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Modern no-duty-to-rescue rules[1] are linked to the past,[2] particularly to a perceived laissez-faire period[3] of Anglo-American jurisprudence—the late 1800s and early 1900s.[4] The past, however, is flawed in two very prominent ways. First, most of the historical no-duty-to-rescue cases have been overruled, discredited, superceded, or removed to new legal categories other than duty rules.[5] Second, the historical cases have been

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1. For bar exam purposes, one would say that there is no general non-statutory duty to rescue unless there is some special relationship present. *See* Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 316 nn.1 & 6 (1997). While not precisely accurate, nor technically complete, *see id.* at 316 n.6, even prominent justices will be heard stating equivalent rules. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) (Posner, J., stating a no duty to rescue rule in the broadest terms: "Now there is of course no general common law duty to rescue a stranger in distress even if the rescue can be accomplished at no cost to the rescuer.").

2. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 316; RESTATEMENT (SECOND) OF TORTS § 314 (1965).

3. *See* Schacht v. The Queen [1972] 30 D.L.R. 3d 641, 651 (Can.) ("[F]rom the legal standpoint the laissez-faire attitude of the priest and the Levite was condoned.").

4. *See, e.g.*, Don M. Reckseen, Note, *The Duty to Rescue*, 47 IND. L. J. 321, 321 & nn.1-5 (1972). The Restatement (Second) of Torts states its no-duty-to-aid rule in section 314. The Reporter's notes provide support for the general rule of section 314 with several cases, most of which were decided in this period. *See* RESTATEMENT (SECOND) OF TORTS § 314 reporter's notes (1965).

5. In a previous article I noted that when historical cases spoke of "no duty" to rescue, they really meant, as was common in periods prior to 1960, "no liability" for failure to rescue. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 319-29. Today, courts typically distinguish "no duty" arguments from other prima facie and affirmative defense liability limiting tools, such as causation and

greatly overgeneralized. The majority of the historical no-duty-to-aid cases arose when boys (although not very young boys)[6] did bad things (such as by trespassing), or when men behaved in foolish ways (such as by canoeing on an icy lake after drinking heavily), or when men[7] did foolish things at work (or worked with foolish or inattentive co-workers). Historical no-duty-to-rescue rules were largely developed from situations involving certain forms of socially unproductive,[8] even foolhardy, behavior exhibited by (often young) males[9] and men misbehaving at work.[10] Most of these historical cases are no longer good law.

Situations involving males behaving badly, thus, shaped the historical cases and became bad law. These cases made things difficult for socially responsible males and almost all females. Modern courts have

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assumption of risk. *See* Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503 (1997).

6. *See* RESTATEMENT (SECOND) OF TORTS § 339 (c), (d) (1965) (stating that very young boys sometimes become beneficiaries of a rule ameliorating the "no duty" rule, e.g., attractive nuisance doctrine).

7. Prior to workers' compensation, the workplace was largely a no-duty zone, due in part to policy goals that were not merely miscreant-male-oriented. When women or girls entered the workplace, they were often treated as badly as men and boys. *See, e.g.*, Allen v. Hixson, 36 S.E. 810, 810 (Ga. 1900) (no duty to aid a woman who worked in a laundry who became trapped in a roller press machine).

8. In some instances, even though the behavior itself was socially unproductive, the costs to prevent that behavior were well out of proportion to any reasonable prevention of risks. *See, e.g.*, Kravetz v. Perini & Sons, 252 F.2d 905, 909 (3d Cir. 1958); Powell v. Ligon, 5 A.2d 373, 376 (Pa. 1939) (in both cases, holding that the cost of fencing in a large area of land outweighed the risk of danger).

9. Even today young men and boys are significantly greater risk generators. For example, American automobile insurance rates are typically gender and age sensitive, with young males typically paying the highest rates outside of assigned risk pools. Moreover, drunk driving incidents are overwhelmingly caused by men. *See* Jessica DeBianchi, *Don't Forget Insurance; Type of Vehicle, Your Age, Gender, Record Are Factors*, SUN-SENTINAL (Fort Lauderdale, Fla.), Oct. 14, 1998, at 16.

10. Workers' compensation laws cover the majority of workplace injuries. Today, we tend to experience bad employee behavior through, in part, workers' compensation insurance crises.

overlooked the fact that a particular subset of males and their behavior largely created "rescue" doctrine. In an incredible twist of irony, the historical cases have actually been used to protect some socially unproductive behavior and to deny protection for many individuals who behaved in socially productive or responsible manners.[11]

Today, when modern courts look for support for no-duty-to-rescue rules, they should put the historical cases in proper perspective. Those cases teach some important lessons about socially unproductive behavior and tort law, but they suffer badly from overuse, misconception, and over-generalization. Using these cases as a way to avoid dealing with modern affirmative duty problems is inappropriate.

I. MISBEHAVING BOYS UNDER COMMON LAW

Misbehaving boys like to trespass and play with unreasonably dangerous things. The common law was reluctant to protect such behavior unless the boys were very young, and even then, not always.[12] Of the sixteen cases cited by the reporter in support of Restatement (Second) of Torts, section 314,[13] two illustrate this reluctancy—*Riley v. Gulf, C. & S. F. Ry. Co.*[14] and *Sidwell v. McVay.*[15]

In *Riley*, plaintiff's son, Oscar, had his foot amputated following an accident involving a train.[16] Oscar was attempting to board a freight train

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11. Thus, in a recent decision, the Virginia Supreme Court ruled (contrary to most courts) that a psychotherapist owed no duty to warn a woman of an imminent threat of violence to her. *See* Nasser v. Parker, 455 S.E. 2d 502, 502 (Va. 1995); *see also* Peter F. Lake, *Virginia Is Not Safe for "Lovers": The Virginia Supreme Court Rejects Tarasoff, in* Nasser v. Parker, 61 BROOK. L. REV. 1285, 1289-91 (1995) (stating that the *Nasser* court relied on Restatement (Second) of Torts' no-duty-to-rescue rules to protect psychotherapists from liability for their socially unproductive behavior—failing to give a simple warning that would save lives and refusing to protect blameless women victims).

12. *See infra* note 56.

13. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

14. 160 S.W. 595 (Tex. 1913).

15. 282 P.2d 756 (Okla. 1955).

16. *See Riley*, 160 S.W. at 595.

en route to Texas when "his foot was mashed and broken."[17] After Oscar suffered the injury, he sent a friend to get a doctor.[18] The train personnel detained Oscar's friend, however, causing a delay in his receiving aid.[19] Once the doctor arrived, train personnel directed the doctor to give Oscar only minimal care, preferring instead to get him to the hospital.[20] Presumably, if the doctor had done more, the foot might have been saved.[21] The court viewed Oscar as a trespasser who in, attempting to thieve a ride, was owed no duty by the railroad.[22]

Although *Riley* would be suspect as a no-duty case today,[23] *Riley* represents a classic misbehaving male scenario. Misbehaving boys—old enough to appreciate the risks and consequences of their behavior—try to cop a ride on a train, injure themselves, and then expect someone to compensate them for their injuries. Moreover, in *Riley* it is not entirely clear that the train personnel were callous or unreasonable.[24] The initial delay could have been due to a desire to sort out the story of a trespasser, and the directions to the doctor may have been reasonable.[25]

Sidwell involved a sixteen-year-old boy who blew his hand off while

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17. *Id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* at 596-97.

23. The train employees were considered to be acting outside the scope of employment. *See id.* at 597. Today's broader notions of scope of employment would no doubt encompass their actions. *See, e.g.*, Riviello v. Waldron, 391 N.E.2d 1278, 1281 (N.Y. 1979) (an employee's scope of employment includes doing the master's work or furthering some purpose of the master). The actions of the railroad employees in *Riley* were in the nature of interfering with the rescue of another or taking charge or control of an injured person, which today would trigger potential liability. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1202-03 (7th Cir. 1983); *see also* RESTATEMENT (SECOND) OF TORTS §§ 323, 324, 327 (1965).

24. *See Riley*, 160 S.W. at 595.

25. For example, had the railroad directed or permitted the doctor to treat the foot, and if the evidence had tended also to show that hospitalization would have been more effective, the railroad might have been sued for those reasons.

attempting to construct a pipe bomb.[26] Sidwell and his friends bought firecrackers, from which they extracted significant quantities of gunpowder.[27] They intended to build a pipe bomb as they had done on previous occasions.[28] To put the finishing touches on the pipe bomb, Sidwell repeatedly beat the pipe with a hammer.[29] The other boys—in fear for their own well-being—moved away to safety.[30] Sidwell continued to hammer away until the bomb exploded; luckily, the explosion did not kill him.[31] After the explosion, Sidwell sued his friends and the parents of one friend, on whose property the Fourth of July[32] injury occurred.[33]

Sidwell's principal argument was that as land owners and operators, the defendants were duty-bound to eject him or to warn him of the dangers of his actions.[34] Interestingly, Sidwell was deemed to have "an alert mind" and had specific experience with pipe bombs.[35] Moreover, his friends claimed they did warn him.[36]

The *Sidwell* court recognized that Sidwell's arguments invoked, albeit improperly, the doctrine of attractive nuisance.[37] Sidwell was old enough to know of the danger, and he brought the danger onto the prem-

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26. *See* Sidwell v. McVay, 282 P.2d 756, 758 (Okla. 1955).

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* The parents had seen the boys with the gunpowder, and the father admonished the boy about the pipe bomb. *See id.*

32. Fourth of July is a favorite miscreant-male day. A man created havoc (both in fact and doctrinally) on the Fourth of July when transporting explosives in an unmarked package. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928); *see also* Osterlind v. Hill, 160 N.E. 301, 302 (Mass. 1928) (An intoxicated man drowned after falling out of a rental canoe.).

33. *See Sidwell*, 282 P.2d at 757.

34. *See id.* at 758.

35. *See id.*

36. *See id.* at 758-59.

37. *See id.* at 758.

ises himself.[38] The defendants, therefore, owed no affirmative duty to eject him or warn him of the danger he was creating.[39]

Although the court rested its decision on no-duty grounds,[40] it could have decided the case on breach, causation,[41] or affirmative defense grounds.[42] Today, most jurisdictions treat invited social guests like Sidwell as invitees or as someone owed a duty of reasonable care.[43] In those states, Sidwell would have lost on these other non-duty grounds, unless the court applied something analogous to an "open and obvious danger" no-duty rule to *Sidwell*-like situations.[44] In this sense, Sidwell's no-duty rationale has been effectively superceded by modern concepts of tort liability; however, the no-liability result is still one that most courts would and should reach on these facts—even as a matter of law.

A famous case, not relied on by the Restatement (Second) of Torts,

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38. *See id.*

39. *See id.* at 758-59. As to the friends who allegedly stood by, the court also refused to impose a duty to warn or assist, citing a general no-duty-to-aid rule. *See id.* at 759. That rationale was strained, given that there was testimony that the boys were engaged in a common undertaking and had all participated in active misconduct that increased the risk of harm to Sidwell and themselves. *See id.* at 758. Thus, the matter was not one of affirmative duty alone. However, the court noted a more convincing rationale—no breach of duty. *See id.* at 759. The court stated that the boys claimed they tried to stop Sidwell from hammering away. *See id.* The court also noted Sidwell's defiance of his friends' warnings against him and held that there was no proof of affirmative misconduct. *See id.*

40. *See id.* at 758-59.

41. In the 1950s, it would not have been uncommon to view Sidwell, a deliberate actor, as the sole proximate cause of his own harm. *See id.*; *see also* Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) (holding that the decedent was the sole proximate cause of his death even though he was induced to enter into certain acts by the proprietor).

42. In the 1950s, plaintiffs typically faced all-or-nothing affirmative defenses, clearly applicable here, of assumed risk and contributory negligence. *See Sidwell*, 282 P.2d at 759; *Yania*, 155 A.2d at 344.

43. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, *supra* note 1, at 316.

44. *See* Turcotte v. Fell, 502 N.E.2d 964, 969 (N.Y. 1986) (holding that the duty owed by one participant to a co-participant in a sporting event—in this case a horse race—is a duty to merely avoid reckless or intentionally harmful conduct).

presents the same type of misbehaving male problem. In *Buch v. Amory Manufacturing Co.*,[45] an eight-year-old boy trespassed into a factory.[46] His presence was known to the plant employees.[47] Soon after the boy entered, a piece of machinery caught his arm.[48] The *Buch* court refused to impose a duty to remove or warn the boy.[49] In fact, the court believed the boy might owe money to the business for trespassing damages.[50]

Today, *Buch* stands as bad law on its own. Overruled in substantial measure in its own jurisdiction,[51] a *Buch* result would be inappropriate in American jurisdictions today.[52]

It does reflect, however, the potency of fact patterns involving miscreant young males; it also reflects then extant paradigms of no liability.[53]

II. YOUNG MISBEHAVING BOYS— THE ATTRACTIVE NUISANCE DOCTRINE

In the mid-to-late 1800s and early 1900s, miscreant boys were considered bad at almost any age and were barred from recovery, as they were in *Buch*.[54] As late as 1922, the United States Supreme Court echoed

45. 44 A. 809 (N.H. 1897), *overruled in part by* Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976).

46. *See id.* at 809.

47. *See id.* at 810.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See* Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976).

52. *Buch* involved injury arising from an instrumentality under the control of the defendant, triggering RESTATEMENT (SECOND) OF TORTS § 322 (1977) responsibility. In addition, some duty was owed to this type of trespasser (particularly a child trespasser). *See id.*

53. The injured boy in *Buch* came onto the premises probably in pursuit of a job or future job prospect. Had he been an employee, he might have fared little better than a "trespasser." *See Buch*, 44 A. at 811.

54. *See* Leon Green, *Landowners' Responsibility to Children*, 27 TEX. L. REV. 1 (1948).

the sentiment that trespassing boys are not entitled to relief.[55] Because trespassing was a prominent source of injuries for miscreant boys, the courts faced a number of scenarios,[56] some of which were particularly unpalatable as no-duty cases.[57] Thus, in the late 1800s courts began to draft an important exception to no-duty-to-aid-or-rescue rules—the attractive nuisance doctrine.[58]

Implicitly, most courts in that formative period concluded that protecting against all trespassing boys, and the injuries that they caused themselves, would be socially undesirable. However, when a person knew a very young child—one too young to appreciate the danger—might be hurt by something that could have easily been made safe, it was hard to justify the no-liability results typically applicable to minor, nonteenage boys.[59] In the late nineteenth century, the so-called "turntable

55. *See* United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 276 (1922) (no duty owed to trespassing children).

56. There is little to suggest that the "historical" courts placed as much emphasis on misfeasance/nonfeasance as they do today. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 319-29. For the most part, the emphasis was on the misconduct of the plaintiff/miscreant and the burden on the defendant, as opposed to questions as to whether the plaintiff requested protection from affirmative conduct of some unintentional kind or to be extricated from a place of danger. *Cf. Buch*, 44 A. at 809. (A young boy was injured in active, non-natural operations of a defendant, yet the court placed heavy emphasis on the distinction between preventing and causing an injury.) The common law courts of the historical period saw little practical difference between the claim, "Help me, my arm is stuck in your machine" and "protect me from encountering your machine."

57. *See* JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 9.02, at 141 (1996).

58. It is more common today to consider attractive nuisance rules in the context of landowner duties, particularly in light of an exception to duties owed to trespassers. *See id.* at 138-42. Appropriate as that is, the attractive nuisance doctrine draws its roots to the period in which courts generally denied virtually all legal responsibility for bad boys, men behaving badly, and people at work. The attractive nuisance doctrine was a limited amelioration of a general no-liability approach, much as the last clear chance doctrine operated to ameliorate the harsh effects of the doctrine of contributory negligence. Most bad boys were out of luck; a few special bad boys could claim the status of child trespasser subject to attractive nuisance rules and were able to gain recovery.

