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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?

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I. INTRODUCTION

The death of a princess halfway around the world focused on an arcane, but important, fundamental rule of American tort law: the no duty to rescue rule. Chief Justice Shake of the Supreme Court of Indiana stated the American rule on rescue almost six decades ago:

> It may be observed, on the outset, that there is no general duty to go to the rescue of a person who is in peril.[1]

The contrast between America's no duty to rescue rule and the law in most civil countries,[2] such as France,[3] has recaptured the attention of the general media since

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1. L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942) (explaining that the rule of no duty to rescue is premised on the belief that there must be a legal duty in order to impose liability; thus, "'[w]ith purely moral obligations the law does not deal'" (quoting Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1898))). Under American law, a defendant can be liable for negligent conduct, but there is no requirement that he be a "Good Samaritan." *See Buch*, 44 A. at 810; *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, 254 (1983). Thus, Jesus' parable of the Good Samaritan who rescued a man beaten by thieves while the priest and the Levite passed by on the other side presumedly indicates that the priest and the Levite are not legally liable for the man's suffering, although morally they should have given their time and effort to save him. *See Buch*, 44 A. at 810; *Luke* 10:30-35.

2. Over 100 years ago, the Netherlands and Portugal became the first European countries to enact a duty to rescue statute. *See* Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 445 (1985) (proposing a duty to render aid and explaining how it would apply). Other European countries that have a duty to rescue include France, Germany, Poland, Italy, Denmark, Russia, Norway, Romania, Turkey, and Hungary. *See* Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 59 n.56 (1972) (discussing a Vermont statute that imposes a duty to rescue).

3. *See* CODE PÉNAL [C. PÉN.] art. 223-6, § 3, ¶ 2 (Dalloz 1997-98) (Fr.).

the recent tragedy in Paris.[4] Commentators and the media have noted that the law in France is otherwise: when a person, without danger to himself or others, could provide aid to another and rescue a person in distress, he could be subject to liability if he failed to do so.[5] In determining liability, French law requires a person to make a reasonable effort to rescue.[6] Thus, immediately after the deaths of Princess Diana and Emad Mohamed al-Fayed, nine photographers and one motorcycle driver were investigated for failure to rescue the injured victims.[7]

Under French law, the victims of the accident could bring a private law claim for the photographers' failure to rescue by "simply add[ing] the tortious implications of the offence to the criminal action before the criminal courts."[8] In France, "[a] person who has suffered damages as a result of another's violation of a penal statute has the option of incorporating his action for damages in the penal proceedings or of bringing an independent civil action."[9] The damages would be what might have been avoided by a reasonable effort to rescue.[10] The photographers did not necessarily have a duty to go to the Mercedes and actually try to move the injured victims from the car; however, under French law, the reasonable effort requirement imposes a duty to at least seek medical attention or call the police.[11] Under American law, no such duty exists.[12]

Editorial writers are now questioning the American rescue rule,[13] as have legal scholars and observers throughout American history.[14] Many have suggested that

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4. *See* Ann G. Sjoerdsma, *Good Samaritan Law? Not in America Punishing Good Deeds,* ROANOKE TIMES & WORLD NEWS, Sept. 18, 1997, at A9, *available in* 1997 WL 7304233.

5. *See* C. PÉN. art. 223-6, § 3, ¶ 2.

6. *See id.; see also* Sjoerdsma, *supra* note 4, at A9 (noting that the French term for reasonable person is *bon pere de famille*).

7. *See* Charles Trueheart, *Diana's Guard Can't Recall Paris Crash; French Investigation Secretive, Methodical,* WASH. POST, Sept. 20, 1997, at A1.

8. *See* WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 172 (1995).

9. *See* RENE DAVID & HENRY P. DE VRIES, THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS 56 (1958) (citing CODE DÉ PROCÉDURE PÉNALE [C. PR. PÉN.] [*Code of Criminal Procedure*] art. 3 (Fr.)); Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis, in* THE GOOD SAMARITAN AND THE LAW 91, 115 (James M. Ratcliffe ed., 1966). There is criminal and civil liability imposed for failure to rescue under French law. *See id.* The plaintiff's private law claim "is usually handled as part of the criminal proceedings against the potential rescuer, the victim demanding recovery of damages as *partie civile*," which is the injured party in criminal proceedings. *See id.*

10. *See* CAIRNS & MCKEON, *supra* note 8, at 67-68; *see also* Trueheart, *supra* note 7, at A1 (noting that the photographers are being sued for damages by al-Fayed's father).

11. *See* C. PÉN. art. 223-6, § 3 (explaining that the duty to rescue means assistance through personal action or seeking assistance of the medical services).

12. *See, e.g.*, L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984).

13. *See* Sjoerdsma, *supra* note 4, at A9.

14. *See* JOHN W. WADE ET AL., CASES AND MATERIALS ON TORTS 405 (9th ed. 1994) (noting that the topic of America's no duty to rescue rule "has engaged a good many writers"); *infra* note 15.

the American rule seems harsh and should be abandoned,[15] but before it is criticized, it should be understood. The general media is not the proper forum for a treatise on torts, and for that reason it is understandable that the American rule of no duty to rescue seems harsher on television than it is in reality.[16]

Since the time Chief Justice Shake uttered the words regarding no duty to rescue six decades ago, a number of inroads have been made on the American rule.[17] A careful investigation of American jurisprudence suggests that the erosion of the rule has been substantial.[18] For example, six decades ago, an apartment owner would not be liable for failure to protect or rescue a tenant from danger inflicted by a felon.[19] Today, a landlord might face liability in such circumstances.[20] Six decades ago, a psychiatrist would not be subject to liability for failure to protect or rescue a "foreseeable victim" from the potential conduct of the psychiatrist's patient; today, he might.[21]

This Comment begins by setting forth the five general exceptions to the no duty to rescue rule: 1) negligent injury by a defendant;[22] 2) innocent injury by a defendant;[23] 3) special relationships;[24] 4) defendants who assume a responsibility

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15. *See generally* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908) (discussing the development of ethics in the law throughout history); Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT'L REV. L. & ECON. 141 (1995) (presenting an economic analysis which contrasts the common law hypothesis that not requiring a duty to rescue brings about economic efficiency); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (developing a rationale and theory for a general duty to rescue); Wallace M. Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965) (formulating a duty to rescue rule and explaining its application); Silver, *supra* note 2 (formulating a duty to rescue rule and explaining its application); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) (arguing that the law should impose a duty of "easy" rescue); Lipkin, *supra* note 1 (presenting arguments for the no duty to rescue rule, then objecting to each argument and proposing a general duty to rescue rule).

16. *See* Sjoerdsma, *supra* note 4, at A9.

17. *See* Lipkin, *supra* note 1, at 252.

18. *See* Weinrib, *supra* note 15, at 248 (suggesting that the inroads have "consumed" the no duty to rescue rule).

19. *See* Melinda L. Reynolds, Note, *Landowner Liability for Terrorist Acts*, 47 CASE W. RES. L. REV. 155, 163 (1996).

20. *See, e.g.*, Braitman v. Overlook Terrace Corp., 346 A.2d 76, 84 (N.J. 1975) (holding a landlord liable to the tenants when the landlord failed to take action and protect the tenants from crime). For a further discussion about landlord liability for criminal or terrorist acts, see Reynolds, *supra* note 19.

21. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976) (holding psychiatrists potentially liable for failing to warn the plaintiff that a patient had told the psychiatrists that he intended to kill the plaintiff). For a further discussion of *Tarasoff*, see *infra* note 89.

22. *See infra* notes 39-46 and accompanying text.

23. *See infra* notes 47-65 and accompanying text.

24. *See infra* notes 66-108 and accompanying text.

to undertake a rescue;[25] and 5) statutes.[26] In Part III, this Comment briefly compares the rescue law in France to the law in America and questions whether the two laws are truly different and whether the American rule should survive.[27] Part IV focuses on basic truths behind American tort law which serve as the cornerstone for the no duty to rescue rule and suggests that the American rule should remain.[28]

With a turn of phrase, this author does not seek to rescue a rule that does not need rescuing, but to analyze the rule for what it is and suggest how the rule should apply now and in the future.

II. THE CASE LAW AND ITS STATUTORY DEVELOPMENT

Stated again, black letter American tort law holds that there is no duty to rescue a person who is in peril,[29] sick,[30] injured,[31] or under criminal attack.[32] The American rule, known as "no duty to rescue," applies to the average reasonable person.[33] There is a classic hypothetical given to first-year students in law school tort classes to explain the rule: a man comes upon a complete stranger who is drowning in a lake; there is a rope and a boat on a nearby dock; the man stands on the dock, smokes a cigarette, and watches the stranger drown.[34] Under today's American rescue rule, black letter law continues to allow a bystander who comes upon a person in need of rescuing to watch instead of help;[35] however, to state that

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25. *See infra* notes 109-46 and accompanying text.

