A Psychological Approach to Understanding the Legal Basis of the No Duty to Rescue Rule

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A Psychological Approach to Understanding the Legal Basis of the No Duty to Rescue Rule*

I. INTRODUCTION

Two years ago a college-age male raped and killed a girl in a casino in Las Vegas.¹ The killer was at the casino with a friend, and there is evidence that the friend knew what was happening and did nothing to stop the rape.² Many questioned why no charges were being brought against the friend, why he had no legal duty to help this girl who his friend had raped and murdered.³ Similarly, in the early sixties, Kitty Genovese was repeatedly attacked over a period of thirty-five minutes, during which time thirty-eight of her New York neighbors saw what was happening and did not summon help.⁴

Is a person who sees another in danger obligated to help in some way? In order to establish a cause of action for negligence, there must be a breach of some legal duty.⁵ In the United States, there is generally no legal duty to rescue.⁶

A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.⁷

One professor relates her experience teaching torts to her students, a majority of whom find the "legal 'no duty' rule reprehensible."⁸ However, after the rule and its rationale are explained to the students, and they are able to "take a distanced, objective posture informed by liberal-

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² See id.
³ See id.
⁵ See RESTATEMENT (SECOND) OF TORTS § 314 (1965).
⁶ See Saul Levmore, Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations, 72 VA. L. REV. 879 (1986). There are some exceptions to this rule which will be discussed later.
⁷ RESTATEMENT (SECOND) OF TORTS § 314 cmt. c, illus. 1 (1965).
ism's concerns for autonomy and liberty, [and] many come to accept the legal rule that intuitively had seemed so wrong to them.\textsuperscript{9} It may be disturbing to think that a person walking along the shore of a lake, who sees a victim drowning, has no legal duty to throw a rope, or reach a stick out to help that person.\textsuperscript{10} This is the case even if there is no hint of danger to the potential rescuer. Neither tort law nor criminal law has recognized general liability for failure to act.

Scholars have both criticized and supported the no duty to rescue rule. Those who criticize the rule suggest it is inefficient, detached, or individualistic.\textsuperscript{11} Those who support the rule suggest that "legal inducements may impede [the] motivation" of a rescuer helping for altruistic reasons, or out of desire to be regarded as a hero.\textsuperscript{12} Supporters of the current law have also suggested that the law should not impose morality on individuals, and that the cost on individuals may be too great if liability is imposed.\textsuperscript{13} Two major approaches that have been taken to understand and explain the law as it stands are (1) law and economics, and (2) moral considerations.

While it seems there would be a positive impact on society if the courts or legislatures would impose some sort of duty to rescue, social scientific research seems to indicate that any legal duty should be applied with careful limits.\textsuperscript{14} Part II of this Comment will explore the nature of the common law no duty to rescue rule including the numerous exceptions which have been imposed by the courts through its history. Part III will summarize and explain the position of those who use law and economics to either support or criticize the law. Part IV will discuss ethical arguments in favor and against the no duty to rescue rule. Finally, Part V will analyze the no duty to rescue rule in light of the current theories of psychology on helping behavior, including why people do or do not help in various situations, and what social or psychological impediments must be overcome in order for people to be likely to rescue.

\textsuperscript{9} Id.
\textsuperscript{10} See Francis Bohlen, \textit{Moral Duty to Aid Others as the Basis of Tort Liability}, 56 U. PA. L. REV. 217 (1908) (citing Francis Bohlen, \textit{The Basis of Affirmative Obligations in the Law of Tort}, 53 U. PA. L. REV. 209 (1905)).
\textsuperscript{14} See infra notes 121, 124, 126, and 133.
II. HISTORY AND BACKGROUND

The Restatement Second of Torts section 314 states, "the fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." An important distinction between misfeasance and non-feasance must be recognized in order to understand the law as it stands. "Misfeasance differs from non-feasance in two respects; in the character of the conduct complained of, and second, in the nature of the detriment suffered in consequence thereof." A person will be held liable if their misfeasance causes or compounds the injury, but will not be held liable if their non-feasance resulted in greater injury. While this difference is a foundation of the no duty to rescue rule, "[t]he clever law student is . . . able to turn commissions into omissions by arguing, for example, that negligent driving is nothing more than the failure to brake." Due to the lack of clarity between action and inaction, the no duty to rescue rule has many exceptions. Liability for non-feasance first appeared in situations where there was some special relationship between the parties. In these cases, the defendant was found to have some kind of duty to aid or protect the plaintiff.

A. Exceptions to the No Duty to Rescue Rule

Although some exceptions have been created by statute, the majority arose out of court decisions imposing liability in specific circumstances. Exceptions to the no duty to rescue rule include (1) statutes imposing an affirmative duty, and (2) special relationships, such as that among a ship's crew or between an employer and employee, a carrier and its passengers, and innkeepers and guests.

