The saved and the drowned: Governing indifference in the name of security

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Abstract
The duty to render assistance at sea appears to be a well-established humanitarian norm, nonetheless in 2011 alone more than 1500 people drowned in the Mediterranean. Witnesses recount that many could have been rescued if fellow seafarers had not ignored their pleas for help. Struggling to understand failures to rescue, many seek to portray indifference as individual failure from the norm. In contrast hereto, this article provides an insight into the governing of indifference in contemporary liberal societies - that is, how people are guided towards becoming indifferent to the lives and sufferings of particular populations. Thus, my focus will be on the workings of law and its potential to produce collective indifference. The drowned, I argue, are not casualties of individual immoral behaviour; through a system of sanctions, fellow human beings are encouraged to look away and even to let people die at borders in the name of security. This not only dilutes the legal duty to rescue but has also had a detrimental impact upon the normative landscape, leading to a distinction between worthy lives that fall within the duty to rescue and charitable lives becoming a question of benevolence.

Keywords
security, law, borders, rescue, migrants, indifference

Introduction
10 April 2011. An unnamed, unregistered boat floats back to Libya. After 14 days adrift on the Mediterranean, just 11 of 72 passengers are still alive (Shenker, 2011; Strik, 2012; Heller et al.,

What laws, what barb’rous customs of the place,
Shut up a desart shore to drowning men,
And drive us to the cruel seas again?

(Virgil, Aeneid, Book I)

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Within the first day after setting sail, the boat started running out of fuel, water, and food. The Maritime Rescue Coordination Centre Rome received information on a distress at sea and sent distress signals to vessels in the area, repeated every four hours for the following days. Survivors recount encounters with a military helicopter (which dropped a few bottles of water and biscuits), a military ship, and a number of fishing vessels. Nobody came to rescue them, however; on the contrary, many left swiftly and even failed to inform maritime authorities. This is not an isolated incident; rather, the regularity of such tragedies is striking. The UN High Commissioner for Refugees (UNHCR) conservatively estimates that in 2011 alone more than 1,500 people drowned or were missing in the Mediterranean, making the Mediterranean the ‘most deadly stretch of water for refugees and migrants’ in the world (UNHCR, 2012). In 2013 the number of people who had died over the previous two decades trying to reach the southern borders of Europe surpassed the 20,000 mark (Kanter, 2013; IOM, 2013). These official figures are based on actual bodies counted; unofficial estimates are much higher, as many of the missing are never accounted for (Del Grande, 2013; Kiza, 2008; Spijkerboer, 2007, 2013).

Many deaths, including the ‘left-to-die boat’ described above, occur in the Strait of Sicily, which at its narrowest point between Tunis and Sicily is about 80 nautical miles (NM) wide, extending at its east between Tripoli and Lampedusa to 180NM, covered through the Search and Rescue Regions of Malta, Italy, Tunisia, and Libya. This stretch of the Mediterranean is anything but a deserted area, with a significant number of regular commercial fishing fleets, supplemented in 2011 by close aerial and maritime NATO surveillance. Survivors of distress situations recount numerous encounters and how pleas for assistance are repeatedly ignored (Cacciaguidi-Fahy, 2007; Gammeltoft-Hansen and Aalberts, 2010; Strik, 2012). It is not geography or lack of surveillance capacity that poses limits to rescue but lack of human engagement and indifference to human suffering. Many could have been rescued had fellow beings not ignored their pleas for help.

It is this phenomenon of indifference, and more specifically reasons for collective indifference, that offers the starting point for the present research. Struggling to understand failures to rescue, many portray indifference as individual deviation from the norm. The present article, however, attempts to move beyond the simple distinction between the Good Samaritan who rescues the stranger and his counterpart, the bystander, an idle observer lacking active compassion. Thousands of deaths at sea cannot be explained solely by reference to individual characteristics and psychology. Rather than focusing on individual traits, my primary interest is in understanding the socio-legal context of human conduct and, more specifically, the governing of human conduct.

Contrary to the portrayal of deaths at sea as exceptional events, the frequency and magnitude of these occurrences demonstrate an uncomfortable regularity, displaying a deeper rationale at work. These deaths at sea cannot only be casualties of individual behaviour but result from a system of sanctions that punish rescuers and the process of rescue of particular people, commonly labelled refugees, irregular migrants or boat people. The decision as to who should be saved or permitted to drown is the ultimate exercise in governing human conduct, in producing collective indifference to human suffering and human lives. It demonstrates how even the most fundamental right, the right to life, can be contested with regard to particular populations in liberal societies. By means of a system of sanctions, political authorities attempt to guide human conduct on the seas, encouraging seafarers to look away and even to let people die at borders in support of a policy of border deterrence through forces of nature (Cornelius, 2005; Doty, 2011).

