Notes

RESCUING THE HERO: THE RAMIFICATIONS OF EXPANDING THE DUTY TO RESCUE ON SOCIETY AND THE LAW

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ABSTRACT

The ongoing debate about the legal duty to rescue another person in peril is fraught with a familiar tension. On one side stands the traditional and distinctly American determination that freedom from such a duty is essential, that the technical rules of tort law and self-preservation instincts disdain such a requirement, and that the postulates of religion and morality are sure to fill in any legal gaps. On the other, a more recent humanitarian perspective—seen in revisions to the Restatement, case law, and some state statutes—advocates for requiring easy rescue, positing that religiously inspired morality and public good-doing are unlikely, and citing highly publicized incidents in which bystanders remained callously, though lawfully, inactive.

But the classic dialogue between an autonomist's protection of the rescuer and the humanitarian protection of the rescuee has thus far neglected a thorough treatment of a figure viscerally affected by the slow erosion of the historical no-duty rule: the hero. The hero derives his meaning by acting in ways that are not legally required; in other words, the hero is valuable because he acts not as the law's "reasonable man," but as a figure wholly outside of it. This Note

† Duke University School of Law, J.D. expected 2010; Stanford University, B.A. 2005. Thank you to Professor Doriane Coleman for her mentorship of both this piece and of me, to Kyle Thomason for his insightful edits, to Natalie Bedoya for her lessons in writing and in leadership, and to my fellow *Journal* members, who make me proud to be a part of this publication. Thank you most of all to my parents—the very first academic writers I knew—who instilled in me a love of language and ideas, and who have always supported and believed in me.

argues that as the duty to rescue expands, the moral realm in which the hero acts consequently shrinks, and that the values a hero inspires in society—hope, exemplary conduct, public celebration, societal reflection, and spiritual absolution—are likely to suffer as well. In this way, increasing the duty to rescue not only affects society but also runs the risk of confusing the law by deeming potentially heroic action reasonable. This dual distortion of social and legal values merits a new and invigorated examination of the role of the hero as a real and meaningful concept—a concept that risks danger should the duty to rescue continue to expand.

INTRODUCTION

Imagine the law as a line that separates legal requirement from moral choice on a continuum that embodies all acts of rescue. The first space on the continuum is a realm of "legal duty," wherein certain behavior is required by law. The second space, residing on the other side of the line, is a realm of "no legal duty," wherein acts are evaluated according to moral norms and social aspirations. This second space is also the realm of a little-discussed figure in American duty to rescue law: the hero.[1] If heroes are heroes because of their decisions to act in ways that set them apart, then a society that demands action through law redefines the notion of who is a hero and, correspondingly, the nature of heroic acts. Because the law typically provides that ordinary actions—what the average person does or would do—are the essence of reasonableness, the legal boundary simultaneously defines the reasonable person. Necessarily, the creation of new legal duties to rescue increases the size of the

1. Several articles have considered the repercussions to altruism or heroes and then quickly discarded the notion. *See* 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, 918 (recognizing and briefly refuting "the argument . . . that where altruism is required, it loses its moral value to society"); Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1469, 1474 (2008) (noting that a duty to rescue would create a "discount of altruism," which would mean that "altruistic, praiseworthy behavior will be transformed and diminished to not much more than ordinary obedience of the law and compliance with the minimum social expectation that is articulated by that law" as one in a list of "costs of a coercive rule"); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 434 (1985) ("A final concern is that a rescue duty would deprive society of clear examples of heroic conduct by making it uncertain whether rescue had been occasioned by altruistic impulses or by fear of legal sanctions. However, any rescue law would almost certainly provide . . . that a would-be rescuer need not imperil his own life. As such, there would be ample opportunity for heroism.").

legal space on the continuum and thus decreases what remains—the moral space—by leaving citizens a moral choice to take action in fewer instances.[2] As a result, shifting the location of the line of the law along the continuum of rescue acts either increases or decreases the number of instances in which individual actions can be characterized as heroic or merely as the right thing to do, as required by the law.

Anglo-American law proscribes an extremely narrow set of legal duties, leaving a large moral realm in which a citizen may choose to act heroically or simply to be an uninvolved bystander.[3] This holds true for a broad range of scenarios. On one end of the spectrum of rescue acts exist cases of "easy rescue,"[4] in which an onlooker could act without incurring harm to himself or others, such as by picking up a baby in the path of an oncoming train.[5] On the other end, situations of more difficult or "expensive" rescue arise, with risks that could cost the would-be rescuers loss of property or tangible opportunity, infliction of serious bodily injury, and even their lives.[6] The decision to construct the space of legally required rescue so narrowly has been the subject of much debate in both the legal academic literature[7] and in policy circles.[8] This decision has historically been defended on two main grounds: that legally required rescue infringes upon a distinctly American sense of individual liberty, and that it flies in the face of

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2. *See* A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1273 (1983) ("The area of so-called Good Samaritan law . . . is one in which the relationship between morality and law is particularly sensitive.").

3. *See infra* Part I.

4. Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 750 (1994) (suggesting that hypothetically "courts might recognize a limited duty to rescue that would be enforceable only in tort law, and that would apply only to cases of 'easy rescue,' in which one individual is able to rescue another with little or no risk or expense to herself or others").

5. *See infra* note 31 and accompanying text.

6. *See* Heyman, *supra* note 4, at 750 ("[E]asy rescues involve no significant risk of injury or expenditure of resources that would require public compensation to the rescuer or others.").

7. *E.g.*, Silver, *supra* note 1, at 423; Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 258–68 (1980); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 13–23 (1993).

8. This debate has led several states to enact statutes establishing an affirmative duty to rescue or otherwise aid. *See, e.g.*, MASS. GEN. LAWS ch. 268, § 40 (2002) (establishing a duty to report certain heinous crimes); MINN. STAT. § 604A.01 subdiv. 1 (2008) (establishing a duty to provide "reasonable assistance"); R.I. GEN. LAWS §§ 11-37-3.1 to -3.4 (2002) (establishing an affirmative duty to report a rape that occurred in one's presence); VT. STAT. ANN. tit. 12, § 519 (2002) (establishing a duty to provide "reasonable assistance"); WIS. STAT. ANN. § 940.34 (West 2005) (establishing a duty to aid); *see also* Silver, *supra* note 1, at 427 (describing legislative enactments of duties to aid in various states); *infra* Part II.

natural law instincts of self-preservation.[9] The law generally cherishes the choice not to rescue, even in the least risky of cases. The result is a moral sphere left wide open to the possibility of heroes.

Relatively recently, however, the law has been characterized by small but steady attempts to shrink that sphere by increasing legal duties to rescue.[10] The movement has been justified by humanitarian concerns and a utilitarian perspective that champions the important and palpable benefit of saving a life in easy rescue cases—that is, cases containing no tangible risk to the would-be rescuer and, it is argued, a comparably insignificant loss of personal liberty.[11] States have steadily chipped away at the no-duty realm through case law[12] and Good Samaritan statutes,[13] which legally require action in these scenarios. The shift reflects an increasingly strong norm that rescue acts that would have little risk[14] should be required by law.

Even given this trend, evidence of an ongoing debate about the duty to rescue remains. Legislatures have required further duties only incrementally,[15] and Good Samaritan statutes have rarely, if ever, been enforced.[16] Despite the academic[17] and sometimes even societal[18] call for reform, the common law tradition of narrow duties seems to

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9. *See infra* Part I.

10. *See supra* note 8; *infra* Part II.

11. *See, e.g.*, Weinrib, *supra* note 7, at 272 ("It . . . seems that the imposition of a duty to effect an easy rescue in an emergency would form a coherent part of a growing pattern in those doctrines that most fully embody the common law's notion of individual liberty." (citation omitted)); *see also* Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252, 291 (1983) ("A person should accept the principle of easy rescue because it enhances his liberty.").

12. The Restatement codified these trends by identifying four circumstances in which a duty to rescue was owed: the duties of a common carrier to its passengers, an innkeeper to his guests, a possessor of land who holds it open to the public to the visiting public, and one who voluntarily undertakes custody of another to the one in custody. RESTATEMENT (SECOND) OF TORTS § 314A(1)–(4) (1965). Though these situations may not always be classified as easy rescue, it is likely that on balance the requirement that the rescue act need only be "reasonable," *id.* § 314A(1), ensures this. For a discussion of some of the case law that tends toward expanding the duty, see *infra* Part II.

13. *See infra* notes 97–113.

14. *See supra* notes 4–6 and accompanying text.

15. *See infra* Part II.

16. *E.g.*, Nancy Benac, *Pretty Good Samaritans: Unlike European Countries, the United States Has Generally Chosen Not to Adopt Laws Requiring Residents to Help Someone in Need*, ST. PAUL PIONEER PRESS, Oct. 27, 1997, at 2C ("It was a rare case of prosecution in America for failing to help someone in need.").

17. See *supra* note 7.

18. See *infra* Part II.

maintain an impressive stronghold.[19] The discussion that continues is broad—each side takes its own stance on the realistic likelihood of successfully defining legal causation,[20] respecting individual liberty,[21] overcoming the practical difficulties of enforcement,[22] and wrestling with the special relationship and affirmative act exceptions to the duty to rescue should it expand.[23]

The academic and policy discussion of the no-duty-to-rescue rule, however, has thus far excluded a thorough analysis of an external cost to requiring rescue that may tip the debate: decreasing the possibility of heroes.[24] Heroic acts are valuable from a social standpoint because they provide an ideal to which citizens can aspire, inspire hope, serve as a means of spiritual absolution, and benefit people who are rescued. They are also valuable from a legal standpoint because they provide a foil for the acts of the reasonable man, steadying the law by offering an example of what it should not require.[25] Looking critically at the effect upon heroes of expanding the duty to rescue is about the autonomous self in that it advocates a society in which strongly defined heroes are advantageous to individuals. This critical analysis is also about utility in that heroes create a host of social benefits. But arguing for a greater consideration of heroes does not precisely conform to the enduring tensions between the autonomist common law and the modern utilitarian trend. Rather, it exists, more than not, outside that debate, campaigning for a figure that is crucial to society and the law.

The wide range of views on what constitutes heroism,[26] however, makes the concept difficult to define. A recluse who highly cherishes autonomy may view an easy rescue, such as picking up a baby from the railroad tracks, as expensive because it forces him to give up his freedom not to act. At the other end of the moral spectrum, another may unflinchingly sacrifice his own life to save another.