1. Statutes

Various types of statutes have been adopted that impose a duty on one person to help another in need. The primary example are "hit and run" statutes, which require a driver involved in an automobile accident, whether or not he was at fault, to give assistance to those injured. When

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17. See Levmore, supra note 6, at 879.
18. Id.
19. See infra Part II.A.
driving an automobile, a person who causes injury cannot merely walk away under a no duty to rescue rule. Aside from “hit and run” statutes, other types of statutes that impose a duty to rescue those in danger have been adopted as well. For example, a Vermont law states that:

[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.23

The duty to rescue is limited to where the rescuer can act without putting herself in danger. A Minnesota statute, similar to the Vermont statute, imposed a duty on persons who were “at the scene of an emergency.”24 The Vermont statute imposes a duty on persons “who know that another is exposed.”25 Both Rhode Island and Massachusetts enacted statutes imposing a more limited duty to rescue. Under Rhode Island law, a witness to a sexual assault must immediately notify the police.26 The Massachusetts statute applies to witnesses of armed robberies and homicides as well as rapes.27

2. Case Law

The case law exceptions to the no duty to rescue rule all arise out of special relationships between the victim and the rescuer. One category of exceptions to the no duty to rescue rule is that of the person who negligently injures another. “[C]ourts have broadened [the] rule, placing the duty on anyone whose conduct—whether innocent or negligent—has

23. VT. STAT. ANN. tit. 12, § 519 (1973). The section continues stating:
(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice. (c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

24. MINN. STAT. ANN. § 604.05 (repealed 1994).


Actually, the Rhode Island and Massachusetts statutes are ‘rescue’ statutes only to the extent that police might be notified during the commission of a crime and might respond in time to prevent or mitigate harm. Since a witness could comply with their duty by notifying police shortly after the commission of the crime, these statutes more closely resemble the common law ban against ‘misprison of felony.’ Silver, supra note 26, at 427 n. 35.
caused injury or unreasonable danger." 28 By causing the initial injury, a person becomes liable for the effects of that injury. Thus a special relationship is created between the injurer and the person injured.

Other exceptions to the no duty to rescue law have been imposed through the courts over time. One type of exception is where there is a working or quasi-partnership relationship between the rescuer and the victim. For example, a ship's captain and crew have a duty to rescue other members of the crew. In Harris v. Pennsylvania Railroad Co., 29 the court held that the crew of a ship owes a duty to rescue one of its members who, even by his own neglect, falls into the sea. While Harris was working, he fell overboard, and a fireman he had been working with called "man overboard." Harris was about twenty-five feet behind the boat, and the fireman picked up a hawser 30 and threw it toward Harris, but it was too heavy and did not reach him. 31 "No other effort was made to throw a line or other device to Harris while he was in the water." 32 The Harris court stated that there was no doubt that a legal obligation rested upon the ship's crew to use due diligence to save another member of the crew who had fallen into the sea. 33 As the court states, a person is "completely dependent for care and safety upon such succor as may be given by the members of the crew." 34 The court noted the ease with which a life buoy or other item could have been thrown to save Harris. However, the court affirmed that the exception to the no duty to rescue rule did not come from the ease of rescue, but from the relationship between the ship and its crew. 35

Another exception to the general rule is that an employer has a duty to her employee where in the course of that employment the employee suffers injury. In Carey v. Davis, 36 an employee, who was excavating a gravel pit, became overheated. The employee fainted, regained consciousness, resumed working and fainted again. His co-workers put him into a wagon out in the sun and left him there for about four hours, causing his condition to worsen. The court stated the general rule, that there is no legal duty "in the absence of any agreement or contract" to care for

29. 50 F.2d 866 (4th Cir. 1931).
30. A hawser is a heavy cable or rope used in mooring or towing a ship. See id.
31. See id.
32. Id. at 867. There was a life buoy kept near the pilot house which White, the first mate, could have reached within three to four seconds. He made no attempt to do so, and after not seeing Harris, walked back into the pilot house after a couple of minutes. Id.
33. See id. at 868.
34. Id.
35. See id.
36. 180 N.W. 889 (Iowa 1921).
a sick or injured servant, but then went on to hold:

Where in the course of his employment a servant suffers serious injury or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm, the master, if present, is in duty bound to take such reasonable measures or make such reasonable effort as may be practicable to relieve him, even though such master be not chargeable with fault in bringing about the emergency.

Thus, a duty was imposed on employers because of their special relationship to the injured or suffering employee.

Another exception to the general rule is that a carrier has a duty to its passengers. In Middleton v. Whiteridge, the New York Court of Appeals held that a duty springs from "the contract to carry safely." In this case a man was riding a streetcar and experienced a cerebral hemorrhage. The man rode for some time, and seemed okay to the conductor at first. Later, the conductor noticed there was something wrong with the man. He was vomiting, and according to the conductor, he looked intoxicated and sick to his stomach. The man died and medical evidence showed that if the deceased had received proper care within one or two hours after the cerebral hemorrhage happened, he would have likely recovered. The court held, "if a passenger becomes sick and unable to care for himself during his journey ... the carrier owes him an added duty resulting from the change of situation." Thus, those whose work is in transporting others have been held to have a duty to the passengers.

Other relationships have also been held to impose a special duty to rescue despite non-involvement in the situation. This includes an innkeeper and his guests, such that "[a]n innkeeper is obliged, in the exercise of reasonable care, to protect his guests against assaults from any one, including his employees." Additionally, a police officer who has
taken a person into custody owes a duty of care to that person. This duty is to exercise ordinary care to keep the prisoner safe and free from harm generally. This includes protecting prisoners from harming themselves or from being harmed by others. While the courts of the United States have held to the general rule that there is no duty to rescue, they have also seen the need for extensive exceptions to that rule.

