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Trolley Problems, Private Necessity, and the Duty to Rescue

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. THE HISTORY OF THE CASE 3
III. PRIVATE NECESSITY, DRAFTED RESCUERS, AND OTHER MEANS TO AN END 15
A. The Private Necessity Doctrine 16
B. The "No Duty to Rescue" Doctrine 27
C. The Trolley Problem(s) 32
III. RETURNING TO *LAIDLAW V. SAGE* 37
IV. CONCLUSION 42

I. INTRODUCTION

Many who teach tort law introduce students to the "trolley problem." Popularized by philosopher and ethicist Judith Jarvis Thomson, who was building on a hypothetical by philosopher and ethicist Philippa Foot, the trolley problem posits that there is an out-of-control trolley heading toward five individuals who are on the track and have no means of escape.[1] The reader cannot stop the trolley but has the ability to throw a switch to divert the trolley onto a different track, where there is a single

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1. Judith Jarvis Thomson, Comment, *The Trolley Problem*, 94 YALE L.J. 1395, 1395 (1985).

individual with likewise no means of escape.[2] The ethical question is what choice the reader would make and why. Thomson and others have presented variations on this theme—a surgeon who can save five individuals in desperate need of organ transplants by killing a sixth and using his organs; the trolley that can be stopped from killing the five but only by pushing a sixth in front of the trolley to his death[3]—but the question presented is typically the same: Why do our moral intuitions allow room for some of these scenarios (the trolley diversion, perhaps) but not others (the scavenging surgeon)?

As some have noted, the fantastical nature of the trolley problem can make it a challenging tool for determining reactions to real-life problems.[4] Yet the advent of self-driving automobiles and related technologies will make the sacrificial tradeoffs at the heart of the trolley problem frighteningly real. Will a car that senses that it is about to plow into a group of children chasing a ball into the street be programmed to divert the car in a way that risks killing the driver? Will a driver have an opportunity to adjust these settings to match their own moral intuitions?

These questions are not simply philosophy in the air; they also influence the law around tort questions such as the doctrine of private necessity and the duty to rescue. Nor are tradeoffs involving lives, bodily injury, or property limited to such questions; simple negligence law involves these tradeoffs on a regular basis. There is ultimately no difference in the value of the lives traded when the decision is made based on knowledge—the trolley problem—compared to statistics—the understanding that there is a substantial chance that a worker will be seriously injured during the construction of an underwater tunnel. Nevertheless, there are cases involving real-life trolley-type problems that might help us focus on the realities of these tradeoffs. *Laidlaw v. Sage*, considered at the time by one

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2. *Id.*

3. *Id.* at 1396.

4. *See, e.g.*, Douglas Laycock, *The Ultimate Unity of Rights and Utilities*, 64 TEX. L. REV. 407, 412 (1985) ("In the real world, choices among competing human lives do not look like Thomson's neat hypotheticals."); Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105, 2105 (2001) (testing the hypothesis that reactions to ethical dilemmas, such as the trolley problem, may depend on emotional engagement); *see also* Dries H. Bostyn, Sybren Sevenhant & Arne Roets, *Of Mice, Men, and Trolleys: Hypothetical Judgment Versus Real-Life Behavior in Trolley-Style Moral Dilemmas*, 29 PSYCH. SCI. 1084 (2018) (testing and recommending future investigations of actual behavior in addition to responses to hypothetical scenarios); Christopher W. Bauman, et al., *Revisiting External Validity: Concerns About Trolley Problems and Other Sacrificial Dilemmas in Moral Psychology*, 8 SOC. & PERSONALITY PSYCH. COMPASS 536, 546 (2014) ("[R]esearchers could create new scenarios involving the same kinds of trade-offs as sacrificial dilemmas but present them in ways that are more consistent with how people might face those trade-offs in the real world.").

commentator to be "one of the most important cases tried in the [New York] supreme court in years, not only because of the prominence of one party to it and the widespread interest that it created, but also by reason of the unusual legal problems that it involved,"[5] neatly encapsulates several doctrines—some on its face and others not—in a way that suggests that it should get more attention than it otherwise has,[6] as I will discuss below.

Perhaps most important, the trolley problem is divorced from any sense of fault and, therefore, of remedies. The reader is asked to decide between allowing the trolley to continue on its original track toward the five or to divert it toward the one, but that is where the problem ends—the reader is not asked to consider what happens next. Was anyone responsible for the trolley's brakes failing in the first place? Will anyone compensate the family of the one for their loss, incurred as a result of saving the five? *Laidlaw* and the intense press coverage it received at the time suggests that the question of remedies is perhaps what matters most.

II. THE HISTORY OF THE CASE

As the *New Yorker* reported, the incident at the heart of the case took place on December 4, 1891.[7] Russell Sage, seventy-five years old and reportedly the third richest man in the United States—the result of a history as a financier and investor in railroads—was in his office in the Arcade Building at the corner of Broadway and Rector Street.[8] A man, later identified as Henry W. Norcross of Somerville, Massachusetts,[9] came to Sage's

5. C.H. Redfern, *A Retrospect*, 41 PROC. N.Y. STATE SHORTHAND REPS.' ASS'N 103, 110 (1916). One biography of Celora Eaton Martin, the judge who wrote the final opinion in the New York appellate court, listed *Laidlaw* as one of three opinions authored by Judge Martin "of considerable significance." Justin C. Levin, *Celora Eaton Martin*, HIST. SOC'Y N.Y. COURTS, https://history.nycourts.gov/biography/celora-eaton-martin/ [https://perma.cc/3SK6-DAFS].

6. KEITH N. HYLTON, TORT LAW: A MODERN PERSPECTIVE 83 (2016) ("One of the most fascinating tort cases ever, *Laidlaw v. Sage*, is not a necessity case, but can be analyzed from the perspective of necessity." (footnote omitted)).

7. Edmund Pearson, *Annals of Crime: Mr. Laidlaw and Mr. Sage*, NEW YORKER, May 15, 1937, at 95.

8. *Id.* at 95. Sage might, in some circles, be referred to as a "robber baron." *See* HYLTON, *supra* note 6.

9. Pearson, *supra* note 7, at 96. Norcross's identity was eventually confirmed by his parents; his head survived the ensuing explosion fairly intact. *Id.*; *see also A Crazy Man's Awful Act: He Throws a Dynamite Bomb in Russell Sage's Office*, N.Y. TIMES, Dec. 5, 1891, at 1; *Identified as Norcross*, N.Y. TIMES, Dec. 15, 1891, at 5.

office and handed Sage a typewritten note.[10] The note read, as Sage later reported, "This carpet bag which I hold contains ten pounds of dynamite, and if I drop it, it will destroy this whole building in ruins and kill everybody in it. I demand $1,200,000. Will you give it? Yes or no."[11]

There were, at the time, at least three others in the office: a man with the surname Norton, who was Sage's assistant; Charles E. James, a broker with whom Sage was meeting; and William R. Laidlaw, Jr., a banker's clerk from Bloodgood & Company.[12] Sage reportedly began a conversation with Norcross, hoping to stall any action. Norcross then asked Sage, "Do I understand you to refuse my offer?," and Sage responded, "Oh no, I don't refuse it. I have an appointment with two gentlemen. I think I can get through with them in about two minutes, and then I will see you."[13]

All commentators agreed that the result was an explosion that could be heard for more than two miles.[14] According to the *New Yorker*, "[t]he partitions, floor, joists, plaster, desks and other furniture were destroyed; window sashes and frames were blown out."[15] Norcross was immediately killed; Norton was thrown out the window and later died; Sage was "half-buried under a heap of timbers and plaster"[16] but survived with numerous small wounds;[17] and Laidlaw survived but with more serious injuries.[18] Many other occupants of the building were injured or killed.[19]

What remained in dispute, however, was what happened just before the explosion. As Laidlaw described it, when Sage was attempting to delay Norcross, he moved back behind Laidlaw, took one of Laidlaw's hands in both of his, and slowly drew Laidlaw between Sage and Norcross,[20] using

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10. Pearson, *supra* note 7.

11. *Mr. Sage Tells the Story*, N.Y. TIMES, Mar. 12, 1892, at 8. Perhaps not surprisingly, accounts differ as to the precise text of the note. *See, e.g.*, Pearson, *supra* note 7 (describing the note as demanding $1,250,000).

12. Pearson, *supra* note 7.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 95–96 (noting that Sage suffered many small wounds but was able to "return[] to work in two weeks").

18. *Id.* at 96 ("[Laidlaw] spent fifty-five days at St. Vincent's Hospital, and when he appeared at the inquest, three months after the explosion, [he] was still wearing bandages."); *see also Told by Eye Witnesses*, N.Y. TIMES, Dec. 5, 1891, at 1 (describing the condition in which Laidlaw was found); *Mr. Sage Tells the Story*, *supra* note 11 (describing Laidlaw as "more severely wounded than anybody else by the explosion").

19. *A Crazy Man's Awful Act, supra* note 9; *A Demon's Deed*, DAILY SHIELD & BANNER, Dec. 5, 1891. The *Times*, in its initial reporting, noted, that the man gave a card to a clerk in the office with the name H.D. Wilson. *A Crazy Man's Awful Act*, *supra* note 9.

20. Pearson, *supra* note 7; *Mr. Sage Tells the Story*, *supra* note 11 (recounting Laidlaw's testimony at the coroner's inquest that Sage had never before placed his hands

him as a human shield. Sage denied having touched Laidlaw at all;[21] indeed, in his recounting of the event to a reporter for the *New York World*—who also happened to be his grandnephew—Sage said that Laidlaw entered the room only moments before the explosion.[22] The writer also noticed that, three days after the explosion, Sage's face "was clean-shaven and showed almost no marks of the glass cuts from the explosion" and that the writer "was startled to see him looking so well."[23] Frank Robertson, a clerk in the office at the time, testified that Sage did not touch Laidlaw or use him as a shield.[24] Reporting the next day, the *New York Times* noted that "Mr. Sage's escape from instant and terrible death was marvelous" and that he likely survived "because of the fact that his body was partly behind the partition between the anteroom and the public office, while his head and one arm were sheltered by the door."[25] Laidlaw requested financial compensation, which Sage refused, leading Laidlaw to file suit for $50,000

on Laidlaw's shoulders or shaken hands with him); *Used as a Human Screen: W.R. Laidlaw Wants Russell Sage to Pay Damages*, N.Y. TIMES, June 6, 1893, at 1 (recounting Laidlaw's testimony at trial).

21. Pearson, *supra* note 7, at 96. The *Boston Transcript* opined, in an April 1, 1894, article, that "[Laidlaw] has never recovered from the physical and nervous consequences of the ensuing explosion, and Mr. Sage—whose life, as most men believe, he saved—has never, with surpassing selfishness, made any real acknowledgment for so rare a service." *Mr. Joseph Choate*, BOS. EVENING TRANSCRIPT, Apr. 2, 1894, at 5.

22. JAMES MCGRATH MORRIS, THE ROSE MAN OF SING SING 117 (2003) (recounting the reporter's impressions). In court, Sage apparently testified that Laidlaw had entered the room before Norcross had entered it. *Choate Torments Sage*, SUN, June 14, 1895. During the third trial on the matter, Sage testified, as described by the *New York Times*, that Laidlaw "was not within four feet of him at any time after Laidlaw entered the room, and before the explosion." *Here's Mr. Sage's Version: He Denies that He Used Laidlaw to Shield Himself from Harm*, N.Y. TIMES, Jan. 18, 1895, at 9.

23. MORRIS, *supra* note 22, at 115. In his testimony, Sage discredited the article, calling it a "gross exaggeration." *Choate Torments Sage*, *supra* note 22.

24. *Choate Torments Sage*, *supra* note 22.

25. *A Crazy Man's Awful Act*, *supra* note 9.

in damages in the Supreme Court of New York in June 1893.[26] Laidlaw, who was married, reportedly had not had steady work since the incident.[27]

The trial judge at the New York Supreme Court granted Sage's motion to dismiss after the close of Laidlaw's case, finding that the proximate cause of Laidlaw's injuries was Norcross's actions, not Sage's actions[28]—in other words, that Laidlaw would have been just as injured from the explosion if Sage had not touched him at all. The appeals court reversed and remanded for a new trial, holding that Laidlaw had indeed established a prima facie case—that Sage had maneuvered Laidlaw and that injury to him resulted—and so the burden was then on Sage to show that his actions did not in any way contribute to the nature or extent of Laidlaw's injuries.[29] At the second trial, despite Sage's testimony that he should be considered the savior for pulling Laidlaw from the debris, the jury found for Laidlaw, awarding him $25,000.[30] Reportedly, the jury hoped that by awarding Laidlaw half of what he requested, Sage would forgo an appeal.[31]

This was not the case, however. Sage did appeal, the appeals court again reversed for an error in the jury instructions,[32] and a third trial took

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26. Pearson, *supra* note 7, at 97. Sage was advised by one of his lawyers, John F. Dillon, a former federal judge, to settle the claim for $25,000, but Sage refused, believing the lawsuit to be "'blackmail'—aided and abetted by the courts." PAUL SARNOFF, RUSSELL SAGE: THE MONEY KING 290 (1965). Laidlaw was represented by Noah Davis of Davis, Work, Pincoffs & Jessup; Joseph H. Choate was special counsel. *Id.* Sage was represented by Dillon and Rush Taggart, with Col. Edward C. James as counsel. *Id.* at 290–91. Jacob Stein wrote, "As the trial approached a lawyer commented that Laidlaw was bound to lose because of his own contributory negligence: 'When any man finds Russell Sage taking his hand in both of Sage's hands, it is his duty to run.'" Jacob A. Stein, *Laidlaw, Sage, Prosser & Joseph Choate*, 8 GREEN BAG 2D 173, 175 (2005).

