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Rescue without Law: An Empirical
Perspective on the Duty to Rescue

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Abstract

For more than a century, legal scholarship on the duty to rescue has proceeded on a sophisticated theoretical plane. Proponents of a duty to rescue have argued that it will decrease the frequency of non-rescue without creating undue distortions or other difficulties. Opponents of a duty to rescue have argued that such statutes are ineffective, infringe on individual liberties, may actually discourage rescue, and are likely to be misused by politically ambitious prosecutors. No effort has been made to test any of these claims empirically, even though from a policy perspective, the critical threshold question – how often do Americans fail to rescue one another in circumstances where only a generalized duty to rescue would require them to do so – is entirely factual. This article provides the first empirical study of the no-duty rule in action. Using more than twenty independent data sources, the article provides a “law and reality” perspective on rescue and non-rescue that complicates – and sometimes is flatly inconsistent with the positions of both proponents and opponents of a duty to rescue. The results paint a rich and largely reassuring picture of the behavior of ordinary Americans faced with circumstances requiring rescue, and indicate that both more and less is at stake in the debate over the no-duty rule than has been commonly appreciated. Law professors and judges have been fascinated with the no-duty rule for theoretical reasons, but the ongoing debate should not obscure the reality that in the real world, rescue is the rule – even if it is not the law.

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An Empirical Perspective on the Duty to Rescue

David A. Hyman¹

“I have always depended on the kindness of strangers.”²

Abstract

For more than a century, legal scholarship on the duty to rescue has proceeded on a sophisticated theoretical plane. Proponents of a duty to rescue have argued that it will decrease the frequency of non-rescue without creating undue distortions or other difficulties. Opponents of a duty to rescue have argued that such statutes are ineffective, infringe on individual liberties, may actually discourage rescue, and are likely to be misused by politically ambitious prosecutors. No effort has been made to test *any* of these claims empirically, even though from a policy perspective, the critical threshold question -- how often do Americans fail to rescue one another in circumstances where only a generalized duty to rescue would require them to do so -- is entirely factual. This article provides the first empirical study of the no-duty rule in action. Using more than twenty independent data sources, the article provides a “law and reality” perspective on rescue and non-

¹ Professor of Law and Medicine, University of Illinois. I owe a considerable debt of gratitude to the organizations that provided access to their records on rescues. In particular, I wanted to acknowledge the extraordinary assistance of Walter Rutkowski, the executive director of the Carnegie Hero Fund Commission, who was an early and enthusiastic supporter of this research. Yvonne McMorris did her typical superhuman job entering data into spreadsheets, and preparing tables and figures. I received helpful comments when this article was presented at the University of California-Los Angeles, the University of Illinois, the University of Maryland, and the University of Alabama. I am also indebted to Anita Bernstein, Kenworthy Bilz, Richard Epstein, Lee Fennell, Oscar Gray, Michael Heise, Keith Hylton, John C.P. Goldberg, Nancy King, Andrew Klein, Andrew Kull, Richard McAdams, Bill Sage, Cathy Sharkey, and Charles Silver, who provided helpful written comments.

² Tennessee Williams, *A Streetcar Named Desire* 142 (1947)

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I. Introduction

The common law approach to rescue is clear and straightforward. Absent a limited number of narrow exceptions, there is no duty to rescue, regardless of the ease of rescue and the consequences of non-rescue.¹ Indeed, by restricting the ability of rescuers to recover in tort for injuries they might suffer, the common law actually creates affirmative disincentives to rescue. Generations of law students have learned of the no-duty rule by reading hypothetical cases of babies who drowned in bathtubs and actual cases of people who drowned in ditches and lakes, while bystanders did nothing.

The no-duty rule may prevail in forty-seven of the fifty states, but it is distinctly unpopular. When a case of non-rescue becomes public, newspaper editorials and television commentators will denounce the indifference of bystanders. If the non-rescuers can be identified, they will be held up to public scorn. The responsible district attorney will reluctantly acknowledge that the criminal law is powerless in such cases, while condemning the non-rescuers on moral grounds. If a tort case is actually brought against a non-rescuer, the judge will throw it out, but note that the non-rescuer must answer to God for failing to act. Politicians will introduce legislation reversing the common law rule. Comparisons will be drawn to other infamous cases of non-rescue, such as Kitty Genovese.

In short order, academic conferences and symposia will be held at which speakers will criticize the no-duty rule and the indifference of bystanders. Communitarians will suggest that

¹ See Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L. J. 247, 247 (1980) ("No observer would have any difficulty outlining the current state of the law throughout the common-law world regarding the duty to rescue. Except when the person endangered and the potential rescuer are linked in a special relationship, there is no such duty.") The no-duty rule is based on the fundamental distinction drawn by the common law between omissions and commissions. See Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217, 219 (1908) ("There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance. . . .")

Americans are insufficiently civic minded. Social meaning scholars will suggest that the no-duty rule is sending the wrong “expressive” message. Feminists will decry the “male” orientation of tort law, with its emphasis on individual autonomy and rule-based decision-making. Psychologists and evolutionary biologists will report the insights derived from research on altruism and collective inaction. Corrective justice scholars will argue the law should enforce common moral intuitions. Comparative law scholars will suggest the United States should follow the rest of the civilized world in adopting a duty to rescue. Law and economics scholars will debate whether the no-duty rule is efficient. Doctrinal scholars will debate the relative merits of criminal and tort sanctions in dealing with future non-rescues. Law review articles and notes condemning the current state of the law will be published. The sequence will then terminate, to be repeated after the next instance of non-rescue.

Everyone involved in these serial exercises in ritual indignation behaves as if non-rescues occur sufficiently frequently that a statutory solution is urgently required. Stated more concretely, the entire debate over the no-duty rule has proceeded based on the assumption that non-rescues are (too) common – meaning that rescues are (too) infrequent. Proponents of a duty-to-rescue have argued that a statutory solution can decrease the frequency of non-rescue and increase the frequency of rescue, without creating undue distortions or other difficulties. Opponents of a duty-to-rescue have argued that such statutes are ineffective, infringe on individual liberties, and are likely to be misused by politically ambitious prosecutors.

Unfortunately, little or no effort has been made to test *any* of these claims empirically, even though legal academics and judges have been debating the merits of the no-duty rule for more than a century. Indeed, remarkably enough, to date *no one* has tried to offer a “useful answer to the most preliminary and significant of questions about . . . [non-rescue] -- its frequency.”²

² David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L. J. 797, 844 (1998). Obviously, the frequency of non-rescue is not dispositive of the issue

Instead, the debate over the no-duty rule has largely proceeded on a sophisticated theoretical plane, even though from a policy perspective, the critical threshold question -- how often do Americans fail to rescue one another in circumstances where only a generalized duty to rescue would require them to do so -- is wholly factual.

This article provides the first empirical study of the no-duty rule in action. Using more than twenty independent data sources, the article provides a “law and reality” perspective on rescue and non-rescue in the United States throughout the 20th Century. The results presented in this article paint a rich and largely reassuring picture of the behavior of ordinary Americans faced with circumstances requiring rescue. These results complicate -- and sometimes are flatly inconsistent with -- the positions of both opponents and proponents of the no-duty rule.

To summarize briefly, verifiable non-rescues are extraordinarily rare, and verifiable rescues are exceedingly common -- often in hazardous circumstances, where a duty to rescue would not apply in the first instance. Controlled for population, the frequency of verifiable rescue declined in the first 40 years of the 20th century, but has remained fairly stable or increased since then. Most rescuers are young males -- particularly when strangers are rescued or the rescue is risky. States that have adopted a duty-to-rescue have not seen an increase or decrease in the number of non-risky rescues or the number of accidental deaths. The rate of non-risky rescues in these states is also lower than that in comparable states that do not have a duty to rescue. There is no evidence that prosecutors are misusing these laws; indeed, after a combined total of almost 80 years of experience in three states, there have been no prosecutions for non-rescue -- most likely because there were never any actionable non-rescues in those states to begin with.

of whether something should be done about non-rescue. *See infra* notes 88-89 and accompanying text. However, the frequency of non-rescue profoundly affects the costs and benefits of attempting to address the problem. *See infra* notes 83-85, and accompanying text.

Finally, if the no-duty rule that prevails in 47 of the 50 states is “sending the wrong message” about the desirability of undertaking a rescue, it is doing a singularly poor job of it. Indeed, even in the absence of a statutory duty, Americans turn out to be *too* willing to undertake rescue, judging by the substantial number of rescuers that are killed or injured every year. Stated bluntly, six times as many Americans lose their lives *every year* trying to rescue someone else than have lost their lives to a non-rescue *in the past ten years combined*.

These results suggest that both more and less is at stake in the debate over the duty to rescue than has been commonly appreciated. The handful of highly salient anecdotes of non-rescue that everyone knows about are extraordinarily unrepresentative of the real world, where rescue is the rule – even if it is not the law.

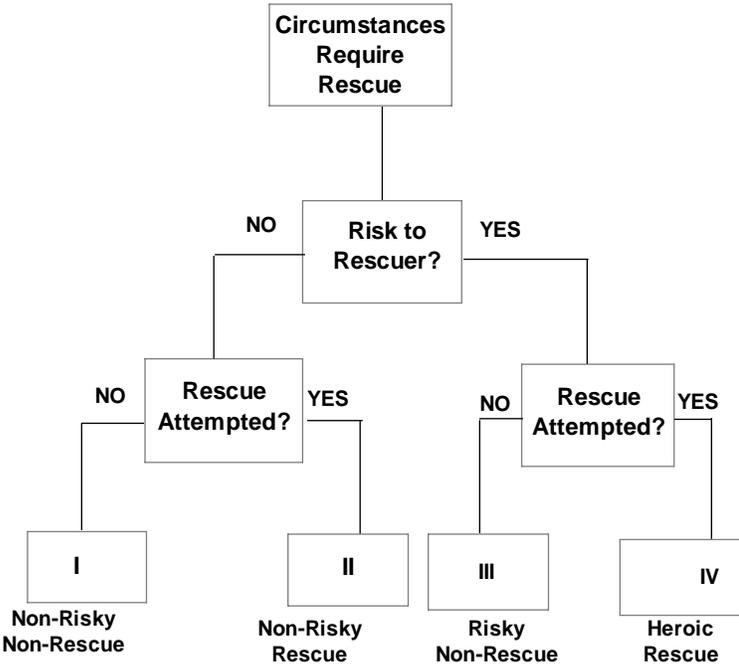
Part II provides an analytical framework for analyzing rescue and non-rescue, and explains why knowing the frequency and results of rescue and non-rescue is important before assessing what (if anything) should be done about the issue. Part III documents popular and scholarly perceptions of the consequences of the no-duty rule, and then collects every documented case of non-rescue during the past forty years. Part IV uses approximately twenty unique data sets, none of which have been previously analyzed in the massive literature on the duty to rescue, to document the actual frequency of rescue. Part V addresses the demographics of rescue and non-rescue. Part VI considers the reliability of the data presented in Parts III-IV. Part VII assesses the impact of creating a statutory duty to rescue in the three states that have done so. Part VIII explores the implications of these results for the ongoing debate over the no-duty rule, and offers a tentative explanation for why the debate has been so completely divorced from reality. Part IX provides a brief conclusion.

II. Rescue and Non-Rescue

A. Analytical Framework

Rescue occurs in a wide range of circumstances. Figure 1 presents the analytical framework for collecting and analyzing data:

Figure 1



“Circumstances require rescue” means that a victim was facing a peril that was reasonably understood by a non-professional rescuer to place the victim’s life or limb at risk, consistent with the statutory requirements in the three states that have adopted a duty to rescue.³ The rescuer had to have no legal obligation to undertake rescue, and no responsibility for the risk that necessitated rescue.⁴ The peril could be natural in origin (e.g., fire and flood), created by the intentional or negligent actions of other individuals (including criminal behavior of third parties), or it could have “just happened” (e.g., someone collapses, and will die without CPR)

“Risk to rescuer” means the rescuer faced a non-trivial risk to life or limb if they attempted a rescue. Several of the organizations which provided data on rescue performed a variant of this sorting for their own purposes. Organizations that did not differentiate between risky and non-risky rescues were typically treated as all risky or all non-risky rescues, depending on the criteria for the award and the amount of detail that was available.

“Rescue attempted” means that a rescuer took an affirmative step intended to protect the victim from the source of peril or prevent further injury. The rescue need not have been successful to satisfy this requirement. Providing notice to a professional rescuer was treated as an attempted rescue.⁵ Of

³ Only cases involving non-professional rescuers were considered, unless a professional rescuer (typically police and firemen) was off-duty at the time of the rescue, or took action well beyond that reasonably expected under the circumstances. When it was not possible to make such distinctions, the rescues were excluded from further consideration.

⁴ Stated differently, none of the status-based exceptions to the no-duty rule could apply. Thus, if the rescuer had caused the risk which required rescue, it was excluded from the frequency estimate for a cell.

⁵ To be sure, one might argue that simply providing notice to a professional rescuer should not count as a non-risky rescue. Yet, Kitty Genovese only counts as a non-rescue if the failure of her neighbors to provide notice to a professional rescuer is blameworthy. In like fashion, Minnesota treats notice to a professional rescuer as satisfying the statutory duty to rescue. Regardless, the calculations presented in Section IV are sufficiently transparent that those who

course, this definition means that as long as one individual attempts a rescue, the fact that others stood by does not a non-rescue make.⁶

Proponents of a duty-to-rescue have, without exception, focused on individual anecdotes from cell 1, and ignored the other cells entirely. Part IIB explains why knowing the frequency of rescue and non-rescue is important in determining the policy consequences of the no-duty rule, and deciding what (if anything) needs to be done about the issue.

B. Why Frequency Matters

From a public policy perspective, context (*i.e.*, how the mine run of situations requiring rescue are handled) matters a great deal more than the facts -- however bad they may be -- of any given non-rescue in assessing the overall merits of the no-duty rule. Disregarding this fundamental point can result in "reforms" which are intended to correct what is perceived to be a real

do not believe notice constitutes rescue can simply "back-out" such rescues from the totals.

⁶ There are certainly cases in which some people stand by while others rescue. Under a strict definition of the term, one could argue that all those who failed to assist should be counted as non-rescuers. The difficulty with this approach is two-fold. First off, I have been unable to locate any cases in which non-rescuers were prosecuted or otherwise held up to significant public scorn when a rescue actually occurred. The absence of an identifiable victim obviously affects the political saliency of that issue. Second, the practical difficulties of identifying blameworthy non-rescuers when a rescue was performed are even more daunting than in the garden-variety non-rescue case. For example, a non-rescuer could argue that they knew someone else was performing the rescue, and hence saw no reason to intervene -- particularly if the person performing the rescue was better trained/more expert/younger/less risk-averse than the bystander.

Finally, too many rescuers can be just as bad (or even worse) than too few, since they can get in one another's way and place one another and the victim at risk. Professor Levit, who noted the "wonderful problem" of too many rescuers did not appreciate this basic fact about rescue. See Nancy Levit, *The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act*, 40 Washburn L.J. 463, 477 (2001). Indeed, a "bad" rescuer may well be worse than no rescuer at all, in that the total number of deaths may increase as a result of their intervention. See Part V, *infra*.

problem (non-rescue), but might not be a significant problem at all – while risking disruption of the balance of the system, which actually might be working tolerably well.⁷ Until the comparative magnitude of the problematic non-rescue numerator and the unproblematic rescue denominator is assessed, one simply cannot know the potential benefits of trying to fix the problem of non-rescue – let alone how to address it or score the costs and benefits of different strategies for doing so.⁸

Instead of basing policy on (potentially unrepresentative) anecdotal evidence of particular non-rescues, it is necessary, to the extent feasible, to develop frequency estimates for each of the cells in Figure 1. Indeed, defensible frequency estimates for cell 1 and cell 2 are required simply to “score” the potential benefits from implementing a generalized duty to rescue. For example, if cell 1 is large relative to cell 2, that fact would tend to indicate that imposing a duty to rescue has the potential to save a substantial numbers of lives. Conversely, if cell 2 is large relative to cell 1, there are likely to be limited benefits from imposing a duty to rescue, regardless of how efficiently the duty is implemented.

The comparative magnitude of the cells also provides useful information about the extent to which the no-duty rule has any significant expressive function. Legal theorists have suggested that individuals take their cues as to acceptable and unacceptable behavior from the substantive content of the law. For example, if the law prohibits littering, fewer people will litter even if the law is never enforced. Many people will also think less of those who choose to litter. If the no-duty law has a significant expressive function, it should be detectable by comparing the magnitude of cell 1 and cell 2 in states that do and do not have a duty to rescue. If cell 1 is large relative to cell 2 in states that have not enacted a duty to rescue, then it is plausible that the no-duty rule has an expressive function. Conversely, one would expect the opposite

⁷ See David A. Hyman & Mark Hall, *Two Cheers For Employment-Based Health Insurance*, 2 YALE J. HEALTH POL’Y, L. & ETHICS 23 (2001).

⁸ Strictly speaking, the denominator is total cases – both the “smoothly working” instances of rescue and the “problematic” cases of non-rescue.

pattern (i.e., cell 2 should be large relative to cell 1) in states that have adopted a duty to rescue.

On the other hand, if cell 2 is large relative to cell 1 even in states that have a no-duty rule, it is unlikely that the no-duty rule has a significant expressive function.⁹ In like fashion, if cell 4 is as large or larger than cell 1, and individuals are willing to expose themselves to significant risk in undertaking a rescue the law instructs them is non-obligatory, then it is unlikely the no-duty rule has *any* expressive effect – even at the margins -- on the actions of ordinary citizens.

III. Non-Rescue: Perception and Reality

The problem of non-rescue has attracted considerable scholarly attention over the past century. Every torts textbook features a section on the subject.¹⁰ More than a hundred law

⁹ Of course, there are other possible explanations. For example, Americans simply may not know about the no-duty rule.

¹⁰ Every single torts textbook includes a section on the no-duty rule. *See* GEORGE C. CHRISTIE & JAMES E. MEEKS, *CASES AND MATERIALS ON THE LAW OF TORTS* 438-472 (1990); JAMES A. HENDERSON, RICHARD N. PEARSON & JOHN A. SILICIANO, *THE TORTS PROCESS* 231-237, 251-257 (6TH ED.); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* (7TH ED. 2001); DOMINICK VETRI, LUCINDA M. FINLEY, LAWRENCE C. LEVINE & JOAN E. VOGEL, *TORT LAW AND PRACTICE* 271-288 (2002); DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* (2001); RUSSELL L. WEAVER, JOHN H. BAUMAN, JOHN T. CROSS, ANDREW R. KLEIN, EDWARD C. MARTIN, AND PAUL ZWIER, *TORTS: CASES, PROBLEMS, AND EXERCISES* 381-424; JERRY J. PHILLIPS, NICHOLAS P. TERY, FRANK L. MARAIST, FRANK MCCLELLAN, THOMAS C. GALLIGAN, JR., & PHOEBE A. HADDON, *TORT LAW: CASES MATERIALS, PROBLEMS* 468-479 (3RD ED.); FLEMING JAMES, OSCAR GRAY & DONALD GIFFORD, *CASES AND MATERIALS ON THE LAW OF TORTS*; ARTHUR BEST & DAVID W. BARNES, *BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS* 505-516 (2003); VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, *PROSSER, WADE & SCHWARTZ'S TORTS* 413-421 (10TH ED. 2000); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §56 (1984); ROBERT E. KEETON, LEWIS D. SARGENTICH & GREGORY C. KEATING, *TORT AND ACCIDENT LAW* 254-271 (3RD ED. 1998); AARON D. TWERSKI & JAMES A. HENDERSON, JR., *TORTS: CASES AND MATERIALS* 276-318; RICHARD A. EPSTEIN,

review articles and several books have been written on the subject, with dozens more touching on it in passing.¹¹ These articles

CASES AND MATERIALS ON TORTS 548-565 (7TH ED.). *SEE ALSO* JULIE A. DAVIES, LAWRENCE C. LEVINE & EDWARD J. KIONKA, A TORTS ANTHOLOGY 178-200 (2ND ED.); SAUL LEVMORE, FOUNDATIONS OF TORT LAW 225-258 (1994).

¹¹ The stack of law review articles focusing on the no-duty rule in my office is 1.5 feet tall, and totals more than 100 articles. *See* Carl V. Nowlin, *Don't Just Stand There, Help Me!*, 30 WM. MITCHELL L. REV. 1001 (2004); Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647 (2002); Christopher H. White, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507 (2002); Gary T. Schwartz, *Feminist Approaches to Tort Law*, 2 THEORETICAL INQUIRIES IN L. (Online Edition): No. 1, Article 6 (2001), available at <http://www.bepress.com/til/default/vol2/iss1/art6>;

Assaf Jacob, *Feminist Approaches to Tort Law Revisited - A Reply to Professor Schwartz*, 2 THEORETICAL INQUIRIES IN LAW (Online Edition): No. 1, Article 7 (2001), available at <http://www.bepress.com/til/default/vol2/iss1/art7>; Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605 (2001); Levit, *supra* note 6; Shaya Rochester, *What Would Have Seinfeld Done Had He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 79 WASH. U. L. Q. 1185 (2001); Edward A. Tomlinson, *The French Experiment with a Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 NY L.S.J. INT. & COMP. L. 451 (2000); Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971 (2000); Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991 (2000); Jennifer Bagby, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 IND. L. REV. 571 (2000); Marcia M. Ziegler, *Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome*, 104 DICK. L. REV. 525 (2000); Angela Hayden, *Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws Good Ideas?*, 6 NEW ENG. INT'L & COMP. L. ANN. 27 (2000); Andrew D. Kaplan, *"Cash-ing Out": Regulating Omissions, Analysis of the Sherrice Iverson Act*, 26 N.E. J. ON CRIM. & CIV. CON. 67 (2000); Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L. J. 105 (1999); Peter F. Lake, *Bad Boys, Bad Men, and Bad Case Law: Re-examining the Historical Foundation of No-Duty-to-Rescue Rules*, 43 N. Y. L. SCH. L. REV. 385 (1999). Jessica R. Givelber, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169 (1999); Sungeeta Jain, *How Many People Does it Take To Save a Drowning Baby?* 74 WASH. L. REV. 1181 (1999); Melody J. Stewart, *How Making the Failure to*

Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability, 25 AM. J. CRIM. L. 385 (1998); Peter M. Agulnick and Heidi V. Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 TOURO INT'L L. REV. 93 (1998); Steven J. Heyman, *The Duty to Rescue: A Liberal-Communitarian Approach*, 7 RESPONSIVE COMMUNITY 43 (Summer, 1997); Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315 (1997); Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207; Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649 (1995); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994); Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J.L. REF. 439 (1994); Ben Zion Eliash, *To Leave or Not to Leave: The Good Samaritan in Jewish Law*, 38 ST. LOUIS L.J. 619 (1994); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L. Q. 1 (1993); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); 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; Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 8 J. LEGAL ED. 3 (1988); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Jay Silver, *The Duty to Rescue: A Reexamination*, 26 WM. AND MARY L. REV. 423 (1985); Mark K. Osbeck, *Bad Samaritanism and the Duty to Render Aid: A Proposal*, 19 U. MICH. J. L. REF. 315 (1985); Robert A. Prentice, *Expanding the Duty to Rescue*, 19 SUFFOLK U. L. REV. 15, 16 (1985); Martin B. Rosenberg, *The Case Against a Duty to Rescue*, 19 COLUM. J. L. & SOC. PROBS. 1 (1985); Robert J. Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983); A.D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983); Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698 (1986); James A. Henderson, *Process Constraints in Torts*, 67 CORNELL L. REV. 901 (1982); Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L. J. 551 (1980); Anthony D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 800 (1975); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972).

