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A Duty to Rescue and Its Cost[4]

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Abstract

The purpose of the present paper is to analyse the problem of cost generated by the performance of a duty to rescue. The authors consider three distinct views of this problem by confronting a scenario in which one party decides to rescue another, where providing such assistance seems to involve an infringement upon the property rights of the third party. For example, *A* rescues drowning *B* but in the process of doing so *A* apparently trespasses upon *C*'s land. The question that the authors pose is: Assuming that there is a duty to rescue, who should be charged with the cost of what seems to be an infringement upon the third party's property rights? The paper analyses the following possibilities: the cost should be borne by (a) the victim of the emergency, (b) the rescuer, (c) the third party whose rights seem to have been encroached upon. Even though the authors begin with a pronouncedly libertarian assumption about the third party's absolute property rights, in the course of the discussion they come to the conclusion that it is exactly this assumption that should be further probed and ultimately relaxed in order to reach the most plausible solution to the present dilemma.

Introduction

In the present paper we take up the question of who should cover the cost of discharging a duty to rescue. More specifically, if discharging a duty to rescue results in what seems to be an infringement upon the third party's private property rights, who should compensate the third party for the encroachment upon his rights. Should it be the rescuer, the rescued or the third party himself? For example, *A* rescues drowning *B* but in the process of doing so *A* apparently trespasses upon *C*'s land. Who should cover the cost—say, compensate for the apparent property rights infringement—of the rescue? As it seems, the answer to this vexing question, far from being obvious, depends not only on our straightforward moral intuitions or considered moral judgements but also on our beliefs about the nature of rights and remedies.

After some preliminary analysis, we pinpoint three valid solutions to the question of who should cover the cost of discharging a duty to rescue. First, we identify and discuss a solution which can be associated with rights absolutism or some branches of radical libertarianism and which in turn posits that the property rights of the third party should take precedence over the duty to rescue. Second, we consider a solution which takes the opposite stance, that is, gives precedence to the duty to rescue over property rights of the third

party. However, despite prioritizing the duty to rescue, the solution in question does not submit that the said duty overrides or extinguishes the property rights. Rather, the duty to rescue only overtops them. This solution is often associated with the seminal ruling in *Vincent v. Lake Erie Transportation Co.* as well as with a family of views prevalent amongst some prominent contemporary Anglophone philosophers (for example, Bernard Williams or Judith Jarvis Thomson). While they are opposites of each other on one plane, these two solutions are nevertheless in agreement (at least by assumption made *arguendo* in the present paper) insofar as they both acknowledge that there is a real conflict of rights between the third party's property rights and the emergency victim's right to be rescued. Thus, in contradistinction to these two solutions stands the third one, which denies that there is any conflict of rights and which in turn subscribes to the view that the duty to rescue overrides the property rights of the third party.

Upon distinguishing and characterizing these three solutions, we embark on making an argument that it is the second one that is superior to the others. In order to substantiate our point, we resort to the whole gamut of reasons, from moral intuitions, through inference to the best explanation, to the conceptual features of rights, and submit that where the first solution runs against our considered judgements, the third one does not take property rights seriously enough to be considered victorious. Thus, the verdict that we reach as a result of our investigations ultimately points to the rescuer as the best candidate for the bearer of the remedial duty to compensate the third party for the property rights infringement. At the same time, our inquiry prompts us to believe that despite the verdict just mentioned, the beneficiary of the rescue also incurs some residual duties to the rescuer as well as to the third party, a fact that additionally problematizes the picture that emerges from our disquisition.

Our paper is organized in the following way. Section 2 introduces the problem and makes necessary assumptions about the duty to rescue for the subsequent discussion to follow. Section 3 probes the problematic contours of the third party's property rights, arguing that the assumption about the existence of those rights is underdetermined and requires more careful treatment and specification. Thus, looking closer at the exact features of those rights allows us to distinguish three main solutions to the problem of who should cover the cost of discharging the duty to rescue. Section 4 plays these three solutions against one another and makes a case

for the superiority of the one which recognizes the precedence of the duty to rescue over the third party's property rights, without yet interpreting these rights as being overridden or extinguished by the said duty. Section 5 concludes.

Setting the Stage: The Contours of a Duty to Rescue and Its Cost

In his paper aimed at changing our attitudes towards helping those in need, Peter Singer (1972, p. 231) presented the famous example of a drowning child, which can be paraphrased as follows:

> *Drowning Child*
>
> A man is strolling in a park on a hot day. At one point he notices that a child is drowning in a shallow pond. He can easily run up and pull the child out of the pond, saving his life.

The first question is whether the passer-by has a moral duty to save the drowning child. The second question is whether this moral obligation can somehow be enforced, for example, in the form of direct coercion or punishment that would fall on a person who failed to engage in such a rescue. Note that this thought experiment is designed in such a way that the duty to rescue imposes virtually no cost on the passer-by.[5]

Most of us seem to have a very strong moral intuition that the passer-by has a moral duty to save the child, and that this duty could somehow be enforced by law (it is worth noting, however, that even if the latter intuition is strong, it is inevitably weaker than the former: the intuition indicating that we have a right to use force to compel someone to do x is almost always weaker than the intuition that we have a duty to do x). This intuition can be reinforced by various forms of ethical reflection. For example, a utilitarian would point out that the passer-by should save the child because the cost of assistance would be close to zero, and the loss of social utility prevented by saving the child would be enormous. Such reasoning stood behind Singer's original example. Singer (1972, p. 231) argued that

[5] This is slightly different from Singer's original example, where the man "muddies his clothes," which constitutes a small cost.

"if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it." A contractualist would hold that the passer-by should save the child, since individuals in the original position (or in any other type of contractual situation) would certainly agree to such an obligation (or at least to an institutional framework that entails such an obligation somewhere down the line).[6] In fact, it is hard to think of any arguments that could be put forth in such an original position against the duty to rescue. Moreover, both the utilitarian and the contractualist could also insist that such a duty to rescue should be enforced by law in one way or another.

Now absolutist libertarians would disagree with the claim that there is a duty to rescue in such a situation (Rothbard, 1974, p. 106). The foundation of libertarianism is the belief that each person owns his or her body and may use it as he or she wishes (as long as he or she does not infringe on the symmetrical rights of other individuals). This claim is known as self-ownership.[7] Forcing someone to help another means using him merely as a tool to achieve goals which are not his own, which involves taking away his dignity. An individual who is treated as a tool can no longer shape or author his own life, but is used to realize someone else's goals or values. Libertarians sometimes compare a person forced to help another to a slave: they argue that the coerced person becomes a temporary slave of the coercer (Nozick, 1974, p. 199).

However, the position of absolutist libertarians is rejected by most philosophers, including non-absolutist libertarians. The latter, while disagreeing with the claim that people have a general duty to rescue, are nonetheless willing to concede that an individual has such a duty in a specific type of boundary situations ("life-boat situations") if it involves a negligibly small cost for him or her to save the needy person from great suffering (Huemer, 2013, p. 83). You do not lose your dignity if you are forced to waste five minutes of your life to help a drowning child. Note that most people

[6] Compare Rawls, 1999, pp. 98–99.

