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Negligence, Responsibility, and the Clumsy Samaritan: Is there a Fairness Rationale for the Good Samaritan Immunity?

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NEGLIGENCE, RESPONSIBILITY, AND THE CLUMSY SAMARITAN: IS THERE A FAIRNESS RATIONALE FOR THE GOOD SAMARITAN IMMUNITY?

Dov Waisman*

ABSTRACT

The Good Samaritan immunity has been roundly criticized for failing in its stated goal of encouraging physicians and laypersons to volunteer assistance in emergencies. Yet in the half century since its inception, all fifty states have adopted the immunity in one form or another, and it shows no sign of disappearing any time soon. This Article represents the first serious attempt in the literature to evaluate a rarely discussed rationale for the immunity which may explain its persistence: that it is unfair to impose negligence liability on the clumsy Samaritan, i.e., someone who, without obligation, altruistically comes to the aid of another in an emergency but does so ineptly.

Based on a close examination of different types of voluntary rescue cases, I conclude that fairness does require an immunity but only in narrow circumstances: where a lay rescuer's act of ordinary negligence leaves the victim no worse off than she would have been absent the intervention (i.e., where the gravamen of the action is that a lay rescuer negligently failed to alleviate the pre-existing peril). Outside of these circumstances, principles of fairness support holding the clumsy Samaritan liable for negligence in performing the rescue.

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This, I argue, has an important and unappreciated implication for negligence theory. My analysis presents a novel challenge to the view of corrective justice theorists like Ernest Weinrib, who contend that the duty to repair an injury caused by negligence rests on the culpable disrespect the injurer evinces in failing to act with due care. Because, in the paradigm case of voluntary rescue, the rescuer acts selflessly and out of a profound respect for the physical integrity of the imperiled person, the intuition that liability may nevertheless be appropriate if the rescuer fails to exercise reasonable care supports a competing view of the moral basis of negligence liability. The case of the clumsy Samaritan shows in a compelling way that the moral basis of negligence liability has to be the injurer's moral responsibility for the consequences of her dangerous, even if non-culpable, conduct.

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INTRODUCTION

On a winter day in 1998, five friends rode their snowmobiles alongside a highway in rural Minnesota.[1] Among them was thirteen-year-old Kelly Swenson.[2] When the snowmobile she was driving struck a drainage culvert in a ditch next to the highway, Swenson suffered a dislocated knee.[3] Swenson's companions flagged down a passing motorist, Lillian Tiegs, who offered to drive Swenson to a nearby hospital.[4] After Swenson entered Tiegs's van, Tiegs—apparently without checking for oncoming traffic—attempted a U-turn onto the opposite side of the highway.[5] Before Tiegs could complete the U-turn, a tractor-trailer traveling in the opposite direction struck the passenger side of her van, killing Swenson.[6]

Under the common law, Swenson's survivors would have been entitled to recover from Tiegs upon a showing that she acted negligently in making the U-turn.[7] However, half a century ago, American state legislatures began abrogating the common law doctrine that allows liability to be imposed on a volunteer rescuer for her negligence in performing the rescue.[8] By 1980, all fifty states had enacted "Good Samaritan immunity" statutes shielding medical professionals (and, in most states, laypersons) from liability for ordinary negligence committed in the course of a voluntary,[9] good-faith attempt to assist someone in an emergency.[10] Thus, when Swenson's survivors

1. Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794, 795 (Minn. Ct. App. 2002).
2. *Id.*
3. *Id.*
4. *Id.* at 795–96.
5. *Id.* at 796.
6. *Id.*
7. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 324 (1965); 57A AM. JUR. 2D *Negligence* § 106 (2004); 65 C.J.S. *Negligence* § 84 (2010).
8. Barry Sullivan, *Some Thoughts on the Constitutionality of Good Samaritan Statutes*, 8 AM. J.L. & MED. 27, 27 n.1 (1982) (listing state Good Samaritan laws).
9. Throughout this Article, I use the term "voluntary" in the following sense: "Without valuable consideration or legal obligation; gratuitous <voluntary gift>." BLACK'S LAW DICTIONARY 1710–11 (9th ed. 2009).
10. *See* Sullivan, *supra* note 8; Henry R. Stiepel, Note, *Good Samaritans and Hospital Emergencies*, 54 S. CAL. L. REV. 417, 421 (1981).

brought suit, the Minnesota Court of Appeals held Tiegs immune from liability under the state's Good Samaritan immunity statute.[11]

The policy justification courts and legislators have offered for the immunity has, without exception, been an instrumental one: to encourage people to offer help in emergency situations by allaying their fear of suit in the event the rescue goes badly.[12] Over the past fifty years, the thrust of the scholarship on the immunity has been to question its success in attaining this goal.[13] One commentator after another has voiced skepticism about whether, even at the margin, the immunity makes willing rescuers of people who otherwise would have looked the other way.[14]

No commentator, however, appears to have addressed the equally fundamental question of whether the immunity can be justified on non-instrumental grounds; in particular, on the basis of *fairness*.[15] On a gut level, penalizing a person for their clumsiness in performing an altruistic act of rescue seems unfair. But does this intuition withstand scrutiny, particularly when considered alongside the victim's interest in being made whole? In this Article, I offer the first systematic attempt to answer that question, which is important on two accounts.

First, to the extent imposing negligence liability on clumsy Samaritans like Lillian Tiegs turns out to be unfair in some meaningful

11. *Swenson*, 653 N.W.2d at 800. This ruling came in an underinsured motorist action that Swenson's survivors (her parents) filed against their own insurer. The Swensons had previously settled with both the tractor-trailer driver and Tiegs's insurer. *See infra* note 171.

12. *See generally* Danny R. Veilleux, Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R.4th 294, at § 2.5 (1989); *see also* sources cited *infra* note 89.

13. *See* sources cited *infra* note 129.

14. *See* sources cited *infra* note 129.

15. To be sure, some commentators have, without analysis, posited that it can. *See, e.g.*, Christopher H. White, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 517 (2002) ("In all cases, however, the states passing such [Good Samaritan immunity] statutes appear to have recognized that a system that punishes people for performing altruistic acts is unfair to rescuers and discourages socially beneficial conduct."). The notion of fairness I rely on throughout this Article is one articulated by Jules Coleman, among others. Fairness, as I understand it, refers to the general ideal of "reciprocity among free and equal individuals." Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, *in* PHILOSOPHY AND THE LAW OF TORTS 183, 206 (Gerald J. Postema ed., 2001). As such, its fundamental requirement is that "no person be permitted to set the terms of cooperative interaction between individuals unilaterally." *Id.* at 205. Following Coleman, I understand corrective justice theory as specifying the requirements of fairness in cases where one person has suffered a loss as the result of the agency of another person. *See infra* note 149.

sense, this blunts the force of much of the criticism the immunity has received. If the immunity is there as much to ensure volunteer rescuers are treated fairly as for any other reason, it would seem to be a law worth having even if it has no appreciable effect on people's behavior.

Second, the question leads naturally to a consideration of the moral basis for negligence liability generally. Though scholars have widely discussed the corrective justice rationale for negligence liability,[16] no commentator appears to have considered what light the case of *samarital* negligence can shed on the debate. I do so here and argue that *Swenson* and similar cases involving clumsy Samaritans reveal something important about the moral underpinnings of negligence liability.

This Article has three parts. Parts One and Two are setup; Part Three lays out my argument. In Part One, I examine the common law volunteer rescuer doctrine, which the Good Samaritan immunity abrogates.[17] Here I point out an apparent conflict among the leading authorities. The conflict concerns whether liability is appropriate in a case where, without worsening the imperiled person's plight, the volunteer rescuer negligently fails to prevent the pre-existing peril from taking its harmful course. The Second and Third Restatements of Torts suggest liability may be appropriate in such circumstances;[18] a number of leading cases and treatises suggest otherwise.[19] I note the conflict here but do not attempt to resolve it until the final section of Part Three.

In Part Two, I examine the origin and content of Good Samaritan immunity statutes in the United States and then discuss some broad trends in how courts have applied the statutes over the past fifty years.[20] I also discuss the chief criticism that commentators have leveled at the immunity: that it has failed, even at the margin, to make

16. *See* discussion *infra* note 149.

17. *See infra* Part I.

18. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 324 (1965).

19. *See infra* note 47.

20. *See infra* Part II.

willing rescuers of people who, absent the immunity, would have declined to intervene.[21]

In Part Three, I turn to a critique of the rationale for the volunteer rescuer doctrine and, by implication, of the hypothesis that the Good Samaritan immunity can be justified as vindicating the rescuer's fairness interests.[22] Based on a close examination of different types of voluntary rescue cases, I argue that the immunity *can* be justified on fairness grounds but only in narrow circumstances: where the gravamen of the imperiled person's action is that a lay rescuer, acting in good faith and without recklessness, negligently failed to alleviate the pre-existing peril but did not make the situation any worse. Otherwise—i.e., where the rescuer is a physician or other medical professional, where the rescuer's misconduct exceeds ordinary negligence, or where the rescuer's intervention changes the imperiled person's situation for the worse—fairness considerations support liability for injuries resulting from the rescuer's negligent conduct.

This finding has an important implication for the scholarly conversation about the moral rationale for negligence liability. Broad consensus exists that one of the primary justifications for negligence liability is *corrective justice*—the view that the central purpose of tort liability is to enforce agents' duty to repair the wrongful losses they cause to other agents. Corrective justice theorists are divided, however, on the question of the precise moral basis of this duty in cases of negligence.

On the one side are commentators like Ernest Weinrib, who maintain that negligent conduct intrinsically violates a deontological norm, such as acting with appropriate impartiality or showing adequate respect for the physical security of others.[23] Negligent conduct is, in this view, at least minimally morally *culpable* and this culpability is the basis of imposing liability on the negligent actor.[24] On the other side are commentators like Stephen Perry, who assert that neg-

21. *See infra* Part II.
22. *See infra* Part III.
23. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 152–53 (1995).
24. *Id.*

ligent conduct gives rise to *responsibility* for the harmful outcome regardless of whether such conduct is itself morally blameworthy.[25] On this view, negligent actors are morally responsible for injuries caused by their unreasonably dangerous conduct; the unreasonable conduct *may* itself be morally culpable, but it need not be for liability to properly attach.[26] The responsibility-based view draws support from the inarguable fact that courts impose negligence liability on the basis of an objective standard—the care that a reasonably careful person would exercise under the circumstances—without taking account of the sort of subjective facts thought to be relevant to culpability, e.g., facts relating to the negligent actor's character, capacities, or accompanying mental state.[27]

The common law's imposition of negligence liability on the volunteer rescuer notwithstanding her having performed the rescue wholeheartedly and in good faith—together with the sense that such liability is, in many circumstances, justly imposed—represents a challenge to the culpability theory of negligence liability and provides support for the responsibility view. Because the entire voluntary rescue effort is, in the paradigm case anyway, founded on a profound and genuine concern for the physical well-being of the imperiled person, it seems implausible to attribute the negligent act to a failure of impartiality or a lack of adequate respect for the imperiled person's physical security. In many voluntary rescue cases, the rescuer's negligent act, rather than evincing a failure to appropriately honor the imperiled person's interest in physical integrity, is better characterized as a mistake or miscalculation made in the course of a sincere effort to *promote* that interest. The responsibility-based version of the corrective justice rationale for negligence liability can explain why such acts should

25. *See* Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 73 (Gerald Postema ed., 2001) [hereinafter Perry, *Responsibility*]; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 496–512 (1992) [hereinafter Perry, *Moral Foundations*].

26. Perry, *Moral Foundations*, *supra* note 25, at 488–89.

27. This fact does not necessarily settle the debate, however. Adherents of the culpability view might contend that negligent conduct *necessarily* signifies a moral shortcoming in the act thus rendering superfluous any independent inquiry into the actor's character, disposition, or state of mind.

give rise to liability despite their having been performed during a general course of conduct that shows genuine respect for the injured person's agency. Because it premises a duty of repair directly on the injurer's ownership of the risk materializing in harm rather than on the culpability of the risk-creating act, the responsibility-based view better accounts for the common law's justifiable willingness to impose liability on the clumsy Samaritan in appropriate circumstances.

I. THE VOLUNTEER RESCUER AT COMMON LAW

In this section, I examine the contours of the common law volunteer rescuer doctrine, which the Good Samaritan immunity abrogates. After outlining the basics of the doctrine, I illuminate a conflict between the Second and Third Restatements of Torts, on the one hand, and a number of other authorities (a line of cases and several tort treatises) on the other. The conflict concerns whether, at common law, a volunteer rescuer could be held liable merely for negligently failing to bring the imperiled person to safety, even where the rescuer's action does not worsen the imperiled person's position. The Restatements suggest such non-worsening negligence is actionable at common law while the other authorities suggest it is not.[28] While I explain the conflict in this section, I do not attempt to resolve it until Part Three of this Article.[29] There, I invoke Arthur Ripstein's notion of *risk ownership*[30] to argue for an intermediate position: from the standpoint of fairness, non-worsening samarital negligence should not be actionable unless: (1) the rescuer is a physician or other medical professional; or (2) the rescuer's misconduct involves bad faith or exceeds ordinary negligence.[31]

28. For a discussion of the conflicting views and reasoning, see *infra* Part I.B.
29. *See infra* Part III.
30. Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J.L. & JURIS. 361, 386 (2004).
31. *See infra* Part III.

A. Doctrinal Basics

As most first-year law students learn, the common law imposes no general duty to assist another in peril.[32] In the words of an oft-cited decision,

> With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.[33]

At common law, a duty to assist an imperiled person arises only in specific circumstances: where one has a special relationship with that person (e.g., employer–employee, common carrier–passenger, innkeeper–guest)[34] or where one is responsible, innocently or tortiously,

32. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 (Proposed Final Draft No. 1, 2005) ("An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable."); RESTATEMENT (SECOND) OF TORTS § 314 (1965); *see also* 57A AM. JUR. 2D, *supra* note 7, § 106 ("Generally, there is no duty to aid a person who is in distress or danger, even if the rescue can be accomplished at no cost to the rescuer. In other words, the law imposes no liability upon those who stand idly by and fail to rescue a stranger who is in danger."); 65 C.J.S., *supra* note 7, §§ 79, 80, 82. Three states—Minnesota, Vermont, and Rhode Island—have enacted statutes that, to some extent, abrogate this rule by imposing affirmative duties to perform easy rescues, and at least one state—Wisconsin—requires a bystander at the scene of a crime to assist the victim or report the incident to the police. *See* MINN. STAT. § 604A.01 (2012); R.I. GEN. LAWS § 11-56-1 (2011); VT. STAT. ANN. tit. 12, § 519 (West 2011); WIS. STAT. ANN. § 940.34 (West 2011). New Hampshire imposes a more narrow affirmative duty to assist, which requires a rescuer to place an imperiled person under the care of a qualified medical professional after she has voluntarily provided emergency assistance as soon as it is feasible. *See* N.H. REV. STAT. ANN. § 508:12 (West 2011).

33. Union Pac. Ry. Co. v. Cappier, 72 P. 281, 282 (Kan. 1903).

34. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 (Proposed Final Draft No. 1, 2005); 57A AM. JUR. 2D, *supra* note 7, § 90 ("Generally, in the absence of some special relation between the parties, the law imposes no duty on one person to come to the aid of another, even though the means by which harm can be averted are in his or her possession, unless the dangerous situation was created by such person. Thus, in the absence of a special relationship, no one is

for creating the peril.[35] Absent these circumstances, one violates no legal duty if one stands idly by and watches another person succumb to the danger they are facing.[36]

Once one undertakes to assist and takes charge of a helpless and imperiled person, however, the common law imposes a duty to use reasonable care in the undertaking, even if one had no duty to assist as an initial matter.[37] This requirement, which I refer to as the "volunteer rescuer doctrine,"[38] is a species of the general common law rule that one who undertakes to perform *any* act, whether gratuitously or for consideration, is bound to exercise reasonable care in doing so.[39] According to the general rule, a person's failure to use reasona-

required to save another from a danger which is not of his or her making."); 65 C.J.S., *supra* note 7, §§ 79, 82.

35. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 39 (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS §§ 321, 322 (1965); 57A AM. JUR. 2D, *supra* note 7, § 90; 65 C.J.S., *supra* note 7, §§ 80, 82.

36. This principle has been the subject of extensive criticism by scholars. *See, e.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 293 (1980).

37. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 (Proposed Final Draft No. 1, 2005) ("(a) An actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled and (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge. (b) An actor who discontinues aid or protection is subject to a duty of reasonable care to refrain from putting the other in a worse position than existed before the actor took charge of the other and, if the other reasonably appears to be in imminent peril of serious bodily harm at the time of termination, to exercise reasonable care with regard to the peril before terminating the rescue."); RESTATEMENT (SECOND) OF TORTS § 324 (1965) ("One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him."); 57A AM. JUR. 2D, *supra* note 7, § 106 ("[O]ne who voluntarily assumes to assist a sick, injured, or imperiled person, while not an insurer, is charged with the duty of common or ordinary humanity to provide proper care and attention."); 65 C.J.S., *supra* note 7, §§ 83, 84. Although the Second and Third Restatements include a "taking charge" requirement as part of the volunteer rescuer doctrine, many cases and treatises omit such a requirement.

38. I use this term rather than "Good Samaritan doctrine" to distinguish the rescue-related rule from the rule applying to voluntary undertakings of other kinds. Many cases and commentators, however, use the latter term to refer specifically to the common law doctrine relating to liability of a volunteer rescuer. *See, e.g.*, cases cited *infra* note 47.

39. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 323 (1965); 57A AM. JUR. 2D, *supra* note 7, § 193 ("The law imposes a duty upon everyone who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he or she has undertaken."); *see also* Indian Towing Co. v. United States, 350 U.S. 61, 64–65 (1955) ("[I]t is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance

ble care in performing a voluntary undertaking is actionable only if it leaves the victim in a worse position than she would have been in absent the undertaking.[40] As we will see shortly, the leading authorities appear to disagree about whether and to what extent such a position-worsening requirement applies in the case of the volunteer rescuer doctrine.[41]

In determining negligence liability, the common law holds persons acting in emergency situations to a lower standard of care than would otherwise apply.[42] This lowering of the standard of care—commonly known as the "emergency doctrine"—applies not only in instances where the emergency assistance is gratuitously offered, but also to situations where it is offered for compensation by a doctor or other professional.[43]

Further, according to the Second and Third Restatements of Torts, the gratuitous nature of the actor's conduct should be taken into account in determining whether the actor used reasonable care.[44] Thus, by implication, gratuitous emergency assistance would presumably be subject to a more lenient standard of care than emergency aid provided pursuant to a pre-existing professional or legal duty. Although Restatement (Second) takes the position that the gratuitous nature of the assistance should affect the applicable standard of care only

must perform his 'good Samaritan' task in a careful manner.").

40. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (Proposed Final Draft No. 1, 2005) (requiring increased risk or reliance for liability based on negligence in voluntary undertaking); *see also id.* at § 43; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 381 (5th ed. 1984) ("Many of the decisions state that some such [situation-worsening] element is necessary, and that there can be no liability where the conduct in no way aggravates the situation or misleads the plaintiff, and he is left no worse off than he was before.").

