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The Law of Rescue

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Diverse areas of law regulate acts of rescue, often inconsistently. For example, maritime law mandates rescue, immigrant harboring law prohibits it, and tort law generally permits it but does not require it. Modern legal scholarship has focused principally on mandatory and permissive forms of rescue. With humanitarian actors facing prosecution for saving migrants' lives in the Arizona desert and elsewhere, however, scholarly treatment of the phenomenon of prohibited rescue is increasingly urgent.

By analyzing disparate regimes of rescue, and focusing on migrant rescue specifically, this Article makes three contributions. First, it argues that the law of rescue generally privileges property rights and commercial interests over the ethical dimensions of rescue. Second, it develops a framework for evaluating rescue, one that focuses on rescuers' liberty, beneficiaries' dignity, and potential third-party harm. Third, it identifies and highlights creative ways to achieve humanitarian ends within the law.

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INTRODUCTION

The Pima County Forensic Science Center received the remains of 122 unauthorized migrants during a recent calendar year, over one-third of them from the hottest part of the Arizona desert.[1] These tragic deaths are common in the region. They follow from a longstanding border enforcement policy based on deterrence that obstructs pathways and drives migrants to increasingly hazardous desert trails.[2] The nongovernmental organization (NGO) No More Deaths

1. *Migrant Deaths and the Right to Provide Humanitarian Aid Without Fear of Prosecution*, NO MORE DEATHS (Dec. 24, 2018), http://forms.nomoredeaths.org/migrant-deaths-and-the-right-to-provide-humanitarian-aid-without-fear-of-prosecution/ [https://perma.cc/C2KK-PCSQ].

2. George Joseph, *Why Do Border Deaths Persist When the Number of Border Crossings Is Falling?*, PROPUBLICA (Sept. 21, 2017), https://www.propublica.org/article/why-do-border-deaths-persist-when-the-number-of-border-crossings-is-falling [https://perma.cc/2SAA-G85W] (describing Clinton-era border policy of "Prevention Through Deterrence," which forced "illegal [migrant] traffic" through "more hostile terrain"); *see also* ANANDA ROSE, SHOWDOWN IN THE SONORAN DESERT: RELIGION, LAW, AND THE IMMIGRATION CONTROVERSY 50 (2012) (discussing humanitarian worker's

(NMD) has been working in the region to stop migrant deaths resulting from this policy since 2004.[3] Its volunteers leave jugs of water on known migrant trails to prevent dehydration and offer shelter and medical care to migrants.[4] A ministry of the Unitarian Universalist Church of Tucson, NMD attracts a corps of volunteers pursuing "civil initiative,"[5] a term coined by one of the founders of the American sanctuary movement, Jim Corbett, to refer to a practice of direct service.[6] NMD volunteers contest the militarization of the border and seek to provide humanitarian aid to migrants in need as a matter of faith and decency.[7] The federal government, however, interprets federal anti-harboring law to prohibit such assistance to unauthorized migrants.[8]

In January of 2018, Customs and Border Protection (CBP) arrested Scott Daniel Warren, a college geography instructor and longtime NMD volunteer, for giving food, water, and shelter to two unauthorized migrants at a private residence known as "the Barn."[9] The U.S. Attorney's Office charged Warren

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view that, "[s]ince 1994, migrants have been intentionally pushed into the open desert as a result of consciously chosen public policy").

3. NO MORE DEATHS, *supra* note 1.

4. *Id.*

5. *See* Jim Corbett, *Sanctuary, Basic Rights, and Humanity's Fault Lines: A Personal Essay*, 5 WEBER STUD. 7 (1988), https://weberstudies.weber.edu/archive/archive%20A%20%20Vol.%201-10.3/Vol.%205.1/5.1Corbet.htm [https://perma.cc/LQH5-6CZ3] (distinguishing civil initiative from civil disobedience).

6. *See id.*; ROSE, *supra* note 2, at 30 (describing the preference of founders of the sanctuary movement for civil initiative over civil disobedience); Ming Hsu Chen, *Sanctuary Networks and Integrative Enforcement*, 75 WASH. & LEE L. REV. 1361, 1378 (2018) (describing the "soft power" and creativity of NGOs seeking to "refashion federal immigration policy" through civil initiative).

7. *See* NO MORE DEATHS, *supra* note 1; Jacob Gershman, *Aid for Immigrants on Desert Trek Stirs Religion-Freedom Fight*, WALL STREET J. (Dec. 6, 2018), https://www.wsj.com/articles/aid-for-immigrants-on-desert-trek-stirs-religion-freedom-fight-1544092201 [https://perma.cc/EHR7-GT49]. No More Deaths does not describe its work explicitly as "rescue," but it does assert a "humanitarian presence" and the provision of "emergency first-aid treatment to individuals in distress." Informational Brochure, NO MORE DEATHS (Dec. 24, 2019), https://nomoredeaths.org/wp-content/uploads/2019/12/NMD-Brochure-2019-ENG-1.pdf [https://perma.cc/E8AD-GQDE].

8. *See, e.g.*, United States v. Lopez, 521 F.2d 437, 441 (2d Cir. 1975) (holding that harboring encompasses "conduct tending substantially to facilitate an alien's 'remaining in the United States illegally,'" even if not for the purpose of evading the authorities); Criminal Complaint, United States v. Warren, No. CR-18-00223-TUC-RCC (DTF) (D. Ariz. Jan. 18, 2018) (alleging that defendant provided food, shelter, and water to unauthorized migrants in violation of the harboring statute). *But see* United States v. Costello, 666 F.3d 1040, 1050 (7th Cir. 2012) (rejecting interpretation of harboring to include "simple sheltering"); ROSE, *supra* note 2, at 25–45 (discussing the prosecution of sanctuary workers in the 1980s for sheltering Central American asylum seekers whose asylum claims the U.S. government had rejected).

9. *See* Criminal Complaint, *supra* note 8 (stating that Border Patrol Agents saw Scott Warren and two "illegal aliens" exit a Nissan Xterra and enter "the Barn"); Ryan Lucas, *Deep in the Desert, a Case Pits Immigration Crackdown Against Religious Freedom*, NPR (Oct. 18, 2018), https://www.npr.org/2018/10/18/658255488/deep-in-the-desert-a-case-pits-immigration-crackdown-against-religious-freedom [https://perma.cc/3FHF-R2PM] (describing "the barn"). The government also alleged that Warren discussed with the migrants various paths to avoid immigration enforcement checkpoints in the interior. Government's Response to Defendant's Amended Motion to Dismiss Counts 2 and 3, at 2–3, *Warren*, No. CR-18-00223-TUC-RCC (DTF) (May 2, 2018). In his motion to dismiss the indictment, however, Warren denied discussing with the migrants tactics for evading the authorities

with one count of conspiring to transport unauthorized migrants and two counts of "harboring" them.[10] Warren argued that his conscience and religious beliefs compelled him to provide "emergency aid" to the migrants, to quench their thirst, to feed them, and to give them a place to rest.[11] The government contended that the migrants required no emergency aid.[12] Regardless, the government asserted that prosecuting Warren was the least restrictive means of pursuing the "compelling interest" of border security.[13] After a hung jury in which eight jurors voted to acquit and four voted to convict, federal prosecutors decided to retry Warren on the harboring charge only, dropping charges relating to smuggling and conspiracy.[14] On November 20, 2019, a jury acquitted Warren of all felony charges.[15] Warren's repeated prosecution illustrates the clash of legal interpretations between rescuers and the government.[16]

Areas of law as diverse as tort law, contract law, criminal law, immigration law, public international law, and maritime law all regulate acts of rescue. Traditional common law principles of rescue focus on the right, or the absence of the right, of the person in distress to another person's rescue services.[17] Some legal scholars advocate for a legal duty to perform "easy" rescues,[18] and others

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or providing the migrants with maps, flashlights, or backpacks. *See* Amended Motion to Dismiss Counts 2 and 3, at 4, *Warren*, No. CR-18-00223-TUC-RCC (DTF) (Apr. 2, 2018).

10. Indictment at 1, *Warren*, No. CR 18-223-TUC-RCC (DTF) (Feb. 14, 2018). In addition to charging Warren, federal prosecutors charged four NMD volunteers who left food and water for migrants inside the Arizona Wildlife Refuge with criminal misdemeanors for entering a wildlife refuge without a permit and operating a vehicle inside it. Rafael Carranza, *Aid Volunteers Found Guilty of Dropping Off Water, Food for Migrants in Protected Part of Arizona Desert*, AZCENTRAL (Jan. 18, 2019), https://www.azcentral.com/story/news/2019/01/18/no-more-deaths-volunteers-found-guilty-dropping-water-food-migrants-cabeza-prieta-refuge-arizona/2617961002/ [https://perma.cc/7YCC-PXE9]. After a bench trial, a judge convicted them and concluded that they knowingly committed acts in violation of the law. *See id.* The volunteers argued that they could not obtain a permit because it would have required them to vow not to leave food or water in the refuge, their very purpose. *See id.*

11. *See* Amended Motion to Dismiss Counts 2 and 3, *supra* note 9, at 5.

12. *See* Government's Response to Defendant's Motion to Dismiss Indictment for Violations of International Law, *Warren*, No. CR-18-00223-TUC-RCC (DTF) (May 2, 2018) (noting that migrants were in good health upon reaching the Barn).

13. Government's Response to Defendant's Amended Motion to Dismiss Counts 2 and 3, *supra* note 9, at 12.

14. *See* Ryan Devereaux, *Criminalizing Compassion: The Unraveling of the Conspiracy Case Against No More Deaths Volunteer Scott Warren*, INTERCEPT (Aug. 10, 2019), https://theintercept.com/2019/08/10/scott-warren-trial/ [https://perma.cc/HN2R-UTSD].

15. Bobby Allyn & Michel Marizco, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NPR (Nov. 21 2019), https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona [https://perma.cc/BM77-FL57].

16. *Cf.* ROBERT M. COVER, JUSTICE ACCUSED 6 (1975) (describing the complex "field of action and motive" facing judges in a "dynamic model," where the law "is always becoming" and its content "is frequently unclear").

17. *See infra* notes 18–20.

18. *See, e.g.*, Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 881 (1986).

defend the absence of such a legal duty.[19] But this discourse overlooks the possible right of a *rescuer* to provide rescue services to a willing recipient, a critical issue that arises when the law prohibits rescue. Why does the law permit, or even mandate, some rescues and prohibit others? Modern legal scholarship has avoided trans-substantive study of legal doctrines relating to rescue, which has prevented this question from being squarely addressed.[20] This Article seeks not only to fill that gap but also to articulate a theoretical framework for rescue, and to illustrate its application to rescue of migrants at the border.

Rescue is about having beneficence in the wake of distress, or soothing the suffering of others, but the law of rescue does not facilitate beneficence. Instead, as this Article argues, the law of rescue has an economic orientation, manifesting either as economic efficiency[21] or as a heightened concern for property rights.[22] The law of rescue was not designed to express, promote, or protect the human dignity of beneficiaries[23] or the liberty of rescuers.[24] Accordingly, the law of rescue leaves vast areas of important rescue work exposed to prosecution. At the same time, the law of rescue serves as a site for dissent from official policy, where rescuers assert against the government a competing vision of who matters, who belongs in a community, and what forms of distress warrant aid.[25]

From the abolitionists prosecuted under the Fugitive Slave Act for rescuing enslaved persons in the nineteenth century to sanctuary workers charged with harboring unauthorized migrants more than a century later, the conflict over

19. *See, e.g.*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 189–93 (1973) (defending the Good Samaritan rule on the grounds that the would-be rescuer has not caused harm to the victim).

20. To my knowledge, the only other self-described trans-substantive study of rescue is William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 84 (1978). But that study omits any discussion of prohibited rescue. *See id.* at 85 (limiting study to doctrines in admiralty, restitution, property, and torts). Other scholars have recognized the value of analyzing disparate rescue regimes together, but they have not undertaken a comprehensive study of the subject. *See, e.g.*, Lawrence Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779, 784 (1954) (comparing admiralty law's duty to rescue property with the remuneration given to those who captured enslaved people during the colonial era).

21. *See* Landes & Posner, *supra* note 20, at 85.

22. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 39 (1988) (defining an owner of property as "simply the individual whose determination as to the use of the [property] is taken as final in a [private property] system").

23. *See* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 33 (2012) ("[T]he modern notion of *human* dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.").

24. *Cf.* Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109, 109–11 (2008) (justifying the state's power over its borders as an exercise of the state's freedom of association).

25. *See, e.g.*, MARÍA CRISTINA GARCÍA, SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA 94 (2006) (describing NGOs asserting "a view of the Central American conflict [producing refugees' flight to the United States] that was quite different from that promoted by the Reagan and Bush administrations").

illegal rescue is endemic.[26] This Article considers the persistent, recurring clash of the government's interpretation of prevailing law and rescuers' competing interpretations, including those premised on a "higher law"[27] such as international treaties. In doing so, this Article advances an additional claim: that rescuers and their allies, apart from working for law reform, should leverage existing protective mechanisms of the law. These protective mechanisms include statutory interpretation,[28] religious exemptions,[29] bureaucratic discretion,[30] and administrative preapproval.[31] These tools offer an equitable "safety valve" that guards against punishment for morally-justified conduct.[32] Although these tools may, to varying degrees, divert energy from truly transformative law reform, they stand to reorient the law of rescue away from its commercial foundations and toward more fundamental human values.

This Article trans-substantively explores and illuminates the dominant theme of the law of rescue, but with an emphasis on the rescue of unauthorized migrants at the border. This Article focuses on migrant rescue because it captures the high normative stakes involved when the law prohibits rescue—namely, the urgent need for rescue and the tremendous desire on the part of volunteers to provide it. At the same time, the government and many of its supporters emphasize the third-party costs such rescue produces. These claimed costs

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26. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 208–09 (1977) ("Doubtful law is by no means special or exotic in cases of civil disobedience. On the contrary. In the United States, at least, almost any law which a significant number of people would be tempted to disobey on moral grounds would be doubtful – if not clearly invalid – on constitutional grounds as well.").

27. *See, e.g.*, ROSE, *supra* note 2, at 54 (quoting O'odham tribe member appealing to "higher . . . law" to justify leaving jugs of water on reservation land, despite tribe's prohibition on doing so); Maria Lorena Cook, *"Humanitarian Aid is Never a Crime": Humanitarianism and Illegality in Migrant Advocacy*, 45 LAW & SOC'Y REV. 561, 562–63 (2011) ("Humanitarian activists appeal to higher law, drawing on alternate sources of legitimacy as a way to elude charges . . . .").

28. *See, e.g.*, COVER, *supra* note 16, at 6–7 (discussing "dynamic interpretation"); Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 98–100 (2012) (arguing that the harboring statute should be interpreted not to criminalize the provision of food, water, shelter, and medical care to undocumented immigrants).

29. *See* Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5 (2018), *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (continuing to apply RFRA to the federal government). For a discussion of how RFRA might protect sanctuary workers, see Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 433–49 (2018).

30. The term "bureaucratic resistance" appears in PAUL A. LEVINE, FROM INDIFFERENCE TO ACTIVISM: SWEDISH DIPLOMACY AND THE HOLOCAUST 15 (1996); this concept relies heavily on bureaucrats' discretion in applying the law.

31. *See Italy's Code of Conduct for NGOs Involved in Migrant Rescue*, EURONEWS, https://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue [https://perma.cc/YV29-9J35].

32. *See, e.g.*, Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1251 (2016) (describing equitable discretion as a safety valve to introduce a measure of mercy or leniency "simply out of grace").

include economic harm[33] and violations of sovereignty,[34] with the view of migrant rescue as just another "pull-factor."[35] Thus, migrant rescue implicates rescuer liberty and beneficiary dignity, as well as very serious potential third-party costs.

The government has prosecuted migrant rescuers under the federal harboring statute, 8 U.S.C. § 1324.[36] Under that provision, anyone who knowingly "conceals, harbors, or shields from detention" any unauthorized noncitizen commits a crime.[37] Courts have interpreted "harboring" expansively to cover simple "sheltering,"[38] and the statute contains no humanitarian exception.[39] Using Warren's prosecution as a guiding example of "prohibited rescue," this Article seeks to illuminate the themes underlying the law of rescue, develop a theory justifying such rescue under some circumstances, and identify protective mechanisms in the law to contest the prohibition. Part I analyzes regimes of discretionary, mandatory, and prohibited rescue, concluding that they share common themes of economic efficiency and protection of property rights. Part II rejects the dominance of economic considerations and offers a normative framework to justify prohibited rescue in moral terms under some circumstances. Finally, Part III highlights tools within the legal system that rescuers may use to resist criminal punishment for violating prohibitions on morally-justified rescue.

I.
RESCUE INSIDE AND OUTSIDE OF THE LAW: THE PRIORITY OF ECONOMIC INTERESTS

The law alternatingly mandates, permits, or proscribes rescue across various common law doctrines, statutes, and treaties. Rescue fundamentally involves aiding others in distress, but the law of rescue has a deeply economic orientation. The law generally protects a beneficiary's property and commercial interests more consistently than their life or liberty, and similarly guards third

33. ROSE, *supra* note 2, at 55 (noting the view of ranchers and members of civilian patrol groups that "leaving water out in the desert would give undocumented migrants more incentive to try to cross").

34. *See, e.g.*, Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/R4HP-UPZP] ("[P]romoting and enforcing the rule of law is vital to protecting a nation, its borders, and its citizens.").

35. Tania Karas, *Crimes of Compassion: US Follows Europe's Lead in Prosecuting Those Who Help Migrants*, PUB. RADIO INT'L (June 6, 2019), https://www.pri.org/stories/2019-06-06/crimes-compassion-us-follows-europes-lead-prosecuting-those-who-help-migrants [https://perma.cc/3U7B-WYEE] ("NGOs are accused of being a pull factor.").

36. Jasmine Aguilera & Billy Perrigo, *They Tried to Save the Lives of Immigrants Fleeing Danger. Now They're Facing Prosecution*, TIME (Nov. 11, 2019), https://time.com/5713732/scott-warren-retrial/ [https://perma.cc/95AX-WP8E] ("[Scott] Warren isn't the first U.S. aid worker to be prosecuted for helping migrants since Donald Trump was elected on a brash anti-immigrant platform . . . .").

37. *See* 8 U.S.C. § 1324(a)(1)(A)(iii) (2018) (prohibiting harboring).

38. *See, e.g.*, United States v. Acosta de Evans, 531 F. 2d 428, 430 (9th Cir. 1976).

39. *See* Shalini Bhargava Ray, *Saving Lives*, 58 B.C. L. REV. 1225, 1266 (2017).

parties from economic harms. This preference for property and commerce, while not absolute, helps explain disparate regimes of rescue. Commentators have long argued that rules regulating acts of "disinterested service to others" have sought to protect economic interests for centuries.[40] Human life and health gained relevance with respect to enslaved people or household dependents, whom the law once treated as economic units of production and cost.[41] Moreover, Richard Posner and William Landes argue that economics can "demonstrate the intellectual unity" of the law of rescue by showcasing the economic efficiency of rules governing acts of rescue.[42]

Scholars such as Posner and Landes have previously identified the economic orientation of the law of rescue, noting its efficient design,[43] but have omitted discussion of prohibited rescue and associated questions. On the one hand, one could extend the efficiency rationale to prohibited rescue—understanding prohibitions on rescue as merely correcting for externalities produced by particular types of rescue—thereby creating a uniform rationale.[44] But this reasoning masks important normative questions about *whose* utility should count and whether the claimed harms justify a prohibition.[45] This Section will define rescue and analyze discretionary, mandatory, and prohibited rescue to illuminate the logic underlying the law of rescue.

A. Defining Rescue

Rescue refers to the act of saving someone or something from harm or distress.[46] It connotes deliverance from "confinement, danger, or evil,"[47] or

40. John P. Dawson, *Rewards for the Rescue of Human Life?*, *in* THE GOOD SAMARITAN AND THE LAW 63, 64 (James M. Ratcliffe ed., 1981).

41. *See, e.g.*, Heather L. Ross & Isabel V. Sawhill, *The Family as Economic Unit*, 1977 WILSON Q. 84, 85–86. I do not suggest that economic considerations fully explain various duties arising in family law.

42. *See* Landes & Posner, *supra* note 20, at 85 ("Economics can contribute to the understanding of rescue law by demonstrating the intellectual unity of the rescue problem, by clarifying legal analysis of rescue . . . and by showing that the major doctrines and case outcomes related to rescue have been shaped by concern with promoting economic efficiency.").