59. Similarly, it was difficult to justify using the doctrine of contributory negligence against a now helpless plaintiff.

doctrines" were born.[60] These cases involved very young children who trespassed onto railroad yards and became mangled on railroad "turntables" that resembled, or were enticing as, carnival rides.[61] By the middle of the twentieth century, courts had fully embraced the more expansive attractive nuisance doctrine, described today in the oft-cited Restatement (Second) of Torts section 339.[62]

Critically, the attractive nuisance doctrine created a duty to warn, aid, or protect only young misbehaving boys.[63] The doctrine favored landowners, however, when, *inter alia*, a child should have appreciated the danger or when the burden to protect was too great in light of the

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60. *See* DIAMOND ET AL., *supra* note 57, § 9.02, at 141.

61. *See id.* at 143.

62. *See, e.g.*, Szyplinski v. Midwest Mobile Home Supply Co., 241 N.W.2d 306, 308-09 (Minn. 1976) (citing Restatement (Second) of Torts section 339 as reflecting a rule previously adopted in Minnesota). Section 339 provides that:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339. Section 339 reflects the broadening of the turntable doctrines in at least two important ways. First, the attractive nuisance doctrine was broadened to apply to situations outside the railroad turntable scenarios. Second, the requirement that that which lured a child to the premises must cause harm was relaxed. *See also* DIAMOND ET AL., *supra* note 57, at 141-42.

63. *See, e.g.*, King v. Lennen, 348 P.2d 98, 99 (Cal. 1959) (18-month-old child); McWilliams v. Guzinski, 237 N.W.2d 437 (Wis. 1976) (four-year-old child).

risks posed.[64] Thus, when older boys were injured by large, artificial water conditions while they were trespassing, courts typically have remained cautious about imposing liability on landowners given that older boys should appreciate the danger.[65] As discussed in a comment to section 339 of the Restatement (Second) of Torts,[66] courts confronting trespassing teenage boys near the age of sixteen who dive into shallow waters and become seriously injured have often rejected liability to landowners or only cautiously allowed such liability.[67]

Often, misbehaving boys in need of protection or aid were deemed trespassers. The common law development of the doctrine of attractive nuisance was one method used to ameliorate the potentially harsh effects of a no-duty/no-liability rule toward these boys. Attractive nuisance law was an exception to no-affirmative-responsibility-to-aid decisions.[68] Very young misbehaving boys were sometimes owed a duty, including, if reasonably necessary, a duty to rescue, aid, or protect; older misbehaving boys were much less likely to succeed on these theories.[69] Adult

64. *See* RESTATEMENT (SECOND) OF TORTS § 339 (c), (d) (1965) ("As the age of the child increases, conditions became fewer for which there can be recovery.").

65. *See* Hughes v. Quarve & Anderson Co., 338 N.W.2d 422, 424-25 (Minn. 1983).

66. *See* RESTATEMENT (SECOND) OF TORTS § 339 cmt. c (1965).

67. *See, e.g., Hughes,* 338 N.W.2d at 425. In *Hughes* a 16-year-old boy trespassed into a quarry and dove headfirst into three feet of water, rendering him a quadriplegic. *See id.* at 423. There was evidence that the water was murky and that the plaintiff was not as mature as other 16-year-olds. *See id.* at 423, 425. In affirming a lower court's decision to allow a jury to hear the case, *Hughes* noted that several cases had taken the view that such a 16-year-old was an adult trespasser, to whom no special duty was owed. *See id.* at 425. However, the court also pointed to a number of cases where the maturity of 16-year-old (and younger) boys was not assumed. *See id.*

68. Obviously, the doctrine had broader implications than simply requiring one to use reasonable care.

69. It is interesting to note that especially for teenagers, the decisional law is heavily weighted to bad boys and not trespassing girls. *See Hughes,* 338 N.W.2d at 425. Even the attractive nuisance doctrine points to the special attention given to adolescent boys and young men. Implicitly, the common law was reacting to a sense of disproportionate risk creation. Today, one can see evidence in the case law that no-duty rules with respect to older bad boys are being supplanted by comparative fault calculations. *See id.* (16-

males consistently failed on claims made under these theories.

III. LIABILITY ISSUES INVOLVING YOUNG COLLEGE MEN

Although few cases involve college-age men in classic duty-to-rescue scenarios, this century's development of liability law involving college campuses has raised interesting problems for the affirmative duty rule—the area where duty-to-rescue rules are thought to originate—and misbehaving male youths. Some instructive insights into the miscreant male problem can be gleaned from the evolution of cases involving collegiate men. College-aged men are often a problematic group, particularly when brought together.[70] In war time, large groups of young boys were often called armies, and a paternalistic, almost militaristic sentiment, pervaded collegiate cases prior to 1960. During this period, the college was understood to stand *in loco parentis* for college students—most of whom were male rather than female and most of whom were separated and segregated based on gender.[71] *In loco parentis* put the

year-old boys who dive into a quarry were owed a duty, but subject to significant comparative fault offset). In the pre-comparative fault period it was easy to equate no duty with no liability results. *See Lake, Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 329-33. After all, a 16-year-old who deliberately jumped into a ditch could be, *inter alia,* an intervening cause or contributorily negligent. In either instance, the historical result was no liability, and practically speaking, no duty. Moreover, in an era when "boys will be boys," a tricky responsibility issue arose. We might not fault boys for being boys, but we might wish to make them learn responsibility for their decisions. Thus, there is a difference between being responsible for breaking a lamp and being responsible to take care of the new kitten you wish to adopt. For very young boys, too young to be able to handle significant responsibility lessons, imposing the kitten type of responsibility might be unrealistic and unfair. Therefore, when four-year-old Johnny wants a cat, he says he will take care of it. Unless you are an idiot or have a natural born concierge for a child, you know that you, the parent, will do most of the work, at least for several years. Johnny is too young to take on that responsibility, and a principal factor in deciding to keep the cat will be if it is too much of a burden on you, the parent.

70. *See* Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918 (Cal. Ct. App. 1991).

71. *See* Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts,* 20 J.C. & U.L. 261, 263-67 (1994).

college in the position of being able to exercise its disciplinary power with near impunity.[72]

In particular, a college could make, enforce, and use almost any rule and procedure deemed necessary.[73] The legal powers conferred to a college were not so far from those depicted in the movie *Animal House*,[74] where Dean Wormer could make and enforce probationary rules (even double secret probation) and summon a military-style honor council to adjudicate matters.[75] *In loco parentis* doctrine was designed to provide a college with the power to control students and their behavior;[76] the doctrine was not applied to protect the physical security of the students, except possibly indirectly by protecting the college's right to discipline students.[77]

During the period of the *in loco parentis* doctrine, young men in college were subject to strict disciplinary powers. In fact, a right to control supplanted duty (or non-duty) to aid and protect. The period of the *in loco parentis* doctrine, however, came to an end in the 1960s and 1970s.[78] The courts' initial reaction to colleges' loss of strict control over student behavior often was to insulate the college from liability arising from student (typically male)[79] misconduct, particularly where the misconduct which caused injury involved drinking.[80]

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72. *See id.* at 265.

73. *See id.* at 265-66.

74. ANIMAL HOUSE (Universal Pictures 1978).

75. *See, e.g.*, Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) (upholding the power of a university to suspend/exclude students on the basis of allegedly vague rules and in summary fashion).

76. *See* Bickel & Lake, *supra* note 71, at 265-66.

77. *See id.* at 266.

78. *See id.* at 266-70.

79. Female college students have become subject to fellow student rules and assumption of risk rules reminiscent of traditional workplace rules.

80. The classic cases on this point are: Bradshaw v. Rawlings, 612 F.2d 135, 144 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980) (college owed no duty to an 18-year-old male who had been drinking with another young college male and who was involved in a vehicular accident); Beach v. University of Utah, 726 P.2d 413, 414 (Utah 1986) (univer-

Curiously, courts began to create a doctrinal paradox: if a student was injured by a non-student while on campus, that student was far more likely to recover than if the student was injured by another student.[81]

The unmistakable image that courts had of the post-*in loco parentis* campus was that of an alcohol-infused campus populated with uncontrollable underage drinkers, who injured themselves and others (on or off campus), and who accepted these risks as part of college life. *Bradshaw v. Rawlings*,[82] decided in 1979, is the quintessential case. *Bradshaw* involved underage men who were drinking at an off-campus picnic and caused a serious automobile accident.[83] The off-campus party was a sophomore class party where almost everyone was underage and drinking.[84] The faculty were involved in the planning of the picnic. A faculty advisor co-signed a check for funds that were later used to buy beer. The *Bradshaw* court, however, mischaracterized[85] the case as one of (no) affirmative duty.[86] Assuming that the only way to control student behavior would be to impose "custodial" duties of care,[87] the *Bradshaw* court expressed a perceived futility in having anything less than Dean Wormer-like[88] *in loco parentis* rules:

> The centerpiece of Bradshaw's argument is that beer-

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sity owed no duty to a 20-year-old female student injured while drinking on a field trip after a fall into a crevice); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987) (university owed no duty to a female student who suffered severe injuries after being abducted from her dorm building by a drunken fraternity brother).

81. *See* Bickel & Lake, *supra* note 71, at 281.

82. 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980).

83. *See Bradshaw*, 612 F.2d. at 137.

84. *See id.*

85. *See* Bickel & Lake, *supra* note 71, at 272-74, 287-88.

86. *See Bradshaw*, 612 F.2d at 138-39.

87. *See id.* at 143.

88. It is worth remembering that Dean Wormer's strict tactics backfired in *Animal House*. In the end, alcohol-suffused sociopaths, masquerading as ex-fraternity brothers, brought down the town in a Valhallan triumph of chaos over order. *See* ANIMAL HOUSE (Universal Pictures 1978).

drinking by underage college students, in itself, creates the special relationship on which to predicate liability and, furthermore, that the college has both the opportunity and the means of exercising control over beer drinking by students at an off campus gathering. These contentions miss the mark, however, because they blur the distinction between establishing the existence of a duty and proving the breach thereof. Bradshaw does not argue that beer drinking is generally regarded as a harm-producing act, for it cannot be seriously controverted that a goodly number of citizens indulge in this activity. Our national public policy, insofar as it is reflected by industry standards or by government regulation of certain types of radio-television advertising, permits advertising of beer at all times of the day and night even though Congress has banned advertisement of cigarettes and the broadcasting industry has agreed to ban the advertisement of liquor. What we know as men and women we must not forget as judges, and this panel of judges is able to bear witness to the fact that beer drinking by college students is a common experience. That this is true is not to suggest that reality always comports with state law and college rules. It does not. But the Pennsylvania law that prohibits sales to, and purchases by, persons under twenty-one years of age, is certainly not a universal practice in other countries, nor even the general rule in North America. Moreover in New Jersey, the bordering state from which the majority of Delaware Valley College students come, . . . the legal drinking age is eighteen. Under these circumstances, we think it would be placing an impossible burden on the college to impose a duty in this case.

. . . .

. . . Therefore, we conclude that Bradshaw failed to establish a prima facie case against the college that it should be charged

with a duty of custodial care as a matter of law . . . .[89]

In a facially inconsistent line of post-*in loco parentis* cases, courts also held that colleges owed duties to protect students on campus from off-campus intruders.[90] How can one distinguish, in principle, between a woman abducted from a dorm room by a drunk fraternity brother[91] and a woman abducted by a non-student assailant?[92] Most courts in the immediate post-*in loco parentis* period never attempted to reconcile this paradox. Like children injured by an attractive nuisance, students asked for protection from the consequences of their own bad behavior. Unlike the typical attractive nuisance plaintiffs, however, college students were much older and had won their rights to self-determination.[93] Further, the courts' initial perception was that college drinking was uncontrollable and unavoidable and, thus, reasonable efforts could not prevent alcohol-related student injuries.[94]

While post-*in loco parentis* no-duty case law focused primarily on male misconduct, young women historically have been the injured persons. For example, in *Rabel v. Illinois Wesleyan University*, it was a young female who was abducted from her dorm room,[95] and in *Beach v. University of Utah*, it was a young woman who drank and fell into a canyon.[96] When women voluntarily join the beer-and-party college culture, courts show little sympathy for them, especially when their injuries occur

89. *Bradshaw*, 612 F.2d at 142-43 (footnotes omitted).

90. *See, e.g.*, Mullins v. Pine Manor College, 449 N.E.2d 331, 333 (Mass. 1983) (holding that the college had a duty to protect a student who was raped by an outside assailant); *see also* Bickel & Lake, *supra* note 71, at 281-83.

91. *See* Rabel v. Illinois Wesleyan Univ., 514 N.E. 552, 554 (Ill. App. Ct. 1987).

92. *See Mullins*, 449 N.E.2d at 333.

93. Hence, in *Bradshaw*, the court placed heavy emphasis on the successful attempts of students to gain a greater range of personal rights and freedoms. *See Bradshaw*, 612 F.2d at 138-40.

94. *See id.* at 142.

95. *See Rabel*, 514 N.E.2d at 554.

96. *See* Beach v. University of Utah, 726 P.2d 413, 415 (Utah 1986).

off campus.[97] Considering the period in which post-*in loco parentis* no-duty cases arose—the 1970s, 1980s, and 1990s—women may have won a certain type of equality in the courts: when a young woman today engages in underage drinking, the courts treat her like a misbehaving young man. This is true even though fraternities are traditionally more dangerous than sororities.[98]

Many of the female cases, however, involve women who were blameless or marginally blameworthy, or whose mistakes did not justify their own injuries. Thus, no one seriously contends that after a few drinks, the complainant in *Tanja H. v. The Regents of the University of California*[99] deserved to be, or even assumed the risk of being, gang raped.[100] Explaining those cases requires other theories. Some of the cases could be explained on the basis of the debatable perception that no reasonable efforts could prevent certain injuries. For example, attempting to fence in a large national lake to protect very young children is unreasonably burdensome, if not impossible, as many courts seem to believe.[101] Similarly, preventing all random acts of alcohol violence, or following a young college woman around to protect her from date rape, or other sexual assault, is equally unreasonable. On the other hand, these cases may reflect a "fellow-student rule" (like the old fellow-servant

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97. *See* Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918 (Cal. Ct. App. 1991) (first-year female student raped after alcohol was served at a party); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981) (young female student severely injured in auto collision occurring in auto race after an off-campus drinking escapade); *see also* Crow v. California, 271 Cal. Rptr. 349 (Cal. Ct. App. 1990) (young woman was beaten by football player whose attacks may have been precipitated by the fact that alcohol was served in a dorm party).

98. *See* Diedtra Henderson, *Sororities and Fraternities Want a Hand in Solutions: Actions of Few Mar Image of All, They Assert*, SEATTLE TIMES, Oct. 10, 1992, at A7; John Hill, *Abolish Frats, Sororities, Rhode Island Report Says*, DENVER ROCKY MOUNTAIN NEWS, Apr. 17, 1994, at 41A.

99. 278 Cal. Rptr. 918 (Cal. Ct. App. 1981).

100. *See id.* at 919 (at no point did the university or the judiciary argue that complainant assumed the risk of being raped by attending a party where alcohol was served).

101. *See, e.g.*, Kravetz v. Perini & Sons, 252 F.2d 905, 909 (3d Cir. 1958); Powell v. Ligon, 5 A.2d 373, 376 (Pa. 1939).

rule[102]) or other general assumption-of-risk-type rules analogous to the old workplace rules.

So far we have seen the *in loco parentis* and immediate post-*in loco parentis* legal culture, but the story does not end there. In recent times (as with the miscreant male situations), courts have backed off from the no-duty approach. A recent series of college law cases challenges the no-duty results of the preceding era.[103] Thus, in many ways college law mimics the developments of the law of affirmative duty in other areas. The power of the bad-boy/no-duty paradigms was so strong as to exert a discernable influence over the development of American law, even into the 1970s and 1980s. No-duty approaches to university law, however, are in retreat as courts recognize that there are realms of "control" which are less drastic than custody.[104]

IV. MEN BEHAVING BADLY

When grown men act foolishly, childishly, drunkenly, or unlawfully,[105] and then ask to be assisted from peril, courts often have been unsympathetic. Some of the most frequently cited and referenced no-duty-to-rescue cases are of this type. As with other problem-male categories, however, courts have recently softened their no-duty stances against this type of men.[106]

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102. *See infra* note 175 and accompanying text.