This article does not seek to explore the full range of factors that facilitate indifference at Europe’s southern borders. Instead, it uses the Strait of Sicily to explore one specific technique of governing collective indifference, namely governing indifference through law. It demonstrates how the legal system sanctions rescue efforts and uses the workings of law as a liberal technique
of governing indifference, or in other words, how indifference toward undesired populations can be advanced and enforced through the legal system. This appears at first as a contentious claim, since, *prima facie*, international and national laws positively affirm a duty to rescue at sea, combined sometimes even with penalties for non-rescue.\textsuperscript{1} A closer investigation reveals, however, a coexisting system of sanctions equally instated through law that have been used to guide human conduct toward the collective production of indifference, providing law with a capacity to sanction the very conduct that it prescribes, and allowing liberal democracies to withdraw the fundamental rights that they are supposed to protect. Legal sanctions not only effectively dilute the duty to rescue but also signal changes to the normative landscape by authorizing distinctions in humanity, defining who is worthy of rescue and who is not.

In order to explore the significance of law as a technique for generating collective indifference in liberal democracies, this article begins with an inquiry into the governing of human conduct (part one), followed by an analysis of the ambiguous tension in governing conduct through law between the duty to rescue (part two) and sanctions against rescue that dilute the very same duty and contribute to indifference, as revealed through the trials of Agrigento (part three). Next I will highlight the implications of the tension between legal duties and legal sanctions for the normative landscape (part four). This article is part of my current research into techniques of governing indifference in liberal democracies, including different sites and techniques. It contributes to a wider research agenda on the limitation of fundamental rights by liberal democracies, how the rule of law can be employed to undermine fundamental rights, and how illiberal practices become normalized in liberal regimes (Bigo and Tsoukala, 2008; Basaran, 2010).

**Governing indifference**

The central issue at stake here is to understand the governing of indifference in contemporary liberal societies, or how people are guided toward becoming indifferent to the lives and suffering of particular populations. This requires moving beyond individual attribution, which views casualties at sea primarily as a result of individual dispositions of ‘a few bad apples’, toward the political and social context of indifference, or how indifference is governed in the face of a well-accepted norm of behaviour, such as rescue, that is anchored in various normative orders, including moral codes, international laws, and professional rules of engagement. While governing indifference in liberal societies constitutes a relatively new research agenda, causes, and consequences of indifference have been widely discussed in the context of genocide, mass violence, and state-sanctioned violence under totalitarian regimes (Bauman, 1990; Herzfeld, 1992).\textsuperscript{2} In this sense, ‘The saved and the drowned’ is another study of indifference and governing indifference in the face of humanitarian standards that we would normally hold as absolute; however, it is also a special case. It emphasizes an often forgotten part of indifference not associated with illiberal environments or extraordinary circumstances, such as wars, conflicts or authoritarian regimes, but with the regular functioning of liberal democracies. The governing of indifference in liberal societies requires more subtle forms of governing, not based upon coercion and force but embedded in routine and less visible practices. This study seeks to disentangle how liberal techniques of governing, and more specifically the legal environment, operate to foster conditions that contribute to collective indifference to human suffering and death at sea.

Governing indifference is nothing less than an inquiry into the central problem of governing; namely, how to govern human conduct – that is, to distinguish between wanted and unwanted conduct and to guide subjects toward acceptable behaviour (Foucault, 1982). It enquires into how social proximity and distance are produced in liberal societies so as to explain collective disengagement from particular populations, the governing of indifference, and the rise of differential norms. The specific trait of liberal ways of governing, in juxtaposition to illiberal or authoritarian
ways, is that they do not and cannot rely upon coercion or force, but operate under conditions of power and freedom; power presupposes the freedom of the governed, asserting the freedom of the individual and governing, regulating, and modifying it at once. Directing the freedom of the governed is the core issue at stake in liberal ways of governing, which seek to direct conduct by creating ‘a field of possibilities in which several ways of behaving, several reactions and diverse comportments may be realized’ (Foucault, 1982: 790). To govern is ‘to structure the possible field of action of others’ and to guide conduct in such a way that a limited number of outcomes in human conduct can occur (Foucault, 1982: 790). In this very sense, governing conduct on the seas also presupposes the freedom of the governed subjects while directing the conduct of the subjects (seafarers) through diverse techniques of power, including law, toward certain outcomes.

Governing refers to the variety of ‘techniques and procedures for directing human behavior’ (Foucault, 1997: 82; see also governmentality: Foucault, 1991 [1978], 2008 [1979]; Burchell, 1991), averting the classical concept of governing associated purely with the government institutions.3 The word conduct takes on two complementary meanings (Foucault, 1982). It refers to leading others, but also to leading oneself, thereby also producing two meanings of the word subject – ‘subject to someone else by control and dependence, and tied to [one’s] own identity by a conscience or self-knowledge’ (Foucault, 1982: 781). Governing conduct means, hence, to control the conduct of one’s subjects but also to let them govern themselves; both dimensions are closely intertwined. Indifference to human suffering also takes place along these two interrelated axes; namely, the setting of rules and sanctions through the legal complex and the internalization of norms, or appropriate ways of behaviour, by the governed subjects – thus highlighting the importance of self-government for governing collective indifference.