43. *See, e.g.*, *id.* at 89.

44. *Id.* at 85.

45. Efficiency generally does not benefit "elites," but rather represents an optimal outcome where "everyone" is as well off as possible without anyone being made worse off than their starting point. However, aside from the question of who is included in the population of persons affected by a rule or course of conduct, efficiency often has distributional consequences that amplify existing inequalities. *See* DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, ECONOMIC ANALYSIS AND MORAL PHILOSOPHY 127 (1996) (explaining that because property rights are "often taken as starting points in economic analysis," economists regularly accept the "existing property regime" uncritically). Efficiency frequently benefits elites in an outsized way. *Cf.* Landes & Posner, *supra* note 20, at 87–88 (discussing Pareto optimality). Protections for owners of ships, boats, and lost property protect interests of those with the means to own valuable property.

46. Landes & Posner, *supra* note 20, at 83 (defining rescue as "all attempts to save a person or his property").

47. *Rescue*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rescue [https://perma.cc/5D85-PL7G].

saving someone or something from a "dangerous, harmful, or difficult situation."[48] Rescue occurs in response to a crisis or threat of harm. Common modes of rescue include administering aid to accident victims and pulling individuals out of fires, gorges, or other dangerous places.[49] Humanitarian aid administered neutrally and impartially is quintessential rescue.[50] It encompasses saving lives, "alleviat[ing] suffering," and promoting dignity in response to war, other human-made crises, or natural disasters.[51] Rescue can also refer simply to preventing "major loss" to another.[52] For example, contracts scholars have argued that rescue encompasses the duty to warn, the duty to disclose, and the duty to mitigate losses, even when the rescuer did not cause or create the prospect of loss.[53] Thus, rescue refers to the conferral of a significant benefit to another when that person faces severe distress or potential loss.[54]

Rescuers act to prevent harm, not simply to confer a gratuitous benefit. The rescuer, often without any expectation of compensation, must have a "reasonable belief that the [victim] is in danger."[55] If a person meets a friend in passing and gives the friend a bottle of water, the person has conferred a gratuitous benefit on the friend, but the person has not "rescued" the friend in the ordinary usage of the word. Even if the friend complains of thirst, the gift of water would not amount to "rescue" because the gift does not prevent serious harm. Instead, the level of present or prospective distress must be more than *de minimis* for a benefit to rise from merely "produc[ing] . . . [a] favorable effect" to "preventing

48. *Rescue*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/rescue [https://perma.cc/9JNB-UDHW].

49. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 32 cmt. b, illus. 1–3 (AM. LAW INST. 2010).

50. *See Humanitarian Principles*, U.N. HIGH COMM'R FOR REFUGEES: HANDBOOK FOR EMERGENCIES, https://emergency.unhcr.org/entry/44765/humanitarian-principles [https://perma.cc/9REL-D3MX] ("The principal motivation of humanitarian action is to save lives and alleviate suffering in a manner that respects and restores personal dignity.").

51. *See Defining Humanitarian Assistance*, DEV. INITIATIVES, http://www.globalhumanitarianassistance.org/data-guides/defining-humanitarian-aid [https://perma.cc/2ABF-LM7U].

52. Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 647 (2002).

53. *Id.* at 658 (identifying a duty to mitigate damages under American contract law); *id.* at 663 (describing the breaching party's duty to warn the non-breaching party of breach if the cost of warning is "relatively low"); *id.* at 675 (discussing example pointing to a duty to disclose information). Professor Eisenberg describes the duty to rescue as "a duty that is imposed by law upon one actor, *A*, to bestir himself to take a low-cost, low-risk, and otherwise reasonable action that will forestall a major loss to another actor, *B*, although *B*'s peril of prospective loss is not created by *A*'s fault." *Id.* at 647.

54. Such losses can also be financial. For example, Britain's legislature adopted a "rescue culture" in corporate insolvency law almost twenty years ago, acknowledging the value of protecting businesses "as a going concern" whenever possible. Muir Hunter, *The Nature and Functions of a Rescue Culture*, 104 COM. L.J. 426, 435, 441 (1999) (describing British rescue culture's "more benevolent treatment of insolvent persons . . . and at the same time . . . more draconian treatment of true economic delinquents").

55. Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 642 (1952).

harm"—an act of rescue.[56] The distress prompting rescue can be acute, such as imminent loss, pain, or death;[57] or it can be chronic, such as enslavement.[58]

Scholars generally disagree about whether to understand "rescue" as an act of charity or a moral duty, apart from its treatment in the law.[59] To those who view rescue as charity, wholly a matter of an individual's grace, such conduct acquires its quality, vitality, and, perhaps, efficacy from its voluntary character.[60] Some have noted that rescuers engage in acts of rescue to express their altruism.[61] Others argue that rescue need not be wholly voluntary to qualify as rescue and that legal compulsion does not diminish the salutary effect of acts of rescue.[62] On this view, we should define rescue by the assistance rendered and its effect on the recipient, not the goodwill or grace of the rescuer. After all, professional rescuers compensated for their services are still engaged in rescue.[63]

B. Discretionary Rescue

American common law generally imposes no duty to rescue others,[64] and good reasons exist to be skeptical of these kinds of affirmative duties. Historical examples abound of public-spirited affirmative duties fueling nefarious ends. For example, during the Nazi era, German criminal law required individuals to aid

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56. *See* JOEL FEINBERG, HARM TO OTHERS 139 (1984) (defining benefit and harm).

57. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 32 (AM. LAW INST. 2010).

58. Even by the lights of individuals who are sympathetic to the plight of migrants and fugitive slaves, "rescue" is not automatically right or just in all circumstances. For example, statutes that prohibit the rescue of prisoners could be justified on public safety grounds. *See, e.g.*, IDAHO CODE ANN. § 18-2501 (West 2006) ("Rescuing prisoners"); ME. REV. STAT. ANN. tit. 17-A, § 756 (2010) ("Aiding escape"). On the other hand, mass incarceration for nonviolent offenses and abysmal prison conditions might give rise to a moral argument in defense of such rescue, even if ultimately such an argument is rejected.

58. *See, e.g.*, COVER, *supra* note 16, at 183–85.

59. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 3–4 (1993) (noting both views regarding the Christian biblical tradition).

60. *See* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 103 (2004) ("By meddling with issues that are better left to the moral domain, law can only 'reduce the moral worth of human action,' making altruism increasingly unnecessary, relegating it to 'the dustbin of supererogatory.'"); Levmore, *supra* note 18, at 886 (1986) (discussing Posner's and Landes's argument that a legal obligation might discourage a rescuer who would have been motivated by altruism absent a legal obligation).

61. *See, e.g.*, Landes & Posner, *supra* note 20, at 124; Susanne M. Burstein, Note, *Saving Steel Over Souls: The Human Cost of U.S. Salvage Law*, 27 TUL. MAR. L.J. 307, 330 (2002) (noting argument against life-salvage awards in maritime law on the theory that they would "'weaken the overwhelming humanitarian obligation' to [rescue]").

62. *See, e.g.*, FEINBERG, *supra* note 56, at 130–31.

63. *See* Landes & Posner, *supra* note 20, at 85–86 ("Professional rescue is our term for the sale (whether voluntarily or through operation of law) of rescue services by profit-maximizing firms to victims of hazards.").

64. *Id.* at 119 ("The common law has traditionally refused to impose liability for failure to assist a stranger in distress, no [m]atter how low the costs of assistance would be or how great its benefits.").

the police.[65] Vichy France adopted the same law, imposing on private individuals the obligation to "inform" on their neighbors.[66] A comparative study of duties to rescue notes that the former Soviet Union imposed a host of duties on its citizens, including a duty to work for all persons who were capable of working, a duty to use property "in accordance with its economic end," and a duty to perform "any 'state task.'"[67] On the other hand, legal systems that recognize affirmative duties better protect an individual's right to engage in humanitarian rescue out of solidarity with those in need.[68]

For both Kantian and Benthamite reasons, the common law of torts in the United States treats acts of rescue as matters of individual choice.[69] Consider various scholars' defenses of the no-duty-to-rescue rule on the grounds of individual liberty and freedom of choice.[70] On this view, an individual walking by a lake should retain the choice to toss or not toss a flotation device to a drowning person because of the primacy of choice as a moral value and because of an underlying conception of liberty.[71] Commentators have explained the common law's failure to recognize a duty to rescue in most circumstances by noting the difficulty of "enforc[ing] unselfishness" at the expense of "personal freedom."[72]

The distinction between misfeasance and nonfeasance also supports a rights-based rationale.[73] According to this view, doing a bad act is morally

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65. Dawson, *supra* note 40, at 69.

66. Note, *supra* note 55, at 639–40.

67. *Id.* at 636–37.

68. Elian Peltier & Richard Pérez-Peña, *'Fraternité' Brings Immunity for Migrant Advocate in France*, N.Y. TIMES (July 6, 2018), https://www.nytimes.com/2018/07/06/world/europe/france-migrants-farmer-fraternity.html [https://perma.cc/JX8H-87RD].

69. *See* FEINBERG, *supra* note 56, at 129–30 (discussing moral arguments against a duty to rescue); *see also* Amelia J. Uelmen, *Where Morality and the Law Coincide: How Legal Obligations of Bystanders May Be Informed by the Social Teachings of Pope Francis*, 40 SEATTLE U. L. REV. 1359, 1395–97 (2017) (describing Kantian arguments against a duty to rescue in tort law); Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 106–07 n.6 (1999) (noting "moral debates about whether a duty to rescue or report would impose an impermissible burden on individual liberty" and collecting scholarship).

70. *See, e.g.*, Epstein, *supra* note 19, at 190–91 (defending the absence of a duty to rescue another on the grounds that a defendant who declines to rescue a plaintiff in need does not *cause* the plaintiff's harm); *id.* at 195 (arguing that "the common law has never found a home for" obligations to confer gratuitous benefits on others).

71. *See* FEINBERG, *supra* note 56, at 130–31 (discussing Jeffrie G. Murphy's defense of the choice not to save the drowning child on the ground that a person declining to save the child has not violated the child's *rights*, and further characterizing this view as one that regards "our moral claim against others [as one that] is only to be let alone, that is, not harmed").

72. Allen M. Linden, *Rescuers and Good Samaritans*, 34 MODERN L. REV. 241, 242 (1971).

73. *See* Epstein, *supra* note 19; Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 319–20 (1997); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 250 (1980) (describing Epstein's view). Scholars have critiqued this distinction as a "chimera" and have emphasized that the canonical cases for the no-duty-to-rescue rule often make no reference to it. Lake, *supra*, at 360. Thus, the distinction may lack the importance typically assumed.

distinct from failing to do a good act. One does not violate another individual's rights simply by declining to aid them.[74] Where an individual creates or contributes to harm, that individual has some obligation to cure that harm; otherwise, the individual has no obligation.[75] Thus, the law should not punish the mere failure to act, even if such a rule seems heartless or immoral.

Others have argued from a consequentialist standpoint that mandating rescue harms society overall. On this view, imposing a duty to rescue will likely backfire and reduce the total incidence of rescue, as "reluctant rescuers"[76] will eschew risky activities in order to avoid potential liability.[77] The quality of rescue acts could also plummet if individuals are forced to rescue others.[78] A greater risk of harm to rescuers themselves arises when they undertake rescue without confidence in their own ability to rescue or in the likelihood of success.[79]

Discretionary rescue has deep roots in U.S. common law, but critics have assailed the absence of a duty to rescue by appealing both to rights and consequences.[80] Professor Joel Feinberg has argued that a person's failure to perform a low-risk rescue plays a morally relevant causal role in harming the victim, thus infringing on the victim's rights.[81] An adult walking by a lake in which a child is drowning has an obligation to toss a readily available flotation ring to the child. Under such circumstances, the adult who fails to toss the ring does not merely refrain from conferring a benefit on the child; the adult *harms* the child.[82] Feinberg distinguishes assistance to another that *improves* that person's status beyond their baseline from assistance that *restores* another person's pre-crisis status.[83] No one has an obligation to confer on another person

74. Epstein, *supra* note 19, at 190–91.

75. *Id.*

76. Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1469–80 (2008) (discussing the costs of a rule mandating rescue).

77. Landes & Posner, *supra* note 20, at 120 (analogizing liability to a "tax" on risky activities, leading to substitution away from such activities).

78. Scordato, *supra* note 76, at 1472 (arguing that the "reluctant rescuer" will "engage in a lower quality of rescue effort").

79. Scordato, *supra* note 76, at 1476–78 (2008) (discussing risk of harm to less capable rescuers forced to act when the law requires rescue); *see also* Levmore, *supra* note 18, at 884 (describing Posner's and Landes's argument against a duty to rescue).

80. *See, e.g.*, Lake, *supra* note 73; Levmore, *supra* note 18; Linden, *supra* note 72; Note, *supra* note 55; John T. Pardun, Comment, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L.J. 591 (1998); Weinrib, *supra* note 73; Yeager, *supra* note 59.

81. *See* FEINBERG, *supra* note 56, at 136–39. *But see* Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 627–28 (2001) (critiquing Feinberg's causation analysis as excessive, for under it, "just about any setback to a person's interest can count as a violation of a right").

82. *See* FEINBERG, *supra* note 56, at 136–39; *cf.* Patricia Smith, *The Duty to Rescue and the Slippery Slope Problem*, 16 SOC. THEORY & PRAC. 19, 24 (1990) (arguing that the "lack of causation seems to fade into irrelevance in clear cases" because the failure to act constitutes "willful and reckless disregard for human life").

83. *See* FEINBERG, *supra* note 56, at 136–39; PATRICIA SMITH, LIBERALISM AND AFFIRMATIVE OBLIGATION 40 (1998) (supporting Feinberg's analysis).

a gratuitous benefit or "windfall," but they do have an obligation to prevent loss to a victim when they can do so without risk of undue harm or expense to themselves.[84]

Professor Steven J. Heyman similarly argues for a duty to rescue based on rights associated with shared citizenship rather than on the individual rights and duties of private persons.[85] Heyman regards the criminal assault, rooted in wrongful human conduct, rather than the accidental drowning of a stranger, as the "paradigm case of a duty to rescue."[86] Once the law recognizes a duty to prevent *criminal* harm to others, premised on shared citizenship, it need expand only modestly to impose a duty to prevent *noncriminal* harms to others.[87] On this view, for example, allowing an individual to *elect* not to save a drowning child, when such rescue would be relatively easy for the rescuer, would violate a moral obligation and should also violate the law.[88]

Others have argued for a duty to rescue on efficiency grounds rather than on rights grounds, *contra* earlier economic analysis of such a duty.[89] Professor Richard L. Hasen has argued that Posner and Landes's conclusion that a duty to rescue could be inefficient depends greatly on the assumption that the population of potential rescuers is completely distinct from the population of potential victims.[90] Hasen argues for a "more realistic behavioral assumption that individuals assess the probability of being a victim or potential rescuer if involved in a rescue situation as about equal."[91] On that assumption, individuals would not avoid hazardous areas because they would see themselves as equally likely to be a rescuer or a victim needing rescue if an accident were to occur.[92] Accordingly, the substitution effect Posner and Landes posited would not occur, and a rule requiring rescue would be optimal.[93]

The surface libertarianism of discretionary rescue, however, masks other values embedded in the law of rescue; namely, the social utility of rescue, or the good bestowed upon the beneficiary. The law actively promotes rescue where it does not require it through so-called "Good Samaritan" laws that protect

84. *See* SMITH, *supra* note 83, at 40 (describing Feinberg's view but noting that Feinberg does not explain *why* individuals have a duty to prevent losses to others).

85. Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 680 (1994).

86. *Id.* at 679.

87. *Id.*

88. *See* FEINBERG, *supra* note 56, at 130–31 (critiquing Jeffrie G. Murphy's defense of the choice not to save the child).

89. *See, e.g.*, Eric H. Grush, Comment, *The Inefficiency of the No-Duty-to-Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U. PA. L. REV. 881 (1998); Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT'L REV. L. & ECON. 141 (1995).

90. Hasen, *supra* note 89, at 142 (noting that none of the critiques of Landes's and Posner's analysis "has challenged the analysis's underlying behavioral assumption that the world is divided into two classes: potential rescuers and victims").

91. *Id.*

92. *Id.*

93. *Id.*

rescuers.[94] These laws typically insulate rescuers from liability stemming from failed, botched, or otherwise loss-producing rescues.[95] Such protection encourages rescue by reducing potential rescuers' costs.[96] Without protection for acts of rescue that might fail or go astray, rescuers will fear potential liability for their well-intentioned deeds and will be less likely to help.[97]

Similarly, the law sometimes provides compensation to rescuers for injuries a rescuer incurs through an act of rescue, even if the rescuer contributed to the harm they suffered.[98] Pursuant to the "rescue doctrine," courts consider whether the individual or company who caused the original danger could foresee the rescuer's harms.[99] Even if a rescuer bears some responsibility for the harm they suffer, the original defendant might be liable if such harm to a potential rescuer was reasonably foreseeable.[100]

Finally, aside from damages at common law, equity offers remedies for rescuers. If a rescuer seeks recovery from the rescued person rather than from the original defendant or tortfeasor, perhaps because no tortfeasor exists, the claim arises from the equitable doctrine of restitution.[101] The common law of restitution generally recognizes recovery where the rescue succeeded and could be understood as premised upon a hypothetical contract.[102] But courts decline to award Good Samaritans compensation on a theory of restitution for labor expended in rescuing a person because they deem the rescuer's service

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94. *See* Eric A. Brandt, *Good Samaritan Laws – the Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303, 304 (1983) (describing Good Samaritan statutes as shielding "altruistic rescuers from possible liability for any negligent acts or omissions arising out of their rescue attempts" and contrasting those statutes with the common law that did not recognize such immunity for negligent rescues); Danny R. Veilleux, Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4th 294 (2020).

95. *See* Brandt, *supra* note 94, at 303–04, 310–18 tbl.I (noting variation among Good Samaritan statutes, with some providing no additional protection to rescuers than the common law did).

96. *See* Veilleux, *supra* note 94.

97. *See id.*; McDaniel v. Keck, 53 A.D.3d 869, 872 (N.Y. App. Div. 2008). Under the traditional common law doctrine, altruistic but negligent rescues could lead to liability. *See, e.g.*, Mueller v. McMillian Warner Ins. Co., 714 N.W.2d 183 (Wis. 2006). On this rule, a person who chooses to undertake rescue must use reasonable care in executing the rescue. *See* Linden, *supra* note 72, at 251.

98. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 32 cmt. b (AM. LAW INST. 2010); *e.g.*, Hutton v. Logan, 566 S.E.2d 782, 785 (N.C. Ct. App. 2002) (describing rescue doctrine's effect in preventing a tortfeasor from resisting a claim for damages from an injured rescuer based on the rescuer's contributory negligence).

99. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 32 cmt. b; *e.g.*, McCoy v. Am. Suzuki Motor Corp., 961 P.2d 952, 956 (Wash. 1998) (describing the rescue doctrine).

100. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 32 cmts. b, d.

101. Noncontractual rescue can be regarded as the conferral of a benefit on a party that obligates that party to compensate the person conferring the benefit, or unjust enrichment. *See* Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CALIF. L. REV. 85, 109–10 (1986); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2084 (2001).

102. *See* DAGAN, *supra* note 60, at 94, 96. *But see* Glenn v. Savage, 13 P. 442, 447–48 (Or. 1887).

gratuitous.[103] However, commentators have encouraged courts to reverse this presumption and to consider awarding compensation for expenditures and costs.[104]

In a variety of ways, the common law encourages rescue without requiring it, preserving the liberty of the rescuer and recognizing the benefit to the victim rescued.

C. Mandatory Rescue

Although the common law does not impose a general duty to rescue, it does require rescue under some circumstances. In the realm of statutory or treaty law, the law often requires rescue. Analyzing examples in torts and maritime law, this Section argues that mandatory rescue regimes reveal a preoccupation with protecting property rights and the commercial interests of those with relative economic advantage (i.e., those possessing the resources to acquire property or commercial interests in the first place). When rescue augments property rights, the law tends to require rescue.

1. Common Law Duties to Rescue Between Parties Having a "Special Relationship"

Discretionary rescue in the common law becomes mandatory when the person in distress and the would-be rescuer have a "special relationship."[105] These so-called "special" relationships are largely commercial.[106] Specifically, the Restatement of Torts specifies that the following "special relationships" give "rise to the [mandatory] duty to rescue":

1) a common carrier with its passengers,
2) an innkeeper with its guests,
3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
4) an employer with its employees, [under limited circumstances],
5) a school with its students,
6) a landlord with its tenants,
7) a custodian with those in its custody, [under limited circumstances].[107]

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103. *See* Albert, *supra* note 101, at 90 (discussing "common law barriers to restitution" to include that the notion that an unsolicited benefit is a gift).

