In Defense of the Good Samaritan

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Hanoch Dagan*

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I. PROLOGUE

In the year 1880, in Dalles City, Oregon, a large and valuable load of lumber fell into the Columbia River and was about to be carried away by the river’s waters. Since Savage, the owner of this lumber, was absent from the scene, Glenn — who, at that time, was doing construction work for Savage — “furnished help and did service” in saving the lumber “from being washed away and lost.”

Seven years later, the Supreme Court of Oregon rejected Glenn’s claim that Savage owed him “the reasonable value” of his services as well as of the services of the workmen he employed in saving the lumber. The court did not deny that these services had been “meritorious, and probably beneficial, to Savage,” but it nonetheless insisted that the services “could not create a legal liability on the part of Savage.”2 “To make him liable,” the Court ruled, “he must either have requested the performance of the service, or, after he knew of the service, he must have promised to pay for it.” Otherwise, the law deems “an act done for the benefit of another, without his request, as a voluntary act of courtesy, for which no action can be sustained.”3 Were it otherwise, the Court explained, the result would be “ruinous litigation, and the overthrow of personal rights and civil freedom.”4 As the New Jersey Supreme Court had put it, in an earlier case cited by the Glenn Court, were such actions permitted, “[n]o man’s private business . . . would be under his control, or free from the interference of strangers, perhaps idlers, drunkards, and perhaps enemies, under such pretences, drawing him from business into litigation.”5 Furthermore, if the law were otherwise, it would do “violence to some of the kindest and best effusions of the heart to suffer them afterwards to be perverted by sordid avarice.”6 Hence, the law must not permit “meritorious and generous acts” to be “afterwards converted into a pecuniary demand.”7

2. 13 P. at 448.
3. 13 P. at 448.
4. 13 P. at 448 (quoting Force v. Haines, 17 N.J.L. 385, 387 (1840)).
6. 13 P. at 448.
7. 13 P. at 448.
Although some of the details of the doctrine governing such instances of good samaritan intervention have changed since the seminal case of *Glenn v. Savage*, there has been no change in the basic approach of the common law with regard to good samaritans who render help and services in response to another's need without any preexisting duty (private or public) to intervene. This approach is especially persistent in cases like *Glenn v. Savage* where unsolicited benefits are conferred in order to preserve or protect another person's property or financial concerns (as distinguished from her life or health).\(^8\) It is best evidenced in the wide range of epithets directed at good samaritans when they seek restitution for the expenses they incurred or for the value of the services they supplied. In most cases, good samaritans are described by the courts as "mere" strangers, volunteers, officious meddlers, intermeddlers, or interlopers.\(^9\) Needless to say, use of these derogatory epithets usually indicates that the plaintiff's claim is doomed to fail.\(^10\)

In this article, I contest this "long standing judicial reluctance to encourage one person to intervene in the affairs of another by awarding restitution of benefits thereby conferred."\(^11\) In particular, I take a critical look at the two rationales suggested in *Glenn* for this reluctance: the concern for preserving personal liberty and the claim that altruism should be reward enough in itself. I contend that both rationales are misconceived, and that a reasonable account of both liberty and altruism requires that we relinquish the traditional reluctance that typifies the law's treatment of good samaritan claims. To be sure, I do not maintain that these two very different considerations lead to the same conclusions regarding the precise contours of an alternative doctrine. On the contrary, one theme of this article is that delineating the precise doctrinal details requires significant normative choices. Nonetheless, it should be

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10. See Restatement of Restitution § 2 (1937) ("A person who officiously confers a benefit upon another is not entitled to restitution therefor."); Restatement (Second) of Restitution § 2 (Tentative Draft No. 1, 1983) (similar rule). In most cases where recovery has been allowed for services rendered to others motivated by altruism, there has been a strong and direct public interest in the performance of that service, such as where a close relative of a deceased has paid funeral expenses and seeks reimbursement from the estate. See, e.g., Restatement of Restitution § 115 cmt. b (1937); John P. Dawson & George E. Palmer, Cases on Restitution 48 (2d ed. 1969). This article focuses on cases in which no such direct public interest exists.

11. Palmer, supra note 8, at 359.
emphasized that neither liberty nor altruism can vindicate either the traditional hostility toward unsolicited benefactors or the result in *Glenn v. Savage*.

Indeed, my claim is that *both* liberty and altruism can justify, in certain circumstances, acknowledging good samaritan claims for reimbursement of expenses incurred as well as for compensation for services rendered or for certain damages suffered by the benefactor as a consequence of her act. My analysis perceives these remedies as instruments for encouraging beneficial interventions or, more precisely, for offsetting countervailing incentives faced by potential good samaritans. I maintain that personal liberty justifies — or even mandates — such an offsetting whenever it is evident (at the time when the potential benefactor must decide whether or not to act) that the beneficiary's expected gain from intervention exceeds the expected costs of the intervention, provided that there is no reasonable way for the beneficiary to communicate actual consent. I further contend that there is one conception of altruism that can justify a similar rule and that other conceptions could be even more amenable to good samaritans' claims.

The doctrine of good samaritan intervention obviously is not the most frequently applied segment of private law. Therefore, the direct practical significance of an argument against the traditional doctrine may be rather marginal. Yet claims of good samaritans have always captured the interest of private law scholars. I believe that this interest is not only due to the intricacies of this doctrine (some of which are explored in Part III), but rather, is also entailed by a sense — which I hope to help vindicate in the discussion that follows — that the social significance of the legal prescription for these cases cannot be reduced to its direct behavioral impact. This apparently inconsequential doctrine may, upon reflection, turn out to be a rather significant segment of our law — and thus, indirectly, of the kind of society in which we live — due to the

symbolic and expressive ramifications of the social choices it embodies.\textsuperscript{13}

\section*{II. ENCOURAGING GOOD SAMARITANISM}

\subsection*{A. Restitution as an Instrument for Encouraging Potential Benefactors}

In this Part, I seek to defend the claim that common law should change its basic approach to good samaritans and adopt, in its stead, a far more favorable attitude, the details of which are developed in Part III. As a prelude to the main arguments in favor of this conclusion, I need to clarify two presuppositions and one limitation to the analysis that follows. The title of this section is intended to capture the essence of these caveats, but each nonetheless requires a brief elaboration.

Restitution — I suggest in the title — can serve as an instrument for encouraging potential benefactors to render necessary assistance. Hence, I highlight the incentive effect of the applicable legal rules.\textsuperscript{14} More particularly, I imply two presuppositions. First, I assume that the pertinent doctrine has some (at least marginal) impact on the behavior of potential benefactors; or more precisely, I presume that the hostility demonstrated by the traditional doctrine toward claims made by good samaritans for restitution of the costs incurred due to their intervention could discourage potential benefactors from intervening.\textsuperscript{15} Second, I assume that the content of the relevant legal rules is to be decided from a prospective viewpoint, rather than from a retrospective perspective (or, at least, not primarily on the basis of retrospective considerations).\textsuperscript{16} Hence, the discussion that follows omits any reference to the backward-looking concept of corrective justice that is, at times, said to be the underly-


\textsuperscript{15} See McNees, \textit{supra} note 12, at 44-45; Rose, \textit{supra} note 12, at 178. For a much more skeptical view regarding the ability of law to affect human behavior, see IZHAK ENGLARD, \textit{The Philosophy of Tort Law} 43-44 (1993).

\textsuperscript{16} For a similar assumption, see GARETH JONES, \textit{Restitution in Public and Private Law} 144 (1991). This assumption corresponds with the generally accepted view that one important function of law is to direct behavior. \textit{See} JOSEPH RAZ, \textit{The Functions of Law, in The Authority of Law: Essays on Law and Morality} 169 (1979).
ing foundation of restitutionary doctrines. Likewise, I will not consider the possibility of perceiving certain restitutionary duties imposed on beneficiaries of good samaritan interventions as a way of institutionalizing a (backward-looking) moral debt of gratitude on their part.

A prospective approach interested in affecting the behavior of potential benefactors can lead down several different paths, but this article is limited to one. One possible path, which I do not discuss in this article, is the imposition of positive duties to rescue and assist backed by criminal or civil sanctions. The legal and philosophical questions raised by this path, then, need not be considered herein. By the same token, I will not consider, except in passing, the maritime doctrine of salvage, which allows rescuers a positive reward for their (successful) efforts. The considerations raised in the maritime context are unique — most notably, the need to promote a salvage industry, due mainly to the unique equipment and skills that are required for successful interventions — and are, therefore, beyond the scope of this article.

Hence, I will focus exclusively on only one type of legal norm, namely, those rules that entitle benefactors to restitution of the costs they have incurred due to and while performing their well-intended services. These rules seem to be intended to offset “pre-legal” countervailing disincentives for potential good samaritans; to “neutralize” any worry they may have ex ante that their other-regarding intervention ultimately will cause them actual loss, such as uncompensated expenses or damages (the terms “encourage” and “encouragement” are employed below as shorthand for this more precise meaning). In advocating expansion of these rules,


18. See generally A. John Simmons, Moral Principles and Political Obligations 163-183 (1979) (discussing the moral debt of gratitude).


21. Saul Levmore suggests that “it is convenient to think of a legal right to reimbursement as a reward,” because whereas reimbursement in itself merely “erases a penalty otherwise incurred by a rescuer,” a legal entitlement to reimbursement of expenses creates “a package of reimbursement, public acclaim, and private gratitude,” which, as a whole, may be regarded by potential rescuers as “a substantial carrot.” Levmore, supra note 12, at 882. In
this Part confronts a fundamental question: Why should the law discard its traditional reluctant stance — which merely maintains the “pre-legal” state of affairs in which claims of potential benefactors are not guaranteed — and adopt, in its stead, a doctrine that encourages good samaritan intervention?

The following sections suggest two answers to this question. The first answer acts to justify encouragement of good samaritanism by referring to the (hypothetical) will of the beneficiary. The second answer finds its premise in the inherent value of altruism, and its justification for encouraging good samaritanism is concern for others, which is nurtured and inculcated by beneficial interventions. As we shall see, the relationship between the personal liberty account and the altruistic account is not a simple one. These two approaches raise different considerations that may justify — Glenn v. Savage notwithstanding — encouraging good samaritanism. The latter approach, which is grounded in altruism, however, is open to several different interpretations, yielding correspondingly divergent policies. While one version of this approach serves to reinforce the conclusions of the personal liberty account, others engender certain variations of this account, some of which are rather radical. This complexity should be borne in mind when we arrive at Part III of this article, where I outline an alternative doctrine of good samaritan intervention.

B. Personal Liberty and the Encouragement of Beneficial Interventions

A tentative draft of the Second Restatement of Restitution explains,

The chief policy [of the doctrine that denies restitution for benefits officiously conferred] can be expressed in two ways. First, a person should have the privilege of determining for [her]self what obligations [she] wishes to assume; and second, no one should be empowered to thrust a benefit on another and by that means become [her] creditor.

contrast to these incentives, which Levmore suggests may turn reimbursement into a positive reward, there are countervailing factors that reduce the likelihood of the promised reimbursement's being awarded or being fully compensatory if awarded (for example, the possibility that the ex post judicial determination will not perceive the intervention as reasonable, the litigation costs involved, the possible difficulties in collecting the reimbursement, or the possibility of the beneficiary's insolvency). It is difficult to decide how to balance all of the additional considerations mentioned in this footnote. Therefore — and for the sake of keeping the analysis simple — I assume that they are more or less of equal force, thus ignoring them altogether.
The ideal is that of self-determination, or autonomy, in incurring obligations. But does this ideal — which, for the purposes of this section, is assumed to be an uncontroversial good — in actual fact justify the rather extreme anti-interventionist rules currently prevalent in most Anglo-American jurisdictions? I believe that it does not. In order to understand why, we must first consider the familiar account of requiring restitution for unsolicited benefits in the name of a “hypothetical contract.”

