

# Liability for omissions in tort law: Economicanalysis

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# Liability for Omissions in Tort Law: Economic Analysis

by

Michael G Faure\*

*Abstract: This paper discusses the economic approach to the question whether there should be a legal duty to rescue and a corresponding liability for omissions. It discusses the law and economics literature which holds that a rule of no-liability for rescue is efficient since a legal duty to rescue may crowd out altruism and could create a substitution effect. The subsequent literature has refined and criticised this hypothesis, arguing that in particular cases, where a special relationship between the potential rescuer and the injurer or victim exists, a duty to rescue may be efficient. Empirical studies concerning the duty to rescue are also discussed, showing that notwithstanding the absence of a legal duty to rescue, rescue without law seems to be the norm in the US. Finally, the possibility of a duty to rescue in criminal law is discussed.*

(2011) 2 JETL 184

## I. Introduction

Traditional tort law is mostly occupied with acts, that is, positive conduct as a result of which damage is caused to others. However, many spectacular examples are quoted in the literature, making clear that a failure to act, in other words, an omission, can also contribute to damage. If a swimmer is in difficulty and will eventually drown, the failure of others in the vicinity of the victim (who are good swimmers and have the capacity to assist the victim) can be said to have contributed to the victim's loss. Some dramatic cases are cited where numerous witnesses have failed to act despite the fact that prevention (by, for example, calling the police or warning the victim) would have been possible with relatively little effort. An often quoted case that will be shocking to many is the murder of Kitty Genovese which took place on 13 March 1964 as a result of a brutal attack in New York over a period of 35 minutes during which at least 38 witnesses heard the 20-year-old Kitty desperately screaming for help but none of them did anything to prevent the assault taking place, resulting finally in her death.<sup>1</sup> These and many other examples of omissions

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1 See inter alia on the Kitty Genovese case, *M Scordato*, Understanding the Absence of a

(also referred to as failures to rescue) can be morally shocking; a different and probably more difficult issue is how they should be treated from a legal perspective and more particularly in tort law.

This contribution will examine the liability for omissions from the angle of economic analysis of tort law. At first blush there may seem to be little reason in the economic analysis of tort to make a distinction between acts and omissions. As Weinrib argued, within the framework of the Coase theorem, the distinction between acts and omissions should not matter since Coase stressed the reciprocal nature of harm.<sup>2</sup> For Coase the question is therefore whether the injurer is allowed to impose costs resulting from his activity on the plaintiff or whether the plaintiff, via the legal process, will be allowed to damage the potential injurer.<sup>3</sup>

Moreover, it could be said that in many cases the cost of an action that would have prevented the harm (for example, making a phone call to the police) would be minor and would have resulted in a significant benefit (reduced harm for the victim). At first blush, again, utilitarianism would therefore predict that the minor costs of prevention should be incurred to avoid the greater harm to the victim.

Although, therefore, at least at first glance, the case for a legal duty to rescue seems to be clear on the economic grounds, the reality is different, at least in the common law (which is widely discussed in the economics literature).<sup>4</sup> The common law basically denies the existence of a legal duty to rescue (with a few exceptions) and consequently also holds that there can generally be no liability in tort for omitting to rescue. The underlying legal reasoning holds that the distinction between acts and omissions is important, more particularly, since the common law is strongly based on the premise that liberty should be protected and hence in principle no legal duty to rescue (which would violate this liberty) should be created. Since (again under common law) a liability in tort can only follow when a duty has been violated, liability for omissions fails for the simple reason that no legal duty to rescue exists. It has especially been the Chicago tort lawyer Richard Epstein who has strongly defended the view that, to put it simply, the common law rightly makes a distinction between acts

Duty to Reasonably Rescue in American Tort Law, 82 *Tulane Law Review* (Tul L Rev) 1447, 1449 (2008).

2 See *R Coase*, *The Problem of Social Cost* (1960) 3 *Journal of Law and Economics* (JL & Econ) 1–44.

3 See further *E Weinrib*, *The Case for a Duty to Rescue*, 90 *Yale Law Journal* (Yale LJ) 247, 249 (1980).

4 The focus of this literature is US Law but other common law systems take an approach that is broadly comparable: see *E Quill*, *Affirmative Duties of Care in the Common Law* (2011) 2 JETL 151.

and omissions and rightly rejects a general duty to rescue.<sup>5</sup> The central question for this contribution is whether, seen from an economic perspective, there should be a liability for omissions. There is a large body of economic literature dealing with this issue. However, since most of this literature is of North-American origin many of the articles are written against the background of the denial of a duty to rescue (and of any corresponding liability for omissions) in the common law. Still, the scholarship dealing with the issue from an American legal angle is generally interesting, also for European tort lawyers, since the literature discusses the arguments in favour and against liability for omissions at a more general, abstract level. Moreover, much of the literature also discusses US common law in comparison to the law in many European legal systems where a legal duty to rescue is more generally accepted.<sup>6</sup>

The topic is very interesting since, as mentioned above, the absence of a legal duty to rescue (and of any corresponding liability for omissions) seems inefficient and thus at odds with economic analysis of the law. This seems remarkable given that law and economics scholars like Richard Posner have always defended the hypothesis that courts will act in such a way that they strive to improve economic efficiency. Not surprisingly, therefore, William Landes and Richard Posner have defended the traditional reluctance of the common law to accept a legal duty to rescue in one of the basic articles dealing with liability for omissions.<sup>7</sup> However, their article has led to much debate in law and economics scholarship as a result of which the question of potential liability for 'bad Samaritans' continues to attract the attention of law and economics scholarship. The issue can hence shed some light on the more general question, namely whether common law judges do indeed strive to promote efficiency.

The topic is also of interest for another reason: law and economics is increasingly influenced by the idea that individuals are not always rational utility-maximising persons (as assumed in 'rational choice' theory) but may be subject to a variety of so-called heuristics and biases (or stressed in behavioural law and economics). The question which arises in this respect is whether individuals will simply have an intrinsic motivation to do the right thing (and rescue others) or whether an external motivation (in the form of a legal duty or liability rule) is needed to reach this result. Moreover, the interesting question also arises of

5 See *R Epstein*, A Theory of Strict Liability, 2 *Journal of Legal Studies* (J Leg Stud) 151 (1973).

6 For an interesting comparative perspective on the duty to rescue under American law and in various European Legal systems see *JM Smits*, The good Samaritan in European private law; on the perils of principles without a programme and a programme for the future, inaugural lecture, Maastricht University, 19 May 2000, available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=848947](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=848947)>.

7 See *WM Landes/RA Posner*, Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism, 7 *J Leg Stud* 83 (1978).

whether a legal duty (or liability rule) may not have precisely the adverse effect of reducing the incentives for altruism. This is referred to as the crowding out of intrinsic motivation.<sup>8</sup> The topic can hence shed some light on the (positive or negative) role of law on intrinsic motivation.

The remainder of this contribution is set out as follows: after this introduction I will briefly review the arguments against a legal duty to rescue as they are presented in the American legal literature, and the evolutions in that respect. Such an overview is useful and necessary since most of the economic literature commences from the same starting point (II). Next, the economic analysis of a duty to rescue and a corresponding liability for omissions in tort follows (III); specific attention will be paid to the question of whether the exceptions to the absence of a duty to rescue can be explained on the basis of economic theory as well (IV). Many of the economic arguments for or against a legal duty to rescue rely on assumptions about how individuals will react to such a duty or its absence. To a large extent these assumptions do not seem to be supported by empirical evidence; hence it is important to examine what empirical evidence shows in that respect (V). It is also striking that, whereas law and economics scholars traditionally opposed criminal liability (given its high costs) in this domain of a duty to rescue, they argue that if such a duty were to be introduced at all it should be enforced via criminal law rather than via tortious liability (VI). Section VII concludes.