26. *See infra* notes 147-73 and accompanying text.

27. *See infra* notes 174-217 and accompanying text.

28. *See infra* notes 218-42 and accompanying text.

29. *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (Pa. 1959) (holding that the defendant had no duty to rescue a drowning man when the defendant enticed the man to jump into the water); 57A AM. JUR. 2D *Negligence* § 114 (1989).

30. *See, e.g.*, Hurley v. Eddingfield, 59 N.E. 1058 (Ind. 1901) (holding a physician not liable for refusing to render aid to a dying person who may have been saved, even when the physician was the only doctor available); 57A AM. JUR. 2D *Negligence*, *supra* note 29, § 114.

31. *See, e.g.*, Allen v. Hixson, 36 S.E. 810 (Ga. 1900) (holding an employer not liable for failing to rescue his employee when the employer knew the employee's hand was caught in a machine and did not come to her aid); 57A AM. JUR. 2D *Negligence*, *supra* note 29, § 114.

32. *See, e.g.*, St. Louis-San Francisco Ry. Co. v. Mills, 271 U.S. 344 (1926) (holding that an employer had no duty to protect the employees from the criminal acts of striking workers); 57A AM. JUR. 2D *Negligence*, *supra* note 29, § 118.

33. *See, e.g.*, *Yania*, 155 A.2d at 346; WADE ET AL., *supra* note 14, at 404 n.3. In addition, most courts apply the no duty to rescue rule to government agencies who are defendants. *See, e.g.*, Riss v. City of New York, 240 N.E.2d 860 (N.Y. 1968) (holding a municipality not liable for failure to protect upon request a person who was continually threatened); WADE ET AL., *supra* note 14, at 404 n.3 (observing that most courts apply the same standard of care to government officials as to private individuals). The rule even extends to professionals, such as doctors. *See Hurley*, 59 N.E. at 1058; WADE ET AL., *supra* note 14, at 405 n.4. Thus, even though medical ethics rules state that in emergencies, doctors should rescue victims in need of their services, "tort law places no such obligation on the profession." *See id.* at 405.

34. *See* KEETON ET AL., *supra* note 12, § 56, at 375 (citing Osterlind v. Hill, 160 N.E. 301 (Mass. 1968)).

35. *See id.*

a person never has a duty to rescue others would be a "'mistake.'"[36] There are five general exceptions to the no duty to rescue rule,[37] and in most rescue situations, one of the exceptions will likely apply.[38]

A. An Inroad That Is Not an Inroad: Negligent Injury by the Defendant

When a defendant, by his own negligent act, hurts another, there is "general agreement" in the case law that the defendant has a duty to take reasonable steps to rescue the injured victim from further harm.[39] For example, in *Parrish v. Atlantic Coast Line Railroad Co.*,[40] the plaintiff alleged that the defendant negligently obstructed the view of his railroad crossing by placing freight cars on a dirt bank in front of the tracks.[41] The plaintiff was involved in a collision and laid unconscious on the roadbed for almost an hour, even though the defendant could have taken the plaintiff to a hospital by locomotive.[42] The court held that if the defendant negligently obstructed the view of the crossing, the defendant "must take all steps necessary to mitigate the hurt."[43]

The negligent injury by the defendant exception is not a true inroad to the American no duty to rescue rule because it merely holds a defendant liable for hurt caused through the defendant's own affirmative conduct.[44] The main rationale behind the no duty to rescue rule is that the defendant did not engage in any action that gave rise to the plaintiff's harm.[45] Therefore, holding a defendant liable for hurt caused by his own negligence is consistent with the principles behind tort law and does not truly alter the rescue rule. The negligent injury by the defendant exception, however, gave rise to another, more expansive, exception: innocent injury by the defendant.[46]

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36. *See* Nancy Benac, *Few Requirements for Americans to Be 'Good Samaritans,'* ASSOCIATED PRESS, Sept. 4, 1997, *available in* 1997 WL 4882260 (quoting Mike Steenson, professor at William Mitchell College of Law in St. Paul, Minn.).

37. *See* WADE ET AL., *supra* note 14, at 407-12 nn.1-20; *see also* Silver, *supra* note 2, at 425-26 (discussing the exceptions to the no duty to rescue rule).

38. *See* Benac, *supra* note 36.

39. *See, e.g.*, Parrish v. Atlantic Coast Line R.R. Co., 20 S.E.2d 299, 304 (N.C. 1942); WADE ET AL., *supra* note 14, at 408 n.7.

40. 20 S.E.2d 299 (N.C. 1942).

41. *See id.* at 301.

42. *See id.*

43. *See id.* at 305.

44. *See id.* at 304-05; KEETON ET AL., *supra* note 12, §1, at 2-3.

45. *See* Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 925 (Ct. App. 1991) (reaffirming that the no duty to rescue rule is rooted in the fact that the defendant did not engage in any conduct that brought about the plaintiff's circumstances); KEETON ET AL., *supra* note 12, § 56, at 373.

46. *See* Silver, *supra* note 2, at 425.

B. An Inroad: Innocent Injury by the Defendant

If the defendant, through no fault of her own, places the plaintiff in a situation where the plaintiff is in danger of being seriously harmed, some courts have held that a defendant has a duty to rescue the plaintiff.[47] This has not always been the rule;[48] however, it is unlikely that a court would not apply the rule today.[49] This rule also requires a defendant to render aid if the defendant's instrumentality innocently harms someone.[50] For example, in *L.S. Ayres & Co. v. Hicks*,[51] the court held that the defendant had a duty to rescue the plaintiff when the plaintiff's fingers got caught in the defendant's escalator.[52] Although the original injury was caused by the plaintiff's negligence, the defendant had a duty to render aid because the defendant possessed the means to turn the escalator off.[53]

The Restatement (Second) of Torts changed the law to impose such a duty on defendants, stating as follows: "If [a person's] act, or instrumentality within his control, has inflicted upon another such harm that the other is helpless and in danger . . . the actor is under a duty to take . . . action even though he may not have been originally at fault."[54]

Cases falling under this exception commonly involve a situation where a defendant innocently creates a dangerous condition on a highway.[55] Thus, in *Hardy v. Brooks*,[56] a motorist innocently and without negligence hit and killed a cow.[57] The plaintiff was injured when the plaintiff's car struck the carcass of the

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47. *See, e.g.*, Hardy v. Brooks, 118 S.E.2d 492 (Ga. Ct. App. 1961) (holding that the defendant had a duty to warn or protect others from a cow in the road after the defendant innocently killed it); KEETON ET AL., *supra* note 12, § 56, at 377. When the duty to rescue rule applies, it not only requires the defendant to render aid to injured parties, but, if possible, it requires the defendant to warn others of the danger. *See Hardy*, 118 S.E.2d at 495.

48. Older cases held that a defendant did not have a duty to rescue a plaintiff who had been innocently injured by the defendant or his instrumentality. *See, e.g.*, Union Pac. Ry. Co. v. Cappier, 72 P. 281, 282 (Kan. 1903) (holding that a railroad company was not obligated to help the plaintiff who was bleeding to death after the railroad, without negligence, ran over the plaintiff).

49. *See* WADE ET AL., *supra* note 14, at 408.

50. *See, e.g.*, L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334 (Ind. 1942); WADE ET AL., *supra* note 14, at 409.

51. 40 N.E.2d 334 (Ind. 1942).

52. *See id.* at 337-38.

53. *See id.* at 336. There was another basis for a duty to render aid under this case: a special relationship between the shopkeeper and the visitor. *See id.* at 337. For a further discussion on the special relationships exception, see *infra* notes 66-108 and accompanying text.

54. RESTATEMENT (SECOND) OF TORTS § 322 cmt. a (1965). Many courts rely heavily on this section of the Restatement. *See* Amy J. Fanzlaw, Comment, *"A Sign of the Times:" How the Firefighter's Rule and the No-Duty-To-Rescue Rule Impact Convenience Stores' Liability for Failure to Aid a Public Safety Officer*, 23 STETSON L. REV. 843, 860 (1994).

55. *See* WADE ET AL., *supra* note 14, at 408.

56. 118 S.E.2d 492 (Ga. Ct. App. 1961).