27. SARNOFF, *supra* note 26, at 292.

28. *See* Pearson, *supra* note 7, at 97; *Mr. Sage Escapes Again: W.R. Laidlaw's Suit Against Him Dismissed*, N.Y. TIMES, June 7, 1893, at 8 ("All the evidence put in shows conclusively that the plaintiff must have been seriously injured in any event, even if he had remained on the spot where he stood when Sage caused him to move." (quoting Judge Andrews)).

29. *Laidlaw a Winner at Last: Russell Sage May Have to Pay for His Human Shield*, N.Y. TIMES, Nov. 18, 1893, at 1; *see also* Note, Laidlaw v. Sage, 7 HARV. L. REV. 302, 303–04 (1893) (anticipating that Sage would ask for an instruction at the next trial that he could not be liable to Laidlaw if he acted instinctively and raising doubt that "whether the facts as we have them do not show a rapid exercise of the reasoning faculty, rather than purely impulsive action").

30. Pearson, *supra* note 7, at 99; Laidlaw vs. Sage, N.Y. TIMES, Mar. 31, 1894, at 4; *Russell Sage Must Pay: Worth $25,000 to Use Laidlaw as a Human Shield*, N.Y. TIMES, Mar. 31, 1894, at 1.

31. Pearson, *supra* note 7, at 99. Laidlaw apparently sued Sage for slander based on the belief that Sage had called him a "common blackmailer." *Russell Sage Charged with Slander*, N.Y. TIMES, July 7, 1894, at 9.

32. *See Mr. Sage May Escape Payment*, N.Y. TIMES, Oct. 13, 1894, at 4. The basis for reversal was that the trial court had erred in refusing to instruct the jury that Sage could

place in 1895. At this trial, George Kendall was produced as a witness for Laidlaw and testified that he had heard Sage say, "I am not much hurt, but if I hadn't got that young man between us, I would have been a dead man."[33] This time, the jury could not agree on a verdict—it apparently split nine to three in Laidlaw's favor, with the nine voting to give Laidlaw his full requested amount of $50,000—and the judge declared a mistrial.[34]

At the fourth trial, also in 1895,[35] the jury once again found for Laidlaw and awarded $40,000. Sage moved for a new trial; his motion was denied, and the denial was affirmed by the Appellate Division of the New York Supreme Court.[36] The editors of the *New York Times*, although critical of the fact that Laidlaw was not awarded the full amount he sought, suggested that most New Yorkers would be gratified by the verdict.[37] The *Times* conceded that Sage's action could have been involuntary, "arising from the instinct of self-preservation, that led him to shelter himself

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not be held liable if what happened was involuntary or instinctive. Laidlaw v. Sage, 52 N.E. 679, 682 (N.Y. 1899). The court noted that an instinctive act, although voluntary, is "not the result of an intent based upon reasoning." *Laidlaw v. Russell Sage (The Dynamite Case) Goes to a Third Trial*, 8 HARV. L. REV. 225, 225–26 (1894).

33. Pearson, *supra* note 7, at 99. Sage denied that he had made this remark. *Here's Mr. Sage's Version: He Denies that He Used Laidlaw to Shield Himself from Harm*, *supra* note 22. It should be noted that Sage and Kendall had a contentious business history. *See Will Stick to Laidlaw: Through Ninety Trials and for Ninety Years Says Mr. Choate*, N.Y. TIMES, Jan. 22, 1895, at 14.

34. *Mr. Sage Again Escapes: Jury in the Laidlaw Damage Suit Was Unable to Agree*, N.Y. TIMES, Jan. 23, 1895, at 16. The editors of the *New York Times* used the event to call in an editorial both for an end to the requirement of unanimous juries and a call for the diminishment of the American tendency "to admire and envy the possessors of great fortunes, without any regard to their personal qualities." Laidlaw vs. Sage, N.Y. TIMES, June 11, 1895, at 4.

35. *See Russell Sage Was Not Present: Opening of the Fourth Trial of the W.R. Laidlaw's Suit for $50,000 Damages—The Plaintiff Again a Witness*, N.Y. TIMES, June 12, 1895, at 2. A new witness, George Ballard, testified that, after the incident, Sage said that his injuries were minor because he had been "protected from the explosion." *Mr. Sage Tells His Story: Does a Bit of Acting, Too, in the Laidlaw Trial*, N.Y. TIMES, June 13, 1895, at 13.

36. *May Cost Mr. Sage $40,000: Verdict Returned for This Amount in the Laidlaw Case*, N.Y. TIMES, June 19, 1895, at 1; Laidlaw vs. Sage, N.Y. TIMES, Mar. 7, 1896, at 4; *Mr. Sage Again Loses: The Verdict of $40,000 in the Laidlaw Case Approved*, N.Y. TIMES, Mar. 7, 1896, at 9–10. The court's opinion, which the *Times* reprinted in full, notes that the jury was entitled to believe Laidlaw's version of events over Sage's and that because Sage testified that he did not touch Laidlaw at all, the issue of whether liability could rest on an instinctive, and so not intentional, touching, was not before the court. *See Mr. Sage Again Loses: The Verdict of $40,000 in the Laidlaw Case Approved*, *supra*.

37. *See Laidlaw's Verdict*, N.Y. TIMES, June 19, 1895, at 4.

behind Laidlaw, so that Laidlaw received the injuries which otherwise would have befallen Sage."[38] Even so, the *Times* asserted, Sage should be held liable for the harm done to Laidlaw, "as he would have been liable if the object he used as a shield had been an inanimate object and the property of somebody else."[39]

Sage once again appealed. The appellate court, in 1899, reversed and ordered a fifth trial, issuing the opinion for which the case is known.[40] After dispensing with a procedural issue, the court first considered whether there was sufficient evidence that Sage acted wrongfully such that he could be liable for even a technical tort.[41] Had Sage touched Laidlaw at all? The trial court had, in its charge to the jury, stated that Sage had testified that he acted consciously and deliberately during the incident. But, the appeals court noted, Sage had also testified that he had never touched Laidlaw, which the trial court did not convey.[42] Moreover, the appellate court noted that the only evidence it found in the record that supported Laidlaw's view of events was the testimony of Laidlaw himself, an individual whose "memory had been very seriously impaired, and to such an extent that he was unable to remember from day to day or hour to hour what he was told to do, and that this condition of his mind continued from the time of the accident until the last trial of this case," as compared to Sage, who "clearly and positively denied that he interfered with [Laidlaw] at all" and whose injuries were inconsistent with Laidlaw's claim to have shielded Sage from the blast.[43] Thus, the court noted, there was "nothing more than a mere scintilla" of evidence supporting Laidlaw's claim to have been moved by Sage, and the lower court should have directed a verdict for Sage on that ground.[44] (Joseph Hodges Choate, Laidlaw's counsel, believed the court improperly decided questions of fact that the jury had already resolved.[45])

Even if Sage *had* moved Laidlaw, the court continued, it would have been understandable given the circumstances:

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38. *Id.*
39. *Id.*
40. Laidlaw v. Sage, 52 N.E. 679, 682, 690 (N.Y. 1899); *see also Russell Sage Victorious: No Redress for Laidlaw, Injured in the Financier's Office*, N.Y. TIMES, Jan. 11, 1899, at 3.
41. *See Laidlaw*, 52 N.E. at 684.
42. *See id.* at 685.
43. *Id.* at 685–86.
44. *Id.* at 686.
45. 2 EDWARD SANDFORD MARTIN, THE LIFE OF JOSEPH HODGES CHOATE: AS GATHERED CHIEFLY FROM HIS LETTERS 471 (1920).

> [Sage] suddenly and unexpectedly found himself confronted by a terrible and impending danger which would naturally, if not necessarily, terrify and appall the most intrepid . . . . If with this awful peril before him, he maintained any great degree of self-control, it indicated a strength of nerve and personal bravery quite rare indeed.[46]

Quoting *Moak's Underhill on Torts*, the court stated that "[t]he law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily,"[47] noting with approval the maxim that "self-preservation is the first law of nature, and that where it is a question whether one or two men shall suffer, each is justified in doing the best he can for himself."[48] One is instinctively motivated, suggested the court, to save one's own life, even if that comes at the expense of another's.[49]

From there, the court moved on to the second question: Even if Laidlaw's version of events were correct, did Laidlaw suffer any substantial damages resulting from having been moved that justified the jury's award?[50] The trial court had charged the jury that if Laidlaw had suffered more or different injuries as a result of being moved, it could find in favor of Laidlaw.[51] But the appellate court noted that there was insufficient evidence to suggest any particular path of the explosion that would have caused Laidlaw a different injury from the one he would have suffered simply from being in the room, and to permit the jury to speculate in this regard was erroneous.[52]

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46. *Laidlaw*, 52 N.E. at 685.
47. *Id.* at 685 (citation omitted).
48. *Id.* (first citing Scott v. Shepherd (1773) 96 Eng. Rep. 525 (KB); and then citing Vandenburgh v. Truax, 4 Denio 464 (N.Y. Sup. Ct. 1847)).
49. *Cf.* RESTATEMENT (SECOND) OF TORTS § 73 (Am. L. Inst. 1965) ("The intentional infliction upon another of substantial bodily harm, or of a confinement involving substantial pecuniary loss, for the purpose of protecting the actor from a threat of harm or confinement not caused by the conduct of the other, is not privileged when the harm threatened to the actor is not disproportionately greater than the harm to the other."); *id.* cmt b. illus. 1–4 (giving illustrations in which a defendant deliberately sacrifices another's life to preserve one's own and positing liability in each case); *id.* caveat ("The Institute expresses no opinion that there may not be a privilege to inflict a comparatively slight bodily harm upon another for the purpose of protecting the actor or a third person from a disproportionately greater bodily harm, as for instance, death, threatened otherwise than by the conduct of the other.").
50. *See Laidlaw*, 52 N.E. at 684.
51. *See id.*
52. *Id.* at 686–88.

> No one can read the evidence in the record as to the nature, power, and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them all, destroying or seriously injuring every person or thing with which it came in contact.[53]

Here, concluded the court, was a second basis for directing a verdict for Sage.[54]

Finally, and relatedly, was the last question: Even if Laidlaw had suffered substantial injuries after being moved by Sage, were Sage's actions the proximate cause of those injuries? After a long discussion on what distinguished a proximate cause from a remote cause,[55] the court concluded that the answer was no. "All the injuries which the plaintiff sustained were caused directly and immediately by the act of Norcross in exploding the dynamite," wrote the court.[56] "[U]nder no circumstances can it be properly said that the act of the defendant in changing the plaintiff's position a few inches to the left of where he previously stood caused the explosion or occasioned the catastrophe."[57]

The court concluded with some thoughts on the economic position of the parties.[58] Although the appellate court believed that it was improper for the lower court to have permitted evidence on the relative wealth of the parties,[59] it also remarked that it was "impossible to consider the plaintiff's injuries without a feeling of profound sympathy," albeit improper to give sympathy any "proper place in the administration of the law."[60] Indeed, the court continued, perhaps in a gentle rebuke to the jury or an attempt to mollify the public,

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53. *Id.* at 687–88.

54. *Id.* at 688.

55. Kenneth Abraham and Edward White note, "At points, the opinion conflates cause in fact with proximate cause, and the absence of causation with remote cause." Kenneth S. Abraham & G. Edward White, *Recovering* Wagner v. International Railway Company, 34 TOURO L. REV. 21, 45 (2018) (citing *Laidlaw*, 52 N.E. at 688).

56. *Laidlaw*, 52 N.E. at 689.

57. *Id.* The court also concluded that the testimony of George Baillard that Sage had referenced having interposed someone between him and the explosion was too vague to have been considered by the jury. *Id.*

58. *See id.* at 690.

59. *Id.* ("It has ever been the theory of our government, and a cardinal principle of our jurisprudence, that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law.").

60. *Id.*

> [i]f permitted to make it the basis of transferring the property of one party to another, great injustice would be done, the foundation of the law disturbed, and anarchy result. Hence, every proper consideration requires us to disregard our sympathy, and decide the questions of law presented according to the well-established rules governing them.[61]

The fourth trial was the last. Laidlaw did not pursue a fifth trial and never received a cent from Sage, who died in 1906.[62] Laidlaw reportedly went on to form a brokerage firm,[63] but it is unclear whether it was successful. An announcement of Laidlaw's death in 1911 indicated that Laidlaw had exhausted his funds in pursuing the lawsuits against Sage and that, after Sage's death, his sisters appealed to Sage's widow for support, which she denied.[64] Laidlaw died, penniless, in the Home for the Incurables in the Bronx.[65] Sage's widow donated much of Sage's fortune by establishing Russell Sage College—with campuses now in Albany and Troy, New York—and the Russell Sage Foundation.[66]

The four trials of Laidlaw's suit against Sage were the subject of much public attention in New York and across the country.[67] The *New York Times* alone published over fifty stories on the dispute. The story was made for entertainment: one of the country's wealthiest men allegedly used an office clerk as a human shield and did not deign to compensate him for the service.[68] A letter to the editor of the *Times* during the appeal

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61. *Id.*

62. *Russell Sage Dies Leaving $80,000,000: Famous Financier Borne Down by the Weight of His 90 Years*, N.Y. TIMES, July 23, 1906, at 1–2.

63. *New Stock Exchange Firm*, N.Y. TIMES, Apr. 29, 1900, at 27.