There are also numerous books that address the problem of non-rescue. See RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORE ON HIS

follow a consistent strategy of recounting the horrific details of a particular anecdote or two, and then offering vague generalities to the effect that the anecdotes illustrate a larger problem.¹² None

EIGHTEENTH BIRTHDAY (PETER CANE & JOHN GARDNER, EDS 2001); PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME* (1995); THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID (MICHAEL A. MENLOWE & ALEXANDER MCCALL SMITH, EDS. 1993); MARY ANN GLENDON, *RIGHTS TALK* (1991); MARSHALL S. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER & PUBLIC POLICY* (1977); *THE GOOD SAMARITAN AND THE LAW* (J.M. RATLIFF, ED 1964).

Finally, there are numerous articles published in non-law journals on the subject of rescue and the no-duty rule, and numerous law reviews that address the no-duty rule in passing. *See, e.g.*, Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 *Cornell L. Rev.* 583 (2003); Ronald C. Johnson, *Attributes of Persons Performing Acts of Heroism and of the Recipients of These Acts*, 12 *INSTITUTE FOR PSYCHOLOGICAL THERAPIES* (2002); Jean Peters-Baker, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 *UMKC L. Rev.* 1003 (1997); Stephen D. Sugarman, *Assumption of Risk*, 31 *VAL. U. L. REV.* 833 (1997); John L. Brown, *Statutory Immunity for Volunteer Physicians*, 1 *WIDENER L. SYMP. J.* 425 (1996); Alison McIntyre, *Guilty Bystanders: On the Legitimacy of Duty to Rescue Statutes*, 23 *PHIL. & PUB. AFF.* 157 (1994); Amy J. Fanzlaw, "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 (1994); Mark F. Anderson, *Encouraging Bone Marrow Transplants From Unrelated Donors: Some Proposed Solutions to a Pressing Social Problem*, 54 *U. PITT. L. REV.* 477 (1993); Patricia Smith, *The Duty to Rescue and the Slippery Slope Problem*, 16 *SOCIAL THEORY & PRAC.* 19 (1990), Mary Ann Glendon, *Does the United States Need 'Good Samaritan' laws? 1990/1991 RESPONSIVE COMMUNITY* 9; George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 *COLUM. L. REV.* 533 (1987); Susan Bandes, *The Negative Constitution: A Critique*, 88 *MICH. L. REV.* 2271 (1990);

¹² *See, e.g.*, Prentice, *supra* note 10, at 16 ("Unfortunately, horror stories like these occur with alarming frequency."); Hayden, *supra* note 10, at 27-28 ("Too many cases of onlooker apathy demonstrate that this country needs to enact 'good samaritan' statutes to encourage and remind people to do what they ought to feel obligated to do.") *But see* Adler, *supra* note 10, at 868, n. 6 ("Although cases involving one private individual's failure to engage in an effortless rescue do still arise, today they are relatively rare."); Glendon, *Rights Talk*, *supra* note 10, at 79 ("The Yania case was indeed bizarre, and fortunately such cases do not arise frequently. But there was nothing unusual about its legal outcome.") Other strategies include disclaiming the possibility of determining the frequency

explore the typicality of such anecdotes, or attempt to specify the frequency of non-rescue and rescue. For most commentators, the inevitable conclusion is that there is a problem with non-rescue, for which “there ought to be a law.”¹³ The willingness of average Americans to rescue one another is typically discounted or dismissed entirely. Attention is called to the moral superiority of the European countries which have adopted a duty to rescue.

As outlined in Part II, such strategies provide an insufficient factual basis for recommending “reform” of the no-duty rule. Instead, to even begin the analysis of the policy implications of the no-duty rule, it is necessary to develop a defensible frequency estimate for non-risky non-rescue (cell 1). Several strategies were employed to develop this estimate. The first step was to collect a dozen leading criminal and tort law textbooks, and identify every occasion in which an actual instance of non-actionable non-rescue was described. The second step involved a similar analysis of every law review article written about the no-duty rule during the 20th century. The analytical basis for this second step was the assumption that those criticizing the

of non-rescue or ignoring the issue entirely, and focusing on the philosophical and moral issues raised by the no-duty rule.

Predictably enough, similar strategies are employed in addressing practical objections to the duty to rescue; the typical response takes the form: “Europe can do it, why can’t we?” See Smith, *supra* note 10, at 19-20 (“From a practical standpoint it has been argued that such laws will cause insurmountable problems of evidence and enforcement. These arguments, however, are unpersuasive in face of the fact that many countries (for example, most of those in western Europe) have had Good Samaritan laws in operation for many years without noting any particular practical problems peculiar to them. . . the practical objections do not hold up.”); Eisenberg, *supra* note 10, at 685 (“It is hard to believe that civil-law countries would have persisted in maintaining a duty to rescue if the rule was unadministrable.”). This issue is addressed in greater detail *infra*.

¹³ Of the approximately 100 articles that have been written in the last century on the duty to rescue, the overwhelming majority supported the imposition of a generalized duty to assist. Almost without exception, all of these articles framed the duty in generalities (“easy rescue should be required), instead of offering specific statutory language.

current state of the law had every incentive to identify and describe every possible instance of non-rescue.¹⁴ Finally, Lexis and Westlaw searches were conducted of newspapers, magazine articles, and common law precedent for similar incidents. The study focused on the period 1994-2004, because more recent incidents are more likely to receive press coverage.¹⁵ Because the goal was to identify the frequency of non-rescues in situations where there was no duty to rescue, the analysis necessarily excluded all cases in which an exception to the no-duty rule applied (i.e. in which there was a statutory or common-law duty to rescue).

These search measures are likely to be under-inclusive for a variety of reasons.¹⁶ However, they nonetheless provide a collective picture of non-rescue that is more systematic than that resulting from the recounting of salient individual anecdotes. Table 1 presents the results of this analysis.

¹⁴ Professor George Stigler concisely defended the logic of a similar assumption regarding the non-existence of Giffen goods: How can we convince a skeptic that this ‘law of demand’ is really true of all consumers, all times, all commodities? . . . Perhaps as persuasive a proof as is readily summarized is this: If an economist were to *demonstrate* its failure in a particular market at a particular time, he would be assured of immortality, professionally speaking, and rapid promotion while still alive. Since most economists would not dislike either reward, we may assume that the total absence of exceptions is not from lack of trying to find them. George J. Stigler, *The Theory of Price* 23 (4th ed. 1987).

¹⁵ A similar analysis was performed for incidents of non-rescue that occurred during the period 1964-1993. An infamous case of non-rescue (Kitty Genovese) occurred in 1964, and the issue attracted more attention as a result. However, relatively few additional cases were identified during the thirty-year period in question (1964-1993). As such, the frequency estimate of non-rescue employed in the balance of the article is based on the past decade only.

¹⁶ See Part VII, *infra*.

Table 1						
#	Year	Last	First	Sex	State	Peril
1	1994	Levick	Joey	M	WA	Crime
2	1995	Word	Deletha	F	MI	Crime
3	1995	Vasquez	Gabriella	F	NY	Crime
4	1995	N/A		F	VA	Crime
5	1995	Gugel	David	M	AZ	Crime
6	1996	N/A		F	TX	Crime
7	1997	Iverson	Sherrice	F	NV	Crime
8	1998	N/A		F	MA	Crime
9	1998	Maarouf	Mostapha	M	CO	Crime
10	1998	N/A		F	NJ	Crime
11	1998	N/A		F	MA	Crime
12	1998	Collins	Anthony	M	WA	Drown
13	2000	Heisinger	Kevin	M	MI	Crime
14	2000	Morris	Charles	M	CA	Crime
15	2001	McCann	John	M	ME	Crime
16	2002	Viscome	Robert	M	NY	Crime
17	2003	Price	Allen	M	DC	Crime

Appendix A contains additional detail on each case of non-rescue. As Table 1 reflects, confirmable instances of non-rescue are actually an extraordinary rare event, occurring about 1.7 times per year in the entire United States during the past decade. 94% of the cases of non-rescue had their origins in criminal conduct by a third party. Women and men each accounted for 50% of the victims of non-rescue.

By way of comparison, Table 2 provides the annual death toll attributable to a range of causes.

CAUSE OF DEATH	ANNUAL DEATHS
All Accidents	100,000
Motor Vehicle Accidents	41,000
Drowning	8,000
Food-born Illness	5,000
Electrocution (Home)	1,000
Bicycle Accidents	800
Lightning	75
Bee Stings	50
Rabies	1-2

Although each and every actual case of non-risky non-rescue is tragic, the trivial magnitude of cell 1 makes it difficult to argue that non-risky non-rescue is actually a serious problem, even without considering the magnitude of cell 2 and cell 4 (the subject of Part IV) and the legal process difficulties of implementing a duty to rescue.

IV. Rescue: How Many and How Dangerous?

The obvious challenge to quantifying the frequency of non-risky rescue (cell 2) and risky rescue (cell 4) is identifying and securing the necessary data. As noted previously, prior commentators have focused on cell 1, disclaimed the possibility of quantifying cell 2, and ignored cell 4 entirely. Identifying individual rescues and obtaining sufficient information to confirm what actually happened presents numerous challenges. Rather than attempt to identify and confirm individual instances of risky and non-risky rescue, the analysis focused on identifying entities that give awards or recognition to individuals who perform rescues. This article describes approximately twenty different

entities that provided data on awards or recognition for civilian rescue. None of these data sources have been analyzed (and only one has ever been mentioned) in the vast literature on the duty to rescue.¹⁷

For varying periods during the 19th and 20th century, these entities recognized heroic and non-heroic lifesaving behavior by ordinary citizens. Some entities awarded certificates, others gave cash awards, others gave out medals, and some did all three. Each entity reviewed and investigated the underlying facts – some of them exhaustively -- before giving out their respective awards. Most of these entities provided sufficient access to their records to include them in the analysis. Detailed information on each of these entities is provided in appendix B.

Because there are multiple entities, each of which made individualized independent determinations whether to recognize a particular case of rescue using consistent standards over time, one can be reasonably confident that any observable patterns are not likely to be the result of random chance. At the same time, it is important to recognize that these results reflect actual and attempted rescues, which is not the same thing as “circumstances requiring rescue.” Thus, for example, one can use these data sources to determine how many rescues there were of people who were drowning, but not how often people who are drowning are rescued.

Aggregating the figures on rescue derived from these distinct sources creates some methodological problems. Each source uses its own definition of rescue and risk – a Silver Lifesaving Medal from the U.S. Coast Guard is not readily comparable to a Certificate of Merit from the American Red Cross.

¹⁷ Two previous articles on the duty to rescue briefly mentioned an article which appeared in a psychology journal, which analyzed one of these data sources. See Schwartz, *supra* note 10 and Jacob, *supra* note 10, both referencing Johnson, *supra* note 10. Another article mentioned the same data source in a single footnote. See Yeager, *supra* note 10, at 11, n. 51. None of these articles analyzed the underlying data at any length, let alone performed original empirical research.

Conduct that qualifies for a lifesaving medal from the Girl Scouts might not qualify for a medal from the Boy Scouts. Should rescue by quasi-professional rescuers and those with specialized training be combined with rescue by those who simply saw a need and “jumped in?” On the other hand, so long as the calculations are sufficiently transparent, readers who disagree with the analysis can do the math for themselves, and draw their own conclusions about the best estimate of the magnitude of cell 2 and cell 4. Table 3 summarizes the average annual awards granted by each of the entities described in Appendix B.

Table 3		
Organization	Non-Risky	Risky
AAA	7	
American Red Cross	200	
Bell	38	5
Boy Scouts	191	30
Carnegie	365	100
Com Ed	5	
Federal Gov't	39	43
Girl Scouts	17	5
Goodyear	15	5
Heimlich	15	
Kiwanis		15
LSBA		4
NALC	75	
State Gov't	11	43
TCA		13
U.S. Sailing		
Wireless	25	
Total	1003	263

As Table 3 reflects, there are approximately 1003 non-risky rescues (cell 2) and 263 risky rescues (cell 4) per year in the United States. Thus, verifiable rescues outnumber non-rescues by almost 800:1. If one loosens the standard for rescue only slightly, to encompass instances of rescue that were reported in a newspaper but did not pass initial screening by the Carnegie Hero Trust Commission, the ratio increases to approximately 1400:1.

Approximately 100 Americans lose their lives every year as a result of attempting to rescue someone else. Thus, even in the absence of a duty to rescue, deaths among rescuers outnumber deaths attributable to non-rescue by approximately 60:1 every year. Stated differently, there are six times as many rescuer deaths *every year* as there are deaths attributable to non-rescue *in the past ten years combined*.

Finally, injury is common among rescuers. Aggregate figures are unavailable, since most of the data sources did not separately track injury, but in those that did and as detailed below, a substantial percentage of risky-rescuers and a significant number of non-risky rescuers were injured – sometimes quite severely.

V. The Demographics of Rescue and Non-rescue

The demographics of rescue and non-rescue (including trends over time) provides additional insight into the accuracy of numerous assertions made by academic commentators on the no-duty rule. Part V focuses on whether the frequency of rescue has declined over the course of the 20th century, whether women or men are more likely to be rescuers and/or victims, whether women or men are more likely to rescue strangers, the class implications of rescue, and the risks associated with rescue.

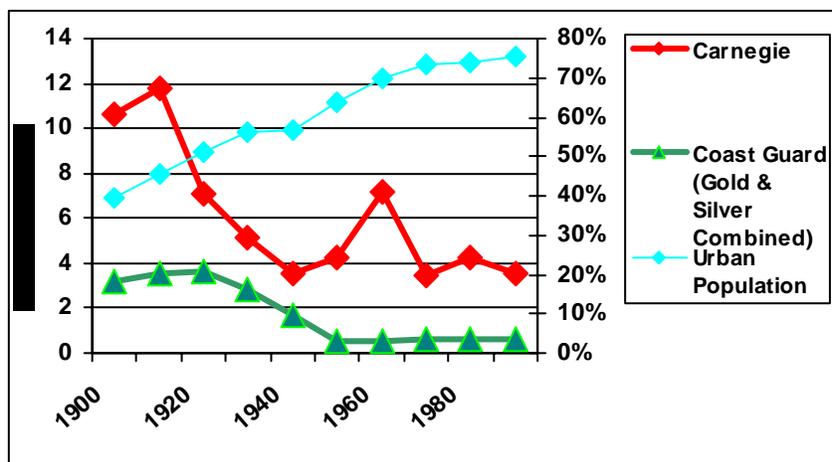
A. Temporal Trends in Rescue

The communitarian critique of the no-duty rule is that it reflects and reinforces the overly individualistic tendencies of

modern America.¹⁸ These tendencies are asserted to have become more pronounced with the rise of urbanization over the course of the 20th century, and emerged most forcefully since the late 1960s. The empirically falsifiable hypothesis that results from this critique is that rescue frequency should have declined over the course of the 20th century as urbanization increased, and the slope of decline should have increased in the past forty years.

The data outlined in Part IV make it possible to directly test this claim. Figures 2 and 3 presents the results for the three data sets which span most of the 20th Century. Figure 2 presents the results for the Carnegie and Coast Guard Awards, expressed in terms of awards per 10 million population per year, averaged over each decade.

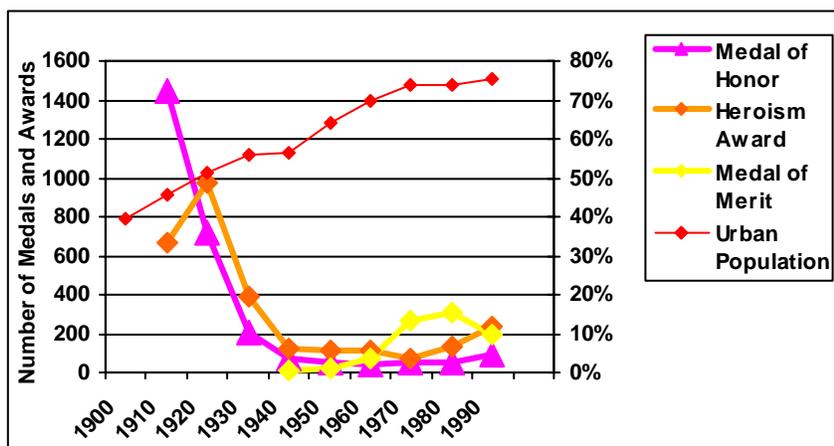
Figure 2



¹⁸ Heyman, *supra* note 10; Glendon, *supra* note 10; Ackerman *supra* note 10.

Figure 3 presents the results for the three awards made by the Boy Scouts, expressed in terms of awards per million Scouts per year, averaged over each decade.

Figure 3



As Figure 2 and 3 demonstrate, the results reported in this article are inconsistent with the claims made by communitarian scholars. Although rescues declined during the course of the 20th century, they did so in the first half of the century, and the number of rescues stabilized or even increased in the latter half of the 20th century – even though the urban population increased steadily throughout the period 1900-1980. There is also no evidence that the trends since the early 1970s are discontinuous with those in the 1950s and 1960s. Stated more directly, these results are inconsistent with the communitarian critique of the no-duty rule.

These results, however, point to a different problem: why is it that the frequency of rescue awards declined so precipitously over the period 1900-1940? The percentage of the population living in urban areas rose steadily over this period, but the decline in the number of rescues was far steeper. Possible explanations include a decline in the demand for civilian rescue (whether because professional rescuers were available in urban areas, or

because the population as a whole (whether in urban or rural areas or both) became more self-reliant and less in need of rescue), a decline in the supply of civilian rescuers, or a decline in willingness to report rescue. However, none of the reasons explain why rescue became more frequent during the period 1950-2000, as urbanization reached an all-time high. Research continues on this issue.

B. Gender and Rescue

One feminist scholar has asserted that the no-duty rule reflects a rule-based “male” perspective that ignores the interconnectedness of every human being.¹⁹ Another scholar has similarly asserted that the no-duty case law is a series of cases about “bad boys and bad men.”²⁰ The demographics of rescue and non-rescue cast some light on the extent to which gender figures in rescue and non-rescue. Table 1 demonstrates that a slight majority of the victims of non-rescue are female. In most of these cases, it was impossible to determine the gender of non-rescuers, or there was a crowd of bystanders composed of both men and women.

However, as Table 4 demonstrates, the overwhelming majority of rescues, both non-risky and risky are performed by men.

Organization	Male Rescuers
Red Cross COM	63%
Carnegie Non-Risky (News Reports)	77%
Carnegie Non-Risky (Reviewed)	87%
Carnegie Risky	91%

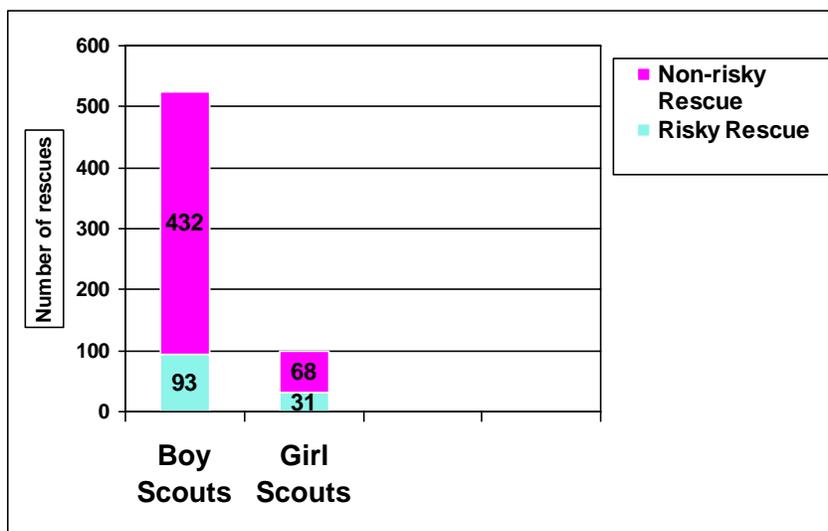
¹⁹ See Bender, *supra* note 10, at 580-581; Bender, *Primer*, *supra* note 10, at 33-36. See also McClain, *supra* note 10, at 1228-42.

²⁰ Lake, *Bad Boys*, *supra* note 10.