103. *See, e.g.*, Nero v. Kansas State Univ., 861 P.2d 768, 782-83 (Kan. 1993) (university liable for placing dangerous student in dorm); Furek v. University of Del., 594 A.2d 506, 509 (Del. 1991) (university liable for injuries arising out of drunken fraternity activity). An extended discussion of the case law and recent shifts is beyond the scope of this article. For more information on this subject, see Bickel & Lake, *supra* note 71.

104. *See, e.g.*, Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1324 (Ohio 1997) (holding that "the psychotherapist-outpatient relationship embodies sufficient elements of control to warrant a corresponding duty to control").

105. The men behaving badly cases feature behavior that is not merely negligent but silly, useless, or pugnacious.

106. Again, there were some notable exceptions. *Griswold v. Boston & Maine R.R.* is one of the very few historical cases in which a woman (not at work) was the party seeking an affirmative duty. *See* Griswold v. Boston & Maine R.R., 67 N.E. 354, 355

The Restatement (Second) of Torts cites two well-known cases in support of section 314's no-duty rule—*Osterlind v. Hill*[107] and *Yania v. Bigan.*[108] Both cases have been discredited or superceded in their rationales and reasoning,[109] but they are classic instances of men who behave badly and seek—but do not receive—rescue or other protection.

In *Osterlind*, two men rented a canoe on the Fourth of July.[110] The men had been drinking before they rented the canoe.[111] Shortly after the men were in the canoe, it overturned and one man drowned.[112] The Massachusetts Supreme Judicial Court held that there was no duty to "refrain from renting [the men] a canoe," nor was there a duty to respond to their cries for help.[113] The court found that the men were not "helpless," given that the men held on for a long time before one of them drowned.[114]

The court's emphasis on the decedent's lack of helplessness is odd. On the one hand, it seems ridiculous that a truly "helpless" person could

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(Mass. 1903). In that case, a 19-year-old "girl" trespassed in a rail yard trying to take a shortcut home. *See id.* She was struck by a train and needed assistance. *See id.* In a very brief opinion, the Massachusetts Supreme Judicial Court determined that there would be no liability for the injuries she sustained. *See id.* at 356. On the one hand the court seemed to emphasize that there was no breach of duty in hitting the plaintiff or in failing to extricate her more quickly. *See id.* at 355. The court suggested that the train personnel acted reasonably once she was hit, or, at the very least, merely exercised less than their best judgment as to what to do. *See id.* Yet, on the other hand, the court asserted that no duty was owed to her or anyone like her once she was struck. *See id.* The court seemed satisfied that there had been no negligence and stated: "[W]e have no doubt that such [reasonable] assistance [to an injured trespasser] has always been rendered." *Id.* at 356. *Griswold* has been questioned and effectively overruled in Massachusetts case law. *See* Pridgen v. Boston Hous. Auth., 308 N.E.2d. 467, 475-76 (Mass. 1974).

107. 160 N.E. 301 (Mass. 1928).

108. 155 A.2d 343 (Pa. 1959).

109. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 320-23, 326-29.

110. *See Osterlind*, 160 N.E. at 302.

111. *See id.* It is worth noting that canoes do not usually tip over on lakes on calm days unless someone is not using due care.

112. *See id.*

113. *See id.*

114. *See id.*

operate a canoe. On the other hand, the focus on helplessness comes from out of nowhere and seems almost inapposite. It is not the general rule that one can do anything, even unreasonable things, to non-helpless people.[115] The focus on helplessness is curious until one considers the courts' state of mind during the period. At that time, the distinction between pro-active prevention and re-active rescue was not as well formed as it is today.[116] Furthermore, landowner/property law paradigms were very strong.[117] In that context, courts conceptualized the cases in a manner that today's courts would call duty-to-rescue cases. When boys trespassed, their principal method of relief, if any, was the attractive nuisance doctrine with its emphasis on whether someone was in a position to appreciate the dangers posed—thus a kind of helplessness.

Perhaps more importantly, the *Osterlind*-era courts crafted a partial exception to the no-duty-to-protect, men-behaving-badly rules—the doctrine of last clear chance—which played a role similar to the attractive nuisance doctrine for misbehaving children.[118] Under the traditional approach to contributory negligence, any fault on the part of the plaintiff was a complete bar to recovery.[119] That same doctrine could be applied, however, to negate a person's responsibility to protect one who had been rendered helpless by his or her own misconduct. Thus, courts crafted a

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115. Today, for example, a canoe operator must use care towards its business invitees. *See* Thomas R. Trenker, Annotation, *Liability of Owner or Operator of Boat Livery for Injury to Person*, 94 A.L.R.3d 876, 881 (1996). Certainly letting a canoe to a helpless person would be per se unreasonable; however, that does not mean that a duty is owed only to the "helpless."

116. As I have argued previously, we also put a misfeasance/nonfeasance gloss on cases like *Osterlind*, when in fact that case, and others, do not truly rely on that type of distinction. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, *supra* note 1, at 319-29.

117. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 947-49 (1981).

118. The doctrine of last clear chance is said to have originated from an English case in the mid-1800s. *See* Davies v. Mann, 152 Eng. Rep. 588, 588-89 (1842). As it has evolved into modern form, the doctrine of last clear chance can be seen in RESTATEMENT (SECOND) OF TORTS §§ 479-80.

119. *See, e.g.*, Butterfield v. Forrester, 103 Eng. Rep. 926, 926-27 (1809).

safety valve exception in the last clear chance doctrine so as to require a person to use reasonable care towards helpless[120] individuals.[121] Although *Osterlind* does not refer directly to the last clear chance doctrine, the court's focus on "helplessness" follows the principles of this doctrine. Presumably, the two men who had been drinking in *Osterlind* contributed to their own canoe-related injuries or at least those injuries that reek of alcohol-related lack of judgment and motor skills control. Thus, without the doctrine of last clear chance, the men would have had no recovery. They would have had to claim that they were "helpless" individuals; the court in *Osterlind*, however, found that the men were not "helpless."[122]

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120. *See* DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 265-67 (2d ed. 1993). Faulty individuals were usually barred from recovery. *See id.*

121. The last clear chance doctrine was used to negate a defense, not create a duty. Thus, last clear chance doctrine did not itself create "affirmative" duties. However, the doctrine functioned much like a "rescue" rule in that it often required reasonable efforts to protect helpless persons from further harm. Additionally, at the time "classic" no-affirmative-duty-to-aid cases were forming, courts were not as focused on negative and affirmative duty and misfeasance/nonfeasance questions as commentators are today. *See* Lake, *supra* note 1, at 311-29.

122. It is tempting to make an out-of-context bright line distinction for *Osterlind.* Thus, one might distinguish between the letting of the canoe (misfeasance type claim) and the failure to rescue (nonfeasance type claim), and attribute the last clear chance like logic to the former but not the latter. This is particularly tempting given that *Osterlind* seems to focus its "helplessness" reasoning to the time of the letting of the canoe and not to the twenty-ninth pre-death minute in the lake when the men were truly helpless (although the case does not disclose how the other man survived). However, given the typical ambiguities in the uses of the term duty in that period, *see* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, *Osterlind* may have understood that "no duty" is owed to a nonhelpless faulty party—which is tantamount to saying that there is no liability. Therefore, once it was established that there was "no duty" to refrain from letting the canoe, *Osterlind* could quickly dismiss the failure to respond to cries for assistance as "immaterial." *See* Osterlind v. Hill, 160 N.E. 301, 302 (Mass. 1928). "No legal right of the intestate was infringed." *Id.* The immediate citation to *Griswold v. Boston & Maine R.R.* for this proposition is instrumental. *See id. Griswold* had earlier held that merely taking actions, not themselves actionably negligent, does not create liability for failure to act more quickly or more effectively. *See* Griswold v. Boston & Maine R.R., 67 N.E. 354, 356 (Mass. 1903). Arguably, *Osterlind* might have focused

Today, *Osterlind* is not good law if it is interpreted as a no-duty case.[123] A canoe or kayak rental entity owes a duty of care to its business invitees.[124] The existence of this duty does not mean that the rental entity is automatically liable or that it must insure the safety of the customers. It merely means that a duty exists.[125] Negligently entrusting a canoe or failing to seek or provide assistance for a patron known to need help, however, would likely raise a *prima facie* case of responsibility.[126]

The 1959 *Yania* case is a more recent illustration of the no-duty rule—even if the decision borrows from a different era.[127]

In *Yania*, a rational adult male jumped into a strip mining cut filled with water and drowned.[128] Ostensibly, he jumped because his companion taunted him into doing so.[129] His companion, who owned the land in

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on the helplessness of the men in the water and imposed a "duty." However, this would not work for two reasons. First, last clear chance doctrine was not used to create duties to bad men: courts did not ask individuals to step out of their way to help misbehaving individuals using last clear chance doctrine. Second, and critically, there is a point at which almost every "inattentive" person becomes helpless. Thus, a person listening to a walkman while walking on a railroad track is merely inattentive and would have been barred from recovery. But there is a point at which a person who was inattentive is now functionally helpless; this line-drawing is as much a function of judgment as policy. Fundamentally, the pre-comparative fault courts were unwilling to extend liability to non-negligent parties for the benefit of men behaving badly. Functionally, the doctrine of last clear chance operated to split the liability issue. Some bad men recovered, but only if a party behaved negligently towards that person; no bad man recovered against a non-negligent person.

123. In Massachusetts, *Osterlind* has been overruled by *Pridgen v. Boston Housing Authority*, 308 N.E.2d 467, 475-76 (Mass. 1974), which questioned and criticized both *Osterlind* and *Griswold*.

124. *See* Trenker, *supra* note 115, at 881.

125. *See id.*

126. *See id.*

127. As I have argued earlier, *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959), is particularly a throwback in that it is ambiguous, in modern terms, as to the basis of its decision. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, *supra* note 1, at 326-29.

128. *See Yania*, 155 A.2d at 344-45, 349.

129. *See id.* at 349.

which the cut existed, allegedly offered no warning and made no effort to rescue the man.[130] The Pennsylvania Supreme Court treated the drowned man as a business invitee, but determined that the danger was obvious and thus required no warning.[131] Additionally, there was no legal obligation to rescue the drowning man because he had made a deliberate decision to jump and the landowner was not "legally responsible, in whole or in part, for placing [the drowning man] in the perilous position."[132]

Although many courts would follow *Yania* on its no-obligation-to-warn conclusion,[133] a no-duty-to-rescue result[134] is not one that modern courts would not typically follow.[135] Even the Restatement (Second) of Torts recognizes that a business invitee, like the jumping decedent in *Yania*, is entitled to some level of care.[136] In today's comparative fault world, a case like *Yania* is more likely to raise questions of contributory fault and assumed risk.[137]

Yania and *Osterlind* are not the only cases where men behaving

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130. *See id.* at 344.

131. *See id.* at 346; Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1. That rationale is consistent with what modern courts might say. *See, e.g.*, Herr v. Booten, 580 A.2d 1115, 1119-21 (Pa. 1990).

132. *Yania*, 155 A.2d at 346.

133. *See supra* note 132 and accompanying text.

134. The specific rationale of *Yania* is difficult to pin down. *Yania* is consistent with no duty, no breach, no causation, and affirmative-defense based no-liability results. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 326-28. Assuming that *Yania* is a no-duty case (in the modern sense of the first element of a prima facie case of negligence), its determination is inconsistent with ones modern courts would reach. At least one recent Pennsylvania court decision has implicitly recognized this problem and effectively recast *Yania* in terms of assumption of risk, rather than in terms of duty. *See Herr*, 580 A.2d. at 1121.

135. *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965) (business invitee stands in special relationship to customer/invitee and has affirmative duty to aid).

136. *See id.* It is curious that the Restatement (Second) of Torts cites *Yania* in support of section 314's general no-duty-to-aid provision but states a rule in section 314A that contradicts the result in *Yania*.

137. In many instances, comparative fault rules and joint and several liability modifications would combine to create little or no liability. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 360-61 & n.351.

badly fared poorly. One very common factual scenario involved the duty to assist an injured trespasser. The classic cases were about men who trespassed onto railroads and were injured by the trains as well as their own furtive activities.

In several decisions in the mid-to-late 1800s and early 1900s, courts showed little sympathy to trespassers who were injured by trains and thereafter claimed a negligent lack of assistance.[138] These cases are interesting because they occurred during a period when the notion that causing a direct and forcible injury created a *prima facie* cause of action was fresh in lawyers' memories.[139] The courts in these early cases deliberately insulated railroads from liability to misbehaving males, and often went out of their way to marshal some of the strongest "no-duty-to-help-anybody" language of any of the miscreant male cases of that era.[140]

During that period, however, some courts became squeamish and disagreed with the no-duty approach.[141] Those cases have been superceded by another line of authority; today courts recognize that if a train hits a trespasser, train personnel must render assistance even if the train was operated with due care.[142]

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138. *See, e.g.*, Griswold v. Boston & Maine R.R., 67 N.E. 354 (Mass. 1903); Kendall v. Louisville & N.R. Co., 76 S.W. 376 (Ky. 1903); Union Pac. Ry. Co. v. Cappier, 72 P. 281 (Kan. 1903).

139. The traditional writ of trespass was a vehicle for establishing such liability. *See* Weaver v. Ward, 80 Eng. Rep. 284 (1616); Brown v. Kendall, 60 Mass. (1 Cush.) 292 (1850). *Brown* is often credited with igniting the "fault" revolution in America, where liability on writ of trespass was altered from a focus on how the injury occurred to the state of mind of the accused actor.

140. *Cappier* is classic: "With the humane side of the question courts are not concerned." *Cappier*, 72 P. at 282. *Cappier* also went on to ratify highly positivist sentiments about the separation of law and morals, including the notion that there is no legal duty to save a drowning child, even at zero risk to the rescuer. *See id.* at 283.

141. *See* Slater v. Illinois Cent. R.R. Co., 209 F. 480 (M.D. Tenn. 1911); Dyche v. Vicksburg, 30 So. 711 (Miss. 1901).

142. *See, e.g.*, South v. National R.R. Passenger Corp., 290 N.W.2d 819 (N.D. 1980); Maldonado v. Southern Pac. Transp. Co., 629 P.2d 1001 (Ariz. Ct. App. 1981); *see also* RESTATEMENT (SECOND) OF TORTS § 322 (1965) (stating a defendant's duty to aid when harm is caused, even innocently, by an instrumentality under the defendant's control).

Yet, today, many courts continue to hesitate in recognizing duties to assist when men behave badly. When this occurs, courts quite often bootstrap historical case law. A few cases involving men drinking and fighting—*Vermont v. Joyce*,[143] *Reynolds v. Nichols*,[144] and *Moore v. Willis*[145]—illustrate this point.[146]

Vermont v. Joyce[147] has been cited to support the proposition that there is no general duty to aid.[148] Apart from *Joyce* being an extremely odd "rescue" case, *Joyce* also rests on questionable authority. *Joyce*, in fact, was not a tort case but rather involved a criminal prosecution of a father who severely beat his son.[149] The father raised as his principal defense to the criminal charge that he was too drunk to form the required intent.[150] The father raised a novel argument in the trial court. He argued that if he "had actually been trying to seriously injure his son, any reasonable person would have done something to stop him."[151] In short, *Joyce* presented an odd duty-to-rescue case because it raised the question of whether a criminal defendant could avoid criminal prosecution because others failed to intervene.

The trial court, however, instructed the jury that there was no duty to attempt to stop a fight and that others' failure to intervene did not excuse the crime.[152] An appeal to the trial court's decision ensued.[153]

The Vermont Supreme Court considered the effect of Vermont's

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143. 433 A.2d 271 (Vt. 1981).

144. 556 P.2d 102 (Or. 1976).

145. 767 P.2d 62 (Or. 1988).

146. The term 'fight' itself is pregnant with an image of competition. Actually, the cases usually involve someone taking or giving a senseless beating.