For the purposes of this discussion, however, it is oddly both important to define the term as clearly as possible while simultaneously remembering that this is hugely difficult, if not

19. *See infra* notes 97–126 and accompanying text.
20. Adler, *supra* note 1, at 912–13.
21. *Id.* at 914.
22. *Id.* at 919.
23. *Id.* at 886, 888.
24. *See supra* note 1.
25. *See infra* Part III.B.
26. *See infra* Part III.A.

impossible, to accomplish. In the former vein, the definition of "hero" in this Note reflects the context of physical rescue in a particular instant, and thus encapsulates one who stands to lose something important by attempting to rescue another—one who risks serious injury (mental or physical) or financial loss through an act. With regard to the latter point, however, it is crucial that the term retain some ambiguity. Because what constitutes "something important" varies according to the would-be rescuer, the movement of the legal line remains important regardless of what precisely the law may ever require. In order to have repercussions, the law need not necessarily require an extreme measure; instead, it may require only gradations of heroic acts and, in doing so, still have pointed effects. It is the very personal meaning of the word "hero"—like the meaning of the word "reasonable"—that makes its care essential. Like the ongoing debate about the reasonable man, the debate about the hero should focus on the ongoing evolution of the creature, rather than on one particular perspective on his nature.

When states pass duty-to-rescue statutes, they necessarily impose their own legal definition of heroism by declaring that a certain course of action is not heroic, but legally required. Making the hero a reasonable man infringes upon a complex social construct that by its nature is anything but reasonable. Even when expanded duties go unenforced, such legislation tinkers with the understanding of the hero, distorting and ultimately decreasing its meaning. This consideration is particularly crucial at present, when the vast majority of states have not yet created an affirmative duty to rescue[27] and experience suggests that such legislation often reacts to horrific failures to rescue, and is therefore likely produced with more haste than thought.[28]

Amidst the debate between autonomists and utilitarians,[29] this Note argues that the significance of heroes is another, separate factor that ought to be considered by those who would shift the line of the law to gradually erode the no-duty rule, and in so doing, narrow the realm of potential heroic acts. The Note proceeds as follows: Part I reviews the historical common law prohibition against requiring any duty whatsoever. Part II examines the slow erosion of the common law no-duty rule, including the evolution of the Restatement and

27. *See infra* Part II.

28. *See infra* notes 193–201 and accompanying text.

29. *See supra* notes 15–23 and accompanying text.

Good Samaritan laws, and discusses the theoretical and philosophical views motivating the movement. Finally, Part III departs from conventional legal wisdom by investigating the implications not for the liberty of a would-be rescuer or the safety of a potential rescuee, but for heroes in a society that legally compels rescue. It investigates the definition of heroes and heroic acts and explains their significance, ultimately arguing that increasing legal duties affects heroes in ways that merit a new and focused attention.

I. THE NO-DUTY RULE AT COMMON LAW

Historically, Anglo-American common law required no duty to rescue, even if the rescue would be easy or inexpensive, costing the would-be rescuer nothing but time or loss of autonomy.[30] The rule made for case law rich in disturbing examples, in which callous bystanders simply watched as easily savable victims suffered before them. The case of *Buch v. Armory Manufacturing Co.*,[31] for instance, has been memorialized for its depiction of a particularly gruesome hypothetical scene in which a bystander sees a young child on the railroad tracks.

> He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.[32]

30. Charles O. Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, *in* THE GOOD SAMARITAN AND THE LAW 23, 23–24 (James M. Ratcliff ed., 1966) ("Our common law has always refused to transmute moral duties into legal duties. . . . [I]t is clear at common law that nobody has to lift a finger—let alone spend a dime and dial a phone number or actually render aid—to help a stranger in peril or distress." (citations omitted)).

31. Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1899). The case itself was not exactly about the duty to rescue, rather about whether a young boy—whose hand was injured when it became stuck in the gears of a machine at a mill—could recover, despite the fact that he was trespassing upon the property. *Id.* at 810. Chief Justice Carpenter seems to have created the hypothetical about the baby on the railroad tracks to justify his admittedly harsh decision not to allow for recovery. *See id.* (observing that in cases involving small children, courts have sometimes inappropriately blurred moral sentiment and the law).

32. *Id.* The passage has been the inspiration for the titles of several law review articles. *See, e.g.*, Norman J. Finkel, *Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times*, 12 PSYCHOL. PUB. POL'Y & L. 242 (2006); Lipkin, *supra* note 11.

The real—rather than hypothetical—cases have been no less dramatic or shocking.[33]

Despite the potential for disturbing outcomes, the no-duty rule was essentially justified by three arguments. First, a legal requirement to rescue would invade autonomy, which is closely related to two other propositions: the consent-of-the-governed rationale and the harm principle. Second, creating a duty would run counter to natural law principles. Finally, religious sensibility was expected to fill any potential gap left by legally requiring so little action.

Of these, the autonomy discussion has been most prevalent. The distinctly American sensibility of autonomy—noted as early as the country's inception by Alexis de Tocqueville[34]—is strongly credited with the formulation of and adherence to this rule, which upholds the freedom to decide whether or not to rescue at the expense of injury to a victim.[35] And despite notorious descriptions of pitiless bystanders who simply look on as victims perish, there is some sense that discomfort with imposing a duty to rescue reflects a genuine and warranted concern about liberty.[36] Viewing the requirement of action as an infringement assumes that one values what is being infringed upon: control over one's own decisions is fundamental from the autonomist's perspective.[37] For some, these are high stakes, and

33. In *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959), for example, the defendant taunted the plaintiff, ultimately convincing him to jump into a trench that was at least eight feet deep. *Id.* at 343. He drowned. In considering whether Yania's estate could recover for Bigan's failure to rescue him, the court dismissed the argument that Bigan had placed Yania in his position of peril. *Id.* at 345. Instead, Yania was responsible for his own actions, and Bigan was consequently under no legal obligation to rescue him. *Id.* at 346.

34. G.W. PIERSON, TOCQUEVILLE IN AMERICA 161 (1938) ("It's really an incredible thing, I assure you, to see how this people keeps itself in order through the single conviction that its only safeguard against itself lies in itself."). Another bedrock of American identity, Patrick Henry's oft-quoted quip, "Give me liberty or give me death," has been taken as shorthand for the notion that "liberty . . . is more valuable than security." Alan Calnan, *Strict Liability and the Liberal-Justice Theory of Torts*, 38 N.M. L. REV. 95, 103 n.33 (2008).

35. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984) (noting the "highly individualistic philosophy of the older common law").

36. *See* George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1451 (1994) (discussing "the problem with affirmative duties").

37. *See id.* ("All of a sudden you find yourself next to the pond with the proverbial drowning child. You must act now. It matters not that you are not in the mood to be a hero or that you have something better to do. There is nothing quite so unpredictable and insistent as having the circumstances determine when and how we must act.").

requiring action is seen as an offense to liberty so grave that it equates to "[making] man a slave."[38]

The autonomy argument is linked to the consent-of-the-governed rationale, which holds that citizens legitimize their government by consenting to it because it reflects their autonomous choices.[39] A lack of freedom of choice in the law, then, is an affront both to individual liberty and individuals who would sustain a legitimate government.

The importance of individual liberty is also linked to the harm principle—the notion that a legal wrong is constituted only when a harm is inflicted.[40] The common law's commitment to punishing misfeasance (essentially, a bad act)[41] but ignoring nonfeasance (essentially, a non act)[42] further supported a system that refrained from prosecuting the absence of rescue.[43] This development grew naturally from a "highly individualistic philosophy of the older common law [which] had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from converting the courts into an agency for forcing men to help one another."[44] The distinction between omissions and acts is more formally justified by noting that the former results in no change to the victims' situations—at most a missed opportunity to benefit them—

38. Robert L. Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946).

39. Lipkin, *supra* note 11, at 277.

40. *Id.* at 279; *see also id.* at 279 & n.158 (arguing that autonomous individuals would likely endorse the harm principle, which prohibits injurious interference with another's person, property, or interests). The principle reinforces the notion of the individual as beyond the reach of a government seeking to impose a duty to aid rule. *Id.* at 282 n.179.

41. *See* KEETON ET AL., *supra* note 35, § 56, at 373 ("There arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance'—that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm.").

42. *Id.*

43. *See, e.g.*, Weinrib, *supra* note 7, at 251–58 (discussing the lack of a duty to rescue and its roots in the common-law distinction between misfeasance and nonfeasance). The actual difference between the two categories, however, has raised much discussion. *See, e.g.*, *id.* at 249 (describing how the development of the Coase theorem may make the distinction insignificant).

44. KEETON ET AL., *supra* note 35, § 56, at 373.

whereas the latter inflicts positive harm.[45] The rules of causation, linked to the requirement of an act, only compounded this dilemma.[46]

In addition to the forces of social identity and legal structure that supported an autonomist perspective, the no-duty rule paralleled the psychological underpinnings of early common law, which recognized that the desire to rescue—because of its risks—ran counter to the "natural law" principle of self-preservation.[47] The instinct for survival was so fundamental and ingrained that it could not realistically be expected to subside in times of potentially life-threatening acts of rescue.

Finally, it was also assumed that the strength of moral aspirations and social norms would compensate for the lack of a formal legal duty. Specifically, the existence and understanding of the divide on the legal and moral continuum under common law doctrine was justified by the promise of religion, a moral sphere expected to pick up where the common law's harsh disregard for the would-be rescuee left off.[48] Because religions generally promote altruism and self-

45. Weinrib, *supra* note 7, at 251; *see also* Terry v. Lincscott Hotel Corp., 617 P.2d 56, 61 (Ariz. Ct. App. 1980) (finding that allegations regarding an omission or nonfeasance did not constitute a cause of action).

46. *See* Lipkin, *supra* note 11, at 267 ("Since liability depends on actually doing something which results in injury, so-called 'negative causation' has no place in tort law. . . . '[N]egative causation' opens a Pandora's box of insuperable difficulties.").

47. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1774 (2008) ("[Edward] Coke[, a common law jurist whose philosophies influenced the Bill of Rights,] agreed with the proposition that basic principles of justice were built into the natural order itself, asserting that the 'law of nature is part of the law of England.' Moreover, Coke agreed that the fundamental basis of law is reason rather than will, and that therefore laws that violate basic principles of justice may not properly be called 'law' at all . . . ." (quoting Calvin's Case, (1608) 77 Eng. Rep. 377, 391 (K.B.) (Coke, C.J.)) (citing 1 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND (1608), *as reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE § 69, at 684 (Steve Sheppard ed., 2003))); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623 (1958) ("Natural-law theory . . . in all its protean guises, attempts to . . . assert that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival . . . ."). This line of reasoning continues to serve as a justification for at least some form of no-duty rule even today. *See* RICHARD D. ALEXANDER, THE BIOLOGY OF MORAL SYSTEMS 191 (1987) (noting that self-sacrifice "represents an evolutionary mistake"); Michael S. Moore, Reply, *More on* Act and Crime, 142 U. PA. L. REV. 1749, 1799 (1994) ("The instinct for survival or the fear of loss of one's own life or bodily integrity may be such that we find it understandable that one could not be a moral hero. Running from a bear as fast as one can is surely one such example.").