Coast Guard Lifesaving Medals (Risky)	98%
---------------------------------------	-----

Stated differently, when rescue is required, it is overwhelmingly men who rescue – particularly when the rescue is risky.²¹ Figure 4 offers particularly compelling evidence on this point, because the populations that are in the Boy Scouts and Girl Scouts are closely matched demographically (with the obvious exception of gender) and both organizations had comparable processes for reporting and recognizing rescues.²²

Figure 4: Rescues Per 10 Million Scouts



²¹ See also Hasen, *supra* note 10, at 149, notes 12-13 (reporting results of a small survey of 40 law students and 26 undergraduates regarding attitudes toward rescue, and finding men thought it much more likely they would be a rescuer than a victim (62:38) compared to women (48:52).)

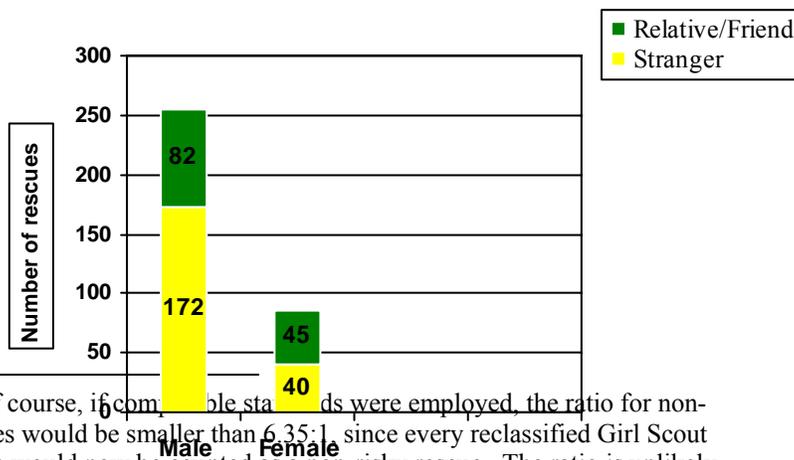
²² To be sure, the Boy Scouts had much more historical data available than the Girl Scouts. To correct for this fact, Figure 4 was calculated using results for the same time period for the Girl Scouts and Boy Scouts (1988-2002).

As Figure 4 reflects, Boy Scouts were responsible for 84% of total rescues, 86% of non-risky rescues, and 75% of risky rescues. Stated differently, when non-risky rescue was required, the rescuer was 6.35 times more likely to be male than female. If the rescue was risky, the rescuer was 3 times more likely to be a male.

These ratios are computed based on the assumption that the Boy Scouts and Girl Scouts had comparable standards for which conduct constituted a risky rescue. A qualitative assessment of news coverage of individual awards suggests that the Girl Scout Award for risky rescue generally involves a lesser degree of risk than is the case for the awards given by the Boy Scouts for risky rescue. This disparity in the standards means that the 3:1 ratio for awards for risky rescues probably understates the ratio that would result if comparable standards were employed.²³

Figures 5 and 6 cast light on the intersection between risk, rescue, gender, and whether the victim is a stranger or relative/friend, using data from Carnegie Awards.

Figure 5

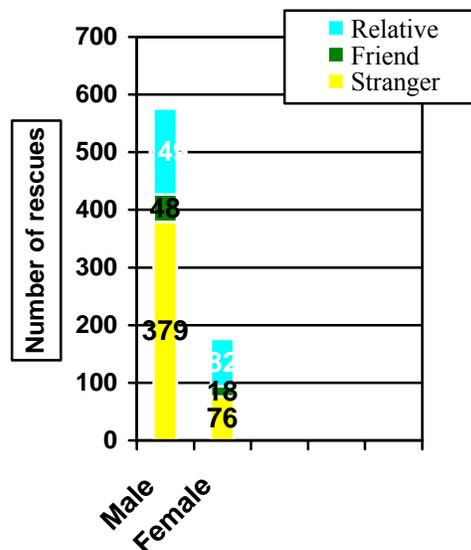


²³ Of course, if comparable standards were employed, the ratio for non-risky rescues would be smaller than 6.35:1, since every reclassified Girl Scout risky rescue would now be counted as a non-risky rescue. The ratio is unlikely to change very much, because the number of non-risky rescues is substantially larger than the number of potentially-reclassifiable risky rescues. Thus, if 10 of the rescues are reclassified, the ratios for risky rescues would increase to 4.9:1 (a 33% increase), and the ratio for non-risky rescues would only fall to 5.53 (a 13% decrease).

As Figure 5 reflects, of 212 risky rescues of strangers, 81% of rescuers were male. When relatives or friends were rescued in comparable circumstances, 58% of the rescuers were male – meaning that females were much more likely to rescue friends or family members than strangers. Stated differently, when males performed a risky rescue, it was to rescue a stranger 73% of the time. When females performed a risky rescue, it was to rescue a stranger only 47% of the time.

The point is further confirmed by Figure 6, which presents information from rescues that occurred in 2003 that were insufficiently risky to satisfy even a preliminary review for a Carnegie award.

Figure 6



As Figure 6 reflects, even with less risky rescues, men are still

responsible for a substantial majority (77%) of rescues, whether of relatives (65%), friends (74%), or strangers (83%). Conversely, women were much more likely to rescue relatives (35%) than friends/acquaintances (27%), or strangers (16%). These results indicate that it is actually women who are failing to satisfy the test enunciated by Professor Bender: “whether one acted out of a conscious care and concern for the safety, health, and well-being of the [stranger] victim in the way that one would act out of care for a neighbor or a friend.”²⁴

To be sure, these results are likely affected by access and opportunity. Men are more likely to work than women, and they are more likely to work in hazardous jobs – meaning that their opportunities to rescue (and to rescue strangers) are likely greater than woman. However, the rescuer gender imbalance has been quite stable throughout the entirety of the 20th century – even as female participation in the work force increased dramatically.

The fact that men are substantially more likely to rescue than women, particularly when strangers are rescued, does not directly affect a judgment as to whether a duty to rescue is sound public policy. It does, however, indicate that the status quo has substantial gendered consequences – and it seems likely that imposing a duty to rescue will replicate those consequences.

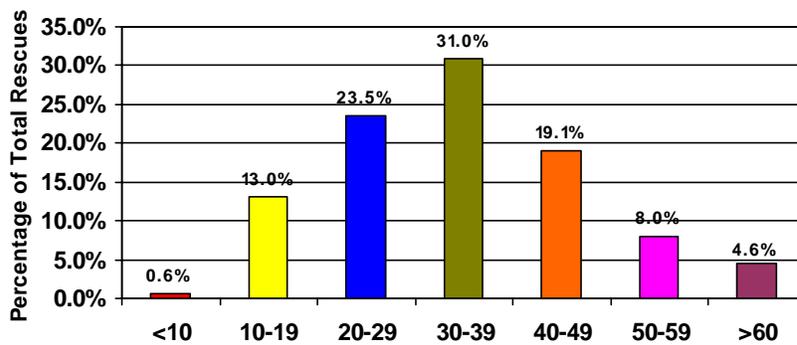
To summarize, the costs and risks of a duty to rescue are likely to be disproportionately borne by men. A duty to rescue might result in an increase in the absolute and relative number of rescues performed by females, but that result seems improbable, given the extent to which subjectively perceived risk will figure in determining whether a particular rescue is non-risky. Research studies indicate women are less prone to risky behavior than men, in part because they subjectively assess the risks to be much higher than men do. Enforcement decisions in cases of non-rescue are likely to track this dynamic, meaning that non-rescue by a male is likely to be judged much more harshly than non-rescue by a female.

²⁴ Bender, *Primer*, *supra* note 10, at 36.

C. Age and Rescue

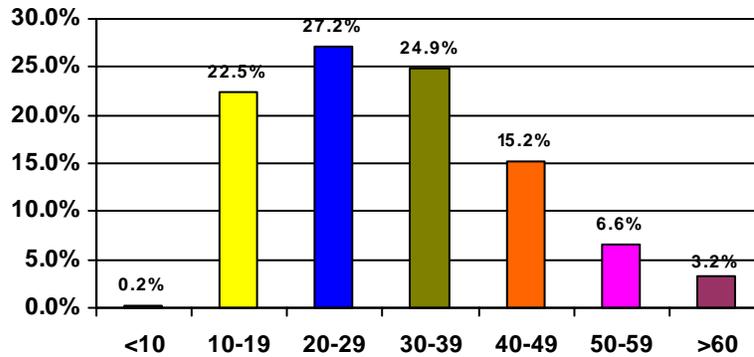
Rescuers are found in every age range – some as young as 5, and others as old as 88. However, as Figure 7 reflects, a disproportionate number of non-risky rescues are performed by individuals between the ages of 20 and 49.

Figure 7 Non-Risky Rescuer Age Distribution
Carnegie Data: 1991-2001 (3559 rescues)



Similarly, as Figure 8 reflects, a disproportionate number of risky rescues are performed by individuals between the ages of 10 and 39.

Figure 8 Risky Rescuer Age Distribution
Carnegie Data: 1991-2001 (100* rescues)



The largest disparity between the age distribution of rescuers and their percentage in the population was for individuals in their 30s

for non-risky rescues, and individuals in their 20s for risky rescues. Thus, non-risky rescues are disproportionately a “young person’s game,” and risky rescues even more so. Of course, access and opportunity also figure in the age distribution of rescuers. For example, traffic accidents tend to draw rescuers from the ranks of other drivers, who are, by definition, at least 16 years old.

D. Class and Rescue

Risky rescue appears to have some class-based distributional implications. A disproportionate number of Carnegie Awards are given to rescuers from small towns and rural areas.²⁵ This over-representation could be because professional rescuers perform more of the rescues in larger towns and cities (substitution effect), because rescue in small towns and rural areas is more likely to be reported to the award sponsors (selection effect), because residents of small towns and rural areas are more likely to perform a rescue, or because more people in small towns and rural areas need to be rescued (base rate effects). It is impossible to differentiate among these possibilities with the available data. Research on this issue continues.

A disproportionate number of Carnegie Awards recipients are individuals with relatively low status and/or unskilled occupations. Interestingly, one risky rescuer expressed class-based solidarity with the person he rescued, stating “I knew there was a good chance I could be electrocuted too. . . He was on fire. But I’m not going to let a working man burn to death in front of me.”²⁶

E. Risk and Rescue

²⁵ See Johnson, *supra* note 10.

²⁶ See Deborah Mendenhall, *Survivor’s Story*, PITTSBURGH POST GAZETTE, Jan. 22, 2002, at B1 (noting rescue in which firefighters and police did not intervene because they thought boom on which victim was burning to death was “hot,” and quoting truck driver who stopped his truck in the middle of traffic and crawled out on boom with a fire extinguisher). I am indebted to John Singer for bringing this case to my attention.

Many rescues involve a range of risks – not all of which are necessarily obvious to potential rescuers. Rescuers can be injured or killed, either by the peril that necessitates the rescue, or in some instances by a completely unrelated risk. These risks are not trivial – 13% of Carnegie Award nominees and 16% of Carnegie Award recipients died.²⁷ Fully 50% of Carnegie Award recipients were injured in the rescue. This group of rescuers is admittedly highly pre-selected for risky rescues, but the rate of injury (ranging from scrapes and minor burns up to severe injury) among rescuers who did not even satisfy the preliminary review for a Carnegie award was 80%. Media accounts of risky rescues often highlight those in which the rescuers were injured or killed.²⁸ On occasion,

²⁷ The risk required to obtain a Carnegie Award is demonstrated by the title of a book that recounts the heroism of particular rescuers. JACK MARKOWITZ, *A WALK ON THE CRUST OF HELL* (1973)

²⁸ Aron Kahn, *Good Samaritans: Why They Heed Cries for Help*, CHICAGO TRIBUNE, July 7, 1985, at 3 (noting case in which rescuer was stabbed five times and suffered nerve damage); VCU Health System, For Your Health, *A Heroes Tale*, <http://www.vcuhealth.org/news.asp?newsID=180&pubID=3> (noting case of Federal Express driver who suffered severe burns rescuing a woman from a house fire); *Fort Worth sued over tourists' drownings in water park*, HOUSTON CHRONICLE, Sep. 9, 2003 (noting death of four Chicago tourists; “witnesses said one of the girls slipped and the others died trying to rescue her.”); Elaine D’Aurizio, *What Makes Heroes Refuse to Run?*, BERGEN RECORD, Dec. 15, 1996, at N01 (noting case of rescuer who was beaten to death); Lee Anderson, *Good Samaritanism Here*, CHATTANOOGA FREE PRESS, July 3, 1998, at A6 (noting case of rescuer beaten unconscious with a concrete block); Patrick O’Driscoll, *Bystanders Silence Resounds Denver shocked by failure to call police during murder*, USA TODAY, March 31, 1998, at 3A (noting case of rescuer paralyzed by bullet); *High Cost of Heroism*, SEATTLE TIMES, March 21, 1994, at B4 (noting case of rescuer shot and killed by original assailant’s boyfriend); *Man is fatally stabbed while trying to aid woman*, BALT. SUN, Mar. 10, 2003, at 3B (“A good Samaritan going to the aid of a woman being assaulted by her boyfriend. . . was fatally stabbed by the man.”); Jay Apperson, *Family, friends mourn student*, BALT. SUN, May 22, 2000, at B1 (student who chased purse-snatcher was stabbed and killed); *Good Samaritan killed, 2nd injured in Indianapolis*, BALT. SUN, Dec. 24, 2003 at 2A (noting case in which individual who stopped to help someone else change tire on interstate struck and killed by hit and run driver, and another individual who stopped to help was struck by another hit and run driver and injured); Dono Babwin, *Boy, 6, Critical After*

willingness to rescue goes beyond heroism into outright stupidity.²⁹ In lifesaving circles it is a truism that an untrained rescuer should never go into the water to rescue a drowning person, because the result is likely to be two (or more) dead people, instead of just one.³⁰

An unappreciated risk of encouraging voluntary rescue is that the situation may be a trap. There are a number of cases of criminals pretending to be in need of assistance, only to turn on the Good Samaritans who stop to help them.³¹

Saving Girl's Life, NEWSDAY, June 10, 2004; *N. Va. Teacher Drowns in Ocean City*, WASH. POST, Nov. 7, 2003, at B3 (noting would-be rescuer had to be rescued); Mayna A. Bracher & John Biemer, *4 drown, 3 missing in Lake Michigan*, CHICAGO TRIBUNE, July 6, 2003, at 1 (noting death of 3 swimmers (2 attempted rescuers and one original victim); Tim Heffernan, *That Masked Man*, BOSTON COLLEGE MAG., Summer 2002 (noting case of equities trader who died in collapse of World Trade Center after rescuing twelve people from the 78th floor Sky Lobby of South tower); Leslie Berestein, *Man Shot to Death As He Chases Suspect in Purse Snatching*, ORANGE COUNTY REG., July 8, 1996, at B3; Nancy Kruh, *We're No Heroes: People Who Intervened in Violent Crimes Tell Why They Did It*, DALLAS MORNING NEWS, July 14, 1996, at 1F.

²⁹ See LEE H. WHITTLESEY, *DEATH IN YELLOWSTONE: ACCIDENTS AND FOOLHARDINESS IN THE FIRST NATIONAL PARK* (1995) (recounting case of man who dived into a hot spring to try and save his friend's dog, suffering third degree burns over 100% of his body, and dying the next day).

³⁰ See, e.g. Clemson University, General Water Safety, http://virtual.clemson.edu/groups/FieldOps/CGS/water_s2.htm, (Someone is drowning! What should I do? The first reaction for most people is to jump in and try to save the person. This is WRONG. NEVER do this unless you have taken a course in Lifesaving. . . In many water accidents each year both the rescuer and the drowning person drown. What happens? The rescuer swims out to the drowning person, who is scared that he/she grabs at anything close by - usually the rescuer's head. Without proper lifesaving training, the rescuer and the drowning person panic (lose control) and both drown. NEVER try to make a swimming rescue without proper lifesaving training.")

³¹ Susan Gilmore, *Is Being Good Samaritan Worth Risk?*, SEATTLE TIMES, March 20, 1994, at B1 (noting case of real estate broker who was shot and killed after stopping to help two stranded motorists); Michael A. Barber, *Would-Be Helper Gets Acid in Face*, SEATTLE POST-INTELLIGENCER, Jan. 19, 1990, at B1 (noting case of Good Samaritan who had acid thrown in his face when he stopped to assist; "The police officer who came to help told me that nowadays you should never stop to help out like that. Just go by and go to a phone booth

The risk of civil litigation against a rescuer has been largely obviated by the enactment of Good Samaritan statutes by all fifty states, but there appears to be a perception that there are significant legal risks to potential rescuers.³² One risk is the possibility of arrest (and even criminal prosecution) if the rescuer's intentions are misperceived or excessive force is employed in the rescue.³³ In one recent case, second-degree murder charges were brought against a Tennessee man who used lethal force against an individual that had attacked the woman who ran the business next

and phone 911.”); *Conn. Hero Rewarded*, *NEWSDAY* (New York), Dec. 27, 1990, at 14 (rescuer who jumped into icy pond to save motorist robbed of \$370 and jacket while in water); Kathy Fair, “*Good Samaritan*” killer faces almost certain execution, *HOUSTON CHRON.* July 1, 1993, at A26 (recounting murder of Good Samaritan by those he stopped to assist). See also Julie Bykowitz, *Man, 32, charged in theft of pickup at I-95 accident*, *BALT. SUN.*, May 10, 2003, at B2 (noting theft of truck belonging to individual who stopped to assist at an accident by individual who had caused the accident); George Watson, *A Risk for Good Samaritans: People may want to help others in danger, but they often put their own lives in peril*, *PRESS ENTERPRISE*, Sep. 7, 2001, at B1.

³² Editorial, *A Sad Twist on the Tale of the Good Samaritan*, *SEATTLE TIMES*, Nov. 25, 1998, at B4 (“Move over Good Samaritan. In the 1990s version of the parable used to teach children the value of compassion, darker specters dominate: the Sued Samaritan and the Jailed Samaritan. Reports across the country tell sad tales of bystanders who want to help the lost child or stranded commuter, but are paralyzed by fear. What if they mistake me for a kidnapper and I end up behind bars? What if I scratch the car and end up in Court?”)

³³ Marta W. Aldrich, *Weighing Risk vs. Rescue*, *LAS VEGAS REV.-J.* Nov. 22, 1998, at 23A (noting case of man who stopped van to keep a toddler from playing in the street, and was arrested for attempted abduction and “had to hire an attorney and spend a day convincing investigators he wasn’t a criminal.”); Linnet Myers, *Violent Rescue Spurs Question of Justice: Did Women’s Neighbors Go Too Far*, *CHI. TRIBUNE*, May 31, 1991, at 1 (noting case in which bystanders intervened to stop beating of pregnant woman, but severely beat aggressor, forcing law enforcement personnel to decide whether to file charges against rescuers); Phillip Burton, *What’s a Cop’s Off-Duty Duty? The Chilling Message of a Rockville Case: Don’t Get Involved*, *WASH. POST*, Dec. 11, 1988, at C5 (off-duty policeman facing assault charges for intervening in what he thought was a rape).

to his.³⁴ The case was ultimately resolved with a plea agreement of voluntary manslaughter and a sentence of probation and community service, but the defendant was forced to turn to the general public for assistance in funding his defense.³⁵ Even though such cases are considerably rarer than non-rescues, they are likely to have a disproportionate adverse impact on the willingness of potential rescuers to get involved.

Thus, individuals who choose to “get involved” in a rescue face a significant risk of injury or death. The academic focus on the plight of the victims of non-rescue has overlooked the far more frequent problem of injured and dead rescuers – and the no-duty rule leaves many of them without significant recourse or remedy.

F. Sources of Peril

Law school textbooks typically illustrate the no-duty rule with criminal cases involving child abuse or domestic violence, and tort cases involving drowning. However, rescue is required (and occurs) in a far wider range of circumstances. For example, in rescues that did not pass an initial screening by the Carnegie Commission, the five most frequent circumstances in which rescue occurred were fire (45%), drowning (22%), accidents (16%), crimes (9%), and animal attack (4%). Among Carnegie Award recipients, the five most frequent causes of rescue are drowning (37%), fire (20%), falling through ice (9.5%), suffocation (9.4%), and motor vehicle accidents (7.1%). Carnegie Award recipients who died were most likely to be engaged in the rescue of a drowning victim (33% of such cases resulted in death), victim of a criminal assault (16% of such cases resulted in death) or fire (6% of such cases resulted in death).

Obviously, all of these circumstances are likely to prove as perilous to the rescuer as to the victim. Stated more bluntly, the

³⁴ See Matthew Gilbert, *Jury Must Decide Whether Nashville Man is Good Samaritan or Murderer*, <http://archives.cnn.com/2002/LAW/08/26/ctv.martin/>; Wayne Martin Defense Narrative, <http://www.waynesdefense.com>.

³⁵ Sheila Burke, *Man Who Killed Robber in '01 Fatally Shot in Holdup Attempt*, <http://www.tennessean.com/local/archives/03/10/40253117.shtml>.

avored non-rescue hypothetical of law professors (a toddler drowning in the shallow end of the swimming pool as an Olympian swimmer watches with indifference) bears no relationship to the actual circumstances under which rescue is required (and occurs) in the real world, let alone the circumstances in which rescue does not occur.³⁶

VI. A Tale of Three States

Three states have enacted statutory duties to rescue: Vermont,³⁷ Rhode Island,³⁸ and Minnesota.³⁹ Vermont and Rhode Island require individuals to perform non-risky rescues; Minnesota requires individuals to either perform the non-risky rescue, or provide notice of the problem to police or rescue personnel. One

³⁶ See Glendon, *supra* note 10, at 10 (“Generations of first-year law students have been initiated into a supposed distinction between acts and omissions through one or another variant of the following hypothetical case: An Olympic swimmer out for a stroll walks by a swimming pool and sees an adorable toddler drowning in the shallow end. He could easily save her with no risk to himself, but instead he pulls up a chair and looks on as she perishes.”); Ruth Marcus, *Why Alleged Onlookers to Rape Cannot be Charged; Under Virginia, Maryland and D.C. law, Standing By and Watching is No Crime*, Nov. 16, 1984, at D1 (same).

