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A Duty to Rescue: The Good, the Bad and the Indifferent—the Bystander's Dilemma

I. INTRODUCTION

In 1964, the nation was shocked as the details of Catherine "Kitty" Genovese's murder were disseminated through news accounts. Ms. Genovese was stabbed to death in her middle-class neighborhood in Queens, New York.¹ The attack lasted thirty-five minutes while her neighbors did nothing and watched from the safety of their apartments. The assailant caught Ms. Genovese on her way home from work as she walked from a parking lot toward her apartment building at about 3:20 A.M. The assailant stabbed her, then fled when she screamed for help. When her screams went unanswered, he returned to strike again. After the second assault, he got into his car and drove away while Ms. Genovese crawled to her apartment doorway. Amazingly, the killer came back a third time and repeated his attack. This time he successfully killed her. "The first call to police was not made until 3:50 A.M. The man who finally called said he waited because he 'didn't want to get involved.'"²

Ms. Genovese was as much the victim of her neighbors' passivity as her assailant's viciousness. The assault is one of the more notorious in a long line of similar incidents.³ Kitty Genovese's neighbors did not violate any law or render themselves legally liable by their inaction on that fateful night. They were legally unrepachable.⁴

The common law does not recognize a duty to aid another in distress.⁵ For many years, the imposition of such a duty has been the

1. Kiesel, *Who Saw This Happen?*, 69 A.B.A. J. 1208 (1983). "Genovese's death became for many the symbol for a society that had somehow lost its sense of humanity." *Id.* at 1208.

2. *Id.* Thirty-eight people watched from their houses without calling the police. See generally A. ROSENTHAL, *THIRTY-EIGHT WITNESSES* (1964).

3. See, e.g., Clendinen, *Barroom Rape Shames Town of Proud Heritage*, N.Y. Times, Mar. 17, 1983, § A, at 16, col. 1. A young woman was raped repeatedly by a group of men in a bar while patrons looked on and cheered.

4. See Kiesel, *supra* note 1, at 1209.

5. See *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897). This case exemplifies the view that there is no general duty to rescue. Consider the court's remarks: Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal . . . Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car

topic of heated debate among legal scholars, legislators, philosophers and the public.⁶ Recently, the common law has come under increasingly critical review. Consequently, several states have enacted a statutory duty to aid,⁷ however, the fact remains that in most states the law still refuses to recognize such a duty.⁸

The question arises as to why there has been such slow progress by society, the legislature, and the judiciary in bringing about a change in the law, in light of the immeasurable price such a refusal to aid exacts from society. To a large extent, the answer lies in the historical origin of the common law rule itself and in the perceived limitations on the power of the courts to impose liability for failure to act.⁹ However, the justifications that originally supported the rule may no longer be valid.¹⁰ Society has changed, and so has its problems and needs. The law must also change in order to address those needs.

As previously mentioned, the duty to rescue has been the subject of innumerable legal articles.¹¹ Therefore, this article is an attempt to examine the status of the law from a somewhat different perspective. The issue of a bystander's duty to rescue touches upon three major disciplines: philosophy, psychology, and law.¹² To date, in studying the duty to rescue issue, these disciplines have been isolated from each other.¹³ However, each significantly impacts on this issue and each should be considered in determining whether a change in the law is advisable.¹⁴ This comment will consider all three disciplines.

approaching. 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.

Id. at 260, 44 A. at 810. See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS 340 (4th ed. 1971); Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 247 (1980).

6. See generally Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Weinrib, *supra* note 5; Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983).

7. See, e.g., MINN. STAT. ANN. § 604.05 (West Supp. 1985); R.I. GEN. LAWS § 11-37-3.1 (Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973).

8. See Comment, *The Duty to Rescue in California: A Legislative Solution?*, 15 PAC. L.J. 1261, 1261 (1984); Comment, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 VT. L. REV. 143, 143-44 (1982).

9. It was commonly believed that legal liability could only be enforced in cases involving misfeasance (where there existed the doing or causing of harm).

10. See *infra* note 71 and accompanying text.

11. See, e.g., THE GOOD SAMARITAN AND THE LAW (J. Ratcliffe ed. 1966); Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241 (1971); Weinrib, *supra* note 5; Comment, *supra* note 6.

12. L. SHELEFF, THE BYSTANDER 6 (1978).

13. *Id.*

14. *Id.* (The three disciplines are considered in the study of victomology.)

This article will first discuss the common law rule concerning duty to aid, its origin, how it has evolved, and whether it needs changing. Second, the erosion of the common law rule through judicial exceptions will be explored. Have the judicial exceptions swallowed the rule? How are the exceptions justified when a public duty to rescue cannot be? Third, what has psychological research uncovered in the area referred to as "crowd inertia?" What are the implications of this research? Finally, the recent legislative enactments imposing a public duty to aid will be discussed and compared.

II. THE COMMON LAW RULE

The common law does not recognize a duty to aid a stranger in distress even though the danger may be great and the inconvenience to the potential rescuer only slight.¹⁵ If A sees B, a blind man, about to step into the street in the path of an approaching automobile, A may watch and do nothing even if he could easily warn B of the danger. A is under no duty to prevent B from coming to harm.¹⁶ The law will not hold A liable for any injuries suffered by B that A could have avoided.