## *II. Absence of a legal duty to rescue in the common law*

The basic rule in the common law is that there is no legal obligation to rescue another from impending peril, even when such protection could be rendered with minimal risk to or effort by the potential rescuer.<sup>9</sup> For tort liability to exist it is required that the defendant owes a duty to the plaintiff. When no such duty (in this case to rescue) exists a corresponding tort action (based on the failure to act) will necessarily fail. The common law traditionally accepts a distinction between misfeasance (wrongful acts) and non feasant (omissions). In the case of non feasant (subject to particular exceptions) the common law will not ordinarily accept that the defendant owes a duty to the plaintiff.<sup>10</sup>

Various justifications are given for this basic point of view. The starting point for the common law is that a legal duty to rescue would be at odds with the

8 See generally on this issue *B Frey, Not Just for the Money. An Economic Theory of Personal Motivation* (1997).

9 *JA Adler, Relying upon the Reasonableness of Strangers: Some Observations about the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 *Wisconsin Law Review* (Wis L Rev) 867; *Quill* (2011) 2 JETL 151, 154.

10 *Adler*, 1991 *Wis L Rev* 867, 872 f.

principles of liberty and individual choice inherent in the common law.<sup>11</sup> The rejection of positive legal duties in the law has been grounded on the fact that this would constitute an excessive interference with individual liberty. The absence of such a duty hence corresponds with the common law's traditional reliance on individual liberty.<sup>12</sup>

Arguments are also presented not only for the absence of a duty to rescue but also for the absence of liability for omissions. Franklin and Ploeger, for example, argue that the traditional functions of tort law (compensation and deterrence) do not apply in the duty-to-rescue cases 'because they are usually involved in cases in which a defendant's conduct caused the victim's plight.'<sup>13</sup> The traditional position of the common law is explained and justified on various philosophical grounds, varying from social contract through rights-based theories to a liberal-communitarian theory of the duty to rescue.<sup>14</sup> Even recently the rejection of tort liability for a failure to rescue was defended by Scordato, arguing *inter alia* that tort liability may lead to potentially high costs and few benefits.<sup>15</sup> A strong argument against liability in tort for a failure to act is also based on the concept of causation. The reasoning is, in short, that the defendant's failure to act cannot be the cause of the other person's harm.<sup>16</sup> This argument is especially strongly advanced by Richard Epstein, who holds that 'negative causation' (resulting from a failure to act) cannot be the basis of liability.<sup>17</sup>

However, notwithstanding the general rejection of a duty to rescue (and of any corresponding liability for omissions) there are a number of exceptions in

11 *Epstein*, 2 J Leg Stud 151, 200 f (1973); *Adler*, 1991 Wis L Rev 867, 914–917 and *S Harnay/A Marciano*, Should I Help my Neighbour? Self-interest, Altruism and Economic Analyses of Rescue Laws (2009) 28 European Journal of Law and Economics (Eur J Law Econ) 103, 105.

12 *L Murphy*, Beneficence, Law and Liberty: The Case of Required Rescue, 89 Georgetown Law Journal (Geo LJ) 605 (2001); Murphy, however, also argues that as such there is nothing in the structure of common law tort doctrine that would block the adoption of a general duty to rescue (*ibid*, 624), suggesting that a development towards acceptance of such a duty may well be possible, even in the common law.

13 *MA Franklin/M Ploeger*, Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children? 40 Santa Clara Law Review (Santa Clara L Rev) 991, 1000 (2000).

14 See *SJ Heyman*, Foundations of the Duty to Rescue, 47 Vanderbilt Law Review (Vand L Rev) 673 (1994): this author discusses the general arguments against a duty to rescue, criticises them and provides a rationale for a general duty to rescue.

15 See *Scordato*, 82 Tul L Rev 1447 (2008). This contribution will be further discussed when referring to the economic analysis in Section III.

16 See *TM Benditt*, Liability for Failing to Rescue (1982) 1 Law and Philosophy (Law & Phil) 391, 396.

17 *Epstein*, 2 J Leg Stud 151, 194 f (1973) and *RA Epstein*, Causation – in Context: An Afterword, 63 Chicago-Kent Law Review 653 (1987).

which there is a duty to rescue (and hence a liability for failure to rescue). The cases in which this duty to rescue exists are essentially those in which there is a special relationship between the plaintiff and the defendant or between the defendant and another person whose act causes the injury. One example is the position of a babysitter who could easily protect a child (for example, from being hit by a truck) without endangering her own life.<sup>18</sup> Another example is where a potential injurer has disclosed his intention to harm a third person to a therapist. A duty to rescue would in those cases be based on the special relationship between the victim and the defendant (babysitter) or the injurer and the defendant (therapist). In many of those cases it can be argued that the relationship brought economic advantages to the defendant (therapist or babysitter) as a result of which there is a basis for a legal duty to rescue.<sup>19</sup> A similar duty to rescue would also exist when the defendant himself had first brought the victim into the dangerous position and thus caused the risk of harm to the plaintiff.<sup>20</sup> The number of exceptions and the conditions under which the exceptions apply are subject to case law development. Some of the case law is, however, debated since a special relationship (as a basis for the existence of a legal duty to rescue) is accepted in some cases, but not in others which nevertheless look similar.<sup>21</sup>

Many scholars also discuss the situation in the common law by comparing it to the legal rules applicable in various European countries where a legal duty to rescue (enforced by the criminal law) does exist and in some cases a corresponding liability for failure to act in tort as well.<sup>22</sup> Some authors devote detailed comparative studies to the differences between the treatment of 'good Samaritans' in common law and in various civil law jurisdictions.<sup>23</sup> Some also attempt to find an economic rationale for the differences between common law and civil law jurisdictions as far as the duty to rescue is concerned, although the explanations are not very convincing. For example, Landes and Posner hold that even in the continental systems economising features are included to make sure that the net social benefits of liability will be positive (for example, by excluding liability where the cost of rescue would exceed its value).<sup>24</sup>

18 *Adler*, 1991 *Wis L Rev* 867, 874.

19 *Benditt* (1982) 1 *Law & Phil* 391, 394.

20 The example is provided of a man who rapes a girl, who subsequently jumps or falls into a river and drowns: the rapist can be held criminally responsible for the death if he could have saved her, but refrained from doing so. See *Benditt* (1982) 1 *Law & Phil* 391, 394 f.

21 For a critical analysis see *Adler*, 1991 *Wis L Rev* 867, 886–900.

22 See *Benditt* (1982) 1 *Law & Phil* 391, 392 and *Harnay/Marciano* (2009) 28 *Eur J Law Econ* 103, 105–108.

23 See more particularly *D Schiff*, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 *Roger Williams University Law Review* 77–141 (2005).