³⁷ 12 Vt. Stat. Ann. § 519 (“[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.”) Individuals who willfully violate this obligation may be fined not more than \$100. *Id.*

³⁸ R.I. Stat. §§ 11-1-5.1, 11-56-1 (“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 or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person.”) Violation is a petty misdemeanor, punishable by no more than six months imprisonment or a \$500 fine, or both.

³⁹ Minn. Stat. Ann. § 604A.01 (“A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel.”) Violation is a petty misdemeanor.

other state (Wisconsin) has a statute that requires persons present at the scene of a crime to either report the incident to the police, or to assist the crime victim.⁴⁰ Several other states have imposed limited duties to report crimes, and every state requires drivers involved in an accident to stay at the scene and report it to law enforcement personnel.⁴¹ There have been unsuccessful attempts to impose a duty to report criminal conduct at both the state and federal levels.⁴²

The fact that three states have enacted such laws creates a natural experiment for testing some of the assertions made by academic commentators on the no-duty rule. For example, law & economics scholars have asserted that imposing a duty to rescue will lead potential rescuers to avoid locations where they are likely to be forced to rescue – meaning that the number of rescues is likely to decline, and the number of accidental deaths is likely to

⁴⁰ Wisc. Stat. Ann. § 940.34. (“Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.”) The statute goes on to note that compliance is not necessary if it would place the individual in danger, interfere with duties owed to others, assistance is being summoned or provided by others, or the crime has already been reported by others.

⁴¹ See Mass. Gen. Laws Ann. ch. 268, § 40 (“Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable”); Haw. Rev. Stat. § 663-1.6 (applying to all crimes in which the victim suffers “serious physical harm”); Ohio Rev. Code § 2921.22 (“No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities”); Fla. Stat. Ann. ch. 794.027; Mass. Gen. Laws Ann. ch. 269, § 18; Rev. Code Wash. Ann. § 9.69.100(1)(c);

⁴² See 105 H.R. 4531, 105 S. 2452, 105th Cong., 2nd Sess. (Sept. 14, 1998) (proposing that federal funds be withdrawn from any state that doesn’t impose a duty to report on people who witness sexual abuse of a child); 1998 N.J. A.B. 2517 (Oct. 5, 1998) (proposing more general duty to report). See also Earl Ofari Hutchinson, *Protecting Children Always a Good Cause*, L.A. TIMES, Sept. 6, 1998, at M5 (describing bills in California and Nevada to impose a duty to report on people who witness assault against a child).

increase.⁴³ Conversely, social meaning scholars have asserted that imposing a duty to rescue will have an expressive effect even if the laws are un-enforced – meaning that the number of rescues is likely to increase and the number of accidental deaths is likely to decline. Critics of the duty to rescue have also asserted that such laws are likely to be misused by politically ambitious prosecutors, and extended to impose broader obligations of assistance.⁴⁴ With almost 80 years of experience with these laws in three states (Vermont (37 years), Rhode Island (20 years) and Minnesota (21 years)) it is possible to begin an assessment of these competing claims.

The starting point for analysis is that there were no reports of non-risky non-rescues in these three states prior to enactment of their respective statutes. In Vermont, the statute was enacted in response to a campaign by physicians to obtain immunity if they stopped to assist at the site of an accident. The bill was broadened while in committee to cover everyone who stopped to assist, and the legislators apparently reasoned that as long as people had immunity for assisting, they ought to provide assistance to those in need, and they imposed the duty to rescue found in the current statute.⁴⁵ In Rhode Island and Minnesota, the statutes were enacted in response to a case in New Bedford, Massachusetts

⁴³ Ian Ayres, *A Theoretical Fox Meets Empirical Hedgehogs: Competing Approaches to Accident Economics*, 82 *Northwestern L. Rev.* 837, 841 (1988) ([Posner and Landes] “argue that imposing liability on potential rescuers will cause them to avoid activities in which they might encounter a duty to rescue – so that there might actually be less rescuing if liability is imposed. . . . The assumption that potential rescuers will be motivated by the potential of liability to change their behavior indicates that they would fail to rescue if they came upon a victim and there was no threat of liability.”)

⁴⁴ There is evidence from France that these statutes are frequently used for cases that bear little resemblance to the paradigmatic conduct that is generally used to justify such statutes. See Tomlinson, *supra* note 10. The unsavory origins of the French statute should also be acknowledged. The statute was enacted by the Vichy government to provide a basis for punishing French citizen-bystanders who refused to assist German soldiers when they were ambushed by the resistance.

⁴⁵ Franklin, *supra* note 10.

where a woman was raped in a bar, and onlookers could not be prosecuted for not calling the police.⁴⁶

Since these statutes were enacted, there have been no reported accounts of criminal enforcement of these statutes, or of non-risky non-rescues in those three states. There have been a handful of civil and one criminal case in which these statutes were implicated, but none of them involved anything like a prototypical instance of non-rescue.⁴⁷ If these statutes are being misused by politically ambitious prosecutors, it has happened without a whisper of complaint.

Data from the Carnegie Hero Trust Commission on the frequency of non-risky rescues provides a more systematic perspective on the issue. Table 5 calculates the average number of non-risky rescues per year per 100,000 population in Minnesota and Rhode Island, both pre-enactment and post-enactment.⁴⁸

Table 5					
State	Pre-enact	Post-enact	Increase	z value	p value
MN	0.056	0.072	0.017	0.964	
R.I.	0.045	0.134	0.088	1.79	

As Table 5 reflects, although there was increase in non-risky rescues in both states, the increase was not statistically

⁴⁶ The incident was subsequently made into a movie, *The Accused*.

⁴⁷ See, e.g., *State v. Joyce*, 433 A.2d 271, 273 (1981) (criminal defendant tries to use Vermont statute offensively, arguing his beating of his son can not constitute a crime, because bystanders would have been obligated to intervene if his son was actually in peril). See also Nancy Benac, *'Good Samaritan' Obligations in America are very different*, CHATTANOOGA TIMES, Sep. 5, 1997, at F1 (noting case involving Wisconsin statute).

⁴⁸ The average was calculated for the thirteen (fourteen) years preceding enactment and the eighteen (seventeen) years post-enactment for Minnesota and Rhode Island, respectively. The year in which the statute was enacted (1983 and 1984, respectively), was excluded from consideration. Unfortunately, Carnegie records did not begin indicating the state in which a rescue occurred until 1969, which was after Vermont enacted its duty to rescue. As such, it is impossible to perform a comparable analysis for Vermont.

significant in either state. Table 6 similarly calculates a blended average accidental death rate per 100,000 population in Rhode Island, Minnesota, and the other 48 states, both pre-enactment and post-enactment.⁴⁹

State	Pre-enact	Post-enact	Decrease	S.D
MN	43.64	35.5	8.14	N/A
48 states	49.78	41.38	8.4	5.83
RI	30.97	29.92	1.05	N/A
48 states	48.61	41.30	7.31	5.71

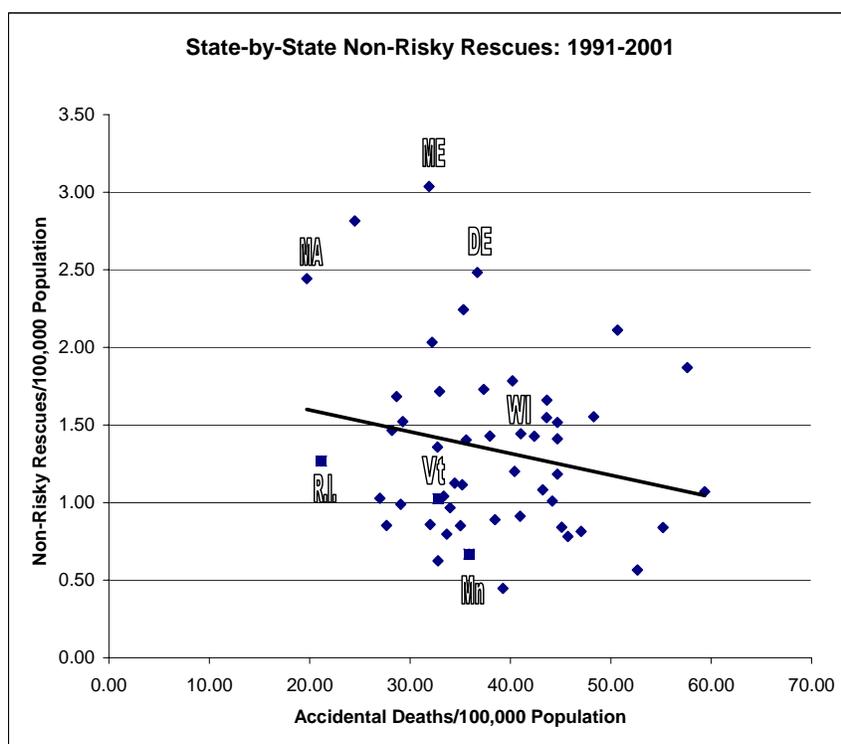
As Table 6 reflects, although per capita accidental deaths declined in Minnesota and Rhode Island during the time periods in question, they also declined in the 48 states that did not enact a duty to rescue. In Rhode Island, the decline in per capita accidental deaths (1.05 deaths per 100,000 population) was less than the mean decline in the other 48 states (7.31 deaths per 100,000 population), but the variance in the other 48 states was substantial, with a standard deviation of 5.71. Per capita accidental death rates in three states (Arkansas, Delaware, and South Carolina) had smaller changes than in Rhode Island, with the death rate actually increasing in two of those states (Arkansas and Delaware). Finally, there is a “floor effect” to be considered – Rhode Island had the lowest accidental death rate in the nation pre-enactment

⁴⁹ The average was calculated for the five (six) years preceding enactment and the six (five) years post-enactment for Minnesota and Rhode Island, respectively. The year in which the statute was enacted (1983 and 1984, respectively), was excluded from consideration.

(and the 2nd lowest post-enactment), so there was effectively little room for improvement in the accidental death rate.

Figure 9 displays the annual number of non-risky rescues per 100,000 population in all 50 states for the period 1991-2001, plotted against the number of accidental deaths per 100,000 population in each state.

Figure 9



Interestingly, the three states that have enacted a duty to rescue have fewer non-risky rescues per 100,000 population than is the average for all states – particularly those that are geographically proximate with comparable numbers of accidental deaths.

Of course, state-by-state examination of the rate of accidental death is a decidedly indirect and imperfect way of assessing the potential impact of imposing a duty to rescue. If the rate of non-rescue is small, even a substantial increase in the probability of rescue is unlikely to show up in the accidental death statistics. On the other hand, this response concedes the rarity of non-rescues, making it difficult to see what is left to argue about from a social policy perspective.

To summarize, enacting a duty to rescue does not appear to materially increase the number of non-risky rescues or lower the number of accidental deaths – most likely because there were no non-risky non-rescues in those states to begin with. At the same time, the number of non-risky rescues did not go down and the number of accidental deaths did not go up, either. Thus, the predictions of social meaning scholars (likely increase in rescues, and decrease in accidental deaths) and law and economics (likely decrease in rescues, and increase in accidental deaths) are both inconsistent with the results of this analysis. Stated bluntly, the available data provides no indication that imposing a duty to rescue has any effect whatsoever.

VII. Validity of the Results

The obvious objection to the results presented in Parts III-VI is validity. Relying on reported incidents to identify rescues and non-rescues creates an obvious problem of selection bias. The selection bias is compounded by its asymmetry: Part IV identifies numerous entities that recognize rescue, but no comparable entities exist to recognize non-rescue. Selection bias can also work in both directions: one has to be concerned about under-identifying and over-identifying both non-rescue and rescue. Finally, there is the

problem of representativeness. Each of these issues is considered in turn.

A. Selection Bias: Under-reporting of Non-rescue

The problem of selection bias leading to under-reporting of non-rescues is fairly straightforward. If there were no witnesses and the non-rescuer kept his mouth shut, or any witnesses also kept their mouths shut, such non-risky non-rescues would never become known to the public. Alternatively, even if cases of non-risky non-rescue become known to the public, the strategies employed to identify such cases may have missed them. For example, if prior scholarship, case law, and news media accounts did not identify such cases, if the search terms employed were unduly restrictive, if media accounts simply did not provide sufficient detail, or if the relevant sources were not included in Lexis and Westlaw, they would not be counted as a non-risky non-rescue.

Subjective beliefs and community expectations matter as well in assessing the problem of underreporting of non-rescue. A person who does not perceive that a rescue is necessary or views the rescue as unnecessarily risky will not believe their inaction constitutes a non-risky non-rescue. Some concrete cases help illustrate the point. Does the failure to call police or personally intervene in response to the sounds of an argument count as a non-rescue? What about the failure to call police or personally intervene in response to a scream coming from a dark alley or the house next door? Does the answer vary depending on the crime rate in the neighborhood, and the number of individuals on the street? Does the answer vary depending on the size and strength of the potential rescuer?

These problems are compounded by the reporting asymmetry noted previously; there is no Seinfeld Award for Craven Non-Rescue.⁵⁰ To summarize, it is certainly possible that

⁵⁰ In the final episode of Seinfeld, the four main characters witnessed a carjacking and made fun of the victim for being fat. <http://www.seinfeldscripts.com/TheFinale.htm>. They were charged with violating a statute that required people to help or assist anyone in danger as long as it was reasonable to do so. The episode took place in New Hampshire, which

particular instances of non-rescue never became publicly known, or fell outside the search methodology outlined in Part III. Such instances of non-rescue cannot be quantified.

B. Selection Bias: Over-reporting of Non-rescues

Non-rescues can also be over-reported, in that circumstances that are not actually non-rescues are deemed a non-rescue. Several of the instances of non-risky non-rescue in Table 1 are questionable, either because it is far from clear they actually occurred, or because preliminary reports that bystanders did nothing were false (Cases 3 and 11), or because the victim was dead and nothing could have been done to assist him (Case 17). A related problem involves assessing the risk of the non-rescue. An overwhelming majority of the cases of non-rescue identified in Table 1 involve criminal conduct, where direct intervention is likely to be dangerous.⁵¹ A strict interpretation of non-risky non-rescue would result in a far smaller number of verifiable non-risky non-rescues.

A final complexity in assessing over-reporting of non-rescues is determining the minimum amount of time that must pass before the failure to assist counts as a non-rescue. For example, according to press accounts, the case of Kitty Genovese involved a delay of approximately 30 minutes, but Case 15 involved a delay of less than a minute, and Case 17 involved a delay of 2-3 minutes. Reasonable people could readily disagree about whether these latter cases constitute non-rescues – particularly given their facts.

does not actually have a duty to rescue. Professor Paul Mahoney suggested, in the alternative, the “Selfish Bastard’s Club.” Personal communication from Paul Mahoney, January 8, 2003.

⁵¹ See *supra* Table 1, *supra*. See also *State v. Joyce*, 433 A.2d 271, 273 (1981) (noting that there is no duty to intervene in a fight since “such a situation must present the ‘danger or peril’ to the rescuer which under the statute prevents a duty from arising.”); Tatsha Robertson, *The Bystanders Dilemma: When to Stand Back, When to Assist*, *Boston Globe*, Jan 21, 2001, at A1 (“it is often wiser to call the police instead of jumping into the fray, since that may save a life rather than raise the body count, said Portland Police Chief Michael Chitwood.”)

C. Selection Bias: Under-reporting of Rescues

The search methodology employed in Part V is likely to miss many rescues. The totals reported in this study only include award-granting entities for which sufficient historical and background information was available. Numerous additional entities were identified that give out such awards, but were excluded from the analysis because they refused access to their records, or insufficient information was available to ensure reliability of the results. If these awards issued by these organizations were included, the number of verifiable non-risky rescues would be substantially higher, with a more modest increase in the number of verifiable risky rescues.

In like fashion, the totals reported in Table 3 exclude numerous rescues that did not meet the selection criteria of award-granting entities. For example, as detailed in Appendix B, Carnegie Commission staff perform an initial screening of newspaper stories they receive from a clipping service, and exclude cases that do not come close to meeting their standards for risk. Such incidents total approximately 750 additional rescues per year.

An additional source of under-reporting of rescue is that a variety of forms of conduct that might qualify as a non-risky non-rescue (e.g., stopping someone from stepping out into traffic, calling 911 after witnessing an auto accident, stopping a toddler from wandering away from an inattentive parent) are sufficiently trivial that no one would think they deserved an award for doing so. For example, although awards were given by the Heimlich Institute and various employers to individuals that performed the Heimlich maneuver on a choking person, there is considerable evidence that hundreds of these incidents occur every year, but are never recognized with an award.⁵²

⁵² A lexis search of “Heimlich Maneuver and choking” in the News, Most Recent Two Years (English, Full Text) database found 707 results, or 353 per year. Not all of these reports involved U.S. newspapers, incidents in which the

Under-reporting of rescue is also compounded by the reluctance of many rescuers to be recognized for their actions. News accounts of risky rescues indicate that many rescuers shun the spotlight. Such reluctance to seek recognition is presumably even more pronounced with conduct that constitutes a non-risky rescue. For all of these reasons, it seems probable that many instances of rescue never became known, and accordingly could not be identified using the strategies outlined in Part III. Such instances of rescue cannot be quantified.

Finally, it is important to recognize that a focus on awards and documented rescues necessarily excludes a broad range of conduct where individuals voluntarily provide assistance to one another, or are prepared to do so. Millions of Americans are volunteer firefighters,⁵³ participate in search-and-rescue teams, belong to the Coast Guard auxiliary,⁵⁴ volunteer to participate in disaster relief for the American Red Cross, donate blood, have been screened to be a blood stem cell donor,⁵⁵ assist in providing police services,⁵⁶ and the like. Millions more have voluntarily received training in first aid and lifesaving. Such conduct may not receive public recognition and awards, but a fair picture of the behavior of ordinary Americans should take account of such conduct.

D. Selection Bias: Over-reporting of Rescues

Although over-reporting of rescues is possible, it is unlikely to be a significant problem given the methodology employed in this study. The process for nominating and investigating rescues before awards are made (and the large number of individuals that were turned down for certain awards)

Heimlich maneuver was performed, or instances in which the Heimlich maneuver was performed in the United States.

⁵³ www.nvfc.org

⁵⁴ The Coast Guard auxiliary has more than 35,000 members, who volunteer more than 2 million hours per year. <http://www.cgaux.org/>

⁵⁵ http://www.marlow.org/NMDP/about_nmdp_idx.html

⁵⁶ Volunteers in Police Services, <http://www.policevolunteers.org/> (noting that almost 70,000 individuals have registered with VIPS).

makes it relatively unlikely that there is a serious problem with over-reporting.⁵⁷ Indeed, a conservative estimate is that the analysis excluded several thousand reported rescues each year, because of inadequate documentation.

There is the possibility of “double-counting” rescues, because the same conduct can qualify for multiple awards. Thus, a member of the Boy Scouts who used Red Cross training to save a life could receive awards from both the Red Cross and the Boy Scouts. Although such double-counting is possible, the underlying documentation that was reviewed indicates that it is exceedingly rare, and unlikely to involve more than a handful of rescues per year.

E. Summary

Selection bias complicates interpretation of the results presented in this article. It is likely that there is under-reporting of both rescues and non-rescues, but the actual magnitude of such under-reporting cannot be quantified. At the same time, the number of verifiable instances of rescue exceeds the number of verifiable instances of non-rescue by approximately 800:1, and that ratio is based on multiple years and multiple independent data sources. It seems unlikely that the under-reporting ratio for non-rescues is so much larger than the under-reporting ratio for rescues to overcome this huge disparity in the number of verified cases.

The results presented in this article do not allow one to reach firm conclusions as to the actual frequency of rescue and non-rescue in the United States, because there is insufficient evidence that the sample that is studied (rescuers and non-rescuers) is representative of the general population. However, the results convincingly demonstrate that documented cases of rescue (both risky and non—risky) overwhelmingly outnumber documented cases of non-risky non-rescue. This consistent finding is drawn from numerous independent data sources, each using its own

⁵⁷ For example, the Carnegie Hero Trust Commission starts with a pool of more than 3000 people, out of which it gives approximately 100 awards.

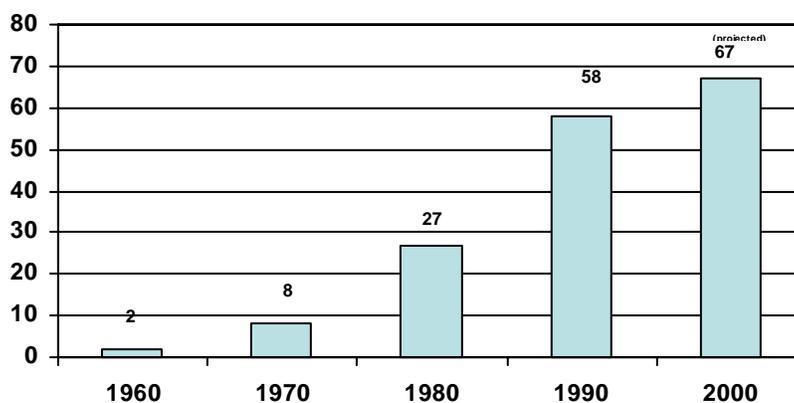
strategies for identifying nominees, investigating the facts, and making decisions as to which individuals deserve recognition.

VIII. Discussion

A. Legal Scholarship

How is it that the no-duty rule has figured so large in legal scholarship, but so little in the real world? Figure 10, which provides a frequency distribution of the law review articles written every decade for the last fifty years on the no-duty rule provides a starting point for analysis of this puzzle.

Figure 10



A simple comparison of Table 1 and Figure 10 makes clear that the number of articles written each year on the no-duty rule substantially exceeds the number of non-rescues during the same time period. Even more remarkably, all of these articles rely on the same handful of anecdotes of non-rescue – when they even bother to mention particular instances of non-rescue. These simple facts have escaped mention in all previous scholarship on the duty to rescue.

