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Marin Roger Scordato

The Catholic University of America, Columbus School of Law

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Understanding the Absence of a Duty To Reasonably Rescue in American Tort Law

Marin Roger Scordato*

The absence in American tort law of a duty to reasonably aid a stranger in peril is perplexing. It is an odd gap in the otherwise nearly pervasive presence of a duty of reasonable care in the modern law of negligence. It utterly fails to accurately articulate our conventional sense of morality and appropriate social behavior. It stands in stark contrast to the treatment of this issue throughout the rest of the world. It is a rule of tort law for which very few commentators have had a kind word.

This Article sets forth a spirited defense of the traditional no-duty-to-rescue rule. It offers a thoroughgoing justification for the doctrine and establishes an understanding of the practical wisdom behind its seemingly amoral veneer. It is a unique attempt in the existing legal literature to develop a clear and unapologetic rationale for this much maligned aspect of tort law.

The argument begins by analyzing the likely benefits available from the adoption of a tort duty to affirmatively aid. It then identifies and describes the probable costs that would accompany such a rule, including the lowering of the quality of rescue effort experienced by those in peril, the discounting of altruism, greater intrusiveness of negligence regulation, an increased risk of harm to rescuers, the creation of a disincentive to cooperate in subsequent investigations and a deterrence to provide delayed aid. In addition, the many problems attendant to the actual operation of a duty to affirmatively aid within the negligence cause of action are considered.

The question of whether a limited version of a duty to affirmatively aid that would apply only to persons who possess special expertise or experience in providing aid is also analyzed, as is the role of Good Samaritan statutes in creating appropriate incentives for such individuals. Finally, the characteristics of a criminal law duty to rescue are compared to those of a tort law duty and both the relative desirability of a criminal law duty and the superfluous nature of a subsequent tort law duty are demonstrated.

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* © 2008 Marin Roger Scordato. Professor of Law, Columbus School of Law, The Catholic University of America. B.A. 1979, Haverford College; J.D. 1983, University of Virginia School of Law. I would like to thank Paula Monopoli and Frank Scordato for their insightful comments and suggestions. I am grateful to the Columbus School of Law for its continuing support of this work. I am also very grateful for the limitless support of Dorothy Scordato in all of my endeavors.

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I. Introduction

Shortly after noon on January 2, 2007, Wesley Autrey, a fifty-year-old construction worker, was waiting for the subway at 137th Street and Broadway in New York City. He was with his two young daughters, ages four and six. Not far from them on the platform was...
Cameron Hollopeter, a twenty-year-old film student. Hollopeter suffered a sudden seizure that caused him to collapse, and after unsteadily getting to his feet, he stumbled backward over the edge of the platform onto the tracks below. With the No. 1 train quickly approaching, Autrey jumped down and pressed himself and Hollopeter tightly into a space between the tracks little more than a foot deep. The train, unable to stop, rumbled over Autrey and Hollopeter, mere inches above them, smudging Autrey’s knit cap with grease. Both men emerged alive and largely uninjured from the ordeal.

Just two days later in a different borough of the same city during the same noon hour, three-year-old Timothy Addo crawled through the window of his babysitter’s apartment in the Bronx and out onto a fire escape. The child climbed down one story and ended up dangling from the metal structure four floors above the sidewalk, rapidly losing his grip. Two lifelong friends, forty-three-year-old Julio Gonzalez and forty-year-old Pedro Nevarez, spotted the child and ran across the street, positioning themselves under the fire escape just as Timothy let loose and fell. The child landed hard on Nevarez’s chest, knocking Nevarez onto the sidewalk. Timothy was then caught in the air by Gonzalez who maintained his hold on the forty-five-pound child. Neither man was seriously injured, and Timothy was released from the hospital after being treated for minor scraps. Later in the day, New York City Police Commissioner Raymond W. Kelly said, “This is a week of heroes here in New York.”

It was not nearly the same kind of week in New York City some forty years earlier when the borough of Queens was the setting of what

3. Id.
4. Id.
5. Id.
6. Id.
9. See Barron & Lee, supra note 8.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id. (internal quotation marks omitted).
is almost certainly the most notorious incident of callousness in the face of another's mortal peril ever to occur in America. In the very early hours of March 13, 1964, Catherine "Kitty" Genovese was stalked, stabbed, brutally attacked again, and eventually killed by Winston Moseley, a complete stranger to Ms. Genovese. This all took place on the public streets of Queens over a thirty-five-minute period during which at least thirty-eight witnesses heard the twenty-eight-year-old woman desperately scream in fear and for help, but none of them did anything whatsoever to assist her. It is reported that one couple turned out the lights in their apartment and pulled chairs up to the window in order to better observe the drama.

Much more recently, in May 2006, David Sharp, a thirty-four-year-old veteran mountaineer, had just achieved a lifelong ambition to reach the summit of Mt. Everest when on his way down he experienced symptoms of severe oxygen deficiency. He managed to maneuver himself into a shallow snow cave approximately 1000 feet below the summit adjacent to a well-traveled trail. As Sharp sat cross-legged in the snow cave struggling for his life, more than forty climbers, all sufficiently experienced and physically conditioned to have ascended to 28,000 feet, walked right by him on their way up to the summit. Nearly all of them passed without offering any assistance whatsoever, and none attempted any sort of rescue.

15. There are innumerable accounts of this incident in newspapers, magazines, books, broadcast media, and the academic literature of many disciplines. See, e.g., A.M. Rosenthal, Thirty-Eight Witnesses 32-37 (1964); Martin Gansberg, 37 Who Saw Murder Didn't Call the Police, N.Y. TIMES, Mar. 27, 1964, at A1.


18. Rod Minchin, Why I Left Brit To Die on Everest, BIRMINGHAM POST (U.K.), May 24, 2006, at 8; Pete Thomas, Morality on a Slippery Slope, L.A. TIMES, June 1, 2006, at A1.

19. See Thomas, supra note 18.


British film crew even shot footage of Sharp as he sat in the snow cave, talking lucidly, saying, "My name is David Sharp. I am with Asian Trekking." One of the mountaineers who passed by Sharp was Mark Inglis, the first double-amputee to climb Everest and the beneficiary of a successful rescue effort that brought him down from New Zealand's highest mountain, Mt. Cook, twenty-four years earlier.

On May 15, 2006, David Sharp died where he sat, not far from the frozen remains of an Indian climber who died in 1997 and whose body Sharp had walked past on his way up to the summit. Sir Edmund Hillary, the legendary mountaineer who, with Tenzing Norgay, reached the summit of Everest for the first time in 1953, openly criticized the climbers who failed to help Sharp: "It was wrong if there was a man suffering altitude problems and huddled under a rock, just to lift your hat, say, 'Good morning' and pass on by . . . . On my expedition there was no way you would have left a man under a rock to die." Ed Viesturs, among the strongest and most accomplished mountain climbers in the world, said, "This isn't the first time this has happened . . . . Passing people who are dying is not uncommon. Unfortunately, there are those who say it's not my problem. I've spent all this money and I'm going to the summit."

Just a few months before his death, as he was preparing to embark on the expedition to Everest, David Sharp sought to console his anxious mother. "'You are never on your own,' he told her. 'There are climbers everywhere.'"

What is the status under American tort law of a failure to reach out and affirmatively aid another in peril? Could a victim, who suffers greater harm because no effort was made to help, successfully sue
those who chose to do nothing when reasonable, even easy, opportunities to aid were available? With a few exceptions, the general rule in American tort law is that bystanders will not be liable to a victim for their failure to affirmatively aid. There is, in other words, no general duty to reasonably rescue in American law.

This feature of American tort law differs markedly from the legal treatment of the same issue in other parts of the world where legal obligations to affirmatively aid another in peril are common. It stands also in striking contrast to most conventional views of common decency and morality. Perhaps because of this, the no-duty-to-rescue

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30. See, e.g., Wetboek van Strafrecht [Sr] [Criminal Code] art. 450 (Neth.) (Dutch Penal Code) ("A person who witnesses the immediate mortal danger of another person and who fails to render or procure such aid and assistance as he is capable of rendering or procuring where there is no reasonable expectation of danger to himself or others is liable to a term of detention of not more than three months or a fine of the second category, where the death of the person in distress ensues"); see also Alberto Cadoppi, Failure To Rescue and the Continental Criminal Law, in The Duty To Rescue: The Jurisprudence of Aid 93, 93 (Michael A. Menlowe & Alexander McCall Smith eds., 1993) (noting the general rule in modern Europe of an affirmative duty to rescue); Damien Schiff, Samaritans: Good, Bad and Ugly: A Comparative Law Analysis, 11 Roger Williams U. L. Rev. 77, 79 (2005) ("Almost every civil law jurisdiction in Europe, as well as in Latin America, recognizes various types of duties to rescue and related tort actions."); Jay Silver, The Duty To Rescue: A Reexamination and Proposal, 26 Wm. & MARY L. Rev. 423, 424 (1985) ("[T]he duty to assist an injured or endangered person is commonplace throughout the world . . . ."); Edward A. Tomlinson, The French Experience with Duty To Rescue: A Dubious Case for Criminal Enforcement, 20 N.Y.L. Sch. J. Int'l & Comp. L. 451, 452 (2000) ("Most civil law countries . . . recognize a general duty to rescue . . . [that] normally results in tort liability.").

doctrine has been frequently and widely condemned, with the great majority of the academic literature on the subject recommending abandonment or change. And yet, the doctrine remains a standard part of the common law canon, soon to be recognized again as such by the Restatement (Third) of Torts.

Why is this the case? This Article sets forth a clear, straightforward, unapologetic justification for the absence of a duty to reasonably rescue in American tort law. As immoral, or amoral, as the doctrine may appear on its face, there exists a complex of arguments that, taken together, provide a powerful rationale for the rule and its continued existence. This kind of fully developed argument in support of the doctrine has not been given much attention in the overwhelmingly critical treatment that the no-duty-to-rescue rule has received thus far.

32. David A. Hyman, Rescue Without Law: An Empirical Perspective on the Duty To Rescue, 84 TEX. L. REV. 653, 663 n.20 (2006) ("The overwhelming majority of published articles support the imposition of a generalized duty to assist."); Philip W. Romohr, Note, A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule, 55 DUKE L.J. 1025, 1025 (2006) ("[T]he absence of a duty to rescue, especially when such rescue could be accomplished with little or no risk to the rescuer . . . has been criticized by the vast majority of legal scholarship on the subject.").


33. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 ("No Duty of Care with Respect to Risks Not Created by Actor"); see also Peter F. Lake, Recognizing the Importance of Remoteness to the Duty To Rescue, 46 DEPAUL L. REV. 315, 316 (1997) ("In the face of continuous academic attacks, one body of tort law has survived this century, at least superficially, intact—the duty (or lack thereof) to rescue." (footnotes omitted)).

34. A convincing justification is still apparently lacking in the literature judging from the reaction that has been expressed by many scholars. See, e.g., Melvin A. Eisenberg, The Duty To Rescue in Contract Law, 71 FORDHAM L. REV. 647, 678-79 (2002) ("That is the argument in favor of a duty to rescue from physical peril. It is extremely strong. Several kinds of arguments have been made against such a duty. They are not very strong—certainly, not strong enough to trump the argument in favor of such a duty.").

Notwithstanding, it offers an understanding of the practical value of the rule that must be dealt with by any future attempt to overturn or alter its status.

Following this introduction, Part II of this Article sets forth the basic tort law doctrine of negligence, including the general absence of a duty to reasonably rescue and its standard exceptions. Part II carefully places the doctrine in the larger context of the negligence cause of action in which it functionally resides. This is important because a full understanding of the no-duty-to-rescue doctrine begins with an appreciation that it is less an affirmative assertion of preferred behavior and outcomes than a tenet of tort law not to extend the usual regulatory pressures of negligence into this particular nook of human judgment.

Part III of this Article advances a justification for the no-duty-to-rescue rule. The analysis adopts a practical perspective, comparing the likely costs and benefits of the no-duty-to-rescue doctrine with those of its alternative, a general tort law obligation to engage in reasonable rescue efforts on behalf of a stranger. The probable consequences of the two competing rules are evaluated from the point of view of potential victims who may need assistance from others, of those who might provide such aid, and of society at large. From all three viewpoints, this Part demonstrates that a general duty to affirmatively aid in tort law would generate far more costs than it would provide corresponding benefits.

Part IV of this Article considers whether a limited duty to rescue should be adopted for those individuals who possess some special training or experience in the furnishing of such aid. While the analysis with respect to specially trained individuals is different in some respects than for individuals without such training, these differences do not justify the imposition upon them of a special duty to rescue. Nevertheless, because specially trained and experienced individuals offer the promise of the highest quality rescue efforts, and thus the optimum number of successful outcomes, it is unsatisfying to have the legal treatment of such individuals remain the same as it is for untrained and inexperienced persons. It is in this context that the operation and function of Good Samaritan statutes are considered.

If it should become necessary to adopt some form of formal legal duty to reasonably rescue, would it be preferable to adopt it as a tort
law duty or as a criminal law duty? Part V analyzes this question and argues for the comparative superiority of a criminal law duty but not for the ultimate desirability of such a statute. The primary advantage that a criminal law duty would have over a tort law duty is the presence of prosecutorial discretion. Such discretion permits social control of the pursuit of liability for a failure to rescue in a way not available with a tort cause of action. This Part goes on to demonstrate how some of the costs associated with a tort law duty to rescue could be avoided by a criminal law duty. Part VI concludes the Article.

II. No Duty To Rescue As A Negligence Doctrine

The no-duty-to-rescue doctrine covers behavior, or the absence thereof, that occupies a modest subset of the wide range of behavior that comes under the purview of negligence law. It is, fundamentally, an exception to the normal operation of the negligence cause of action. As such, it is important to approach an understanding of the no-duty-to-rescue doctrine within the broader framework of negligence law.

A. The Context of Negligence

Under the law of negligence, there exists a nearly pervasive duty to act with at least reasonable care regarding other persons and their property. If this duty is breached, and the breaching behavior was the actual and proximate cause of cognizable harm to another, then the breaching party is generally liable to the person who brings an action for the tort of negligence.

36. See Heaven v. Pender, (1883) 11 Q.B.D. 503, 509 (Brett, M.R.) ("[W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."). The notion of duty in negligence as being more or less pervasive relies upon the requirement of proximate cause, rather than the requirement of the existence of a legal duty, to limit the defendant's liability to those situations in which the breach of the duty causes reasonably foreseeable harm to a reasonably foreseeable person. This is the Andrews approach to the duty and proximate cause elements of negligence as articulated in the famous case of Palsgraf v. Long Island Railroad Co., 162 N.E. 99, 101-05 (N.Y. 1928) (Andrews, J., dissenting).

On the whole, most any behavior that can give rise to harm can come under the second-guessing purview of negligence law. The obvious foolishness of driving a car while intoxicated is a possible trigger for negligence liability, as is a delicate and subtle error in the administration of anesthesia during surgery or a difficult and complicated part of the surgical procedure itself. Negligence law is famously immodest, willing to evaluate and judge the reasonableness of most any harm-producing behavior that is alleged to have caused an injury, no matter how much specialized training, experience, and talent is generally required to engage in that behavior.