48. *See* Sande L. Buhai, *Parental Support of Adult Children with Disabilities*, 91 MINN. L. REV. 710, 738–40 (2007) (discussing the idea that Christianity works to elevate society by encouraging the practice of heroism); Lisa McCabe, Comment, *Police Officers' Duty to Rescue*

sacrifice,[49] they would encourage rescue behavior even without the creation of a legal duty.

In *In re St. Joseph-Chicago S.S. Co.*,[50] for example, a majority opinion explicitly cited reward in the afterlife as a kind of damages for a group of rescuers who saved lives from a sinking ship and subsequently sought compensation from the pool of money awarded the towing company. In denying their claim, the court noted: "What they did was inspired by the spirit which since Christendom has been the foundation of the great brotherhood of mankind. . . . Their reward they have; it never can be taken from them, and it is measured by a standard greater than money."[51]

Jesus Christ responds similarly to the question arguably at the heart of the intersection of religion and tort law—"Who is my neighbour?"[52]—with a parable that seems designed to teach the moral duty to aid rule. In it, a Samaritan who "show[s] mercy" to a man beaten and left for dead by robbers is deemed to have "proved [his] neighbor," and Jesus encourages his followers to "'[g]o, and do thou likewise.'"[53] These and other moments in the New Testament[54] reveal a sort of superhuman standard[55] that stands in stark contrast to the

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or Aid: Are They Only Good Samaritans?, 72 CAL. L. REV. 661, 678 (1984) ("[A]cts that aspire toward human perfection . . . are better left with an individual's inner morality . . . .").

49. *See* JANET RADCLIFFE RICHARDS, HUMAN NATURE AFTER DARWIN 156 (2000) ("[R]eligions nearly always promise that self-sacrifice now will reap enormous rewards later.").

50. *In re* St. Joseph-Chicago S.S. Co. (The Eastland), 262 F. 535 (N.D. Ill. 1919).

51. *Id.* at 540.

52. Donoghue v. Stevenson, [1932] A.C. 562, 580 (H.L.) (appeal taken from Scot.) (U.K.). *See generally* KEETON ET AL., *supra* note 35, § 53, at 358–59 (discussing the evolution of the concept of one's "neighbor" in tort law).

53. *Luke* 10:25–37 (American Standard). The moment is also referenced in *Buch v. Amory Mfg. Co.*, 44 A. 809, 810 (N.H. 1898). *See supra* note 31.

54. *See, e.g.*, *John* 15:13 (American Standard) ("Greater love has no man than this, that a man lay down his life for his friends."). The same quote is embossed on each Carnegie Hero Foundation medal given posthumously. Carnegie Hero Fund Commission, http://www.carnegiehero.org/fund_history.php (last visited Apr. 17, 2009); *see also infra* notes 138–40 and accompanying text.

55. Jesus's approach seems attributable to his extremely sensitized empathy, or *rachamin*. *See* DONALD MCNEIL ET AL., COMPASSION: A REFLECTION ON THE CHRISTIAN LIFE 16–17 (1983) ("He became lost with the lost, hungry with the hungry, and sick with the sick."). Similarly, many contemporary heroes credit their faith with their ability to engage in superhuman efforts despite severe illness. *See, e.g.*, MARIA TARNAWSKA, SISTER FAUSTINA KOWALSKA: HER LIFE AND MISSION 318–19 (Anne Hargest-Gorzelak trans., 1989) ("Although loneliness and darkness and sufferings of all kinds beat against my heart, the mysterious power of God supports and strengthens me.").

inaction permitted by the law, even surpassing a moral stance that would advocate for the requirement of an easy rescue.[56]

By comparison, legal scholars have remarked upon the stark contrast between law and religion on this point.[57] In *Donoghue v. Stevenson*,[58] Lord Atkin made an early attempt at describing the tort concept of duty by referring to the same Biblical scene, noting, "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply."[59] To the extent that law conforms itself to the expectations of the reasonable man,[60] religious views on the duty to aid are of a different world.

In sum, the strong stance against a duty to rescue taken in common law jurisprudence was buttressed by a long list of essential philosophical and legal concepts that a creation of the duty would have upset: individual autonomy, consent theory, the harm principle, and natural law. The position was further strengthened by the enduring understanding that religion had the capacity to pick up where the law left off, requiring and rewarding moral acts even if the courts did not obligate them.

II. THE SLOW EROSION OF THE NO-DUTY RULE

If early common law was the domain of autonomists, then the recent evolution of the law has been led by utilitarians. The utilitarian view privileges the benefits of easy rescue over the loss of autonomy that the common law traditionally upheld.[61] The view is buoyed by

56. For this stance, see Lipkin, *supra* note 11, at 293. "[N]umerous emergencies arise when rescues can be effected safely and easily by observers who have no special relation to the victim. Requiring easy rescue will save lives and reduce injury at virtually no cost." *Id.*

57. *See, e.g.*, Sungeeta Jain, *How Many People Does It Take to Save a Drowning Baby?: A Good Samaritan Statute in Washington State*, 74 WASH. L. REV. 1181, 1181–82 (1999) (recounting the Biblical story of the Good Samaritan before noting that "[m]ost American states . . . do not have Good Samaritan laws," but "[i]nstead . . . follow the common law 'no duty to rescue' rule that states that bystanders have no duty to come to the aid of those in peril").

58. Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) (appeal taken from Scot.) (U.K.).

59. *Id.* at 580.

60. *See* KEETON ET AL., *supra* note 35, § 32, at 173 (discussing the reasonable person and noting that "[t]he whole theory of negligence presupposes some uniform standard of behavior").

61. Michael A. Santoro, *Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs*, 31 N.C. J. INT'L L. & COM. REG. 923, 936–37 (2006) ("A [utilitarian] premise of the duty of rescue is that the cost to the rescuer or others must not be so great as to (in the extreme case) outweigh the benefit to the person

humanitarian concerns[62] that have motivated a gradual erosion of the no-duty rule.

There are several reasons behind the slow but steady promulgation of the duty to rescue. First, there is the sense that, in general, "[c]hanging social conditions lead constantly to the recognition of new duties."[63] More specifically, there is the sense that the expansion of the duty to rescue has been necessitated by religion's decreasing ability to hold fast society's moral sensibilities.[64] This view makes the movement a reaction to a contemporary reality the common law did not foresee, and insists that social norms can no longer be trusted to encourage moral action when the law does not require it. In addition to a general malaise about the likelihood of public good-doing, the movement can also be attributed to specific piecemeal changes via case law, in which courts consistently found exception to the harshness of the no-duty rule.[65] Further, legislative responses to horrific and widely publicized stories of desensitized onlookers who refused to act also altered the legal landscape of the rule.[66] And finally, there has been a steadily rising call in legal literature for a duty in easy rescue cases.[67] To date, the movement has seen concrete progress in at least three ways: a Restatement section formally imposing a duty to rescue in four specific scenarios, the development of a body of cases addressing that section, and statutory

being rescued. The less burdensome it is for the rescuer and the greater the benefit to the person being rescued, the more compelling is the obligation to act." (citation omitted)).

62. This Note characterizes this shift as "humanitarian," using the word's more colloquial meaning without exploring its full philosophical connotations. Other authors discuss more thoroughly the movement's humanitarian origins. *See* Julie Stone Peters, *"Literature," the "Rights of Man," and Narratives of Atrocity: Historical Backgrounds to the Culture of Testimony*, 17 YALE J.L. & HUMAN. 253, 261 (2005) ("Rights and the humanitarian duty to aid were, in a sense, two sides of the very definition of what it was to be human: One had rights by virtue of one's humanity . . . and it was one's sense of obligation to another's suffering that proved one human . . . ."); Jennifer L. Groninger, Comment, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What is Left of the American Rule, and Will It Survive Unabated?*, 26 PEPP. L. REV. 353, 362 n.104 (1999) (discussing the "acknowledged tendency of courts to expand the category of special relationships based on humanitarian concerns").

63. KEETON ET AL., *supra* note 35, § 53, at 359.

64. *See id.* § 56, at 375 ("The remedy in [duty to aid cases] is left to the 'higher law' and the 'voice of conscience,' which, in a wicked world, would seem to be singularly ineffective either to prevent the harm or to compensate the victim." (quoting Union Pac. Ry. Co. v. Cappier, 72 P. 281, 282 (Kan. 1903))).

65. *See infra* notes 88–96.

66. *See infra* notes 193–201 and accompanying text.

67. See *supra* note 4.

rules propagated by individual states, also known as Good Samaritan laws.

First, Section 314A of the Second Restatement and its caveat and comment[68] codified a gradual shift in case law that recognized a duty to rescue in certain circumstances.[69] At first, a sort of contractual duty to aid resulted in cases in which people held themselves out as performers of a public service and then breached their duty in that performance.[70] From there, the case law began to recognize a duty to aid between two parties whose relationship maintained certain characteristics that made that duty reasonable. In short, legal duties to rescue have been applied in the presence of a mismatched relationship, in which the plaintiff is relatively dependent upon the defendant or at an economic disadvantage.[71]

The four formal categories of exceptions to the no-duty rule as described in the Second Restatement § 314A (the duties of a common carrier to its passengers, an innkeeper to his guests, a "possessor of land who holds it open to the public" to the visiting public, and one who voluntarily undertakes custody of another to the one in custody)[72] are variations on the patterns recognized by case law.[73] More precisely, the Restatement relationships derive from scenarios in which the would-be rescuer limits the victim's options for rescue by choosing to invite him into a closed sphere—his own carrier, inn, land, or care.[74]

The caveat to § 314A takes care to note that the writers of the Restatement "[express] no opinion as to whether there may not be other relations which impose a similar duty."[75] Comment (b)

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68. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

69. *Id.* § 314A cmt. c (recognizing the law's evolution to include limited duties to rescue in "situations in which there was some special relation between the parties").

70. KEETON ET AL., *supra* note 35, § 56, at 373.

71. *Id.* at 374.

72. RESTATEMENT (SECOND) OF TORTS § 314A.

73. *See* KEETON ET AL., *supra* note 35, § 56, at 374 ("In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare."). These patterns have also been classified as stemming from the "ability condition" and the "dependency condition." Lipkin, *supra* note 11, at 264–65.

74. *See* Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 318 (1997) (discussing in part "how the weakness of the argument to limit liability makes remote-rescue cases more appealing cases to courts than some other rescue cases in which the fear of unlimited liability is greater").