24 *Landes/Posner*, 7 *J Leg Stud* 83, 125 f (1978). At the same time they admit that those on the continent are more altruistic than in the common law world, but this provides an

Levmore pays a lot of attention to the rules in various European legal systems. His general line of reasoning is that most legal systems have an interesting symmetry, combining 'sticks' (penalties for non-rescue) with 'carrots' (rewards for rescue), whereby the absence of sticks is correlated with the denial of carrots.<sup>25</sup> He argues that in European legal systems sticks (usually criminal penalties) for non-rescue are combined with selected carrots (for example allowing recovery of suffered damage or incurred expenses by the rescuer).<sup>26</sup>

The fact that European legal systems do have sticks (both penalties in criminal law and civil liability in many jurisdictions as well) for non-rescue has been an argument used by many US scholars to call for a reform of the common law's non-rescue rule. The difference with European legal systems is of course not the only reason for North American scholars to call for reforms. Legal theorists in particular (but not economists!) have argued that the absence of a legal duty to rescue in the common law is morally unacceptable. One proponent of incorporating a duty to rescue in American law is Weinrib who argued for such a duty to rescue in a 1980 Yale Journal article.<sup>27</sup> But other scholars have argued in favour of such a duty as well, for example, by providing theoretical foundations of a duty to rescue<sup>28</sup> or at least by proposing to expand the duty to act affirmatively.<sup>29</sup>

This brief overview makes clear that, first, the approach in European civil law jurisdictions to the duty to rescue (and the corresponding liability for omissions) seems to be fundamentally different from the approach in the common law and, secondly, the absence of a legal duty to rescue is according to many North American scholars fundamental to the common law but, on the other hand, subject to much criticism and debate as well. The same is, not surprisingly, also the case for the economic analysis which is itself largely based on this debated common law doctrine.

argument against using a liability rule at all; the differences hence remain puzzling from an economic perspective.

25 *S Levmore*, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 *Virginia Law Review* (Va L Rev) 879 (1986).

26 *Levmore*, 72 Va L Rev 879, 913–917 (1986). He pays particular attention to the rule under Austrian law which provides only carrots: a cash award is paid from a public fund to someone who risks his life and saves another from imminent death.

27 *Weinrib*, 90 *Yale LJ* 247–293 (1980). It seems as if Weinrib himself has later moved away from his original position. In a later publication, he argues, 'the reason that tort law imposes no obligation to rescue is that tort law does not conceive of the need, however desperate, of the drowning person to create a right to which others have correlative duties'. See *E Weinrib*, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice* (2001) 2 *Theoretical Inquiries in Law* (Theo Inq L) 107, 139.

28 *Heyman*, 47 *Vand L Rev* 673 (1994).

29 *Adler*, 1991 *Wis L Rev* 867, 911–927.

### III. *Economic analysis*

#### A. *Starting points*

The starting point for many economic studies on the duty to rescue is that society obviously has an interest in having as many cost-efficient rescues as possible, that is, rescues where the costs of intervention to the rescuer are lower than the benefits to the potential victim. The question that is asked next is how incentives can be provided to rescue others.<sup>30</sup> The crucial question in this respect is obviously whether internal motives (altruism) will be strong enough to encourage rescues or whether external incentives need to be provided as well.<sup>31</sup> The shocking example of Kitty Genovese, mentioned in the introduction, is often used to illustrate that internal motivation will often be insufficient to stimulate rescue actions; external incentives need to be provided as well.

With this as a starting point it seems that there should be a role for the law to play in providing these external incentives. As noted in the introduction, many authors start by mentioning that based on simple economic logic the absence of a duty to rescue seems socially inefficient.<sup>32</sup> The reason is that in many cases the costs for the rescuer (for example, simply providing a warning or calling the police) seem trivial compared to the benefits to the potential victim. According to this logic a straightforward utilitarian argument could be made that society would be better off with a duty to rescue since rescues could lead to great social benefits at minimum social costs.<sup>33</sup> Given these obvious advantages of a duty to rescue, at least from a utilitarian perspective, it is all the more surprising that the law and economics literature nevertheless holds that a legal duty to rescue is inefficient.<sup>34</sup>

#### B. *Epstein's libertarianism*

Before discussing the main article by Landes and Posner where this inefficiency of the duty to rescue hypothesis is strongly defended it may be useful to start with a few earlier contributions that constitute the basis for the

30 See eg *Franklin/Ploeger*, 40 Santa Clara L Rev 991, 992 f (2000).

31 *Harnay/Marciano* (2009) 28 Eur J Law Econ 103, 107.

32 *E Grush*, The Inefficiency of the No-duty-to-rescue Rule and a Proposed 'Similar Risk' Alternative, 146 University of Pennsylvania Law Review (U Pa L Rev) 881, 882 (1998).

33 See *Benditt* (1982) 1 Law & Phil 391, 407; *A Harel/A Jacob*, An Economic Rational for the Legal Treatment of Omissions in Tort Law: The Principle of Saliency (2002) 3 Theo Inq L 413–451.

34 See *Harel/Jacob* (2002) 3 Theo Inq L 413, 418.

further economic analysis of the duty to rescue.<sup>35</sup> A starting point for any economic analysis should be the Coase theorem.<sup>36</sup> According to the Coase theorem the distinction between acts and omissions should be unimportant since Coase stresses the reciprocal nature of harm. Weinrib therefore correctly argues that causation is no longer important in Coase's model.<sup>37</sup> It is particularly that aspect – causation – which was regarded as highly important by one of the first writers in this domain, Epstein, who strongly argues against a duty to rescue.<sup>38</sup> Epstein's position<sup>39</sup> is that the law should not require altruism and that a rule requiring rescue would deprive the rescuer of a certain goodness. The legal duty would kill altruism and make the hero feel less virtuous.<sup>40</sup> The task of the law of torts is, in the words of Epstein, 'to define the boundaries of individual liberty'.<sup>41</sup> His argument is that 'it will no longer be possible to delineate the sphere of activities in which contracts (or charity) will be required in order to procure desired benefits and the sphere of activity in which those benefits can be procured as of right'.<sup>42</sup> The consequence is, in Epstein's view, that giving money to charities and serving the sick and needy could also be considered as a legal duty, backed up by tort liability.

Epstein in his 1973 paper generally criticised the economic analysis of liability, at least in its application to rescue cases. He also argued that self-interested Samaritans may have their behaviour impacted by good Samaritan legislation. It could, in other words, create perverse incentives both for potential victims and for rescuers.<sup>43</sup>

However, there are others who argue that the common law's aversion to positive legal obligations is probably also based on the fact that creating such duties can be very costly.<sup>44</sup>

35 For an overview of the economic literature in this respect see *Harnay/Marciano* (2009) 28 Eur J Law Econ 103.

36 *Coase* (1960) 3 JL & Econ 1; See also *Weinrib*, 90 Yale LJ 247 (1980).

37 *Weinrib*, 90 Yale LJ 247, 249 (1980).

38 *Epstein*, 2 J Leg Stud 151, 189 ff (1973).

39 To which many subsequent authors have reacted: eg *Weinrib*, 90 Yale LJ 247 (1980); *Adler*, Wis L Rev 867 (1991); *Harnay/Marciano* (2009) 28 Eur J Law Econ 103; *Landes/Posner*, 7 J Leg Stud 83 (1978); *Quill* (2011) 2 JETL 151, 173. See Section III.D.

40 *Epstein*, 2 J Leg Stud 151, 200 f (1973); for a criticism, see *Adler*, 1991 Wis L Rev 867, 918.

41 *Epstein*, 2 J Leg Stud 151, 203 (1973).

42 *Epstein*, 2 J Leg Stud 151, 199 (1973). For a criticism see *Benditt* (1982) 1 Law & Phil 391, 411.

43 For a summary of Epstein's view see *Harnay/Marciano* (2009) 28 Eur J Law Econ 103, 111–115.

44 *Murphy*, 89 Geo LJ 605, 607 f (2001).