[7] A very good characterization of self-ownership has been offered by Gerald Alan Cohen (1995, p. 67). He maintains that "the thesis of self-ownership ... says that each person is the morally rightful owner of his own person and powers, and, consequently, that each is free (morally speaking) to use those powers as he wishes, provided that he does not deploy them aggressively against others."

would gladly help the child even in the absence of a law requiring them to act in such a manner, which means that such a law would have a bearing only on people unwilling to help, and so one can speculate that such people are acting in bad faith, acting on their own egoism, while not being interested in the question of their own dignity.

Hence, it seems that there is a general consensus—supported by both our moral intuitions and theoretical considerations—that we have a duty (and that it can be enforced by law, although the exact shape of this enforcement is another matter) to rescue a person in a life-threatening situation. However, this consensus can be further probed by modifying Singer's thought experiment so as to introduce an element of a third party's rights:

> *Flower Bed*
>
> On a hot day, a man is drowning in a shallow pond. A passer-by strolling through the park can easily run up and rescue the man. However, there is someone's flower bed between him and the pond, which the rescuer, if he tries to save the drowning man, will trample.

Flower Bed is different from *Drowning Child* in two respects. First, while in the latter case the cost on the part of the rescuer was negligibly small, in the former case the cost is not completely insignificant. To the negligibly small cost in the form of lost time and slightly wet shoes, one should add the cost of damaging the flower bed. If this cost were to be borne by the rescuer, this could theoretically be a rationale for denying that the rescuer has a duty to rescue.[8] However, we will not address this problem here. We assume that although in our case this cost is not completely negligible, it is nevertheless small enough for a duty to rescue to be still in place.

Second, it is important to note that there is a crucial moral aspect to the cost of rescue in *Flower Bed*. After all, we assume that the flower bed is owned by someone. Thus, the question of who should cover the cost of rescue or the cost of trampling the flower bed, if you will, boils down to the question of what sort of moral protection is afforded by property rights

[8] See, for example, Lord Macauley's assertion that "[i]t will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die" (Macauley, 1880, p. 109).

to the flower bed owner. Since there is no right without a remedy,[9] the question of who should cover the cost of rescue seems to ultimately reduce to the question of who should bear the cost of rectifying—probably in the form of compensatory damages—the infringement upon the flower bed owner's property rights. Assuming for the sake of discussion that there is a duty to rescue, it is to this last question that we will now turn.

Probing the Question: The Problematic Nature of the Flower Bed Owner's Rights

Having set the stage for our discussion, the problem situation that we now seem to be facing is the following. The passer-by has a duty to rescue the drowning man (we take it for granted). Yet doing so would apparently infringe upon the flower bed owner's property rights due to trespassing on his land and damaging his flower bed. Thus, as it seems, the question is who should pay compensatory damages to the flower bed owner. Should it be the rescuer or perhaps the drowning man, the only beneficiary of the rescue? However, a moment of deeper reflection suffices to realize that our question is either underspecified or it takes too much for granted or both.

First of all, even if we assume, as we did, that the flower bed owner has private property rights in the flower bed, it is not yet clear what this alleged fact consists in, for it might come to him having a right that is either more stringent than the duty to rescue or less stringent than the said duty. In other words, when combined with the assumption that there is a duty to rescue, the fact of the flower bed owner having property rights to the flower bed can reduce to the conflict of duties[10] having two different distributions of stringency. First, it may be the passer-by's duty—correlative with the flower bed owner's property rights—not to trample the flower bed that is more stringent than the passer-by's duty to rescue (correlative with the drowning man's right to be rescued).[11] Alternatively, it might be the latter duty

[9] On the remedy principle see Kramer, 2005, pp. 312–326.

[10] For an excellent elaboration on conflicting and contrary duties see, for example, Kramer, 2009, pp. 203–206.

[11] On the concept of rights-duties correlativity see Hohfeld, 1913, Kramer, 2002. For a contrasting view *pace* Hohfeld, see, following Kramer, 2002: Raz, 1986, pp. 166, 171, MacCormick, 1982, pp. 154, 161–162.

(that is, to rescue) that is more stringent than the former (that is, not to trample the flower bed), with both duties still being in force, as assumed.[12]

Let us now elaborate on what would follow if the duty against trampling the flower bed had higher stringency than the duty to rescue. We know otherwise that some absolutist libertarians would be ready to embrace the view that private property rights, and thus duties correlative thereto, are always stronger than any other countervailing moral considerations, that is, that the interloper may be not only duly punished for infringing on another's property rights but he may also be prevented from doing so by violent means.[13] For example, considering an age-old dilemma of a father stealing a loaf of bread to feed his starving children, Walter Block (2021, p. 14) opts for the following solution: "Should a man be punished for stealing a loaf of bread to feed his starving child? My heart would go out to him, as a fellow parent, but insofar as libertarianism is concerned, from a deontological point of view, this parent committed a crime and should be duly punished for it." By the same token, even though on a more general note, writes Murray Rothbard (1998, p. 88):

> If every man has the absolute right to his justly-held property, it then follows that he has the right to *keep* that property—to defend it by violence against violent invasion … To say that someone has the absolute right to a certain property but lacks the right to defend it against attack or invasion is also to say that he does not have total right to that property.

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[12] Compare Kramer, 2014, pp. 2–11.

[13] It is important to remember though that libertarians in question would, with all probability, deny that there is any duty to rescue to begin with; or, what comes to a similar thing, they would argue that any existing duty to rescue is only moral (in contradistinction to juridical, that is, backed up with physical force) or that it is extinguished or overridden in a conflict situation. However, as we argue later in this paper as well as some of us point out in other papers (Dominiak, 2017, pp. 114–128, Dominiak, 2019, pp. 34–51, Dominiak, 2021, pp. 27–35, Dominiak & Wysocki, 2023, pp. 5–26), this position is untenable. Besides, we assumed the duty to rescue for the sake of discussion in order to elucidate some important aspects of the structure of morality and since this is after all our own assumption, we have a right to stick to it regardless. So, why do we even reference any libertarians at all in this place? Well, we believe that they are paragons of the view that property rights are strongly absolute and trump, one way or the other, all other moral considerations and thus are very clear, even if exaggerated, illustrations of the solution discussed herein.

To the same effect argues Stephan Kinsella (1996a, p. 317):

> What would it mean to have a right? Whatever else rights might be, certainly it is the case that rights are legitimately enforceable; that is, one who is physically able to enforce his right may not be prevented from doing so. In short, having a right allows one to legitimately punish the violator of the right, or to legitimately use force to prevent another from violating the right.

To be sure, not only libertarians would embrace this seemingly cruel solution about the father and starving children. For example, Lord Matthew Hale (Hale 1736, p. 54) believed—taking into consideration the precedent nature of English common law, presumably not only as far as *de lege lata* postulates were concerned[14]—that "here in *England*…, if a person, being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi* steal another man's goods, it is felony, and a crime by the laws of *England* punishable with death."[15]

Thus, once the duty not to trample the garden is taken to be more stringent than the duty to rescue, it follows that the passer-by ought to forbear from trampling the garden even if he would thereby breach his less stringent duty to rescue. Moreover, were the passer-by to embark on rescuing the drowning person, the flower bed owner may then legitimately and even violently prevent him from doing so. Finally, were the passer-by to choose to discharge the less stringent duty (to rescue the drowning man) by trampling the flower bed, he should be punished accordingly. The reason why the passer-by should be punished is that, after all, by discharging his less stringent duty he did what he ought not to have done. In other words, since the passer-by did what he ought not to have done, he is to be blamed for

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[14] Lord Hale believed that the rule that under necessity "theft is no theft" can bring about very bad consequences. As he put it (1736, p. 54), "very bad use hath been made of this concession by some of the Jesuitical casuists in *France*, who have thereupon advised apprentices, and servants to rob their masters, when they have judged themselves in want of necessaries, of clothes, or victuals; whereof, they tell them, they themselves are the competent judges; and by this means let loose, as much as they can, by their doctrine of probability, all the ligaments of property and civil society."