Why, in light of the extreme consequences that may result, has the law refused to recognize such a duty? The answer, to a large extent, lies in the historical origins of the common law rule.¹⁷ The common law embodies the distinction between misfeasance and nonfeasance.¹⁸ Misfeasance is the causing of harm, while nonfeasance is merely allowing harm to take place through inaction.¹⁹ The common law has long incorporated the general principle that inaction or nonfeasance, will not give rise to legal liability.²⁰

Traditionally courts were not viewed as having the power to impose liability for failure to act.²¹ Liability was found to exist only when an individual in some way caused harm to another.²² Imposing

15. W. PROSSER, *supra* note 5, at 340-41.

16. L. SHELEFF, *supra* note 12, at 102-03.

17. For a general background of the legal duty to rescue in Anglo-American law, see THE GOOD SAMARITAN AND THE LAW, *supra* note 11.

18. See W. PROSSER, *supra* note 5, at 338-50; Bohlen, *supra* note 6, at 219.

19. See Bohlen, *supra* note 6, at 219. See also T. GREY, THE LEGAL ENFORCEMENT OF MORALITY 25 (1983) for examples of these concepts.

20. See T. GREY, *supra* note 19, at 26. This notion was predicated on the theory that nonfeasance left the plaintiff in no worse position than he was in previously. It is also attributable to the idea that individual liberty is violated when someone is forced to prevent harm that he has not caused. *Id.*

21. See, e.g., *Buch*, 69 N.H. at 260, 44 A. at 810.

22. *Id.*

a legal duty to rescue was not considered to be enforceable because it involved an omission to act. The courts did not consider nonfeasance to amount to causation.²³

A. *The Philosophical Basis for the Common Law Misfeasance-Nonfeasance Distinction*

The misfeasance-nonfeasance distinction reflected the attitudes and beliefs of common law courts regarding the justifiable scope of the law.²⁴ These attitudes and beliefs remain prevalent in Anglo-American law.²⁵ Incorporated into the law are certain principles and doctrines espoused by significant philosophers. One philosopher in particular appears to have been especially influential. John Stuart Mill, in his essay, *On Liberty*, published in 1859, advocated a philosophy which focused on individual liberty and the idea that individual freedom, unrestrained by government intervention, is essential for the progress and well-being of society.²⁶

Mill's theory promotes a liberty of individual tastes and pursuits, where each person is free to pursue his interests without impediment from others, no matter how foolish they may think he is, provided he does not put others at risk or subject them to harm in any way.²⁷ Implicit in this theory is opposition to any attempt by the law to coercively impose upon individuals any communal standard of morality.²⁸ Mill considered government's attempt to legislate morality an illegitimate exercise of power. In short, Mill's view is that an individual's private morality is "not the law's business."²⁹

Analyzing the duty to rescue, the controversy focuses not on whether there is a moral obligation to rescue, but whether the law

23. *Id.*

24. See Bohlen, *supra* note 6, at 219-21.

25. See, e.g., *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959). "The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position." *Id.* at 321-22, 155 A.2d at 346.

26. J.S. MILL, *ON LIBERTY* 13-17 (C. Shields ed. 1956). See also T. GREY, *supra* note 19, at 9.

27. See T. GREY, *supra* note 19, at 3.

28. *Id.* at 9.

29. T. GREY, *supra* note 19, at 4. See also *Union Pac. Ry. Co. v. Cappier*, 66 Kan. 649, 72 P. 281 (1930). The court drew a clear distinction between moral and legal obligations.

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. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant is swift and sure.

Id. at 653, 72 P. at 282.

can enforce such an obligation.³⁰ Proponents of Mill's view argue that courts do not have the authority to direct people as to their conscience. The law's role is limited to preventing people from harming one another and may not force them to confer benefits upon each other.³¹

Critics of Mill's view claim that society must and frequently does impose considerable limitations upon the rights and activities of its members, a necessity for its very survival.³² Activities such as taxation and the military draft are accepted as legitimate exercises of government authority.³³ In certain situations, it is appropriate, even necessary, for the law to adopt certain standards of moral behavior.

Mill's theory, commonly referred to by his critics as "excessive individualism,"³⁴ is found to be seriously lacking in its refusal to recognize that there are minimum moral requirements that must be maintained in order for a society to function.³⁵ Indeed, the health and welfare of a society is directly dependent upon adherence of the law to a binding moral code.³⁶ Individualism, it is argued, has two components: "The value of the individual in our society is reflected not only in respect for his rights, but in concern for his well-being."³⁷ How desirable is a philosophy based on individualism that proclaims an individual's liberty and rights, but negates the value of his life?

Lon Fuller, in his work *The Morality of Law*, posits that there are actually two moralities, the morality of aspiration and the morality of duty. The morality of aspiration promotes the affirmative effort to

30. See, e.g., *Buch*, 69 N.H. at 260, 44 A. at 810.

31. Ames, *supra* note 6, at 112.

32. L. SHELEFF, *supra* note 12, at 112.

33. *Id.*

34. T. GREY, *supra* note 19, at 6. Excessive individualism refers to the over-emphasis placed on the individual in Mill's philosophy. The individual reigns supreme and the community is secondary. This unbridled individualism has been criticized as being out of step with the notion of a modern society. *Id.*

35. See L. SHELEFF, *supra* note 12, at 174. See also T. GREY, *supra* note 19, at 4-5. This same debate was exemplified in the famous Hart-Devlin debate which began in England circa 1958. The Wolfenden Committee had been established in England in order to examine the law involving homosexuality and prostitution. The Committee recommended repeal of the law which punished consenting adults for homosexual acts. Lord Devlin spoke out against the conclusions of the Wolfenden Committee, arguing that moral beliefs must be subject to legal enforcement. In answer to Lord Devlin, the British legal philosopher H.L.A. Hart became involved in the dispute, advocating a revised version of Mill's principle. T. GREY, *supra* note 19, at 4-5.