After the first studies by Epstein a seminal paper on the topic was published by Landes and Posner,<sup>45</sup> to which many scholars have subsequently reacted.<sup>46</sup>

### C. *Landes and Posner's defence of the common law*

Landes and Posner in part use their article to react to Epstein (who criticised Posner's theory of negligence) and partly to present their own theory of rescue.

Landes and Posner start by arguing that for professional rescuers, such as doctors, no special rules are needed for the simple reason that they are subject to a competitive market in rescues and the ordinary rules of contract law may suffice.<sup>47</sup> The basis for the analysis of Landes and Posner (criticised in subsequent articles) is that there is no 'reciprocal altruism' except for the case of small communities. Landes and Posner assume that potential victims and potential rescuers are separate categories for the simple reason that the relationship between the rescuer and the victim will usually be too remote.<sup>48</sup> Their next step in arguing against imposing legal liability for non-rescue is that they recognise the importance of intrinsic motivation and altruism, which will be the main drive for many rescue actions. Hence, a problem with imposing legal liability is that it may 'reduce the public recognition accorded the altruistic rescuer and by doing so, we predict, reduce the number of altruistically motivated rescues.'<sup>49</sup> If altruism produces strong incentives for rescue attempts 'a general rule permitting compensation would induce altruistic rescuers to claim compensation, creating heavy administrative costs, but only a small increase in the resources allocated to rescue.'<sup>50</sup> However, when the costs of rescue are relatively high, altruistic motivation may be insufficient to induce an efficient level of rescue. The result will be that a commercial market for rescue is created (for example, salvors of ships in distress). However, a basic problem with allowing compensation is that it can lead to a 'substitution' away from altruistic rescue.<sup>51</sup> This 'substitution' effect, which I will come back to below, is one of their main arguments against a liability for non-rescue, holding that potential rescuers will escape to areas where there is less danger of having to be

45 *Landes/Posner*, 7 J Leg Stud 83 (1978); they published a related paper on the economics of altruism as well: *WM Landes/RA Posner*, *Altruism in Law and Economics*, 68(2) *American Economic Review* 417–421 (1978).

46 The ideas of Landes and Posner are built upon by eg *Grush*, 146 U Pa L Rev 881 (1998); *Harmay/Marciano* (2009) 28 *Eur J Law Econ* 103, 120–128 and *Levmore*, 72 Va L Rev 879 (1986).

47 *Landes/Posner*, 7 J Leg Stud 83, 89 f (1978).

48 *Ibid*, 93.

49 *Ibid*, 94.

50 *Ibid*, 95.

51 *Ibid*, 98.

engaged in rescue situations. This danger of course only exists when altruistically motivated rescue inputs are important.<sup>52</sup>

Landes and Posner go to great lengths in criticising Epstein. Ironically, both Epstein and Landes and Posner are opponents of a legal duty to rescue (and a corresponding liability for failure to do so). Epstein, however, bases his opposition on fundamental principles of liberty, but holds that the absence of a liability rule is inefficient and contradicts the positive economic theory of the common law.<sup>53</sup> Landes and Posner make great efforts to argue that the absence of such a liability rule is in fact efficient. They argue that a liability rule may indeed influence the behaviour of potential rescuers whose altruism is not strong enough to rescue,<sup>54</sup> but this positive effect is largely countered by 'the possibility that potential rescuers will avoid liability by substituting away from activities that give rise to rescue opportunities.'<sup>55</sup> For 'strong' altruists the disadvantage of the liability rule is that weaker altruists may, as a result of the substitution effect, leave the risky area. Thus the likelihood that strong altruists will be confronted with a victim increases. Moreover, the imposition of liability also reduces the supply of a moral value on altruism.<sup>56</sup> The major problem indeed for altruists is that as soon as a liability rule is introduced it is impossible for the rescuer to show that his action was motivated by altruism. This again provides incentives for potential rescuers to substitute a way from hazardous activities. The adverse effect of the liability rule is therefore that it reduces 'the gains from altruistic rescue to those rescuers who desire recognition of their altruism'.<sup>57</sup>

Summarising: the problem that Landes and Posner present is that strong altruists (for example, good swimmers who would normally be willing to intervene when someone drowns) would substitute away from hazardous activities (for example, a beach with many inexperienced swimmers) for two reasons: firstly, because by going to an alternative beach (where there are only experienced swimmers) they reduce the likelihood of being held liable and, secondly, because they cannot get any moral satisfaction from their action any longer since it will be unclear if their action was motivated by altruism or by the liability rule that was imposed.<sup>58</sup>

52 Ibid, 98 f.

53 Epstein, 2 J Leg Stud 151, 189 (1973).

54 Landes/Posner, 7 J Leg Stud 83, 119 (1978).

55 Ibid, 120.

56 Ibid, 121 f.

57 Ibid, 124.

58 For a summary of the reasoning of Landes and Posner, see also Grush, 146 U Pa L Rev 881, 883–885 (1998); Harnay/Marciano (2009) 28 Eur J Law Econ 103, 120–128; Levmore, 72 Va L Rev 879, 884–886 (1986).

#### D. Further studies

Later studies usually take the Landes and Posner analysis as a starting point and further refine it. An initial refinement was provided by Rubin who added to the literature by pointing out the importance of enforcement costs.<sup>59</sup> Rubin holds that, if there was a legal duty to rescue and a victim was to bring a case, the enforcement costs for the victim would potentially be huge and maybe even prohibitive. How could a victim, for example, know who was in a position to perform the rescue? Often there will be no witnesses; the only witnesses available are usually potential rescuers themselves (who could thus also be held liable). None of the witnesses will therefore have any incentive to inform the enforcement authorities of the exact nature of the situation. The enforcement problem is, so Rubin holds, not only to determine who, within a group of potential rescuers should be held liable, but also how to determine who the group of potential rescuers was. He therefore holds that it is quite possible that the extra costs of enforcement would outweigh the benefits of increased efficiency of rescue. Moreover, it is also possible that enforcement costs will indeed be prohibitive as a result of which the duty to rescue would simply not be enforced. But in that case the fear expressed by Landes and Posner of a crowding-out of internal motivation (altruism) would still remain: liability would then only have created additional costs (by reducing altruistic rescues) without any benefits. Rubin's focus on enforcement costs hence supports the scepticism of Landes and Posner about a liability for non-rescue.<sup>60</sup>

Levmore criticises more specifically the idea of Landes and Posner that rescuers are able to avoid hazardous areas (rescue spots). He identifies this in terms of the economic analysis of accident law as an activity level effect of which the substitution effect identified by Landes and Posner is an example and holds that the theory of Landes and Posner is only valid if potential altruistic rescuers can indeed identify rescue spots and then avoid them.<sup>61</sup> If, however, rescuers cannot identify a hazardous area the substitution effect mentioned by Landes and Posner will not take place.<sup>62</sup>

Levmore moreover points to the fact that traditional tort law assumes the existence of one single avoider, whereas the potential number of rescuers (for example, excellent swimmers on the crowded beach) can be large. This unavoidably creates causation problems if a liability approach were to be used. In that case all good swimmers on the beach (how could they be identified?)

59 *P Rubin*, Cost and Benefits of a Duty to Rescue (1986) 6 *International Review of Law and Economics* (Int Rev Law & Econ) 273–276.

60 For a summary of Rubin's paper, see *RL Hasen*, The Efficient Duty to Rescue (1995) 15 *Int Rev Law & Econ* 141.

61 *Levmore*, 72 *Va L Rev* 879, 890 (1986).