[15] Compare also a broader discussion of Hale's position and the problem of necessity in the seminal case *Regina v. Dudley and Stephens* 1884, 14 Q.B.D. 273; for an even broader discussion of necessity and balance of evils, see Kadish, Schulhofer and Steiker, 2007, pp. 73–78, 798–821.

his action, providing that other conditions pertaining to *mens rea* are met.[16] And since the role of punishment is to express blame in a profound, acute and socially consequential way, the passer-by is to be punished.[17]

It is also worth considering what should befall the passer-by if he decides to discharge his more pressing duty. Specifically, what is here under consideration is the situation wherein the passer-by refrains from trampling the flower bed and thus fails to save the person from drowning. Since the course of action in question is what the passer-by, by assumption, ought to do, then, *a contrario* to the above reasoning, the passer-by should not be punished or compelled to discharge his less pressing duty, that is, to rescue the drowning person. Now on this occasion it is important to note that punishing the passer-by would be not only morally grotesque (after all, he does what he ought to do) but also conceptually confused. As mentioned above, punishment is about blaming people, not praising them. And since the passer-by did what he ought to have done and thus what was praiseworthy, punishment would be out of place. However, since we assume that the duty to rescue is not overridden or extinguished and therefore it still exerts its normative force, some sort of remedy must be owed to the drowning person or his heirs or agents. Although it might be an interesting problem what particular form of remedy the passer-by owes to the drowning person (or to his heirs) on this view, a solution thereto would be inconsequential for the purposes of the present paper, so we abstract from considering it herein.

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[16] But mind that as far as some libertarians are concerned, there is no *mens rea* requirement for placing blame. See, for example, Rothbard, 2011.

[17] Most tellingly, Moore (2010, p. 21) takes criminal law to be "marked by the punitive sanction," with the punitive sanction differing from, say, contractual penalties in that the former are inflicted with a punitive intention. Later on, Moore (2010, p. 25) explicates that sanctions normally constituting punishments "are severely unpleasant to endure like death, confinement, the ducking stool" etc. However, as this author perspicuously notes, even these sanctions would not constitute punishments unless the purpose of inflicting them is punitive, that is such that it is aimed at giving the criminal his just due or, in other words, aimed at making the criminal deservedly suffer for his or her culpable wrongdoing (Moore, 2010, p. 25). Moreover, on the libertarian theory of punishment and self-defense see, for example, Rothbard, 1988, Block, 2009, 2019, Kinsella, 1996a, Kinsella, 1996b, Nozick, 1981, Barnett & Hagel, 1977, Dominiak, 2023, Dominiak & Wysocki, 2023, Dominiak, Wysocki & Wójtowicz, 2023, Wójtowicz, 2021.

Since in the next section we are going to argue about the substantive merits of this and the alternative solutions to the problem considered here, it would be convenient to label the solution just presented (and later to do the same for other solutions). So, what we dealt with above was the situation of a conflict of duties (hereinafter labelled "CD"), in which property rights (hereinafter labelled "PR") are more stringent than the duty to rescue (hereinafter labelled "DR") and in which the agent can behave morally optimally (hereinafter labelled "O"), that is, in accordance with a more stringent duty, or morally sub-optimally (hereinafter labelled "S"), that is, in accordance with a less stringent duty. Thus, the solution characterized above is to be labelled {CD, PR, O} or {CD, PR, S}, depending on the course of action taken by the passer-by. The first series, that is, {CD, PR, O}, should be understood as expressing the solution which acknowledges that there is a conflict of duties (CD) in which property rights are more stringent (PR) than the duty to rescue and in which the passer-by behaves morally optimally (O), whereas the second series should be read as expressing essentially the same solution but differing from the previous one, in that the passer-by behaves morally sub-optimally (S). Note also that if, for example, PR is more stringent than DR, instead of representing this relation as "PR>DR" we opt for putting "PR" in the second position in the series, mainly for the sake of simplicity of notation. Accordingly, if DR proved to be more stringent than PR, we would not represent it as "DR>PR" but would instead put "DR" in the second position in the series.

After elaborating on the solution {CD, PR, O} and {CD, PR, S}, we are going to do a similar thing to the solution {CD, DR, O}, that is, to the solution which recognizes a conflict of duties but deems the duty to rescue more stringent than the property rights and in which the passer-by behaves in accordance with the more stringent duty.[18] Now if there is indeed a conflict of duties, while the duty to rescue is more stringent than the flower bed owner's property rights and the passer-by behaves morally optimally ({CD, DR, O}),

[18] Of course, it is possible to behave sub-optimally on the grounds of all the solutions considered in the present paper, which is why we introduced the notation expressing this fact (S), and discussed such an option in the case of the first ("libertarian") solution. However, the truth is that we did this mainly for the sake of completeness of our framework and hence in what follows we are going to focus only on the most relevant courses of behavior within each solution, that is, on the actor doing what he ought to do according to the respective solutions.

then we know for certain that the passer-by does not thereby render himself liable to punishment. Nor should he be forcefully prevented from traversing the owner's land. After all, by assumption, he has behaved morally optimally by discharging a more pressing duty and thus, as observed above, punishing him or forcefully preventing him from doing so would be both morally grotesque if not conceptually misguided as well. At the same time, there is a real conflict of duties assumed here, which implies that property rights are not overridden or extinguished. This, in turn, entails that once the property rights in question are infringed upon, an appropriate remedy is due to the right-holder.

Indeed, such a solution is embraced by many prominent jurists and philosophers. For example, as far as law is concerned, the landmark case in this regard is *Vincent v. Lake Erie Transportation Co.* (1910, 109 Minn. 456). To avoid a steamship being lost to a tempest, those in charge of her decided to keep the vessel moored to the plaintiff's dock, the effect being that the storm threw the ship against the dock, thereby causing damage to the latter. The court opined that "in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship" (*Vincent,* 1910, 458). However, since those in charge of the steamship deliberately decided to keep her "in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted" (*Vincent,* 1910, 459). This in turn can be understood as admitting that those in charge of the vessel acted as they ought to have acted, that is, with "good judgment and prudent seamanship" (*Vincent,* 1910, 458), in other words, in accordance with a more stringent duty to preserve the vessel. Nevertheless, the court decided that the remedy is still due to the dock owner for the infringement upon his less pressing property rights. Adjudicating thus, the court opposed those theologians (proponents of the solution which in our nomenclature we are going to abbreviate below as $\{\neg CD, DR, O\}$) "who hold that a starving man may, without moral guilt, take what is necessary to sustain life" (*Vincent,* 1910, 460) by pointing out that "it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so" (*Vincent,* 1910, 460).