147. 433 A.2d 271 (Vt. 1981).

148. "As a general rule, there is no duty under the common law to aid a person who is in danger." *Id.* at 272.

149. *See id.*

150. *See id.* Needless to say, the attempted defense did not succeed. *See id.* at 273.

151. *Id.*

152. *See id.* at 272-73.

153. *See id.* at 273.

duty to rescue statute,[154] concluding that the statute did not create a duty to intervene in a fight because of the peril to an intervenor.[155] There was, thus, no duty to intervene for the benefit of the son or the father.[156] *Joyce* also concluded that there was no common law duty to aid an imperiled person,[157] citing, *inter alia*, *Reynolds v. Nichols*.[158]

Joyce is a poor decision, however, because none of the authority cited by *Joyce* supports the proposition asserted.[159] The case featured a

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154. *See id.* Vermont's Duty to Aid the Endangered Act provided:

> 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.

12 VT. STAT. ANN. tit. 12, § 519(a) (1998).

155. *See Joyce*, 433 A.2d at 273.

156. *See id.* The court also concluded that the bad dad's real argument was—irrespective of duty—that a reasonable person would have intervened. *See id.* As such, the alleged error could not have misled the jury. *See id.*

157. *See id.*

158. 556 P.2d 102 (Or. 1976).

159. As discussed earlier, *Yania* is difficult to pin down and is distinctly premodern as a no-duty case. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, *supra* note 1, at 326-29. RESTATEMENT (SECOND) OF TORTS § 314 (1965) states a rule that is narrower than the proposition for which *Joyce* cites it. Section 314 provides "that the mere fact that an actor realizes or should realize that he must act for the aid or protection of another, *alone*, is insufficient to impose a duty." *Id.* (emphasis added); *see also* Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 126 (1994). Section 314 is a general rule, but it does not state that there is generally no duty to warn. *See id.* In fact, the Restatement does not state whether there is or is not such a general rule. *See id.* at 126-27. Thus, *Joyce*'s reliance on section 314 for the broader proposition overreaches the source and is inaccurate. *Joyce's* reliance on *Reynolds* is misplaced as well, as I discuss later, *see infra* notes 161-67 and accompanying text. My criticism of *Joyce* on this point should not be misunderstood. First, I believe that the court reached the correct result. Second, the decision on the common law point is dictum. *See Joyce*, 433 A.2d at 273. Third, an idiotic and intuitively implausible argument such as the bad dad's argument does not deserve, and might not receive, strict analytical precision. Ultimately, my

weak argument by a man behaving badly—who ironically sought the protection of a duty-to-rescue rule—and a court that applied a common law no-duty rule where it could easily and more accurately have disposed of the common law rule.[160]

Reynolds v. Nichols,[161] cited in *Joyce*, is another misbehaving man case involving drinking and fighting that has been both bootstrapped and overstated. In *Reynolds*, a guest at a party got drunk and assaulted and stabbed another person.[162] The host was sued on several negligence theories, including failure to control, and warn about, the bad guest.[163] The court in *Reynolds* held that there was no liability for a social host to a third party in such a situation because there was no "reason to know that

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focus on *Joyce* is that this case should not be used to support broad propositions regarding tort duty.

160. The court in *Joyce* could easily have ruled that even if there is a duty there was no breach of that duty as a matter of law. It would be patently unreasonable to ask a bystander to rush into a serious brawl involving a drunken man. Any reasonable person would assume that there would soon be two victims. The *Joyce* court could have used the statute as a *per se* shield here as well; why would the court interpret the common law more broadly than the statute itself? Alternatively, the *Joyce* court could have simply ruled that there is no duty to intervene in a fight to protect a drunken man from criminal prosecution. In effect, the bad dad asked the court to adopt a rule protecting him from his own misconduct. The court correctly decided not to do so.

161. 556 P.2d 102 (Or. 1976).

162. *See id.* at 103.

163. *See id.* at 103-04. It is worth noting that *Reynolds* is not an affirmative duty case because the central arguments were that the "host" took unreasonable actions, created an unreasonable risk, and then failed to fix it. *See id.* The case is not like cases where a stranger happens to see someone in need. As such, it should not be cited for the proposition that there is no common law duty to aid. The only language in *Reynolds* that would seem to support such a rule is when the court cited to *Cramer v. Mengerhausen*, 550 P.2d 740, 743 (Or. 1976), to the effect that there is no duty to aid one in peril in the absence of a special relationship. *See Reynolds*, 556 P.2d. at 104. However, the issue in *Reynolds* was not whether a special relationship existed to control the conduct of another but whether or not the host could reasonably foresee danger in giving alcohol to this guest. *See id.* Perhaps misfeasance should be a kind of special relationship, as alluded to in *Alexander v. Harnick*, 237 S.E.2d 221 (Ga. Ct. App. 1977), but courts do not typically say this, and that is not the approach taken in the RESTATEMENT (SECOND) OF TORTS §§ 314-21 (1965).

the combination of liquor and [the attacker's] violent propensities would prompt him to assault plaintiff. . . ."[164]

Although the *Reynolds* court held that there was no basis to impose a "duty,"[165] the case must be placed in proper perspective. First, given the court's repeated emphasis on the failure of the plaintiff to state a "cause of action" on the pleadings,[166] it would be fair to interpret *Reynolds* to mean that a duty may exist to not serve liquor to one with known dangerous propensities. There could be no breach of, or predicate for, such a duty in *Reynolds*, however, since there were no facts suggesting that the host knew of the danger. The term "duty" is often used by courts in an ambiguous way, sometimes conflating "duty" in its strict sense as the first element of a *prima facie* case of negligence with predicate facts that establish such a duty and breach thereof.[167] For instance, one could say that one has failed to allege facts which impose a duty in a situation where no reasonable juror could determine that a duty was breached. Certainly, it would be appropriate for a court to rule as a matter of law that no cause of action is stated in such a situation.

Second, *Reynolds* has been interpreted narrowly in its own jurisdiction. In *Moore v. Willis*,[168] another case involving a violent encounter with drinking men and guns,[169] the Supreme Court of Oregon revisited the issue of the necessity of pleading foreseeability to establish a cause of action.[170] *Moore* revisited *Reynolds* and interpreted it as a decision that rested on fact bases:

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164. *Reynolds*, 556 P.2d. at 104. In declining to impose social host liability, the *Reynolds* court followed the majority rule. Further, whereas a landowner may be liable for inviting or having a dangerous person on her premises, *Reynolds* would certainly be ahead of the field to the extent that the danger arose simply out of serving alcohol to a social guest on the premises. Thus, *Reynolds* is a bad boy case with a twist in that it subtly suggests expanded social host liability.

165. *See id.*

166. *See id.*

167. *See* Lake, *Duty in Negligence Law*, *supra* note 5.

168. 767 P.2d 62 (Or. 1988).

169. *See id.* at 62-63.

170. *See id.* at 62-65.

> *Reynolds v. Nichols* . . . illustrates *inadequate allegations of facts* from which a *factfinder* could conclude that the defendant should have known of a danger. A social guest of the defendants in that case stabbed the plaintiff, who was visiting the defendants' next door neighbor. The plaintiff alleged that the defendants served alcohol to their guest, who became intoxicated and assaulted the plaintiff. The plaintiff also alleged that the defendants should have known of their guest's violent propensities and his intent to do violence. Despite those allegations, the court found that the complaint did not state a claim. The court upheld a judgment on the pleadings for the defendants.
>
> Part of the rationale for the *Reynolds* decision was that the complaint did not allege that the defendants had reason to know that serving alcohol to the guest would trigger violence. *Reynolds* offers the following dicta:
>
> If the complaint had alleged that defendants served intoxicating liquors to Simmons [the defendant's guest] with reason to know that the combination of liquor and Simmon's violent propensities would prompt him to assault plaintiff, it is arguable that a cause of action might have been stated.
>
> In other words, the complaint did not state a claim for relief because it did not allege facts that would allow a determination that the defendants should have known that serving alcohol to their guest created a risk of violent behavior .... [T]he complaint in Reynolds did not allege facts that would support a determination that the defendants had reason to know that violence could result.[171]

Joyce and *Reynolds* illustrate the ways in which historical aversions to men behaving badly and recovering in tort on failure-to-rescue theories have translated into recent case law. The historical cases have been

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171. *Id.* at 65 (emphasis added) (footnotes and citations omitted); *see also* Buchler v. State, 853 P.2d 798, 805 (Or. 1993).

superseded (e.g., *Yania* with a duty to rescue an invitee), overruled (e.g., *Osterlind*, *Buch*), or rationalized into modern categories of tort analysis (e.g., *Yania* into assumption of risk analysis). Yet, somehow a rule without solid foundations has been perpetuated here and there in statements setting forth rules in cases like *Joyce* and *Reynolds*, which themselves do not establish adequate foundations for no-duty-to-rescue rules.[172] Neither *Joyce* nor *Reynolds* provides support for a decision to deny efforts to rescue a helpless young girl who merely needs someone to summon assistance. As is evident in *Reynolds*, however, the temptation to cite a case like *Joyce* for a broad no-duty-to-rescue rule can bring a no-duty-to-rescue myth into reality. In modern terms, *Joyce* and *Reynolds* show the powerful but weakening pull that courts may have to deny affirmative duties with respect to misbehaving boys.[173]

V. WORKPLACE IMMUNITIES

It is a fascinating and typically overlooked fact that much of our historical no-duty-to-rescue mythology can be traced directly to nineteenth and early twentieth century workplace immunity rules.[174] When men and women went to work, they typically assumed the risks of the job—

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172. There is a growing body of case law that rejects the traditional approach. *See* Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988); Lake, *Revisiting Tarasoff*, *supra* note 159, at 138-51.

173. *Joyce* and *Reynolds* are narrow and readily distinguishable cases (and *Reynolds* suffers from inbreeding by citing *Joyce*). Modern courts are breaking away from no-duty rules even in bad boy and bad man cases. *See, e.g.*, Farwell v. Keaton, 240 N.W.2d 217, 219 (Mich. 1976) (older boy who had been drinking and accosting young women entitled to rescue). The trend is particularly noticeable when bad men put others at risk. *See, e.g.*, Tarasoff v. Regents, 551 P.2d 334 (Cal. 1976) (en banc) (landmark decision permits action against psychotherapists who do not take reasonable precautions for the benefit of those endangered by maniacal patients—often men who attack women or children).

174. The RESTATEMENT (SECOND) OF TORTS § 314 (1965) refers to sixteen specific cases in support of that section in the reporter's notes. Four of those cases are workplace cases. *See id.*

including risks associated with fellow servants.[175] The workplace no duty/no recovery notion was so broad that an injured worker needing assistance was considered to be entitled to nothing from an employer.[176] Except for some of the rhetoric in the no-duty-to-aid employees cases being exceptionally cold-blooded and pseudo-positivistic, the cases kept with a general employer immunity milieu.[177] The courts of that era seem

175. *See, e.g.*, Murray v. South Carolina R.R., 26 S.C.L. (1 McMul.) 385 (1841); Farwell v. Boston and Worcester R.R., 45 Mass. (1 Met.) 49 (1842). Today, fellow-servant rules have typically been superceded by workers' compensation schemes, but there are some survivors. *See, e.g.*, Pomer v. Schoolman, 875 F.2d 1262 (7th Cir. 1989).

176. *See* Allen v. Hixson, 31 S.E. 810, 810 (Ga. 1900) (employee trapped in machine not entitled to reasonable efforts to get released from machine); Stager v. Troy Laundry Co., 63 P. 645 (Or. 1901) (no duty to have someone available to extricate an employee from a machine); King v. Interstate Consol. Ry., 51 A. 301 (R.I. 1902) (employer not responsible to provide food, shelter, or transportation to an employee even if in great danger); Matthews v. Carolina & N.W. Ry., 94 S.E. 714 (N.C. 1917) (no duty to rescue an employee's chattels from destructive force not caused by employer).

177. In *Allen*, 31 S.E. at 810, a young woman brought her supervisor to view a machine that was not functioning. She put her hand into the machine to demonstrate the problem to the supervisor and her hand got caught and crushed on the machine. *See id.* She writhed in agony for approximately a half-hour before help was summoned. *See id.* The Georgia Supreme Court ruled that her act was in the nature of a volunteer and outside the scope of employment: no duty was owed even to use reasonable efforts to extricate her. *See id. Allen* features some classic positivistic rhetoric:

> As to so much of the petition as claims damages because the "defendant negligently allowed petitioner's hand and wrist to remain between said roller and bar," or because of the defendant's "negligently failing . . . to effect her release," we do not think a good cause of action is set forth. When an employe[e], without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employe[e]'s speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability.

Id. Such decisions are so shocking that only by suggesting that law and morals are separate can they be "justified."

to have been caught in a kind of Draconian contract-based logic. Because malfeasance by an employer was not actionable in the workplace, absent some agreement to the contrary, courts rarely recognized an affirmative duty to rescue and thus rejected employer responsibility to provide assistance to injured employees.[178] As if to underscore that these decisions

178. American courts may have been influenced by English courts of the period, which likewise felt that there was no duty to assist an injured employee. *See* C.T. Drechsler, Annotation, *Master's Duty to Care for or to Furnish Medical Aid to Servant Stricken by Illness or Injury*, 64 A.L.R.2d. 1108 (1959):

> (1) The question whether a master is under a duty to care for or to furnish medical aid to a servant who is stricken by illness or injury in the course of his employment arose first in a number of early English cases. In some of these cases, decided in the 18th century, a strong tendency was apparent on the part of the courts to recognize the existence of such a duty in the case of menial or house servants. There is even language seemingly recognizing the existence of such a duty in the case of servants generally, but it is doubtful whether these statements are more than inaccurate expressions of the rule limiting the duty to house servants. But be that as it may, early in the 19th century the English courts expressly rejected any previous notions to the contrary, and definitely established as a rule applicable to servants of all descriptions that there is no duty resting on the master to provide medical attendance or medicine for a servant who is injured or becomes ill while in his employ. Apparently this change in attitude was due primarily to the rise in social and economic status of servants as a class and to the replacement of the existing paternalistic attitude of the master toward his servants by the more or less impersonal relationship between master and servant characteristic of modern industrial society. Reflecting the economic and philosophical theories of early capitalism, the law of the early 19th century recognized the servant as an individual equal to his master not only in a political but also an economic sense, who does not need the protection of the law in his contractual dealings with others. It was for later generations and for another country to see the socially undesirable implications of these theories in their application to the question under annotation.
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> Thus, there are several English cases decided in the first half of the 19th century which strictly and broadly deny any obligation on the part of the master toward his servants as to providing medical aid in case of sudden illness or injury, regardless of circumstances. No case

were not part of the law of affirmative duty and not motivated by judicial aversion to the modern right to be rescued, some courts determined that no duty to aid was owed even when an employer negligently caused the worker's injury.[179] The workplace no-duty cases were *sui generis* and did

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> of more recent origin has been found which indicates, and there is therefore no legal basis for assuming, that the rule as expressed in the early cases referred to above has been changed and does not represent the law in England today.
>
> (2) Turning now to this country, it does not come as a surprise that the English doctrine denying any duty on the part of the master was adopted originally without any qualifications by all the American courts in regard to all servants who received compensation from the master for their services. It was held that a master is under no legal obligation to care for or to furnish medical aid to a servant who is injured or becomes ill while serving the master for compensation. This rule was expressed in a variety of ways and was applied in the case of individual employers as well as corporate employers, and with particular frequency in the case of railroads.

Id. at 1114 (footnotes omitted); *see also* Newman v. Redstone, 237 N.E.2d 666, 668 (Mass. 1968).

179. Drechsler writes:

> The rule that the master was under no obligation whatsoever to provide medical aid for his sick or injured servant *was* so thoroughly embedded in the *legal doctrines of the time that even the fact that the servant's injury or illness was caused by, or resulted from, the employer's negligence, was considered immaterial so far as the applicability of the rule was concerned.* Only in the case of a servant giving his services without compensation was an exception made, if the existence of such an exception may be assumed from the few dicta referring thereto. The exception, if it was a valid exception at all, was obviously based on the fact that an implied promise on the part of the master to provide medical aid to the servant may be more feasibly read into the contract of hiring in a case in which the employee receives no compensation and has, therefore, presumptively little or no financial ability to provide medical aid for himself, than in a case in which the employee is the recipient of wages.