41. *See infra* Part I.B.

42. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 9 (2010) ("If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor's resulting conduct is that of the reasonably careful person.").

43. *See* 1 Med. Malpractice (MB) § 9.06 (Oct. 2008) ("Recognizing that the practice of medicine often requires that decisions be made and actions taken under stressful circumstances, the courts tend to appraise the professional acts performed under such circumstances less severely than those done under more normal circumstances.").

44. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. f (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 324 cmt. d (1965). Neither comment cites authority for this proposition, however.

where the defendant's negligence did not worsen the imperiled person's position, Restatement (Third) appears to have dispensed with that restriction.[45]

B. Conflicting Views On Non-Worsening Negligence

These aspects of the common law rules pertinent to voluntary rescues are relatively clear and uncontroversial. However, this is not quite the end of the doctrinal story. Courts have traditionally declared themselves unwilling to impose liability on a mere showing that, through a failure to use reasonable care, a volunteer rescuer injured the person she was attempting to assist.[46] The injured party has traditionally been required to show that the ultimate result of the rescuer's conduct was to place the injured party in a *worse position* than she would have been in had that particular rescuer never intervened.[47] I will refer to this as the "general position-worsening requirement." As one court has put it, "The liability in most cases has arisen because

45. *Compare* RESTATEMENT (SECOND) OF TORTS § 324 cmt. d (1965), *with* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. f (Proposed Final Draft No. 1, 2005).

46. Rodrigue v. United States, 968 F.2d 1430, 1434 (1st Cir. 1992) ("[T]he Good Samaritan rule does not impose liability for mere negligent failure to confer a benefit, but only for negligently making matters worse." (citing United States v. DeVane, 306 F.2d 182, 186 (3d Cir. 1962))).

47. *See, e.g.*, *id.* at 1434; *DeVane*, 306 F.2d at 186 ("The worsening question arises under the Good Samaritan doctrine which provides that the negligence of the volunteer rescuer must worsen the position of the person in distress before liability will be imposed." (citing United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960))); Ocotillo W. Joint Venture v. Superior Court, 844 P.2d 653, 656 (Ariz. Ct. App. 1992) ("[T]he good samaritan doctrine applies when an actor, otherwise without any duty to do so, voluntarily takes charge of an intoxicated person who is attempting to drive a vehicle and, because of the actor's failure to exercise reasonable care, has changed the other's position for the worse." (citing RESTATEMENT (SECOND) OF TORTS §§ 323, 324 cmts. b, c (1965))); Gates v. Chesapeake & Ohio Ry. Co., 213 S.W. 564, 568 (Ky. Ct. App. 1919) ("Unless the acts complained of aggravated the injury, or made his condition worse, clearly the company would not be liable."); Farwell v. Keaton, 240 N.W.2d 217, 220 (Mich. 1976) ("Without regard to whether there is a general duty to aid a person in distress, there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse."); *see also* 57A AM. JUR. 2D, *supra* note 7, § 107 (citing *DeVane*, 306 F.2d 182); 65 C.J.S., *supra* note 7, § 84 (citing *Rodrigue*, 968 F.2d 1430); 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS 879 (3d ed. 2007) ("Again, the undertaking to rescue, although not required, gives rise to the duty to exercise care not to leave the object of the rescue in worse condition than if the rescue had not been attempted."); KEETON ET AL., *supra* note 40, § 56, at 378 ("If there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse.").

defendant made the situation worse, either by increasing the danger, or by misleading plaintiff into the belief it had been removed, or by inducing him to forego the possibility of help from other sources."[48]

With such a requirement in place, the volunteer rescuer doctrine would deny recovery where the plaintiff's grievance is merely that, as a result of the rescuer's negligence, she failed to realize any benefit from the rescuer's efforts or did not benefit to the extent she would have had the rescuer used reasonable care.[49] This means that the plaintiff must generally do more than show that the rescuer negligently failed to prevent the pre-existing peril from taking its course.[50] She must show that, by creating a new risk of harm, increasing the already-existing risk, or inducing reliance by the plaintiff or by others in a position to offer assistance, the rescuer left the imperiled person worse off than she would have been had the rescuer chosen not to intervene.[51] The chief practical effect of this requirement has been to bar recovery in sea rescue cases where the gravamen of the plaintiff's claim was that the volunteer rescuer negligently failed to locate the imperiled person or negligently failed to reach the imperiled person in time to save him.[52]

Interestingly, though, the Restatement (Third) and Restatement (Second) of Torts both reject the notion that the volunteer rescuer doctrine imposes a general position-worsening requirement.[53] Re-

48. Steckman v. Silver Moon, Inc., 90 N.W.2d 170, 173 (S.D. 1958) (collecting cases); *see also* Hurd v. United States, 34 F. App'x 77, 84 (4th Cir. 2002) ("There are two ways in which a rescuer can worsen the position of the subject of the rescue. The first is by increasing the risk of harm to the person in distress. The second is to induce reliance, either by the subject or other potential rescuers, on the rescuer's efforts." (citations omitted)); Fondow v. United States, 112 F. Supp. 2d 119, 130 (D. Mass. 2000).

49. *Rodrigue*, 968 F.2d at 1434.

50. *Id.*

51. Frank v. United States, 250 F.2d 178, 180 (3d Cir. 1957).

52. *See, e.g.*, *id.* at 179–80; Daley v. United States, 499 F. Supp. 1005, 1010 (D. Mass. 1980); Lacey v. United States, 98 F. Supp. 219, 220 (D. Mass. 1951). Many of the cases applying the volunteer rescuer doctrine involve rescues undertaken by the Coast Guard, which has no legal duty to aid persons in distress. *See, e.g.*, Bunting v. United States, 662 F. Supp. 971, 973 (D. Alaska 1987). Moreover, under the Federal Tort Claims Act, the Coast Guard is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (2006).

53. Restatement (Third)'s rejection of a general position-worsening requirement is evident in its observation that the volunteer rescuer doctrine does not require reliance or increased risk of harm, as well as in the stop-at-the-tavern illustration discussed. *See infra* note 57. A comment to Section 324 of

statement (Third) specifically notes that the volunteer rescuer doctrine "d[oes] not require reliance or increased risk"[54] and that the absence of such a requirement represents a "special and more stringent invocation of an affirmative duty than the other undertaking duties because of the helpless condition of the plaintiff."[55] By the lights of the Restatement, the volunteer rescuer doctrine would allow a plaintiff to recover where the volunteer rescuer—without increasing the risk to the plaintiff, inducing reliance of any kind, or otherwise worsening the plaintiff's position—negligently failed to provide a benefit to the imperiled person, or did not provide the same benefit she would have had she exercised reasonable care.[56] An illustration in

Restatement (Second) implicitly rejects a general position-worsening requirement. RESTATEMENT (SECOND) OF TORTS § 324 cmt. d (1965) ("Where the actor's conduct has changed the other's position for the worse, the fact that the actor was under no duty in the first instance to render the services is immaterial in determining whether or not he has exercised reasonable care. On the other hand, *where the other's only ground of complaint is that he has failed to receive benefit from the actor's assistance*, the gratuitous nature of the services is an important factor in determining whether the actor has exercised reasonable care.") (emphasis added).

54. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. a (Proposed Final Draft No. 1, 2005) (citing RESTATEMENT (SECOND) OF TORTS § 324 (1965)).

55. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 324 cmt. a (1965)).

56. It is important to note, however, that the Restatements do not reject a position-worsening requirement *tout court*. Both Restatement (Third) and Restatement (Second) embrace such a requirement in (at least some) cases where the injury-causing act is alleged to be the negligent manner in which the rescuer *discontinues* assistance rather than his negligence in actually *conducting* the rescue. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44(b) (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 324(b) (1965). In this regard, Restatement (Third) appears to differ from Restatement (Second) in two respects. First, while Restatement (Second) imposes strict liability on a rescuer who, in discontinuing his efforts, leaves the victim in a worse position, Restatement (Third) imposes liability only where the rescuer's discontinuation is negligent. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 reporters' note, cmt. h (Proposed Final Draft No. 1, 2005) ("This Section eschews strict liability when a rescuer leaves another worse off, instead requiring that the actor exercise reasonable care not to leave the other in a worse position upon termination."). Second, under Restatement (Third), the scope of the position-worsening requirement appears to be narrower than under Restatement (Second). While Restatement (Second) imposes liability for a discontinuation of assistance if (and only if) the discontinuation leaves the imperiled person in a worse position, Restatement (Third) imposes liability for any negligent discontinuation that occurs at a time when the person being assisted faces an imminent risk of serious bodily injury. *Compare* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44(b) (Proposed Final Draft No. 1, 2005), *with* RESTATEMENT (SECOND) OF TORTS § 324(b) (1965). Thus, under Restatement (Third), the rescuer who negligently discontinues assistance while the victim is still in imminent peril of serious bodily injury will be held liable under the volunteer rescuer doctrine even if he leaves the victim no worse off than before the rescue began. Under Restatement (Third), then, negligently discontinuing assistance at a time when the victim is *not* in imminent peril of serious bodily injury would be actionable only if the victim was left worse off as a result.

Restatement (Third) makes clear beyond question that this is the drafters' view:

> [I]f an observer, seeing a pedestrian who was run down by a hit-and-run driver and who is bleeding badly, takes the pedestrian in an automobile and runs into a tree, breaking the pedestrian's nose, the rescuer is subject to the ordinary duty of reasonable care. Reference to [the volunteer rescuer doctrine] is unnecessary because the rescuer's conduct in driving the pedestrian created a risk of harm, requiring the exercise of reasonable care. That the harm occurred in the course of a rescue rather than some other occasion does not affect the ordinary duty of care. *On the other hand, if the rescuer, while driving the pedestrian to the hospital, decides to make a stop at a local tavern, the rescuer is subject to liability for any enhanced harm caused by the delay pursuant to this Section, even if the pedestrian would not have arrived at the hospital any earlier if the actor had declined to rescue*.[57]

In the example described in the final sentence, the point of specifying that liability should attach "even if the pedestrian would not have arrived at the hospital any earlier if the actor had declined to rescue"[58] is to establish that the pedestrian need not have been placed in a worse position as a result of the rescuer's negligence. Thus, the gravamen of the pedestrian's negligence action in this case would have to be merely that she failed to benefit from the rescuer's intervention to the extent she would have had the rescuer exercised reasonable care (i.e., had the rescuer driven straight to the hospital without stopping). In other words, the plaintiff is seeking to recover for harm that could have been avoided had the rescuer exercised reasonable care, even though the harm suffered is exactly the same as that

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44(b) (Proposed Final Draft No. 1, 2005).

57. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. e (Proposed Final Draft No. 1, 2005) (emphasis added).

58. *Id.*

which would have been suffered had the rescuer never intervened. The Restatement's position that liability is appropriate under such circumstances therefore conflicts with the general position-worsening requirement articulated in a number of the leading cases,[59] as well as in several tort treatises.[60]

What to make of this conflict? On the one hand, the published cases do not seem to offer any direct support for the Restatement's position.[61] There does not appear to be a case decided under the volunteer rescuer doctrine in which a rescuer was held liable for an act, committed in the course of performing the rescue, that did not in any way—by increasing the risk of harm, inducing reliance, or otherwise—place the victim in a worse position than she would have been had the rescuer chosen not to intervene.[62] Moreover, in a handful of cases involving Coast Guard rescues, courts *declined* to impose liability because the rescuer's negligence did not worsen the plight of the imperiled person.[63] These cases do not actually contradict the Restatement's position, however. With the possible exception of *Frank*[64]—which is highly unusual in featuring a peril that arises *after*

59. A comment in Restatement (Third) concedes that a "long line of admiralty cases" has posited the existence of a general position-worsening requirement as part of the volunteer rescuer doctrine when applied to "coast-guard rescue[s]." *Id.* § 44 reporters' note, cmt. b. However, as the cases cited *supra* note 47 make clear, such a requirement has been articulated in a number of cases not involving a Coast Guard rescue.

60. *See, e.g.*, HARPER, JAMES & GRAY, *supra* note 47, at 879; KEETON ET AL., *supra* note 40, § 56, at 378.

61. *See* cases cited *supra* notes 46–47.

62. There is, however, some support for Restatement (Third)'s position that, when a rescuer is alleged to have been negligent in *discontinuing*, as opposed to performing, the rescue, the imperiled person need not show that she was left in a worse position than she would have been in had the rescuer never intervened, provided a risk of serious physical harm is present at the time of discontinuation. *See, e.g.*, Parvi v. City of Kingston, 362 N.E.2d 960, 965 (N.Y. 1977) (holding that because the duty imposed by the volunteer rescuer doctrine "cannot be fulfilled by placing the helpless person in a position of peril equal to that from which he was rescued," the city was liable for negligence where, after ordering two intoxicated individuals off the street and into their patrol car late at night, city police officers drove them to an unlit, isolated, and abandoned golf course located 350 feet from a highway from which they subsequently wandered onto the highway and were struck by a car).

63. *See* cases cited *supra* note 52.

64. Frank v. United States, 250 F.2d 178 (3d Cir. 1957). In *Frank*, the victim fell into the water after the Coast Guard had begun to tow his disabled boat. *Id.* at 179. The case is unusual from the standpoint of the volunteer rescuer doctrine because the victim became imperiled while already in the charge of his would-be rescuers.

the rescuers have, for another purpose, taken charge of the victim—all of those cases involved negligence that occurred after the rescue had been undertaken but before the rescuers had taken charge of the persons in peril.[65] Thus, the Restatement's "taking charge" requirement would presumably bar liability.[66] In *Lacey*, for example, the Coast Guard rescuers, despite undertaking the rescue, never actually took charge of the imperiled persons, either by establishing physical contact with them or discouraging other rescuers from intervening.[67] The gravamen of the complaint was that Coast Guard personnel had negligently failed to reach the passengers and crewmembers while they were still alive.[68] There does not, then, appear to be a single case decided under the volunteer rescuer doctrine that involves a negligent act that occurred after the rescuer had taken charge of the imperiled person but that did not increase the risk of harm or otherwise worsen the imperiled person's position.

Thus, in their actual holdings regarding liability, the cases applying the volunteer rescuer doctrine seem to be silent as to whether, when a rescuer's negligent act occurs after he takes charge of the imperiled person, liability can be imposed absent a worsening of the imperiled person's position.[69] In light of this silence, the question arises whether, as a *normative* matter, it makes sense to construe the common law as imposing liability for an act of samarital negligence in such circumstances. I am going to put this question aside for the moment, but will return to it in section III.D.[70]

65. *See* cases cited *supra* note 52.

66. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 44(a) (Proposed Final Draft No. 1, 2005).

67. Lacey v. United States, 98 F. Supp. 219, 220 (D. Mass. 1951).

68. *Id.*

69. *See* cases cited *supra* notes 46–47.

70. *See infra* Part III.D.

II. THE GOOD SAMARITAN IMMUNITY

The King James Bible recounts two exchanges between Jesus and a lawyer.[71] In the Book of Matthew, a lawyer asks Jesus, "Master, which is the great commandment in the law?"[72] Jesus replies, "Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself."[73]

The second exchange, in the Book of Luke, picks up where the first leaves off. A lawyer presses Jesus, "And who is my neighbour?"[74] Jesus's response represents one of the most well-known passages in the New Testament, the so-called "Parable of the Good Samaritan":

> A certain man went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead. And by chance there came down a certain priest that way: and when he saw him, he passed by on the other side. And likewise a Levite, when he was at the place, came and looked on him, and passed by on the other side. But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him, And went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him. And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.[75]

71. Some versions of the Bible refer to Jesus's interlocutor differently. *Compare Matthew* 22:35 (New International Version) ("an expert in the law"), *with Matthew* 22:35 (New Living Translation) ("an expert in religious law").

72. *Matthew* 22:36 (King James).

73. *Id.* at 22:37–39.

74. *Luke* 10:29 (King James).

75. *Id.* at 10:30–35.

Jesus then asks the lawyer, "Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves? And he [the lawyer] said, He that shewed mercy on him. Then said Jesus unto him, Go, and do thou likewise."[76]

It is a well-known (and often lamented) feature of the common law that it imposes no duty to act as the biblical Samaritan did. As discussed in the previous section, the common law imposes no general duty to assist a stranger in peril.[77] However, as Justice Cardozo noted, "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."[78] Thus, though the common law imposes no general duty to assist an imperiled and helpless stranger, it does impose a duty of reasonable care once one voluntarily undertakes a rescue.[79] "The result of all this," observed Dean Prosser, "is that the Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing."[80]

In 1959, California abrogated the common law doctrine in this area by enacting the nation's first Good Samaritan immunity statute.[81] The rest of the states soon followed suit, passing some version of a law shielding medical professionals (and, in most states, laypersons) from liability for ordinary negligence committed in the course of a voluntary, gratuitous, and good-faith attempt to assist someone in an emergency.[82] The rationale courts have since offered for the immunity has, without exception, been instrumental. The immunity's purpose is

76. *Id.* at 10:36–37.
77. *See* sources cited *supra* note 32.
78. Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922).
79. *See* sources cited *supra* note 37.
80. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 344 (4th ed. 1971); *see also* Frank J. Helminski, Note, *Good Samaritan Statutes: Time for Uniformity*, 27 WAYNE L. REV. 217, 220 (1981) ("Many courts were disturbed by a rule which made a well-intentioned though incompetent humanitarian liable, but excused persons who showed indifference to the sufferings of others.").
81. Helminski, *supra* note 80, at 218 n.4.
82. Sullivan, *supra* note 8.

said to be to encourage people to provide emergency assistance by allaying the fear of suit in the event the rescue goes badly.[83]

In this section, I provide some general background on Good Samaritan immunity statutes in the United States. I show that the immunity was conceived as a means of encouraging physicians to provide voluntary assistance in emergency situations by assuaging their fear of being sued for malpractice by the person in peril.[84] I also show that the little empirical evidence available tends to support commentators' broad skepticism that the immunity has succeeded in this ambition.[85] This makes the question posed by this Article a pressing one. Good Samaritan immunity statutes have persisted—indeed, proliferated—in the half century since their inception, notwithstanding the pervasive skepticism among commentators that they actually incent voluntary rescues and the absence of any empirical data suggesting they do.[86] Might their true purpose be to protect the rescuer's fairness interests?

A. Origin

Although in most states Good Samaritan immunity statutes currently shield both laypersons and a range of professionals,[87] the statutes originated with concerns about and among physicians.[88] Com-

83. *See, e.g.*, Deal v. Kearney, 851 P.2d 1353, 1356–57 (Alaska 1993); Lee v. State, 490 P.2d 1206, 1209 (Alaska 1971); Guerrero v. Copper Queen Hosp., 537 P.2d 1329, 1331 (Ariz. 1975) (en banc); Reynoso v. Newman, 24 Cal. Rptr. 3d 5, 8 (Cal. Ct. App. 2005); Colby v. Schwartz, 144 Cal. Rptr. 624, 627 (Cal. Ct. App. 1978); Neal v. Yang, 816 N.E.2d 853, 858 (Ill. App. Ct. 2004); Pemberton v. Dharmani, 525 N.W.2d 497, 500 (Mich. Ct. App. 1994); Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794, 797 (Minn. Ct. App. 2002); Velazquez *ex rel.* Velazquez v. Jiminez, 763 A.2d 753, 774 (N.J. Super. Ct. App. Div. 2000); McDaniel v. Keck, 861 N.Y.S.2d 516, 518 (N.Y. App. Div. 2008); McDowell v. Gillie, 626 N.W.2d 666, 671 (N.D. 2001); Jackson v. Mercy Health Ctr., Inc., 864 P.2d 839, 843 (Okla. 1993); *In re* Certification of a Question of Law, 779 N.W.2d 158, 163 (S.D. 2010); Chau v. Riddle, 254 S.W.3d 453, 456 (Tex. 2008); Hirpa v. IHC Hosps., Inc., 948 P.2d 785, 789 (Utah 1997); Hardingham v. United Counseling Serv. of Bennington, 667 A.2d 289, 292 (Vt. 1995); Mueller v. McMillian Warner Ins. Co., 714 N.W.2d 183, 189 (Wis. 2006).