36. See *id.* Lord Devlin made this argument in the debate. *Id.*

37. Comment, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 UTAH L. REV. 529, 542 (1976).

perfection and excellence in all human endeavors.³⁸ This type of morality cannot be encompassed in a legal system. However, the morality of duty is the minimum moral requirement necessary for a healthy, working society that must be included within its laws.³⁹

One of the most telling distinctions between Anglo-American law and the civil law of continental Europe is their respective treatments of the duty to rescue.⁴⁰ Almost all European countries have enacted statutes enforcing a general duty to rescue and these statutes have proved to be workable.⁴¹ The statutes are usually incorporated within the criminal code, which encompasses penalties consisting of both fines and prison sentences for failure to take action.⁴² Article 63 of the French Penal Code provides, "[w]hoever is able to prevent by his immediate action, without risk to himself or others, the commission of a serious crime or offense against the person, and voluntarily neglects to do so shall be liable."⁴³ Criminal sanctions may be imposed whether or not harm resulted from the failure to rescue and the penalty may be imprisonment for up to five years.⁴⁴ Similar provisions imposing criminal liability for failing to come to the aid of another in distress have been enacted in Turkey, Portugal, Italy, Norway, Poland, Denmark and Rumania.⁴⁵

The 1983 multiple rape in a New Bedford, Massachusetts tavern⁴⁶ is reminiscent of an earlier case which involved British soldiers stationed in Germany.⁴⁷ They were present while a woman was gang raped and did nothing to aid her. Charges were brought against them for aiding and abetting. Although originally convicted, they were

38. L. FULLER, *THE MORALITY OF LAW* (1964). Fuller's argument is that the contrasting viewpoints are flawed because they fail to define the meaning of morality. *Id.* at 3-4.

39. See *id.* at 5-6. "Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark." *Id.*

40. See Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW*, *supra* note 11, at 91-134; Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 635-40 (1952).

41. See Rudzinski, *supra* note 40, at 91-92. See also Comment, *supra* note 37, at 529 (contrasting the American approach with the Czechoslovakian and Russian approaches). The 1964 Czechoslovak Civil Code imposes a duty to prevent "injury to health and damage to property or undue enrichment to the detriment of society of individuals." T. GREY, *supra* note 19, at 173 (quoting the Czechoslovakian Civil Code).

42. See Rudzinski, *supra* note 40, at 108-10; L. SHELEFF, *supra* note 12, at 109.

43. L. SHELEFF, *supra* note 12, at 108 (quoting Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 632 (1958)).

44. Rudzinski, *supra* note 40, at 108-10.

45. See Feldbrugge, *Good and Bad Samaritans. A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630, 632 (1966).

46. Kiesel, *supra* note 1, at 1208.

47. R. V. Clarkson, [1971] 3 All E.R. 344. See also L. SHELEFF, *supra* note 12, at 107.

later found not guilty on appeal precisely because they had remained totally impassive and had in no way attempted to intervene. Had they been subject to German law instead of British law, they would most likely have been convicted under Article 330c of the German Criminal Code for failure to rescue.⁴⁸ This case illustrates what has commonly been said regarding the lack of duty to rescue in Anglo-American law, it "reflects a peculiarly callous and selfish individualism" prevalent in English-speaking countries.⁴⁹

The courts have created a rather perverse situation by following the common law rule of no duty to rescue. A potential rescuer who stops and attempts to render aid must be cautious. If he in any way is negligent or exacerbates a victim's injuries, a court may find him liable to the victim.⁵⁰ This is true even if the injuries are minor as compared to the harm that might have resulted had rescuer walked away. The potential rescuer who does not lift a finger to help has nothing to worry about. The law will absolve him of his callousness.⁵¹

The common law has not intended to discourage such Good Samaritan behavior although this has often been the result.⁵² The sometimes incredulous results of the rule have been viewed as the inevitable, albeit ignoble, consequences paid to protect individual lib-

48. L. SHELEFF, *supra* note 12, at 107. Article 330c of the German Criminal Code reads as translated:

Anybody who does not render aid in an accident or common danger or in an emergency situation, although aid is needed and under the circumstances can be expected of him, especially if he would not subject himself thereby to any considerable danger, or if he would not thereby violate other important duties, shall be punished by imprisonment not to exceed one year or a fine.

Feldbrugge, *supra* note 45, at 655 (citing Germany, Crim. Code, Art. 330c (1953)).

49. T. GREY, *supra* note 19, at 168 (quoting Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 1073 (1961)).

50. See *Silva v. Providence Hosp. of Oakland*, 14 Cal. 2d 762, 775, 97 P.2d 798, 804 (1939). If an individual attempts a rescue, the law construes it as an assumption of duty and imposes liability for any negligence on the rescuer's part. *Id.*

51. Dean Prosser, in criticism of the common law rule, wrote:

The law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. Some of the decisions have been shocking in the extreme. The expert swimmer . . . who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette and watch the man drown . . .