How did this state of affairs come about? Several possibilities suggest themselves. Legal academics are particularly

prone to “perfectionitis.” Any deviation from absolute perfection in the performance of a system is typically taken as a license to upend the entire system. Worse still, when things are working tolerably well, they are, by definition, not reducible to salient anecdotes, and so the (more than) tolerable performance of the system never registers in the (exclusively anecdotal) scheme of things.⁵⁸

The selection and socialization processes that produce lawyers and law professors, along with the incentives under which these professions operate, also have a substantial influence on the type of legal scholarship that is generated.⁵⁹ Professor Rosenberg neatly stated the problem (along with its causes and consequences) at a symposium on civil procedure:

The tendency of legally-trained minds to prefer thinking to counting is legendary. So is the lawyer's preference for learning by watching for the vivid case rather than tabulating the mine-run cases. The problem is not that watching this case or that is useless. A dramatic case or anecdote may be more informative and more memorable than a tubful of printouts. But the rub is that good anecdotes do not care if they are not representative; they can be badly misleading if generalized.⁶⁰

Finally, there is the well-known fascination of law professors with hypothetical examples and intellectual puzzles. In combination, these elements result in an “echo chamber” of anecdotal data driven scholarship, with each author convincing himself there

⁵⁸ A comparative institutional analysis helps moderate these academic tendencies, because it makes it clear that “bad is often best, because it is better than the available alternatives.” NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 204 (1994).

⁵⁹ See Michael Heise, *The Importance of Being Empirical*, 26 *PEPPERDINE L. REV.* 807 (1999); Peter Schuck, *Why Don't Law Professors Do More Empirical Research?* 39 *J. LEG. ED.* 323 (1989).

⁶⁰ Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 *U. PA. L. REV.* 2197, 2211 (1989).

is a problem, based on the number of articles criticizing the no-duty rule that have preceded his efforts.⁶¹

B. The Perils of Anec-data

Anecdotes offer a highly unreliable basis for policy-making and scholarship. The difficulties are usefully analyzed in terms of the truthfulness and typicality of such anecdotes, and the dynamics of argument by anecdote.

1. Truthfulness

People lie. When they aren't affirmatively lying, they often shade the truth, downplaying some facts and emphasizing others, to enhance the persuasiveness of the story they are telling. As such, context, "uncomfortable" facts, and the adverse consequences associated with proffered reforms are likely to be omitted entirely from "anec-data."⁶² This ability to use anecdotal data to "load the evidentiary dice" suggests that such "evidence" should be approached with considerable skepticism – and the more egregious the described conduct, the greater the degree of skepticism required.

Heightened skepticism is also required because such anecdotes do not emerge into public view at random or by accident. Instead, they are sought out, packaged and "spun" by policy entrepreneurs and advocacy groups, who use them to further

⁶¹ The process could also be described as a "norm cascade." See Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

⁶² See Robert J. Condlin, *Learning From Colleagues: A Case Study in the Relationship Between 'Academic' and 'Ecological' Clinical Legal Education*, 3 CLIN. L. REV. 337, 339 - 40 n. 29 (1997) (noting strategic omission from first-person account of death penalty litigation of the details of horrific crime for which client was convicted, and observing that stories "are always an advocacy move, used as much to make a point as to discover one, even if the storyteller does not think so."); Martha Minow, *Stories in Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 24, 31 (1996) (noting problem of selectivity in storytelling, and conscious refusal to include "additional stories which convey unattractive features of the community that I was trying to paint in a sympathetic light.")

their agenda.⁶³ When the only source of information we have is someone complaining about the conduct in question, it is fair to wonder whether we are getting the truth, let alone “the whole truth and nothing but the truth.” The result is that anecdotes frequently mis-frame, if not completely misrepresent the costs and benefits of the status quo and its alternatives. It is no accident that the legal system generally declines to take action on the say-so of one party,⁶⁴ and looks with considerable disfavor on limitations on the right to confrontation and cross-examination.⁶⁵ These questions about truthfulness call into serious question the utility of anecdotal evidence as a basis for policy-making and scholarship.⁶⁶ Thus, examples of non-rescue (cell 1) are insufficient, standing alone, to even document the existence of the problem they purport to identify.

2. Typicality

Scrupulously accurate and complete anecdotes can still be atypical. Atypical (or unrepresentative) anecdotes can lead to the

⁶³ See Daniel Koshland, *Scare of the Week*, 244 SCIENCE 9 (1989) (“Each group convinces itself that its worthy goals justify oversimplification to an ‘ignorant’ public.”)

⁶⁴ See *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972) (“Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides - and does not generally take even tentative action until it has itself examined the support for the plaintiff’s position.”)

⁶⁵ See *Coy v. Iowa*, 487 U.S. 1011, 1016, 1019-1020 (1994) (“[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact . . . It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”); Christopher B. Mueller & Laird C. Kirkpatrick, *EVIDENCE* 6.29 (1995) (“If the calling party’s opponents cannot subject the witness to cross-examination for reasons that are not his fault, some remedy is necessary. . . . If cross-examination is permanently blocked, the direct testimony usually should be stricken in both civil and criminal cases, or a mistrial declared if the direct testimony is critical and striking it would not be effective.”).

⁶⁶ As Part VII explains in greater detail, several of the standard non-rescue anecdotes do not bear close examination. This problem is not unique to this area. See Hyman, *supra* note 2.

adoption of policies that make the underlying problem worse, or cause other unintended consequences. The problem was nicely framed by Professor Saks:

Even if true and accurate, anecdotes contribute little to developing a meaningful picture of the situation about which we are concerned. It makes a difference if for every ten anecdotes in which an undeserving plaintiff bankrupts an innocent defendant, one, ten, one hundred, or one thousand equal and opposite injustices are done to innocent plaintiffs. The proportion of cases that results in one or the other error, and the ratio of one kind of error to the other, ought to be of greater interest to serious policy-makers than a handful of anecdotes on either side of the issue. Reforms are intended to change that ratio and the tens of thousands of anecdotes the ratio summarizes."⁶⁷

Absent proof of representativeness/typicality, a single anecdote of non-rescue could be just that: singular. Even if a single anecdote of non-rescue is representative of a larger reality, one must know how frequent that larger reality actually is before deciding what, if anything, to do about it.⁶⁸

⁶⁷ See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?*, 140 U. PA. L. REV. 1147, 1161 (1992). See also Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607, 1619-620 (1993) (issues of truthfulness, frequency, and typicality preclude generalization).

⁶⁸ See Richard Posner, *Legal Narratology*, 64 U. Chi. L. Rev. 737, 742-44 (1997):

The significance of a story of oppressiveness depends on its representativeness. In a nation of more than a quarter of a billion people all blanketed by the electronic media, every ugly thing that can happen will happen and will eventually become known; to evaluate policies for dealing with the ugliness we must know its frequency, a question that is in the domain of social sciences rather than of narrative. . . . Even if all these stories are true. . . frequency is an essential issue in deciding what if anything the law should try to do about the suffering that the stories narrate.")

3. Dynamics of Argument by Anecdote

Anecdotes are used because they are effective persuasive tools, particularly for creating mass support for a policy proposal.⁶⁹ The more compelling the anecdote, the more likely it is to be credited as truthful and typical, whether it is or not -- and anecdotes are at their most compelling when they appeal to our passions and prejudices.⁷⁰ Argument by anecdote also worsens the tendency in policy debates to privilege identifiable lives over statistical lives -- hardly a recipe for sensible and cost-effective policies.⁷¹ Indeed, even if an anecdote is highly representative, other considerations may dictate a policy diametrically opposed to the one suggested by the anecdote.⁷²

⁶⁹ See Jill Lawrence, *When Studies Don't Sway, Bring on the Victims*, L.A. TIMES, July 15, 1990, at A18 ("Capitol Hill hearings are often characterized by the relentless recitation of government statistics, the polite drone of think tank researchers, the familiar arguments of professional lobbyists. Even the most sensitive lawmakers can become numbed. That's when it's time to bring on the victims.")

⁷⁰ See David A. Hyman, *Regulating Managed Care: What's Wrong With A Patient Bill of Rights*, 73 S. CAL. L. REV. 221, 241 (2000) ("the more compelling the anecdote, the less likely we are to consider issues of typicality and frequency -- meaning the risk of being led astray is a direct function of the persuasiveness of the anecdote.")

⁷¹ See Clark C. Havighurst, James F. Blumstein, and Randall Bovbjerg, *Strategies in Underwriting the Cost of Catastrophic Disease*, 40 L. CONTEMP. PROB. 122, 140-41 (1976) (contrasting willingness of society to sacrifice identifiable lives v. statistical lives; "it is difficult to improve significantly on the commonplace observations that human beings cannot empathize with faceless abstractions and that 'squeaking wheels' - the complaints of known victims, such as the very vigorous lobbying of kidney-disease patients - not the silence of statistical unknowns will get the government grease. Spending 'millions to save a fool who has chosen to row across the Atlantic has external benefits' lacking from highway safety spending.")

⁷² See David A. Hyman, *Do Good Stories Make For Good Policy*, 25 J. Health, Politics, Pol'y & L. 1149, 1153 (2000).

C. Psychology and Non-Rescue

The no-duty rule has also figured prominently in a number of elegant empirical studies done by psychologists. These studies have demonstrated that under the “right” circumstances, a majority of Americans will not provide assistance to someone in need.⁷³ These studies, which were performed in the aftermath of the Kitty Genovese tragedy, found that the likelihood of rescue was significantly affected by the number of witnesses and the ambiguity of the situation. At first glance it is difficult to reconcile the findings of these psychological studies with the results presented in this article. How can documented rescues outnumber documented non-rescues by 800:1 when a majority of Americans have been shown to be non-rescuers?

⁷³ See generally John M. Darley & Bibb Latane, *Bystander intervention in emergencies: Diffusion of responsibility*, 8 J. PERSONALITY AND SOCIAL PSYCHOLOGY 377 (1968); Bibb Latane & John M. Darley, *Group inhibition of bystander intervention in emergencies*, 10 J. PERSONALITY AND SOCIAL PSYCHOLOGY 215 (1968); Bibb Latane & John M. Darley, *Bystander "apathy"*, 57 AM. SCIENTIST 244 (1969); Bibb Latane & John M. Darley, *Social determinants of bystander intervention in emergencies*, in ALTRUISM AND HELPING (J. Macaulay and L. Berkowitz (Eds.), 1969); Bibb Latane & John M. Darley, *THE UNRESPONSIVE BYSTANDER-WHY DOESN'T HE HELP?* New York: Appleton-Century-Crofts (1970); John M. Darley, *et al.*, *Do groups always inhibit individuals' responses to potential emergencies?* 26 J. PERSONALITY AND SOCIAL PSYCHOLOGY 395 (1973); Bystander phenomena, In *Encyclopedia of Psychology*, Alan Kazden, (Ed.) APA press, Washington, DC, 2000, 1, 493-495; John M. Darley and C. Daniel Batson, “*From Jerusalem to Jericho*”: *A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY AND SOCIAL PSYCHOLOGY 100 (1973).

See also Joel Greenberg, *Why Do Some People Turn Away From Others in Trouble*, N.Y. TIMES, July 14, 1981, at C1.

In fact, these findings are readily reconcilable. First, even if a majority of Americans are non-rescuers under certain carefully defined conditions, it does not follow that those carefully defined conditions actually occur with any particular frequency in the real world. Although the need for rescue is sometimes ambiguous, it often is not – as a few minutes spent reading rescue accounts and award citations amply demonstrates. Second, unless willingness to rescue declines more than inversely with group size, larger groups actually increase the probability that there will be at least one individual willing to perform a rescue. Third, these psychological factors are far from dispositive; even with highly ambiguous conditions and large groups, approximately 30% of subjects are still willing to rescue.

Psychology does provide a reason for why cases of non-rescue are so salient when they do occur. Psychologists have discovered that individuals get much more upset about a negative event if a readily available “counterfactual” would have prevented the bad outcome. This cognitive phenomenon, known as “counterfactual thinking,” has been demonstrated in numerous settings.⁷⁴ People often have difficulty in resisting counterfactual reasoning when learning of a misfortune. Non-risky non-rescues are particularly susceptible to such reasoning, because the atmospherics of a non-rescue are generally loaded with precursors to “if only” reasoning – and if they were not, the circumstances would probably not have counted as a non-risky non-rescue in the first instance.

⁷⁴ WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING 353, 354 (NEAL J. ROESE & JAMES M. OLSON, EDS. 1995); Dale T. Miller & William Turnbull, *The Counterfactual Fallacy: Confusing What Might Have Been with What Ought to Have Been*, 4 SOC. JUSTICE RES. 1, 2 (1990); Daniel Kahneman & Amos Tversky, The Simulation Heuristic, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201 (Daniel Kahneman et al., eds, 1982); Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCH. REV. 136 (1986). I am indebted to Lee Fennell for calling my attention to this literature.

D. Rescue, Non-Rescue, Altruism, and Social Norms

Professor Robert Ellickson titled his seminal book on the subject of social norms, “Order Without Law.”⁷⁵ As the title of this article suggests, the United States similarly has “rescue without law.” Those who rescue receive awards and public recognition; those who fail to rescue are treated with scorn and disdain.⁷⁶ Are these patterns the result of social norms or something else? How do such patterns develop when the law does not require rescue, and actually creates affirmative disincentives to doing so? Might the imposition of legal obligations crowd out such behavior?

Complete consideration of these issues lies beyond the scope of this article, but some preliminary observations are possible. “Rescue without law” is unlikely to be the result of social norms, because these patterns developed in the teeth of laws that encourage the opposite behavior, they involve strangers who are unlikely to ever meet again,⁷⁷ and their development and maintenance do not fit into either of the two main theories of social

⁷⁵ ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

⁷⁶ Many of the articles decrying the no-duty doctrine comment on this public scorn, and use this observation as the basis for their arguments to impose a duty to rescue. One article explored the extent to which this scorn could be leveraged into sanctions in other domains, and discovered considerable reluctance to do so as long as the law sanctioned the underlying conduct. See Norman J. Finkel, *When Principles Collide in Hard Cases: A Commonsense Moral Analysis*, 7 *Psych. Pub. Pol. & L.* 515, 538 (2001) (finding 52% of study participants believed that David Cash should not be expelled from school for his non-rescue, “despite universally condemning his moral failure.”)

⁷⁷ Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 *U. CHI. L. REV.* 359 (2003); See also Ann E. Carlson, *Recycling Norms*, 89 *CAL. L. REV.* 1231 (2001); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 *B.U. L. REV.* 333, 340-44 (2001); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 *CHI. KENT L. REV.* 1257 (1998); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 *MICH. L. REV.* 1724 (2001).

norms.⁷⁸ Instead, research into behavioral psychology suggests that “rescue without law” is most likely the result of “hard-wired” altruism, which induces rescue even at significant personal risk.⁷⁹ As such, the presence or absence of a duty to rescue (let alone *ex post* awards or public recognition for rescuing) are unlikely to be material factors in whether a rescue occurs. Interestingly, Andrew Carnegie believed the same thing; even though he contributed a considerable sum of money to the Carnegie Hero Fund, he wrote “I do not expect to stimulate or create heroism by this fund, knowing well that heroic action is impulsive. But I do believe that if the hero is inspired in the bold attempt to save his fellows, he and those dependent upon him should not suffer pecuniarily.”⁸⁰

In like fashion, the scorn to which non-rescuers are routinely subjected is most likely the result of a combination of counterfactual thinking and hard-wired expectations of altruistic rescue, although social norms may enter into the extent and depth of public scorn. Although *ex post* public scorn obviously attaches a cost to non-rescue, it seems unlikely to be a material factor in whether a particular rescue occurs or not.

⁷⁸ Compare Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (esteem theory) with ERIC POSNER, *LAW AND SOCIAL NORMS* (Harvard 2000) (signaling theory).

⁷⁹ See KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY* (1996). See also William M. Landes & Richard Posner, *Altruism in Law and Economics*, NBER Working Paper No. 217 (1977).

⁸⁰ History of the Carnegie Hero Fund, http://www.carnegiehero.org/fund_history.php. The inflation adjusted present value of Carnegie’s initial endowment of \$5,000,000 exceeds \$100,000,000.

A final norms-related issue is why the universal public scorn of non-rescue has not resulted in statutes imposing a duty to rescue. Stated differently, if MADD can change social and legal norms regarding drunk driving, why can't norm entrepreneurs do the same thing for non-rescue?⁸¹ After all, public attitudes regarding non-rescue are far more unfavorable than have ever been for drunk driving. Drunk drivers may be sent to prison, but they are almost never the target of mass demonstrations, nationwide press coverage, and tabloid television shows. The most likely explanation is that there simply aren't enough cases of non-rescue to create the necessary group of concerned and committed activists/norm entrepreneurs. In the three states that have enacted a duty to rescue, there was no lobbying by concerned citizens or public pressure for such legislation. Although relatives of those who have died from a non-rescue have been known to lobby for a duty to rescue, such norm entrepreneurs are few and far between – and for that reason they have proven insufficient to the task of changing legal norms. Stated differently, the absence of any organization to speak for the victims of non-rescue is itself further evidence of the rarity of non-rescue.

When norm entrepreneurs have sought to address the problem of non-rescue, they have focused solely on legal norms (i.e., reversing the no-duty rule), and not on social norms/harm reduction. MADD, on the other hand, has been successful because it simultaneously addresses legal norms (by seeking stiffer sentences for those who drive while intoxicated and lobbying to lower the blood alcohol level required to violate the law) and social norms/harm reduction (with public campaigns discouraging people from driving while intoxicated).

⁸¹ See Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1416, n. 90 (2002); Harold G. Gramsick, et al., *Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions*, 21 CRIMINOLOGY 41 (1993). On norm entrepreneurs, see Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

To summarize, although rescue is routine, and viewed as normatively appropriate, “rescue without law” is not a social norm in the standard sense of those words.⁸²

E. Implementation/Legal Process Issues

The debate over the duty to rescue has been carried out on a wholly theoretical plane, but the issue necessarily involves a host of wholly practical implementation and legal process problems. Should the duty to rescue be enforced by criminal penalties, or through private tort litigation? If criminal penalties are appropriate, how severe should they be? How broadly should the law be cast? How risky must the rescue be to convert a “guilty bystander into an “innocent bystander?”⁸³ How will those enforcing the law correct for hindsight bias in making these determinations? Will the creation of affirmative duties of assistance encourage unqualified rescuers to undertake risky rescues, or lead to broader invasions of individual liberty and second-guessing of private conduct?⁸⁴

These implementation and legal process issues must be factored into the equation – particularly since statutory design and

⁸² See, e.g., Strahilevitz, *supra* note 77 (“Thus, it is improper to speak of a social norm of ‘breathing’ among restaurant customers, but there may be a norm of tipping.”)

⁸³ In the final Seinfeld episode, the defense attorney’s opening statement for the four main characters charged with non-rescue was as follows:

You know what these four people were? They were innocent bystanders. Now, you just think about that term. Innocent. Bystanders. Because that's exactly what they were. We know they were bystanders, nobody's disputing that. So how can a bystander be guilty? No such thing. Have you ever heard of a guilty bystander? No, because you cannot be a bystander and be guilty. Bystanders are by definition, innocent. That is the nature of bystanding. But no, they want to change nature here. They want to create a whole new animal - the guilty bystander.

Id.

⁸⁴ See *supra* note 44.

implementation are imperfect arts.⁸⁵ There is always the risk that statutes (even well-intentioned statutes) will have unforeseen costs and unintended consequences. It is worth incurring these risks if the statute promises a clear improvement on the status quo. Yet existing institutional arrangements result in approximately 800 rescues for every non-rescue, and considerable evidence indicates that the real problem is that Americans are too willing to rescue. Is it really plausible that a duty to rescue statute, no matter how artfully drafted and efficiently enforced, will improve on the status quo? To be sure, no obvious adverse consequences have materialized in the three states that have imposed a (quite limited) duty to rescue, but are we willing to gamble that pattern will continue in exchange for a virtually non-existent upside?

Finally, there are institutional risks with relying on the legislature to undertake the moral instruction of the citizenry through the enactment of laws. Consider the deep insight into the human condition that prompted the state of Maryland to declare jousting as its state sport, and select a state anthem that refers to Abraham Lincoln as a despot in the first stanza, and urges the citizens of Maryland to “spurn. . . the Northern scum” in the last stanza.⁸⁶ Numerous attempts to change the state song to something less offensive to the dignity of the “Northern scum” have proven unsuccessful.⁸⁷ Such examples may constitute

⁸⁵ More formally, there are always Type I and Type II errors in designing and implementing laws. A Type I error is a false positive, such as someone being prosecuted for non-rescue when their conduct does not meet the statutory requirements. A Type II error is a false-negative, when conduct that meets the statutory requirements for prosecutable non-rescue is not pursued. Both Type I and Type II errors undermine the perception that the law requiring rescue is being enforced in an even-handed way.

⁸⁶ Maryland Ann. §§ 13.307, 13-308 (1984). The poem on which the state song is based was intended to push Maryland into the Confederacy -- not that the residents of Baltimore needed much encouragement. See William Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L. REV. 927, 928-29 (recounting support for Confederacy in Baltimore).

⁸⁷ David Snyder, *A Renewed Effort to Rewrite Controversial State Song*, WASH. POST, Jan. 24, 2003.

atypical outliers – but that description applies equally well to instances of non-rescue.

F. Preferences and the no-duty rule

The frequency of non-risky non-rescue is an important factor in deciding how urgent a problem non-rescue actually is, but other factors are obviously material as well.⁸⁸ For example, the severity of the adverse consequences that result from non-rescue and the potential adverse consequences from addressing and not addressing non-rescue also need to be factored into the equation. Indeed, some conduct is deemed sufficiently blameworthy that society seeks to deter it (typically through criminal sanctions) virtually regardless of its frequency.⁸⁹ Thus, personal preferences matter in determining whether anything should be done about non-rescue.

Yet, the only cases of non-rescue that can be punished are those that become known – meaning that the maximum potential

⁸⁸ See Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1800 (2001) (“The empirical evidence set forth in this Essay is a necessary component, but not a sufficient one, to make these determinations [on the constitutionality of bright-line tests]. The evidence tells us about the amount of ‘chill’ that may be expected under various forms of the bright-line tests. . . . The evidence, however, cannot tell us how to make the difficult policy choices as to when the state’s compelling interests in regulating campaign finances necessitate tolerating some overbreadth stemming from a narrowly tailored statute.”)