Drechsler, *supra* note 178, at 1114 (footnotes omitted); *see also* Davis v. Forbes, 51 N.E. 20, 20 (Mass. 1898) ("defendant was under no legal obligation to furnish the plaintiff

not focus heavily on specific concerns about men and boys behaving badly. The cases did not always feature foolish employees.[180] The cases also did not present overwhelming numbers of male employees as they often featured women workers.[181] Thus, these cases had a separate lineage from other no-duty cases.

Today, the no-duty-to-assist/protect-an-injured-employee rule has been overwhelmingly eradicated.[182] As courts (and legislatures through

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[servant] with medical attendance, even if he had been liable for the injury . . ."), *superceded by* Newman v. Redstone, 237 N.E. 2d 666, 668 (Mass. 1968) (following modern rule favoring a duty to rescue an employee).

180. Even though the woman in *Allen* was considered to be outside the scope of employment, she was trying to further a master's purpose. *See Allen*, 31 S.E. at 810.

181. In a number of cases cited by the Restatement (Second) of Torts in support of section 314 (1965), the employees did not act but were instead injured by their employers. Furthermore, half the cases involved women. *See id.*

182. *See* Drecshler, *supra* note 178, at 1114.

> While . . . the American courts originally adopted unquestioningly the general rule as developed in England to the effect that the master is under no duty to care for or to furnish medical aid to his sick or injured employee, later developments of the law in this country brought a limitation of, or exception to, the unqualified application of the rule. During the second half of the 19th century courts in various jurisdictions, particularly in the Middle West, were shocked by the results of the rule in more extreme circumstances, and they pointed out that in emergency situations the master has a moral duty to look after his servant where action is demanded to save the servant's life or to prevent further serious bodily injury to him. It was only one step from recognizing the moral obligation to the creation of an analogous legal duty. Under the increasing pressure of what may be called the "modern social conscience," these courts created an exception to the general rule, which was at first strictly limited to employees of railroad companies and which imposed upon such companies the legal duty to provide in an emergency situation medical aid to a servant stricken in the course of his work and rendered helpless to care for himself. While originally strictly limited to railroad companies, which, since they required many of their employees to be absent from their home localities and families, were considered more responsible for creating emergency situations than employers with stationary places of work, in later years this exception was extended

workers' compensation statutes) in the mid-twentieth century rejected the nineteenth century approach to employees, they often recognized the non-positivistic influence of morality on law. As the New Jersey Supreme Court stated in *Szabo v. Pennsylvania Railroad Co*:[183]

> In our judgment there is a sound and wise exception to this rule, founded upon humane instincts.
>
> That exception is, that where one, engaged in the work of his master receives injuries, whether or not due to the negligence of the master, rendering him helpless to provide for his own care, dictates of humanity, duty and fair dealing, require that the mas-

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> to cover all types of employers in cases where medical assistance was imperatively demanded to preserve life or to prevent further serious harm. Even though this so-called emergency doctrine was expressed by the courts in a variety of ways, it seems that these various statements were intended to cover more or less identical situations. And since the doctrine was supposed to take care of situations of extreme human need, the fact that the master was completely free of guilt, as far as the creation of the emergency situation was concerned, was considered immaterial and his obligation was established regardless of fault.

Id. (footnotes omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 315(b) (1965) (acknowledging special relationships between employer and employee sufficient to impose duty to aid); RESTATEMENT (SECOND) OF AGENCY § 512 (1997):

> (1) If a servant, while acting within the scope of his employment, comes into a position of imminent danger of serious harm and this is known to the master or to a person who has duties of management, the master is subject to liability for a failure by himself or by such person to exercise reasonable care to avert the threatened harm. (2) If a servant is hurt and thereby becomes helpless when acting within the scope of employment and this is known to the master or to a person having duties of management, the master is subject to liability for his negligent failure or that of such person to give first aid to the servant and to care for him until he can be cared for by others.

(footnotes omitted).

183. 40 A.2d 562 (N.J. 1945).

> ter put in the reach of such stricken employee such medical care and other assistance as the emergency, thus created, may in reason require, so that the stricken employee may have his life saved or may avoid further bodily harm. This duty arises out of strict necessity and urgent exigency. It arises with the emergency and expires with it.
>
> This precept probably had its inception in the code of moral conduct, but, like many others, such as furnishing the employee with a safe place in which to work, and proper tools with which to labor, has become a legal duty incorporated in every contract of hiring, by legal inference, notwithstanding a lack of specific provision or statutory requirement.[184]

Thus, a major area of no-duty to assist case law has been largely eradicated. Ironically, and inappropriately, the workplace cases formed what is now a crumbling foundation for modern analysis of no-duty-to-rescue rules.

VI. BAD CASES—THE LACK OF FOUNDATION FOR RESTATEMENT (SECOND) OF TORTS SECTION 314

Modern courts often look to the Restatement (Second) of Torts for guidance regarding the duty to rescue.[185] They rely heavily on section 314,[186] which purports to state the general no-duty rule.[187] The Reporter's Notes cite sixteen cases in support of section 314—over half of which

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184. *Id.* (citations omitted); *see also* Hunicke v. Meramec Quarry Co., 172 S.W. 43, 54-55 (Mo. 1914) (discussing basis of duty rule in basic humanity).

185. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, *supra* note 1, at 329 n.100; John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 877 n.41.

186. *See* Adler, *supra* note 185, at 877 n.41.

187. *See* RESTATEMENT (SECOND) OF TORTS § 314 reporter's notes (1965).

were decided prior to the end of World War I.[188] These sixteen cases are no longer good law, however; they have been overruled, discredited, superceded, over-generalized, or misinterpreted. Thus, the foundations of section 314 stand in ruin. The assumption that there was some magic historical consensus on a no-duty-to-rescue rule is misguided, and the case law that allegedly justifies such a belief is no longer accepted.

Four cases cited in the Reporter's Notes support the proposition that an employer owes no duty to assist an imperiled employee.[189] Although these cases have not been explicitly overruled, they have been superceded by the majority rule that employers have a duty to assist injured employees in an emergency situation.[190] These four cases also suffer from over-generalization and misconstruction. They were decided in accordance with the strong no-duty-in-the-workplace immunity concepts crafted in the nineteenth century,[191] and should not be applied to strang-

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188. *See* RESTATEMENT (SECOND) OF TORTS § 314 reporter's notes (1965). The sixteen cases cited are: *Gautret v. Egerton*, L.R. 2 C.P. 371 (1867); *Toadvine v. Cincinnati*, N.O. & T.P. Ry., 20 F. Supp. 226 (E.D. Ky. 1937); *Gilbert v. Gwin-McCollum Funeral Home, Inc.*, 106 So.2d 646 (Ala. 1958); *Louisville & N. R.R. v. Scruggs & Echols*, 49 So. 399 (Ala. 1909); *Allen v. Hixson*, 36 S.E. 810 (Ga. 1900); *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901); *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928); *O'Keefe v. W.J. Barry Co.*, 42 N.E.2d 267 (Mass. 1942); *Matthews v. Carolina & N.W. Ry.*, 94 S.E. 714 (N.C. 1917); *Schichowski v. Hoffman*, 185 N.E. 676 (N.Y. 1933); *Stager v. Troy Laundry Co.*, 63 P. 645 (Or. 1901); *Prospert v. Rhode Island Suburban Ry.*, 67 A. 522 (R.I. 1907); *King v. Interstate Consolidated Ry.*, 51 A. 301 (R.I. 1902); *Riley v. Gulf, C. & S. F. R.R.*, 160 S.W. 595 (Tex. Civ. App. 1913); *Sidwell v. McVay*, 282 P.2d 756 (Okla. 1955); and *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959).

189. The cases are *Allen v. Hixon*, 36 S.E. 810 (Ga. 1900); *Stager v. Troy Laundry Co.*, 63 P. 645 (Or. 1901); *King v. Interstate Consolidated Ry.*, 51 A. 301 (R.I. 1902); and *Matthews v. Carolina & N.W. Ry.*, 94 S.E. 714 (1917). *Matthews* stands for the notion that an employer does not have to protect an employee's chattels from destruction and is thus readily distinguishable from duty-to-rescue cases that involve risk to human life. *See Matthews*, 94 S.E. at 714-15.

190. *See, e.g.*, Conveyors' Corp. of Am. v. Industrial Comm'n, 228 N.W. 118, 120 (1929) ("It is the duty of an employer to rescue his employee from a position of imminent danger in an emergency."); State v. Hunter, 911 P.2d 1121, 1124 (1996) ("Special types of relationships ... have been found to create a duty to render aid, such as ... employer/employee ....").

191. *See supra* note 189 and accompanying text.

ers in need of rescue.[192]

Two of the remaining cases cited in support of section 314 involve misbehaving boys.[193] Today, a duty of care could attach in a number of ways in a factual scenario similar to the one presented in *Riley v. Gulf, C. & S.F. Railway Co.* In *Riley*, the defendant's instrumentality caused the harm, the defendant's employees took charge of the victim, and the defendant's employees interfered with a rescue.[194] *Riley* is better described as a no-breach-of-duty case. There is language in *Riley* to support such a reading, given that the defendant's failure to provide treatment may have been reasonable.[195]

Sidwell v. McVay, which is one of only three post-World War II decisions cited by the Reporter, was decided before *Rowland v. Christian*,[196] a case that directly or indirectly influenced a number of jurisdictions to change entrant status classifications, particularly with respect to social guests.[197] Today, most people live in jurisdictions where an invited social guest is owed a duty of reasonable care, including a duty to assist if reasonably necessary.[198] This is not the case today in Oklahoma, however, where *Sidwell* was decided.[199] Even so, *Sidwell* clearly was owed some duty, though not the protective, proactive duty asserted by the in-

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192. Indeed, some cases from this period dealing with injury outside the workplace take a pro-duty stance. *See, e.g.*, Depue v. Flateau, 111 N.W. 1, 3 (Minn. 1907) (duty to assist dinner guest stricken with illness); *see also* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue, supra* note 1, at 334-39. Humanitarian cases like *Depue* were ignored by the Restatement in favor of sixteen weak no-duty cases.

193. The cases are *Riley v. Gulf, C. & S.F. Ry.*, 160 S.W. 595 (Tex. Civ. App. 1913), and *Sidwell v. McVay*, 282 P.2d 756 (Okla. 1955). These cases have already been discussed *supra* notes 14-42 and accompanying text.

194. *See Riley*, 160 S.W. at 595-96.

195. *See id.* at 597.

196. 443 P.2d 561 (Cal. 1968).

197. *See* DIAMOND ET AL., *supra* note 57, at 147-49.

198. *See id.* While not quite a majority rule, in terms of the states' population, the social guest rule is a majority rule. *See* Lake, *Common Law Duty in Negligence Law*, *supra* note 5, at 11.

199. *See* King v. Lunsford, 852 P.2d 821, 822 (Okla. Ct. App. 1993).

jured boy.[200]

Sidwell can be better categorized as a no-breach-of-duty case, or as a pre-comparative fault assumption-of-risk/contributory negligence case. The plaintiff was an older child who knew what he was doing, knew the risks involved, and had brought the danger onto the property.[201] Obviously, even bad homeowners owe little responsibility to protect a social guest against open and obvious dangers,[202] particularly when the danger is brought onto the premises by the guest.[203] Neither of these cases supports a general no-duty-to-rescue rule in the sense that some courts may use it.

Two cases cited by the Reporter's Notes in support of section 314 deal with men behaving badly[204] *Osterlind v. Hill*, the famous drowning-men-in-a-canoe case, is no longer good law as a no-duty case in Massachusetts. In *Pridgen* v. *Boston Housing Authority*,[205] a case involving a trespassing older boy who was caught in an elevator, the Massachusetts Supreme Judicial Court rejected older no-duty cases, including *Osterlind*, by recognizing a duty to aid the trapped boy.[206] Moreover, business customers like the men in *Osterlind* are owed a duty of reasonable care aris-

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200. When the *Sidwell* court stated that "[i]n the case before us there is a complete absence of proof of any duty to plaintiff owed by any of the defendants," the court was simply rejecting the particular duty asserted by the plaintiff (basically an attractive-nuisance duty) on the grounds that the plaintiff was a social guest. Sidwell v. McVay, 282 P.2d 756, 757 (Okla. 1955).

201. *See id.* at 758.

202. *See, e.g.*, Zuther v. Schild, 581 P.2d 385, 387 (Kan. 1978) (holding that no duty was owed to a woman who slipped on ice while leaving the defendant's home after a girl scout meeting, as the icy conditions were obvious to the plaintiff).

203. *See Sidwell*, 282 P.2d at 758-59.

204. The cases are *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928), and *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959).

205. 308 N.E.2d 467 (Mass. 1974).

206. *See id.* at 475-76; *cf.* Rhodes v. Illinois Cent. Gulf R.R., 665 N.E. 2d 1260, 1272 (Ill. 1996) (rejecting *Pridgen* and stating that no legal duty should be imposed on landowners to take affirmative action to rescue injured trespassers, as *infra* note 236).

ing from the business/customer special relationship.[207] This duty might not extend, however, to providing a fool-proof rescue plan or to having all possible means to effect a rescue on hand.[208] In addition, *Osterlind* is arguably not even a nonfeasance/affirmative duty case in that it raises questions regarding negligent entrustment of the canoe.[209] *Osterlind*, like many cases of its era, can be better understood as a no-breach-of-duty/affirmative defense case.[210]

Yania v. Bigan also presents interpretation problems, and has been interpreted narrowly even in its own jurisdiction.[211] *Yania* does not reflect modern duty-to-rescue rules with respect to business entities,[212] and should also be considered a pre-comparative fault case.[213] *Yania* has become powerful because of its ambiguity; it is far too easy to characterize or caricature the case.[214]

Cases like *Yania* may take on mythic proportions through over-generalization. For example, in *Jackson v. City of Joliet*,[215] Judge Posner

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207. *See, e.g.*, Urban v. Wait's Supermarket, Inc., 294 N.W.2d 793, 794-95 (S.D. 1980) (holding that the supermarket owed a duty to a woman who tripped over a watermelon in defendant's store).

208. *See* Moore v. City of Ardmore, 106 P.2d 515, 516 (Okla. 1940). The plaintiff brought suit on behalf of a decedent who drowned in a city lake. *See id.* Plaintiff sued the City of Ardmore for renting the decedent a boat that was not equipped with air flotation chambers or life preservers. *See id.* The court found that the city owed the decedent no duty to equip the boat with these safety devices. *See id.* at 516.

209. *See Osterlind*, 160 N.E. at 302 ("The defendant's employees placed a helpless man, a man impotent to protect himself, in a dangerous position.").

210. *See* Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, *supra* note 1, at 320-21.

211. *See* Herr v. Booten, 580 A.2d 1115, 1121 (Pa. Super. Ct. 1990).

212. *See, e.g.*, O'Shea v. K. Mart Corp., 701 A.2d 475, 476 (N.J. Super. Ct. App. Div. 1997).

213. At the time of *Yania*, a person who assumed a risk was not entitled to recover.

214. In discussing the enduring significance of many of Judge Cardozo's opinions like *Palsgraf v. Long Island Railroad Company*, Judge Posner has pointed out that such cases became powerful because they have "omni significance"—a little something for everyone. *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990). *Yania*, although not written by Judge Cardozo, is just such a case.