1. The Hypothetical Contract Theory

The prescription advocated by hypothetical contract theorists is simple and powerful: courts, they claim, should allow recovery to unsolicited interveners — that is, should allow them to impose a hypothetical contract on their beneficiaries — if, and only if, the court can reasonably conclude that at the point in time that the benefit was conferred, the beneficiary would have agreed to pay for it had she been able to communicate her express wishes. Thus, this requirement implies that recovery is justified only if two conditions are met: (a) prohibitive transaction costs — usually due to the unavailability of the beneficiary or the need of an immediate intervention — preclude the possibility of negotiating an express agreement before conferring the benefit; and (b) the imposed transaction mimics the assumed (ex ante) intentions of the beneficiary — that is, the transaction is to her advantage (when its expected benefits are compared with its expected costs).
Hypothetical contract theorists are divided, however, with respect to such idiosyncratic preferences as the preference to benefit from one's own efforts rather than from the unsolicited efforts of others. On the one hand, it has been claimed that the "court-imposed transaction [must make] the involuntary parties subjectively better off, not merely . . . [increase] their wealth."25 Therefore, any subjective objection, even if based on idiosyncratic or accidental characteristics of the defendants should be "a fatal response to a proposed hypothetical agreement."26 On the other hand, proponents of a more expansive doctrine have maintained that the courts should not allow such evidence of idiosyncratic preferences or accidental characteristics of the beneficiary and should adhere instead to an "idealized contract of the kind that rational and informed parties would have perceived as mutually beneficial had they had that opportunity."27

These views are obviously at odds in terms of their doctrinal implications, but they share an underlying assumption. The restrictive approach insists that the hypothetical contract story be premised upon the value of individual liberty and suggests that abandoning the subjective utility calculus in favor of an objective standard of cost-benefit analysis violates this value. The expansive approach unabashedly admits that a hypothetical contract imposed where the twofold requirement doctrine is met cannot be supported by values of personal autonomy. Rather, such hypothetical contracts are justified only by efficiency considerations: they are intended to "reward the bestowers of positive externalities" and to encourage "value-creating activities" in cases where "market alternatives" are unavailable.28 Thus, both approaches presuppose that individual liberty cannot justify the relatively broad doctrine that finds the satisfaction of the two conditions listed above sufficient to support liability.

I wish to challenge this assumption and, in so doing, claim that personal liberty — and not only efficiency — justifies a doctrine that admits good samaritan claims for restitution whenever the

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26. Id.
above two (objective) conditions are met. Substantiating this claim requires, first, some elaboration of the Second Restatement's ideal of self-determination, or autonomy, in incurring obligations. It also requires exploring the (weak) sense in which the court-imposed contract is hypothetical in cases of good samaritan intervention where the two conditions of the hypothetical contract theory are fulfilled. Finally, it requires explaining why such hypothetical contracts — as opposed to contracts that are hypothetical in a stronger sense — can coexist with (and are maybe even required by) the ideal of personal liberty.

2. The Restatement's Ideal

The Second Restatement's ideal of self-determination, or autonomy, in incurring obligations echoes the familiar liberal value (some may prefer to call it ideology) of negative liberty. It is premised on the belief that independence ("freedom from") — although it is not necessarily the ultimate value — is essential to personal development and autonomy. Because each individual is distinct and unique, each should be able to choose her goals voluntarily (as well as the means of achieving such goals) and should be held responsible for such choices. People should enjoy — that is, the law should guarantee them — a private moral sphere that is free from forcible human interference. Boundary crossing, trespassing on the individual's moral space, should be viewed with suspicion and, preferably, deterred. Individuals should, therefore, be entitled to control of their resources, at least insofar as they do not actively harm others in exercising such control. Their actual consent — express or implied, but, in all events, actual and not legally imposed — should

29. The discussion that follows can be read as an extension of Randy Barnett's claim that a consent theory of contract can coexist with (and even justify) the objective approach to contract interpretation. See Randy E. Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 300-07 (1986).

30. One may assume that this ideal does not restrict the legitimacy of imposing a duty not to harm others.


be the prerequisite to any legitimate transfer of, or interference with, any of their resources.33

This normative infrastructure explains the instinctive caution with which common law treats good samaritans34 (although I insist below that this infrastructure does not justify the extent of its hostility toward their claims). Instances of unsolicited benefits threaten potential beneficiaries' control over their resources. Hence, a legal regime that takes seriously people's negative liberty must adopt the potential beneficiary's point of view. It must, as a rule, require that these potential beneficiaries be the gatekeepers of their own affairs. Thus, a contract is the proper and only legitimate way of effectuating any external interference, especially where, in the final analysis, it is performed at the expense of the beneficiary of the interference. A person's actual — and not idealized — consent, her unencumbered free will, should be the sole judge of the desirability of any external interference in her affairs.

3. Strong and Weak Hypothetical Contracts

The previous paragraphs explain why claims of idealized or hypothetical contracts, which are currently in vogue in normative discourse, are frequently problematic from the standpoint of personal liberty. Thus, for example, there has been some resistance — which I find convincing — to using a hypothetical contract as justification for the normative desirability of wealth maximization. Critics claim that the consent that is attributed to individuals in order to accord a contractarian validation to the maxim of wealth maximization is not only hypothetical, it is often counterfactual — that is, attributed to individuals in circumstances where it is rather obvious that had they been asked for their opinion, they would not have given the consent attributed to them and may have even expressed objection.35 One important reason for this conclusion is that, due to the marginal utility of money, wealth maximization systematically improves the


condition of the better-off, but may well also systematically hurt the worse-off.36

But note the difference in the hypothetical contract discussed in this section, as opposed to the hypothetical contract which is said to justify the maxim of wealth maximization.37 Unlike the hypothetical contract advanced by proponents of wealth maximization, ours is not evidently counterfactual;38 in other words, it is not a contract that systematically leads to one party finding itself on the losing side. To be sure, the hypothetical contract discussed here has never been agreed to, explicitly or implicitly, by the parties involved. It is, nonetheless, idealized in only a weak sense. It is supported by the outward behavior of the benefactor and — much more significantly — by reasonable assumptions regarding the consent of the beneficiary: the hypothetical contract must be, from the beneficiary’s (ex ante) point of view, cost-beneficial and enforced only because prohibitive transaction costs prevented actual negotiation. Furthermore, an implicit, third condition under the hypothetical contract theory needs to be addressed explicitly in order to explain the weak sense of idealization it requires. According to this condition, any external indication, explicit or implicit, of the beneficiary’s objection (idiosyncratic as it may be) to the beneficial interference that the benefactor should have reasonably noticed before conferring the benefit necessarily mandates the rejection of a claim of a hypothetical contract and, thus, denial of the good samaritan claim. Any actual or implied voice of the beneficiary that indicates that she may disapprove of the intervention must be fatal to this claim if we are to remain loyal to personal liberty.

Indeed, unlike stronger forms of hypothetical contracts, ours is a modest technique that is intended to assess, in circumstances where there is no better method, what the best course of action would be from the perspective of the potential beneficiary herself. The last stage of my argument in this section is to claim that this weak form of a hypothetical contract does not violate the conception of personal liberty discussed above and, indeed, may even be required by

37. The discussion that follows can be read as criticism of the indiscriminate nature of some of the critiques of contractarian arguments in law, such as Jules L. Coleman et al., A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law, 12 HARV. J.L. & PUB. POLY. 639, 645-46 (1989).
it. The ramifications of successfully substantiating this claim would be that personal liberty, and not only efficiency, necessarily supports the expansive approach to the hypothetical contract theory.

4. Weak Hypothetical Contracts and Personal Liberty

Consider the choice faced by the court in a case of good samaritan intervention: it can either afford relief or refrain from doing so. If it declines, it acts to deter (for most — rational and not particularly other-regarding — potential benefactors) interferences, which are, from the ex ante perspective of the beneficiary, cost-beneficial. The reason for this disincentive is straightforward: because negotiation is impractical, a potential benefactor would fear that the beneficiary — whom she does not know and can only presume to be as rational and not particularly other-regarding as she is — would refuse ex post to reimburse her for her expenses, from which the beneficiary has already benefitted. Put differently, without a legal guarantee, a potential benefactor — who needs to decide whether to intervene before she is able to receive the beneficiary’s binding commitment that she will, indeed, reimburse her — must take into account that her well-intended intervention could be abused. This would, at least at the margin, deter beneficial interventions. In most cases, where the potential beneficiary is rational, this result would frustrate, rather than enhance, her preferences.

I, for one, would be hard-pressed to find a reason for how the law, in the name of personal liberty, could lead to such a disappointing outcome. Once the third (no observable objection) and first (prohibitive transaction costs) conditions of the hypothetical contract theory are fulfilled, the defendant cannot be said to be deprived of any meaningful choice. The choice to encourage or discourage interventions that are objectively beneficial (as assured by the second condition of this weak hypothetical contract theory) must be made, in any event, by the law. Is it reasonable for the law
to undermine the preferences of the majority of (rational) beneficiaries (by discouraging beneficial interferences) in the name of preventing any boundary crossing when we cannot be absolutely certain that the beneficiary would have voluntarily consented? Is it reasonable to do so even in circumstances where beneficiaries have no way of communicating their (frequent) approval or (in the rare cases of idiosyncratic beneficiaries) disapproval?

These questions must be answered in the negative. While wariness of boundary crossings — the commitment to negative freedom — is of immense importance for personal liberty, it is not, as may be recalled, its ultimate prescription (at least not in the liberal tradition). Rather, negative freedom serves a more fundamental purpose: personal development and autonomy, in other words, self-determination. In many cases, promoting the means (negative freedom) does not clash with achieving the end (self-determination). In some cases, however, promoting the means does threaten to undermine the end. In such cases the legal norms that best promote negative freedom must retreat and give way to those norms that best promote the individual's more essential interest to act on her goals and aspirations.

Cases of good samaritan intervention in which all three conditions of the hypothetical contract theory are met clearly belong to this category. Where it is impractical to inquire whether the beneficiary approves of the intervention and there are no external indications that she disapproves of the court-imposed contract of intervention in consideration of restitution of expenses, a court would be justified in allowing claims on the basis of a hypothetical contract, provided that the intervention is (ex ante) cost-beneficial. As we have seen, rejecting such claims would have the effect of discouraging potential good samaritans. This undoubtedly would promote the means of deterring boundary crossings, thereby preserving the individual's moral space from any interference by an-

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43. The argument that follows is not intended, obviously, to exhaust the familiar debate respecting negative vs. positive liberty, since many of its aspects — e.g., the meaningfulness of choice without adequate means or the legitimacy of interfering with people's explicit choices which seem "objectively" to their detriment — are irrelevant here. My only concern is to highlight the difficulties of a position that insists on preventing boundary crossings where all three conditions of the weak hypothetical contract account apply.


45. Courts nonetheless may be concerned that their ex post evaluation of the benefactor's ex ante estimation of the expected efficiency of her intervention may be prone to error, and, therefore, they may increase somewhat the margin of error to ensure that the contract they are imposing indeed corresponds to the beneficiary's ex ante interests.
other and serving, in the best possible way, the interests of certain idiosyncratic beneficiaries. In most cases, however, discouraging good samaritanism would be at the cost of frustrating the end that we initially ascribed to such a policy, namely, ensuring that an individual's preferences determine the fate of everything that is within her moral space.46

C. Varieties of Altruism and the Alleged Paradox of Encouraging Altruism

Having discussed the first, liberty-based argument advanced in Glenn v. Savage, I wish to turn now to the second argument raised against claims of good samaritans. "The law will never permit," declared the Glenn court, "a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand." The reason for this is that it "would be doing violence to some of the kindest and best effusions of the heart to suffer them afterwards to be perverted by sordid avarice."47 In other words — those of an English court almost a century earlier — "perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude."48

Should, indeed, altruism be its own reward?49 By allowing claims of good samaritans, do courts in fact obliterate altruism? In what follows, I answer these questions in the negative. I maintain that, contrary to the spirit of these judicial statements (and to some academic elaborations thereupon),50 a genuine commitment to fostering altruism requires a favorable legal response in cases of altruistic intervention. I begin by offering a summary account of the value of altruism and by characterizing such a favorable doctrine as

46. Can this conclusion be too harsh on beneficiaries for whom the intervention is not value-increasing due to their relative poverty (which makes the effective cost of payment higher for them than for the typical beneficiary)? Will such beneficiaries be forced into destitution? This result may indeed eventuate in cases of bodily injuries sustained by good samaritans, hence the plausibility of socializing this type of cost, discussed infra text accompanying notes 179-81. In other types of cases, however, they are much less likely to occur, because in most interventions the benefactor would know (or, in any event, should have known) — as we usually do utilizing normal social cues — the approximate status of the intended beneficiary and should thus take it into account. Hence, it is only respecting "real eccentricities" that my discussion concludes that subjective preferences should not be counted.