In this sense, law as a liberal technique requires more than the threat of sanctions, more than a capacity to punish those who transgress its commands (see also Hunt, 1992). Undeniably, laws and legal sanctions are generally powerful in their ability to deprive people of their property, liberties, and even life, and thus provide strong incentives for adhering to their guidelines of conduct (a characteristic of law, independent of whether it is used in liberal or illiberal ways). Assuming that fear of punishment and penalties – whether civil, criminal or procedural, and whether affecting personal liberties or economic resources – is by itself sufficient to guide human conduct would, however, ignore the liberal properties of law as a technique of governing. Liberal law requires more than sanctions; it requires the freedom of governed subjects and their self-government according to its principles. By installing a sense of self-government, liberal law has the potential to govern human conduct that is beyond its jurisdiction. It has the potential to constitute, contribute to or disrupt prevalent normative orders, such as the norm of rescue (for the relation between law and norms see Ewald, 1991). Governing the conduct of shipmasters at sea equally requires not only controlling their conduct according to legal rules but also instating a sense of self-government, an internationalization of norms; seafarers are led to govern themselves on the seas within a permissible framework of conduct established, among other ways, through the legal complex.

The objective of liberal ways of governing is to produce a conforming population, by governing people’s conduct and norms. In guiding the subjects’ conduct toward non-rescue, state authorities face a significant normative challenge, however. All norms, whether deriving from customary, divine, moral, professional or legal orders, unconditionally approve of rescue and exert an important influence on shaping the conduct of seafarers. Human conduct is not only governed by legal authority but by a variety of authorities, including social, religious, and traditional authorities that distinguish between wanted and unwanted conduct. To enforce compliance with their rules, these authoritative orders have different mechanisms for rewarding wanted and sanctioning unwanted conduct, including internal rewards and sanctions, such as feelings of guilt and contentment, or societal rewards and sanctions, including praise and disapproval by peers. Many of these
normative authorities are to a large degree independent from state authorities and, together, they create multiple rules and norms within which individual human conduct is enacted. Even though multiple authorities govern human conduct, in modern societies law has become a dominant technique in liberal ways of governing, taking a central role in setting both accepted rules and norms of conduct, both by legal authorization and prohibition, both through its commands and its omissions. In cooperation and competition with other normative orders, law governs human conduct by promoting acceptable behaviour and by providing visions of norms and normality. It has the potential to disrupt prevalent normative orders and produce (in the long term) subjects who are indifferent to the fates and lives of particular populations.

‘The saved and the drowned’ is a study of the ultimate exercise in governing conduct, in producing a population that is taught to look away and be indifferent to certain human lives. Differential treatment of populations, distinguishing between worthy and unworthy lives, thus becomes a ‘prescribed’ form of action, a way of governing. While this study will specifically focus on how power operates through the legal complex and the effects of this power endorsed by legal authority on the conduct of seafarers and the evolution of the norm of rescue (Rose and Valverde, 1998), governing the ‘conduct of conduct’ of people toward indifference is not only crucial at sea but a significant element of guiding conduct of third parties toward unwanted populations, whether at sea or on land, through sanctions targeting the provision of employment, housing, and/or humanitarian relief (Basaran, 2014; Burridge, 2009). The following discussion will illustrate the tension between legal duties and legal sanction that dilutes the duty to rescue and contributes to indifference.

The duty to rescue

The duty to render assistance at sea appears to be a well-established universal humanitarian norm, anchored in various overlapping normative orders, including moral codes, customary practices, legal conventions and divine precepts, providing an unequivocal compass for human conduct. These rules stress unanimously that assisting a stranger in distress should not only be a desirable but a required human conduct: we should help a person in distress, especially if we can do so at little cost to ourselves. As demonstrated by Singer’s famous scenario of a drowning child, if we notice that a child has fallen into a pond and appears to be drowning and if it is easy to wade in and pull the child out, we have a duty to assist the child (Singer, 1997). The praise for Good Samaritans, along with the public outrage and condemnation displayed toward bystanders, seems to confirm the existence of a well-aligned normative compass, pointing unequivocally to saving lives. These norms are legally anchored in manifold international and national laws that require a duty to rescue and, in some cases, even stipulate penalties for non-rescue.