B. The International Rule on Duty to Rescue

Many other countries around the world imposes a duty to rescue. In Europe, the duty is widespread. The French Penal Code provides that:

[Ä]ny person who willfully fails to render or to obtain assistance to an endangered person when such was possible without danger to himself or others, shall be subject to [imprisonment] for no less than three months nor more than five years, a fine from 36,000 to 1,500,000 francs, or both.

This rule is substantially harsher than the laws in Vermont and Minnesota, where the maximum stay in prison is one year. Germany enacted a statute in 1935 which states:

Whosoever, in case of accident or common danger, or necessity, does not render assistance, even though this is his duty according to sound popular sentiment and, in particular, does not comply with the request for assistance of a police agent, even though he could comply with the request without serious danger and without the infringement of other

occurred off the premises of the defendant, and therefore the defendant innkeeper was not held liable for the injuries to the plaintiff, despite the general duty to rescue. See also Lehnen v. E. J. Hines & Co., 127 P. 612 (Ill. 1912).

45. See Thomas v. Williams, 124 S.E.2d 409 (1962). In this case a police officer arrested and incarcerated a drunk prisoner. The prisoner had a lighted cigarette and matches on him. The officer knew the condition of the prisoner and left him unattended in the cell. The mattress in the cell, upon which the prisoner was lying, caught fire and the whole area filled with smoke. When the officer came back in he did not remove the prisoner, but doused the cell and mattress with water, which increased the amount of smoke. The prisoner died of exposure to fire and smoke. "This case establishes the standard of care owed by a law enforcement officer to a prisoner placed in his care and custody - to keep the prisoner safe and free from harm, to render him medical aid when necessary, and to treat him humanely and refrain from oppressing him. Georgia is in accord with the majority of courts in imposing this standard of care." Id. at 413 (citing Anno. 14 A.L.R.2d 354 (1950)).

46. See id.

47. See id.

48. See supra notes 29, 36, 44, and 45. Each of these cases represents an exception to the general no duty to rescue rule.

49. See Thomas, 124 S.E.2d at 434.

50. Id. (quoting THE FRENCH PENAL CODE, in 1 The American Series of Foreign Penal Codes (G. Mueller ed. 1960)).
important duties, is punishable with prison for up to two years or with a fine.\textsuperscript{51}

All of the Eastern European codes except Albania have similar statutes regarding rescue.\textsuperscript{52} "In Latin America, almost every country . . . provides in its penal code for the punishment of bad samaritans."\textsuperscript{53}

It is clear that a large portion of the countries of the world has imposed some sort of duty to rescue. That duty is generally triggered by: (1) awareness of someone in danger; (2) the ability for the potential rescuer to help without putting himself or others in danger; (3) some sort of relationship between the victim and rescuer; and (4) the amount of "help" required of the rescuer.

\textbf{III. A Law and Economics Approach}

Scholars have taken various approaches to analyzing the no duty to rescue rule. Economical efficiency is one argument supporting this rule.\textsuperscript{54} In order to illustrate this, William Landes and Richard Posner present a scenario in which a person is presented with a choice between two activities, A and B, each having equal entertainment value. However, each of these activities has a different magnitude of risk. If liability for non-rescue is imposed, those who could be potential rescuers will choose the safer activity in order to avoid the potential liability involved with the riskier activity. By doing so they have reduced the number of potential rescuers in activity A because of the greater costs associated with the potential liability created by an affirmative duty to rescue. As the rule currently stands, there is no affirmative duty to rescue and therefore, according to Landes and Posner, a potential rescuer will not avoid the more dangerous activity because the potential cost of liability is no greater than the potential cost of liability for a safe activity.\textsuperscript{55} Assume activity A is swimming at the beach, and activity B is playing racquetball. Person X enjoys both swimming and racquetball and is an excellent swimmer. If liability were imposed based on an affirmative duty to rescue, X would be more likely to avoid swimming, because X will be required to rescue

\textsuperscript{51} Alberto Cadoppi, \textit{Failure to Rescue and the Continental Criminal Law, in The Duty to Rescue: The Jurisprudence of Aid} 93, 101 (Michael A. Menlowe \& Alexander McCall Smith eds., 1993) (citing Para. 330c. StGB). The author reflects on the idea that the above cited statute came from the Nazi regime. At the time, the previous weaker rule had been "strongly criticized and considered the typical product of an individualistic and liberal society." \textit{Id.} at 101. Since that time, the statute has been amended and contains no references to the "sound popular sentiment." \textit{Id.} at 101-102.

\textsuperscript{52} See \textit{id.} at 104.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} See generally Landes, \textit{supra} note 12.

\textsuperscript{55} See \textit{id.}
if there is an emergency. If those who are good swimmers avoid the activity because it is a dangerous activity, and an affirmative duty to rescue increases the costs associated with that activity, there will be fewer potential rescuers participating in those activities. In the alternative, as long as there is no legal duty, then the costs associated with swimming are not any greater and people will continue to swim, and people will continue to rescue out of altruistic motives.\textsuperscript{56} According to Landes and Posner, the rule as it stands is more efficient in that if an affirmative duty were imposed, potential rescuers would be likely to avoid risky activities because of the higher cost associated with them, and the overall amount of rescuing would go down.\textsuperscript{57} Landes and Posner similarly argue that imposing a duty to rescue might decrease the number of people who rescue out of altruism, because such people may be viewed as having acted only to avoid the penalty.\textsuperscript{58}

Furthermore, the question asks how far the imposition of an affirmative duty to help may go. "Even if the rule starts out with such modest ambitions, it is difficult to confine it to those limits."\textsuperscript{59} What is the limit on how much help a person must give in order to help another?