64. *The News of the Week*, COMMONER, Aug. 18, 1911, at 10.

65. *Sage's Rescuer Dies: W. R. Laidlaw Was Injured Protecting Financier from Bomb*, GETTYSBURG TIMES, Aug. 9, 1911; *Victim of Sage Bomb Dead*, N.Y. TIMES, Aug. 9, 1911, at 9; *see also* Ian Fisher, *Caring for Poor and for Profit*, N.Y. TIMES, Mar. 9, 1998, at B1 (noting that the Home for the Incurables is known today as St. Barnabas Hospital; it is located on Third Avenue at 183rd Street).

66. *See Giving Away Russell Sage's Money*, L.A. SUNDAY HERALD, June 13, 1909.

67. *See, e.g.*, Laidlaw vs. Sage, *supra* note 34.

68. *See* LIFE, Jan. 7, 1892, at 4 ("[I]f Mr. Sage really did what Mr. Laidlaw says he did, it is doubtful if to an average jury his conduct will seem at all irregular. . . . [W]hen a man's income reaches a hundred thousand a year, of course he cannot afford to hold himself so cheap, and if he can get a five-dollar-a-day man between him and sudden death, it is obviously business-like for him to do it."); *see also The Ugly Suggestion in Sage's Boast*, ILLUSTRATED AM., July 6, 1895, at 14–15 (criticizing Sage's stated disdain for the jury as "such scruff"); *Mr. Joseph Choate*, *supra* note 21 ("The clerk has never recovered from the physical and nervous consequences of the ensuing explosion, and Mr. Sage—whose life, as most men believe, he saved—has never, with surpassing selfishness, made any real acknowledgment for so rare a service.").

of the verdict from the fourth trial opined that "in one of the most striking cases of the century—a case, in short, without precedent in our judicial records—it was decided that simple and exact justice can be obtained by a plaintiff, however poor, even when the defendant is one of the wealthiest men in the Nation."[69] Edmund Pearson, writing in the *New Yorker* many years after the deaths of both Sage and Laidlaw mused, "It is hard to believe that anybody thought the result much of a triumph for justice."[70]

The public's interest was heightened by the performance of Joseph Hodges Choate, Laidlaw's counsel and a well-known New York lawyer, who took great delight in skewering Sage on the witness stand.[71] As one writer put it in the *Boston Evening Transcript* on April 2, 1894:

> [Choate's] soothing familiarity seemed to lure Sage to confusion, albeit Mr. Choate's cold, eager gray eyes might well have warned him, until keen question as to wealth and manner of life and quick exposure of evasive answers brought the money-lender to a plight that might have moved a stone to amused pity. If the town has laughed at Sage he has only his open and petty meannesses, the mixture of envy and contempt in human nature for such a life as his and Mr. Choate's quick and penetrating wit to blame.[72]

Similarly, Choate's biographer wrote, "Mr. Sage could more suitably be classified as a cash-register than as a human being, and in skinning him Mr. Choate was merely skinning a skinflint. He believed in the justice of Laidlaw's claim and was absolutely scornful of the meanness of Sage in doing nothing for him."[73] The *New York Times*, during the third trial, wrote that the public "would not regret it, except on poor Mr. Laidlaw's account, if the cross-examination of Mr. Sage were to become an annual sporting 'fixture.'"[74]

Others were less supportive of Laidlaw and his counsel's tactics. The *Brooklyn Daily Eagle* lauded the appellate court's opinion, noting that Laidlaw "probably could not remember anything, but when on the stand he seemed to remember all that happened to him and to remember it in just such a way as to strengthen his complaint against Mr. Sage. Thus the unconscious operation of interest on recollection became very plain."[75] Of Choate, one writer concluded,

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69. J. Henry Hager, Letter to the Editor, *Value of the Laidlaw Decision*, N.Y. TIMES, Mar. 11, 1896, at 14.
70. Pearson, *supra* note 7, at 100.
71. *See Mr. Joseph Choate*, *supra* note 21.
72. *Id.*
73. 2 MARTIN, *supra* note 45.
74. Laidlaw vs. Sage, N.Y. TIMES, Jan. 18, 1895, at 4.
75. *A Wholesome Decision*, BROOKLYN DAILY EAGLE, Jan. 11, 1899, at 4.

> Had the lawyer for the plaintiff been a lesser person than Joseph H. Choate, idol of the New York bar, some of his questions might not have been allowed by the court. As it was, the general public was vastly entertained at the expense of the defendant by having peculiarities which had no bearing on the case held up to open ridicule.[76]

And an anonymous merchant, in a letter in response to a *New York Times* editorial taking delight in Choate's cross-examination during the fourth trial, wrote:

> Mr. Sage did not send for Laidlaw; he came at an unfortunate moment for himself, and Mr. Sage, obeying the first law of nature, screened himself all he could, as Choate himself would have done in similar circumstances, and for this the great advocate is at liberty to jibe and jeer and tear the heartstrings of Mr. Sage because he is reputed rich.[77]

On the merits, public opinion was again divided. The *New York Times* was willing to accept both that Laidlaw was telling the truth about Sage's actions and that Sage was acting instinctively.[78] Because Laidlaw had not seen Norcross's note, the *Times* concluded, his emotions, and thus his memory—unlike Sage's—would not have been affected by the apprehension of the threatened destruction.[79] But Sage, the *Times* also noted, did "only what would be natural for any human being at a moment so critical," following

> a blind instinct of self-preservation by attempting to interpose something, no matter what, between him and the dynamite. If he had not had Laidlaw, he might have opened an umbrella. But having no umbrella and having Laidlaw, he naturally, involuntarily, and, as it now appears, unconsciously, unfurled Laidlaw to the breeze.[80]

Indeed, continued the *Times*, "[a] man in imminent danger of death is to be forgiven for snatching at anything within reach to save himself . . . ."[81]

But there was one response for which Sage could be criticized, the *Times* concluded: "Necessarily [such a man] is responsible for any damage that he may cause to the object he thus converts to his own use, whether the object be an inanimate umbrella or an animated broker," and thus "Mr.

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76. Jane Remsen, *Russell Sage: Yankee*, 11 NEW ENGLAND Q. 4, 24 (1938).
77. Letter to the Editor, *Cruelty to Russell Sage: His Heartstrings Torn by the Inhuman Choate*, N.Y. TIMES, June 15, 1895, at 4.
78. *The Sage-Laidlaw Controversy*, N.Y. TIMES, Mar. 12, 1892, at 4.
79. *Id.*
80. *Id.*
81. *Id.*

Laidlaw is entitled to recover from Mr. Sage compensation for the damage he has sustained in helping to preserve Mr. Sage's valuable life."[82] In an editorial subsequent to the first dismissal of Laidlaw's case, the *Times* likened Sage's actions to his modus operandi in finance: "[H]e induces some other and less fortunate person to occupy [a hole], while he himself remains outside, having arrested himself at the brink."[83]

Other commentators, however, applauded Sage for pursuing vindication of a legal principle, regardless of the fact that he could have afforded to pay Laidlaw's demands hundreds of times over. As one commentator wrote, "He deserves respect who asserts a right when little is involved, in disregard of carping critics who call him mean. The fear of that criticism has led many a man, otherwise brave, to submit unwillingly to injustice."[84]

Despite the intense public interest in the case at the time, the final appellate opinion has not been among the most influential in tort law casebooks or scholarship; it has been cited by courts about 180 times as of this writing.[85] Those courts have found different aspects of it to highlight. Some have cited it for the proposition that one must act intentionally, and not instinctively, in order to commit a battery.[86] Most have cited it for its causation holding—that a defendant cannot be held liable for a plaintiff's injury if the plaintiff would have been similarly injured regardless of the defendant's actions.[87] Some have cited it for the principle that a court must reverse a verdict where there is insufficient evidence to support it.[88] And some have cited it for the idea that the amount of compensatory

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82. *Id.*

83. *Russell Sage's Escape*, N.Y. TIMES, June 9, 1893, at 4.

84. John Caldwell Myers, *Russell Sage's Career as a Litigant*, 6 BENCH & BAR 83, 90 (1906).

85. *See Shepard's:* Laidlaw v. Sage*, 158 N.Y. 73 (1899)*, LEXISNEXIS, https://plus.lexis.com/api/permalink/05dcca59-b426-4721-8f62-187ca7fbbb45/?context=1530671.

86. *See, e.g.*, Betancourt v. 141 E. 57th St. Corp., 393 N.Y.S.2d 35, 36 (1977).

87. *See, e.g.*, Peithman v. Beals, 242 N.E.2d 476, 478 (Ill. App. Ct. 1968); Hynes v. N.Y. Cent. R.R. Co., 131 N.E. 898, 900 (1921); Seifter v. Brooklyn Heights R.R. Co., 62 N.E. 349, 350 (N.Y. 1901); Salsedo v. Palmer, 278 F. 92, 95–96 (2d Cir. 1921); *see also* Prescott F. Hall, *Some Observations on the Doctrine of Proximate Cause*, 15 HARV. L. REV. 541, 548 (1902) ("The court held that the explosion and not the act of Sage was the proximate cause of Laidlaw's injuries, as it was not shown that the injuries had been increased by Sage's act." (citing Laidlaw v. Sage, 52 N.E. 679 (1899)); *Progress of the Law*, 47 AM. L. REG. 247, 256 (1899) ("The court did not rest its opinion upon the question of proximate cause alone, yet it is very apparent that that was the determining factor in the decision, and it was based upon the fact that plaintiff would have been injured if Sage had not moved him, because everybody in the room was injured.").

88. *See, e.g.*, Walters v. Syracuse Rapid Transit Ry. Co., 71 N.Y.S. 853, 857 (App. Div. 1901); Nelson v. Masonic Mut. Life Ass'n, 68 N.Y.S. 290, 292 (App. Div. 1901) ("[T]he rule emphasized by *Laidlaw v. Sage* makes it improper to submit to the jury evidence which is insufficient to sustain the claim of the party upon whom the *onus* rests.") (citing *Laidlaw*, 52 N.E. at 687).

damages should not depend on the defendant's wealth or sympathy for the plaintiff's predicament.[89]

What attraction, then, can *Laidlaw v. Sage* hold today, many years removed from the drama of wealthy robber baron versus impecunious clerk? As I will discuss, *Laidlaw* presents an interesting opportunity to consider the intersection of two potentially competing doctrines: the doctrine of private necessity and the general rule against a duty to rescue absent a special relationship. In considering these doctrines, I will adopt a version of the facts in *Laidlaw* closer to that advanced by the plaintiff (and, for what it is worth, determined by the jury): that Sage indeed pulled Laidlaw in front of him and, in doing so, reacted quickly but not involuntarily.

III. PRIVATE NECESSITY, DRAFTED RESCUERS, AND OTHER MEANS TO AN END

Under the facts of *Laidlaw* so construed, one might think of the case as simply another instance giving rise to an analysis under the doctrine of private necessity, as developed in the famous cases *Ploof v. Putnam*[90] and *Vincent v. Lake Erie Transportation Co*.[91] In other words, just as those cases involved an attempt to save one's property—and, in the case of *Ploof*, one's life—by encroaching on another's property without permission, *Laidlaw* involved a similar attempt in which Sage used Laidlaw as a human shield—as the *New York Times* suggested, as something akin to an umbrella.[92] (The *Times* editorial may have anticipated the discussion in *Vincent* by almost twenty years.) Under this analysis—and particularly that of *Vincent*—if Sage indeed pulled Laidlaw in front of him, he should have been made to compensate Laidlaw for the "property" used to save his life.[93]

89. People v. Brim, 22 Misc. 2d 335, 338–39 (N.Y. Gen. Sess. 1960) ("[S]ympathy . . . has no proper place in the archives of the law."); Lahren v. Boehmer Transp. Corp., 856 N.Y.S.2d 363, 365 (2008) ("[E]vidence of a party's wealth generally is not admissible . . . ."); Marshall v. Beno Truck Equip., Inc., 481 So. 2d 1022, 1027–28 (La. Ct. App. 1985) (citing *Laidlaw* in discussion of overall jurisprudential rule permitting consideration of wealth or poverty of party in determining compensatory damages).

90. Ploof v. Putnam, 71 A. 188 (Vt. 1908).

91. Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

92. *The Sage-Laidlaw Controversy*, *supra* note 78.

93. The Second Restatement suggests similarly but notes simply that this is due to a lack of privilege. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 49.

Considered from another angle, though, *Laidlaw* invokes the "no duty to rescue" doctrine—indeed, just as the private necessity cases do, but perhaps more evidently given that Laidlaw's person was at stake. Laidlaw, in other words, was made to be a rescuer against his will. If negligence law would not hold Laidlaw liable for standing by and letting Sage take the force of the explosion—putting aside for the moment that Laidlaw was also at risk—then would there be a theory under which a compulsory rescue would be deemed compensable?

What would this analysis look like if we followed it through? Some readers may not need their memories refreshed as to what happened in *Ploof* and *Vincent*, but let us begin there anyway.