W. PROSSER, *supra* note 5, at 340. The example given is based on the facts of a real case. See *Osterland v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928).

52. T. GREY, *supra* note 19, at 29.

erty.⁵³ Fundamental to the courts' continued allegiance to the rule is the belief that the spirit of individualism indirectly benefits society as a whole. As each individual furthers his own welfare, society inevitably reaps some of the benefits.⁵⁴

There is a growing concern that the increasing mobility of society has led to the weakening of community bonds and social pressures to come to the aid of another in distress.⁵⁵ Most people, as in Kitty Genovese's case, do not want to get involved. Commentators have argued that American society as a whole needs to become more concerned about a neighbor's welfare.⁵⁶

Advocates of a statutory duty to rescue take issue with Mill's pronouncement against legislating morality. They argue that the law, itself, is society's pronouncement of right and wrong and, as such, is in essence a moral determination.⁵⁷ As times change and morals change so should the law. The law embodies the priorities and values of a society.⁵⁸ Society must, in the final analysis, decide whether it is willing to use the resources at its disposal to cultivate prosocial behavior in the form of benevolence towards and assumption of responsibility for one's neighbor.⁵⁹

B. The Erosion of the Common Law Rule

An action for negligence will lie only if the defendant owed a recognized legal duty to the plaintiff to exercise reasonable care and failed to do so.⁶⁰ Legal duties are continuously being created by the courts.⁶¹ As Dean Prosser wrote, "Changing social conditions lead constantly to the recognition of new duties."⁶² The essential question is "whether the plaintiff's interests are entitled to legal protection

53. *Id.*

54. See L. SHELEFF, *supra* note 12, at 112.

55. See *Tarasoff v. Board of Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976).

56. See *Soldano v. O'Daniels*, 141 Cal. App. 3d 443, 449, 190 Cal. Rptr. 310, 314 (1983). See also Comment, *The Duty to Rescue in California: A Legislative Solution?*, 15 PAC. L.J. 1261, 1281 (1984); Note, *Creation of a Duty Absent A Special Relationship — Legal Duty Based on Moral Obligation — Soldano v. O'Daniels*, 6 WHITTIER L. REV. 605, 610-11 (1984).

57. See *The Queen v. Instan*, [1893] 1 Q.B. 450 (Lord Coleridge, C.J.). Not "every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation." *Id.* at 453.

58. "The law is the witness and external deposit of our moral life." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

59. See generally L. SHELEFF, *supra* note 12, at 185.

60. See *McIntosh v. Milano*, 168 N.J. Super. 466, 480-81, 403 A.2d 500, 507 (1979).

61. See *Tarasoff*, 17 Cal. 3d at 434, 551 P.2d at 342, 131 Cal. Rptr. at 22.

62. See W. PROSSER, *supra* note 5, at 327. Dean Prosser has stated "that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* at 325-26.

against the defendant's conduct."⁶³

The legislature and the judiciary have recognized a need for protection for the victim in the duty to rescue area. The legislatures of a number of states have created statutory duties to aid a stranger in certain scenarios. Many states require that a driver involved in an automobile accident, regardless of fault, must stop and render assistance to anyone that is injured.⁶⁴ In addition, the egregious consequences often resulting from the application of the common law rule have led the courts to develop certain exceptions which justify the imposition of a duty to aid. These exceptions are predicated on the existence of a special relationship between the parties.⁶⁵

At early common law, the only special relationships falling into the exception to the rule were common carrier to passenger, innkeeper to guest, and shipmaster to seaman.⁶⁶ As discussed earlier, the common law rule of no duty to act was premised upon the traditional misfeasance-nonfeasance distinction.⁶⁷ The recognition of a special relationship exception created a duty in the absence of misfeasance, or lack of causation.⁶⁸

Commentators, in an effort to justify the existence of the special relationship exceptions, speculate that it is the rescuer's ability to rescue coupled with the victim's dependency on the rescuer that gives rise to the duty.⁶⁹ There is usually some economic benefit flow-

63. W. PROSSER, LAW OF TORTS 332-33 (3d ed. 1964).

64. See, e.g., CAL. VEH. CODE § 20003 (West 1971), amended by CAL. VEH. CODE § 20003(b) (West Supp. 1985); ILL. ANN. STAT., ch. 95 1/2, § 11-403 (Smith-Hurd Supp. 1985).

65. See, e.g., *Anderson v. Atchison, Topeka & Santa Fe Ry.*, 333 U.S. 821, 823 (1948) (employer-employee); *Devlin v. Safeway Stores, Inc.*, 235 F. Supp. 882, 887 (S.D.N.Y. 1964) (proprietor-customer); *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974) (property owner-trespasser); *Farwell v. Keaton*, 396 Mich. 281, 287, 240 N.W.2d 217, 222 (1976) (companion-companion).

66. RESTATEMENT (SECOND) OF TORTS § 314A (1965); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 55 (8th ed. 1973).

67. See W. PROSSER, *supra* note 5, at 338.

68. See Comment, *supra* note 6, at 263. Consider:

A. omits to give Z. food, and by that omission voluntarily causes Z.'s death. Is this murder? Under [the applicable] rule it is murder if A. was Z.'s gaoler, directed by law to furnish Z. with food. It is murder if Z. was the infant child of A., and had, therefore, a legal right to sustenance, which right a Civil Court would enforce against A. It is murder if Z. was a bedridden invalid, and A. a nurse hired to feed Z. . . . It is not murder if Z. is a beggar, who has no other claim on A. than that of humanity.