62 See also *Hasen* (1995) 15 *Int Rev Law & Econ* 141 f.

would be potentially liable rescuers.<sup>63</sup> These problems related to multiple non-rescuers may hence also be one of the reasons for the traditional reluctance of the common law to accept liability for non-rescue. However, Levmore also points out that for traditional tort law multiple tortfeasors were also a large problem. These problems have been largely solved (through various development in case law) as a result of which Levmore holds that ‘multiple non-rescuers may also be held liable in the future, for now that tort law has grappled with multiple parties there is less reason to think that rescue law will not do the same.’<sup>64</sup> However, Levmore is realistic enough to realise that a liability for rescue may still not be possible in a case like the famous Kitty Genovese incident where liability would potentially fall on 38 non-rescuers. In those cases the contribution of each non-rescuer would be probabilistically so small that liability law would again likely not play a large role.<sup>65</sup>

Hasen attacks the assumption in the Landes and Posner model that potential rescuers and the victims belong to different categories.<sup>66</sup> It is that assumption that also causes the above-mentioned substitution effect and drives out intrinsic motivation on the part of altruistic rescuers. Hasen holds that the story changes when individuals *ex ante* assess their probability of being a victim or a potential rescuer as about equal. In that case he proves that the imposition of a liability rule is efficient because the activity level effects (substitution to safe areas) will not take place.<sup>67</sup> Hasen also argues that the reason why the common law chooses an inefficient rule (of no liability) may be that the duty to rescue a stranger rarely reoccurs, as a result of which norm-building (via the courts) is not likely. Another reason could be that individuals simply suffer from probability neglect and wrongly believe that the low probability of being involved in a rescue situation is equal to a zero probability. That may explain the indifference of people to a no-liability rule.<sup>68</sup>

The important result of Hasen’s study is that, when the potential rescuer/victim dichotomy (adopted by Landes and Posner ‘for the sake of simplicity’) is relaxed, imposing liability for failure to undertake rescue proves to be efficient.<sup>69</sup>

Grush takes Hasen’s point of view and argues that the efficiency of liability for non-rescue hence depends on whether there is a substitution danger (as argued

63 *Levmore*, 72 Va L Rev 879, 933 f (1986).

64 *Ibid*, 936.

65 *Ibid*, 940.

66 *Hasen* (1995) 15 Int Rev Law & Econ 141.

67 *Ibid*, 142 f.

68 *Ibid*, 145 f.

69 For a summary of Hasen’s point of view, see *Grush*, 146 U Pa L Rev 881, 885–887 (1998).

by Landes and Posner) or whether substitution will not occur (as argued by Hasen).<sup>70</sup>

Hasen holds that even if the groups (of rescuers and victims) might overlap two additional problems still arise: first, not every potential rescuer will substitute away from potential victims (mostly because substitution, for example, to another beach can be costly) and, secondly, potential victims may change their activity (in other words, follow the potential rescuers).<sup>71</sup> Grush therefore proposes what he refers to as a 'similar risk' rule, meaning that a potential rescuer would be held liable for a failure to rescue if he is generally subject to a similar risk as that faced by the victim.<sup>72</sup> The reason is that, if the rescuer is exposed to a similar risk, there would under Hasen's theory, be overlapping risks, in which case a potential rescuer would *ex ante* (judging from behind a veil of ignorance) prefer a liability rule. In that case the substitution concerns of Landes and Posner would not arise.<sup>73</sup> The similar risk rule, so Grush holds, is not only efficient (by imposing liability only when rescuers and potential victims are exposed to similar risks and hence belong to an overlapping group), but also preserves individual liberty (since the legal duty is only imposed upon individuals who would also voluntarily chose it).<sup>74</sup>

### *E. Recent studies*

A most interesting recent analysis, again building and expanding on the earlier research, is a study by Harel and Jacob.<sup>75</sup> They argue that the basic problem is that, in cases of omissions where multiple injurers are involved (what they refer to as alternative care situations), attributing liability to all potential tortfeasors would mean that all of them would only be liable individually for a very small contribution to the harm, resulting in a dilution of liability.<sup>76</sup> That is why Harel and Jacob propose their principle of 'salience': liability should be attributed to small groups or preferably to one agent who is held liable. The problem, so they argue, is that – for example, in the situation of potential rescuers on a beach – there are many so-called cheapest cost avoiders. Allocat-

70 Ibid.

71 Ibid, 887–889.

72 Ibid, 897.

73 Ibid, 898.

74 Ibid, 899.

75 *Harel/Jacob* (2002) 3 *Theo Inq L* 413.

76 In theory, joint and several liability still applies in several US states. This means that in theory, each non-rescuer faces the threat of being held liable for the full amount of the loss unless there is an effective recourse against the other parties. However, in reality, such a joint and several liability is seldom exercised and as such the non-rescuer would only be liable for a small proportion of the harm, in which case the problem of dilution of liability, to which the literature refers, would result.

ing liability to all of them would in fact dilute incentives and diminish the risk of liability.<sup>77</sup>

Harel and Jacob also discuss Hasen's critique of Landes and Posner, repeating that if there are overlapping situations (whereby individuals could *ex ante* be both rescuers and victims) liability may be efficient.<sup>78</sup> However, in cases of multiple actors who could all prevent an accident the risk of a dilution of liability is high, for example, when liability could be allocated to 100 bystanders who could all potentially have prevented the accident.<sup>79</sup> That is precisely why they are in favour of singling out one or a limited number of agents to whom liability will be allocated. Thus the dilution of liability can be prevented.<sup>80</sup>

The broad exemption from liability for omissions now recognised in the common law has the advantage of formulating a simple, practical rule,<sup>81</sup> but the disadvantage that it does not capture situations where liability may be efficient. The principle of salience, so they argue, also has the advantage of being a simple rule, but leads to liability only when a single agent (cheapest cost avoider) can be identified.

Finally, in a recent paper, Scordato defends the traditional common law position (but pays no attention to most of the economic literature, with the exception of Epstein).<sup>82</sup> He argues *inter alia* that the potential benefits of a legal duty to rescue would only be modest since there would already be a large degree of uncoerced compliance (altruism) and reluctant rescuers are not likely to change their behaviour under the threat of a tort suit.<sup>83</sup> To the contrary, Scordato holds that the potential costs of a coercive rule (introducing a legal duty to rescue) would be high for the well-known reasons discussed earlier, *inter alia*, the fact that it would drive out altruism, that there may be increased risks of harm to rescuers and that a liability rule provides a disincentive for witnesses to cooperate in subsequent investigations. After all, a liability rule could lead to finding out that witnesses were in fact potential rescuers who failed to act and could therefore be held liable.<sup>84</sup>

77 Ibid, 415 and 427.

78 Ibid, 420.

79 Ibid, 428–430.

80 Ibid, 431.

81 Ibid, 427.

82 Scordato, 82 Tul L Rev 1447, 1477 (2008).

83 Ibid, 1464–1469.

84 Ibid, 1469–1480.

### *E. Summary*

Reviewing this overview of economic literature one notes as the starting point the studies by Epstein, who argues that a legal duty to rescue (and a corresponding liability for non-rescue) would in fact be efficient as a result of which he holds that the refusal of the common law to hold rescuers liable violated the hypothesis of the efficiency of the common law. Nevertheless, he is a fierce opponent of a legal duty to rescue, not for economic reasons (which he then rejected), but rather on libertarian grounds: a duty to rescue would violate fundamental principles of liberty on which the common law is based. Subsequently, Landes and Posner reacted to this argument, defending the no-liability rule, basically because a duty to rescue would dilute altruistic incentives on potential rescuers and would lead to substitution of rescuers. However, subsequent authors have rightly pointed out that the Landes and Posner hypothesis (the inefficiency of a duty to rescue) rests upon the assumption that rescuers and victims are a separate class of individuals. Hasen and subsequently Grush have shown that when this assumption is relaxed (so that both categories overlap) individuals (not knowing *ex ante* whether they will be rescuers or victims) may prefer a legal duty to rescue and a corresponding liability rule. The final and probably most important step in the economic analysis was made by Harel and Jacob in pointing out that Landes and Posner are right to the extent that they identify a potential dilution of liability in cases of liability for omissions (since the potential rescuers could be numerous as a result of which each potential liability could be probabilistically very small). To solve this problem they advance their principle of salience and hence suggest that liability for omissions should be allowed when it is possible to identify a cheapest cost avoider easily. The problem of dilution of incentives in cases of multiple injurers can thus be prevented. They argue that this is to a large extent already incorporated in the exceptions allowed in the common law, which correspond largely to their principle of salience.