A. The Private Necessity Doctrine

The controversy in *Ploof v. Putnam* involved a sloop carrying the Ploof family—Sylvester Ploof, his spouse, and their two children—on Lake Champlain in November 1904.[94] Caught in a violent storm, the Ploofs tied up at Henry Putnam's dock.[95] Albert Williams, Putnam's employee, untied the boat, resulting in the boat's being thrown against the shore, destroying the boat and its contents and injuring the Ploof family.[96] Sylvester Ploof brought suit against Henry Putnam, seeking recompense for the property damage and arguing that, under the circumstances, Putnam was obligated to allow the Ploofs to remain moored to his dock during the storm.[97]

After Putnam's demurrer to the complaint was overruled by the lower court, Putnam sought review in the Supreme Court of Vermont.[98] On appeal, Putnam argued that the complaint was insufficient both because it did not sufficiently allege facts demonstrating that the Ploofs needed to tie up to Putnam's dock, as opposed to some other object in the area, and that it did not allege that the employee was acting within the scope of his employment, such that his actions could be attributed to Putnam.[99] The court rejected both arguments, finding the complaint sufficient and remanding

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94. *Ploof*, 71 A. at 188.
95. *Id.*
96. *Id.* at 188–89. The Ploofs were apparently well known in the area, which may have led to Williams's reaction. Joan Vogel, *Cases in Context: Lake Champlain Wars, Gentrification and* Ploof v. Putnam, 45 ST. LOUIS U. L.J. 791, 798 (2001) ("Henry Putnam's caretaker untied the Ploofs' boat because he knew them and he was aware of their reputation as thieves, not simply because the Ploofs were using the dock without the owner's permission.").
97. *Ploof*, 71 A. at 189. Ploof's lawsuit contained a count in trespass and a count in case—essentially a count based on an intentional tort and a count based in negligence. *Id.*
98. *Id.*
99. *Id.* at 189–90.

for further proceedings, noting that it was clear from the case law that necessity could justify entering onto another's land or the sacrifice of another's personal property, particularly when necessary to save human life.[100]

Because the Ploofs did not succeed in mooring at Putnam's dock, the case did not present the question of whether an individual, encroaching on another's property under the press of necessity, would nevertheless owe some compensation to the property owner, either for damage done to the property or to represent rental fees for the use of the property. Nor did the court directly engage—perhaps because it was reviewing an overruling of a demurrer—questions of whether there were limitations on the extent or length of the encroachment on the other's property rights. The cases the court cited for the necessity principle all seemingly involved temporary and minor intrusions: a sheepdog that had run onto a neighbor's land; wandering cattle; a traveler who temporarily went onto another's land because the road was suddenly blocked; entry onto another's land to save goods at risk of destruction from flooding or fire or a boat from drifting away; and running through another's property to escape an assailant.[101] The one intrusion of any consequence that the court cited was the well-known *Mouse's Case*, in which a passenger on a barge successfully raised a necessity defense when sued by a fellow passenger for throwing that passenger's property overboard to save the lives of all the passengers during a sudden storm.[102] The *Ploof* court, citing this case with approval, noted that "every one ought to bear his loss to safeguard the life of a man,"[103] suggesting that every passenger's property was equally likely to have been selected for jettisoning, and so the act did not give rise to a cause of action.

Both issues were, however, presented in the equally famous case of *Vincent v. Lake Erie Transportation Co*. Lake Erie's steamship, the *Reynolds*, was moored to R.C. Vincent's dock in Duluth to unload its cargo one

100. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS §§ 197, 263 (Am. L. Inst. 1965). Ploof prevailed at trial. *Ploof*, 71 A. at 189–90. On another appeal to the Supreme Court of Vermont, Putnam contended that the jury had been incorrectly instructed that the employee, Williams, was acting within the scope of his employment. Ploof v. Putnam, 75 A. 277, 279 (Vt. 1910). The court rejected this argument. *Id.* Ploof later sought a new trial on the basis of newly discovered evidence, but that was also denied. Ploof v. Putnam, 76 A. 145, 145 (Vt. 1910).

101. *Ploof*, 71 A. at 189 (citations omitted).

102. *Id.* at 189–90 (citing Mouse's Case, 77 Eng. Rep. 1341 (KB)).

103. *Id*. at 189.

November night in 1905. As the unloading wrapped up, an unexpectedly strong storm developed, making it unsafe to leave the harbor; no tug was available to assist.[104] Lake Erie decided to stay moored to Vincent's dock, a decision the court held was appropriate under the circumstances, replacing the ropes securing the ship as they broke.[105] The force of the storm threw the moored vessel against the dock repeatedly, resulting in $500 worth of damage to the dock, for which Vincent sought compensation.[106]

On appeal to the Minnesota Supreme Court, Lake Erie contended that, given the circumstances, it was necessary to keep the boat moored, so it should not have been held liable for the resulting damage to the dock.[107] The court disagreed; its basis for doing so is what has given the case its lasting influence in the scholarly literature, if not in the case law.[108] The court concluded that the storm resulted in a suspension of the "ordinary rules regulating property rights,"[109] such that it would have been an "act of God" if the boat had been thrown against the dock absent any mooring; so, too, if the ropes from the initial mooring pre-storm had broken and sent the boat into the dock.[110] The difference in this case, however, was the decision by Lake Erie's employees to replace the ropes as they broke, which the court deemed an intentional act to "preserve[] the ship at the expense of the dock."[111] This intentional act, the court held, would not constitute a trespass,[112] but it would obligate the actor to pay for the damage done, just as "a starving man may, without moral guilt, take what is necessary to sustain life; but 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."[113]

The difference was in the intentionality. If "the infliction of the injury was beyond the control of the defendant," no compensation would be due, but where the defendant "prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable

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104. Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 221 (Minn. 1910).
105. *Id.*
106. *Id.*
107. *Id.*
108. A LexisNexis search conducted on February 15, 2023, suggests that *Vincent* has been cited in just twelve subsequent cases but more than 300 law review articles.
109. *Vincent*, 124 N.W. at 221.
110. *Id.* at 222.
111. *Id.* The court cited *Ploof*, stating that if the Ploofs had been allowed to remain at the dock but had damaged it, they would have been liable to compensate Putnam for that damage. *Id.*
112. Keith N. Hylton, *The Economics of Necessity*, 41 J. LEGAL STUD. 269, 270 (2012) (noting that one who successfully claims the necessity privilege is not considered a trespasser under the law).
113. *Vincent*, 124 N.W. at 222.

property," compensation would be due for any damage done.[114] The initial intrusion was not truly volitional, but the decision thereafter to change the natural course of events was intentional and, therefore, blameworthy, even if it was the prudent thing to do. Tying up was privileged; retying was not.

The usual label that is assigned to the result in *Vincent* is that it represents an "incomplete privilege." As Kenneth W. Simons has noted,

> it privileges the actor to intrude upon another's property, in the sense that the property owner has no right to interfere with that intrusion and cannot obtain a tort remedy for such an intrusion; but at the same time, the actor must pay compensation for the harm done to the property owner.[115]

The actor's intrusion is permitted because, in essence, they had no reasonable choice but to intrude under the circumstances. The idea, then, is that the "choice" to invade the other's property rights is not really a choice at all—what George Fletcher has called in the criminal context "normative involuntariness."[116] As Vera Bergelson has written, the doctrine is a "choice of a lesser evil" approach that "reflects our moral intuitions and common sense" that "sometimes, breaking the rules is the right—indeed, the only —thing to do in order to avoid a greater evil."[117] Characterizing this action as

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114. *Id.* Justice Lewis, in dissent, joined by Justice Jaggard, concluded that the decision to replace the ropes should have made no difference. *Id.* (Lewis, J., dissenting).

115. Kenneth W. Simons, *Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality*, 55 SAN DIEGO L. REV. 357, 363–64 (2018). Simons notes that the doctrine can be analogized to that of eminent domain in that both do not permit the property owner to stop the use or acquisition of the property but require compensation. *Id.* at 365; *see also, e.g.*, Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 313 (1926). *But see* George C. Christie, *The Unwarranted Conclusions Drawn from* Vincent v. Lake Erie Transportation Co. *Concerning the Defense of Necessity*, ISSUES LEGAL SCHOLARSHIP, 2006, at 1, 15 ("[I]f one destroys property in order to save life and is not at fault in creating the underlying situation, then one has no legal obligation to compensate the owner for his loss.").

116. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 803 (1978); *see also* Jerome E. Bickenbach, *The Defence of Necessity*, 13 CANADIAN J. PHIL. 79, 81 (1983) ("An agent may be said to be acting under necessity when, through no fault of his own, circumstances force him to invade the rights or interests of another (the victim) in order to prevent harm to his own interests, to someone else's interests, or to the interests of a group which may or may not include the agent."). *But see* Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 270 (1995) ("[D]uress does not involve involuntariness of any sort.").

117. Vera Bergelson, *Choice of Evils: In Search of a Viable Rationale*, 6 CRIM. LAW & PHIL. 289, 290 (2012).

a privilege or justification, rather than an excuse, reflects a conclusion that the actor acted properly, not wrongfully;[118] the individual who encroaches on the rights of another under necessity is doing what we want them to do under the circumstances even though another choice was technically available to them.[119]

This does not mean, however, that the necessity doctrine involves instinctive action—the equivalent of ducking when a ball is thrown at someone's head or the tossing of the squib from participant to participant in *Scott v. Shepherd*.[120] Characterizing an action as instinctive means that the resulting interference with another's property or bodily integrity was not intentional as a *factual* matter and, therefore, could not qualify as an intentional tort. The necessity doctrine, by contrast, operates to eliminate intent as a *legal* matter.[121] The decision to leave the *Reynolds* at Vincent's dock was not made in a thoughtless manner—it was a deliberate decision that it was safer to remain than to leave; so too regarding the decision to replace the ropes as they frayed, which might suggest that the distinction the court attempts to draw is unfounded.[122]

With this framing, however, the relevance of the storm becomes less clear. Imagine, for example, that as Lake Erie is unloading its cargo, it receives a weather report that a torrential storm would soon be traveling through the area where the *Reynolds* would have headed after leaving Vincent's dock but would miss the area around Vincent's dock entirely. After consulting with its navigation experts, Lake Erie decides that it would be prudent to wait out the time at Vincent's dock until the storm completely

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118. *Id. But see* Bohlen, *supra* note 115, at 308 (contending that the terms, at least at that point, were seen as interchangeable).

119. *See* Bickenbach, *supra* note 116, at 87 (noting that the characteristic of choice is what characterizes the doctrine as a justification rather than an excuse).

120. Scott v. Shepherd (1773), 96 Eng. Rep. 525, 525–26 (KB).

121. *See* HYLTON, *supra* note 6, at 85; *see also* Bickenbach, *supra* note 116, at 85 ("[A]cting under necessity is acting, not reacting."); *id.* at 86 ("Acting under necessity must be *deciding* to preserve an interest in a manner which sacrifices the interests of another.").

122. Hylton, *supra* note 112, at 285; *see also* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 629 (1949) (contrasting "willful" actions with those done in self-defense "in response to an impulse deeply ingrained in human nature"); Christie, *supra* note 115, at 19 ("If the key element in *Vincent* was the reattaching of the lines so that the case did not involve a variant of storm damage, which seems to be how the majority viewed it, I would submit that the case is not an instance of the exercise of a privilege at all. It is simply a case of intentionally damaging the property of another in the civil sense of 'intention,' that is, of engaging in conduct that one knows, with substantial certainty, will lead to that result." (footnotes omitted)); Simons, *supra* note 115, at 365 n.49 (taking the position that compensation would have been appropriate even if the ropes had not been retied); *cf.* Christie, *supra*, at 115 (considering to be correct the "common ground" between the majority and the dissent "that, had the original lines not failed, there would have been no liability").

passes through to avoid heading out directly into the storm and risk capsizing the boat, and all agree that this is the right call. While moored at Vincent's dock, a large wake caused by a passing ocean liner throws the *Reynolds* against Vincent's dock, causing $500 worth of damage. The decision to remain at Vincent's dock was equally the right decision as the one made in the case, but without the pressing emergency of the storm. Presumably, many would conclude that this is not a proper case for the application of the necessity doctrine—not because this is not a "lesser of evils" case, or because Lake Erie had any other reasonable choice but to remain, but presumably because the lack of urgency means that Vincent and Lake Erie had the time to negotiate over a rental fee for the use of the dock.[123]

This would suggest that *Vincent*'s assumption that both law and morality would require payment for the damage done was essentially a court-created agreement that the urgency of the situation prevented from being negotiated. (Kenneth Simons states that it is "virtually the *only* case that squarely holds that compensation is owed in such circumstances."[124]) Of course, the principle of "take first, pay later" is not uncommon, encompassing doctrines ranging from eminent domain to compulsory licensing in copyright law,[125] in which the law statutorily changes the framework from a property rule to a liability rule. But in such cases, the amount to be paid presumably represents some government assessment of the value of what has been taken. In *Vincent*, however, the requirement to pay only for the damage done to the dock ignores an additional taking: the rental value of the dock space.

123. Keith Hylton has suggested that the compensation requirement in *Vincent* depended on the "the fact that it was a case of property against property and that there was time to calculate the costs of alternative courses of action." *See* Hylton, *supra* note 112, at 274.

124. Simons, *supra* note 115, at 364.

125. 17 U.S.C. § 115 (an individual or entity who wishes to "make and distribute phonorecords of a nondramatic musical work" to the public for private use can do so without seeking permission of the copyright owner of the musical work, so long as the individual or entity complies with the statutory requirements, including by paying the required royalty); *see also* Peer Int'l Corp. v. Pausa Recs., Inc., 909 F.2d 1332, 1334 (9th Cir. 1990) ("Because the plaintiffs' copyrighted works are governed by the compulsory licensing provisions of section 115(c), the plaintiffs also could not prevent the defendants from obtaining licenses to use other copyrighted works not subject to the [plaintiffs'] revocation [due to nonpayment]."). As one district court noted, however, "[m]ost record companies do not make use of the process outlined [in section 115], but acquire licenses from [the] Harry Fox [Agency], which is authorized to issue mechanical licenses on behalf of the major U.S. music publishers." EMI Ent. World, Inc. v. Karen Recs., Inc., 603 F. Supp. 2d 759, 763 (S.D.N.Y. 2009), *amended by* 681 F. Supp. 2d 470 (S.D.N.Y. 2010).