75. RESTATEMENT (SECOND) OF TORTS § 314A caveat.

emphasizes the "question . . . left open by the Caveat," but notes that even so "[t]he law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence."[76] More helpfully, the comment pinpoints the commonality among the four duties, that is, that they "arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule."[77]

The meaning and extent of these "special relationships" has been the subject of many cases that take up the question of § 314A. The results have generally aligned with the four duties specifically prescribed. Cases such as *Thornton v. City of Flint*,[78] which recognized a special relationship between the city and an incarcerated plaintiff injured on the premises,[79] and *Brown v. Knight*,[80] which found a special relationship between the host of a summer-school picnic and a young child injured while there,[81] both conform to the Restatement view that there is a special relationship when one voluntarily takes custody of another.[82]

Similarly, courts have often refused to find a special relationship that would warrant a duty to rescue when the situation does not align with one of the scenarios outlined in § 314A. In *Iseberg v. Gross*,[83] an Illinois court found no special relationship between business partners,[84] some of whom had failed to tell another partner that an investor had made threats on his life.[85] In so doing, the court rejected the plaintiff's theory that the special relationship limitation had been eroded to the point that it was "out of step with contemporary

76. *Id.* § 314A cmt. b.

77. *Id.*; *see also id.* ("The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.").

78. Thornton v. City of Flint, 197 N.W.2d 485 (Mich. Ct. App. 1972).

79. *Id.* at 493.

80. Brown v. Knight, 285 N.E.2d 790 (Mass. 1972).

81. *Id.* at 791–92.

82. RESTATEMENT (SECOND) OF TORTS § 314A(4).

83. Iseberg v. Gross, 879 N.E.2d 278 (Ill. 2007).

84. *Id.* at 292.

85. *Id.* at 282.

societal morals."[86] The notion that the "affirmative duty . . . particularly in situations where the parties are not strangers, should be a policy determination, made on a case-by-case basis" was precluded by the special relationship requirement of § 314A.[87]

In some cases, however, courts have used the common principles behind § 314A to find a special relationship not explicitly described by the Restatement. It is these sorts of cases that characterize a steady move away from the strict common law adherence to the no-duty rule, or even the four Restatement exceptions. The Supreme Court of Minnesota, for instance, found a special relationship between an owner of a farm and a minor guest who was sexually abused by the owner's boyfriend,[88] reasoning that the plaintiff, as a child, had no "normal opportunities for self-protection."[89] In *Furek v. University of Delaware*,[90] heralded as the case that marked the end of the bystander,[91] the Delaware Supreme Court created a special relationship between a university and a student injured during fraternity hazing activities.[92] The court based its decision upon two § 314A exceptions: voluntary assumption of another[93] and business invitee status.[94] Additionally, decisions such as the 2002 case of *Schieszler v. Ferrum College*,[95] in which a federal court found a special relationship between a university and a student that legally compelled the university to take reasonable measures to prevent his suicide,[96]

86. *Id.* at 288–89.

87. *Id.* at 288.

88. Bjerke v. Johnson, 742 N.W.2d 660, 663 (Minn. 2007).

89. *Id.* at 666; *see also id.* at 665–67 (analyzing whether a special relationship existed).

90. Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991).

91. ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 127–30 (1999).

92. *Furek*, 594 A.2d at 519; *see also* Kathleen Connolly Butler, *Shared Responsibility: The Duty to Legal Externs*, 106 W. VA. L. REV. 51, 84 (2003) ("The court rejected the idea that [the] 'student and the university operate at arms-length, with the student responsible for exercising judgment for his or her own protection when dealing with other students or student groups.' Given the nature of the relationship, the duty owed was limited, but a duty was owed." (quoting *Furek*, 594 A.2d at 517)).

93. *Furek*, 594 A.2d at 517 n.8.

94. *Id.* at 522 n.17.

95. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002).

96. *Id.* at 611; *see also* Heather E. Moore, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423, 431 (2007) (discussing the case in some detail and noting that it was the first signal to universities that the law relating to liability and suicide was in flux).

suggest a pattern of expansion of the duty beyond the four Restatement exceptions.

These shifts have also been captured in Good Samaritan statutes at the state level. Massachusetts,[97] Minnesota,[98] Rhode Island,[99] Wisconsin,[100] and Vermont[101] are a sampling of states with an

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97. MASS. GEN. LAWS ch. 268, § 40 (2002). The statute provides that:

> Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

Id.

98. MINN. STAT. § 604A.01 subdiv. 1 (2008). The statute provides that:

> Duty to assist. A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

Id.

99. R.I. GEN. LAWS §§ 11-37-3.1 to -3.4 (2002). The statute provides that:

> § 11-37-3.1 Duty to report sexual assault. – Any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence shall immediately notify the state police or the police department of the city or town in which the assault or attempted assault is taking place of the crime.
>
> § 11-37-3.2 Necessity of complaint from victim. – No person shall be charged under § 11-37-3.1 unless and until the police department investigating the incident obtains from the victim a signed complaint against the person alleging a violation of § 11-37-3.1.
>
> § 11-37-3.3 Failure to report – Penalty. – Any person who knowingly fails to report a sexual assault or attempted sexual assault as required under § 11-37-3.1 shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year, or fined not more than five hundred dollars ($500), or both.
>
> § 11-37-3.4 – Immunity from liability. – Any person participating in good faith in making a report pursuant to § 11-37-3.1 shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any participant shall have the same immunity with respect to participation in any judicial proceeding resulting from the report.

Id.

100. VT. STAT. ANN. tit. 12, § 519 (2002). The statute provides, in relevant part:

> (a) 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.
>
> . . . .
>
> (c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

Id.

101. WIS. STAT. ANN. § 940.34 (West 2005). The statute provides, in relevant part:

affirmative duty to rescue.[102] Although these statutes demand action in only some form, and in only some cases, and none provide for prison time of more than one year[103] or penalties of more than $2500 for failure to act,[104] the relatively new requirements are in keeping with a general trend that moves the law further down the continuum into what was once strictly a moral realm.

Minnesota requires "[a] person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm" to "give reasonable assistance" as long as he can do so without posing a danger to himself or others.[105] The law takes care to note that this can simply mean contacting law enforcement or medical personnel.[106] The Rhode Island statute is almost identical, though it does not provide an example of "reasonable assistance."[107]

Massachusetts, on the other hand, requires only that a witness to certain enumerated crimes—"aggravated rape, rape, murder, manslaughter or armed robbery"—report the crime to law

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> (1)(a) Whoever violates sub. (2)(a) is guilty of a Class C misdemeanor.
>
> . . . .
>
> (2)(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.
>
> . . . .
>
> (d) A person need not comply with this subsection if any of the following apply:
>
> 1. Compliance would place him or her in danger.
>
> 2. Compliance would interfere with duties the person owes to others.
>
> 3. In the circumstances described under par. (a), assistance is being summoned or provided by others.

Id.

102. Some other states also maintain various forms of a duty to rescue statute. *See, e.g.*, FLA. STAT. § 794.027 (2009) (requiring one who "observes the commission of the crime of sexual battery" to "seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer"); OHIO REV. CODE ANN. § 2921.22(A)(1) (LexisNexis 2009) ("[N]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities."); WASH. REV. CODE § 9A.36.160 (2009) (describing the "crime of failing to summon assistance"). This Note discusses just five such statutes.

103. The Rhode Island law allows the possibility of up to one year of imprisonment. R.I. GEN. LAWS §§ 11-37-3.3.

104. Failure to report the enumerated witnessed crimes in Massachusetts carries a fine of between $500 and $2500. MASS. GEN. LAWS ch. 268, § 40 (2002).

105. MINN. STAT. § 604A.01 subdiv. 01 (2008).

106. *Id.*

107. R.I. GEN. LAWS §§ 11-37-3.1 to -3.4. The law also pertains only to first-degree sexual assault. *Id.* § 11-37.3.1.

enforcement as soon as reasonably practicable, provided this can be done without danger to oneself or others.[108] Wisconsin's variation of a Good Samaritan statute compels a duty to aid a victim or "summon law enforcement officers or other assistance" if it would not place the actor in danger or interfere with duties owed to others.[109] One is also not required to act if help has already been called or is being provided or if the instance has already been reported to law enforcement officials.[110] But Wisconsin narrows the duty by requiring these actions only when one "knows that a *crime* is being committed."[111] Interestingly, by addressing only criminal acts, this leaves to die the baby on the railroad tracks.[112] Finally, Vermont requires "reasonable assistance" when one "knows that another is exposed to grave physical harm," but does not expressly require that the rescuer in fact be at the scene of the emergency.[113]

Taken together, there seems to be a crucial tradeoff at play in the approach of these five states. Wisconsin and Massachusetts require a duty to aid only when a crime is being committed—the former commanding action for the witness of any crime,[114] and the latter requiring action only in the case of particular crimes.[115] But, in exchange, two of the three states that more broadly require action even when the potential rescuee is not the victim of a crime—Minnesota and Rhode Island—narrow the duty by requiring the rescuer to be at the scene of the emergency.[116] The third, Vermont, cuts a broader swath through both of these requirements: the rescuer need have only knowledge (not be present at the scene) and that knowledge need be only of a danger (not necessarily of a crime).[117]

Despite their intriguing drafting differences, many commonalities among the statutes are striking. All five states insist upon some form of aid only if that aid would not present a harm or

108. MASS. GEN. LAWS ch. 268, § 40.
109. WIS. STAT. ANN. § 940.34(2)(a) (West 2005).
110. *Id.* § 940.34(2)(d)(3).
111. *Id.* § 940.34(2)(a) (emphasis added).
112. *See supra* Part I.
113. VT. STAT. ANN. tit. 12, § 519(a) (2002).
114. WIS. STAT. ANN. § 940.34(2)(a).
115. MASS. GEN. LAWS ch. 268, § 40 (2002).
116. MINN. STAT. § 604A.01 subdiv. 1 (2008); R.I. GEN. LAWS §§ 11-37-3.1 to -3.4 (2002).
117. VT. STAT. ANN. tit. 12, § 519(a).

danger to oneself or others.[118] Two of the states further constrict the duty by using the term "reasonable assistance,"[119] and Massachusetts essentially defines the term "reasonable" by itemizing the only crimes that require action if witnessed.[120] Three of the states—Minnesota, Massachusetts, and Wisconsin—note that simply enlisting some form of professional aid may suffice.[121]

These similarities reveal a sense of the tight, constrained nature of the duty, described in ways that are almost visibly painstaking and deliberate. Layer upon layer of constricting stipulations narrowing the duty are only punctuated by the statutes' comparably light penalties. Only Rhode Island and Wisconsin provide for potential prison time—the former for up to one year, the latter for up to just thirty days—but both statutes offer the alternative of fines up to $500.[122] Massachusetts provides for the greatest fines—up to $2500[123]—whereas Minnesota provides for a fine of up to $300,[124] and Vermont—perhaps tempering its more liberal view of the duty—does the same.[125] Further, the minimal amount of prosecution under these statutes may emphasize the apparent hesitancy to force the issue[126] or the dearth of situations in which people act—and are caught acting—with callous disregard for another's plight.

