

# TESTING THE WATERS FOR AN ARIZONA DUTY-TO-RESCUE LAW

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*This Note considers the curious urban legend that suggests Arizonans have a legal duty to provide water to thirsty strangers. It concludes that this “law” is a myth, but its existence reflects the important reality that Arizona is an outstanding candidate for a duty-to-rescue law that would require citizens to assist people in grave danger (including those who are severely dehydrated). This Note gives a detailed overview of the philosophical debate over duty-to-rescue laws, discusses the content and effect of existing duty-to-rescue laws in the United States, and proposes a model duty-to-rescue statute for Arizona.*

## TABLE OF CONTENTS

INTRODUCTION .....	898
I. THE “DUTY TO PROVIDE WATER” URBAN MYTH .....	898
II. DUTY-TO-RESCUE STATUTES AND THE COMMON LAW .....	900
III. THE POLICY DEBATE OVER DUTY-TO-RESCUE LAWS .....	903
A. Arguments in Favor of Duty-to-Rescue Laws .....	903
B. Philosophical Arguments That Duty-to-Rescue Laws Are Bad for Society .....	904
C. Pragmatic Arguments That Duty-to-Rescue Laws Are Bad for Society ....	907
IV. DUTY-TO-RESCUE LAWS IN PRACTICE .....	910
A. The Lack-of-Enforcement Critique of Duty-to-Rescue Laws .....	910
B. Comparative Analysis of the Case Law About Duty-to-Rescue Statutes...	914
V. PROPOSING A DUTY-TO-RESCUE LAW FOR ARIZONA .....	917
A. Choosing Between Civil Liability and a Criminal Penalty .....	917
B. Choosing the Textual Content of the Proposed Statute .....	918
C. Political Factors and Potential Consequences of the Proposed Statute .....	920

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## INTRODUCTION

According to local legend, Arizona law requires a person to provide free water to anyone who asks for it; however, in reality, businesses and individuals are not legally obligated to provide water to thirsty members of the public. Assuming no special relationship exists, even if a person dying of thirst stumbled out of the desert, neither federal law nor Arizona law would subject an onlooker to criminal or civil penalties for refusing to give that person a glass of water.<sup>1</sup> The common-law tradition within U.S. jurisprudence does not impose a “duty to rescue” imperiled strangers.<sup>2</sup>

Recently, some American jurisdictions have departed from traditional common-law precedent and have statutorily imposed a “duty to rescue” in certain circumstances.<sup>3</sup> This Note evaluates the appropriateness of such laws, and concludes that a duty-to-rescue statute should be imposed in Arizona. Part I of the Note debunks the duty-to-provide-water myth. Part II summarizes the common-law “no duty” tradition and explains types of duty-to-rescue statutes that challenge it. Part III engages with the scholarly debate over the desirability and efficacy of such laws. Part IV summarizes the experiences of four states that have already enacted duty-to-rescue laws, and synthesizes lessons learned from these jurisdictions. In Part V, this Note concludes by proposing enactment of a criminal statute that imposes a small fine of \$500 upon people who know someone is in serious danger, yet fail to call for help or attempt to rescue that person. The proposed law does not require action in situations where reporting danger or attempting rescue would be perilous to the would-be rescuer. The model statute is designed to incentivize rescue without being overly coercive or creating negative side effects.

### I. THE “DUTY TO PROVIDE WATER” URBAN MYTH

The myth of a “duty to provide water” in Arizona has spread largely through word-of-mouth and online gossip. Several websites and message boards promote the myth, though they disagree over whether the legal requirement applies only to businesses or to individuals as well.<sup>4</sup> In reality, Arizona has no such law requiring either individuals or businesses to provide water to people.

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1. This outcome assumes no special relationship establishing a duty of reasonable care, and operates on the presumption that the court adjudicating the case follows typical common-law doctrine. Special relationships in tort law include carrier–passenger, innkeeper–guest, invitor–invitee, employer–employee, school–student, and landlord–tenant, among others. *See, e.g.*, 2 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 408 (2d ed. 2011).

2. *See infra* Part II.

3. *See infra* notes 17–21 and accompanying text.

4. *See, e.g.*, *Illegal to Refuse to Provide Drinking Water in Arizona?*, SNOPE (Mar. 13, 2009, 3:53 PM), <http://message.snopes.com/showthread.php?t=43247> (featuring commenters disagreeing over whether the duty applies to individual citizens or only to “eating establishments”); Cheryl Larkin, *Ten of the Strangest Arizona Laws*, YAHOO! VOICES (Nov. 8, 2006), <http://voices.yahoo.com/ten-strangest-arizona-laws-106957.html?cat=17> (suggesting that there is a general duty to provide water but that businesses “are reported and

The perception of a duty to provide water probably derives from Arizona's unusually hot and dry environment. These harsh conditions can be hazardous to people who do not receive adequate hydration, especially during summer months that feature average high temperatures of over 100 degrees Fahrenheit in many regions of the state.<sup>5</sup> This results in a high number of heat-related deaths every year.<sup>6</sup> Additionally, most of the state's desert land is sparsely populated, making it potentially difficult for someone in danger to find help if stranded in a remote area.<sup>7</sup>

Undocumented immigrants are adversely affected by Arizona's harsh environment more often than other population groups.<sup>8</sup> Dozens of people die every year attempting to cross the border from Mexico into the United States.<sup>9</sup> Some non-governmental organizations ("NGOs"), such as the Tucson-based group No More Deaths, have placed water canisters in desert border areas as a form of humanitarian assistance in attempts to prevent deaths from heat and exposure.<sup>10</sup> No More Deaths recently experienced a legal victory when the United States Court of Appeals for the Ninth Circuit held that volunteers who left behind plastic jugs of water were not guilty of "littering" on federal land.<sup>11</sup> Humanitarian NGOs' attempts to assist people involved in illegal border crossing remain controversial, with opponents claiming that their efforts encourage illegal immigration.<sup>12</sup> A duty-to-rescue law could play a role in mitigating border deaths without violating federal immigration policies.<sup>13</sup>

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heavily fined the most for not following this law"); Jen Wolfe, *Arizona Fun Facts*, SEETHESOUTHWEST, (Mar. 25, 2011), <http://seethesouthwest.com/2559/arizona-fun-facts/> (indicating a general duty to provide a glass of water to anyone who asks for one).

5. THE WORLD ALMANAC AND BOOK OF FACTS 2012, 302; *Monthly Averages for Phoenix, AZ*, WEATHER.COM, <http://www.weather.com/weather/wxclimatology/monthly/graph/USAZ0166> (last visited Oct. 11, 2013).

6. CTRS. FOR DISEASE CONTROL & PREVENTION, HEAT-RELATED MORTALITY—ARIZONA, 1993–2002, AND UNITED STATES, 1979–2002, at 628–30 (2005) ("Findings indicated that, during 1979–2002, a total of 4,780 heat-related deaths in the United States were attributable to weather conditions and that, during 1993–2002, the incidence of such deaths was three to seven times greater in Arizona than in the United States overall.").

7. WORLD ALMANAC, *supra* note 5, at 610 (documenting that Arizona's population density is only 56.3 per square mile, ranking 17th lowest out of 50 states).

8. Christopher K. Mrela & Clara Torres, ARIZ. DEPARTMENT OF HEALTH SERVICES, DEATHS FROM EXPOSURE TO EXCESSIVE NATURAL HEAT OCCURRING IN ARIZONA: 1992–2009, at 2 (2010) (finding that more illegal immigrants than native-born Arizonans died of heat-related causes within the state between 1992 and 2009).

9. *Id.* at 11 (featuring statistics indicating that since 2000, the number of heat-related immigrant deaths per year has ranged from a low of 30 in 2008 to a high of 116 in 2005).

10. Fernanda Santos, *Group Rooted in the Desert Looks Out for Migrants*, N.Y. TIMES, Aug. 3, 2013, at A11.

11. *United States v. Millis*, 621 F.3d 914, 914–15 (9th Cir. 2010). *See also infra* Part V.C.

12. Marc Lacey, *Water Drops for Migrants: Kindness, or Offense?*, N.Y. TIMES, Sept. 27, 2010, at A10.

13. *See infra* Part V.

Legends and myths about law reflect underlying societal values and beliefs.<sup>14</sup> Popular notions of the law, even if inaccurate, influence political actors.<sup>15</sup> Additionally, if people take action based upon a mistaken belief that a law exists, such as by going out of their way to provide water to thirsty strangers, and by telling other people they are legally obligated to do the same thing, that conduct has an influence on the social and legal architecture of the polity even though the perceived law does not appear in official legal code. The statute proposed in this Note simply attempts to make our society's legal norms compatible with its already-existing social norms.

The mistaken belief that there is a legal duty to provide water is based on the perception that such a law would be logical because of Arizona's extreme weather and hazardous environment. The existence of the urban legend might indicate that some people believe an individual who refused to give water to a desperately thirsty person *should* face legal sanctions. Arizonans who hold this viewpoint are at odds with the traditional tort law principle that individuals have no legal obligation to assist a stranger in mortal peril.<sup>16</sup>

## II. DUTY-TO-RESCUE STATUTES AND THE COMMON LAW

The traditional absence of a duty to rescue in American tort law has been the subject of considerable commentary among legal scholars.<sup>17</sup> Certain legal precedents have become famous, if not infamous, for finding that individuals who watched people drown without taking action were not legally culpable.<sup>18</sup> This principle is still the standard doctrine of tort law: Arizona case law establishes that individuals who fail to provide help for a stranger in harm's way ("nonrescuers") are usually not subject to civil or criminal penalties.<sup>19</sup> The civil law tradition of

14. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 723 (1998) (arguing that "legal legends" are pervasive in part because they "give expression to genuine and deep concerns shared by large numbers of people").