Imagine, for example, that Vincent had rented to another boat owner the right to dock their boat there each night and so lost that night's fee when that owner had to find another place to rest for the night.

So, to the extent the court's holding represents an agreement, it is better characterized as an agreement that the court thinks morally *should* have been made, not one that likely *would* have been made. If Vincent thought at all like Putnam, it might be that Vincent preferred not to have Lake Erie there at all rather than simply being compensated for any damage. In such a case, the appropriate compensation would have been not the amount of the damage to the dock but rather an amount that took into consideration the loss of the property right.[126] To the extent that a property right is about the ability to decide how that property should be used, the result of *Vincent* is to shift the nature of the right from decision to integrity: to have the property returned in its prior form, but not to prevent it from being used in the first place.

We might also ask to what extent this court-mandated agreement depends, in part, on the fact that the court knew, *ex post*, the relative nature of the harms—that the damage caused to the dock was far less than the damage that presumably would have been caused to the *Reynolds* if Lake Erie had decided to venture out into the storm rather than to remain in the harbor.[127] Recall that the court noted that Lake Erie "prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property."[128] Would the court have reached the same result if Lake Erie had sought to preserve property worth much less than the damage caused to the dock, even under the same pressing threat of the storm? One might surmise that in such a case, the court would not simply leave Lake Erie with the costs of its ill-considered bargain but would instead query whether the privilege of trespass should have been available to Lake Erie at all.

Similarly, we might have expected a different result if the property that Lake Erie had consumed (the damage to the dock) had been something more fungible—that is, less specific to the situation at hand. The *Reynolds* was moored to the dock in the first place because of an existing contractual relationship that allowed Lake Erie to use the dock to unload its cargo.

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126. *See* Kai Devlin, *Rights, Necessity, and Tort Liability*, 28 J. SOC. PHIL. 87, 99 (1997) (characterizing *Vincent* as requiring compensation for value appropriated); Stephen D. Sugarman, *The "Necessity" Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency*, ISSUES LEGAL SCHOLARSHIP, Oct. 21, 2005, at 1, 27 (noting that this compensation is simply providing fair market value for the service provided rather than filling in the terms of a contract).

127. *See* Bohlen, *supra* note 115, at 314.

128. *Vincent*, 124 N.W. at 222.

That contract could have included an allocation of the cost of any damage to the dock; a court resolving a dispute between the two might therefore assume that Lake Erie, rather than Vincent, should bear that cost.[129] But imagine, instead, a set of facts that takes the negotiations out of the typical stream: Lake Erie offers one of Vincent's employees money to abandon the storm preparations he was engaging in for Vincent to help secure the *Reynolds*, or Lake Erie takes a pile of lumber being stored at the end of the dock to reinforce the *Reynolds* as the storm intensifies. In both of these scenarios, the decision might be deemed a rational one from a cost-benefit analysis: the value of the lumber or the value of the lost productivity of the employee might have been less than the anticipated damage to the *Reynolds*. But it is not clear that the court would have seen these actions as privileged.[130]

As some have noted, it might be difficult to square the idea of having a privilege to trespass with the idea that some sort of compensation is required; one does not typically owe compensation for acts that are not wrongful.[131] Richard Epstein has suggested that, as a matter of negligence law, the boat owner should not have to compensate the dock owner, given that his conduct was appropriate under the circumstances and "served to minimize the total amount of damage suffered; the expected benefits of further precautions were outweighed by their costs."[132] Of course, we need not explain one in relation to the other; it could be the case simply that the boat owner has

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129. *Cf.* Sugarman, *supra* note 126, at 38 ("The question remains why should the permissible and reasonable use of the cable in the emergency setting give rise to liability. Why not instead consider the cable a modest rescue device that its owner ought to be delighted was so helpful and which he surely would have had a moral obligation to employ on behalf of the defendant had he been on the scene?").

130. *Cf.* Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFFS. 93, 102 (1978). Feinberg poses the much-discussed hypothetical in which a backpacker is imperiled by an unanticipated storm, breaks into an unoccupied cabin, and consumes the owner's food and burns furniture to keep warm. *Id.* He concludes,

> Surely you are justified in doing all these things, and yet you have infringed the clear rights of another person. . . . More importantly, almost everyone would agree that you owe *compensation* to the homeowner . . . for the same reason one must repay a debt or return what one has borrowed.

Id. at 102.

131. Phillip Montague, *Rights and Duties of Compensation*, 13 PHIL. & PUB. AFFS. 79, 80 (1984).

132. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 158 (1973). Keith Hylton has suggested that the compensation rule diminishes the incentives that property owners have to take socially and economically unwanted actions to defend their property. *See* Hylton, *supra* note 112.

the right to dock and that the dock owner has the right to demand compensation for damage but not rent.[133] A rule requiring compensation, Epstein concludes, can thus only be justified by a theory of strict liability, and this would be the case whether the defendant merely created a reasonable risk of injury or acted reasonably to cause certain harm.[134]

Indeed, John Goldberg contends that the court's holding in *Vincent* represents not a limitation on trespass but rather a limitation on self-help by the property owner.[135] The requirement to pay for the damage to the dock is, in other words, exactly the relief that would be granted upon a finding of trespass; what the doctrine changes is the dock owner's ability to resist the trespass under the circumstances, as in *Ploof*.[136] This view is appealing, although it does not seem to explain the *Vincent* court's view that no damages would have been owed had the ropes not been replaced.

Additionally, as commentators have noted, it is not clear why only certain types of invasions fall under the *Vincent* rule and others do not. Dale Broeder, for example, notes that when a merchant reasonably but erroneously detains a suspected shoplifter—reasonably being the key word here—the merchant is not obligated to compensate the customer for their psychic or other injuries resulting from the detention.[137] In other words, even though, as in *Vincent*, the action taken would otherwise be considered

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133. *See* Bohlen, *supra* note 115, at 316; Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 197 (1996) ("A plausible explanation for this result is that necessity excused the defendant's taking of the 'physical possession' stick, but did not excuse the defendant's failure to make good the 'monetary value of the item' stick.").

134. Epstein, *supra* note 132 ("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."); *see also id.* at 160 ("If the defendant harms the plaintiff, then he should pay even if the risk he took was reasonable just as he should pay in case of certain harm where the decision to injure was reasonable."); *id.* at 189 ("[T]he rules of liability should be based upon the harm in fact caused and not upon any subsequent determination of the reasonableness of the defendant's conduct."). Epstein notes at the conclusion of his article that a theory of strict liability will not result in liability in all cases where one has caused harm to another, "for it may still be possible for him to escape liability, not by an insistence upon his freedom of action, but upon a specific showing that his conduct was either excused or justified." *Id.* at 204; *see also* Siegler v. Kuhlman, 502 P.2d 1181, 1185 (Wash. 1972) (characterizing *Vincent v. Lake Erie Transportation Company* as a strict liability case).

135. John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 483 (2015).

136. *Id.*; *see* Bergelson, *supra* note 117, at 292–93 (justifying compensation on the ground not that the plaintiff lost their property rights in such circumstances but the infringement of that right by the other requires compensation); Feinberg, *supra* note 130, at 103 (discussing infringement versus violation of right to life in an "innocent shield" scenario).

137. Dale W. Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HASTINGS L.J. 217, 229–30 (1965).

a tort but for the privilege (here, the shopkeeper's privilege), the law does not, as in *Vincent*, require compensation for damage incurred. Stephen Sugarman takes a similar view, contending that the privilege in *Vincent* should have been complete, given that "one of the risks of owning a dock is that it will be reasonably damaged by another in an emergency," whether as in *Vincent* or by a boat being blown into the dock during a storm.[138]

Thus, what *Ploof* and *Vincent* do not take into account is any autonomy interest of the property owner. Note that the result in *Ploof* was not simply that the Ploofs could have used Putnam's dock without risking a claim of trespass;[139] it was that Putnam was not permitted to use self-help (in the form of his employee) to prevent the use at all. Would Putnam, then, have been equally in the wrong if he had installed a barrier at the end of the dock that made the unpermitted use of it impossible? Consider this akin to, perhaps, the individual who clearly expresses a lack of consent to a blood transfusion even in a lifesaving situation, in that both situations involve a communication explicitly rejecting what would otherwise be seen as a benefit exceeding the costs.[140] What if Putnam's own boat had been moored at the dock instead, blocking the only way for the Ploofs to tie up? We might say that the doctrine does not require Putnam to affirmatively facilitate the Ploofs' privileged trespass—in the form of unmooring his own boat so that the Ploofs can tie up instead—but it is not clear why that should be the case. Is there really a difference between the affirmative decision not to move the obstructing boat and the affirmative decision to untie the Ploofs' boat, beyond the fact that the costs incurred by Putnam from each act differ?

In a sense, then, the result of *Ploof* and *Vincent* is that the courts compelled Putnam and Vincent to participate in a rescue—through the use of their property—when U.S. tort law generally imposes no duty to rescue another, absent a preexisting special relationship. In both cases, the result

138. Sugarman, *supra* note 126, at 11–12; *see also id.* at 109 ("[F]or me, the moral obligation to pay (or even offer) compensation (or not) . . . is a question of how selfish we think the original owner ought to be able to be; or put differently, how much do we think he ought simply to share what he has.").

139. *See* George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1007 (1999) (criticizing the idea that exercise of the necessity privilege entails the ability to infringe on the other's property rights by force).

140. *Cf.* Bickenbach, *supra* note 116, at 95 (characterizing implied consent, as in the case of an unconscious patient being given a life-saving blood transfusion as an instance of private necessity, albeit for the patient's benefit rather than the physician's).

was a determination that the defendants should, in an emergency situation, have given up the right they presumably would otherwise have had to resist being drawn into a rescue. Of course, both *Ploof* and *Vincent* involved balancing lower value property against higher value property or bodily integrity, and so one might presume that when the compelled rescue involves the rescuer's own bodily integrity, the balance would tip in the other direction.[141] *Cordas v. Peerless Transportation Co.*,[142] however, another torts chestnut, provides a counterexample that we will briefly consider here before thinking about a duty to rescue more generally.

In *Cordas*, an individual was held up and robbed at gunpoint in an alley near 26th Street and Third Avenue in New York.[143] The individual chased his assailants, one of whom got in a taxicab owned by Peerless Transportation Company heading south on Second Avenue, putting his gun in the driver's back.[144] The cab driver pulled his emergency brake and jumped out of the cab, followed by his passenger.[145] The cab continued in motion and onto the sidewalk at 24th Street, striking Mary Cordas and her two children and leaving them with minor injuries.[146] The Cordas family brought suit against Peerless, arguing that the driver had been negligent in abandoning the taxicab. But the court, after trial, disagreed, ordering judgment for Peerless on the grounds that the driver had not breached a duty of reasonable care, citing *Laidlaw* for the proposition that "self-preservation is the first law of nature."[147] The court continued:

> If under normal circumstances an act is done which might be considered negligent it does not follow as a corollary that a similar act is negligent if performed by a person acting under an emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication.[148]

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141. *See* Simons, *supra* note 115, at 369 (characterizing the Restatement of Torts as adopting a "largely utilitarian balance" to assess necessity but with a "significant thumb on the scale favoring the victim's interests" when the interest involves bodily integrity rather than property); *see also*, *e.g.*, Fuller, *supra* note 122, at 623 ("Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-lane concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss.").

142. Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (1941).

143. *Id.* at 199.

144. *Id.*

145. *Id.*

146. *Id.* at 200.

147. *Id.* at 201–02 (quoting Laidlaw v. Sage, 52 N.E. 679, 685 (1899)).

148. *Id.* at 202.

Although the issue in the case was framed as negligence, the tradeoffs here are similar to those in *Ploof* and *Putnam*. An emergency situation arose, and the taxicab driver made a decision to preserve his own life, knowing with substantial certainty that harm to another was likely to result. The decision was not instinctive and was not, in truth, the only choice that could have been made. The driver could have remained at the wheel, with obvious peril to his own life. Yet in this case, the court not only determined that the exigencies of the situation eliminated fault but also did not obligate the defendant (here, the employer of the driver) to compensate the Cordas family for the injuries they sustained. The family was, therefore, made to be involuntary rescuers for the driver.[149]

Before we consider whether these cases can be reconciled, a discussion of the general view in tort law that there is no duty to rescue will be helpful.

B. The "No Duty to Rescue" Doctrine

It is generally accepted as a matter of U.S. tort law that there is no duty to rescue a stranger from peril, even if the rescue would almost certainly be successful and even if the rescue could be accomplished at minimal risk or cost to the rescuer. One often-cited example from the case law is *Yania v. Bigan*.[150] Joseph Yania and Boyd Ross were visiting John Bigan at his coal strip-mining operation in Somerset County, Pennsylvania.[151] The operation had resulted in several deep trenches where the earth had been removed; one such trench was sixteen to eighteen feet in depth and contained eight to ten feet of water, with a pump installed to remove the water.[152] Bigan asked Ross and Yania to help him start the pump, and he and Ross went down into the trench.[153] Yania, who had been standing at the top of the trench, then jumped into the water and drowned.[154]

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149. *Cf., e.g.*, Shaw v. Lord, 137 P. 885, 886 (Okla. 1914) (discussing the general rule that an individual shooting in lawful self-defense who accidentally wounds a bystander is not liable if the gun was not fired negligently). Such cases similarly involve injury to innocent bystanders but are not quite "unwilling rescuer" cases in that the party seeking a rescue was not necessarily "saved" as a result of the injury. *See id.*

150. Yania v. Bigan, 155 A.2d 343 (Pa. 1959).

151. *Id.* at 344.

