The Duty to Rescue in California: A Legislative Solution?

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In March 1983 appalling news accounts of a multiple rape in New Bedford, Massachusetts were circulated. A twenty-one year old woman stopped in a local tavern for cigarettes and a drink and emerged after midnight bruised, half naked, and screaming for help. The victim relayed a terrifying narrative of being hoisted onto a pool table and then tormented and raped repeatedly by a group of men for over two hours. Patrons of the bar stood watching, some taunted and cheered, but most importantly, no one assisted the victim or notified authorities.

The behavior of passive bystanders first came into public focus in 1964, when thirty-eight people watched or listened for an extended period while Kitty Genovese was murdered outside an apartment building in New York City. Without a doubt, the inaction of the witnesses to these crimes is barbaric and morally reprehensible. Legally, however, these bystanders are under no obligation to aid another person in danger or peril.

The common-law rule that a bystander is under no legal duty to rescue another person remains in our legal system despite numerous examples of callous refusals to render aid. For example, an expert swimmer is under no obligation to rescue a drowning man within reach, and the law imposes no liability upon a witness who stands by and watches another bleed to death. The refusal of the common law to recognize a moral obligation of one person to aid another has been criticized repeatedly. To reconcile legal principles with moral

2. Clendenin, supra note 1, at A16.
3. Kiesel, supra note 1, at 1208.
5. See Ogren, supra note 1, at 218; Prosser, supra note 4, at 340.
6. Prosser, supra note 4, at 340.
7. See id. at 341.
obligations, courts gradually have expanded the concept of legal duty.9 Currently, certain special relationships are recognized as giving rise to an affirmative duty to assist.10 These judicial expansions of the duty to rescue, however, do not apply in situations like those discussed above, because the bystander has no existing familial or professional relationship with the victim.

The infamous Genovese murder in 1964 led to numerous articles, books, and conferences calling for a statutory abrogation of the common-law no duty position.11 Until recently the recommendations of these commentators went unheeded, except in Vermont, where the Duty to Aid the Endangered Act was enacted in 1967.12 The Vermont statute requires a bystander to render reasonable assistance to the extent that assistance can be rendered without injury to the rescuer.13 Between 1967 and 1982, the common-law no duty rule remained intact in all other states.

Since 1982, as a result of public outrage following events such as the recent rape in New Bedford, Massachusetts,14 and increased public interest in crime prevention and control,15 four states have adopted statutes requiring affirmative conduct to assist another person in peril.16 This comment will focus on this legislative trend and advocate the enactment of a similar statutory duty to rescue in California. To

10. See infra text accompanying notes 57-60.
12. VT. STAT. ANN. tit. 12, § 519 (1967). The statute is referred to as the Duty to Aid the Endangered Act and provides:
(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts committed in the ordinary course of his practice.
(c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

Id.

13. See id. In addition to the Vermont statute, almost all continental European countries have enacted duty to rescue statutes. See Feldbrugge, Good and Bad Samaritans: A Comparative Survey of the Criminal Law Provisions Concerning Failure to Rescue, 14 AM. J. COMP. L., 630, appendix (1966).
15. See Soldano, 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314.
16. These states are Massachusetts, Minnesota, Rhode Island, and Pennsylvania. The Pennsylvania statute was pending in the legislature at the time of publication. See infra notes 188-99 and accompanying text. See also Kiesel, supra note 1, at 1208; Ogren, supra note 1, at 218.
accomplish this, the evolution of the common-law concept of duty will be examined,\(^\text{17}\) with particular emphasis on California decisional law.\(^\text{18}\) California courts, frequent forerunners in the expansion and revision of common-law rules,\(^\text{19}\) have expanded the concept of duty in recent years.\(^\text{20}\) Despite this expansion of duty in other areas, California courts have not imposed a general duty to rescue in most situations.\(^\text{21}\)

An examination of recent California cases imposing an affirmative duty to warn\(^\text{22}\) will reveal that courts have focused principally upon the defendant’s knowledge of impending peril to the victim and the public interest in freedom from violent assault.\(^\text{23}\) These considerations will be shown to be equally applicable in a duty to rescue context.\(^\text{24}\) In addition, existing legislatively imposed duties in California will be analyzed.\(^\text{25}\) These statutes indicate the legislative interest in promoting social behavior that is consistent with community morality.\(^\text{26}\)

The Vermont law and the more recent legislative enactments in other states will be compared and contrasted to illustrate the viability of a statutorily imposed duty to rescue.\(^\text{27}\) Moral and practical considerations relating to a statutory duty to rescue will be scrutinized to counter frequently posited arguments against an affirmative legal duty.\(^\text{28}\) A possible civil supplement to a criminal duty to rescue also will be discussed.\(^\text{29}\) Finally, a model statute will be proposed for California.\(^\text{30}\)

An inquiry into the viability of a statutory duty to rescue in California necessarily requires an examination of the judicial concept of duty and the evolution of that concept. The following discussion includes analyses of the common-law rules recognized in the United States, particularly in California. This discussion is relevant to a later analysis of the legislative response to the judicial treatment of the duty to rescue.\(^\text{31}\)

\(^{17}\) See infra notes 32-56 and accompanying text.

\(^{18}\) See infra notes 77-148 and accompanying text.

\(^{19}\) See infra note 77.

\(^{20}\) See Soldano, 141 Cal. App. 3d at 448, 190 Cal. Rptr. at 313.


\(^{22}\) See infra notes 100-119 and accompanying text.

\(^{23}\) See id.

\(^{24}\) See infra notes 151-65 and accompanying text.

\(^{25}\) See infra notes 151-66 and accompanying text.

\(^{26}\) Id.

\(^{27}\) See infra notes 167-99 and accompanying text.

\(^{28}\) See infra notes 201-50 and accompanying text.

\(^{29}\) See infra notes 251-57 and accompanying text.

\(^{30}\) See infra appendix.

\(^{31}\) See infra notes 167-200 and accompanying text.
COMMON-LAW DUTY

Historically, the law has recognized a distinction between misfeasance and nonfeasance. This distinction has resulted in the imposition of legal liability for proscribed affirmative conduct (misfeasance). Conversely, the absence of affirmative conduct (nonfeasance) has resulted in an absence of legal liability. This distinction applies with equal force to the duty to rescue situation, with tort immunity for bystanders who fail to act affirmatively.

Commensurate with the reluctance of the early common-law courts to require affirmative conduct was a disinclination to recognize the legal rights of an individual who voluntarily rescued another person in peril. Early tort law did not provide compensation for rescuers who were injured in the course of the rescue. Furthermore, despite the absence of a legal duty to render aid, a voluntary rescuer was liable for ordinary negligent acts or omissions that occurred during the course of the rescue.

The early common-law courts adhered to the idea that laws were intended to prevent people from harming one another, not force them to confer benefits upon each other. Moreover, the imposition of affirmative duties was considered to be an infringement on personal independence and freedom because legal philosophy idealized these rights. These courts also found that altruistic behavior was impossible to standardize because of the unique moral foundations of each individual.