### *IV. Exceptions*

It has already been shown above that the absence of a legal duty to rescue in the common law is not absolute and that, *inter alia*, when a special relationship exists between rescuer and either victim or injurer a duty to rescue may be accepted. The question of a personal relationship arises, for example, when a therapist identifies that a patient is potentially dangerous and omits to take measures in response (for example, warning the police) and the patient subsequently commits violence against a third party. However, the way this exception is dealt with in the common law is criticised by commentators. In the *Tarasoff* case the California Supreme Court accepted a claim by the plaintiffs (parents of the victim) against a therapist employed by the University of

California for failing to protect their daughter from his patient who had threatened her. The court found that the therapist had a duty to the victim because of his special relationship to the patient, who subsequently killed the victim.<sup>85</sup> However, in other cases, the courts have refused to recognise such a duty on the part of counsellors, and it is not always clear when the courts will accept the existence of such a special relationship (giving rise to a duty to rescue). In one case, a victim of a violent attack claimed that the police were watching a laundromat where a man had stabbed a woman the previous evening. They watched the suspect go into the laundromat and come out 15 minutes later without warning the plaintiff that she was in danger, whereby she too was stabbed on the premises. In this case, however, the argument of the existence of a special relationship between the police and the assailant was rejected.<sup>86</sup>

To some extent the existence of a special relationship is also discussed in the law and economics literature and is seen as confirming the economic reasoning: when such a special relationship exists it does seem to make sense to impose a duty to rescue. Landes and Posner, for example, argue that most of the cases where common law courts hold that there is a duty to rescue concern situations where the defendant (potential rescuer) was under a contractual obligation to act. For example, situations where an employer must render assistance to an injured employee, or where a barkeeper should not have allowed an obviously drunk customer to wander off, are both examples of cases where the victim may be a stranger but the injurer not. These are, according to Landes and Posner, not real exceptions to the non-duty doctrine.<sup>87</sup>

The exceptions may also fit in with the view of Levmore, who holds that liability for non-rescue may be inefficient since the number of potential rescuers will be large, leading to many causation problems.<sup>88</sup> However, precisely when there is such a special relationship, the problem of multiple potential rescuers is solved since it becomes easy to identify who the non-rescuer was who could have prevented the loss. These special relationships have, so Levmore holds, one thing in common: 'when there is a special relationship there is no multiple rescuer problem', which explains why non-rescuers are held liable if they are easy to identify, such as the bar keeper or the psychologist who could have prevented the harm.<sup>89</sup> However, if one takes this criterion (easy to

85 *Tarasoff v Regents of the University of California* (1976) 17 California Reporter (Cal Rptr) 551, 334; *Adler*, 1991 Wis L Rev 867, 889–891.

86 *Davidson v City of Westminster* (1982) Cal Rptr 649, Pacific Reporter, Second Series (P 2d) 894. For further discussion of these cases, see *Adler*, 1991 Wis L Rev 867, 893–898.

87 *Landes/Posner*, 7 J Leg Stud 83, 125 (1978). They also provide an economic justification for the exception to the non-duty of rescue in cases where the potential rescuer caused the emergency.

88 *Levmore*, 72 Va L Rev 879, 934 (1986).

89 *Ibid*, 933–936.

identify a single non-rescuer, thereby avoiding causation problems), the potential for a duty to rescue (and consequential liability) may be much broader than that which is accepted in modern common law. For example, in the previous cited case of the police surveying the laundromat in which both attacker and victim were present, is also a case where it is relatively easy to single out the actor who could have prevented the harm.

The application of the principle of salience proposed by Harel and Jacob could also lead to many more cases where it is possible to single out one agent and hence where a duty to rescue could be established.<sup>90</sup> They identify many grounds for salience (where a single agent can be selected), some of which correspond with the exceptions already identified in modern common law, but others, which go further. They point, for example, to a decision of the Israeli Supreme Court in a case where the plaintiff, waiting for a bus in the Jerusalem central bus station, was severely beaten. He sued the bus company for failure to take measures to prevent those acts of aggression. The Supreme Court held that the injury was a foreseeable risk and that even though liability for failing to prevent crimes is rare, the fact that the third party's assault was spontaneous and unprovoked, is not sufficient to exempt the defendant from liability.<sup>91</sup> Harel and Jacob hold that this follows economic logic since the bus company in this case could certainly be considered the cheapest cost avoider in comparison to the numerous bystanders. Salience would hence lead to singling out the bus company as liable for the omission.<sup>92</sup> Liability for an omission would also be accepted when the potential rescuer was at the root of the harm: an example is a case concerning teenagers involved in a fight, in which one of them was severely beaten and fell unconscious. A friend left him in the car in the driveway of the victim's grandparents. They found their grandson the next morning and took him to the hospital where he died of his wounds. In this case the relationship between the victim and his friends was also considered sufficient to give rise to a duty to rescue.<sup>93</sup> Many other cases, including, for example, the liability of an employer to take precautions to prevent harm to an employee, can indeed be considered cases where it is easy to single out the cheapest cost avoider and hence where multi-party causation is likely not to arise.<sup>94</sup>

Even though many of the exceptions to the traditional refusal of the common law to accept liability for non-rescue could thus be compatible with economic logic, one could well hold that the Harel/Jacob principle of salience (ease of

90 See *Harel/Jacob* (2002) 3 Theo Inq L 413, 431–445.

91 CA 3510/99, *Valaas v Egged*, 35(5) Piskey Din (PD) 826.

92 *Harel/Jacob* (2002) 3 Theo Inq L 413, 434 f.

93 *Farwell v Keaten* 240 North Western Reporter, Second Series (NW 2d) 217 (1976); *Harel/Jacob* (2002) 3 Theo Inq L 413, 438 f.

94 *Harel/Jacob* (2002) 3 Theo Inq L 413, 443 f. Moreover, Harel and Jacob rightly argue that the employer's liability (for omissions) can also be justified by the fact that this is typically a low transaction cost situation.

singling out the cheapest cost avoider) could possibly lead to more situations of potential liability for omissions than are accepted today.