152. *Id.*

153. *Id.*

154. *Id.*

Yania's surviving spouse brought wrongful death and survival actions aiming to hold Bigan responsible for Yania's death.[155] After holding that Yania was in full possession of his mental faculties and so made his own choice to jump, and that the dangerous nature of the trench was obvious and apparent (Yania was a coal-strip mine operator himself), the court turned to the third theory of liability: that Bigan "failed to take the necessary steps to rescue Yania from the water."[156] Having concluded that Bigan was not responsible for putting Yania in danger in the first place, the court held that the mere fact that Bigan was aware that Yania was in need of rescue "imposed upon him no legal, although a moral, obligation or duty to go to his rescue . . . ."[157]

Although a small number of U.S. jurisdictions have imposed a duty by statute,[158] the common law has remained consistent on this point. Unless a party has a special relationship with the plaintiff giving rise to a duty or has taken on a duty to rescue due to the nature of their employment—a lifeguard, obviously, has a duty to swimmers on a beach—or has put the plaintiff in a position of danger, a party generally has no duty to rescue another even though the rescue could easily be accomplished and so, in a cost-benefit analysis, would clearly be warranted.[159] The basis for the no-duty rule has historically rested, in large part, on a distinction between misfeasance and nonfeasance—"between the infliction of harm and the failure to prevent it."[160] This is the case even though media stories featuring instances where bystanders watched someone in peril without taking any action typically elicit shock and outrage.[161]

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155. *Id.*

156. *Id.* at 345–46.

157. *Id.* at 346.

158. *See, e.g.*, VT. STAT. ANN. tit. 12, § 519(a) ("A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or herself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others."); *see also id.* § 519(c) (providing for a maximum $100 fine for violations).

159. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 340–42 (4th ed. 1971).

160. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 247 (1980).

161. The case of Kitty Genovese is often cited, although more recent reports have suggested the facts were more complicated than initially reported. *See* Nicholas Goldberg, *The Urban Legend of Kitty Genovese and the 38 Witnesses Who Ignored Her Blood-Curdling Screams*, L.A. TIMES (Sept. 10, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-09-10/urban-legend-kitty-genovese-38-people [https://perma.cc/M6DK-7JJZ]. For a more recent story, see Faith Karimi, *Teens Who Laughed and Recorded a Drowning Man in His Final Moments Won't Face Charges*, CNN (June 26, 2018, 6:27 PM), https://www.cnn.com/2018/06/26/us/florida-teens-no-charges-drowning-man/index.html [https://perma.cc/TW9R-RSE9] ("[T]here is no Florida law that requires a person to provide emergency assistance under the facts of this case.") (quoting Office of the State Attorney spokesperson).

Scholars have spent many pages debating whether this doctrine should be modified or upended.[162] Some place considerable weight on the morality interest that drives public reaction, emphasizing the relational position of individuals toward one another—what Leslie Bender has characterized as a view of tort law that assumes "responsibility rather than rights" and "interconnectedness rather than separation."[163] For example, in responding to the typical hypothetical of whether there should be a duty to rescue a drowning stranger by throwing a rope or inflatable ring, Bender writes, "In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty."[164] Those commentators seeking to frame this concept in a more administrable way suggest that there should be a duty to rescue when the rescue is easy, poses little risk to the rescuer, and is in response to an immediate emergency (as opposed to a chronic condition).[165] Of course, what makes a rescue "easy" or "low-cost" may depend on one's perspective. One rescue that is typically perceived as easily accomplished at little risk to the rescuer is to call 911 for assistance, and if someone is trapped, bleeding, or drowning, calling 911 certainly seems like a much-desired response. But calling 911 might not be a "rescue" in all cases, given that the involvement of law

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162. *See, e.g.*, Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 880–81 (1986).

163. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 31 (1988).

164. *Id.* at 34; *see also, e.g.*, Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 631 (2001) ("[A] duty to rescue can legitimately be enforced precisely for the reason that, though it does diminish the negative liberty of the person coerced, it promotes the interests of others."); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 755 (1994) ("[T]his Article has developed a theory of rescue that holds that the community has a responsibility to protect its citizens from both criminal violence and other forms of harm. In return, an individual has an obligation to assist in performing this function, an obligation that is owed not only to the community but also to its members, and that is enforceable in both criminal and tort law.").

165. Patricia Smith, *The Duty to Rescue and the Slippery Slope Problem*, 16 SOC. THEORY & PRAC. 19, 23–30 (1990); *see also* Murphy, *supra* note 164, at 656; Sugarman, *supra* note 126, at 116; Weinrib, *supra* note 160, at 292 ("[W]hen there is an emergency that the rescuer can alleviate with no inconvenience to himself, the general duty of beneficence that is suspended over society like a floating charge is temporarily revealed to identify a particular obligor and obligee, and to define obligations that are specific enough for judicial enforcement.").

enforcement in some situations might escalate matters past the original level of risk.

Those tending to oppose a duty to rescue typically take the view that the costs that would attend any duty to rescue under negligence law outweigh the modest benefits that would be achieved, given the perceived tendency for many people to engage in simple rescues without the incentive that risk of liability would create.[166] For example, a duty to rescue might encourage what turns out to be low-quality rescues by those who are inept or unskilled but fear liability if they do not make an attempt.[167] In addition, determining when a duty arises to engage in a rescue or what level of rescue would be required to avoid breaching that duty in a particular circumstance would be practically challenging.[168] For example, if one were to drive past a car on the side of a highway, with a driver sitting in the front seat, would one always be obligated to stop and see if the driver needed help? Would this be true of every driver who passed by, or at least every driver who did not see another driver already pulled over? Would the possible benefits this would bring be worth the traffic snarls that this would cause, or the risk of collision from rubbernecking, or the possible emotional exhaustion of the driver of the car, who had merely pulled over to take a phone call, who had to tell a hundred well-meaning individuals that they were not in need of assistance?

In addition to these pragmatic concerns, other scholars have suggested that imposing a duty to rescue might increase other kinds of costs or change behavior in undesirable ways. For example, they suggest, a duty to rescue a drowning swimmer at the beach might cause strong swimmers to avoid popular beaches for fear that they will be burdened with rescuing any weaker swimmers in trouble.[169] Others point to the incursion on individual autonomy that imposing a duty to rescue would cause. No matter how minimal the cost or effort to the rescue, such commentators maintain that it should remain an individual decision whether to become involved, absent any preexisting relationship that would compel action.[170] Without concern for autonomy, these scholars note, imposing a duty to rescue in such circumstances risks

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166. *See* Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1502 (2008).

167. *Id.* at 1472.

168. *Id.* at 1480–83.

169. *See* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J.L. STUD. 83, 120 (1978). *But see* Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT'L REV. L. & ECON. 141, 143 (1995) ("[A]ctivity-level concerns are unwarranted where people assess the probability of being a potential rescuer or victim as equal.").

170. Theodore M. Benditt, *Liability for Failing to Rescue*, 1 LAW & PHIL. 391, 392 (1982).

becoming boundless. What is the difference, for example, between imposing a duty on an individual to rescue someone lying face down on the sidewalk —even to the limited extent of calling 911—and requiring an individual with sufficient financial resources to donate $10 to save a child in another country from starvation?[171] In both instances, we assume, the rescue is virtually costless to the individual, and in both instances the rescue would save another human life, but we would likely be reluctant to require contributions to charity on pain of tort liability.[172] If this instinct bears out, then we would need a better delineation of what types of rescue the duty encompasses beyond simply saying rescues that are "easy."

Perhaps most important, David Hyman's 2006 empirical study has revealed that the debate may indeed be academic. According to Hyman, "proven cases of non-rescues are extraordinarily rare, and proven cases of rescues are exceedingly common—often in hazardous circumstances, where a duty to rescue would not apply in the first instance."[173] The cost of this state of affairs, moreover, is not always positive, given that "even in the absence of a statutory duty, Americans appear to be *too* willing to undertake rescue if one judges by the number of injuries and deaths among rescuers."[174] This study, along with the apparent nonexistent level of enforcement in jurisdictions where a statutory duty to rescue exists, suggests that the common law approach may be the better one overall.

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171. *See* Epstein, *supra* note 132, at 199 ("Where tests of 'reasonableness'—stated with such confidence, and applied with such difficulty—dominate the law of tort, it becomes impossible to tell where liberty ends and obligation begins; where contract ends, and tort begins. In each case, it will be possible for some judge or jury to decide that there was something else which the defendant should have done, and he will decide that on the strength of some cost-benefit formula that is difficult indeed to apply."). Epstein therefore concludes that strict liability should also apply to such situations, under which the defendant who failed to rescue would not be liable because they did not cause the plaintiff any harm; strict liability also explains the "no duty to rescue" rule. *See id.* at 191–92; *cf.* Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 108 (1999) (contending that a required duty to rescue risks making people less likely to engage in socially beneficial behavior in other ways); Benditt, *supra* note 170, at 402 ("[T]o decide that something is a misfeasance rather than a nonfeasance is already to have drawn a conclusion about liability.").

172. Vera Bergelson characterizes these justifications as the "enforced benevolence argument," the "line-drawing argument," the "argument from undue interference from liberty," and the "argument from causation." Bergelson, *supra* note 117, at 299 (emphasis removed).

173. David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 656 (2006).

174. *Id.* at 657 ("[P]roven rescuer deaths outnumber proven deaths from non-rescue by approximately 70:1.").

Although the common law does not impose on individuals a duty to rescue others perceived to be in peril, it does allow for an award of damages to a voluntary rescuer from a negligent party who caused the ultimately rescued person to be in peril in the first place. "Danger invites rescue," as then-Judge Cardozo famously noted in *Wagner v. International Railway Co.*[175] and as several courts have confirmed, so long as the rescue was deemed reasonable under the circumstances.[176] It also seems to be the case that a rescuer can recover damages from the rescued as well, provided that the rescue was reasonable and the rescued party was negligent in putting themselves in danger.[177] Thus, it is not the fact of amateur rescues that the law wants to discourage (otherwise, we would expect no compensation for injuries sustained during such rescues); rather, it would seem to be concerned about the unwilling rescuer whose autonomy has been infringed by the imposition of a legal duty.

C. The Trolley Problem(s)

We can now reintroduce the trolley problem. The trolley problem originated in Judith Jarvis Thomson's 1985 article in the *Yale Law Journal*.[178] Building on a hypothetical raised by philosopher Philippa Foot, Thomson discusses a scenario in which the reader is the driver of a trolley on which the brakes have failed.[179] Ahead on the track are five workers; because the track runs through a valley and the sides slope up from the track, there is no ability for the five to escape the path of the trolley. However, the track splits ahead, and on the spur to the right is one worker, similarly situated as the five. Although the trolley's brakes have failed, it can still

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175. Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (N.Y. 1921).

176. *See, e.g.*, Perpich v. Leetonia Mining Co., 137 N.W. 12, 14 (Minn. 1912) ("Sentiments of humanity applaud the act, the law commends it, and, if not extremely rash and reckless, awards the rescuer redress for injuries received, without weighing with technical precision the rules of contributory negligence or assumption of risk."); Eckert v. Long Island R.R. Co., 43 N.Y. 502 (N.Y. 1871).

177. *See, e.g.*, Rasmussen v. State Farm Mut. Auto. Ins. Co., 770 N.W.2d 619, 625–26 (Neb. 2009) ("[W]e find no reason to make a distinction between the negligence of the person being rescued which is a proximate cause of injury to the rescuer and the negligence of a third party which placed the person to be rescued in peril and caused injury to another who attempted the rescue."); W.C. Crais III, Annotation, *Rescue Doctrine: Negligence and Contributory Negligence in Suit by Rescuer Against Rescued Person*, 4 A.L.R.3d 558 ("The rescue doctrine provides generally that one who is injured in reasonably undertaking a necessary rescue may recover from the person whose negligence created the situation necessitating rescue.").

178. Thomson, *supra* note 1.

179. *Id.* at 1395 n.1 (citing PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, *in* VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 23 (1978)).

be steered. Thus, the question is whether it is morally permissible to turn the trolley onto the spur, killing one individual to save five.[180]

Thomson reported that everyone with whom she discussed the hypothetical said that it is morally permissible to take the one life; indeed, some said that it is morally required.[181] This is so even though one might suppose—and my students over the years have confirmed—that many would respond differently when asked to apply similar cost-benefit analyses in product liability situations. But when a different hypothetical is presented—a transplant surgeon with five patients all in desperate need of an organ transplant, and one individual whose organs are a perfect match for all five—most people will say that the surgeon should not kill the one individual (without the individual's consent) to harvest the organs so that the other five can live. Here, the morally correct tradeoff, everyone believes, is to have five die rather than one.[182] The same is true with yet another hypothetical, in which the trolley is prevented from hitting the five workers by pushing an individual onto the tracks to stop the trolley.[183]

Thomson posits a number of variations of these hypotheticals before arriving at what she believes is a satisfying explanation of why people judge these situations differently. In the trolley problem, the threat posed to the five workers is the same as the threat that would be posed to the one if the trolley is switched to the other track; the runaway trolley is going to kill someone no matter what. By contrast, the threat to the one individual in the transplant situation is different from the one that threatens the five needing organs (their illness); the threat to the one individual is *created* by the surgeon, not merely diverted, and that is insufficient to overcome a strong right of the individual not to give up their life.[184] As Thomson

180. *Id.* at 1395.