57. *See id.* at 494.

cow.[58] The court held that although the defendant had not negligently created the dangerous situation, the defendant may have been under a duty to help the plaintiff avoid the injury.[59] Thus, the defendant must either eliminate the danger or warn others of the danger.[60] Likewise, in *Montgomery v. National Convoy & Trucking Co.*,[61] the court held that the defendant had a duty to prevent harm to a plaintiff when the defendant's truck, without negligence, stalled in the middle of an icy road at night.[62] The rationale for this exception is that the defendant is responsible, even though innocently, for creating the danger; therefore, the defendant is not a complete bystander.[63]

Like the first exception, innocent injury by the defendant imposes a duty to rescue on a defendant because the defendant's positive action contributed to the plaintiff's peril.[64] Courts have gone further, however, and established an exception to the no duty to rescue rule where the defendant may not have engaged in any action that brought about the victim's dangerous situation: special relationships.[65]

C. An Expanding Inroad: Special Relationships

Courts have created a third exception to the no duty to rescue rule by requiring that a person rescue another when a special relationship exists between the parties.[66] There are two categories of special relationships. First, the law will impose a duty to rescue when there is a special relationship between the rescuer and the rescuee.[67] Second, the law will impose a duty to rescue when there is a special relationship between the rescuer and a third person who might commit a harm.[68] Under both categories, the rescuer "need not have been responsible for the

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58. *See id.*

59. *See id.* at 496 (affirming the denial of general demurrers only).

60. *See id.* at 495.

61. 195 S.E. 247 (S.C. 1938).

62. *See id.* at 253. For additional cases with similar holdings, see, for example, Kirk v. United Gas Pub. Serv. Co., 165 So. 735 (La. Ct. App. 1936) (holding the defendant liable for failure to prevent the plaintiff's injuries when the plaintiff's car hit the carcass of a calf that the defendant had innocently killed), *rev'd on other grounds*, 170 So. 1 (La. 1936); Simonsen v. Thorin, 234 N.W. 628 (Neb. 1931) (holding that the defendant had a duty to prevent injury to the plaintiff when the defendant innocently knocked a trolley pole into the street).

63. *See Hardy*, 118 S.E.2d at 495.

64. *See id.*

65. *See generally* Lipkin, *supra* note 1, at 263-69 (outlining the special relationships exception).

66. *See, e.g.*, Thomas v. Williams, 124 S.E.2d 409 (Ga. Ct. App. 1962) (holding that the jailor had a duty to rescue the prisoner from his jail cell when the prisoner's mattress caught on fire because of the special relationship between a custodian and his charge); WADE ET. AL., *supra* note 14, at 407 n.1.

67. *See, e.g., Thomas*, 124 S.E.2d 409; WADE ET AL., *supra* note 14, at 407 n.1.

68. *See, e.g.*, Linder v. Bidner, 270 N.Y.S.2d 427 (Sup. Ct. 1966); WADE ET AL., *supra* note 14, at 407 n.1.

victim's peril."[69]

The first category of special relationships, a relationship between the rescuer and the rescuee, has its roots in maritime law where a duty was created that required ship masters to make reasonable efforts to rescue seamen who fell overboard.[70] This principle was quickly applied to other employees.[71] The exception now applies to relationships such as common carrier and passenger,[72] innkeeper and guest,[73] legal custodian and his charge, such as jailor and prisoner[74] or teacher and student,[75] and shopkeeper and business visitor.[76]

California courts limit the special relationship between shopkeeper and visitor by not enforcing a duty on shopkeepers to rescue patrons outside their business establishment.[77] If a "Good Samaritan"[78] requests to use the shopkeeper's phone, however, the shopkeeper does have a duty to allow the person to use the phone.[79] Thus, in *Soldano v. O'Daniels*,[80] a restaurant owner did not have a duty to make an emergency call for a person who suffered a gunshot wound across the street from his restaurant.[81] He did, however, have a duty to allow a Good Samaritan to make an emergency call because the law does not allow a person to prevent another person's attempt to rescue.[82]

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69. *See* Silver, *supra* note 2, at 426.

70. *See, e.g.*, Harris v. Pennsylvania R.R. Co., 50 F.2d 866 (4th Cir. 1931); KEETON ET AL., *supra* note 12, § 56, at 376.

71. *See, e.g.*, Anderson v. Atchison, Topeka & Santa Fe Ry. Co., 333 U.S. 821, 823 (1948) (holding the trainmen liable for not making efforts to rescue a conductor who fell overboard); Carey v. Davis, 180 N.W. 889, 891-92 (Iowa 1921) (holding that the defendant had a duty to render aid to his farm laborer who suffered sunstroke). Courts limit the duty to rescue in employer and employee situations when the injury occurs outside the scope of the employer and employee relationship or in circumstances where the employee is able to render aid to himself. For an example of an injury occurring outside the scope of the employer and employee relationship, see Allen v. Hixson, 36 S.E. 810 (Ga. 1900) (holding that an employer had no duty to rescue an employee who stepped out on his own time for a beer). For an example of an injury occurring in an employer and employee relationship where the employee was able to render aid to himself, see Wilke v. Chicago, Great W. Ry. Co., 251 N.W. 11 (Minn. 1993) (holding that an employer had no duty to rescue an employee who had become sick due to heat).

72. *See, e.g.*, Yu. v. New York, New Haven & Hartford R.R. Co., 144 A.2d 56 (Conn. 1958) (holding that a railroad had a duty to render aid to a passenger who fell while boarding the train).

73. *See, e.g.*, Dove v. Lowden, 47 F. Supp. 546 (W.D. Mo. 1942) (holding that the innkeepers had a duty to protect their guests from assault by employees or others).

74. *See, e.g.*, Thomas v. Williams, 124 S.E.2d 409 (Ga. Ct. App. 1962) (holding that a jailor had a duty to rescue a prisoner from his jail cell when the prisoner's mattress caught on fire).

75. *See, e.g.*, Pirkle v. Oakdale Union Grammar Sch. Dist., 253 P.2d 1 (Cal. 1953) (holding that a teacher properly rendered aid to a student who was injured during recess while playing touch football).

76. *See, e.g.*, L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334 (Ind. 1942) (holding that the defendant had a duty to rescue a business visitor when the visitor got his fingers caught in the defendant's escalator).

77. *See* Soldano v. O'Daniels, 190 Cal. Rptr. 310, 317 (Ct. App. 1983).

78. A Good Samaritan is a person who, on his own, decides to help. *See* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 539 (1984).

79. *See Soldano*, 190 Cal. Rptr. at 317.

80. 190 Cal. Rptr. 310 (Ct. App. 1983).

81. *See id.* at 317.

82. *See id.*

The second category of special relationships, a relationship between the rescuer and a third person, applies when a defendant has the power to control the actions of that third person.[83] This type of special relationship can also be found where the defendant voluntarily assumes control over a third party.[84] Either way, these kinds of special relationships do not focus on vicarious liability, but on the duty of a person to rescue a plaintiff because of the special relationship between the rescuer and the third person who might commit a harm.[85] Such relationships can include parent and child,[86] prisoner and his guard,[87] employer and employee,[88] and psychotherapist and patient.[89] In *Linder v. Bidner*,[90] an eighteen-year-old boy who was living with his parents had a "'vicious and malignant disposition.'"[91] The

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83. *See, e.g.*, Linder v. Bidner, 270 N.Y.S.2d 427 (Sup. Ct. 1966); WADE ET AL., *supra* note 14, at 415. The defendant is "required to use reasonable care to exercise . . . control to prevent the third person from injuring the plaintiff." *See id.*

84. *See, e.g.*, Taggart v. State, 822 P.2d 243 (Wash. 1992) (holding that a special supervisory relationship may arise when parole officers take charge of the parolees they supervise even when there is no custodial relationship).

85. *See* KEETON ET AL., *supra* note 12, § 56, at 377. If there is no special relationship between the defendant and the third party, then the general rule applies, and there is "no duty to control the conduct of another, even if he has the practical ability to exercise such control." *See* 57A AM. JUR. *Negligence*, *supra* note 29, § 100.

86. *See, e.g., Linder*, 270 N.Y.S.2d at 427 (holding the parents liable for failing to prevent their minor child from assaulting other children when the parents knew of their child's propensity to commit violent acts).

87. *See, e.g.*, Morgan v. County of Yuba, 41 Cal. Rptr. 508 (Ct. App. 1964) (holding that the sheriff's department had a duty to help the plaintiff avoid injuries when a prisoner was released who had threatened to kill the plaintiff).

88. *See, e.g.*, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983) (holding the employer liable for the death of the plaintiff's husband when the employer told his drunken employee to leave, and the employee got in his car and caused a car wreck).

89. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976). In *Tarasoff*, the therapists were held to have an obligation to prevent possible injury to a girl whom the therapists' patient threatened to, and eventually did, kill. *See id.* at 341. This rule can create difficult situations for therapists. *See* D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L.J. 1165, 1185 (1993). The rule brings up an apparent conflict because it causes a therapist to disclose information that a patient has told the therapist in confidence. *See id.* at 1188. The therapist may be protecting a foreseeable victim by warning her about the patient, and thereby avoiding liability under the exception to the no duty to rescue rule; however, a cause of action may arise for breach of confidentiality or invasion of privacy. *See, e.g.*, Urbaniak v. Newton, 277 Cal. Rptr. 354 (Ct. App. 1991) (holding a physician liable for invasion of privacy when the physician disclosed the plaintiff's HIV status to a health care worker); Estate of Behringer v. Medical Ctr., 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991) (holding a hospital liable for breach of confidentiality when the hospital, in order to protect the health of the patients, revealed results of a surgeon's HIV status). A separate problem is that the violence of a plaintiff can be hard to predict, leaving therapists anxious about potential liability. *See* Rosenhan et al., *supra*, at 1185-86.

90. 270 N.Y.S.2d 427 (Sup. Ct. 1966).

91. *See id.* at 428 (quoting the third cause of action in the complaint).

parents were aware of their son's propensity for "'mauling, pummeling, assaulting, and mistreating smaller children.'"[92] Therefore, when the boy assaulted the plaintiff, a minor child, the parents had a duty to render aid.[93]

The special relationships exception is continually eroding the general no duty to rescue rule because "courts are . . . inclined to increase the number of special relationships."[94] For example, in *Pridgen v. Boston Housing Authority*,[95] the court applied the special relationships exception to a landowner and a trespasser who became trapped in the landowner's elevator.[96] Although the court held the owner had a duty to rescue, the court made a distinction between a harmless trespasser, as the *Pridgen* case involved,[97] and an "intruder" who, for example, "is cut during the act of pushing his fist through the glass in a door."[98]

In addition to special relationships that have found judicial acceptance across the nation, individual states are expanding the category.[99] For example, Tennessee holds that a special relationship exits between a social guest and host,[100] and Washington recognizes a special relationship between a hospital and its patients.[101] In *Farwell v. Keaton*,[102] Michigan found a special relationship to exist simply because the plaintiff's decedent and the defendant were friends.[103] The court reasoned that in such a relationship, there is an "understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself."[104] Finally, American criminal law may further open the door to the

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92. *See id.* (quoting the third cause of action in the complaint).

93. *See id.* at 430.

94. *See* Lipkin, *supra* note 1, at 261-62; *see also* Heyman, *supra* note 15, at 675 (discussing how the courts have eroded the no duty to rescue rule).

95. 308 N.E.2d 467 (Mass. 1974).

96. *See id.* at 477.

97. The trespasser in the *Pridgen* case was an eleven-year-old boy. *See id.* at 469.

98. *See id.* at 477.

99. *See* Lipkin, *supra* note 1, at 261-62.

100. *See* Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 860 (Tenn. 1985) (holding a defendant liable for failing to rescue the decedent after the defendant invited the decedent to his party and the decedent was injured after jumping off a balcony).

101. *See* Hutchins v. 1001 Fourth Ave. Assoc., 802 P.2d 1360, 1366 (Wash. 1991).

102. 240 N.W.2d 217 (Mich. 1976).

103. *See id.* at 222. In *Farwell*, Farwell was severely beaten by six boys while out with his friend, Siegrist. *See id.* at 219. Siegrist put ice on Farwell's head, then left Farwell in a car overnight. *See id.* Three days later, Farwell died. *See id.* The court stated that to hold Siegrist under no duty to render aid "would be 'shocking to humanitarian considerations' and fly in the face of 'the commonly accepted code of social conduct.'" *See id.* at 222 (quoting Hutchinson v. Dickie, 162 F.2d 103, 106 (6th Cir. 1947)).

104. *See id.* Peter Lake suggested that the *Farwell* court manipulated the special relationships doctrine in order to reach the desired outcome of imposing a duty to rescue. *See* Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 317-18 nn.13-14 (1997) (citing 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, 869). Despite the acknowledged tendency of courts to expand the category of special relationships based on humanitarian concerns, some hold to the belief that "[c]ourts have

special relationships exception in tort law.[105] In criminal law, parents can be responsible for failing to render aid to their children,[106] and spouses have been charged with failing to rescue their partners.[107] It is likely that the parent and child and husband and wife relationships will be established as special relationships under the exception.[108]

D. A Subtle Inroad: Volunteers

There is a subtle inroad that focuses on volunteers: if one voluntarily chooses to undertake a rescue, she is required to do so carefully.[109] For example, a rescuer cannot drag a victim halfway across the street and then decide to leave him.[110]

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recognized this duty only in relationships of the greatest intimacy and dependence." *See* Silver, *supra* note 2, at 426.

105. *See* KEETON ET AL., *supra* note 12, § 56, at 377. Now that there is a movement in tort law to abrogate immunity for intrafamily relationships, legal scholars have argued that parents should have a duty to make a reasonable attempt to rescue their children. *See* WADE ET AL., *supra* note 14, at 408. For a further discussion on the abolition of intrafamily immunity, see *infra* notes 238-40 and accompanying text.

106. *See* State v. Zobel, 134 N.W.2d 101, 109 (S.D. 1965) (holding the parents criminally liable for failing to render proper care to their child); *cf.* Cox v. Malcolm, 808 P.2d 758 (Wash. Ct. App. 1991) (holding that no special relationship existed between a stepgrandparent and a stepgrandchild, but that the duty could exist under other circumstances).

107. *See* KEETON ET AL., *supra* note 12, § 56, at 377.

108. *See id. But see In re* Marriage of J.T., 891 P.2d 729 (Wash. Ct. App. 1995) (holding that there is no legal duty to disclose extramarital sexual relations to one's spouse and hence, under the facts, no special relationship existed between the husband and the wife); *cf.* Bell & Hudson v. Buhl Realty Co., 462 N.W.2d 851, 854 (Mich. 1990) (holding that no special relationship existed between two brothers).

Although the special relationships category is being expanded, there are some notable exceptions. *See* Silver, *supra* note 2, at 426 n.23. Many states still follow cases such as *Yania v. Bigan*, 155 A.2d 343 (Penn. 1959). In *Yania*, the Pennsylvania Supreme Court refused to find a special relationship between a host and his business guest, even when the host coaxed his guest to jump into a water-filled ditch. *See id.* at 346. Such harsh results cause outrage throughout the nation and prompt legal scholars to argue that moral and humanitarian concerns should create a duty to rescue. *See* Lipkin, *supra* note 1; *see also* Lake, *supra* note 104, at 316 (arguing that when a helpless individual is in a remote location in need of immediate rescue, courts should impose a duty to rescue upon a defendant).

109. *See, e.g.*, Parvi v. City of Kingston, 362 N.E.2d 960 (N.Y. 1977) (holding police officers liable when they discovered the intoxicated plaintiff and placed him a short distance away from a highway where the plaintiff was later struck and injured); 57A AM JUR. 2D *Negligence*, *supra* note 29, § 112. Thus, although a defendant may not have a duty to rescue, he can be held liable for the injures the plaintiff suffers as a result of the defendant's affirmative acts. *See Parvi*, 362 N.E.2d at 964-65. Additionally, a defendant can be liable for interfering with a rescue or for hindering others from rendering it. *See, e.g.*, Metallic Compression Casting Co. v. Fitchburg R.R. Co., 109 Mass. 277 (1872) (holding a railroad company liable for preventing the rendering of aid when the company ran over a fire hose being used to put out a fire); KEETON ET AL., *supra* note 12, § 56, at 382.

110. *See, e.g., Parvi*, 362 N.E.2d at 960 (discussing police officers who moved an intoxicated plaintiff off of the highway, but not far enough to avoid all oncoming traffic).

There is a split in the jurisdictions about whether to impose liability upon a volunteer rescuer who negligently rescues a victim.[111] Most courts follow the Restatement (Second) of Torts and hold a defendant liable for a negligent rescue only if the defendant left the victim in a worse condition than when the victim was found, or when the rescuee detrimentally relied on the undertaking.[112] The Restatement (Second) of Torts states as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if, . . . his failure to exercise such care increases the risk of such harm.[113]

However, some courts have rejected the Restatement's approach, holding that a defendant can be liable to a victim who does not suffer increased harm if the assistance was negligent.[114] Arguably, the Restatement's language dictates that courts should hold a defendant liable for a negligent rescue attempt regardless of the victim's final condition.[115] Either way, the volunteers exception illustrates an irony: those who stand aside are not subject to liability, but those who take action in rescuing a fellow person may become liable.[116] To the extent people are aware of these principles of law, the law has the effect of discouraging rescues.[117]

One group of people aware of these principles include doctors, nurses, and other medical personnel.[118] Doctors are much more likely to encounter and suffer from the irony because doctors can find themselves in rescue situations without proper equipment or sanitation.[119] Thus, doctors could decide it would be wiser not to rescue a victim and avoid liability than to rescue a victim and risk being sued for medical malpractice.[120] These public policy concerns gave birth to the Good Samaritan laws.[121] Good Samaritan laws limit doctors' liability for any harm they may cause when they render aid on the scene unless the doctor acts with reckless