The Restatement, case law, and statutes have added much to the ongoing discussion of the duty to rescue. But so far, that discussion has been primarily dominated by two camps: the autonomists in favor of a limited duty and the utilitarian humanitarians in favor of expanding it. As a result, the debate has neglected to fully consider

118. This interpretation presumes that the Wisconsin statute's provision that the action not "interfere with duties the person owes to others," WIS. STAT. ANN. § 940.34(2)(d), includes a duty of not posing a danger to others.

119. MINN. STAT. § 604A.01(1) subdiv. 1; VT. STAT. ANN. tit. 12, § 519(a).

120. MASS. GEN. LAWS ch. 268, § 40.

121. *Id.*; MINN. STAT. § 604A.01 subdiv. 1; WIS. STAT. ANN. § 940.34(2)(d).

122. R.I. GEN. LAWS § 11-37-3.3 (2002); WIS. STAT. ANN. § 940.34(1)(a) (making violations a Class C misdemeanor in reference to WIS. STAT. ANN. § 939.51(3)(c)).

123. MASS. GEN. LAWS ch. 268, § 40.

124. Minnesota classifies a violation of its Good Samaritan statute as a petty misdemeanor, MINN. STAT. § 604A.01 subdiv. 1, for which the penalty cannot exceed $300, *id.* § 609.02 subdiv. 4a.

125. VT. STAT. ANN. tit. 12, § 519(c) (2002).

126. *See* Benac, *supra* note 16 (quoting Duke University School of Law Professor Sara Sun Beale as noting that "there's a fairly big feeling that if you want to be Mother Teresa, you can be Mother Teresa . . . . [b]ut putting yourself at risk or going out of your way is seen as a choice, not a socially enforceable obligation").

another, separate element: the effect of expanding the duty on heroes.

III. HEROES AND THE DUTY TO RESCUE

If the law's initial reaction was to favor the rescuer by protecting his duty not to aid, then its more recent approach has been to begin to side with the rescuee. But this humanitarian argument focuses on bettering the situations of two of the three key players: the rescuee and society at large.[127] That this approach limits the choices of the third player, the rescuer, has been well considered.[128] What has not been thoroughly accounted for is society's perception of the rescuer as he is forced by the law to commit acts that were once considered voluntary; that is, the repercussions of mandating good acts on the existence and understanding of heroes remain largely unexplored.[129] In sum, the reasons for imposing a duty to aid have centered on the benefits accrued by both the victim and a society that backs its ideals with the force of law, but less so on the rescuer and the detriments to a society—and its laws—that forces such moral choices by the threat of legal sanction.

The argument about the importance of heroes in society relies on at least two propositions: one, that society understands what heroes are, and two, that they are valuable. The first warrants an attempt at defining heroes, the second an effort at describing why they matter. In other words, to understand that heroes should figure in the duty-to-rescue discussion, it is necessary to contend with their meaning on both a definitional and social scale. This Part addresses each in turn, before going on to reckon with the potential consequences of expanding the duty to rescue.

A. The Meaning of the Word "Hero"

Society defines heroes rather messily.[130] Generally, the term takes in a wide swath of possibilities. Heroes earn their moniker because they perform good deeds over time,[131] because they are objects of

127. *See supra* note 62.

128. *See supra* Part I.

129. *See supra* note 7.

130. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 543 (10th ed. 1996) (defining hero as "a mythological or legendary figure . . . with great strength or ability; . . . a man admired for his achievements and noble qualities").

131. *See infra* notes 149–50 and accompanying text.

societal respect,[132] or because they act with bravery.[133] Heroes might be people who sacrifice their lives[134] or merely their time. They may even disagree with society's perception of how much they have sacrificed. The observable tendency of people dubbed "heroes" to respond, "I don't feel like a hero,"[135] demonstrates the dilemma of defining the term: there is fundamental disagreement about what it means, even among those on whom society would bestow the title. Stemming from this definitional quandary, the simple fact that easy rescue does not seem reasonable to everyone—as illustrated by egregious acts that go uninterrupted by seemingly heartless bystanders[136]—often encourages proponents of expanding the duty.[137] This kind of problem requires a more thorough investigation of what is really reasonable.

Society may find occasion to define heroes more specifically when there is a particular purpose behind doing so. The Carnegie Hero Fund Commission, for example, defines them in their specific application criteria. The Commission accepts as a candidate for the Carnegie Medal only a "civilian who voluntarily risks his or her life to an extraordinary degree while saving or attempting to save the life of another person. The rescuer must have no full measure of responsibility for the safety of the victim."[138]

Like duty-to-rescue law, the Carnegie Hero Fund concerns itself with momentary, physical rescue, rather than a broader conception of the term "hero." Easy rescues like the ones mandated by Good Samaritan statutes are unlikely to qualify for recognition by the Carnegie Hero Fund. The kinds of rescuers who would qualify are precisely the kinds of heroes the law never expects—Carnegie's latter requirement even seems to rule out the Restatement exceptions as possible situations in which a hero may emerge.[139] It is appropriate,

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132. *See infra* notes 149–50 and accompanying text.

133. *See infra* notes 152–53 and accompanying text.

134. *See infra* notes 152–53 and accompanying text.

135. This was the response of one woman honored by Yad Vashem, an Israeli organization that honors non-Jews who came to the aid of those persecuted by the Nazis. Geri J. Yonover, *The Lessons of History: Holocaust Education in the United States Public Schools*, 26 VT. L. REV. 133, 146–47 (2001).

136. *See infra* notes 193–99 and accompanying text.

137. *See infra* notes 193–99 and accompanying text.

138. Carnegie Hero Fund Commission, http://www.carnegiehero.org/heroFund.php (last visited Apr. 18, 2009).

139. The Commission's requirement that the rescuer have no responsibility for the victim would rule out the four exceptions to the no-duty rule as outlined by § 314A, which delineates

therefore, that heroes dwell, by Carnegie's own admission, at the extreme end of the moral spectrum. Unlike most definitions of heroes, there is some significance attached to making these stipulations precise: it narrows the field for the contest and assures that only the most "thrill[ing]" heroes—what Carnegie called the "heroes of civilization"[140]—receive recognition.

Yet the pursuit of answers to the question considered by Carnegie and many others—what is heroic and what is simply reasonable—has thus far been a highly constrained topic in the rescue context. The law shies from the term,[141] but implicates it by propagating exceptions to the no-duty rule. The Restatement exceptions suggest that reasonable rescues in those scenarios are not heroic in the eyes of the law—instead, they are expected. The same expectation goes for those professions that by their nature require rescue and whose duty to rescue is legally prescribed. In fact, under the "Firefighter's Rule," many professional rescuers are not permitted to recover damages incurred during the course of rescue—instead, they are presumed to have assumed the risk of injury.[142] What society may look upon with compassion and pity and in fact claim as heroic,[143] the law views as part of an assumed duty, one made reasonable by occupation.[144]

In sum, the debate surrounding the no-duty rule is at least in part a debate about what it means to be a hero. By expanding a rule to require certain conduct, the law implicitly defines that conduct as reasonable. But does this mean that the conduct is consequently not heroic? The differences between the social and legal approaches to defining the term is what makes answering such a question so

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situations in which the would-be rescuer *does* have full responsibility for the victim because of their relationship. *See supra* note 72 and accompanying text.

140. Carnegie Hero Fund Commission, *supra* note 138.

141. *See, e.g.*, E.H. Loewry, *AIDS and the Physician's Fear of Contagion*, 89 CHEST 325, 325–26 (1986) (noting that society's "expectations of 'reasonable risk' necessitates [*sic*] courage without demanding heroism").

142. *See* Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 116 (2008) ("Reckless conduct can provide a basis for recovery for injured professional rescuers, otherwise barred by the application of the so-called Firefighters' Rule.").

143. *E.g.*, Deborah Young, *Sunday Morning Mayhem: FDNY Hero Perishes Battling House Blaze*, STATEN ISLAND ADVANCE, Nov. 24, 2008, at A01.

144. This is in keeping with tort law's tendency to view foreseeability as a necessary component to fault. *See* KEETON ET AL., *supra* note 35, § 29, at 162 (discussing the importance of foresight in tort). It also conforms to George P. Fletcher's view that a layman's duty to rescue infringes upon individual liberty at least in part because the rescue is demanded spontaneously, and is therefore unforeseeable. *See supra* note 37.

complex. Society applies the term to one who makes everyday sacrifices in raising his children[145] or injures himself in rescuing others from burning buildings;[146] the law, however, is unconcerned with the former and offers no recourse for the latter.[147] The social and legal realms, like the moral and legal realms, view the question of who is a hero quite differently.

B. The Significance of Heroes

If heroes were not valuable, society would not care about a rule that shrinks their realm. Societies value heroes and heroic acts for reasons that are not always explicit, but that are better ferreted out from the way in which heroes are discussed and interpreted. Historically, heroes have enjoyed a kind of cult status. The word derives from the ancient Greek, *heros*, which is thought to derive from a word related to the English word "year"—a linguistic connection that reflects the seasonal schedule on which heroes were worshipped.[148] Public praise was essential to the nature of heroes, who were given their title because they "achieved immortality through the local community's memory and continuing esteem for them."[149] Herakles, the most famous of the Greek heroes, serves as a paradigmatic illustration. Defined primarily by his physical prowess, not by any artistic skill, Herakles became famous for his many labors, which tended to include brave, decisive physical action such as killing dangerous animals.[150]

In contemporary culture, heroes retain many of their historic virtues, and communities continue to admire them in similar ways. Many modern heroes also take brave and decisive physical action. Yet a hero need not orchestrate physical violence; instead, the hero often prevents it. President Ronald Reagan's 1982 State of the Union Address, for instance, referenced a government official who had rescued a woman just two weeks before. The anecdote buttressed the inspirational tone of his message:

> Just 2 weeks ago, in the midst of a terrible tragedy on the Potomac, we saw again the spirit of American heroism at its finest—

145. *See infra* note 166.

146. Young, *supra* note 143.

147. *See supra* note 142 and accompanying text.

148. RICHARD P. MARTIN, MYTHS OF THE ANCIENT GREEKS 145 (2003).

149. *Id.*

150. *Id.* at 150–53.