104. *See, e.g., id.* at 86–87.

105. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. LAW INST. 2012).

106. *See* Yeager, *supra* note 59, at 10 ("Service, employment, or economically-oriented relationships are 'special,' while 'one's nephew, one's neighbor (and the neighbor's baby) are "strangers."'").

107. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b).

Commentators note that courts' policy judgments often inform which relationships are identified as "special."[108] Moreover, this default regime of duties promotes efficiency by eliminating the transaction costs of countless bargains between producers and consumers.[109] Thus, while common carriers, innkeepers, businesses, employers, and landlords are all obligated to aid those who pay them for a consumer good or service, or who provide labor in exchange for payments, they also benefit from the duty. Not all special relationships relate to commerce, however, and scholars have argued that the label "special relationship" communicates the conclusion that a court has recognized a duty rather than the *rationale* for imposing one.[110] In most of the settings listed in the Restatement, mandatory rescue efficiently designates an on-site rescuer, as a Good Samaritan is unlikely to come upon the scene and assist.[111] The designated rescuers are "the cheapest cost avoiders," and in this sense, the duty promotes efficiency.[112]

Just as these special relationships in tort law trigger the duty to rescue, so does the relationship between contracting parties under some circumstances.[113] Contract law entitles the party in breach to the non-breaching party's assistance in the form of mitigation; in other settings, the law also imposes a duty to warn on the breaching party.[114] Professor Melvin Eisenberg argues that this regime treats contracting parties as having a "special relationship," thus harmonizing the doctrine with tort law's exceptions to the no-duty-to-rescue rule.[115] In these ways, both sets of common law duties to rescue—those arising out of tort as well as contract—facilitate commercial relations and are often justified as efficient.

2. *Maritime Salvage Law and the Duty to Rescue at Sea*

Although the duty to rescue any person in distress at sea is often considered one of the noblest duties under international law and many domestic statutes, many scholars have observed that this duty evolved from law defining duties to

108. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmts. b, h.

109. *See* Eisenberg, *supra* note 52, at 647.

110. *See, e.g.*, Kenneth S. Abraham & Leslie Kendrick, *There's No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649, 1666 (2019).

111. Parental duties to rescue in tort law are uncertain. *See* Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311, 311–13 (2006). Some scholars have noted the ancient pedigree of "[t]he notion of the child as property." Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1043 (1992). Professor Woodhouse further argues that, although the law today does not regard children as property, "our culture makes assumptions about children deeply analogous to those it adopts in thinking about property." *Id.* at 1042.

112. Catherine M. Sharkey, *In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule*, 85 U. CIN. L. REV. 1017, 1039 (2018).

113. *See* Eisenberg, *supra* note 52, at 647.

114. *See id.* at 660, 663.

115. *See id.* at 691.

rescue ships and cargo.[116] International and domestic law have developed significantly over the past century to produce a mix of discretionary and mandatory rescue laws, including laws that recognize the right of migrants and people "engaged in unlawful activity" to be rescued. While this appears to reflect a prioritization of life, states struggle to enforce the obligation to rescue people, compensation is uncertain, and the applicable duties stop short of requiring countries to allow migrants rescued at sea to disembark from the rescue vessel and enter into the haven state to apply for humanitarian protection.

Maritime salvage law began as a civil law framework for compensating rescuers saving ships and cargo.[117] An act of maritime salvage is "the [voluntary] rescue of a ship or its cargo on navigable waters from a peril that, except for the rescuer's assistance, would have led to the loss or destruction of the property."[118] Within this context, every successful maritime salvage creates a right to compensation for salvors and an incentive for them "to save valuable property from marine perils."[119] To be eligible for such an award, the salvor must prove that the subject of salvage was maritime property[120] in peril not created by the salvors, that the salvors voluntarily rendered aid in the absence of any legal obligation, and that the results were successful or contributed to ultimate success.[121] Even if rescue efforts are unsuccessful, salvors may nonetheless be entitled to compensation for the amount deserved based on their labor under a *quantum meruit* theory of recovery.[122]

A detailed scheme for compensation promotes the rescue of vessels and cargo. The requirement that the salvors be volunteers follows from the notion that one should not be compensated for fulfilling one's existing obligations to rescue.[123] If a salvor is required by, say, an insurance policy to rescue a ship, the salvor cannot turn to salvage law for an award.[124] The principal exception is

116. *See, e.g.*, G. H. Robinson, *The Admiralty Law of Salvage*, 23 CORNELL L. REV. 229 (1938).

117. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 771 (6th ed. 2019).

118. *Salvage*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/topic/salvage [https://perma.cc/BK9X-ZNMY].

119. SCHOENBAUM, *supra* note 117, at 772.

120. *Definition of Maritime Property*, LAW INSIDER, https://www.lawinsider.com/dictionary/maritime-property [https://perma.cc/JQ84-EZ9F] (defining maritime property as "vessels and their engines, tackle, gear, equipment, appurtenances, furnishings, cargoes, stores, personal property then on board belonging to the vessels' occupants, and such other similar property as is consistent with the general maritime law of the United States").

121. *See* Robinson, *supra* note 116, at 231, 236, 242 ("It is sufficient if he endeavor to do so and his efforts have a causal relation to the eventual preservation of it.").

122. *See Quantum Meruit*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/quantum-meruit [https://perma.cc/P2RU-KRR6]; Robinson, *supra* note 116, at 244. Salvors may be liable for "faults in beneficence" if the rescue attempt goes astray and induces further damage to the distressed ship and its cargo. *Id.* at 247.

123. *See id.* at 239.

124. *See id.* at 237.

"contract salvage," wherein the salvor contracts with the distressed vessel's captain to perform the salvage operation prior to commencing salvage.[125]

Salvage awards have traditionally depended on several factors, including:

1) the labor expended by the salvors in rendering the salvage service;
2) the promptitude, skill, and energy displayed in rendering the service and saving the property;
3) the value of the property employed by the salvors in rendering the service and the degree of danger to which such property was exposed;
4) the risk incurred by the salvors in securing the property from the impending peril;
5) the value of the saved property; and
6) the degree of danger from which the property was rescued.[126]

The value of the cargo on board and any possible reduction in its value also affect salvage awards.[127]

All of this underscores maritime salvage law's purpose of promoting economic efficiency.[128] It establishes incentives for those best situated at sea to save valuable property and thus promote "the best use of productive resources."[129] Commentators note the lesser need for such a doctrine with respect to endangered property on land.[130] Maritime rescuers, as professionals, operate in a distinct economic environment from laypeople on land—their work more specialized, their rescues costlier.[131] Accordingly, maritime salvage law reflects the unique challenges of rescue at sea.[132]

Maritime salvage law financially rewards the rescue of ships and cargo, but those who save "mere life," known as "pure life salvors," were for many years compensated only with the moral satisfaction of doing a good deed.[133] Rescuers who saved lives incident to saving property fared better.[134] Some have attributed this seemingly inequitable result to the *in rem* nature of a salvage action, which places compensation for life salvage outside the scope of a typical maritime

125. *See* ROBERT FORCE, FED. JUDICIAL CTR., ADMIRALTY AND MARITIME LAW 157, 160 (2004).

126. *Id.* at 168.

127. *See* Robinson, *supra* note 116, at 257–58.

128. *See* SCHOENBAUM, *supra* note 117, at 772.

129. *Id.*

130. *See, e.g.*, *id.*

131. *See* Landes & Posner, *supra* note 20, at 118.

132. *See id.*

133. Jason Parent, Comment, *No Duty to Save Lives; No Reward for Rescue: Is That Truly the State of International Salvage Law?*, 12 ANN. SURV. INT'L & COMP. L. 87, 109 (2006); *see also* Steven F. Friedell, *Compensation and Reward for Saving Life at Sea*, 77 MICH. L. REV. 1218, 1223–24 (1979) ("[C]ourts and writers have tended to agree that the general maritime law gives no reward for saving life when no property is saved.").

134. *See* Friedell, *supra* note 133, at 1223–24.

proceeding.[135] As the court's jurisdiction is based on the property rather than its owner, any recovery takes the form of a lien, which cannot apply to a rescued person.[136]

Commentators decried the law's preference for property in this setting, and international and domestic law responded by explicitly providing for life salvage awards, as well as by imposing duties to rescue both persons and vessels in distress at sea.[137] In 1910, at the international level, various countries adopted the Brussels Convention on Assistance and Salvage at Sea (Brussels Convention).[138] The Brussels Convention established a master's duty to rescue "everybody, even . . . an enemy, found at sea in danger of being lost," provided the master "can do so without serious danger to his vessel, her crew and passengers."[139] The treaty, however, left the determination of life salvor remuneration to treaty signatories.[140]

Congress implemented this treaty through the Salvage Act of 1912, thus creating the first federal duty to rescue at sea.[141] Like the Brussels Convention, the Salvage Act requires rescue of "every person who is found at sea in danger of being lost," so long as the salvors can effectuate rescue "without serious danger to his own vessel, crew, or passengers."[142] This federal duty to rescue distressed vessels and persons, on pain of a $1,000 penalty, meant that two sets of domestic laws regulated rescue at sea: maritime salvage law, which awarded discretionary rescue, and federal maritime statutes, which mandated rescue.[143] Scholars have suggested that courts interpreted the Brussels Convention and Salvage Act provisions on life salvage awards too narrowly, with the result that the new regime provided *less* generous awards than what the former maritime law had provided.[144] In contrast to the clarity with which the law addresses compensation for salvage of maritime property, these developments show the legal system grappling with various sources of complexity relating to rescue, namely, whether to create a legally enforceable duty, whether to extend such a duty from vessels to people, and how to reward successful efforts relating to both. State creation of a duty to rescue did not resolve questions of incentives

135. *See* Albert, *supra* note 101, at 113 ("The rationale for the rule denying an award for life salvage has to do with the nature of a salvage proceeding. The action brought by a salvor is in rem against the ship or any other property rescued.").

136. *Id.*

137. *See* Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea art. 11, Sept. 23, 1910, 37 Stat. 1658.

138. *Id.*

139. *Id.*

140. Friedell, *supra* note 133, at 1245.

141. *See* 46 U.S.C. § 2304 (2018); Patrick J. Long, Note, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, 48 BUFF. L. REV. 591, 595–96 (2000).

142. Robinson, *supra* note 116, at 239.

143. *See id.*

144. *See, e.g.*, *id.*

and compensation, and courts generally remained reluctant to award compensation for pure life salvage.[145]

Congress subsequently enhanced the incentives for rescue through the Standby Act in 1983.[146] This statute obligates masters of vessels involved in a collision to "stand by" the other vessel "until [they have] ascertained that she has no need of further assistance."[147] It further clarifies that rescuers are "entitled to protection from liability" for acting in an "ordinary, reasonable, and prudent manner."[148] Adding this "Good Samaritan" protection for maritime rescuers brought maritime law into alignment with the approach used in tort law.[149]

Other treaties establish a duty to rescue persons in distress at sea,[150] but enforcement of the duty remains a challenge.[151] Despite the many international treaties on the topic, it would be a mistake to read these provisions as prioritizing *life*. Instead, states' consent to these obligations rests on respect for states' sovereignty above all else. None of these treaties create a right of entry for migrants or a duty on states to accept migrants into their territories, or even at their ports.[152] In fact, maritime law allows haven states to close their ports to rescued migrants.[153] These treaties also may complicate rescue efforts at sea. For example, once rescuers prevent migrants from drowning and bring them onto boats where they can drink water, receive medical care, and warm themselves, rescuers face a host of ambiguities.[154] Do the rescuers have a right to disembark the migrant passengers? Where, and on what terms?[155] Must they turn back? Will rescuers entering a state's territorial waters with a boat of unauthorized migrants be prosecuted for smuggling? Commentators note that neither maritime law nor

145. *See* Burstein, *supra* note 61, at 330 ("[T]he United States persisted in its narrow reading of the statute and continues to uphold the law denying rewards to pure life salvors.").

146. 46 U.S.C. § 2303 (2018). *See also* Marilyn Raia, *Rescue at Sea*, PAC. MAR. MAG. (July 1, 2015), https://www.pacmar.com/story/2015/07/01/maritime-law/rescue-at-sea/357.html [https://perma.cc/NF94-ZY23] (discussing the Standby Act).

147. SCHOENBAUM, *supra* note 117, at 813.

148. 70 AM. JUR. 2D *Shipping* § 484 (2019).

149. The international community further updated the international salvage regime in 1989 with ratification of the International Convention on Salvage, replacing the Brussels Convention. International Convention on Salvage, *adopted* Apr. 28, 1989, S. TREATY DOC. No. 12, 1953 U.N.T.S. 165.

150. *See* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 283–84 (3rd ed. 2007).

151. *See* Irini Papanicolopulu, *The Duty to Rescue at Sea, in Peacetime and in War: A General Overview*, 98 INT'L REV. OF THE RED CROSS 491, 492 (2016) (claiming that "the duty to rescue is one of the best-established principles of the international law of the sea, maritime law and international humanitarian law (IHL)" but acknowledging many unresolved issues).

152. *See* GOODWIN-GILL & MCADAM, *supra* note 150, at 279.

153. *See* Eugenio Cusumano & Kristof Gombeer, *In Deep Waters: The Legal, Humanitarian and Political Implications of Closing Italian Ports to Migrant Rescuers*, 25 MEDITERRANEAN POL. 245, 247–49 (2020).

154. *See* ANNE T. GALLAGHER & FIONA DAVID, THE INTERNATIONAL LAW OF MIGRANT SMUGGLING 444–45 (2014).

155. *See id.*

refugee law solves the dilemma facing rescuers bringing migrants to the port of a potential haven state.[156]

Moreover, as scholars have noted, states rarely enforce the duty to rescue at sea.[157] The difficulty of enforcement lies in the remote relationship of the vessel's crew to the state with which they have registered the vessel.[158] All ships must fly under a state flag, and public international law imposes rescue obligations on such flag states.[159] Often, however, flag states lack a meaningful relationship to the master or crew of the vessel; the flag state is simply where the ship is registered.[160] In such a situation, the flag state functionally exercises no control over the ship.[161] Yet rescuers are often required to communicate with distant and disinterested flag states about the state of rescue operations in order to proceed.[162] Moreover, flag states seldom prosecute masters of vessels flying under their flag who renege on their rescue obligations.[163] Scholars have suggested that *port* states, or "the states at whose ports these vessels call,"[164] might enforce these obligations more effectively, but until then, life salvage appears to be a manifestation of a grudging accommodation.[165] Thus, a state's right to exclude—an exercise of sovereignty and dominion over its property—constrains the humanitarian potential of the duty to rescue at sea.[166] Ultimately, the laws governing the rescue of vessels and people at sea privilege maritime property and the protection of national territory from migrants, reinforcing elite interests.

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156. *See, e.g.*, Ray, *supra* note 39, at 1243–44 (noting this dilemma).

157. *See, e.g.*, Martin Davies, *Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea*, 12 PAC. RIM L. & POL'Y J. 109, 140 (2003) (discussing how the duty to rescue at sea is ineffectively enforced through civil law).

158. *See id.* at 125 (discussing the phenomenon of "[f]lag-of-convenience" states and their disinclination to enforce legal duties at sea); *Flag of Convenience*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/flag-of-convenience [https://perma.cc/FVN5-89RG] (defining "flag of convenience" as an arrangement by which a ship operates and is taxed "under the laws of a country different from its home country in order to save money").

159. *See* Davies, *supra* note 157, at 110; *see also* RICHARD COLES & EDWARD WATT, SHIP REGISTRATION: LAW AND PRACTICE 1 (2d ed. 2009) (describing public international law's requirement that every vessel on the high seas have a nationality, and noting that "[n]ationality is attributed to vessels flying the flag of a State in which the vessel is publicly registered"). Thus, a vessel's "flag state" is the State in which the vessel is publicly registered.

160. *See* Davies, *supra* note 157, at 110.

161. *See id.*

162. *See* Eugenio Cusumano, *Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs*, 24 MEDITERRANEAN POL. 106, 109–10 (2019).

163. *See* Davies, *supra* note 157, at 125.

164. Cedric Ryngaert & Henrik Ringbom, *Introduction: Port State Jurisdiction: Challenges and Potential*, 31 INT'L J. MARINE & COASTAL L. 379, 380; *see also* Daniel Bodansky, *Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond*, 18 ECOLOGY L.Q. 719, 739 (discussing port state jurisdiction as jurisdiction based on the presence of a vessel at a state's port).

165. *See* Ryngaert & Ringbom, *supra* note 164, at 392.

166. *Cf.* U.N. Convention on the Law of the Sea (UNCLOS), pmbl., *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397. (recognizing "due regard for the sovereignty of all States"). The United States is not a party to UNCLOS.

3. Miscellaneous Affirmative Duties to Rescue

Some jurisdictions apply affirmative duties to rescue on land, generally for the sake of efficiency. Civil law countries such as France and Germany impose duties to rescue, and scholars have argued that these legal regimes, in their design, could be economically efficient.[167] In the former Soviet Union, such a duty existed for openly economic purposes, including "the safeguarding of public property."[168] Apart from promoting efficiency, these laws may also reflect the legacy of authoritarianism.[169] For example, no duty to rescue existed in France until World War II; however, based on the Vichy government's law that required people to "aid" each other and inform on each other, France subsequently adopted a general duty to assist others in peril.[170]

Affirmative duties to rescue are thought to be rare outside of public international law and European civil law jurisdictions.[171] Yet, in the 1970s, a few states in the United States adopted statutes that criminalized the failure to rescue others when such rescue could be accomplished without "danger or peril" to the rescuer. Vermont was the first.[172] Its Duty to Aid the Endangered Act established that:

> (a) A person who knows that another is exposed to grave physical harm shall, to the extent the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.[173]

Section (c) of the statute further establishes that persons who willfully violate subsection (a) "shall be fined not more than $100.00." Notably, the statute did not limit the imposition of this duty to persons with "special skills or relationships,"[174] thus establishing a much broader scope than the exceptions under tort law. Minnesota, Rhode Island, and Wisconsin adopted similar laws.[175] These duties typically only apply when rescue can be accomplished cheaply, thus explicitly reflecting a concern for efficiency.[176]

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167. *See, e.g.*, Landes & Posner, *supra* note 20, at 125–26.

168. Note, *supra* note 55, at 635.

169. *See id.* at 639–40.

170. *Id.*

171. However, one scholar has recently documented that statutes imposing a duty to aid—through rescue or report—are much more common than other scholars had previously claimed. *See* Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1345–46 (2019).

172. Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 54–55 (1972).

173. VT. STAT. ANN. tit. 12, § 519(a) (2020); *see also* Franklin, *supra* note 172, at 54 (quoting same).

174. Franklin, *supra* note 172, at 60.

175. MINN. STAT. § 604A.01 (2018 & Supp. 2019); 11 R.I. GEN. LAWS ANN. § 11-56-1 (West 2020); WIS. STAT. § 940.34 (2020).

176. Landes & Posner, *supra* note 20, at 126.

D. *Prohibited Rescue*

Prohibitions on rescue typically promote the interests of a society's insiders, or those with relative economic advantage. They undermine the interests of outsiders, or those deemed "other." Thus, the law might operate to maximize utility, but often on a restricted view of whose utility counts. From the prosecution of rescuers under the Fugitive Slave Act in the nineteenth century to the contemporary prosecution of humanitarians providing aid to unauthorized migrants in the Arizona desert, these legal regimes evidence an elite skew. The Fugitive Slave Act's prohibition on rescue and imposition of a duty to capture humans regarded as another's property provides a stark illustration.

1. *The Fugitive Slave Act's Prohibition on the Rescue of Enslaved Persons*

Mandatory rescue reveals the law of rescue's implicit priorities; prohibited rescue underscores them. American legal history offers an illustrative example of prohibited rescue; namely, the nineteenth century prohibition on assisting in the escape of enslaved persons. The legal framework prohibiting rescue of others quite explicitly protected property owners' interests to the detriment of enslaved persons. It also served as a site for dissent and competing policy visions.[177]

Scholars and jurists have expounded on the brutality of the slave system, some observing that the underlying legal theory was not simply the legal fiction that people were property.[178] Rather, some slavery apologists regarded the slave's *labor* as the slave owner's property and some regarded the slave's *body* itself as such.[179] Both conceptions violated the Lockean concept that every person owns their own labor.[180]

At the same time that slave owners laid claim to enslaved people's labor or bodies, the law imposed legal duties on slaves.[181] For example, an enslaved person who committed murder was punished accordingly.[182] Thus, the law treated slaves "for some purposes as if [they] were not a person," but not for others.[183] Robbing enslaved people of full legal personhood[184] rendered them

177. *See* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861, at 1, 7 (1999) (introducing personal liberty laws expressing Northern states' opposition to federal pro-slavery policy).