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111. *See* Adler, *supra* note 104, at 877.
112. *See id.* at 874-75, 875 n.37.
113. RESTATEMENT (SECOND) OF TORTS § 323 (1965).
114. *See* Adler, *supra* note 104, at 875 n.37; *see also* Bartlett v. Taylor, 174 S.W.2d 844 (Mo. 1943) (holding a landlord liable for injuries caused to the tenant when the landlord voluntarily took action to repair a defect on the premises, the tenant knew of the landlord's unreasonable repair, and the tenant was injured).
115. *See* Adler, *supra* note 104, at 875 n.37 (stating that "the wording of section 324 also suggests that a rescuer failing to use reasonable care in assisting one who is helpless may be liable even though the victim's situation did not worsen").
116. *See* WADE ET AL., *supra* note 14, at 411 & n.19.
117. *See id.*
118. *See id.* & n.20.
119. *See id.*
120. *See id.*
121. *See id.*

disregard for a victim's safety.[122]

Good Samaritan laws changed the common law rule and created a more limited duty for a person who decides to rescue someone.[123] For example, when a doctor sutures a hiker's wound without properly cleaning the dirt and the gravel out of the wound, the doctor is not liable to the plaintiff for further complications with the injury, even though the doctor's negligent care caused further harm.[124] Consequently, commentators argue that Good Samaritan laws are really "Bad Samaritan" laws because they allow for a negligent rescue.[125]

There are other arguments against Good Samaritan laws. Frank Mapel and Charles Weigel suggest that Good Samaritan laws are "odd" because "reasonable care . . . [varies] with the circumstances."[126] Tort law does not require a physician "to provide . . . high-quality care at the scene of an accident";[127] rather, it requires a doctor to act in the same way as a reasonable doctor would act in an emergency.[128] Thus, Good Samaritan laws do not truly provide an incentive to rescue. Studies have shown that the beneficial impact of Good Samaritan

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122. *See id.* An example of a Good Samaritan law states that "[n]o licensee, who in good faith renders emergency care at the scene of an emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care." CAL. BUS. & PROF. CODE § 2395 (West 1990). One purpose of Good Samaritan laws "is to induce voluntary aid by removing the fear of potential liability . . . [t]hus Good Samaritan statutes are directed toward persons who are not under some pre-existing duty to remedy aid." *See* Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 860 (Tenn. 1985) (citing Lee v. State, 490 P.2d 1206, 1209 (Alaska 1971)).

123. *See generally* Frank B. Mapel, III & Charles J. Weigel, II, *Good Samaritan Laws–Who Needs Them?: The Current State of Good Samaritan Protection in the United States*, 21 S. TEX. L.J. 327, 342 (1980) (stating that typical Good Samaritan laws eliminate liability unless the person acts recklessly). On the other hand, a few states' Good Samaritan laws create a more stringent duty. *See id.* For example, four states have Good Samaritan laws that not only require the common law reasonableness standard of conduct, but additionally require that the rescuers act in good faith, meaning that they "be spurred by noble intentions." *See id.*

124. *See* McCain v. Batson, 760 P.2d 725, 731-32 (Mont. 1988) (holding a doctor not liable when he complicated an injury because he was acting as a Good Samaritan in an emergency medical situation with limited medical supplies and his negligence did not amount to gross negligence).

125. *See* Mapel & Weigel, *supra* note 123, at 342. Some states make no exception from immunity for aggravated misconduct. *See id.* Thus, a physician could act with negligent misconduct, reckless misconduct, or possibly even intentional misconduct and be protected by Good Samaritan laws. *See id.* at 342-43.

126. *See id.* at 328-29.

127. *See id.* at 329.

128. *See id.* The argument condoning Good Samaritan laws includes the belief that even though reasonable care is supposed to vary with the circumstances, "'an unwitting jury may hold . . . [the doctor] to the standard of care which should be exercised by a general practitioner or even a specialist in the field.'" *See id.* (quoting *Selected 1959 Code Legislation*, 34 CAL. ST. B.J. 581, 583 (1959)).

legislation has been little to none.[129]

Despite some harsh criticism of Good Samaritan laws, all fifty states and the District of Columbia have some form of a Good Samaritan statute.[130] Many Good Samaritan statutes are not limited to doctors, but apply to other medical personnel, such as firefighters and police officers.[131] Other Good Samaritan statutes hold that anyone who attempts to rescue an endangered person will be protected from liability.[132] Lawyers have advocated that if Good Samaritan laws apply to everyone, a general duty to rescue should be created because imposing a duty to rescue would not bring additional liability to a person who decided to be a Good Samaritan.[133] Some states have adopted this reasoning in their legislation.[134]

The rule requiring a defendant who undertakes a rescue to do so reasonably includes a scenario where the defendant verbally promises the plaintiff that the defendant will rescue the plaintiff, the plaintiff relies on the promise, and the defendant fails to fulfill his promise.[135] Using the same law school hypothetical of the man standing next to a lake watching a person drown,[136] if the man had instead called to the drowning victim and told him that help was on the way, threw the rope to the victim and began to pull him towards safety, and then decided it was too much work and abandoned the whole rescue attempt,[137] the man could be liable for failure to rescue because the victim had detrimentally relied upon the defendant's voluntary undertaking.[138]

The rule holds true even when the defendant does not begin to engage in any action.[139] For example, in *Dudley v. Victor Lynn Lines, Inc.*,[140] a truck driver became ill at work.[141] His wife could not come to take him home, but the assistant

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129. *See* WADE ET AL., *supra* note 14, at 411; *see also* Mapel & Weigel, *supra* note 123, at 354 (reporting that a study "which asked physicians whether fear of malpractice claims made them unwilling to stop at the scene of an emergency, revealed little difference between the answers coming from physicians in states which had enacted Good Samaritan laws and those in states without them").

130. *See* Mapel & Weigel, *supra* note 123, at 327.

131. *See, e.g.*, LA. REV. STAT. ANN. § 37:1732 (West 1988); Mapel & Weigel, *supra* note 123, at 327.

132. *See* Mapel & Weigel, *supra* note 123, at 327 (citing ME. REV. STAT. ANN. tit. 14, § 164 (West 1964)).

133. *See id.*

134. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 164.

135. *See* WADE ET AL., *supra* note 14, at 412.

136. *See* KEETON ET AL., *supra* note 12, § 56, at 375 (citing Osterlind v. Hill, 160 N.E. 301 (Mass. 1968)); *supra* text accompanying note 34.

137. *See* WADE ET AL., *supra* note 14, at 409.

138. *See* RESTATEMENT (SECOND) OF TORTS § 323 cmt. e (1965); WADE ET AL., *supra* note 14, at 409. The idea being that the plaintiff sacrificed the opportunity to seek help elsewhere. *See id.* at 410.

139. *See, e.g.*, Dudley v. Victor Lynn Lines, Inc., 138 A.2d 53, 60 (N.J. Super. Ct. App. Div. 1958), *rev'd on other grounds*, 161 A.2d 479 (N.J. 1960); WADE ET AL., *supra* note 14, at 409.

140. 138 A.2d 53 (N.J. Super. Ct. App. Div. 1958), *rev'd on other grounds*, 161 A.2d 479 (N.J. 1960).

141. *See id.* at 55.

warehouse foreman promised to call a doctor.[142] The foreman did not call, and the man died of a heart attack.[143] The court found the foreman liable for failing to properly undertake his promise to render aid.[144]

Finally, a defendant may have a duty to rescue when the defendant impliedly volunteers a rescue attempt.[145] For example, a person can correctly rely on a hospital emergency room to render aid, even if no verbal promises were given by the hospital.[146]

E. The Inroad of the Future?: Statutes

A duty to rescue can be created by statute. Common examples are hit and run driver statutes.[147] For example, in *Brumfield v. Wofford*,[148] the defendant's vehicle hit and killed the plaintiff.[149] The defendant failed to stop and render assistance as required under West Virginia's hit and run driver statute.[150] The court held that the defendant could be held liable under the statute for failing to rescue the plaintiff "as quickly as possible" upon hitting him.[151]