By the same token, in another consequential case, *Ploof v. Putnam*, the plaintiff moored his sloop, on which there were his wife and two minor children, to the defendant's dock in order to avoid the danger of a sudden and

violent storm. Writing the opinion for the court, Loveland Munson, J. argued that although interference with the private property of the defendant, that is, with his dock, would normally count as trespass, the necessity to escape the immediate danger of the violent tempest rendered the unmooring of the sloop a tortious act on the part of the defendant. More specifically, the court pointed out, *inter alia*, that "it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest" (Epstein, 1995, p. 54). Thus, even though the defendant had property rights to the dock, in the face of necessity he was not permitted to prevent the plaintiff's interference therewith. Now if juxtaposed with *Vincent* and considered counterfactually, *Ploof* can support the conclusion that the defendant should have allowed the plaintiff to moor his sloop and only then sue, arguably successfully as per *Vincent*, for damages.[19]

There are also many prominent philosophers who are clearly friendly, one way or the other, towards this solution (that is, {CD, DR, O}). For example, Joel Feinberg (1978, p. 102) claims that it is permissible to break into another's cabin in order to escape a ferocious blizzard, even though by doing so one would be infringing upon another's property rights and thus owe the owner proper compensation later on. By the same token, Bernard Williams (1973, p. 172) argues that unlike in the conflict of beliefs, in morality the agent who faces two conflicting moral considerations does not "think in terms of banishing error" but rather "in terms of acting for the best, and this is a frame of mind that *acknowledges* the presence of both the two *ought*'s" (Williams, 1973, p. 172). Now the presence of the *ought* not acted upon is driven home to the agent by the regret he feels despite acting for the best or morally optimally, if you will. Thus, for Williams (1973, p. 175) it is "a fundamental criticism of many ethical theories that their accounts of moral conflict and its resolution do not do justice to the facts of regret and related considerations: basically, because they eliminate from the scene the *ought* that is not acted upon." In turn, Judith Jarvis Thomson (1990), although critical of Williams linking regret specifically with moral *ought*, also believes that the moral residue left after our acting for the best in conflict situations is explained by the presence of a claim, "for a claim is equivalent to a constraint

[19] Again, what we are considering here is a counterfactual question. Thus, it is no obstacle for our analysis that *Vincent* actually came after *Ploof*.

on the claim-giver's behavior that includes such things as that the claim-giver may have to make amends later if he or she does not accord the claim" (Thomson, 1990, p. 85) in order to do what he or she ought to have done or what was, in the vernacular assumed in the present paper, the morally optimal course of action. Hence, as pointed out by Thomson (1980, p. 6), "[w]e Feinberg-friends … are committed, not merely to there being cases in which A has a right against B which B may permissibly infringe, but also to there being cases in which A has a right against B that B not do a thing, though it is not permissible for A to prevent him from doing it."

Now we believe that both solutions analyzed above, that is, {CD, PR, O} and {CD, DR, O}, albeit yielding substantively different conclusions, are nonetheless well captured by the conceptual framework introduced by Matthew Kramer (2014). Since presenting this framework will prove useful in the later discussion, it is laying it down that we are turning to now. Thus, Kramer (2014, p. 9) distinguishes between rights that are *strongly* and *weakly* absolute. The former are such that they count as moral absolutes. That is to say, there are no possible worlds in which the said rights are of lesser moral importance than any other merely possible ones. In other words, once we identify a strongly absolute right, this implies that the right in question is "always of greater normative importance" (Kramer, 2014, p. 9) than any other right, whether the latter is actual or merely possible. Or more technically, a strongly absolute right is always *overtopping*, which is another way of saying that it is always normatively more significant than any other actual or (merely) possible rights. By contrast an *overtopped* right (and its correlative duty) is such that it exerts a weaker normative force than some other right that is in conflict with it. It can be seen then that it is a *weakly* rather than *strongly* absolute right that is vulnerable to being overtopped. Remember, a strongly absolute right cannot be overtopped by definition. However, a weakly absolute right, Kramer emphasizes, also binds "everywhere and always in all possible worlds" (Kramer, 2014, p. 9) (that is why it is still absolute, even if only weakly absolute). Namely, the fact that there is a moral consideration of greater significance does not imply that the weakly absolute right in question is overridden or extinguished. Far from it, as Kramer (2005, p. 348) insists, infringing upon an overtopped moral prohibition still calls for appropriate remedial actions. After all, since the overtopped duty (and its correlative right) is *not* overridden in the face of a more

stringent and conflicting consideration, if an actor breaches an overtopped duty, he still behaves *weakly* impermissibly, although morally optimally.

As the Kramerian framework shows, in all of the above solutions there are real conflicts of duties, that is, neither duty overrides nor extinguishes the other. Instead, one only overtops the other. However, there is a great tradition of moral thinking, already mentioned *in passim* in this section (for example, while quoting the court's remarks about some theologians in *Ploof*), which submits that even though property rights should be respected in normal circumstances or if opposed by considerations of comparable weight, they should entirely give way in cases of necessity when, for example, a grave duty is calling. In such circumstances there are no real conflicts of duties, for the less pressing requirements are suspended or revoked for as long as the higher necessity or a graver duty exerts its moral force.[20] Thus, using our notation introduced above, we can represent the present view as the following series: {¬CD, DR, O} or {¬CD, DR, S}. Note that our notation exhibits consistency throughout the paper. The above series communicates the fact that there is no conflict of duties (¬CD), for the duty to rescue (DR) takes

[20] At this stage it might be elucidating to point out that when necessity (duress of nature) or compulsion as such (that is, also duress proper or coercion, if you will) is in the offing, it can exert its moral power and thus excuse the actor in two different, although often operating together, ways. Following Herbert Hart (1968, p. 152), we can say that, on the one hand, compulsion can *incapacitate* the actor's will or ability to make choices or his process of practical reasoning as in the cases of inducing in him an extreme fear or overwhelmingly strong desire. On the other hand, it can present him with a situation in which although he has full capacity to make choices, his *opportunities* to use this capacity are very *limited* as in the cases in which he has a choice only between two evils, for example, to either drive the hitmen to the victim's place or to have them kill his family (compare *Director of Public Prosecutions for Northern Ireland v. Lynch* 1975). If, however, the evil chosen by the actor is greater than the one avoided, then, following Michael S. Moore (2020, pp. 317–322), we can say that his limited opportunities cannot excuse his committing the net wrong. Needed is some—accordingly smaller—amount of incapacitation. Now the crucial point that we would like to drive home at this stage is, again following Michael S. Moore (2020, pp. 317–322), that if, on the other hand, in the face of compulsion, the evil chosen by the actor is smaller than the one avoided, then instead of excusing the actor via affecting his choice situation either via incapacitation or diminished opportunities, compulsion *justifies* (via the balance of evils justification) or renders permissible (if not obligatory) his actions so that there is no net evil left to be excused. In a word, compulsion either excuses or justifies. It is this latter mode of compelling that we are focusing on in the present paper.

precedence over property rights *via* the relation of overriding rather than overtopping, as in the previously considered series, and the actor behaves morally optimally (O) by discharging the duty to rescue or morally suboptimally (S) by failing to do so.

Indeed, various versions of the {¬CD, DR, O} solution have been supported by philosophers throughout history. For example, Socrates in Plato's *The Republic* (I, 331C) argued that if "you borrowed some weapons from a friend … [and] he later went mad, and then asked for them back again. Everyone would agree, I imagine, that you shouldn't give them back to him, and that anyone who did give them back… would not be doing the right thing." Similarly, Saint Thomas Aquinas in his *Summa Theologica* (II-II, q. 66, a. 7) expressed a belief that "[i]n cases of need all things are common property, so that there would seem to be no sin in taking another's property, for need has made it common." Moreover, he commented therein (II-II, q. 66, a. 7) that

> while it is impossible for all to be succored by means of the same thing, each one is entrusted with the stewardship of his own things…. Nevertheless, if the need be so manifest and urgent, that it is evident that the present need must be remedied by whatever means be at hand (for instance when a person is in some imminent danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another's property, by taking it either openly or secretly: nor is this properly speaking theft or robbery.