178. *See, e.g.*, STEPHEN M. BEST, THE FUGITIVE'S PROPERTIES: LAW AND THE POETICS OF POSSESSION 12 (2004).

179. *See id.* at 8–9.

180. *See id. See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1689) ("[E]very man has a *property* in his own *person* . . . . The *labour* of his body, and the *work* of his hands, we may say, are properly his.").

181. *See* BEST, *supra* note 178, at 12.

182. *Id.*

183. *Id.*

184. *See* Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549, 583 (2013).

ineligible to receive beneficence; they could not be rescued within the government's interpretation of prevailing law.[185]

Denying enslaved persons legal personhood and then prohibiting their rescue directly promoted slave owners' property rights. Congress recognized these property rights through the Fugitive Slave Clause. Found in Article IV, Clause 2, Section 3 of the Constitution, the Fugitive Slave Clause states:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[186]

Congress passed the Fugitive Slave Act of 1793 (FSA of 1793) to implement the Fugitive Slave Clause,[187] thus implicitly interpreting the clause as an "affirmative constitutional guarantee of the slaveholder's property right of recapture."[188] In implementing this "broadest reading" of the Fugitive Slave Clause,[189] the FSA of 1793 created a system of civil remedies for slave owners.[190]

Half a century later, Congress redoubled its efforts to preserve slavery by prohibiting rescue and requiring private citizens to assist in the return of alleged fugitive persons. The Fugitive Slave Act of 1850 (FSA of 1850) created a summary process in the federal courts for slave owners to recapture alleged "fugitive person[s]," along with an elaborate scheme of criminal remedies.[191] Specifically, Section 6 of the FSA of 1850 authorized "such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid," but prohibited the admission of testimony of the alleged fugitive person in any proceeding under the Act.[192] Section 7 of the FSA of 1850 prohibited individuals from "knowingly and willingly obstruct[ing], hinder[ing], or prevent[ing]" a "claimant" from recapturing a fugitive person; from rescuing or attempting to rescue a fugitive person; aiding, abetting, or

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185. *See* COVER, *supra* note 16, at 6 (previewing argument that "the law's content is frequently unclear," and that judges have a role in determining which interpretations become law). This fact complicates the common narrative that enslaved people were "dehumanized." *See* Walter Johnson, *To Remake the World: Slavery, Racial Capitalism, and Justice*, BOS. REV. (Feb. 20, 2018), http://bostonreview.net/forum/walter-johnson-to-remake-the-world [https://perma.cc/C4VR-BR72].

186. U.S. CONST. art. IV, § 2, cl. 3.

187. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (repealed 1864).

188. Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 163–64 (2004) (discussing the FSA of 1793).

189. *Id.* at 164.

190. *Id.* at 164–67.

191. Act of Sept. 18, 1850, ch. 60, § 6, 9 Stat. 462, 463 (repealed 1864); *see also* Kaczorowski, *supra* note 188, at 191–93 (discussing the FSA of 1850).

192. 9 Stat. at 463.

assisting a fugitive person in escape; or harboring or concealing a fugitive person.[193]

In addition to prohibiting the rescue of "fugitive persons," the FSA of 1850 further authorized federal officials to enlist the aid of "bystanders, or *posse comitatus* of the proper county, when necessary to ensure a faithful observance of' the Fugitive Slave Clause and this statute."[194] Under the doctrine of *posse comitatus*, which remains the law in some form in all fifty states,[195] the citizenry possesses a latent obligation to uphold the law—and when law enforcement cannot effectively execute their enforcement obligations, they may call upon the private citizenry to assist.[196] In the antebellum era, this doctrine effectively imposed a duty on private citizens to rescue human property.[197] Thus, federal statutes in the nineteenth century not only criminalized the rescue of persons escaping from slavery but also imposed a duty to recapture those same persons deemed property. Here as well, the law of rescue privileged property owners.[198]

Those prosecuted under Section 7 of the FSA of 1850 exploited the tools of the state-court system to achieve equitable results (even if only fleetingly), such as writs of habeas corpus[199] and the state court's more robust procedural safeguards.[200] In state court, rescuers could develop the "testimony of the alleged fugitive" or submit documents establishing facts regarding the alleged fugitive to use in the FSA summary process.[201] The state court also offered possibilities, such as the appointment of a guardian *ad litem* in the case of an alleged child fugitive, that ultimately "could prolong the entire matter to the point where a rescue might be made, a purchase might be negotiated, or a witness might be found to help the fugitive's case."[202] Through these methods, rescuers routinely used various procedural devices within the system to achieve a just outcome in

193. *Id.* § 7, 9 Stat. at 464. Later in this Article, I will address the similar language used in 8 U.S.C. § 1324 (2018), the statute prohibiting the smuggling and harboring of undocumented migrants.

194. Kaczorowski, *supra* note 188, at 191(discussing the FSA of 1850 and quoting Section 5).

195. *See* David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761 app. (2015) (listing state *posse comitatus* statutes in each of the fifty states).

196. *See* Kaczorowski, *supra* note 188, at 191, 238 (analyzing the application of the doctrine of *posse comitatus* in the Fugitive Slave Acts in the late eighteenth and nineteenth centuries).

197. *See id.*

198. Southern slaveholders have long been understood as occupying the elite "master class" in antebellum America. *See* MATTHEW KARP, THIS VAST SOUTHERN EMPIRE 4–5 (2016) (discussing slaveholding elites' dominance in the federal government and over foreign policy in the nineteenth century).

199. *See* COVER, *supra* note 16, at 184; MORRIS, *supra* note 177, at 9–11 (discussing abolitionists' use of habeas corpus and the writ of personal replevin to skirt recapture of alleged enslaved persons who had escaped from a slave jurisdiction). For a discussion of habeas corpus's equitable roots, see Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 150–151 (2014).

200. *See* COVER, *supra* note 16, at 184.

201. *Id.*

202. *Id.*

an individual case, thus revealing that not all seemingly prohibited rescue is necessarily illegal.

Rescuers and abolitionists agitated for and then invoked an alternative set of laws to legitimate their work as well. Northern states opposed federal law by passing a range of personal liberty laws securing some measure of freedom to blacks in nineteenth century America.[203] Pennsylvania passed the first of these laws in 1826, which explicitly rejected "the idea of voluntary cooperation" with the federal Fugitive Slave Act.[204] New York passed a similar law aimed at restraining "the kidnapping of free [blacks]."[205] States thus worked to alter the application and impact of federal law in their jurisdictions. Although the Supreme Court ended the era of state experimentation in *Prigg v. Pennsylvania*,[206] these state personal liberty laws attempting to legalize the rescue of blacks reveal the instability of prohibitions on rescue.[207]

2. *Economic History and Structure of Harboring Laws*

Over a century later, the government prosecuted another set of rescuers: participants in the sanctuary movement, a faith-based movement to provide refuge to Central American asylum seekers fleeing brutal regimes that had acquired power largely due to U.S. foreign policy in the region.[208] Sanctuary workers believed that international human rights law required the United States to provide refuge, and that the *government* violated the law by denying asylum to these refugees.[209] Sanctuary workers further believed that private persons had an obligation to house, clothe, and feed asylum seekers, as well as conceal them from the authorities, even if domestic law criminalized such assistance.[210]

Sanctuary workers saw themselves as rescuers because asylum seekers faced not only the immediate distress of lacking basic needs but also, absent a grant of asylum or other relief, a prolonged state of crisis.[211] The threat of deportation to lands where asylum seekers would face violence or death constituted a crisis calling for emergency aid.[212] With the government invoking the rule of law and the need to guard against the purported economic- and security-related harms associated with unauthorized migration,[213] the conflict

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203. *See* MORRIS, *supra* note 177, at 45-46.

204. *Id.* at 46.

205. *Id.* at 53 (citation omitted).

206. 41 U.S. 539 (1842).

207. *See* MORRIS, *supra* note 177, at 58 (describing increasing "sectional tensions" and proslavery and antislavery view of personal liberty laws as embodying "vital sacrifices of principles").

208. *See* GARCÍA, *supra* note 25, at 104 (describing sanctuary workers' belief that "they were answering a higher call" in aiding Central American asylum seekers).

209. *See* Cook, *supra* note 27, at 583.

210. *See id.*

211. *See* Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 133 (1993).

212. *See id.*

213. *See* Ray, *supra* note 39, at 1258.

between the government and humanitarian activists could not be reconciled. Instead, the government prosecuted the sanctuary workers.[214]

These prosecutions have prompted commentators to analogize the fugitive slave era's Underground Railroad to modern rescue efforts with respect to undocumented immigrants,[215] but such a comparison has many flaws.[216] For one, enslaved persons had no choice about their place of residence.[217] In addition, the consequences of the legal classification of humans as property, including the brutal physical attacks on enslaved persons' bodies, have few parallels.[218]

Nonetheless, the federal prohibitions on rescue in the two settings share key features.[219] Specifically, the history of the federal law criminalizing immigrant harboring offers a rich example of the law of rescue's preoccupation with the economic interests, alternatingly, of U.S. laborers and elites such as Texas agricultural growers.[220]

Congress criminalized various forms of assistance to undocumented migrants in the early twentieth century, but due to wartime labor shortages, administrative agencies waived formal immigration inspection for large numbers of Mexican farmworkers, and the government rarely enforced the statute for many decades.[221] As Professor Deborah Kang has explained, during that period, the U.S.-Mexico border was more than just a geographic "line" between two countries. Professor Kang argues that, as immigration enforcement waxed and waned in response to the demands of various interest groups, "the line" was a

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214. *See* GARCÍA, *supra* note 25, at 106 (describing Operation Sojourner of the former Immigration and Naturalization Service (INS), which led to "the indictment of sixteen sanctuary workers").

215. *See, e.g.*, Jake Halpern, *The Underground Railroad for Refugees*, NEW YORKER (Mar. 6, 2017), https://www.newyorker.com/magazine/2017/03/13/the-underground-railroad-for-refugees [https://perma.cc/FU6W-SRKC]; *see generally* Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring their Similarities*, 61 CATH. U. L. REV. 921 (2012).

216. *See* McKanders, *supra* note 215, at 923-24; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1837 & n.18 (discussing reasons for skepticism about the comparison, including the involuntary nature of slavery and the legal classification of enslaved persons as property); Fred Schwarz, *Is Deporting Immigrants the Same as Returning Fugitive Slaves?*, NAT'L REV. (May 4, 2018), https://www.nationalreview.com/2018/05/california-sanctuary-supporters-not-like-fugitive-slave-rescuers/ [https://perma.cc/5GDZ-Y5NG].

217. *See* Neuman, *supra* note 216; Schwarz, *supra* note 216.

218. *See* MORRIS, *supra* note 177, at 153 (describing the fate of Thomas Sims, who was returned to slavery under the Fugitive Slave Act and whipped publicly thirty-nine times upon recapture). In addition, scholars comparing the two eras have focused principally on their shared experience of failed federalism. *See, e.g.*, McKanders, *supra* note 215, at 940.

219. *See generally* McKanders, *supra* note 215.

220. Others have extensively documented the explicit racial animus toward Mexican immigrants that drove the passage of the harboring law. *See, e.g.*, Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 157 (2010) (discussing "racist and exclusionary impulses" evident in lawmakers' stated views of unauthorized migrants). My aim here is to call attention to underappreciated economic interests also implicated.

221. *See* S. DEBORAH KANG, THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE US-MEXICO BORDER, 1917–1954, at 21 (2017).

site of tremendous administrative discretion, at times extending into interior spaces.[222] Although commercial interests favored lax enforcement of immigration controls, the American Federation of Labor favored stricter enforcement to prevent the increased supply of labor from diminishing wages.[223] The Immigration Act of 1917 created criminal penalties for the smuggling and harboring of undocumented migrants,[224] giving the government an additional tool to punish migrants as desired, but the government at all levels used its discretion to avoid interfering with incoming migrant labor for many years.[225] Specifically, prosecutors and federal judges "demonstrated leniency" towards defendants charged with immigrant smuggling due in part to their sympathy for "farmers and ranchers."[226]

Congress adopted the modern prohibitions on immigrant harboring in the McCarran-Walter Act, also known as the Immigration and Nationality Act of 1952 (INA).[227] INA preserved a familiar mix of harsh nativism,[228] fear of Mexican labor competition,[229] and pro-business provisions.[230] "'[L]abor groups and liberal congressmen'" sought stringent restrictions on Mexican migration to protect American workers, and the updated provisions criminalizing various forms of assistance to unauthorized migrants reflected this stringency.[231] At the same time, the statute expressly declined to criminalize the *employment* of undocumented migrants as a form of harboring.[232] This was known openly as the

222. *See id.* at 37 (noting that Border Patrol's response to local defiance transformed the border from a line "into a space or from an international boundary into a legal jurisdiction").

223. *See id.* at 26; JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 122 (1980) (describing organized labor's opposition to so-called "illegals" based on the belief that they "depressed wages and disrupted unionization efforts by acting as strikebreakers").

224. *See* Pub. L. No. 64-301, § 8, 39 Stat. 874, 880 (repealed 1952) (establishing misdemeanor liability for harboring an unadmitted immigrant).

225. *See* KANG, *supra* note 221, at 16-17 (describing federal officials' use of the Act to "expel suspected alien enemies and subversives throughout the country"); *id.* at 20–24 (describing Department of Labor's consistent efforts to relax restrictions to ensure adequate supply of agricultural workers).

226. *Id.* at 107.

227. Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

228. *Cf.* Jain, *supra* note 220 (noting lawmakers' racial animus evident in the statute's legislative history).

229. *See* GARCÍA, *supra* note 223, at 122; KANG, *supra* note 221, at 107–08; *cf.* Jeremy Waldron, *Immigration: A Lockean Approach* 15 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 15-37, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652710 [https://perma.cc/P7SZ-BP5X] (noting the illegitimacy of seeking to lessen "the number of one's economic competitors" by restricting immigration).

230. *See* GARCÍA, *supra* note 223, at 131 (noting that "employing illegal entrants did not constitute harboring" under the McCarran-Walter Act); *cf.* KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 155 (2010) (discussing farmers and ranchers in Texas, "the region's elite," complaining to Congress about immigration enforcement).

231. *See* KANG, *supra* note 221, at 108.

232. *See* GARCÍA, *supra* note 223, at 131; KANG, *supra* note 221, at 45. Instead, Congress imposed criminal penalties on employers decades later through Immigration Reform and Control Act (IRCA) of 1986.

"Texas Proviso," a nod to the "delegation [that] demand[ed] its inclusion"[233] and agribusiness's reliance on Mexican farmworkers.[234] Congress also reduced the Border Patrol budget to further protect "agribusiness interests."[235] Thus, the law has tolerated or even encouraged some forms of unauthorized presence—to the extent that it benefitted commercial interests—since its inception, but it also adopted strict criminal penalties for those who assist undocumented migrants.[236] Just as in the era of the Fugitive Slave Acts, elite economic interests are enmeshed with racial hierarchy, although not without complications and exceptions.[237] These economic interests have often valued black and brown bodies only as units of labor, if not property—subjects of extreme regulation.[238]

Congress designed INA's criminal provisions to curb the incentives for migrants to enter, move about, or remain in the country in violation of its immigration laws.[239] In its modern form, the statute prohibits transporting, harboring, or smuggling an unauthorized migrant, or inducing or encouraging an unauthorized migrant to remain in the United States.[240] The concern for incentives shapes enforcement and interpretation of the "harboring provision," which prohibits harboring, concealing, or shielding an unauthorized noncitizen from detection.[241] Because Congress did not define "harboring," federal courts

233. *The Bracero Program*, RURAL MIGRATION NEWS (Apr. 2003), https://migration.ucdavis.edu/rmn/more.php?id=10 [https://perma.cc/HQE2-2M44].

234. *See* KANG, *supra* note 221, at 45.

235. *See id.* at 142.

236. *See id.* at 55 (describing local economic pressure for laxer border enforcement as a precursor to adjustment of status, a pathway to permanent residency without requiring a migrant to apply for a visa from the migrant's home country).

237. *See* Karla Mari McKanders, *supra* note 215, at 924; *cf.* Kevin R. Johnson, *Sweet Home Alabama? Immigration and Civil Rights in the "New" South*, 64 STAN. L. REV. ONLINE 22, 22 (2011), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2011/12/64-SLRO-22.pdf [https://perma.cc/RV6D-J532] (drawing similarities between anti-immigrant state laws in the twenty-first century and "civil rights issues raised by Jim Crow for African-Americans").

238. The Black Codes adopted during and after Reconstruction resemble the strict regulation of unauthorized migrants in cities like Hazleton, Pennsylvania, that prohibited migrants from renting apartments or entering into contracts. *Compare* Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) (striking down on preemption grounds municipal ordinances barring landlords from renting apartments to undocumented migrants, among other restrictions), *and* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 530 (5th Cir. 2013) (striking down similar ordinance on preemption grounds), *with* Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013) (affirming similar ordinance), *and* ERIC FONER, RECONSTRUCTION 199–201 (1988) (describing infringements on freed blacks' freedom of contract, among other restrictions, and use of vagrancy statutes to punish unemployment). A preemption analysis, however, elides the fundamental critique that the laws regulate people like they are simply units of labor.

239. Although entering the United States without inspection is a misdemeanor under 8 U.S.C. § 1325(a) (2018), mere unlawful presence is a civil immigration violation rather than a crime. *See* Arizona v. United States, 567 U.S. 387, 396 (2012) (defining unlawful presence as a civil rather than a criminal offense).

240. 8 U.S.C. § 1324(a) (2018). Under these provisions, the government must prove that the defendant knew or should have known of the noncitizen's unauthorized status.

241. *Id.* § 1324(a)(1)(A)(iii).

have interpreted the term differently.[242] Some interpret the harboring provision to criminalize any kind of assistance to unauthorized noncitizens, including "simple sheltering."[243] Others require more, such as acts of concealment, or, absent such acts, "strong measures to keep [unauthorized noncitizens] here" like free housing, food, and other inducements.[244] Courts engage in fact-intensive inquiries,[245] and the degree to which the assistance lures the unauthorized noncitizen to stay or facilitates their prolonged illegal presence appears to weigh heavily in courts' analysis.[246] Thus, those who employ unauthorized noncitizens are often found guilty of harboring their workers when they provide *free* housing and other necessities to facilitate their workers' continued presence;[247] in contrast, those who *charge* for such amenities per the usual course of business generally avoid liability.[248]

Again, this approach reveals a preoccupation with incentives. A defendant who merely charges the going rate for a room rental is not subsidizing the unauthorized migrant's continued presence. Instead, the defendant is exacting from the unauthorized migrant the "market" price, which in theory the migrant would have to pay regardless of the defendant's offer. Thus, the defendant in such a case makes the migrant's stay no more or less painful; their act leaves existing incentives untouched.[249] If the migrant does not rent a market-rate room from the first landlord, they will rent one from the second. The substitutability of market goods drives this conclusion.

On the other hand, a charitable defendant who donates or heavily subsidizes essential items like food, water, and shelter could conceivably alter a migrant's

242. *See, e.g.*, United States v. Costello, 666 F.3d 1040, 1043–45 (7th Cir. 2012) (advocating for a context-specific interpretation of "harbor"); United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976) (ultimately defining "harbor" as "afford shelter to").

243. "JULIE" YIHONG MAO & JAN COLLATZ, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, UNDERSTANDING THE FEDERAL OFFENSES OF HARBORING TRANSPORTING, SMUGGLING, AND ENCOURAGING UNDER 8 U.S.C. § 1324(a) 33 (2017) (quoting *Acosta de Evans*, 531 F.2d at 430), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2017_28Sep_memo-1324a.pdf [https://perma.cc/HT3T-2MKF].

244. *See, e.g.*, United States v. McClellan, 794 F.3d 743, 750 (7th Cir. 2015) (quoting *Costello*, 666 F.3d at 1045).

245. MAO & COLLATZ, *supra* note 243, at 6 ("[C]ourts generally conduct a fact-based, circumstantial analysis.").

246. *Cf.* Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1602–03 (2019) (discussing state and municipal incentives and disincentives for immigrants' unauthorized presence).