15. See Elizabeth Chambliss, *When Do Facts Persuade?: Some Thoughts on the Market for Empirical Legal Studies*, 71 LAW & CONTEMP. PROBS. 17, 18–19 (2008) (noting the resilience and social impact of false legal legends and online rumors); David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797, 800–01 (1998) (observing that anecdotal evidence and "legal narratives" of questionable veracity can have a significant effect on swaying public opinion); see also Myron Levin, *Legal Urban Legends Hold Sway*, L.A. TIMES (Aug. 14, 2005), <http://articles.latimes.com/2005/aug/14/business/fi-tortmyths14> (quoting legal experts who claim that myths about plaintiffs winning ridiculous, frivolous lawsuits were swaying public opinion in favor of corporate campaigns to limit liability).

16. See *infra* notes 17–19 and accompanying text.

17. See, e.g., THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID (Michael A. Menlowe & Alexander McCall Smith eds., 1993); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908).

18. See *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928) (holding that owner of a boat rental business who refused help to drowning customers was not liable for their deaths); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (ruling that a man who induced an acquaintance to jump into a water-filled trench and then watched him drown could not be held legally responsible for his death).

19. *Miller v. Arnal Corp.*, 632 P.2d 987, 994 (Ariz. Ct. App. 1981) ("[T]here is no duty to rescue an endangered stranger.").

continental Europe has taken a different approach, and several nations impose legal penalties on nonrescuers.<sup>20</sup> Some American states have also departed from common-law traditions and passed laws imposing a limited legal duty to rescue.<sup>21</sup>

Duty-to-rescue laws generally only apply to situations where the endangered person and the potential rescuer are strangers. Under common-law precedent, people already have a duty of reasonable care toward others with whom they have an existing legal special relationship, such as an employer's responsibility toward an employee.<sup>22</sup>

Absent a duty of reasonable care, individuals also have a common-law duty to assist an endangered stranger if their own actions placed the victim in serious peril.<sup>23</sup> Additionally, an individual assumes a duty if he or she begins to attempt a rescue and then abandons it; once a rescuer has chosen to help someone failing to follow through is considered negligence under the common law.<sup>24</sup> Under these scenarios, an obligation exists even in the absence of a duty-to-rescue law.<sup>25</sup>

Duty-to-rescue statutes, which apply to strangers rather than those who already owe a special duty, are similar to laws commonly referred to as "Good Samaritan" laws, in reference to the Biblical story portraying a traveler who aided an injured stranger as a praiseworthy example of moral conduct.<sup>26</sup> Good Samaritan laws deal with the issue of liability for assistance to strangers in harm's way.<sup>27</sup> Every state in the United States, including Arizona, has passed some form of a Good Samaritan law to protect people from civil liability if they attempt to rescue

20. Nations with duty-to-rescue laws include Germany, France, Italy, and Spain, among others. See Damien Schiff, *Samaritans: Good, Bad, and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 87–92 (2005). See also William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 125–26 (1978); Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 616 (2010); Edward A. Tomlinson, *The French Experience With Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 451, 452 (2000).

21. Four states (Minnesota, Rhode Island, Vermont, and Wisconsin) have adopted broad duty-to-rescue laws. MINN. STAT. § 604A.01 (2013); R.I. GEN. LAWS § 11-56-1 (2013); VT. STAT. ANN. tit. 12, § 519 (2013); WIS. STAT. § 940.34 (2013).

22. See Levy, *supra* note 20, at 661; Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 248 (1980).

23. Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1461 (2008).

24. See Levy, *supra* note 20, at 661–62 (explaining that rescuers are required to complete a rescue because others may refrain from giving assistance in reliance upon their completion of the rescue); Scordato, *supra* note 23, at 1461–62.

25. See Restatement (Second) of Torts § 323 (1965).

26. See Luke 10:25–37; see also Justin T. King, Comment, *Criminal Law: "Am I My Brother's Keeper?" Sherrice's Law: A Balance of American Notions of Duty and Liberty*, 52 OKLA. L. REV. 613, 618 (1999).

27. Duty-to-rescue laws are sometimes referred to as "Bad Samaritan Laws" in order to distinguish them from Good Samaritan Laws that protect rescuers from negligence lawsuits. See, e.g., Levy, *supra* note 20, at 616; Tomlinson, *supra* note 20, at 454.

someone—as long as they act in good faith and avoid recklessness.<sup>28</sup> A second type of law goes further; it does not protect people from lawsuits if they choose to rescue a stranger in distress, but rather it creates an affirmative legal duty requiring a stranger to provide reasonable assistance. These are the so-called duty-to-rescue laws.

Duty-to-rescue laws can take one of two forms. The first is a “duty-to-report-crime” statute, which applies only when a criminal’s illegal conduct puts a victim in physical danger; these laws require someone who witnesses a crime to notify emergency personnel.<sup>29</sup> These statutes do not require citizens to report victimless crimes, and they generally do not encourage citizens to personally intervene. Some of these laws apply to only a short list of serious crimes; for example, Florida has a duty-to-report-sexual-assault law, which subjects violators to up to one year in jail.<sup>30</sup> Other, broader statutes, which require citizens to contact paramedics or law enforcement if they see any crime victim suffer substantial physical harm, tend to have more minor penalties.<sup>31</sup> Duty-to-rescue laws applying to criminal cases received widespread pop-cultural exposure in the final episode of the television sitcom *Seinfeld*, which featured all four main cast members being sentenced to one year in prison under a Good Samaritan law for watching an armed robbery take place without making any effort to help or report the incident to the authorities.<sup>32</sup>

Duty-to-rescue-from-danger statutes extend beyond cases of crime victims to require assistance to people in serious physical dangers of any kind.<sup>33</sup> These are the laws that could have provided legal culpability (in the form of a criminal penalty, not the requested civil liability) to the infamous nonrescuers that law students learn about in most first-year torts classes.<sup>34</sup> Vermont, Minnesota, and Rhode Island are the only states to pass these duty-to-rescue-from-danger laws, which tend to have less severe criminal penalties than laws penalizing citizens for failing to report violent crimes; punishments range from misdemeanor penalties to a mere \$100 fine in Vermont.<sup>35</sup> Arizona currently has no general duty-to-rescue-from-danger statute,

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28. ARIZ. REV. STAT. ANN. § 36-2263 (2013). See also Danny R. Veilleux, Annotation, *Construction and Application of “Good Samaritan” Statutes*, 68 A.L.R.4th 295, 300 (1989) (“After the first Good Samaritan statute was passed in 1959, all states have enacted some form of the legislation.”).

29. See, e.g., WASH. REV. CODE § 9.69.100 (2013).

30. FLA. STAT. § 794.027 (2013).

31. For example, citizens who fail to report endangered crime victims face petty misdemeanor penalties in Hawaii; in Massachusetts, they are subjected to a fine of between \$500 and \$2,500. See HAW. REV. STAT. § 663-1.6 (2013); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2013).

32. *Seinfeld: The Finale* (NBC television broadcast May 14, 1998).

33. E.g., VT. STAT. ANN. tit. 12, § 519(a) (2013) (“A person who knows that another is exposed to grave physical harm shall . . . give reasonable assistance to the exposed person.”).

34. See e.g. *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959).

35. See MINN. STAT. ANN. § 604A.01 (stating that those who violate the law will be subject to petty misdemeanor penalties); R.I. GEN. LAWS § 11-56-1 (subjecting

although it does have a law requiring a vehicle driver to “[r]ender reasonable assistance to a person injured in an accident” that the driver caused.<sup>36</sup> Only a broader, general duty-to-rescue statute could require citizens to provide water to a person dying of thirst in the Arizona desert.

### III. THE POLICY DEBATE OVER DUTY-TO-RESCUE LAWS

The desirability and effectiveness of duty-to-rescue laws remain controversial, and has been hotly debated within legal scholarship for decades. This Part discusses the arguments in favor of these laws, as well as philosophical and pragmatic counterarguments.

#### A. Arguments in Favor of Duty-to-Rescue Laws

Duty-to-rescue proponents offer two main arguments. The more pragmatic argument suggests that these laws will provide an incentive for citizens to help strangers in peril, thereby leading to the desirable public policy outcome of a greater number of endangered people being rescued.<sup>37</sup> The more theoretical argument contends that these statutes make the common law more harmonious with basic principles of morality and justice.<sup>38</sup> The absence of a duty to rescue demonstrates the Anglo-American legal tradition’s tendency to emphasize individual rights and personal freedoms, sometimes at the expense of prioritizing responsibilities to the common good.<sup>39</sup> Proponents argue that establishing duty-to-rescue laws would make the law better reflect the moral norms of a communitarian society by giving people an affirmative obligation to help individuals in serious danger when doing so is safe and reasonable.<sup>40</sup> This change would legally codify the notion that people have a civic responsibility to look out for one another.

These arguments in favor of duty-to-rescue laws are fairly straightforward, but proponents must rebut a number of powerful counterarguments rooted in two core critiques: the first critique claims that such laws are ineffective and unnecessary;<sup>41</sup> the second critique goes further, suggesting that duty-to-rescue laws

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lawbreakers to six months in jail or a \$500 fine or both); VT. STAT. ANN. tit. 12, § 519 (the \$100 fine has not been modified or adjusted for inflation since passage of statute in 1967).

36. ARIZ. REV. STAT. ANN. § 28-663(a); see *Miller v. Arnal Corp.*, 632 P.2d 987, 991 (Ariz. Ct. App. 1981).

37. See Levy, *supra* note 20, at 627 (contending that duty-to-rescue laws should be imposed in order to “minimize needless deaths and injuries”); Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605 (2001) (arguing that a legal incentive may be necessary to overcome some people’s self-interested reasons for avoiding involvement with another person’s emergency).

38. See Levy, *supra* note 20, at 627–28 (suggesting that duty-to-rescue laws would allow society to express its “moral outrage” toward egregious nonrescuers and to send an “aspirational message” that citizens should look out for one another); Weinrib, *supra* note 22, at 285–88 (arguing that “duty to rescue” is consistent with both utilitarian and deontological approaches to ethical philosophy).

39. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 650, 660 (1995).

40. *Id.* at 662.

41. See *infra* Part IV.

in fact have a negative, rather than a neutral or *de minimus* effect. These objections are discussed below.