Take a simple case first. X as a representative of a private charity asks you for $10 in order to save the life of some starving child in a country ravaged by war. There are other donors available but the number of needy children exceeds that number. The money means "nothing" to you. Are you under a legal obligation to give the $10? Or lend it interest-free? Does $10 amount to a substantial cost or inconvenience ...?\textsuperscript{60}

While this deals with a charitable contribution as opposed to some physical form of help, it is easy to see that the line between the two, if there is one, is thin indeed. How far must a person go in order to help someone? If a person sees another driving, and it sounds like their brakes are about to give out, are they obligated to take some affirmative action and warn or help the person with the squeaky brakes? "In each case, it will be possible for some judge or jury to decide that there was something else which the defendant should have done ...,"\textsuperscript{61}

Additionally, there are a number of problems with imposing a legal duty to rescue. The first question involves who should be made liable. In

\textsuperscript{56} See id.
\textsuperscript{57} See id. The authors admit that they have not proved that imposing liability for failure to rescue would not be as efficient: "[w]e have merely suggested that the results under the common law, occasionally imposing liability but mostly denying it, may be consistent with efficiency." Id. at 126.
\textsuperscript{58} See id.
\textsuperscript{60} Id. at 198-99.
\textsuperscript{61} Id. at 199.
many situations there are many people around who could possibly help. Is it proper to impose liability on all of them? What if rescue is easy for some and more difficult for others? What if there is a large strong person who is a good swimmer who could easily rescue a victim, and on the other hand a small weak person who does not know how to swim? If they are both sitting on the dock when a victim is drowning are they equally obligated to rescue? Those in favor of imposing liability suggest these cases be treated similarly to joint and several liability, similar to the situation in which two hunters negligently shoot and one unintentionally hits the third person.\(^{62}\) However, the problem with this is that each person may have heard a distant call for help and believed someone else is there to help. The number of excuses for not helping may be large. Establishing causation in a case such as this would be nearly impossible.

Some people suggest rescue should only be required if it is easy to do and will not put the rescuer's life in peril. The problem with this idea is that in an emergency a potential rescuer must then evaluate any situation and determine whether or not they might be put in danger by helping. This seems to be a very gray area in which it would be difficult to determine liability. Should the person have reached in to save the drowning swimmer, or might she have been pulled in by the swimmer and been placed in danger herself? In such a variety of situations it could be very problematic for the courts to impose a general rule. On the other hand, courts are often called upon to make these types of difficult decisions.

The rule encourages people to take steps to avoid dangers. Knowing there is no legal duty to help, or be helped, people are more likely to take care of themselves.\(^{63}\) If there were some duty to help, it is possible that people would be less concerned about potential hazards because they know that as long as someone is around, they are required to help. Those who support the no duty to rescue rule see it as being an efficient rule\(^{64}\) which encourages self-reliance\(^{65}\) and only makes a person responsible for the harm she caused through her actions, as opposed to harm she could have prevented by acting.

On the other hand, scholars have also posed economic arguments as to why imposing a duty to rescue would be more efficient.\(^{66}\) Rather than looking at potential rescuers and victims as different classes of people as has been done previously,\(^{67}\) some have suggested that those who are po-

\(^{62}\) See Levmore, supra note 6, at 934 n. 180 (citing Summers v. Tice, 199 P.2d 1 (1948)).

\(^{63}\) See Epstein, supra note 59, at 203.

\(^{64}\) See generally Landes, supra note 12.

\(^{65}\) See Epstein, supra note 59 at 203.

\(^{66}\) See Grush, supra note 11, at 881.

\(^{67}\) This is the view that has been posed in the Landes & Posner argument. They argue that
tential rescuers are also potential victims. People are not necessarily more likely to avoid an activity that is dangerous because they will be called upon to be a rescuer. While imposing liability may increase the costs associated with a particular activity for a potential rescuer, the costs of participating in that activity are at the same time diminished because the person weighing the alternatives would also know that they will likely be rescued in the event that something unfortunate befalls them. In response to the argument that the high cost associated with saving will drive a person away, others have suggested that there are transaction costs associated with changing a particular activity, and those costs may outweigh the costs associated with imposing liability.

IV. A MORAL/PHILOSOPHICAL APPROACH

Scholars have also taken a philosophical approach as to whether the no duty to rescue rule is appropriate. Much of the argument regarding the imposition of a duty to rescue is based on ethical considerations. John Stuart Mill suggested that “the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.” He further went on to clarify this assertion by saying, “His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others to do so would be wise or even right.” According to this statement we should not be coerced by government into helping others. The United States Constitution suggests part of its purpose is to “secure the Blessings of Liberty to ourselves and our Posterity.”

Therefore, is it proper to impose a moral duty to help others through a legal obligation?

On the one hand, one may argue that the function of law is to promote the common good or the greatest happiness of the greatest number. On
the other, it may be argued that, when moral opinions differ, a tolerant society should use law to enforce the moral convictions of some only when absolutely necessary. 72

Is this an area that should remain as a moral duty as opposed to a legal duty? Michael Godwin suggests that “man’s moral development requires the law’s abstention from interference in private judgment . . .” 73 Thus, in order to have sufficient moral development of citizens, citizens must be allowed to act and make decisions for themselves rather than having their morality legislated. By not making moral decisions for themselves, people may never become intrinsically moral. Their actions may be based merely on what the law requires them to do.