47. Glenn v. Savage, 13 P. 442, 448 (Or. 1887).


49. See Restatement (Second) of Restitution § 3 cmt. c (Tentative Draft No. 1, 1983); McCamus, supra note 22, at 302.

50. See infra text accompanying notes 63-68.
a form of "institutionalized limited altruism." Only with this as my background can I consider the abovementioned challenges and try to explain why I find them to be misconceived. Having cleared the way for an altruism-based argument for good samaritan claims, this section will conclude by considering some of the complexities of such an argument: pointing to certain varieties of altruism and to the entailing divergent doctrinal implications.

1. Restitution as Institutionalized Limited Altruism

Philosophers have invested considerable thought to the importance we attach to altruism, but this is not the appropriate place for a detailed account. It will suffice to mention two approaches.51 One view contends that altruism arises from the human capacity to view oneself simultaneously from both the personal and the impersonal standpoints. This capacity is premised on "a recognition of the reality of other persons, and on the equivalent capacity to regard oneself as merely one individual among many," all of whom are included in a common world and are persons in as full a sense as oneself is.52 Another view explains altruism in communitarian terms. This account emphasizes the human need for social solidarity, communal concern, and a sense of togetherness, all of which can be satisfied only in a moral community that is premised on a maxim of mutual responsibility — hence, our natural tendency to understand any other-regarding requirement as a way of contributing to a community we regard as our own.53 These accounts differ in many respects. Nonetheless, they converge in finding that the justification for responding to others' claims is the importance we attach (or should attach) to others, whether as atomized human beings or as fellow members of our constitutive community — whether due to rational deliberation or to innate emotions. In short, the appeal of

51. A third explanation of altruism is based on empathy, or identification with others and the incorporation of their interests into our subjective welfare function. See Jane J. Mansbridge, The Rise and Fall of Self-Interest in the Explanation of Political Life, in BEYOND SELF-INTEREST 3, 20 (Jane J. Mansbridge ed., 1990); Amartya K. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, in BEYOND SELF-INTEREST, supra at 25, 31-34. But surely the benevolent sentiments people actually have are directed at a much narrower circle than the entire range of beneficiaries of the legal rules discussed herein (i.e., the whole legal community — typically the state). See MICHAEL IGNATIEFF, THE NEEDS OF STRANGERS (1984). Hence, the empathy factor will not be considered here.


other-regarding ideas derives from the other-regarding element of the self.

I suggest that we analyze a doctrine that takes a favorable view of good samaritan interventions as a form of institutionalized limited altruism: a legal device that calls for other-regarding action and seeks to inculcate other-regarding motives; an institutional design that responds to and supports the other-regarding perspective of human beings. Thus, such a doctrine regards us as "divided selves": individuals who have both a personal perspective — preoccupied with self-interest — and an impersonal or communitarian perspective (depending on one's preferred theory of altruism), which is the source of other-regarding action. This doctrine appeals to the other-regarding standpoint of the agent. It seeks to sustain and inculcate her other-regarding side or, at least, to create "an ecological niche" for altruistic behavior and altruistic motives.

The metaphor of a divided self helps explain the limited altruism that this proposed doctrine seeks to institutionalize. A restitutory doctrine that favors good samaritan claims does not require actual self-sacrifice; instead, it guarantees potential good samaritans reimbursement of any expenses they incur. It thus encourages them to be aware of another's distress, expecting them to inconvenience themselves to some extent in response to such distress. It encourages them, more precisely, to be prepared to set aside pursuit of their nonwelfare interests for the benefit of others, knowing that


55. Cf. Nagel, supra note 52, at 79. I believe that expanding the notion of self-interest to incorporate other-regarding motives only makes it vacuous, because we are still left with the problem of distinguishing action that is totally indifferent to the ultimate welfare of others from action that is, at least partially, concerned with the welfare of others. In contrast, in separating the notions of "self-interest" (narrowly perceived) and "altruism," we maintain and, thus, are able to examine this important distinction. See Amitai Etzioni, *The Moral Dimension: Toward A New Economics* 34-35 (1988); Christopher Jencks, *Varieties of Altruism, in Beyond Self-Interest*, supra note 51, at 53, 55.


any actual sacrifice they may make in their intervention is only temporary, that is, relatively easily reversed.58

Indeed, the altruism institutionalized herein is by no means of a heroic or purely selfless nature; it does not expect unreserved subordination of an agent’s self-interest. On the contrary, it is a somewhat calculated altruism, a willingness to benefit the other, but at the other’s own expense.59 Nevertheless, requiring people to serve the interests of others in circumstances where the former have no self-interest in so doing (such as the possibility of reaping some profit or reward)60 is virtuous enough. Such delineation of the expected balance between self and other is a sensible limitation of the level of altruism (the “call of duty”) prescribed by a doctrine that acknowledges that our self is divided; that an individual’s primary attachment is to her personal interests, projects, and commitments; and that institutionalized altruism can insist only that such attachment be restrained by the other-regarding standpoint.61 After all, moral individuals are not—and should not be expected to be—moral saints; they do not—and should not be expected to—set aside their needs; “they include themselves in the calculation and give themselves weight in the determination of the right action to make.”62

2. Altruism and Law

Consider now the difficulty with which this section began. At least as it is conventionally perceived, altruism is a virtue, “a self-perfective quality.” It focuses on the agent’s nature and defines moral goodness in terms of “the excellence of the agent’s charac-

59. See Stoljar, supra note 54, at 14, 24, 149.
60. For a more detailed discussion, see infra text accompanying notes 155-59.
61. See Nagel, supra note 56, at 37-38. The difficulty with setting limits on the degree of altruism expected from “a divided self” is aggravated when one considers, as we do here, altruism in the context of the large scale nation-state (or, even more obviously, the world community), rather than in the context of any smaller sub-unit thereof. When large numbers of potential beneficiaries are involved—as in the case of practically every legal community—small contributions add up to “heroic totals” that most would perceive as “beyond the call of duty.” See James S. Fishkin, The Limits of Obligation (1982).
62. Jean Hampton, Selflessness and the Loss of Self, in ALTRUISM 135, 164 (Ellen Frankel Paul et al. eds., 1993); see also id. at 144-45; cf. Peninsular & Oriental, Etc. v. Overseas Oil Carriers, Inc., 553 F.2d 830, 836 (2d Cir. 1977) (maintaining that seeking reimbursement of expenses—as distinguished from a reward—does not make “assistance to an ailing seaman a matter of negotiation, rather than moral duty. On the contrary . . . this rule will encourage seamen aboard large vessels to perform their moral obligation to their brethren on smaller ships without fear their benevolence will result in unreasonable expenses to their ship’s owners.”).
ter."63 Beneficial consequences can be achieved with or without excellence of character and with or without contributing to such excellence.64 When an action leading to such consequences is “self-initiated and proactive” — a result of an “uncoerced voluntary choice” — it is indeed virtuous, that is, genuinely altruistic. But when it is instead “instrumental” and “reactive” — compelled or otherwise driven by certain external incentives — no virtue and, therefore, no altruism is involved.65 No action, however appropriate, insightful, or beneficial, can qualify as altruistic (virtuous) if not freely chosen.66 Even worse, expanding the category of beneficial actions that are not truly virtuous in fact undermines altruism, since it makes this virtue increasingly unnecessary and, thus, unimportant, relegating altruism to “the dustbin of supererogatory.”67 Therefore, institutionalizing altruism — if not an oxymoron — is at least an undesirable phenomenon, because it “could only reduce the moral worth of human action.”68 In order to sustain its status as a virtue, altruism needs to be — as prescribed by the Glenn court — a reward in and of itself, and the best course of action for a legal system interested in inculcating altruism is simple inaction.

This is a broad and ambitious argument. It is not satisfied with merely casting doubt on the value of imposing criminal or civil sanctions for noninterference to allay another’s distress. Rather, it goes beyond that, implying that even if the behavioral effect of a restitutionary doctrine favorable to good samaritans is not as dramatic as that of a doctrine that imposes positive obligations to assist, the former doctrine is still bad enough. Notwithstanding certain quantitative distinctions, any form of legal intervention — whether discouraging noninterference, rewarding successful interventions, or offsetting the pre-legal incentives facing potential good samaritans — can be interpreted as a device for promoting compliance with some public (external) policy;69 thus, any such intervention has devastating implications for the virtue of altruism.

64. See id. at 197.
65. See id. at 192, 222-23.
66. See id. at 197.
67. See id. at 193.
But is, indeed, the concept of altruism extraneous to law? Is there no possibility of promoting altruism — or any other virtue, for that matter — through law? Is institutionalizing virtues, such as altruism, necessarily destructive? I believe that such conclusions are far too extreme and probably misguided.

To understand why, consider the conception of law implied by these challenges. Law is perceived merely as a set of incentives that serves as the basis for the prediction of some external reaction, hostile or favorable, to deviation from or compliance with its dictates. This conception echoes the infamous predictive theory of law. As such, it disregards the "internal point of view" applied by most of us with regard to the law, according to which legal norms are taken as "guides for the conduct of social life," bases for claims, demands, and criticism; and standards for conduct and judgment. Furthermore, it is now rather commonplace to assume that law — like other major social practices and institutions — simultaneously reflects the prevailing belief system of its constituents, as well as shapes it; that the relationship between people's dispositions and the values ingrained into their society's institutional design is one of reciprocity; that our attitudes toward one another and the prescriptions of our legal regime are embedded in one holistic web, each one inculcating and inculcated by the other.

If the law is, in fact, such an important social institution, shaping, to some extent, its constituents' perceptions of themselves (in other words, if the law cannot avoid affecting popular consciousness), then it seems plausible that the law, like other primary social institutions, serves — intentionally or inadvertently — to preserve, sustain, and reinforce a certain equilibrium between the

70. For the classic statement of the predictive theory of law, see Oliver Wendell Holmes, The Path of the Law, in Collected Legal Papers 167 (1920).


self-regarding and the other-regarding perspectives of agents in a relevant legal community.74

Therefore, we should think of legal norms that encourage good samaritanism as a public expression of our bonds of concern and solidarity with others — a symbolic political expression of the importance that our community attaches to other-regarding actions and motives.75 Glenn’s challenge notwithstanding, such norms not only promote beneficial consequences (altruistic action), but also preserve and inculcate the other-regarding aspect of our selves. Even if the direct beneficial conduct that has been engendered by external incentives cannot be deemed altruistic, the public expression of (limited) altruism as the proper standard for conduct and judgment is bound to be internalized by the agent as well as by her community and to prompt future self-initiated and proactive — that is, genuinely altruistic, virtuous — beneficial actions.76

Phrased so broadly, however, this conclusion is problematic. The difficulties are rooted in the inherent tension — some would say, contradiction — between two fundamental characteristics of law: its normativity and its coerciveness.77 Thus, alongside the claim that legally-induced other-regarding conduct can help reinforce the other-regarding side of ourselves, there is the undeniable possibility that the law's coercive interference in people's lives also might have a counterproductive impact. The law's threat to individual freedom and control might create resentment or psychological reactance, which, in turn, may cause people to form negative attitudes with regard to the source of this threat (the coercive law), thus undermining the very possibility of such law serving a transformative function.78 If institutionalizing altruism were to create resentment, it might, in the end, impede — rather than enhance — the inculcation of altruistic motives.