T. GREY, *supra* note 19, at 161.

69. Comment, *supra* note 6, at 263-66; see also M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY 69 (1977). There are four types of rescue. First, a person may rescue another by physically intervening to help. Second, a person can

ing between the parties. The plaintiff initially depends on the rescuer for things other than safety.⁷⁰ For example, the plaintiff depends on the common carrier for transportation or on the innkeeper for room and board. A relationship thus existed before the emergency or need to rescue arose. In such a situation, the defendant is thought to hold some power or control over the plaintiff since "the defendant has the opportunity to take certain precautions to decrease the probability that harm will come to the plaintiff."⁷¹

The courts have expanded the list of special relationships to include the following: employer to employee,⁷² shopkeeper to customer,⁷³ host to guest,⁷⁴ jailer to prisoner,⁷⁵ school to student,⁷⁶ and companion to companion.⁷⁷ The expansion has caused problems.⁷⁸ The general rule has been almost completely consumed by the burgeoning number of exceptions.⁷⁹ The relationship between the general rule and its exceptions is inherently at odds—the general rule requires misfeasance, the exceptions do not.⁸⁰

The rationale originally espoused to justify the early exceptions is not applicable to more recent court holdings.⁸¹ The inconsistent manner in which the exceptions have been adopted has led to considerable confusion concerning which special relationships give rise to a duty and whether a particular relationship fits within a recognized exception.⁸²

In *People v. Beardsley*,⁸³ the court held that the relationship between a man and his lover was not sufficient to justify imposing a legal duty to aid. The defendant and his lover had been together for

prevent an injury by making his property safe. Third, a person may save another through a warning. And finally, one may rescue another by calling the appropriate authorities. Comment, *supra* note 6, at 266 n.72.

70. Comment, *supra* note 6, at 265.

71. Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551, 553 (1980).

72. See, e.g., *Anderson v. Atchison, Topeka & Santa Fe Ry.* 333 U.S. 821 (1948); *Carey v. Davis*, 190 Iowa 720, 180 N.W. 889 (1921).

73. See, e.g., *Connelly v. Kaufmann & Baer Co.*, 349 Pa. 261, 37 A.2d 125 (1944); *Larkin v. Saltair Beach Co.*, 30 Utah 86, 83 P. 686 (1905).

74. See, e.g., *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir.), *cert. denied*, 332 U.S. 830 (1947).

75. See, e.g., *Farmer v. State*, 224 Miss. 96, 79 So. 2d 528 (1955); *O'Dell v. Goodsell*, 149 Neb. 261, 30 N.W.2d 906 (1948).

76. See, e.g., *Pirkle v. Oakdale Union Grammar School Dist.*, 40 Cal. 2d 207, 253 P.2d 1 (1953).

77. See, e.g., *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976).

78. See Comment, *supra* note 6, at 262, 262 n.52.

79. Weinrib, *supra* note 6, at 248.

80. *Id.*

81. See Note, *supra* note 71, at 553.

82. Comment, *Taking Notice of Good Samaritan and Duty to Rescue Laws*, 11 J. CONTEMP. L. 219, 220 (1984); see also W. PROSSER, *supra* note 5, at 340-42.

83. 150 Mich. 206, 113 N.W. 1128 (1907).

several days, drinking and carousing while the defendant's wife was out of town.⁸⁴ While intoxicated, the lover imbibed morphine and consequently fell into a stupor.⁸⁵ The defendant never summoned medical attention and the next day the woman died.⁸⁶ The court held that the defendant was not criminally liable because no special relationship was found to have existed between the defendant and the decedent.⁸⁷

Likewise, in *Yania v. Bigan*,⁸⁸ the defendant enticed a business invitee to jump into a trench filled with about ten feet of water. Although the decedent yelled for help, he was ignored by the defendant.⁸⁹ The court held that the defendant was not liable due to the absence of a special relationship.⁹⁰

However, in the case of *Farwell v. Keaton*,⁹¹ the court found a special relationship. Two companions, Siegrist and Farwell, went out for the evening. During the course of the night, they got into a disagreement with some other boys and a fight ensued.⁹² Siegrist escaped, but Farwell suffered a severe beating.⁹³ Siegrist later went back to find Farwell and took him home.⁹⁴ Farwell was asleep in the back seat of the car and Siegrist could not awaken him, so Siegrist went home.⁹⁵ The next morning, Farwell's grandparents discovered him in the car and took him to the hospital, where he died three days later.⁹⁶ Farwell's father brought a wrongful death action against Siegrist.

84. *Id.* at 208, 113 N.W. at 1129.

85. *Id.*

86. *Id.*

87. *Id.* at 209, 113 N.W. at 1131. The *Beardsley* court held that although the defendant's inaction was surely questionable, no legal duty to act existed simply because the two were alone together. The court did say a manslaughter verdict could have been sustained if the lover was the defendant's wife. *Id.* at 208, 113 N.W. at 1129.

88. 397 Pa. 316, 155 A.2d 343 (1959).

89. *Id.* at 319, 155 A.2d at 344.

90. *Id.* at 322, 155 A.2d at 346.

91. 396 Mich. 281, 240 N.W.2d 217 (1976).