Often, the reasonableness of a given behavior is determined by reference to what most persons would do if facing circumstances similar to those faced by the defendant in the negligence action. Would most railroad companies place broad gauge trailers onto narrow gauge trucks? Would most ophthalmologists administer a glaucoma test to a patient presenting glaucoma-like symptoms who was under the age of forty? Would most landlords rent an apartment with plain glass installed in a bathtub enclosure door?

This important element in determining the reasonableness of a given behavior is typically called the custom factor or the industry standard. Use of a prevailing custom or an industry standard as a surrogate measure for reasonableness encourages persons to become aware of such customs or standards and to at least meet them when

38. KEETON, DOBBS, KEETON & OWEN, supra note 37, § 33, at 193 (“The application of this standard of reasonable conduct is as wide as all human behavior. There is scarcely any act which, under some conceivable circumstances, may not involve an unreasonable risk of harm.”).
40. See Denise Ping Lee, The Business Judgment Rule: Should It Protect Nonprofit Directors?, 103 COLUM. L. REV. 925, 954 (2003) (“Lawyers, doctors, accountants, and all other professionals are subject to ordinary negligence review, and courts have never questioned their ability to second-guess decisions after the fact.” (footnote omitted)).
41. See RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965); KEETON, DOBBS, KEETON & OWEN, supra note 37, § 33, at 193-94 (“If the actor does only what everyone else has done, there is at least an inference that the actor is conforming to the community’s idea of reasonable behavior.”).
45. RESTATEMENT (SECOND) OF TORTS § 295A.
engaging in potentially harm producing behavior. It establishes an aspirational minimum of reasonable care for potentially dangerous activities in society. Thus, in medical malpractice actions, the defendant physician's actions are typically compared to those of a hypothetical reasonably prudent physician, and the jury is permitted to assume that the actions taken by most physicians under similar circumstances is an appropriate measure of the actions of the reasonably prudent physician.

In some cases, there may not exist a prevailing custom or an industry standard that usefully applies to the defendant's harm-producing behavior. In other cases, the plaintiff may wish to challenge the industry standard itself as being unreasonably careless. In both of these circumstances, the reasonableness of the behavior under review is usually analyzed by means of what is commonly called the Learned Hand Formula. The Learned Hand Formula is essentially a cost-benefit approach to reasonable care that compares the cost of the precaution necessary to avoid the harm caused by the defendant to the cost of the harm discounted by the probability that the precaution, if taken, would have in fact prevented the harm from occurring.

Persons subject to negligence law are thus encouraged to take cost-effective precautions to avoid causing harm to others in order to avoid potential liability for themselves. The reasonable person will

46. See id. (finding that custom is the collective judgment of what precautions should be taken to avoid risks and that it creates a justifiable expectation that others will do what is usual to prevent negligence).
47. See Zacher v. Budd Co., 396 N.W.2d 122, 133 (S.D. 1986) ("[I]ndustry standards are merely a minimal standard that may be considered . . . ").
49. The T.J. Hooper v. N. Barge Corp., 60 F.2d 737, 740, 1932 AMC 1169, 1175 (2d Cir. 1932) (finding no established custom for receiving sets).
53. See Michael D. Green, Negligence = Economic Efficiency: Doubts, 75 TEX. L. REV. 1605, 1612 (1997) ("For those who create risks of harm that may be suffered by others,
act to reduce the risk of injuring another whenever the precaution to be taken is less costly than the risk of loss it eliminates. When it operates properly, negligence law holds liable those persons who fail to take cost-effective precautions and as a result cause harm to others.

Negligence law is, in a sense, a massive formal system of second-guessing, of Monday-morning quarterbacking, with the defendant's assets held in the balance. One of its striking features is its fearlessness, some might say its hubris, in the breadth of human activities it is prepared to formally second-guess. Though aided by (often conflicting) expert testimony, negligence law essentially involves only three attorneys (judge included) and a dozen or fewer members of the public looking back and second-guessing the reasonableness of most any human activity that can cause harm to another. Through the cause of action of negligence, society collectively passes judgment on the adequacy of the work of a cardiac surgeon who has successfully completed decades of formal education, apprenticeship, and training and who may have the benefit of additional decades of clinical experience. The public will also, without hesitation, judge her similarly educated, trained, and experienced colleagues in neurology, anesthesiology, pulmonology,

the risk-benefit standard for negligence provides incentives to take precautions to avoid or minimize risks that can be avoided more cheaply than the cost of the precautions.); Douglas Litowitz, A Critical Take on Shasta County and the "New Chicago School," 15 YALE J.L. & HUMAN. 295, 300 (2003) ("Under traditional legal analysis ... the law of negligence places responsibility for the damage on one of the two parties, thereby motivating that person to take precautions in order to avoid liability.").

54. See Mark F. Grady, Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion, 82 NW. U. L. REV. 293, 303 (1988) ("Of course, it is quite permissible for the reasonable person to omit precaution that is not cost-justified ... .").

55. See McCarty, 826 F.2d at 1557 ("Unreasonable conduct is merely the failure to take precautions that would generate greater benefits in avoiding accidents than the precautions would cost."); Mark F. Grady, A New Positive Economic Theory of Negligence, 92 YALE L.J. 799, 801 (1983) (noting that negligence law determines when people have failed to take enough precautions through its breach of duty element).


57. See Rachlinski, supra note 56, at 572.

and every other medical specialty, no matter how complex or arcane. Similarly, society stands ready to review and pass judgment on the highly technical and often subtle judgments and specialized work of architects, accountants, engineers, and professionals of every stripe.

B. The No-Duty-To-Rescue Rule

In the midst of this more or less pervasive obligation of reasonable precaution and care generated by the operation of negligence law, there exists a black hole, a small void in which the duty of reasonable care does not apply. Is this exceptional absence of the otherwise omnipresent duty to act reasonably with regard to the safety of others reserved for some activity that is thought to be too technical and complex for fair assessment by laymen and lawyers? Does it represent a human judgment too fraught with moral ambiguity to be reasonably second-guessed? Hardly.

It is a long-established feature of American tort law that a person owes no legal duty to affirmatively act to aid a stranger in peril, no matter how reasonable a readily available affirmative act might be.


61. See Lacey v. United States, 98 F. Supp. 219, 220, 1951 AMC 1657, 1659 (D. Mass. 1951) ("It is well settled common law that a mere bystander incurs no liability where he fails to take any action, however negligently or even intentionally, to rescue another in distress."); Williams v. California, 664 P.2d 137, 139 (Cal. 1983) ("As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another . . ."); Union Pac. Ry. Co. v. Cappier, 72 P. 281, 283 (Kan. 1903) ("The moral law would obligate an attempt to rescue a person in a perilous position—as a drowning child—but the law of the land does not require it, no matter how little personal risk it might involve . . ."); see also RESTATEMENT (SECOND) OF TORTS § 314 (1965) (noting that knowledge that action is required to aid another does not create a duty to render aid); sources cited supra note 29 (reviewing in case law and scholarship the lack of a duty to rescue).

However, there are three states that have enacted some form of statutory duty to rescue: Minnesota, Rhode Island, and Vermont. See MINN. STAT. ANN. § 604A.01 (West 2000) ("A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person."); R.I. GEN. LAWS § 11-56-1 (2002) ("Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so
Thus, if I am standing by my car in a fairly steeply sloped parking lot of a shopping center, and I see a heavy metal shopping cart, completely unattended, rolling towards a small and oblivious group of people conversing together some yards downhill, I need not do so much as shout a simple warning in order to avoid subsequent liability for negligence when the cart hits and badly injures some of them.

The overwhelming majority of people in a similar position would have at least called out a warning. A shouted warning would have been nearly free of cost to me and would almost certainly have saved the victims from significant physical injury. Under no recognized approach to determining the reasonableness of a person's judgment would not calling out a warning be deemed acceptable. And yet, in most every jurisdiction in this country, I would face no exposure to negligence law liability for my complete failure to act reasonably in this instance, for in American tort law, I have no legal duty to reasonably act toward a stranger in peril—no duty to affirmatively aid.

There are three basic exceptions to the general no-duty-to-rescue rule that are recognized in a majority of American jurisdictions. One covers situations in which a particular relationship exists between the

without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person.”]; VT. STAT. ANN. tit. 12, § 519(a) (2002) (“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”); see also Marc A. Franklin, Vermont Requires Rescue: A Comment, 25 STAN. L. REV. 51, 55-61 (1972) (discussing the Vermont statute).

A statutory duty to affirmatively aid, rare as it is in America, was given national exposure when it was featured in the plot of the series finale of the television show “Seinfeld.” Seinfeld: The Finale (NBC television broadcast May 14, 1998) (transcript available at http://www.seinfeldscripts.com/TheFinale.htm). Even more rare, indeed apparently nonexistent, is an actual prosecution of a violation of one of these statutes. See Hyman, supra note 32, at 657 & n.7 (“[A]fter a combined total of almost eighty years of experience in three states, there have been no prosecutions for non-rescue . . . .”).

62. See Liam Murphy, Beneficence, Law, and Liberty: The Case of Required Rescue, 89 GEO. L.J. 605, 625 (2001) (“[A]ll agree that the person who fails to effect an easy rescue is a moral monster . . . .”).

63. See Weinrib, supra note 32, at 247 (“No observer would have any difficulty outlining the current state of the law throughout the common-law world regarding the duty to rescue. Except when the person endangered and the potential rescuer are linked in a special relationship, there is no such duty.”).

64. Various commentators have suggested the existence of more than three exceptions to the general rule, though the three described here are all consensus choices that occupy the core of the exceptions. See, e.g., Eisenberg, supra note 34, at 654 (arguing that American contract law imposes a duty on contracting parties to act affirmatively to protect each other from significant loss).
plaintiff and the defendant. The two relationships most commonly held to fall within this exception are the businessperson-customer relationship and the employer-employee relationship. Thus, if a sales associate working in a department store observes a customer on the sales floor kneel over in apparent pain and fall to the ground, the clerk, representing the department store, could not fail to take any action on behalf of the stricken customer without having that decision potentially second-guessed in a subsequent negligence suit. Similarly, if the sales associate were experiencing medical distress and the manager of the department were observing the scene, the manager would not be protected by the no-duty-to-rescue rule from subsequent negligence liability for a failure to act.

A second well-recognized exception to the general rule applies to circumstances in which the defendant was a cause of the peril faced by the plaintiff. Thus, if the plaintiff's and the defendant's cars collide, and the plaintiff is knocked unconscious, slumped in his driver's seat, while the defendant remains alert and capable, the defendant will owe to the plaintiff a legal duty to take reasonable measures on the plaintiff's behalf.

A third exception to the general no-duty-to-rescue rule is triggered by the defendant voluntarily rendering aid to the plaintiff.

65. Restatement (Second) of Torts § 314 cmt. a.
66. Id. § 314A(3) (businessperson-customer); id. § 314B (employer-employee).
67. See Lundy v. Adamar of N.J., Inc., 34 F.3d 1173, 1200-02 (3d Cir. 1994) (Becker, J., concurring in part of the judgment and dissenting in part) (surveying cases from a variety of jurisdictions dealing with the duty of a business to a customer who suffers a heart attack); see also L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337-38 (Ind. 1942) (finding that a businessperson had a duty to rescue a customer who had caught his fingers in an elevator).
68. See, e.g., Harris v. Pa. R.R. Co., 50 F.2d 866, 868-69, 1931 AMC 1303, 1308-09 (4th Cir. 1931) (finding that a shipmaster must make reasonable efforts to rescue a seaman who fell overboard).
69. Hardy v. Brooks, 118 S.E.2d 492, 495-96 (Ga. Ct. App. 1961) (holding that a driver who hit and killed a cow had a duty of reasonable care to protect other drivers on the road blocked by the carcass); Parrish v. Atl. Coast Line R.R. Co., 20 S.E.2d 299, 304-05 (N.C. 1942) (holding that a railroad must take reasonable precautions to protect travelers from obstructions on railroad crossing caused nonnegligently by the railroad); Restatement (Second) of Torts § 322; Dan B. Dobbs, The Law of Torts § 316, at 856 (2000) ("The defendant who knows or should know that he has caused physical harm to the plaintiff, even if caused without fault, owes a duty of reasonable care to avoid further harm.").
70. Brumfield v. Wofford, 102 S.E.2d 103, 104-05 (W. Va. 1958) (noting that violating a criminal "hit and run" statute is prima facie evidence of a driver's negligence).
71. Marsalis v. La Salle, 94 So. 2d 120, 126 (La. Ct. App. 1957) (holding a cat owner liable for failure to keep her promise to help the plaintiffs keep her cat indoors until rabies status could be established after the cat bit the plaintiff); Dudley v. Victor Lynn Lines, Inc., 161 A.2d 479, 482, 487-88 (N.J. 1960) (holding an employer liable when a coworker promised the victim's wife that he would call a doctor and failed to do so); Zelenko v. Gimbel
Suppose the defendant sees the plaintiff, a stranger, fall to the sidewalk of a public street and lapse into unconsciousness. A small crowd of onlookers gathers around the plaintiff. The defendant says out loud, “I’ll go for help,” and begins to walk briskly down the street. After turning a corner and moving out of sight of the crowd, the defendant abandons his plan to seek help and instead walks home. In such circumstances, the plaintiff may, through a negligence claim, formally question the reasonableness of the defendant’s failure to do more on his behalf.  

Despite the existence of these three traditional exceptions, the general no-duty-to-rescue rule remains robust, covering a large number of possible circumstances in which a person’s condition may be seriously worsened by another’s failure to reasonably help. Why would a regime of negligence law that is willing to scrutinize for reasonableness all manner of human judgments be unwilling to do its usual work in even the most obvious of cases? Why not impose upon each of us an obligation to act with at least reasonable care when confronted with another in peril? Why, in the earlier example, impose an obligation to drive to the shopping center with reasonable care, to park with reasonable care, to shop with reasonable care, and to depart with reasonable care, but fail to impose upon me any obligation at all to reasonably call out a warning to the people threatened by the runaway shopping cart?  

Bros., Inc., 287 N.Y.S. 134, 135 (Sup. Ct. 1935) (“If a defendant undertakes a task, even if under no duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing the task.”); RESTATEMENT (SECOND) OF TORTS § 323; see RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 42 reporters note (Proposed Final Draft 2005) (“Nearly every jurisdiction has endorsed and applied § 323 or accepted a similar principle.”).  

72. See Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) (“If you do begin to rescue someone you must complete the rescue in a nonnegligent fashion even though you had no duty of rescue in the first place.”); Farwell v. Keaton, 240 N.W2d 217, 220 (Mich. 1976) (“Where performance clearly has been begun, there is no doubt that there is a duty of care.”) (quoting WILLIAM L. PROSSER, THE LAW OF TORTS § 56, at 346 (4th ed. 1971)).  

73. One circumstance that has attracted calls for the creation of an additional exception to the traditional no-duty-to-rescue rule is the family relationship. PROSSER, supra note 28, § 56, at 342; Vincent R. Johnson & Claire G. Hargrove, The Tort Duty of Parents To Protect Minor Children, 51 VILL. L. REV 311, 320-22 (2006). Despite this pressure, there is virtually no significant case law support for such an exception and the Restatement (Third) of Torts explicitly refuses to recognize it. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. o.  