The difficulty in developing workable standards for rescue behavior often is discussed as an explanation for the endurance of the common-

32. See Prosser, supra note 4, at 338-50. Nonfeasance was not recognized in the common-law English courts because of the difficulties incorporating inaction in the writs that were the basis of each cause of action. See Bohlen, supra note 8, at 219-22.
33. See Prosser, supra note 4, at 338-50.
34. See Linden, Rescuers and Good Samaritans, 34 Mod. L. Rev. 241, 242 (1971).
35. Id.
36. See Comment, Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach, 7 Vt. L. Rev. 143, 150 (1982); see also Prosser, supra note 4, at 343 (discussing the duties and liabilities of rescuers). Modernly, most statutes imposing a duty to rescue carry with them tort immunity for ordinary negligence. See infra notes 168-99 and accompanying text; Linden, supra note 33, at 242.
37. See Ames, supra note 8, at 97.
38. See Linden, supra note 33, at 242; Prosser, supra note 4, at 339.
39. Myers v. Quesenberry, 144 Cal. App. 3d 888, 892, 193 Cal. Rptr. 733, 735 (1983); Prosser, supra note 4, at 341. In addition, requiring a complete stranger to risk danger or death to effectuate a rescue does not seem reasonable. Moreover, the courts refused to recognize a duty rather than address the difficult problems of causation and proximate cause. Linden, supra note 33, at 242.
law no duty rule.40 For example, the determination of who among the many individuals on a crowded beach should be liable for the drowning of a person within full view of everyone would be a problem not easily resolved.41 Furthermore, courts are cognizant of the difficulties in standardizing the degree of risk a bystander is required to take in effectuating a rescue.42 Lastly, courts are unable to promulgate a general rule for determining how long a rescuer must continue assistance if, for example, the victim is starving or bleeding to death.43 Rather than attempting to create lines of demarcation for tort liability in the failure to rescue context, courts have adhered to the no duty rule.44

Based on the traditional notions of individual freedom and the difficulties in creating workable standards, the common-law no duty rule has persisted, resulting in some shocking case law. In Yania v. Bigan,45 for example, a landowner taunted and coaxed a business invitee to jump into a water filled trench. After the invitee obeyed, the landowner refused to go to the aid of the drowning victim. The court held that the defendant had no legal duty to rescue the victim.46 The court maintained that the victim was aware of the risks involved47 and that the defendant had satisfied his duty to warn of a dangerous condition.48

In another case, Osterlind v. Hill,49 the defendant rented a canoe to the victim, who was visibly intoxicated. The canoe capsized, and the victim clung to it for one-half hour, calling repeatedly for help. The defendant ignored the victim’s calls for assistance, and the victim drowned. The court held that no legal duty to rescue existed, and characterized the failure of the defendant to respond to the victim’s calls as immaterial to the case.50

More recently, a Georgia court refused to impose a duty to rescue

40. See Prosser, supra note 4, at 341.
41. See id.; Linden, supra note 33, at 242. One commentator has suggested that a possible solution to this problem is simply to make the several bystanders liable as joint tortfeasors. Comment, Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue, 31 UCLA L. Rev. 252, 271 (1983).
42. Linden, supra note 33, at 242.
43. Id.
44. See Prosser, supra note 4, at 341; see also Winkelman v. City of Sunnyvale, 59 Cal. App. 3d 509, 512, 130 Cal. Rptr. 690, 691 (1976).
46. 155 A.2d at 346.
47. Id.
48. Id.
49. 160 N.E. 301 (Mass. 1928).
50. 160 N.E. at 302.
in *Handiboe v. McCarthy.* Plaintiff’s four year old son, invited to play on defendant’s premises, fell into a swimming pool and drowned. The failure of the defendant’s servant to rescue the child was held not actionable because of the absence of a legal duty to rescue. Although courts confronted with similar factual situations acknowledge a *moral* duty to rescue, courts have been unwilling to impose a legal duty on that basis alone.

The common-law concern for individual freedom becomes less admirable in the context of cases similar to these. Resulting from the judicial repugnancy to according tort immunity in certain situations, courts gradually have etched out several exceptions to the no duty rule. While these exceptions do not result in a complete abrogation of the common-law rule, they do indicate judicial willingness to utilize moral and public policy considerations as a basis for the imposition of legal liability.

### Judicial Exceptions to the No Duty Rule

The existence of the various exceptions to the no duty rule represents a judicial attempt to close the gap between law and morality by requiring affirmative conduct when a special relationship exists. Traditionally, the only relationships giving rise to a duty to rescue were common carrier-passenger, innkeeper-guest, and shipmaster-seaman. This early list of special relationships, however, gradually has been expanded, indicating an increased inclination of courts to equate moral and legal duties. As a result, in addition to the exceptions noted above, modern decisional law recognizes the following exceptions to the no duty rule: landowner-invitee, law enforcement officer-prisoner, employer-employee, school-student, hospital-patient, and parent-child. Even in the absence of a legally

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52. Id. at 907.
54. See Winkelman v. City of Sunnyvale, 59 Cal. App. 3d at 512, 130 Cal. Rptr. at 691.
56. See *id.*
58. *Restatement (Second) of Torts §314A; 4 B. Winkin, Summary of California Law, Torts §55 (8th ed. 1973).*
60. *Prosser, supra* note 4, at 341; *Winkin, supra* note 57, §555; see Myers 144 Cal. App. 3d at 893, 193 Cal. Rptr. at 735.
recognized special relationship, courts have created additional exceptions to the no duty rule. These exceptions, discussed below, can be characterized as "special circumstances" that lead courts to impose an affirmative duty.

One example of a judicially recognized "special circumstance" exists when an actor knows or should know that his conduct has caused bodily harm to a victim who is helpless and in danger of further bodily harm. A duty is imposed requiring reasonable care to prevent the further harm. Moreover, courts recognize a duty to avoid affirmative acts that worsen the victim's situation. Affirmative conduct by a bystander that interferes with the acts of a rescuer results in liability for harm resulting from that conduct. Intentionally preventing assistance or destroying the usefulness of an instrument necessary to give aid also will result in liability. A bystander under no legal obligation who voluntarily undertakes a rescue must attempt to complete the rescue and use reasonable care in doing so. Through the undertaking of a voluntary rescue, a duty arises. If the bystander represents to the victim that he will extend aid, the bystander is liable for the harm caused by failure to render the aid if, but for the bystander's conduct, aid would have been offered by others. Reliance by the victim upon the promise to aid is necessary for the imposition of a duty. When confronted with each of these special circumstances, courts will impose an affirmative duty to rescue.

Despite the attenuation of the common-law no duty rule when a special relationship or circumstance exists, courts have not extended the duty concept in other situations. The no duty rule continues to apply in the absence of a legally recognized special relationship be-

61. RESTATEMENT (SECOND) OF TORTS §322.
63. RESTATEMENT (SECOND) OF TORTS §327 (negligently preventing assistance).
64. Id. §326 (intentionally preventing assistance).
65. Id.
66. Whether an undertaking has occurred is a question for the trier of fact. Farwell v. Keaton, 240 N.W.2d 217, 220 (1976).
67. See id. at 220; PROSSER, supra note 4, at 343-44. Persons injured during the course of a rescue may recover from the individual whose negligence created the peril, but the rescue must be absent rash or reckless conduct on the part of the rescuer. The theory underlying this concept is the notion that rescuers as a class are always foreseeable when the defendant's negligence places the plaintiff in peril. Solgaard v. Guy Transport, 6 Cal. 3d 361, 368, 491 P.2d 821, 825 (1971), 99 Cal. Rptr. 29, 33.
68. Farwell, 240 N.W.2d at 222.
69. See PROSSER, supra note 4, at 344; see also Thorne v. Dean, 4 Johns 84, 86 (N.Y. 1809).
between the victim and the bystander.\textsuperscript{71} In most jurisdictions, mere friendship is insufficient to create a legally recognized special relationship.\textsuperscript{72} Furthermore, the no duty rule still applies when the bystander did not cause the harmful situation and when the victim intentionally or recklessly places himself in danger.\textsuperscript{73} In summary, a common-law duty to rescue is recognized only within narrowly construed judicial limitations.

The judicial treatment of the duty to rescue in California has followed the trends of the common law in other states,\textsuperscript{74} maintaining the general rule that a bystander is under no duty to rescue.\textsuperscript{75} California decisional law, however, has expanded the concept of duty more liberally in other areas.\textsuperscript{76} The evolution of the common-law concept of duty in California will be analyzed next to determine whether California courts should further expand the concept of duty to include the imposition of liability for failure to rescue.