247. *See McClellan*, 794 F.3d at 743; United States v. Ye, 588 F.3d 411, 417 (7th Cir. 2009); Sarkar, *supra* note 246.

248. *See* DelRio-Mocci v. Connolly Props. Inc., 672 F.3d 241, 246 (3d Cir. 2012); MAO & COLLATZ, *supra* note 243, at 28. States like California moved years ago to prohibit landlords from asking prospective tenants about their immigration status. *See, e.g.*, *California First State to Prohibit Anti-Immigrant Rental Ordinances*, ACLU OF SAN DIEGO & IMPERIAL COUNTIES (Oct. 11, 2007), https://www.aclusandiego.org/california-first-state-to-prohibit-anti-immigrant-rental-ordinances-aclu-business-real-estate-leaders-and-civil-rights-groups-applaud-the-bill/ [https://perma.cc/V55D-G3A7].

249. *Cf. Costello*, 666 F.3d at 1050 (rejecting interpretation of harboring to include "simple sheltering").

incentives for remaining (and the government's ability to detect their presence).[250] Such a charitable defendant takes "strong measures to keep [unauthorized noncitizens] here."[251] By easing the migrant's entry into and presence in the United States, the defendant increases the likelihood that the migrant will recover from their journey, regain their strength and health, and continue their unlawful presence—perhaps traveling even deeper into the interior where immigration enforcement officers will struggle to find them.[252]

One could argue, surely, that the landlord who overlooks the unauthorized status of a prospective tenant for the sake of conducting business is more culpable than the sanctuary worker who provides life's essentials out of a sense of shared humanity or solidarity with migrants.[253] But that intuition focuses on the defendant's purpose rather than the incentive effects of their conduct; and the law is fundamentally organized to punish conduct that distorts migrants' incentives, whether that conduct is charitable or for-profit.

Although INA's anti-harboring provisions suggest that unauthorized presence is an unalloyed "harm," the statute's religion-oriented exception directly undermines that notion. That exception insulates nonprofit organizations and their agents from liability if they "encourage, invite, call, allow, or enable" an unauthorized noncitizen "to perform the vocation of a minister or missionary for [a] denomination or organization in the United States" that provides the minister's or missionary's basic needs,[254] as long as the minister or missionary works as an otherwise uncompensated volunteer and has been a member of the denomination or organization for at least a year.[255] This exception recognizes

250. *See, e.g.*, *Ye*, 588 F.3d at 417; MAO & COLLATZ, *supra* note 243, at 13. The Ninth Circuit has held that a defendant must have "intended to violate the law" to be guilty of harboring. United States v. Tydingco, 909 F.3d 297, 303–04 (9th Cir. 2018). Thus, a sanctuary worker who publicly flouts the immigration law could be liable despite their charitable intentions, but an individual whose knowledge of immigration law is hazy might escape liability on that basis.

251. *Costello*, 666 F.3d at 1045.

252. The harboring statute also prohibits "encourage[ing] or induc[ing]" an unauthorized noncitizen "to come to, enter, or reside in the United States." 8 U.S.C. § 1324(a)(1)(A)(iv) (2018). The federal circuit courts are divided as to the constitutionality of the provision. *Compare* United States v. Sineneng-Smith, 910 F.3d 461, 485 (9th Cir. 2018) (finding the provision unconstitutionally vague and overbroad), *cert. granted*, 140 S. Ct. 36 (2019) (Mem.), *with* United States v. Anderton, 901 F.3d 278, 283 (5th Cir. 2018) (finding the same language sufficiently clear on plain error review), *cert. denied*, 139 S.Ct. 1214 (2019) (Mem.).

253. *Cf.* Angus Grant, *The Smuggled and the Smuggler: Exploring the Distinctions Between Mutual Aid, Humanitarian Refugee Assistance and People Smuggling in Canadian Law*, REFLAW (June 22, 2016), http://www.reflaw.org/the-smuggled-and-the-smuggler-exploring-the-distinctions-between-mutual-aid-humanitarian-refugee-assistance-and-people-smuggling-in-canadian-law/ [https://perma.cc/572J-KZQE] (discussing Canadian law's differential treatment of humanitarian aid and for-profit people-smuggling).

254. 8 U.S.C. § 1324(a)(1)(C). The statute specifies "room, board, travel, medical assistance, and other basic living expenses." *Id.*

255. *Id.* Commentators note that Congress adopted this exception at the behest of members of the Church of Jesus Christ of Latter-day Saints, which requires its male members to perform missionary work, and that the Church has seen a growing population of undocumented adherents. *See, e.g.*, Scott-Railton, *supra* note 29, at 443.

that providing assistance in the form of food, shelter, and medical expenses to *some* unauthorized noncitizens does not cause prohibited harm, or else that the competing interests of religious organizations outweigh it. Thus, while the law generally regards unauthorized presence as a trespass[256]—the harm being the very transgression of a boundary[257]—it sometimes treats unauthorized presence as a nuisance, a harm susceptible to balancing.[258]

E. Identifying Common Themes in Laws of Rescue

The project of articulating common themes across disparate regimes of rescue must consider factors such as the beneficiary's status in the jurisdiction. The legality of rescue might depend simply on the status of the person being rescued, not the economic interests at stake. On this view, when someone is permitted in a jurisdiction, others are free to rescue them; sometimes, such a duty is mandated if life-threatening danger is likely. On the other hand, when someone is not permitted in a jurisdiction, people are *not* free to rescue them. Unauthorized migrants, like escaped prisoners,[259] have no legal right to be where they are found, let alone the right to be assisted in moving into prohibited spaces.[260] The same logic animated prosecutions of people who rescued alleged fugitive slaves.[261] Thus, this view regards the mix of legal rules regulating rescue as being based on a person's status within a given jurisdiction, with race and status correlating to a high degree.[262] But this status-based explanation fails to account for the full range of rescue regimes within the law. First, the anti-harboring law has numerous exceptions, including ones for employers of fewer than ten unauthorized employees,[263] and for unauthorized migrants who serve in a mission or ministry.[264] Even though the migrants contemplated in these provisions entered without inspection, thereby committing a crime,[265] the law does not criminalize the act of employing them in small numbers or sustaining

256. For a discussion of this "trespass" theory of immigration, see Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 110 (2012).

257. *See* FEINBERG, *supra* note 56, at 107.

258. *See* RESTATEMENT (SECOND) OF TORTS § 821F (AM. LAW INST. 1979) (discussing private nuisance); 7 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 20:1 (2018) (discussing nuisance generally and balancing).

259. *See, e.g.*, ME. STAT. tit. 17-A, § 756 (2020) ("Aiding escape"); IDAHO CODE § 18-2501 (2019) ("Rescuing prisoners").

260. *Cf.* Zadvydas v. Davis, 533 U.S. 678, 703 (2001) (Scalia, J., dissenting) (noting that an inadmissible noncitizen "at the border" has no legal right to enter and a noncitizen already present but with a final order of removal has no legal right to remain).

261. *See* COVER, *supra* note 16, at 185.

262. *See* HERNÁNDEZ, *supra* note 230 (describing the U.S. Border Patrol's "racialization of the legal/illegal divide").

263. 8 U.S.C. § 1324(a)(3)(A) (2018) (imposing penalties on the employment of *more than ten* unauthorized migrants); *see also* 8 U.S.C. § 1324a (2018) (imposing *civil* penalties for hiring unauthorized migrants). *But see* E-Verify Act of 2019, S. 301, 116th Cong. (2019) (bill proposing enforcement of work authorization requirements for noncitizens).

264. 8 U.S.C. § 1324(a)(1)(C).

265. 8 U.S.C. § 1325 (2018).

them with room, board, and other necessities. In these ways, the law decouples assistance to a person from that person's prior criminal conduct, and rescue is not simply illegal whenever the beneficiary has committed a crime.[266]

Moreover, in the realm of international law, migrants have a legal *right* to rescue on the high seas that they lose the moment they disembark and become unauthorized migrants at the shores of a haven state, wherein their rescue is a criminal offense.[267] They have every right to be on the high seas, but their presence there merely precedes or comprises part of a journey to some *other* territory, one where haven states will regard them as unauthorized.[268] Thus, it seems odd to say that vessels must rescue migrants on the high seas because the migrants are legally present when they are, in fact, imminent outlaws.

The law of rescue's revealed preference for the interests of property owners and other economic elites suggests that this area of law—often understood to promote beneficence or at least the freedom to act beneficently—may not in fact adequately protect these important values. When it comes to prohibited rescue specifically, the law disregards the rescuer's liberty to engage in rescue and the beneficiary's dignity at stake in a rescue. Using the specific setting of migrant rescue, this Article now turns to the normative case for permitting currently-prohibited rescue.

II.
THE NEW LAW OF MIGRANT RESCUE

The law of rescue has an economic orientation that generally privileges property-owning beneficiaries and third parties, but its logic does not reduce to a single principle, interest, or value. It reflects some non-economic concerns: for example, the rescuer's liberty to choose whether to engage in rescue, as illustrated in tort law's general lack of a duty to rescue. Various Good Samaritan protections also suggest that the law seeks to promote rescue and protect rescuers, even while retaining rescue's voluntary character. The law's economic orientation, however, tends to dominate these other considerations. This Section sketches a framework for thinking about rescue generally and prohibited rescue specifically, seeking to amplify these considerations. Under this framework, this Section argues that current prohibitions on migrant rescue lack sufficient justification. The framework developed in this Section, however, does not justify all forms of prohibited rescue.

266. Notably, aiding and abetting is distinct from assisting unauthorized migrants *after* they have effectuated an entry. *See* 3 Immigr. L. Serv. 2d (West) § 17:51 (Feb. 2020). Unlawful presence itself is only a civil violation rather than a crime. *See* Arizona v. United States, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). Thus, facilitating unlawful presence alone (rather than entry) is not "aiding and abetting" a crime.

267. *See* GALLAGHER & DAVID, *supra* note 154, at 44–45.

268. *See id.*

Taking inspiration from the Supreme Court's decision in *Mathews v. Eldridge*,[269] this Section offers a three-part balancing test of sorts—a mix of rights and utility. This framework considers the rescuer's liberty to engage in rescue, the beneficiary's need for rescue, and the potential third-party harm flowing from a consensual rescue. This framework recasts the concept of the need for rescue as the beneficiary's "dignity" in order to capture the range of fundamental rights and interests at stake.

A. The Meaning of Migrant Rescue

Migrant rescue refers to the rendering of humanitarian aid to migrants in distress along a national border.[270] Generally, distress can be acute, encompassing medical emergencies such as dehydration or injured limbs,[271] or diffuse and structural, such as the need for protection from deportation to a persecuting country.[272] These distinct forms of distress gave rise to a conception of rescue that animated the original sanctuary movement and its newer incarnation.

The original sanctuary movement in the 1980s responded to both sets of dangers—imminent and structural—based on the movement's understanding of the brutality of Central American governments, its assessment of the content and contours of international human rights law, and its conclusion that the U.S. government had violated such law.[273] International human rights law protects core rights relating to "life, bodily integrity, freedom of movement, and freedom from state-imposed harm,"[274] and sanctuary workers believed that protection of such "basic rights" could never be illegal.[275] Central American governments visited horrors upon their people, but the U.S. government rejected the claims of nearly all Central American asylum seekers during this era.[276] This drove sanctuary workers to "active[ly] and visibl[y]"[277] resist immigration enforcement, which in turn followed from their commitment to live in community with one another and implement (their understanding of) "the law."[278]

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269. 424 U.S. 319 (1976).

270. *See About No More Deaths*, NO MORE DEATHS, https://nomoredeaths.org/about-no-more-deaths/ [https://perma.cc/PZ8P-JGU8] (describing "year-round humanitarian presence in the deserts of southwestern Arizona").

271. *See id.* (describing emergency medical aid to migrants in the desert).

272. *See* JIM CORBETT, GOATWALKING 163 (1991) (discussing disagreement within the sanctuary movement and characterizing one possible response to arriving refugees as serving as "refugee medics" but implying that a deeper level of commitment to refugees was needed).

273. *See* Cook, *supra* note 27, at 583.

274. Ray, *supra* note 39, at 1263.

275. *See* CORBETT, *supra* note 272, at 104.

276. GARCÍA, *supra* note 25, at 85.

277. CORBETT, *supra* note 272, at 78.

278. *See id.* at 100 ("'The law' as right is a single, intra-active, evolving order. 'Laws' or statutes are chronically in need of interpretation, testing, and adjudication to determine how and whether they fit into the law.").

This capacious conception of rescue has waned over the years, and individuals and organizations engaged in migrant rescue today have disavowed evasion of immigration enforcement, focusing instead on prevention of migrant deaths.[279] Humanitarian organizations such as Humane Borders, Tucson Samaritans, and No More Deaths contend that their work is "legal," and that the mere provision of humanitarian aid is not a crime.[280] But this is consistent with the view that evading immigration enforcement *would* be a crime. Participants in the new sanctuary movement appear to share this view. At his trial for violating INA's anti-harboring provisions, for example, Scott Warren testified that he never counseled the migrants he encountered on how to evade immigration enforcement.[281] He conceded that federal harboring law has the force of "law," impliedly rejecting the original sanctuary movement's view that evading immigration enforcement was itself lawful—the government's interpretation of the harboring statute notwithstanding.[282] Such a focus resonates with international legal protections for life and bodily integrity, and reaffirms the special status of emergency medical treatment as manifested in other areas of federal law, such as requirements for hospitals to provide emergency medical care to all persons, regardless of immigration status.[283]

A conception of rescue any narrower than this, however, would nullify humanitarian aid by authorizing less assistance than required to sustain migrants walking through dangerous terrain. The federal government advanced such a restricted conception of humanitarian aid in the first prosecution of Scott Walker, wherein prosecutors argued that the alleged provision of maps, flashlights, and backpacks to unauthorized migrants would exceed any permissible humanitarian aid.[284] However, such a view is mistaken. Through official policy, the government has closed off less dangerous paths to entry.[285] As a result, asylum seekers find themselves on dangerous, deadly trails. Without the means to

279. *See* ROSE, *supra* note 2, at 49 (describing individual humanitarian, John Hunter, who aimed solely at providing water without assisting migrants in evasion or challenging broader immigration policies). This narrower conception of distress might support using the necessity defense in some cases, pursuant to which a defendant can defeat liability for committing a crime to avoid a greater harm. *See, e.g.*, United States v. Perdomo-Espana, 522 F.3d 983, 988 (9th Cir. 2008). The defense, however, is narrow and requires proof that "there were no other legal alternatives to violating the law." *Id. See also* United States v. Schoon, 971 F.2d 193, 197 (9th Cir. 1991) (characterizing the elements of the necessity defense as "strict" and stating that "society receives no benefit from the criminal conduct" if the "criminal act cannot abate the threatened harm" (citation omitted)).

280. *See* ROSE, *supra* note 2, at 65.

281. *See* Paul Ingram, *No More Deaths Trial: Warren Testifies, Prosecutors Call Final Witness*, TUCSONSENTINEL.COM (June 6, 2019) http://www.tucsonsentinel.com/local/report/060619_nmd_warren_trial/no-more-deaths-trial-warren-testifies-prosecutors-call-final-witness/ [https://perma.cc/6M8R-A7JN] (summarizing testimony).

282. *See id.*

283. *See* Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2018).

284. *See* Amended Motion to Dismiss Counts 2 and 3, *supra* note 9, at 4.

285. *See* U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN: 1994 AND BEYOND, at 6 (1994).

navigate the terrain, they risk imminent physical harm or even death.[286] Humanitarian aid, properly understood, encompasses assistance in navigating the desert geography.[287]

B. *The Values of Migrant Rescue*

Permitting the rescue of unauthorized migrants stands to promote both liberty and dignity. Giving the rescuer the freedom to engage in acts of rescue for a willing beneficiary, absent serious third-party harm, honors both the rescuer's liberty and the beneficiary's dignity. In addition to respecting an individual's choice *not* to rescue, as in tort law, the law ought to go further by respecting a rescuer's right to engage in rescue under certain circumstances.

1. *Rescuer's Liberty*

A rescuer's freedom to engage in rescue follows from the freedom of association. Apart from having a constitutional valence[288] and widespread recognition in international law,[289] the freedom of association is also a moral value. Free associations encompass a range of relationships, including those within families, schools, or clubs and those among friends.[290] They involve coming together with one another for a shared purpose.[291] At times, individuals and groups have invoked the freedom of association as a means to promote equality[292] and solidarity,[293] but just as often parties rely on it to exclude out-groups.[294] The freedom of association also shapes debates about migration, with both advocates of open borders and exclusionary immigration policy appealing to associative freedom.

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286. *See* ROSE, *supra* note 2, at 63 (describing *No More Deaths* base camp provisions).

287. *See id.*

288. *See* U.S. CONST. amend. I; Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 991 (2011) (discussing assembly and association as "essential components of political activism").

289. *See Rights to Freedom of Peaceful Assembly and of Association*, OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/InternationalStandards.aspx [https://perma.cc/JY4H-P6VF] (cataloguing international standards on rights to freedom of assembly and of association).

290. *See Freedom of Association*, STAN. ENCYCLOPEDIA PHIL. (May 3, 2019), https://plato.stanford.edu/entries/freedom-association/ [https://perma.cc/R93L-QNMC].

291. *See id.* (citing John Stuart Mill).

292. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 452, 460 (1958) (recounting the NAACP's efforts in Alabama to support black students "seeking admission to the state university" and the Montgomery bus boycott, which prompted the State Attorney General to sue in equity to obtain their membership list, the forced production of which, the Court held, would infringe members' right to the freedom of association).

293. *See* Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2057–59 (2018) (describing the central role of the freedom of association in combatting "low wages, rising economic inequality, declining union density, criminalization of immigration, and outsourcing and subcontracting").

294. Boy Scouts of America v. Dale, 530 U.S. 640, 656 (2000) (holding that the forced inclusion of a gay scout master in the Boy Scouts would interfere with the organization's anti-gay message).

In his defense of exclusionary immigration policy, Professor Christopher Heath Wellman argues that individuals, groups, and even polities enjoy a freedom of association, including the freedom *not* to associate.[295] Starting with the freedom to associate in the context of marriage, Wellman argues that having the freedom to marry someone does not require any individual to agree to marriage; after all, the courted individual can decline.[296] Professor Sarah Song similarly describes marriage as a right "whose exercise depends on finding cooperative partners with whom to exercise the right."[297] Just like individuals contemplating marriage, the argument goes, associational groups should enjoy latitude to associate or not with persons however they see fit, and so should states. According to Wellman, a polity's freedom of association is essential for its "self-determination."[298]

Libertarians, however, also invoke the freedom of association—but at the individual level—and they arrive at arguments in favor of open borders.[299] Specifically, libertarians appeal to citizens' right to "dominion" over their private property, including the right to hire workers of their choosing. Based on their right to dominion over their land, the argument goes, individual citizens should dictate who enters the country and who stays, the polity's preferences notwithstanding.[300] Although the state also has a right to control its "political territory," the individual landowner's right should prevail.[301] Such a freedom for individual citizens would severely limit a state's right to "self-determination."[302]

Wellman sees this leading to anarchy.[303] To avert anarchy, a polity's freedom of association should constrain individual associational choices.[304] In his view, the libertarian position requires some explanation of why the individual's freedom of association should take precedence over the polity's, or why an individuals' right to dominion over their property overrides the polity's right to control its territory.[305] Not finding one, Wellman finds the libertarian defense of open borders unpersuasive.[306]

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295. *See* Wellman, *supra* note 24, at 109–13.

296. *See id.*

297. SARAH SONG, IMMIGRATION AND DEMOCRACY 105 (2019).

298. Wellman, *supra* note 24, at 110–11. Song, however, critiques Wellman's reliance on the freedom of association, in part because the state is not an intimate association. SONG, *supra* note 297, at 44–45.

299. *See, e.g.*, CHRISTOPHER HEATH WELLMAN AND PHILIP COLE, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 79 (2011).

300. *See id.* at 80 (noting libertarians' view that "restricting immigration . . . conflicts with the property rights of insiders who might want to invite various foreigners to visit their land").

301. *See id.* at 80–81.

302. *See* Wellman, *supra* note 24, at 133.

303. *Id.* at 131.

304. *See id.*

305. *Id.* at 132.

