

Morality, Law and the Duty to Act: Creating a Common
Law Duty to Act Modeled After the Responsibility to
Protect Doctrine
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INTRODUCTION

In 1997, high school senior David Cash accompanied his friend, Jeremy Strohmeyer, to a resort and casino along the California-Nevada border. That night, Cash witnessed Strohmeyer rape and murder Sherrice Iverson, a seven-year old girl. Despite catching Strohmeyer in the act, Cash did and said nothing; rather, he went outside and waited for his friend to join him.¹ While Strohmeyer is currently serving a life sentence for the crime, Cash received no civil or criminal penalty, but instead went on to study engineering at Berkley.² This is because Nevada and California, following the American common law tradition, did not require an affirmative duty to act to prevent a criminal act.³

Three years earlier, a similar atrocious act occurred, this time resulting many more victims. The Hutus in Rwanda began their systematic process of completely annihilating the Tutsi race.⁴ The violence lasted one hundred days⁵ and claimed the lives of roughly 800,000 men, women, and children.⁶ As machetes were being sharpened and used every day, the rest of the world stood still and watched in horror.⁷ While small actions were taken to bring peacekeeping forces to Rwanda, their narrow mandate made the forces unable to actually protect the victims.⁸ The result

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¹ *Slaying Suspect's Friend Not Seen As Accomplice*, L.A. TIMES, June 3, 1997, at A16.

² "Sherrice Iverson Bill" Becomes Law, L.A. TIMES, Sept. 19, 2000, at B4; Doug Bandow, *Can Shame Do What Laws Cannot Do?*, SAN-DIEGO UNION-TRIBUNE, Feb. 16, 2000, at B10.

³ Sam Diaz, *Slain Girl Inspires Bills on Witnesses Proposals*, SAN JOSE MERCURY NEWS, Dec. 10, 1998, at B1.

⁴ U.N. SCOR, 54th Sess., at 3, U.N. Doc. S/1999/1257 (Dec. 16, 1999).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 26-27. See also S.C. Res. 912 ¶ 8, U.N. Doc S/RES/912 (April 21, 1994) ("Decides . . . to adjust the mandate of UNAMIR as follows: (a) To act as an intermediary between the parties in an attempt to secure their agreement to a cease-fire; (b) To assist in the resumption of humanitarian relief operations to the extent feasible; and (c) To monitor and report on developments in Rwanda, including the safety and security of the civilians who sought refuge with UNAMIR . . .").

effectively created an international audience to the domestic massacre.

The two stories above, though they involve different races, times, and hemispheres, have something in common. A horrible crime was committed with witnesses watching, but no one responded to either situation in order to stop the criminal act. While the United Nations had more time to act and needed the approval of others to intervene successfully, the underlying premise remains the same: morality required action to stop the crimes. But was there a legal duty?

It is well-established that American common law does not require an affirmative duty to rescue, absent special circumstances.⁹ The focus of this note is to examine the underlying philosophy behind the refusal to introduce an affirmative duty in American common law, and to compare and contrast it with the developing “Responsibility to Protect” (R2P) doctrine in international law, which imposes an affirmative duty to act on a much larger scale.

Part I will examine the history and philosophy of the American common law “no duty to act rule.” Part II will cover the history and the development of the R2P doctrine in international law, arguments for and against the doctrine, and its underlying philosophy. This note will argue that even though the underlying philosophies of American and international law differ, there is no reason why the American system cannot join the rest of the world in creating a legal duty to act.

I. THE AMERICAN COMMON LAW “NO DUTY TO ACT RULE”

The *Restatement (Second) of Torts*, Section 314 states, “The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”¹⁰ This reflected that the common law rule comes from the dichotomy established in early common law between “misfeasance” and “nonfeasance.”¹¹ Misfeasance involves an actual action that harms another person, while nonfeasance is the lack of action that leads to harm to another.

⁹ RESTATEMENT (SECOND) OF TORTS § 314 (1965).