**COMMON-LAW DUTY IN CALIFORNIA**

California courts, frequent forerunners in the expansion and revision of common-law rules,\textsuperscript{77} have expanded the concept of duty in recent years.\textsuperscript{78} These courts have often abrogated common-law rules that no longer are equitable or reflective of current societal attributes or morals.\textsuperscript{79} For example, in *Rowland v. Christian*,\textsuperscript{80} the California Supreme Court eliminated the common-law distinction between business invitees, licensees, and trespassers.\textsuperscript{81} Prior to *Rowland*, courts used

\textsuperscript{71} See Prosser \textit{supra} note 4, at 346.

\textsuperscript{72} See Restatement (Second) of Torts §314A. \textit{But see} Farwell v. Keaton, 240 N.W. 2d 217, 222 (Mich. 1976) (holding that mere companions had a duty to aid each other in an emergency).


\textsuperscript{75} See id.

\textsuperscript{76} See \textit{infra} note 77-147 and accompanying text.


\textsuperscript{78} See \textit{id}. Whether an individual has a duty to act in a particular instance is a question of law, which, in most cases, is decided by the judge. Thompson v. County of Alameda, 27 Cal. 3d 741, 750, 614 P.2d 728, 732, 167 Cal. Rptr. 70, 74 (1980). \textit{But see} Richards v. Stanley, 43 Cal. 2d 60, 66, 271 P.2d 23, 27 (1954) (duty may be a preliminary question for the jury). Duty is the initial question to be decided. After duty is determined, causation and proximate cause still must be proven. \textit{Myers}, 144 Cal. App. 3d at 894-95, 193 Cal. Rptr. at 737.


\textsuperscript{80} 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

\textsuperscript{81} \textit{Id}. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.
these distinctions to classify the plaintiff and determine the type of duty owed by the possessor of land. The *Rowland* court recognized that these classifications were inherited from antiquated English common law when laws and culture were deeply rooted in the land. In replacing the outmoded rules, the court set forth a number of considerations to be used in determining whether a duty exists. The court concluded that the liability of a landowner must be determined on the basis of whether a property owner has acted reasonably in view of the foreseeability of injury to others. The *Rowland* decision signifies the California common-law interest in balancing the reasonableness of the defendant's behavior against the foreseeability of harm to the victim in determining whether a duty is owed.

In *Dillon v. Legg*, decided the same year as *Rowland*, the California Supreme Court further expanded the concept of duty. In *Dillon*, a parent witnessed the death of her child resulting from the negligence of the defendant. The court recognized for the first time a cause of action for negligent infliction of emotional distress brought by a plaintiff out of the zone of danger. *Dillon* emphasized the importance of focusing on the foreseeability of harm when determining whether a duty exists. Specifically, the court stressed the high degree of foreseeability that a parent of a small child would be in the vicinity of an accident causing death or injury to the child, and suffer emotional harm as a result. From this foreseeability, the court imposed a duty upon the defendant to exercise due care.

In reaching this conclusion, the *Dillon* court engaged in a lengthy

82. Id. at 113, 443 P.2d at 565, 70 Cal. Rptr. at 101.
83. Id.
84. These factors include:
   [The foreseeability of the harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *Rowland* v. Christian, 69 Cal. 2d at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100.
85. 69 Cal. 2d at 119, 443 P.2d 568, 70 Cal. Rptr. at 104.
86. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
87. Id. at 747, 441 P.2d at 925, 69 Cal. Rptr. at 88.
88. Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court set forth the following guidelines for use in determining duty: (1) whether the plaintiff was located near the scene of the accident as contrasted with one who was a distance away, (2) whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others, and (3) whether the plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. *Id.*
89. Id. at 741, 441 P.2d at 721, 69 Cal. Rptr. at 81.
90. Id. at 747, 441 P.2d at 925, 69 Cal. Rptr. at 88.
discussion of the concept of duty in tort law. The court acknowledged that the concept of duty originated as a judicial device designed to limit liability and diminish potentially large jury awards. The court, however, weighed this consideration against the basic premise of tort litigation: "that there be a remedy for every substantial wrong." To reconcile these competing interests, the court established the frequently cited theory that "duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.

The policy considerations set forth in Dillon have similar application in a duty to rescue context. Following Dillon, the difficulty in defining the limits of recovery for nonfeasance should not suffice to deny recovery for all plaintiffs who are injured as a result of a nonrescue. The expansion of duty would allow greater legal protection for innocent plaintiffs by imposing legal liability upon bystanders who do not act to assist a victim in peril. As the public interest in freedom from violent assault increases in our urbanized society, courts should attach additional weight to that consideration in the analysis of whether a duty to rescue exists.

Dillon and Rowland are both landmark cases in the expansion of the concept of duty, and represent a trend in the law of California. The pro-plaintiff direction of these and other recent cases indicates an increased awareness of societal attitudes favoring greater protection for the consumer, the individual, and the innocent victim. Although California courts currently are in accord with the general common-law no duty rule, the number of legally recognized special relationships has been expanded beyond that of most jurisdictions.

A specific area of liberal judicial expansion of the concept of duty in California is the duty to warn. California courts now readily extend affirmative duties when a defendant stands in some special relation-
ship either to (1) the person whose conduct needs to be controlled, or (2) the foreseeable victim of the conduct. The special relationship between the defendant and the victim may be much more attenuated in a duty to warn context, as compared to the relationships traditionally required by the courts. As a result, California courts rely heavily on the defendant's knowledge of impending harm to the victim. Since prior knowledge of impending harm relates directly to the foreseeability of that harm, courts have determined that this knowledge satisfies the foreseeability requirement set forth in Dillon. The duty to warn cases, like bystander cases, differ significantly from the traditional exceptions to the no duty rule because the defendant may or may not have prior contact with the victim. Regardless of a prior relationship in a failure to warn context, the defendant's knowledge of foreseeable harm results in the imposition of a legal duty. Similar considerations apply in bystander cases since a prior relationship between the bystander and the victim may be unlikely.

One line of cases imposes liability for a failure to warn of the known violent tendencies of a child. In Ellis v. D'Angelo, for example, the court found that the parents of a violent child had a duty to warn a babysitter of these tendencies. Another case, Johnson v. State of California, upheld a cause of action for failure to warn foster parents of the dangerous tendencies of their foster child. In both cases, the commonly recognized special relationship between plaintiff and defendant was absent. Instead, the court considered both the relationship between the defendant and the violent child and the defendant's knowledge of the violent tendencies of the child to impose an affirmative duty to warn.

Another line of cases imposing liability for failure to warn involves instances when a professional releases from protective custody an individual who poses a predictable threat of harm to a specified or

102. See id. (when defendant knows or should have known).
103. See id.
105. Id.
106. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).
107. Id.
109. See Tarasoff, 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.
easily identifiable individual. Based on the special relationship between the defendant professional and the violent individual, and defendant's knowledge of foreseeable harm to the plaintiff, a duty to warn is imposed. In *Morgan v. County of Yuba*, a California appellate court sustained a cause of action against a law enforcement official who had promised to warn decedent before releasing a dangerous criminal but failed to do so. In 1976, the California Supreme Court furthered the expansion of this duty in *Tarasoff v. Regents of the University of California*. In *Tarasoff*, the court held that a psychotherapist had a duty to exercise reasonable care to protect foreseeable victims when a patient indicates an intent to commit a violent act. Although recognizing the importance of the psychotherapist-patient privilege, the court held that the public interest in safety from violent assault is a greater social concern. These policy considerations, combined with foreseeability of danger to the victim, led the court to impose an affirmative duty to warn. All of the above mentioned cases extend the exceptions to the no duty rule to plaintiffs having no special relationship with the defendant.