### ***B. Philosophical Arguments That Duty-to-Rescue Laws Are Bad for Society***

A variety of philosophical objections claim that duty-to-rescue laws will have a negative effect on society.<sup>42</sup> Opponents of the statutes suggest that they would undermine key values and ideals of our society, including personal autonomy.

Substantial philosophical arguments contend that duty-to-rescue laws infringe upon individual freedom by denying people the choice of whether to assist a person in peril.<sup>43</sup> Advocates of this position imply that an affirmative duty to rescue infringes on a “right not to rescue.”<sup>44</sup> This perspective regards the individualism of the common-law tradition as a positive trait of English-speaking countries that are cultural bastions of individual freedom.<sup>45</sup> One duty-to-rescue opponent observes that some European countries first passed their duty-to-rescue laws during periods of authoritarian rule, and implies that these laws might take the United States down the slippery slope toward allowing an oppressive government to impose various unreasonable requirements on the public.<sup>46</sup> This argument is unconvincing, however, because duty-to-rescue nations including the Netherlands, and U.S. states such as Vermont, have not evolved into highly autocratic and coercive polities in the decades since passing such laws.<sup>47</sup>

Libertarians’ philosophical objections to positive duties involve a fundamental disagreement with duty-to-rescue proponents about which social policies are effective and which ethical values ought to be prioritized. Contrary to some libertarians’ claims, there is considerable evidence that absolute freedom for individuals to pursue their self-interests is no policy panacea; functional societies

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42. See, e.g., Scordato, *supra* note 23, at 1502 (arguing that the costs of a duty-to-rescue law would outweigh the benefits).

43. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 200 (1973) (arguing that absence of duty to rescue in common law is moral because it maintains “freedom of the will” and avoids coercing people); Scordato, *supra* note 23, at 1475 (contending that duty-to-rescue statutes are overly restrictive on individual choice and prevent people from using their own judgment in an emergency situation).

44. One good summation of this perspective was given by fictional attorney Jackie Chiles in *Seinfeld: The Finale* (NBC television broadcast May 14, 1998). In this episode, Chiles states, “Good Samaritan Law? I never heard of it. You don’t have to help anybody. That’s what this country’s all about.” *The Finale (I)*, SEINFELD SCRIPTS, <http://www.seinfeldscripts.com/TheFinale.htm> (last visited July 17, 2014). *But see also* Levy, *supra* note 20, at 657 (discussing and rejecting a libertarian argument that onlookers have a “legal right to refrain from attempting to rescue”).

45. See Schiff, *supra* note 20, at 120 (“The common law’s repugnance to forced charity also speaks against a wholesale importation of civil law duties to rescue. Anglo-American jurisprudence is individualistic because common law countries’ cultures tend toward individualism.”).

46. Schiff, *supra* note 20, at 79, 119.

47. THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2012: DEMOCRACY AT A STANDSTILL 1–3 (2013) (ranking The Netherlands as the 10th most democratic nation in the world based on factors such as electoral pluralism, civil liberties, functioning of government, political participation, and political culture).

are not the product of self-interested actions alone, and human beings sometimes fail to understand or follow their rational self-interests.<sup>48</sup> Even if all individuals could be successful in understanding and pursuing their own interests, the results of this behavior may create negative externalities for the public. In response, communities might require some social or legal pressure on individuals to prevent “free riders” from acting in a manner that benefits themselves while damaging society as a whole.<sup>49</sup>

A related objection goes beyond asserting a broad “right not to rescue” as a universal principle, and posits that some individuals may have specific, personal reasons to avoid attempting to rescue someone, and therefore it would be unfair to require it of the public at large. For example, some people may have a genetic or psychological predisposition to “freeze up” in an emergency.<sup>50</sup> Others might be afraid that individuals with criminal or predatory intent will falsely pose as being in danger in order to lure in victims.<sup>51</sup>

These objections are inappropriate considerations for determining whether the law should punish action (or inaction). People are legally required to follow their duties to act with reasonable care, including assisting a person in peril where a special relationship applies, such as between a parent and child or an employee and a customer.<sup>52</sup> A psychological tendency to “freeze up” in an emergency would probably not prevent a supervisor from being held liable if he refused to call the paramedics while an employee died of a heart attack, for the same reason that genetic predispositions do not usually serve as a valid defense for people who engage in

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48. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 9 (rev. ed. 2009) (“The false assumption is that almost all people, almost all of the time, make choices that are in their best interest or at the very least are better than the choices that would be made by someone else.”).

49. Interestingly, some libertarians have recognized and addressed the “free rider” problem. See, e.g., Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill’s ‘Harm Principle,’ and American Social Morality*, 38 AM. J.L. & MED. 374, 387 (2012) (arguing that the minimum coverage provision of the Affordable Care Act is a solution to the free rider problem that is compatible with libertarian ideals because it does not violate John Stuart Mill’s “harm principle”). However, some harder-line libertarian approaches that view affirmative duties as anathema are unlikely to provide an adequate solution to the problem of people failing to rescue others. For more general examples and discussions of the “free rider problem,” see e.g., Victor P. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736, 738–39 (1984); Curtis L. Mack & Ezra D. Singer, *Florida Public Employees: Is the Solution to the Free Rider Problem Worse Than the Problem Itself?*, 6 FLA. ST. U. L. REV. 1347, 1348–49 (1978); Andrew P. Morriss, *Private Actors & Structural Balance: Militia & The Free Rider Problem in Private Provision of Law*, 58 MONT. L. REV. 115, 119–20 (1997).

50. Scordato, *supra* note 23, at 1483–84 (“A given individual’s response when unexpectedly thrust into such a situation is probably determined . . . by largely immutable elements of their personality: by their quickness of thought and action, their confidence in the face of pressure to physically perform, their fear of failure, their tendency to freeze when taken by surprise, their natural athleticism and physicality, etc.”).

51. Scordato, *supra* note 23, at 1477 (“Criminals sometimes prey upon their victims by posing as someone in need of assistance or emergency aid.”).

52. See *supra* note 1 and accompanying text.

violent crimes.<sup>53</sup> As to the issue of fear of predators pretending to need rescue, most duty-to-rescue statutes give individuals the option of reporting *or* rescuing, which protects people by giving them the option to simply call the paramedics or police if they are uncertain of the safety of the situation or the intentions of the person who appears to be in danger.<sup>54</sup> American duty-to-rescue statutes do not require any action where rescue would be dangerous for the rescuer, nor is any advocated here.<sup>55</sup>

Another philosophical argument against a duty to rescue notes that rescuing a stranger in peril may be the correct moral action under those circumstances, but the law should not coerce people into acting morally other than making sure citizens do not actively violate the “negative rights” of others.<sup>56</sup> Proponents of “duty to rescue” emphasize that most laws are—and should be—rooted in broad concepts of morality.<sup>57</sup> They also note that although the U.S. government does not impose many affirmative duties on its individual citizens, there are some areas in which American law requires citizens to take actions for the benefit of the common good. For instance, income earners must file their taxes; drivers must register their vehicles and obtain licenses; eligible males must file for Selective Service and subject themselves to a potential military draft.<sup>58</sup> An affirmative duty to report or to rescue (if doing so is easy and safe) when one encounters an individual in peril is a form of coercion most people are unlikely to encounter on a regular basis, if ever. The high

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53. While courts have traditionally been reluctant to accept a genetic defense to legal claims, whether genetic predispositions should carry weight in sentencing decisions is a hotly-debated topic in legal scholarship. *See, e.g.*, Maureen P. Coffey, *The Genetic Defense: Excuse or Explanation?*, 35 WM. & MARY L. REV. 353, 356 (1993) (“In light of increasing knowledge and understanding, traditional yet outdated notions of freedom and responsibility should be modified to square with a scientific view of human conduct.”); Nita A. Farahany & James E. Coleman Jr., *Genetics and Responsibility: To Know the Criminal From the Crime*, 69 LAW & CONTEMP. PROBS. 115, 116 (2006) (“[I]rrespective of the scientific progress in the field of behavioral genetics, as a matter of criminal law theory, such evidence has little utility in assessing criminal responsibility.”); Karen Rothenberg & Alice Wang, *The Scarlet Gene: Behavioral Genetics, Criminal Law, and Racial and Ethnic Stigma*, 68 LAW & CONTEMP. PROBS. 343, 346 (2006) (“[T]his article explores how genetics research on criminal or antisocial behavior has the unique potential to stigmatize racial and ethnic minority groups in a manner that both reflects and reinforces social inequality.”).

54. However, such distinctions would likely be held to a reasonableness standard. A physically-capable person who opted to call 911 rather than throw an easily-accessible life preserver to a drowning person might be determined to have not made a reasonable choice of whether to report to authorities or to personally intervene.

55. *See* Murphy, *supra* note 37, at 656.

56. Libertarians argue that laws should be based on a morality centered only on maintenance of people’s rights to be left alone. *See, e.g.*, Kimberlianne Podlas, *Respect My Authority! South Park’s Expression of Legal Ideology and Contribution to Legal Culture*, 11 VAND. J. ENT. & TECH. L. 491, 525–26 (2009) (“[U]nder libertarian theory, law’s function is only to preserve rights . . . a libertarian system of law honors negative rights, but rejects all positive rights. In very rudimentary terms, a negative right is a right to *not* be interfered with.”) (emphasis added).

57. *See* Ackerman, *supra* note 39, at 661 (“Clearly, the law is a reflection of our moral principles, and we should be neither ashamed nor embarrassed by this fact.”); Weinrib, *supra* note 22, at 264 (“If any legal obligations are legitimate, legal obligations that duplicate preexisting moral ones must be.”).