The analysis offered in this Article does not support such an exception, primarily because the level of uncoerced compliance among family members is most likely so sky high that almost any set of moderate costs associated with the adoption of such an affirmative duty would swamp the expected practical benefits.
Surely no satisfying explanation of this feature of tort law resides in the degree to which it gives expression to conventional morality or ethics. The overwhelming majority of us, if asked, would certainly say that the proper, socially acceptable response to a stranger in physical peril is to offer at least reasonable aid. No serious religion or secular system of ethics recommends that its adherents fail to aid another in peril when a reasonable response is available. In fact, a person who fails to act in such a situation could rightly be condemned for such a decision, and every now and then celebrated cases of this sort receive their share of national attention.

III. RATIONALES SUPPORTING THE NO-DUTY-TO-RESCUE RULE

How, then, can tort law possibly justify the continued presence of this no-duty-to-rescue rule? The answer lies within a collection of approximately half a dozen basic arguments, some of which carry more weight in the overall scheme than others.


75. See Antony M. Honoré, Law, Morals and Rescue, in The Good Samaritan and the Law 225, 231 (James M. Ratcliffe ed., 1966) ("'If [rescue] efforts should be omitted by anyone when they could be made without imperilling his own life, he would, by his conduct, draw upon himself the censure and reproach of good men.'" (quoting United States v. Knowles, 26 F. Cas. 800, 801 (N.D. Cal. 1864) (No. 15,540))); Christopher H. White, Comment, No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine, 97 NW. U. L. REV. 507, 513 (2002) ("These [duty to rescue] laws acknowledge the belief that the common-law no-duty-to-rescue rule is inconsistent with modern social goals. Few would dispute the argument that a society in which people assist their fellow citizens in times of need is superior to one in which they callously ignore the cries for help of others." (footnote omitted)).

76. See Romohr, supra note 32, at 1027 ("[M]ost, if not all, of these theories [of political and moral philosophy] support some form of a duty to rescue."); see also Steven H. Resnicoff, Supplying Human Body Parts: A Jewish Law Perspective, 55 DePaul L. Rev. 851, 853 (2006) ("Unlike common law, Jewish law imposes an affirmative duty to save a person's life through one's direct intervention or through the use of one's resources."); Schiff, supra note 30, at 81 ("Plato's Laws had a bad Samaritan statute . . . . Christian Europe was not deaf to Christ's parable [of the Good Samaritan]: both St. Augustine and St. Thomas recognized the moral obligation to help another in need." (footnote omitted)); Peter Singer, Famine, Affluence, and Morality, 1 PHIL. & PUB. AFF. 229, 231 (1972) ("[I]f it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.").

77. See Norman J. Finkel, Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times, 12 PSYCHOL. PUB. POL'y & L. 242, 248-49 (2006) (discussing several "horrific headline cases"); Hyman, supra note 32, at 655 ("When a case of non-rescue becomes public, newspaper editorials and television commentators will denounce the indifference of bystanders. If the non-rescuers can be identified, they will be held up to public scorn."); supra notes 15-27 and accompanying text.
A. The Potential for Only Modest Benefits

1. Uncoerced Compliance

The rationale for the rule begins, interestingly enough, with the same conventional moral wisdom that makes the rule seem so counterintuitive. Namely, that it is an uncontroversial element of generally accepted societal behavior that one should act reasonably to help another facing serious peril, that every individual should at least call out for help, if while walking in the mall he comes across a person lying on the floor, bleeding, and crying out in pain. So unquestioned is this simple behavioral norm that it is fair to assume that the great majority of people who find themselves in such a situation will in fact call out for help, or otherwise act reasonably, to aid the stranger on the floor.

Thus, it should be acknowledged that a no-duty-to-rescue rule, that is, a rule that threatens negligence liability for a defendant failing to reasonably assist a stranger in peril would generate only a small number of additional rescue efforts than currently exist under the no-duty rule. Because the underlying behavioral norm is so strong and uncontroversial, there can be said to already exist a very high level of uncoerced compliance with the desired behavioral goal. In other words, society already enjoys very high levels of reasonable affirmative responses to others in peril even in the absence of a coercive legal rule.

78. See Hyman, supra note 32, at 656-57 (noting the incredible frequency of rescue, calling Americans "too willing" to rescue).

79. See id. at 654 ("[I]n the real world, rescue is the rule—even if it is not the law."). In his article, Professor Hyman makes a heroic effort to quantify rescue behavior relevant to the traditional no-duty-to-rescue rule. Id. at 669-82. In addition to making some fascinating findings, Professor Hyman demonstrates overwhelmingly how difficult, if not outright impossible, it currently is to obtain hard measurements of these behaviors. Id. at 693. Professor Hyman himself concludes, "The results presented in this article do not allow one to reach firm conclusions as to the actual frequency of rescue and non-rescue in the United States because there is insufficient evidence that the studied sample of rescuers and non-rescuers is representative of the general population." Id.

80. See id. at 665 ("[C]onfirmable instances of non-rescue are actually extraordinarily rare events, occurring about 1.6 times per year in the entire United States during the past decade.").

81. See id. at 668 ("[C]onfirmed rescues outnumber non-rescues by approximately 740:1."); White, supra note 75, at 508 ("People, for moral or other reasons, often spring into action when they see their fellow citizens in danger.").

82. See Mary Ann Glendon, Looking for "Persons" in the Law, FIRST THINGS, Dec. 2006, at 19, 22 ("[A]ctual cases of failure to rescue rarely arise."); Hyman, supra note 32, at 706 ("[C]onsiderable evidence indicates that the real problem is that Americans are too willing to rescue in risky circumstances.").
In this sense, one can look at a duty-to-rescue rule as being a bit like an affirmative legal requirement that parents care for the basic physical needs of their newborn children. No one questions the importance of parents caring for their infant children or the significant social cost that would result if parents failed to do so, but the clear tendency of the overwhelming number of parents to care for their newborns, and to do so even in the absence of a formal legal rule requiring them to, strongly suggests that the existence of such a rule would have little practical effect on overall parenting behavior. It is of little surprise, therefore, that over time the American legal system has not developed a vigorous jurisprudence in this area.

In contrast, there are some behaviors deemed by society as useful and important for individuals to undertake, but in the absence of a coercive legal rule, many citizens are unwilling to undertake them. This may be the case even in the face of widespread consensus that the individual behavior is valuable or even necessary. One example of such a behavior is the payment of taxes to finance the operation of government. In the absence of a coercive legal rule and aggressive enforcement, one would expect a fairly low level of purely voluntary compliance with this behavioral norm, even among those who would acknowledge the validity of the norm itself. Hence, we see the maintenance of a very vigorous jurisprudence in this area of the law.

83. The National Center for Health Statistics reports that there were 4,066,000 live births in the United States in the twelve months ending September 2003. Paul D. Sutton & Martha L. Munson, Births, Marriages, Divorces, and Deaths: Provisional Data for September 2003, NAT’L VITAL STAT. REP., Feb. 13, 2004, at 1, 1, http://www.cdc.gov/nchs/data/nvhrs/nvhsr52/nvhsr52_16.pdf. There were 89,970 victims of child maltreatment under the age of one year in 2004. ADMIN. FOR CHILDREN & FAMILIES, CHILDREN’S BUREAU, CHILD MALTREATMENT 2004, tbl. 3-10 (2004), http://www.acf.dhhs.gov/programs/cb/pubs/cm04/table3_10.htm. These numbers project that slightly more than two percent of all infants under the age of one year were the victims of child maltreatment in 2004. While this number of infant victims is deplorably high, it does indicate that the overwhelming percentage of parents in the United States adequately care for their newborn babies.

84. In fact, the vast majority of jurisdictions recognize, or recognized, a general parent-child immunity. See, e.g., Hewellette v. George, 9 So. 885, 887 (Miss. 1891) (adopting the first formulation of parent-child immunity, which was subsequently overruled in Glaskox ex rel. Denton v. Glaskox, 614 So. 2d 906 (Miss. 1992)).

85. See generally Belli v. Comm’r, 57 T.C.M. (CCH) 1172, 1181 (1989) (“Expressing one’s feelings about the IRS . . . is not an element of tax fraud; if it were, our Federal prisons undoubtedly would be brimming with such ‘tax convicts.’ We fail to discern any requirement that taxpayers must enjoy or look forward to paying their taxes.”); Danshara Cords, Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs, 2005 BYU L. REV. 1515, 1522 (“Notwithstanding the popular maxim that ‘taxes are what we pay for a civilized society,’ most people would rather not give money to the government.” (footnote omitted)); Kenneth H. Ryesky, Taxation Unchecked and Unbalanced: The Supreme Court’s Denial of Certiorari in Sorrentino, 41 GONZ. L. REV. 505, 536 (2006) (“[N]o taxpayer
If one accepts that reasonably responding to another in peril is more like parents caring for their newborn than like paying taxes, one can then conclude that the practical benefit of switching from a no-duty-to-rescue rule to an affirmative duty-to-rescue rule would be quite modest. This is especially true as technological advances, like mobile telephones, often make a reasonable effort to aid another in peril easy and virtually risk free. Because the vast majority of persons subject to the rule are already thought to be engaging in the desired behavior, only the actions of the uncommon few who refuse to conform to the prevailing societal norm are subject to change. Whatever the cost of this candle, we can say with some confidence that the light that it will produce will be rather dim.

2. Reluctant Rescuers

Few overall changes in behavior are likely to result from the adoption of an affirmative duty to rescue. The assertion that high levels of uncoerced reasonable rescue efforts currently exist also allows the behavioral analysis to focus usefully on the predicted actions and reactions of those who would only engage in reasonable rescue efforts in the presence of a coercive legal requirement.

The situation is much like the recurring discussion among law school faculties about which courses in the curriculum should be required of all students prior to graduation. Take, for example, a course like corporation law. There are very interesting arguments, in the abstract, for the value of corporation law as a subject of study and as a necessary or desirable body of predicate knowledge prior to

is expected to have amorous feelings towards paying taxes, or towards the agencies that collect the revenue ... ").

86. See, e.g., 2007-8 I.R.B. 523 (containing eighty-eight pages of summaries of the Internal Revenue Service substantive rulings, comments, and explanations over a one-week period).

87. This is a faculty discussion that I have observed and in which I have participated in at no fewer than five different law schools over some twenty years. For references to the identification and modification of law school required courses in the literature, see Russell Engler, From 10 to 20: A Guide To Utilizing the MacCrate Report over the Next Decade, 23 PACE L. REV. 519, 556 (2003); Keith A. Findley, Rediscovering the Lawyer School: Curriculum Reform in Wisconsin, 24 WIS. INT'L L.J. 295, 326-28 (2006); Peter K. Rofes, Mandatory Obsolescence: The Thirty Credit Rule and the Wisconsin Supreme Court, 82 MARQ. L. REV. 787, 791-93 (1999). See generally Rena L. Steinzor & Alan D. Hornstein, The Unplanned Obsolescence of American Legal Education, 75 TEMP. L. REV. 447, 447-51 (2002) (advocating for continuous monitoring and reform of law school curricula); John C. Weistart, The Law School Curriculum: The Process of Reform, 1987 DUKE L.J. 317, 318-29 (discussing the history and variety of curricular reform proposals at American law schools).
practicing law in the modern world. In an important sense, however, these arguments are somewhat beside the point. The overwhelming majority of students do in fact take a course in corporation law and in other foundational subjects like constitutional law, evidence law, and commercial law before they graduate, even if not formally required. Thus, the more relevant inquiry is less whether such courses are generally valuable or invaluable, but why the small minority of students who choose not to take the course prior to graduation make that decision.

If I were to discover that most of the students who choose not to take corporation law do so because they were undergraduate business majors, held advanced degrees in business management or accounting, or were otherwise exposed to basic corporate law through experience in the securities industry or elsewhere and thus wished to spend their credit hours on a subject with which they were less familiar, I would feel one way about making corporation law a graduation requirement. On the other hand, if I came to believe that most of these students avoided the corporation law course out of a generalized distaste for business matters and the fear of having to work with numbers and finance, I would feel quite differently.

Similarly, in predicting the differences in behavior when society applies a no-duty-to-rescue versus an affirmative duty-to-rescue rule, the most useful analysis focuses only on the likely behavior of persons who would behave differently under the two competing rules, i.e., those who would only attempt to rescue because of an affirmative, coercive legal requirement to do so. These persons can be called, for convenience, reluctant rescuers. When thinking about reluctant rescuers, it should be acknowledged that not all persons who would choose not to reasonably aid another in the absence of a coercive legal rule would necessarily respond by engaging in the socially desired behavior when faced with the threat of tort law liability. After all, much more severe consequences now exist for those found guilty of


homicide, armed robbery, and other serious crimes, and yet people continue to commit those crimes.\textsuperscript{90} Moreover, situations in which a person comes across an opportunity to reasonably aid another in peril and chooses not to do so rarely present an easy opportunity for the victim to identify the potential defendant and subsequently bring suit.\textsuperscript{91} If the driver of the first car standing at the light of an intersection at which a severe collision has just occurred fails to pick up his mobile phone and call for emergency services, who among the potential plaintiffs is likely to ever know? What are the chances of detection and civil prosecution when someone passively watches a shopping cart strike its victims in the parking lot? Thus, the often undetectable nature of possible defendants diminishes further the practical effect of an affirmative duty-to-rescue rule.

Of course, the likelihood of identification as someone who failed to reasonably aid another in peril increases dramatically if there are bystanders other than the victim physically present.\textsuperscript{92} Consequently, one might expect those who would otherwise fail to render aid to be more likely to do so when there are other persons present. The relative importance of requiring a reluctant rescuer to act, however, decreases as the number of other people present on the scene and available to render aid to the victim increases. Therefore, it is likely that an affirmative duty to rescue will produce a greater number of additional rescue efforts in just those circumstances in which additional coerced rescue efforts are least needed.


\textsuperscript{92} See Hyman, supra note 32, at 700 ("[T]he likelihood of rescue [is] significantly affected by the number of witnesses . . . ").
In summary, the practical benefits of an affirmative duty to reasonably rescue in tort law would be quite meager, both because the existing level of uncoerced compliance is quite high and because the percentage of noncompliers likely to change their behavior because of a coercive rule will be small.  

B. The Likely Costs of a Coercive Rule

To this point in the argument, the focus has been on the minimal nature of the perceived benefits of switching from the current no-duty-to-rescue rule to an affirmative duty-to-rescue rule. As such, the analysis is vulnerable to the following challenge: why not switch to a more morally intuitive and satisfying legal rule, even if such a switch is likely to result in only an insignificant increase in the number of rescue efforts? Is it not better, particularly from a potential victim’s point of view, to increase the number of rescue efforts modestly than not at all? After all, an affirmative-duty rule that has only slightly better results than the current no-duty rule is still a superior rule.  

To support the no-duty rule in the face of this challenge, likely costs of an affirmative duty must be identified and shown to outweigh the modest benefits that an affirmative duty promises. This goal can be achieved by shifting the standard by which the superiority of one rule over the other is measured. Thus far, the analysis has proceeded as if the superior rule is the one that results in the greater number of rescue efforts when such efforts are reasonable under the circumstances. This seems eminently sensible, because most of us, if placed in a position of peril, would presumably prefer a greater likelihood of rescue to a smaller one.