The duty to assist in distress at sea is specifically codified in various international laws that seek to guide human conduct by encouraging rescue and sanctioning inaction, by protecting the Samaritan and/or punishing bystanders. The principal international conventions are the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1989 International Convention on Salvage (SALVAGE) and the 1979 International Convention on Maritime Search and Rescue (SAR):

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him. (UNCLOS, art. 98.1)
The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance … (SOLAS, ch. V, reg. 33.1)

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1. (SALVAGE, art. 10)

These conventions impose upon the master of a ship, whether civilian or military, the positive duty to provide assistance to any persons in distress at sea, independent of their status, nationality or circumstances (SAR, ch. 2.1.10). The sole qualification limiting this duty is if rendering assistance would pose a ‘serious danger’ to the vessel, crew, and passengers (UNCLOS, 1982, art. 98.1; SALVAGE, 1989, ch. V, reg. 33.1).

In spite of these laws and norms enforcing the duty to rescue and providing an indisputably strong framework for conduct, lack of assistance has led to thousands of deaths in the Mediterranean. In an effort to explain and ameliorate the situation and correct for the occurrence of this behaviour, many start from the assumption that lack of assistance is due to human inclination not to behave according to laws and norms, thus individualizing the problem of rescue and presenting the (deviant) individual as the subject to reform. The question then becomes how to better govern the conduct of people and by implication how to better enforce laws. In line with this assumption, a common approach – taken by policymakers, lawyers, and civil-society actors alike – to strengthening rescue efforts and eliminating deaths at sea has been to insist on strengthening and reinforcing the already existing duty to assist (see, for example, the European Union’s agenda for saving lives at sea; see also current efforts of UNHCR, IOM, and other institutions to provide advice, rewards and legal education to shipmasters). The failure to render assistance at sea is attributed to the imperfection of (international) law and portrayed as a problem of legal loopholes in substance, interpretation or implementation (Cacciaguidi-Fahy, 2007; Ryan and Mitsilegas, 2010).

Many recent efforts to strengthen rescue efforts at sea have concentrated on the international legal framework for rescue, targeting issues of disembarkation and place of safety, individual and state responsibility, and/or proper interpretation and implementation of international legal instruments (see especially propositions in the aftermath of the Tampa affair that have led to SOLAR and SAR amendments in 2006; Kenney and Tasikas, 2003). Since the imperfection of the duty to render assistance is assumed to be at the root of the problem, the proposed solutions seek to enhance the authority of international law, close gaps in the law, and ensure a consistent interpretation and a better implementation of the law. This is a valid approach, but insufficient to address indifference at sea. It fails to consider an important aspect of law that equally guides conduct at sea: the effects of legal sanctions and the workings of law in society encouraging indifference at sea.

The legal complex shapes the disposition to rescue in society in multiple ways. We should not only focus on the duty to rescue for governing conduct but seek to understand the effects of powers that guide human conduct in practice. Personal encounters with the justice system, for example, have a strong capacity to guide human conduct. A thorough investigation reveals a system of sanctions used to punish rescuers and the process of rescue, thus guiding people to turn away from those in need at sea and undermining the prima facie rules. These legally instated means of discouraging rescue and directing human conduct call for a deeper level of analysis that views individual conduct as a symptom of a broader rationale, a liberal way of governing. While there are multiple ways of sanctioning the duty to rescue, one simple but important and effective method of counteracting through law the duty to rescue will be illustrated in the next section.
Sanctioning rescue

In autumn 2009 in Agrigento, a small city in the southern part of Italy, a tribunal issued its verdicts on two cases that had been weighing on the fishing communities in the Strait of Sicily for many years: Cap Anamur and Morthada and El-Hedi. Both cases involved charges of aiding and abetting crime under the Italian penal code (CP, art. 110) in the matter of clandestine immigration (DL, no. 286, 25 July 1998, art. 12) and for disregarding orders of disembarkation. The defendants claimed that they were carrying out their duty to rescue. Even though all defendants were eventually acquitted, these prosecutions deeply influenced the conduct of seafarers in the Strait of Sicily; they demonstrated that rescue at sea could be considered as a sanctioned enterprise. As Captain Stefan Schmidt, one of the acquitted defendants, expressed in a sombre assessment of the Cap Anamur verdict: ‘If seafarers at sea notice a refugee boat, they know that we stood trial for three years. The acquittal then perhaps does not play an important role anymore’ (Die Zeit, 2009).

The Cap Anamur trial involved three members of Cap Anamur, a humanitarian organization founded in 1979 to support boat people: director Elias Bierdel, Captain Stefan Schmidt and first officer Vladimir Dachkevitch. On 20 June 2004, the Cap Anamur (a vessel of the organization, sailing under the German flag) took on board 37 people in distress between Libya and Lampedusa, Italy. After traveling toward Malta to accompany a second boat encountered in distress, on 30 June the Cap Anamur requested permission to dock at the Sicilian port of Empedolce. It was denied permission. On 12 July, after 12 days of waiting, the Cap Anamur navigated toward the port, citing distress on the vessel, and hence allowing it under customary international law to enter a place of refuge and disembark. Upon arrival the director, captain, and first officer were detained and the vessel seized for assisting irregular entry. The Cap Anamur trial began two years later, in November 2006.