¹⁰ *Id.*

¹¹ *Id.*

A. Historical Reasons for the Rule

There are several theories as to why a duty to act was slow to develop in common law. The *Restatement* argues that it was inefficient because courts and governments had enough forms of misbehavior to regulate, and they simply did not have time to regulate non-actions.¹² Other jurists, such as law professor Nancy Levit, propose a cultural and religious reason for the lack of an affirmative duty to rescue.¹³ Levit argues that regulating non-actions through tort law was not necessary, because religion was so pervasive within society, and “[p]eople thought they would burn in hell”¹⁴ for such immoral actions as refusing to help those in need.¹⁵ A more formalistic approach ascribes the Latin maxim *unicuique tribuere jus sum*.¹⁶ Prior to the late eighteenth century, “[t]he duties of justice could be compelled and were properly within the competence of the state, unlike the duties of charity; these the state left to ‘Him who searches the heart’.”¹⁷

Although the ultimate source of this omission may be debated, it is not contested that originally there were legitimate reasons for not requiring an affirmative duty to act.¹⁸ However, as the law evolved, society did not face the enforcement problems of the middle ages, rendering the efficiency argument moot.¹⁹ Religion’s involvement in law is now practically extinct,²⁰ and “[n]ation, not religion . . . [has become] . . . the glue of society.”²¹ In spite of these cultural changes, the development of the American rule continued well into the nineteenth and twentieth centuries. While new justifications for this doctrine have emerged,²² they are not persuasive enough to supersede the moral duty that exists.

¹² RESTATEMENT (SECOND) OF TORTS §314C (1965).

¹³ Nancy Levit, *The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act*, 40 WASHBURN L.J. 463 (2001).

¹⁴ *Id.* at 467.

¹⁵ *Id.* at 468.

¹⁶ Damien Schiff, *Samaritans: Good, Bad, and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 78 (2005). The English translation of this maxim is “Justice is the set and constant purpose which gives to every man his due.” *Id.* at n.4.

¹⁷ *Id.* at 78.

¹⁸ However, Plato’s *Laws* did provide for an affirmative duty to act, with the penalty for non-action being a fine. *Id.* at n.19.

¹⁹ *Id.* at 82, n. 23.

²⁰ Levitt, *supra* note 13, at 468.

²¹ Schiff, *supra* note 16, at 114.

²² See *infra* notes 62-71 and accompanying text.

B. Development in American Common Law

The most well known description of the American no duty to act rule is found in *Buch v. Amory Manufacturing. Co.*²³ In this case, an eight-year old boy, who was unable to understand English, followed his brother to his work at a manufacturing plant.²⁴ However, while there, the owner of the manufacturing plant ordered the eight-year old to leave, but he did not understand.²⁵ No further attempts were made by the owner to induce the boy to exit the premises, and an accident later occurred, injuring the boy.²⁶ The Supreme Court ruled that the defendant owed no more duty of care than to a trespasser.²⁷ The court stated that the “duty to do no wrong is a legal duty,”²⁸ and the “duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of trust, a moral obligation only”²⁹ According to the Court, this duty was not legally enforceable because “[w]ith purely moral obligations, the law does not deal.”³⁰ Supporting the argument with the biblical story of the Good Samaritan, the Court continued, “the priest and Levite who passed by on the other side were not . . . liable at law for the continued suffering . . . which they might, and morally ought to have, prevented or relieved.”³¹

Despite this strong opinion, five categories of exceptions to the common law rule have evolved. Although the black letter law still exists, these five inroads significantly weaken the traditional no duty to act rule, as “in most rescue situations, one of the exceptions is likely to apply.”³²

The exceptions to this rule apply when there exists:

- (1) negligent injury by a defendant;
- (2) innocent injury by a defendant;
- (3) special relationships;
- (4) defendants who assume a responsibility to undertake a rescue; or

²³ 44 A. 809 (N.H. 1898).

²⁴ *Id.* at 809.

²⁵ *Id.*

²⁶ *Id.* at 810 (The exact facts of the injury and accident were not disclosed.).

²⁷ *Id.* at 811.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Buch* A. at 810.

³¹ *Id.*

³² Jennifer L. Groniger, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What is Left of the American Rule, and Will It Survive Unabated?*, 26 PEPP. L. REV. 353, 357 (1999).

(5) statutes.³³

The first of the five exceptions, negligent injury by a defendant, follows the traditional tort concept of duty.³⁴ If a defendant, by his or her negligence, causes harm to another, the defendant “must take all steps necessary to mitigate the hurt.”³⁵ The second, innocent injury by a defendant, is more of an exception, because it does not involve an actual act of negligence by the defendant. An innocent injury by a defendant involves instances where the defendant, though not through negligence or any fault, creates the situation that causes the plaintiff harm.³⁶ The *Restatement (Second) of Torts* describes this exception as one where a defendant’s “act, or instrumentality within his control, has inflicted upon another such harm that the other is helpless and in danger.”³⁷ This exception, while less in line with traditional tort doctrines, still does not create a *true* affirmative duty to rescue, as the defendant is not completely a bystander, since his own actions created the perilous situation.³⁸