78. See Brady, supra note 76, at 560; see also Landes and Posner, supra note 12, at 94 (suggesting that some methods for promoting beneficial interventions, “notably imposing legal liability for [non-interference],” may turn out to be counterproductive, because they “may reduce the public recognition accorded to the altruistic rescuer and [thus] the number of altruistically motivated rescues”).
Indeed, in order to perform effectively its value-shaping function, the law must "bargain against the people's [pre-existing] preferences." Legal norms may be successfully designed to affect people's values and preferences, but only if the norms are not overly ambitious, if they acknowledge that both the law and the prevailing ethos are cultural systems and, as such, usually evolve only gradually. Neither the goals of the legal norm nor the means it employs should be perceived as unreasonable and, therefore, offensive if the norm is to have actual transformative consequences.

It would appear that encouraging good samaritanism by securing restitution of the costs of benevolent interventions is precisely the moderate legal device needed to inculcate altruism. It is much less coercive than the more resolute legal norms, which encourage beneficial interferences by establishing positive duties of assistance and by imposing criminal or civil sanctions in cases of nonperformance. It is a reasonable device for promoting limited altruism, an attitude toward others that calls for other-regarding action and motives without mandating selflessness or challenging the existence — even predominance — of the self-regarding standpoint of agents. Therefore, allowing restitutionary relief for good samaritans may mitigate, if not entirely eliminate, any resentment toward the law's altruistically oriented interference. It also avoids tainting the motives of potential benefactors with any possibility of personal (tangible) gain or reward. Hence, contrary to the Glenn dictum, restitutionary measures can promote — rather than do violence to — "the kindest and best effusions of the heart."

81. Hence, it is also plausible to assume that the availability of restitutionary relief would not significantly reduce the public recognition accorded to the altruistic rescuer and, therefore, would not cause any decrease in the incidence rate of intervention. See Levmore, supra note 12, at 885-86; McLanesh, supra note 12, at 44 n.45. On the other hand, it may well be true that in cases of extreme distress — notably clear danger to a person's life — the more resolute and coercive devices of tort and criminal law may lead to superior behavioral consequences (as compared to those induced by the mere availability of restitutionary relief). Furthermore, in such limited cases, it is possible that imposing civil or criminal liability for noninterference would not be considered excessive legal interference with individual freedom.
82. For an elaborate discussion of this point, see infra text accompanying notes 158-59.
83. Glenn v. Savage, 13 P. 442, 448 (Or. 1887).
3. Three Conceptions of Altruism

Thus far, I have tried to show that restitutionary claims in cases of good samaritan interventions can be supported by altruism-based arguments. The remainder of this section continues this characterization of such arguments by comparing them to the first rationale suggested for our doctrine — personal liberty. At first glance, the difference between the altruism rationale and the personal liberty rationale is obvious. The latter rationale focuses on the beneficiary, insisting that in certain, well-defined circumstances, encouraging intervention can correspond to, or even be required by, her claim to personal liberty. In contrast, the former rationale addresses the good samaritan, with the intention of inculcating potential benefactors with the value of altruism, of reinforcing their — and that of society at large — other-regarding standpoint of the self.

These different starting points and theoretical justifications notwithstanding, the two rationales can coincide in terms of the ramifications of their adoption as the normative guides for the legal doctrine. Such concurrence would result if the “other,” whose interests must be taken into consideration under the altruistic rationale, were to be defined exclusively in terms of the beneficiary’s autonomous will. In that case, concern for the other — more accurately termed “respect” for the other — would require strict adherence to the doctrinal recommendations of the personal liberty rationale.

But this is only one possible, and by no means exclusive, interpretation of the altruistic rationale, which can certainly incorporate other understandings of the vital interests of individuals. Such rival understandings need not necessarily negate the importance of the individual’s interest in autonomy or personal sovereignty. This friction merely requires acknowledgment of the fact that personal sovereignty is not the only interest that has bearing for an individual, and therefore, respecting another person’s preferences (explicit or hypothetical) does not exhaust the concept of concern for others. Genuine concern for other people entails — according to this interpretation — taking into account the whole spectrum of human interests, particularly their well-being;84 and at times (where the individual’s choice really is substantially non-optimizing), this must

84. Another interest, which, in other contexts, may expand the conception of others’ interests leading to justified paternalism, is “integrity or self-respect.” See Anthony T. Kronman, Paternalism and the Law of Contracts, 92 YALE L.J. 763, 774-86 (1983).
be done even if to the dissatisfaction of the beneficiary. In other words, unlike the deferential stance entailed by respect for others, a sympathetic understanding of (and response to) another's predicament as well as her well-being may require that the benefactor make a paternalistic decision and act in accordance with the beneficiary's true interests and contrary to her explicit, implicit, and hypothetical preferences.

Such paternalistic interference with people's preferences for "reasons referring exclusively to [their] welfare, good, happiness, needs, interests, or values," although "not recognized as such by those persons for whom the good is intended," infringes upon their freedom of choice. In certain cases where an individual's preferences are the result of a clear cognitive failure, ignorance, or extreme pressure, a paternalistic overriding of her choices is said to be justified by reference to "what fully rational individuals would accept as [a form] of protection." This justification for preventing persons from exercising their free will, where their preferences are either explicit or can be easily determined, is a tenuous ("idealized") version of hypothetical consent. Therefore, even if only such a weak form of legal paternalism is involved, and (as in most cases of encouraging beneficial intervention in the face of the beneficiary's objections) no outright prohibition is at issue, such paternalistic interference cannot be supported by (and is instead antagonistic to) the personal liberty rationale as conceptualized in the previous section. Whereas altruism as respect for others offers an additional normative premise for the doctrine endorsed by the personal liberty rationale, altruism as a paternalistic concern for others may lead to a completely different legal doctrine.


88. Id. at 29; cf. Ronald Dworkin, Liberal Community, 77 Cal. L. Rev. 479, 484-87 (1989).

89. For the distinctions between weak and strong versions of legal paternalism and between outright prohibition and making choices more difficult or less attractive, see Joel Feinberg, Legal Paternalism, in Paternalism, supra note 87, at 3, 8-11, 17.
Finally, there is one other interpretation of the altruistic rationale with doctrinal consequences that diverge from those of the personal liberty rationale, although this divergence is not as significant as that manifested by the understanding of the altruistic rationale as paternalistic concern for others. This deviation could result from an approach that perceives the interest of promoting concern for others as a social value of intrinsic importance and that acknowledges law’s impact in inculcating this value. Hence, this approach can justify legal devices that encourage beneficial interventions — and, therefore, arguably inculcate communal concern — even in cases where it is not clear that the intervention corresponds with the beneficiary’s will, that is, where it is not possible to support such intervention by reference to her explicit, implicit, or hypothetical preferences. To be sure, nonpaternalistic altruism cannot yield a policy of encouraging interventions where the beneficiary’s disapproval is — explicitly, implicitly, or hypothetically — clear. In borderline cases, however, where it is hard to ascertain the preferences of the expected beneficiary, an approach that is not content with merely respecting people’s preferences but also seeks to inculcate concern for others would reject the presumption of noninterference implied by the personal liberty rationale and would adopt, in its stead, the opposite presumption, according to which the law seeks to encourage beneficial interventions.

III. Toward a New Doctrine of Good Samaritan Intervention

A. The Normative Framework

By now, I hope that Glenn’s spell has been effectively dissipated. Neither personal liberty nor altruism, as I attempted to show in Part II, are necessarily antagonistic to good samaritan

90. The interest of promoting concern for others obviously would be regarded as an intrinsic social value from a communitarian perspective, which emphasizes the human belonging to constitutive communities and the entailing value of social responsibility. See supra text accompanying note 53. The intrinsic value of such collective goods can be appreciated also from a liberal perspective, as long as we acknowledge that leading an autonomous life requires a sufficient number of acceptable alternatives and that at least some of the social conditions that constitute such options are collective goods. See Joseph Raz, The Morality of Freedom 198-207 (1986). Inculcating social solidarity and concern can be perceived as one of these collective goods of intrinsic value.

91. See supra text accompanying notes 71-76.

92. As the text implies, there are two senses in which this approach is not paternalistic. First, it does not justify interference when it is clearly undesirable to the benefactor. Second, it is not motivated by a sympathetic overriding of the benefactor’s “mistaken” preferences, but, rather, by a public interest of promoting concern for others. See Feinberg, supra note 89, at 13; Shapiro, supra note 86, at 547-48.
claims for restitution. On the contrary, in certain circumstances, both can serve as the normative underpinnings of these claims. Nonetheless, we have seen that neither necessarily acts to substantiate the whole range of altruistically motivated interventions. These rationales yield a broad spectrum of doctrinal alternatives for shaping the contours of a new doctrine of good samaritan intervention, and consequently, they require that a normative choice be made.

At one end of this spectrum lies the personal liberty rationale, together with the altruistic rationale interpreted as respect for others. Both rationales — which, for the sake of simplicity, I join together below under the title of personal liberty — justify restitution by referring to the benefactor’s (ex ante) preferences. Consequently, under these rationales, restitution should be allowed if, and only if, in the given circumstances, (a) it was impractical to inquire into the actual preferences of the expected beneficiary, (b) there is no external indication that she disapproves of the court-imposed contract of intervention in consideration of restitution of expenses, and (c) the intervention was clearly (ex ante) cost-beneficial to her.

At the other end of this spectrum lies, as we have seen, the “altruism as a concern for other people’s genuine interests” rationale. To the extent that our law would be willing to adopt this rationale as the normative guide for its restitutionary doctrine, it would require decisionmakers to consider which types of human interests and human predicaments justify legal overriding of people’s preferences, because according to this stance, a potential beneficiary’s veto need not always be respected.

Between the two poles of the spectrum lies a third approach, which (unlike the first approach) does not perceive respect for others’ preferences as the sole consideration at issue, but (unlike the second approach) does not endorse any sort of paternalism. Rather, it adds the consideration of inculcating concern for others and — in the name of this social value — allows restitution even if the interference involved was not as clearly advantageous to the beneficiary as required under the personal liberty rationale.

The objective of Part III is not to arbitrate between these three possible rationales. Instead, it seeks to delineate — albeit only partially and in rather broad lines — the contours of a restitutionary doctrine that seriously renounces Glenn. More particularly, in what follows, I examine three doctrinal issues: the significance of the intervention’s success; the benefactor’s claim to remuneration for her time, effort, and expertise; and her right to compensation for losses she may have incurred due to her intervention. With regard to all
three questions, I demonstrate that discarding *Glenn* necessitates reforming the current approach to good samaritan intervention at common law (although the position adopted along the spectrum discussed above may create a corresponding range of diverging ramifications in terms of the required doctrinal changes).

There is, however, one aspect of the existing doctrine that I would be content to endorse. Common law traditionally has differentiated its response toward beneficial interventions according to the interest protected. In particular, claims of good samaritans whose intervention was aimed at rescuing life were treated somewhat more liberally than those of benefactors who preserved only a proprietary interest of another. Although, as indicated above, I believe that the approach at common law with respect to both types of intervention needs to be liberalized, I nonetheless appreciate the normative power of this distinction and, hence, seek to preserve it. My reason for this springs from the connection between the spectrum of possible rationales and the nature of the resource involved. Thus, given the significance of bodily integrity for our physical well-being as well as the fact that our body is both the physical embodiment of our selves and the utmost reflection of who we are, it should not be surprising that even the traditional doctrine allows restitutionary claims for services rendered in rescuing another's life or health, notwithstanding certain types of objections (irrational or uninformed) on the part of the beneficiary. On the other hand, where the protected interest is not life or limb, but merely proprietary in nature, and where there are no specific circumstances indicating some unique characteristic(s) of the potential beneficiary's predicament, even this weak paternalism seems misplaced. With respect to proprietary interests, the significant normative choice that our law faces seems to be between the pure personal liberty rationale and the intermediate stance that gives weight also to the social interest in inculcating altruism.