1. Refining the Goal of the Doctrine

It is important to recognize, however, that not all rescue efforts, even efforts deemed reasonable under an affirmative-duty rule, will result in an improvement in the victim’s condition. Inevitably, some affirmative attempts by strangers to aid others in peril will cause

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93. See Eugene Volokh, *Duties To Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 106 (1999) ("Those who don’t respond to the social norm of helping people in distress—at least by calling 911—probably aren’t likely to be swayed by the normative effect of a new duty-to-rescue/report law.").
94. See, e.g., Eisenberg, *supra* note 34, at 678 (noting the benefits of an affirmative duty-to-rescue rule, such as marking societal norms, that are unrelated to the increase in percentage of potential rescues).
greater harm than good. The best intentioned rescuer could move the victim of the fresh car accident into a seemingly more comfortable position and as a consequence aggravate his injuries. The person seeking to help a stranger in distress on the sidewalk could pick up their mobile phone and, flustered and distracted, badly misidentify to emergency personnel the location of the victim.

The fact that an affirmative duty-to-rescue rule would encourage only reasonable rescue efforts will do nothing to alleviate this problem. The rule, embedded in negligence law, would compel the potential rescuer to affirmatively act only if, and only to the extent that, a reasonably prudent person faced with similar circumstances would act. The incentive to act has its primary effect when the potential rescuer is faced with the possibility of rescue action ex ante. Thus, the rule cannot discriminate between rescue efforts that subsequently benefit the victim and those that go awry.

For example, imagine a defendant who is boating on a lake and comes across a person stranded in the water, clinging desperately to an overturned canoe. An affirmative duty-to-rescue rule in negligence law would expose the defendant to liability if he failed to take reasonable action to aid the other. So if the defendant could have easily thrown the victim a flotation device and did not and as a result the victim suffered greater harm, liability would be likely. If, all things considered, diving into the water to attempt a more vigorous hand-to-hand rescue would have exposed the defendant to unreasonable risk, then the defendant’s decision not to do so should trigger no liability.

In neither case, however, should the specific outcome of the defendant’s decision to affirmatively aid properly factor into the analysis of whether the decision to rescue was reasonable or not. It is, at least in the abstract, reasonable for the defendant to throw the victim a flotation device whether the victim is effectively spared from

95. See, e.g., Sagan v. United States, 342 F.3d 493, 495-96, 2003 AMC 2597, 2598-99 (6th Cir. 2003) (reviewing a claim that the Coast Guard delayed a water rescue and significantly worsened the victim’s condition); United States v. DeVane, 306 F.2d 182, 183-86, 1963 AMC 1400, 1401-06 (5th Cir. 1962) (reviewing a claim that the cancellation of a water search and rescue effort was negligent and proximately caused the death of boat captain); United States v. Gavagan, 280 F.2d 319, 323-30, 1961 AMC 1439, 1443-53 (5th Cir. 1960) (reviewing a claim that the negligent direction of a maritime rescue effort resulted in the death of shrimp boat crew); United States v. Lawter, 219 F.2d 559, 560-62, 1955 AMC 637, 638-41 (5th Cir. 1955) (finding negligence in allowing an untrained individual to participate in helicopter rescue that resulted in the death of the victim).

96. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

97. See Eisenberg, supra note 34, at 681-82 (noting a duty-to-rescue rule “imposes an affirmative obligation” on potential rescuers and that omissions can result in liability).
drowning or instead the throw is misjudged, strikes the victim on the head, and takes him under. Similarly, the reasonableness of the defendant attempting a rescue by personally diving into the water should be determined independently from the actual outcome of the rescue effort.

As a consequence, an affirmative duty to rescue will encourage a greater number of reasonable rescue efforts irrespective of whether or not these additional rescue efforts result in actual benefit to the victim. Inevitably, some additional rescue efforts that in fact do the victim no good or result in greater harm to the victim will occur as a result of the adoption of an affirmative-duty rule. Under either an affirmative-duty or a no-duty regime, the actions of a rescuer, once begun, will be subject to a duty of reasonable care, but that is not relevant one way or the other to this aspect of the no-duty-to-rescue analysis.

The standard to determine the superiority of either the no-duty or the affirmative-duty rule should not be the degree to which one rule or the other encourages a greater number of rescue efforts. Instead, the more appropriate measure is the degree to which one rule or the other creates conditions in which the victim's situation is likely to be improved. The superior rule should result not just in more rescue efforts, but in more successful rescue efforts.

2. Replacing Higher Quality Rescue Efforts with Lower Quality Efforts

From this perspective, at least one more characteristic of rescue situations should be noted. While not always the case, a great many potential rescue situations possess an aspect of exclusivity. That is to say, in a large number of circumstances in which a person in peril needs aid from another, the natural inclination to offer help diminishes significantly once someone else has begun the effort. It is far less likely that a bystander will move to help a stranger lying on the ground in the park in obvious medical distress if he sees that someone else is already kneeling down beside him. A driver is far less likely to pull his car over to the side of the road in response to a recent accident if his will be the third or fourth car to do so.

This natural tendency identifies a potential practical cost of encouraging a greater number of rescue efforts through adoption of a

98. See Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[O]ther potential rescuers (if any) will be less likely to assist if they see that someone is already at the scene giving aid."); Romohr, supra note 32, at 1032-33 ("[A] potential rescuer is less likely to attempt a rescue if another is already giving aid.").
formal duty to affirmatively aid. The argument goes like this: the only persons whose behavior will be altered in the switch from a no-duty to an affirmative-duty rule are the reluctant rescuers, the individuals who will attempt a rescue effort only under a coercive rule out of fear for their potential liability if they do not. Given their attitude and motivation, such rescuers can be expected, in general, to engage in a lower quality of rescue effort than would a purely altruistic rescuer, who would choose to act on their own under either legal regime. Given the often exclusive nature of rescue situations, the actions of a reluctant rescuer will sometimes preempt, and thereby replace, the actions of an altruistic rescuer. In such situations, the victim will, as a result of the existence of the coercive rule, receive a lower quality of affirmative aid than he otherwise might. This substitution in some situations of a higher quality altruistic rescuer by a lower quality reluctant rescuer represents a cost to victims generated by the adoption of an affirmative duty to aid.

One possible objection to this argument might be that a victim would prefer even a reluctant rescuer to no rescuer at all in those situations in which the only possible rescuer is a reluctant rescuer. While this is almost certainly true, its practical significance may be quite small.

Remember that reluctant rescuers are those individuals who would not act to aid the victim in the absence of a legal requirement, but who would act in the presence of a coercive legal rule.99 Perhaps some of these individuals would change their behavior out of abstract respect for the law. Assuming that the overwhelming majority of reluctant rescuers change their behavior from fear of liability should they breach the legal duty, it is reasonable to assume that they are more likely to act in those situations in which their exposure to liability would be greatest and, conversely, that they would be least likely to act, even in the presence of a legal duty to do so, in those situations in which they are unlikely ever to be held legally liable for doing nothing. Doing nothing, after all, is the preferred behavior of the reluctant rescuers in the absence of a coercive rule.100

In a world in which a duty to affirmatively aid exists, a person could most easily be held liable by the victim for failing to reasonably aid when the defendant's failure occurred in a setting in which other

100. See supra Part III.A.2.
persons were present. Conversely, the risk of eventual liability for failing to reasonably act would presumptively be smallest in those situations in which only the victim and the defendant were present. Thus, a reluctant rescuer, prepared to reasonably aid another only because such action will avoid possible liability, is far more likely to engage in rescue efforts when others are present to observe his failure to do so than in circumstances where no one else is likely to know of his failure to act.

Therefore, the presence of a coercive legal duty to affirmatively aid will most effectively encourage reluctant rescuers to act in those situations in which other people are present, and these are exactly the situations in which the actions of the reluctant rescuer are most likely to supplant more desirable altruistic rescue efforts. It is in those situations in which no one else is present, and the reluctant rescuer's actions are most needed by the victim, that the coercive legal rule generates the weakest incentive for the reluctant rescuer to act.

Thus, while the adoption of an affirmative duty to aid can be expected to increase the overall number of rescue efforts, the additional rescue efforts generated by the duty-to-rescue rule can be expected to be relatively small in number and more likely to occur in those circumstances in which they would impose an undesirable burden on the victim by supplanting higher quality efforts to help.

3. Discount of Altruism

Another cost associated with the adoption of an affirmative duty to aid can be identified by looking at the effect of such a rule on the majority of persons whose behavior would be unchanged in the shift from a no-duty to an affirmative-duty regime. For these individuals who would shout a warning to those in the path of a runaway shopping cart and otherwise would act reasonably to aid another in peril, the adoption of an affirmative-duty rule marks a subtle, but arguably profound, shift in the social quality of that behavior.

Under the current no-duty doctrine, there is little doubt that those who undertake rescue efforts on behalf of another are doing so voluntarily and altruistically, and they may rightfully enjoy higher self-

101. For previously discussed rationales of identification and the disinclination to attempt rescue when other bystanders are present, see supra Part III.A.2.
102. See supra Part III.A.2.
103. See Eisenberg, supra note 34, at 682 (detailing and responding to the argument that a duty to rescue may reduce the moral quality of the rescue).
esteem and greater regard by others as a result. Conversely, if a legal duty to affirmatively aid were adopted, these same behaviors by these same individuals under the same circumstances could be viewed as no more than mere compliance with the legal requirement, engaged in as much out of a desire to avoid subsequent legal liability as from genuine altruism or beneficence. In the eyes of others, and perhaps to some extent to themselves as well, the nature of their act has been transformed from the manifestly honorable to the merely compliant.

This effect can be called a discount of altruism. Assuming that an overwhelming percentage of persons will at least act reasonably on behalf of another in peril in the absence of a coercive legal rule, then the adoption of a coercive duty to act will, in a sense, taint the moral and social quality of socially desirable behavior that would have been engaged in by the vast majority of persons anyway. Such altruistic, praiseworthy behavior will be transformed and diminished to not much more than ordinary obedience of the law and compliance with the minimum social expectation that is articulated by that law. While this may not be a devastating tangible cost of adopting an affirmative duty to act, it is a significant intangible cost and will affect most persons who actually engage in affirmative rescue efforts.

4. Greater Intrusiveness of Second-Guessing

Another cost of an affirmative duty to rescue focuses less on a particular group of actors than on the broader nature of an affirmative duty to act. The argument begins with an appreciation for the fact that the great complex of formal second-guessing that is tort law negligence, unbounded by the prosecutorial discretion that is integral to criminal law, is a rather intrusive system of oversight and regulation. As noted earlier, the implicit burden of reasonable care and the threat of liability for its breach apply to nearly every imaginable action that can proximately cause harm to another.

Now, it is one thing to say to the citizens of a jurisdiction that when you choose to go out in the world and seek your fortune and your pleasure, you must behave with reasonable care toward other persons and their property. It seems reasonably appropriate for society to determine that when individuals venture out to seek their

104. See sources cited supra note 1.
105. See Eisenberg, supra note 34, at 682-83 (noting the moral argument about diminishing the social quality of the rescue).
106. See supra notes 57-60 and accompanying text.
107. See KEETON, DOBBS, KEETON & OWEN, supra note 37, § 33, at 193.
satisfactions, they should be mindful of and should answer for harm that they carelessly inflict on others. 108

On the other hand, it is entirely and importantly different for society at large to say to an individual that it will not only second-guess the reasonableness of his behavior when he affirmatively moves about in the world, but that it will also, with his assets at risk, second-guess his decision not to act at all. 109 While it may be a fair societal determination to impose a formal duty of reasonable care when one enters the game and chooses to play, it is something else altogether to second-guess the reasonableness of one’s decision not to play at all.

It must be remembered here that the affirmative actions taken by a rescuer, reluctant or voluntary, can always be the object of a subsequent negligence claim should those actions go awry and cause greater harm to the plaintiff. 110 Thus, under an affirmative duty-to-rescue rule, reluctant rescuers are forced into action when they otherwise would have done nothing and are then subjected to the second-guessing mechanism of negligence law with respect to the quality of those coerced actions. 111

In effect, under an affirmative duty to act, there is no space to which a person can retreat and, in exchange for doing nothing at all, in exchange for seeking nothing at all, avoid the otherwise constant gaze of the reasonably prudent person. 112 With an affirmative duty to act, that final refuge will be penetrated. There will exist no sanctuary in which the pervasive duty of reasonable care will not reach. The elimination of that final private space marks a degree of intrusiveness by negligence law that, while perhaps practically modest, is theoretically and symbolically profound. It inevitably involves an undesirable degree of intimate intrusiveness on the autonomy of individual choice and judgment.

108. Responsibility for negligence is well-accepted and has been for years. See, e.g., Heaven v. Pender, (1883) 11 Q.B.D. 503, 509.

109. See Silver, supra note 30, at 429-30 (noting the difference between liability for commissions and omissions).

110. See McDowell v. Gillie, 626 N.W.2d 666, 669 (N.D. 2001) (“If one voluntarily undertakes to rescue or render aid to a stranger, the rescuer is liable for any physical harm that results from the failure to exercise reasonable care’’); Jackson v. Mercy Health Ctr., Inc., 864 P.2d 839, 842 (Okla. 1993); RESTATEMENT (SECOND) OF TORTS § 323 (1965).

111. See PROSSER, supra note 28, § 56, at 344 (“[T]he good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.’’).

112. See id. § 56, at 343 (noting that when an affirmative duty to aid exists, a defendant will be charged with acting reasonably).
5. Increased Risk of Harm to Rescuers

It was argued earlier that the proper measure of the superior legal rule regarding rescues should not be the encouragement of the maximum number of rescue efforts or even the maximum number of reasonable rescue efforts. Instead, it should be the creation of conditions which encourage the maximum number of successful outcomes for the victims in peril. Additionally, the superior rule should also encourage the maximum number of successful outcomes for the individual engaging in the rescue effort. In other words, while rescue efforts may go awry and place the victims in greater peril, they may also turn out badly for the rescuers themselves, causing them harm.

It is conventional wisdom in professional lifesaving circles that unless you are well trained and confident of success, you should not jump into an emergency situation in an attempt to save another. Much too often such behavior results in two victims rather than one successful rescue. More generally, it is obvious that an attempt to provide aid to someone in peril could, in a wide range of circumstances, result in injury or death to the rescuer.