And Saint Bonaventure (1999, p. 317) concurred, for he also submitted that the "first kind of community [of goods] is derived from the right of *natural necessity*: anything capable of sustaining natural existence, though it be somebody's private property, may belong to someone who is in the most urgent need of it. This kind of community of goods cannot be renounced."

In a somehow similar vein, the Moderns also believed that in cases of extreme necessity property rights are extinguished vis-à-vis the person in dire straits. Thus, Francis Bacon (1630, p. 29) contended that "[n]ecessity carrieth a privilege in itself…. First of conservation of life: if a man steals viands to satisfy his present hunger, this is no felony or larceny."[21] Hugo Grotius (2005, p. 434) also subscribed to the view under consideration,

[21] Again, compare a broader discussion of Bacon's and other Moderns' positions re necessity in *Regina v. Dudley and Stephens* 1884, 14 Q.B.D. 273; and for even broader discussion go to Kadish, Schulhofer and Steiker, 2007, pp. 73–78, 798–821.

as he held that "whoever shall take from another what is absolutely necessary for the Preservation of his own Life, is not from thence to be accounted guilty of Theft." Or more specifically, as further explained by Salter (2005, p. 285), Grotius clearly recognized private property rights but still maintained that "[n]ecessity…was a reason for making an *exception* to the law of private ownership, or in other words, for suspending the law." Or, to put it in Grotius' (2005, p. 434) own words, when in dire straits, "that antient Right of using Things, as if they still remained common, must revive, and be in full Force." Likewise, John Locke in his *First Treatise on Government* (1988, §42, p. 170) argued that "[a]s *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extreme want, where he has no means to subsist otherwise." And Samuel von Pufendorf was another prominent figure to acknowledge the right of necessity. In his *Of the Law of Nature and Nations*, he considers a person in necessity trying to persuade a person of ample means, with the former eventually taking possession of a much needed resource "either secretly, or by open Force" (Pufendorf, 1729, p. 206). In this situation Pufendorf feels "that such a Person doth not contract the Guilt of Theft" (Pufendorf, 1729, p. 207).[22]

As pertaining specifically to our flower bed situation, the solution under consideration, that is, {¬CD, DR, O}, can be portrayed as recognizing

[22] It is important to note, as perceptively pointed out by John Salter (2005, p. 289), that Grotius parted ways with those thinkers who insisted that "a man who has availed himself of his own right is not bound to make restitution" and argued that, in terms of the right of necessity, "this Right is not absolute, but limited to this, that Restitution shall be made when that Necessity's over" (Grotius, 2005, p. 437). This would suggest that Grotius's position is closer to *Vincent* or has a structure similar to the solution we called {CD, DR, O}. However, as brilliantly spotted by none other than Pufendorf, (1729, p. 208): "*Grotius* requires *Restitution* to be made in these Cases: But I am oblig'd to no such Duty, when I take a thing by Virtue of my Right." As in turn put by Salter (2005, p. 295), "according to Pufendorf, if the goods were taken as of right there could be no grounds for insisting on restitution." Now we believe that Pufendorf's criticism applies to all thinkers, not only Grotius, who would like to contend that one can have a liberty to take or use another's property and yet be obligated to pay compensation for it later on. We believe, following Kramer's (2005, pp. 312–326) remedy principle, that it is conceptually confused to take such a position, for either one has a liberty and then no rectification of injustice is due (although some other kind of payment might be perfectly in order) or one has a duty not to and then should rectify his breach thereof.

a necessity easement[23] on the flower bed owner's land. Thus, even though in normal circumstances the flower bed owner has full ownership over his land, in cases of necessity his rights are temporarily suspended vis-à-vis whoever is involved in relieving the necessity. Which is not to say, of course, that these rights are compromised vis-à-vis anyone else. In comparison with the view {CD, DR, O} discussed earlier in which the person coming to another's aid was bound by a duty not to trample the flower bed and so faced a conflict with his stronger duty to rescue (after all, it was, by assumption, not possible for this person to rescue the drowning man otherwise than by traversing the land in question), in the present case (that is, {¬CD, DR, O}) there is the opposite of the duty not to traverse the land, that is, a vested liberty[24] to do so. Accordingly, there is no conflict of duties. More specifically, a duty to rescue does not compete with a duty requiring an incompossible forbearance, that is, abstaining from trampling the flower bed, but is instead accompanied by a liberty to perform a perfectly compossible action of traversing the land.[25]

Now note that since the flower bed owner's rights are suspended only in the case of coming to conflict with a duty to rescue, it makes sense to say that counterfactually, that is, in comparison with a possible world wherein there is no emergency, he suffers a loss, even if it is only *damnum absque injuria*. That is to say, were there no emergency in the first place, he would enjoy full ownership vis-à-vis all people at all times. Thus, the question arises: Who, if anyone, and for what reason, should bear the said cost? Should it be the owner himself, the rescuer or the drowning person? Clearly, whoever covers the cost, this coverage cannot be considered a remedy, for there was no right against crossing the land that could possibly have been infringed upon. Again, as pointed out by Pufendorf (1729, p. 208), "I am oblig'd to no such Duty, when I take a thing by Virtue of my Right." Thus, especially the rescuer, who enjoys a liberty towards the flower bed owner, appears to fall outside the remit of any obligation to make up for the flower bed owner's loss. And as it seems, the drowning man, who is not an actor at all,

[23] On the problem of necessity easements under the libertarian construal of strongly absolute property rights see, *inter alia*, Block, 2004, Block, 2010, Block, 2016, Block, 2021, Dominiak, 2017, Dominiak, 2019, Dominiak, 2021.

[24] The fact that the liberty in question is vested by a perimeter of rights testifies to, *inter alia*, the impermissibility of the flower bed owner preventing the crossing.

[25] On the compossibility of rights, see Steiner, 1977, whereas on conflicting and contrary duties, see Kramer, 2009.

is not a good candidate for any remedial duty either. Still, the coverage might assume a different form than a remedy for rights infringement, or so it seems. Consider the following reasoning.

Clearly, the drowning man is the sole beneficiary of the rescue. Equally clearly, the flower bed owner is the main loser in the entire situation, even if his loss is without injury. The rescuer, in turn, bears, by assumption, only some negligible cost. Now a suggestion can be made that if we consult our moral intuitions, it seems to be the case that the rescued man owes something to the owner of the flower bed who suffered a loss, though without injury, in order for the drowning man to be benefited, that is, rescued.[26] Since the rescued man was not an actor in the entire situation—and even if he were an actor, he would still have a necessity easement on the flower bed owner's land—he cannot owe the flower bed owner anything as a matter of (or stemming from) a duty correlative with the latter's (suspended by way of easement) property rights. However, as evidenced by our moral intuition, it would be independently appropriate for the rescued man to at least express sorrow for the owner's loss. This fact of moral residue[27] persisting after the successful rescue could in turn testify to the fact of the rescued man having an independent duty to the flower bed owner—a duty springing from his status as the sole beneficiary of the flower bed owner's loss and thus correlative with an independent, that is, different than any property right, claim or right of the flower bed owner. The same rationale applies, *mutatis mutandis*, to the rescuer as well, for the rescued man owes him at least an expression of gratitude which in turn testifies to the rescued man having an independent duty to the rescuer.