215. 715 F.2d 1200 (7th Cir. 1983).

considered a section 1983 claim involving a flaming car crash and police and fire personnel who allegedly did not do enough to extricate individuals from the flaming wreck.[216]

The court rejected the section 1983 claim, but suggested the possibility that the case may have presented a viable state tort claim for failure to rescue.[217] Much of what Posner had to say about state common law duty was dictum and occurred in a context where dictum suggested a common law duty to rescue existed:

> Now there is of course no general common law duty to rescue a stranger in distress even if the rescue can be accomplished at no costs to rescuer. And although circumstances can create such a duty, . . . a mere failure to rescue is not tortious just because the defendant is a public officer whose official duties include aiding people in distress. But if you do begin to rescue someone you must complete the rescue in a non-negligent fashion even though you had no duty of rescue in the first place. The rationale is that other potential rescuers (if any) will be less likely to assist if they see that someone is already at the scene giving aid. This rationale is strained in some cases, . . . but not here: with a policeman and firemen at the scene of the accident, no motorist was likely to assist the occupants of Ross's burning car—especially when the police officer was directing them away from the scene.[218]

Judge Posner cited *Yania* for the "general common law" rule, even though *Yania* was not a case involving strangers and is readily distinguishable.[219]

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216. *See id.* at 1201-02.

217. *See id.* at 1203 ("But even if the complaints state good claims under general tort principles, it does not follow that they state good claims under section 1983 just because the defendants are public officers.") (citations omitted).

218. *Id.* at 1202-03 (citations omitted).

219. In *Jackson*, a young couple, including a pregnant mother, were trapped in a flaming wreck (the cause of the crash unknown). *See Jackson*, 715 F.2d at 1201. In

The Illinois Supreme Court applied "the general common law rule" in *Rhodes v. Illinois Central Gulf Railroad*,[220] a classic modern day misbehaving male decision that states the following proposition: "Our common law generally imposes no duty to rescue an injured stranger upon one who did not cause the injury in the first instance."[221] The only non-Illinois state case cited to support the no-duty proposition is *Jackson v. City of Joliet*,[222] which relies upon *Yania* as its principal source for its similar proposition. *Rhodes* does not advert to Posner's use of *Depue v. Flateau*[223] and *Hutchinson v. Dickie*,[224] but to the idea, also stated by Posner, that a rescue must be reasonably completed once it has begun.[225] *Jackson* and *Rhodes* teach important lessons about *Yania* and the Restatement (Second) of Torts, section 314. First, once a male-behaving-badly case finds its way into the law it can become insidiously embedded in opinions stating propositions, which, when further decontextualized, are used to create grand, general statements that lack a firm foundation. Second, bootstrapping also helps to make bad case law and to create myths about the values inherent in our legal system.

In addition to the eight cases discussed above, the Reporter's Notes to section 314 cite to eight additional cases.[226] Each one of these cases

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Yania, a man in full capacity deliberately jumped in a body of water and drowned. *See* Yania v. Bigan, 155 A.2d 343, 344 (Pa. 1959). By overgeneralizing *Yania* and other bad male cases, one can reach results that are patently unjust and inappropriate. We should not forfeit our basic right to humanitarian treatment just because some individuals choose to do so.

220. 665 N.E.2d 1260 (Ill. 1996).

221. *Id.* at 1270.

222. *See Jackson*, 715 F.2d at 1202. A *see also* cite to section 314 shows the ways in which a court may turn to a section of the RESTATEMENT (SECOND) OF TORTS (1965) uncritically and risk further bootstrapping.

223. 111 N.W. 1 (Minn. 1907).

224. 162 F.2d 103 (6th Cir. 1947).

225. *See Rhodes*, 665 N.E.2d at 1269.

226. The eight cases are: *Warshauer v. Lloyd Sabaudo*, 71 F.2d 146 (2d Cir. 1934), *cert. denied*, 293 U.S. 610 (1934); *Frank v. United States*, 250 F.2d 178 (3d Cir. 1957), *cert. denied*, 356 U.S. 962 (1958); *Bartlett v. State*, 301 P.2d 985 (Cal. App. 1956); *Furst v. Carrico*, 175 A.2d 442 (Md. 1954); *Long v. Patterson*, 22 So.2d 490

provides little or no support for the section 314 rule today.

A. *Gautret v. Egerton*

In *Gautret v. Egerton*,[227] an English decision, one judge stated: "[N]o action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him."[228] This proposition, stated without supporting authority, presumably led the Reporter to section 314. Not only is *Gauret* a foreign case decided well after the adoption of the United States Constitution, it cites no relevant pre-Constitution authority and establishes little more than typical entrant-status-classification/duty-owed propositions.

In *Gautret*, the victim—who would have been at best a licensee under today's law—fell into a cutting on defendants' land and died as a result.[229] The plaintiff's allegations of wrongdoing were essentially that the defendants had on their land a dangerous (but obvious) condition and someone was injured by it.[230] Whereas a typical licensor owes no duty to make premises safe, as an invitor would, the plaintiff tried to argue that such a duty was owed to the decedent and others.[231] In short, apart from some flourishing dictum, *Gautret* stands for the absence of a duty owed by a landowner to licensees (or trespassers); it is *neither* a rescue case nor a novel landowner case. It should not be broadly interpreted by way of dictum.[232]

(Miss. 1945); *Miller v. Muscarelle*, 170 A.2d 437 (N.J. 1961); *Weinfeld v. Kaplan*, 26 N.E.2d 287 (N.Y. 1960); and *Galicich v. Oregon Short Line R.R.*, 87 P.2d 27 (Wyo. 1959).

227. 2 L.R.-C.P. 370 (1867).

228. *Id.* at 375.

229. *See id.* at 372.

230. *See id.* at 374.

231. *See id.* Moreover, there was no indication in the allegations as to specifically what was to be done. *See id.*

232. For what it is worth, there is solid American authority for the notion that a licensee (for example, a social guest) is due reasonable care if in peril and the landowner knows of the peril. *See, e.g.*, Depue v. Flateau, 111 N.W. 1 (Minn. 1907); *see also* Hut-

B. *Hurley v. Eddingfield*

In *Hurley v. Eddingfield*,[233] the complaint alleged that a physician caused the death of his patient by refusing to render aid after the patient had summoned him for assistance.[234] The court determined that in the absence of a contractual arrangement, the doctor was not required to render assistance, even if the refusal to do so was arbitrary.[235]

Although some people rush to generalize *Hurley*, it is a case susceptible to a narrow as well as a broad reading. The defendant did not contest "that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to everyone who applied."[236] Technically, the defendant argued that a general physician licensing statute does not itself create a duty to aid "on other

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chinson v. Dickie, 162 F.2d 103 (6th Cir. 1947). There is also authority for the notion that a trespasser whose imminent peril is known is due reasonable assistance, whether or not caused by any activity or condition on land. *See* Pridgen v. Boston Hous. Auth., 308 N.E.2d 467, 470 (Mass. 1974) (due care owed to trespassing 11-year-old); *cf.* Rhodes v. Illinois Cent. Gulf R.R., 665 N.E.2d 1260, 1270-71 (Ill. 1996) (no duty to rescue trespassing drunken college-aged males when cause of injury not due to any activity or condition on landowner's property and when the injury and evidence of peril are not obvious to the landowner).

233. 59 N.E. 1058 (Ind. 1901).

234. *See id.* at 1058.

235. *See id.*

236. *Id.* The *Hurley* court noted that the plaintiff draws "analogies . . . from the obligations to the public on the part of innkeepers, common carriers and the like," but rejected them as " beside the mark." *Id.* Given that the court did not hear counsel to be arguing a background common law right to treatment, the plaintiff must have been seen as making statutory arguments. It is tempting to read too much into why the plaintiff did not make the common law argument. One might assume that it was thought to be a weak argument. Notwithstanding the special relationship between the doctor and patient (the patient was *not* a stranger), this argument assumes too much. It may well have been the case that the doctor had many good reasons to refuse treatment, even if he did not offer them to the patient. *Hurley* emphasized the alleged wrongful act was the doctor's refusal to contract to treat, not *the unreasonable refusal to treat. See id.* (emphasis added). The plaintiff may have lacked the evidence of breach of duty apart from some hoped for negligence *per se* argument.

terms than [the doctor] may choose to accept."[237] In essence, *Hurley* held that it is not negligence per se for a doctor to refuse to aid someone, even a previous patient, under a general licensing statute. This narrow reading of *Hurley* is consistent with the similar longstanding notion that the failure to comply with general medical licensing statutes does not raise an implication of negligence per se, even in a doctor's *active* treatment of a patient.[238]

In keeping with the pattern of zealous over-generalization of these historical cases, *Hurley* has been read broadly. Thus, as one typical commentator in the 1950s wrote: "[*Hurley*] held that a physician was not under a duty to administer to his patient. The physician gave no reason for refusing to respond to a call, there were no other doctors available and the patient died, but no liability attached to the doctor."[239] The Restatement (Second) of Torts used the broader reading to support section 314 and thus advanced an over-generalized *Hurley* and no-duty-to-rescue rule.

The inherent weakness of the broad no-duty rule in the medical practice context is reflected by the complexity of modern rules requiring physicians and hospitals to treat emergency patients and the concomitant qualified immunities that follow.[240] Today, a doctor or hospital may have a duty to treat a patient in an emergency situation.[241] A broad, unqualified *Hurley* rule of no physician duty is no longer the rule in the United States, although a physician continues to enjoy some protection from

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237. *Id.*

238. *See, e.g.*, Brown v. Shyne, 151 N.E. 197, 198-99 (N.Y. 1926) (holding that the absence of a license to practice medicine alone does not necessarily prove negligence in treatment).

239. Gerald L. Gordon, *Moral Challenge to the Legal Doctrine of Rescue*, 14 CLEV.-MARSHALL L. REV. 334, 335 (1965); *see also* Brodersen v. Sioux Valley Mem'l Hosp., 902 F. Supp. 931, 940 n.10. (N.D. Iowa 1995).

240. It is beyond the scope of this article to detail the rejection of a broad *Hurley* rule in modern times. For an extensive treatment of this and related issues, see *Brodersen*, 902 F. Supp. at 940-56. (discussing the Emergency Medical Treatment and Active Labor Act).

241. *See, e.g., Brodersen*, 902 F. Supp at 940-41.

affirmative duty.[242]

Hurley, in fact, has been overstated and superceded. The effect of section 314 bootstrapping historical cases into broad proportions and then using that bootstrapping to support section 314—which, in turn, validates the bootstrapped interpretation of such cases—is particularly evident in *Hurley* and its progeny.

C. *Prospert v. Rhode Island Suburban Railway Co.*

The fact that *Prospert v. Rhode Island Suburban Railway Co.*[243] has *no* subsequent history signals its unusual nature. In *Prospert*, a woman and child were traveling on an electric car when the car was stalled by heavy snow.[244] Despite efforts to move the car, the woman and child spent nearly twelve hours trapped inside it.[245] The woman was so angry that no effort had been made to remove her and her child from the car and to move them to a warm place that she sued on negligence grounds.[246] The trial judge directed a verdict for the defendant carrier, and the Rhode Island Supreme Court affirmed.[247]

Not noted for luminous opinions in that era, that Rhode Island court determined that no "duty" (meaning no *negligence*) was owed and employed positivistic rhetoric, which gained this case a place in history, in support of section 314:

> The defendant could not be held to be guilty of negligence in failing to further operate its car after it had been stopped by the snow, having exhausted all its power in the effort to move the

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242. *See, e.g.*, Lyons v. Grether, 239 S.E.2d 103, 105 (Va. 1977) (citing *Hurley* for the proposition that a doctor does not have to accept everyone as a patient in the absence of statutory authority to the contrary).

243. 67 A. 522 (R.I. 1907).

244. *See id.* at 522.

245. *See id.*

246. *See id.*

247. *See id.*

> car from time to time against the accumulation of the snow. It was not, then, guilty of negligence in not carrying the plaintiff to her destination; and, having carried her as far as it could by the exercise of its power with the appliances at its disposal, it had done all that could be required to carry out its legal duty in her behalf. It would, indeed, have been an act of humanity and kindness on the part of the conductor, as of any other person seeing the plaintiff helpless and exposed to injury from cold and snow, to have helped her to a place of safety, if possible; and the duty of so doing, resting in moral rather than in legal obligation, would have been a personal one, resting upon the conductor or the motorman as an individual, and not as an agent or servant of the defendant corporation, in the same way and to the same extent that it would have rested upon any individual, had the plaintiff seen fit to leave the car and endeavor to struggle through the snow to a place of safety. The duty of assistance or rescue in distress in such case rests, not in contract, or in legal obligation, but in moral obligation growing out of human relations, and therefore is not a proper ground of action for damages.[248]

The court reached the correct result in the case, but it did so for the wrong reasons. The duty of a common carrier to aid a passenger in distress is—and was—so well established that no court could seriously follow *Prospert* on its no-duty rationale.[249] *Prospert* makes more sense, however, as a no-*breach*-of-duty case. As the court repeatedly emphasized, there was no evidence that a safe haven actually existed prior to the time when the removal was completed.[250] That fact alone could justify a directed verdict given that it is a plaintiff's burden to show a breach of duty owed. The plaintiff's entire theory of the case was that it was negligent to not have removed the plaintiff and her daughter sooner—although the plaintiff offered no evidence that reasonable alternatives

248. *Id.* at 523.

249. *See, e.g.*, O'Shea v. K. Mart Corp., 701 A.2d 475 (N.J. Super. Ct. App. Div. 1997).

250. *See Prospert*, 67 A. at 523.

existed.[251] Moreover, the defendant eventually removed the plaintiff and infant to safety,[252] and it is possible that any attempt to move them earlier would have been more dangerous.[253]

Prospert used the term "duty" in the sense of standard of care. Later, when other courts rushed to find no-duty rules, they overlooked the fact that the Restatement (Second) of Torts de-emphasized the term "duty"—unlike modern courts—in favor of just such a mixed message.

D. *Louisville & Nashville Railroad Co. v. Scruggs & Echols*

Louisville & Nashville Railroad Co. v. Scruggs & Echols[254] is another no-negligence case blown out of proportion by section 314 because of some unfortunately overbroad language. In *Louisville* (a bench trial) a railroad was accused of negligently moving its railroad cars to a place where they interfered with firefighting efforts.[255] The defendant had placed a fairly lengthy train between a fire hydrant and the burning property of the plaintiff.[256] The railroad did not cause the fire and had no knowledge or reason to know of it until after the train was moved.[257] There was no proof that the train was deliberately or negligently placed to block the path of the firefighting equipment.[258]

After the train had been innocently moved into this intersecting position, plaintiff requested that the defendant move the twenty-five-car train.[259] The train remained in the problematical position for a very short time—between five and twenty minutes—before it was cleared to move

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251. *See id*
252. *See id.* at 522.
253. *See id.* at 523.
254. 49 So. 399 (Ala. 1909).
255. *See id.* at 400.
256. *See id.*
257. *See id.*
258. *See id.*
259. *See id.*

by the dispatcher.[260] On clearance, the defendant immediately moved the train.[261] The trial judge ruled in favor of the plaintiffs, but the Supreme Court of Alabama reversed.[262] The majority opinion—somewhat typically for the period—used the terms "duty" and "negligence" interchangeably.[263] The court framed the question presented as one of duty and violation of duty simultaneously.[264] It is not surprising that a court considering these facts might find in favor of the defendant, given that there was no negligence in positioning the train or in the response time.

Undoubtedly, the Restatement (Second) of Torts focused on language that "there is . . . a distinction to be drawn between an active and a passive use, in the enjoyment of one's property rights."[265] The court stated: "The law imposes no duty on one man to aid another in the preservation of the latter's property, but only the duty not to injure another's property in the use of his own."[266] As a matter of duty, this proposition was debatable at that time and has been superceded today.[267]

There was substantial authority at common law that a landowner

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260. *See id.* The dissent pointed out that "[a]ccording to the testimony for the plaintiffs, the employe[e]s in the physical control of this train evinced, after full notice, an indifference to the situation and emergency that was little short of shocking." *Id.* at 402. Of course that was the testimony of the plaintiffs' witnesses and moving a large train in no more than twenty minutes at the request of an outsider is still pretty quick, particularly considering that the plaintiff was not seeking assistance from personal injury but from *property damage.*

261. *See id.* at 400.

262. *See id.* at 400.

263. *See id.* at 400.