113. See supra Part III.B.1.
114. A search in Westlaw's ALLNEWS database on November 6, 2007, for documents that contained "'good samaritan' w/ 5 (injured or killed)" returned 366 stories for just the past year. Some of these stories report the same incident, and a few do not report a circumstance involving injury or death to a Good Samaritan while providing assistance, but the overwhelming majority do. See, e.g., Kim Bell, Good Samaritan in Starbucks Case Dies, St. Louis Post-Dispatch, Mar. 5, 2008, available at 2008 WLNR 4392492 (reporting on a Good Samaritan struck by vehicle while trying to stop a thief); Clarence Williams & Allan Lengel, Man Killed by Cement Mixer, Wash. Post, Feb. 8, 2007, at B3 (reporting on a Good Samaritan struck and killed by a truck as he was directing traffic); see also Roberts v. Burlington Indus., Inc., 364 S.E.2d 417, 418-19 (N.C. 1988) (reviewing the case of a Good Samaritan hit and killed by a car while aiding the victim of an earlier collision); Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61, 63, 1991 AMC 2914, 2915-16 (Tex. 1991) (reviewing the case of the Good Samaritan who barely escaped free a boat propeller and was fatally crushed between the boat and a barge).
115. See, e.g., A.J. McLean ET AL., AUSTRALIAN DEP’T OF TRANSP. AND REG’L SERVS., CR 59: HEAD AND NECK INJURIES IN PASSENGER CARS: A REVIEW OF THE LITERATURE § 7.2 (1987), http://www.atsb.gov.au/publications/1987/Injury_Pass_1.aspx (“[N]on-medical personnel are often the first to attend to a road crash victim, and if untrained, poorly trained or careless, they may disregard correct methods of handling spinal injured people and so risk the victims [sic] entire future.”); Steve Hudson, Editor's Report, Dixie Contractor, Feb. 19, 2007, at 5, available at 2007 WL 3473271 (“‘Expertise is essential when working to rescue a trapped person .... Many cases of multiple accidents are the result of unqualified cowokers or untrained rescuers attempting to save the victim.’”).
116. See, e.g., Pachesky v. Getz, 510 A.2d 776, 777 (Pa. Super. Ct. 1986) (reviewing the case of a woman injured while attempting to aid a man whom she observed as unconscious and slumped over the steering wheel of his car in the middle of the street);
This is an inherent risk involved in choosing to provide another with affirmative aid, especially under emergency conditions. It is part of what makes rescue efforts morally praiseworthy and sometimes even heroic. It is a risk that every person who provides aid to another in peril voluntarily assumes under the current no-duty-to-rescue regime.

This risk, however, under an affirmative duty-to-rescue doctrine, will fall upon reluctant rescuers only because of their coerced compliance with the legal rule. Some of these reluctant rescuers will inevitably be injured in the course of their rescue efforts. Some will die. By definition, no reluctant rescuers will suffer such harm under a no-duty-to-rescue rule, and this difference must be counted as a cost of an affirmative-duty regime.

This concern can be extended one small step further. Criminals sometimes prey upon their victims by posing as someone in need of assistance or emergency aid. For example, a predator could ask for directions and try to draw the victim into his car to point the way on a map. A predator could impersonate a motorist stranded on the shoulder of a remote road next to a disabled automobile. If an affirmative-duty-to-rescue doctrine is to have any practical effect at all,

Joshua Dressler, Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws, 40 SANTA CLARA L. REV. 971, 984 n.58 (2000) ("[T]here is never true risk-free assistance . . . ."); Hyman, supra note 32, at 668 ("At least 78 Americans lose their lives every year as a result of attempting to rescue someone else, while there were only 1.1 deaths per year attributable to non-rescue.").

117. See Dressler, supra note 116, at 984 & n.58 (arguing that in every case of assistance there is some level of risk posed to the rescuer).

118. See supra Part III.A.2.

119. See Hyman, supra note 32, at 668-69 ("[A] substantial percentage of risky rescuers and a significant number of non-risky rescuers were injured—sometimes quite severely."). This cost is not mitigated, at least from society's perspective, by the existence of the so-called "rescue rule" that permits a person injured in a non-negligent rescue effort to recover against any defendant who negligently placed the victim in peril, including the victim himself. See Dillard v. Pittway Corp., 719 So. 2d 188, 193 (Ala. 1998); Boddie v. Scott, 722 A.2d 407, 412 (Md. Ct. Spec. App. 1999); Estate of Minser v. Poinsette, 717 N.E.2d 1145, 1148 (Ohio Ct. App. 1998). Frequently the damage award is an insufficient remedy. See White, supra note 75, at 520-27 (critiquing the current rescue doctrine as not providing adequate protection).

120. See sources cited supra note 114.

its presence should result in a greater number of rescue efforts in such situations as these than would occur in its absence. In every such case in which the apparent victim in peril is in fact a lure for criminal activity and the actual victim-rescuer would not have been drawn in but for the existence of a legal duty to rescue, the resulting harm inflicted upon the victim is another cost of an affirmative-duty rule.

6. Disincentive To Cooperate in Subsequent Investigations

Consider again the infamous Kitty Genovese incident described above. In the current environment in which no duty to rescue, either civil or criminal, generally exists, an individual who is present when another is in peril and chooses to do nothing may be subject to moral condemnation, but they face no exposure to legal liability. As a result, their willingness to cooperate with police who may be investigating the harm suffered by the victim is not affected by the current status of the legal rule regarding rescues.

All this would change with the adoption of a formal legal duty to rescue. Under such a rule, all individuals who fail to assist at the scene of an accident would face the possibility of liability for their failure to render aid. That is, of course, the intended operation of a duty-to-rescue doctrine. For those who believe that they may have breached the legal duty, such a regime would create a significant disincentive to cooperate with investigations of the incident and with any subsequent prosecutions. The disincentive would be felt both by those who failed to act altogether as well as by those who are concerned that they may not have done enough to satisfy the legal requirement.

This deterrent would be generated by the adoption of either a tort law or a criminal law duty to rescue. However, with a criminal law duty to rescue, police and prosecutors would have the option of granting an important witness immunity for the failure to aid sufficiently in exchange for their cooperation with the investigation. No such option would be available with a tort law duty to rescue.

122. See supra notes 15-17 and accompanying text.
123. See supra note 61 and accompanying text.
124. See PROSSER, supra note 28, at 343.
7. Deterrence To Provide Delayed Aid

A formal duty to affirmatively aid would also discourage those who initially fail to help another in peril from reconsidering their decision and subsequently taking action. Suppose, for example, that a driver on a road late at night in a relatively rural area comes across two badly damaged cars on the shoulder of the road that appear to have just collided. Both cars are badly damaged. A figure is slumped behind the steering wheel of one car. Another person is standing on the shoulder of the road waving for help. Startled by the scene and a little frightened, the driver drives right past without stopping. After driving for another minute or two, he calms down a bit and begins to think about turning around and going back to help.

In the absence of a legal duty to rescue, the ultimate decision will depend upon each individual’s own unique personal complex of considerations. If there exists a legal duty to affirmatively aid, however, the potential rescuer must also consider the significantly increased risk of liability for his initial failure to help. By returning, the rescuer becomes known and identified. No matter how grateful the person flagging the driver down may be when he returns, they may feel differently some time later. How will the person still in their car and slumped behind the wheel react upon hearing that his rescuer initially passed them by? Even in merely picking up a mobile phone and notifying the authorities of the existence and location of the accident scene, the rescuer’s identity and failure to stop initially or subsequently turn around will be known. Thus, an affirmative duty to rescue creates barriers for an individual rethinking an initial failure to aid and considering making an effort at providing delayed aid.

And so, the basic rationale supporting the maintenance of a no-duty-to-rescue rule in American tort law involves at least seven main arguments: (1) because of the already high level of uncoerced reasonable rescue efforts, the increase in the number of such attempts that will be produced by adoption of a coercive rule will be quite small; (2) because all of the increase in rescue efforts will come from reluctant rescuers, because the quality of rescue efforts by reluctant rescuers generally will be of lower quality than that of purely voluntary rescuers, and because lower quality coerced rescue attempts will
sometimes replace higher quality voluntary rescue efforts, it is not at all clear that a person in peril requiring affirmative aid from another would be better served, as a purely practical matter, by a formal duty to affirmatively aid; (3) the existence of an affirmative duty to aid would discount the obvious altruism of otherwise voluntary rescue efforts; (4) it would be a significant and unwelcome extension of the intrusiveness of negligence law's duty of reasonable care; (5) it would increase the risk that harm will be suffered by those providing rescue efforts; (6) for those who fear that they may have breached an existing duty to rescue, it would create a disincentive to cooperate with the authorities or the plaintiff in subsequent investigations of the incident; and (7) it would deter providing delayed aid.

C. Problematic Aspects of a Breach of a Duty-To-Rescue Claim

The existence of an affirmative duty to rescue within tort law would be enforced through a negligence action brought by the victim or the victim's wrongful death beneficiaries against those persons who failed to provide the victim with at least reasonable rescue efforts. In a number of different ways, this would represent a particularly poor context for the operation of the normal second-guessing mechanism of negligence.

1. Duty

One difficulty would involve the formulation, even implicitly, of a consensus regarding the circumstances that should trigger the legal obligation to affirmatively aid.\textsuperscript{126} In other words, just what kind of peril faced by another is sufficient to compel one to take affirmative action on their behalf?

There will of course be easy cases, like the person drowning or being attacked on a public street. But there will be an endless series of difficult cases: an adult loudly scolding a young child in public, perhaps using profanity and harsh insults, perhaps also vigorously shaking the child; teenage siblings locked in a physical wrestling match that appears to be intensifying and growing more hostile, either in public or in their own backyard; a nearby passenger on the train who is having her wallet quietly lifted from her bag by the person sitting

next to her; a colleague who is the victim of vicious and false rumors at the workplace.

Unlike the typical negligence claim, in which the affirmative action of the defendant invokes the legal obligation to engage in that action reasonably, breach of a duty to affirmatively aid will require the decision makers, be it judge or jury, to decide in a wide range of uncertain circumstances whether any legal obligation existed for the defendant to have acted at all. Few clear social conventions exist to guide the formal decision makers in this task or to inform the public at large about their likely judgments. An enormously wide range of responses to essentially similar situations could be expected both within and across jurisdictions, raising serious due process concerns. Risk-averse individuals might be expected to react to this inevitable uncertainty by affirmatively acting in an ever greater number of questionable circumstances.

2. Breach

Assume a relatively easy and rather common set of facts in which most of society would attach a formal duty to rescue: the defendant is driving on a public road and comes across two cars located on the shoulder obviously having recently collided with one another. There are a few people located in and around the cars but no other vehicles in sight. Apparently the defendant is the first person not directly involved in the collision to arrive at the scene.

What would be required of the defendant in such a situation to fulfill a legal duty to reasonably rescue and to avoid liability for a breach of that duty in a subsequent negligence action? Is making a call to official emergency services and notifying them of the existence and location of the accident scene enough? Is it sufficient to wait and make that call at the next pay phone (increasingly unavailable these days) if the defendant does not have a mobile phone in the car? Must

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127. See Epstein, supra note 35, at 199 (commenting on the unpredictability of determinations, "it becomes impossible to tell where liberty ends and obligation begins").

128. See Silver, supra note 30, at 431 (1985) (noting that commentators "have expressed the concern that, in many situations, there would be uncertainty about the need to intervene, and that this may lead to 'officious intermeddling' in the affairs of strangers"); see also Harvey A. Hornstein, The Influence of Social Models on Helping, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 29, 29-31 (J. Macaulay & L. Berkowitz eds., 1970) (noting that when the behavioral demands of society are unclear, an observer bases his behavior on the behavior of others).
the defendant vigorously search for the nearest available pay phone? Should he exceed posted speed limits in doing so?

Before making a call to the authorities, what kind of precautions should the defendant take to ensure that he is correct about the location of the cars and the number and condition of the people on the scene? Should the defendant at least stop or pause briefly at the scene to determine the extent of any critical injuries and the general condition of the victims before determining that a phone call alone is a sufficient reasonable response?

The answers to the above questions, all absolutely relevant to the determination of the defendant's actual breach of a duty to reasonably rescue, could be expected to vary significantly depending on slight changes in the factual circumstances. How remote was the location of the accident scene? How heavy or light was the traffic on the road at the time? Did this occur in the middle of the day or late at night? What were the weather conditions? How many people did the defendant see at the scene and in what condition? Were there children, either with or without adults? How old was the defendant and was he alone or with others in his car? Has the defendant ever had any experience or training in rendering emergency aid?

The behavior required of the defendant to satisfy the legal duty and to avoid subsequent liability will vary significantly based on the specific answers to these questions and many others. In making the determination of whether the defendant failed to take sufficient, reasonable affirmative action to aid the victims, the legal decision maker will most likely not enjoy the benefit of an existing social custom or industry standard with respect to such behavior as is often available in negligence cases. This distinguishes the breach in a duty-to-rescue case from even the most complicated medical malpractice case, where the jury at least has the benefit of extensive expert testimony describing the customary professional standard of care and procedures typically used under circumstances similar to those faced by the defendant.

The determination of what a reasonable affirmative response should be in even the most straightforward factual circumstance is obviously a very complex and subtle social calculation. It does not

129. See supra notes 41-50 and accompanying text.

easily yield clear and objective conclusions. It is fraught with value judgments and beliefs about the appropriate nature of relations and obligations among strangers in a complicated society. It is necessarily rooted in cultural and religious traditions and practices. It is hardly easy work for judges and juries, and the results reached by them over time and across different jurisdictions can be expected to vary wildly and frequently be inconsistent and contradictory.

3. Nature of Evaluation

Even in the small number of cases in which both the need to affirmatively aid and the nature of a reasonable affirmative response are fairly determinable, a claim for a breach of a duty to reasonably rescue is a particularly poor context in which to engage in the usual second-guessing project of negligence.

Unlike the typical negligence case in which the defendant is accused of having engaged in some behavior in an unsafe manner, like failing to adequately maintain the brakes of his car or stocking an insufficient supply of bottled oxygen in a surgical theater, the defendant in a breach-of-duty-to-rescue case is most likely confronted suddenly by the situation of the plaintiff in peril. The circumstances probably call for a very quick assessment by the defendant and an equally quick response to provide the plaintiff with effective assistance, especially if the risk threatening the plaintiff is severe.

A given individual's response when unexpectedly thrust into such a situation is probably determined, in whole or in part, by largely immutable elements of their personality: by their quickness of thought and action, their confidence in the face of pressure to physically perform, their fear of failure, their tendency to freeze when taken by

131. Steven Hetcher, The Jury's Out: Social Norms' Misunderstood Role in Negligence Law, 91 GEO. L.J. 633, 640 (2003) ("[I]t is predictable that jurors, when attempting to engage in good faith deliberations, will fall back on their ordinary moral intuitions regarding the demands of reasonableness.").

132. See id. at 646-52 (arguing that juries rely on their everyday practices and customs rather than a cost-benefit analysis in determining reasonableness in negligence liability).

133. See Dilan A. Esper & Gregory C. Keating, Abusing "Duty," 79 S. CAL. L. REV. 265, 280 (2006) ("The application of the reasonable person standard requires bringing a number of considerations to bear and reasonable people may reasonably disagree over how to evaluate the significance of particular factors even when they agree on the facts." (footnote omitted)).

134. See, e.g., Buckley, supra note 1 (exemplifying the suddenness of a rescue situation).
surprise, their natural athleticism and physicality, etc.\textsuperscript{135} This is in contrast to the typical negligence action where the defendant’s judgment on safety and his willingness to expend resources on adequate precautions in advance of the actual harm producing circumstance is the focus of the second-guessing inquiry.\textsuperscript{136} For example, did the defendant reasonably maintain the brakes on his automobile in the months preceding the actual day that they failed and the car smashed into the rear of the plaintiff’s vehicle? What procedures did the hospital have in place to ensure that the operating theaters were adequately stocked with bottled oxygen before and on the day of the actual injury?