94. For a related argument respecting another paradigmatic case of the law of restitution, see *Dagan*, *supra* note 17, at 40-49, 63-108.


96. See *Restatement of Restitution* § 116 (c), (d) & cmt. b & illus. 2-4 (1937). For a particularly restrictive view, see *Mason & Carter*, *supra* note 8, at 248-49.

With this proposed distinction in mind, let me now turn to the three doctrinal issues mentioned above, beginning with the question of the significance of the intervention's success.

B. The Significance of the Intervention's Success

The prerequisite of the Anglo-American law for allowing good samaritan restitutionary claims is — except, perhaps, with regard to an intervention directed at saving life — that the claimant’s effort to preserve or protect the defendant's interest meet with actual success. A fruitless intervention, even if reasonable, so the argument goes, cannot be said to produce “any net value for the defendant” (that is, any enrichment), and in any case, “a reasonable [person] could say that [s]he would only have been willing to pay for a result, not an attempt.” In contrast, under civil law systems, the good samaritan is not required to demonstrate “ultimate success,” as long as she can show that she acted with “reasonable diligence.”

In what follows, I argue that whichever rationale outlined in section III.A above is applied, the civil law requirement of reasonable diligence is normatively preferable to the more demanding requirement of actual success applied at common law. In addition, I discuss the criteria according to which such reasonableness should — as per these rationales — be examined.

1. Against a Requirement of Ex Post Success

The starting point for my discussion is the incentive effect of the current common law requirement of actual success. Making success the prerequisite for restitution of expenses incurred in altruistic in-


99. Wade, supra note 9, at 1186-87.

100. Burrows, supra note 14, at 247 n.2; see also Restatement of Restitution § 117(1)(e) & cmt. d (1937). Professor Gareth Jones expresses a dissenting opinion. Based on an analogy to cases of preservation of life, he believes that fruitless but reasonable attempts to preserve property should be recognized as sufficient grounds for restitutionary claims. See Jones, supra note 16, at 149-50. For a similar point, see Mason & Carter, supra note 8, at 238, 240. The discussion that follows can be read as a normative defense for this conclusion.

interventions reduces the expected recovery of potential benefactors to below their actual expenses. This prerequisite thus amounts to a disincentive for such interventions. Because potential benefactors can rarely be certain in advance that their intervention will indeed succeed, they might be discouraged by such a requirement and, therefore, unwilling to undertake a costly intervention.\textsuperscript{102}

This behavioral impact undermines each one of the possible normative rationales underlying our doctrine. It is obviously antithetical to the rationale of altruism as paternalistic concern for the genuine interests of others, as well as to the social value of inculcating concern for others: the merit (virtue) in intervention is rooted in a benefactor's willingness to incur inconvenience or danger in responding to another's need and, therefore, is not dependent upon success.\textsuperscript{103}

Furthermore, the disincentive created by the requirement of success also conflicts with the rationale of personal liberty because it is contrary to the potential beneficiary's hypothetical preferences. To be sure, the beneficiary would appreciate not having to pay for an unsuccessful intervention. Yet this advantage is bound to be outweighed (ex ante) by the disadvantage inherent in such an exemption: discouraging potential benefactors and, thus, depriving the potential beneficiary of sources of potential assistance. As we have seen, under such a regime, any potential benefactor who is not willing to sacrifice her own resources for the benefit of others would be deterred from intervening unless confident of success. Because in most interventions success is not guaranteed, and because most potential benefactors — who, in the paradigmatic case under consideration, do not have any special social relations with the beneficiary — cannot be regarded as intending to assist gratuitously (they are not selfless), a requirement of ex post success frustrates potentially beneficial interventions. Thus, it works to the detriment of the potential beneficiary (provided, as will be emphasized shortly, that the interventions indeed are ex ante beneficial).\textsuperscript{104}

\textsuperscript{102.} See Dawson, (pt. 2), supra note 12, at 1115; McInnes, supra note 12, at 62.

\textsuperscript{103.} See Lavasseur, supra note 54, at 96-97; Dawson, (pt. 2), supra note 12, at 1115; Kleinig, supra note 58, at 386.

\textsuperscript{104.} Cf. McCamus, supra note 22, at 311-12. To be sure, I do not deny the possible existence of cases where the other-regarding motives of a particular potential benefactor would suffice in order to induce intervention, even if the law conditions recovery on success. See Landes & Posner, supra note 12, at 95. But if, as I claim in the text, these cases are the exceptions to the rule, then the hypothetical preference of any potential beneficiary would be to opt for the legal norm that is most advantageous to her, i.e., the one that does not require success.
Yet some authors still insist that to eliminate the requirement of success would be undesirable. They point to the fact that success — complete or partial — is also required under maritime law. The basis of their normative argument in favor of this requirement is twofold. First, they claim that if success were eliminated as a requirement, there would not be enough incentive for benefactors who have begun to intervene, but have encountered difficulties, to press on and succeed, and not to stop at halfhearted attempts. Second, they insist that — insofar as the disincentive created by the requirement of success is detrimental from the perspective of potential beneficiaries — this flaw can be remedied, as it is in maritime law, by adjusting the amount of recovery received by successful benefactors so that ex ante potential benefactors are as motivated as they would be if they were to receive only restitution in all intervention attempts.

I believe that both prongs of this counterargument are misconceived. First, while the concern with regard to halfhearted efforts may be genuine, it seems to me that focusing on this concern is counterproductive from the perspective of the potential beneficiary. At least insofar as one agrees that the success requirement has a substantial disincentive effect, the advantage of the special treatment that this requirement gives to halfhearted attempts seems insignificant given that requiring success has the far more likely consequence of discouraging potential benefactors from making any effort whatsoever. In other words, if most potential benefactors are deterred from intervening due to the fear of incurring financial loss, what benefit would potential beneficiaries derive from the guarantee that they will not be charged for halfhearted attempts?

To be sure, this would not be the case if the second claim made by proponents of the success prerequisite were valid, because if a legal regime that requires success can still produce sufficient incentives to intervene, the best of both worlds can, indeed, be realized. But I think that unfortunately, there is an important difference between the paradigmatic case under consideration and the maritime

105. See Burrows, supra note 14, at 247; Levmore, supra note 12, at 894.
106. See Mason & Carter, supra note 8, at 244. For maritime law on this point, see, for example, A.D.M. Forte, Salvage Operations, Salvage Contracts and Negotiorum Gestio, 1993 Jur. Rev. 247, 252-53.
107. See Burrows, supra note 14, at 247; Levmore, supra note 12, at 894.
108. See Levmore, supra note 12, at 894.
cases in which this happy result is possible. In the maritime context, as I indicated above, rescuers are, in many cases, professional salvors, skilled and equipped to undertake the complicated task of beneficial intervention at sea, doing so as their primary vocation. In contrast, the typical benefactor with whom this article is concerned is a bystander who responds to another's distress, although this response distracts her from the ordinary pursuit of her predetermned objectives. This distinction is crucial for our purposes. For the maritime salvor, interventions are a matter of business; therefore, as long as her expected recovery exceeds the cost of her intervention (as it is under maritime law, which combines substantial positive rewards in cases of successful intervention with a rule of no recovery — not even of expenses — where there is no success), she will intervene whenever such intervention is expected to be beneficial and, at the same time, be motivated enough to complete her task successfully. But whereas for the professional maritime salvor, the possibility of extracting a positive reward will usually offset the risk of incurring uncompensated expenses and losses in cases of failed attempts, it is difficult to believe that this possibility would have the same effect on the garden-variety bystander of our paradigmatic case. The latter's intervention is not part of an enterprise, which is self-insured against failed transactions. Therefore, if the law were not to provide her with external insurance — a guarantee that she would not be materially worse-off due to her other-regarding intervention — the typical bystander, who is likely to be risk averse respecting such a contingency, would abstain from intervening, even if faced with the possibility of positive recovery.

My conclusion, therefore, is that contrary to conventional wisdom, a reasonable person would not say that she “would only have been willing to pay for a result, not an attempt.” Rather, the likely consequence of requiring success is overdeterrence of bystanders who are potential benefactors. Therefore, this requirement runs counter to the potential beneficiary's hypothetical preferences.

110. See supra text accompanying note 20.

111. See Landes & Posner, supra note 12, at 101; Rose, supra note 12, at 176, 198.

112. I therefore find myself in agreement with the traditional reluctance of the common law doctrine of good samaritan intervention to draw analogies from maritime law. See, e.g., Nicholson v. Chapman, 126 Eng. Rep. 536, 538-39 (1793). Whereas according to the traditional approach, the difference between these paradigms is that only in the case of maritime salvage is a legal incentive to intervene needed, I claim that in both cases, legal encouragement is required, but that the type of incentive that has an impact on bystanders is different from the type of incentive that can affect professional maritime salvors.
This is the case when proprietary interests are at stake, because even risk neutral potential beneficiaries object to such over-deterrence. This is even more so the case when an intervention is aimed at saving life or limb, with regard to which most potential beneficiaries are risk averse. Success, therefore, should not be a prerequisite for good samaritan claims. Instead, the concern of halfhearted attempts must be addressed as part of the inquiry as to the good samaritan's reasonable diligence, so that her claim will be rejected only if the intervention's failure is a result of her inappropriate withdrawal.

I will not attempt to deny that where a good samaritan's attempt has failed, she cannot point to any actual enrichment of the beneficiary. And although some have, in fact, attempted to reconceptualize enrichment so as to include also the advantage of such attempts, to my mind, there is no need to do so. I concede that the concept of enrichment can be interpreted so as to support either of the conflicting doctrinal rules with regard to the requirement of success. This result does not disturb me, because in my opinion, "unjust enrichment" (in cases of good samaritan interventions as well as in other cases of restitutionary claims) is but a conclusion in need of supportive normative arguments. Hence, only by directly resorting to the pertinent normative considerations (in our case, reference to the rationales of personal liberty and of altruism) should and can doctrinal dilemmas be resolved.

2. Reasonable Diligence in Good Samaritan Interventions

The conclusion that not one of the rationales canvassed above can substantiate the requirement of success does not imply that the ex ante likelihood of success carries no weight. On the contrary, as I implied above, a legal regime guided by the personal liberty rationale must follow the civil law approach and be attentive to the question of whether the benefactor acted with "reasonable diligence" or, more precisely, whether the act performed was to the advantage of the beneficiary from her perspective at the point in

113. See Wonnell, supra note 23, at 169-70.
115. See Hanoch Dagan, Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory, 1 THEORETICAL INQUIRIES IN LAW (forthcoming 1999). For a narrower claim that insists that cases of good samaritan intervention are different from other paradigmatic cases of unjust enrichment and, therefore, are not necessarily concerned with the enrichment of the beneficiary, see Muir, supra note 14, at 297-98; Stoljar, supra note 54, at 41.
time when the act was performed. In other words, potential beneficiaries cannot be impervious to the range of different probabilities of success, and they (or, rather, their hypothetical preferences) are bound to be more reluctant to allow interventions as the probability of success decreases. The (ex ante) appeal of intervention is conditional upon the magnitude of the expected damage in the event that no intervention occurs and upon the expected cost of intervention.

This observation can be formulated with greater precision. Consider the case of a potential beneficiary who is risk neutral with respect to the exigency triggering the intervention, so that her preferences between contingencies are determined according to expected monetary values. This potential beneficiary would prefer intervention if, and only if, the expected value of the benefit it may generate exceeds its cost. The expected benefit of intervention equals the magnitude of the expected damage multiplied by the (ex ante) probability of success, that is, the extent to which the intervention seems, at the relevant point in time, to reduce the likelihood of occurrence of the damage.

Therefore, instead of focusing on the requirement of success, courts

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116. See Ernest G. Lorenzen, The Negotiorum Gestio in Roman and Modern Civil Law, 13 CORNELL L.Q. 190, 196 (1928); Rose, supra note 12, at 193.