264. *See id.* "But one question is argued for our consideration, and that is whether there was a duty owing from the defendant to the plaintiffs, under the facts, for a violation which the plaintiffs have a cause of action." *Id.* The court considered, as a singular issue, the questions of duty and breach, clearly putting the issue in factual terms. Later, the court stated that the defendant was guilty of no negligence and in a subsequent paragraph equated "legal responsibility" with "duty." *Id.*

265. *Id.*

266. *Id.*

267. Again, the court used the term "duty" and the phrase "legal responsibility" interchangeably. *See id.*

owed no off-premises duty to others for natural conditions causing injury or damage.[268] Yet, it was and continues to be well-recognized today that active operations *or* artificial conditions on land would give rise to an off-premises duty of reasonable care.[269] A case like *Louisville,* which attempted to craft an active/passive distinction in place of a natural/artificial distinction, was not the norm at the time. Moreover, *Louisville* is an artificial conditions case and would today be a "duty-owed" case.[270] Courts today are moving towards an abolition of artificial/natural distinctions in favor of a simpler reasonable-care-owed-off-premises rule.[271]

Thus, *Louisville* should not be interpreted in an overbroad way for several reasons. First, it is tempting, but unfair, to read *Louisville* strictly as a "duty" case, given the posture of the case and the ambiguous way in which the court used the term "duty" to include "breach of duty." Second, it is a case involving property damage, not human life. Third, to the extent that the case is a duty case, it was not solid law in its day, and very clearly has been superceded today. *Louisville* is overbroad as a no-duty-to-rescue case and represents a rule that is no longer good law.

E. *Schichowski v. Hoffman*

Schichowski v. Hoffman[272] is an unusual case involving corporate discovery and contempt proceedings. In *Schichowski,* a corporate secretary failed to appear for a scheduled deposition and was held in contempt.[273] As a condition of purging himself of contempt, the secretary had to appear for the deposition with certain corporate books.[274] He did

268. *See* DIAMOND ET AL., *supra* note 57, § 9.04, at 149; RESTATEMENT (SECOND) OF TORTS § 363(1) (1965); Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (1868).

269. *See* DIAMOND ET AL., *supra* note 57, § 9.04 at 149.

270. Thus, it is not necessarily a duty-breached case.

271. *See* DIAMOND ET AL., *supra* note 57, § 9.04, at 149-50; Taylor v. Olsen, 578 P.2d 779 (Or. 1978); Sprecher v. Adamson Cos., 636 P.2d 1121 (Cal. 1981).

272. 185 N.E. 676 (N.Y. 1933).

273. *See id.* at 677.

274. *See id.*

not have the books, however, as he had given them to the corporate president at an earlier time.[275] Because the president did not turn the books over to the secretary, the secretary went to jail.[276] The secretary then sued the president for the imprisonment and won at the trial level.[277]

In reversing, the New York State Court of Appeals noted that the case was "novel" and cast the president, who refused to "rescue" the secretary from imprisonment, as a "stranger" to the proceedings.[278] To the extent that the secretary could not produce the books through reasonable efforts, the court criticized the order of contempt imprisoning the secretary.[279] The secretary, however, was hardly a model citizen in complying with court orders and process, as he failed to show up for his own contempt hearing.[280] Nonetheless, the court recognized that the secretary sought to make a collateral attack on the order of the court by bringing a private tort claim against the president of the corporation.[281]

In disavowing a right to such a collateral attack, the court made broad statements about a "duty":

> Our concepts of legal duties are not static in a changing world. They grow and change as new conditions arise; as life becomes more complex in its social relations; as the social conscience of the community imposes upon its members new obligations or frees them from old obligations. The field in which a man may with impunity cause damage to another for his own selfish ends has been restricted by statute and, at times, even by judicial decision. *The field in which a man may be held liable for failure to take affirmative action to avert from another damage which may arise from causes which he has not created*

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275. *See id.*
276. *See id.*
277. *See id.* at 676-77.
278. *See id.* at 677.
279. *See id.* at 678.
280. *See id.*
281. *See id.*

> *has not been greatly enlarged.* The plaintiff here was threatened with the consequence of acts which the court had adjudicated constituted a willful disobedience of its mandate. The court could relieve the plaintiff from these consequences if convinced that the plaintiff was using his utmost endeavors to comply with that mandate. The defendant, not having caused the court to act or refrain from acting, was not under a legal duty to come to the plaintiff's aid. If the plaintiff did in fact willfully disobey the mandate of the court, he cannot shift the penalty to the defendant. A sense of loyalty to an associate or employee who was threatened with imprisonment because he had served the defendant too faithfully might well have impelled the defendant to come to the plaintiff's assistance. The law imposed no such duty upon him.[282]

This language, which must have caught the eye of the Restatement (Second) of Torts reporter, framed the case in terms of affirmative duty. Notably, although the language of *Schichowski* suggests further expansion of affirmative duty liability,[283] the court did not expand such duty in that case.

Schichowski is readily distinguishable from the typical duty-to-rescue case. In *Schichowski*, an emergency was created by an arguably erroneous judicial decision. The person in need of rescue (a kind of corporate misbehaving boy) was not lily-white, and he substantially contributed to his own state of contempt and imprisonment.

Schichowski stands for the rule that one may not sue a third party in tort as a collateral attack on discovery/contempt orders. The best way to attack a contempt order is through the appropriate processes, not through a tort suit against another party. *Schichowski* remains one of the oddest no-duty-to-aid cases and has fallen into desuetude. The question of whether a party should have a legal duty to intervene in proceedings in front of a court of competent jurisdiction, for the benefit of another party,

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282. *Id.* at 678 (emphasis added).

283. *See id.*

is different from the question presented when a person in physical danger is in an emergency situation.

F. *Toadvine v. Cincinnati*

Toadvine v. Cincinnati[284] is a case that is inapposite to the affirmative duty problem; it raises the procedural question of removal jurisdiction and an alleged duty to watch for people to rescue. The case does not support the rule stated in section 314, or any broader "no-duty-to-rescue" proposition. Instead, *Toadvine* appears to have been carelessly placed in the Reporter's Notes.[285]

In *Toadvine*, a train accident case was removed from a Kentucky state court to a federal court sitting in diversity.[286] The plaintiff moved to remand the case to state court after joining a resident defendant in an attempt to defeat diversity jurisdiction.[287]

The non-resident defendant, an employee of the railroad, operated a signal tower at the intersection of his employer's and another railroad company's railroad lines.[288] The highway crossing where the accident occurred was "near" an intersection of the two railways, but the non-resident defendant's duties as an employee extended only to regulating and controlling the safe crossing of trains at that intersection.[289] The non-resident defendant was not aware of the peril of the plaintiff, nor was it his job to monitor the road crossing.[290] The duty of the railroad itself to maintain a safe crossing was *not* the question presented; the question presented was whether an employee in some vague physical proximity to

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284. 20 F. Supp. 226 (E.D. Ky. 1937).

285. A close reading of the case discloses that the court used the term "duty" in many ways, including the sense of "duty" as an employee with respect to employment responsibilities and obligations.

286. *See Toadvine*, 20 F. Supp. at 227.

287. *See id.*

288. *See id.* at 228.

289. *See id.*

290. *See id.*

a potential accident has an affirmative duty to perform another employee's work duties and use reasonable care to discover the perils of others.[291]

Toadvine decided that, at least for purposes of defeating removal jurisdiction, no such "duty" existed.[292] Had *Toadvine* held otherwise, each Santa Claus at Macy's might be charged with the responsibility to discover what perils the other Santa Clauses were creating for children and customers at other entrances to the store. The matter would be entirely different if the employee in *Toadvine* knew of peril to a person. There is a big difference, however, between a duty to rescue and a duty to find out who might need to be rescued. In the *Toadvine* case, for example, placing the burden of the watchman's obligations on the non-resident defendant signal operator would have increased the risk of train collisions as much as placing the burden of the signal operator's duties on the watchman would have made the crossing less safe. If there was a problem in the way the employment duties were divided, delegated, and supervised, it was not due to the negligence of the employees. Perhaps it might have been reasonable for the *company* to post a watchman in the signal area nearby, but the failure to post a watchman could not have been the fault of the signal operator.

Toadvine is a case about an attempt to defeat removal jurisdiction by imputing corporate responsibility to an individual employee, and courts generally will not hold corporate employees personally liable for torts committed by the corporate entity. Moreover, *Toadvine* establishes, at most, that one ordinarily has no affirmative duty to seek out people to aid or rescue.[293] It is an easy case on that point, given that a reasonable em-

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291. *See id.* at 227.

292. *Toadvine* used the term "duty" in several senses. In addition to using the term to describe one's employment responsibilities, *see id.* at 228, the court used the notions of duty and breach thereof interchangeably. *See id.* at 227-28.

293. Courts have been understandably reluctant to require individuals to seek out those who are in the need of assistance. Even police and fire departments are subject to public duty immunities, requiring the creation of a special duty to the plaintiff before responsibilities attach. *See, e.g.*, Cuffy v. City of New York, 505 N.E.2d 937 (N.Y. 1987). Mandating a society of roving saints would be very unproductive, particularly in

ployee would, *ceteris paribus*, stick to his job and avoid doing other employees' jobs, particularly when a lack of such focus would increase the risk to others in their area or sphere of responsibility.[294] *Toadvine* is not a case of the absence of affirmative duty. It may not even be an affirmative duty case—after all, the railroad did have a duty to keep the crossing reasonably safe and to operate its trains reasonably safely. The question was not whether *a* responsibility to protect existed, but whether that employee had such a responsibility.[295]

G. *O'Keefe v. William J. Barry Co.*

O'Keefe v. William J. Barry Co.[296] is another weak case in support of section 314. *O'Keefe* merely establishes some innocuous propositions about responsibilities with respect to operations that create hazards in abutting areas to a premise.[297]

In *O'Keefe*, a woman was injured when she stumbled over rocks that

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today's society where someone usually knows of or has strong reason to know of another's peril.

294. Recall that in this period, or just prior, such an act would be considered volunteering, and a supervisor could leave a person with his arm caught in a machine. *See, e.g.*, Allen v. Hixson, 36 S.E. 810 (Ga. 1900).

295. It is not entirely clear what language drew the Reporter's Notes to *Toadvine*. At one point the court distinguished legal and moral obligations:

> The right of recovery afforded by the law for losses occasioned by negligence is necessarily limited to those losses which occur in the breach of a legal duty and not for the failure to observe moral or humane obligations. Such limitation is necessary to restrain the law's remedies from being pushed to an impracticable extreme. "There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect."

Toadvine, 20 F. Supp. at 227 (quoting Savings Bank v. Ward, 100 U.S. 195, 202 (1879)). However, the court interwove concepts of duty, breach, and even proximate causation. *Toadvine*, 20 F. Supp. at 227-28.

296. 42 N.E.2d 267 (Mass. 1942).

297. *See id.* at 268-69.

had allegedly fallen from the defendant's trucks carrying onto a highway leading from the defendant's quarry.[298] There was quite a bit of traffic on this driveway, and the stones may have come from any number of locations.[299] Indeed, there was no evidence that the offending stones came from the quarry's trucks, nor was there any evidence of negligence as to how the rocks got in the driveway.[300] There was also no evidence that the defendant had exclusive control of the public roadway.[301] The jury found for the plaintiff, but the Massachusetts Supreme Judicial Court vacated the judgment.[302] This case merely established that, in these specific circumstances, there was no "*rocks ipsa loquitur.*"[303]

The Massachusetts court pointed out that the defendant quarry did not control the roadway and was under no duty to remove the stones if they were deposited there "through no negligence of the defendant."[304] "[U]nless the rock was shown to have been placed upon the driveway by the negligence of the defendant, as the plaintiff alleged, the fact, *if it were a fact*, that the defendant's watchman was supposed to remove the crushed rock from the driveway *was not an admission of negligence of the defendant.*"[305] Given that the quarry employed a watchman, "[o]ne of whose duties was to clear the driveway of stone,"[306] it could be tempting to twist these assertions into a no-affirmative-duty posture. That posture,

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298. *See id.* at 267.

299. *See id.* at 267-68.

300. *See id.* at 268.

301. *See id.*

302. *See id.* at 267-69.

303. To establish breach of duty in the absence of specific evidence of negligence, a plaintiff must turn to the doctrine of *res ipsa loquitur* for assistance. *See* RESTATEMENT (SECOND) OF TORTS § 328D (1965). Typically, a plaintiff must show that the defendant had exclusive control of the instrumentality of injury at the time of the negligence. *See, e.g.*, Dermatossian v. New York City Transit Auth., 492 N.E.2d 1200 (N.Y. 1986). Although the Massachusetts Court did not directly refer to *res ipsa* doctrine, the way the court emphasized the defendant's lack of exclusive control over the roadway would have precluded a *res ipsa* charge to the jury. *See O'Keefe*, 42 N.E.2d at 268.

304. *See O'Keefe*, 42 N.E.2d at 268.

305. *Id.* (emphasis added).

306. *Id.*

however, would be highly misleading.

First, the fact that a duty to clean up the driveway may have existed does not mean that it was breached. An admission of a duty assumed is not an admission of a breach. Second, the company, by its use of a watchman, may have assumed a duty of reasonable care to clean up its own rocks, but does not mean that the quarry assumed a duty to clear up *all* hazards, regardless of who created them. There was no suggestion that the watchman even knew of the presence of the rocks in the road.[307] The plaintiff essentially sought a rule, as in *Toadvine*,[308] whereby one would be duty-bound to watch for persons to assist.

Later Massachusetts case law recognized *O'Keefe* as support for these principles.[309] Typically, unless one has assumed a duty, or created a hazard, there is no necessity to patrol abutting property areas for persons to protect or aid:

> It is settled that "an abutter in control and occupation of premises as between himself and the public must exercise reasonable care to maintain his premises in a . . . [reasonably] safe condition so as not to cause injury to the public traveling on the way, and if he *knows* or *ought to know* that the use which he is making or permitting to be made of his premises is rendering the public way dangerous for those passing along the way, he may be found liable to a pedestrian who thereby sustains an injury. . . ."[310] It is equally well settled that "[u]nless the unsafe condition of the sidewalk resulted from a wrongful act or omission of the defendant, it had no duty—breach of which would constitute negligence—to keep the sidewalk in a reasonably safe

307. *See id.*

308. Toadvine v. Cincinatti, 20 F. Supp. 226 (E.D. Ky. 1937).

309. *See, e.g.*, Wallace v. Folsom's Market, 177 N.E.2d 778 (Mass. 1961).

310. *Id.* at 779 (quoting Mays v. Gamarnick, 93 N.E.2d 236, 237 (Mass. 1950)).

condition for the use of travellers.[311]

O'Keefe does not reach or decide the more difficult issue of whether a watchman must act for the benefit of others if he knows that someone else's rocks are in the road that he ordinarily patrols. *O'Keefe* can be interpreted consistently with either a duty posture or a no-duty posture.

H. *Gilbert v. Gwin-McCollum Funeral Homes, Inc.*

In *Gilbert v. Gwin-McCollum Funeral Homes, Inc.*,[312] the plaintiff was hurt in a car accident while riding as a passenger in the last car of a funeral procession.[313] The plaintiff alleged that the funeral director was responsible because, having undertaken to direct and lead the procession, he negligently failed to provide safe passage to the members of the procession, failed to provide an escort or other protection for the procession, and failed to warn approaching vehicles of the presence of the funeral procession.[314] While the funeral director assembled the procession and provided some direction, he did not operate, own, or otherwise control the vehicles once they left for the cemetery.[315]

The plaintiff's action was dismissed, and the Alabama Supreme Court upheld the dismissal.[316] The Alabama Supreme Court held that in the absence of an express or implied contract, the mere fact that the funeral director led and arranged a funeral procession did not impose a duty to protect vehicles in the procession from other vehicles on the highway.[317] *Gilbert* stressed the fact that the funeral director lacked control over the vehicle in which the passenger was riding, and distinguished

311. *Id.* (quoting Farolato v. Springfield Five Cents Sav. Bank, 39 N.E.2d 948, 949 (Mass. 1942)).