> the heroism of dedicated rescue workers saving crash victims from icy waters. And we saw the heroism of one of our young Government employees, Lenny Skutnik, who, when he saw a woman lose her grip on the helicopter line, dived into the water and dragged her to safety.
>
> . . . .
>
> . . . Don't let anyone tell you that America's best days are behind her . . . . We've seen it triumph too often in our lives to stop believing in it now.[151]

Heroes are intended to be inspirational figures and have, in fact, inspired others to take real action. In 1904, an explosion in a mine near Harwick, Pennsylvania left 181 dead—two among the death toll perished while trying to rescue others.[152] The story is what encouraged Andrew Carnegie to establish the Carnegie Hero Foundation, which annually pays tribute to fifty individuals for heroic deeds, and has so far awarded more than nine thousand medals and $30 million in grants to heroes and their survivors.[153]

Heroic acts have also been depicted as exercises in freedom,[154] despite the common law perception that legally requiring those acts would be quite the opposite.[155] Heroic acts have worked as tools of absolution, too—as in the case of Idaho prisoners, who may seek reduced sentences as a reward for heroic deeds performed while in the penitentiary.[156] And for those who believe in spiritual absolution, heroic acts are rewarded with promised recognition in the afterlife as well.[157]

As in ancient times, the formal ways in which heroes are recognized also serve as a proxy for their social value. In addition to

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151. Ronald Reagan, Address Before a Joint Session of Congress Reporting on the State of the Union, 1 PUB. PAPERS 72, 78–79 (Jan. 26, 1982). This stands in stark contrast to the idea of the no-duty rule as distinctly American. *See supra* Part I.

152. Carnegie Hero Fund Commission, *supra* note 54.

153. *Id.*

154. Anthony M. Kennedy, *Law and Belief*, TRIAL, July 1998, at 23, 24 ("[W]hen our heroes are counted, they will be ones who recognized that individual responsibility is a celebration of freedom, not its denial.").

155. *See supra* Part I.

156. Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991, 993 (2000).

157. *See supra* note 49.

acknowledgment from the highest office in the land, newspapers regularly relish heroic tales with catchy headlines and portraits of admirable protagonists.[158] Further, organizations such as the Carnegie Hero Foundation and Yad Vashem, which honors non-Jews who came to the aid of those persecuted during the Nazi takeover,[159] exist to identify and praise heroes. Less formally, some communities have established college funds for the survivors of those killed in the performance of heroic acts.[160] Even jury nullification may reveal a respect for a hero who fails in his heroic effort. In *Eckert v. Long Island Railroad Co.*,[161] the jury had refused to find that the decedent, who perished while rescuing a four-year-old boy from the path of an oncoming train, was contributorily negligent, finding instead that death was not foreseeable.[162] The New York Court of Appeals declined to overturn the verdict.[163] One commentator noted that the nature of the act seems to have persuaded the court that "[s]uch a heroic effort was clearly worthy of community approbation in spite of the foreseeability of death."[164] Posthumous praise for the hero was so important that it trumped application of the law.

To the extent that presidents, newspapers, organizations, and juries represent a community and its beliefs, these examples support a more abstract contention: the decision to uphold someone as a hero can provide insights about the community itself. This social barometer function of heroes has both anthropological and philosophical value; the presence of heroes—or lack thereof—has been used to interpret the aspirations and norms of the country.[165]

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158. *E.g.*, *Football Hero*, SPORTS ILLUSTRATED, July 11, 1983, at 18; Jimmie Tramel, *True Hero's Gift of Life Remembered*, TULSA WORLD, Dec. 25, 2005, at B3.

159. *See* Yonover, *supra* note 135, at 146–47.

160. *See* Franklin & Ploeger, *supra* note 156, at 996.

161. Eckert v. Long Island R.R. Co., 43 N.Y. 502 (1871).

162. *Id.* at 506.

163. *Id.* at 508.

164. Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1383 n.247 (1994).

165. *See* Finkel, *supra* note 32, at 249 ("[A] number of media and social commentators were quick to conclude that these modern anecdotal stories of horrors without civic-minded actions reflected a decline in civic duty."); Ted Gest, *Are Good Samaritans a Vanishing Breed?*, U.S. NEWS & WORLD REP., Nov. 14, 1983, at 9 (offering reasons for the decline in unsolicited rescue, including the possibility that it is due to "an increasingly impersonal U.S. society"); Austin Wehrwein, *Enforcement Uncertain: 'Samaritan' Law Poses Difficulties*, NATL. L.J., Aug. 22, 1983, at 5 (describing the representative who introduced the Minnesota rescue bill as expressing that "[t]he traditional common-law rule that a bystander has no duty to aid an endangered person would permit 'totally unacceptable conduct for civilized society'"); Ruth Youngblood,

And yet this valuable social construct—like hope, aspiration, and absolution—cannot survive without the existence of the fundamental social value of heroes. The most critical value corresponds with the supposition with which the law is most occupied: heroes do good acts. In the duty-to-rescue context, they aid people in momentary and dire situations that threaten severe bodily harm and even death.[166] The utilitarian aspect of heroes is the foundational argument for expanding the duty to rescue.[167] It is also at the heart of the debate over the pros and cons of legislating heroism.

C. The Consequences to Heroes of Expanding the Duty

There are two ways in which heroes experience negative consequences as a result of expanding the duty to rescue. This Section first discusses the problem that stems from the disconnect between social and legal norms that results from chipping away at the distinction between the ordinary man and the hero. Tangentially, blurring this line also makes for more confusion about the meaning of a heroic act. This Section then addresses counterarguments to these claims. Finally, this Section closes by offering an on-the-ground picture of how legislatures tend to enact statutory expansions of the duty that heightens these theoretical concerns. Such statutes often arise under reactionary public pressure, resulting in overbroad laws that wrongly assume they can legislate moral acts. This pattern threatens to infringe further upon the realm of heroes by failing to fully evaluate potential effects on heroes in the fray.

Rapes Trigger Calls for New Laws, MIAMI HERALD, Apr. 4, 1983, at 3D ("The degeneration of one person is the degeneration of us all . . . . If a community like ours can solve the problem, then cities and towns all over the country will seize upon the solution." (quoting the mayor of New Bedford, the town in which a young woman was raped in a bar while at least a dozen men watched)).

166. *See, e.g.*, *infra* text accompanying note 180. Most classic examples of the rule are cases involving a life-saving rescue. The murder of Kitty Genovese, the public rape of a young woman on a pool table, and the rape and murder of Sherrice Iverson in Las Vegas—all credited with incentivizing duty-to-rescue legislation—similarly involve dire situations. *See infra* notes 193–201. Consequently, this Note's discussion focuses on heroes who perform these sorts of acts, rather than other kinds of heroes, often so called because they perform good deeds over a longer period of time. *See* Reagan, *supra* note 151, at 78 ("And then there are countless quiet, everyday heroes of American life—parents who sacrifice long and hard so their children will know a better life than they've known . . . ."). Society seems to value both kinds.

167. *See, e.g.*, Philip W. Romohr, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule*, 55 DUKE L.J. 1025, 1037 (2006) ("Utilitarians generally support a duty to rescue others, at least to the extent that such a duty provides maximum satisfaction to the most people.").

1. *Expanding the Duty to Rescue Diminishes the Concept of the Hero and Confuses the Law*. Overlapping concepts of heroic and ordinary acts means a loss for society, which understands and benefits from heroes because they are separate, moral entities. Heroes are meaningful because they are fundamentally unlike the rest of humankind. Historically, this respect was reflected in worship; today, it is revealed in other public forums, such as a State of the Union address or newspaper stories.[168] But regardless of how society comes together to pay tribute to them, heroes depend on a community that holds them up as worthy—and fundamentally separate from the general populace—for their meaning and their power. Taking heroes off the pedestal—or confusing the height of the pedestal—by transforming moral choice into the realm of reasonable choice means that this clear, necessary separation is lost. If part of the meaning of heroes is derived from separateness, then lumping them in with the ordinary man fundamentally changes their meaning and likely makes them mean less.

This results in fewer opportunities for inspiration, absolution, and spiritual reward, and for the organizations and news media that uphold heroes as exemplary to inspire others through consistent and public recognition of heroic acts. It means a lesser role for heroes as indicators of society's nature and aspirations, or as societal barometers. But it also means a loss for the law, because a clearer understanding of what is reasonable is lost. Again and again, the law proclaims that it does not require heroes.[169] Instead, their presence helps to define the most perplexing of all tort creatures by showing what he is not: the reasonable man. By expanding the duty to rescue, the law takes on a word with almost exclusively social meaning. In so doing, it takes on the imprecise social handling of heroes—what they do and what they mean—and makes them the business of the law. In short, it turns philosophical questions into legal problems.

Granted, it may be that under special conditions, some acts that society deems heroic will be deemed reasonable and thus expected by the law—the two terms are not always mutually exclusive. Firemen are a prime example. Society celebrates their heroism, and the law

168. *See infra* Part III.B.

169. *See, e.g.*, Weinrib, *supra* note 7, at 261 ("Acts that are beyond the call of duty demand of the agent extraordinary heroism or sacrifice, and 'while we praise their performance, we do not condemn their non-performance.'" (quoting HENRY SIDGWICK, THE METHODS OF ETHICS 219 (5th ed. 1893))).

sees their actions as reasonable. But in that case, the duties of a fireman are explicitly prescribed by law,[170] formally taught in a training school,[171] and voluntarily accepted far in advance. The stamp of the law over a heroic duty in a context without such structure is likely to cause far more confusion in comparison to this narrow circumstance in which people elect to take on a dangerous duty to help others through their occupation in public safety.

Further, the claim that "anyone would do it" or even that the conduct is "reasonable" does not mean that the law should necessarily require the act. This view confuses widespread agreement about what ought to be done with a mandate for legal obligation.[172] Just because everyone would do it does not mean that everyone should do it, nor does it mean that a normative argument should be backed by force of law. Even if reasonable action is not necessarily the opposite of heroic action, the two terms help to define one another indirectly.[173] The stamp of law, however, forces the two into an odd dichotomy.

In addition to taking on a broad view of heroes that is merely inconsistent, requiring rescue may also invite problems relating to strong disagreements about what defines a hero. For autonomists who believe that the right to be left alone is more important than ensuring that the baby be rescued from the railroad tracks, an easy rescue may constitute heroism, because even that rescue represents a decision to do something other than nothing. Gradations of this scenario force

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170. *See supra* note 142.

171. *E.g.*, Education Portal, Fireman Training, http://education-portal.com/fireman_training.html (last visited Apr. 10, 2009).

172. For a discussion of the interplay between social norms and the law, see generally Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). Sunstein notes that "[s]uccessful law and policy try to take advantage of learning about norms and norm change." *Id.* at 909. But he also notes: "Many laws have an expressive function. They 'make a statement' about how much, and how, a good or bad should be valued. They are an effort to constitute and to affect social meanings, social norms, and social roles." *Id.* at 964.