84. *See infra* Part II.A.

85. *See infra* Part II.D.

86. *See infra* Part II.A–D.

87. *See* 4 Med. Malpractice Online, *supra* note 43, § 21.05 (Oct. 2012) (listing state-by-state Good Samaritan statutes and describing persons covered, circumstances, and required conduct).

88. *See* KEETON ET AL., *supra* note 40, § 56, at 378.

mentators writing in the immediate aftermath of California's enactment of the nation's first immunity statute identified two distinct, but related, impetuses for the legislation.[89] The first, intriguingly, seems to have been a single, widely disseminated anecdote involving the failure of several physicians to assist a stranger in an emergency.[90] A woman skiing in the Squaw Valley-Lake Tahoe area of Northern California had fallen on the slopes and injured herself.[91] Although there were several doctors in the vicinity available to assist, they all failed to volunteer.[92] Or so the story goes. Two student commentators writing in the early 1960s reported direct correspondence with William Byron Rumford, then-Chairman of the California Assembly's Committee on Public Health, in which Assemblyman Rumford specifically cited this incident in connection with the immunity legislation.[93]

The other, and probably more significant impetus was the widespread perception that doctors had become reluctant to volunteer in emergencies because of a pervasive fear of being sued for malpractice.[94] Some commentators have attributed this fear to the general increase in malpractice litigation that occurred in the decades following World War II.[95] As many commentators have noted, the fear could not have been based on actual liability determinations in re-

89. *See* Eric A. Brandt, Comment, *Good Samaritan Laws—The Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303, 306, 332 (1983); Norman S. Oberstein, Note, *Torts: California Good Samaritan Legislation: Exemption from Civil Liability While Rendering Emergency Medical Aid*, 51 CALIF. L. REV. 816, 817–18 (1963).

90. *See* Oberstein, *supra* note 89, at 818.

91. *Id.*

92. *Id.*; *see also* Note, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301, 1301 (1964).

93. *See* Note, *supra* note 92, at 1301 n.2; Oberstein, *supra* note 89, at 818 n.13. The early commentators mention other similar anecdotes. *See, e.g.*, Note, *supra* note 92, at 1301 ("On the Bronx Whitestone Bridge, a motorist lay in need of urgent medical attention as a physician drove past and deliberately declined to stop."); Oberstein, *supra* note 90, at 818 n.12 ("Assemblyman Rumford stated that the oral hearings disclosed numerous incidents where accident victims remained unattended due to the physician's fear of a malpractice suit."); *see also* Lynwood M. Holland, *The Good Samaritan Laws: A Reappraisal*, 16 J. PUB. L. 128, 130 n.17 (1967) (discussing an incident in which a resident surgeon was held liable for $10,000 in damages after providing gratuitous medical care to girl with fractured arm, which healed improperly).

94. *See* Brandt, *supra* note 89, at 332.

95. *See, e.g.*, Holland, *supra* note 93, at 132; Oberstein, *supra* note 89, at 817; Stiepel, *supra* note 10, at 419–20 & nn.15 & 16.

ported cases since, prior to 1959, not a single reported decision existed in which a physician was held liable for negligence in providing gratuitous medical care in an emergency.[96] Of course, if the relevant fear is of being sued, and not merely of being held liable, the absence of such reported decisions is largely beside the point.[97] Moreover, even if the fear of being named in a malpractice suit proved unfounded, it could still have an inhibitory effect on doctors' willingness to offer assistance in an emergency. But however baseless this fear may have proven to be, the Good Samaritan immunity was conceived as a means of allaying it and thereby encouraging doctors to volunteer their services in an emergency.[98]

In a 1978 article, Richard Posner and William Landes hypothesized that Good Samaritan immunity statutes—which they deemed "puzzling from an economic standpoint"—"are to be explained—as so much legislation is to be explained, including other legislation affecting physicians—by the political power of the beneficiaries rather than by the community's interest in promoting efficiency."[99] Consistent with this hypothesis, the effort to pass Good Samaritan immunity legislation in the United States was spearheaded by professional associations of doctors and nurses.[100] Both the California Nurses Association and the California Medical Association sponsored the initial California bill.[101] Outside California, the American

96. A number of commentators have reached this conclusion. *See, e.g.*, Holland, *supra* note 94, at 133 (quoting Law Medicine Notes, 260 NEW ENG. J. MED. 1003 (1964)); Frank B. Mapel, III & Charles J. Weigel, II, *Good Samaritan Laws—Who Needs Them?: The Current State of Good Samaritan Protection in the United States*, 21 S. TEX. L. J. 327, 330 (1980–1981); Theodore Flowers & William J. Kennedy, Note, *Good Samaritan Legislation: An Analysis and a Proposal*, 38 TEMP. L. Q. 409, 419 n.9 (1965); Robert A. Mason, Comment, *Good Samaritan Laws—Legal Disarray: An Update*, 38 MERCER L. REV. 1439, 1441 n.16 (1987).

97. *See, e.g.*, Stewart R. Reuter, *Physicians as Good Samaritans: Should They Receive Immunity for Their Negligence When Responding to Hospital Emergencies?*, 20 J. LEGAL MED. 157, 158 (1999) ("[I]t was not so much the physician's fear of losing suits that helped shape this type of legislation but, rather, the fear of being sued at all."); Note, *supra* note 92, at 1312; Stiepel, *supra* note 10, at 421 n.22.

98. *See generally* Veilleux, *supra* note 12, § 2.5; *see also* cases cited *supra* note 83.

99. 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, 127 (1978).

100. *See* Flowers & Kennedy, *supra* note 96, at 418 n.5; Oberstein, *supra* note 89, at 816–18.

101. *See* Flowers & Kennedy, *supra* note 96, at 418 n.5; Oberstein, *supra* note 89, at 817 n.8. Interestingly, none of the legislative hearings held in connection with the initial California bill were recorded nor were briefs filed by the sponsors. Oberstein, *supra* note 89, at 817 n.6.

College of Surgeons, the American Association for the Surgery of Trauma, and the National Safety Council "worked together in a joint action program to foster such legislation," according to one commentator.[102]

Once California enacted the first immunity statute in 1959, other states quickly began following suit. By 1966, thirty-three states had enacted Good Samaritan immunity legislation.[103] By 1980, every state in the nation, along with the Virgin Islands and the District of Columbia, had done so.[104]

B. Content

The scope of the Good Samaritan immunity's protection varies from jurisdiction to jurisdiction. A substantial majority of jurisdictions have an immunity statute protecting any person who can meet the statutory requirements, including laypersons.[105] However, a sizeable minority of jurisdictions exclude laypersons from the immunity's protection, extending it only to certain classes of professionals (e.g., physicians, nurses, osteopaths, emergency medical professionals, etc.).[106]

Here are two Good Samaritan immunity statutes, the first typical of those written to protect all persons, the second typical of those protecting physicians or other professionals:

> Any person who in good faith renders emergency care, without remuneration or expectation of remuneration, at the scene of an accident or emergency to a victim of the accident or emergency shall not be liable for any civil damages resulting from the person's acts or omissions, except for such damages as may result

102. Flowers & Kennedy, *supra* note 96, at 418 n.5.

103. *See* Holland, *supra* note 93, at 130–31; Flowers & Kennedy, *supra* note 96, at 419, 431.

104. *See* Sullivan, *supra* note 8, at 27; Stiepel, *supra* note 10, at 421.

105. Thirty-eight jurisdictions have statutes protecting all persons. *See* 4 Med. Malpractice, *supra* note 43, at § 21.05 (2012).

106. The fourteen jurisdictions whose statutes protect only specified professionals are: Alabama, Connecticut, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New York, Pennsylvania, Rhode Island, the Virgin Islands, and Utah. *Id.*

> from the person's gross negligence or wanton acts or omissions.[107]

> A person licensed to practice medicine and surgery [in Connecticut] or dentistry [in Connecticut] or members of the same professions licensed to practice in any other state of the United States, a person licensed as a registered nurse . . . or certified as a licensed practical nurse [in Connecticut], a medical technician or any person operating a cardiopulmonary resuscitator or a person trained in cardiopulmonary resuscitation in accordance with the standards set forth by the American Red Cross or American Heart Association, or a person operating an automatic external defibrillator, who, voluntarily and gratuitously and other than in the ordinary course of such person's employment or practice, renders emergency medical or professional assistance to a person in need thereof, shall not be liable to such person assisted for civil damages for any personal injuries which result from acts or omissions by such person in rendering the emergency care, which may constitute ordinary negligence. . . . The immunity provided in this subsection does not apply to acts or omissions constituting gross, wilful [sic] or wanton negligence.[108]

Apart from specifying the class of persons to whom it applies, the typical Good Samaritan immunity statute contains three basic requirements—(1) the rendering of emergency care (2) in good faith and (3) gratuitously, i.e, without compensation or the expectation thereof—and an exception for grossly negligent, wanton, or willful misconduct.[109] Many immunity statutes contain an additional requirement concerning the location at which emergency care must be

107. HAW. REV. STAT. § 663-1.5(a) (2011).

108. CONN. GEN. STAT. § 52-557b(a) (2011).

109. Not all jurisdictions have incorporated all of these elements into their immunity statutes. Nebraska, for example, has no good faith requirement or gross negligence exception. NEB. REV. STAT. ANN. § 25-21,186 (LexisNexis 2012). At least six states have no requirement that care be rendered gratuitously. *See* 4 Med. Malpractice, *supra* note 43, at § 21.03 (2012). Note also that the Connecticut statute quoted in the main text has no good faith or scene of emergency requirement.

provided, e.g., that it be rendered "at the scene" of the emergency or accident[110] or that it not be rendered in a hospital or other clinical facility.[111] Further, many jurisdictions, either by statute or case law, impose an explicit requirement that, when a doctor or other professional claims the protection of the immunity, there have been no pre-existing professional duty owed by the professional to the imperiled person or, equivalently, that the care not have been provided in the ordinary course of the professional's employment or practice.[112]

C. Application[113]

Research for this Article identified 108 published cases featuring the application of a Good Samaritan immunity statute. This figure includes only cases applying "true" Good Samaritan immunity statutes, i.e., statutes immunizing voluntary, gratuitous emergency care.[114] The figure includes only civil actions in which the immunity is invoked by a defendant–rescuer as an affirmative defense to a tort action brought by an imperiled person claiming to have been injured as a result of the rescuer's tortious conduct in performing the rescue.[115]

110. *See, e.g.*, ALA. CODE § 6-5-332(a) (2011); ARK. CODE ANN. § 17-95-101(b) (2012); N.M. STAT. ANN. § 24-10-3 (2012).

111. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1799.102(a) (West 2012); FLA. STAT. ANN. § 768.13(2)(a) (2012); *see also* Victoria Sutton, *Is There a Doctor (and a Lawyer) in the House? Why Our Good Samaritans Laws Are Doing More Harm than Good for a National Public Health Security Strategy: A Fifty-State Survey*, 6 J. HEALTH & BIOMED. L. 261, 276–77 (2010); 4 Med. Malpractice, *supra* note 43, at § 21.03[2][b] (Sept. 2006).

112. *See* Reuter, *supra* note 97, at 161; Mason, *supra* note 96, at 144–46; Veilleux, *supra* note 12, § 2.5. Notably, many states have immunity statutes protecting professionals for care rendered pursuant to a pre-existing professional duty or as part of the normal course of their employment. *See, e.g.*, Sutton, *supra* note 111, at 278–79.

113. All the data presented in this section is based on a collection and summary of Good Samaritan immunity cases on file with the author.

114. The figure therefore excludes cases exclusively applying emergency medical provider immunity statutes with no requirement that the care have been provided gratuitously or without remuneration. *See, e.g.*, Wright v. City of Hamilton, 750 N.E.2d 1190, 1193 (Ohio Ct. App. 2001); Fuson v. City of Cincinnati, 633 N.E.2d 612, 614 (Ohio Ct. App. 1993). It includes, however, cases applying emergency medical provider immunity statutes that contain a requirement that the care have been provided without remuneration, even if it was clear from the facts of the case that the defendant provided emergency care as part of her professional duties.

115. The figure therefore excludes cases where the immunity was invoked under different circum-

In fifty-seven of the 108 cases, the immunity statute was deemed applicable and shielded the defendant from liability.[116] In the other fifty-one cases, the court either expressly deemed the immunity inapplicable or refused to rule dispositively in the defendant's favor based on the immunity (e.g., the court affirmed a denial or reversed a grant of the defendant's motion for summary judgment).[117] Seventy-eight of the 108 cases were decided on summary judgment.[118] Nineteen were decided on a jury verdict or on a post-trial motion.[119] The rest were decided on demurrer or at some other procedural phase.[120]

Seventy-six of the 108 cases involved emergency care provided by a physician or other medical professional.[121] More specifically, forty-eight cases involved care provided by a physician, twenty-one involved care provided by a paramedic or emergency medical technician, and seven involved care provided by some other type of medical professional (e.g., a nurse or dentist). Of the remaining thirty-two cases, seven involved care provided by a government employee (e.g., a member of the Coast Guard, a police officer, etc.) and twenty-four involved care provided by a private layperson. In one case, the identity of the rescuer was not clear from the opinion.[122] Of the forty-eight cases involving physicians, the immunity was ruled applicable in

stances. *See,e.g.*, Maynard v. Ferno-Washington, Inc., 22 F. Supp. 2d 1171, 1174–77 (E.D. Wash. 1998) (immunity invoked by non-rescuing defendant against employee-rescuer's negligence claim); Klvana v. California, 911 F. Supp 1288, 1298 (C.D. Cal. 1995) (immunity invoked in criminal action); Hutton v. Logan, 566 S.E.2d 782, 785 (N.C. Ct. App. 2002) (plaintiff asserted immunity to defend herself from a contributory negligence claim).

116. *See, e.g.*, McDaniel v. Keck, 861 N.Y.S.2d 516, 518 (N.Y. App. Div. 2008) (holding that defendant was entitled to immunity under state's Good Samaritan statute).

117. *See, e.g.*, Gragg v. Neurological Assocs., 263 S.E.2d 496, 497–98 (Ga. Ct. App. 1979) (finding immunity inapplicable because the situation did not constitute an accident or emergency as required by the statute); Velazquez *ex rel.* Velazquez v. Jiminez, 763 A.2d 753, 774 (N.J. Super. Ct. App. Div. 2000) (finding immunity inapplicable where defendant responds to an emergency in a hospital).

118. *See, e.g.*, Neal v. Yang, 816 N.E.2d 853, 861 (Ill. App. Ct. 2004) (affirming trial court's grant of summary judgment).

119. *See, e.g.*, Hamburger v. Henry Ford Hosp., 284 N.W.2d 155, 156 (Mich. Ct. App. 1979) (jury verdict for plaintiff).

120. *See, e.g.*, Ferrell v. Minden Family Care Ctr., 704 So. 2d 969, 972 (La. Ct. App. 1997) (directing verdict for one defendant at the close of evidence).

121. *See, e.g.*, Colby v. Schwartz, 144 Cal. Rptr. 624, 624 (Cal. Ct. App. 1978) (analyzing immunity asserted by multiple physician defendants).

122. *See* Markman v. Kotler, 382 N.Y.S.2d 522 (N.Y. App. Div. 1976).

thirty, or nearly two-thirds. By contrast, of the twenty-four cases involving laypersons, the immunity was ruled applicable in just seven, or less than one-third.

In fifty-eight of the 108 cases, the emergency care was provided in a hospital (forty-two cases, immunity ruled applicable in twenty-four) or other clinical setting (sixteen cases, immunity ruled applicable in eight). In the remaining fifty cases, the care was provided in a non-clinical setting (forty-eight cases) or in a combination of clinical and non-clinical settings (two cases).

D. Criticism

Perhaps the most pervasive—and certainly the most damning—criticism of the Good Samaritan immunity is that it has failed in its primary mission of encouraging people to volunteer in emergencies.[123] This criticism cuts to the heart of the immunity's instrumental rationale. If, in fact, the immunity is not (at least at the margin) making willing rescuers of people who would otherwise have been bystanders, it is not clear what purpose it could serve other than perhaps protecting the rescuer's fairness interests.

One basis for this criticism is that the key elements of the immunity—particularly the good faith, emergency care, and gratuitous care requirements—are too vague to send a clear message to potential plaintiffs that, in any particular case, the rescuer whose conduct is at issue is likely to avoid liability. For the immunity to succeed in encouraging emergency aid, the perceived likelihood of nonliability has to be strong enough to regularly discourage potential plaintiffs from filing suit, since even the prospect of being named in a malpractice action may be sufficient to deter doctors from intervening in an emergency.[124] The vagueness of the immunity's elements is thought

123. *See, e.g.*, Mapel & Weigel, *supra* note 96, at 354; Brandt, *supra* note 89; Note, *supra* note 92, at 1311–12; Helminski, *supra* note 80, at 232; Mason, *supra* note 96, at 1459; Oberstein, *supra* note 80, at 822.

124. *See, e.g.*, Reuter, *supra* note 97, at 158 & n.6.

to dilute the potential plaintiff's certainty that the rescuer could satisfy them, thereby encouraging the filing of a lawsuit.[125]

Given these concerns, it is somewhat surprising that there appears to have been very little empirical study of the immunity's instrumental effectiveness. Still, the empirical studies that have been done tend to corroborate scholars' skepticism about the immunity's instrumental efficacy.[126] The literature mentions just two studies of the efficacy of the Good Samaritan immunity in encouraging emergency assistance, both surveys of physicians.[127] One survey was conducted by the Law Department of the American Medical Association in 1963, at which time roughly two-thirds of the states had enacted Good Samaritan immunity legislation.[128] It showed that the immunity effected an essentially negligible (1%) increase in the reported willingness of doctors to offer emergency assistance as compared with doctors in states with no immunity legislation in force.[129] Interestingly, the survey also showed that the presence of Good Samaritan immunity legislation caused a significantly larger *decrease* in the willingness of doctors to offer emergency assistance as compared with doctors in states in which no immunity legislation had been introduced.[130] Arguably, this suggests that the very introduction of immunity legislation in a state's legislature may bring the possibility of Good Samari-

125. Note, *supra* note 92, at 1311–12; *see also* Mapel & Weigel, *supra* note 96, at 338–39; Sutton, *supra* note 111, at 292–93.