The prosecution demanded a fine of 400,000 euros per person and imprisonment of four years on charges of assisting irregular entry under aggravated circumstances (these charges were based upon CP, art. 110; DL 286/98, art. 12 i, iii e, iii bis). The prosecution supported this claim by stating that the defendants had sought to procure a profit through their actions, declaring that ‘to procure a profit whether direct or indirect – also consisted in the advertising and international publicity obtained, as well as in the profit obtained in the sale of third-party images and information relative to the facts of the process’ (Cap Anamur, Tribunale di Agrigento, 954/2009). Further, the defendants were accused of false declaration of a medical emergency so as to be allowed to disembark and facilitate irregular entry. As noted above, the trial ended with the acquittal of all defendants three years later in October 2009.

The second trial, Morthada and El-Hedi, took place roughly in the same time period and was directed against seven crewmembers of two Tunisian fishing boats, the Fakhreddine Morthada and the Mohamed el-Hedi. On 8 August 2007, fishermen on the two boats took on board 44 shipwrecked people near Lampedusa. All crewmembers were detained upon arrival on charges of human smuggling (these charges are based upon CP, art. 110; DL 286/98, art. 12 iii e, iii bis; CPP 530, sec. comma). The trial began on 22 August 2007, and the verdict was announced more than two years later, on 17 November 2009. The tribunal of Agrigento acquitted all seven fishermen, but captains Abdelkarim Bayoudh and Abdelbasset Zenzeri were convicted of ‘charges of resisting a public officer and committing violence against a warship’ as they proceeded with their boats to Lampedusa, disregarding non-disembarkation orders (Bayoudh and Zenzeri, Tribunale di Agrigento, 1107/2009). Each captain was sentenced to imprisonment of two years and six months and a penalty of 440,000 euros. The captains were acquitted by the Court of Appeal of Palermo on 22 September 2011, reversing their previous criminal convictions (Bayoudh and Zenzeri, Court of Appeal of Palermo, 2932/2011).
Even though both cases eventually ended in acquittal, the defendants were nonetheless severely punished in their encounter with the law. The legal process amounted to punishment (Feeley, 1979). Costs imposed by criminal procedures included detention, financial costs of the trial, loss of income in terms of time and due to the confiscation of boats, and psychological costs of the trial. The trials lasted for many years, absorbing the energies and economic resources of the accused. The suspects were detained, ranging from a few days for the crew of the Cap Anamur to a month for the seven crewmembers of the Tunisian vessels, with both captains of the Tunisian boats even being placed under house arrest during the period of the trial. The vessels were confiscated over prolonged periods – eight months for the Cap Anamur and many years for the Tunisian boats. During the trial the economic livelihoods of the fishermen and their families were ruined, their confiscated boats became unusable due to damage and their licences for fishing on the high seas were denied, effectively amounting to loss of their livelihoods and careers (Arntz, 2009). None of the defendants received any compensation after their acquittals. Hence, even in the absence of civil or criminal penalties, the costs imposed by the legal system effectively fulfilled sanction and deterrence functions.

In a narrow sense, legal sanctions are equated with criminal and civil penalties, and punishments are applicable only to those convicted of transgressing legal rules. In a broader sense, legal sanctions include, apart from the penalties foreseen by criminal law, the costs and sanctions imposed by criminal procedure. Penalties by procedure are (in some ways) similar to penalties by conviction, including denial of freedom (pre-trial detention and house arrest), economic penalties (confiscated boats, impossibility of pursuing a livelihood), and psychological costs. Often these are referred to as precautionary measures, administrative sanctions or similar in order to distinguish them conceptually from penalties by conviction, but the effects on defendants are strikingly similar, undermining the ideal liberal principle that no person shall be deprived of life, liberty or property without due process. In these instances, criminal procedures, rather than legislation, serve as an exercise of power, as a governing technique to regulate conduct.

Even though legislation clearly states a duty to render assistance, as the trials of Agrigento illustrate, influencing human conduct to the contrary does not require the criminalization of rescue by introducing, suspending, revising or amending these legal rules. It does not even require sentencing and punishment; the defendants eventually escaped legal sanctions for assisting irregular entry and human smuggling and did not have to face the heavy penalty of imprisonment and fines provided by criminal laws. It is not simply the outcome of the trial that determines conduct, but the ominous threat of prosecution is in itself sufficient to subvert a positive duty, a demand to act rather than to refrain from an action. Law retains its authority and power to sanction, whether the punishment is by criminal conviction or by criminal procedure. Therefore, it is not only the frequency and magnitude of criminal sanctions and penalties that determine human conduct but also the weight of procedural sanctions. The subjects of law are not only guided by legal rules but also by the effects of law on their lives. Legal procedures can effectively counteract the legal duty to rescue. Legislation becomes incapable of guiding conduct when state authorities weaken its foundation through contradictory prosecutions.