The foregoing duty to warn cases also illustrate how policy considerations are utilized by courts to impose affirmative duties in cases that would be dismissed under the traditional no duty rule. The foreseeability of harm to the victim is an important element in these decisions. This foreseeability flows from the defendant's knowledge of a third person's intent to harm the plaintiff. Furthermore, the societal interest in safety from violent assault is emphasized as an important policy consideration.

These factors are helpful in analyzing a nonrescue case. A bystander who witnesses a violent assault upon a victim has knowledge of the

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111. See *Tarasoff*, 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.
113. Id. at 946, 41 Cal. Rptr. at 513.
115. Id. at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.
116. Id. at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26.
117. Id.
118. Id. at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27; see also Myers v. Quesenberry, 144 Cal. App. 3d 888, 193 Cal. Rptr. 733 (1983). Myers sustained plaintiff's cause of action against defendant physicians who failed to warn their patient against driving an automobile in an uncontrolled diabetic state that was compounded by pregnancy complications. The court held that liability is not conditioned on potential victims being readily identifiable as well as foreseeable. Id. at 893, 193 Cal. Rptr. at 736.
119. See *Tarasoff*, 17 Cal. 3d at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26.
foreseeability of further harm to the victim as a result of the bystander's nonfeasance. The public interest in safety from violent assault also should be emphasized by the courts in determining whether a duty should be imposed in a nonrescue case, since emergency situations often result from criminal activity.

The expansion of duty in a nonrescue context is illustrated in a recent California appellate case. In *Soldano v. O'Daniels*, the court imposed an affirmative duty to assist in notifying authorities despite the absence of any special relationship between the defendant and the victim. In *Soldano*, a patron from an establishment across the street entered defendant's tavern and requested defendant's bartender to notify the police for the benefit of a man who had been threatened. The bartender refused to make the call and would not allow the patron to use the telephone. No assistance was summoned, and the victim was killed. The court held that the bartender owed a duty to the plaintiff's decedent to permit the use of the telephone for the placement of an emergency call.

The *Soldano* court characterized the conduct of the bartender as a display of disregard for human life that is "morally wrong." Since the general rule imposed no duty in this situation, the court stated that the rule required "limited re-examination in light of current societal conditions." The court recognized the dubious morality of a law that fails to acknowledge the moral obligation of one person to aid another in peril. The *Soldano* court cited the various expansions in the common-law concept of duty. Due to the absence of a legally recognized special relationship, application of the general rule would result in tort immunity. Emphasizing the callous behavior of the bartender in this case, the court stated that the existing common-law rule of nonliability for nonfeasance must be scrutinized.

The *Soldano* court first examined the increase in crime in modern society and the legislative and societal responses to this problem. The necessity of citizen involvement in the prevention of crime also

121. *Id.* at 453, 190 Cal. Rptr. at 317.
122. *Id.*
123. *Id.* at 451, 190 Cal. Rptr. at 316.
124. *Id.* at 450, 190 Cal. Rptr. at 315.
125. See *id.* at 447, 190 Cal. Rptr. at 313.
126. See *id.* at 448, 190 Cal. Rptr. at 313.
127. See *id.*
128. *Id.* at 449, 190 Cal. Rptr. at 314.
129. See *id.*
130. See *id.*
was emphasized. In addition, the court cited various legislative enactments involving the priority use of the telephone in emergency situations.

In deciding whether to impose a duty, the court utilized factors set forth in *Rowland v. Christian.* The *Soldano* court concluded that harm to the victim was foreseeable and that the bartender's refusal to allow the use of the telephone was closely connected with the resulting injury. Furthermore, the bartender's behavior was callously indifferent to the possibility that the victim might suffer harm. The court emphasized that no excessive costs were involved if aid had been given. Moreover, a private citizen was not being legally forced to be exposed to unnecessary dangers. Instead, the court expressly stated that this ruling would not require a private citizen to open a private home so that a stranger could use the telephone. The major policy concern of *Soldano* was the "administrative factor," or the consequences to the community if an affirmative duty were imposed. Recognizing that the reluctance of the judiciary to impose liability for nonfeasance stems from the possible difficulties in setting standards and creating workable rules, the *Soldano* court stated that the possibility of liability in this case did not constitute a great change in the law.

Noting that the California Supreme Court holding in *Tarasoff* was based primarily upon the defendant's knowledge of foreseeable danger to the victim, the *Soldano* court relied on the bartender's knowledge of peril to the victim in ruling that an affirmative duty existed. Although a traditionally recognized special relationship was absent in *Soldano,* the bartender did have knowledge of danger to

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131. See id. (citing the National Advisory Commission on Criminal Justice Standards and Goals, Report on Community Crime Prevention (1973)).

132. *Soldano,* 141 Cal. App. 3d at 450, 190 Cal. Rptr. at 315; see, e.g., Cal. Gov't Code §§53100, 53112 (relating to use of telephone in emergency situations).

133. See supra note 84.

134. See *Soldano,* 141 Cal. App. 3d at 451, 190 Cal. Rptr. at 315.

135. Id. at 451, 190 Cal. Rptr. at 316.

136. Id. at 452, 190 Cal. Rptr. at 316.

137. Id.

138. Id. at 451-52, 190 Cal. Rptr. at 316. The term "administrative factor" was coined by Professor Green in his analysis of determining whether a duty exists in a given case. Green, The Duty Problem in Negligence Cases, 28 Colum. L. Rev. 1014, 1035-45 (1929).

139. See *Soldano,* 141 Cal. App. 3d at 451, 190 Cal. Rptr. at 316.

140. See id. at 452, 190 Cal. Rptr. at 316.

141. Id. at 454, 190 Cal. Rptr. at 318.


143. Id. at 437-39, 551 P.2d at 345-47, 131 Cal. Rptr. at 25-27.

144. 141 Cal. App. 3d at 448, 190 Cal. Rptr. at 314. Duty would arise only if it were clearly conveyed that imminent danger of physical harm existed. Id. at 452, 190 Cal. Rptr. at 316.
the victim. From this knowledge an affirmative duty to aid arose. The court viewed this imposition of an affirmative duty as only a slight departure from the morally questionable no duty rule.\textsuperscript{145} Despite the hesitance of the judiciary to impose affirmative duties, the \textit{Soldano} court opted to expand the law judicially rather than await legislative action.\textsuperscript{146} This decision represents the logical and necessary growth of the common law.\textsuperscript{147}

These California cases have important implications for a discussion of potential tort liability for failure to rescue. Although the concept of duty has been liberally expanded, courts have been unwilling to extend liability in most nonrescue cases.\textsuperscript{148} The duty to warn cases, however, can be analogized to nonrescue cases. In most situations, both cases involve policy considerations relating to criminal violations against the victim. In addition, the knowledge of foreseeable injury is an important element of the duty to warn analysis. This factor also should be used by courts in nonrescue cases. In weighing these policy considerations, courts should find a duty to rescue when the bystander consciously or willfully refuses to lend assistance.

As previously discussed,\textsuperscript{149} the judicial hesitation to impose affirmative duties results from the common-law difficulty in drawing a workable framework for imposing liability. Since the resulting nonliability for nonfeasance is morally offensive in many situations, the California Legislature has enacted various statutes that impose affirmative duties.\textsuperscript{150} The legislative response to the common-law disinclination to extend the concept of duty is demonstrated by these enactments. By imposing legal duties, these laws encourage and mandate affirmative conduct by private citizens.