117. Can the common law requirement of success be interpreted as a proxy for desirable ex ante interventions that (as a proxy) avoids the possibility of judicial error, which might be involved in the assessment of ex ante desirability? See Saul Levmore, Obligation or Restitution for Best Efforts, 67 S. CAL. L. REV. 1411, 1430, 1437, 1442 (1994). I believe that the answer to this question is no, for the same reason that the consideration of halfhearted attempts is not determinative (see supra text accompanying notes 109-12): the disincentive effect of the requirement of success makes any advantage it may have in screening interventions relatively negligible.


119. Notice that the discussion of the text deals only with securing that inefficient attempts are not made. Potential beneficiaries may also be interested in making sure that benefactors will invest optimal amounts in their attempts: namely, that they will not invest less than the sum that equates the marginal benefit from rescue with the marginal cost. Such an optimal result is probably much more difficult for the law to secure unless it allows benefactors to receive positive rewards, which I believe it should not (see infra text accompanying notes 155-59). Hence, the text should not be read as suggesting that the doctrine which compensates for failed but ex ante reasonable attempts optimizes the benefactor's investment from a social welfare point of view. My claim is more modest: that if indeed we are unwilling to allow positive rewards, such a doctrine is preferable to the prevailing requirement of success.

120. For the sake of simplicity, this equation assumes that success means full preservation of the resource (complete avoidance of $D$). A more formal presentation requires consideration of partial success as well.

121. Formally, $P_s$ is the difference between the probability of such damage occurring when no intervention takes place and the probability of its occurrence given such intervention.
that are guided by the personal liberty rationale should ask themselves whether indeed $E_b$ — which equals $D \times P_s$ — exceeds $C$ or, in other words, whether $P_s$ exceeds $C/D$. If, but only if, the answer to this question is affirmative, restitution should be granted.122

However, the assumption of risk neutrality is not necessarily accurate. At least with respect to contingencies that affect significant portions of their wealth, people tend to be risk averse — to care not only about the expected monetary values of these contingencies, but also about the uncertainty regarding the size of loss per se.123 Risk averse people are, therefore, willing to pay (for example, purchase insurance or incur a certain, but rather minimal, loss) in order to avoid having to face uncertain outcomes.124 More precisely, people’s value function seems to be concave for gains and convex for losses and steeper for losses than for gains, so that their response to losses is more extreme than to gains.125

The implications of such an attitude to risk in the typical cases of good samaritan intervention is rather straightforward. Where the magnitude of the expected damage in the event that no intervention occurs is significant and where the expected cost of such an intervention is relatively small, a risk averse potential beneficiary would prefer intervention to noninterference, even if $P_s$ does not exceed $C/D$. In other words, such a beneficiary is likely to perceive intervention as a form of insurance and be willing to reduce the risk that her resource will be damaged or destroyed by paying some premium — the expenditure of $C$ (the cost of intervention) — even if the (expected) benefit from the intervention is less than its (certain) cost. The more a beneficiary is risk averse, the more she is likely to prefer intervention, even where the expected monetary value is negative.

Characterizing the attitude to risk of potential beneficiaries as a group is complicated. Even if we disregard idiosyncrasies which, in

122. I do not consider the possibility of the intervention causing damage either to the beneficiary or to a third party. This contingency requires some fine-tuning of my argument, which is not necessary for the purposes of this article.

123. See Steven Shavell, Economic Analysis of Accident Law 186 (1987). Risk aversion derives from the fact that people making decisions under uncertainty do not attempt to maximize expected monetary values, but rather, to maximize expected utility. See Robert Cooter & Thomas Ulen, Law and Economics 44-45 (2d ed. 1997). Insofar as the truisms of diminishing marginal utility of income is valid, it generates risk aversion and makes the degree thereof dependent on the concavity of the graph of utility of wealth. See Shavell, supra, at 186-88.

124. See Cooter & Ulen, supra note 123, at 48-49.

any event, the law cannot adequately address, the extent to which a potential beneficiary is risk averse is a function of the ratio between the value of the protected interest at stake and the total wealth of the beneficiary.126 This implies that most people are probably risk averse with respect to their lives and bodily integrity. Hence, this risk aversion allows the conclusion that with regard to this resource, the personal liberty rationale supports a considerable (although not total) relaxation of the requirement of ex ante reasonable diligence, as conceptualized above (obviously, the other rationales, if applied, would only serve to fortify this conclusion). A more subtle question arises with respect to proprietary interests. Due to the diversity of such protected interests and the diversity of potential beneficiaries, the doctrinal conclusion with regard to proprietary interests must rely on the pertinent presumption generated by the chosen rationale: if our law were to adopt the “pure” personal liberty rationale, with its presumption of noninterference, it would probably opt for the more rigid requirement yielded by the assumption that the potential beneficiary is risk neutral. In contrast, if the intermediate stance — which gives some weight also to the social value of inculcating altruism — were to be adopted, the opposite presumption would govern, and therefore, the more lax interpretation of the reasonable diligence requirement would be applicable.127

C. The Benefactor’s Claim for Remuneration

The second doctrinal issue I wish to consider relates to good samaritan claims for remuneration for time, effort, and expertise. Common law allows such recovery only with respect to preservation of life or limb and only if the services rendered were provided by trained professionals whose unsolicited services fall squarely within the realm of their vocations (the most typical case is the off-duty physician who provides assistance in an emergency situation).128 Civil law — which originally disallowed any remuneration

126. See Shavell, supra note 123, at 189; see also supra note 123.
127. It should be recalled that as far as proprietary resources are concerned, I have discounted the possibility of any paternalism being involved.
128. See Connam v. Wisdom, 104 S.W. 164 (Ark. 1907); Matheson v. Smiley [1932] 2 D.L.R. 787 (Can.); Jones, supra note 16, at 163; Klippert, supra note 22, at 110-11. But cf. RESTATEMENT OF RESTITUTION § 117 cmt. c (1937) (including the reasonable value of the services rendered within the applicable measure of recovery). The traditional common law dismissal of non-professionals’ claims for remuneration is premised on the presumption of gratuity respecting such benefactors. See RESTATEMENT OF RESTITUTION § 114 cmt. c (1937); RESTATEMENT (SECOND) OF RESTITUTION § 3 cmt. c (Tentative Draft No. 1 1983). This presumption, however, has been vigorously attacked, and many have urged for its reversal. See, e.g., Jones, supra note 16, at 147; Albert, supra note 20, at 97-98, 101-07.
for services and limited recovery to only the sum of the outlay — currently seems to concur with the common law regarding the latter limitation, but not the former one, so that professional services rendered in an ex ante beneficial intervention for the preservation of another's proprietary interest also trigger a valid claim for recovery. Finally, although it seems common knowledge that the law prescribes the "reasonable" or fair market value of the services rendered as the applicable measure of recovery in cases where a good samaritan's claim does hold, there is some disagreement with respect to the valuation of such reasonable value. In the leading case of Cotnam v. Wisdom, the court held that it should not consider prevailing practices (in this particular case, the custom of physicians to graduate their charges according to the patient's ability to pay) that may indicate what the benefactor's colleagues would have charged for the service rendered. This view, however, is controversial, and opposing it is the claim that any practice that affects the reasonable market value of the services rendered should be taken into account.

The claim put forth in this section is that no defense can be made on behalf of either one of common law's two traditional limitations described above. This section maintains that both the altruistic rationale and the personal liberty rationale prohibit the courts from limiting renumeration awards to only those claims that meet a rigid prerequisite with regard to the type of resource preserved. Furthermore, I contend that although cases of nonprofessional intervention may require some special caution, there is no justifica-
tion, from either the perspective of personal liberty or altruism, for negating all good samaritan claims for remuneration for time and effort, even if outside the realm of the benefactor's professional expertise. Finally, this section concludes by addressing the question of the appropriate methods to measure recovery and suggest some criteria that can help resolve the current doctrinal disarray.

1. The Overly Restrictive Doctrine

In order to facilitate the discussion of these issues, we should recall the distinction between explicit, or accounting, cost and opportunity cost. Accounting cost is the expenditure or out-of-pocket costs incurred consequent to a certain course of action. Often the cost of our choices — respecting investment, consumption, or any other matter that requires allocation of scarce resources between competing ends — greatly exceeds the accounting cost. The true economic cost that an individual incurs in making a decision is the cost of the next best alternative that must be foregone in order to take one action rather than another. This cost (what has been relinquished by the agent in order to pursue her chosen course of action) is the true economic cost — the opportunity cost — of that course of action.

It is clear that acknowledging this fact entails repudiating the traditional civil law dichotomous treatment of expenditures and services. Allowing a benefactor reimbursement only for explicit costs she has incurred cannot be justified because, in the event that the intervention requires a "loss of profitable time," excluding remuneration for the benefactor's services leaves intact some of the intervention's cost. Neither the rationale of personal liberty nor that of altruism justifies such a disincentive. Thus, provided that the intervention is ex ante beneficial, a potential beneficiary (hypothetically) would prefer that possible benefactors be assured that their reasonable costs — either in the form of accounting costs or in terms of opportunity costs — will be covered, so that they are not discouraged from rendering assistance. (From the perspective of the beneficiary, it is immaterial whether

135. See Cooter & Ulen, supra note 123, at 28.
136. Id.
137. Id.
the benefactor subcontracts all of the tasks involved and submits them as expenses\textsuperscript{139} or whether she intervenes by herself.)\textsuperscript{140}

Referring to the rationale of altruism does not alter this conclusion. As long as the applicable measure of recovery does not include any component of gain, which could tempt people "to make a profit out of what should be a kindness,"\textsuperscript{141} there is no difficulty — from the vantage point of the limited altruism toward which our proposed restitution doctrine may be directed — with compensating benefactors for the true (that is, full) costs of their interventions. As I insisted above,\textsuperscript{142} serving the interests of others when no self-interest is furthered in so doing is virtuous enough.

One conclusion that can be derived from these remarks is that there should be no difference in principle between claims for reimbursement of expenditures spent and claims for remuneration for services rendered. Furthermore, the above discussion should also provide sufficient support for the claim that the common law limitation of allowing recovery only in cases where life and limb are at risk is misguided.