As the prosecutor of Agrigento, Ignacio de Francisci highlighted the objective of the trials in an astonishingly sincere manner: ‘legal and political considerations [had to be taken into account] to avoid the repetition of these kinds of actions, even if they happen due to a noble purpose’; otherwise, there would be the risk to ‘let in Trojan horses that allow thousands of people to come to us’ (Hans, 2009).12 Judging by this quotation, the intention was to set precedents and to deter by prosecution instated as a form of sanction. Even though all cases ended in acquittal, nonetheless they had an important purchase on the local transnational community of fishermen, increasing and exposing costs associated with rescue, and thus raising the stakes for rescue at sea (Strik, 2012).
Given these precedents, rescue at sea became a costly operation that small fishing boats and even larger commercial vessels needed to avoid, if possible, or to comply with only to a minimum degree.

The scope of humanity

Although many seafarers would still uphold their general duty to render assistance at sea, dispositions to rescue appear to have been lowered specifically for a class of humans perceived as undeserving of rescue. When life is at risk, the concept of humanity requires equal conduct toward all, not permitting derogations and differentiations. Contemporary events, however, demonstrate that this notion is in danger of being transformed into one that establishes varying degrees of humanity, prescribing differential conduct depending upon the legal status of the people encountered. Increasingly, the duty to rescue at sea is at risk of becoming limited to an inner circle of human beings, as it is transformed from a question of duty encompassing all human beings into an optional act of charity for some people. Duties are owed to the other person, whereas charity can be weighed against other considerations, such as the seriousness of the situation and questions of convenience or financial results, and is open for individual utilitarian calculations. Legal sanctions not only endanger the duty to rescue but also signal changes to the normative landscape, authorizing the creation of distinctions in humanity, defining who falls within the scope of the norm and hence who is worthy of rescue and who is not. Thus, legal rules and norms are not suspended but delimited in their scope of application to a particular category of people.

As this article has illustrated, increasingly legal status defines access to rescue and creates a category of people exempted from ordinary norms of humanity. Classifying people as unauthorized, irregular, illegal, and/or criminal creates suspicion, stigmatization, and feelings of distrust toward these populations. This has an important impact upon the conduct of potential rescuers and their willingness to intervene on behalf of individuals seen as transgressing the legal boundaries of conduct. Chances of survival are increasingly linked to the assumed legal status of individuals, as reflected in their way of travel. Third-class passengers crossing the sea on overcrowded small boats are at higher risk of being ignored and left to fend for themselves than their tourist counterparts. The legal status indicates the ‘perceived relative worth of individuals’ (see also Sayer, 2010) and provides a compass for distinguishing between worthy lives falling within the duty to rescue and unworthy lives becoming a matter of charity.

The rise of a discomforting normative order with new norms and normalities is becoming evident not only in acts of omission but also single incidents of commission and the appearance of what could be labelled as ‘humanitarianism light’. ‘Humanitarianism light’ consists in providing directions, water, and possibly food to people in distress, but without taking them on board, hence avoiding complications associated with rescue. The case of the Budafel is one such example (CIR, 2007). In May 2007, on their sixth day at sea, 27 passengers encountered the commercial fishing vessel Budafel, tried to tie their boat to the ropes, capsized, and swam to Budafel’s floating tuna pen. Upon notification by his staff, the captain alerted Maltese authorities and provided the people holding on to the floating tuna pen over the next two days with water and fruit, but refused to take them on board, letting them cling to the buoys and a small walkway under harsh weather conditions (CIR, 2007). ‘I’m prepared to assist people, but there’s a limit to everything’, ship-owner Charles Azzopardi, one of the two brothers directing the Maltese company Azzopardi Fisheries, maintained (Grech, 2007).

Seafarers have not only been unwilling to rescue but have occasionally resorted to more extreme measures, even including murder. In January 2008, for example, parallel to the double trials of Agrigento, a murder trial was commenced against Captain Mariano Ruggiero, accused of pushing
a man who was seeking to climb on the boat back into the sea and leaving him to drown (Borderline Europe, 16 January 2008; Klepp, 2011a, 2011b). Cases of stowaways thrown overboard, beaten and shot to avoid fines equally confirm a trend toward a distinction between worthy and unworthy lives (Migreurop, 2011). Information on these practices is difficult to obtain and mostly based upon testimonies of survivors and crewmembers; prosecutions for acts of commission as well as acts of omission are rare due to lack of evidence. This situation, in which rescue can possibly be punished but non-rescue and even murder are rarely prosecuted, creates misplaced incentives impairing the duty to rescue.