\textbf{Affirmative Duties Imposed by Legislation in California}

Due to the relatively slow growth of judicial exceptions to the no duty rule, the California Legislature often has responded by imposing statutory duties. Consistent with the societal concern regarding the increase in crime in the United States,\textsuperscript{151} the California Legislature enacted Government Code section 13970 in 1965, expressly declaring

\begin{itemize}
\item \textsuperscript{145} See \textit{id.} at 454, 190 Cal. Rptr. at 318.
\item \textsuperscript{146} See \textit{id.} at 453, 190 Cal. Rptr. at 317.
\item \textsuperscript{147} See \textit{id.} The court viewed this expansion of duty as particularly logical in relation to \textit{Restatement (Second) of Torts} \textsection{327} (intentional interference with the acts of a rescuer). \textit{Id.}
\item \textsuperscript{148} See \textit{Winkelman}, 59 Cal. 3d at 512, 130 Cal. Rptr. at 693.
\item \textsuperscript{149} See \textit{supra} notes 32-56 and accompanying text.
\item \textsuperscript{150} See, e.g., \textit{Cal. Gov't Code} \textsection{13970}.
\item \textsuperscript{151} See \textit{Soldano}, 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314.
\end{itemize}
that direct action on the part of private citizens to prevent the commission of crimes benefits the entire public. Meritorious actions on the part of private citizens to apprehend criminals or rescue persons in immediate danger may be indemnified by the state pursuant to specified guidelines. Although this provision does not require affirmative action by members of the general public, the law clearly is intended to encourage public participation in crime control.

The Legislature has created mandatory affirmative duties in specified situations. For example, the California Vehicle Code imposes an affirmative duty upon an automobile driver involved in an accident to stop and render assistance to any persons injured in the accident. The duty imposed by this statute is independent of the fault of the driver or the contributory negligence of the injured person. The California Harbors and Navigation Code imposes a similar duty upon the operator of a vessel. This statute requires the rendering of assistance to other persons involved in a vessel collision, accident, or other casualty. Furthermore, this statute creates civil immunity from a suit for damages if the rescuer acted as a responsible, prudent person would have acted under the same or similar circumstances. The California Penal Code imposes misdemeanor liability for willfully permitting child abuse. Arguably, the statutory language is broad enough to encompass individuals who have knowledge of ongoing child abuse. This statute, therefore, may create an affirmative duty to report instances of child abuse to the specified authorities. Additionally, the California Civil Code imposes an affirmative duty upon the owner of a dog that has bitten someone.

152. CAL. GOV'T CODE §13970.
153. Immediate danger includes fire, death, or other catastrophe. Id.
154. See Id.
155. See Soldano, 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314. The legislative awareness of the crime problem was evidenced more recently by several well publicized increases in the severity of punishment for criminal offenses. See, e.g., CAL. PENAL CODE §§667 (enhancing sentences for habitual criminals), 667.5 (additional sentences for prior violent felonies), 12022 (additional penalties for firearm use during a felony).
156. CAL. VEH. CODE §§20001-20003.
157. Id.
158. Id. Other states impose a similar duty. See, e.g., ILL. REV. STAT. Ch 95 1/2 §11-403 (1973).
159. CAL. HARB. & NAV. CODE §656.
160. Id. §656(a).
161. See id. §656(b).
164. See id. at 213.
165. CAL. CIV. CODE §3342.5.
Under this statute, the dog owner is required to take reasonably necessary steps to remove any danger presented to other persons from dog bites.\textsuperscript{166} Each of these laws is the result of legislative balancing of the interests of individual citizens with the interests of society as a whole. These laws indicate the desire of the California Legislature to encourage conduct in conformity with current societal needs. Similar concerns were addressed by the Vermont Legislature in 1967 when the Duty to Aid the Endangered Act was promulgated. The following section discusses the Vermont law and the more recent legislative alternatives to the common-law no duty rule.

\textbf{Legislatively Imposed Duty to Rescue}

Until recently, the common-law no duty rule was followed in forty-nine states. Although each jurisdiction has created judicial or legislative exceptions, the rule in the main has persisted.\textsuperscript{167} Prior to 1982, only one state had recognized the importance of a statutory duty and enacted legislation requiring rescue.\textsuperscript{168} In the wake of the infamous Genovese murder,\textsuperscript{169} the Vermont Legislature in 1967 promulgated the Duty to Aid the Endangered Act.\textsuperscript{170} While the common-law rules

\begin{footnotesize}
\begin{enumerate}
\item[166.] \textit{Id.}; see Witkin, \textit{supra} note 57, §562(3). In addition to these affirmative duties, the California Legislature also has recognized the importance of the telephone in procuring emergency assistance. See, e.g., \textit{Cal. Gov't Code} §5100 (establishing a statewide emergency number and eliminating the coin requirement); \textit{Cal. Penal Code} §384 (creating criminal liability for refusal to relinquish a party line when informed of a need to notify authorities of an emergency).
\item[167.] See generally, \textit{Prosser, supra} note 4, at 341-43 (discussion of judicial exceptions to the no duty rule).
\item[169.] Kitty Genovese was stabbed to death on a residential street in Queens, New York City during an attack that lasted over 35 minutes. Thirty-eight witnesses saw or heard the attack from a nearby apartment building, but no one made an effort to assist the victim or notify the authorities. The first call to the police was almost an hour after the attack began. The loss of humanity by society was symbolized by this famous incident. See Kiesel, \textit{supra} note 1, at 1208.
\item[170.] \textit{Vt. Ann. Stat. Tit. 12} §519 (1967). The statute reads as follows: §519 Emergency Medical Care
\begin{enumerate}
\item[(a)] A person who knows that another is exposed to grave physical harm shall to the extent the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
\item[(b)] A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.
\item[(c)] A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.
\end{enumerate}
\end{enumerate}
\end{footnotesize}
establish a duty to rescue in the presence of special relationships and circumstances, the Vermont statute substantially expands the affirmative duty beyond this to anyone who knows another is exposed to grave danger.\textsuperscript{171} The statute specifically requires reasonable assistance that can be rendered without danger or peril to the rescuer or others to whom the rescuer owes a duty.\textsuperscript{172} The statute imposes misdemeanor liability in the form of a fine.\textsuperscript{173} In addition, the Vermont statute provides immunity from civil damages unless the rescuer's acts constitute gross negligence or the rescuer expects to receive remuneration.\textsuperscript{174}

Although the enactment of the Vermont statute was extremely innovative relative to the common law, the effect of requiring a duty is debatable. No formal documentations of prosecutions under the Vermont statute have been made.\textsuperscript{175} Furthermore, only one published opinion has cited the Vermont rescue statute, and this decision, \textit{State v. Joyce},\textsuperscript{176} merely provided a limited interpretation of the statutory language.

In \textit{Joyce}, the Vermont Supreme Court addressed the argument that five witnesses to a physical altercation were required to assist under the Vermont rescue statute.\textsuperscript{177} The court held that the affirmative duty set forth in the rescue statute did not require a rescuer to intervene in a fight.\textsuperscript{178} The court apparently relied on the portion of the statute that requires assistance only if the rescue does not subject the rescuer to injury.\textsuperscript{179} As a result, a duty was not found because of the foreseeability that a rescuer intervening in a fight could suffer injury.\textsuperscript{180}