126. *See*, *e.g.*, Neil L. Chayet, *This Summer in Samaria*, EMERGENCY MED., June 1971, at 161; Law Dep't of the Am. Med. Ass'n, *1963 Professional-Liability Survey*, 189 JAMA 859 (1964).

127. *See* Chayet, *supra* note 126; Law Dep't of the Am. Med. Ass'n, *supra* note 126.

128. Law Dep't of the Am. Med. Ass'n, *supra* note 126, at 865. Respondents were asked, "Does fear of a claim make you unwilling to furnish emergency medical care, away from your office or hospital, to a stranger injured in an accident or stricken with a sudden illness?" *Id.* Of physicians in states that had enacted immunity legislation at the time of the survey, 50.0% responded in the affirmative, 47.1% responded in the negative, and 2.9% chose not to answer the question. *Id.* Of physicians in states that had not enacted such legislation at the time of the survey, 50.5% responded affirmatively, 46.1% negatively, and 3.4% did not answer the question. *Id.* Interestingly, the lowest affirmative response rate—45.4%—came from physicians in states in which immunity legislation had not yet been introduced, while the highest affirmative response rate—52.5%—came from physicians in states in which immunity legislation had been introduced but rejected. *Id.*

129. *Id.*

130. *Id.*

tan liability into the public consciousness, thereby exacerbating the very fear it seeks to allay.

The other survey, mentioned without a supporting citation in a 1971 article in *Emergency Medicine*, reportedly showed that the immunity had a similarly negligible effect on the willingness of doctors to offer assistance in emergencies.[131] According to the author of the article, when the survey was administered prior to the enactment of immunity legislation in the state in question, exactly 50% of the respondents said they would stop to render assistance at the scene of an automobile accident or some other type of accident.[132] When the survey was administered after the state had enacted immunity legislation, 49% of the respondents reported being willing to stop and offer assistance.[133]

III. THE VOLUNTEER RESCUER AND CORRECTIVE JUSTICE

In this section, I turn to a critique of the rationale for the volunteer rescuer doctrine and, by implication, of the hypothesis that the Good Samaritan immunity can be justified as a vindication of the rescuer's fairness interests. I make four related points: (1) the rationale courts have offered for the volunteer rescuer doctrine is inadequate, or at least incomplete; (2) a general corrective justice rationale for negligence liability can justify the volunteer rescuer doctrine, but only if that rationale is understood to rest on the negligent actor's *responsibility* for the harm she has caused rather than the actor's *culpability* in connection with the harm; (3) the notion of risk ownership, which is central to responsibility-based accounts, helps to explain the intuition that liability is appropriate from the standpoint of corrective justice in cases where the volunteer rescuer has, through her negligence, placed the imperiled person in a worse position than she would have been in

131. Chayet, *supra* note 126. This survey should not be given great weight as the *Emergency Medicine* article does not report who conducted it or where it was published, if at all. Moreover, by the author's description, the survey reported responses of physicians from just a single state.

132. *Id.*

133. *Id.*

had the rescuer declined to intervene; and (4) the beneficent nature of the volunteer rescuer's intervention becomes relevant to the question of risk ownership only where the rescuer has not increased the risk of harm to the imperiled person or otherwise placed her in a worse position than she would have been in had the rescuer declined to intervene. In such circumstances, fairness considerations provide a sufficient basis for exempting the rescuer from liability provided the rescuer is a layperson and has acted in good faith and without recklessness.

Two conclusions follow, one practical and the other theoretical. First, the Good Samaritan immunity cannot be justified from a non-instrumental, fairness standpoint except in narrow circumstances. If, as many have argued, the oft-stated instrumental justification for the immunity fails, then the immunity is essentially a law in search of a purpose. Second, my analysis presents a challenge to the view, taken by some corrective justice theorists, that the obligation to repair a negligently caused injury derives from a morally culpable attribute of the negligent act, e.g., that it evinces disrespect for the injured person's physical security. Because, in the paradigm case, the volunteer rescuer acts selflessly and out of a profound respect for the physical integrity of the imperiled person, the intuition that liability may nevertheless be appropriate if the rescuer fails to exercise reasonable care supports a competing view of the moral basis for negligence liability: that the obligation to repair a negligently inflicted injury rests not on the injurer's culpable disposition toward other agents, but on the injurer's responsibility for the consequences of his dangerous, even if non-culpable, conduct.

A. The Inadequate Rationale Offered By Courts

Let us begin by discussing the rationale that courts themselves have most frequently offered for the volunteer rescuer doctrine. That rationale rests on the observation that, once a person undertakes to aid another in peril, other potential rescuers may refrain from doing

so in the expectation that help is on the way.[134] Thus, "a clumsy rescue attempt may have interfered with a competent rescue by someone else."[135] On this rationale, the purpose of imposing liability on a negligent volunteer rescuer seems to be twofold: to compensate the imperiled person for losing out on the non-negligent aid that may have been forthcoming from another source and to deter intervention by persons who are likely not up to the task of providing competent aid when other, more capable persons stand ready to assist. Accordingly, courts have, in a number of cases, determined whether to impose negligence liability under the volunteer rescuer doctrine by inquiring whether the volunteer rescuer's actions precluded or discouraged intervention by others.[136]

This rationale has serious limitations, however. Although it is often described as underlying the volunteer rescuer doctrine *generally*, courts have, as a rule, relied on it only in admiralty cases where the rescuer's only alleged wrongdoing was a negligent failure to reach or locate the imperiled person in time to provide assistance.[137] The ra-

134. *See, e.g.*, Cuyler v. United States, 362 F.3d 949, 953–54 (7th Cir. 2004); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); Lacey v. United States, 98 F. Supp. 219, 220 (D. Mass. 1951); *see also* Brandt, *supra* note 89, at 305; *cf.* Warren A. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 919 (1951).

135. Stockberger v. United States, 332 F.3d 479, 481 (7th Cir. 2003); *see also Cuyler*, 362 F.3d at 953–54.

136. *See, e.g.*, United States v. DeVane, 306 F.2d 182, 185, 187 (5th Cir. 1962) (finding evidence of position-worsening negligence where the Coast Guard's erroneous assurance of the imperiled ship's safety caused at least one other potential rescuer to refrain from coming to the ship's aid); United States v. Gavagan, 280 F.2d 319, 328–29 (5th Cir. 1960) (finding Coast Guard worsened position of crew of imperiled shrimping vessel by deterring other potential rescuers from "taking action which, in all probability, would have been successful"); Daley v. United States, 499 F. Supp. 1005, 1010 (D. Mass. 1980) (noting in *dicta* that Coast Guard's delay in starting search, even if negligent, could not serve as basis for Good Samaritan liability because there were no other possible rescuers who, as a result of the Coast Guard's undertaking, desisted from intervening); *Lacey*, 98 F. Supp. at 220 ("That the Government does not come within the Good Samaritan rule is demonstrated by the fact that the complaint does not show that the Coast Guard's rescue attempt reached the stage where other would-be rescuers were induced to cease their efforts in the belief that the Coast Guard had the situation in hand."); David v. S. Farm Bureau Cas. Ins. Co., 122 So. 2d 691, 696 (La. Ct. App. 1960) (noting defendant did not "exclude in any manner any other person present from accompanying him on the mission"). *But see City of Joliet*, 715 F.2d at 1203 (noting in *dicta* that complaint may have stated a valid claim for negligence under the volunteer rescuer doctrine because "with a policeman and firemen at the scene of the accident, no motorist was likely to assist the occupants of Ross's burning car—especially when the police officer was directing them away from the scene.").

137. *See, e.g.*, *DeVane*, 306 F.2d at 185 (negligent delay in starting search due to erroneous interpreta-

tionale seems inconsistent with cases in which courts, without determining whether the rescuer's actions precluded intervention by others, indicated a willingness to impose Good Samaritan liability on the basis that the rescuer increased the risk of harm to the imperiled person[138] or induced the imperiled person to rely, to her detriment, on the rescuer's assistance.[139] And it seems particularly difficult to reconcile with cases where the court held the rescuer liable for negligence even though, at the precise time the rescuer chose to intervene, there were no alternative sources of aid available.[140] Likely for these

tion of telephone message relating to status of imperiled vessel); *Gavagan*, 280 F.2d at 321–22, 328–29 (negligent failure to locate imperiled vessel); *Daley*, 499 F. Supp. at 1010 (negligent delay in starting search and negligent failure to locate imperiled persons once search had begun); *Lacey*, 98 F. Supp. at 219 (negligent failure to reach plane that had crashed into ocean). *But see* Frank v. United States, 250 F.2d 178, 178–80 (3d Cir. 1957) (concluding Coast Guard's failure to reach a drowning man in time to save him had not worsened his position for purposes of the Good Samaritan rule without analyzing whether the Coast Guard's actions had precluded or discouraged intervention by others).

138. *See, e.g.*, Sarracino v. Martinez, 870 P.2d 155, 156–57 (N.M. Ct. App. 1994) (reversing summary judgment for the defendant where, after driving intoxicated plaintiff around in her truck late at night, defendant left plaintiff alone in the truck in the parking lot of a bar, where she was subsequently attacked); Atkinson v. Stateline Hotel Casino & Resort, 21 P.3d 667, 673 (Utah Ct. App. 2001) (denying summary judgment for defendant hotel where hotel employee took charge of severely intoxicated plaintiff and delivered her to the hotel room of a man who falsely claimed to be staying with her and then raped her); *see also* RESTATEMENT (SECOND) OF TORTS § 324 cmt. c (1965) ("A is run over by an automobile and left lying in the street. B, seeing A's helpless condition, takes him in his car for the purpose of taking him to a hospital. B drives the car so negligently that he runs into a tree. The collision greatly increases A's original injuries. B is subject to liability to A for so much of the harm to him as is due to the collision.").

139. *See, e.g.*, United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189, 195 (1st Cir. 1967) (affirming denial of government's exoneration petition where, due to a faulty loran, a Coast Guard patrol boat towed a fishing vessel, which had lost its rudder but was otherwise safe, onto a shoal, where it later sank along with members of its crew, and reasoning that "the Coast Guard led the [fishing vessel] to believe that the [Coast Guard patrol boat] was reasonably capable of performing the task"). Notably, although the court in this case concluded that the Coast Guard worsened the vessel's position by inducing detrimental reliance, towing the vessel onto the shoal seems clearly to have increased the risk of harm to the vessel's crew, as at least one other court has recognized. Fondow v. United States, 112 F. Supp. 2d 119, 130 (D. Mass. 2000) (construing *Sandra & Dennis Fishing Corp.* as an instance of a rescuer making a situation worse by "increasing the risk of harm to the person in peril").

140. *See, e.g.*, United States v. Lawter, 219 F.2d 559, 562 n.1 (5th Cir. 1955) (holding Coast Guard liable for negligence under the volunteer rescuer doctrine where Coast Guard helicopter crew undertook rescue at a time when "[t]here were no boats or vessels nearby to rescue" four shipwreck victims and the crew performed the rescue ineptly, resulting in one of the victims falling to her death from a helicopter cable); *see also* RESTATEMENT (SECOND) OF TORTS § 323 cmt. e (1965) ("Clear authority is lacking, but it is possible that a court may hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and left him to drown, is liable *even though there were no other possible sources of aid*, and the situation is made no worse than it was.") (emphasis added).

reasons, at least one court has deemed the precluding-rescue-by-others rationale "strained."[141] The principal value of the rationale seems to be to show that, even where it may seem that the rescuer's negligence resulted only in a failure to *improve* the imperiled person's situation, if the rescuer somehow precluded or discouraged other potential rescuers from intervening, then the rescuer effectively *did* leave the imperiled person worse off than she would have been had the rescuer refrained from intervening altogether.

So it appears that the general rationale courts have offered for the volunteer rescuer doctrine is, in fact, insufficiently general. It justifies liability only where the rescuer has worsened the position of the imperiled person by deterring or precluding other potential rescuers from intervening. It does not adequately justify liability where the rescuer has worsened the imperiled person's position by affirmatively increasing the risk of harm because courts have been willing to impose liability in such cases without considering how the negligent rescuer's actions affected the behavior of other potential rescuers.[142] More fundamentally, it fails to explain why it is *ever* appropriate to hold the volunteer rescuer liable for negligence in conducting the rescue. As discussed above, such an explanation seems necessary because of the persistent intuition that it is, in some sense, unfair to penalize the volunteer rescuer for her ineptitude in performing the rescue, particularly in light of the common law's lenient treatment of the non-acting bystander.

B. Corrective Justice: Culpability v. Responsibility

If the precluding-rescue-by-others rationale is inadequate, what alternative rationale might support the volunteer rescuer doctrine? Given that my ultimate interest in posing this question is to determine whether the Good Samaritan immunity can be justified on a non-instrumental basis (i.e., fairness), I am going to ignore, for the purposes of this Article, the possible instrumental justifications for the

141. *City of Joliet*, 715 F.2d at 1203.
142. *See* cases cited *infra* notes 138–40.

volunteer rescuer doctrine. I will not consider, for example, whether the doctrine can be justified on efficiency grounds, i.e., as an instrument for inducing volunteer rescuers to use an optimal level of care in conducting the rescue. I will instead focus on the prominent corrective justice rationales for negligence liability generally. I will ask whether, in the paradigm case of voluntary rescue, these rationales would seem to apply with their usual force. If they do, I take this to suggest that the intuition that the volunteer rescuer doctrine is, in some sense, unfair to the rescuer may be mistaken, at least in certain cases. If they do not, I take this to vindicate the intuition, perhaps confirming the existence of a non-instrumental, fairness-based rationale for the Good Samaritan immunity.

My underlying assumption in proceeding in this manner is that, as Jules Coleman has put it, corrective justice theory specifies what fairness requires in allocating the costs of losses owing to human agency.[143] In other words, when one person has been injured by another, the work of corrective justice theory is to specify when it is fair for the injurer to be held responsible for the victim's loss. Given this close relationship between fairness and corrective justice, one can test whether and to what extent the volunteer rescuer doctrine is unfair by asking whether and to what extent, in a case where an already-imperiled person is injured by her would-be rescuer, corrective justice considerations support liability.

Before examining the corrective justice rationales for negligence liability, it will be helpful to make clear that, following the Restatement (Third) of Torts, I understand negligence as a failure to "exercise reasonable care under all the circumstances."[144] I take the determination of whether a particular actor exercised reasonable care in a particular situation to rest both on a common sense inquiry into how

143. *See* Coleman, *supra* note 15, at 203–04 ("The principle of corrective justice—that each of us has a duty to repair the wrongful losses for which we are responsible—specifies the content of fairness by articulating relationships among concepts central to the idea of fairness, concepts of loss, responsibility, and repair."). *But see* Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 221–22 (2000) (arguing that fairness considerations are native to distributive, rather than corrective, justice).

144. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010).

a reasonably careful person would have acted under the circumstances and the balancing test embodied in the Learned Hand formula—i.e., a measurement of the "foreseeable likelihood that the person's conduct will result in harm [and] the foreseeable severity of any harm that may ensue" against "the burden of precautions to eliminate or reduce the risk of harm."[145] These inquiries represent alternative and complementary ways of asking whether the conduct in question met the applicable standard of care. Whether an actor exercised due care depends both on a common sense assessment of how the average reasonable person would have acted under the circumstance, as well as on a comparison between the magnitude of the risk posed by the negligent actor's conduct and the cost to the actor of taking a precaution that would have removed or lessened that risk. As the Restatement notes, this conception is flexible enough to accommodate both *inadvertent* negligence—a failure to recognize a risk one should have recognized as being created by one's conduct—and *advertent* negligence—a failure to appreciate that a risk one recognized oneself to be creating was unjustifiable under the circumstances.[146] The common sense inquiry may feature more prominently in the case of inadvertent negligence whereas the balancing approach may be more useful where the actor adverts to the risk imposed by his conduct.[147]

The corrective justice rationale for tort liability rests on the axiom that a person who has wrongfully harmed another has a duty to repair the harm.[148] One key feature of corrective justice theory is its retro-

145. *Id.* For purposes of this Article, I take no position on the appropriate interpretation of the Hand formula. I leave unaddressed, for example, questions about whether the rationality-based interpretation implicit in economic theories of negligence liability is preferable to the reasonableness-based interpretation offered by commentators like Gregory Keating. *See, e.g.*, Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653, 655–59 (2003) (contrasting these two interpretations); *see also* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

146. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. k (2010).

147. *See id.*

148. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 361 (1992) ("A loss falls within the ambit of corrective justice only if it is wrongful. Losses are wrongful if they result from either *wrongdoing*, that is, unjustifiable departures from the relevant standards of permissible behavior or, *wrongs*, that is, invasions of rights. Corrective justice responds to such losses by imposing on individuals a duty to repair them."); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003)

spective orientation.[149] Corrective justice theory holds that cases should be decided and legal rules determined from an *ex post* standpoint, asking what legal rule or outcome represents the most appropriate way of rectifying a harm *that has already occurred*.[150] In the context of negligence, corrective justice theory holds that where one person imposes an unjustifiable risk of harm on another and the risk materializes in injury, the injurer has wrongfully harmed the victim and therefore owes the victim a duty to repair the harm.[151]

Most corrective justice theorists would presumably agree on these principles (or some version of them). The consensus dissolves, however, when it comes to specifying the precise sense in which negligent conduct is supposed to be *wrongful*. At this point, corrective justice theorists divide roughly into two camps.[152] Theorists in one camp take the view that negligent conduct itself constitutes moral wrongdoing that makes the negligent actor at least minimally morally *culpable*.[153] Within this camp, some theorists view negligent conduct as morally wrongful on consequentialist grounds, whereas others view it as wrongful on non-consequentialist, deontological grounds.[154] Theorists in the other camp reject the notion that negligence necessarily involves morally culpable wrongdoing but hold that negligence can nevertheless give rise to a moral *responsibility*

("Corrective justice theory is based on a simple and elegant idea: when one person has been wrongfully injured by another, the injurer must make the injured party whole."); *see also* Jules Coleman & Gabriel Mendlow, *Theories of Tort Law*, STAN. ENCYCLOPEDIA PHIL., 3.1 (Aug. 26, 2010), plato.stanford.edu/archives/fall2010/entries/tort-theories/.

149. Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 282 (1996).

150. This stands in contrast to instrumental theories of tort liability, which are fundamentally forward-looking in their orientation. Such theories, like the efficiency theory of tort liability advanced by law-and-economics theorists, ask what legal rule or outcome will cause actors behaving with knowledge of such rules and outcomes to behave in the optimal (i.e., wealth-maximizing or welfare-maximizing) manner.

151. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. d (2010); COLEMAN, *supra* note 148, at 332; WEINRIB, *supra* note 23, at 145–70; Keating, *supra* note 143, at 221–22.

152. *Compare* WEINRIB, *supra* note 23, at 152–53, *with* Perry, *Responsibility*, *supra* note 25, at 72, 73.

153. *See, e.g.*, WEINRIB, *supra* note 23, at 152–53.

154. *See* Perry, *Responsibility*, *supra* note 25, at 72–75.

for any resulting injury.[155] On this view, while negligent conduct that results in injury to another may not itself be morally culpable, it is wrongful in the sense that it violates a right. When A negligently injures B, A violates B's right to remain free of harms owing to another's failure to exercise due care.[156] On the responsibility-based view, due to her failure to conform her conduct to the applicable objective standard, the negligent actor in some sense "owns" the harmful outcome, has a moral obligation to repair the harm caused by her negligent act, and, should she fail to comply with that obligation, will have *then* done something morally culpable.