⁸⁹ Blackmail prosecutions appear to be rare as well, judging by the number of reported appellate decisions on the subject. Richard Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993) (“A computer search of the approximately three million opinions published by West Publishing Company in the last century disclosed only 72 blackmail cases. Of course most prosecutions do not generate appeals and not all appeals are reported; nevertheless this very small number suggests that blackmail is rarely prosecuted. The reason may be that it is rarely committed.”) The important point is that it does not follow that blackmail should be decriminalized simply because it is rare. Indeed, the comparison is inapt, since blackmail is rare against a background condition of legal prohibition, while non-rescue is rare against a background condition of legal encouragement.

upside from imposing a duty to rescue must be based on the number of reported non-rescues that occur in the absence of such a duty. Worse still, there are reasons for thinking the imposition of a duty to rescue would decrease the number of reported non-rescues.⁹⁰

To be sure, many law professors have used instances of non-rescue as the opening wedge for a broader set of arguments about the duties that Americans *should* owe one another. One can certainly believe that Americans should do more to assist one another than they currently do – but that case should be made based on the facts, and not on highly salient but extraordinarily unrepresentative anecdotes of non-rescue. The verifiable frequency of non-rescue and rescue simply does not support such claims. Those who believe a duty to rescue is necessary have some obligation to either come up with persuasive evidence indicating that the frequency and severity of non-rescue is appreciably higher than demonstrated in this article, or explain why they are relying on atypical outliers to make their case to the general public. Alternatively, they should drop the issue of non-rescue, and instead make their arguments based on the broader issues they are actually concerned about.

To be sure, preferences on the desirability of a duty to rescue may be immutable. When this research has been presented to scholars who are enthusiasts of the duty to rescue, they typically respond with one of two arguments: either they assert that the methodology is flawed because there “are lots of non-rescues out there,” or they assert that “one non-rescue is one too many.” The first argument is a common response to empirical legal research; as Professor Maurice Rosenberg once observed, “there are two kinds of empirical studies of law, those that confirm the hunches of lawyers and those that lawyers perceive to be false.”⁹¹ The

⁹⁰ Volokh, *supra* note 10.

⁹¹ Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 51 (1997). *See also* Rosenberg, *supra* note 60, at 2211 (“No matter how carefully the facts or data are gathered to respond to the pivotal questions, there will be great trouble in penetrating made-up minds. Commonly, lawyers, lawmakers, and

assertion that there must be “lots of non-rescues” because the speaker believes it to be so is an assertion of faith, and not a fact. The best response to such faith-based assertions is simple: “In God We Trust, All Others Bring Data.”⁹²

The second argument (“one non-rescue is one too many”) is somewhat more appealing, at least rhetorically. After all, who could be in favor of non-rescue? However, the objective reality, as noted previously, is that the rarer the frequency of non-rescue, the more likely it is that attempts to address it will have no real upside and the potential for substantial downside. The absurd consequences that have already resulted from zero-tolerance policies in other areas of the law show the difficulties that can result from single-minded pursuit of a desired objective.⁹³

Finally, the dynamics of the policy debate over the duty to rescue are not unique to this setting. As Professor Sunstein has noted, “when intense emotions are engaged, people tend to focus on the adverse outcome, not its likelihood.”⁹⁴ Such “probability neglect” can have profound consequences, including “indifference to real risks or costly expenditures for little or no gain.”⁹⁵ A generalized duty to rescue fits into both of Sunstein’s categories – the emotional overlay associated with infrequent non-rescue has distracted attention from the far more frequent problem of injured and dead rescuers and the dubious prospects for solving the

judges treat systematic data with casual disdain, preferring individualized experience and intuition that they can encapsulate in a war story. Their reaction to systematically gathered data is very often either ‘It’s obvious!’ or ‘It’s wrong!’ depending on whether it squares with their own viewpoint or experience. As I have said, they prefer anecdotes to tables.”)

⁹² Charles M. Cutler, *Research Needs For Managed Care*, 15 HEALTH AFF. 93 (1996).

⁹³ If zero-tolerance is desirable for non-rescue, it should be even more desirable for handling the problem of drugs in the public schools. The result has been frequent, absurd cases of children suspended or expelled for bringing aspirin, Midol, cough drops, and the like to school. Cherry Henault, *Zero Tolerance in Schools*, 30 J. L. & EDUC. 547 (2001).

⁹⁴ Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L. J. 61, 62 (2002).

⁹⁵ *Id.* at 63.

“problem” of non-rescue without creating undue distortions in other domains.

G. Directions For Future Research

The data presented in this article relates solely to the United States.⁹⁶ One obvious avenue for future research is to perform a comparable study in other countries. Further research on how many risky and non-risky rescues and non-risky non-rescues there are in countries with a duty to rescue might cast additional light on the issues addressed in this article. Canada presents an obvious location for further study, because it has nine provinces and three territories in which the no-duty rule prevails, and one province with a duty to rescue.⁹⁷ Similarly, there are Carnegie Funds in ten European countries. Future research will focus on obtaining comparable data from these Funds, and performing a similar analysis to that presented in this article.

⁹⁶ Several of the data sets include awards to Canadians, or to Americans in foreign lands but such awards were excluded from the analysis.

⁹⁷ Quebec’s Civil Code imposes a general duty to assist those in peril. Violators can be liable for damages in tort. The Quebec Charter of Human Rights and Freedoms, enacted in 1975, imposes an obligation to render aid if it can be accomplished without serious risk. Interestingly, Quebec is also the only province to routinely compensate good Samaritans who suffer injury or other losses.

Another obvious direction for future research is to examine the role of technology in individual incidents of rescue and non-rescue. It seems likely that the availability of cell phones and wireless technology has made some forms of non-rescue much less probable. One need not search for a payphone or ask a (not-so-friendly) bartender for permission to use his phone when a substantial percentage of the population carries a cell phone.⁹⁸ Similarly, General Motors offers a wireless system in many vehicles that allows drivers to contact emergency services with the push of a button.⁹⁹ On the other hand, “too many” cell phones could lead to further diffusion of responsibility, as everyone reasons that someone else has called. Sorting out this issue, and assessing the feasibility of a duty to report (but not to rescue) will require further qualitative and quantitative research.

⁹⁸ See, e.g., *Soldano v. O’Daniels*, 190 Cal. Rptr. 310, 317 (1983) (finding refusal to allow use of telephone in bar was actionable failure to assist).

⁹⁹ See, e.g., On Star Helps Police Nab Wanted Fugitive, http://www.gm.com/company/gmability/safety/security/onstar/onstar_fbi_03300_4.html; General Motors’ OnStar Subsidiary Partners with the National Center for Missing & Exploited Children: OnStar’s 2.5 million subscribers can be good Samaritans in the search for missing children, http://www.onstargm.com/promo/html/press_release_ncmec.html (noting 3,000 “Good Samaritan” calls per month relating to car crashes or emergencies involving other parties).

Of course, any supply-side effect might be offset by a demand-side effect; the availability of cell phones and handheld GPS devices might well increase the need for rescue of individuals that get in “over their heads,” and lack the necessary training or self-reliance to get themselves out of trouble.¹⁰⁰ It seems unlikely this demand-side effect will have a significant impact on the number of instances where rescue is necessary because of criminal conduct, which accounted for an overwhelming majority of the cases of non-rescue in Table 1. On the other hand, there may be both a supply and demand side effect on such cases, arising from broader availability of “concealed carry” permits.¹⁰¹ Examining these issues will require extensive qualitative research.

Rescuer demographics indicate rescue has a substantial age, gender, and class overlay. Further research will be necessary to determine whether victim demographics mirror these patterns. Victim demographics are significant because Professors Landes and Posner assumed that the world was divisible into two distinct classes: rescuers and victims.¹⁰² Professor Hasen demonstrates that this assumption drives the indeterminacy of Landes & Posner’s conclusions, and that if “individuals assess the probability of being a victim or potential rescuer if involved in a rescue

¹⁰⁰ See Todd Wilkinson, *Thrill-Seekers Count on Fast Rescues*, CHRISTIAN SCIENCE MONITOR, June 26, 1988, at 4 (“Emboldened with a desire for extreme challenges and a false sense of confidence by having cellular phones in their backpacks, more people than ever are trudging into the outback with not only greater ambitions of confronting danger but higher expectations of getting rescued fast. . . ‘A small but increasing percentage of our visitors are pushing the limits of their abilities, because they believe help is just around the corner.’”)

¹⁰¹ See David C. Biggs, “*The Good Samaritan is Packing: An Overview of the Broadened Duty to Aid Your Fellowman, With the Modern Desire to Possess Concealed Weapons*,” 22 DAYTON L. REV. 225 (1997) (discussing supply side impact); David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 501 (1997) (discussing both supply and demand side impact).

¹⁰² Landes & Posner, *supra* note 10. Professor Eisenberg described this assumption as “exceptionally improbable,” but provided no data, evidence or even an argument indicating why he drew that conclusion. Eisenberg, *supra* note 10, at 687.

situation as about equal, the duty to rescue is both Pareto and Kaldor-Hicks efficient.”¹⁰³ Preliminary evidence indicates that victims are more likely than rescuers to be drawn from a population more reflective of the general population, at least with regard to age and gender – meaning that the world may well be, in fact, divisible in two distinct (albeit overlapping) classes. At the same time, although rescues substantially outnumber non-rescues, they are still relatively infrequent when spread across 50 states, 365 days, and 291 million Americans. People are unlikely to spend much time thinking of themselves as likely rescuers or likely victims, and so the objective realities may not figure in their *ex ante* behavior. On the other hand, it is difficult to explain why large numbers of Americans voluntarily receive training in CPR, lifesaving, and first aid if they do not think of themselves as potential rescuers. Further research will be necessary to sort this issue out.

Finally, the application of the no-duty rule to public entities has been controversial.¹⁰⁴ Academic commentary on such cases has been overwhelming hostile.¹⁰⁵ The results presented in this article focus on rescue by private individuals, and representatives of public entities acting well beyond the scope of their duties. Further research would help clarify the frequency of non-rescue and rescue by representatives of public entities.

IX. Conclusion

During the past decade, there are no more than two documented cases of non-rescue each year in the entire United States. Every year, Americans perform at least a thousand non-risky rescues and approximately two hundred and sixty risky

¹⁰³ Hasen, *supra* note 10, at 142.

¹⁰⁴ See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (failure of police to rescue occupants of a burning car is not a violation of the 14th Amendment).

¹⁰⁵ See Amy G. Markowitz, *The Constitutional Duty to Complete a Rescue: An Examination of Archie v. City of Racine*, 23 COLUMBIA J. L. & SOC. PROBS. 487 (1990).

rescues.¹⁰⁶ Six times as many ordinary Americans die *every year* as a result of attempting a rescue as have died from a documented case of non-rescue in the past ten years combined. If a few isolated (and largely unverified and undocumented) cases of non-rescues have been deemed sufficient to justify legislative reform, one would think a total of a thousand documented cases of non-risky rescue and several hundred documented cases of risky rescue every year should point rather decisively in the opposite direction. When it comes to the duty to rescue, leaving well enough alone is likely to be sufficient unto the day.

What of the impact of statutes reversing the no-duty rule? Although three states have had generalized duties to rescue in effect for a combined total of almost eighty years, there is no evidence that these statutes have affected the number of rescues or non-rescues. There is also no evidence that these statutes are being employed in the sweeping manner feared by critics. Further research will be required to determine whether the enactment of these statutes has led to the creation of broader affirmative duties within these states.

What do we know about rescue and rescuers? Controlled for population, the frequency of civilian rescue declined over the first 40 years of the 20th century, and stabilized or increased over the next sixty years. Rescuers tend to be young males, particularly when strangers are rescued. Rescue is frequently dangerous: a sizeable percentage of rescuers are killed or injured.

Non-rescues are tragic, but it is important to have a sense of proportion about the magnitude of the problem. In a nation of 285,000,000 people, of whom approximately 200,000 die every year in accidents, it is inevitable that there will be occasional instances of non-rescue, just as there are occasional instances of people being decapitated by elevators, drowning in a flood of molasses, killed on amusement park rides, and otherwise dying under freakish and extraordinary circumstances.¹⁰⁷ Given the

¹⁰⁶ To date, I have been unable to identify a data set that casts any light on the size of cell 3. Research on this issue continues.

¹⁰⁷ Peggy O'Hare, *Doctor Decapitated by Malfunctioning Elevator at Hospital*,

rarity of non-rescue and the high frequency of rescue, creating a statutory duty to rescue seems unlikely to have any impact on the number of rescues and non-rescues.

It is certainly possible that the measures employed are insufficiently sensitive to identify non-rescues and capture the effects of statutory reversal of the no-duty rule, and overly sensitive to instances of rescue, but that seems unlikely, given the number of distinct data sources employed, the differing measures employed, and the consistency of the results. This particular dog may not have barked in the night because there simply wasn't a dog to do any barking.¹⁰⁸

The argument that the absence of a statutory duty to rescue "teaches bad morals by example" also appears distinctly implausible. The data indicates that Americans have figured out that it is better to rescue someone in need than to stand by and watch him die. It is unlikely that additional moral instruction, in the form of a statutory duty to rescue, will do anything to reach those few individuals who do not understand this basic insight.

Blanche DuBois depended on the kindness of strangers, and the empirical evidence provides no reason to disagree with her strategy for handling the "problem" of non-rescues. Of course, leaving rescue to the independent discretion of potential rescuers results in a world that is short of perfection -- but the right question is whether imposing a duty to rescue will improve on the status quo.¹⁰⁹ Despite the immediate and automatic "yes" offered by proponents of the duty to rescue, the evidence presented in this article suggests that the answer to that question is almost certainly "no."

HOUSTON CHRON., Aug. 17, 2003 at A1; Edwards Park, *Without Warning, Molasses in January Surged Over Boston*, 14 SMITHSONIAN 213, 213 (Nov. 1983) (noting wave of molasses killed 21 and injured 150 in Boston disaster of 1919).

¹⁰⁸ See David A. Hyman, *A Second Opinion on Second Opinions*, 84 VA. L. REV. 1439, 1462 (1998).

¹⁰⁹ See *id.* at 1453 ("Despite their deficiencies, the rules. . . appear to beat the possible alternatives, which is the right question to ask about any institutional arrangement.")

To be sure, there is room for improvement in the status quo. A substantial number of rescuers are injured or killed every year, and they (or their estates) must largely bear the consequences themselves. It is somewhat surprising that law professors, who have lavished such concern on the subject of what Americans owe one another, have completely ignored the plight of ordinary Americans who voluntarily choose to rescue and suffer injury or death as a result.¹¹⁰ The results presented in this article suggest that this problem is a serious one, deserving of immediate attention. This issue may lack the glamour of taking (yet another) run at reversing the no-duty rule, but it is a much more serious problem than the one that has preoccupied scholars who have written on the subject of the duty to rescue for the past century.

Another issue that requires attention is harm reduction. Danger does appear to “invite rescue,” as Judge Cardozo noted in passing more than eighty years ago. Too many of those who accept the invitation to rescue are seriously injured or killed because the rescue is too dangerous, or the rescuer is inadequately trained.¹¹¹ Rescuers are usually “self-assured people who are

¹¹⁰ Professor Norval Morris focused attention on this issue almost forty years ago, but his insight has been widely ignored:

It is so easy to talk about the failure of others; of how Good Samaritanship seems to be a dying art among others. There is another parable, something about a mote and an eye, which seems to me to have some relevance. Perhaps we should first talk about ourselves, and our failure to provide even minimum conditions financially to protect those amongst us who **are** willing to act the Good Samaritan.

Norval Morris, *Compensation and the Good Samaritan* in THE GOOD SAMARITAN AND THE LAW 139 (1966).

A significant number of states have victim compensation programs, that can help defray the costs of medical treatment of rescuers who are injured by intervening to protect the victim of a criminal act. Kruh, *supra* note 28. Such programs invariably under-compensate those who are injured, and are not available to rescuers who are injured in non-criminal settings.

¹¹¹ *Wagner v. International Railway Company*, 133 N.E. 437 (N.Y. 1921) (“Danger invites rescue. The cry of distress is the summons to relief.”)

certain they will emerge victorious.”¹¹² Self-assurance is one thing; over-confidence is another – and over-confidence increases the death toll among rescuers. A superior strategy, from a harm reduction perspective, would be to encourage rescuers to appreciate that they should “want to be involved, but [not] want to get hurt.”¹¹³ At a minimum, potential rescuers should understand that multiple fatalities (the original victim, plus those who bravely but foolishly attempt to assist) are the likely result of an attempted rescue by someone without sufficient training. Such outcomes may be viewed as the price of success for those who believe non-rescue is a serious problem – but the results presented in this article suggest that the real problem is excessive enthusiasm for rescue, and not non-rescue. As such, better education of rescuers (and of potential victims, to avoid getting into such situations) is likely to prove a more fruitful strategy than reversing the no-duty rule.¹¹⁴

Finally, most scholars appear to have believed that non-rescue was a widespread problem – and that imposing a duty to rescue would result in significant changes in behavior and social norms. The results presented in this article indicate that neither assumption was accurate, and rescuer morbidity and mortality is a much more serious and frequent problem than non-rescue. Future discussions of the merits of the duty to rescue might more profitably begin with the “facts on the ground,” instead of moving immediately to theories of justice and obligation.

¹¹² Aron Kahn, *Good Samaritans: Why They Heed Cries for Help*, CHICAGO TRIBUNE, July 7, 1985, at 3; Kruh, *supra* note 28; Ted L. Huston & C. Korte, *The Responsive Bystander: Why He Helps*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES (T. LICKONA (ED.)) (NEW YORK 1976).

¹¹³ Michele Mitchell, *The Ambivalent Samaritan*, WASH. POST, June 6, 1994, at C1.

¹¹⁴ Of course, to the extent rescue is “hard-wired,” better information will not necessarily affect the decision to rescue. Education is also likely to be inefficient, since only a small number of those who receive the information are likely to be potential rescuers. On the other hand, a substantial number of Americans already receive such training voluntarily. *See supra* note 53, and accompanying text.

Of course, debates over the duty to rescue implicitly involve these broader issues and theories – which is why cases of non-rescue are prominently featured in torts textbooks, and why legal scholars have been arguing about such cases for more than a century. Yet, when neither the initial suppositions nor the expectations for change of proponents seem justified, it is fair to ask them what they believe is actually at stake when the issue of the duty to rescue is under discussion. More broadly, the results presented in this article suggest that the standard “instrumentalist” conception of legal scholarship – in which a legal scholar identifies a significant social problem, analyzes it, and then offers a policy prescription to be implemented by government officials that promises to cure it – is poorly suited to the problem of non-rescue. Theorizing without data has obvious charms, but one of the risks – here fully realized – is that the data will embarrass both the theory and the theorizer.¹¹⁵

Although the no-duty rule presents a vital intellectual puzzle for law professors, judges, and philosophers, the rule has no detectable influence on the behavior of ordinary people. Americans, motivated by the “imperfect obligations” of beneficence, have proven themselves more than up to the task of rescuing those in need, irrespective of whatever the law might happen to say on the subject.¹¹⁶

¹¹⁵ See SIR ARTHUR CONAN DOYLE, *A Scandal in Bohemia*, in THE ADVENTURES OF SHERLOCK HOLMES (1891 (“It is a capital mistake to theorize before one has data.”) See also Otto Lilienthal, *Practical Experiences in Soaring*, 220 PROMETHEUS 192, 195 (1893) (“Indulging in subtle inquiries and theorizing does not promote our knowledge.”)

¹¹⁶ JOHN STUART MILL, UTILITARIANISM 61 (1957). See also Charles Frankel, *Review: Code of Professional Responsibility*, 43 U. CHI. L. REV. 874, 877-79 (1976) (“Among the values which society has an interest in promoting are some which cannot be made the objects of direct command. . . They must be seen as ‘aspirations,’ not legal duties.”)

Appendix A:

Case 1: Joey Levick (1994)¹¹⁷

On June 2, 1994, Joey Levick was assaulted by two men who he had known for several years. Levick fell into a shallow pool of water in the bottom of a ditch. His attackers returned to check on him periodically during the next 12 hours, accompanied by various friends and relatives. One of the assailant's friends placed an anonymous call to 911, but no one rendered assistance to Levick, who ultimately drowned.

Case 2: Deletha Word (1995)

On August 19, 1995, Deletha Word was assaulted on the Belle Isle bridge in Detroit by one man in the view of numerous witnesses. She jumped into the water to escape the assault, and drowned. Two men jumped in the water to try and rescue her, but she swam away from them. Several motorists on the bridge called 911, and 26 people subsequently came forward to help police track down the suspect.¹¹⁸

Case 3: Gabriella Vasquez (1995)¹¹⁹

In July, 1995, Gabriella Vasquez, age 3, was beaten to death by her mother for not being toilet trained. Several neighbors heard the child being beaten on numerous occasions, but none called the police. One neighbor called a child abuse hotline.

Case 4: Unnamed (1995)¹²⁰

In April, 1995, a convenience store clerk was assaulted. Six customers stood by and did nothing. None called police, or

¹¹⁷ Barry Siegel, *Beyond the Reach of the Law*, L.A. TIMES, August 20, 1996, at A1.

¹¹⁸ Myron Stokes, *The shame of the city*, NEWSWEEK, Sep. 4, 1995, at 26.

¹¹⁹ Al Baker et al, *Neighbors said they ignored tot's screams*, N.Y. DAILY NEWS, July 28, 1995, at 18.

¹²⁰ Spencer S. Hu, *Fredericksburg Searches For Its Soul After 6 Stood By During Beating*, WASH. POST, Apr. 8, 1995, at A1.

rendered assistance. After a videotape of the incident was played on local television, the police were inundated with tips, and arrested a suspect.

Case 5: David Gugel (1995)¹²¹

On May 18, 1995, David Gugel was assaulted and killed by his ex-wife and her boyfriend. A neighbor reportedly watched the assault, but did not call police.