306. *See id.* at 137. Libertarians are not the sole advocates for open borders. Egalitarians also argue for open borders based on the notion of moral luck and that no one chooses the country of their birth. *See* JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 226–28 (2013); Wellman, *supra* note 24,

The kind of migrant rescue contemplated here does not assist migrants in transgressing a national boundary illegally, which has already happened by the time of rescue. It also does not amount to admitting migrants for membership to the polity. Instead, migrant rescue constitutes an interstitial association. Assume that a polity has a freedom of association that constrains individual associational choices about whom to admit or exclude. And assume that migrants' need for entry,[307] or a history of war or colonial dealings between the haven state and the countries from which migrants hail,[308] does not overcome this right to exclude. Even then, the freedom of association, understood as a moral value, supports migrant rescue. In such a setting, the individual rescuer seeks not to admit a noncitizen or determine the length of their stay. Instead, the rescuer seeks merely to prevent the death of that person.[309] Interstitial association of this kind does not impede a polity's overall right to self-determination. On its own, rescue does not threaten sovereignty premised on membership and shared governance.

Wellman's second set of arguments is also consistent with an associational right to humanitarian rescue. Specifically, Wellman notes the minimal burden of not being allowed to invite a foreigner onto one's property, and the costs to "compatriots."[310] With respect to humanitarian aid in the desert, as opposed to a decision to admit the person for permanent residence, the force of these reasons is diminished or even reversed. Indeed, the burden of *being prohibited from helping* is high for potential rescuers because their conscience, religious practice, or interpretation of human rights law might compel them to intervene, and their conduct would be laudable (and lawful) if the person in distress were not a migrant.[311] Moreover, the costs to compatriots of the migrant *not dying* are also low,[312] for the rescuer is not deciding whether the migrant will be admitted for permanent residence. Ultimately, the polity's "right to exclude," whether real or imagined, is consistent with permitting individuals to engage in migrant rescue and form interstitial associations that fall short of admission decisions.

2. *Beneficiary's Dignity*

Justifying rescue exclusively based on the liberty interests of rescuers, however, fails to consider whether prospective beneficiaries seek, want, or need

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at 119–30. However, the egalitarian argument is not based on the freedom of association, and thus, not relevant to this liberty-based discussion.

307. *See* SONG, *supra* note 297, at 121–22.

308. *See* E. Tendayi Achuime, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1509, 1522 (2019) (arguing that individual "so-called economic migrants" can help achieve nation-state decolonization through their "personal pursuit of enhanced self-determination").

309. HUMANE BORDERS, https://humaneborders.org/ [https://perma.cc/7A4Y-2GWD] (describing mission of "sav[ing] desperate people from a horrible death by dehydration and exposure").

310. Wellman, *supra* note 24, at 133.

311. *See* Cook, *supra* note 27, at 582 (describing migrant rescuers' appeal to higher law, based on religion and secular beliefs, to justify their work).

312. *See* Wellman, *supra* note 24, at 133.

rescue.[313] Most people presumably would want to receive lifesaving aid, and the law at times treats rescue as involving an implied contract for lifesaving services.[314] Some forms of rescue, however, can impose harm.[315] Thus, consent to rescue cannot always be presumed.

Apart from consent, the law must consider whether rescue advances the interests and respects the capacities of the beneficiary, especially when involving children or others incapable of providing legal consent. Does it protect their rights and promote their agency?[316] Many concepts of dignity appear in constitutional law,[317] and scholars have conceived of dignity as a jurisprudential concept, a quality of a rights-based legal system, and a trait of rights-bearers themselves.[318] With respect to beneficiaries of rescue, dignity has its greatest appeal when understood as respecting a person's humanity and guarding against their humiliation and subordination.[319] Although the Supreme Court has developed the anti-subordination conception of dignity in cases implicating gay rights and reproductive rights, it has also expressed concern about the perpetual subordination of the children of undocumented migrants.[320]

On this conception of dignity, migrant rescue promotes dignity. Rescuers providing humanitarian aid protect migrants' rights relating to life and bodily integrity. They further show respect for migrants' humanity by preventing their

313. On the dangers of a stylized understanding of rescuers and victims in the immigration setting, see Sabrina Balgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 DENV. L. REV. 1 (2016).

314. *See* Albert, *supra* note 101, at 119 (discussing implied agency as basis for rescuer's recovery).

315. Take, for example, parents seeking to "rescue" LGBTQ youth through so-called "conversion therapy." Even if parents believe they are saving the bodies or souls of their children, their freedom to engage in perceived beneficence imposes a range of harms and humiliations on their children, including depression, anxiety, and heightened risks of homelessness and suicide. Thus, such conversion therapy cannot be said to promote the child's dignity. *See The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy [https://perma.cc/BRD7-CGZD]. For discussion of an "objective" conception of harm in immigration law, see Pitcherskaia v. INS, 118 F.3d 641, 644, 648 (9th Cir. 1997) (holding that a Russian lesbian could prove the persecution element of her asylum claim when the Russian government institutionalized her and subjected her to electroshock treatment "in an effort to change her sexual orientation" because a persecutor's belief that the harm "is 'good for' his victim does not make it any less painful to the victim[] or . . . remove the conduct from the statutory definition of persecution").

316. I do not regard beneficiaries as necessarily having a "right" to dignity-promoting rescue; instead, I am concerned with possible justifications for *permitting* rather than requiring currently-prohibited rescue.

317. *See* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 205–08 (2015); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171–72 (2011).

318. *See* JEREMY WALDRON, *supra* note 23, at 49 (2012)

319. *See, e.g.*, Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

320. *See* Note, *Equal Dignity — Heeding Its Call*, 132 HARV. L. REV. 1323, 1328 (2019) (discussing anti-subordination rationale of *Plyler v. Doe*, 457 U.S. 202 (1982)).

deaths, which often occur under degrading or humiliating circumstances.[321] Beyond this, rescue respects migrants' agency in a system rigged against them. International refugee law creates a right against return or refoulement to countries of persecution,[322] but it also poses a fundamental challenge to accessing that protection: migrants must somehow effectuate an entry into a haven state in order to enjoy the protection of non-refoulement. International refugee law expressly contemplates asylum seekers entering haven states irregularly,[323] because haven states offer almost no legal paths to entry.[324] Combined with recent developments in the United States leading to routine prosecution for irregular entry[325] and family separation,[326] the promise of protection rings hollow. Moreover, even if a migrant succeeds in reaching a port of entry, under the so-called Migrant Protection Protocols,[327] the U.S. government will return the migrant to a border town in Mexico—usually a site of murder, rape, and other horrors—while awaiting a hearing.[328] These policies amplify the forces that simultaneously lure and repel migrants.[329] Permitting those migrants who do cross the border to survive the journey is the least the law can do.

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321. *See* Rob O'Dell, *What Dead Pigs Can Teach Us About Missing Migrant Bodies in the Desert*, KTVB (July 5, 2018) https://www.ktvb.com/article/news/nation-now/what-dead-pigs-can-teach-us-about-missing-migrant-bodies-in-the-desert/465-728a855a-0228-4b14-8d7e-fec71322cd9b [https://perma.cc/3B4K-C5ZW] (describing scavenging of migrant bodies in the Arizona desert).

322. *See, e.g.*, Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

323. *See id.* art. 31.

324. *See* Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT'L L. 1215, 1231 (2013); DAVID SCOTT FITZGERALD, REFUGE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS, 1–10 (2019) (describing haven states' efforts to avoid their legal obligation of non-refoulement by repelling asylum seekers and preventing their entry into haven states' territories).

325. *See, e.g.*, Press Release, *supra* note 34.

326. *See Family Separation: By the Numbers*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation [https://perma.cc/J7DC-F3VS].

327. Press Release, U.S. Dep't of Homeland Sec., Migration Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [https://perma.cc/FP33-E4BT]. The Supreme Court granted the government's request to stay the Ninth Circuit's injunction of this program, thus permitting it to take effect. Wolf v. Innovation Law Lab, No. 19A960, 2020 WL 1161432 (S. Ct. March 11, 2020) (mem.).

328. Debbie Nathan, *Trump's "Remain in Mexico" Policy Exposes Migrants to Rape, Kidnaping, and Murder in Dangerous Border Cities*, INTERCEPT (July 14, 2019), https://theintercept.com/2019/07/14/trump-remain-in-mexico-policy/ [https://perma.cc/2X2A-E5RK].

329. *See* Rachel Schmidtke, *Will the U.S.-Mexico Migration Deal Work? Here Are the 6 Things You Need to Know*, WASH. POST (June 27, 2019), https://www.washingtonpost.com/politics/2019/06/27/will-us-mexico-migration-deal-work-here-are-things-you-need-know/?utm_term=.be64d57f911b [https://perma.cc/DME4-TH4S] (discussing Central American migrants' undiminished pressure to reach the United States, perhaps with the aid of smugglers).

3. Third-party Harm

Ultimately, the law should permit or accommodate otherwise prohibited rescue when the liberty of the rescuer, the dignity of the beneficiary, and the absence of significant third-party harm all align. Consideration of third-party harm means that rescuers and beneficiaries cannot simply contract for rescue without regard to externalities. With respect to migrant rescue, the relevant externalities or harms range from the concrete and compensable to the theoretical and non-compensable.[330] Further, some harms are arguably permissible in some contexts.[331]

None of the claimed harms justify a criminal prohibition on migrant rescue. On the concrete side, some ranchers along the southern border have complained that unauthorized migrants damage their land, cut their fences, leave garbage that sickens their cattle, or keep gates open, allowing cattle to wander away.[332] Some ranchers also complain of theft or break-ins.[333] Rescuers at times also impose costs on ranchers by, for example, seeking permission to place water stations on their land.[334] The government regards their acts of leaving bottles of water in nature preserves as "littering."[335] But all of these harms are compensable, and thus, capable of redress outside of the criminal law.[336] More theoretical harms could take the form of the undermining of a freedom of association of the polity, a right to collective self-determination, control over the culture, and, most theoretical, the protection of sovereignty.[337] These are theoretical harms because they undermine an idea more than they threaten any protected interest in life, liberty, or property. Moreover, as discussed in Part II.B.1, rescue itself does not violate sovereignty, for the border transgression has already occurred. One might worry that rescue will incentivize the irregular crossings that constitute sovereignty violations. But an empirical claim that rescue functions as a pull

330. *See* ROSE, *supra* note 2, at 53.

331. For a nuanced treatment of the concept of "harm" in religious freedom cases, see Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. 331, 338 (2020) (proposing a framework of First Amendment harms that includes prohibited harms and those "that can be balanced against other harms").

332. ROSE, *supra* note 2, at 53; *see also* Melissa del Bosque, *'This Is Our Home'*, Part 2 of *Beyond the Border*, GUARDIAN (Aug. 13, 2014), https://www.theguardian.com/world/ng-interactive/2014/aug/13/-sp-border-crisis-texas-ranchers-brooks-county-smugglers-deaths [https://perma.cc/VV6F-NHXW] (describing the dilemma south Texas landowners face between protecting their property and saving migrant lives).

333. ROSE, *supra* note 2, at 53.

334. *Id.*

335. Rafael Carranza, *Four Aid Volunteers Found Guilty of Dropping Off Water, Food for Migrants in Arizona Desert*, USA TODAY (Jan. 20, 2019), https://www.usatoday.com/story/news/nation/2019/01/20/volunteers-guilty-dropping-water-food-migrants-arizona-desert/2632435002/ [https://perma.cc/4Q4L-N8BE].

336. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1799 (1992) (characterizing the civil law system as a "compensatory scheme, focusing on damage rather than on blameworthiness").

337. *See generally* Wellman, *supra* note 24, at 112 (discussing a polity's right to political self-determination); SONG, *supra* note 297, at 69 (discussing the principle of collective self-determination in a democracy).

factor has to contend with the slew of potent push factors also acting upon migrants in their home countries.[338] It assumes migrants are deterrable—a claim lacking empirical support.[339] As a result, the net effect of rescue is at best uncertain. Thus, neither type of harm justifies a criminal prohibition.

Relatedly, some harms might be permissible, such as technical violations of immigration law, but other harms might be impermissible, such as a migrant's act of violence against some other person present in the United States.[340] Although available data demonstrates that immigrants have lower incarceration rates than native-born Americans, the myth of "criminal aliens" endures nonetheless,[341] and, of course, some noncitizens do commit crimes. Given the current empirics, the probability of an asylum seeker or other migrant committing a crime is extremely low. Without data demonstrating some basis for linking unauthorized migrant status and crime, the feared harm is simply too remote, even if there are actual instances of unauthorized migrants committing crimes. Thus, concerns based on technical violations of the law or on unsubstantiated fears of crime similarly do not justify a criminal prohibition on rescue.

Consideration of third-party harm in other settings, however, demonstrates that not all currently prohibited rescue should be permitted. In some cases, third-party harms are unacceptable. Take, for example, prison rescue, a crime under federal and state law.[342] Specifically, federal and state law prohibit not only prison escapes, but also the act of helping someone break out of prison or hide from the authorities. Given the legacies of mass incarceration, over-criminalization, and over-punishment,[343] a private citizen might seek to "rescue" prisoners whom they regard as unjustly incarcerated. One could analogize such action to the direct service or civil initiative of the sanctuary movement with respect to asylum seekers. Apart from promoting rescuers' liberty to engage in

338. *See* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1660 (2010) (discussing push factors and pull factors).

339. *Cf.* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 240–50 (2019) (finding no empirical support for the claim that immigration detention deters migrants).

340. For a discussion of permissible and impermissible harms in the religious-freedom context, see Barclay, *supra* note 331.

341. RUBÉN G. RUMBAUT & WALTER A. EWING, AM. IMMIGRATION LAW FOUND., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION 1–3, 6–10 (2007), https://www.americanimmigrationcouncil.org/sites/default/files/research/Imm%20Criminality%20%28IPC%29.pdf [https://perma.cc/ZPT6-42EE]; *see also* ANNIE LAURIE HINES & GIOVANNI PERI, IZA – INST. OF LABOR ECON., IMMIGRANTS' DEPORTATIONS, LOCAL CRIME AND POLICE EFFECTIVENESS 3–4 (2019), http://ftp.iza.org/dp12413.pdf [https://perma.cc/6ZMV-HVDN] (arguing that deportations pursuant to the Secure Communities program did not lead to decreases in crime rates).

342. *See, e.g.*, 18 U.S.C. § 1072 (2018) ("Concealing escaped prisoner"), ME. STAT. tit. 17-A, § 756 (2020) ("Aiding escape"); IDAHO CODE § 18-2501 (2019) ("Rescuing prisoners").

343. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1223–24 (2015) (describing the need for a prison abolitionist ethic to confront the legacy of overcriminalization and overpunishment); United States v. Bailey, 444 U.S. 394, 420 (1980) (Blackmun, J., dissenting) (describing conditions of "filth," "rape," and "brutality" in America's prisons).

rescue, permitting assistance to prisoners seeking to escape would promote the prisoners' dignity by liberating them from possibly inhumane conditions.[344] But forcible escape from a secure facility will likely lead to violence. And unlike the case of the recent migrant who has yet to lodge their claim for asylum, the prisoner has been afforded some due process (however flawed) prior to incarceration.[345] Moreover, humanitarians saving migrant lives encounter them serendipitously, rather than arranging for their travel into the country, which would amount to smuggling.[346] Thus, this theory would not automatically justify the "rescue" of prisoners.

Similarly, this theory would not justify anti-abortion protesters preventing a woman from entering an abortion clinic to "rescue" fetuses from abortion procedures.[347] Opponents of abortion might invoke their liberty to engage in rescue and the fetus's implied consent, but forced pregnancy produces overwhelming harm to a pregnant woman in continuing her unwanted and possibly unsafe pregnancy.[348] Pregnant women and new mothers in the United

344. *E.g.*, Katie Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours*, N.Y. TIMES (April 3, 2019), https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html [https://perma.cc/5KGV-DBTA]; *cf.* Judith Zubrin Gold, Comment, *Prison Escape and Defenses Based on Conditions: A Theory of Social Preference*, 67 CALIF. L. REV. 1183 (1979) (discussing role of the necessity and duress defenses in prison escape prosecutions).

345. *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 107 (2005) (criticizing the Warren Court's approach to criminal procedure, based on selective incorporation of the Bill of Rights rather than fundamental fairness).

346. The proposed theory, however, would potentially justify permitting private individuals to give water, food, or basic medical care to an injured prisoner who had already escaped, so long as the private individual does not hide the person from the authorities.

347. *See* Bernard Nathanson, *Operation Rescue: Domestic Terrorism or Legitimate Civil Rights Protest?*, 19 HASTINGS CTR. REP. 28, 28 (1989).

348. Tellingly, the common law has never imposed on pregnant women the duty to rescue fetuses growing inside them. Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, BUFF. L. REV. 1142, 1147 (explaining historical treatment of abortion under common law and noting absence of a common law duty to rescue a fetus). Nowadays, many state statutes impose on pregnant women a duty to rescue, as state legislatures have increasingly adopted criminal prohibitions on abortion based on particular religious notions about when life begins. *See* Annalisa Merelli & Ana Campoy, *These Are All the States that Have Adopted Anti-abortion Laws So Far in 2019*, QUARTZ (May 30, 2019) https://qz.com/1627412/these-are-all-the-states-with-anti-abortion-laws-signed-in-2019/ [https://perma.cc/95DM-J6WV]; Matthew Bell, *When Does Life Begin? It Might Depend on Your* Faith, PUB. RADIO INT'L (May 17, 2019) https://www.pri.org/stories/2019-05-17/when-does-life-begin-it-might-depend-your-faith [https://perma.cc/92Z9-FTM3]. Thus, women in a number of states have limited to no access to abortion and face criminal penalties for not carrying a pregnancy to term. Implicit in this regime is the view that the harm to a pregnant woman in whom a fetus grows (possibly without her consent, as in the case of rape) can almost never outweigh the potential life of the fetus. *See* Opinion, *A Woman's Rights*, N.Y. TIMES (Dec. 28, 2018) https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html [https://perma.cc/8YL8-ZLFQ]. On this view, what I characterized as "third-party harm" is set to zero. Thus, by simply "weighing" the three elements differently, opposing parties can use the same theory to advance their claims. Accordingly, my limited purpose in offering this theory is to illustrate why my justification for permitting migrant rescue does not *require* permitting all currently-prohibited forms of rescue.

States are more likely to die than pregnant women and new mothers in any other developed country.[349] Black pregnant women face even greater risks, with a maternal mortality rate three times higher than that of white pregnant women.[350] Thus, pregnancy can endanger a woman's body and life, beyond her life plans and her economic independence.[351] Until recent times, when the law has permitted someone to rescue someone else, it has never required so much from so-called third parties. Thus, the theory offered herein does not support uniformly eliminating all prohibitions on rescue.[352]

The normative considerations identified here support migrant rescue defined as humanitarian aid to unauthorized migrants. Based both on rescuer liberty and migrant dignity, and the absence of serious third-party harm, criminal penalties should not attach to acts of migrant rescue.

III.
RESCUE, EXPOSED: THE NEED FOR PROTECTIVE MECHANISMS IN THE LAW

Rescuers engaged in "illegal" rescue face a recurring dilemma that the law cannot resolve without substantial reform. But even absent transformative law reform, rescuers still might find relief through existing legal tools. Robert M. Cover, in his examination of the entire legal framework upholding and perpetuating slavery amid judges' serious doubts about its morality and legality, demonstrated that the clash of law and morality is much more complex than we appreciate.[353] For example, as Cover demonstrates, the law is not simply given.[354] Instead, judges interpret statutes, and a whole range of actors in the

349. Nina Martin & Renee Montagne, *U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NPR (May 12, 2017), https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world [https://perma.cc/4XD5-LHM6].

350. Amy Roeder, *America is Failing its Black Mothers*, HARV. PUB. HEALTH (Winter 2019), https://www.hsph.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers/ [https://perma.cc/US33-JPWT] (showing the maternal mortality rate for black women to be 40 per 100,000, while white women have a maternal mortality rate of 12.4 per 100,000).

351. Professor Bernstein has argued that forcible pregnancy creates an affirmative duty to benefit another risking one's labor, health, well-being, and future economic prospects. Bernstein, *supra* note 348, at 1146. Because tort law generally disavows any such duty, the right to abortion can be said to have common law roots. *Id.* at 1147, 1184. Apart from causing these potential harms to women's lives and bodily integrity, rescue in this setting interferes with women's reproductive rights, nominally protected by the Constitution. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 164 (1973); Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. (forthcoming 2020) (describing the private interests in avoiding forced pregnancy).