Specific reasons for ignoring requests for help are difficult to ascertain. The conduct of seafarers can potentially be attributed to various factors, including fear of prosecution, lack of compassion, adherence to norms and indifference. Even though individual reasons to look away at sea are difficult to determine, the wider collective effect is to encourage, authorize, and potentially legalize indifference. Indifference becomes a tolerated and accepted form of behaviour. Eventually, disengagement and indifference to the fates of particular populations becomes an acceptable form of conduct, not only legally but also socially and even morally, thus raising the threshold for taking personal responsibility while at the same time absolving people from the consequences of their conduct. Norms, whether derived from mores, laws or customs, are not resistant to societal forces but are shaped and refined within a societal context. They are not monolithic and static, tied to an objective, universal, and enduring set of values, but are social phenomena with temporal, geographic, and social variations (Hitlin and Vaisey, 2010).

Also, aiding strangers in distress takes places within a political and social context that governs human conduct. The formation of norms is embedded within social relations and social orders; social structures reflect norms and morality and vice versa (Sayer, 2010). To quote Durkheim, ‘given the general character of the morality observed in a given society and barring abnormal and pathological cases, one can infer the nature of that society, the elements of its structure and the way it is organized’ (Durkheim, 1961: 87). Hegemonic normative categories are biased in favour of those who hold various forms of power in a society, leading to the marginalization of others not only in social and legal but also in normative terms. In these cases, legal categories are employed to provide for moral and normative distinctions between the deserving and less deserving (on the employment of these categories for the poor see Dean, 1999; Steensland, 2010). The patterns of rescue operations signal a path away from universal notions of rescue toward approaches that favour classification based upon legal status – the new indicator of worthiness of rescue. In these cases, standard universal principles are not suspended but adjusted in their scope.

**Conclusion**

The current situation in the Strait of Sicily reflects attempts by political authorities to reshape human conduct. The duty to render assistance requires that we assist all people in distress at sea, regardless of their status, nationality or circumstances; as the trials of Agrigento demonstrate, however, the legal complex can shape the disposition to rescue by fostering contradictory norms that potentially contribute to collective indifference at sea. This does not require suspending, amending or criminalizing the duty to rescue; sanctions against rescue need not be formalized but are nonetheless effective in guiding conduct and setting norms. It is not the substance but the scope of the duty that is at stake; based upon considerations of legal status, certain lives are considered less worthy of rescue. The tension between duty and sanctions creates an intended ambiguity with regard to applicable legal rules, reinforcing a passive attitude toward rescue by seafarers and increasing the insecurity of, and by that the deterrence effect on, those attempting to cross the seas.
Governing the conduct of populations toward non-rescue allows state authorities to achieve security objectives without direct intervention and, thus, can help to avoid culpability, limiting responsibility and accountability. Deaths at sea are portrayed as the result of forces of nature and unsafe practices of human smugglers. Hence, on the one hand, preventive approaches are proposed to limit the number of those embarking on these perilous journeys, while on the other hand state authorities seek to monopolize and regulate the humanitarian space. Both approaches have the effect of allowing state authorities to combine security objectives with humanitarian concerns for the securitized population. Border security agencies, such as Frontex, are increasingly equipped with the double mission of security and rescue, as state authorities appropriate the space of search and rescue away from private independent actors such as fishermen and relegate functions to state authorities who gain absolute control over humanitarian concerns and human lives. Restricting individual, independent, and spontaneous rescue allows state authorities (along with their accredited actors) to become the sole interface for securitized populations and to enforce a specific form of conduct.

In inducing collective indifference more is at stake than the direct intended effects of regulating mobility and efficient border controls, however. These practices reveal deeper rationales at play, associated with the creation of spaces of security. Security requires the collective indifference of the general population toward securitized populations. By limiting third-party assistance to undesired populations, to the extent that humanitarian acts and even rescue are questioned, penalized, and criminalized, public compassion is discouraged, while collective disengagement and even indifference are encouraged. These practices are about governing compassion in the public space (Fassin, 2012). The sanctioning of rescue is only one element in targeting third-party interactions; various other, more regular forms of societal interactions are equally rendered unlawful and/or scrutinized as to whether they are lawful. These include, as regards irregular migrants, a comprehensive set of sanctions targeting, amongst others, third-party provision of employment, housing, and humanitarian relief. Third parties, independent of whether they are acting out of humanitarian or economic motives, are increasingly exposed to administrative and criminal sanctions for their conduct (Basaran, 2014). Various forms of interaction with securitized populations thus become objects of scrutiny and render third-party actors in relation with the securitized populations suspect. These practices contribute to and consolidate a politics of unease, a generalized form of suspicion as a precondition of security (Bigo and Tsoukala, 2008).