Case 6: Unnamed (1996)¹²²

On March 6, 1996, a man fondled a 12 year old girl on a public street in downtown Dallas. Several people witnessed the assault but did nothing. A man driving by stopped and tackled the assailant.

Case 7: Sherrice Iverson (1997)¹²³

On May 25, 1997, Jeremy Strohmeyer raped and murdered 7-year old Sherrice Iverson in a bathroom in a casino in Primm, Nevada. Strohmeyer's best friend, David Cash, witnessed part of the assault, but did nothing. Cash subsequently gave several interviews in which he expressed no remorse for his actions or sorrow for the death of Iverson, triggering marches and demonstrations at UC Berkeley, where Cash was a student.

Case 8: Unnamed (1998)¹²⁴

During July, 1998, Calvin Bugg verbally and physically assaulted his ex-girlfriend in an elevator. None of the other passengers on the elevator intervened. Bugg was arrested.

¹²¹ *Cowardice of the Crowd*, PHOENIX GAZETTE, Aug. 23, 1995. Further details are provided at David's Story, My Firstborn Murdered, <http://www.geocities.com/Heartland/Bluffs/3295/story.html>.

¹²² Kruh, *supra* note 28.

¹²³ See <http://www.reviewjournal.com/news/primmurder/stroh/statement.html>.

¹²⁴ Beth Dailey, *T attack latest case to test public role*, BOSTON GLOBE, October 20, 1998, at B5.

Case 9: Mostapha Maarouf (1998)

On March 29, 1998, Maarouf, a taxicab driver, was beaten to death by four assailants, who dumped him in the trunk of his cab. The beating took place in front of a high rise apartment building. Initial reports were that no one in the apartment building called police, or told police that Maarouf's body was in the trunk of the cab. Subsequent reports indicated there had been several calls to 911.

Case 10: Unnamed (1998)¹²⁵

On August 18, 1998, a woman was assaulted and beaten by two men who were trying to carjack her Acura Integra. Three friends of the men who were assaulting the victim watched and did nothing.

Case 11: Unnamed (1998)¹²⁶

During October, 1998, a 13 year old student was fondled by four of her classmates on the Boston subway. Initial reports indicated that other passengers ignored the assault. Subsequent reports stated that adult passengers on the subway could not see what was occurring, and that approximately 10 other students were on the car, and some "giggled and laughed about it," and didn't think it was serious. At least one student attempted to intervene, but was "too small."

Case 12: Anthony Collins (1998)

In November, 1998, Anthony Collins drowned in Federal Way, Washington. No details were available on the incident, but a Seattle Times editorial analogized it to the case of Kitty Genovese.¹²⁷

¹²⁵ Lilo Stainton, *Victim Pleads for "Good Samaritan" Law*, Asbury Park Press (Neptune, N.J.), Sept. 17, 1998, at A14.

¹²⁶ Dailey, *supra* note 124

¹²⁷ *See Sad Twist*, *supra* note 32

Case 13: Kevin Heisinger (2000)¹²⁸

Kevin Heisinger was attacked and beaten to death in a bus restroom in Kalamazoo, Michigan by a schizophrenic man. No one came in response to Mr. Heisinger's calls for help. The beating was over in under a minute.

Case 14: Charles Morris (2000)¹²⁹

On August 1, 2000, Charles Morris was assaulted by Richard Cuevas outside a restaurant as part of an altercation involving a total of six people. Cuevas ran into the restaurant and grabbed a 12" kitchen knife, with which he stabbed Morris multiple times. Three employees of the restaurant did not telephone the police or emergency personnel, although one of the other individuals involved in the altercation called 911 shortly after the fight broke out. The police arrived four minutes after the phone call. The restaurant employees claimed the phone was broken, but that

Case 15: John McCann (2001)¹³⁰

On January 12, 2001, John McCann was walking into a supermarket when he was assaulted by Derek Soucy, who suffered from severe mental illness. Soucy approached McCann, knocked him to the ground and kicked him repeatedly in the face, as half a dozen elderly witnesses watched. Several shouted at Soucy to stop, and at least one called the police, but none intervened for several minutes, until a retired firefighter pushed Soucy away from McCann. Interestingly, several of the bystanders tried to prevent the firefighter from intervening, telling him that McCann was dead and Soucy was "crazy."

¹²⁸ See Wendy Wendland-Bowyer and Patricia Montemurri, *Killing Challenges Mental Health Policy*, DETROIT FREE-PRESS, Sep. 19, 2000.

¹²⁹ See <http://www.courtinfo.ca.gov/opinions/documents/S119750.PDF>

¹³⁰ Gregory Kesich, *Man, 88, Kicked to Death*, PORTLAND PRESS HERALD (Maine), Jan. 13, 2001, at 1A; Gregory Kesich, *A retired firefighter says "I just had to do something"*, Portland Press Herald (Maine), Jan. 16, 2001, at 8A.

Case 16: Robert Viscome (2002)¹³¹

On April 23, 2002, Robert Viscome, a high school student and football player was assaulted by Patrick Rukaj, a classmate and teammate. They were at a party and they had been drinking. Viscome taunted Rukaj about a personal matter. Rukaj punched Viscome once, who fell and hit his head on a concrete patio. Other partygoers failed to call 911, and delayed taking Mr. Viscome to the hospital while the evidence of liquor at the party was disposed of. Viscome ultimately died, and Rukaj pled guilty to misdemeanor assault. Six other partygoers were charged with obstruction of justice for telling the police the incident took place at a local park, but those charges were ultimately dropped.

Case 17: Allen Price (2003)¹³²

On January 31, 2003, Allen Price was shot in the head at a gas station in Northeast Washington, D.C. One witness finished filling his tank, paid, and drove away. Over the next few minutes, cars pulled in and out of the gas station, but no one reported the shooting. The gas station manager stated that he called 911 three minutes after the shooting but got a recording and hung up. Someone flagged down a police car a few minutes later, and it arrived seven minutes after the shooting.

¹³¹ Winnie Hu, *Youth Hurt at Party Dies After Week in Coma*, N.Y. TIMES, May 2, 2002 at B8; Jeane MacIntosh & Ikimulisa Sockwell-Mason, *Beer-Blast Tragedy: HS Star in Coma After Fight With Teammate*, N.Y. POST, April 26, 2002, at 25; Lisa W. Foderaro, *Pirro Criticized for Handling of Youth's Death at Party*, N.Y. TIMES, Aug. 10, 2002, at B5.

¹³² David A. Fahrenthold, *As Man Lay Dying, Witnesses Turned Away*, WASH. POST, Feb. 15, 2003, at A1; *Witnesses' Apathy Caught on Tape*, <http://www.cnn.com/2003/US/South/02/16/gas.shooting.ap/>.

Appendix B

A short summary of the awards issued by each entity follows.

Organizations that recognize rescues: records available

1. American Automobile Association (“AAA”)

Since 1949, the AAA has given School Safety Patrol Lifesaving Awards to members of a school safety patrol who, while on duty, have saved the life of a person in imminent danger. The safety patroller cannot have negligently caused or contributed to the person rescued being placed in the situation where his/her life was endangered.

Anyone can nominate a school safety patrol member for the award by filling out a detailed two-page form and providing supporting material before March 4th of the school year in question. The Patrol Supervisor is responsible for investigating the circumstances surrounding the act, and approving the nomination. Nominations are then reviewed by a National Board, made up of representatives from educational, law enforcement, and safety organizations.

2. American Red Cross – Certificate of Merit

The American Red Cross provides training in a variety of skills which can be used to save another’s life (e.g. water safety, first aid, CPR). Since 1928, the American Red Cross has awarded a Certificate of Merit to individuals who have used Red Cross training to rescue or attempt to rescue the life of another person. Records relating to Certificates of Merit awarded prior to 1983 are maintained at the National Archives depository in College Park, Maryland. Records relating to Certificates of Merit awarded from FY 1990 – FY 1996 are maintained in a warehouse in Virginia,

and records from FY1996 on are maintained on two computer databases at Red Cross headquarters in Fairfax, Virginia.¹³³

Individuals are nominated for a Certificate of Merit by their local Red Cross chapter. The national headquarters of the Red Cross confirms that the nominee received Red Cross training, used that training in rescuing someone in need of assistance, and determines whether a Certificate of Merit is warranted. Since 1999, professional rescuers (e.g. firemen and policemen) may not receive a Certificate of Merit, although they qualify for another award. The Red Cross does not distinguish between heroic and non-risky rescues, so all Certificates of Merit were treated as non-risky rescues. A simple count of awarded Certificates of Merit overstates the number of rescues, because the Red Cross awards multiple Certificates of Merit when more than one individual in a particular rescue satisfies the requirements. On the other hand, a simple count of awarded Certificates of Merit understates the number of rescuers, since only those who received official Red Cross training and used that training during the rescue are recognized. Each recipient of a Certificate of Merit was deemed to have participated in a non-risky rescue.

3. Bell System

Theodore N. Vail was the first president of the AT&T Corporation. After his death in 1919, a memorial fund was set up to recognize extraordinary acts of public service by employees of the Bell System. Gold, silver and bronze Vail Medals are given to Bell System employees who demonstrate behavior above and beyond what would have been expected in an emergency. Some Vail Medals were given for extraordinary service in maintaining phone service during exigent conditions, but the majority appear to have been given for rescue or lifesaving. All potentially qualifying cases were submitted to local review Committees, who could award a bronze Vail Medal on their own. All recipients of a bronze Vail Medal were separately considered by a national review

¹³³ Unfortunately, the Red Cross was unable to locate records relating to the Certificate of Merit from 1983-1989.

committee, which had the authority to upgrade the award to a Silver or Gold Vail Medal. Initially, Vail Awards were given only to employees who performed heroic acts while “on duty.” This requirement was eliminated in the late 1940s, and awards were made to employees who performed heroic acts that were not necessarily in the line of duty.

After the Bell System broke up in 1983, the regional Bell operating companies (“RBOCs”) each continued awarding three different Vail Medals, using a similar process for review of nominations. Nynex also awards a Certificate of Meritorious Service. Information on pre-breakup Vail Awards was obtained from Verizon, and from a book published about the program by the Bell system in 1950.¹³⁴ Information about post-breakup Vail Awards was only available for only two of the RBOCs (Bell Atlantic and Nynex), through their corporate successor Verizon.

On July 1, 2001, Verizon replaced the Vail Medals with a Verizon Heroes Award. Individuals may receive a certificate of recognition (for a good deed or act performed without threat to personal safety, risk, or inconvenience), a citation of meritorious service (for special acts or service with little risk or threat to personal safety but a slight degree of inconvenience) that may have contributed to the saving of a life. Bronze, Silver, and Gold Medals may be awarded for lifesaving associated with increasing degrees of personal risk.

4. Boy Scouts of America

The Boy Scouts of America has three distinct awards for lifesaving, and a fourth for meritorious conduct.¹³⁵ All members (including adult leaders) qualify for these awards. The Honor Medal with Crossed Palms is awarded in exceptional cases to an individual who has demonstrated both unusual heroism and extraordinary skill or resourcefulness in saving or attempting to

¹³⁴ FOR NOTEWORTHY PUBLIC SERVICE: THEODORE N. VAIL NATIONAL AWARDS (1950); records on file with author.

¹³⁵ See Boy Scouts of America, Lifesaving or Meritorious Action Awards, <http://www.scouting.org/factsheets/02-521.html>

save another's life at extreme risk to self. The Honor Medal is awarded to an individual who has demonstrated unusual heroism and skill in saving or attempting to save another's life at considerable risk to self. The Heroism Award is awarded to an individual who has demonstrated heroism and skill in saving or attempting to save another's life at minimum risk to self. The Medal of Merit is awarded for an outstanding act of service of a rare or exceptional character that reflects an uncommon degree of concern for the well-being of others.

The Honor Medal with Crossed Palms, Honor Medal, and Heroism Award have been awarded since 1911. The Medal of Merit was first awarded in 1946.

For purposes of the analysis, recipients of the Honor Medal and the Honor Medal with Crossed Palms were treated as having engaged in a risky rescue. Recipients of the Heroism Award and Medal of Merit were treated as having engaged in a non-risky rescue.

Mechanically, local councils nominate members for these awards. A National Court of Honor reviews the factual record, and makes an independent determination of which award, if any, is appropriate under the circumstances. On average, approximately 30 Honor Medals, 56 Heroism Awards, and 135 Medals of Merit were awarded every year.

5. Carnegie Hero Fund Commission

In 1904, Andrew Carnegie created the Carnegie Hero Fund Commission ("Carnegie Commission") to recognize outstanding acts of selfless heroism performed in the United States and Canada. Awardees receive a medal, and a modest cash award. The Carnegie Commission can also make monetary grants of continuing support, scholarship assistance, and death benefits. The Carnegie Commission requires that recipients perform an act that "voluntarily risked his or her own life to an extraordinary degree in saving or attempting to save the life of another person, or voluntarily sacrificed him or herself in a heroic manner for the benefit of others." The rescuer can have no responsibility for the

circumstances which compel rescue. The Carnegie Commission will not consider persons whose duties require them to perform a rescue; members of the armed services; children thought to be too young to comprehend the risks involved; and members of the same family as the victim, except in cases of outstanding heroism where the rescuer loses his life or is severely injured. Professional rescuers can qualify if the rescue is clearly above and beyond the line of duty.

The Carnegie Commission identifies awardees through a multi-step process. A clipping agency reviews newspapers from throughout the nation, and sends the Carnegie Commission accounts of rescues and similar incidents every week. A senior investigator reviews these clippings, and selects those which are plausible contenders for an award from the Carnegie Commission (“nominees”). Each such case is assigned a tracking number, and assigned to an investigator. The investigator is responsible for interviewing those with knowledge of the events in question, and determining whether any of the grounds for exclusion apply.¹³⁶ After multiple levels of review, a list of potential awardees is presented to the Carnegie Commission’s Board, which votes on them individually. On average, during the period 1904-2001, the Carnegie Commission awarded approximately 100 medals per year (heroic rescues). Additional data was available on nominees for the period 1991-2001. During this period, on average, 365 nominees per year did not receive an award because the rescue was not risky enough to qualify for a Carnegie Medal. Such rescues were deemed to be non-risky rescues.

The Carnegie Commission also provided all newspaper articles sent to them during May, 2002 - May, 2003 by their

¹³⁶ The grounds for exclusion include whether the event in question can be demonstrated to have occurred as recounted (establishment); whether the rescuer was a member of the military; whether the event was reported to the Carnegie Commission within two years; whether the event occurred within the United States and Canada; whether the rescuer had any responsibility for the circumstances necessitating rescue; and whether the risk involved in undertaking the rescue was consistent with the requirements of the award.

clipping service that did the Commission's "first cut" to determine nominees for the Carnegie Medal. These articles were coded and entered into a database. Over the course of a year (May, 2002 – May, 2003), an additional 1,000 incidents of non-heroic civilian rescue were reported in these articles.

6. Commonwealth Edison of Illinois

Commonwealth Edison gave Lifesaving Awards to employees who "act effectively in emergencies that threaten human life."¹³⁷ The award is granted to any employee who "by any act, including rescue or resuscitation or both, saves the life of any person, anywhere, at any time."¹³⁸ The standard for making an award is that had the candidate not performed the lifesaving act, the victim would have died. Applications for the Lifesaving Award included a written description of the event, supporting reports and documentation, newspaper accounts, hospital and/or doctor records, and statements of witnesses. A committee met periodically to review pending applications, and make a determination of which individuals deserved a Lifesaving Award. Applications were solicited from Division and Station Safety Advisors. Recipients received a \$1,000 fully paid life insurance policy and a certificate.

The program started in 1956, after Commonwealth Edison merged with the Public Service Company of Northern Illinois, and replaced existing separate programs of the two companies.¹³⁹ No records were available for awards since 1990, with the exception

¹³⁷ *Rules Governing the Granting of All Future Life Saving Awards*, undated document on file with author.

¹³⁸ *Id.* The rules provide that the Lifesaving Award shall be granted irrespective of, and in addition to any non-Company awards for which an employee may be eligible. Company records indicate that four Commonwealth Edison employees also received American Red Cross Certificates of Merit – two in 1986, and two in 1987.

¹³⁹ *Comments for Presentation of Lifesaving Awards*, Feb. 26, 1990, on file with author. The cases involved asphyxiation (11 cases), choking (46 cases), drowning (11 cases), electric shock (37 cases), heart attack (37 cases) and miscellaneous causes (23 cases).

of 1997. A representative of Exelon (corporate successor to Commonwealth Edison) stated in 2002 that the Lifesaving Award had been discontinued several years previously, but was uncertain of the date.¹⁴⁰

7. Federal Government Awards

a) Coast Guard

In 1874, Congress authorized the Secretary of Treasury to bestow medals upon persons who “endangered their own lives in saving or endeavoring to save lives from perils of the sea, within the United States or upon any American vessel.” Effective April 1, 1967, this authority was transferred to the Secretary of Transportation. The authority to make eligibility determinations was subsequently delegated to the Commandant of the United States Coast Guard.

The Coast Guard awards two medals: the Gold Lifesaving Medal is for acts of extreme heroism, and the Silver Lifesaving Medal is for lifesaving acts of extraordinary effort, but of a lesser degree of heroism or risk of life. Military personnel serving on active duty can receive a lifesaving medal only if they are on leave or liberty status. Posthumous awards are possible, and there is no time limit for the awarding of a Lifesaving Medal.

Nominations for these awards are sent to the Commander of the Coast Guard District, who is responsible for conducting an investigation, and making an initial determination of whether a Lifesaving Medal is appropriate. Final determination is made by the Commandant of the U.S. Coast Guard.

Both the Gold and Silver Lifesaving Medal were deemed to involve risky rescues. On average, five Gold Medals and sixteen Silver Medals are awarded every year.

b) Department of Energy

¹⁴⁰ Telephone conversation with Scott D. Murphy, Policy and Compliance Manager, Exelon Corporation, Nov. 7, 2002.

The Department of Energy has numerous facilities in the United States that are administered by independent contractors. One of these facilities, in Hanford, Washington, is administered by Fluor. Fluor Hanford has a Presidents' Zero Accident Council (PZAC), made up of representatives of various Fluor divisions and union leaders. The PZAC grants a Presidents' Life Saving Award to employees whose "life saving actions exemplify the true meaning of caring and courage." The life saving action need not be performed at work. Nominations are presented to the PZAC for a vote. Since 2000, approximately 3 Presidents' Life Saving Awards have been awarded each year.

c) Department of Interior

Since 1957, the Department of the Interior has awarded Medals of Valor to employees who have "demonstrated unusual courage involving a high degree of personal risk in the face of danger. The act of heroism need not be related to official duties, or have occurred at the official duty station. Nominations are reviewed by a committee, with final decisions made by the Secretary of the Interior. On average, 20 Medals of Valor have been awarded annually.

d) Department of Labor

The Department of Labor administers the Joseph A. Holmes Safety Association Awards. The Joseph A. Holmes Safety Association ("JAHSA") is a nonprofit organization that consists of representatives of federal and state governments, mining and labor organizations. Since 1916, awards have been given by JAHSA for personal heroism and distinguished service in the saving of a life to "active and inactive employee[s] of any branch of mining, quarrying, and mineral industries."¹⁴¹ The award can either be in the form of a Medal of Honor (for a rescue involving serious risk to one's own life) or a Certificate of Honor (for a rescue involving a lesser degree of personal risk). Since 1998, JAHSA has also

¹⁴¹ See Dan Harrington et al., *The Joseph A. Holmes Safety Association and Its Awards*, BM Bulletin 421 (Washington, D.C., 1940)

given a Life Savers certificate to individuals who save a life using modern life saving techniques or quick and appropriate action in an attempt to save a life. No risk to the rescuers' own life is required. Trained mine rescue teams are generally disqualified from receiving all of these awards. Nominations, which must include detailed information about the circumstances of the rescue, have to be received by the JAHSA National Council within two years of the event in question. Over the years in question, JAHSA awarded on average 2 Medals or Certificates of Honor and 36 Life Savers Certificates every year.

8. Girl Scouts of America

The Girl Scouts gives two distinct awards for lifesaving. The Bronze Cross is given for saving a life or attempting to save a life with risk to the awardees' own life. The Medal of Honor is given for saving a life or attempting to save a life without risk to the awardees' own life. The awards are reserved for Girl Scouts who "have performed heroic acts beyond the degree of maturity and training to be expected at their age." Awardees must be a registered Girl Scout at the time of the rescue, so adults do not qualify. If the Girl Scout caused or contributed to the circumstances requiring rescue, she is automatically ineligible. Unfortunately, the Girl Scouts had only limited historical data on awards of the Medal of Honor and the Bronze Cross, but provided records for the period 1997-2001.

9. Goodyear Highway Heroes

Goodyear has sponsored the Highway Hero program since 1983. Annual awards are given to full-time truck drivers that perform "heroic rescues or outstanding acts of humanitarianism" in the United States or Canada.¹⁴² The general public can nominate an individual for the award by filling out a detailed form.¹⁴³ A

¹⁴² Goodyear Highway Heroes, http://www.goodyear.com/truck/whatsnew/hero_overview.html

¹⁴³ *Id.* Nominations must be received within a year (or sooner) of the incident in question. For example, nominations for the 2004 Highway Hero

panel of transportation media representatives and industry officials selects a “State Highway Hero” for each state in which a driver was nominated, and then subsequently announces five finalists for the Highway Hero award. One driver is subsequently selected as the Highway Hero for the year. The Highway Hero receives a \$20,000 U.S. Savings Bond, and the other finalists receive a \$5,000 U.S. Savings Bond. State Highway Heroes receive a \$100 U.S. Savings Bond.

Goodyear had limited records on the number of nominees and State Highway Heroes for years prior to 2003.¹⁴⁴ However, they did pick a Highway Hero every year from 1983-2003, and there were, on average, five finalists for the Highway Hero Award from the United States every year during 1986-1988, 1992, 1999, and 2001-2003. Records are more fragmentary on the number of State Highway Heroes that were selected every year. State Highway Heroes were deemed to have performed a non-risky rescue, and finalists for the Highway Hero Award were deemed to have performed a risky rescue.