### V. *Empirics*

A major criticism of traditional economic analyses of law, especially by proponents of behavioural law and economics, has been that the analyses are in some cases based on assumptions concerning human behaviour which do not match reality or at least for which no empirical evidence exists. It seems that this is to a large extent also the case for economic analysis in the domain of the legal duty to rescue and liability for omissions. For example, Landes and Posner assume that potential rescuers and potential victims belong to different classes of individuals and base their entire analysis on this assumption. They equally assume that a liability for non-rescue will lead to the behavioural effect of substituting away from risky activities (in the sense of being held liable to rescue) towards safer areas. This is, however, largely a theoretical assumption. It was (inter alia) criticised by Hasen,<sup>95</sup> who empirically tested the likelihood of being a victim or a potential rescuer when involved in a rescue situation. He found that one third of the people thought they were as likely to be potential rescuers as victims and that the average person thought there was a 57.5% chance that he would be a potential rescuer as opposed to a victim if involved in a rescue situation. In this situation the efficiency of the no-liability for non-rescue rule no longer holds.<sup>96</sup>

As was already stated at the beginning of this contribution, many authors hold that altruism as such is not sufficient to provide an incentive for rescue; internal motives would have to be supplemented with external incentives.<sup>97</sup> Again this is based on assumptions about human behaviour, but there is in fact 'no evidence that citizens are refusing to make early rescues'.<sup>98</sup> Hence, both opponents and proponents of a legal duty to rescue make assumptions about how such a duty would affect human behaviour or present the absence of empirical evidence (there seems to be no problem under a no-liability for non-rescue regime) as an argument to maintain the status quo. Is it indeed so that 'the whole debate is somewhat pointless, because so little turns on it in practice'?<sup>99</sup> The author raising the question, however, answers himself in the negative: 'it is simply not true that the issue of the legal duty to rescue is unimportant in practice'.<sup>100</sup> He refers to the internationally well-known case

95 *Hasen* (1995) 15 *Int Rev Law & Econ* 141.

96 *Ibid*, 144.

97 *Harnay/Marciano* (2009) 28 *Eur J Law Econ* 103, 107.

98 *Franklin/Ploeger*, 40 *Santa Clara L Rev* 991, 1004 (2000).

99 *Murphy*, 89 *Geo LJ* 605, 608 (2001).

100 *Ibid*, 610.

of the alleged failure by the paparazzi to rescue Diana, Princess of Wales.<sup>101</sup> He points out that the stringent criminal duty to rescue in France could apparently not save the Princess of Wales given that the paparazzi 'had an enormous incentive not to waste any time calling for assistance: as they knew very well indeed, photographs of the Princess were worth extraordinary amounts of money'.<sup>102</sup>

Fortunately, an overview of empirical material is provided in a study by Hyman.<sup>103</sup> He holds that, contrary to both what is often assumed and to the non-existence of a legal duty, in reality (at least, in the US) rescue is the rule. Hyman also holds that, even though famous cases like that of Kitty Genovese are often quoted, they are not representative of what is actually happening in practice. The number of verifiable non-rescues is extraordinarily small and verifiable rescues are exceedingly common – often in hazardous circumstances – where a duty to rescue would not apply in the first instance. Interestingly Hyman also found that in US states that have adopted a duty to rescue there is no increase or decrease in the number of non-risky rescues, but the rate of non-risky rescues in those states (with duty to rescue laws) is lower than in comparable states that do not have a duty to rescue.<sup>104</sup> This seems at first blush to give empirical support to the crowding-out hypothesis: altruism may indeed be crowded out by a legal duty to rescue. Hyman also found that the absence of a statutory duty to rescue does not at all prevent Americans from undertaking rescue. The reverse seems to be true: 'Americans turn out to be *too* willing to undertake rescue, if one judges by the number of injuries and deaths among rescuers. Indeed, proven rescuer deaths outnumber proven deaths from non-rescue by approximately 70:1'.<sup>105</sup>

In the remainder of his paper Hyman provides empirical support for his statements, noting, for example, that more than 100 law review articles and several books have been written on the subject,<sup>106</sup> sardonically showing 'that the number of articles written each year on the no-duty rule substantially exceeds the number of non-rescues during the same time period'.<sup>107</sup> He equally argues that it is very dangerous to base policy decisions on anecdotes (like the case of Kitty Genovese) for the simple reason that they are often not truthful.

101 See also on this case *M Vranken*, *Duty to Rescue in Civil Law and Common Law: Les Extrêmes se Touchent?* (1998) 47 *International and Comparative Law Quarterly* (ICLQ) 934.

102 *Murphy*, 89 *Geo LJ* 605, 610 (2001).

103 *DA Hyman*, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 *Texas Law Review* 653 (2006).

104 *Ibid*, 657.

105 *Ibid*.

106 *Ibid*, 661, fn 17.

107 *Ibid*, 694.

Hyman's conclusion is therefore, as the title of his article suggests, that in the US 'rescue without law' is the rule, probably following from a social norm or hardwired altruism in American society.<sup>108</sup> In fact, 'During the past decade, there have been an average of 1.6 documented cases of non-rescue each year in the entire US. Every year, Americans perform at least 946 non-risky rescues and 243 risky rescues. Every year at least sixty-five times as many Americans die while attempting to rescue someone else as die from a documented case of non-risky rescue'.<sup>109</sup>

Moreover, the law does not seem to have any impact since in the states that have statutory duties to rescue 'there is no evidence that these statutes have affected the number of rescues or non-rescues'.<sup>110</sup>

The real problem, according to Hyman, is not the victims resulting from non-rescue, but that 'too many of those who accept the invitation to rescue are seriously injured or killed because the rescue is too dangerous, or the rescuer is inadequately trained'.<sup>111</sup> The empirical evidence presented by Hyman therefore suggests that 'the real problem is excessive enthusiasm for rescue, and not non-rescue'.<sup>112</sup>

This highly interesting study by Hyman, which for the first time provides empirical insight into the effects of a duty to rescue, has some astonishing results. First of all, it appears that indeed all kinds of assumptions have been made in the literature on the perverse effects of a legal duty to rescue that simply cannot be upheld in practice. Moreover, the empirical evidence also indicates that altruism and intrinsic motivation do indeed seem to be strong in the US. The Kitty Genovese case may be shocking, but it is not typical of what Americans actually do in practice. Rescue seems to be the rule and non-rescue a minor exception. This is apparently a domain where social norms and intrinsic motivation are stronger than legal duties. 'Rescue without law' seems to be the norm, as Hyman suggests.

The empirical evidence is also worrying because many theoretical analyses may have been based on assumptions of human behaviour for which there is no empirical evidence. The focus of much of the legal literature in the US to reform the current no-liability for non-rescue rule also seems to be largely pointless (in the sense that it will not increase the number of rescues, as the empirical evidence shows). Moreover, the empirical evidence presented by Hyman also shows that the more than 100 theoretical law review articles that have dealt with the issue have largely dealt with a false problem: it is not the

108 Ibid, 702 f.

109 Ibid, 712.

110 Ibid.

111 Ibid, 714.

112 Ibid, 715.

non-rescues which result from the absence of a legal duty to rescue that are the real problem in the US, but rather the fact that too many rescues take place, often under very risky circumstances, and that too many rescuers are either killed or injured during the course of the rescue. Hyman rightly argues that the number seems to indicate that it is more important to focus on remedies to prevent risky rescues instead of continuing to focus on the (minor) problems of non-rescue.