The Vermont statute does not expressly require bystanders to report crimes to authorities,\textsuperscript{181} and \textit{Joyce} did not address the potential criminal liability of the witnesses for failure to notify authorities.\textsuperscript{182} Presumably, a witness observing a crime in progress that is exposing the victim to grave physical harm is under a duty to notify the proper

\begin{footnotes}
\item[171.] \textit{Id.} See \textit{generally} Comment, \textit{supra} note 36; Franklin, \textit{Vermont Requires Rescue: A Comment}, 25 STAN. L. REV. 51 (1972) (discussing the implications of the Vermont rescue statute).
\item[172.] \textit{Vt. Stat. Ann. Tit. 12 §519(a).}
\item[173.] \textit{Id.} The penalty for violation of the Vermont statute is a misdemeanor punishable by a fine of not more than $100. \textit{Id.} §519(c).
\item[174.] \textit{Id.} §519(b).
\item[175.] \textit{Id.} at 273.
\item[176.] \textit{Id.} at 273.
\item[177.] \textit{Id.}
\item[178.] \textit{Id.}
\item[179.] \textit{Id.}
\item[180.] \textit{Id.}
\item[181.] \textit{Id.} at 169 n.160.
\item[182.] Comment, \textit{supra} note 36, at 169 n.160.
\end{footnotes}
Due to the limited judicial interpretation of the Vermont law, however, and the absence of statistics concerning enforceability, uncertainty exists regarding whether the law effectively promotes this duty.\(^\text{184}\)

Despite uncertainty concerning whether the Vermont statute is enforceable as a practical matter, four states since 1982 have elected to impose a statutory affirmative duty to rescue. Responding to recent events such as the multiple rape in New Bedford,\(^\text{185}\) these laws demonstrate the public desire to improve crime control by mandating citizen involvement in the reporting of criminal activity.\(^\text{186}\) These legislative enactments reflect the realization that certain behavior regarding victims in danger is so offensive to community morality that imposition of criminal liability is required.\(^\text{187}\)

**RECENT LEGISLATIVE ENACTMENTS IMPOSING AN AFFIRMATIVE DUTY TO RESCUE**

Statutes imposing an affirmative duty to rescue have been enacted in Minnesota, Massachusetts, and Rhode Island. A similar statute is pending in the Pennsylvania Legislature. Substantively similar to the Vermont statute, the duty to rescue law recently enacted in Minnesota requires bystanders to render reasonable assistance to *any* person exposed to grave physical harm.\(^\text{188}\) The bystander is not required to risk danger to himself.\(^\text{189}\) Reasonable assistance may take the form of prompt notification to the proper authorities.\(^\text{190}\) Moreover, the bystander is granted civil immunity from suit for good faith efforts to rescue.\(^\text{191}\) The Minnesota provision, mandating rescue whenever a

\(^{183}\) See id.

\(^{184}\) Id. at 144.

\(^{185}\) According to Representative Barbara Gray of Massachusetts (author of Mass. H5961), the new Massachusetts law is a direct response to the New Bedford incident. Telephone conversation with Barbara Gray, Massachusetts State Representative (October 19, 1983) (notes on file at the Pacific Law Journal).

\(^{186}\) See Kiesel, supra note 1, at 1208.

\(^{187}\) See Feldbrugge, supra note 13, at 654.

\(^{188}\) MnN. Stat. §604.05 (1982). The statute provides in pertinent part:

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

\(^{189}\) Id.

\(^{190}\) Id.

\(^{191}\) See id.
bystander has knowledge of grave danger or peril to the victim, is not limited to instances of danger resulting from criminal activity.\textsuperscript{192}

In contrast with the Vermont and Minnesota statutes, the recently enacted Massachusetts,\textsuperscript{193} Rhode Island,\textsuperscript{194} and proposed Pennsylvania\textsuperscript{195} provisions hinge upon knowledge of criminal activity. For example, Massachusetts mandates a report to authorities when a bystander witnesses or has knowledge of an aggravated rape, rape, murder, manslaughter, or armed robbery.\textsuperscript{196} The Pennsylvania law would also require the reporting of kidnapping and arson.\textsuperscript{197} Rhode Island limits the affirmative duty to the reporting of any first degree sexual assault.\textsuperscript{198} Unlike the other legislative enactments, however, the Rhode Island law requires the victim to sign the complaint before the state may seek a conviction under the law.\textsuperscript{199}

These legislative enactments depart from the traditional judicial treatment of liability for failure to rescue. Instead of the general common-law rule that results in tort immunity for nonfeasance, these laws create affirmative duties that require citizen involvement in emergency assistance and crime control, prevention, and enforcement. The laws reflect a legislative decision to incorporate moral standards with accompanying criminal sanctions into the laws of the jurisdiction. As a result, altruistic behavior is encouraged, and antisocial conduct is

\begin{itemize}
\item \textsuperscript{192} Compare id. with R.I. Gen. Laws §11-37-3.1.
\item \textsuperscript{193} Mass. Gen. Laws Ann. ch. 268, §40 (December 1983). The statute provides: Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.
\item \textsuperscript{194} R.I. Gen. Law §11-37-3.1. The statute provides:
\begin{itemize}
\item Duty to Report: Any person, other than the victim, who know or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his/her presence shall immediately notify the state police or the police department of the city or town in which said assault or attempted assault is taking place of said crime.

\item \textsuperscript{195} This legislation is currently pending in the Pennsylvania Legislature. The proposed statute reads: 18 Pa. Cons. Stat. §5105 (1983): (a) A person commits an offense if . . . he fails to report to police, within 24 hours of its commission, a murder, rape, kidnapping, robbery or arson which he has observed being committed and which he knows during its commission, or learns within 24 hours if its commission, is a crime.
\item \textsuperscript{196} See Mass. Gen. Laws Ann. ch. 268, §40.
\item \textsuperscript{197} See proposed Pa. Cons. Stat. §5105 (1983).
\item \textsuperscript{198} See R.I. Gen. Laws §11-37-3.1.
\item \textsuperscript{199} See id. §11-37-3.2.
\end{itemize}
\end{itemize}
A statutory duty to rescue should be enacted in California because of the similar prevalence of these moral considerations and the public interest in crime control. The policy considerations relating to the enactment of a legislatively imposed duty to rescue are important in determining whether laws of this nature are an effective method of fostering rescue behavior. The following sections investigate these considerations.

**Policy Considerations**

Although most individuals would agree that a bystander who witnesses a victim in peril has a moral duty to rescue the victim or provide some reasonable assistance, differences of opinion exist regarding whether a duty should be legally imposed. Proponents of a statutory duty to rescue cite European laws as continuing evidence that a legislated duty can be imposed and enforced.

Most European countries impose varying forms of a duty to rescue. Although these statutes differ in some respects, all require that reasonable assistance be undertaken when a bystander witnesses the peril of another person. These European countries usually incorporate the duty to rescue provisions within the criminal code, providing penalties consisting of both prison sentences and fines. Thus, European criminal law punishes persons who, without risking danger, were able to assist another person in serious peril and failed to act affirmatively.

Growing concern over prevention of crime has led commentators to argue that American society as a whole needs to become more involved and responsible for the reporting and prevention of crime. The traditional common-law rule continues to condone behavior that

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200. See Soldano, 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314.
202. See Ogren, supra note 1, at 218; Dawson, Rewards for the Rescue of Human Life?, in THE GOOD SAMARITAN AND THE LAW, 73 (J. Ratcliffe ed. 1966); SHELEFF, supra note 8, at 108.
203. See Franklin, supra note 171, at 59.
204. See id.
205. European countries that impose a statutory duty to rescue include Turkey, Italy, Poland, France, Denmark, and Czechoslovakia. Feldbrugge, supra note 13, appendix.
207. Feldbrugge, supra note 13, at 652.
208. See Soldano, 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314. "Crime is a blight on our society and a matter of great citizen concern." Id.
209. See Kiesel, supra note 1, at 1209; Soldano, 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314 (citing CRIME PREVENTION REPORT, supra note 131, to support the proposition that citizen involvement is crucial to law enforcement).
is unacceptable in a civilized society.\textsuperscript{210} Placing legal sanctions upon morally reprehensible conduct strengthens the existing moral duty to aid others in emergency situations.\textsuperscript{211} These laws reinforce the sense of community and caring that society desires.\textsuperscript{212}

