

From the Archives

The Pervasive Duty to Rescue

Donald J. Kochan

As individuals, Americans may choose to act as Good Samaritans and come to the aid of those in need, but are not legally obligated to do so. Traditionally under American law, no general duty to rescue is imposed upon us. This, at least, was the classic common tort law of England and the United States. Whatever one might think of the morality of declining to rescue people in trouble, there was no legal penalty for merely going about your own business.

Classic tort law imposed no duty of rescue, and, consistent with that concept, government did not feel it had the power to coerce benevolence in public law either. With the creation of the modern welfare state, however, the government has abandoned its previous restraint. A citizen need only look at his paycheck each week to realize that he is indeed being forced to come to the aid of others.

The private law of torts illustrates one origin of the prohibition on coerced benevolence and is thereby helpful in understanding the injustice of redistribution. The rule accepted in the common law of torts holds that no one can be legally obligated to provide any level of help to another in need. Tort law expressly indicates that an individual cannot be forced to give up a portion of his liberty to benefit another, no matter how little the cost or how great the benefit. This protection against forced benevolence is a logical extension from the concept of negative liberty understood at the Founding and embraced in the Constitution: law exists to protect against intrusions on liberty and not as a means for compelling action.

James Madison, the father of the Constitution, was emphatic in his belief that the Constitution fails to grant the government power to redistribute resources for welfare programs of any kind. In an address to the floor of the House in 1794, Madison attacked a welfare bill stating that he could not “undertake to lay [his] finger on that article of the Federal Constitution which granted a right to Congress of expending, upon objects of benevolence, the money of their constituents.”¹ This statement reflects the enumerated powers doctrine, holding that the government cannot act outside of a specific granted power. The Founders did not believe that Congressional power was plenary, as it is often believed to be today.

Given Madison’s statement, it is impossible to believe that the Founders contemplated that Congress should have the power to compel assistance from one citizen to aid another. In private law, C never has a claim to take A’s property merely because he is in want of it due to his destitution. Such actions are rightly called theft and therefore outlawed. There is no reason to believe that the institution of government somehow transforms this principle and grants C (or others purporting to

act on his behalf) the power to employ the state to these ends.

Thomas Jefferson’s thoughts on the proper role of government bear repeating here: “A wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government.” Taxation to support government welfare programs is clearly at odds with our third president’s philosophy.

Conscience and Constitution

Noted constitutional scholar and Supreme Court Justice Joseph Story wrote that “[A] man has a perfect right to life, to his personal liberty, and to his property; and he may by force assert and vindicate those rights against every aggressor. But he has but an imperfect right to...charity...even if he is truly deserving it...” where these imperfect rights “may not be asserted by force of law, but are obligatory only on the conscience of parties.”²

Ironically enough, some key supporters of the New Deal also recognized that the emerging welfare state was unconstitutional. In 1935, Franklin Roosevelt wrote to the chairman of the House Ways and Means Committee saying, “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.”²

In 1968, Rexford Guy Tugwell, a principal architect of the New Deal, observed, “To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them.”²

Social Security, unemployment benefits, corporate subsidies, farm subsidies, public housing, and countless other manifestations of the welfare state are all coerced transfers which impose an affirmative duty to “rescue” upon us. (Many of the beneficiaries, of course, are not in peril or even the least bit needy, but have learned to play the political game well enough to collect large amounts from the government.) This not only adversely affects individual liberty, but also increases the number of imperfect rescues. Government programs create dependency, create flawed incentives, and are too broad and generalized to target resources effectively. They hurt more than they help. In tort law, an individual can be held liable for a failed rescue when his heroic attempts are beyond his capacity and actually do harm to the one in need of assistance.³ The government, however, is not liable for the harm its “rescue” programs do.

Only private charity can meet the requirements of those truly in need of assistance. Private funds can be targeted

toward those in actual need. Moreover, private organizations are smaller and more localized, allowing them to address the specific problems that needy people have and apply specific solutions, instead of merely sending out impersonal checks drawn against government accounts. Finally, private charities must be more accountable, for they do not have the coercive power of taxation available to ensure continued funding.

Government programs, unfortunately, have co-opted this superior private approach. Many people believe that they need not get involved because of a flawed perception that the government is doing the job. Moreover, many cannot afford to assist privately, given the drain on their budget from taxation. In tort law, a person can be held liable for preventing a needy individual from getting more effective assistance.⁴ That, essentially, is what the government does by its discouragement of private charity, but again, the government is not liable for the harm it does.

The rules of the common law, developed over many centuries, usually exhibit a profound wisdom in the ordering of human affairs. The rule against compulsory rescues is such a rule. If you were obligated to help everyone in need, the

demands on your time and money would be almost endless. The only solution to the problem that protects the individual's freedom of action and property rights is the one adopted by the common law: there is no legal duty to rescue. There may be a moral duty, but the law leaves that to the individual and his conscience.

REFERENCES

1. *The Cato Handbook for Congress*: 104th Congress. Washington, D.C.: Cato Institute; 1995: 19.
2. Anon. Joseph Story, Natural law. *Encyclopedia Americana*. Reprinted as an appendix in: McClellan J. *Joseph Story and the American Constitution*. Norman, Okla.: University of Oklahoma Press; 1990.
3. *Farwell V. Keaton*, 396 Mich. 281, 240 N.W. 2d 217 (1976).
4. *Lacey V. U.S.*, 98 F. supp. 219, 220 (D.Miss. 1951).

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Ode to the Welfare State

Mr. Truman's St. Paul, Minn., pie-for-everybody speech last night reminded us that, at the tail-end of the recent session of Congress, Representative Clarence J. Brown

(R-Ohio) jammed into the Congressional Record the following poem, describing its author only as "a prominent Democrat of the State of Georgia":

Democrat Dialog

(1)

*Father, must I go to work?
No, my lucky son.
We're living now on Easy Street
On dough from Washington.*

(3)

*But if Sam treats us all so well
And feeds us milk and honey,
Please, daddy, tell me what the hell
He's going to use for money.*

(5)

*But, father won't there come a time
When they run out of cash
And we have left them not a dime
When things will go to smash?*

(2)

*We've left it up to Uncle Sam,
So, don't get exercised.
Nobody has to give a damn—
We've all been subsidized.*

(4)

*Don't worry, bub, there's not a hitch
In this here noble plan—
He simply soaks the filthy rich
And helps the common man.*

(6)

*My faith in you is shrinking, son,
You nosy little brat;
You do too damn much thinking, son,
To be a Democrat.*