Now compare this analysis with a scenario in which the flower bed belonged to the drowning man himself. Would he have any grounds for complaining about the rescuer inevitably trampling it in the process of coming to his aid? It does not seem so. And what about the situation in which the flower bed belonged to the rescuer? In such a case, as it seems, it would

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[26] Note that there seems to be no such intuition in the case of the rescuer, that is, if we ask ourselves whether the rescuer, who on the grounds of the solution under consideration enjoys an easement over the flower bed owner's land, owes anything to the flower bed owner for his loss, the answer seems to be in the negative. It is pronouncedly different in the case of the drowning man, the sole beneficiary of the rescue.

[27] On the notion of moral residue see, for example, Thomson, 1990, pp. 84–96, Sinnott-Armstrong, 1988, pp. 44–53.

also be appropriate for the rescued man to at least express his gratitude for being rescued and sorrow for the rescuer's loss. If so, then it turns out that moral residue is a function of who gets benefited and who suffers a loss. And the only situation in which moral residue is absent is the situation in which the beneficiary is the same person as the one who suffers the loss, that is, the rescued, provided that he owns the flower bed. Thus, the principle which seems to be controlling the case under consideration is that becoming a beneficiary by means of somebody else's loss—even if not by the beneficiary's own actions—gives grounds, *via* moral residue, to the beneficiary's duty to appropriately make up for the loss in question. However, as we are going to argue below, from the fact of the drowning man having a duty to make up for the flower bed owner's loss, it does not necessarily follow that it is the drowning man who should cover the cost of the flower bed destruction, for the remedy due might fall short of any material contribution and instead consists in, say, an expression of sorrow alone.

Playing the Solutions against One Another

Having presented the space of possible solutions to *Flower Bed* depending on the exact nature of the flower bed owner's property rights, we are now in a position to discuss the merits of the respective views and thus to finally answer the question of who should cover the cost of the rescue. Let us begin with the solution that we labelled {CD, PR, O} and that is embraced, for example, by these libertarians who believe in strongly absolute property rights. This solution is well illustrated by the above quoted passage from Block (2021, p. 14): "Should a man be punished for stealing a loaf of bread to feed his starving child? My heart would go out to him, as a fellow parent, but insofar as libertarianism is concerned, from a deontological point of view, this parent committed a crime and should be duly punished for it."

There are many problems with this solution. For example, and as some of us argued elsewhere,[28] when applied to protection of property, it suffers from what we called the Property Defense Dilemma. For if having an absolute property right amounts to having a right to defend the property in question and if, in turn, the only way to defend it is disproportionate, then the property

[28] Dominiak, Wysocki, 2023.

owner does not have an absolute right, for by virtue of the proportionality principle, he has no right to disproportionate means of protection. Furthermore, and as one of us has argued elsewhere,[29] the solution in question is entirely unsustainable in cases in which these are property rights themselves that come into conflict with each other. For example, when one real estate is landlocked by the property of another, the ownership rights of the latter must partially give way or contradiction will ensue in the system of rights as the owner of the landlocked property will at the same time have a right to access his land and lack this very right.

However, here we would like to focus on a different argument. When we consult our moral intuitions as to questions like Block's (2021, p. 14), "Should a man be punished for stealing a loaf of bread to feed his starving child?" or "What ought he to do in such a predicament?" etc., it is clear what the answers are. Even Block himself is uneasy about his consistent libertarianism when he (Block, 2021, p. 14) adds that his "heart would go out to him, as a fellow parent." Similarly, when we consult sages, both philosophers and jurists, dealing with such problems or when we open Jeremy Bentham's "great book of laws,"[30] we see what ought to be done in cases of necessity, fathers of starving children or where a duty to rescue is calling. Property rights should, one way or the other, give in to the requirement of emergency. Compare in this regard all other views discussed above. Both the solution {CD, DR, O} as evidenced by the opinions expressed in *Vincent*, *Ploof*, Feinberg, Williams, Thomson, Kramer, etc. and the solution {¬CD, DR, O} supported by Plato, Aquinas, Bonaventure, Bacon, Grotius, Locke, Pufendorf, etc. point to this direction.

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[29] Dominiak, 2017, Dominiak, 2019, Dominiak, 2021.

[30] The quoted phrase, exquisite as it is, "[the] great book of laws," is after Michael S. Moore (2020, p. 109) where Moore quotes Bentham's *The Limits of Jurisprudence Defined* (1945, p. 343). Bentham (1945, p. 343) believed that once enlightened by his utilitarianism, the science of legislation will reach such a level of perfection that "a man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency." We cannot recall (or find the place) where we read it, although if we read it at all, it must have been somewhere in Moore, that Bentham believed, somehow amusingly, that his great book of laws will fit into two volumes. Now if we have anything even remotely resembling such a book, it has at least two thousand volumes. But Bentham's idea is moving nonetheless and we actually look things up in some thick volumes, don't we?

Now it is crucial not to mistake the argument being made herein for the argument from authority. We are not arguing that the solution {CD, PR, O} is morally mistaken because the aforementioned authorities (and our moral intuitions) say so. Quite the contrary, we are arguing that those authorities (and our intuitions) say so because it is the case. In other words, we are submitting that the hypothesis that the solution {CD, PR, O} is morally mistaken is the best explanation of the fact that all these sages (as well as ourselves via intuitions) believe that it is morally mistaken. Or still differently, to say that the solution {CD, PR, O} is morally mistaken, is, to use Charles Sanders Peirce's (1994, p. 100) nomenclature, to reason by abduction or, to employ Gilbert Harman's (1965) phrase, to provide an inference to the best explanation.

It is worth noting that the inference to the best explanation is a tool which is frequently applied in ethics, be it normative or indeed in meta-ethics. For example, Moore (1992, p. 2532–2533) argues that "[t]he best explanation of our particular moral beliefs is that they are caused by moral qualities, and this fact gives us good reason to believe in the existence of such qualities." Then again, what does the explaining (i.e., independently existing moral qualities) is inferred from what is explained (i.e., "our particular moral beliefs"). A similar realist meta-ethical conclusion is reached by David Brink (1989, p. 169), who posits that "the moral fact that torturing kittens is wrong may provide the best explanation of the nonmoral fact that appraisers unanimously agree that pouring gasoline over a kitten and igniting it is wrong." By the same token, the fact that the duty to rescue overtops the property rights provides the best explanation of the nonmoral fact that these authorities almost "unanimously agree" that the solution {CD, PR, O} is morally mistaken. Hence, the inference to the best explanation enables us to infer the solution {CD, PR, O} as flawed from the sagacity of the above-mentioned thinkers.