352. Typically, when discussing pregnancy and rescue, the pregnant woman is cast as the rescuer of the fetus, and the debate is over whether the rescue is mandatory or discretionary. *See* Bernstein, *supra* note 348, at 1146. Where abortion is available, the duty is discretionary; where abortion is illegal, it is a mandatory duty. I have reframed the analysis so that third-parties are "rescuers" and the pregnant woman is, in effect, the third party, to meet potential objections that my theory would automatically allow anyone who believes they are engaging in rescue to do so, provided the beneficiary consents, implicitly or explicitly. That is not so.

353. *See* COVER, *supra* note 16, at 6–7.

354. *See id.* at 6 (noting that, "in a dynamic model, law is always becoming").

criminal justice system have discretion to implement them. These protective mechanisms at times offer legal cover to otherwise seemingly illegal rescue.[355]

This discussion of protective mechanisms of the law starts with the premise that outright legalization of currently prohibited rescue is not immediately achievable. Statutory reform, if possible, would offer the greatest protection to rescuers and beneficiaries alike, assuming third-party harms are modest or negligible. In the context of migrant rescue, decriminalizing entry without inspection, perhaps by recasting irregular entry as a civil violation, would free migrants from the criminal justice system's clutches.[356] If the government decriminalizes the underlying entry, then one common rationale for criminalizing harboring flounders as well. Creating new pathways for legal entry would also depress the demand for irregular border crossings.[357] Barring such developments, however, the law nonetheless contains important tools for rescuers, beneficiaries, and their allies.

Protective mechanisms relevant to the law of rescue vary. They could appear in the judiciary's interpretation of prevailing law and in the discretion of government actors. Other relevant tools could include the use of religious exemptions under the Religious Freedom Restoration Act (RFRA), and, with respect to migrant rescue specifically, the potential licensing of humanitarian NGOs to permit some amount of migrant rescue.[358] Although this Article defends and promotes use of these protective mechanisms to differing degrees, it also acknowledges the potential trade-off between seeking protection within existing law and challenging the premises of the existing system.[359]

A. Statutory Interpretation

The judicial authority to interpret the law, firmly grounded in the common law system of adjudication, provides the most fundamental source of protection

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355. *See* Kate Masur, Commentary, *Chicago's Resistance to ICE Raids Recalls Northern States' Response to the Fugitive Slave Act*, CHI. TRIB. (July 15, 2019), https://www.chicagotribune.com/opinion/commentary/ct-opinion-ice-raids-fugitive-slave-law-20190715-puz4oclc4nczxotfjvhxj5idjq-story.html [https://perma.cc/FU4Q-GVQR] ("[T]he structure of government in the United States allows space for resistance to unjust federal policies.").

356. *See* Jessica Zhang & Andrew Patterson, *The Most Prosecuted Federal Offense in America: A Primer on the Criminalization of Border Crossing*, LAWFARE (July 25, 2019), https://www.lawfareblog.com/most-prosecuted-federal-offense-america-primer-criminalization-border-crossing [https://perma.cc/H2K5-VJ2G].

357. *See* Stephanie Leutert & Caitlyn Yates, *What Are the Legal Pathways for Central Americans to Enter the U.S.?*, LAWFARE (July 17, 2018) https://www.lawfareblog.com/what-are-legal-pathways-central-americans-enter-us [https://perma.cc/2ZPW-G85Y]; Stephanie Leutert, (@Sleutert), TWITTER (Aug. 1, 2019, 9:51 AM), https://twitter.com/Sleutert/status/1156970596158332928 [https://perma.cc/8BZN-WS4E].

358. *See infra* Parts III.A–D.

359. *See, e.g.*, Dara Lind, *"Abolish ICE," Explained*, VOX (Mar. 19, 2018), https://www.vox.com/policy-and-politics/2018/3/19/17116980/ice-abolish-immigration-arrest-deport [https://perma.cc/54S7-LP72] (describing movement to defund ICE and its critique of the legitimacy of deportation).

to rescuers. In *Justice Accused,* Robert M. Cover describes a "dynamic model" of interpretation—one in which "law is always becoming[,] [a]nd the judge has a legitimate role in determining what it is that the law will become."[360] For example, during the century leading up to the Civil War, judges (and advocates) appealed to natural rights, natural law,[361] international law,[362] statutory presumptions in favor of liberty,[363] and federalism to attempt to vindicate the humanity of enslaved people.[364]

Although arguments based on natural law and natural rights played a central role in early arguments for emancipation and then abolition, they ultimately proved unsuccessful. The legal system eventually tamed nature,[365] and "natural law condemnation of slavery came to mean not a common cultural tradition but a personal . . . preference."[366] As a result, appeals to natural law and natural rights served as only a limited resource to advance the cause of abolition; multiple other factors such as public opinion and blacks "acting as if they were free" contributed to the abolition of slavery.[367]

Nonetheless, natural law retained a role in statutory interpretation during this period. It informed judicial construction of statutory purpose in "furtherance of the natural right to freedom," induced judges to regard statutory ambiguity as grounds for advancing liberty, and led courts to presume an aggressive "obligation to achieve a profreedom result unless there is a very specific, concrete positive law that prevents it."[368] Thus, moral condemnation of slavery infused statutory interpretation through pro-freedom rules of thumb, presumptions, and a requirement of a clear statement to abrogate liberty.

Similarly, contemporary judges are empowered to interpret federal harboring law to permit humanitarian aid to unauthorized migrants. Some scholars have argued that judges should interpret the term "harboring" not to include the provision of food, water, and medical care to unauthorized migrants.[369] At one level, the argument recalls Jim Corbett's view that the protection of basic rights can never be illegal.[370] But even focusing on the text of INA's various anti-harboring provisions together, one could argue that Congress has already deemed unobjectionable the "room, board, travel, medical assistance, and other basic living expenses" provided to an unauthorized migrant

360. COVER, *supra* note 16, at 6.
361. *Id.* at 21-22.
362. *Id.* at 101.
363. *Id.* at 62.
364. *See id.* at 183.
365. *See id.* at 31. "Nature Tamed" is the title of Part I of Cover's book.
366. *Id.*at 30.
367. *Id.* at 49.
368. *Id.*at 62.
369. *See* Campbell, *supra* note 28, at 98–100.
370. Corbett, *supra* note 5, at n.3 ("But there should no longer be any question that the nonviolent protection of human rights is never illegal.").

performing an invocation or missionary work.[371] Thus, Congress does not regard the provision of these items to *some* unauthorized migrants as harmful.[372] On the other hand, if Congress wanted to exempt the provision of these very goods in settings outside of missionary or ministry work, it could have done so. Moreover, in identifying permitted assistance in a narrow setting, Congress impliedly did not intend to permit it in a setting *not* identified.[373]

Even given the above, does it then follow that the provision necessarily criminalizes such aid in all other circumstances? Is a judge required to conclude that providing food, water, shelter, or medical care to unauthorized migrants violates the law?[374] Scholars have argued that the anti-harboring provisions' "collocation" of "harbors" with "conceals" and "shields from detection" suggests similar meanings of the words, but the use of "or" could also suggest that each word possesses distinct meaning.[375] Apart from relying on textual and linguistic canons of construction, judges also rely on substantive canons based on "constitutional values and broader policy considerations."[376] In this vein, one scholar has argued that courts should view RFRA as a canon of construction, counseling that courts adopt an interpretation of a statute that minimizes burdens on religious practice.[377] According to this argument, courts should interpret the harboring statute not to reach humanitarian aid provided by churches and other religious communities.[378] Others, writing more generally, and not specifically about immigration, have argued for recognition of a "dignity canon."[379] Such a canon might channel concerns for secular rescuers' free association rights, as well as migrants' dignity interests, and support an interpretation that permits provision of food, water, and medical care, even if it prohibits evading immigration authorities.

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371. 8 U.S.C. § 1324(a)(1)(C) (2018).

372. Some have argued that the existence of the missionary exception to the harboring statute lends support to sanctuary workers' claim to an exemption under the RFRA. *See* Scott-Railton, *supra* note 29, at 448.

373. This argument by negative implication relies on "[a] wedding" of the canon of construction known as *expressio unius est exclusio alterius* and the presumption of consistent usage. WILLIAM N. ESKRIDGE JR. ET AL., STATUTES, REGULATION, AND INTERPRETATION 470 (2014).

374. *See* Government's Response to Defendant's Amended Motion to Dismiss Counts 2 and 3, *supra* note 9, at 3, 14 (implying that transporting an injured migrant to a medical facility to receive care would be permissible).

375. *E.g.*, Loken & Bambino, *supra* note 211, at 145–46. Relatedly, one could argue that failure to give every word significance would render the word "surplusage." Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) (expressing skepticism that statutes are more carefully drafted than judicial opinions or academic articles, which contain surplusage).

376. Noah B. Lindell, *The Dignity Canon*, 27 CORNELL J.L. & PUB. POL'Y 415, 431 (2017); ESKRIDGE, *supra* note 373, at 447–48.

377. *See* Stephanie Acosta Inks, *Immigration Law's Looming RFRA Problem Can Be Solved by RFRA*, 2019 BYU L. REV. 107, 112.

378. *See id.* at 147.

379. *E.g.*, Lindell, *supra* note 376, at 415.

Setting aside reliance on new canons of construction, if courts construe harboring as ambiguous, perhaps even after the application of standard interpretive tools, equitable considerations captured by the rule of lenity might apply.[380] The sort of analysis Cover identified among anti-slavery judges adjudicating cases under the Fugitive Slave Acts serves as an example for other "moral-formal" dilemmas,[381] where the legal system pits liberty—a titan among moral values—against the formal principles that constrain the work of judges.[382] Judges interpreting the harboring statute have freedom within their judicial role to narrow the scope of harboring liability.

B. Religious Exemptions

Religious exemptions offer another safety valve for those who perform acts of rescue out of a sense of religious or spiritual compulsion. Some scholars advocate for exemptions as a form of robust protection for free exercise rights,[383] while others raise concerns about gutting generally applicable laws[384] that may lead to dignitary harms to third parties in particular settings.[385] Members of the LGBTQ community, for example, could find themselves refused service at a public accommodation, such as a bakery, on account of the purveyor's religious beliefs.[386] Ultimately, these exemptions are underdeveloped and underutilized in the migrant rescue setting. At the same time, advocates pursuing religious exemptions for their clients should recognize that the carve-out effectively

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380. Under the rule of lenity, courts resolve "irreconcilably ambiguous" statutes in favor of a criminal defendant. *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 475 (2008).

381. Cover describes this as a question of "whether the moral values served by antislavery (the substantive moral dimension) outweighed interests and values serviced by fidelity to the formal system when such values seemed to block direct application of the moral or natural law proposition." COVER, *supra* note 16, at 197.

382. *See id.*

383. *See* Stephanie A. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1599 (2018) (arguing that religious exemptions offer comparable protection for free exercise rights as provided for other First Amendment rights through as-applied challenges).

384. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990) (noting troubling "prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5 (2018), *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

385. *Compare* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518 (2015) (noting the impact on third parties of complicity-based conscience claims made by people of religious faith), *with* Barclay & Rienzi, *supra* note 383, at 1633 (arguing that risks of gutting generally applicable laws via religious exemptions are overblown when religious exemptions are understood as equivalent to "as-applied" challenges common to First Amendment jurisprudence).

386. *See* Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 187 (2019).

centers the rescuers' conscience and religious practice and erases migrants from consideration. Thus, religious exemptions on their own cannot lead the way to lasting, structural reform.

The Religious Freedom and Restoration Act (RFRA) applies to all federal laws.[387] The statute prohibits the federal government from substantially burdening "a person's exercise of religion even if the burden results from a rule of general applicability" unless the government can demonstrate that the burden represents the least restrictive means of furthering a compelling governmental interest.[388] Scholars have explained that a person claiming an RFRA exemption must demonstrate by a preponderance of the evidence that they hold a belief that is religious in nature; that the belief is sincerely held; and that the government's conduct substantially burdens the exercise of this sincerely held religious belief.[389] Upon making this showing, the claimant wins unless the government can demonstrate that the burden is the least restrictive means of furthering a compelling governmental interest.[390] RFRA further creates a claim or defense in a judicial proceeding for any person whose religious exercise the federal government has substantially burdened in violation of the statutory standard.[391] Ultimately, Congress passed RFRA to revive *Sherbert v. Verner*[392]—the precedent that previously governed Free Exercise claims—which grants broader Free Exercise rights than secured by subsequent interpretation of the First Amendment.[393]

Church volunteers faced prosecution for assisting undocumented migrants during the sanctuary movement in the 1980s,[394] and some volunteers with faith-based NGOs have been prosecuted much more recently.[395] As recounted above, in early 2018, the government indicted No More Deaths volunteer Scott Warren.[396] Warren asserted a defense under RFRA[397] arguing that the federal government's prosecution for immigrant "harboring" substantially burdened his

387. 42 U.S.C. § 2000bb–3(a) (2018). Congress further burnished protection for the free exercise of religion through the passage of the Religious Land Use for Institutionalized Persons Act (RLUIPA), *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695–96 (2014), and the Court dismissed an Establishment Clause challenge to RLUIPA, *see* Cutter v. Wilkinson, 544 U.S. 709 (2005).

388. 42 U.S.C. § 2000bb–1.

389. Brief of and by Professors of Religious Liberty as Amicus Curiae in Support of Defendant's Motion to Dismiss at 4, United States v. Warren, No. CR-18-00223-001-TUC-RCC (DTF) (D. Ariz. June 21, 2018).

390. *Id.*; *Burwell*, 573 U.S. at 690–91.

391. 42 U.S.C. § 2000bb–1(c).

392. 374 U.S. 398 (1963), *overruled by* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

393. *Burwell*, 573 U.S. at 746 (Ginsburg, J., dissenting).

394. *See, e.g.*, Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 YALE J.L. & HUMAN. 381 (1990).

395. *See, e.g.*, Indictment, *supra* note 10 (charging document).

396. *Id.*

397. 42 U.S.C. § 2000bb–1(c) (creating a claim or defense in a judicial proceeding for any person whose religious exercise has been burdened in violation of RFRA); *see* Defendant's Motion to Dismiss Counts 2 and 3, United States v. Warren, *supra* note 11.

"sincerely-held religious belief."[398] A geography instructor who made his home in Ajo, Arizona, in proximity to migrants facing deadly conditions, Warren delivered humanitarian aid through the Unitarian church's ministry for several years prior to his arrest.[399] He aided migrants based on his "spiritual belief in the inherent worth of every human being and the corresponding duty to provide life-saving care to fellow human beings in distress"—a belief, his lawyers argued, that many of the world's major religions articulate.[400] He argued that his sincerely held religious beliefs compelled him to help migrants in the desert, and that the federal government could justify its prosecution only if it was the least restrictive means for advancing a compelling governmental interest.[401]

The District Court presiding over Warren's first harboring prosecution denied his motion to dismiss the indictment based on RFRA; instead, it ruled that the defendant retained the option to reassert the defense at trial.[402] The government argued that Warren's assistance was not compelled by his beliefs, and that his assistance was not humanitarian aid, as they believed that the migrants faced no imminent danger or distress.[403] It further argued that the government had used the "least restrictive means" for advancing its "compelling interests."[404] Ultimately, Warren's jury hung, and his first trial did not settle the applicability of an RFRA defense to migrant-harboring charges.[405]

Warren prevailed on his RFRA defense, however, with respect to a misdemeanor charge.[406] In a "watershed" moment for the interpretation of RFRA,[407] the District Court acquitted Warren on an abandonment of property charge, but it found him guilty of driving in a restricted wilderness area.[408] The court concluded that restrictions on driving in wilderness areas did not substantially burden Warren's religious beliefs.[409] The prohibition on

398. *See* Amended Motion to Dismiss Counts 2 and 3, *supra* note 9, at 8–13.

399. *Id.* at 2, 11.

400. *Id.* at 11 n.5.

401. *Id.* at 8, 21–25.

402. United States v. Warren, No. MJ-17-0341-TUC-BPV, 2018 WL 6809430, at *2, *5 (D. Ariz. Dec. 27, 2018).

403. *See* Government's Response to Defendant's Amended Motion to Dismiss Counts 2 and 3, *supra* note 9, at 9–12.

404. *See id.* at 16–17.

405. *See* Isaac Stanley-Becker, *An Activist Faced 20 Years in Prison for Helping Migrants. But Jurors Wouldn't Convict Him.*, WASH. POST (June 12, 2019), https://www.washingtonpost.com/nation/2019/06/12/scott-warren-year-sentence-hung-jury-aiding-migrants/ [https://perma.cc/455Y-YJ49].

406. Order at 2, *Warren*, No. 17-00341MJ-001-TUC-RCC (D. Ariz. Nov. 21, 2019) (order acquitting Warren of one misdemeanor count based on the RFRA).

407. *Religious Freedom Law Plays Key Role in Migrant-Aid Case*, U.S. NEWS & WORLD REP. (Nov. 26, 2019), https://www.usnews.com/news/us/articles/2019-11-26/religious-freedom-law-plays-key-role-in-migrant-aid-case [https://perma.cc/GSL8-V9JF].

408. Order, *supra* note 406, at 2–3.

409. *Id.* at 3.

abandoning property did, however, because Warren's religious beliefs compelled him to leave jugs of water in the desert.[410]

Scholars of religious freedom endorsed the RFRA defense in Warren's case,[411] but others have noted that exemptions also carry risks generally.[412] For example, Professors Reva B. Siegel and Douglas NeJaime have argued that the increasing use of religious exemptions in the context of the "culture wars" imposes impermissible third-party harms.[413] When the Governor of South Carolina successfully invoked RFRA to exempt faith-based adoption agencies from placing children with parents who do not pass the agency's religious "litmus test,"[414] critics decried the decision for sanctioning discrimination using public dollars.[415] In addition, recent surveys show an increased willingness on the part of various religious communities to support the legality of religion-based refusal to serve black people, Muslims, Jews, LGBTQ people, or other minorities.[416] At some point, religious exemptions stand to eviscerate anti-discrimination norms by authorizing groups to discriminate in public accommodations based on characteristics such as race.[417] Those who back a robust system of religious exemptions, however, argue that the alternative, gutting religious freedom, is equally problematic.[418] As noted above, much depends on the meaning and significance of "harm."[419]

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410. *See id.* at 2.

411. Brief of and by Professors of Religious Liberty as Amicus Curiae in Support of Defendant's Motion to Dismiss, *supra* note 389.

412. *See, e.g.*, NeJaime & Siegel, *supra* note 385, at 2520.

413. *See id.* (characterizing the original focus of the RFRA to be protection of minority religious communities from generally applicable laws that burden their religious practice, but the current use of RFRA to be primarily for majority religious communities seeking exemptions from including or transacting with third parties whose conduct they deem sinful).

414. Letter from Henry McMaster, Governor, S.C., to Steven Wagner, Acting Assisting Sec'y, Admin. for Children and Families, U.S. Dep't of Health and Human Servs. (Feb. 27, 2018), https://governor.sc.gov/sites/default/files/Documents/newsroom/Scanned%20from%20ECOS-XR-SH119.pdf [https://perma.cc/6SQD-JVAX]; Emanuella Grinberg, *South Carolina Foster Care Providers Can Reject People Who Don't Share Their Religious Beliefs*, CNN (Jan. 23, 2019), https://www.cnn.com/2019/01/23/politics/south-carolina-religious-freedom-nondiscrimination-waiver-hhs/index.html [https://perma.cc/MH3E-DSC4].

415. *See, e.g.*, Meg Kinnard, *Lawsuit Claims Discrimination by South Carolina Foster Agency*, WLOS NEWS 13 (Feb. 15, 2019), https://wlos.com/news/local/ap-exclusive-lawsuit-claims-discrimination-by-south-carolina-foster-agency [https://perma.cc/6L8J-YNZT].

416. *E.g.*, ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., INCREASING SUPPORT FOR RELIGIOUSLY BASED SERVICE REFUSALS 7–13 (2019), https://www.prri.org/wp-content/uploads/2019/06/PRRI_Jun_2019_Service-Refusal.pdf [https://perma.cc/8HCN-UUCG].

417. *See* Ronald J. Krotoszynski, Jr., *Agora, Dignity, and Discrimination: On the Constitutional Shortcomings of "Conscience" Laws that Promote Inequality in the Public Marketplace*, 20 LEWIS & CLARK L. REV. 1221, 1249 (2017); Joseph William Singer, *Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations*, 18 THEORETICAL INQUIRIES L. 519, 542 (2017) (noting that public accommodations, unlike homes and churches, "cannot choose which customers to serve").