On the other hand, the law requires moral choices to be made all the time, i.e. murder, theft, etc. In fact, critics of Mills suggest that because we are all a part of society, nobody knows the types of harm we cause to others through our actions. 74 Furthermore, in order to have liberty, there must be structure: “[l]ike a building, every society has a structure that, by constraining the actions of its members, permits them at the same time to act to accomplish their ends. Without any structure, chaos would reign and the current population could not be sustained.” 75

A major reason for imposing a duty to rescue is that it is the moral thing to do. 76 “In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without [imposing] some affirmative duty.” 77 Furthermore, “the drowning stranger is not the only person affected by the lack of care.” 78 As part of a community, we should not just stand by and watch another person in danger of death or major injury without being affected ourselves. 79 People cannot simply refrain

73. Weinrib, supra note 57, at 265 (commenting on 1 W. GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON GENERAL VIRTUE AND HAPPINESS 165 (I. Kramnick ed. 1976)).
76. See generally Menlowe, supra note 72 (commenting on HENRY SIDGWICK, THE METHODS OF ETHICS Book IV, Ch 3 (London, 7th ed., 1922)). Menlowe notes:

It is evident, he thinks, that the greatest happiness of the greatest number is produced by imposing a duty to rescue in certain circumstances. So an exception is required to the general principle that the greatest happiness of the greatest number is produced by allowing individuals freely to contract their services. But the exception is itself justified on utilitarian grounds because it maximizes happiness without undesirable side-effects.

Id. at 23.
77. Bender, supra note 8, at 34.
78. Id.
79. See id.
from making a choice to help. In that non-action, the person has made a decision not to help and to allow another to continue suffering. One author sees humanity as more important than other concerns and suggests "a strong legal value [be] placed on care and concern for others rather than on economic efficiency or individual liberty."^{80}

What assumptions must be made and accepted to say that this is not a plausible argument? Do we naturally assume that individualism is better than a shared existence, and that economic efficiency is the most important goal of society? Perhaps we should be looking at the question in more humanistic terms and see our duty to each other as people as more important than a goal of economic efficiency. According to Bender, doing so would "transform the core of negligence law to a human response system."^{81}

Upon establishing a moral duty to rescue, it is necessary to ask whether that moral obligation should be transformed into a legal obligation. Those who do not think there should be an obligation say it would interfere with liberty and altruistic actions.^{82} However, it can also be argued that the laws we set up for ourselves in turn give us a moral guideline. Our moral values are often shaped by the laws which govern the society of which we are a part.^{83}

Law not only reflects society's moral values, but also helps shape them. As one commentator asserts, 'Legal and moral rules are in symbiotic relation; one learns what is moral by observing what other people . . . tend to enforce.' Accordingly, a legal duty to rescue would increase the number of persons who feel morally compelled to offer emergency aid. This, in turn, would increase the likelihood that people would render assistance in situations in which the failure to do so would go undetected.^{84}

The existence of a legal duty would encourage rescue in four subtly different ways: 1) some people would act out of a desire to be law abiding, 2) others would act out of fear of legal sanctions, particularly when witnesses were present, 3) some who are timid would be provided with the necessary motivation to intervene, and 4) others would be moved into action by a heightened sense of the morality of rescue.

Instead of the law impairing moral development, as has been previously suggested,^{85} the law is likely to guide and improve moral sense.^{86}

80. Id.
81. Id.
82. See supra note 58 and accompanying text.
83. See Silver, supra note 26, at 428-29.
84. Id.
85. See id.
One study analyzed the correlation between the law and the specific society's attitudes. The study found that "the existence of a legal duty . . . correlated with the respondents' view of how the law should treat people who do not help in low-risk situations." The number of people who thought that nothing should be done was lowest in countries where there was a legal obligation to help, and highest in countries where there was no legal obligation to help. Furthermore, "jail sentences for violators were preferred by 22 percent in Germany, 15 percent in Austria, and 2 percent in the United States." This seems to show that people's moral values were correlated with the law in their country. In countries where a legal duty had been imposed, people felt like there was a stronger obligation to help, and more people felt like the person who failed to help should be punished. These arguments suggest a moral obligation can and should be imposed legally. Doing so would increase people's awareness of the need to help others, and also likely adjust their attitudes to the idea that we have a duty to help others we see in trouble.

As was stated earlier, a main reason why some people suggest a legal duty to rescue should be imposed is based on the idea that "lives would be saved and injuries avoided." As the law stands, the United States is a society in which it is legally acceptable to stand by and watch another in distress without doing anything to help. Those who would not impose liability suggest it is not the province of the law to force people to act morally. Those who would have liability imposed argue that the law would be an effective tool to encourage rescue.