At this point, our critic might object that our employment of the inference to the best explanation achieves nothing, for the sagacity of the said authors from which we infer the solution {CD, PR, O} as mistaken cannot be taken for granted unless we first establish that the solution {CD, PR, O} is indeed mistaken. However, this objection can be easily obviated as those philosophers' sagacity can be justified independently, that is, without resorting to any belief vis-à-vis the solution {CD, PR, O}. If so, then no questions are begged when we appeal to the said philosophers'

sagacity to infer the truth of their belief that the solution {CD, PR, O} is flawed.[31]

Thus, we are left only with two solutions: {CD, DR, O} and {¬CD, DR, O}. Alternatively, we are left only with the question of whether it is the rescuer (as predicted by the former solution) or the rescued or the flower bed owner (as predicted by the latter solution) who should incur the cost of the rescue.[32] Let us begin with the latter solution, that is, {¬CD, DR, O}. As we pointed out above, many philosophers believe that in cases of necessity, taking another's

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[31] However, it must be conceded that this coherentist stance whereby one set of beliefs justifies another, with the latter justifying still another one is ultimately circular, for—at the end of the day—one would reach such a pair of beliefs (Belief1 and Belief2) that Belief1 derives its plausibility partly from Belief2 (coupled with many other beliefs on the way), whereas Belief2 is partly justified by Belief1. And yet, this (innocuous) circularity is a mark of coherentism. Unless one is committed to foundationalism—quite a problematic position itself—in epistemology, one cannot avoid the ultimately circular justification for any given belief in a coherent set. For an excellent overview of epistemological positions, see Dancy, 1985. Finally, it should be borne in mind that the inference to the best explanation tallies well with Bayesianism, an undoubtedly burgeoning field in epistemology. For note that, the Bayesian formula—although operating with the language of probability— indeed predicts that, everything else equal, the fact that some piece of evidence is well explained under a certain hypothesis counts in favor of that very hypothesis. Let E denote the evidence (what gets explained) and H a hypothesis doing the explaining. The Bayesian formula goes as follows: $P(H|E)=P(E|H)\,P(H)\,/\,P(E)$. Now note that, *ceteris paribus*, the higher the factor P(E|H) is, the higher P(H|E) becomes. That is to say, everything else equal, the higher the probability of given evidence is under a certain hypothesis, the more probable the hypothesis, given the evidence in question, is itself. This in turn predicts that the fact that a certain hypothesis best explains certain facts (i.e., the facts in question are to be strongly expected were the hypothesis to turn out to be true) counts in favor of the hypothesis itself or, still in other words, gives us good reason to believe the hypothesis.

[32] Remember that in the case of the latter solution we submitted that our moral intuitions do not point to any moral residue as pertaining to the rescuer's actions vis-à-vis the flower bed owner (and certainly not to any moral residue that could trump the one present in the case of the drowning man, the sole beneficiary of the rescue). We hold tight to these intuitions and as the rescuer enjoys an easement over the flower bed owner's land, we do not think that there is even a *prima facie* case to be made for the rescuer bearing the cost of rescue as far as the solution {¬CD, DR, O} is concerned. However, even if we were mistaken about it, that is, even if it were the rescuer who should bear the cost of the rescue under the solution {¬CD, DR, O}, this mistake would result in a distinction without a difference, for as we are going to argue below, it is indeed the rescuer who should cover the cost, but on the grounds of the winning solution {CD, DR, O}.

property is not "properly speaking theft or robbery" (Aquinas, II-II, q. 66, a. 7) and that someone who does so, "is not from thence to be accounted guilty of Theft," (Grotius, 2005, p. 434) "felony or larceny" (Bacon, 1630, p. 29). This fact can in turn induce someone to try to argue from the inference to the best explanation for the superiority of the solution {¬CD, DR, O} over the solution {CD, DR, O}, quite in the same way as we argued against the solution {CD, PR, O} in the previous three paragraphs. However, this time such an argument would not go through.

First of all, where almost all of the quoted sources (representative of both solutions, that is, {¬CD, DR, O} and {CD, DR, O}) agree that necessity requirements take precedence over property rights, they are divided about the scope of this precedence, that is, whether it is a full precedence (and thus extinguishes the rights in question) or a partial one (and thus calls for *ex post* redress). Second of all, even amongst those authorities (representative only of the solution {¬CD, DR, O}) who do believe that in cases of necessity "all things are common property" Aquinas (II-II, q. 66, a. 7) or "that antient Right of using Things, as if they still remained common, must revive, and be in full Force," (Grotius 2005, p. 434) there is a hesitation as to the question of restitution—as best illustrated by Grotius' position and Pufendorf's later criticism thereof. Third, although many of the quoted friends of the solution {¬CD, DR, O} are clear about the fact that taking another's property in cases of necessity is not "properly speaking theft or robbery," (Aquinas, II-II, q. 66, a. 7) "felony or larceny," (Bacon 1630, p. 29) they are silent about whether it is not a tort (conversion or trespass to land, respectively) either. Now from the fact that a given act is not a crime it does not follow it is not a tort. Accordingly, we are left with some degree of vagueness regarding the question of whether those authorities also believe that taking or destroying another's property in cases of emergency is a tort. Hence, it seems that no inference to the best explanation argument can be easily deployed in support of the solution {¬CD, DR, O} vis-à-vis the solution {CD, DR, O}. Thus, we have to consider respective merits of both solutions in some other way.

Let us therefore begin with the question of who should really bear the cost of the destroyed flower bed under the solution {¬CD, DR, O}. As we suggested above, there is moral residue left after the rescue on the part of the rescued towards both the rescuer and the flower bed owner. The first one seems to be exhausted by an expression (and possibly

some token) of gratitude. However, whatever the exact contours of this moral residue, it is less important for our purposes. For the crucial question is whether the residual duty of the rescued towards the flower bed owner is such that it requires the former to pay for the destroyed flower bed. If not, then under the solution {¬CD, DR, O} it is the owner himself who should bear the cost of the rescue. Thus, what is the exact content of moral residue left after the rescue on the part of the rescued towards the flower bed owner?

Clearly, it would be appropriate, as we argued above, to express sorrow for the flower bed owner's loss. Perhaps, it would also be in order to be thankful for the owner's sacrifice. Would it be appropriate to offer assistance, even financial, in restoring the flower bed? It seems so. But we should be careful here. For it would decidedly be inappropriate for the owner, upon receiving the offer (let alone without receiving it), to send the bill to the rescued, requiring him to pay for the restoration of the flower bed or even suggesting that he should do so. Thus, as it seems, the owner has a moral right against the rescued that the latter express sorrow for the owner's loss, maybe also gratitude for his sacrifice, and perhaps that he even offer his help in restoration of the flower bed. However, the owner decidedly does not have a right to the actual assistance. Requiring it as of a right would be clearly inappropriate for the owner. Hence, if any help is actually performed by the rescued, it should be looked at as a gift (as it would not be over the top for the rescued to send the owner some other gift either) or token of supererogation rather than something that can be demanded of him as a duty correlative with the owner's rights. Accordingly, it seems that under the solution {¬CD, DR, O}, despite the residual obligation incumbent on the rescued towards the flower bed owner, it is the owner himself who should bear the actual cost of the destroyed flower bed.