92. *Id.* at 283, 240 N.W.2d at 219. It appears that Farwell and Siegrist met two girls and attempted to engage them in conversation. They followed the girls into a restaurant, and the girls complained to their friends that they were being followed. As a result, six boys chased both Farwell and Siegrist out of the restaurant, and the fight ensued. *Id.*

93. *Id.*

94. *Id.* Siegrist found Farwell underneath a car. Farwell appeared to be all right, so the boys drove around for another two hours and Farwell went to sleep in the back seat of the car. *Id.*

95. *Id.* at 285, 240 N.W.2d at 219.

96. *Id.* Farwell died of an epidural hematoma. *Id.*

The Supreme Court of Michigan held that Siegrist had an affirmative duty to aid Farwell.⁹⁷ As one ground, the court invoked the doctrine that once a person commences a rescue, he or she must then act reasonably. It was reasoned that Siegrist had commenced a rescue when he picked Farwell up, and the subsequent abandonment of him in the car was negligent.⁹⁸ The court went on to rule that, in any event, Siegrist had a duty to rescue Farwell based on their association that evening.⁹⁹ They "were companions engaged in a common undertaking; there was a special relationship" between them.¹⁰⁰ The court, however, failed to explain why this relationship was special.

Given the above-mentioned decisions, why would friends owe a duty to each other but not lovers to each other? The distinction is neither explained nor clear. Not only are the general rule and its exceptions at odds, but the exceptions themselves are inconsistent. The courts, in total contradiction to the rule, have gone even further and found a duty to aid even where no special relationship exists.¹⁰¹

In a recent holding, a California appellate court found an affirmative duty to aid in the absence of a special relationship.¹⁰² The court held that during business hours a business establishment had a duty to allow a Good Samaritan the use of its phone in an emergency.¹⁰³

The plaintiff in that case instituted an action for wrongful death after his father was shot and killed in a bar. The defendant was the owner of a restaurant across the street. Apparently, prior to the shooting, a patron of the bar had come to the restaurant to call the police. The restaurant employee had refused to make the call or allow the patron access to the phone.¹⁰⁴ The court imposed liability on the restaurant owner for negligent interference with a third person attempting to render aid.¹⁰⁵ The court concluded that the employee owed a duty to the decedent to permit the patron to make the call or

97. *Id.* at 292, 240 N.W.2d at 222.

98. *Id.* at 288-89, 240 N.W.2d at 220-21.

99. *Id.* at 291, 240 N.W.2d at 222. "Farwell and Siegrist were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself." *Id.*

100. *Id.* at 292, 240 N.W.2d at 222. The court went on to say that "Siegrist knew or should have known" that Farwell needed medical attention and that "to say Siegrist had no duty to obtain medical assistance or at least notify someone of Farwell's condition . . . would be 'shocking to humanitarian considerations' and fly in the face of 'the commonly accepted code of social conduct.' '[C]ourts will find a duty where, in general, reasonable men would recognize it and agree that it exists.'" *Id.* at 291-92, 240 N.W.2d at 222 (footnotes omitted).

101. *See, e.g.,* Soldano v. O'Daniels, 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983).

102. *Id.* at 449, 190 Cal. Rptr. at 314.

103. *Id.* at 452-53, 190 Cal. Rptr. at 317. *See also* Note, *supra* note 56, at 606.

104. 141 Cal. App. 3d. at 446, 190 Cal. Rptr. at 312.

105. *Id.* at 447, 190 Cal. Rptr. at 313.

to call himself.¹⁰⁶ Since there was no special relationship, the court based this duty on the factors which the California Supreme Court laid out in *Rowland v. Christian*:¹⁰⁷

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.¹⁰⁸

Causation or misfeasance is not required to find liability in special relationships, but is required between strangers. If the defendant did not cause the injury, why should it matter whether or not he knew the victim beforehand? If the answer is that the plaintiff, because of the prior relationship, expects and relies upon the defendant to come to his aid, certainly it is equally true that an individual in an emergency situation would expect and rely upon a bystander, out of common humanity, to come to his aid.

III. THE PSYCHOLOGICAL PERSPECTIVE

The public outcry that resulted from the news of the Kitty Genovese case spurred psychological research in an effort to explain the disturbing and baffling passivity of her neighbors.¹⁰⁹ The controversy surrounding the role of the law has centered around the *desirability* of society's use of the law to encourage morality, instead of the *effectiveness* of the law in encouraging morality.¹¹⁰ The issue yet to be determined is whether the law can be instrumental in encouraging people to exhibit more virtuous behavior.¹¹¹

There is much skepticism as to the effectiveness of religion in encouraging altruistic behavior towards one's neighbor. Indeed, one particularly revealing study showed that seminary students, in a hurry to deliver a speech on the topic of the Good Samaritan, ignored

106. *Id.* at 453, 190 Cal. Rptr. at 317.

107. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In this case, the California Supreme Court eliminated the common law distinction between business invitees, licensees and trespassers. The court balanced the reasonableness of the defendant's behavior against the foreseeability of harm to the victim in its determination whether or not a duty was owed. *Id.* at 118-19, 443 P.2d at 568, 70 Cal. Rptr. at 104.

108. *Id.* at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100. See also *Soldano*, 141 Cal. App. 3d at 451, 190 Cal. Rptr. at 315 (applying the *Rowland* factors to the facts in that case).