To be sure, insofar as the underlying rationale applicable to the protection of life and limb incorporates a paternalistic component (which I assume to be absent in cases of proprietary interests), it may be that the public interest in promoting intervention would justify even stronger means of encouragement — such as positive rewards — in order to ensure that rescues do, indeed, take place.\textsuperscript{143} (If this were to be the case, one could also expect some preferential treatment with regard to claims of professional salvors in order to encourage their presence and secure their willingness.)\textsuperscript{144} Nonetheless, this does not imply that where proprietary interests are at stake, there is no justification for any encouragement. On the contrary, as I have just explained, both the altruistic rationale and the personal liberty rationale require that all types of costs that a benefactor invests in her intervention should be covered as long as they are ex ante justified (in the sense discussed in the previous section). Hence, regardless of whether proprietary interests are governed by

\begin{itemize}
\item \textsuperscript{139} See Restatement of Restitution §§ 116 cmt. a, 113 cmt. h (1937) (entitling the benefactor to do so).
\item \textsuperscript{140} See Stewart, supra note 129, at 168; Rose, supra note 12, at 202.
\item \textsuperscript{141} Leslie, supra note 101, at 22.
\item \textsuperscript{142} See supra text accompanying notes 61-62.
\item \textsuperscript{143} But cf. Jones, supra note 16, at 163 ("In my opinion it would not be desirable to reward the stranger who intervenes on land to save human life. This would be to impose a heavy financial burden on the assisted person.").
\item \textsuperscript{144} This, indeed, is the case in maritime law. See Burrows, supra note 14, at 237.
\end{itemize}
the pure personal liberty rationale or by an intermediate rationale that gives some weight to inculcating altruism, the conclusion remains the same. Namely, with regard to recovery for good samaritans who act to preserve proprietary interests, there should be no distinction between claims for out-of-pocket costs and claims for the opportunity cost of time, effort, and expertise invested, whereby the former is allowed and the latter disallowed.145

I believe that similar considerations act to cast doubt on the conventional rule — in both common law and civil law — that limits the right to remuneration to professionals. I do not challenge the truism that in certain circumstances, intervention by nonprofessionals should be discouraged. Indeed, where a more qualified person is available, ready, and able to act, the law justifiably disallows any claim for restitution.146 This requirement — that the benefactor be the most “proper” or “suitable” person to act — is compatible with, even dictated by, all possible rationales: it is obvious that the services of the most competent person available are preferable above all, because her services are likely to yield the most effective result. But the conventional limitation under consideration raises a different, separate question. What if no professional is present and an available nonprofessional (a passerby lawyer who stumbles upon an emergency situation, for example) is competent enough to undertake the task at hand? Her intervention in such circumstances may, in fact, be desirable (as long as it is ex ante cost-beneficial). Leaving some of her true costs uncovered, however — disallowing any recovery for the value of her time, her opportunity cost — would result in an inappropriate disincentive, which cannot be justified by any one of the possible normative premises of the law of good samaritan intervention. In short, preference for professionals is appropriate and fully guaranteed by the requirement that the benefactor be the most competent person to act; yet no further discouragement of intervention by nonprofessionals is warranted, and therefore, there is no justification for a blanket dismissal of the claims of such good samaritans for remu-

145. The text may be an overstatement if potential benefactors — due to, for example, some cognitive failure — underrate the value of time, effort, or expertise, as compared to out-of-pocket expenditures. But even if such a phenomenon is prevalent, it seems to me to have only marginal effects, which may justify some tightening of the requirements for claims for remuneration of opportunity costs, as opposed to claims for reimbursement of accounting costs, but cannot vindicate the bright-line distinction discussed in the text.

146. See Restatement of Restitution §§ 116 cmt. a, 114 cmt. b (1937); Restatement (Second) of Restitution § 3 cmt. b (Tentative Draft No. 1 1983); Burrows, supra note 14, at 244; Jones, supra note 16, at 147-48; Muir, supra note 14, at 313-14.
eration for the time and effort they expended in performing their ex ante beneficial intervention.147

Some authors nonetheless justify such a dismissal by emphasizing the prohibitive administrative costs of quantifying the remuneration due to nonprofessionals who, unlike professional benefactors, do not sell equivalent services in the market.148 This point of criticism may well undermine the above conclusion if the available measure of recovery is to be the reasonable market value of the services rendered. But as claimed in the remainder of this section, I think that this is not the appropriate measure of recovery for the time, effort, and expertise invested in good samaritan interventions. Furthermore, the alternative measure of recovery that should, in my opinion, prevail — namely, the opportunity cost of the benefactor's decision to intervene — is not particularly difficult to administer when nonprofessionals are involved.

2. The Measure of Recovery

Awarding good samaritans the fair market value of their services seems a reasonable mechanism — although, by no means, the only possible option149 — if we focus on evaluating the enrichment of beneficiaries.150 But as indicated above,151 I do not believe that the concept of enrichment is particularly enlightening for resolving doctrinal difficulties. Rather, the pertinent rationales — in our case, the values of personal liberty and of altruism — should serve as the springboard for resolving these issues.

It is my hope that I have already satisfactorily established that — at least with respect to proprietary interests152 — both these rationales point to the same alternative measure of recovery: a measure that reflects the intervention's cost to the benefactor, rather than its benefit to the beneficiary.153 Only this measure, the bene-

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147. For a similar conclusion with respect to maritime law, see Rose, supra note 12, at 191.
149. For the multiplicity of measures of recovery that are used in the law of restitution under the heading of the beneficiary's gain, see DAGAN, supra note 17, at 12-22.
150. See Wade, supra note 9, at 1186-87.
151. See supra text accompanying note 115.
152. I have already discussed above, see supra text accompanying notes 143-44, cases of rescue of life in which larger measures of recovery may be required.
factor's opportunity cost (which is actually, in many cases, easily determinable),\textsuperscript{154} secures both elimination of any disincentive for ex ante beneficial interventions as well as guarantees that the benefactor will not extract from her intervention any positive reward.

The latter concern needs to be reemphasized. Positive rewards are undesirable from the perspectives of both personal liberty and altruism.\textsuperscript{155} The possibility of extracting a positive reward out of an intervention may become a significant consideration for potential benefactors, which would be unfortunate.\textsuperscript{156} Contrary to the dictates of the personal liberty rationale, this consideration may encourage interventions in cases where the cost of intervention exceeds the expected benefit. Although such interventions involve the risk of dismissal of the benefactor's claim, the possibility of a positive reward may, nonetheless, encourage some to take their chances. Furthermore, the likelihood of positive rewards is pernicious to the virtue of altruism. Even if, as I insist, altruism does not necessarily require material self-sacrifice, encouraging interventions that may be motivated by pure self-interest and, moreover, that may be (ex ante) counterproductive to the beneficiary's interests, in no way promotes or inculcates the virtue of altruism.

But why shouldn't we allow benefactors to receive positive rewards as long as their recovery is limited to the expected benefit of the intervention to its beneficiary? The concern of the personal liberty rationale regarding benefactor's overinvestment seems to be well protected if this condition is satisfied. Moreover, on face, the altruistic rationale is also not really undermined by such a rule, because the prospect of payment may cause individualists to rescue, but will neither decrease the number of rescues by altruists nor decrease the amount of altruism in the world.

I think that this counterargument is not persuasive. Consider first the personal liberty rationale, and recall that the contract prescribed by law according to this rationale is hypothetical only from the perspective of the beneficiary (the benefactor confers the benefit voluntarily). Hence, a "price" closer to the benefactor's cost —

\textsuperscript{154} In my previous example of a passerby lawyer who stumbles upon an emergency situation, the opportunity cost is usually determined according to the lawyer's hourly charge.

\textsuperscript{155} This, of course, is true so long as we are not concerned with paternalistic altruism, which is, in any case, inapplicable to proprietary interests.

\textsuperscript{156} Another difficulty, which is sometimes mentioned with respect to positive rewards, is the concern that overly generous awards would create a moral hazard, i.e., that potential "benefactors" will create a demand (a risk or danger) for their own services. See Levmore, \textit{supra} note 12, at 886-87. But the possibility of a deliberate creation of an emergency can be handled in other, more straightforward, ways, such as by forfeiture of the award and imposition of certain (civil or criminal) sanctions. See Rose, \textit{supra} note 12, at 194.
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a measure of recovery that leaves a greater share of the hypothetical contract surplus in the hands of the beneficiary — must be preferable if we are really concerned with preserving personal liberty. Moreover, the alternative measure of recovery, which is based on the beneficiary's expected benefit, can easily be misapplied by the courts, and if such judicial errors take the form of overestimation, they will infringe upon beneficiaries' personal liberty.  

More important still is the inadequacy of this proposed regime from the viewpoint of the altruistic rationale. The whole point of this rationale, as it is presented herein, is to affect the attitudes of ex ante individualists, rather then to change the attitude or the behavior of ex ante altruists. A regime of positive rewards seems to lose the expressive or symbolic ramification of a genuinely altruistic doctrine, and is thus unable to transform ex ante individualists into other-regarding people. To be sure, I am not contending here that any kind of payment taints the moral implications of the paid-for action (in fact, I have argued earlier against this very proposition). Nor do I think that there is a natural or conceptually necessary limitation to the amount of utility that the actor can obtain and still preserve the moral significance of her act. All I assert is that unlike the right to reimbursement of costs (or their equivalent), a legal right to a positive reward, in this context at least, is likely to be perceived as a commercialization of the entire activity — the doing of it (of every aspect of it) for money — which is, in turn, likely to dilute the moral significance of beneficial interventions.  

Hence my claim is that the opportunity cost of an intervention is the only remedy that responds to the normative premises underlying the law of good samaritan intervention. It is, of course, the only available remedy where nonprofessional benefactors are concerned, but it is no less appropriate in cases involving professional benefactors. To be sure, the fair market value of the services rendered frequently could serve as a reasonable proxy for the profes-

158. See supra section II.C.2.
159. See generally MARGARET JANE RADIN, CONTESTED COMMODITIES (1996). In other contexts, it may well be the case that some positive payoffs can coexist with an appreciation of the intrinsic virtue of the action. This is usually achieved by dissociating the action from the payoff, thus preserving an ambivalent understanding of commodified (paid for or otherwise profitable) and noncommodified (altruistically given) action. See id. at 102-14. Because I can think of no way to achieve such dissociation if there is a legal entitlement to a reward in cases of good samaritan interventions, reimbursement of costs (or the equivalent thereof) seems to be the maximum measure that can be awarded without obliterating the potential shaping effect of our doctrine.
sional benefactor's opportunity cost. There could also be circumstances, however, where the professional benefactor’s opportunity cost would be less than the customary fee (where the demand for her services is less than the regular demand for such services) or greater than the customary fee (due presumably to the high level of her expertise). As I indicated at the outset of this section, the law is baffling with regard to cases of divergence between the benefactor's fee schedule and the prevailing fee for such services. My analysis suggests that the former alternative — that has been hinted at in the case law, but frequently criticized in the literature — is the normatively superior choice.160

D. The Benefactor's Claim to Compensation for Losses

Lastly, I turn to the question of whether a good samaritan should be entitled to compensation for damages to her property or her body that she suffered as a result of her (ex ante) beneficial intervention. As with the two doctrinal issues considered above, common law takes a reluctant (if not hostile) stance: except in cases where some negligence on the part of the beneficiary was the cause of the emergency that “invited” the intervention, common law consistently refuses to require her161 to compensate her benefactor for any damages caused to the latter (or to her property) due to the intervention. This rule applies regarding interventions aimed at protecting a beneficiary's proprietary interests as well as with regard to interventions for the preservation of her life or health.162

The traditional rule has come under criticism from scholars who have denounced the significance of the beneficiary’s negligence163 and have decried the extreme libertarian (“mind your own business”) premise underlying this legal doctrine, which does not require, under any circumstances, that a beneficiary compensate her benefactor for her losses.164 At times, reference has been made to civil law (especially in Germany and France), which takes a much

160. See ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 61 (1979). The conclusion respecting opportunity costs that are significantly higher than the customary fee of “regular” professionals should be somewhat modified: in such cases, the benefactor's recovery should also be conditioned on the unavailability of such “regular” professionals.

161. Indeed, this section does not address possible proceedings the benefactor may launch against the person responsible (if any) for creating the emergency. Moreover, I assume that both the benefactor and the beneficiary are uninsured.

162. See Jones, supra note 16, at 154-55, 164-67; Levmore, supra note 12, at 898; Muir, supra note 14, at 323.


164. See Honoré, supra note 69, at 236.
more liberal approach and manipulates the possible causes of action in order to indemnify, at least in cases of ex ante beneficial intervention aimed at life preservation, the rescuer (or her dependents) for such losses. But this approach has also been criticized. Where the damage caused by the intervention is severe — the extreme case obviously being the benefactor's death — the compensation involved may be huge, and notwithstanding the moral appeal of the claim of the benefactor or her dependents, it seems harsh to lay the entire loss on the shoulders of the imperiled beneficiary who is at no fault.

This dilemma is genuine, and without easy solution. But I would, nonetheless, recommend the Israeli statutory mechanism. As I hope to demonstrate below, this scheme can be interpreted as responding to the normative foundations of the law of good Samaritan intervention, as analyzed herein. It is, furthermore, responsive to the criticism leveled at the traditional common law doctrine as well as to the reluctance toward its civil law counterpart.