### VI. Criminal liability

Strikingly, a large part of American scholarship that is strongly opposed to tort liability for non-rescue, does not oppose the enforcement of a legal duty to rescue via the criminal law. This is noteworthy as one would normally assume that the criminal law is the more costly and invasive system, going much further than civil liability under tort. Several arguments are presented in the literature in favour of criminal liability. Benditt, for example, argues that compensation should not be the goal in cases of non-rescue, but criminal liability may be appropriate.<sup>113</sup> He argues, however, that the type of criminal liability that was imposed in Vermont would be too small to make a sufficient difference in people's behaviour. Others, however, argue that the advantage of the criminal law is precisely the fact that only a minimal penalty can be imposed, whereas 'tort law may be far more threatening and burdensome for many persons than criminal law'.<sup>114</sup> This may be particularly true in the US where tort law can lead to high damage awards. Others stress that the advantage of criminal liability is that prosecutorial discretion can be used as a result of which violation need not lead to actual criminal prosecution.<sup>115</sup>

The argument is also made that, if criminal law can provide an adequate remedy, tort law would no longer be necessary.<sup>116</sup> Full compensatory liability under tort law is seen as excessive from an instrumental perspective and could lead to moral hazard on the side of potential victims; criminal liability would have the advantage of the flexibility of the sanction (proportionality) whereas tort law would always lead to full compensatory damages.<sup>117</sup>

The argument in favour of criminal law also receives some support from economic analysis. Rubin, for example, argues that there may be a danger that when the legal duty to rescue is introduced the probability of detection will be

113 *Benditt* (1982) 1 *Law & Phil* 391, 418.

114 *Franklin/Ploeger*, 40 *Santa Clara L Rev* 991, 1005 (2000).

115 *Scordato*, 82 *Tul L Rev* 1447, 1496–1500 (2008).

116 *Murphy*, 89 *Geo LJ* 605, 663 (2001); *Franklin/Ploeger*, 40 *Santa Clara L Rev* 991, 1025 (2000) and *Scordato*, 82 *Tul L Rev* 1447, 1500 (2008). See also *A Ripstein*, *Three Duties to Rescue: Moral, Civil, and Criminal* (2000) 19 *Law & Phil* 751, 774 ff.

117 *Murphy*, 89 *Geo LJ* 605, 662 (2001).

low. In that case a fine or other punishment would have to be created greater than the costs of the offence in order to outweigh the low probability of detection. Violation of this duty would hence be a crime rather than a tort, but the problem is of course that this could potentially create extra costs of enforcement, which may outweigh the benefits of the increased efficiency of the rescue.<sup>118</sup> Harel and Jacob also make an argument in favour of the criminal law, noting that the problem of dilution of incentives in cases of multiple offenders will not arise under criminal law as the severity of the criminal sanction is independent of the number of offenders.<sup>119</sup> A disadvantage of the criminal law, however, is that it may lead to excessive investment in precautions. On the other hand it can be more lenient in attributing liability to multiple offenders in alternative care situations.<sup>120</sup> A similar argument was presented by Murphy, holding that where there are multiple potential rescuers each of them could be held criminally liable.<sup>121</sup> Murphy also holds that in jurisdictions where a legal duty to rescue exists (like in continental Europe) criminal liability for failure to rescue is more common than civil liability.<sup>122</sup>

### VII. Concluding remarks

This contribution has provided an economic perspective on the suggested necessity of a legal duty to rescue and a corresponding liability for non-rescue. It is, as I have shown, an issue which is highly debated not only in tort literature but also in the law and economics literature, especially in North America. The topic seems largely of theoretical importance, having commenced with an attack by Epstein on the hypothesis that the common law strives for efficiency. He argued that a legal duty to rescue would clearly be efficient and that the absence of such a duty cannot be grounded in economics but in the fundamental principle of liberty protected by the common law.<sup>123</sup> Worried about the attack on the efficiency of the common law hypothesis, Landes and Posner defended the no-liability for rescue rule in 1978, arguing that a legal duty to rescue may crowd out altruism and could create a substitution effect.<sup>124</sup> Others have refined and criticised their hypothesis, most recently by introducing the so-called principle of salience. Harel and Jacob rightly point out that a problem with liability for omissions is that the number of potential rescuers can in some cases be so large that a probabilistic liability would dilute incentives. This is an argument, so they hold, for allocating

118 *Rubin* (1986) 6 Int Rev Law & Econ 275.

119 *Harel/Jacob* (2002) 3 Theo Inq L 413, 449.

120 *Ibid*, 449 f.

121 *Murphy*, 89 Geo LJ 605, 620 (2001).

122 *Ibid*, 663.

123 See Section III.B.

124 See Section III.C.

liability for omissions only where a single (or few) defendant(s) can be singled out who could be considered as the cheapest cost avoider(s). This seems to a large extent to correspond with the tendency in the common law to accept exceptions to the no-liability for non-rescue rule in the case of a special relationship between the potential rescuer and the injurer or victim. Still, the salience rule would potentially enlarge the number of cases where a duty to rescue (and corresponding liability) would be accepted.<sup>125</sup> Levmore additionally points out that tort law today is better able to deal with torts caused by multiple parties, which could potentially lead to expanding liability for omissions as well.<sup>126</sup>

Many authors have stressed the difference in approach of the common law on the one hand (where a legal duty to rescue is largely rejected) from that of continental Europe on the other hand (where in many countries such a duty does exist).<sup>127</sup> It would certainly merit further research to examine what the precise sources of those differences are and to what extent they can be traced back to criteria identified in the economic analyses or, for example, are related to different attitudes towards altruism.

It is striking that already in the early writings of Epstein (1973) and Landes and Posner (1978) concepts which are now often used, such as the importance of altruism and intrinsic motivation (and the danger that these would be crowded out as a result of legal duties), were discussed. In these works, behavioural law and economics apparently already played a role *avant la lettre*. Still, one notices that the literature largely speculated on how various legal rules (or the absence thereof) would influence the behaviour of potential rescuers and victims, whereas it was less clear how this would play out in practice.

This has been addressed in the study by Hyman, which produced a number of astonishing results on the empirical importance of the duty to rescue.<sup>128</sup> The present contribution began with the oft-quoted case of Kitty Genovese,<sup>129</sup> which suggested that non-rescue could be a serious problem, meriting the introduction of a legal duty to rescue. Hyman's empirical research, however, shows that, notwithstanding the absence of a legal duty to rescue, rescue without law seems to be the norm in the US, with non-rescue being limited to only two reported cases a year. The states that have introduced a legal duty to rescue could not show any positive effect from such a duty; it only appeared that the number of rescues in states with a duty to rescue was lower than in states without such a duty. This could point to a crowding out of altruism and hence

125 See Section III.E.

126 See Section III.D.

127 See Section II.

128 See Section V.

129 See Section I.

confirm the point that introducing a legal duty to rescue would have no beneficial effects.

These findings by Hyman of course place the extensive and detailed theoretical scholarly discussions in a different light. It would be worthwhile expanding on the research by Hyman with further studies in European countries where such a duty to rescue does exist in order to examine whether there are substantial differences from the situation in the US. As just noted, Hyman's research also addressed US states which (like continental European legal systems) do have a legal duty to rescue and found no positive effect from such a legal duty; a similar result could perhaps be expected for Europe as well.

It is also striking that, whereas legal and economic scholarship tends towards restricting the use of criminal law, arguing that it should be an *ultimum remedium* and that preference should generally be given to the civil law, in this domain such scholars argue in favour of criminal as opposed to civil liability. Perhaps the empirical findings, highlighting the relatively minimal practical relevance of the issue, stress the point already made by Epstein in 1973, namely that it is possibly difficult to rephrase or explain the existence or absence of a legal duty to rescue in economic terms. Perhaps cultural differences in terms of which either spontaneous altruism and liberty are valued as fundamental (in the common law) or social solidarity and the idea that altruism should be enforced via regulation are given priority (in the civil law) can explain the existing differences better than economic logic.