312. 106 So.2d 646 (Ala. 1958).

313. *See id.* at 647-49.

314. *See id.* at 648-49.

315. *See id.* at 649-50.

316. *See id.* at 653.

317. *See id.*

the situation in *Gilbert* from a situation in which an "undertaker was under contract to transport the funeral party to the cemetery and back, [and had] hired the cars from a third party placing them in the procession, and [had given] them written instructions of operation with regard to safety."[318] *Gilbert* also gave the case a *Palsgraf*-like flavor[319] in ruling that no duty was owed to this plaintiff for this type of injury.[320]

Gilbert is poorly reasoned. It was not a case where a person fainted and needed assistance, but received no aid. Rather, *Gilbert* was a case where the drivers of the colliding vehicles had duties to protect the plaintiff. The funeral director did not have to protect the plaintiff from the misdeeds of others, particularly since he had no control over the conduct of the other drivers.[321] *Gilbert* is not really an affirmative duty case in a strict sense. The funeral director took actions—although allegedly not enough actions—with respect to the procession.[322] The funeral director was not some stranger who blithely watched a truck plow into a processional, but was an active participant in the funeral who simply did not know of the oncoming truck.

VII. MISBEHAVING MALES AND NO-DUTY-TO-RESCUE RULES TODAY

Perpetuation of the misbelief that a no-duty-to-rescue rule was once dominant and remains the general rule today[323] is due in part to: 1) courts

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318. *Id.* at 652. *Gilbert* stated simply that these facts were not the ones at hand. *See id.* Apparently, the existence of a contract, funeral parlor hired cars, and *written* instructions would have made the difference in surviving demurrer. One might quarrel with the court's somewhat aggressive use of demurrer.

319. *See* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

320. *See Gilbert*, 106 So.2d at 650, 652.

321. *See id.* at 648-50.

322. *See id.* at 652.

323. In *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 485 (7th Cir. 1995), for example, the court had "to grapple with the elusive concept of 'duty' in the law of torts" in the context of a case raising the standard of care owed by a firefighter fighting a blaze on private premises. In surveying the law of duty in a non-duty to rescue case, Judge Posner observed:

> Should a passerby be liable for failing to warn a person of a danger? The courts thought not, and therefore said there is no tort duty to rescue. Even if the defendant had acted irresponsibly or even maliciously in failing to warn or rescue the passerby—suppose, for example, the defendant had been aware of the danger to the plaintiff and could have warned him at negligible cost—the plaintiff could not obtain damages. This limitation on the scope of the duty of care has stood but others have fallen by the wayside in most or all states, such as the nonduty of care of a manufacturer to users of his defective products other than the first purchaser, the nonduty of care of an accountant to persons who rely on his audit report but have no contractual relation with him, and the nonduty of care of railroads in avoiding fire damage to anyone other than the owner of buildings or other property actually struck by the railroad's sparks, as opposed to owners of property to which the fire that had been started by those sparks spread.

Id. at 488 (citations omitted).

Judge Posner's opinion echoes a commonly heard theme: that rescue rules remain a last bastion of no-duty rules. *See, e.g.*, Adler, *supra* note 185, at 877; *see generally* Joseph W. Little, *Erosion of No-Duty Rules*, 20 HOUS. L. REV. 959 (1983). Although *Edwards* is not a duty-to-rescue case, Judge Posner's dictum in a federal diversity case is fodder for citation. Judge Posner's opinion, and other modern opinions, cite the classic cases of *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928), and *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959), without giving attention to their current standing. *Handiboe v. McCarthy*, 151 S.E.2d 905 (Ga. Ct. App. 1966), is another frequently cited case that does not deserve, but receives, over-generalization. In *Handiboe*, a very young child drowned in a neighbor's pool while a servant was supposedly looking after that child and the homeowner's child. *See id.* at 907. The poor child drowned in just three feet of water and apparently was unable to get out of the pool because the bottom was covered with slimy, slippery leaves, trash, and scum. *See id.* Treating the four-year-old decedent as a mere licensee, and not subject to an attractive nuisance rule, the court held that no actionable negligence arose from the failure of the sitter to protect the child. *See id.* at 906-07. The complaint also contained an allegation to the effect that "defendant's servant [failed] to rescue the plaintiff's child from the perilous situation . . . ." *Id.* at 907. The court did not make reference to any other facts alleged, so we do not know whether the court's use of "rescue" might have meant only protecting the child from falling in. Nonetheless, the court stated a broad no-duty-to-rescue rule, which has been cited repeatedly by the Georgia courts, *see, e.g.*, Alexander v. Harnick, 237 S.E.2d 221, 222 (Ga. Ct. App. 1977), as well as courts in other jurisdictions, *see, e.g.*, *Edwards*, 50 F.3d at 488. Although the no-duty-to-rescue position of *Handiboe* received little analysis and looks like a throw-away point in the opinion, courts are eager to seize on it without attention to some fairly obvi-

and commentators continuing to cite cases without due regard for their context and (subsequent) history;[324] 2) the success of the Restatement (Second) of Torts in basing a rule on sixteen weak cases;[325] 3) the paucity of cases where people act in complete disregard of a fellow human being's peril;[326] 4) concerns about unlimited liability;[327] 5) practical limitations on a duty-to-rescue rule;[328] and 6) the fact that sentiments against miscreant males still make subtle waves in the law.[329] The situation is such a tangled mess that courts today either follow the herd,[330] avoid the question, or in an increasing number of cases, reject the pseudo-historical approach in favor of a general duty of reasonable care.

Not surprisingly, because miscreant males remain a problem in modern society,[331] they account for some prominent no-duty rules (in spite of

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ous points. First, *Handiboe* would not be followed in most states under the attractive nuisance doctrine. *See supra* notes 54-69 and accompanying text. Second, most Americans live in a jurisdiction where the infant was owed a duty of reasonable care as an invited social guest. *See supra* notes 198-199 and accompanying text. Third, even the Georgia appellate courts recognize that when someone increases the risk of peril, or assumes responsibility, a duty attaches. *See Alexander,* 237 S.E.2d at 222.

324. *See supra* notes 5-11 and accompanying text.

325. *See supra* notes 12-44 and accompanying text.

326. *See supra* notes 105-173 and accompanying text.

327. *See supra* notes 174-184 and accompanying text.

328. *See supra* notes 185-226 and accompanying text.

329. *See supra* notes 105-109 and accompanying text.

330. *See, e.g.*, Edwards v. Honeywell, Inc., 50 F.3d 484, 488-90 (7th Cir. 1995) (expressing, however, hints of criticism).

331. In 1996, highway deaths *rose* in America (41,907 fatalities in 1996), and it has been common knowledge that young men and alcohol create inordinate risk. *See* Matthew L. Wald, *Repeal of U.S. Speed Limit Is Found to Raise Highway Deaths*, N.Y. TIMES, Oct. 12, 1997, § 1, at 36. However, a "new" phenomenon has been identified that is believed to contribute to the increase in highway deaths. Ricardo Martinez, administrator of the National Highway Traffic Safety Administration, testified before a Congressional subcommittee in 1997 to the effect that "road rage" (aggressive driving) accounts for about one-third of the fatal crashes and two-thirds of the resulting fatalities. *See Road Rage: Causes and Dangers of Aggressive Driving: Hearings Before the Subcomm. on Surface Transp. of the House Comm. on Transp. and Infrastructure*, 105th Cong. 25, 26 (1997) (statement of Ricardo Martinez, M.D., administrator, NHTSA). David K. Willis of AAA Foundation for Traffic Safety reported on a study of over 10,000

the erosion of no-duty rules generally).[332] For example, many of the no-duty-to-college-student cases involve miscreant males injuring themselves or others.[333] Only recently have courts been willing to consider claims against psychotherapists for failure to protect against their patients' violent tendencies.[334] Today, most of these duty-to-protect cases involve criminal males or males that threaten women with violence. Despite a wave of acceptance of the basic duty notion, several courts have expressed reluctance to protect women categorically from dangerous male patients.[335] Underlying such cases is a sentiment that it is not fair or appropriate for health care professionals to be responsible for uncontrollable, heinous male behavior. No-duty-to-rescue cases today continue to take their cues from misbehaving-male scenarios.

Consider the very recent case of *Rhodes v. Illinois Central Gulf Railroad*,[336] which states a narrowly drawn no-duty-to-rescue rule—albeit in a classic example of going back to an imagined past. This case has it all: a railroad; a trespassing, drunken person; college freshman tom-foolery; and hints of a new future.

Early one Saturday morning, the defendant's commuter train person-

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accidents occurring in 1990-1997. *See id.* at 85-86 (statement of David K. Willis, President, AAA Foundation for Traffic Safety). The conclusion: the majority of aggressive drivers are men aged 18 to 26. *See id.* at 86 (Willis). Martinez identified them as bad males: "'double-O drivers,' licensed to kill in some ways, because they have a license and they have the car and they have this belief of independence and fully in control of the vehicle." *Id.* at 73.

332. *See, e.g.*, Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988).

333. *See, e.g.*, Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987).

334. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (recognizing a psychotherapist's duty to protect a third party from a violent patient's expressed intentions to kill her).

335. *See* Nasser v. Parker, 455 S.E.2d 502, 502 (Va. 1995) (finding no duty to warn a woman of an abusive male's release from a mental institution); *see also* Fraser v. United States, 674 A.2d 811, 812-13 (Conn. 1996) (no duty to control psychiatric outpatient who attacked a third party).

336. 665 N.E.2d 1260 (Ill. 1996)

nel saw a person lying face down in an unmanned train station.[337] This person was Carl Rhodes, an eighteen-year-old male in his freshman year of college.[338] Rhodes had been drinking heavily that evening and, in his quest for alcohol, had received a serious blow to the head.[339] Rhodes showed some signs of being injured—though not severely—and otherwise appeared to be a homeless person who had spent the night in the warm train station.[340] Eventually, the train personnel, with the assistance of law enforcement, brought Rhodes to a hospital.[341] By that time, however, it was too late—Rhodes had earlier received a nearly invisible intercranial head wound that had gone beyond the point of repair.[342] Rhodes was treated by the train personnel like the numerous homeless people who populate our rail stations; but if he had received medical treatment a few hours earlier, he may have survived.[343] When the train personnel found Rhodes, however, there was little evidence to indicate the severity of his injury.[344]

Although the evidence did not clearly show there was any breach of duty, the trial court instructed the jury that a landowner owes a duty to trespassers who are discovered in a "place of danger."[345] The jury returned a verdict against the railroad, which was upheld by an intermediate appellate court.[346] The Illinois Supreme Court reversed, and remanded the case to the trial court with instructions to determine whether Rhodes was a patron or a trespasser.[347] In Illinois, a landowner has no duty to take affirmative action to aid an injured trespasser.[348] There is a

337. *See id.* at 1263.
338. *See id.* at 1263-64.
339. *See id.*
340. *See id.*
341. *See id.*
342. *See id.* at 1265-66.
343. *See id.*
344. *See id.* at 1266.
345. *See id.* at 1267.
346. *See id.*
347. *See id.* at 1274.
348. *See id.* at 1270.

limited exception, however, which *Rhodes* reaffirmed, that a landowner has "the duty to use ordinary care to avoid injury to a trespasser who has been discovered in a 'place of danger' on the premises."[349] The court distinguished the situation at hand, however, by pointing out that Rhodes had not been injured by either a condition or activity on the premises.[350] "The place of danger exception does not arise," the court held, "simply because a trespasser is discovered in an injured state on the landowner's premises."[351]

The court was not asked to disregard "the longstanding general rule that there is no duty to take affirmative action to aid an injured stranger,"[352] but the court did engage in some extensive and strong no-duty-to-rescue analysis.[353] With this caveat, the court ruled that there was

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349. *Id.* at 1268. *Rhodes* thus *affirms* a duty-to-rescue rule for trespassers in some circumstances. *See id.*

350. *See id.* at 1269.

351. *Id.*

352. *Id.* at 1271.

353. *See id.* In strong language, the court stated:

> Certainly, the impracticality of imposing a legal duty to rescue between parties who stand in no special relationship to each other would leave us hesitant to do so. Our law recognizes that, while persons may owe a *moral* duty to take affirmative action to help a fellow human being in distress, legal liability for failing to do so should not be imposed.
>
> As noted by Prosser and Keeton, discussing the continued adherence of the common law to the general rule:
>
> > the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application.
>
> In this same vein, another writer has remarked, "it may be that [a general rule imposing a duty to rescue] involves a risk of making

no duty to rescue a trespasser injured by something other than the landowner or his premises.[354]

It is hard to believe that the *Rhodes* court would have been so stern if a pregnant woman had trespassed and needed obvious assistance to deliver a baby, but had received indifference. *Rhodes* is distinguishable because of three critical features. First, the trespassing, drunk male was injured earlier, before entering the railroad's premises. Second, the injuries were not obviously life threatening and the victim looked much like the people who inhabit the stations of our transportation systems. Courts do not typically require investigation into the identity of persons in need of rescue. Third, the case could have been easily disposed of on no-breach-of-duty grounds, as there is little evidence that the train personnel operated unreasonably. The *Rhodes* case certainly provided a number of points which may be distinguishable in future cases. Once again, however, a miscreant-male case creates no-duty law, even if far more narrowly than some of the historical cases did. No doubt, *Rhodes* will also

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> good-hearted people liable without fault, as where a timid automobilist is sued for refusing to pick up a 'thummer,' who in fact needs help or where a swimmer drowns in full view of unobservant, or perhaps, stupid people."
>
> Likewise, principles of morality may dictate that a landowner take steps to rescue a trespasser found injured on his premises, but legal liability should not flow from the failure to do so. We cannot accept the plaintiff's suggestion that we should be swayed by the fact that ICG was a business, rather than a private, landowner. The rule here sought by the plaintiff, imposing a duty on ICG to rescue Carl simply because he was discovered injured on ICG's property, would apply to *all* landowners, including private homeowners, because the only required relationship with the landowner is the trespasser's presence on the property. We are not persuaded that we should adopt a rule which could render a homeowner liable to an injured, drunken stranger who comes to rest on the homeowner's lawn.

Id. (citations omitted). The court did not address the issue of whether a landowner would owe a duty to one "lawfully" on his or her premises. *See id.* at 1271-72.

354. *See id.* at 1272.

be carelessly followed.

VIII. CONCLUSION

Historical no-duty-to-rescue cases are by no means on firm footing; however, they have achieved derivative validation through secondary sources (especially the Restatement (Second) of Torts) and some modern case law, which systematically overstate the historical rules without critical examination of their context. Some of this overstatement is rooted in the fact that certain problematical male behavior has driven courts to protect defendants as a matter of law against miscreant males who seek to impose the consequences of their behavior on others. Alternatively, some of this overstatement is due to a curious desire to elevate certain cases to broad generality, while downplaying more humanitarian case law. Also, some of the overgeneralization arises from the failure to distinguish affirmative duty from meta-affirmative duty: there is a difference between asking someone to provide aid and asking someone to patrol the world looking for people to aid. Finally, some of this overstatement is due to the susceptibility of the common law to find a historical rationalization and make it history, only to lose the process of rationalization in the sands of interpretation.

Feminist legal scholars have pointed to the American duty-to-rescue rules as emblematic of a system that is based on a masculine ethic of lack of care, support, and so on.[355] Here I have no occasion to agree or disagree with that proposition. Gender-correlated behavior, however, has been remarkably important to the development of no-duty-to-rescue law. When trespassing, criminal, miscreant, drunk, or foolish males ask for assistance from problems they created, courts are still reluctant to require another individual to affirmatively help them.

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355. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33-36 (1988); Martha Siegel, *A Practitioner's Guide to Feminist Jurisprudence*, 37-OCT B. B.J. 6, 10-11 (1993).

Expanding these cases into broad anti-humanitarian propositions is inappropriate, particularly in an era when courts are divided on these kind of cases. It is time to squarely address the underlying policy issues that unite the miscreant male cases, and put an end to bad case law.