86. See Silver, supra note 26, at 428-29 (quoting Anthony D'Amato, The "Bad Samaritan" Paradigm, 70 NW. U. L. REV. 798, 809 (1975)).
87. See Franklin, supra note 11, at 59 (citing Zeisel, An International Experiment on the Effects of a Good Samaritan Law, in THE GOOD SAMARITAN AND THE LAW 141, 209 (J. Ratcliffe ed. 1966)).
88. Id.
89. Id.
90. See id.
91. D'Amato, supra note 86, at 809:
[Other] studies support the existence of this relationship. In one, a group was given a number of fact situations, such as that of a bystander who watched idly as a man drowned 10 feet from shore. They were told that an attempt to rescue was required by law. Another group was given identical facts, except that an attempt to rescue was not required. A greater proportion of the first group felt that the actions of the passive observer were morally wrong. The existence of a legal duty apparently helped the subjects define the failure to rescue as immoral
92. See id.
V. A Psychological Approach

While moral/philosophical, and economic efficiency paradigms have been used to support or refute the need for imposing liability on the person who fails to rescue another in need, none of these have explained why people do or do not help in certain situations. The economic models suggest that everything is done in terms of what will offer the highest utility while keeping costs at a minimum. These models, however, often fail in their attempt to capture the human experience. Are all decisions people make based on their estimation of a cost benefit analysis? Are even a significant part of the decisions people make based on a cost benefit analysis? Psychologists have shown that people often take cognitive shortcuts labeled heuristics, in order to process the vast amount of information that is constantly taken in. This being the case, it is difficult to suppose that in emergency situations, people are likely to take time to make a cost benefit analysis before deciding whether or not to help another in need. The field of psychology is based around understanding how and why people act the way they do. Social psychology is aimed at understanding the effect on a person's behavior of both personality and situational influences. As part of this study several theories have arisen as to why people do or do not help in certain situations, and these can give insight into why the no duty to rescue rule is fashioned as it is.

A. Self-Interested Help

Much of the theoretical basis for psychological research assumes that people are generally self-interested. In an address to the American Psychological Association, David Campbell stated, “Psychology and psychiatry... not only describe man as selfishly motivated, but implicitly or explicitly teach that he ought to be so.” William James, a founding father of American psychology, expressed a similar view. He stated, “Each mind, to begin with, must have a certain minimum of selfishness in the shape of instincts of bodily self-seeking in order to exist. This minimum must be there as a basis for all further conscious acts, whether of self-

93. See generally Landes, supra note 12.
95. See David T. Campbell, On the Conflicts Between Biological and Social Evolution and Between Psychology and Moral Tradition. 30 AM. PSYCHOLOGIST 1103, 1104 (1975).
96. Id.
negation or of a selfishness more subtle still . . .

A major answer to the question of why people help others is that they do so for egoistic concerns. Some of the egoistic concerns may include material or social rewards; another motivation may be to reduce the aversive feelings associated with seeing someone else in distress.

One group of researchers suggested people will be more likely to help when they feel bad because helping is a way for people to make themselves feel better. Those theories which focus on reduction of negative feelings associated with seeing others in distress suggest that often the easiest way to get rid of those feelings is to run away from the situation rather than help. Thus, rather than a deep seated moral need to help others, perhaps much of the helping behavior we do or do not see is based on selfish concerns. If it is rewarding enough to help, or aversive enough not to help, people will be more likely to do it. Accepting this premise, the law as it stands would not be most effective. Imposing a general duty to help would be more effective at encouraging helping behavior because people would be motivated to help by the desire to avoid the negative consequences of not helping. As will be discussed below, some psychologists have suggested alternative theories of motivation for helping behavior.

B. Empathy-Altruism

In contrast to the idea that all behavior, including that of helping, is based on selfish motives, Daniel Batson suggests that many helpful actions performed by people may be motivated by altruism, which is the desire to increase another’s welfare. According to Batson’s Empathy-Altruism hypothesis, if a person feels empathy for another person in need, they are more likely to help that person than if they do not feel empathy. In this model, the first step is for a person to perceive that another person needs help. Once a person sees that help is needed, the second step is whether that person adopts the other person’s perspective. If they do, they will have empathic concern, but if they do not,
they will experience personal distress. Concern leads to an altruistic motivation with the goal of reducing the other person’s distress. Lack of concern leads to an egoistic motivation and a desire to reduce a person’s own distress. One study predicted and found that those high in empathy would be likely to help even when they had a chance to easily escape the situation. Alternately, those who did not feel empathy for the victim helped in order to reduce their own aversive feelings, but if there was an easy chance to escape without helping, they were more likely to take it.

Legal scholars have suggested that altruistic rescue may decrease if liability is imposed for failing to rescue because then rescuers will be perceived as less altruistic, and their motives will be based around potential compensation from rescuing another. According to psychological theorists, this motive for rescuing would be considered an egoistic concern as opposed to an altruistic concern. If empathy is the primary explanation for why people help others, then it is unlikely that imposing a duty to rescue others in need would change the amount of help that is generally given. However, if there is more than one explanation or motivation behind why people help, then viewing some helping behavior as egoistic and some as altruistic is appropriate. Based on these two explanations, imposing a duty to rescue would likely increase the number of rescues because those who rescue for altruistic purposes will not decrease, and the number of those who help for egoistic purposes will increase.