The principle objection to the enactment of a statutory duty requiring rescue in the United States appears to be the notion that a legal system should not mandate altruism and legislate morality.\textsuperscript{213} The rescue statutes in Europe, however, seemingly are based on moral precepts that, in turn, are promoted by the imposition of legal liability.\textsuperscript{214} These criminal sanctions reflect the current moral values of European society.\textsuperscript{215} Our criminal provisions also should reflect these concerns because similar moral considerations concerning the duty to rescue prevail in the United States.\textsuperscript{216}

Opponents of a legal duty to rescue question the effectiveness and enforceability of a rescue statute.\textsuperscript{217} The absence of enforcement difficulties in Europe refutes these contentions.\textsuperscript{218} Some commentators argue that laws alone cannot make people better and that human morality cannot be legislated.\textsuperscript{219} Research on human behavior, however, indicates that people ordinarily act in accordance with the current law.\textsuperscript{220} Furthermore, these studies indicate that awareness of a particular legal obligation is likely to influence the decision of a potential rescuer.\textsuperscript{221} The bystander may be motivated to act by the knowledge of potential legal liability for inaction.\textsuperscript{222} Since the behavior is legally mandated, the desirability of rescue activity may be enhanced.\textsuperscript{223}

\textsuperscript{211} Ogren, \textit{supra} note 1, at 218.
\textsuperscript{212} Id. Difficulties arise, however, in deciding whether equity should coerce a bystander into being a "Good Samaritan" through legal sanctions. D'Amato, \textit{supra} note 56, at 801. Furthermore, difficulties arise in standardizing omissions and creating liability for inaction. Franklin, \textit{supra} note 171, 56 n.37.
\textsuperscript{213} See id.; see also Comment, \textit{supra} note 36, at 148 n.30.
\textsuperscript{214} See Feldbrugge, \textit{supra} note 13, at 653.
\textsuperscript{215} See id. at 654.
\textsuperscript{216} Reports have been made that a majority of Americans favor a statutorily imposed duty to rescue. \textit{See Briefs, TRIAL MAGAZINE,} Nov. 1983, Vol. 19, No. 11, at 16.
\textsuperscript{218} See Rudzinski, \textit{supra} note 206, at 121.
\textsuperscript{219} Note, \textit{supra} note 9, at 324.
\textsuperscript{220} See generally Note, \textit{supra} note 217, at 556 (discussions of the passive bystander phenomenon).
\textsuperscript{221} See id. at 557-58; Franklin, \textit{supra} note 169, at 60.
\textsuperscript{222} See Note, \textit{supra} note 217, at 560; D'Amato, \textit{supra} note 56 at 805.
\textsuperscript{223} Franklin, \textit{supra} note 171, at 58. In situations where no legal duty to rescue exists,
Extensive public discussions preceding the adoption of a rescue law would aid public awareness of the law and improve compliance.\(^2\)\(^4\)

Statutes that impose relatively minor penalties\(^2\)\(^5\) may be seen as merely symbolic commentary on human morality.\(^2\)\(^6\) A civil liability supplement to the criminal provisions, however, may improve the stature of these laws. Civil liability would be an appropriate addition to the legislative proscription of nonrescue behavior.\(^2\)\(^7\) Private litigants who successfully prove the essential causal relationship between harm to the victim and the defendant’s nonfeasance would be able to seek damages based upon the breach of a duty to rescue.\(^2\)\(^8\) Furthermore, rescue statutes that grant civil immunity for good faith rescue efforts reward altruistic behavior.

Various arguments have been presented concerning the reasons why a duty to rescue should not be imposed legislatively through the Penal Code. These conjectural arguments apparently stem from a continued emphasis on the freedom of individual citizens to choose whether to act in an altruistic manner. These objections include (1) the effect of a duty to rescue statute upon the availability and truthfulness of witnesses in a criminal proceeding, (2) the difficulties in proving the elements required in a duty to rescue statute, and (3) concerns regarding the privacy of the victim, particularly in sexual assault cases.

### A. Adverse Effect upon Criminal Witnesses

Duty to rescue statutes may have an adverse effect upon witnesses in criminal proceedings.\(^2\)\(^9\) Witnesses who fear imposition of criminal liability for nonrescue may refrain from offering information.\(^2\)\(^0\) Law enforcement investigations may be impeded by the hesitation of witnesses. Thus, prosecuting jurisdictions should use discretion in the application of a criminal duty to rescue provision. Witnesses already called to testify at a criminal proceeding may hesitate to testify truthfully following a violation of the duty to rescue statute.\(^2\)\(^1\) As in any current statistics indicate that the larger the group of potential rescuers, the less likely each individual is to act, and therefore the less likely that a rescue will occur. Id. at 60. Although the degree of fault of each tortfeasor could be difficult to determine, this should not be a bar to plaintiff’s cause of action. Comment, supra note 36, at 180.

\(^2\)\(^4\) See Franklin, supra note 171, at 58.

\(^2\)\(^5\) See VT. STAT. ANN. TIT. 12, §519. Vermont imposes a $100.00 fine. Id.

\(^2\)\(^6\) See Kiesel, supra note 1, at 1209 (quoting Baltimore attorney Larry Ritchie).

\(^2\)\(^7\) Franklin, supra note 171, at 55-56.

\(^2\)\(^8\) Id. at 56.

\(^2\)\(^9\) See Kiesel, supra note 1, at 1208.

\(^2\)\(^0\) See Wehrwein, supra note 210, at 5.

\(^2\)\(^1\) See id.
other judicial proceeding, however, the veracity of the witness is tested through cross examination under oath.

B. Problems in Proving Statutory Elements

Problems of proof may arise for the state in attempting to prove that the bystander had knowledge of another person's danger and recognized that danger as serious. The prosecuting jurisdiction would be required to prove this knowledge beyond a reasonable doubt. If the proceeding were civil, the plaintiff would be required to prove this knowledge by a preponderance of the evidence. In addition, the plaintiff would be required to prove the other elements of a negligence cause of action, namely causation and proximate cause.

The criminal statutes that are in effect do not specify whether the state must prove that anything the bystander might have done would have helped. Some commentators view this as a major flaw in the new laws. This argument is faulty, however, because the duty arises from the defendant's knowledge of the peril. The lack of a legal duty is only the initial inquiry. A more difficult problem would be showing an irrefutable connection between the final harm and the acts leading to the harm. Whether affirmative conduct on the part of the bystander could, or would, save the victim from harm is not important to the determination of duty. These issues relate to whether the bystander's conduct was the proximate cause of the injury.

C. Concern for the Privacy of the Victim

Questions also have been raised regarding the privacy of the victim, particularly in relation to the Rhode Island statute, which requires the victim to sign the complaint to prosecute the bystander. Because of concern for the personal safety and privacy of sexual assault victims, courts should use discretion in these cases, and close proceedings to protect the privacy rights of these victims. These considerations are particularly important when the victim of the sexual

232. Id.
234. Wehrwein, supra note 210, at 5.
235. Id.
236. R.I. Gen. Laws §11-37-3.1; see Kiesel, supra note 1, at 1208. The Rhode Island statute was opposed by the Rhode Island Rape Crisis Center and the Rhode Island Chapter of the American Civil Liberties Union. Id.
assault is a minor. In addition to the policy considerations set forth in this section, moral considerations surrounding a duty to rescue must be discussed. The following section presents these moral factors.

MORAL CONSIDERATIONS

As members of a civilized society, citizens should feel a personal responsibility for the protection of each other, particularly in situations of danger or peril. The purpose of duty to rescue laws is to encourage and support positive behavior within society. These laws give effect to valuable moral principles. The statutes do not require heroism; they require only a reasonable amount of affirmative action. The statutes ordinarily provide the potential rescuer with a choice to intervene personally or obtain help and assistance. Only callous refusal to assist is punished.