58. *See* Ackerman, *supra* note 39, at 662; King, *supra* note 26, at 642.

social benefit of the obligation, i.e. saving lives, justifies the relatively rare incursion on an individual's moral autonomy.<sup>59</sup>

Opponents of a duty to rescue claim that creating a legal requirement to rescue may lessen the social value of heroism, thus reducing people's incentive to risk rescue.<sup>60</sup> The human tendency to honor those who put themselves at risk to help people in danger—regardless of whether the heroic behavior was legally mandated—is universal enough to suggest that this concern is frivolous; people still celebrate the heroism of firefighters, for example, despite the fact that rescuing people is a regular part of their job description.<sup>61</sup>

### *C. Pragmatic Arguments That Duty-to-Rescue Laws Are Bad for Society*

More pragmatic arguments suggest the duty-to-rescue laws create bad incentives with negative consequences that outweigh any benefits that could be gained by passing such statutes. For example, one pragmatic concern is that it might be difficult to impose a legal obligation given the potential difficulty of evaluating whether someone is genuinely in danger and the degree to which an easy rescue is possible.<sup>62</sup> If this problem cannot be resolved, unjust convictions could result. In response, advocates of duty-to-rescue laws argue that charges should only be pressed in rare cases where both the danger to the individual in harm's way and the ability to conduct a reasonable, nonrisky rescue are obvious.<sup>63</sup> Prosecutorial discretion would then allow law enforcement to dismiss a technical duty-to-rescue violation in a case with significant mitigating factors.<sup>64</sup>

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59. See Levy, *supra* note 20, at 663 (arguing that if affirmative duties are ever justified, then surely they are legitimate in cases where the legally-mandated action would "save the life of another"). The actual size of the incursion on an individual's autonomy may depend on the nature of the rescue involved. Requiring someone to report a dangerous situation or to provide water to a dehydrated person may be a small incursion on individual autonomy; requiring someone to perform CPR would be a larger incursion, but still would be morally justifiable when, for example, a person who is physically-fit and CPR-certified encountered a dying stranger in the wilderness.

60. Landes & Posner, *supra* note 20, at 94 ("[I]mposing legal liability for nonrescue, may reduce the public recognition accorded to the altruistic rescuer and by so doing, we predict, reduce the number of altruistically motivated rescues."). See also Scordato, *supra* note 23, at 1474 ("[T]he adoption of a coercive duty to act will, in a sense, taint the moral and social quality of socially desirable behavior that would have been engaged in by the vast majority of persons anyway.").

61. E.g., Matt Pearce, *Obama on Arizona Firefighter Deaths: 'They Were Heroes'*, L.A. TIMES (July 1, 2013), <http://articles.latimes.com/2013/jul/01/nation/la-na-nn-arizona-firefighters-obama-20130701>.

62. See Scordato, *supra* note 23, at 1458 (criticizing the harshness of judicial second-guessing of someone's quick decision in a difficult situation); Tomlinson, *supra* note 20, at 454 ("[H]ypotheticals are contrived. . . . In real life, cases rarely arise where the danger is so clear and the rescue is so easy.").

63. See Levy, *supra* note 20, at 692 ("It is simply unfair to punish Nearby for failing to rescue Victim if she did not know either that she could easily rescue Victim or even that Victim required rescuing in the first place.").

64. Obviously, prosecutorial discretion must be based upon legitimate factors rather than personal biases or irrational prejudices in order to be in the interest of justice and

This issue becomes more complicated in cases of multiple victims or multiple potential rescuers. If a disaster endangered a small group of people on a crowded beach, it may be difficult to determine which party or parties are responsible for attempting rescue.<sup>65</sup> Proponents of duty-to-rescue laws counter by suggesting that the mere fact that there are multiple potential rescuers present should not absolve each person from a duty to perform rescues that are reasonably safe in such an emergency.<sup>66</sup> No case law has yet emerged establishing how courts would apply duty-to-rescue laws to disasters involving a large group of victims or potential rescuers.

Another argument wielded by detractors of duty-to-rescue laws is that they incentivize reckless behavior. People might be more likely take foolish risks if they know that onlookers are legally required to come to their rescue.<sup>67</sup> One critic argues that in cases where the risk-taker's own recklessness caused his emergency, it is unfair to make others come to his aid.<sup>68</sup> The counterargument to this point recognizes that people are unlikely to gamble their lives on the mere assumption that people will comply with a duty-to-rescue law, especially when the penalties are minimal.<sup>69</sup> Furthermore, a duty to rescue is not overly burdensome or unreasonable when rescue is easy and safe, even if it is in response to someone's reckless behavior.

Nevertheless, critics are not only concerned about people recklessly *relying* upon rescue, but also about people recklessly *engaging* in rescue due to the existence of these laws.<sup>70</sup> Even under the current norm, people get injured attempting

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to be in compliance with public policy. See Sidney I. Lezak & Maureen Leonard, *The Prosecutor's Discretion: Out of the Closet—Not Out of Control*, 63 OR. L. REV. 247, 257 (1984) ("Given that prosecutorial discretion results in both benefits and detriments to the administration of justice, the question obviously becomes how best to regulate its exercise to maximize benefits and minimize abuse."). For one proposal to encourage fairness in prosecutors' decisions about whether to press charges, see Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 373 (2010) ("The first step . . . is to make discretion transparent. This would not mean opening every confidential file to public scrutiny . . . . But it does mean publishing better statistics about initial charges, final charges, recommended sentences, and reasons for charges, plea bargains, sentences, and related deals.").

65. Landes & Posner, *supra* note 20, at 124.

66. Murphy, *supra* note 37, at 620 ("[A] rescuer . . . would continue to render assistance to as many people as she could, so long as this involved no peril to her and so long as the cost sustained remained reasonable . . .").

67. Tomlinson, *supra* note 20, at 454.

68. Schiff, *supra* note 20, at 111 ("[D]uty-to-rescue statutes . . . should not require substantial affirmative bystander conduct when the victim appears to be the cause of his own peril.").

69. For example, the Arizona duty-to-rescue law proposed in this Note would only impose a minimal penalty consisting of a \$500 fine. See *infra* p. 23. Vermont's current duty-to-rescue statute has an even smaller penalty, a fine of \$100. VT. STAT. ANN. tit. 12, § 519(c) (2013).

70. Scordato, *supra* note 23, at 1469–70 ("Inevitably, some affirmative attempts by strangers to aid others in peril will cause greater harm than good.").

dangerous rescues.<sup>71</sup> Many of these are acts of vigilantism, where individuals step in to stop a criminal from endangering another person.<sup>72</sup> Advocates of duty-to-rescue laws emphasize that rescues should not be attempted in dangerous situations, and stopping dangerous criminals is a job generally best left to law enforcement professionals.<sup>73</sup> The problem also exists when the person faces danger from natural causes, such as in cases where brave but inexperienced rescuers try to rescue a drowning person and end up being drowned themselves.<sup>74</sup>

The problem of reckless rescuers may be mitigated if the language of the law limits the duty to situations where a rescue can be achieved without putting the would-be rescuer in danger. Proponents of a duty-to-rescue law should make certain that the public is informed that the law will not require people to engage in dangerous rescues. That said, the line between an easy and difficult rescue may not always be easy to determine, and it may depend on the individual rescuer. It would be easy for a world-class swimmer such as Michael Phelps to rescue a child from drowning in a backyard pool, but it might be dangerous for a person who does not know how to swim to attempt the same rescue. Courts will need to consider evidence about the physical capabilities of nonrescuers before convicting them for violating a duty-to-rescue law.<sup>75</sup>

One of the more interesting arguments against duty-to-rescue laws suggests that they may lead “Delayed Samaritans” and “Passive Samaritans” to be prosecuted for belatedly reporting to police or paramedics that they saw a person in danger when they failed to intervene or report *during* the incident.<sup>76</sup> Such prosecutions could create a disincentive for after-the-fact emergency reporting; someone who failed to assist at the scene of the danger would decline to report it later due to fear of being charged with a crime.<sup>77</sup>

There are two answers to this critique. One approach would be to carve out an exception in the statute, exempting “Delayed Samaritans” from prosecution. This language could provide a safeguard against the unintentional negative incentive, but

71. David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 715 (2006) (claiming that injuries from reckless rescue attempts would likely be more common than injuries resulting from refusals to rescue).

72. *See id.* at 680.

73. Levy, *supra* note 20, at 693–94.

74. Hyman, *supra* note 71, at 678 n.47 (documenting instances where attempted rescuers ended up drowning).

75. Murphy, *supra* note 35, at 656 (“Whether a particular person is liable for nonrescue would then turn on an investigation of her actual chances of success and (perhaps) her awareness of those chances.”). Some citizens may have reasonable uncertainty about whether they have a legal duty to rescue in a certain situation; a nonrescuer’s reasonable belief that a duty-to-rescue law did not apply in an ambiguous circumstance could serve as an effective defense, persuading a judge or jury not to convict that person.

76. The use of the “Delayed/Passive Samaritans” terminology is taken from: Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 106–07 (1999). *See also* Scordato, *supra* note 23, at 1479 (“A formal duty to affirmatively aid would also discourage those who initially fail to help another in peril from reconsidering their decision and subsequently taking action.”).

77. Volokh, *supra* note 76, at 107–08.

it might also reduce the positive incentive effect within the law because people would know they could avoid the penalty for failing to promptly report or rescue if they reported the incident later.<sup>78</sup> A second approach would be to simply rely on the discretionary judgment of police and prosecutors. Law enforcement would have reason to limit duty-to-rescue prosecutions of “Delayed Samaritans” to the most egregious cases.<sup>79</sup> After all, a broad policy of prosecuting people who do not report dangerous situations to police quickly enough would deter people from contacting or cooperating with police.<sup>80</sup> Even if this safeguard fails in some instances, judges and juries may be unlikely to allow unreasonable prosecutions of late reporters to succeed under a duty-to-rescue law.