104. See id.
105. See id.
106. See id. While much of this seems to be common sense, it goes against many of the theoretical foundations of psychology which have previously been noted. In order to test this idea the researchers lead a subject into a room, told them they would be working with another person, and let them read an information sheet. The sheet informed subjects that one subject would perform a task while the other would observe, and that the parts would be assigned randomly. The other “subject” who is actually a confederate working with the researchers, arrives and is chosen as the person to be shocked. She is hooked up and receives some shocks, she looks extremely uncomfortable, and as she asks for a glass of water she tells the researcher that she had a bad experience with an electric fence as a child. But she says she will continue the experiment. The researcher then asks if the subject will take the confederate’s place. Empathy was measured by self-reports. As predicted, those higher in empathy took on the shock. Even when the researchers provided a way for the subject to leave, they took on the shocks when they felt empathy for the confederate. Id.
107. See id.
108. See id.
109. See generally Landes, supra note 12.
110. See BATSON, supra note 100, at 51.
C. Factors Which Predict Helping

Besides internal motivation, there are other factors that have been shown to reliably predict helping. These factors include similarity, closeness, and belief in a just world. Research has indicated that we are more likely to help those who are similar to us. A sociobiological explanation for this is that we are genetically predisposed to help our species continue, and those who look more similar to us are more likely to be genetically similar to us. Similarly, the law reflects this bias towards those who are our offspring by imposing a duty on parents to rescue their children.

Additionally, people are more helpful to others they know and care about than they are to total strangers or merely superficial acquaintances. This research is useful in understanding the exceptions to the general rule of no duty to rescue. The major exception to the rule is when there is some sort of special relationship. Parents have a duty to their children, and spouses have a duty to each other. One explanation as to why this particular duty has been implemented at common law is that there is a closeness in these relationships, and it is expected when people have a close relationship they will help one another.

A final factor that predicts whether or not a person is likely to help is a belief in a just world. This belief rests on the assumption that people get what they merit. People who are good and do good things will be blessed, and those who do not, and are bad, will suffer. This belief leads people to attribute bad characteristics to those who are suffering and this may justify a person who does not help someone they perceive to be suffering. In this way, the usual distress involved in seeing an-

112. See BATSON supra note 100, at 51.
113. See id. (citing D. Krebs, The Challenge of Altruism in Biology and Psychology, in SOCIOBIOLOGY AND PSYCHOLOGY: IDEAS, ISSUES, AND APPLICATIONS 81 (C. Crawford et al. eds., 1987)).
114. See Silver, supra note 26, at 425.
115. See Matthew Clark, Recipient’s Mood, Relationship Type, and Helping, 53 J. PERSONALITY AND SOC. PSYCHOL. 94 (1987).
116. See Silver, supra note 26, at 425.
118. See id.
119. See id.
other person suffer is lessened. 120 By understanding this general belief, it is easier to understand why certain people are not likely to help another in need. Imposing a general rule requiring people to help goes against some people's assumptions about the world.

D. The Problem With Bystander Intervention

A final theory for understanding what inhibits people from helping in certain circumstances is the bystander effect. 121 According to researchers, there are basic social norms which promote helping victims, however there are also fears which block people from helping. Some of these fears include, "fears of physical harm, public embarrassment, involvement with police procedures, lost work days and jobs, and other potential dangers." 122 While logically it would seem that the more people there are around when you are in need, the more likely you are to receive help, this is not the case. One study simulated a person having a seizure. When people thought they were alone, they were likely to help 85% of the time. Those who thought there were others around only provided help 31% of the time. 123 From this and further research, Bib Latane and John Darley, two social psychologists, were able to point out a series of steps or hurdles a person must go past in order to make the decision to help. 124 These hurdles can be used to understand why people do not help at times, and in turn why the law has not imposed a general duty to rescue.

1. Noticing

The first step is noticing. 125 A person must notice that someone needs help, or that something unusual is happening. One of the biggest barriers against noticing a situation is being in a hurry. People who are pressed for time are not as likely to notice a problem. The likelihood a person will notice a problem is also a factor of the size of the community a person is in. People in larger cities are less likely to help than those who live in smaller, rural communities. 126 For example, in a small community, seeing a person lying on the sidewalk may immediately signal the need

120. See id.
122. Id.
123. See id.
125. See id.
for rescue, whereas in a large city, it may be more common. This obstacle could be used to show that a duty to rescue should not be imposed because it would be difficult to prove whether a person actually noticed the emergency or not. However, imposing a legal duty may also have the effect of requiring people to be more aware of their surroundings and possible emergencies. This would have the effect of reducing generally the obstacle of failure to notice.

2. Interpreting

A second hurdle that must be crossed is interpreting the event as an emergency. When we come upon a situation where it appears someone is in trouble, but no one else has done anything to help, we often look to others to determine how we should behave. This is called social validation, which suggests that we look to others for cues on how to act when we are in an unfamiliar situation or setting. In the case above where a person has come upon a situation which appears to be an emergency, if others are not doing anything, it is likely that the newcomer will also do nothing. This comes from the fear of embarrassment that may result for having misunderstood the situation and rushing in where help was not really needed.

Furthermore, a phenomenon called pluralistic ignorance occurs when everyone present in a situation assumes there is no emergency because nobody is acting like there is an emergency. This happens not only in emergency situations, but can also happen in the classroom. People may be afraid to ask a question for fear of looking stupid. Then, when the question is not asked, it is possible that nobody understands.