The incentive that negligence law creates for the public at large to act with reasonable care towards others works best when it reviews the safety judgment exercised by the actor and can be satisfied by considered investment in greater precaution.\textsuperscript{137} This incentive is far less likely to be effective when it is directed, as it most often would be in failure-to-reasonably-rescue cases, to the quality of the defendant’s reaction to a sudden and highly pressurized situation that demands a rapid physical response. To the extent that a given individual’s ability to perform in such circumstances is a function of largely immutable personal characteristics, the threat of legal liability for the failure to react adequately is unlikely to result in much of an increase in the actual quality of such reactions.\textsuperscript{138} This is particularly pernicious in a failure-to-adequately-rescue situation where the defendant’s decision to act at all, and in a way that is now being evaluated for its adequacy, may well have been influenced, if not coerced, by the very existence of a duty-to-reasonably-rescue rule.

Moreover, the glacially paced, backward-looking, highly formal context of negligence litigation is far better suited to a second-guessing of the defendant’s underlying judgment regarding safety and his investment in adequate precautions. While perhaps not perfect, one

\textsuperscript{135} See Schiff, supra note 30, at 110 (“The emotions of the bystander who wishes to intercede but remains undecided do not foster clear and reasonable thinking. Immediately upon witnessing an accident or violent crime, the would-be Good Samaritan experiences: ‘first, the intense emotional shock—characterized predominantly, but not exclusively, by anxiety; second, the cognitive perception and awareness of what has happened; third, an inertial paralysis of reaction, which as a non-act becomes in fact an act, and fourth, the self-awareness of one’s own shock anxiety, non-involvement which is followed by a sense of guilt and intra-psychic and social self-justification.’”).

\textsuperscript{136} This is the essence of the Learned Hand formula. See Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101-05 (N.Y. 1928).

\textsuperscript{137} See supra note 135 and accompanying text.

\textsuperscript{138} See supra Part III.B.2.
can imagine a jury taking in the offered evidence and then carefully considering in the leisure and hindsight of its deliberations whether the defendant took reasonable care of his automobile brakes or took reasonable measures to ensure that a sufficient supply of bottled oxygen was present in the operating theater. Far less confidence can be invested in the thought of these same jurors trying to summon the specific empathy to place themselves in the emergency situation faced by the defendant and accurately imagine how they, or a hypothetical reasonable person, would have reacted.\textsuperscript{139} The whole of the defendant’s encounter with the plaintiff in peril and the defendant’s response thereto probably lasted no more than a few minutes. In stark contrast, the jury’s review of the defendant’s performance will take place years later, in the abstract, and at a very deliberate pace.

IV. THE PREFERRED LEGAL TREATMENT OF SPECIALY TRAINED INDIVIDUALS

A. The Possibility of Crafting a Duty To Rescue for Specialy Trained Individuals

Even accepting that the general population should not have a formal duty to rescue, does it make sense to add a fourth exception to the list of established exceptions to the no-duty-to-rescue rule that would cover only individuals specially trained, experienced, or possessing a certification in rendering aid?

One argument in favor of such a doctrine is that because such persons already possess an obligation to affirmatively aid a stranger in peril arising from the ethical mandates of their profession or a requirement of licensure, the adoption of a formal duty to affirmatively aid for such persons would not come with the cost of significantly discounting the altruism of the act because it is required already. Nor would it add any additional level of intrusiveness to the formal duty of reasonable care.\textsuperscript{140} Another argument in favor of such a limited duty is

\textsuperscript{139} See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties To Help Strangers, 71 WASH. U. L.Q. 1, 26-27 (1993) (“[E]xpansive territory lies between moral athleticism and minimally decent Samaritanship, and because any intervention involves at least some risk (if only in the form of opportunity cost), the proof process would be a difficult one.” (footnotes omitted)).

\textsuperscript{140} For example, an affirmative duty to rescue would not create any additional obligations for medical professionals. See WORLD MED. ASS'N, WORLD MEDICAL ASSOCIATION INTERNATIONAL CODE OF MEDICAL ETHICS (2006), http://www.wma.net/e/policy/c8.htm (“A physician shall give emergency care as a humanitarian duty unless he/she is assured that others are willing and able to give such care.”); CANADIAN MED. ASS’N, CODE
that the risk of low quality rescue efforts would be relatively small, whether the rescue efforts were purely voluntary or coerced. One would, therefore, not expect a meaningful difference, on the whole, in the quality of rescue effort between voluntary and reluctant rescue efforts that were undertaken by the specially trained. Thus, it could be reasonably asserted that at least three of the arguments that support the no-duty-to-rescue rule with respect to the public at large do not apply, either at all or with nearly the same force, to those who possess special training, experience, or certification in emergency aid.

On the other side of the issue, those with special training could be divided into two groups: those who operate under an independent professional obligation to affirmatively aid and those who do not. For those who possess an obligation not arising from any duty of care in negligence law, the existence of a formal legal duty would be superfluous. Among this group, one would expect the adoption of a legal duty to rescue to generate no more than a trivial number of additional rescue efforts, if it encouraged any additional rescue efforts at all. Thus, the substantive effect of adopting such an affirmative duty would be practically nil, consigning to irrelevance, for the purpose of this analysis, the higher quality of coerced rescue efforts, the lower discount of altruism, and the smaller degree of intrusion that might exist within this group.

Among the other group, those specially trained individuals who do not bear an extralegal obligation to provide affirmative aid to a stranger, it should be conceded that the quality of coerced rescue is likely to be higher than the quality of rescue efforts coerced from reluctant rescuers at large, and probably high enough, given their special training, not to pose any significant problem for those in peril. Despite a higher quality of coerced rescue efforts, however, the

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141. The Principles of Medical Ethics (Principles) adopted by the American Medical Association in 1957 included the statement: “A physician may choose whom he will serve. In an emergency, however, he should render service to the best of his ability.” AM. MED. ASS’N, PRINCIPLES OF MEDICAL ETHICS § 5, at 2 (1958). The rendering of this standard, adopted in the 1980 and 2001 versions of the Principles, softens the articulation of this obligation dramatically, transforming it into, at most, an implicit implication of the statement. The current version of the principle reads, “A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care.” AM. MED. ASS’N, PRINCIPLES OF MEDICAL ETHICS princ. VI (2001). Both versions of the principles are available at http://www.ama-assn.org/ama/pub/category/4256.html (last visited Mar. 13, 2008).
number of additional rescue efforts induced by a formal duty imposed upon the specially trained would be quite small and very much smaller than among the population at large. After all, in contrast to the general population, those who possess special training can be supposed to be a self-selected group that voluntarily sought to improve its ability to be of help to others in peril and thus is much more likely to use its heightened skills to provide aid voluntarily. Specially trained and experienced individuals are also far less likely than untrained individuals to panic in the face of an emergency of this sort and are therefore less likely to be inhibited by fright or anxiety from helping another in peril.

Moreover, there is no reason to believe that the discounting of altruism and the greater intrusiveness of second-guessing arguments against the adoption of an affirmative duty to rescue would have any less force among this group than they would with respect to the public at large. The same is true with respect to the increased risk of harm to rescuers, the disincentive to cooperate in subsequent investigations, and the deterrence to provide delayed aid arguments.

Further, with respect to specially trained people in either subgroup, a limited affirmative duty designed to pertain only to them would come with its own rather significant costs. For example, how might one functionally define the specialized group to whom the affirmative duty to rescue would apply? How much and what kind of training or experience should be required? How recent should the training or experience be? How close to the focus of the defendant’s training should the aid required by the person in peril be in order to invoke the affirmative duty? None of these questions have obvious answers, and the working out of the contours of the rule in each jurisdiction, along with the resulting uncertainty among the specially trained, will consume resources and constitute costs.142

Finally, the adoption of a formal legal duty to rescue that applies only to the specially trained will act as a deterrent for some individuals who otherwise might seek, or agree to receive, such special training. Such a deterrent compromises the larger social goal of creating

conditions that maximize the possibility of those in peril receiving quality aid and being successfully rescued.\textsuperscript{143}

\textbf{B. The Undesirability of Neural Treatment for Specially Trained Individuals}

All things considered, the lack of an affirmative duty to rescue applicable only to the specially trained seems, while perhaps not inevitable, at least fully understandable. Yet, simply to abandon the analysis at this point would leave it wanting. Without something more, tort law would simply operate with a no-duty-to-rescue rule that would apply to the regular individual and to the specially trained individual in the same manner. This is arguably unsatisfactory for at least two reasons.

The first is that, at least from the perspective of the person in peril, the affirmative aid of a specially trained individual will probably be far more valuable than the rescue efforts of an untrained and inexperienced person. A tort law regime that treats both of them alike is therefore less desirable than one that more vigorously encourages affirmative aid from the specially trained. This is especially true when one continues to consider the quasi-exclusive nature of many rescue situations. Once again, it can be argued that the creation of an incentive for reluctant rescuers to affirmatively aid is less attractive than it may seem due to lower quality reluctant rescue efforts potentially replacing higher quality altruistic rescue efforts. Such a tort law rule that treats equally the specially trained and the untrained individual can be faulted for failing to minimize these situations in which a lower quality rescue effort by an untrained individual will effectively replace a higher quality rescue effort by a specially trained person. A superior liability regime is one that would generate a stronger incentive for the specially trained to act than it would for an untrained individual.

Secondly, there is some reason to believe that those individuals who are specially trained in disciplines most likely to be relevant to rescue situations, like physicians, might actually be less willing than untrained individuals to engage in voluntary rescue efforts in the absence of a coercive legal rule.\textsuperscript{144} The argument here rests upon the

\begin{footnotesize}
\textsuperscript{143} See Hyman, supra note 32, at 684 & n.73 (noting the argument that an imposition of liability on potential rescuers will encourage them to avoid situations where they could have to rescue someone).

\textsuperscript{144} See Robert Dachs, Curbside Consultation: Emergency Response, 67 AM. FAM. PHYSICIAN 2423, 2423 (2003) (*"Despite the professional and humanitarian desire to assist in
notorious distrust and suspicion that communities of recurring defendants in tort cases, like physicians, have developed regarding the fairness and accuracy of the judgment of courts, and especially juries, in negligence cases. The literature of such professions is replete with complaints about the unfair operation of negligence law, stories of outrageous outcomes in specific cases, and proposals for reform. Specially trained individuals who are regularly exposed to this literature, and who might share many of these same sentiments, may be reluctant to affirmatively aid another when such a situation arises. They may well fear that should things go badly for the victim, the cases of emergencies, concern about legal reprisal might result in a physician’s inclination to shy away from rendering assistance ...”); Jennifer L. Groninger, Comment, No Duty To Rescue: Can Americans Really Leave a Victim Lying in the Street? What Is Left of the American Rule, and Will It Survive Unabated?, 26 PEPP. L. REV. 353, 364 (1999) (“[D]octors can find themselves in rescue situations without proper equipment or sanitation. Thus, doctors could decide it would be wiser not to rescue a victim and avoid liability than to rescue a victim and risk being sued for medical malpractice.” (footnote omitted)).

145. See, e.g., Philip G. Peters, Jr., The Role of the Jury in Modern Malpractice Law, 87 IOWA L. REV. 909, 921-50 (2002) (reviewing five arguments frequently used to support medical professionals’ skepticism of a jury’s ability to fairly and accurately determine the correct standard of care).

146. See, e.g., Tanya Albert, Lawyers Try New Tacks in Malpractice Suits, AM. MED. NEWS, Feb. 9, 2004, http://www.ama-assn.org/amednews/2004/02/09/prca0209.htm (“Just as quickly as medical knowledge and disease treatment options increase, so too do advances in the strategies lawyers use to bring medical malpractice lawsuits. Last year, an Ohio jury awarded $3.5 million to the family of a man who died of a heart attack. His family claimed that the physician didn’t do enough to help the man lose weight and stop smoking, given that physicians now know how smoking and excess weight contribute to heart disease and given the significant advances in treatment.”); Defensive Medicine: Sacrificing Quality Care, But Can the Trend Be Changed?, PHYSICIAN’S WEEKLY, Feb. 6, 2006, http://www.physiciansweekly.com/article.asp?issueid=317&articleid=2982&printable=1 (“Although only a small number of physicians report that malpractice concerns are the reason for their decisions to admit a patient to the hospital or to order a specific test, data on triage and test ordering decisions in real life cases suggests that malpractice concerns are a much greater factor than physicians believe.” (quoting David A. Katz, MD)); Donald J. Palmisano, Health Care in Crisis, 109 CIRCULATION 2933, 2933 (2004) (“The most threatening component of the healthcare storm, however, is a broken medical liability system that defies common sense and reason.”); Press Release, Project on Med. Liab. in Pa., New Survey Says Mounting Medical Malpractice Costs in PA Affect Doctors’ Decisions to Stay in State (July 7, 2005), available at http://pdfserver.emediawire.com/pdfdownload/259084/pr.pdf (“A new survey published this month in ‘Obstetrics and Gynecology’, indicates that the high cost of medical malpractice insurance is a major reason why the medical residents surveyed plan to leave Pennsylvania upon completing their training.”). But see NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 268-69 (1995) (describing a group that believes there is no crisis unfairly applying negligence law).
reasonableness of their behavior in the circumstances will not be fairly or accurately judged in any subsequent negligence action.\textsuperscript{147}

To the extent that this is true, the existence of such a dynamic would indeed be ironic. Negligence law's efforts to encourage specially trained individuals to affirmatively aid when reasonable and necessary would be compromised in part by the mistrust of these very individuals in the fair operation of negligence law itself. In such circumstances, increasing the pressure on specially trained individuals by creating a coercive rule that applies only to them is likely to be counterproductive. If they are already more reluctant than they might otherwise be to render aid voluntarily for fear of unfair treatment in a subsequent negligence action, expansion of negligence law's jurisdiction in these situations is hardly likely to help. After all, the regulated individual's distrust of that very system of negligence may be the source of their reluctance to act.\textsuperscript{148}

A hypothetical illustration can demonstrate this point. Imagine a commercial airliner on a flight from Hawaii to California located midway across the Pacific Ocean flying at 30,000 feet. A passenger on board the plane begins to experience symptoms of a severe heart attack.\textsuperscript{149} His condition is apparently worsening. The stewards rush back to the passenger's seat on the plane and carry him up the center aisle to the front galley where they lay him down. They activate the intercom on the plane, explain the situation, and ask if any one among

\textsuperscript{147} See VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, supra note 37, at 425 ("While liability is aimed at deterring negligence, it may deter doctors from providing emergency medical assistance. The doctors are concerned about potential malpractice suits, especially when they are obliged to work on the scene of an emergency without any equipment, without proper sanitation, and without any assistance.").

\textsuperscript{148} See supra note 146 and accompanying text.

\textsuperscript{149} The Federal Aviation Administration estimates that an average of fifteen medical emergencies occur daily on U.S. airlines and that the number of such emergencies has more than doubled in the last decade. Tamar Nordenberg, \textit{Air Aid: Medical Kits Reach New Heights}, FDA CONSUMER, Jan.-Feb. 1998, http://www.fda.gov/FDAC/features/1998/198_air.html.