Israeli law treats the benefactor's proprietary losses differently from the way it deals with her bodily injuries. If "damage is caused to the property of the benefactor in consequence of [her intervention], the Court may order the beneficiary to pay compensation to the benefactor if it considers it just to do so in the circumstances of the case." This discretionary authority is limited strictly to damages to the benefactor's proprietary interests. A different statutory framework is applied with respect to bodily injuries sustained by good samaritans pursuant to intervention. "A person who voluntarily without remuneration does any act to save the life or property of another or others" is entitled, in certain conditions, to compensa-

165. See LAVASSEUR, supra note 54, at 128-29; Dawson, (pt. 2), supra note 12, at 1108-12; Fokkema & Hartkamp, supra note 129, at 108; Stoljar, supra note 54, at 42, 144-46; André Tunc, The Volunteer and the Good Samaritan, in THE GOOD SAMARITAN AND THE LAW, supra note 69, at 43, 51-54.

166. See Jones, supra note 16, at 166; Dawson, (pt. 2), supra note 12, at 1114-15; Stoljar, supra note 54, at 149-51.

167. See infra text accompanying notes 168-69.

168. Unjust Enrichment Law, § 5(a), 1979, 33 L.S.I. 44-45, (1978-79) (Isr.); see also Legislation, Unjust Enrichment Law 1979 (Israel); 1 RESTITUTION L. REV. 213, 214 (1993). Dawson mentions a somewhat similar arrangement, which has been adopted by the Swiss judiciary, according to which discretion can be applied in order to scale down the liability of a rescued person for her rescuer's bodily injury in the event that such liability exceeds her ability to pay. See Dawson, (pt. 2), supra note 12, at 1116-17. As explained in the text, the Israeli rule differs both in its range of application (to proprietary interests alone) and in the factors of which it allows consideration (as will be indicated below, see infra notes 174-78 and accompanying text).
tion from public funds, which are administered as part of the social security apparatus.\textsuperscript{169}

The normative justification for allowing compensation, in certain circumstances, for damages sustained to a benefactor's property in the course of and due to her intervention should be obvious by now. Disallowing compensation is tantamount to creating a disincentive for a possible beneficial intervention,\textsuperscript{170} contrary to the hypothetical preferences of the beneficiary.\textsuperscript{171} Hence, superficially at least, there should be no distinction whatsoever between claims for restitution of expenses incurred and claims for compensation for damages caused.\textsuperscript{172}

I do not wish to dispute this need of the law to offset the disincentive effects of the risk of benefactors' damages.\textsuperscript{173} My point is a more modest one. I merely wish to emphasize the need to draw certain distinctions between restitution of expenses and compensation for damages and thereby caution against making a hasty analogy between these two issues.

\begin{itemize}
\item \textsuperscript{169} The National Security Law (Consolidated Version), § 287(5), 1995, 1522 L.S.I. 210, (Isr.) [Heb.]; see also Life-Saving Operations (Soldier Casualties) (Benefits) Law, § 2, 1965, 19 L.S.I. 314, (1964-65) (Isr.) ("A soldier who sacrificed his life, or became an invalid, in rescuing a person from mortal danger shall, in all respects, be regarded as a fallen soldier or a Defence Army of Israel invalid, as the case may be."). A similar solution was reported to be applied in Austria and has been strongly recommended by leading authorities. See Jones, supra note 16, at 167; Dawson, (pt. 2), supra note 12, at 1121 & n.112; Honoré, supra note 69, at 236-37. For similar, although less comprehensive, schemes in other countries, see John P. Dawson, Rewards for the Rescue of Human Life?, in THE GOOD SAMARITAN AND THE LAW, supra note 69, at 63, 75-67, 88; Stoljar, supra note 54, at 151-52; Wade, supra note 9, at 1188 n.26.
\item \textsuperscript{170} See Albert, supra note 20, at 108; cf. McInnes, supra note 12, at 68.
\item \textsuperscript{171} See Honoré, supra note 69, at 236.
\item \textsuperscript{172} Moreover, at times, the distinction between expenditures and losses may seem "arbitrary and uncertain." McInnes, supra note 12, at 69; see Albert, supra note 20, at 104 n.105; cf. Jones, supra note 16, at 164-65 (stating that courts should alert themselves to the possibility of a claim for expenses that conceals a claim for loss suffered).
\item \textsuperscript{173} Such an attitude is implied by Landes and Posner. They maintain that there is no need to permit benefactors to obtain compensation for damages they incur: [i]f the probability of serious injury to the [benefactor] is slight ex ante, then the expected cost of [her intervention] will not be substantially higher than if there were no danger, while if the probability of a serious injury to the [benefactor] is high ex ante, the net expected benefits from the rescue attempt are apt to be small or even negative. In neither case is there a substantial basis for seeking to alter the level of (altruistically induced) rescues by always giving the [benefactor] a right to compensation for [her] injury.
Landes & Posner, supra note 12, at 111-12. Although I agree with the latter conclusion, I do not think it implies — as Landes and Posner suggest — a vindication of the common law blanket refusal to allow compensation. These authors ignore the intermediate (and, therefore, probably most frequent) cases in which the expected injury is not slight, so that compensation is not superfluous, but is still not too high, and the intervention is, therefore, not (ex ante) undesirable. The doctrine suggested below seeks to accommodate these cases, as well as both the extreme categories referred to by Landes and Posner.
\end{itemize}
To begin with, if the intervention has been performed by a professional who sues and recovers remuneration for her services, one should be aware of cases where the benefactor's fee schedule already incorporates a risk premium, so that no further compensation is necessary to offset the disincentive effect of the risk of damages. But even if no such double compensation is involved, there is still a need to distinguish between restitution and compensation, at least with respect to emergency cases involving people's proprietary interests.

When I discussed the question of restitution of good samaritan expenses, I considered the beneficiary's possible risk aversion to the damage that the intervention was aimed to prevent. This possibility led me to the conclusion that if the law were to adopt an intermediate stance that confers some weight on the social value of inculcating altruism, it also would need to adopt a lax interpretation of the reasonable diligence requirement. The same reasoning, however, cannot be applied in this context because, unlike the accounting and the opportunity costs of intervention, which are relatively fixed ex ante, the cost of the benefactor's damages cannot be predetermined. Therefore, from the potential beneficiary's vantage point, the contingency of excessive damage to the benefactor is just as risky as the contingency of the occurrence of the damage that the intervention is meant to prevent (which relates, I assume now, to her proprietary interests). Consequently, even risk averse beneficiaries would opt for a rigid interpretation of the reasonable diligence requirement. If indeed — as I assume throughout — there is no paternalistic overriding of beneficiaries' hypothetical preferences when proprietary interests are at stake, the law should also adhere to this rigid interpretation.

In short, where proprietary losses to the benefactor are a reasonable result of her intervention, compensation for such injuries should be allowed only if they are ex ante cost-beneficial, that is, only if the expected benefit of an intervention (or, the magnitude of the expected damage it is aimed to prevent multiplied by its ex ante probability of success) exceeds its expected cost (which is the sum of its accounting and opportunity costs and of the expected cost of

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174. See Albert, supra note 20, at 118.
175. See supra text accompanying note 127.
176. The text assumes that the extent of uncertainty of the two risks involved — losing the interest that is at peril and being exposed to tortious liability — is similar as well. If this assumption is relaxed and the beneficiary is risk averse, the comparison of the expected risks, suggested in the text below, is not sufficient, and due consideration must also be given to the relationship between their standard deviations.
the damage that may occur to the benefactor's property as a consequence of her intervention).

This analysis, however, does not apply with respect to cases where the intervention is aimed at protecting life or limb and not proprietary interests. One can hardly deny that the risk aversion of potential beneficiaries respecting bodily injuries is typically greater than their risk aversion in the context of monetary losses, even if significant, as in the case of beneficiaries who may be found liable for their benefactors' damages. Hence, whereas the risk of such liability is deemed to make even a potential beneficiary who is risk averse somewhat cautious respecting an ex ante beneficial interference with her proprietary interests, she can be presumed to take a much less reluctant stand when her life or limb is at stake. In other words, her risk aversion regarding bodily injuries outweighs her risk aversion respecting monetary liabilities, so that the lax, rather than the rigid, interpretation of the reasonable diligence requirement reflects her hypothetical preferences. Furthermore, insofar as the law would apply some version of the paternalistic interpretation of the altruistic rationale with regard to the individual's interest in her bodily integrity, we could find justification for encouraging interventions aimed at protecting these interests, even if an intervention deviates from the beneficiary's hypothetical preferences.

The foregoing discussion justifies the need to reform common law with regard to compensation of benefactors for proprietary damages they incur and explains the need to grant the judiciary a margin of discretion to accommodate the considerations that should delineate the compensatory liability of the beneficiary. Yet should the conclusions of this discussion be applicable only to the benefactor's proprietary damages? What about her bodily injuries? Do bodily injuries not entail precisely the same considerations and, therefore, require precisely the same doctrinal conclusion? How can we justify a statutory scheme that exempts beneficiaries — contrary to the most basic maxim of mutual responsibility — from liability for bodily damage to their own benefactors and shifts the cost to the public pocket?

It seems to me that the need to resort to a public law solution when a benefactor has suffered bodily injury derives from the fact that this is the most extreme — and, hence, most troubling — instance in which both rules of no recovery (the traditional common

177. See supra text accompanying note 126.

178. As the text implies, however, one can assume that this paternalistic overriding would still be limited.
law doctrine) and of (relatively) easy recovery (its civil law counterpart) are unsatisfactory. Leaving such a benefactor to her own devices is not an acceptable solution: it undermines altruism, and usually, it also contradicts the hypothetical preferences of potential beneficiaries. As critics of the civil law approach frequently comment,179 however, compensation for bodily injury is typically high, and imposing such a prohibitive liability on an innocent beneficiary — even where the intervention corresponds with her hypothetical preferences180 — seems just as unacceptable an outcome. The socialization of the risks of good samaritan interventions averts both of these undesirable results. Moreover, the “public subsidy” of altruistic interventions that lead to bodily injury of benefactors — spreading the cost of mutual aid over the whole community in these extreme circumstances — can be interpreted as (at least a symbolic) reaffirmation of the public interest in inculcating the virtue of altruism.181

IV. Epilogue

The spirit of Glenn v. Savage has dominated the common law for far too long. It has entailed a hostile attitude toward claims made by good samaritans. It has led to a distortion of the doctrine in vital aspects — for example, establishing the undesirable requirement of success; applying an overly narrow scope of admission of claims for remuneration for time, effort, and expertise; and insisting on a blanket refusal of any compensation to benefactors for damages they incur consequent to their intervention.

A careful analysis of the normative justifications of Glenn v. Savage exposes their weaknesses, demonstrating that neither personal liberty nor altruism justify the common law’s traditional reluctance with regard to the monetary claims of good samaritans. Indeed, we have seen that both values mandate — albeit for different reasons and in differing degrees — radical reform of the prevailing rules. Such reform can and should be informed by comparative analysis. Hence, I pointed to the civil law requirement of reasonable diligence as a better rule than the common law requirement of success and to the Israeli complex statutory scheme regarding benefactor damages as a relatively satisfactory solution to

179. See supra text accompanying note 166.
180. Obviously, the objection to exacting restitution from the beneficiary is even stronger when the intervention was not justified in terms of her hypothetical preferences but, rather, only due to the law’s paternalistic stance.
the difficult consequences of both the common law and civil law doctrines.

In the final analysis, however, arbitrating between doctrinal alternatives requires an explicit normative investigation. Only such an investigation could justify my recommendations for these doctrinal "borrowings." Only an explicit normative discussion could help specify the more precise meaning of reasonable diligence and explain why claims for remuneration for time, effort, and expertise should not be limited strictly to professional benefactors who act to save life and limb, and why the proper measure of recovery in such claims should be the benefactor's opportunity cost. Finally, as we have seen, with regard to some doctrinal issues, the recommendations of the personal liberty rationale and those of the altruistic rationale (more precisely, of some of its interpretations) diverge. With regard to these issues, there is no choice but to confront our commitment to personal liberty, the significance we attribute to inculcating altruism in our society, and our instinctive sense of sympathetic concern for the genuine interests of others.