If a duty to rescue were to be legally imposed then the costs associated with liability for not helping would likely be higher than the social costs of looking foolish upon trying to help at the wrong time. If people knew the law requires them to rescue, then they may be primed and ready to interpret the situation as an emergency and overcome this obstacle. The costs associated with liability would be greater than those associated with the social embarrassment of attempting to help when none was needed. If the social norm is to take action and immediately aid an-

127. See Latane, supra note 124, at 31-32. In a similar type of study, researchers place subjects into a room either alone, or with two other non-reacting confederates to perform a task. During their task, smoke began filling the room. Those who were in the room alone reported the smoke seventy-five percent of the time. Those who were in the room with the non-reacting confederates only reported the smoke ten percent of the time. Bibb Latane & John M. Darley, Group Inhibition of Bystander Intervention in Emergencies, 10 J. PERSONALITY & SOC. PSYCHOL. 215 (1968).

128. See id.

other in distress, it seems that imposing a legal duty would also help overcome this second obstacle.

3. Taking Responsibility

The third hurdle a person must overcome when deciding to help is taking responsibility. 130 Even if a person notices and recognizes the emergency, they must still take responsibility before they will act. 131 This is less likely to happen if others are around. 132 When others are around people tend to assume that someone else will do something to help the victim. Again, contrary to what would seem logical, the larger the number of bystanders the less likely people are to help. 133 In large groups people tend to feel less responsible. According to this theory of reduced responsibility, “when diffusion occurs, an individual recognizes and continues to believe that help is needed and should be given but also believes that this help will be given by other bystanders.” 134 The presence of others allows the person, who has seen an emergency, to assume that others will take care of the emergency. When it is assumed that someone else has or will take care of the problem it is both unnecessary, and might even seem foolish to step in and do something more.

This common thought process would be altered by imposing a duty to rescue. If people know they are going to be held accountable for noticing a situation and not helping, there is a higher probability they will act. However, the reverse may be true as well. Despite the knowledge that they could be held liable, people may assume that someone else will take care of the emergency and therefore they will not be held liable, and they will not have had to extend any effort to help. Therefore, the mere imposition of liability may not help overcome this hurdle.

4. Deciding how to provide help

The fourth hurdle is deciding how to best provide the needed help. 135 Often people are not trained to provide medical assistance in the case of a car accident. There may be a fear of causing more harm than has already been done, and/or looking foolish when trying to help. 136 If others

130. See Darley, supra note 121, at 31.
131. See id.
132. See Darley, supra note 121, at 377.
134. See id. at 445.
135. LATANE, supra note 124.
136. See Frederick M. Siem & Janet T. Spence, Gender-Related Traits and Helping Behaviors, 51 J. PERSONALITY & SOC. PSYCHOL. 615 (1986). This research seemed to indicate that with
are around, a potential rescuer may feel afraid to perform in front of them, especially if she is not confident in her ability to help. She may feel that somebody else on hand would perform better in this situation. This is another hurdle which would not be overcome by imposing liability. If a person feels like they do not know how to help, the increased stress of potential criminal or civil liability could either inhibit their performance, or motivate them to escape the situation without helping.\footnote{See Robert B. Zajonc, Social Facilitation, 149 SCIENCE. 269 (1965). According to Zajonc’s studies, the arousal caused by stress or by the presence of others will facilitate a person’s dominant response. In easy tasks, increased arousal leads to increased performance. In difficult tasks, increased arousal leads to decreased performance. See id.} In this case, imposing liability could potentially decrease rescue.

As has been presented there are various psychological hurdles that can stop a person from helping another in need. A person must notice the emergency situation and interpret it as such, she must take responsibility to do something, decide how to help, and then actually perform the help. In the cases where the court made exception to the no duty to rescue rule, the scenario was such that these previously mentioned factors were not as prevalent.\footnote{See supra Part II.A.2.} These cases involve some kind of relationship between the potential rescuer and victim, or a situation in which the rescuer should know that the victim is in danger.

VI. CONCLUSION

Taking a psychological perspective on the no duty to rescue rule gives a dual perspective. On the one hand, the law as it stands reflects the unwillingness of lawmakers to impose a general duty to rescue, and reflects the difficulty in understanding why in any one instance a person fails to help. Rather than being individualistic and morally vacant, the law may reflect the psychological impediments that inhibit rescue. The psychological phenomenon of bystander intervention seems to show, [T]hat a victim may be more likely to get help, or an emergency may be more likely to be reported, the fewer people there are available to take action. It also may help us begin to understand a number of frightening incidents where crowds have listened to but not answered a call for help. Newspapers have tagged these incidents with the label ‘apathy.’ We have become indifferent, they say, callous to the fate of suffering others. The results of [these] studies lead to a different conclusion. The failure to intervene may be better understood by knowing the relation-
ship among bystanders rather than between a bystander and the vic-
tim.  

However, this perspective also shows that the law could potentially be used to increase helping behavior. The law and people's morality form a kind of symbiotic relationship.  

The law is shaped by the public morality, and the law shapes people's morality.

Therefore, rather than imposing a general duty and harsh penalties for those who fail to rescue in an emergency situation, it may be more effective to impose a limited duty to help 1) in situations which pose no threat to the rescuer, or 2) when there is a special relationship as has been defined in the common law exceptions to the duty to rescue rule, the failure to rescue would result in a minor penalty. Imposing a duty to rescue would put people on notice of the need to rescue and help break down some of the psychological barriers which may prevent people from performing a rescue.

David N. Kelley

139. LATANE, supra note 124, at 221.
140. See Silver, supra note 26, at 428-29.