A final pragmatic concern mentioned by duty-to-rescue opponents is that demagogic or overzealous prosecutors might misuse the statutes to press frivolous charges.<sup>81</sup> In France, for example, authorities have convicted people of violating duty-to-rescue laws when they failed to stop a family member from committing a crime.<sup>82</sup> Yet, this result would be difficult, if not impossible, to justify based upon the text of any of the American statutes. Furthermore, in the United States these laws have very rarely been enforced, so the frivolous prosecutions issue has not emerged as a serious cause for concern.<sup>83</sup>

#### IV. DUTY-TO-RESCUE LAWS IN PRACTICE

To date, only four states have adopted duty-to-rescue laws.<sup>84</sup> These statutes have produced very little case law, but the lack of court decisions related to these laws is understandable given the fact that they have rarely been enforced.<sup>85</sup>

##### *A. The Lack-of-Enforcement Critique of Duty-to-Rescue Laws*

Critics of duty-to-rescue laws have focused on this lack of enforcement as evidence that duty-to-rescue laws are ineffective and unnecessary.<sup>86</sup> One possible

78. See *id.* at 110 (noting the possibility of a “second chance” defense excluding people who volunteer information to authorities after the emergency from liability under a duty-to-rescue law).

79. Scordato, *supra* note 23, at 1478 (“[W]ith a criminal law duty to rescue, police and prosecutors would have the option of granting an important witness immunity for the failure to aid sufficiently in exchange for their cooperation with the investigation.”).

80. *Id.*

81. Hyman, *supra* note 71, at 656. See also Tomlinson, *supra* note 20, at 495–98 (arguing that the vagueness of the statutes allows public “moral outrage” to be a factor in determining whether someone is convicted).

82. Tomlinson, *supra* note 20, at 474–75.

83. Hyman, *supra* note 71, at 657. If frivolous prosecutions under duty-to-rescue laws did become a problem, duty-to-rescue proponents would likely encourage other methods to mitigate frivolous prosecutions, rather than responding by proposing repeal of the law itself. On the related issue of policing prosecutorial discretion, see *supra* note 53 and accompanying text.

84. MINN. STAT. § 604A.01 (2013); R.I. GEN. LAWS § 11-56-1 (2013); VT. STAT. tit. 12, § 519 (2013); WIS. STAT. § 940.34 (2013).

85. There are only two major court decisions related to these laws: *State v. Joyce*, 433 A.2d 271 (Vt. 1981), and *State v. LaPlante*, 521 N.W.2d 448 (Wis. Ct. App. 1994).

86. *E.g.*, Hyman, *supra* note 71, at 656.

reason for the low number of prosecutions is that violations of duty-to-rescue laws are not being reported to the police.<sup>87</sup> Indeed, it is undeniable that a nonrescuer is unlikely to report his or her own refusal to help someone in danger, and a third party may be reluctant to report someone else's failure to rescue unless the third party had no opportunity to rescue and was thus invulnerable to being charged with violating the statute. There might be occasions when police investigating an accident scene will learn from a victim about the presence of a stranger who refused to assist in an easy rescue, and in those cases the police would have discretion to seek out the nonrescuer and enforce the law. So, advocates of duty-to-rescue may point out that, like many crimes, this one will be underreported and difficult to investigate. Nevertheless, in egregious cases the existence of the statute will give law enforcement recourse against callous acts of nonrescue.<sup>88</sup>

A second possible reason that duty-to-rescue laws are seldom enforced is that nonrescues are so rare, resulting in very few violations of these statutes to report.<sup>89</sup> Critics have focused on this second possibility as a factor that renders the existence of these laws to be superfluous and unnecessary.<sup>90</sup> David Hyman, a law professor at the University of Illinois, published an extensive investigation of the impact of American duty-to-rescue laws in 2006, which included an analysis of empirical data documenting incidents of rescue and nonrescue.<sup>91</sup> He finds that although the laws have not had some of the negative consequences that critics predicted, they have not been effective.<sup>92</sup> The most substantial point that he makes is that incidents of nonrescue are extremely rare.<sup>93</sup> He claims that the scenario of a person refusing to rescue a stranger in danger is not likely to occur very often, and,

87. Scordato, *supra* note 23, at 1468 (“[T]he often undetectable nature of possible defendants diminishes further the practical effect of an affirmative duty-to-rescue rule.”); Volokh, *supra* note 76, at 106 (“The law’s coercive force, moreover, will be rather low, because the witnesses know they’re unlikely to be conclusively identified if they just stay quiet.”).

88. Levy, *supra* note 20, at 681 (suggesting that failure to rescue is only one of many crimes, including murder, that are underreported and difficult to solve, but this is no reason to repeal such criminal penalties or to completely give up on trying to enforce them); Scordato, *supra* note 23, at 1497–98 (arguing that prosecutors could limit enforcing duty-to-rescue laws to the most reprehensible or egregious cases of failure to execute an easy rescue).

89. Hyman, *supra* note 71, at 657 (“[A]fter a combined total of almost eighty 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.”) (emphasis added). This assertion that there have been no prosecutions for nonrescue is inaccurate. See *infra* Part IV.B.

90. Scordato, *supra* note 23, at 1464 (“Because the underlying behavioral norm is so strong and uncontroversial, there can be said to already exist a very high level of uncoerced compliance with the desired behavioral goal.”).

91. Hyman, *supra* note 71, at 656 (“This Article provides the first empirical study of the no-duty rule in action.”).

92. *Id.* at 712–13.

93. *Id.* at 656 (“[P]roven cases of non-rescues are extraordinarily rare, and proven cases of rescues are exceedingly common . . .”).

in fact, people may be too willing to rescue, resulting in dangerous or reckless attempts at heroism.<sup>94</sup>

Hyman's portrayal of an eager-to-rescue public may be overly optimistic. He admits that a potential problem with the data he has gathered is that incidents of nonrescue are much less likely to be reported than incidents of rescue.<sup>95</sup> It is true that a few incidents of nonrescue have gained wide attention and commentary. Famous cases of onlookers' callous indifference to brutal crimes include: the 1964 stabbing of Kitty Genovese while dozens of neighbors ignored her cries for help; a 1983 public rape in a New Bedford, Massachusetts bar;<sup>96</sup> and the 1997 sexual assault and murder of seven-year-old Sherrice Iverson while the assailant's friend watched and did nothing.<sup>97</sup> However, other than these infamous cases that managed to gain national media attention, there are not many ways for less sensational acts of nonrescue to gain publicity, while there are numerous organizations devoted to identifying and rewarding ordinary "heroes" who engage in acts of rescue.<sup>98</sup>

The people involved with a nonrescue would have either little ability to report it or little incentive to do so. If the victim died, she would obviously be unable to report the nonrescuer. If the victim lived, she still probably would be unlikely to encounter the nonrescuer again (if she lived in a large city), and would likely be unable to identify the nonrescuer if she only saw him from a distance. The nonrescuer would usually never report his failure to rescue, because he would have nothing to gain (except possibly assuaging guilt) and much to lose in terms of social esteem. Any third party who saw someone fail to do an easy rescue would have to explain why he was unable or unwilling to intervene.<sup>99</sup>

Hyman's study is a useful starting point for empirical analysis of the impact of duty-to-rescue laws, but its methodology likely underestimates the problem of nonrescue. After conceding that his data may underestimate incidents of failure to rescue, Hyman argues that the huge disparity tracked by his methodology (which portrays reported rescues vastly outnumbering reported nonrescues) could not be overcome by a slight underreporting of nonrescues.<sup>100</sup> In making this assumption, he likely fails to appreciate the extent to which nonrescue goes unreported.

In one of his quantitative calculations attempting to analyze the impact of duty-to-rescue laws, Hyman finds that the rate of rescues actually increased in states with duty-to-rescue laws, although the finding is not statistically significant.<sup>101</sup> The

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94. *Id.* at 715.

95. *Id.* at 689–90 (acknowledging that incidents of nonrescue are probably underreported).

96. Scordato, *supra* note 23, at 1450 n.17.

97. Levy, *supra* note 20, at 623–24.

98. Hyman, *supra* note 71, at 667 (“For varying periods during the nineteenth and twentieth centuries . . . entities recognized risky and non-risky lifesaving behavior by ordinary citizens. Some entities awarded certificates, others gave cash awards, others gave out medals, and some did all three.”).

99. *See supra* notes 85–86 and accompanying text.

100. Hyman, *supra* note 71, at 693 (“It seems unlikely that the underreporting ratio for non-rescues is so much larger than the underreporting ratio for rescues to overcome this huge disparity in the number of verified cases.”).

101. *Id.* at 686.

absence of a negative correlation may at least defeat some of the critics' concerns discussed in Part III that duty-to-rescue statutes may create perverse incentives that actually decrease the number of successful rescues.

Nonrescues may occur for a variety of reasons. It may be difficult to determine if the person crying out for help is joking around, or seriously expressing that they are in danger. Some people may be concerned about criminals posing as needing rescue.<sup>102</sup> Others may simply be too disengaged to get involved in the troubles of strangers. Today, people are often distracted by electronic devices that prevent them from paying close attention to what is going on around them. If smartphones can make people so oblivious to their surroundings that they risk crashing their automobiles, certainly there will be incidents of iPod-wearing joggers or Facebook-updating tourists who fail to respond to cries for help off in the distance.<sup>103</sup> A legal duty to rescue, even if rarely enforced, might create an incentive for people to be more aware of their surroundings.