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142. *See id.* at 55-56.
143. *See id.*
144. *See id.* at 61.
145. *See generally* WADE ET AL., *supra* note 14, at 409 n.11 ("A duty to act may be imposed whenever the defendant assumes a responsibility to act and such undertaking increases the risk of such harm, or is relied upon by the plaintiff to her detriment . . . .").
146. *See, e.g.*, Wilmington Gen. Hosp. v. Manlove, 174 A.2d 135 (Del. 1961) (recognizing that a hospital may be liable for failure to give aid to a patient when the case is "predicated on the refusal of service to a patient in the case of unmistakable emergency, if the patient has relied upon a well-established custom of the hospital to render aid in such a case").
147. *See, e.g.*, CAL. VEH. CODE § 20003 (West Supp. 1998) (stating that "[t]he driver of any vehicle involved in an accident resulting in injury to or death of any person . . . shall render to any person injured in the accident reasonable assistance, including transporting, or making arrangements for transporting, any injured person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if that transportation is requested by any injured person"); WADE ET AL., *supra* note 14, at 409 n.10 (stating that in a number of jurisdictions, hit and run statutes have been held to mean that a driver involved in an accident who fails to give aid may be liable for negligence per se).
148. 102 S.E.2d 103 (W. Va. 1958). For examples of other cases, see Brooks v. E.J. Willig Truck Transp. Co., 225 P.2d 802 (Cal. 1953) (holding a truck driver liable for negligence as a matter of law when the driver hit a pedestrian and failed to render aid); Hallman v. Cushman, 13 S.E.2d 498 (S.C. 1941) (holding that a driver's failure to stop and give aid may be relevant to show the driver's willful and wanton conduct before the accident).
149. *See Brumfield*, 102 S.E.2d at 104.
150. *See id.* at 105.
151. *See id.*

Some duty to rescue statutes apply only to specific agencies.[152] In *Sabia v. State*,[153] for example, a Vermont statute required the Department of Social and Rehabilitation Services (SRS) to render assistance to children when an SRS investigation evidenced abuse.[154] Therefore, the court held that the Vermont statute placed a duty on the SRS to render assistance to the plaintiffs.[155]

The most significant development under the statute exception is that six states have rejected outright the common law no duty to rescue rule and legislated a duty to rescue in "easy rescue" situations.[156] An easy rescue is one where a victim is in danger and a potential rescuer is in a position to alleviate the harm without any significant cost to himself.[157] Vermont's legislation imposing a duty of easy rescue combines the possibility of both civil and criminal liability.[158] Vermont's statute reads as follows:

> 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.[159]

Vermont's statute allows for a criminal penalty of a "fine not more than $100.00"[160] or for civil liability only where the potential rescuer's "acts constitute gross

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152. *See, e.g.*, Sabia v. State, 669 A.2d 1187 (Vt. 1995). In the absence of a specific statute, government agencies generally do not have a duty to rescue. *See supra* note 33.

153. 669 A.2d 1187 (Vt. 1995).

154. *See id.* at 1191-92. Other states have upheld similar statutes. *See, e.g.*, Mammo v. State, 675 P.2d 1347 (Ariz. Ct. App. 1983) (holding that the agency could be liable for failure to protect a child based on the social workers' statutorily created duties); Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987) (holding that a state statute imposed a duty on a social services agency to investigate and take actions to protect children from neglect); Department of Health & Rehabilitative Serv. v. Yamuni, 529 So. 2d 258 (Fla. 1988) (holding that an actionable legal duty arose by statute requiring an agency to assist children when there had been reports of abuse); Coleman v. Cooper, 366 S.E.2d 2 (N.C. Ct. App. 1988) (holding that a negligence action may arise against a state agency from a statutorily imposed duty to protect abused children); Brodie v. Summit County Children Serv. Bd., 554 N.E.2d 1301 (Ohio 1990) (holding that a statutorily imposed duty to investigate reports of child abuse created a specific duty abrogating the public duty doctrine of immunity); Jensen v. Anderson County Dep't of Soc. Serv., 403 S.E.2d 615 (S.C. 1991) (holding that governmental immunity may not be asserted where the statutorily created duty to protect children "is owed to individuals rather than the public only"); *cf.* Owens v. Garfield, 784 P.2d 1187 (Utah 1989) (finding that a governmental agency did not have a sufficiently close relationship to the third party child who had not been reported as a possible abuse victim).

155. *See Sabia*, 669 A.2d at 1192.

156. *See* Benac, *supra* note 36; *see also* Silver, *supra* note 2, at 426-27 (discussing the statutes enacted by Virginia and Minnesota).

157. *See* Weinrib, *supra* note 15, at 250.

158. *See* Silver, *supra* note 2, at 427.

159. VT. STAT. ANN. tit. 12, § 519(a) (1973).

160. *See id.*

negligence."[161]

States that have followed Vermont's lead include Minnesota,[162] Massachusetts,[163] Rhode Island,[164] Louisiana,[165] and Wisconsin,[166] although some of those states require less of a duty than others.[167] For example, Rhode Island only requires witnesses of sexual attacks to inform the police.[168] Further, Vermont is the only state to allow a tort claim for a defendant's failure to rescue.[169] Other state statutes have limited a defendant's liability to criminal penalties.[170]

States which have enacted a general duty to rescue statute have not influenced a large number of other states legislatures or judiciaries.[171] One reason may be that "[n]o court has recognized a general duty of easy rescue unless prompted by legislation . . . [probably because] doing so would be a sharp break with precedent."[172] It is not clear that a court could make this break on its own.[173]

III. VIVE LA DIFFÉRENCE?

A. What Does a Rescue Require?

State statutes or judicially created exceptions which require a duty to rescue do not direct that action must be taken merely because someone is in need of rescuing.[174] When one of the exceptions applies, a person has a duty to act

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161. *See id.* It is interesting to note that a statute granting immunity from civil liability in all cases, except for those which constitute gross negligence, is in apparent contradiction to the requirement of "reasonable assistance." *See* Silver, *supra* note 2, at 426 (citing VT. STAT. ANN. tit. 12, § 519(a)). In addition, the criminal liability is set at a maximum possible fine of $100. *See id.*

162. *See* MINN. STAT. ANN. § 604A.01 (West Supp. 1998).

163. *See* MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990).

164. *See* R.I. GEN. LAWS §§ 11-37-3.1 to 3.4 (1994).

165. *See* LA. REV. STAT. ANN. § 14.501 (West 1986). Louisiana's statute limits the duty to rescue to hunters who have accidentally shot someone. *See id.* However, general tort law would require a duty to rescue in such a situation absent any state legislation. *See supra* notes 47-65 and accompanying text.

166. *See* WIS. STAT. § 940.34 (1996). Minnesota, Rhode Island, and Massachusetts enacted rescue statues in response to a rape incident in a bar near Boston. *See* Silver, *supra* note 2, at 427.

167. *See* Silver, *supra* note 2, at 427.

168. *See* R.I. GEN. LAWS §§ 11-37-3.1 to 3.4; *see also* Silver, *supra* note 2, at 427.

169. *See* Benac, *supra* note 36.

170. *See id.*

171. *See id.*

172. *See* Silver, *supra* note 2, at 431.

173. *See id.*

174. *See* Farwell v. Keaton, 240 N.W.2d 217, 221-22 (Mich. 1976).

reasonably under the circumstances.[175] The concept of reasonableness includes the rescuer's knowledge of the victim's peril and the danger the rescuer would be exposed to if she undertook the rescue.[176] Thus, if a defendant is not aware of an illness or injury, she has no duty to rescue the plaintiff, even under one of the exceptions.[177] Likewise, a defendant has no duty to render aid under any exception if doing so would bring about an unreasonable risk of harm to herself.[178] When one is required to render aid, "[h]e will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick person over to a doctor or to those who will look after him until one can be brought."[179]

The duty imposed under one of the exceptions is similar to the duty imposed under French law. In France, the consequence of failing to act usually takes the form of criminal punishment;[180] however, victims may couple their civil claims with the criminal proceedings.[181] French law states the following:

> [A]nyone who voluntarily abstains from assisting a person in danger, such assistance which, without risk to himself or to third parties, he could have given either through his personal action, or by seeking the assistance of the emergency services [shall be punished by five years imprisonment and a fine of FRF 500,000].[182]

The contrast between the American and French legal systems derives from the difference in their origins.[183] America's legal system is based on English common law, which is highly individualistic and against selective enforcement.[184] France's civil law derives from Roman law, which is based on the Napoleonic Code and prizes "social solidarity . . . over individual choice."[185] Despite the differences in the historical structure of the two legal systems, a comparison of France's duty to rescue law and America's duty to rescue law, when imposed by an exception,

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175. *See* Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 859 (Tenn. 1985); KEETON ET AL., *supra* note 12, § 56, at 377.

176. *See Farwell*, 240 N.W.2d at 222.

177. *See, e.g.*, Grimes v. Hettinger, 566 S.W.2d 769 (Ky. Ct. App. 1978) (holding that the owner of a pool was under no duty to rescue a drowning girl when the owner was never aware that the girl was in danger); KEETON ET AL., *supra* note 12, § 56, at 377.

178. *See* KEETON ET AL., *supra* note 12, § 56, at 377.

179. *See id.*

180. *See* Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 914 (1986).