Now the final question is how this solution fares in comparison with the solution {CD, DR, O} in which it is the rescuer who should bear the cost of the rescue. First of all, note that taking or destroying another's property out of necessity unquestionably creates a loss. Even if it were a loss without injury, *damnum absque injuria*, it would be a loss, nonetheless. Now the solution {¬CD, DR, O} seems to be rather weak at dealing with this loss, for it allows it to fall where it does (that is, on the flower bed owner), regardless of who brought it about—a verdict which seems unfair and morally arbitrary. Thus, although it was the rescuer whose intentional

action caused the loss, under the solution {¬CD, DR, O} the loss should be suffered by the flower bed owner. Yet, if the flower bed belonged to the rescuer himself, he would have to suffer the loss himself. Why then is he allowed to shift the loss to another party *only because the flower bed did not belong to him*? This seems morally arbitrary or unfair as the authorship of the loss is the same in both cases. Consider in this regard Epstein's exquisite (1973, p. 158) analysis of *Vincent*:

> Had the Lake Erie Transportation Company owned both the dock and the ship, there could have been no lawsuit as a result of the incident. The Transportation Company, now the sole party involved, would, when faced with the storm, apply some form of cost-benefit analysis in order to decide whether to sacrifice its ship or its dock to the elements. Regardless of the choice made, it would bear the consequences and would have no recourse against anyone else. There is no reason why the company as a defendant in a lawsuit should be able to shift the loss in question because the dock belonged to someone else. The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the Transportation Company must bear all the costs in those cases in which it damages its own property, then it should bear those costs when it damages the property of another. The necessity may justify the decision to cause the damage, but it cannot justify a refusal to make compensation for the damage so caused.

Surely, the dock in *Vincent* belonged to the plaintiff whereas the solution {¬CD, DR, O} assumes that the rescuer had an easement over the flower bed owner's property. Nevertheless, the flower bed owner suffers a loss and the question of who should pay for it remains valid. What the solution {¬CD, DR, O} has to offer is arbitrariness of the let-it-fall-where-it-does rule. This is weak, for an action and causation of damage seem to be, as they almost always are,[33] morally relevant features of the event in question whereas the person of the sufferer seems to be, at best, of secondary importance. After all, does it really matter whether *A* inflicts a loss on *B* or *C* when all other things are equal between the two parties? Why should it be

[33] On action and causation as well as other supervenience bases of moral responsibility see Moore, 2009, pp. 34–77.

any different whether *A* inflicts a loss on *B* or himself? As it seems, it should not. The identity of the party concerned is morally irrelevant.

Another grounds for preferring the solution {CD, DR, O} over the solution {¬CD, DR, O} is that it is only the former that gives proper weight to the flower bed owner's property rights. Note that the solution {¬CD, DR, O} does not really negate the fact that the flower bed owner has property rights to the garden. Rather, it submits that under the extraordinary condition of necessity these otherwise properly acquired ownership rights are temporarily suspended vis-à-vis the rescuer. If the emergency did not occur in the first place—a very likely scenario indeed—the flower bed owner's rights would be intact and exerting their full normative force *erga omnes*. Thus, it is strange to say that justly acquired (for instance, by mixing one's labor with an unowned resource or taking first possession thereof or obtaining it via a voluntary transfer from someone who originally appropriated the said resource in one of the first two ways) property rights simply disappear—however temporarily—as the said conditions, that is, necessity or other emergency, arise and then reappear when those conditions cease to operate. This additionally and problematically suggests that whereas in the case of acquiring a right there must be an investitive fact, that is, a certain human action (such as labor-mixing or performing a speech act amounting to a waiver), in the case of rights reappearing, no such facts are required. Certainly, it is much more natural to say that once justly acquired, these rights remain in place even if the said circumstances (that is, necessity or other emergency) arise. Hence, what the occurrence of the emergency compromises is only the strength of the property rights in question. And since these rights are in place all the time and there is no right without a remedy, the trespasser, that is the rescuer, ought to remedy his infringement.

Now friends of the solution {¬CD, DR, O} might respond with a charge that our last argument begs the question because it assumes that the property rights of the flower bed owner disappear in the case of emergency. This, however, is not the only possible way of interpreting the solution {¬CD, DR, O}. What they might have in mind is the so-called rights specificity,[34] that is, a claim that it is the *content* of the flower bed owner's property rights that

[34] On rights specificity see, for example, Oberdiek, 2004, pp. 325–346; Oberdiek, 2008, pp. 29–307.

does not protect him against having his garden trampled in cases of emergency, not the fact that his property rights are temporarily suspended. In other words, what the flower bed owner acquires by, say, mixing his labor with an unowned resource is a specific right not-to-have-his-garden-trampled-but-under-necessity rather than a general right against any interference whatsoever which might yet get suspended in cases of emergency. Making this maneuver would in turn inoculate the friends of the solution {¬CD, DR, O} against our objection to the effect that rights disappear and reappear together with ebbs and flows of emergency. So, what are we to say against this stratagem?

Besides that the rights specificity charge does not work against our employment of Epstein's point related to the distribution of actual loss (for whatever is the specific content of rights involved, causation of damage is a matter of fact and cannot be affected by this content), it fares rather poorly when confronted with other moral intuitions. To see that, let us introduce a case which is more emotionally charged, and therefore pumping our intuitions better, than our rather mundane *Flower Bed*. Consider a variation on *Tactical Bomber*.

> *Tactical Bomber*
>
> A pilot drops a bomb on a munition factory in order to secure his side, waging a just war, a significant military advantage over the enemy. The pilot knows that sixty non-combatants in a nearby hospital will be killed as a side-effect of the blast.[35]

This is the *locus classicus* of the Doctrine of Double Effect (DDE). The standard DDE solution is that the tactical bomber is permitted, if not obligated, to kill the non-combatants. Now, as it seems, rights specificity would predict that this is so because non-combatants do not have a general right not to be killed. Rather, what they have is a content-specific right not-to-be-killed-but-in-accordance-with-DDE. Now ask yourself: even assuming that DDE is correct in predicting that the non-combatants might be permissibly killed, should their heirs nonetheless have a right to compensation for the death of their loved one? Our moral intuition clearly yields the answer in the affirmative and if so, then rights specificity seems to be a suboptimal account of rights because there would be no room for compensatory remedy if non-combatants

[35] Based on Frowe, 2011, p. 141.

had a right only not-to-be-killed-but-in-accordance-with-DDE. Since their heirs do have a right to compensation, then the right in question must have been, by virtue of the remedy principle, non-specific, that is, held against being killed, period.

We conclude that in light of the above considerations it is the solution {CD, DR, O} that proves to be superior and thus even though the rescued has a residual duty to express sorrow or offer his assistance to the flower bed owner, it is the rescuer who has a second order, remedial duty to the flower bed owner to compensate him for the trespass and destruction of the flower bed. At the same time, it seems that the rescued might have a somehow augmented residual duty to the rescuer, for the latter not only saved his life, but also incurred the cost of the destroyed flower bed while discharging his overtopping duty to rescue.

Conclusions

In the present paper we considered the question of who should cover the cost of discharging a duty to rescue. If rescuing a drowning person requires trespassing on another's property, who should pay damages for trespass to land, for example? In the paper we offered three distinct solutions to this quandary and supported each of them with sundry arguments. Besides making clear that the answer to the above question is in no way obvious, we elucidated various philosophical and economic underpinnings of each solution, showing thereby how alternative answers to the puzzle at hand can be dependent on otherwise contentious issues in moral philosophy, metaethics and jurisprudence. Upon all the analysis conducted above, we arrived at the conclusion that it is the rescuer who should cover the cost of the flower bed destroyed in the process of discharging his duty to rescue. However, the inquiry into the specific aspects of the problem situation revealed that it is also the rescued who has an independent, residual duty to both the rescuer and the flower bed owner consisting, respectively, in showing gratitude and expressing sorrow accompanied by an offer of assistance in the restoration of the sacrificed property.

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