One infamous case where onlookers allegedly failed to intervene was the paparazzi's reaction to Princess Diana's fatal car accident in 1997.<sup>104</sup> In today's world of Snapchat and YouTube uploads, many people may be accustomed to observing their surroundings in a passive and self-centered way, and like the paparazzi, they might be more interested in capturing a crisis on camera than thinking to intervene. A legal duty might prevent this type of thoughtless behavior. Some people may be reluctant to get involved out of fear of putting themselves in harm's way, others out of callous indifference. It is these hesitant individuals who might be incentivized into behaving differently if they knew they had a legal duty to act.<sup>105</sup> A duty to rescue might also help mitigate the "bystander effect," which is the tendency of people to be less likely to help a stranger in peril when they are part of a large crowd.<sup>106</sup> People may be less likely to be passive and assume that someone else will step in and help if they know that they could individually be held legally accountable for their inaction.<sup>107</sup>

This Note's skepticism as to the rarity of nonrescue does not mean to suggest a belief that failure to rescue is a rampant social problem or that most people

102. Scordato, *supra* note 23, at 1477.

103. See, e.g., Ashley Halsey III, *Survey: Drivers ignore warnings about risk of texting and cellphone use while on the road*, WASH. POST (Dec. 16, 2013), [http://www.washingtonpost.com/local/trafficandcommuting/survey-drivers-ignore-warnings-about-risk-of-texting-and-cellphone-use-while-on-the-road/2013/12/16/0978f75a-6677-11e3-8b5b-a77187b716a3\\_story.html](http://www.washingtonpost.com/local/trafficandcommuting/survey-drivers-ignore-warnings-about-risk-of-texting-and-cellphone-use-while-on-the-road/2013/12/16/0978f75a-6677-11e3-8b5b-a77187b716a3_story.html); Becky Pallack, *Trucker on Facebook at time of deadly Arizona crash, records show*, ARIZ. DAILY STAR (Oct. 31, 2013, 10:37 AM), [http://azstarnet.com/news/state-and-regional/trucker-on-facebook-at-time-of-deadly-arizona-crash-records/article\\_20df01c0-4253-11e3-8722-0019bb2963f4.html](http://azstarnet.com/news/state-and-regional/trucker-on-facebook-at-time-of-deadly-arizona-crash-records/article_20df01c0-4253-11e3-8722-0019bb2963f4.html).

104. Murphy, *supra* note 37, at 610.

105. See Levy, *supra* note 20, at 627 (suggesting that some individuals may only take action to help an endangered stranger "from fear of punishment and its consequent stigma").

106. Schiff, *supra* note 20, at 112.

107. See *id.* ("To avoid the undesirable results of the bystander effect, duty-to-rescue laws should require notification of authorities or other actions that can be done without the actors needing to disassociate themselves from the group.").

are unwilling to provide assistance to strangers. Rather, this Note simply contends that the assumption that nonrescue is so rare that it does not justify any kind of policy response is probably mistaken.

### *B. Comparative Analysis of the Case Law About Duty-to-Rescue Statutes*

Two significant cases have addressed existing duty-to-rescue laws. In a Vermont criminal case, a jury convicted a father of attempting to cause serious bodily injury to his son during a fight outside their home.<sup>108</sup> The father argued that his conviction should be overturned, in part because the trial court incorrectly told the jury that bystanders had no legal duty to intervene in the fight.<sup>109</sup> The reason this duty-to-rescue issue was significant to the case was that the defense had raised the claim that “if the appellant had actually been trying to seriously injure his son, any reasonable person would have done something to stop him.”<sup>110</sup> The trial court responded by issuing a jury instruction that “[t]here is no duty for a person to attempt to stop a fight from taking place in his presence.”<sup>111</sup>

The State claimed that no duty to assist existed under Vermont law, and therefore the trial court’s instructions to the jury had been correct, but the Supreme Court of Vermont disagreed and upheld the validity of the state’s duty-to-rescue law.<sup>112</sup> Even so, the Vermont Supreme Court held that there was no reversible error, because the duty-to-rescue law did not apply to these circumstances; the language of the statute only requires assistance when assistance “can be rendered without danger or peril to” the would-be rescuer, and the court found that trying to break up a fight was too inherently dangerous to be a situation where the duty-to-rescue law applied.<sup>113</sup> The Vermont Supreme Court had the opportunity to invalidate the duty-to-rescue law in this case, and instead it upheld the statute, while clarifying and narrowing the circumstances in which it would apply.

An actual conviction under a duty-to-rescue law took place in Wisconsin: a circuit court convicted defendant Karie LaPlante under the state’s duty-to-rescue law for failing to call for help or offer assistance while observing the brutal beating of a woman on her property during a party at her home.<sup>114</sup> LaPlante appealed her conviction by challenging the duty-to-rescue statute, but the appellate court rejected her argument that the statute was unconstitutionally vague regarding under which circumstances the duty to rescue applied to observers of a potentially dangerous

108. State v. Joyce, 433 A.2d 271, 272 (Vt. 1981).

109. *Id.* at 273.

110. *Id.*

111. *Id.* The claim referencing the duty-to-rescue law was just one of three claims of trial-court error made by the appellant in this case, in addition to an argument that the evidence related to intent was “entirely circumstantial” and an argument that “the defendant was too intoxicated to form the intent necessary for the crime of aggravated assault.” *Id.* at 272.

112. *Id.* (“Contrary to the assertions of the State, this statute does create a duty to aid endangered persons under some circumstances.”).

113. VT. STAT. ANN. tit. 12, § 519(a) (2013); Joyce, 433 A.2d at 237 (“It does not create a duty to intervene in a fight, however. Such a situation must present the ‘danger or peril’ to the rescuer which under the statute prevents a duty from arising.”).

114. State v. LaPlante, 521 N.W.2d 448, 449 (Wis. Ct. App. 1994).

situation.<sup>115</sup> The court also rejected her claim that the reporting requirement violated her constitutional right against self-incrimination, noting that the language of the statute gives the observer of a person in danger three options—she may contact a law enforcement officer, contact someone other than a law enforcement officer who could provide aid, or directly help the victim—but does not require her to disclose any self-incriminating information when making a call for assistance.<sup>116</sup>

The Vermont and Wisconsin cases have similar facts; therefore it could be argued that these states have developed a jurisdictional split regarding interpretation of duty-to-rescue law. After all, both cases involved the question of whether duty-to-rescue laws applied to individuals observing a beating taking place outside a home, and whether the duty-to-rescue law required those onlookers to assist the person in peril.<sup>117</sup> In Vermont, the court held that a duty-to-rescue statute did not require onlookers to intervene in a physical altercation, while the court in Wisconsin upheld the conviction under a duty-to-rescue law of an onlooker who failed to seek help for an assault victim.<sup>118</sup> That said, these seemingly contradictory rulings may be based upon differences between the specific facts of the cases or upon differences in the language of the respective state duty-to-rescue statutes. Therefore, these rulings may be less divergent and more harmonious than they initially appear.

The Vermont case involved a fight between a father and a son observed by neighbors, while the Wisconsin case involved a woman beaten by a group of people at the defendant's own home.<sup>119</sup> Arguably, the necessity to intervene was greater in the second case both because of the brutality and uneven odds of the attack, and because of the homeowner's enhanced responsibility for what went on at a party on her property, and these facts may have influenced the decisions of these judges.<sup>120</sup> However, it could be argued in the opposite—that the onlookers in the Vermont case had a more significant burden to act because it would be much easier to intervene in a fight between two people, rather than in the Wisconsin case where it could have been much more dangerous to intervene in a group assault. Differences in the facts of the cases may have contributed to the divergent results, but it remains uncertain.

A stronger explanation for the differing rulings is the significant difference in wording between the Vermont law and the Wisconsin law. The Vermont law lacks a specific provision for calling for outside help. It simply states that “[a] person who knows that another is exposed to grave physical harm shall . . . give reasonable assistance to the exposed person unless that assistance or care is being provided by

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115. *Id.* at 451 (“To prove a case . . . the state must convince the fact-finder that an accused believed a crime was being committed and that the victim was exposed to bodily harm.”).

116. *Id.* at 452 (“By calling for help, LaPlante would have been under no obligation to provide her name, nor would she have been required to provide any information as to why the victim was harmed.”).

117. *Compare Joyce*, 433 A.2d at 273, with *LaPlante*, 521 N.W.2d at 449.

118. *Compare Joyce*, 433 A.2d at 273, with *LaPlante*, 521 N.W.2d at 449.

119. *Compare Joyce*, 433 A.2d at 273, with *LaPlante*, 521 N.W.2d at 449.

120. *See LaPlante*, 521 N.W.2d at 449 (“While Hendy was outside, seven other people who were attending the party brutally beat her. LaPlante was outside the home when the beating occurred and witnessed the event.”).

others.”<sup>121</sup> It is unclear whether the “give reasonable assistance” clause implies the existence of a duty to report, or if it instead only mandates direct rescue. The Wisconsin statute, on the other hand, specifically requires a person “who knows that a crime is being committed and that a victim is being exposed to bodily harm” to pursue one of three options: to contact law enforcement officials, to seek “other assistance,” or to personally provide aid to the victim.<sup>122</sup>

Like the Vermont statute, the Wisconsin law contains a provision stating that the duty to rescue does not apply where an attempt to give aid would put the would-be rescuer in danger.<sup>123</sup> However, because of the local statute’s specific duty-to-report requirements, in order for LaPlante to have been exempted from the duty to report, the court would have had to determine that even placing a 911 call would have placed her in severe peril. In fact, while the Vermont court emphasized that its duty-to-rescue law could not require people to assume the danger inherent in attempting to stop a fight, the Wisconsin appellate court did not even discuss the possibility that the situation was so dangerous to LaPlante that the duty did not apply; instead, it focused only upon the affirmative defenses that she raised challenging the constitutionality and clarity of the duty-to-rescue law.<sup>124</sup>

These two rulings show that the impact of duty-to-rescue laws will not be merely symbolic. In egregious cases of nonrescue, prosecutors can opt to use these laws to punish individuals who callously refuse to call for help or make an easy rescue.

The evidence that American duty-to-rescue laws have lacked a clear positive effect is much greater than any evidence that they have had a negative effect on public safety.<sup>125</sup> Although positive effects may prove to be *de minimis* it can be argued that even if one life is saved because of these laws, they are worthwhile.<sup>126</sup> One might view the absence of a measurable increase in the overall number of rescues as proof that duty-to-rescue statutes fail to incentivize rescue, yet this quantitative argument only refutes one of the two basic rationales for the statutes.

The second argument in favor of duty-to-rescue laws is that they have symbolic worth because they express the moral beliefs of our society.<sup>127</sup> Whether one agrees with that proposition is not a question of their empirically measurable

121. VT. STAT. ANN. tit. 12, § 519(a) (2013).

122. WIS. STAT. ANN. § 940.34(2)(a) (2013).

123. See VT. STAT. ANN. tit. 12, § 519(a) (limiting the duty to rescue to situations where assistance can be given without putting the rescuer in “danger or peril”); WIS. STAT. ANN. § 940.34(2)(d)(1) (stating that the requirement to report or rescue does not apply to the would-be rescuer if “compliance would place him or her in danger”).