109. L. SHELEFF, *supra* note 12, at 5.

110. *Id.* at 174.

111. *Id.*

a stranger en route who had collapsed on the ground.¹¹² This example merely emphasizes the possibility that society cannot rely on the dictates of religion to sufficiently cope with the bystander dilemma. As one commentator put it, "[I]n certain important respects, the fear of the law is the beginning of virtue."¹¹³ But is that true? What is the potential of using the law to increase the incidence of morally desirable behavior?

Studies indicate that "altruistic behavior is dictated by societal norms."¹¹⁴ Individuals tend to act in accordance with the current law. In another study,¹¹⁵ two groups of students were told that a man was drowning about ten feet from where another man stood on shore. The first group was informed that there was a law requiring rescue and the second group was told that there was no such law. Each group was told that the man on shore failed to act. In evaluating that man's inaction in terms of moral behavior, the first group judged the man's failure to act more severely—"[b]reaking the law was itself viewed as immoral"¹¹⁶

In an experiment conducted by Clark and Wood,¹¹⁷ bystanders were confronted with the situation of a maintenance man falling from his ladder. In the first scenario he cried out for help, creating an obvious emergency situation. In the second scenario he remained quiet, creating an ambiguous emergency situation. In the latter situation, fewer bystanders went to his aid. Clark and Wood concluded that "whether the victim received help or not depended directly on the level of ambiguity presented in the emergency situation."¹¹⁸ The more ambiguous the situation, the less likely it was that a bystander would take action.

Some of the most significant work done in the area of bystander

112. Darley & Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERS. & SOC. PSYCHOLOGY 100-08 (1973).

113. E. CAHN, *THE MORAL DECISION* 190 (1955).

114. Note, *supra* note 71, at 556 (footnote omitted). "[I]ndividuals usually conform to norms as recognized standards of behavior. One [reason] is the concern about the reaction of others, since people often react adversely to 'abnormal' behavior." *Id.* at 556-57. Also, acting in accordance with norms reduces uncertainty. In an ambiguous situation, people usually rely on norms instead of evaluating the particular situation. *Id.* at 557. See also F. HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* (1958).

115. See Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 58 n.51 (1972) (citing Kaufmann, *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgments*, in *ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES* 77 (J. Macauley & L. Berkowitz ed. 1970)).

116. Franklin, *supra* note 115, at 58-59.

117. Clark & Wood, *Why Don't Bystanders Help? Because of Ambiguity?*, 24 J. PERS. & SOC. PSYCHOLOGY 392-400 (1972).

118. Clark & Wood, *Where is the Apathetic Bystander? Situational Characteristics of the Emergency*, 29 J. PERS. & SOC. PSYCHOLOGY 279, 285 (1974).

response was conducted by Latané and Darley in the 1960's.¹¹⁹ What has emerged from their research is a very disturbing dilemma involving crowd inertia: the presence of a crowd or group of bystanders at the scene of an emergency, instead of encouraging the bystanders to take action, has the opposite effect. The more people there are, the less likely it is that any one of them will respond.¹²⁰

This disturbing response is attributed to two concepts—the “diffusion of responsibility” and the “diffusion of blame.”¹²¹ It is explained as follows:

If only one bystander is present in an emergency, he carries all the responsibility; he will feel all the guilt for not acting; he will bear all of the blame that accrues from non-intervention. If others are present, the onus of responsibility is diffused, and the finger of blame points less directly to any one person. The individual may be more likely to resolve his conflict between intervening and non-intervening in favor of the latter alternative.¹²²

Each bystander is perceiving an emergency situation, but he is simultaneously observing a lack of response from the other bystanders. The inaction of the others leads him to believe he has misinterpreted the situation and that it must not be as serious as he first thought. The bystander observes that others are not going to the aid of the victim, thus he concludes that it is inappropriate or unnecessary for him to do so.¹²³ “[I]t is possible for a state of pluralistic ignorance to develop, in which each bystander is led by the *apparent* lack of concern of the others to interpret the situation as being less serious than he would if alone.”¹²⁴

What are the implications of this research? Since it is quite common that a crowd will be present at the scene of an emergency,¹²⁵ this issue requires immediate attention. Much of the research done to date indicates that the law can be used effectively to increase Good Samaritan behavior.¹²⁶ Is there a compelling reason why we should

119. See L. SHELEFF, *supra* note 12, at 12-13. Their research was precipitated by the Genovese case and is based on the premise that people commonly act unselfishly, motivated by goodwill. *Id.*

120. See *id.* at 13 (citing B. LATANÉ & J. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP? (1970) [hereinafter THE UNRESPONSIVE BYSTANDER]).

121. *Id.* (citing generally THE UNRESPONSIVE BYSTANDER, *supra* note 120).

122. *Id.* (quoting THE UNRESPONSIVE BYSTANDER, *supra* note 120, at 90).

123. *Id.* (citing THE UNRESPONSIVE BYSTANDER, *supra* note 120, at 110).

124. *Id.* (quoting THE UNRESPONSIVE BYSTANDER, *supra* note 120, at 110 (emphasis in original)).

125. See, e.g., Kiesel, *supra* note 1, at 1208-09. As the four men raped the young woman, patrons watched and cheered and, according to the bartender, “bystanders were afraid to call the police.” *Id.* at 1209.