The function of the law in society is two-fold. The first function is to coerce behavior that is thought to be in the best interests of society. The second function is a teaching role that serves to illustrate the behavior desired from the individuals within a society. Regrettably, the common-law view of rescue fails in the teaching function of the law. Rather than teaching members of society that rescues are exemplary, the law encourages selfish nonrescue behavior. The imposition of an affirmative duty to rescue would reconcile legal and moral principles. The enactment of a criminal statute requiring affirmative conduct to assist makes a bystander's behavior a matter of public concern, and criminal sanctions against passivity protect a legitimate social interest.

Following the adoption of a criminal statute imposing a duty to rescue, courts should use the statute as the standard of care in a suit brought by the victim for civil damages. As a supplement to the legislative proscription of nonrescue behavior, civil damages would

238. See D'Amato, supra note 56, at 806.
239. Ogren, supra note 1, at 218.
240. Kiesel, supra note 1, at 1208.
241. Ogren, supra note 1, at 218.
242. See, e.g., Minn. Stat. §604.05.
243. See Rudzinski, supra note 206, at 121.
244. See Ogren, supra note 1, at 218.
245. Id.
246. Id.
247. Id.
248. Id.
249. See D'Amato, supra note 57, at 808.
250. See id. at 807.
serve to put the victim in his original position. Furthermore, civil immunity for good faith efforts to comply with the duty to rescue statute would reward altruistic behavior. The following section discusses supplemental civil liability.

**Supplemental Civil Liability**

A criminal statute in California may be used as the basis for civil liability. California Evidence Code section 669 codifies the presumption of negligence rule in cases when a violation of a criminal statute has occurred. A criminal duty to rescue statute, therefore, could be used by the victim to recover damages from a passive bystander who refused to render assistance.

The imposition of civil liability would serve to compensate the victim who was not aided by a potential rescuer with knowledge of the victim’s peril. As a supplement to criminal provisions, civil liability would provide additional monetary sanctions against those who do not act in the victim’s best interests. Combined with a civil immunity for good faith efforts to rescue, altruistic behavior would be encouraged and morally offensive behavior would be discouraged.

Although the passive bystander is not the initial cause of the victim’s peril, legal culpability should arise from the conscious indifference of the bystander to the knowledge of peril to the victim. Allowing recovery of civil damages for nonrescue could lead to financial rewards for risk takers who continually subject themselves to dangerous situations. If the conduct of the victim creates the peril, however, common-law rules imposing no duty would remain intact. Permitting a civil cause of action may also lead to fraudulent claims, such as staged accidents. The California Supreme Court in *Dillon v. Legg*, however, clearly held that fear of fraudulent claims is not a sufficient basis to deny recovery.

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251. Cal. Evid. Code §669. To apply this provision, the violation must be of a statute (1) intended to protect a class of persons of which plaintiff is a member, and (2) protect the plaintiff from the type of harm suffered. Id.

252. Franklin, supra note 171, at 56.

253. See id. at 55.

254. See Comment, supra note 36, at 179.

255. See D’Amato, supra note 56, at 808.

256. See id. One commentator argues that tort liability may be applied unevenly because of the ineffectiveness of money judgments against defendants who are judgment proof. See id. at 809. This theory has no more viability in a no-rescue case than it has in any other traditional tort cause of action.

257. 68 Cal. 2d at 735, 441 P.2d at 918, 69 Cal. Rptr. at 78.
LEGISLATIVE PROPOSAL

The moral and policy considerations discussed in the preceding section should serve as the basis for an amendment to the California Penal Code to impose an affirmative duty to rescue. Legislation of this type has a dual purpose. First, the law must be practically designed so that rescues are actually effected. Second, the law should be structured to encourage bystanders to act affirmatively to assist victims in peril, rather than consciously deciding to refrain from offering assistance. As a result, altruistic behavior would be encouraged, and the Legislature officially would sanction nonrescue when the bystander intentionally refuses to render aid. The statute should require the prosecuting jurisdiction to prove that the bystander knew or should have known that the victim was in serious danger. Rescuers should not be required to risk any danger to themselves, and the statute should allow the bystander to respond reasonably. Therefore, a specific type of rescue behavior need not be set forth in the statute. Varying examples of emergency situations necessarily require statutory language that is adaptable to differing fact patterns. As noted in the Soldano opinion, a telephone call to the authorities will rarely subject the caller to bodily harm.\textsuperscript{258} Thus, notification to proper authorities within a reasonable amount of time should be specifically included in the law. Good faith efforts to comply with the provisions of the statute should result in tort immunity. Both fines and jail sentences should be available, and the prosecutorial focus should be upon bystanders who callously or consciously refuse to render aid.

A statutory provision incorporating these principles would serve to illustrate the type of behavior that society should encourage. By enacting a duty to rescue statute, the California Legislature would mandate rescue behavior when the bystander has knowledge of the victim’s peril. A duty to rescue provision would reconcile humanitarian and legal obligations by requiring assistance when it presents no serious risk to the bystander.

CONCLUSION

The concept of duty in California gradually has been expanded by the California Supreme Court. Using public policy considerations and moral obligations, courts have devised various exceptions to the general common-law rule requiring no affirmative conduct to assist another

\textsuperscript{258} 141 Cal. App. at 451, 190 Cal. Rptr. at 315.
person in danger. The courts now recognize a variety of special relationships that give rise to an affirmative duty to rescue. California courts have diluted the close special relationships traditionally required by the common law, resulting in an increase in the number of cases in which an affirmative duty is imposed. In a recent California appellate court case, the mere knowledge of impending harm to a victim sufficed to impose an affirmative duty to rescue.

The California Legislature also has recognized that affirmative duties should be imposed under specified circumstances. Furthermore, the Legislature expressly has approved rescue activity by private citizens and provides indemnification by the State of California for rescue activity in certain cases. Recent events such as the multiple rape in New Bedford, Massachusetts have led some states to enact duty to rescue laws. These statutes are patterned after Vermont and Continental European statutes. Although these laws vary, they all require affirmative conduct if a witness has knowledge of the peril to the victim.

Due to the expansion of the concept of duty in California and the express legislative approval of rescue attempts, a statutory duty to rescue should be enacted. The statute should impose criminal penalties. Furthermore, California Evidence Code Section 669 should be used to allow a civil cause of action by the victim against the passive bystander. Civil immunity should be granted for good faith efforts to comply with the provisions of the statute. The imposition of legal liability for failure to rescue would reverse a long-standing common-law rule that has no place in modern urban society.

Recently, the press carried an account of the rescue of a woman who had been swept downstream by a strong river current. She was seen by three teenagers riding their bicycles along the river, and they made efforts to assist her. One of the boys went to summon help, and the other two rode along the river bank, trying to catch up with the struggling victim. After about a mile down river, they came abreast, waded into the water and pulled the victim out of the water. At that moment, one of the boys discovered that he had helped save his mother's life.259

"It serves to remind us that we can never know when we may be bystanders and who our victim will be; or when we may be victims and who our bystander will be."260

Beverly Anne Seagraves

259. See Boy Races River, Finds He's Saved His Own Mother L.A. Times, June 5, 1978, at 1, col. 1.
260. Sheleff, supra note 8, at 204.
Appendix

Proposed statute: California Penal Code

Duty to Rescue

(a) Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm, shall give reasonable assistance to the extent that the assistance can be rendered without danger or peril to the rescuer or others. Obtaining or attempting to obtain aid from law enforcement or medical personnel may be deemed reasonable assistance.

(b) Any person who renders assistance in good faith compliance with subdivision (a) will be immune from civil liability, except in the case of gross negligence.

(c) A violation of subdivision (a) is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand ($1,000), or by both fine and imprisonment.