124. Compare *Joyce*, 433 A.2d at 273, with *LaPlante*, 521 N.W.2d at 449 (“LaPlante raises two issues of error for our review: (1) whether § 940.34, STATS., is unconstitutionally vague; and (2) whether § 940.34, as applied under the facts of this case, violates her right against self-incrimination.”).

125. See *supra* note 101 and accompanying text.

126. Scordato, *supra* note 23, at 1469 (suggesting that proponents of duty-to-rescue laws will argue in favor of establishing the morally satisfying rule, even if it only leads to a very modest increase in the number of rescues).

127. Murphy, *supra* note 35, at 664–65 (arguing that establishing a limited duty-to-rescue criminal penalty is consistent with the morality of a “decent community”).

effect on the number of rescues, but rather reflects whether one agrees that requiring rescue in some circumstances is consistent with the values of American society. Some libertarians who champion individual autonomy and choice would disagree with the establishment of such a law. More communitarian Americans would agree with the law's promotion of heroism and self-sacrifice to help others who are in danger, in spite of the statute's potential incursion upon individual autonomy.<sup>128</sup>

## V. PROPOSING A DUTY-TO-RESCUE LAW FOR ARIZONA

In attempting to discern which approach to establishing a duty to rescue is preferable in Arizona, this Part begins by discussing a civil liability alternative and why a criminal penalty is a better public policy solution. This Part is followed by an examination of the differing scope of existing duty-to-rescue laws establishing criminal penalties and concludes by offering a model statute based upon the best aspects of various existing statutes.

### A. Choosing Between Civil Liability and a Criminal Penalty

Civil liability and criminal sanctions are two possible approaches to establishing a "duty to rescue." The current common-law rule generally does not permit civil suits in instances of voluntary rescue because the rescue is presumed to be a gratuity rather than a contractual arrangement.<sup>129</sup> Indeed, although some foreign countries have established civil liability, no American jurisdiction has pursued this option, either judicially or statutorily.<sup>130</sup>

Reformist American judges could overrule common-law torts doctrine by allowing victims to sue the nonrescuers who failed to assist them, but it is unlikely that many jurisdictions would choose to make such a dramatic break with tort-law precedent.<sup>131</sup> A more immediate method would be the creation of a statutory right for victims to sue nonrescuers.<sup>132</sup> Reward money could either be required by courts

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128. Levy, *supra* note 20, at 660 ("[O]ur society is not so radically libertarian as to prohibit liability for any omission.") (emphasis added); see also Sharon Jayson, *Study: 20% of Americans have done heroic deeds*, USA TODAY (Jan. 14, 2011, 1:44 AM), [http://usatoday30.usatoday.com/yourlife/mind-soul/doing-good/2011-01-14-heroes14\\_ST\\_N.htm](http://usatoday30.usatoday.com/yourlife/mind-soul/doing-good/2011-01-14-heroes14_ST_N.htm).

129. Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CALIF. L. REV. 85, 101-02 (1986).

130. Schiff, *supra* note 20, at 104-06.

131. 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, 870 (1991) ("The proposed approach would obviate the need for judicial hair-splitting over whether behavior is 'misfeasance' or 'nonfeasance,' and, if it is characterized as nonfeasance, whether it falls within one of the exceptions to the traditional no-duty rule.").

132. Albert, *supra* note 129, at 86-87 ("Under the proposed reform, a nonprofessional rescuer who is injured in the course of a successful nonnegligent rescue of human life would recover out-of-pocket expenses from the rescuee, including both medical costs and lost earnings.").

to be paid from the rescued party to the rescuer, or could be awarded to the rescuer out of a public fund created by the statute.<sup>133</sup>

Civil liability is a problematic approach because it could motivate people to falsely claim peril in hopes of gaining a windfall by suing alleged nonrescuers. The approach allowing nonrescuers to be held liable for the entirety of an injured person's medical expenses would be more coercive than a small criminal fine because it could financially ruin the person who failed to aid in the rescue.<sup>134</sup> The other civil option, allowing rescuers to seek compensation (either from the rescued person or from a public fund), may have negative-incentive effects by causing people to attempt foolish or unnecessary "rescues" in hopes of becoming entitled to a profit.<sup>135</sup> It is also philosophically more appropriate to create a criminal penalty, because the duty in question arises not out of some preexisting obligation toward the person in danger; instead, the duty to behave in a way conducive to a safe and harmonious community is owed to society in general.

### *B. Choosing the Textual Content of the Proposed Statute*

The four states that have existing duty-to-rescue statutes all established only criminal penalties.<sup>136</sup> In 1995, the Supreme Court of Vermont held that its criminal duty-to-rescue statute did not expose nonrescuers to civil liability.<sup>137</sup>

All four state statutes also provide an exception that exempts someone from the duty to rescue in circumstances where attempting a rescue would put the would-be rescuer or third parties in danger.<sup>138</sup> Arizona's duty-to-rescue law should contain a similar exception in order to avoid incentivizing people to place themselves in perilous situations.

133. Murphy, *supra* note 37, at 658 ("[P]roviding for compensation would require no further legal innovation—unless it was thought, as seems plausible, that the compensation should flow not from the person rescued, but from the community at large by way of a statutory compensation scheme.").

134. *Id.* at 662–63 ("[T]he prospect of a person who failed to respond to an emergency situation being liable for damages in full compensation for the death of the victim seems likely to be highly unappealing.").

135. *Id.* at 663 (contending that offering rescuers compensation may lead to "foolish and highly risky activities" by would-be rescuers).

136. See MINN. STAT. § 604A.01 (2013); R.I. GEN. LAWS § 11-56-1 (2013); VT. STAT. ANN. tit. 12, § 519 (2013); WIS. STAT. § 940.34 (2013).

137. *Hardingham v. United Counseling Serv. of Bennington*, 667 A.2d 289, 292 (Vt. 1995) ("A person who willfully fails to make a reasonable effort to provide assistance is subject to a \$100 fine, 12 V.S.A. § 519(c), but is not subject to civil liability unless the person's actions are grossly negligent or unless the person receives or expects to receive remuneration. Any other interpretation would . . . thwart the statute's primary purpose – to encourage rescuers to provide assistance by protecting them from civil liability for ordinary negligence.").

138. See MINN. STAT. § 604A.01; R.I. GEN. LAWS § 11-56-1; VT. STAT. ANN. tit. 12, § 519; WIS. STAT. § 940.34.

Unlike the other three states, Wisconsin's duty-to-rescue law only applies to crime victims.<sup>139</sup> Wisconsin's statutory language would not require someone to provide water to a person dying of thirst in the desert; thus, Arizona should adopt a broader statute that would address such situations.

The Vermont statute lacks a specific duty to report, which has prevented its duty to rescue from applying to situations where reporting might be done safely but personal intervention could not be done safely.<sup>140</sup> The model Arizona statute should include a duty-to-report requirement for situations where reporting the danger to qualified authorities would be the only reasonable and safe way to assist the endangered person.

The Minnesota statute is the best model language for Arizona, because it specifies that the duty to "give reasonable assistance . . . may include" reporting the danger to "law enforcement or medical personnel," but does not necessarily limit reasonable assistance to merely placing a phone call.<sup>141</sup> The statute should expect someone who could easily throw a life preserver to a drowning person to do so, as that would be more reasonable than calling 911 and waiting for medical professionals (who may arrive too late).

The Minnesota language also requires the would-be rescuer to specifically be present at the scene of the emergency for the duty to apply, while other states lack that clarifying language.<sup>142</sup> This is another reason to follow the Minnesota language, because someone who is not at the scene of an emergency cannot reasonably be expected to have enough knowledge to make a proper determination about whether report or rescue is necessary.

This model duty-to-rescue statute for Arizona adopts the language of the Vermont statute for its final sentence, opting for a specific financial penalty rather than simply classifying it as a general minor misdemeanor like Minnesota and Wisconsin do.<sup>143</sup> However, it adopts Rhode Island's \$500 penalty instead of Vermont's low \$100 penalty.<sup>144</sup> That financial penalty, along with the stigma of a

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139. WIS. STAT. ANN. § 940.34(2)(a) (limiting its language about who the statute applies to "[a]ny person who knows that a crime is being committed and that a victim is exposed to bodily harm"); Schiff, *supra* note 20, at 96.

140. See discussion *supra* Part IV.B comparing case law from Vermont and Wisconsin.

141. See MINN. STAT. ANN. § 604A.01.

142. *Id.* ("A person at the scene of the emergency . . ."); Schiff, *supra* note 20, at 103 ("In Wisconsin and Vermont, knowledge is sufficient for the duty to arise.").

143. See MINN. STAT. ANN. § 604A.01 (stating that those who violate the law will be subject to petty misdemeanor penalties); R.I. GEN. LAWS § 11-56-1 (subjecting lawbreakers to six months in jail or a \$500 fine or both); VT. STAT. ANN. tit. 12, § 519 (the \$100 fine has not been modified or adjusted for inflation since passage of statute in 1967); WIS. STAT. ANN. § 940.34 (making violation of the law a Class C misdemeanor).

144. Compare R.I. GEN. LAWS ANN. § 11-56-1 (2013) (subjecting violators of the duty-to-rescue law to six months in jail or "a fine of not more than five hundred dollars (\$500) or both"), with VT. STAT. ANN. tit. 12, § 519(c) (2013) ("A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.").

criminal conviction, should be enough to provide people with an incentive to follow the law.