181. *See* C. PÉN. art. 223-6, § 3, ¶ 2, cmt. 44 (Dalloz 1997-98) (Fr.).

182. *Id.* at art. 223-6, § 3, ¶ 2.

183. *See* CAIRNS & MCKEON, *supra* note 8, at 3.

184. *See Editorials*, DENV. POST, Sept. 22, 1997, at B6; *see also* CAIRNS & MCKEON, *supra* note 8, at 3-6 (discussing the differences between Napoleonic law and common law).

185. *See Editorials*, *supra* note 184, at B6; *see also* CAIRNS & MCKEON, *supra* note 8, at 3-6 (comparing the Napoleonic and common law systems).

reveals that the requirements are substantially similar.[186] For example, France's duty to rescue law requires that the potential rescuer have knowledge of the helpless victim; otherwise, no duty arises.[187] Additionally, French citizens do not have to rescue a victim if doing so would endanger themselves or others.[188] In France, a person is only required to do what is within one's power under the circumstances.[189] When a duty to rescue arises under American law, it constitutes the same requirements.[190]

There are other similarities in the requirements. The duty arises under French law when a person is in a state of peril that necessitates immediate intervention.[191] Such a state includes the danger of death or serious bodily harm.[192] Likewise, under American law, when an exception to the general rule applies, the law will not hold a defendant liable if the endangered person can help himself.[193]

The most striking difference between the two nations' application of the rule does not fall in the requirements, but in the consequences. The punishment for violation of the law in France is severe and almost always carried out.[194] Under French law, a citizen can receive up to five years in prison and approximately 500,000 francs in fines.[195] Under a civil law claim, damages to the plaintiff are what might have been avoided by a reasonable effort to rescue.[196] By contrast, the legislatively created duty to rescue laws of America "are narrowly written, carry light penalties, and are seldom used."[197] One of the toughest penalties is found in Wisconsin, where a defendant can receive "up to 30 days in jail and a $500 fine."[198] Even though statutes have been legislated in a few states, they are "hard to enforce."[199] In America, "'there's a fairly big feeling that if you want to be Mother

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186. In civil countries other than France, there are differences in the duty to rescue rule's requirements. For example, in the Netherlands, a duty to rescue arises only if the victim's life is in danger. *See* Rudzinski, *supra* note 9, at 115. In Romania, one must rescue another even if doing so would place the rescuer at a serious risk, but not if it would be a risk of her life. *See id.* at 105.

187. *See* C. PÉN. art. 223-6, § 3, ¶ 2, cmt. 17.

188. *See id.* at art. 223-6, § 3, ¶ 2.

189. *See id.* at art. 223-6, § 3, ¶ 2, cmt. 28-29.

190. *See, e.g.*, Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 859 (Tenn. 1985); KEETON ET AL., *supra* note 12, § 56, at 377; *supra* notes 174-79 and accompanying text.

191. *See* C. PÉN. art. 223-6, § 3, ¶ 2, cmt. 10-11.

192. *See id.*

193. *See* Wilke v. Chicago, Great W. Ry. Co., 251 N.W. 11, 13 (Minn. 1933).

194. *See* Trueheart, *supra* note 7, at A1 (noting that under the French system, 95% of the cases that an investigating magistrate sends to trial end in conviction).

195. *See* C. PÉN. Art. 223-6, § 3, ¶ 2.

196. *See* CAIRNS & MCKEON, *supra* note 8, at 68.

197. *See* Benac, *supra* note 36.

198. *See id.*

199. *See id.*

Theresa, you can be . . . [b]ut . . . going out of your way is seen as a choice.'"[200]

B. *Is the Law of France and America the Same Regarding the Duty to Rescue the Victim of an Accident?*

Immediately after the Paris car accident, allegations were made that the "photographers taking pictures in the tunnel may have created a flash that blinded the driver and caused the accident."[201] If such facts were true, would the photographers be liable in France, but not in America? Most likely, the photographers would be liable under both French and American law.[202] The first exception to the American no duty to rescue rule, negligent injury by the defendant, would apply in this scenario if it was determined that the photographer's negligence gave rise to the accident.[203]

There are other contradictory accounts of how the accident in the Paris tunnel occurred.[204] Following the accident, witnesses said that "photographers had swarmed round the mangled car taking pictures and blocking police from giving assistance."[205] Once again, both French and American law would have similar results in such a scenario because both countries recognize liability for interfering with a rescue.[206]

A few days after the accident, reports came in that investigators were trying to identify the driver of a Fiat Uno who allegedly struck the Mercedes and fled the scene of the accident.[207] France's duty to rescue law and hit and run driver statutes in America would both impose a duty to rescue on the driver of the car.[208]

Applying the law of both countries to various fact patterns may cause one to wonder whether the difference between French and American rescue law is substantial. The difference is significant because under American law, no

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200. *See id.* (quoting Sara Sun Beale, law professor at Duke Univ.).

201. *See* Armond Budish, *Ohio "Good Samaritans" Protected from Liability*, PLAIN DEALER, Sept. 21, 1997, at J9, *available in* 1997 WL 6614966.

202. *See id.*

203. *See supra* note 39 and accompanying text.

204. *See Dateline Profile: First on the Scene* (NBC television broadcast, Oct. 6, 1997).

205. *See* Alain Navarro, *ADDS Comments by Accident Experts*, AGENCE FRANCE-PRESSE, Sept. 3, 1997, *available in* 1997 WL 13388205.

206. *See supra* note 109 and accompanying text. In France, the punishment for interfering with a rescue is more severe than failing to rescue. *See* C. PÉN. art. 223-5, § 3, ¶ 2 (Dalloz 1997-98) (Fr.) (stating that anyone who hinders another person from assisting an endangered person can be punished by seven years in prison and 700,000 francs in fines). Two of the ten photographers under investigation for failing to rescue the victims of the Paris car crash are also under investigation for "interfering with and abusing police while continuing to snap the death scene." *See* Thomas Sancton & Tamala M. Edwards, *Drunk and Drugged: The Shocking Tale of How Diana's Driver Spent the Hours Before Her Death*, TIME MAG., Sept. 22, 1997, at 26, 29.

207. *See* Craig R. Whitney, *Crash Investigators Searching for White Fiat in Diana Death*, ARIZ. REPUBLIC, Jan. 1, 1998, at A24, *available in* 1998 WL 7740762.

208. *See supra* notes 147-51 and accompanying text.

"bystander" or complete stranger to the accident would have a duty to render aid.[209] In each factual scenario above, the exceptions to the rule in America would impose the duty on the photographers or the Fiat driver, but no one else.[210] In France, however, anyone who is even aware of the victim's peril must render help.[211]

While some argue that America should adopt a law as strong as France's, others argue that when a person is imperiled, people will be inclined to rescue, regardless of any law that may apply.[212] However, when Princess Diana lay dying in her car, not one phone call was made to the police or emergency room; instead, photographers stood by and snapped photographs.[213] The 1998 rape and murder of Sherrice Iverson had similar results. At a Nevada casino, seven-year-old Sherrice Iverson was sexually assaulted and killed in the casino's restroom.[214] A twenty-year-old male, David Cash, stated that he walked into the restroom, saw the assault, but never called the police.[215]

Situations like these send a "chilling message" that rescuing those in need should be forced by statute in America.[216] Additionally, with an American no duty to rescue rule that has been eaten away by exceptions, advocates for a general duty to rescue rule argue that the law is outdated and should be abandoned.[217]

IV. SHOULD WHAT IS LEFT OF THE AMERICAN RULE SURVIVE?

Ernest Weinrib argues that the exceptions to the original American rule have eroded it so substantially that they "have made the general absence of a duty to rescue seem more eccentric and isolated."[218] Furthermore, he argues that the exceptions raise "the possibility that the general rule is . . . being consumed."[219] Before longstanding law is repealed, however, one should look to the roots of the law and understand its foundation.