126. See Franklin, *supra* note 115, at 58. “From what experiments have taught us about human behavior in rescue situations, we might well conclude that the legal re-

not use it as such? In the final analysis, society must decide whether it is willing to use the resources at its disposal to promote the notion of communal responsibility over individual self-interest.

IV. THE LEGISLATIVE INITIATIVE

The need for a public duty to rescue has been recognized by at least a few state legislatures. Vermont was the first state to enact a statutory duty to rescue when it enacted the Duty to Aid the Endangered Act in 1967.¹²⁷ Minnesota followed Vermont's example when it enacted its Good Samaritan law in 1971.¹²⁸ More recently, public outcry over the gang rape in New Bedford, Massachusetts¹²⁹ has spurred passage of a similar legislative enactment in Rhode Island.¹³⁰

These statutes are all similar in that they require affirmative conduct to assist another person in peril. However, the Rhode Island statute is a narrower form of rescue legislation in that it applies only to the reporting of any first degree sexual assault.¹³¹

Vermont's and Minnesota's statutes have much broader applica-

quirement of rescue would, in moments of hesitation, tip the balance toward the desired action." *Id.* (footnote omitted).

127. VT. STAT. ANN. tit. 12, § 519 (1973). The statute reads as follows:

(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.

(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.

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

Id.

128. See MINN. STAT. ANN. § 604.05 (West Supp. 1985). The statute provides in pertinent part:

(1) Duty to Assist. Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to himself 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. Any person who violates this section is guilty of a petty misdemeanor.

Id.

129. See Kiesel, *supra* note 1.

130. R.I. GEN. LAWS § 11-37-3.1 (Supp. 1984). The statute provides:

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 in [sic] taking place in his/her presence shall immediately notify the state police or the police department of the city or town in which said assault or attempted assault is taking place of said crime.

Id.

131. *Id.*

tion. They are not limited to criminal activity but apply to all types of emergencies.¹³² Vermont requires that anyone who knows that another is exposed to grave danger must render assistance, provided he can do so without endangering himself.¹³³ A person is not required to place himself in peril in order to try to rescue another. The rescuer is granted civil immunity for the aid rendered unless his actions constituted gross negligence.¹³⁴ The statute imposes a fine not to exceed \$100 for willful failure to act.¹³⁵

The Minnesota statute applies only to bystanders at the scene of the emergency.¹³⁶ A bystander is required to reasonably assist anyone exposed to serious physical injury.¹³⁷ Reasonable assistance may take the form of prompt notification to the authorities.¹³⁸ The rescuer is exempted from civil liability unless he acted in a willful and wanton or reckless manner.¹³⁹ One who violates this statute is guilty of a petty misdemeanor.¹⁴⁰

The objective of this legislation is not to coerce the rescuer into exposing himself to unreasonable danger for a stranger, but is rather to encourage action on the part of the bystander so that if aid cannot be rendered the rescuer will call for help. Despite this recent legislative expansion of the duty to rescue, the future of such laws is unclear. Progress toward a public rescue duty has been slow and has met with reluctance. Despite all the attention that the issue has attracted, only two states, Vermont and Minnesota, enforce a general public duty to rescue.¹⁴¹

132. *See supra* notes 127 & 128.

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

134. *Id.* § 519(b).

135. *Id.* § 519(c).

136. MINN. STAT. ANN. § 604.05(1) (West Supp. 1985).

137. *Id.*

138. *Id.*

139. *Id.* § 604.05(2). This subsection provides in pertinent part:

(2) General immunity from liability. Any person who, without compensation or the expectation of compensation renders emergency care, advice, or assistance at the scene of an emergency or during transit to a location where professional medical care can be rendered, is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance unless that person acts in a willful and wanton or reckless manner in providing the care, advice, or assistance. . . .

Id.

140. *Id.* § 604.05(1).

141. *See supra* notes 127 & 128.

V. CONCLUSION

The law as it exists today in the area of duty to rescue is both confusing and contradictory. The courts have devised various "special relationship" exceptions to the duty to rescue rule. The proliferation of these exceptions has not only threatened to swallow the rule itself but has created a situation where it is no longer possible to determine which relationships are "special" and which relationships are not. Either the rule must be changed or the exceptions clarified.

Much of the psychological research done to date appears to indicate that the law may be an effective resource in encouraging altruistic behavior. Given what the research has uncovered concerning crowd reaction in an emergency situation, the law may be a very necessary tool to combat "crowd inertia" and the failure to aid phenomenon. However, only two states have enacted a general public duty to rescue.

The bystander issue is a critical one. It is a dilemma which not only involves the particular bystander, but affects all of society. It focuses on the very essence of society in both the formation and reflection of mankind's true nature and general quality of life. The importance of this issue is perhaps best demonstrated by a recent press report, about a woman who was caught in a river current and swept downstream. Three teenagers on their bicycles saw her and while one went to get help, the other two rode along the river trying to catch up with her. Eventually, they were able to wade into the water and pull her onto the bank. One of the boys then discovered that he had saved his own mother's life.¹⁴² This real life illustration "serves to remind us that we can never know when we may be bystanders and who our victim will be; or when we may be victims and who our bystander will be."¹⁴³

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142. See L. SHELEFF, *supra* note 12, at 204 (citing *Boy Races River, Saves Mom*, L.A. Times, June 5, 1978, at 1, col. 5).

143. See L. SHELEFF, *supra* note 12, at 204.