181. *Id. But see, e.g.*, Christie, *supra* note 139, at 980 ("I completely disagree with the conclusion of Foot and Thomson that a person acting in a private capacity can ever intentionally kill an innocent person to save the lives of a greater number of other people.").

182. Thomson, *supra* note 1, at 1396.

183. *Id.* at 1409.

184. *Id.* at 1408; *see also id.* at 1404 ("Rights 'trump' utilities." (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977)). Thomson assumes that most would agree that there would be no conflict if the right being infringed was not life but was trivial—crossing someone's property to divert the trolley, for example. *Id.* at 1411; *see also* Douglas Laycock, Observation, *The Ultimate Unity of Rights and Utilities*, 64 TEX. L. REV. 407, 408 (1985) ("The reason for our strong and unanimous intuitions about [the] *Transplant* [hypothetical] is that the healthy donor has the strongest imaginable entitlement to

puts it, the justification "permits intervention into the world to get an object that already threatens death to those many to instead threaten death to these few, but only by acts that are not themselves gross impingements on the few."[185] The focus on the source of the threat is an explanatory framework for the intuitive differences respondents tend to report, which also allows self-defense—where the action is taken against the source of the threat—to be incorporated.[186]

Thomson's "famous violinist" is a hypothetical illustrating the duty to rescue. In the hypothetical, the reader wakes up to find herself surgically attached to a famous, unconscious violinist who can be saved only by using the reader's circulatory system. The reader was asleep and thus unable to object at the time she was attached. The choice now is whether the reader can demand that the violinist be unplugged, killing him, or whether the reader must now accede to remaining connected for however long it takes for the violinist to fully recover[187] and thus become an unwilling rescuer. Here, we have a considerably heightened version of *Ploof*. Having been made to be a rescuer without first giving consent, the reader must now decide whether to unmoor the violinist, and the law must determine whether such unmooring is an unlawful act.

As noted above, the hypothetical (and even fantastical) nature of Thomson's hypotheticals might mean that some respondents and readers are likely to find them disconnected from real-life dilemmas. But these hypotheticals are likely to arise in real life as we determine such things as liability for accidents involving self-driving cars, in which decisions are

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his own body organs."); *id.* at 409 ("This distinction between diverting an existing threat and creating a new one has no explanatory power whatever for me.").

185. Thomson, *supra* note 1, at 1412.

186. *See* Christie, *supra* note 139, at 1000 ("No one, not even those who think it is sometimes permissible to kill an innocent person to save the lives of a greater number of other innocent persons, believes that there is a general privilege to kill an innocent person to save one's own life or the life of a third party."); Larry Alexander, *Self-Defense, Justification, and Excuse*, 22 PHIL. & PUB. AFFS. 53, 55 (1993); *id.* at 59 ("Given Thomson's principles, shields, like bystanders, have a right not to be killed because it will not be true that if you do not kill them, they will kill you.").

187. Patricia A. Cain & Jean C. Love, *Stories of Rights: Developing Moral Theory and Teaching Law*, 86 MICH. L. REV. 1365, 1365 (1988) (reviewing JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION & RISK: ESSAYS IN MORAL THEORY (William Parent ed., 1986)); *see also* Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, *in* THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE 143 (P.A. Woodward ed., 2001). In the hypothetical as presented, the length of time is nine months, consistent with Thomson's use of the hypothetical to open debate on abortion. While recognizing the use by others of the hypothetical in that discussion, my intention is not to engage it here. For a discussion of how Thomson's work can be usefully deployed in a law school classroom, see Cain & Love, *supra*.

made in advance as to how to balance harms.[188] For example, imagine that such a car is proceeding through an intersection with the right of way, and several children run out in the street. There is no ability to stop the car in time; the only options are to save the driver but injure the children or to turn the car abruptly, injuring the driver but saving the children. Here is the trolley problem made manifest, with the additional fact that the choice as to which decision to take must be made and programmed well in advance.

The question then becomes whether the doctrine of private necessity and the doctrine of no duty to rescue are in something of a conceptual conflict. To the extent that tort law suggests, under the doctrine of private necessity, that the rights of another should give way, if only to a limited extent, in the face of a greater peril of another but also suggests, under the doctrine of "no duty to rescue," that one should not be obligated to take on even an easy burden to save another from such a peril, there seems to be at least a need for greater clarity.[189] One might explain the difference using the usual distinction between misfeasance and nonfeasance, in that in a private necessity situation, the property owner is simply restricted from engaging in self-help as opposed to being required to take an affirmative action of rescue. But this would likely seem unsatisfying to one motivated by autonomy interests, in which an inability to prevent the use of one's

188. For (already historical) considerations, see Michael I. Krauss, *Freedom from Control, Freedom from Choice? How Will Tort Law Deal with Autonomous Vehicles?*, 25 GEO. MASON L. REV. 20 (2017); Harry Surden & Mary-Anne Williams, *Technological Opacity, Predictability, and Self-Driving Cars*, 38 CARDOZO L. REV. 121, 162 (2016) ("Because of the complexity and abstractness of machine learning models, even the programmers who created them are not always able to understand how and why they perform the way that they do."); Bryant Walker Smith, *The Trolley and the Pinto: Cost-Benefit Analysis in Automated Driving and Other Cyber-Physical Systems*, 4 TEX. A&M L. REV. 197, 201 (2017) ("[A]utomated driving systems and other complex cyber-physical systems will necessarily make decisions about what risks to accept long before any physical harm is inevitable or even probable."); *id.* at 207 ("[T]he code that creates [cyber-physical] system[s] will explicitly or implicitly contain fundamental value judgments."). The consideration is necessarily a holistic one, as in any tort case, where the full costs and benefits of a choice must be determined. The difference may be, however, that an *ex ante* consideration of tradeoffs will feel more intentional than probabilistic—in other words, a car may be programmed such that we will know precise outcomes in advance. *See* Heather M. Roff, *The Folly of Trolleys: Ethical Challenges and Autonomous Vehicles*, BROOKINGS (Dec. 17, 2018), https://www.brookings.edu/research/the-folly-of-trolleys-ethical-challenges-and-autonomous-vehicles/ [https://perma.cc/8TVS-VFJ8].

189. *See* Bergelson, *supra* note 117, at 300 (noting that the necessity doctrine requires self-sacrifice on the part of the one whose rights are infringed).

property might feel like the equivalent of being required to act. This dissatisfaction would likely be even greater in cases involving bodily autonomy.

Additionally, the two doctrines seem to require a choice from the perspective of self-sacrifice. If we require rescue—even to the extent of foregoing self-help— we are requiring the other to sacrifice something for the benefit of the one in peril. But if we require the one in peril to forego availing themselves of assistance—even assuming, for this purpose, that the peril was not the result of their own negligence or intentional act, such as the storms in *Ploof* and *Vincent*—then we are asking the one in peril to engage in their own form of self-sacrifice—to incur injury even when it might have been easily prevented.[190]

As Kenneth Simons points out, the question is much less clear when bodily integrity, rather than property rights, is at stake.[191] If we define rescue as requiring some sort of personal engagement, either an activity or putting oneself in the way of harm, the conflict becomes even sharper. Does the doctrine of private necessity allow a person to impose harm to another in order to save their own life—to make another an unwilling rescuer? Francis Bohlen concluded in 1926 that "no legitimate distinction [could] be drawn between interests of personality and interests of property," and thus an actor could equally claim a privilege to invade a "merely dignitary interest of personality" in the same way that they could claim privilege regarding "a similar invasion of a similar interest of property," although this would not be true for infliction of a commensurate harm.[192]

Given that the law does, however, tend to see property and individual autonomy differently, the task is to determine the circumstances that justify even the distinction that Bohlen makes. If that view is correct, then *Vincent* suggests a similar result involving bodily integrity: that some level of interference can be justified to prevent a greater harm, so long as the other is compensated for the harm done. Simons contends that courts might be wary of imposing such a compensation rule, given the much higher awards that are likely to prevail,[193] but this would seem to be a matter of imposing limits on the doctrine, not eliminating it completely.[194]

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190. Bickenbach, *supra* note 116, at 86 ("[O]ne is never obliged, when there is a direct and unavoidable threat to one's life or limb, to act heroically.").

191. Simons, *supra* note 115, at 366; *see also id.* at 372 ("Those invoking private necessity to justify interference with *personal* rights might or might not owe compensation, public officials invoking public necessity might or might not, and private individuals invoking public necessity do not.").

192. Bohlen, *supra* note 115, at 319 & n.18.

193. Simons, *supra* note 115, at 373.

194. *See, e.g.*, McFall v. Shimp, 10 Pa. D. & C.3d 90 (1978) (denying motion for preliminary injunction compelling defendant to submit to a bone marrow transplant for

III. RETURNING TO *LAIDLAW V. SAGE*

We now put this all together by returning to the *Laidlaw* scenario. If Sage did in fact pull Laidlaw in front of him to shield himself from the force of the blast, should we think of this as an instance of private necessity pursuant to *Ploof* and *Vincent*, where we weigh the relative harms to each, or a compelled rescue? In either case, does the decision require compensation for the harm suffered, or is this a *Cordas* situation in which a bystander must occasionally incur a smaller harm to prevent a larger one to another?[195]

Consider the misfeasance/nonfeasance distinction discussed above. Imagine that, instead of pulling Laidlaw in front of him, Sage had ducked behind Laidlaw just before the blast, as if Laidlaw were a piece of office furniture. Presumably, we would not think of Sage's actions as involving the same sort of compelled rescue as the act of physically interposing Laidlaw between Sage and Norcross, just as the *Vincent* court would not have required compensation had the boat been knocked against the dock by the force of the storm alone, as opposed to being held against the dock by the mooring ropes. Similarly, we might not expect compensation if Sage had hidden behind Laidlaw to avoid detection by an assassin. This then suggests that an important piece of the consideration is the existence of an intentional diversion from existing conditions (consistent with the differing reactions to the trolley problem); this might also explain the result in *Cordas*, where the driver intentionally abandoned his vehicle, albeit under the stress of being carjacked, but arguably did nothing to change the vehicle's course.

The facts of *Laidlaw* add an additional wrinkle to the question of damages. The court concluded that Laidlaw would essentially have suffered the same injuries whether Sage had used him as a shield or not, given the force of the blast. (Contrast this with a scenario in which Norcross was running at Sage with a knife, and there was no real possibility of Laidlaw's getting injured unless he were pulled into the path between Norcross and Sage. In that case, using Laidlaw as a shield would have been exposing him

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plaintiff, despite evidence that defendant was the only compatible donor, citing principle of no duty to rescue). For a troubling contrary decision, see *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. Ct. App. 1969), in which the majority, over a dissenting opinion, affirmed a lower court decision authorizing a kidney transplant from a twenty-seven-year-old individual (with an intellectual age of six years) to his brother.

195. *See* RESTATEMENT (SECOND) OF TORTS § 74 (Am. L. Inst. 1977) (discussing the extent of privilege for minimal harm inflicted on another for the purpose of protecting the actor from a substantial bodily harm but citing no cases in support).

to risk that he would not have been exposed to otherwise.) Does the court's conclusion then mean, under a *Vincent* analysis, that Laidlaw has no injury for which he even could be compensated?[196] In this case, we might analogize what Sage did to the circumstance of A's destruction of B's house in order to save A's house from a fire, where B's house would have burned to the ground in any event. On the other hand—comparable to the suggestion above of a rental fee in *Vincent*—did Laidlaw suffer a dignitary harm simply from the fact of having been used? *Vincent* suggests that the answer to this is no—that the privilege of the trespass negates any claim for nominal damages for a technical trespass—but this feels less satisfying when bodily interests are at stake.

We might also ask, moreover, the following: If Laidlaw would essentially have suffered the same injuries from the blast no matter where he stood in the room, would a duty of "easy" rescue mean that he should have thrown himself in front of Sage's body to limit the nature of Sage's injuries? Put otherwise, if one should rescue another if it can be done without considerable burden, it might seem that either Sage or Laidlaw should have attempted to rescue the other and absorbed the blast, given that all this would entail would be a small movement of one's body. Indeed, would a devotee of the trolley problem have suggested that it might have been appropriate for a third party in the room to push Laidlaw in front of Sage?

To the extent the reader sees these as equally hypothetical as Thomson's trolley problem, consider the following story, immortalized in the film *Touching the Void*.[197] In 1985, experienced mountaineers Simon Yates and Joe Simpson ascended Siula Grande in Peru. During the descent, Simpson fell, breaking his leg. The two continued down the mountain, connected by a 300-foot rope. Yates would secure himself in the ice and lower Simpson the length of the rope. Simpson would then secure himself in the ice and take his weight off the rope, which would allow Yates to climb down to meet him. The process repeated, the two inchworming down the icy surface. Things went seriously awry when Simpson was lowered over the edge of a cliff, leaving him suspended in mid-air, his weight constantly pulling Yates down the mountain. After about 90 minutes, with Yates starting to lose

196. Eric H. Grush, Comment, *The Inefficiency of the No-Duty-to-Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U. PA. L. REV. 881, 897 (1998) ("[A] potential rescuer would be held liable for failure to rescue if she is generally subject to a risk similar to the risk faced by the victim. A potential rescuer would be considered subject to the same risk faced by the victim if she could have been subject to the same risk at any point in time."); *see also* Alexander, *supra* note 186, at 61 (concluding that the use of a bystander is easily impermissible because "[y]ou are appropriating the bystander, using him as an involuntary resource, and in doing so making yourself better off than you would be without him and making him worse off than he would be without you").