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209. *See supra* note 1 and accompanying text.
210. *See id.*
211. *See* C. PÉN. art. 223-6, § 3, ¶ 2, cmt. 17. For example, France has convicted physicians who failed to visit sick people that the physicians knew were sick, even if the physicians were not nearby. *See id.* at art. 223-6, § 3, ¶ 2, cmt. 18.
212. *See* Benac, *supra* note 36.
213. *See* Sancton & Edwards, *supra* note 206, at 29.
214. *See Kidnews*, CHI. TRIB., Sept. 1, 1998, at 3.
215. *See id.* The mother of Sherrice Iverson is trying to change the law to create a duty to rescue by statute. *See id.* Iverson's mother has gotten thousands of Nevada and California residents to sign a petition to change the no duty to rescue law in those states so that Cash can be "punished for ignoring the crime." *See id.*
216. *See* Silver, *supra* note 2, at 423.
217. *See* Weinrib, *supra* note 15, at 248.
218. *See id.*
219. *See id.*

A. *American Tort Law Requires That a Defendant's Conduct Cause a Harm*

A fundamental principle of American tort law requires that a defendant have caused some harm to a plaintiff before he is asked to pay damages.[220] To suggest that a defendant "causes a harm" when he or she did nothing to bring about such harm turns the plain meaning of the words upside down.[221] Advocates for a duty to rescue rule argue that a defendant is "causally responsible for an injury if he is morally expected to perform a certain action, but does not."[222] It is argued that because the defendant has the capacity to prevent the injury, he is liable.[223] However, "[a]n act or an omission is not regarded as a cause of an event if the particular event would have occurred without it."[224]

In failure to rescue cases, the cause of the plaintiff's injuries is not the defendant's failure to act; rather, it is the accident or event that brought the plaintiff to his position.[225] As common law has always recognized, when the defendant is "in no way responsible for the perilous situation" he is not liable for any harm the plaintiff suffers because the defendant "did not increase the peril" nor did he take away something from the person in danger.[226] A defendant who "simply fail[s] to confer a benefit upon a stranger" cannot be liable because "[t]he law does not compel active benevolence between man and man."[227] "It is left to one's

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220. *See* KEETON ET AL., *supra* note 12, § 41, at 263. In order to impose legal responsibility on the defendant, the cause of the injury must be "so closely connected with the result and of such significance that the law is justified in imposing liability." *See id.* § 41, at 264.

221. *See id.* § 41, at 265.

222. *See* Lipkin, *supra* note 1, at 267. Other advocates argue that failure to act does not cause the injury, but that the law should impose a duty on people to help someone in distress regardless. *See* Ames, *supra* note 15, at 212.

223. *See* Lipkin, *supra* note 1, at 267. Lipkin also suggests that because causation is ignored for the special relationships exception, it should be ignored in cases involving strangers. *See id.* at 269.

224. *See* KEETON ET AL., *supra* note 12, § 41, at 265. The law of causation "applies to the defendant's omissions as well as the defendant's acts." *See id.* Therefore, a failure to do something can be considered the cause of the plaintiff's injuries. *See id.* For example, "[t]he failure to fence a railway track may be a cause . . . that a child is struck by a train." *Id.* However, courts follow the "sine qua non" rule, which states that in order for a defendant's acts or omissions to be a cause of the event, the event must be one that would not have occurred "but for" the defendant's negligence. *See id.* § 41, at 266. The concept of torts does not include "negative causation." *See* Lipkin, *supra* note 1, at 267. Negative causation is the idea that "[t]he failure to do something" which would prevent the occurrence of an injury that is already taking place is the cause of the injury. *See id.*

225. As discussed above, when the defendant does bring about the cause or the event which is harming the plaintiff, the defendant does have a duty to rescue. *See supra* notes 39-65 and accompanying text.

226. *See* Ames, *supra* note 15, at 112-13.

227. *See id.* at 112.

conscience whether he shall be the Good Samaritan or not."[228]

B. American Tort Law Provides for Damages to One Who Has Been Harmed

Another fundamental rule of American tort law is that it provides for substantial damages to a person who has been harmed because the defendant's conduct is deemed tortious.[229] The damages that American tort law provide go beyond mere out of pocket compensation and encompass damages for pain and suffering that may be four, five, or ten times that amount.[230] In addition, in cases involving reckless behavior, punitive damages may be imposed on a defendant.[231]

It is a defendant's affirmative wrongful act that deems it a sufficient basis for transferring wealth from a defendant to a plaintiff.[232] American tort law is not a religious or moral code.[233] This is shown in cases distinguishing tort law and religion. Almost 100 years ago, a court stated a view that most courts would uphold today:

> With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. . . . [When one fails] to respond to the calls of worthy charity, . . . [the] penalties are found not in the laws of men, but in that higher law . . . .[234]

Failure to rescue should not be viewed in terms of tort liability, but as a desire emanating from our moral conscience to preserve the human race we all cherish.

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228. *Id.* For articles further discussing the concept of causation and its relationship to omissions of action, see Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Weinrib, *supra* note 15, at 247; Mark K. Osbeck, Note, *Bad Samaritanism and the Duty to Render Aid: A Proposal*, 19. U. MICH. J.L. REFORM 315 (1985).

229. *See* WADE ET AL., *supra* note 14, at 507.

230. *See id.* at 515-16.

231. *See, e.g.*, Sebastian v. Wood, 66 N.W.2d 841 (Iowa 1954); KEETON ET AL., *supra* note 12, § 2, at 9-10.

232. *See* KEETON ET AL., *supra* note 12, § 2, at 9-10.

233. *See id.* § 2, at 7.

234. Union Pac. Ry. Co. v. Cappier, 72 P. 281, 282 (Kan. 1903) (holding the defendants not liable unless they breached a legal duty owed to the plaintiff).

C. *The No Duty to Rescue Rule Is Easy to Apply*

The line that has been drawn by the no duty to rescue rule is easy to understand and apply. In its total absence, it is not. Even with "reasonableness" principles as a guide, an open-ended duty to rescue rule would create difficult questions, such as exactly when the duty arises, when it ends, and what conduct is required.[235] Such questions present difficult problems because it becomes hard for a plaintiff to establish liability.[236]

Creating a negligence principle for failing to act is much easier to state than to apply. History has shown that negligent conduct is hard to determine when cases involve nonfeasance.[237] For example, in recent years, there has been a trend among courts to abrogate the doctrine of parental immunity in intrafamily lawsuits.[238] When children began bringing actions against their parents, the courts experienced extreme difficulty defining the scope of negligent conduct for a parent's failure to act.[239] Abrogating parental immunity is analogous to abrogating the American no duty to rescue rule because both situations involve defining a standard of "reasonable conduct" when there has been no action.[240] Because of the difficulty in determining liability for nonfeasance, it has been slow to gain recognition in tort law.[241] It does apply in certain circumstances, but before allowing it to enter into the realm of the no duty to rescue rule, one must consider its practical implications. When the line is crossed and parties are engaged in misfeasance, "liability is much easier to determine."[242]

Finally, and possibly most importantly, tort law principles that create a duty to rescue present the problem of allowing jurors to render hindsight judgments about what might have happened and what could have been done to avoid a tragedy. It is not hard to foresee that whether it be the death of a princess or an ordinary citizen, there will always be a hindsight instinct suggesting more could have been done.

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235. *See* KEETON ET AL., *supra* note 12, § 56, at 379.

236. *See* Benac, *supra* note 36.

237. *See* KEETON ET AL., *supra* note 12, § 56, at 373. Nonfeasance is "passive inaction or a failure to take steps to protect [others] from harm," while misfeasance is "active misconduct working positive injury." *See id.* The lynchpin of the duty to rescue rule lies in the distinction between misfeasance and nonfeasance. *See id.*

238. *See* Jim Cahoy, *Arizona High Court Abolishes Parental Immunity, Adopts 'Reasonable Parent' Standard,* WEST'S LEGAL NEWS TORTS & PERSONAL INJURY: PARENTAL IMMUNITY, Nov. 28, 1995, *available in* 1995 WL 907159.

239. *See* KEETON ET AL., *supra* note 12, § 122, at 904-05.

240. *See id.* § 122, at 907.

241. *See id.* § 56, at 373.

242. *See id.* § 56, at 378. For example, a truck driver may be under no obligation whatsoever to signal to a car behind him that it may safely pass; but if he does signal, he will be liable if he fails to exercise proper care and injury results. *See* Shirley Cloak & Dress Co. v. Arnold, 90 S.E.2d 622, 625-26 (Ga. 1955).

IV. CONCLUSION

The no duty to rescue rule in American tort law is a rule not often thought of until a situation arises like the death of Princess Diana[243] or the murder of a little girl in a Nevada casino.[244] In those situations, the law on rescue is "revolting to any moral sense."[245] Thus, at first glance it may seem undebatable that a duty to rescue rule should be created in this country. Before the American tort system creates a new law, however, one must remember the principles behind tort law and understand why they are significant.

Although well-intentioned, letting the genie out of the bottle and creating an open-ended duty to rescue rule may cause more harm in the long run. Longstanding rules cannot simply be repealed without thinking about the implications. In some situations, it is easier and more efficient to determine liability when there is a rule with numerous exceptions as opposed to creating a new law.

JENNIFER L. GRONINGER[246]

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243. *See supra* notes 7, 213 and accompanying text.
244. *See supra* notes 214-15 and accompanying text.
245. *See* KEETON ET AL., *supra* note 12, § 56, at 376.
246. Special thanks to Professor Victor E. Schwartz, senior partner, Crowell & Moring LLP; adjunct professor at the University of Cincinnati, for his review of and suggestions about this Comment.