This Note proposes only a small fine as a criminal punishment based upon the idea that the law should be more of a “nudge” than a “shove”.<sup>145</sup> If the fine amount proves insufficient to induce compliance with the law, legislators can simply amend it to make the penalty more severe. A small fine is an inconvenience; nonrescuers know they might be subjected to a criminal conviction and a financial loss for failing to act, but they would not face imprisonment or a crushing financial setback. Obviously all laws are designed to be complied with, but if someone had major ideological or psychological reasons for not engaging in a rescue attempt, the consequences of noncompliance with this law would not be debilitating for that person.<sup>146</sup>

Here is the proposed model statute for Arizona:

*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 the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this section shall be fined not more than \$500.*

### **C. Political Factors and Potential Consequences of the Proposed Statute**

Arizona may be uniquely well-suited to a duty-to-rescue law because its harsh geography and climate result in an unusually large number of people in need of rescue from heat-related illness.<sup>147</sup> Additionally, the state’s large number of swimming pools and reservoirs may require a surprisingly large amount of drowning rescues.<sup>148</sup>

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145. The idea of “nudges” as policies that encourage positive behavior by citizens without being overly coercive is developed by Richard H. Thaler and Cass R. Sunstein in THALER & SUNSTEIN, *supra* note 48, at 6 (“A nudge, as we will use the term, is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”). Some may argue that a criminal fine is too inherently coercive of a policy to strictly fit Thaler & Sunstein’s definition of a “nudge,” but nevertheless the reason the Author of this Note decided to go with a small fine rather than a more severe penalty is because he was inspired by their “nudge” concept.

146. One possible exception to this general rule would be if a person convicted of violating the duty-to-rescue law refused to pay the \$500 criminal fine on ideological grounds, then that person could face the more severe consequence of being jailed for contempt of court. However, this scenario is unlikely to be a regular occurrence.

147. See *supra* notes 5–7 and accompanying text.

148. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC CHILDHOOD INJURY REPORT: PATTERNS OF UNINTENTIONAL INJURIES AMONG 0–19 YEAR OLDS IN THE UNITED STATES, 2000–2006, at 55 (2008), available at <http://www.cdc.gov/SafeChild/images/CDC-ChildhoodInjury.pdf> (showing that Arizona’s unintentional drowning death rate for children 0 to 19 years old is above the national average). For an example of a rescuer preventing a drowning death, see Laurie Merrill, *Bystander Saves Phoenix Boy’s Life in Pool Scare*, ARIZ.

Besides being sound public policy, the proposed statute's very mild penalty to "nudge" people toward doing the right thing may be more politically palatable to conservative-leaning Arizona lawmakers than a statute that threatened nonrescuers with imprisonment.<sup>149</sup> Arizona's current Republican-majority state legislature might be inclined to reject a broad and punitive duty-to-rescue law on ideological grounds as a form of heavy-handed government paternalism.<sup>150</sup>

Among the most important social and political factors unique to Arizona are the state's border with Mexico and the high numbers of undocumented immigrants who die from heat and exposure while trying to cross into the United States.<sup>151</sup> These migrants would likely be among the main beneficiaries of a duty-to-rescue statute, but some Arizonans may be reluctant to offer such assistance based on fear of legal responsibility for assisting an illegal border crossing, or based on fearful or prejudiced attitudes about undocumented immigrants.<sup>152</sup>

A recent Ninth Circuit case, *United States v. Millis*, is material to the issue of providing water to undocumented immigrants engaged in a dangerous desert crossing. The court overturned the conviction of a humanitarian aid worker for No More Deaths who had been leaving plastic jugs of water in the desert.<sup>153</sup> His lower court conviction was not for helping facilitate illegal immigration by engaging in this behavior, but rather for illegal waste disposal within a national wildlife refuge.<sup>154</sup> While this ruling was heartening to immigrants' rights groups, the ruling only addressed whether bottles filled with water were technically "garbage" under the relevant statute; it did not discuss whether humanitarian actions have any sort of special legal protection.<sup>155</sup> By finding that leaving water bottles did not amount to

REPUBLIC (Sept. 22, 2013, 5:54 PM), <http://www.azcentral.com/community/phoenix/articles/20130922phoenix-boy-pool-scare.html?sfi7511897=1>.

149. See Micah Cohen, *Why Arizona Isn't a Battleground State (and Why It May Be Soon)*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (Oct. 23, 2012, 3:57 PM), [http://fivethirtyeight.blogs.nytimes.com/2012/10/23/why-arizona-isnt-a-battleground-state-and-why-it-may-be-soon/?\\_php=true&\\_type=blogs&\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2012/10/23/why-arizona-isnt-a-battleground-state-and-why-it-may-be-soon/?_php=true&_type=blogs&_r=0) ("[Barry] Goldwater . . . exemplified the political ethos of the state: conservative, with a strong libertarian streak.").

150. See Fernanda Santos, *Nine in G.O.P. Vie to Succeed Arizona Governor, With Party Identity at Stake*, N.Y. TIMES (March 29, 2014), <http://www.nytimes.com/2014/03/30/us/nine-in-gop-vie-to-succeed-arizona-governor-with-party-identity-at-stake.html> ("Arizona leans right. Republicans are the majority in both legislative chambers and occupy every statewide office.").

151. See *supra* notes 8–9 and accompanying text.

152. See Kristina M. Campbell, *Humanitarian Aid is Never a Crime?: The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 100 (2012) ("The INA contains several criminal prohibitions against the harboring and transport of undocumented immigrants.").

153. *United States v. Millis*, 621 F.3d 914, 914–15 (9th Cir. 2010).

154. The incident occurred at Buenos Aires National Wildlife Refuge in Southern Arizona. *Id.* at 915.

155. *Id.* at 918 ("The narrow question we consider today is whether the term 'garbage' within the context of the regulation was sufficiently ambiguous that the rule of lenity would apply in this case."); Campbell, *supra* note 147, at 74 ("The Ninth Circuit overturned Mr. Millis' conviction because it determined that the regulation governing his conviction is ambiguous; it did not explicitly address his humanitarian defense in its holding,

littering, the ruling allows pro-immigrant groups to continue engaging in that behavior without fear of prosecution. However, the ruling narrowly applied to this specific activity rather than giving broad protection to assisting thirsty immigrants.<sup>156</sup>

The *Millis* case differs from the scenario suggested by this Note in that the water bottles were *left behind* in case someone in need of water passed through the area; they were not *directly given* to an immigrant actually encountered by an aid worker.<sup>157</sup> The duty to rescue does not imply a duty for landowners whose property is regularly crossed by illegal immigrants to put water tanks on their land in case someone is dying of thirst. Only if they actually know that a specific person is present, and see that the person is so desperately thirsty as to be in real physical peril, would they need to intervene under the statute.<sup>158</sup>

Still, the proposed law would create a requirement to provide water to any individual dying of thirst in the desert, regardless of that person's immigration status. The model statute adopted by this Note does not use the term "U.S. citizen," it uses the word "person," therefore the law creates a duty to assist people regardless of national origin or immigration status. The proposed law does not directly conflict with U.S. immigration law by facilitating illegal immigration.<sup>159</sup> The only potential tension between the proposed law and federal immigration law would be if a rescue involved transporting an undocumented immigrant over a significant distance, but few of the "easy rescues" required by the statute would make such efforts necessary.<sup>160</sup> Reporting is likely to be a more common form of compliance with the proposed law than direct rescue, and if a rescuer opted to report an endangered undocumented immigrant to law enforcement or medical officials, the immigrant might be more likely to be apprehended and removed after the provision of medical care.<sup>161</sup> The proposed law should fulfill the humanitarian objective of making sure

and did nothing to signal either its approval or disapproval of the provision of humanitarian aid to those seeking refuge within our borders.").

156. Campbell, *supra* note 152, at 74.

157. *Millis*, 621 F.3d at 914–15.

158. The language of this Note's proposed Arizona statute only requires assistance by: "Any person *at the scene* of an emergency who *knows* that another person is exposed to or has suffered grave physical harm . . ." (emphases added). See *supra* p. 24.

159. Federal law prohibits U.S. citizens from smuggling in aliens, from transporting illegal immigrants (knowingly or "in reckless disregard" of the person's immigration status), and from concealing illegal immigrants from authorities. 8 U.S.C. § 1324(a)(1)(A)(i)–(iii). The proposed duty-to-rescue law would not require any of these illegal activities.

160. Federal immigration law in 8 U.S.C. § 1324(a)(1)(A)(ii) establishes criminal penalties for anyone who "knowing[ly] or in reckless disregard of the fact that an alien . . . remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States . . ." The duty-to-rescue law proposed in this Note would require an Arizonan to provide water to an undocumented immigrant who was dying of thirst (which would not violate any immigration laws), but it would not require driving him into Tucson (which might violate the aforementioned immigration law provision).

161. Federal immigration law in 8 U.S.C. § 1324(a)(1)(A)(iii) establishes criminal penalties for anyone who "conceals, harbors, or shields from detection" an illegal immigrant. The duty-to-report option would be the opposite of concealing someone from the authorities;

that undocumented immigrants in physical danger get medical attention, without assisting their efforts to enter or reside in the United States illegally.

### CONCLUSION

The legal impact of adopting a duty-to-rescue statute is not likely to be monumental.<sup>162</sup> Yet if the new law increases the rescue rate by even a very small percentage or saves just one life, the statute is worth enacting. A moral legal system should prioritize the value of human life and discourage callous disregard for the safety of others. The counterarguments that the law will have substantial negative effects are not convincing, and major policy problems have not emerged as the result of the laws already on the books in Vermont, Minnesota, Wisconsin, and Rhode Island.<sup>163</sup> Even if violators are rarely punished, a duty-to-rescue law may provide positive incentives for citizens to do the right thing, just as an inaccurate perception of a duty-to-provide-water may currently incentivize people to help individuals suffering from dehydration.

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it would involve reporting that person to the authorities in order to save that person from grave physical harm.

162. See *supra* notes 125–26 and accompanying text.

163. See MINN. STAT. ANN. § 604A.01 (2013); R.I. GEN. LAWS ANN. § 11-56-1 (2013); VT. STAT. ANN. tit. 12, § 519 (West); WIS. STAT. ANN. § 940.34 (West).

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