173. One particularly salient description of the interplay between duty, reasonableness, and heroics has arisen in the quasi-duty-to-rescue context of doctor responsibility in the face of the AIDS epidemic. *See* Loewry, *supra* note 141, at 325–26 ("Fear of coming to harm as a consequence of medical practice has been of concern to physicians at least since contagion has been recognized to exist. The balance among duty, fear, and courage has been a necessary part of medical practice ever since. . . . Society assumes that the contract [between the healer and the community] will be honored and the trust kept in time of need. Its expectations of 'reasonable risk' necessitates [*sic*] courage without demanding heroism. A definition of what is reasonable is inherent within the context of the situation abroad at the time. The contract is reasonable. It has endured over the ages and has been hallowed by use.")

further questions about the precise degree of foregone opportunity or incurred risk necessary to deserve the word "hero." For some, stopping to rescue the baby on the way to a job interview is heroism; for others, the act would only be heroic if the train were inches from the baby when the rescuer retrieved him. Such considerations suggest that heroism is in the eye of the beholder—that perhaps there is a general sense of what the term means, but, like the reasonable man, there is confusion at the margins. In addition, manipulating philosophical rather than factual hypothetical situations leads to a different kind of debate.

Consider the requirements of the bystander as laid out by the statutory rules reviewed in Part II. Proponents of expanding the duty are right to note that the evolution of the law in Good Samaritan statutes tends to remain gradual.[174] These statutes require relatively little action with relatively little penalty.[175] It does not necessarily follow, however, that even small expansions of the duty do not threaten the stability of the hero as a social figure or a foil for the law. This is most easily seen in the tendency of society to label as "hero" one who performs precisely what in some states is required by law. A recent newspaper article, for example, described as "heroic" the actions of two co-workers, one of whom called 911 when the other was shot by an intruder.[176] But in Massachusetts, Minnesota, and Wisconsin, enlisting the aid of emergency personnel in such a situation is required by law.[177] The use of the term "hero" suggests that there is some disagreement on the legal and social definition of the term—what the law would prescribe as required "reasonable assistance,"[178] society upholds as heroic. Even the smallest steps toward enlarging the duty, it seems, create inconsistencies between

174. *See* Yeager, *supra* note 7, at 24–25 ("[A] bystander's duty does not include the heroism of invulnerability and infantile omnipotence.").

175. *See supra* notes 97–126 and accompanying text.

176. Colleen Kenney, *Night Shift from Hell . . . and Back; Jacque Bethune Is Recovering from a Gunshot Wound to the Mouth, a Crime Never Solved*, LINCOLN J. STAR, Nov. 16, 2008, at A1; *see also* Christina Hall, *As Flames Tear Through Home, Warren Teen Becomes a Hero; Cops: Mom Drugged Kids' Hot Chocolate, Set Fire*, DET. FREE PRESS, Nov. 20, 2008, at A1 (describing a 13-year-old boy who guided his sister out of a burning house and called 911 as a "hero"). Failure to perform the act in the latter case would violate the Minnesota and Wisconsin statutes. *See supra* notes 106–07, 110–11 and accompanying text.

177. MASS. GEN. LAWS ch. 268, § 40 (2002); MINN. STAT. § 604A.01 subdiv. 1 (2008); WIS. STAT. ANN. § 940.34 (West 2005).

178. *See, e.g.*, MINN. STAT. § 604A.01 subdiv. 1.

social and legal understandings of rescue acts and begin to diminish the understanding of heroes.

To the extent that "reasonable assistance" remains undefined in these statutes, the distinction between heroic and non-heroic acts becomes even more difficult. In Vermont, calling for emergency personnel is not explicitly described as satisfying the statute.[179] Is the man who witnesses a shooting and calls 911 simply a law-abiding citizen or a hero? What if he then rushes to the victim's aid, bringing a gun along in case the attacker returns? What if he then stays with the victim until police arrive, periodically shaking him to keep him awake? Does it matter that the rescuer and victim later learn that the attacker is a wanted serial killer? Or that the victim calls the other man a "hero"? Paul Patrick, who narrowly escaped the "Serial Shooter," uses the word to describe Saul Guerrero, who came to his aid in each of these ways on the evening of June 8, 2006.[180] But at what point did he actually become one?

Under the Vermont statute, it remains unclear at what point Guerrero transforms from the reasonable man into the hero. This is true regardless of whether a rescuer like Guerrero would ever realistically be prosecuted under either statute. The point is that the mere existence of the requirement of "reasonable assistance" creates confusion that has a real and palpable effect on an understanding of the difference between reasonable and heroic actors.

2. *Response to Counterarguments*. It is crucial to address valuable counterarguments to these points. Those in favor of the duty to rescue might argue that an expansion of the rule will increase all of the social values that heroes already promote and allow for more examples of persons to emulate, more opportunities for absolution, more cause for public celebration both formally and informally, spiritual compensation in the afterlife, a social barometer that reflects a more moral nation, and—the utilitarian's ultimate goal—more people saved from injury and death. It follows that the benefit of normalizing certain good behaviors is that it encourages or even forces conformity.[181]

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179. VT. STAT. ANN. tit. 12, § 519 (2002).

180. Nick R. Martin, *Bearing Witness Against Serial Shooter Suspect: Valley Man Shot in 2006 Testifies, Tells of Life Since Then*, MESA TRIB. (Ariz.), Nov. 16, 2008, at A2.

181. *See* Sunstein, *supra* note 172, at 910 ("Norms can tax or subsidize choice. Collective action—in the form of information campaigns, persuasion, economic incentives, or legal coercion—may be necessary to enable people to change norms that they do not like.").

But these social values will exist in an altered form. The social barometer function of heroes, for instance, is likely to function less meaningfully if those heroes are acting out of a sense of obligation. The barometer would better reflect the law itself, rather than those acting under it, because the decision to expand the duty would tend to reveal a society committed to the perpetration of good deeds in name (making it more difficult to measure or identify those good deeds committed out of true altruism). Similarly, the law would confuse those trying to determine whom to emulate and about whom to run inspirational new stories. As in *Eckert*,[182] even when citizens seem capable of recognizing heroes in spite of the law, they will be forced to choose between a social and legal understanding of the term. The confusion that results from such a forced choice—regardless of how the choice is made—is the damaging aspect of expanding the duty. Because something at least closer to heroism will be required by law, the social force of these values are likely to mean at least something different, and will probably come to mean something less.

Those in favor of expanding the duty may note another kind of social force also under threat in modern society—religion. If the common law presumed that religiously inspired altruism would fill any holes left by a lack of a duty to rescue,[183] then a decline in religion would suggest it can no longer suffice as a remedy. This argument encounters several problems. First, it is far from clear that religion is experiencing a downturn.[184] Second, the argument presumes that a moral sensibility unguided by official religious doctrine could persuade at least an easy rescue. Finally, adoption of this stance takes on the weakness of the common law presumption that law must shine a light wherever there is moral darkness (or, as the common law saw it, that there was no need for such a light where morality already existed).[185] The concern about religion's shortcomings would make an ironic argument against more fully allowing the spiritual growth of

182. For the description of a situation in which a jury nullified in favor of a man who attempted to save a child from an oncoming train, see *supra* notes 160–63 and accompanying text.

183. *See supra* notes 48–56 and accompanying text.

184. Neela Banerjee, *Changing Faiths: More Americans than Ever Are Leaving Childhood Affiliations Behind and Making Their Own Decisions About Religion*, N.Y. TIMES UPFRONT, Apr. 4, 2008, at 12–13 (noting that an increase in the percentage of people who claim to be unaffiliated with a particular religion "does not mean that Americans are becoming less religious").

185. *See supra* notes 48–56 and accompanying text.

society in another way—by ensuring that its law does not infringe upon the clear definition of its heroes.

Proponents will also posit that these intangible costs will be more than made up for by the concrete and worthy result of lifesaving.[186] Bystanders on their own will be required to rescue those in peril, thus decreasing the cost of undertakings by professional rescuers, who would benefit from a society that demanded laypersons chip in.[187] This is the same kind of argument made for expanding the duty in the face of complaints about cost to individual autonomy: the large gain of life trumps the small loss of liberty,[188] and the law is a relatively inexpensive way to shift the norm toward rescue.[189]

But the values lost are not necessarily comparable. And both kinds of arguments jettison criticisms about the costs of norm shifting by assuming that the norm actually needs shifting. At least one recent empirical study shows that a failure to rescue is actually the exception—not the norm.[190] The widespread agreement that easy rescue seems reasonable may also indicate that the norm of rescue in some situations already exists, and that therefore legal sanction is unnecessary.[191] Further, this kind of cost-benefit analysis also runs the risk of assuming that simply because social values are not concretely measurable, they are somehow less important.

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186. *See* Adler, *supra* note 1, at 918–19 ("[W]hat society loses in the goodness of volunteerism, it will recoup in the reduction of blameworthy conduct.").

187. *See* Lipkin, *supra* note 11, at 258 ("A general legal duty to rescue would save lives and reduce the cost of rescue operations.").

188. *See id.* at 288 ("Adopting the harm principle restricts the individual's freedom to interfere with and injure others, but enhances his overall freedom by rendering the avenues traversed through life relatively safe and predictably free from avoidable injury and death. This sort of calculation is the hallmark of individualism and the first principle of prudential reasoning.").

189. *See* Sunstein, *supra* note 172, at 908 ("A regulatory policy that targets social norms may well be the cheapest and most effective strategy available to a government seeking to discourage risky behavior.").

190. *See* David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 656 (2006) ("[P]roven cases of non-rescues are extraordinarily rare, and proven cases of rescues are exceedingly common—often in hazardous circumstances, where a duty to rescue would not apply in the first instance."). Strong and widespread negative public reactions to bad bystanders may also suggest that the norm does not need changing. *See infra* notes 193–201.

191. This would seem to reveal that the so-called problem is less than imagined, and that the moral duty to rescue is quietly present. *See* Sunstein, *supra* note 172, at 912 ("[W]hen social norms appear not to be present, it is only because they are so taken for granted that they seem invisible.").

But those in favor of the duty to rescue do maintain one particularly strong contention: that the law will only require reasonable or perhaps even easy rescue,[192] thereby counteracting all or at least many of these concerns. If only the most basic and least dangerous acts of rescue are required, then heroes remain free to roam the realm of truly heroic acts, maintaining their separate status and allowing society a full range of their values and the law an untouched understanding of the reasonable man. But although the easy rescue is an easy choice for the utilitarian, it is not a concept likely to be so easily accepted, legislated, or defined for society as a whole—especially the autonomist. Like the word hero, the meaning of an easy rescue depends on the would-be rescuer; and differing views on its meaning confuse the social value of one who rescues: the hero. Even reasonable rescue threatens the understanding and meaning of heroes, both because it addresses a concept (heroism) that varies according to the viewer and because it blurs the line between the ordinary and the great upon which the very definition of heroism depends. But if the argument only runs that easy rescue is all that will ever be asked of a bystander, a cogent response—because the claim is based upon a prediction about the likely evolution of the duty to rescue—requires a closer look at how these laws actually evolve.