The wider societal and normative effects of these practices consist of raising the cost of empathy toward securitized (unwelcome) populations, thus unsettling bonds of solidarity and humanity. Securitized populations are increasingly isolated spatially, economically, and socially from the general population, eventually facilitating an emotional detachment and disengagement from securitized populations. With many daily interactions with securitized populations limited and dissenting third-party voices silenced, securitized populations are increasingly rendered vulnerable as they lack everyday support mechanisms in society. This allows state authorities and their accredited actors (both for-profit and non-profit) to gradually become the sole interface for the governing of the securitized populations. A generalized form of collective indifference and societal isolation provides the possibility for governing these populations differently. As the public is largely willing to observe, but not to engage, scrutinize or dissent, security practices can be deployed with limited public interference and resistance, and even with limited condemnation. This is a well-established governing technique, a technique of separation to prevent unwanted contact and communication between two population groups so as to reduce possible acts of solidarity. The production of collective indifference has been crucial for a variety of state-sanctioned violence. In these situations, whether during the times of Primo Levi or in contemporary politics, the silence of the public provides the background against which securitization of particular populations can take place. Guiding
human conduct, but also shaping socialization, expectations, and norms is thereby an important means of securing indifference toward securitized populations.

The saved and the drowned provide an insight into the normative order of European societies and expose broader questions at stake regarding the normative geographies of Europe and the scope of humanity. Contemporary policies and practices not only highlight the lack of fundamental rights at the borders of Europe but also create new norms and normalities that justify inaction toward human suffering and death. A normative order is in the process of being established that permanently allows distinguishing between worthy lives and charitable lives. People left to die at sea demonstrate new fissures in longstanding codes of humanity, leading to the fundamental question of who falls within the scope of the norm and hence, ultimately, who belongs to humanity. This exposes a rationality of government that solidifies difference and differential treatment, a way of governing in which certain humans are no longer perceived as of humanitarian concern, thus undermining the universality of humanitarian norms and even the notion of humanity.

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Notes
1. International law provides an important distinction between rescue and rendering assistance. A shipmaster has the duty to render assistance to those in distress at sea; the term rescue is reserved for arrival at a ‘place of safety’. In the following, I will use these terms largely as synonyms.
2. Debates on indifference in liberal democracies are usually restricted to questions of individual disposition or, if discussed on a collective level, to at-distance phenomena (for example, humanitarian aid abroad). This article takes as its starting point collective indifference to direct experience of human suffering and death.
3. An analytics of power necessitates an analysis of the ways that power operates and its effects in modern societies, the ‘rationalities and techniques through which we govern and are governed’ or ‘the techniques and strategies by which a society is rendered governable’ (Dean, 1999: x). This article, nonetheless, provides a privileged position to various forms of power associated with state authorities in shaping this field as to highlight the various ways that state institutions are actively involved in liberal ways of governing and how they attempt to structure the possible fields of conduct.
4. This international legal edifice is supported in many European countries (civil law systems) through a general legal duty to assist strangers in distress, which is presumed to include the international legal duty to render assistance at sea. The laws that provide for a general legal duty to rescue, in spite of the great variations that exist between them, share two components. First, they impose a legal duty to assist. A breach of this duty constitutes a criminal and civil offence, punishable by imprisonment, fines, and liability for damages. Second, these laws seek to reduce hesitation to intervene by limiting the rescuer’s legal liabilities for harm caused in the process of rescue. In principle, the rescuer who follows his or her duty to rescue and causes harm in this process, whether to the rescued or a third party, is liable under civil and possibly even criminal law; in practice, however, liability is limited by means of special legal justification applicable to rescue only.
5. UNCHR, IOM, and various other institutions have provided advice and legal education to shipmasters through leaflets, for example. It is doubtful, however, that shipmasters are unaware of their obligations under international law or that these efforts can counteract the effect of the sanctions to which shipmasters are exposed. Various organizations have tried to establish mechanisms for recognizing shipmasters.
that rescue as an incentive for others to follow their paths. The UNHCR, for example, has launched the Per Mare Awards to promote rescue at sea. The UNHCR has also offered financial incentives, such as partial financial compensation for reimbursement of occurring costs.

6. The law specifies that procuring illegal entry shall be punished with imprisonment of one to five years and a fine of up to 15,000 euros for each person (DL, no. 286, 25 July 1998, art. 12.1), and that to profit, even indirectly, from illegal migration shall be punished with imprisonment of four to 15 years and a fine of 15,000 euros for each person (DL, no. 286, 25 July 1998, art. 12.3). These penalties increase under aggravating circumstances, that is if the illegal entry or stay concerns five or more persons (DL, no. 286, 25 July 1998, art. 12.3, 3-bis.a) or if the offence is committed by three or more people (DL, no. 286, 25 July 1998, art. 12.3, 3-bis.c-bis).


8. Original text: ‘al fine di procurarisi un profitto sia diretto che indiretto – anche consistito nella pubblicità e risonanza internazionale ottenuta ed inoltre un profitto relativo alla vendita a terzi della immagini e delle informazioni relative ai fatti per cui e processo – utilizzando la motonave ‘CAP ANAMUR’ battente bandiera tedesca’.


10. The verdict was read on 7 October 2009 and published on 15 February 2010.


References


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