My basic claim is that samarital negligence liability, at least in the paradigm case where a volunteer rescuer acts diligently, wholeheartedly, and in good faith to bring the imperiled person to safety, cannot be supported by the moral culpability view. This shows one of two things: either there should be no liability for samarital negligence in such cases or culpability-based versions of the corrective justice rationale for negligence liability are deficient in not being able to account for the intuition that, in certain circumstances, volunteer rescuers *should* be held liable for their negligence in conducting the rescue.

I argue that the latter proposition is correct and that responsibility-based versions of the corrective justice rationale for negligence liability can better explain why samarital negligence liability is appropriate from the standpoint of corrective justice. In my view, this counts as a point in favor of responsibility-based versions of the corrective justice rationale for negligence liability and one against culpability-based accounts.

It is somewhat surprising that culpability-based versions of the corrective justice rationale for negligence liability have persisted among respected scholars given the widely held view that tort liabil-

155. *See id.* at 72, 73; Perry, *Moral Foundations*, *supra* note 25, at 496–512.

156. *See* Coleman & Mendlow, *supra* note 148, at 3.1 ("For a loss to be wrongful in the relevant sense, it need not be one for which the wrongdoer is morally to blame. It need only be a loss incident to the violation of the victim's right not to be injured—a right correlative to the wrongdoer's first-order duty not to injure.").

ity generally is not concerned with the moral blameworthiness or praiseworthiness of the defendant's actions.[157] But, as we will see shortly, persisted they have.

One might think that, in light of the inarguable fact that negligence liability is assessed on an objective basis without taking account of the actor's character, capacities, or mental state, culpability-based versions of the corrective justice rationale for negligence liability would have to rest on consequentialist grounds. Given that a person can be deemed legally negligent despite being of excellent moral character and making their best efforts to anticipate relevant risks and take appropriate precautions (i.e., to conform their behavior to the objective standard of conduct applicable under the circumstances), it would seem that the most promising basis for arguing that negligent conduct is immoral conduct is to construe morality strictly in terms of the good and bad outcomes resulting from a given action. There does, after all, seem to be a straightforward sense in which negligent conduct is morally wrongful from a consequentialist point of view.[158] However, few such accounts have, to my knowledge, been offered.[159] To the contrary, most culpability-based versions of the corrective justice rationale for negligence liability have rested on deontological

157. *See, e.g.*, COLEMAN, *supra* note 148, at 219 ("Fault liability in torts, especially liability for negligence . . . does not require culpability or moral blameworthiness. Blameless agents can be held liable in torts; and fault can be the basis of their liability. Fault liability may be liability without blame."); Gerald J. Postema, *Introduction: Search for an Explanatory Theory of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 1, 3 (Gerald J. Postema ed., 2001) ("Tort law appears to be utterly indifferent to the culpability of the injurer."); Richard W. Wright, *The Standards of Care in Negligence Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 258 (David G. Owen ed., 1995) (advocating Kantian position that, in tort actions, liability hinges on an assessment of the defendant's "moral *responsibility* for having adversely affected someone else's person or property" rather than on the "moral *blameworthiness or merit* of the defendant's . . . conduct").

158. *See, e.g.*, Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 271 (1996) ("If it is wrong to do more harm than good in the arena in which deontological maxims do not apply, then it would appear culpable to do an act under circumstances in which the discounted value of the harm that act will cause exceeds the costs of precautions that it would take to prevent that harm.").

159. *See id.* at 270, 271 (taking the position that "negligence cannot be construed as deontologically wrongful" and that "to be negligent is to act culpably with regard to causing consequential wrongs—wrongs that are not of deontological consequence, but wrongs that any deontologist can and should regard as of significant moral importance"); *see also* Simons, *supra* note 149, at 282 (discussing, but ultimately rejecting, an "attenuated" consequentialist rationale for negligence liability whereby "the law essentially grants the victim a corrective justice right not to suffer at the hands of a 'wrongdoer,' defined as one who has failed to maximize the consequences of his actions").

grounds, i.e., that it lies in the intrinsic nature of negligent conduct to violate some deontological norm.[160]

One such view is that negligent conduct is morally wrongful because it violates the deontological norm of *impartiality*.[161] The drafters of Restatement (Third) of Torts explicitly embrace this view in a comment concerning the "[r]ationales" for negligence liability:

> One justification for imposing liability for negligent conduct that causes physical harm is corrective justice; imposing liability remedies an injustice done by the defendant to the plaintiff. An actor who permits conduct to impose a risk of physical harm on others that exceeds the burden the actor would bear in avoiding that risk impermissibly ranks personal interests ahead of the interests of others. This, in turn, violates an ethical norm of equal consideration when imposing risks on others. Imposing liability remedies this violation.[162]

And the drafters of Restatement (Second) of Torts clearly had impartiality in mind as well, stating in a comment concerning "weighing interests" that negligence law

> Requires . . . that the actor . . . give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others.[163]

In addition to the drafters of the Restatement, at least one other commentator appears to have endorsed a deontological rationale for negligence liability that centers on impartiality.[164] On this view, my

160. *See* WEINRIB, *supra* note 23, at 152–53.
161. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. d (2010).
162. *Id.*
163. RESTATEMENT (SECOND) OF TORTS § 283 cmt. e (1965).
164. *See* Simons, *supra* note 149, at 282 (opining that one "plausible" nonconsequentialist justifica-

failure to take a precaution which, though it imposes some cost on me, protects someone else from a harm that would impose a greater cost on them, is morally objectionable because it evinces a failure to consider others' interests as equal in value to my own.

So, is imposing liability on the volunteer rescuer—who negligently injures the person he is trying to help—justifiable on the basis that, in doing so, the rescuer has exhibited an impermissible degree of partiality to his own interests? It is not. Samarital negligence may be the example *par excellence* of negligent conduct that does not violate the deontological norm of impartiality. Can the volunteer rescuer's negligent conduct really be said to derive from the rescuer having considered her own interests more important than those of the imperiled person? The entire rescue effort is ostensibly founded on, and motivated by, a concern for the imperiled person's welfare. While the authenticity of such concern might be questioned in cases where the rescuer has been grossly negligent or reckless in conducting the rescue, ordinary negligence does not seem incompatible with it. Unlike many types of non-samarital negligence, samarital negligence typically does not involve what could be called an act of selfishness. The very decision to offer assistance to the imperiled person, though one has no legal obligation to do so, seems to rest on a self*less* concern for that person's well-being and a desire to do something to promote that person's interests, setting one's own interests to the side. Rather than deriving from a failure to be impartial in one's practical deliberations, creating an unjustifiable risk in such a situation could plausibly have resulted from a miscalculation about how best to bring the imperiled person to safety or a mistake in attempting to do so.

The case of *Swenson v. Waseca Mutual Insurance Co.*, nicely illustrates this point.[165] In *Swenson*, thirteen-year-old Kelly Swenson dislocated her knee when the snowmobile she was riding struck a

tion for negligence liability is "a Kantian conception of cost-benefit analysis, which requires actors to give impartial consideration to the interests of others in deciding how to act"); *see also* Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES L. 105, 106 (2003) (describing "Kantian account of tort liability" under which "the negligent injurer failed in that he immorally preferred his own interests to the interests of the victim").

165. Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. Ct. App. 2002).

drainage culvert alongside a highway.[166] Swenson's companions waved down a passing motorist, Lillian Tiegs, who agreed to take Swenson to the hospital.[167] After Swenson boarded Tiegs's van, Tiegs attempted to make a U-turn onto the opposite side of the highway.[168] Before Tiegs had completed the U-turn, a tractor-trailer travelling at an estimated seventy miles per hour in a fifty-five-mile-per-hour zone struck the passenger side of Tiegs's vehicle.[169] Swenson died from the injuries she sustained in the collision.[170] The court held Tiegs immune from liability under Minnesota's Good Samaritan immunity statute.[171] Suppose it could be established that Tiegs began to make the U-turn without checking to see if another vehicle were approaching on the opposite side of the road.[172] Suppose further that, had she looked, she would have seen the tractor-trailer and, consequently, delayed making the turn until it passed. Now, it seems clear that, in failing to check the road for other vehicles, the rescuer "impose[d] a risk of physical harm on others that exceeds the burden

166. *Id.* at 795.

167. *Id.* at 795–96.

168. *Id.* at 796.

169. *Id.* The published opinion notes only that the tractor-trailer was "exceeding the posted speed limit." *Id.* The Respondent's Brief in the *Swenson* case, however, states that "The investigating trooper, Brent Richter, opined that Johnson [the tractor-trailer driver] was traveling at approximately 70 miles per hour in a 55 mile per hour speed zone." Respondent's Brief at 3 Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. Ct. App. 2002) (No. C5-02-651).

170. *Swenson*, 653 N.W.2d at 796.

171. *Id.* at 800. After filing a wrongful death action against both the tractor-trailer driver and Tiegs, Swenson's parents settled with both defendants. *Id.* at 796. According to the court, the Swensons then brought an "underinsured-motorist claim" against "the insurer for Tiegs." *Id.* The Appellants' Brief, however, makes clear the Swensons actually filed this claim against their *own* insurer, Waseca Mutual. Appellants' Brief at 2, Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. Ct. App. 2002) (No. C5-02-651).

172. This fact was not affirmatively established in *Swenson*, but, as the appellants noted in their brief, the circumstances strongly suggest that Tiegs failed to check the traffic on the opposite side of the highway before beginning her U-turn. Appellants' Brief at 6, Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. Ct. App. 2002) (No. C5-02-651) ("Just as [Johnson, the tractor-trailer driver] was about to pass the group, Ms. Tiegs suddenly and without looking or signaling her intentions turned from the shoulder directly into his lane."). The Respondent's Brief acknowledges that Tiegs "did not see" the tractor-trailer, and it does not suggest that Tiegs would not or could not have seen the tractor-trailer had she checked the road an instant before making her turn. Respondent's Brief at 3, Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. Ct. App. 2002) (No. C5-02-651). For the remainder of this Article, and solely for purposes of my argument, I will assume Tiegs failed to check the road before beginning the turn.

[she] would bear in avoiding that risk."[173] The risk was significant and the potential harm severe; the burden of taking the risk-avoiding precaution, on the other hand, was minimal. But can it really be said that the rescuer's failure to check the road before making the U-turn resulted from her having "impermissibly rank[ed] personal interests ahead of the interests of others"?[174] It is not at all clear what she personally stood to gain by neglecting to do so. Her failure to check the road, after all, created as serious (or nearly as serious) a risk of harm to *herself* as to her passenger. What makes the error in this case *negligent* is that it created (or increased) significant risks of serious harm that were avoidable at a minimal cost to the injurer. It does not follow, however, that the failure to avoid creating or increasing those risks resulted from the injurer's pursuit of *her own* interests at the expense of the interests of the other.[175] By contrast, consider a classic case of non-samarital negligence such as that of the driver who, in an effort to arrive on time for a dinner party, causes a serious accident by significantly exceeding the legal speed limit. In that instance, there is a clear sense in which the driver's negligent act seems to in-

173. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. d (2010).

174. *Id.*

175. *Cf.* Porat, *supra* note 164, at 121–28 (discussing a category of negligence cases, which he takes to include many medical malpractice cases as well as voluntary rescue cases, in which "the injurer failed in balancing the different interests of the victim without taking into account any self-interest at all"). Porat argues that imposing liability in such cases "is not generally crucial and, at times, even detrimental," basing this conclusion, in part, on his view that

> [i]n terms of *ex post* justice, it is apparent that the moral claim of a victim who was injured due to the injurer's disdain for her interest or due to the injurer's inappropriate preference of his own interest over her interest . . . is stronger than the moral claim of a victim who was injured during an effort to act for her benefit or to improve her condition.

Id. at 123. Porat here seems to conflate the injurer's moral culpability in connection with the injury with the victim's moral entitlement to compensation. Though I agree that it is "apparent" that an injurer's moral culpability is generally greater where her negligence results from a failure of impartiality than where it results from a failure to properly balance the different interests of the victim, it does not necessarily follow that the victim's moral entitlement to compensation is any less in cases of the latter type. Porat would seem to owe an explanation of why, to use his own example, an emergency room patient who died as the result of a doctor's unreasonable failure to conduct a complete examination in response to the patient's complaint of severe chest pains has any less of a right to compensation where the doctor's failure resulted from a good-faith, but unreasonable, belief that the patient's symptoms were caused by indigestion than where it resulted from the doctor's wish to avoid being delayed and to save the hospital money. *Id.* at 124.

volve ranking his own interests (e.g., his interest in arriving sooner at his destination) ahead of the safety interests of other drivers.

There may, of course, be cases where the volunteer rescuer, despite having undertaken to assist an imperiled stranger to whom he owed no duty, performs the undertaking so callously or half-heartedly as to suggest that he is not principally motivated by a concern for the imperiled person's welfare. For example, in *Zelenko v. Gimbel Brothers, Inc.*, Mary Zelenko became ill in the defendant's store.[176] After undertaking to assist Zelenko, store personnel moved her to the store's infirmary where she remained for six hours without any medical care.[177] Zelenko later died.[178] Denying the defendant's motion to dismiss, the court noted, "If defendant had left plaintiff's intestate alone, beyond doubt some bystander, who would be influenced more by charity than by legalistic duty, would have summoned an ambulance. Defendant segregated this plaintiff's intestate where such aid could not be given and then left her alone."[179] In such a case, the impartiality rationale may well apply. But the apparent inapplicability of that rationale to at least some cases of samarital negligence seems to support the intuition that holding the volunteer rescuer liable for negligence in such cases is in some way fundamentally unfair. So far as the impartiality justification for negligence liability is concerned, then, it seems that the intuition with which I began this Article may be on to something. Perhaps one feels that it is unfair to hold the volunteer rescuer liable for negligence because one of the prominent culpability-based corrective justice rationales for negligence liability—lack of impartiality—fails, it seems, to apply with its usual force.

But there is another rationale that needs to be considered: one centering on the notion of *respect*. Some commentators maintain that negligent conduct is a form of wrongdoing because, as Gregory Keat-

176. Zelenko v. Gimbel Bros., Inc., 287 N.Y.S. 134, 135 (N.Y. Sup. Ct. 1935).
177. *Id.*
178. *Id.* at 134.
179. *Id.* at 135.

ing[180] has put it, such conduct constitutes "the failure to act with sufficient respect for the security of those endangered by one's actions."[181] On this view, negligent conduct is morally objectionable not because I have, in acting negligently, ranked my own interests above those of another. It is rather that, even if my negligent act did not serve to promote my own interests in any meaningful way, it still evinced a failure to appropriately honor another person's interest in their own physical integrity. Here is Keating's fuller account of the wrongfulness of negligent conduct:

> Negligence is the failure to prevent a risk imposition that should have been prevented. . . . The imposition of a negligent risk expresses inadequate respect for the security of the victim; it is an "affront to personality" in this sense. Those who negligently injure others are therefore guilty of a kind of *primary* wrongdoing not present when reasonable conduct issues in injury. This link between negligence and disrespect makes negligence liability an instance of corrective justice in a robust sense: The duty to repair a negligently inflicted injury is a duty to make right a harm wrongly inflicted.[182]

In the same vein, Keating later remarks:

> [N]egligence is a form of wrongful conduct—a failure to exhibit sufficient respect for the physical integrity and property of others. Treating the lives, limbs, and property of others with insufficient respect is a form of mistreatment. Negligent injurers therefore cannot complain if they are made to repair the harm that

180. Because of Keating's emphasis on distributive justice concerns, some have concluded that he is not a corrective justice theorist. *See, e.g*, Zipursky, *supra* note 148, at 699 n.18. However, at least with regard to negligence liability, corrective justice considerations retain an important place in Keating's account. For example, although considerations of distributive justice constitute, for Keating, the primary rationale for negligence liability, he explicitly notes that "[c]onsiderations of corrective justice . . . supply a second justification for the duty of reparation that negligence law imposes on careless injurers." Keating, *supra* note 143, at 222.

181. Keating, *supra* note 143, at 221.

182. *Id.* at 200–01.

> their disrespect—their wrongdoing—has wrought.[183]

Ernest Weinrib has advanced a similar account of the wrongfulness of negligence, one resting on the Kantian notion of self-determined agency:

> To refuse to mitigate the risk of one's activity is to treat the world as a dumping ground for one's harmful effects, as if it were uninhabited by other agents. . . . Under the Kantian principle of right, the position of each party must be consistent with the other's being a self-determining agent. Accordingly, the plaintiff cannot demand that the law regard as wrongful the creation of all risk; such a judgment of wrongfulness would render action by the defendant impermissible, thus denying to the defendant the status of agent. Similarly, the defendant cannot claim immunity regarding risks that could have been modulated; that claim would ignore the effect of one's action on other agents and would treat them as nonexistent. When combined, these two considerations constitute a standard of care in which doer and sufferer rank equally as self-determining agents in judgments about the level of permissible risk creation.[184]

For Weinrib, imposing an unjustifiable risk on another agent is wrongful in that it involves treating the other agent as though she does not exist.[185] This is of a piece with Keating's claim that negligence is wrongful in that it expresses disrespect for the person whose physical security is thereby put at risk.[186] The disrespect consists in acting as though there *were* no agent whose physical security is placed at risk by one's conduct.

This rationale holds the promise of better justifying liability for samarital negligence since it can explain why liability may be appro-

183. *Id.* at 222.
184. WEINRIB, *supra* note 23, at 152.
185. *Id.*
186. Keating, *supra* note 143, at 222.

priate even where the injurer's negligence did not result from excessive self-preference. In a case like *Swenson*,[187] there seems to be at least a prima facie sense in which the rescuer's negligence evinces a failure to adequately take into account the victim's physical security. After all, the rescuer in that case failed to take a very low-cost precaution—ensuring the road was clear before making a U-turn—which, had it been taken, would have greatly reduced the likelihood of an extremely costly harm befalling the victim.[188] This alone might be thought to establish a lack of respect for the victim's security.

However, the case of samarital negligence places a significant degree of pressure even on the inadequate respect rationale for negligence liability. Like the impartiality rationale, the inadequate respect rationale premises negligence liability on a defect in the negligent actor's *attitude* toward the agency of others, particularly toward the agency of those placed at risk by her conduct. On this view, negligent conduct is deemed wrongful—not in itself—but rather in virtue of what it, to use Keating's terms, "expresses" or "exhibits" about the actor's attitude toward the agency of others.[189] A lack of sufficient respect is a defect in the agent's comportment toward others as expressed by her conduct; not a defect in the conduct itself. Because of its attitudinal nature, the inadequate respect rationale must contemplate a more or less holistic assessment of the agent's motives and intentions in acting negligently. The nature of the negligent act itself might be one important indicator of the actor's attitude toward others, but it surely is not the only relevant indicator. The factual circumstances surrounding the negligent conduct would seem to be no less important, as might the actor's beliefs, motives, and intentions.