418. *See* Barclay, *supra* note 331, at 359.

419. *See id.*

Advocates asserting an RFRA defense for defendants charged with harboring for providing humanitarian aid to unauthorized migrants are developing an important protective mechanism contained in the law. However, they should also recognize the risks of locating the illegitimacy of the prosecution in the individual defendant's conscience or religious practice rather than in the dignity of migrants and their right to seek asylum.[420]

C. *Equitable Discretion*

Additional protective mechanisms include the vast discretion that various government actors possess. When high-ranking officials establish laws that undermine or violate human life and dignity, bureaucrats may facilitate rescue of vulnerable people using their discretion. They may transform illegal escape into lawful exit. Similarly, government officials in the criminal legal system possess discretion to not subject rescuers to criminal charges or punishment.

The twentieth century offers an example of public officials who, by issuing papers, facilitated the rescue of refugees.[421] During the later years of the Holocaust, for example, Hungarian officials regularly deported Jews to death camps.[422] In a display of what historian Paul Levine has called "bureaucratic resistance," Swedish diplomats issued exit visas from Hungary and entry visas to haven states to facilitate refugees' flight.[423] Without these papers, any Jewish migration out of Hungary was illegal, hazardous, or completely impossible.[424] Diplomats also issued a range of official-looking documents, including, on occasion, a simple letter indicating the Swedish government's interest in a particular refugee.[425] These papers sometimes fell short of facilitating lifesaving migration; some papers had more modest, domestic effects, such as protecting a Jewish person from police harassment.[426] As Levine observes, diplomats themselves, at times, were unsure of the significance or "protective value" of the papers they issued, some of which they invented without much forethought.[427] This so-called "paper chase"[428] allowed diplomats to exploit the usual channels of diplomacy for lifesaving outcomes and to functionally evade strictures

420. *Cf.* CORBETT, *supra* note 272, at 104 (emphasizing legal right of refugees to safe haven and impliedly rejecting view of sanctuary as charity).

421. *See* Levine, *supra* note 30, at 146.

422. *Id.* at 267.

423. PAUL A. LEVINE, RAOUL WALLENBERG IN BUDAPEST 90 (2010) (describing the *Schutzpass* and other diplomatic documents used by Swiss and Swedish diplomats to save Jews in Hungary).

424. *See id.* at 91 ("[A] piece of paper held in one's hand could mean life, because it just might cause a threatening official to give way.").

425. Levine, *supra* note 30, at 276 (describing incident of a Jewish man in Budapest who was released from police custody upon showing a document issued by the Swedish government).

426. *Id.*

427. LEVINE, *supra* note 423, at 125; *see also* Photograph of a *Schutz-pass* Issued by the Swedish Government, U.S. HOLOCAUST MEMORIAL MUSEUM, https://collections.ushmm.org/search/catalog/pa1055014 [https://perma.cc/474F-JYDV].

428. LEVINE, *supra* note 423, at 92.

without openly defying them.[429] Through official communications and papers, bureaucrats exhibited their humane creativity.[430]

An exercise of bureaucratic discretion often constitutes extraordinary relief.[431] In the example of Swedish diplomacy during the Holocaust, diplomats keenly understood that their rescue efforts would lose effect if they "conceded too much."[432] The more widespread the exercise of bureaucratic discretion in favor of vulnerable Jews, the greater the suspicions aroused among German or Hungarian officials, prompting those officials to scrutinize diplomatic documents more closely or to refuse to permit Jewish refugees to exit the country altogether.[433]

Bureaucratic discretion in immigration law today resides with consular officers, asylum officers, CBP officers, and any others who serve as gatekeepers. Consular officers can issue visas that enable migrants to travel and enter the United States legally.[434] Asylum officers have discretion to grant asylum to eligible applicants.[435] CBP officers have the authority to overlook technical violations of INA.[436] All of these actors shape and produce migrants' legality.[437]

Similarly, outside of an immigration bureaucracy, individual actors exercise discretion throughout the criminal legal system, either on their own, or in concert with others. For example, judges can direct verdicts.[438] Prosecutors can decline to charge defendants, despite having probable cause that the defendants committed crimes.[439] More controversially, juries can nullify

429. *Id.* at 92–93 (discussing bureaucrats' autonomy to evade orders without openly defying them).

430. And yet these diplomats were no saints. As Levine carefully demonstrates, many of these same diplomats contributed to restrictive migration laws in the first place. *See id.*

431. *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7–13 (2015).

432. Levine, *supra* note 30, at 278 (quoting cable between Swedish diplomats).

433. *See id.* (quoting diplomat on the paradox of rescue); *see also* Ray, *supra* note 324, at 1265 ("The paradox of humanitarian rescue . . . is that it is most effective when rare.").

434. *See Consular Career Track*, U.S. DEP'T ST., https://careers.state.gov/work/foreign-service/officer/career-tracks/consular [https://perma.cc/X7Y9-CJYP].

435. Matter of A-B-, 27 I&N Dec. 316, 345 n.12 (A.G. 2018) ("Asylum is a discretionary form of relief from removal.").

436. LENA GRABER & JOSE MAGAÑA-SALGADO, IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY, DACA, ADVANCE PAROLE, AND FAMILY PETITIONS 7 (2016), https://www.ilrc.org/sites/default/files/resources/prac_adv-daca_advance_parole_fam_pet-20160531.pdf [https://perma.cc/8TPS-TFCC].

437. *Cf.* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 153–55 (2004) (describing how commissioner general of the INS devised administrative methods in the absence of law reform to facilitate "legalization of illegal workers").

438. Yeager, *supra* note 59, at 27 (listing directed verdicts and appellate review as standard tools in the criminal law to achieve substantive justice).

439. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1683–84 (2010) (defending prosecutors' equitable discretion not to charge prospective defendants).

deliberations.[440] Seemingly extralegal considerations, including moral ones, routinely interrupt the enforcement and execution of the law, sometimes with the law's blessing.

Ultimately, discretion is neither a panacea nor an inherently protective tool. Although the executive branch can limit its prosecution of irregular entry offenses,[441] President Donald Trump's administration made the opposite choice early on. Federal prosecutors have brought many more cases against humanitarians after the U.S. Department of Justice's "zero-tolerance" policy took effect.[442] Thus, discretion merely has the potential to protect, depending on context and the political environment.

D. Administrative Pre-approval of Humanitarian Aid

Finally, rescuers and allies can challenge blanket criminalization of humanitarian aid to unauthorized migrants through development of an administrative process, such as permitting or licensing,[443] to preapprove humanitarian aid.[444] In the administrative state, as in private law, a license permits commission of an otherwise illegal act.[445] It also serves as a tool to regulate the occurrence of a certain activity or its quality.[446] A preapproval process and regulation generally express the idea that too much of an activity would produce harm.[447] In addition, such processes typically address concerns

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440. *See* Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 693–94 (2012) (defending jury nullification on a functionalist conception of the rule of law, one that "encompass[es] competing visions and legal interpretations"); *cf.* JEANNINE MARIE DELOMBARD, SLAVERY ON TRIAL: LAW, ABOLITIONISM, AND PRINT CULTURE 46 (2007) (describing jury's disregard of judge's instructions in a seditious libel case brought against a critic of the New York governor).

441. *See* Zhang & Patterson, *supra* note 356.

442. Lorne Matalon, *Extending 'Zero Tolerance' to People Who Help Migrants Along the Border*, NPR (May 28, 2019), https://www.npr.org/2019/05/28/725716169/extending-zero-tolerance-to-people-who-help-migrants-along-the-border [https://perma.cc/SF2M-H6MR] (showing spike in harboring prosecutions after Sessions' "zero-tolerance" memorandum).

443. The Administrative Procedure Act (APA) refers to licenses, but later refers to both interchangeably. *See* 5 U.S.C. § 551(8) (2018) (defining license as "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"); *cf.* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 143–46 (2014) (explaining the meaning of permit and license in the context of the APA).

444. I thank Martha Minow for suggesting this possibility some years ago.

445. *License*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/license [https://perma.cc/62QS-SXJC]. Biber & Ruhl, *supra* note 443, at 146 ("[A] permit can be defined as: an administrative agency's statutorily authorized, discretionary, judicially reviewable granting of permission to do that which would otherwise be statutorily prohibited.").

446. *See, e.g.*, *Permits*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/permits/ [https://perma.cc/9YUR-CJ3G] (noting that state agencies issue hunting and fishing licenses); *State and Territorial Fish and Wildlife Offices*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/offices/statelinks.html [https://perma.cc/UCG5-R468].

447. *See, e.g.*, *Health and Environmental Effects of Hazardous Air Pollutants*, EPA, https://www.epa.gov/haps/health-and-environmental-effects-hazardous-air-pollutants [https://perma.cc/NPD2-Z69C] (discussing health problems resulting from exposure to "sufficient quantities of air toxics over time").

about the quality of a service offered, such as the operation of a childcare facility,[448] the qualifications of a provider (such as a cosmetologist),[449] or the qualifications of a person possessing a deadly weapon.[450] With respect to humanitarian aid, preapproval would remove the risk of prosecution for organizations administering humanitarian aid, but individual Good Samaritans or bystanders would likely not benefit.

When it comes to migrant rescue, haven states that generally prohibit all assistance to unauthorized migrants could allow a select group of NGOs, those which have been preapproved, to provide humanitarian aid. In so doing, the haven state would concede the value of humanitarian aid to unauthorized migrants and allow it when administered by trusted organizations. However, by stopping short of blanket legalization, the use of a preapproval process also signals that the state has concerns. It fears that humanitarian aid could go awry. For example, a state might fear that NGOs will, perhaps unwittingly, serve as coconspirators to commercial human smugglers.[451]

Preapproval offers a number of potential benefits to NGOs providing aid, the government, migrants, and the public. First, it provides some measure of security to NGOs. It allows them to plan their work in a more stable, certain environment. Second, it allows the government to consider fully the costs and benefits of particular NGOs engaging in this work. Third, a preapproval process directly benefits migrants to the extent it spurs the provision of much-needed humanitarian aid. Finally, use of a preapproval process could reassure the public that the government will screen for security risks, but also highlight the legality of humanitarian aid to unauthorized migrants, thus affirming those migrants' humanity.

Government oversight through preapproval, however, also risks undermining NGOs' work. Usually, governments impose licensing requirements for the safety and well-being of the public or consumers, and the safety of migrants could be one reason for backing a preapproval process for humanitarian organizations. But a darker purpose lurks. Governments might concede the value of humanitarian assistance but *also* wish to limit its efficacy, out of fear that "too

448. *See, e.g.*, *Child Care Licensing & Regulations*, OFF. CHILD CARE, https://childcare.gov/consumer-education/child-care-licensing-and-regulations [https://perma.cc/VS6K-B9LA].

449. *See, e.g.*, Barbering and Cosmetology Act, CAL. BUS. & PROF. CODE §§ 7301–7426.5 (West 2019).

450. *See, e.g.*, ALA. CODE § 13A-11-75 (2019).

451. *See e.g.*, Atika Shubert & Nadine Schmidt, *He Went to Greece to Help Migrants, Now He's Accused of Trafficking Them*, CNN (Oct. 19, 2018), https://www.cnn.com/2018/10/19/europe/search-rescue-volunteers-prison-intl/index.html [https://perma.cc/DGQ8-NKB7]; Stuart A. Thompson & Anjali Singhvi, *Efforts to Rescue Migrants Caused Deadly, Unexpected Consequences*, N.Y. TIMES (June 14, 2017), https://www.nytimes.com/interactive/2017/06/14/world/europe/migrant-rescue-efforts-deadly.html [https://perma.cc/G96F-RJJG]; BLAMING THE RESCUERS: CRIMINALISING SOLIDARITY, RE-ENFORCING DETERRENCE, BLAMING THE RESCUERS, https://blamingtherescuers.org/ [https://perma.cc/AM8X-UP66].

much" humanitarian assistance will serve as a pull factor, luring more migrants with greater safety. Thus, a basic question about the potential "harm" exists: is it harm to migrants who receive poor-quality humanitarian aid, or is it harm to the governmental objective of minimizing unauthorized migration?

European scholars have demonstrated how licensing requirements function as a "straightjacket" on NGOs.[452] They note that, once upon a time, NGOs rescuing asylum seekers stranded in the Mediterranean en route to Italy operated without risk of prosecution.[453] Governments valued their humanitarian work and the funds saved when private humanitarian actors conducted search and rescue (SAR) work that otherwise would fall to the state.[454] By 2017, however, when countries bordering the Mediterranean found themselves without support from fellow European Union countries, those countries started viewing with suspicion and frustration the NGOs performing sea rescue.[455] They accused NGOs of luring migrants into making perilous journeys across the sea, serving as a "pull factor," and of unwittingly assisting people-smugglers.[456]

These countries, principally Italy and Greece, have adopted "codes of conduct" to balance their desire to permit some level of humanitarian assistance to migrants while suppressing smuggling operations and preventing NGOs from inadvertently facilitating such operations.[457] Under these codes of conduct, countries permit NGOs to disembark migrants at their ports in exchange for signing on to the state's terms.[458] These agreements provide legal cover, but they also expressly hinder the very rescue work for which NGOs seek protection in the first instance.[459] For example, Italy's code of conduct prohibits rescue boats from shining lights at night, for the very purpose of making those rescue boats less visible to distressed migrants.[460] Governments "shackle"[461] these NGOs out of fear that the NGOs will inadvertently facilitate for-profit smugglers in making themselves highly visible.[462]

Other provisions also hobble rescue work. For example, Italy's code of conduct prohibits transferring rescued people to other vessels, which functionally requires every NGO vessel to complete a given rescue operation

452. *See, e.g.*, Cusumano, *supra* note 162, at 113.

453. *See id.*

454. *See id.*; Ray, *supra* note 39, at 1261 (discussing concern that private rescue might crowd out public SAR expenditures).

455. *See* Cusumano, *supra* note 162, at 106–08.

456. *See id.*

457. *See* Ray, *supra* note 39 (discussing state interests behind anti-smuggling laws).

458. *See* Cusumano, *supra* note 162, at 107.

459. *See id.* at 108–11; Isla Binnie & Antonio Denti, *Aid Groups Split Over Italy's New Rules for Migrant Rescues*, REUTERS (July 31, 2017), https://www.reuters.com/article/us-europe-migrants-italy-ngo/aid-groups-split-over-italys-new-rules-for-migrant-rescues-idUSKBN1AG2FT [https://perma.cc/5MZ8-FHJJ].

460. *See* Cusumano, *supra* note 162, at 109.

461. *Id.* at 108–09.

462. *See, e.g.*, sources cited *supra* note 451.

from start to finish; this disrupts the current division of labor between smaller ships that "temporarily host[] migrants" and larger ships that transport them to port.[463] In addition, states extract loyalty promises from NGO personnel, demanding cooperation with law enforcement at the "place of disembarkation,"[464] further requiring NGO personnel to cooperate with investigations into migrant smuggling. NGOs view police presence on a rescue vessel as compromising the "neutrality of the humanitarian space,"[465] and scholars have critiqued these and other provisions as redundant or harmful.[466]

For these reasons, preapproval processes for humanitarian NGOs are potentially problematic, and NGOs disfavor them. A preapproval process imposes crude regulatory management on a nuanced set of concerns. But preapproval also undeniably offers NGOs protection. Refining the equilibrium through discretion and other standard protective mechanisms becomes paramount; and until the government decriminalizes irregular entry and humanitarian harboring, preapproval remains an important tool to consider in reform efforts. Short of systemic change, tools such as statutory interpretation, religious exemptions, discretion, and preapproval all stand to contribute meaningfully to a more equitable law of rescue.

E. Objections

Creating and nurturing protective mechanisms within the law could strike some as misguided at best or harmful at worst. Some argue that humanitarians and their allies should work toward law reform to decriminalize rescue,[467] or to go deeper and eliminate the criminal prohibition on entry without inspection.[468] Efforts to encourage generous exercises of discretion, frequent grants of religious exemptions, and agreements policing humanitarian aid could undermine this goal. For one, creating and nurturing mediating safety valves could divert precious energy away from truly transformative reform and could instead serve to reaffirm the existing legal regime's criminalization of the very conduct that renders rescue illegal.[469] For example, it could preserve and entrench prevailing

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463. Cusumano, *supra* note 162, at 110.

464. *Id.*; *see also* GALLAGHER & DAVID, *supra* note 154, at 452–54 (discussing rescue and disembarkation).

465. Cusumano, *supra* note 162, at 111.

466. *See, e.g.*, *id.* at 110.

467. For an argument for a humanitarian exception to the harboring statute, see Ray, *supra* note 39, at 1271–73 (proposing a humanitarian exception to immigrant harboring).

468. *See* Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1264 (2014). This issue specifically has featured prominently in some former 2020 presidential candidates' agendas; Shikha Dalmia, *Julian Castro's Bold Plan to Decriminalize Immigration Changed the Terms of the Debate Last Night*, REASON (June 27, 2019), https://reason.com/2019/06/27/julian-castros-bold-plan-to-decriminalize-immigration-changed-the-terms-of-thedebate-last-night/ [https://perma.cc/64D3-QKZF].

469. *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1445–46 (2016) (discussing the opportunity to use the

attitudes towards unauthorized migration, focusing all the attention on legal cover for rescuers without focusing on what some regard as an underlying legal error of punishing entry without inspection as a crime.[470]

As noted earlier, such a regime also centers rescuers rather than migrants. Although the dignity of migrants remains a theme, the focus on protective mechanisms addresses the problem of criminal punishment of rescuers. Such a focus risks minimizing the rights and interests of migrants, the intended beneficiaries. It also risks amplifying gendered, racialized tropes about rescuers and victims that have dominated human trafficking discourse.[471] For these reasons, this Article does not intend to minimize the deeper work of organizing and advocacy required to achieve a more just immigration system. Instead, both deep, transformative work and more immediate protections for rescuers are required.

Safety valves legitimate the existing system, but abandoning them imposes cruelties on many people. Through these safety valves, new norms can take root, ultimately leading to a reinterpretation of the law, its repeal, or foundational reform. An example case from France is instructive. France's Constitutional Council recently recognized a humanitarian exception to its migrant anti-smuggling law based on the French constitutional principle of "fraternity."[472] This principle connotes brotherhood[473] or solidarity.[474] In that case, the government prosecuted an olive farmer, Cedric Herrou, for helping migrants cross France's border with Italy.[475] The court ruled that the principle of fraternity gave Herrou the right to provide humanitarian assistance out of solidarity with migrants, but it would not protect for-profit smugglers.[476] Although France's recognition of a humanitarian exception to its migrant smuggling laws followed from its unique constitutional guarantee of "fraternity," it also appears likely that its existing civil legal framework, rich in affirmative duties to assist others in distress,[477] nurtured a jurisprudence that allowed the court to recognize that principle in the context of migrant rescue. In the United States, a new norm of

law as a "'ratchet' to address racial injustice," but also warning of its potential to "undermine the larger radical project of transformation").

470. 8 U.S.C. § 1325 (2018) ("Improper entry by alien").

471. *See* Balgamwalla, *supra* note 313, at 18.

472. Peltier & Pérez-Peña, *supra* note 68.

473. Lucy Williamson, *What Do Liberty, Equality, Fraternity Mean to France Now?*, BBC NEWS (July 14, 2016), https://www.bbc.com/news/world-europe-36775634 [https://perma.cc/8PW9-6X4D].

474. *See* Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1710 (2006) (book review) (describing solidarity and fraternity as ideals of the French Revolution).

475. Conseil constitutionnel [CC] [Constitutional Council] decision No. 2018-717/718 QPC, July 6, 2018, https://www.conseil-constitutionnel.fr/en/decision/2018/2018717_718QPC.htm [https://perma.cc/SX75-NYWM].

476. *Id.*

477. *See* Note, *supra* note 55, at 646 (describing France's treatment of rescue).

upholding migrants' dignity could emerge, one that evolves from rescue to rights.

CONCLUSION

This Article argues that the disparate regimes of rescue in the law today are best understood as tools for promoting efficiency, protecting property rights, and facilitating commercial relations. It further argues for reorienting the law of rescue away from its economic foundations to a path more responsive to liberty and dignity—a path capable of (imperfectly) mediating the clash between the government's interpretation of prevailing law and the rescuer's competing legal interpretation or sense of decency. It offers a framework for renegotiating the line between permissible and prohibited rescue, and considers several tools for providing protection for illegal but morally-justified rescue. It concludes that they constitute important experiments in an incremental process of changing social norms and creating a path for bolder law reform.