197. TOUCHING THE VOID (FilmFour 2003).

traction, Yates decided, to avoid both climbers falling to their deaths, to cut the rope. Remarkably, both men survived. Most scholars, presumably, would treat this as a justifiable act akin to self-defense. Even though the situation arose accidentally, Simpson was exerting a life-threatening force on Yates that would justify Yates in responding with a commensurate amount of force in cutting the rope. From a misfeasance/nonfeasance perspective, scholars would also likely conclude that Yates was not adding any additional risk to Simpson that he was not already facing. Like the trolley problem reader who merely moves the train from one track to another, Yates had determined that death was inevitable, and so the primary goal should be not the impossible one of trying to avoid it but rather to minimize the number of individuals who would be killed by an already existing force.

But what about the reverse situation? Imagine that Simpson, the climber hanging over the ravine, realizes that he has a knife that would allow him to cut through the rope. Imagine, moreover, that he is able to communicate to Yates that he is about to do this, so that Yates can prepare for the shift in weight by bracing himself in the ice. Would we say that that Simpson now should have a duty of rescue that would legally *require* him to cut the rope, given that there is a high risk of both climbers dying if he does not act but a chance of saving one if he does? And so, if it is true that Laidlaw would have suffered the same injuries from the explosion whether he had remained where he was or moved a few inches in front of Sage, should Laidlaw have had a similar duty to rescue, knowing that if he did not move, both men would have suffered serious injuries but that if he did interpose himself between Sage and Norcross, the former might be spared significant injury?

Finally, we might reframe the entire analysis by thinking not about liability but about remedies. If Laidlaw was compelled to rescue Sage without his consent, but did not suffer any greater bodily injury than he would have suffered had he remained where he was, is restitution a better way of analyzing the benefit that he conferred on Sage[198]—and the benefit that Vincent conferred on Lake Erie?[199] Restitution might feel like a more

198. *See generally* John W. Wade, *Restitution for Benefits Conferred without Request*, 19 VAND. L. REV. 1183 (1966). Of course, this is not a situation in which Laidlaw was suing Norcross's estate and thus seeking to recover damages for shielding Sage resulting from the actions of Norcross. *See id.* at 1190.

199. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 410–11 (1959) ("But explaining *Vincent* by a generalization that enrichment through another's loss is a ground for liability may open a door to considerable extensions of

satisfying theory in such a case because it does not depend on a relative weighing of the costs and benefits to each party. Under a restitution framework, the fact that Laidlaw suffered similar injuries matters less; what matters is that Sage benefited from the use of Laidlaw's body.[200]

The *Laidlaw* court reversed the jury verdict in part because, it concluded, even if Sage had moved Laidlaw's body, that movement was not the cause of the injuries that Laidlaw received because the force of the blast meant that he would likely have been similarly injured regardless. But that depends on a particular view of Laidlaw's injury. If the injury was the harm caused to Laidlaw's body from the blast, the court's reasoning seems justified. But if the harm was the intrusion on bodily integrity resulting from Laidlaw's body being used by Sage as a means to an end—like an umbrella, as the *Times* suggested—then the causation analysis looks very different.

Reframing the harm instead through a restitutionary lens might be considered similar to the "loss of a chance" theory put forward by the court in *Herskovits v. Group Health Cooperative of Puget Sound*,[201] which helped to solve the causation problem that arises in a case of negligent medical misdiagnosis when the patient was more likely than not to die from the underlying disease even if the disease had been timely diagnosed. The *Herskovits* court reframed not the causation analysis but rather the nature of the damages. By characterizing the harm to the plaintiff not as death but as the loss of a chance of survival,[202] it was easy to determine that the doctor's negligence was more likely than not the cause of that harm. Here, then, if we describe the harm not as the additional injuries that Laidlaw

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'unjust enrichment.'"). Keeton notes that using "unjust enrichment" in liability cases would "press[] us to recognize that the term 'enrichment' includes not only gain and avoidance of loss but also avoidance of *risk* of loss." *Id.* at 411; *see also id.* at 412 ("[I]t is probable that *Vincent* itself was a case of avoidance of a risk of loss that probably would not have occurred, but might have been so severe that a prudent shipowner would not have taken the chance."); Dennis Klimchuk, *Necessity and Restitution*, 7 LEGAL THEORY 59, 73 (2001) (noting that if the dock owner in *Vincent* had reinforced the dock beforehand so that it suffered no damage, the boat owner would still have benefited equally for being able to tie up the boat, even though the dock incurred no damage); *id.* at 80 (noting that nothing in a restitutionary theory explains why the benefit to the boat owner of the use of the dock should be measured in terms of the damage to the dock).

200. Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 512 (1980) ("It is arguable that the sacrifice of B in such a case [like *Laidlaw v. Sage*] is closely analogous to the sacrifice of one person's property to save that of another—a situation in which the property theory clearly supports a right to restitution"). *But see, e.g.*, Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2104 (2001) ("Thus, leaving unresolved the basic question of how much equity a legal system should allow, it seems unwise to interpret unjust enrichment as a general source of authority for judges to avoid the undesirable consequences of rules.").

201. Herskovits v. Grp. Health Coop. of Puget Sound, 664 P.2d 474, 478 (Wash. 1983).

202. *See id.* at 476–77.

did or did not suffer but rather as the benefit Sage acquired through the use of Laidlaw's body, the causation problem is minimized because (adopting Laidlaw's view of the facts) Sage's actions indeed caused that harm.[203]

Such a theory also responds to the view of defending a duty to rescue by saying that the parties would have bargained for such a rescue ahead of time if they had had the opportunity to do so.[204] Even putting aside the difficulty of determining the terms of such an agreement, that view does not necessarily anticipate "the enforcement of a contract by private action when one of the parties objects to its performance. . . . At the time of the enforcement, one party argues not for an *exchange* which makes both parties better off, but for a *transfer* of wealth which makes him better off."[205]

A restitutionary theory, however, poses three additional problems. First, if restitution depends on an *unjust* enrichment, that means that it would be inconsistent with a theory of private necessity, for which the underlying assumption is that the defendant's actions were permissible.[206] "Unjust" doesn't necessarily mean that the action was done with ill intent—it could be the result of a mistake—but the idea seems to entail at least the fact that the restitutionary remedy is correcting a wrong,[207] and the court concluded in *Vincent* that it was entirely prudent and appropriate to moor at the dock given the storm.

The second question intersects not with the issue of private necessity but with the "no duty to rescue" doctrine. If the law does not impose a duty to rescue one in peril, but an individual chooses to undertake such a rescue nonetheless, the act may well be seen as motivated by altruism rather than by circumstances justifying compensation. The Restatement suggests as much, advancing a position that provides for a restitutionary remedy in cases of professional rescuers but not for nonprofessionals on the grounds, *inter alia*, that

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203. *Cf., e.g.*, Kemezy v. Peters, 79 F.3d 33, 34–35 (7th Cir. 1996) (suggesting that one justification for punitive damages is to make torts from which the defendant derives pleasure in excess of compensatory damages more costly to the defendant).

204. Epstein, *supra* note 132, at 202.

205. *Id.*

206. *But see* Friedmann, *supra* note 200, at 541 ("[I]t might be thought as a general proposition that necessity is a complete defense to an action in tort, but does not affect liability based on unjust enrichment.").

207. *See id.* at 505 ("By viewing restitution as an alternative to tort damages, courts were able to rest on developed principles of tort law to define cases in which a defendant might be made to disgorge wrongful profits.").

> [a] heroic rescue may confer a benefit of inestimable value, but it is likely to be purely altruistic in origin. The imposition of restitutionary liability in such circumstances—a principle that would become visible only when the claim was resisted—transforms an act of self-sacrifice into a contentious exchange of values. The law avoids these unedifying consequences by presuming that an emergency rescue is a gratuitous act.[208]

Of course, the difference in *Laidlaw* was that Laidlaw was made an unwilling rescuer, more akin to Vincent. Thus, the third question would be, if restitution were deemed appropriate, how might one value the restitutionary remedy. Is it the full value of the saved boat in *Vincent*, and the value of Sage's life in *Laidlaw*? If that is the case, Lake Erie would ostensibly, in the case of a threatened destruction of the boat, be indifferent as to being rescued or not because the cost borne by the boat owner would be the cost of the boat in either instance.[209] Perhaps the better framing is, once again, the idea of a contract—the value that the rescued party would have paid had the parties been able to negotiate the rescue in advance. If A says to B, a stranger, "I am going to swim across the lake, but if I cannot make it, I would like you to come out and get me in your boat," B would arguably be justified in requesting a payment for that effort, and it is difficult to see why that payment should not also be made when B takes the same action to rescue A in distress without a prior negotiation.[210]

IV. CONCLUSION

For William Laidlaw himself, and his defenders at the *New York Times*, the issue in his longstanding dispute with Russell Sage was more about the compelled rescue and the infringement of Laidlaw's autonomy, particularly

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208. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 cmt. b (AM. L. INST. 2011).

209. *See* Wonnell, *supra* note 133, at 218–19.

210. *See, e.g.*, Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1936) (enforcing promise to pay plaintiff $15 every two years for life after plaintiff saved defendant from death or grievous bodily harm but suffered severe bodily injury himself). It is true that in such cases, the remedy is supported, if not entirely justified, by the promise made by the rescue, which helps to determine the value of the benefit received, at least to the promisor. *See, e.g.*, Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL. STUD. 411, 418–19 (1977). A contrary case is *Harrington v. Taylor*, 36 S.E.2d 227 (N.C. 1945), where the court declined to enforce a promise to pay after the plaintiff saved the defendant, a perpetrator of domestic violence, from being killed by his victim. Given the limited scope of the latter opinion, it is difficult to offer a definitive explanation for the different results, although one might surmise that they resulted from the difference in the situations giving rise to the injury (employment versus domestic violence) and/or the race of the parties in *Harrington*. *See* North Carolina State Board of Health, Office of Vital Statistics, Certificate of Death for Lena Harrington, Sept. 8, 1967 (on file with author); U.S. Department of Selective Service, Registration Card for Lee Walter Taylor (on file with author).

by one who had considerably more in the way of financial resources. Sage treated Laidlaw, in Laidlaw's telling, as merely a means to an end, and for some commentators, that was the deciding factor.[211] If Laidlaw, in an act of self-sacrifice, had made the decision to jump in front of Sage to protect him from the explosion, he would have been heralded as a hero, even if the attempt had largely failed.[212] But, as I have described above, the law does not clearly align with these moral intuitions. Indeed, one aspect of *Laidlaw v. Sage* that seemed to matter considerably to observers, if not the courts, was the relevance of the relative economic positions of the two men to a determination of whether justice had been served, which might in turn have been a view motivated by restitutionary impulses.

As our consideration of the legal issues surrounding self-driving cars and similar devices develops, such determinations will become even more important. It is uncontroversial to note that well-programmed autonomous vehicles represent an overall increase in safety over human drivers.[213] But even with an increase in safety, some choices must be made. The trolley problem has been beset, for some, by a consideration of the relative worth of the individuals on each spur of track,[214] and the fact that the algorithms determining later decision points for autonomous vehicles must be developed *ex ante* means that programmers will have to decide tradeoffs in advance.[215]

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211. *See* Bickenbach, *supra* note 116, at 97 ("Necessity will not justify A's action because A was using V as a shield to save himself, a clear affront to V's personhood."); *cf.* Christie, *supra* note 139, at 1042 ("[T]he proposition that it is permissible intentionally to kill an innocent person in order to save a larger number of other people is highly suspect. . . . [It] certainly seems to violate Kant's injunction that one must treat people as ends in themselves and never as means." (citing IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54 (Lewis White Beck trans., Bobbs-Merrill, 3d ed. 1969) (1785))).

212. *See* Weinrib, *supra* note 160, at 248 ("Recognizing the meritoriousness of rescue and the desirability of encouraging it, the courts have increasingly accorded favorable treatment to injured rescuers.").

213. Ryan Abbott, *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, 86 GEO. WASH. L. REV. 1, 18 (2018) ("The critical issue is not whether computers are perfect (they are not), but whether they are safer than people (they are). Nearly all crashes involve human error." (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., FEDERAL AUTOMATED VEHICLE POLICY: ACCELERATING THE NEXT REVOLUTION IN ROADWAY SAFETY 5 (2016))).

214. *See, e.g.*, Edmond Awad et al., *The Moral Machine Experiment*, 563 NATURE 59, 59 (2018) (testing intuitions around moral dilemmas relating to autonomous vehicles).

215. *See* Simons, *supra* note 115, at 378 ("But in many life-threatening emergency situations that individuals face when acting on their own, it would be unrealistic and unduly onerous to require the individual to provide advance assurance . . . that he or she

Thus, as the trolley problem becomes more real and less fanciful, we should not ignore the way in which it forces us to confront how relative value is an unavoidable part of lowering the overall costs of accidents—not simply property versus property, but life versus life.

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can pay for any harm caused."); ANDREA RENDA, ETHICS, ALGORITHMS AND SELF-DRIVING CARS—A CSI OF THE "TROLLEY PROBLEM" 9 (2018) (noting that algorithms that require a self-driving car to minimize the cost of accidents "inevitably introduces new elements of discrimination in the behaviour of self-driving cars" by requiring the system to determine *ex ante* which lives are more or less valuable); *see also* Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 259 & n.30 (1950) (characterizing the repeated overturning by judges of jury decisions that Sage was partly responsible for Laidlaw's injuries as an example of the principle that "[a] value differential in attitude of judge and jury towards a given class will be reflected in differences of judgment as to whether individuals of the given class are responsible for the wrongs complained of").