Illness on board an aircraft is a significantly more serious risk than an aircraft crash. More than 100 people each year die in flight or soon after landing as a result of suffering a medical emergency on a major American airline. Matthew L. Wald, \textit{Saving Lives in the Skies}, N.Y. TIMES, May 2, 2004, § 5, at 2. The three most common in-flight medical emergencies on American Airlines are cardiac events, seizures, and asthma attacks, with cardiac emergencies outnumbering the others. \textit{Special Report: Cabin Safety: Bodily Fluids a Fact of Life for In-Flight Heart Emergencies}, AIR SAFETY WEEK, Mar. 13, 2000. Asthma is the most common life-threatening condition reported by British Airways. Nigel Dowdall, "\textit{Is There a Doctor on the Aircraft?}" \textit{Top 10 In-Flight Medical Emergencies}, 321 BRITISH MED. J. 1336, 1336 (2000). Several babies are born on aircraft traveling in international airspace every year. \textit{Id.} at 1337; see, e.g., S.A. Reid, \textit{Doctors Deliver Baby on Airliner}, ATLANTA J. & CONST., May 26, 2007, at A1, available at2007 WLNR 9886334.
the other passengers on board is a physician or possesses any specialized medical training and if they would be willing to come up to the front of the plane and provide emergency aid to the distressed individual. No one responds. Another request, and again no response. The passenger dies before the plane can touch down in California. Suppose further that some subsequent investigation locates the passenger manifest for the flight and determines that one or more persons on board were in fact fully licensed physicians. A bizarre and unrealistic scenario? As noted at the beginning of this Article, in May 2006 a climber attempting to descend from the top of Mt. Everest fell into distress not far from the summit and was ignored and abandoned by approximately forty other climbers who walked right past him, most of them twice. While conditions near the summit of Mt. Everest may be uniquely hostile, it is certainly fair to presume that climbers of the caliber and experience necessary to place themselves within 1000 feet of the world’s highest peak are thoroughly trained in at least the rudiments of providing aid to other climbers in distress. And yet, among this exceptionally elite group, not a single one reportedly did anything to help.


151. One source states, “There is a physician passenger on board a commercial flight 40-90% of the time.” Id. See generally The Law Report, Health Law: Part Two (Australian Broadcasting Corp. radio broadcast Aug. 3, 1999), available at http://www.abc.net.au/rn/talks/ 8.30/lawrpt/istories/lr990803.htm (transcript) (discussing the frequency of medical emergencies on airplanes and Australia’s imposition of liability on physicians who do not respond to an emergency on a plane).

152. Approximately 1000 people die each year as a result of a medical emergency on board an airplane, which is more than the annual number of deaths from airplane crashes, according to the Aviation Institute in Oxford. Dachs, supra note 144, at 975; The Law Report, Health Law: Part Two, supra note 151; see also Dowdall, supra note 149, at 1336 (“In the year ending 31 March 1999 British Airways carried 36.8 million passengers and there were 3386 reported in-flight medical incidents: about 1 per 11 000 passengers. Though 70% were managed by cabin crew without the assistance of an on-board health professional, in almost 1000 incidents doctors and nurses were asked to help with the management of ill passengers.”); Samantha Gross, Dealing with Death, In-Flight, VA. PILOT & LEDGER-STAR, Feb. 29, 2008, at 3, available at 2008 WLNR 4019442 (describing how airlines handle in-flight deaths). It has been reported that psychiatrists are often especially concerned about responding to a request for in-flight medical assistance. Dowdall, supra note 149, at 1337.

Medical emergencies are already the leading cause of diverting aircraft. Mick Hamer, Giant Plane Raises Fear of Medical Emergencies, NEW SCIENTIST, May 20, 2005, at 8, available at http://www.newscientist.com/article.ns?id=mg18625004.900.html. Both the advent of much larger commercial airliners that can carry far greater numbers of passengers and the trend for more elderly persons to fly has caused some observers to predict an increase in onboard medical emergencies in the near future. Id; Wald, supra note 149.

153. See supra text accompanying notes 18-27.
Consider then the physicians on board the airplane who chose not to respond to the stewards' calls for help. Should they simply be regarded as moral monsters? What could they possibly say by way of justification for their actions?

Perhaps they could say something like the following:

"Yes, I am an experienced and licensed physician; yes, I was on board that plane and heard the request for assistance; and yes, I chose not to respond. Because I am a physician I could see when the passenger was carried up to the front of the plane by my seat that he was in a grave and near terminal condition.

I knew from my watch that we were nowhere near land and that it was unlikely that this man would survive until touch down. I suppose I could have gone to the front galley and tried.

The hypothetical scenario offered here is intentionally simple and dramatic. It can serve to help frame the reasons why a specially trained person may choose not to offer assistance in an emergency situation without being at all representative of the response of such persons in such situations. In contrast, and in fairness, it is worth noting an incident that actually occurred on a commercial flight from Philadelphia to Orlando in December 2003. A sixty-seven-year-old woman flying from her home in Liverpool, England, to her daughter's wedding in Florida experienced massive pains in her chest and arm not long after the plane departed from Philadelphia on the second leg of the flight. When stewards assessed her condition as serious and inquired over the cabin sound system whether there was a physician on board willing to help, no fewer than fifteen cardiologists, all on their way to a convention in Florida, rushed down the aisle and treated her. Though she subsequently spent time in the intensive care ward of an Orlando hospital, the passenger survived. John Mahoney, Seaper Star; Cardio Docs in Mid-Air Rescue, Daily Star (U.K.), Jan. 1, 2004, at 22; Geoff Marsh, Is There a Doctor on Board? Yes, Er, 15 of Us Mid-Air Medics Flock To Save Heart Victim 67, Express (U.K.), Jan. 1, 2004, at 22; see also Stephen Franks, Is There a Doctor on the Plane?, 34 Med. Educ. 1043, 1043 (2000) (providing a first-hand account of a passenger-physician responding to a medical emergency on board a commercial flight).

The degree to which specially trained individuals are generally willing to help in such circumstances is necessarily speculative. One reason for this is that Good Samaritan statutes, and the inducement to act that they provide, now exist in all fifty states and have been around since the late 1950s. See Danny R. Veilleux, Annotation, Construction and Application of “Good Samaritan” Statutes, 68 A.L.R. 4th 294, 300 (1989); infra Part IV.C. Thus no current or recent studies could easily capture the willingness of specially trained individuals to affirmatively aid in the absence of such statutes. It is also difficult to develop even an anecdotally based sense of the probable degree of voluntary affirmative aid because incidents of individuals failing to aid are, by their nature, very unlikely to be discovered and reported in the media, especially when no legal duty to aid exists that might spark an official investigation. See sources cited supra note 91 and accompanying text (noting the difficulty in identifying and discovering persons who ignored an opportunity to reasonably aid another in peril).

The World Medical Association has adopted as its official policy the following statement:

The environment in normal passenger planes is not conducive to the provision of quality medical care, especially in the case of medical emergencies. Noise and movement of the plane, a very confined space, the presence of other passengers who may be experiencing stress or fear as a result of the situation, the insufficiency
to make him comfortable and perhaps provide some solace, but with only the equipment and medications available on board, I knew that his chances for survival were small and that the odds of saving his life were very slim.156

What do you think was most likely to happen had I provided him aid and he died before landing as he was almost certain to do? I would find myself, some months down the road, a defendant in a negligence action in which the lawyers for the estate would try to convince a naïve and technically ignorant jury that if only I had thought to perform some improbable procedure with the materials at hand, I could have saved the man’s life. And in such circumstances my hard-earned professional reputation, my financial resources, and my liability insurance coverage would all be ultimately exposed to the judgment of those untrained and inexperienced jurors.

No, I thought to myself. On balance, the meager benefit that I might provide to that unfortunate man is outweighed by the enormous risk to which I would expose myself.157

To the extent that this imagined justification for inaction is realistic, the existence and operation of negligence law itself can be considered to be operating as a deterrent to the very behavior by the very individuals that we, on behalf of those who are facing such a peril, would most want to encourage. This effect is reinforced by the fact that in most potential rescue situations, unlike the case of the airplane, it is extremely difficult for a potential plaintiff to identify those individuals, specially trained or not, who quietly and anonymously choose not to render any aid.158 Thus, in most cases, a

or complete lack of diagnostic and therapeutic materials and other factors create extremely difficult conditions for diagnosis and treatment. Even the most experienced medical professional is likely to be challenged by these circumstances.


156. Federal regulations require that a basic emergency medical kit be on board all U.S. commercial airliners. 14 C.F.R. § 121.803 (2007); see also Thomas N. Bettes & David K. McKenas, Medical Advice for Commercial Air Travelers, 60 AM. FAM. PHYSICIAN 801, 802 (1999) (“[T]he contents of the kits are limited and are intended for basic emergency treatment only, not to sustain or treat critically ill passengers on extended flights.”).

157. See, e.g., Krys v. Lufthansa German Airlines, 119 F.3d 1515, 1517, 1528 (11th Cir. 1997) (upholding the district court’s finding that, notwithstanding a physician’s medical advice that the passenger was not suffering from heart attack symptoms, the airline employees were negligent in not scheduling an emergency landing).

158. See, e.g., Silver, supra note 30, at 433 (“Some critics question the enforceability of the duty. They worry that nonrescuers would often be difficult to trace, and nearly impossible when not witnessed by others.”); Volokh, supra note 93, at 106 (“The law’s
specially trained individual who decides not to affirmatively aid and thus discretely moves along, or away, faces little risk of identification and subsequent suit.

At this point, common law tort doctrine, exclusively dependent upon the negative reinforcement regime of threatened liability, has exhausted its options. While it would be desirable legally to encourage specially trained individuals to engage in reasonable rescue efforts, the prospects of doing so through the creation of a formal legal duty within negligence law are thin. In fact, as previously discussed, it is indeed possible that the existence of a negligence-based duty of care invoked after the specially trained individual acts deters such rescue efforts.

coercive force, moreover, will be rather low, because the witnesses know they’re unlikely to be conclusively identified if they just stay quiet.

59. Nothing in the traditional common law of tort provides a mechanism for rewarding or compensating a successful voluntary rescuer. Some jurisdictions have created a fund from which rescuers may be compensated if they are injured in the course of aiding a victim of crime. See Victims of Crimes Acts, 42 U.S.C. §§ 10601-10608 (2000); Desmond S. Greer, A Transatlantic Perspective on the Compensation of Crime Victims in the United States, 85 J. CRIM. L. & CRIMINOLOGY 333, 350 (1994). For a very sophisticated analysis of the optimal mix of rewards and punishments in the realm of affirmative aid, see Levmore, supra note 35, at 886-91.

160. See Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (stating that a license permitting a physician to practice medicine does not require him to practice and permits him to refuse to render aid without reason).

161. See Franklin, supra note 61, at 52 (noting that Good Samaritan statutes were passed “in response to assertions that the growing concern about malpractice suits resulted in having significant numbers of physicians drive past accidents rather than stop to render aid”). Professor Franklin includes in note 13 of his article the following passage from the American Medical Association:

“Early in 1961 the Law Medicine Research Institute of Boston University conducted a 10% sample survey of the practicing physicians in Massachusetts. Among other things, the physicians were asked to assume that they were enjoying an evening at the theater. They were then queried if they would answer the call, ‘Is there a doctor at the house?’ 27% replied that they would; 41% replied that they would if they saw no other doctor responding; 14% replied that they would if they could first determine what the trouble was; 16% said no; the remaining 2% failed to answer the question. 76% of those who said they would not respond indicated that the fear of a malpractice suit was their principal reason for not doing so; 51% of those who said they would only respond after they had found out what was wrong expressed concern of a malpractice suit; 35% of those who said they would respond if no other doctor would indicated that fear of a malpractice suit was the thing which held them back.”

Id. at 52-53 n.13 (quoting Theodore Flowers & William J. Kennedy, Note, Good Samaritan Legislation: An Analysis and a Proposal, 38 TEMP. L.Q. 418, 419 n.10 (1965)).
C. The Function of Good Samaritan Statutes

In the face of this circumstance, tort law has taken an interesting twist. Lacking a negative reinforcement strategy that is likely to succeed, it has instead sought to offer a carrot, though one of a peculiarly tort-like nature. Rather than offering a tangible reward to those who engage in reasonable rescue efforts, as one might expect from a positive reinforcement scheme, tort law promises not to hit them with potential liability quite as hard as it otherwise might. In effect, tort law offers to voluntary rescuers the prospect of having their rescue efforts judged in any subsequent negligence action by a lowered standard of care or even, perhaps, not to have their rescue efforts second-guessed at all.

These carrots are offered to potential rescuers by laws that are commonly referred to as Good Samaritan statutes. As a general matter, Good Samaritan statutes modify the usual duty of care standard ordinarily applied in a negligence action that is based upon a plaintiff’s assertion that the careless rescue efforts of the defendant harmed him. These statutes can lower the usual standard in various ways, such as by requiring the court to apply an unmodified reasonable person duty of care to the actions of a specially trained individual or requiring the use of a gross or reckless negligence standard. They can also go even further by eliminating the possibility of a subsequent negligence action altogether.

As to the beneficiaries, Good Samaritan statutes can make these incentives available to all persons who engage in reasonable rescue efforts, or they can instead offer them only to those possessing special training or experience. Moreover, more sophisticated Good Samaritan arrangements can mix and match these options so that persons possessing different levels of training and experience are offered correspondingly different levels of inducement.
Good Samaritan statutes in general encourage voluntary rescue efforts by decreasing legal exposure and thus lowering the risk of a voluntary rescue effort.\textsuperscript{171} This is especially true in the case of specially trained individuals.\textsuperscript{172} By this device, negligence law, in a sense, moves or is pushed out of the way, and we rely upon the strong moral value of voluntarily helping another in peril to take over and produce sufficient reasonable rescue efforts.

Now that Good Samaritan statutes have become common in this country, the adoption of a formal affirmative duty to rescue becomes even more problematic. The practical consequence of a formal duty to rescue combined with a Good Samaritan statute that applies to all rescuers would be to coerce some additional rescues and to then judge the quality of the reluctant rescue effort on a lower than normal standard of care, or to not formally second-guess the quality of the reluctant rescue effort at all. However, an important argument against an affirmative duty to rescue is a concern for lower quality reluctant rescue efforts replacing higher quality voluntary rescue efforts, the consequences of which will only intensify if the reluctant rescuer either faces no liability or his effort is held to a lowered standard by the operation of a Good Samaritan statute.

V. THE RELATIVE SUPERIORITY OF A CRIMINAL LAW DUTY TO RESCUE

The arguments offered above to support the practical wisdom of a lack of a duty-to-rescue rule in tort law can also be applied to support the current absence of a criminal law obligation to reasonably rescue in nearly all jurisdictions in the United States. A high level of uncoerced compliance, the expected performance of reluctant rescuers, replacement of higher quality rescue efforts with lower quality efforts, discount of altruism, increased risk of harm to rescuers, and deterrence

\textsuperscript{171} See Nowlin, supra note 142, at 1006-07 (noting that the purpose of Good Samaritan statutes is to encourage emergency care by limiting liability).

\textsuperscript{172} There is, of course, disagreement about the degree to which these statutes have in fact encouraged additional rescue efforts by specially trained individuals. See, e.g., Eric A. Brandt, Comment, Good Samaritan Laws—The Legal Placebo: A Current Analysis, 17 AKRON L. REV. 303, 331-33 (1983); Robert A. Mason, Comment, Good Samaritan Laws—Legal Disarray: An Update, 38 MERCER L. REV. 1439, 1459-60 (1987).