Claiming that the negligent volunteer rescuer's actions evince a lack of respect for the victim's security seems to violate this commitment to holism since it evaluates the negligent act in a vacuum, separate from the beneficent context in which it occurs. A voluntary attempt to assist someone in dire peril, if it expresses anything about

187. Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. Ct. App. 2002).
188. *Id.* at 796.
189. Keating, *supra* note 143, at 200, 222.

the rescuer's attitude towards the victim, expresses a profound concern with and respect for the victim's physical integrity. Where such an attempt is undertaken diligently and in good faith—that is, wholeheartedly and with a genuine intention of benefitting the other person—it seems a bit forced to characterize a negligent error committed in the course of the attempt as necessarily evincing inadequate *respect* for the victim's security. When, in performing the general course of conduct in which the negligent act occurred, the actor is motivated by true beneficence—a genuine concern for the welfare of another and a wholehearted willingness to act, voluntarily and gratuitously, on that concern, even at some cost to herself—both the inadequate respect and the impartiality rationales run into trouble because it seems inapt to premise liability on an attitudinal defect in the actor.

In *Swenson*, the negligent act is embedded in a course of conduct that, by all appearances, is motivated by genuine beneficence.[190] Far from treating the imperiled person as though she does not exist (à la Weinrib), the rescuer in that case acted in recognition of and with deference to the imperiled person's interest in physical integrity. There is, of course, a clear sense in which a case like *Zelenko* is different.[191] In that case, notwithstanding the rescuer's having voluntarily undertaken to assist the imperiled person, one can reasonably question whether the rescuer's overall course of conduct—moving Zelenko to the infirmary and leaving her there without attention for several hours—expressed respect for her physical integrity.[192] The facts suggest such a degree of callousness and inattentiveness as to make it implausible to characterize the rescuers' negligence as consisting merely in a mistake or miscalculation made in the course of a good-faith attempt to bring the imperiled person to safety. In a case like *Swenson*,[193] however, the rescuer's failure to use due care in one particular aspect of her conduct does not vitiate the sense that the rescuer's *general course of conduct* expressed genuine respect for the

190. *Swenson*, 653 N.W.2d 794.
191. Zelenko v. Gimbel Bros., 287 N.Y.S. 134 (N.Y. Sup. Ct. 1935).
192. *Id.* at 135.
193. *Swenson*, 653 N.W.2d 794.

imperiled person's agency and physical integrity. Given that the rescuer's general course of conduct undeniably expresses an attitude of profound respect for the victim's physical integrity, it seems inappropriate to regard an inadvertent (and no doubt deeply regretted) mistake committed during that course of conduct as evidence that the agent harbors the diametrically opposite attitude.

The inapplicability of the culpability-based rationales for negligence liability apparently vindicates the intuition that it is unfair to impose liability on the volunteer rescuer for her ineptitude in performing the rescue. If negligent conduct is wrongful in that it constitutes a basis for deeming the agent herself, in at least some minimal sense, morally culpable, a volunteer rescuer's ineptitude or clumsiness in performing the rescue is usually not wrongful and, therefore, would not give rise to a moral obligation to repair any resulting injury. As we have seen, in the paradigm case of voluntary rescue, where the rescuer acts diligently and in good faith, attributing even a minimal level of moral culpability to the rescuer as a result of her failure to exercise reasonable care seems problematic. Where the rescuer's alleged negligence consists in a mistake or miscalculation made in the course of a wholehearted, good-faith attempt to bring the imperiled person to safety, it just seems wrong to claim that such negligence evinces a failure of impartiality, a lack of respect for the imperiled person's agency, or some other attitudinal defect that serves as a basis for holding the rescuer morally culpable.

However, there is another sort of corrective justice rationale for negligence liability that needs to be considered. On this view, while negligent conduct need not indicate an attitudinal defect in the actor and need not constitute a basis for deeming the actor herself morally culpable,[194] it nevertheless gives rise to moral *responsibility* for the

194. As noted above, many commentators believe that negligent conduct need not be morally culpable. *See, e.g.*, Peter Birks, *The Concept of a Civil Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 29, 45 (David G. Owen ed., 1995) ("Negligence consists in the breach of a duty of care to avoid damage. The duty is given content by the standard set by the notional reasonable man. . . . In practice the application of that standard is a very imperfect guide to the question whether a defendant was worthy of blame, reproach, or revulsion."); Wright, *supra* note 157, at 258 (advocating Kantian position that, in tort actions, liability hinges on an assessment of the defendant's "moral *responsibility* for having

harmful outcome. Whereas culpability-based accounts view negligent conduct as wrongful by dint of what it (necessarily) reveals about the injurer's attitude toward other agents, the responsibility-based account views such conduct as wrongful solely in virtue of its failure to conform to the standard of due care. On this latter view, the injurer's moral responsibility for the injury rests *directly* on her failure to act as the average reasonable person would have acted. It does not premise the injurer's responsibility on a claim that such a failure necessarily constitutes morally culpable wrongdoing.

Commentators adhering to the responsibility-based view have offered different accounts of the particular sort of responsibility at issue and I cannot explore all the nuances of the different conceptions in this Article.[195] However, most responsibility-based corrective justice theories of negligence liability share certain core features, two of which I will focus on here.

First, accounts premising negligence liability on responsibility tend to center on an evaluation of the negligent *action*, considered in abstraction from the character, motives, attitudes, or mental state of the actor whose action it was.[196] For example, in developing his notion of outcome-responsibility, Stephen Perry notes

> [O]utcome-responsibility involves the retrospective evaluation of action in light of its outcome. Such evaluation can be moral but need not involve the ascription of blame or culpability. It is pos-

adversely affected someone else's person or property" rather than on the "moral *blameworthiness or merit* of the defendant's . . . conduct"); Larry Alexander, *Negligence, Crime, and Tort: Comments on Hurd and Simons*, 76 B.U. L. REV. 301, 302 (1996) (stating belief that inadvertent negligence is not culpable).

195. *See, e.g.*, ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 94–113 (1999); Perry, *Responsibility*, *supra* note 25, at 73; Perry, *Moral Foundations*, *supra* note 25, at 496–512 (advocating avoidability-based conception of Tony Honore's concept of outcome-responsibility); Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXFORD J. LEGAL STUD. 1, 1 (2010) (developing account of responsibility based on rational functioning, i.e., that one is responsible for conduct resulting from the functioning, successful or failed, of one's capacity for rational agency); Ripstein, *supra* note 30, at 361 (advocating a notion of responsibility based on reciprocity and risk ownership); Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES L. 97, 110 (2008) (discussing the conception of responsibility implicit in civil recourse theory).

196. Perry, *Moral Foundations*, *supra* note 25, at 509.

> sible to judge actions *as* actions, considered simply as the product of agency, without judging the agent herself, although as the author of the action the agent's reasons for subsequent action may be affected; it is, after all, still her action.[197]

Responsibility-based accounts of negligence liability share the core belief in the validity of something like Jules Coleman's distinction between "fault-in-the-doing" and "fault-in-the-doer" as well as in the notion that tort liability may be appropriate even where only the former is present.[198] It is clear how this feature of responsibility-based views can help to account for the objective character of negligence liability. Provided that I have a basic capacity for rational agency, such liability can be assessed solely on the basis of what I, in fact, did rather than on the basis of what my conduct signifies about my disposition toward other agents.

Second, responsibility-based accounts typically premise negligence liability on the nature of the actor's relationship to the risk that materialized in injury to the plaintiff.[199] Most central in this regard is the notion of *risk ownership*. Arthur Ripstein explicitly rests his account of negligence liability on this notion and then argues that a reciprocity-based conception of responsibility is implicit in it.[200] Ripstein describes risk ownership in the following way:

197. *Id.*; *see also* RIPSTEIN, *supra* note 195, at 133 ("Tort law's negligence standard measures conduct, apart from any questions about the defendant's thoughts. . . ."); *Id.* at 73 ("We can thus restate the question of [tort] liability with a question about whose bad luck an injury is. In answering that question, no inquiry into the agent's will or character is necessary, only one into his or her deeds."); Coleman, *supra* note 148, at 219 ("Fault liability in torts refers to fault in the doing, not in the doer. An agent is at fault in torts whether or not the fault in his conduct marks a shortcoming in him."); Jules L. Coleman, *Mistakes, Misunderstandings, and Misalignments*, 121 YALE L.J. ONLINE 541, 548 (2012), *available at* http://yalelawjournal.org/images/pdfs/1061.pdf ("It is a commonplace that negligence is behavior rather than a state of mind. This means that one's negligence consists in a failure on a particular occasion to act as would a person who takes the interests of others appropriately into account. Negligence does not require a disposition to act in a particular way or to have or hold others in a particular regard—as unworthy or less equal or what have you."); Arthur Ripstein, *Closing the Gap*, 9 THEORETICAL INQUIRIES L. 61, 76 (2008) ("Many cases of negligence reflect badly on the defendant. . . . [B]ut the basis for liability is the dangerousness of [the negligent actor's] conduct, not its defective moral character.").

198. *See* Coleman, *supra* note 148, at 219.

199. Ripstein, *supra* note 30, at 361 (advocating a notion of responsibility based on reciprocity and risk ownership).

200. RIPSTEIN, *supra* note 195, at 53–54.

> In assigning liability, the fault system determines whose problem a certain loss is. When a risk ripens into an injury, the injury belongs to whomever the risk in question belongs. Reasonable risks—those risks the imposition of which is compatible with appropriate regard for the interests of others—lie where they fall. Unreasonable risks belong to those who create them; as a result, the injuries that result from unreasonable risk imposition belong to the injurers. Since they are the injurer's problem, the injurer must make them up. Hence, damages provide the remedy.[201]

Thus, for Ripstein, negligent actors own the risks created by their negligence.[202] Something like this notion of risk ownership is also implicit in Perry's responsibility-based account of negligence liability.[203] For Perry, an agent's outcome-responsibility[204] for a particular harm represents a "plateau of responsibility that singles out the outcome-responsible agent as a *potential* cost-bearer."[205] It is not, therefore, a sufficient condition of a moral obligation to compensate the injured party.[206] For Perry, negligence liability is appropriate only where the risk resulting in injury was created jointly by the victim and the injurer as part of an accepted pattern of interaction (e.g., driver-pedestrian interactions).[207] In such circumstances, an actor has a duty to repair an injury when his conduct creates a risk that exceeds the normal range of risks associated with the pattern of interaction (e.g., he drives recklessly).[208] He also owes a duty to repair harm caused by a risk lying *within* the normal range of risks associated

201. *Id.*; *see also* Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 214, 223–24 (Gerald Postema ed., 2001) ("[L]iability can be thought of on the model of ownership for a particular risk: If I create a risk, it is my risk, and if it ripens into an injury, the costs that it imposes are costs that others are entitled to force me to bear.").

202. RIPSTEIN, *supra* note 195, at 53–54.

203. Perry, *Responsibility*, *supra* note 25, at 73.

204. According to Perry, "an agent is outcome-responsible for a harmful outcome if and only if he causally contributed to it, possessed the capacity to foresee it, and the ability and opportunity to take steps, on the basis of what could have been foreseen, to avoid it." *Id.* at 91.

205. *Id.* at 73–74.

206. *Id.* at 74.

207. *Id.*

208. *Id.* at 112.

with the pattern of interaction if, per the Hand formula, he fails to take a precaution the cost of which is less than the expected cost of the harm (e.g., he fails to double-check the crosswalk before turning).[209] "The basic idea," observes Perry, "is that while risks are, in a wide variety of circumstances, the product of joint action, individual actors will very often exercise some degree of control, and often a great deal, over the level of risk in particular circumstances."[210] The notion of an actor exercising *control* over the level of risk imposed in particular circumstances strikes me as very similar to the concept of risk ownership.[211] When I exercise a sufficient amount of control over the level of risk present in certain circumstances, it is appropriate to regard the risk actually imposed as *mine*.[212]

209. Perry, *Responsibility*, *supra* note 25, at 113.

210. *Id.* at 112.

211. *See* Postema, *supra* note 157, at 8 (noting that Perry's notion of outcome-responsibility "is not tied directly to blame or a right to punish, but rather with 'ownership' of losses"); *see also id.* at 11.

212. Notwithstanding the important similarities between the responsibility-based accounts offered by Perry and Ripstein, there is an important difference. Perry's notion of responsibility is moral, while Ripstein's is political. Whereas Perry believes that my duty to repair a negligently-caused injury derives from my pre-political status as a moral agent, Ripstein maintains that the duty derives from my status as a party to the social contract, i.e., my membership in a society whose coercive institutions set and enforce the fair terms of interaction among its members. Ripstein thinks Perry's view cannot account for the fact that negligence liability is based on the *objective* foreseeability of the injury. On Ripstein's view, if the basis for negligence liability is a moral responsibility resting on my agency, I should only be liable for injuries that I *actually* foresaw and not for reasonably foreseeable injuries that I failed to foresee. This is because, as Ripstein puts it, "A person's agency is expressed in her *actual* exercise of her capacities. That she, or some other, hypothetical person might have exercised them differently does not change what of her *was* expressed in the deed." RIPSTEIN, *supra* note 195, at 100. Ripstein concludes, "[F]oresight is not required because it is a general condition of agency. Instead, it is implicit in the idea of fair terms of interaction." *Id.* at 105. Thus, Ripstein would seem to be committed to the view that, when my negligence involves a failure to foresee an injury that a reasonable person would have foreseen, I have no pre-political moral obligation to compensate the injured party. In my opinion, this position is untenable. It is founded on an unduly restrictive notion of moral responsibility, one which appears to conflate moral responsibility with moral culpability. If I take my eyes off the road for five seconds while driving and consequently run over a pedestrian, it would seem absurd to claim that my failure to foresee the possibility of the resulting injury excuses me from moral responsibility for it, however much that failure may diminish my blameworthiness. The pedestrian's moral entitlement to receive compensation from me cannot plausibly depend on whether, on that particular occasion, I happened to foresee what an ordinary reasonable person would have foreseen. Ripstein takes too narrow a view of interpersonal morality when he suggests that reciprocity—"the idea that one person may not unilaterally set the terms of his interactions with others"—is one native to *political* morality. *Id.* at 2. Thus, though I rely heavily on Ripstein's notion of risk ownership throughout this Article, I part ways with Ripstein in believing that a risk owner is *morally* responsible for injuries resulting from risks he owns (i.e., from his negligent conduct). In this respect, the responsibility-based conception of corrective justice I endorse here represents a hybrid of the accounts offered by Ripstein and Perry.

It is not difficult to see how responsibility-based versions of the corrective justice rationale for negligence liability can justify liability in the paradigm case of voluntary rescue. Because responsibility-based accounts premise negligence liability on a feature of the negligent action itself rather than on any feature of the negligent actor's deliberative attitude toward other agents,[213] the beneficent nature of the volunteer rescuer's undertaking does not represent a hurdle to liability. An actor's responsibility for a harmful outcome depends on whether, to adopt Ripstein's terminology, the actor *owns* the risk materializing in that harm.[214] An actor's ownership of a particular risk depends fundamentally on whether the actor's *conduct* conforms to the objective standard of care applicable under the circumstances; the actor's intention, attitude, capacities, or mental state need not enter into the calculus. Therefore, that a harmful outcome resulted from a risk an actor imposed in the course of a genuine, wholehearted, and good-faith attempt to assist an imperiled person does not, at least in any obvious way, bear on the actor's ownership of the risk—however much it may bear on the actor's attitude toward the agency and physical security of the imperiled person. If one believes, for example, that the motorist in *Swenson* owned the risk that materialized in injury to the snowmobiler—since a fatal traffic collision is a foreseeable risk of making a U-turn on a highway and double-checking the road is a low-cost precaution that foreseeably mitigates that risk—negligence liability would be appropriate from a corrective justice standpoint.[215] That the negligent actor in *Swenson* made the U-turn in the course of a good faith, voluntary, and gratuitous effort to deliver the snowmobiler from a pre-existing peril would not represent an obstacle to liability since it does not touch on the question of risk ownership.[216]

213. Perry, *Responsibility*, *supra* note 25, at 73.
214. RIPSTEIN, *supra* note 195, at 53.
215. *See supra* text accompanying notes 165–72.
216. Although, for the drafters of the Restatement, the gratuitous and voluntary nature of the care offered would, at least in certain circumstances, be a factor to be taken into account in determining whether the rescuer exercised reasonable care under the circumstances. *See supra* note 53 and accompanying text.

Thus, of the two types of corrective justice rationales for negligence liability discussed—those based on culpability and those based on responsibility—it seems that only responsibility-based accounts can support liability in the paradigm case of samarital negligence. But just because the responsibility-based account can explain why, from the standpoint of corrective justice, liability is the right result in samarital negligence cases does not mean that liability actually is the right result. In other words, why does my argument that culpability-based rationales fail to support liability in a case like *Swenson* not show that, from a corrective justice perspective, liability is, in fact, *not* appropriate in such a case?[217] Looking at such cases, do our intuitions tell us that, from the standpoint of justice, the rescuer should bear the loss—or at least some portion of it? To pose this question in a slightly different way, do two particular features of the paradigm voluntary rescue situation—the pre-existence of a risk to the imperiled person's well-being for which the rescuer has no responsibility and the voluntary, gratuitous nature of the rescuer's attempt to prevent that pre-existing risk from materializing—make the rescuer's failure to exercise reasonable care less of a compelling basis for shifting the loss (or some portion of it) onto the rescuer than it would be in an ordinary case of non-samarital negligence?

C. Samarital Negligence Through The Lens Of Risk Ownership

The answer to this question will vary according to the particular circumstances of the rescue and the nature of the rescuer's relationship to the risk(s) that materialized in injury to the imperiled person. This returns us to the question discussed in Part I: whether, for purposes of liability for samarital negligence, it should make a difference whether the rescuer's negligence placed the imperiled person in a worse position than she would have been in had the rescuer re-

217. Recall that in *Swenson*, the Good Samaritan immunity shielded the defendant from liability. The relevant question is not, then, whether liability was correctly imposed but whether, from a corrective justice standpoint, liability would have been appropriate assuming it were established that the rescuer's failure to exercise reasonable care resulted in injury.

frained from offering assistance.[218] I now return to the question of position-worsening, looking at it through the lens of risk ownership.

Before applying the concept of risk ownership to cases of samarital negligence, it will be helpful to distinguish two senses in which negligent conduct can involve risk. This distinction is not, to my knowledge, discussed by Ripstein, Perry, or any other corrective justice theorist, probably because it becomes relevant only in specific circumstances, most notably, where the actor's duty of care is based on a voluntary undertaking. The distinction can be stated roughly as follows: acting in the world very often creates foreseeable risk to others; acting in the world without exercising reasonable care creates further foreseeable risk. I label the first "action risk" and the second "breach risk." An example will help to illustrate the distinction. The act of driving my car at a normal driving speed down a busy street, no matter how carefully I might do so, creates a foreseeable risk of harm to pedestrians and other drivers. By putting my car in motion at normal driving speed in the vicinity of other people, I create (or participate in creating) the possibility of others being injured in a way that would not be possible if I stayed at home, namely, I create the possibility of others being injured through a collision with *my* car. Now, suppose that, while I drive down the busy street, I begin texting furiously on my iPhone. One might say that, in doing so, I have failed to exercise reasonable care with respect to the risk I have created by driving down the street. One might also observe that, through that failure, I have *increased* the risk presented by my driving down the busy street; indeed, I have transformed the risk of driving down the street while keeping my attention on the road into the greater risk of driving down the street while dividing my visual attention between the road and my iPhone. The crucial point is that, as the Restatement (Third) puts it, "[N]egligent conduct always increases risk beyond that which would exist without the negligent conduct."[219]

218. *See supra* Part I.

219. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 reporters' note, cmt. a (Proposed Final Draft No. 1, 2005).

Risk ownership in ordinary cases of negligence (i.e., those not involving voluntary undertakings) typically rests on the presence of both action risk and breach risk. In other words, underlying the sense that the defendant owns the injury-causing risk is the belief that the injury the plaintiff suffers lies foreseeably within both the risk that the defendant creates just by acting in the world in a particular way *and* the further risk the defendant creates by failing to moderate the risks created by his action through the exercise of reasonable care. This is just another way of saying that ordinary cases of negligence involve a defendant who creates a risk of harm and then fails to exercise reasonable care with respect to that risk.[220]

The Restatement (Third) takes the position that the fundamental duty associated with negligence law is to exercise reasonable care when creating a risk of harm.[221] The sense of "risk" at work here is action risk. According to the Restatement, the affirmative duties, of which the volunteer rescuer doctrine is one, concern the duties binding actors in situations where the plaintiff is injured as the result of a risk the actor did not create out of whole cloth.[222] Thus, a case like *Swenson*—where the risks materializing in injury to the imperiled person are created entirely by the rescuer—is not, according to the Restatement, properly analyzed under the volunteer rescuer doctrine.[223] In such cases, the pre-existing peril necessitating the rescuer's intervention did not proximately cause the plaintiff's injuries since those injuries resulted not from the risk posed by the pre-existing peril but from the action risk posed by the rescuer's intervention (e.g., making a U-turn on a highway). The key distinguishing mark of such cases is that the harm the imperiled person suffers is

220. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (2010) (stating the duty not to act negligently is a "duty to exercise reasonable care when the actor's conduct creates a risk of physical harm"). The Restatement specifically notes that the volunteer rescuer doctrine and other duties attaching upon voluntary undertakings are affirmative duties "imposed even though the actor did not create a risk of harm to another." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 3, scope note (2010).

221. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 (2010).

222. *Id.*

223. Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794, 795 (Minn. Ct. App. 2002).

within the foreseeable action risk presented by the rescuer's conduct, even when that risk is considered in isolation from the peril necessitating the rescuer's intervention. A serious collision is a foreseeable risk of making a U-turn on a highway regardless of whether the driver, in making the turn, is acting to alleviate a pre-existing peril facing her passenger.

Where an imperiled person is injured through an action and breach risk created entirely by her rescuer, the sense of the injurer's ownership of the harmful outcome would, in at least one sense, seem to be no weaker than in an ordinary case of non-samarital negligence. In *Swenson*, the risks materializing in injury to the imperiled person (making a U-turn on a highway without appropriately checking the road for oncoming traffic) were created entirely by her rescuer. In other words, the action and breach risks posed by the rescuer's conduct are exhaustive of the risks materializing in harm to the imperiled person. In this particular respect, a case like *Swenson*[224] is identical to an ordinary case of non-samarital negligence. One can say with near certainty not only that, absent the rescuer's failure to exercise due care, the imperiled person would not have suffered the particular injury that she suffered, but also that, had the rescuer chosen not to offer assistance at all, the imperiled person would not have suffered such injury. In such a case, where the rescuer owns the entirety of the harm-causing risk, the sense is strongest that the rescuer's failure to exercise reasonable care with regard to that risk, and her consequent responsibility for the harm caused, should give rise to a moral duty of repair. In light of the rescuer's total ownership of the harm-causing risk, it is appropriate to shift the resulting loss from the imperiled person to the rescuer. I think this makes sense intuitively. It would be difficult, I think, to deny the snowmobiler's parents' moral entitlement to a quantum of compensation from the rescuer (or her insurance company) to cover, for example, medical and funereal expenses incurred as a result of the accident.

224. *Id.*

But why, one might ask, does it not make a difference that the rescuer imposed this risk as part of a good faith, voluntary effort to assist another person in an emergency? The rescuer's conduct may have created an independent risk of harm, but the rescuer created that risk for the sole purpose of providing a much-needed benefit to the imperiled person, a benefit the rescuer was under no legal or professional duty to provide. Arguably, this makes a case like *Swenson* importantly different from an ordinary case of non-samarital negligence, notwithstanding the similarity discussed in the preceding paragraph.

The question, though, is whether this difference negates the imperiled person's moral entitlement to compensation. As I said a moment ago, as an intuitive matter, I do not believe it does. Few of us, I think, believe that a greater injustice would be done to the rescuer by asking her to shoulder at least some portion[225] of the snowmobiler's loss than would be done to the snowmobiler's family by denying them any compensation for that loss from the rescuer. If the choice is between saying to the snowmobiler's family, "The law denies you *any* compensation from the defendant who was responsible for creating the risks that materialized in fatal injury to your loved one because the defendant created those risks as part of a gratuitous attempt to rescue your loved one from a pre-existing peril," and saying to the rescuer, "The law requires you to pay *some* compensation to the snowmobiler's family because, though you imposed risks as part of a voluntary, good-faith rescue attempt, the risks materializing in the snowmobiler's death were ones created by your actions and breach of due care in conducting the rescue," most of us would, I imagine, believe justice lies with the latter. One might, of course, believe that the

225. Here, I suggest that it may be appropriate for the rescuer to bear only a portion of the imperiled person's loss rather than the entirety of it. In this Article, I ask whether corrective justice considerations provide a basis for imposing *any* degree of liability on the volunteer rescuer for her negligence. I leave for another day the question whether, given the beneficent, voluntary nature of the rescuer's intervention, corrective justice considerations provide a basis for making the rescuer's liability for the imperiled person's injury less than total. *Cf.* ALAN CALNAN, JUSTICE AND TORT LAW 104 (1997) (advocating partial liability in cases where, "[g]iven the gulf between the culpability of [the defendant's] act and the seriousness of [the plaintiff's] injury, it seems unfair to hold either party wholly accountable for the loss").

former response is appropriate on the basis of *instrumental* considerations, i.e., encouraging people to volunteer their aid in emergency situations. But, as discussed above, my analysis here is concerned with determining whether nonliability in such situations can be justified on non-instrumental, fairness grounds. My position is that it cannot because, from the standpoint of corrective justice, negligence liability is premised on risk ownership and, in a case like *Swenson*, the rescuer is properly regarded as the owner of the risk that materialized in harm, notwithstanding the beneficent, voluntary nature of her intervention.

Does the situation change when the rescuer has merely increased the already-existing risk rather than creating an independent risk of harm? Increasing the already-existing risk of harm means elevating the risk of harm "beyond that which existed in the absence of the actor's undertaking"[226] and often involves some significant change in the imperiled person's physical circumstances, such as moving the imperiled person to a different location.[227] Consider a case like *Jackson v. Mercy Health Center, Inc.*[228] In *Jackson*, Tim Jackson accompanied his pregnant wife into an operating room at the defendant hospital to observe her Caesarean section.[229] During the preparations for the surgery, Jackson became dizzy.[230] Hospital personnel took his arm, led him out of the operating room into the hallway, and seated

226. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 cmt. f (Proposed Final Draft No. 1, 2005). At least two courts have stated that, when the defendant rescuer is alleged to have worsened the plaintiff's position by increasing the risk of harm, the relevant "test is not whether the risk was increased over what it would have been if the defendant had not been negligent, but rather whether the risk was increased over what it would have been had the defendant not engaged in the undertaking at all." Sagan v. United States, 342 F.3d 493, 498 (6th Cir. 2003) (quoting Myers v. United States, 17 F.3d 890, 903 (6th Cir. 1994)) (internal quotation marks omitted); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 reporters' note, cmt. a (Proposed Final Draft No. 1, 2005) ("negligent conduct always increases risk beyond that which would exist without the negligent conduct").

227. *Cf.* Patentas v. United States, 687 F.2d 707, 717 (3d Cir. 1982) (noting that, for the purposes of section 324A of the Restatement (Second) of Torts, an increased risk of harm involves "some physical change to the environment or some other material alteration of circumstances").

228. Jackson v. Mercy Health Ctr., Inc., 864 P.2d 839 (Okla. 1993).

229. *Id.* at 841.

230. *Id.*

him on his wife's empty hospital bed.[231] The hospital personnel did not raise the bed's side rails or otherwise secure Jackson to the bed.[232] Jackson then fell and injured himself.[233] The court held the hospital immune from liability under Oklahoma's Good Samaritan immunity statute.[234] In such a case, does it seem less appropriate, from the standpoint of corrective justice, to shift the loss from the imperiled person to the rescuer? Note that the risk materializing in injury to the imperiled person is a *composite* of the pre-existing peril necessitating the rescuer's intervention and the action risk created by the rescuer's conduct in performing the rescue. The harm the imperiled person suffers is within this composite risk, though it is typically not within the rescuer's action risk considered on its own. Placing a healthy, stable person on a gurney might not pose a foreseeable risk of the person rolling off the gurney onto the floor but placing a *dizzy* person on a gurney certainly might. At the very least, placing a dizzy person on a gurney poses a *greater* foreseeable risk of a fall than placing a healthy person on a gurney. Does the fact that the imperiled person's injury does not lie within the rescuer's action risk, considered on its own, dilute the sense that it is appropriate to shift the imperiled person's loss, or a significant portion of it, to the rescuer?

I do not believe it does. In such cases, the action risk posed by the rescuer's non-breach-constituting conduct is part of the composite of risks that materializes in injury to the imperiled person. The breach risk is, of course, part of this composite too. Whatever foreseeable risk of a fall is created by placing a dizzy person on a gurney, an additional risk is created by failing to raise the gurney's side rails. But the key point for purposes of risk ownership is that the harm the imperiled person suffers, in addition to falling within the actor's breach risk, falls within the risk posed by certain actions of the rescuer *other*

231. *Id.*

232. *Id.* at 841, 845 n.24. An expert witness for the plaintiff testified that the failure to place the side rails up on the bed constituted a departure from the "*standards of hospitals in Oklahoma*." *Id.* at 845 n.24. For the purposes of deciding the case, the court assumed that the failure to secure Jackson to the bed "may have" constituted negligence. *Id.* at 842.

233. *Id.* at 841.

234. *Jackson*, 864 P.2d at 844–45.

than those constituting the breach. That is, the rescuer's breach consists not just in a failure to appropriately mitigate risks posed by the pre-existing peril; it also involves a failure to mitigate risks she herself created (or enhanced) in conducting the rescue.

For this reason, the rescuer can properly be regarded as the owner of the risk that materialized in harm to the imperiled person. In a case like *Jackson*, where a volunteer rescuer has significantly increased the already-existing risk of harm,[235] the rescuer may not have been responsible for creating the totality of the harm-causing risk, but she nevertheless played a crucial role in making that risk what it was. In other words, cases involving an increase in the risk of harm often involve not only a *quantitative* elevation in the chances of the pre-existing risk materializing in injury, but also a *qualitative* change in the precise nature of the risk.

In placing the dizzy hospital visitor on a gurney without raising the side rails, the hospital personnel in *Jackson* converted the risk of a dizzy person collapsing from a chair or a standing position into the more serious risk of such a person falling to the floor from an elevated platform.[236] In moving the sick patron to the infirmary and abandoning her, the store personnel in *Zelenko* converted the modest risk associated with a person's taking ill in a public place into the far more serious risk of a person's remaining ill for a prolonged period in an isolated place without any sort of medical attention or treatment.[237] In these cases, there is therefore sufficient ownership of the harm-causing risk to make the rescuer's failure to exercise due care with regard to that risk sufficient grounds on which to impose a duty of repair for at least some portion of the resulting loss.

The situation is somewhat different where the rescuer increases the risk of harm by deterring or precluding others from intervening rather than by effecting some material change in the imperiled person's physical circumstances.[238] For example, in *United States v. Gavagan*,

235. *Id.* at 841.
236. *Id.*
237. Zelenko v. Gimbel Bros., Inc., 287 N.Y.S. 134, 135 (N.Y. Sup. Ct. 1935).
238. According to the Third Restatement, inducing reliance by third parties is simply one way a

the Coast Guard undertook to rescue a disabled shrimping boat.[239] Though crewmembers of the disabled boat had close friends on other boats in the vicinity who were aware of the situation, in close communication with the Coast Guard, and prepared to assist, they stood by in "continued reliance upon the Coast Guard's celebrated skill."[240] Due to an internal communication error, Coast Guard vessels failed to reach the disabled boat before darkness fell and its crew was lost.[241] Applying the volunteer rescuer doctrine, the court held the Coast Guard liable for the deaths of the crewmembers.[242] In such a case, the rescuer has an important role in making the risk of harm what it is since her intervention transforms the risk from one potentially mitigable by multiple parties into one mitigable by only a single party. The risk that materializes in injury to the imperiled person therefore encompasses not only the rescuer's breach risk, but also her action risk, in the sense that the non-breach-constituting action of discouraging others from intervening heightens the risk of harm to the imperiled person. The transformation of the risk in such a case seems more quantitative than qualitative, i.e., the rescuer does not change the nature of the risk but makes the chances of the risk materializing greater by restricting the field of potential rescuers. Still, in a case like *Gavagan*,[243] depriving the imperiled person of the possibility of assistance from other sources decreases the imperiled person's chances of being brought to safety to such a degree as to make the situation similar to one in which the rescuer has increased the risk through a change in physical circumstances. It is appropriate, there-

volunteer rescuer can increase the risk of harm to the imperiled person. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 cmt. f (Proposed Final Draft No. 1, 2005) ("This requirement [that the actor have increased the risk] is often met because the plaintiff or another relied on the actor's performing the undertaking in a nonnegligent manner and declined to pursue an alternative means for protection. Although reliance is merely a specific manner of increasing the risk of harm to another, this Section retains reliance as a separate basis for imposing a duty because historically it has been treated separately.").

239. United States v. Gavagan, 280 F.2d 319, 323–24 (5th Cir. 1960).

240. *Id.* at 328–29.

241. *Id.* at 324–25.

242. *Id.* at 330.

243. *Id.* at 325.

fore, to regard the rescuer as the owner of the risk and to shift at least some portion of the imperiled person's loss onto her shoulders.

In this section, I have argued that, from the standpoint of corrective justice, liability is appropriate under the volunteer rescuer doctrine in cases like *Swenson*, *Jackson*, and *Gavagan*.[244] Though one might reasonably balk at the idea of shifting the *entirety* of the imperiled person's loss onto the volunteer rescuer's shoulders in such cases, most of us, I think, intuitively believe it would be fair to ask the rescuer to bear some *portion* of the loss. I have invoked the concept of risk ownership to explain this intuition. Where the risks materializing in injury to the imperiled person encompass both a risk posed by the manner in which the rescuer chose to conduct the rescue (action risk) and a risk posed by her failure to exercise reasonable care in conducting it (breach risk), it is appropriate to regard the risk as belonging to the actor rather than to the imperiled person. In such cases, the rescuer has not merely negligently failed to mitigate the pre-existing risk to the imperiled person; she has negligently failed to mitigate risks that she herself had a hand in creating. My core point is that the concept of risk ownership does a good job of accounting for our intuitions concerning how, from the standpoint of corrective justice, the imperiled person's loss should be allocated in such cases.

D. Non-Worsening Samarital Negligence Revisited

But what about cases in which the volunteer rescuer has not increased the risk of harm beyond that presented by the pre-existing peril, where the imperiled person has not, as a result of the intervention, been placed in a worse position than she would have been had the rescuer refrained from intervening? In cases where the rescuer has not worsened the imperiled person's position, one definitively *cannot* assert that, had the rescuer chosen not to offer assistance at all, the imperiled person would not have suffered the injury she suffered. In such cases, the injury the imperiled person suffers is *pre-*

244. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); *Gavagan*, 280 F.2d at 321; Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794, 800 (Minn. Ct. App. 2002).

cisely the injury she would have suffered had the rescuer not undertaken to assist at all. That, in fact, would have to be the very basis of liability. For this reason, there is undeniably an intuitive reluctance to shift the imperiled person's loss onto the rescuer. The intuition that it is unfair to impose negligence liability on the volunteer rescuer is probably strongest where it seems the rescuer is being held responsible for harm resulting from a risk that existed prior to her arrival on the scene and for whose creation she had no responsibility. In cases like *Swenson* and *Jackson*,[245] the rescuer has a significant degree of ownership of the risk that materializes in the imperiled person's injury since she either creates that risk in the course of the rescue or acts in a way that intensifies and, in some sense, reshapes the pre-existing risk. In such cases, the rescuer is being held morally responsible for the harmful effects of a risk she had a hand in creating. But in cases of non-worsening samarital negligence, the risk materializing in harm to the imperiled person is one the rescuer has not created, intensified, or reshaped; it is one she has merely failed to mitigate.

All of the Restatement's examples of non-worsening negligence involve acts so callous and inexplicable as to suggest bad faith or recklessness.[246] Prime examples include the stop-at-the-tavern,[247] the rescuer who pulls a drowning man halfway to safety and then abandons the effort for no apparent reason,[248] and the rescuer who saves the drowning victim only to leave him in the middle of a busy highway.[249] But consider the following variation on the stop-at-the-tavern hypothetical, one that I intend to represent an act of ordinary negligence committed in good faith.

245. *City of Joliet*, 715 F.2d at 1202; *Swenson*, 653 N.W.2d at 795–96.

246. *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. e, h (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS §§ 323 cmt. e, 324 cmt. g (1965).

247. *See supra* note 53 and accompanying text.

248. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. h (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 323 cmt. e (1965).

249. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. h (Proposed Final Draft No. 1, 2005); *see also* RESTATEMENT (SECOND) OF TORTS § 324 cmt. g (1965).

A driver sees a badly bleeding pedestrian lying on the side of a remote, rural highway in the middle of the night. The driver picks up the pedestrian and begins to drive him to the nearest hospital, some fifty miles away. Twenty miles into the trip, the driver passes a gas station but, caught up in the urgency of the situation, keeps his eyes on the road and fails to check his gas gauge. Had he done so, he would have noticed that his gas tank was nearly empty. Ten miles after passing the gas station, the driver runs out of gas. As a consequence, it is several hours before the driver manages to arrive with the pedestrian at the hospital, by which time the pedestrian has lost so much blood that he cannot be saved.

Assume that, had the driver stopped for gas and then driven straight to the hospital, the pedestrian could have been saved. Assume further that the driver's failure to stop for gas constituted a failure to use reasonable care under the circumstances. Should the driver nevertheless be permitted to avoid liability upon a showing that, prior to noon the following day, no other driver or pedestrian passed the point at which the injured pedestrian was lying and that therefore, had the driver not stopped, the pedestrian would have bled to death on the side of the highway?