10. Heimlich Institute

In 1974, Dr. Henry Heimlich published an article describing a method for saving the life of someone who was choking by forcibly and abruptly squeezing them sub-diaphragmatically (“Heimlich maneuver”).¹⁴⁵ In short order, the Heimlich maneuver became the standard treatment for choking – and posters providing instructions on how to perform the Heimlich maneuver appeared in many workplaces, restaurants, and other places of public accommodation.

cover the time period between November 16, 2003 and November 15, 2004, and must be received by November 30, 2004. *Id.*

¹⁴⁴ But see Mick Hans, *Highway Heroes Rise to the Occasion*, 92 *Traffic Safety* 24, 26 (May/Jun. 1992) (“Since 1982, the company has chosen hundreds of drivers for state awards. Eighteen drivers received state awards in 1991.”)

¹⁴⁵ Henry J. Heimlich, *Pop Goes the Café*, *Emergency Med.* 154 (1974). See also Henry J. Heimlich, *A life saving maneuver to prevent food- choking*, 234 *JAMA* 416 (1975).

The Heimlich Institute maintains case reports of the performance of the Heimlich maneuver, gathered from correspondence and newspaper clippings. Beginning in 1997, the Heimlich Institute began issuing Sav-A-Life Awards to individuals who successfully performed the Heimlich maneuver on another person, and provided sufficient documentary evidence. The Heimlich Institute also receives scores of newspaper clippings and correspondence relating to the performance of the Heimlich maneuver every year.

11. Kiwanis Foundation

Since 1967, the Kiwanis Foundation has awarded the Robert P. Connelly medal to non-professional rescuers who risk death or personal injury in rescuing a non-relative. Beginning in 1980, the Kiwanis Foundation awarded either a Medal of Valor or a Certificate of Valor to individuals whose conduct does not meet the exacting standards for the Connelly medal. Only individuals nominated by a local Kiwanis chapter were considered for these awards.

12. Life Saving Benevolent Association of New York

The Life Saving Benevolent Association of New York was founded in 1849 by merchants and ship owners concerned about the frequency of shipwrecks along the Long Island coastline. The LSBA awards medals for lifesaving on the waterways of New York, New Jersey, and Connecticut. The majority of these awards are given to policeman and fireman, but every year several civilians receive awards. Awardees receive a letter of commendation, or a silver or bronze medal and a cash stipend, ranging from \$250-\$1,000, depending on the particular rescue. Since 1997, the LSBA has published brochures outlining each rescue.

13. National Association of Letter Carriers

The National Association of Letter Carriers (“NALC”) is the union of city delivery letter carriers working for the United

States Postal Service. The union has approximately 210,000 members who are active city delivery letter carriers.¹⁴⁶ The NALC publishes a monthly magazine, the Postal Record, which includes a section titled “Proud to Serve.” This section features accounts of NALC members who provide assistance to those in need, including heroic rescues. Individuals are selected for inclusion in Proud to Serve based on a form completed by their union local, along with supporting documentation.

Since 1974, NALC has given out a national Hero of the Year Award, and three regional Heroes of the Year Awards, “to pay public tribute to outstanding letter carriers who, ignoring dangers to themselves, perform selfless and heroic acts to rescue those at risk of losing their lives.”¹⁴⁷ Since 2002, NALC also has had a separate award for Carrier Alert Rescue, which honors letter carriers “who do not risk their own lives, but who, due to their alert observations of conditions and people on their routes, save customers' lives.” Recipients for these awards are chosen by a panel of independent judges, representing the labor community, community service organizations, and emergency public services. The committee reviews items published in the “Proud to Serve” column, and selects winners in each of these categories. Cases in which a postal carrier noted that mail was accumulating and contacted police or a relative were not included in the total.

14. State Government Awards

Numerous states give non-financial awards or recognition to citizens who perform a rescue.

a) Iowa

The Governors’ Lifesaving Program was initiated in the 1970s to recognize those who have courageously attempted to rescue someone else, or unselfishly assisted in an emergency

¹⁴⁶ Quick Facts About the NALC,
<http://www.nalc.org/nalc/facthist/nalcfact.html>

¹⁴⁷ NALC 2004 Heroes of the Year,
<http://www.nalc.org/news/latest/index.html#heroes>

situation.¹⁴⁸ There are three awards: Lifesaving with Valor (awarded to those individuals who at the risk of their own life, attempted to save that of another), Lifesaving (awarded to those individuals who have attempted to save the life of another individual, but did not put their own life in jeopardy during the rescue) and Meritorious (awarded to those individuals in recognition of outstanding and unselfish service rendered in time of distress). Nominations may be made by anyone. Nominees may not be trained in professional lifesaving techniques, and cannot have rescued an immediate family member. Nominations are investigated by the Iowa Department of Public Safety, which prepares a report on the incident. The report is considered by a committee that has the ultimate decision-making authority.¹⁴⁹ On average, Iowa has recognized eight risky rescues and six non-risky rescues per year since the inception of the program.¹⁵⁰

b) Montana

Since 1985, the Montana Governor has the authority to award a Medal of Valor to “any citizen of the state who displays extraordinary courage in a situation threatening the lives of one or more people.”¹⁵¹ The Governor can also give a Special Recognition Award to individuals who have taken immediate and selfless action to assist those in need. The Governor’s Office seeks nominations from the general public, who must provide background information, names of witnesses, and supporting documentation. A selection committee reviews the nominations, and makes recommendations to the governor as to which individuals should be recognized.

c) New York

¹⁴⁸ See <http://www.dps.state.ia.us/pib/lifesavingtypes.htm>

¹⁴⁹ See <http://www.dps.state.ia.us/pib/procedures.htm>

¹⁵⁰ For purposes of this analysis, Lifesaving with Valor Awards were treated as risky rescues; Lifesaving was treated as a non-risky rescue, and Meritorious awards were excluded.

¹⁵¹ MONTANA CODE ANNOT. 1-1-515 (1985).

Since 1984, the New York State Department of Correctional Services awards the Medal of Merit to employees for “extraordinary performance in the line of duty or for an exceptional contribution to the Department.” In practice, most of the awards have been for off-duty acts of risky rescue. After nominations are received, the Department of Correctional Services investigates the incident, and decides whether an award is justified. On average, five Medals of Merit have been awarded each year since the inception of the program.

d) Ohio

In 1985, the Ohio State Fire Commission created the Ohio Fire Service Citizens Award for Heroism. The Award is conferred on individuals who perform a lifesaving act in a fire or emergency situation at risk of their own life.¹⁵² Nominees cannot be a member of the same household as victims. Members of the fire service, state legislature or local government may nominate an individual for the award by completing a form and providing supporting information/documentation.¹⁵³ The supporting documentation must clearly and adequately describe “the severity and intensity of the fire or other incident, the specific dangers which the nominee faced and overcame, and just why this act of heroism was exceptional.” On average, the award has been given six times each year since its inception.¹⁵⁴

In 2001, the State Fire Marshal created an Award for Heroism. The Award is given to “civilians and emergency services personnel who make extraordinary efforts in emergency situations in an attempt to save the lives of others.” Members of

¹⁵² <http://www.com.state.oh.us/odoc/sfm/CitizensCriteria.htm>

¹⁵³ <http://www.com.state.oh.us/odoc/sfm/app/citizen.pdf>

¹⁵⁴ See Press Releases, <http://www.com.state.oh.us/odoc/sfm/pub/2003HallofFame.pdf>; <http://www.com.state.oh.us/odoc/sfm/ValorAwards2002.htm>; <http://www.com.state.oh.us/odoc/press1/01releases/fm0921.htm>; <http://www.com.state.oh.us/odoc/press1/97releases/fm0923.htm>; <http://www.com.state.oh.us/odoc/press1/99releases/fm0921.htm>; <http://www.com.state.oh.us/odoc/press1/98releases/fm0924.htm>.

the fire service, state legislature or local government may nominate individuals by completing the necessary form and providing supporting information and documentation.¹⁵⁵ Nominees cannot be a member of the same household as victims. As with the Fire Service Citizens Award, the supporting documentation must clearly and adequately describe “the severity and intensity of the fire or other incident, the specific dangers which the nominee faced and overcame, and just why this act of heroism was exceptional.” On average, the award has been given once each year since its inception.¹⁵⁶

e) Oklahoma

Since 1990, the Oklahoma Governor has had the authority to designate individuals as “Heroic Oklahomans.”¹⁵⁷ In general, the award is given for “exemplary heroism” in saving a human life, but not all the awards have involved risk to the rescuer. Most recipients appear to have been nominated for the award by a state legislator. The governors’ office investigates these nominations, and makes its own determination as to who should receive the award. On average, there has been one Heroic Oklahoman per year since the inception of the award.

f) Washington

The Washington Department of Labor and Industries issues Lifesaving Awards for heroic actions to save another person’s life. Nominees must be an employee in the state of Washington who is

¹⁵⁵ State Fire Marshal’s Award for Heroism,
<http://www.com.state.oh.us/odoc/sfm/app/heroismform.pdf>;
<http://www.com.state.oh.us/odoc/sfm/pub/heroismselectioncriteria.pdf>.

¹⁵⁶ See Press Releases,
<http://www.com.state.oh.us/odoc/sfm/pub/2003HallOfFame.pdf>;
<http://www.com.state.oh.us/odoc/sfm/ValorAwards2002.htm>;
<http://www.com.state.oh.us/odoc/press1/01releases/fm0921.htm>;
<http://www.com.state.oh.us/odoc/press1/97releases/fm0923.htm>;
<http://www.com.state.oh.us/odoc/press1/99releases/fm0921.htm>;
<http://www.com.state.oh.us/odoc/press1/98releases/fm0924.htm>.

¹⁵⁷ Oklahoma Stat. §74-3116.

covered by industrial insurance, whether state-funded or self-funded. The lifesaving act can have occurred at any place or time, but nominations must be received within a year of the rescue. Rescue/law enforcement personnel can receive a Lifesaving Award, but the conduct must be above and beyond the line of duty. The general public can nominate individuals by completing an application, and providing supporting official documentation. The awards committee of the Governor's Industrial Safety and Health Advisory Board reviews all nominations, and makes a determination as to who should receive an award. If the victim did not survive, the individual rescuer can receive a Humanitarian Award. Extensive records are available for the past four years, and more sketchy records are available for five years before that. During the time period in question, an average of 20 Lifesaving Awards and 3 Humanitarian Awards were issued every year. One individual lost his life while performing a rescue during 2001.

15. Truckload Carriers of America ("TCA")

Since 1997, TCA has designated as "Highway Angels" professional truckdrivers that do "good deeds," ranging from fixing a flat tire to heroic life-saving efforts.¹⁵⁸ Anyone can nominate a professional truckdriver by completing an on-line form.¹⁵⁹ Nominations are reviewed by a committee at TCA. Award recipients receive a lapel pin, clothing patch, and certificate of recognition.

Approximately 135 Highway Angel awards have been issued annually since the inception of the program. TCA issues a press release when a Highway Angel award involving heroic lifesaving, with significant peril to the truckdriver. During the period 1999-2004, it issued press releases for approximately thirteen Highway Angel Awards annually. An additional 40 Highway Angel Awards per year qualified as a non-risky rescue.

¹⁵⁸ Truckload Carriers Association, Highway Angels

¹⁵⁹ Truckload Carriers Association, Highway Angels Nomination Form, <http://www.truckload.org/highwayangels/nominate.asp>

The remainder of the Highway Angel Awards (82 per year) were excluded from the analysis.

16. United States Sailing Association

Since 1989, the United States Sailing Association has awarded the Arthur B. Hanson Rescue Medal to skippers of pleasure sailboats or race support vessels who effect rescues of victims from the water.¹⁶⁰ The award is for rescues in U.S. waters, or those which occur in races beginning or ending in U.S. ports. Anyone may nominate a skipper by completing an on-line form.¹⁶¹ The form and any supporting documentation is considered by the Safety at Sea Committee of the United States Sailing Association, whose determination is final.¹⁶² The United States Sailing Association's web page contains a detailed account of most such awards.¹⁶³ On average, 8 medals have been awarded every year since the inception of the award.

17. VITA Wireless Samaritans

Beginning in 1993, the Cellular Telecommunications & Internet Association's Wireless Foundation recognizes individuals who have used their wireless phones to summon help in an emergency. From 1993-2002, VITA Wireless Samaritan Awards were given annually to one individual from each of the 50 states, the District of Columbia, and Puerto Rico. Since 2003, multiple awards may be given in a single state, and awards are made on a rolling basis, instead of once a year.

Employees of wireless companies whose actions take place as part of their daily job and prior recipients are ineligible. Candidates may be nominated by their local wireless company or by any member of the public by completing a form and, if possible,

¹⁶⁰ Hanson Guidelines,
http://www.ussailing.org/safety/Rescues/hanson_guidelines.htm

¹⁶¹ Nomination Form,
http://www.ussailing.org/safety/Rescues/submit_a_nomination.htm

¹⁶²
¹⁶³ Hanson Rescues, <http://www.ussailing.org/safety/Rescues/>

providing supporting documentation. A national panel of representatives from law enforcement and emergency response services judges all entries and selects award recipients based on the importance of the individual to the situation, the effort of the action that was taken, the importance of technology to the situation, and the potential educational value of recognizing the individual in question.¹⁶⁴

No information is available on the number of awards from 1993-2000. During 2000-2004, there were approximately 55 VITA Wireless Samaritan Awards each year, selected from a larger group of nominations.¹⁶⁵ Not all of these awards meet the requirements of a non-risky rescue outlined previously. After individual review, approximately 25 VITA Wireless Samaritan Awards per year were deemed to be non-risky rescues.

B. Organizations that recognize rescues: records unavailable

A number of organizations provide recognition to individuals who rescue someone in need, but insufficient records were available to include such rescues in the analysis.

1. American Red Cross: Ordinary Heroes

Since 1999, individual chapters of the American Red Cross have administered a program called “Ordinary Heroes.” Participating chapters solicit nominations from the general public for individuals who have “shown extraordinary courage, compassion, character or humanity and saved or improved the lives of other local residents.” Awards are given in twelve different categories: Education, Public Safety, Volunteer, Fire and Rescue, Red Cross, Older Adult (age 65 or over), Youth (age 18 or under), Healthcare, Workplace, Sports, Military and Community.

¹⁶⁴ Judging Process, <http://www.wirelessfoundation.org/VITA/judging.cfm>

¹⁶⁵ Unfortunately, limited information is available on the number of nominations. One document indicates that CTIA received 110 VITA nominations in 2001.

The American Red Cross does not maintain centralized records on how many chapters participate in the Ordinary Heroes program, or how many recipients there have been of such awards. There are approximately 900 chapters of the American Red Cross and computer searches indicate an appreciable number of chapters participate in the program.

2. Medic First Aid

Medic First Aid (“MFA”) is a private company that provides emergency care training programs (including CPR and first aid) for businesses and the general public. According to MFA’s website, over seven million students have been trained by them worldwide. MFA helps private businesses meet OSHA requirements that in the absence of a nearby infirmary, clinic, or hospital, businesses must provide someone adequately trained to render first aid to injured employees. Since 1981, MFA has awarded a Good Samaritan certificate to individuals who received MFA training and used it to provide assistance to someone in need. MFA’s website indicates at least eight such awards were given during the period 1997-2002.¹⁶⁶ A representative of MFA stated that many more awards had been given, but refused to provide access to supporting documentation or MFA records. It is unclear what process MFA goes through to determine whether or not to make a Good Samaritan Award. Accordingly, for purposes of this article, MFA Good Samaritan Awards were not treated as evidence of a rescue, and were excluded from further consideration.

3. National Ski Patrol

¹⁶⁶ Medic First Aid International, Good Samaritan Stories, http://www.medicfirstaid.us/index.php?page_id=51 The website indicates that two additional Good Samaritan Awards were granted, but it does not provide the dates of those rescues. See Medic First Aid International, Diabetic Emergency, http://www.medicfirstaid.us/index.php?page_id=110 and Medic First Aid International, http://www.medicfirstaid.us/index.php?page_id=111

The National Ski Patrol (“NSP”) is an organization of ski patrollers, who provide emergency care and rescue services to skiers. The NSP has approximately 27,000 members, the overwhelming majority of whom are volunteers, providing services at ski resorts throughout the United States.¹⁶⁷ The NSP awards several different merit stars for lifesaving. The Purple Merit star is given for saving a human life through emergency care. The Blue Merit Star is awarded for outstanding or heroic use of ski patrol skills in an attempt to save a human life. The Green Merit Star is awarded for outstanding acts of heroism that do not meet the lifesaving requirements of the Purple Merit Star. The Yellow Merit Star is awarded for outstanding acts or services to the NSP, including service in support roles associated with the Purple, Blue, or Green Merit Stars. A Merit Star may be awarded irrespective of where the lifesaving assistance was provided. Individuals who perform lifesaving acts while on duty in the course of their normal occupations do not qualify for a Merit Star. The NSP Manual requires the completion of a form nominating the ski patroller for a particular Merit Star, along with letters of recommendation and supporting documentation. Nominations are reviewed at multiple levels within the NSP before a Merit Star is awarded.

The NSP refused to provide access to its records relating to these Merit Stars. A representative of the NSP estimated that Purple Merit Stars were awarded about fifty times per year, and Blue and Green Merit Stars were each awarded about 100 times a year, for a total of approximately 250 rescues per year.¹⁶⁸ Press reports and other materials indicate that numerous Merit Stars have been awarded in the past to NSP members.¹⁶⁹ Unfortunately, in

¹⁶⁷ In 2002, the NSP had 26,782 members. Membership records indicate 22,442 were volunteer ski patrollers (84%), 3,697 were paid ski patrollers (14%) and 643 had no status indicated (2%).

¹⁶⁸ The same individual estimated that more than 250 Yellow Merit Stars were awarded every year. However, Yellow Merit Stars are not limited to involvement in a rescue.

¹⁶⁹ See, e.g. Gretchen R. Besser, *The National Ski Patrol: Samaritans of the Snow* (1984); *Newswatch*, Seattle Times, Oct. 28, 2001 at B3 (noting seven members received Yellow Merit Stars for rescuing a paralyzed snowboarder);

the absence of access to NSP records, insufficient information was available to generate a defensible figure for rescues by NSP members. Accordingly, for purposes of this article, NSP Merit Stars were excluded from the reported totals.

4. Other Organizations

Numerous additional entities recognize risky and non-risky rescues. These entities include private firms (Liberty Mutual and UPS¹⁷⁰), associations (the American Gas Association,¹⁷¹ American Water Works Association,¹⁷² the Association for Rescue at Sea,¹⁷³ the Palm Beach Civic Association,¹⁷⁴ Rotary,¹⁷⁵ the United States Lifesaving Association¹⁷⁶ and the Young Marines¹⁷⁷) and various levels of government (the Federal Executive Board,¹⁷⁸ the

Ski Patrol Members Earn National, Divisional Awards, Spokesman-Review, Nov. 17, 1998, at D5 (noting five Blue Merit Stars awarded *Ventura Association will register players*, *Ventury County Star*, Oct. 25, 1998, at C12 (noting that Southern California Nordic Ski Patrol members received 39 merit stars in 1987); *Bridgewater Man to be Honored For Rescue*, *Patriot Ledger*, May 10, 1996, at 17S (noting award of Purple Merit Star); Tommy Hine, *The Rescue that Made 'Rescue 911': Life or death on a ski slope*, *Hartford Courant*, Jan 8, 1993, at E1 (noting award of Purple Merit Star); Marilyn Wellemeyer, *The Good Samaritans of the Slopes*, *Fortune*, Feb. 22, 1982, at 149 (noting recipient of Purple Merit Star, and observing that nationwide statistics suggest 2.16 per 1,000 skiing visits result in injury);

¹⁷⁰ UPS, Driver Stories, <http://www.community.ups.com/community/safety/driver.html>

¹⁷¹ Heroic Rescue Earns Lally AGA Award, http://www.aga.org/Template.cfm?Section=Past_Issues&template=/ContentManagement/ContentDisplay.cfm&ContentID=6672

¹⁷² AWWA Heroism Award, http://www.awwa.org/about/oandc/awards/AWARDDES.cfm#P572_59698

¹⁷³ AFRAS Silver Medal, <http://www.afras.org/award/silvermedal.html>

¹⁷⁴ Raymond J. Kunkel Foundation History, http://www.palmbeachcivic.org/kunkel_foundation.html

¹⁷⁵ Heroic Acts, http://www.usla.org/PublicInfo/heroic_main.asp

¹⁷⁷ Young Marines of the Marine Corps League, Awards Manual, available at http://www.youngmarines.com/Adult/Awards%20man/awards_annex_three.htm

¹⁷⁸ *Federal Executive Board Honors EPA Hero*, available at <http://www.epa.gov/region02/news/2003/03055.htm>

Harrisburg Mayor, the Governor of Indiana, the Texas Department of Agriculture,¹⁷⁹ and the Los Angeles County District Attorney's Office).¹⁸⁰ Other entities seem to have given awards at some time in the past, but no longer do so.¹⁸¹ All of these entities were excluded from the reported totals as well.

¹⁷⁹ Mandy Spikes, *Tractor accident leaves father pinned, under water*, Country World, Aug. 22, 2004, available at <http://www.countryworldnews.com/Editorial/CTX/2004/ct0422RuralHero.htm> (noting Rural Heroism Award, given annually by the Texas Department of Agriculture).

¹⁸⁰ Acts of Heroism, www.lapdonline.org/salute/heroism/acts_of_Heroism_main.htm

¹⁸¹ For example, the National Safety Council awarded a President's Medal approximately 72 times each year from 1928-1964 to individuals who used one of two specific forms of artificial resuscitation to save a life. No records were available for awards after 1964, and the President's Medal was discontinued sometime during the 1970s. Research indicated analogous awards were also given by the Edison Electric Institute, GTE (the Morris Felton Lacroix Award), and the Federal Fire Council (Junior Fire Marshall Gold Medal).