A study done by the American Medical Association in 1963 is often cited in this regard. Based on a survey of physicians, the study reported that 51.5% indicated that they would stop and provide assistance to a stranger suffering a medical emergency if a Good Samaritan statute were in effect while 48.8% said that they would do so if no such statute existed. Law Dep't of the Am. Med. Ass'n, First Results: 1963 Professional-Liability Survey, 189 J. AM. MED. ASS'N 859, 865 (1964).
to provide delayed aid all justify a continued absence of a criminal law duty as forcefully as they support the absence of a tort law duty.

Assume, however, that the pressure to adopt a legal rule that more accurately reflects the preferred moral position in this area becomes too great to resist and a formal legal obligation to reasonably rescue must be adopted. In such a circumstance, the adoption of a criminal law duty would be far preferable to a tort law duty. Moreover, if a criminal law duty were adopted and nearly all of the advantages deriving from such a legal obligation were achieved, any potential advantage from an additional adoption of a tort law duty would be marginal.

The critical advantage that a criminal law duty to rescue would have over a tort law duty to rescue is the existence of prosecutorial discretion. Violations of criminal law statutes do not result in actual criminal prosecution until the appropriate government authority has examined the situation and determined that the defendant's behavior, all things considered, warrants the allocation of public resources in the pursuit of a criminal conviction.\(^\text{173}\) In sharp contrast, a tort plaintiff operates under no such formal constraints or public concern and is largely free to pursue civil liability against a defendant whenever the claim is at least plausible.\(^\text{174}\)

The necessary exercise of prosecutorial discretion in the criminal context means that a criminal duty to rescue can formally exist in the statutes, reinforcing the moral standard so articulated, and yet be brought to bear against a defendant who has failed to affirmatively aid only in those situations in which the defendant's failure to act warrants prosecution, such as if he has exhibited exceptional callousness or

\(^\text{173}\) See Wayte v. United States, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

\(^\text{174}\) See Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 386 (2004) ("In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion. In contrast, there are no analogous checks in the civil discovery process here.").
unquestionably reprehensible conduct. Similarly, prosecutors can choose to pursue only those cases that are most likely to send a positive message about reasonable rescue to the public at large without unduly aggravating its possible costs.\textsuperscript{175} None of this careful tailoring of a formal duty to rescue is available in the case of tort law. There the plaintiff is not constrained by such factors in choosing whether or not to seek redress from the defendant and, moreover, looks to the possibility of personal financial gain from the success of the action.\textsuperscript{176}

Thus, a criminal law duty to rescue could be adopted only to have very little, if any, actual prosecution take place pursuant to the statute. In this way, the law can conform in a more satisfying manner to prevailing public morality on the issue of reasonable rescue without generating unwanted litigation or incurring other associated costs. In fact, there is some strong indication that this is the de facto state of affairs in those very few jurisdictions that have adopted this criminal standard.\textsuperscript{177} Such a strategy of announcement without aggressive enforcement could never be reliably pursued in the case of a tort law duty to rescue because, being a civil action, the government does not control the cause of action.

In addition to the tremendous advantage that the existence of prosecutorial discretion gives to a criminal law duty to rescue over a similar tort law duty, a criminal law duty may also avoid some of the costs associated with a tort law duty. For example, a criminal law statute could define the obligation to provide reasonable rescue efforts without requiring that the defendant's failure to do so actually result in greater injury to the person in peril, thus avoiding difficult problems of negative causation that are unavoidable in the tort context.\textsuperscript{178} Similarly, prosecution under a criminal statute need not involve placing a specific

\textsuperscript{175.} See Wayne, 470 U.S. at 607.
\textsuperscript{176.} See Cheney, 542 U.S. at 386 (noting lack of limitations on a plaintiff bringing a case).
\textsuperscript{177.} See sources cited supra note 61 (noting that few or no prosecutions have resulted in the states with an affirmative duty).
\textsuperscript{178.} See Adler, supra note 32, at 912-13 ("It is argued that where there is a failure to rescue, the potential rescuer has in no way increased the risk of harm to the victim and therefore cannot be culpable. However, in other contexts, the inability to prove physical causation will not always prevent the imposition of legal responsibility. In criminal law, for example, where a father fails to save an infant from drowning, 'illegal inaction' may support criminal sanctions." (footnote omitted)); John Kleinig, Criminal Liability for Failures To Act, 49 L. & CONTEMP. PROBS. 161, 178 (1986) ("Why, it might be asked, is anything as strong as a causal thesis required to hold people criminally liable for their failures to act? . . . The lifesaver who fails to go to someone's rescue may be held liable, not because he was a causal factor in that person's drowning, but because, having some control over the outcome, he failed to act to prevent it.").
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dollar value on the additional harm caused to the victim by the
defendant’s failure to reasonably help, a highly speculative and
uncertain aspect of any successful tort action for failure to aid.

Furthermore, unlike tort law, criminal law’s ability to impose on
the defendant a sanction that is not directly measured by the harm
caused to the plaintiff allows criminal law to fashion a penalty for
failure to rescue that is carefully tailored to the moral culpability of the
defendant’s behavior under the specific circumstances of the case.179
Thus, a criminal law duty could much more appropriately handle a
situation where the defendant unreasonably, but not egregiously, failed
to provide assistance to another who then suffered serious injury or
death.180 Tort law damages in such a circumstance would necessarily
be measured by the harm suffered by the plaintiff rather than the moral
culpability, beyond mere unreasonableness, exhibited by the defendant.

Finally, the argument against a tort law duty to rescue based on
the greater intrusiveness of the second-guessing that would be imposed
does not carry quite the same force with respect to a criminal law duty
to rescue. Since the New Deal and the rise of the modern
administrative state, legal obligations to take affirmative action and not
just avoid harm-producing behavior are hardly unknown. One obvious
to reference the obligation to report and pay income tax.181 These
obligations, though often regulatory in nature, are frequently enforced
by a criminal sanction.182 Thus, a criminal duty to affirmatively aid

179. See Franklin, supra note 61, at 55 & n.29 (noting that through its legislature, a
state can impose a penalty for a failure to rescue through criminal statutes based more on the
community’s moral attitudes than the actual damages of the offense).

180. For example, the Dutch criminal statute establishing an affirmative duty to aid
provides for a maximum of only three months in prison for an unreasonable failure to aid
another who subsequently dies as a result. See supra note 30 and accompanying text.

individuals, heads of households, and unmarried individuals); id. § 6011(a) (requiring the
filing of a tax return by any person liable for taxes); id. § 6012(a)(1)(A) (requiring persons
whose gross income is equal to or greater than the exemption amount to file a tax return); id.
§ 6651 (listing penalties for failure to file a tax return or pay tax).

182. See id. § 7201 ("Any person who willfully attempts in any manner to evade or
defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties
provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more
than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years,
or both, together with the costs of prosecution."); id. § 7202 (providing for a felony charge for
"[w]illful failure to collect or pay over tax"); id. § 7203 (providing for a misdemeanor charge
for "[w]illful failure to file return, supply information, or pay tax"); id. § 7206 (providing for
a felony charge for "[f]raud and false statements"). See generally 15 CARINA E. BRYANT,
MERTENS LAW OF FEDERAL INCOME TAX § 55A.04 (2007) (overview of criminal tax statutes);
id. § 55A.05-27 (discussing specific tax provisions imposing criminal sanctions); 2
FREDERICK K. GRITTNER & NANCY SAINT-PAUL, WEST'S FEDERAL ADMINISTRATIVE PRACTICE
§ 1641, at 106-08 (4th ed. 2003) (describing penalties for violation of the tax code and
would not push the intrusiveness of criminal law into a new and inappropriately intimate sphere in the same way that a tort law duty to rescue could.

While the above analysis suggests that a criminal duty to rescue would be far more preferable than a corresponding tort law duty should it be necessary to adopt one or the other, it does not argue for the desirability of a criminal law duty to rescue. On the whole, the analysis developed herein supports the continued absence of such criminal statutes. Moreover, the enactment of a criminal law obligation to reasonably rescue is likely to have an important effect on the operation of tort law, even in the absence of an independent tort law duty to rescue, as plaintiffs seek to hold defendants civilly liable for the violation of the criminal statute under the doctrine of negligence per se.

VI. CONCLUSION

On the whole, people expect that the law will articulate with reasonable accuracy society’s prevailing behavioral norms. Criminal law is thought to catalogue carefully a lengthy series of socially undesirable behaviors and to threaten those who engage in them with criminal sanctions. Tort law also is generally viewed as being involved in a project of specifying certain unwanted harm producing behaviors and responding to them with the threat of civil liability. Arguments over whether certain behavior should or should not be criminalized, or be made subject to tort law liability, usually focus on

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183. See, e.g., Eisenberg, supra note 34, at 678 (“[A] major function of legal rules is to mark out those social norms that the community regards as especially important. The inclusion in the law of a duty to rescue a victim from physical peril sends the message that members of a society owe one another an important obligation of due concern. The omission of such a duty to rescue sends the message that due concern is not an important obligation.”); O.W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 459 (1897) (“The law is the witness and external deposit of our moral life.”); Weinrib, supra note 32, at 264 (“Moral duties not only provide a basis for judicial justification; they also provide a minimal standard for legal legitimacy. If any legal obligations are legitimate, legal obligations that duplicate preexisting moral ones must be.”).

184. See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1807 (1992) (“We are accustomed to saying that the purpose of the criminal law, in its most general sense, is control of antisocial behavior.”).

185. See Michael Wells, Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer, 26 GA. L. REV. 725, 727 (1992) (“Before World War II, the central (though not exclusive) methodology in addressing tort problems was to make rules that reflected, in a straightforward way, the social expectations of the laymen whose conduct they governed.”).
whether the behavior in question is truly antisocial and undesirable, whether it is objectionable enough to criminalize.  

In this context, the continued absence in both criminal law and tort law of a duty to reasonably aid a stranger in peril is perplexing. It is especially puzzling in the case of tort law because the negligence tort, in which such a duty would reside, is generally robust and hardly modest about the scope of harm-producing behavior that it is willing to second-guess formally. Why would a cause of action through which a plaintiff may question the reasonableness of a surgeon’s subtle judgments in the performance of a complicated procedure or an engineer’s highly technical decisions in the design of a complex machine deny a victim the opportunity to second-guess a stranger’s complete failure to provide aid, even when that aid could have been given easily and at little or no cost to the defendant?

This question is made more pointed by the fact that many other countries, especially in Europe, have adopted an opposite position on this issue and in fact do have laws, both criminal and civil, that require a stranger to take affirmative action on behalf of another in peril. Moreover, the absence of such a duty in American law has been roundly and regularly criticized by academics and laypersons alike. Much of the energy fueling the continuing criticism of the doctrine comes from the fact that the no-duty-to-rescue rule leaves the law articulating a morally and socially monstrous position: that a citizen need not so much as lift a finger to help a fellow citizen facing terrible peril. How can this feature of American tort law continue year after year in the face of these pressures?

This Article has offered a comprehensive justification for the traditional absence in American tort law of a duty to reasonably rescue. The framework for the analysis is not abstractly philosophical, nor is it historical. It does not rely upon theoretical distinctions between commissions and omissions or misfeasance and nonfeasance, nor does


187. See supra text accompanying notes 57-60.

188. See sources cited supra note 30.

189. See sources cited supra note 32.
it suggest that the rule as it stands is the only logical extension of
Locke's or Hume's theory of the individual and the state. 190

It is, instead, fundamentally instrumentalist in nature. The
existing rule is contrasted with its alternative, a tort law duty to
reasonably rescue that is understood to be part of the general duty of
reasonable care in negligence. The likely benefits and costs of an
affirmative duty-to-rescue rule are identified and discussed. The case
is developed in some detail that the very modest benefits that could be
expected from the adoption of an affirmative duty-to-rescue rule
would be overwhelmed by more than a half-dozen discrete costs. The
analysis leads to the conclusion that, on balance, the adoption of such a
duty within negligence law on instrumentalist grounds can simply not
be rationalized.

The discussion then turns to the question of specially trained
individuals and asks if a limited duty to rescue that would apply only
to them could be justified. 191 It cannot. However, an argument is
developed that recognizes that similar legal treatment of the specially
trained and the untrained is less than optimal in this area and also notes
that the current common law regime, even without an affirmative-duty
rule, may significantly discourage the specially trained to voluntarily
provide aid. 192 It is in this context that the role and function of Good
Samaritan statutes are explained. 193

Finally, a comparison is made of an affirmative duty to reasonably
aid as a criminal law rule with that as a tort law doctrine. 194 Because of
the existence of prosecutorial discretion in the enforcement of criminal
statutes, a criminal duty to reasonably rescue can gratify the desire for

190. For a sample of the rich literature discussing the relevance to the no-duty-to-
rescue rule of a distinction between misfeasance and nonfeasance, see Francis H. Bohlen,
The Moral Duty To Aid Others as a Basis of Tort Liability, 56 U. PA. L. REV. 217, 218-20
(1908); Charles O. Gregory, Gratuitous Undertakings and the Duty of Care, 1 DEPAUL L. REV.
30, 30-33 (1951); Fleming James, Jr., Scope of Duty in Negligence Cases, 47 NW. U. L. REV.
778, 801 (1953). For a relatively recent and powerful critique of the importance of the
distinction between omissions and commissions in this context, see Jean Elting Rowe &
Theodore Silver, The Jurisprudence of Action and Inaction in the Law of Tort: Solving the
Puzzle of Nonfeasance and Misfeasance Fifteenth Through the Twentieth Centuries, 33 DUQ.
L. REV. 807 (1995); Eisenberg, supra note 34, at 681 (“The autonomy argument against a duty
to rescue is often coupled with a distinction, said to be basic, between commissions and
omissions. The idea here is that it is proper to regulate commissions, but not omissions. That
idea, however, adds nothing to the autonomy argument, and is both flimsy and unwarranted
except to the extent that it simply restates the autonomy argument.”).
191. See supra Part IV.A.
192. See supra Part IV.B.
193. See supra Part IV.C.
194. See supra Part V.
the law to articulate accurately the prevailing social value in this area at much less cost than a tort law version of the duty. Prosecutors have the opportunity to choose only those cases for enforcement that display exceptional indifference on the part of the defendant so that an appropriate signal regarding acceptable rescue behavior can be sent to the public without incurring any of the difficult line-drawing costs that would inevitably be associated with a tort law duty. In addition, criminal law is far better able than tort law to fashion a sanction for the defendant because the duty can be carefully tailored to the moral blameworthiness of the defendant's conduct. Should a criminal law version of a duty to rescue be adopted, the case for a tort law duty, already small, diminishes substantially because most all of the benefits available from a tort law duty would be achieved by the criminal law duty, leaving an even more imbalanced scale of benefits to costs on the tort side.

No matter how unsatisfying it may be for the law to fail to embrace and articulate a widely shared social and moral value, and no matter how tempting it is to threaten with legal liability those who fail to display a common decency towards fellow humans facing serious peril, it simply cannot be said that a general tort law duty to provide affirmative aid to a stranger in peril is likely to do more good than harm under current societal conditions. Of course, things may change. Most importantly, the number of voluntary reasonable rescue efforts in the absence of a coercive legal rule may significantly decrease or, even more importantly, the present perception that the current level of such voluntary efforts is quite high may change. Until then, however, the long-standing absence in American tort law of a duty to reasonably rescue can be expected to remain largely unchanged.