3. *Legislatures Heighten Theoretical Concerns by Rashly Expanding Duties to Rescue*. A closer look at the genesis of duty-to-rescue statutes and comparable provisions reveals that the conditions under which many of the statutes have been enacted are further reason for pause when considering the expansion of the duty against the backdrop of heroes.

Three of the five states discussed in this Note with criminal penalties for failing to act in an emergency created their statutes in response to a particularly horrifying and well-publicized occasion of what has come to be known as "spectator rape."[193] On March 6, 1983, a young woman was repeatedly raped on a pool table by four men in Big Dan's Tavern in New Bedford, Massachusetts, while at least a dozen other men looked on.[194] The public outcry was swift and strong;

192. *See* Adler, *supra* note 1, at 918 ("Actions that are beyond the call of duty will not be legally required in any case, so the law will not deprive society of heroes nor deprive individuals of all opportunities to perform heroically.").

193. Finkel, *supra* note 32, at 248.

194. Ellen Goodman, Op-Ed, *Horror Show in a Tavern*, BOSTON GLOBE, Mar. 17, 1983.

almost immediately, legislators in Massachusetts and Rhode Island began clamoring for a change in witness liability law[195] and were ultimately successful in passing duty to aid statutes.[196] Democratic representative Randy Staten also cited the New Bedford rape as the reason for introducing the bill that is now Minnesota law.[197]

Although the resulting statute does not fall strictly within the realm of duty-to-rescue statutes, history repeated itself in strikingly similar circumstances fifteen years later, when a similar nationwide uproar resulted after seven-year-old Sherrice Iverson was attacked in a Las Vegas casino bathroom while the attacker's friend and classmate, David Cash, watched from a nearby stall. In response, California unanimously enacted the Sherrice Iverson Child Victim Protection Act, which created a duty to report child abuse and neglect.[198] Nevada followed suit with a similar law.[199]

The Iverson case, like the ones that preceded it, highlighted the traditionally widespread, emotional response to horrific cases in which bystanders choose to do nothing when rescue is easy and danger to the victim is great.[200] Duty-to-rescue laws, because they are so often spurred on by an event overcharged with public sentiment, run the risk of encouraging impetuous legislation that fails to fully weigh the ramifications of expanding the duty—including the impact upon the moral realm of heroes. That this consideration may sound crass after a brief description of such a parade of callous witnesses only emphasizes the point that moral outrage easily colors more resigned, measured thought.[201]

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195. Youngblood, *supra* note 165.

196. Silver, *supra* note 1, at 427.

197. Wehrwein, *supra* note 165.

198. Finkel, *supra* note 32, at 249.

199. *Id.*

200. The "David Cash case" resulted in three hundred newspaper articles nationwide. Susan B. Apel, *Privacy in Genetic Testing: Why Women Are Different*, 11 S. CAL. INTERDISC. L.J. 1, 14 n.67; *see also, e.g.*, Op-Ed, *America's Shame*, BOSTON GLOBE, Apr. 1, 1983 ("Americans reacted with understandable outrage recently when bystanders in a New Bedford bar acted as callous spectators to the crime of rape. We are now learning that American officials acted as accessories after the fact in aiding Nazis who took part in the slaughter of millions of innocent people. No moral outrage is commensurate with that crime.").

201. Alan Dershowitz, who was quoted as the calmer voice of reason about the technicalities of expanding a duty in the wake of the New Bedford spectator rape case, recognized this pattern by noting: "We don't want to make it a crime for someone to refuse to endanger his own life. . . . Law is often the product of the worst abuses in human nature." Youngblood, *supra* note 165. The legend of the Kitty Genovese incident may also stand as an example of the potential for a particularly emotional reaction to an event to influence the

More measured thought would recognize that simply because one person fails to act morally in a particular instance does not mean that society as a whole would benefit from a change in the law requiring moral action. Instead, the social barometer function of heroes works just as well when society reacts to one who fails to act heroically, and a high degree of public outrage may indicate that the law that would prohibit the outrage-inducing conduct is not as necessary as it would seem. As one commentator noted in the aftermath of the Sherrice Iverson incident, "[t]he fact that the moral outrage is so deafening is an encouraging sign that the nation's moral compass still works. That Mr. Cash isn't being prosecuted means the justice system hasn't gone haywire either."[202]

In addition to the potential of reactionary laws to overlook their ramifications upon heroic action and to incorrectly assume a general lack of moral good-doing based upon a single example, the impact of such legislation is also, in a practical sense, limited once passed. Actors are rarely—if ever—prosecuted under such statutes,[203] a fact that may owe to the difficulty in tracing transgressors,[204] particularly given the potential hesitancy on the part of eyewitnesses to be prosecuted for the same crime. Regardless of the reason for the lack of enforcement, putting these laws on the books threatens heroes by officially condoning a legal definition of the reasonable man that confuses the social meaning of heroes. This remains true regardless of the degree to which the laws are enforced. Should these young statutes serve as templates for future legislation by other states, this concern only multiplies. And given the potential political backlash of repeal, it will be difficult to reverse rash legislation in the future as well.

On a more philosophical level, efforts to increase a duty to rescue are a reminder that "as the Cowardly Lion learned in Oz, courage is not something one person can give another or a legislature

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relating of that event. *See* Jim Rasenberger, *Kitty, 40 Years Later*, N.Y. TIMES, Feb. 8, 2004, § 14, at 1 ("Yeah, there was a murder. . . . Yeah, people heard something. You can question how a few people behaved. But this wasn't 38 people watching a woman be slaughtered for 35 minutes and saying, 'Oh, I don't want to be involved.'" (quoting one who researched the incident forty years later)).

202. Editorial, *'Good Samaritan': Reaction Shows Public Is Not Indifferent*, DALLAS MORNING NEWS, Sept. 4, 1998, at 30A.

203. *See* Benac, *supra* note 16.

204. Silver, *supra* note 1, at 433 (noting that "nonrescuers would be difficult to trace, and nearly impossible when not witnessed by others").

can pass for its constituents."[205] But in much the same way that it is irrelevant whether Saul Guerrero might have been prosecuted under these statutes had he failed to render the assistance that he did, it is also irrelevant in relation to the argument about the value of heroes whether these statutory efforts fail to bestow Oz-like power (or whether that is even their intent). In both cases, this legislation remains dangerous because it begins to unravel social and legal understandings of heroes that provide real value in both the social and legal contexts.

It is for these reasons that proponents are oversimplifying the problem when they insist that expanding the duty to include easy rescue would leave the realm of heroes intact because "[a]ctions that are beyond the call of duty will not be legally required in any case."[206] An examination of statutes that have already expanded the duty reveals that virtually any amount of legislation on the subject of rescue automatically invites questions about the realm of heroes. This is true even when bystanders are asked to perform relatively small tasks—such as enlisting emergency aid—because society considers even this action to be "heroic," a term that flies in the face of statutes that claim to demand only "reasonable assistance." As for cases in which those statutes do not specify such an example of "reasonable assistance," the impact upon heroes is even more uncertain. And because these statutes likely make incorrect assumptions about the need for moralist legislation and its actual ability to change behavior, they likely counter—or at least cause further confusion about—what should be and can be expected of the reasonable man.

That many of these statutes have origins in reactions to sensational (and perhaps sensationalized) single instances of bystander cruelty may explain why their enactors have failed to fully appreciate these and other ramifications. Proponents of expanding the duty who insist so early in the jurisprudence that the law will never head in the extreme direction of requiring unreasonable rescue forget that reason's counterpart—emotion—has largely dictated the jurisprudence so far. In short, the assumption that the law will always be reasonable not only seems subject to suspicion based on past facts,

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205. Timothy Harper, *Duty to Help*, LEXINGTON HERALD-LEADER (Ky.), Mar. 11, 1984, at A2. Andrew Carnegie seems to have agreed with this assessment. About establishing monies for heroes, he noted, "I do not expect to stimulate or create heroism by this fund, knowing well that heroic action is impulsive." Carnegie Hero Fund Commission, *supra* note 54.

206. Adler, *supra* note 1, at 918.

but is also dangerous for the future. If the assumption is true, then dismissing the discussion of ramifications to heroes only shortchanges a full consideration of what reasonable means. If it is false, then society remains unprepared for, and consequently more vulnerable to, a shift that does, in fact, require unequivocally unreasonable conduct.

CONCLUSION

Heroic action loses its moral force when it is required by law. Critical literature, however, has focused not on the consequences of this loss, but on two competing social forces, which have thus far shaped the question of whether the law should impose a duty to rescue another. The first—an autonomist perspective—finds its roots in classic historical cases that uphold a freedom from obligation to aid at the expense of a victim whose harm was easily preventable. The second and more recent utilitarian-based perspective upholds the benefits of rescue at the expense of individual autonomy in easy rescue scenarios, a movement that has evolved through the Restatement, case law, and Good Samaritan statutes. Much has been written about this trade-off and the kind of society that elects one over the other. But this exploration has focused primarily on the pros and cons of the choice with respect to those particular values—the value of liberty and the value of rescue, broadly speaking—without an examination of other kinds of social values inherent and affected by such a choice. Although heroes provide social meaning and legal clarity in a way that is important to both autonomists and utilitarians, their importance does not fit cleanly into either camp.

An examination of the value of the rescuer as hero is a crucial missing piece in the ongoing duty-to-rescue dialogue. Heroes are treasured on a social level for reasons that are familiar—they inspire hope and incite other good-doing, and are cause for public celebration in many varied forms. In turn, heroes reflect upon the society in which they live. Heroes do good deeds and, in the duty-to-rescue context, can even save lives. The significance of heroes on a legal level is perhaps less readily apparent but nonetheless just as crucial—they illuminate the meaning of reasonable conduct by demonstrating what reasonable is not: heroic. And they do this by existing on a plane that is separate from that of ordinary men.

Expanding the duty to rescue in the hero context confuses the meaning of the word by merging—even if only a bit—those two

planes, consequently changing and ultimately damaging the social and legal values the concept provides. The recent enactment of state statutes creating affirmative duties to rescue—despite their narrow drafting—reflects further problems with an increased duty that does not parallel what society deems reasonable and attempts to demand "reasonable assistance" that society may call "heroic." Such statutes tend to work from pessimistic assumptions about society's general moral sensibilities that are probably false, and—if true—do not realistically reflect the capacity of moral legislation to change action.

The debate over whether to require more rescue would benefit from further discussion about the various meanings of rescue to a society that celebrates those who perform them. In any case, expanding the duty, at the very least, blurs a line between reasonable and heroic conduct that is valuable when steadily drawn. And instead of creating more heroes—as proponents of an expanding duty might expect—requiring action further along the moral continuum only muddles the continuum itself, leaving society with heroes that mean less and laws that are unlikely to create more.