I suspect that different people may respond differently to this question. But I think that very fact shows that the question of whether non-position-worsening negligence should be actionable under the volunteer rescuer doctrine is a more complicated one than the Restatement suggests. The Restatement stacks the deck against the position-worsening requirement by offering examples of such severe misconduct that one hesitates to excuse it on any basis.[250] As I hope the empty-gas-tank example shows, the picture gets somewhat fuzzier when dealing with a case of ordinary negligence committed in good faith by a lay rescuer.[251]

250. *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. e, h (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS §§ 323 cmt. e, 324 cmt. g (1965).

251. I doubt that a factual causation analysis can explain the differing intuitions I suspect many people would have regarding the propriety of liability in the stop-at-the-tavern and empty-gas-tank examples. If one believes liability would be appropriate in the stop-at-the-tavern, one presumably believes

The question is whether the rescuer can, in any meaningful sense, be said to own the harm-causing risk in cases of this type where the rescuer does not, as a result of her intervention, place the imperiled person in any worse position than she would have been in had the rescuer chosen not to intervene. In other words, where the imperiled person's injuries lie only within the rescuer's breach risk, and not within her action risk, under what circumstances, if any, can the rescuer be said to own the risk that materialized in harm? In the stop-at-the-tavern and empty-gas-tank examples, the only actions of the rescuer that pose a risk within which the imperiled person's injuries happened to fall are those that constitute breach of the applicable standard of care. To be sure, the rescuer's non-breaching actions—placing the bleeding pedestrian in her car, driving the pedestrian to the hospital—created risks of harm, but *those* risks did not materialize in injury to the pedestrian. The only rescuer-derived risk that could be said to have resulted in injury to the pedestrian was that posed by the rescuer's negligent conduct, i.e., stopping at the tavern or failing to stop for gas.

Breach risk is typically second-order risk; it is risk that consists in the actor's failure to mitigate some other risk. In ordinary negligence cases, the risk the actor, through her breach, fails to mitigate is her own action risk, i.e., a risk the actor has herself created by acting in the world. Keeping an attentive eye on the road is a way of mitigating the risk I create to others by driving down a busy street. What makes

that the rescuer's negligent conduct factually caused the plaintiff's injury, notwithstanding that had the rescuer chosen not to intervene, the pedestrian would have suffered precisely the same injury. If one believes that, it seems to me one is committed to a similar view about the empty-gas-tank example. The relevant counterfactual inquiry in determining factual causation is "what would have occurred if the actor had not engaged in the tortious conduct." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. e (2010). In both the stop-at-the tavern and empty-gas-tank examples, the fact that, absent the rescuer's intervention, the victim would have suffered the same ultimate fate (death) does not negate factual causation because one can still say with near certainty that, but for the rescuer's tortious conduct (i.e. his recklessness in stopping at the tavern or negligence in failing to check his gas gauge as he passed the gas station), the victim would have survived. Factual causation is present because, had the rescuer not acted tortiously, the harm would have been avoided. Of course, the very concept of tortious action presupposes the existence of a duty of care. The fact that, had the defendant not acted at all, the plaintiff would have suffered the same harm may still be relevant to liability, but it seems to me it is relevant to the existence of a duty, not to causation.

samarital negligence cases of the non-worsening type somewhat unusual is that the actor's breach consists in a failure to mitigate a risk for whose creation she has no responsibility. The rescuer's negligence consists solely in failing to appropriately mitigate the pre-existing, foreign risk necessitating her intervention, not in failing to mitigate her own action risk.

It is important to keep in mind that, as a general matter, the law does not hesitate to impose liability for negligence that results in a failure to mitigate a pre-existing, foreign risk rather than a failure to protect against a risk the defendant herself had a hand in creating. For example, the law imposes negligence liability on the physician who negligently fails to interrupt a pre-existing condition from taking its harmful course[252] and on the rescuer with a pre-existing duty of care to the imperiled person for negligently failing to alleviate the peril.[253] But the case of non-worsening samarital negligence seems importantly different because of the voluntary, altruistic nature of the rescuer's intervention.

When a volunteer rescuer's intervention creates or increases the risk that ends up harming the imperiled person, the rescuer could, by hypothesis, have prevented the harm both by using due care and by choosing not to intervene. This is just another way of saying that the harm befalling the imperiled person lies within both the rescuer's action risk (considered on its own or in conjunction with the risk posed by the pre-existing peril) and her breach risk. In such a case, the ultimate result of the intervention was to cause a harm that quite likely could have been avoided had the rescuer gone on his cheerful way. There is a retrospective sense, then, in which the imperiled person's complaint with the rescuer's conduct *can legitimately begin*

252. *See* 1 Med. Malpractice, *supra* note 43, § 4.02 nn.10, 12 & 13 (Dec. 2007) (citing examples of cases in which courts imposed malpractice liability for negligent omissions such as failure to hospitalize, failure to inform patient of diagnosis or need for treatment, failure to prescribe necessary medication, and failure to correctly diagnose patient's condition).

253. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. f, illus. 1, 3, cmt. j, illus. 4 (Proposed Final Draft No. 1, 2005) (providing examples of situations in which a rescuer with a special relationship to the imperiled person would be subject to negligence liability for failing to ameliorate, as opposed to worsening, the imperiled person's condition).

with the undertaking itself. By this I mean that, in retrospect, the imperiled person (or his survivors) in cases like *Swenson*, *Jackson*, and *Gavagan*[254] might reasonably say to the rescuer: all things considered, it would have been better if you had never gotten involved. By contrast, in cases where the rescuer merely fails, albeit negligently, to ameliorate the imperiled person's condition, the undertaking itself is not, retrospectively, the point at which the victim can take issue with the rescuer's conduct.

The failure to use due care in the course of the rescue, not the voluntary undertaking itself, represents the sole basis on which the imperiled person can reasonably take issue with the rescuer's conduct. And, crucially, the imperiled person's claim against the rescuer for negligently failing to ameliorate her condition is premised, causally and logically, on the rescuer's beneficent act of undertaking to offer aid. Had there been no such act, there would have been no occasion to sue the rescuer. Though the same might be said in cases where the rescuer's intervention leaves the imperiled person worse off, the imperiled person can respond that, in retrospect, the rescuer's wrongdoing began with that same act, i.e., the action risk the rescuer created in performing the rescue, as well as her breach risk, materialized in the imperiled person's injury.

There is therefore a sense, in cases of non-worsening samarital negligence, in which the imperiled person attempts to *use the rescuer's own beneficent act against her*. This, in my view, is the source not only of the strong intuitive repulsion against penalizing the Samaritan in such cases but also of a legitimate moral reason for letting the imperiled person's loss lie where it has fallen rather than shifting the loss (or any portion of it) onto the rescuer. If the law frowns on the notion of a person profiting under it as a result of their own wrong,[255] it should, by the same token, abhor the notion of a person suffering under the law as a result of their own beneficence In cases

254. *See* Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983); United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960); Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. Ct. App. 2002).

255. This maxim has been described as lying "deep down among the foundations of English jurisprudence." Wellner v. Eckstein, 117 N.W. 830, 838 (Minn. 1908) (Elliott, J., dissenting).

where a lay rescuer has committed an act of ordinary negligence that does not increase the risk of harm beyond that present when the rescuer intervened, this principle tells us that the rescuer's ownership of the breach risk does not provide a sufficient basis in corrective justice for shifting the loss onto the rescuer. There is something perverse about premising the actor's liability for a harmful outcome on her act of voluntarily undertaking to offer assistance to another in peril where the altruistic nature of the undertaking is untainted by any retrospective sense that the undertaking itself created or increased the risk that materialized in harm.

Where the gravamen of a samarital negligence action is the volunteer rescuer's responsibility for the same harm that would have resulted absent the rescuer's intervention, it seems to me that, in addition to the action-centered considerations native to responsibility-based views of negligence liability, agent-centered considerations—such as the agent's deliberative attitude toward the security and well-being of other agents—may become relevant to the question of risk ownership in a way they are not elsewhere. This does not represent a concession to an agent-centered, culpability-based account of negligence liability, for such accounts posit that negligence liability is *necessarily* founded on an attitudinal defect in the agent. The case of samarital negligence represents a challenge to those views because it shows that negligence liability may be appropriate even where the injurer's general course of conduct indicates an appropriately impartial and respectful attitude toward other agents. That the character of the agent's deliberative attitude toward other agents *need* not be relevant to negligence liability, however, does not mean that, in appropriate circumstances, it *cannot* be. My point is merely that in cases like the empty-gas-tank example—where a lay rescuer, without increasing the risk of harm or otherwise worsening the imperiled person's position, negligently fails to prevent the pre-existing risk from materializing—the altruistic nature of the rescuer's undertaking can render the rescuer's failure to exercise reasonable care an insufficient basis for shifting the imperiled person's loss onto her shoulders. Put slightly differently, in such circumstances, the rescuer's breach risk is

not a sufficient basis for attributing ownership of the risk that materialized in harm.

In certain circumstances, however, the rescuer should properly be regarded as the owner of the risk that materialized in harm notwithstanding the fact that the only risk she posed was that created by her breach. Once a volunteer rescuer takes charge of a helpless and imperiled person, she exerts a uniquely high degree of control over that person's fate and well-being. It is not an exaggeration to say that, in such cases, the rescuer, upon taking charge, often holds the imperiled person's life in his or her hands. And, importantly, this holds true whether or not the rescuer's act of taking charge discourages intervention by others. Moreover, the imperiled person, as a result of the often extreme nature of the peril he is facing and his helplessness to extricate himself from it, typically has no choice but to rely on the assistance of the particular person who has volunteered. The imperiled person may even be "unconscious or otherwise incapable of deciding whether to accept or to reject the assistance."[256] I would suggest that it is in light of these circumstances—the extraordinary degree of control the rescuer exerts over the imperiled person's well-being upon taking charge and the rescuer's essentially unilateral decision over whether such control gets placed in his own hands—that the Restatement maintains that the rescuer should be held accountable for the consequences of any deviation from a reasonable standard of conduct while the imperiled person is within his charge, even a deviation that leaves the imperiled person no worse off than he would have been had the rescuer chosen not to intervene.[257] Although I think the Restatement goes too far in suggesting that liability may be appropriate in cases like the empty-gas-tank example, I do believe that, in two types of cases, the radical susceptibility of the imperiled person to the rescuer's carelessness may support liability even where the imperiled person's position has not been worsened as a result.

256. RESTATEMENT (SECOND) OF TORTS § 323 cmt. b (1965).

257. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. e (Proposed Final Draft No. 1, 2005).

The first type of case is where the rescuer's misconduct involves bad faith or goes beyond ordinary negligence. In the stop-at-the-tavern example, once the rescuer has taken charge by placing the pedestrian in his car, the pedestrian becomes *radically* susceptible to being harmed or benefitted by the rescuer's conduct. Given the extreme nature of the peril and the pedestrian's helplessness in the face of it, whether the pedestrian lives or dies depends directly on what the rescuer does after taking charge. In choosing to stop at a tavern while the badly injured pedestrian lies helpless and bleeding in his vehicle, the rescuer has, in an extreme way, abused the extraordinary power he has chosen to assume over the pedestrian's welfare. The Restatement's position, which I think is defensible, is that such egregious abuse should be actionable[258] notwithstanding the fact that the pedestrian would have been no better off had the rescuer chosen not to intervene. In such a case, using the rescuer's beneficent act of undertaking the rescue as a premise for negligence liability is not troubling from a moral point of view because the rescuer's subsequent conduct, in a clear sense, *negates* the beneficence of the undertaking. The rescuer's breach is, in other words, so extreme that, even though her only contribution to the risk materializing in harm was the breach itself, it still seems appropriate to regard her as the owner of that risk.

The second type of case is where the volunteer rescuer is a physician or other professional bound by an ethical duty to provide voluntary assistance in an emergency. For example, in *Matts v. Homsi*, Ronald Matts came to a hospital emergency room with abdominal bleeding after being involved in a car accident.[259] Realizing that Matts needed surgery, the staff physician at the emergency room called R.K. Homsi, another staff physician at the hospital, who was not on call at the time and who "had no direct responsibility to respond to the request for assistance if he did not want to."[260] When Homsi arrived at the emergency room, he found Matts bleeding pro-

258. *Id.* at cmt. e, h; RESTATEMENT (SECOND) OF TORTS §§ 323 cmt. e, 324 cmt. g (1965).
259. Matts v. Homsi, 308 N.W.2d 284, 285 (Mich. Ct. App. 1981) (per curiam).
260. *Id.*

fusely and in severe shock.[261] Homsi performed several hours of surgery and Matts's condition started to improve.[262] The next day, however, Matts's condition deteriorated.[263] His kidneys failed and his lungs became congested.[264] A second surgery revealed several unrepaired tears to his mesentery tissues and several unrepaired holes in his small intestine.[265] Soon after the second surgery, Matts died.[266] The court held Homsi immune from liability under Michigan's Good Samaritan immunity statute.[267] Notice that the doctor's omission during the surgery—failing to repair the abdominal tissues requiring repair—could not have increased the risk of harm *beyond* that posed by the patient's injuries from the car accident, i.e., beyond the risk that would have been present had the doctor chosen not to get involved. The doctor's failure to make the necessary repairs was a failure to *ameliorate* the injuries for which the patient sought treatment and not, in any sense, an *aggravation* of those injuries. Assume further that it could be shown that the doctor's intervention did not preclude or discourage any other available doctors from offering assistance (assume he was the only surgeon capable of performing the necessary operation who, at the time the patient was brought into the emergency room, was within a reasonable distance of the hospital).[268] Would it nevertheless seem fair to excuse the doctor from liability on the basis that he did not place the patient in a worse condition than he would have been in had the doctor chosen not to intervene (in which case the patient would presumably have died)? To put this question another way: in light of the fact that the doctor's negligent act 1) was committed in the course of a gratuitous attempt to assist a helpless and gravely imperiled person and 2) did not, in at least one definite sense, make matters worse, is it unjust that he be held liable?

261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Matts*, 308 N.W.2d at 286.
266. *Id.*
267. *Id.* at 287.
268. This assumption is necessary to make *Matts* a genuine example of non-worsening samarital negligence.

I believe it is just to hold the doctor liable under these circumstances. Given the extraordinary degree of control the doctor has, upon taking charge, willingly chosen to assume over the patient's well-being and the patient's consequently radical susceptibility to being harmed (or benefitted) by the doctor's actions, it seems fair to charge the doctor with liability for any harm that results from a failure to use due care, even if the resulting harm is precisely the same as that which would have resulted had the doctor failed to intervene. Doctors, as part of their professional duties, routinely assume such an extraordinary degree of control over the well-being of others and are specially trained to manage such control with care. Moreover, the very premise of a doctor's undertaking is to ameliorate (or disrupt the natural worsening of) the condition for which the patient has sought treatment. Indeed, in ordinary (i.e., non-samarital) medical malpractice cases, a physician can be held liable for negligently failing to ameliorate the patient's pre-existing condition.[269] Finally, and most importantly, although they labor under no legal duty to volunteer their services in an emergency, doctors are bound by an *ethical* duty to do so.[270] In such a case, the beneficent nature of the physician's undertaking to assist is somewhat diluted, since, in light of the ethical duty to assist in emergencies, her intervention cannot be regarded as truly voluntary. The doctor in *Matts* may not have been under a legal duty to offer his services to the accident victim but, in light of his ethical duty to do so, a refusal might well have tarnished his profes-

269. *See* 1 Med. Malpractice, *supra* note 43, § 4.02 nn.10, 12 & 13 (Dec. 2007) (citing examples of cases in which courts imposed malpractice liability for negligent omissions such as failure to hospitalize, failure to inform patient of diagnosis or need for treatment, failure to prescribe necessary medication, and failure to correctly diagnose patient's condition).

270. *See Principles of Medical Ethics*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page? (last visited Oct. 25, 2012) ("A physician shall, in the provision of appropriate patient care, *except in emergencies*, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care.") (emphasis added); *Opinion 8.11—Neglect of Patient*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion811.page? (last visited Oct. 25, 2012) ("Physicians are free to choose whom they will serve. The physician should, however, respond to the best of his or her ability in cases of emergency where first aid treatment is essential.").

sional reputation.[271] Contrast this with the situation of the lay rescuers in the stop-at-the-tavern and empty-gas-tank examples who could have driven past the bleeding pedestrian without facing any legal or professional repercussions. In light of these considerations, it would seem odd, from the standpoint of corrective justice, to relieve a doctor of the obligation to use reasonable care in attempting to do the very thing she is trained to do, and which she is ethically required to do, simply because she is doing it as a volunteer. Leaving aside these two types of cases, though, I have provided an important qualification to my general conclusion that there is no non-instrumental, fairness-based rationale for the Good Samaritan immunity. Where a lay rescuer, acting in good faith, has, without worsening the imperiled person's position, negligently failed to prevent the pre-existing peril from taking its harmful course, such failure does not, from a fairness standpoint, warrant shifting any portion of the resulting loss onto the rescuer.

CONCLUSION

In this Article, I have argued that liability for samarital negligence is not, in principle, unfair. I have attempted to prove this contention by showing that, except in narrow circumstances, a volunteer rescuer's failure to exercise reasonable care does give rise to a moral obligation to repair the injury, regardless of the fact that the failure may not have been morally culpable. If this is true, it follows that the Good Samaritan immunity cannot, in its present form, be justified on fairness grounds. Except in the relatively small group of cases in which it shields a lay rescuer from liability for non-worsening negligence,[272] the immunity would have to rest on the forward-looking, instrumental rationale that courts have typically offered. Thus, if the Good Samaritan immunity is a law worth having, it must be because of its efficacy in incentivizing voluntary rescues.

271. Matts v. Homsi, 308 N.W.2d 284, 286 (Mich. Ct. App. 1981) (per curiam).
272. *See* discussion *supra* Part II.C.

My deeper ambition is to suggest that the case of the clumsy Samaritan reveals something important about the moral underpinnings of negligence liability generally. Because, in a wide range of circumstances, it seems intuitively just to require the clumsy Samaritan to repair an injury caused by his negligence, a corrective justice rationale for negligence liability should be able to explain this intuition. I argue that only a corrective justice rationale centered on the actor's moral responsibility for negligently harming another person—rather than on the actor's moral culpability in connection with the harming—can do so. If the moral basis of negligence liability is the injurer's selfishness or disrespect, it is hard to see why a volunteer rescuer who strives wholeheartedly and in good faith to bring an imperiled person to safety should ever be held liable for her clumsiness or ineptitude in performing the rescue. In other words, if culpability-based theories are correct, samarital negligence liability should only be appropriate in cases like *Zelenko* or the stop-at-the-tavern, where the rescuer's conduct passes beyond a good-faith mistake or miscalculation into the realm of bad faith, gross negligence, or recklessness.

But our intuitions suggest otherwise. I posit that most of us believe that, from a fairness standpoint, some degree of liability is warranted—even in cases like *Swenson*, *Jackson*, and *Gavagan*, where the rescuer's negligence consists of an honest mistake made in the course of a good-faith attempt to bring the imperiled person to safety. If that is true, culpability-based versions of the corrective justice rationale for negligence liability are deficient in not being able to account for our intuitions in this particular area of the law. From the standpoint of corrective justice, the rationale for imposing liability on the negligent injurer must rest not on a sense that the injurer did something morally wrong in causing harm to another person but rather on a sense that the injurer, simply by virtue of the dangerousness of her conduct, owns the harm and has a moral obligation to repair it.