The third exception is triggered when there is a special relationship between the rescuer and the person being rescued, or between the rescuer and a third party.³⁹ The first category includes relationships between: a captain and seamen, an employer and employees, parents and children, a jailor and prisoners, and to a more limited extent, shopkeepers and customers.⁴⁰ There commonly exists a duty to rescue within such relationships. Although some states may apply an affirmative duty to rescue to the shopkeeper-customer relationship, others simply impose a duty not to prevent a rescue by a third person.⁴¹ The special relationship between a rescuer and a third party is a bit more complex. Such relationships may include parents and children, but also involve such relationships as between psychiatrist and patient. This relationship becomes a basis for liability when the rescuer “has the power to control the actions of [the] third party.”⁴² These

³³ *Id.* at 355-56.

³⁴ *Id.* at 357.

³⁵ *Id.* (citing *Parrish v. Atl. Coast Line R.R. Co.*, 20 S.E.2d 299 (N.C. 1942)).

³⁶ *Id.* at 358.

³⁷ RESTATEMENT (SECOND) OF TORTS § 322 cmt. A (1965).

³⁸ Groniger, *supra* note 32, at 359.

³⁹ *Id.* at 359.

⁴⁰ *Id.* at 360. Some states (such as California) enforce a duty on a shopkeeper and customer if the customer is on the premises belonging to the shopkeeper, but do not carry this duty outside of the shop. *Id.*

⁴¹ *Id.*

⁴² *Id.* at 361.

relationships are complex because not only must a court find that the defendant actually had the power to control the actions of another (difficult in and of itself), but also because the states differ in determining which third party relationships trigger such a duty.⁴³ For instance, while some states only require the closest of relationships, other states consider relations as removed as a social guest and host to create a duty to rescue.⁴⁴

The fourth exception is less obvious. This exception involves the voluntary assumption of duty by attempting a rescue. The *Restatement (Second) of Torts* states that one who voluntarily attempts a rescue “is subject to liability . . . for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if . . . his failure to exercise such care increases the risk of such harm.”⁴⁵ This exception creates an ironic result, seemingly contrary to the purposes of the exceptions. If one does not attempt a rescue, there is no cause for liability to arise; however, if one does try to rescue another, he or she must be sure to do so with the utmost care to avoid liability. Thus the effect is to *discourage* rather than *encourage* rescue attempts.⁴⁶ One way that states have attempted to counter this result is to enact Good Samaritan statutes.⁴⁷ These statutes limit the liability of professionals such as doctors and other medical personnel, in order to encourage these individuals to attempt rescues.⁴⁸ The standard for liability is raised from simple negligence to reckless disregard.⁴⁹ Reckless disregard implies some knowledge that the actions taken will have significant effects, and takes into account the fact that emergency situations, and therefore the duty of care,

⁴³ *Id.* at 362.

⁴⁴ See Groniger, *supra* note 32, at 361-63.

⁴⁵ RESTATEMENT (SECOND) OF TORTS §323 (1965).

⁴⁶ Groniger, *supra* note 32, at 364.

⁴⁷ *Id.* at 364.

⁴⁸ *Id.* at 364-65. An example of the wording and content of a Good Samaritan statute is provided in the CALIFORNIA BUSINESS AND PROFESSIONAL CODE. It states, “no licensee, who in good faith renders emergency care at the scene of an emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care.” CAL. BUS. & PROF. CODE § 2395 (West 1990)).

⁴⁹ *Id.* at 364-65. This raised negligence standard also applies to legal advice in emergency situations. See MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 3 (2003) (“In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required . . . [but] assistance should be limited to that reasonably necessary in the circumstances . . .”).

often differ from those of everyday life.⁵⁰ Some form of a Good Samaritan statute exists in each of the fifty states, as well as the District of Columbia.⁵¹

The last exception to the black letter law providing no duty to act is statutes.⁵² States may enact laws that require a rescue attempt for a wide range of situations. Some states require specific governmental agencies to act,⁵³ while others only have hit and run statutes.⁵⁴ Six states have enacted affirmative duty to act laws that require action when the situation involves an “easy rescue.”⁵⁵

Despite the force of the exceptions above, common judge-made law still refuses to create an affirmative duty to act, absent the exceptions above.⁵⁶ While the exceptions may cover many rescue situations, they still fail to cover those such as the rape and murder of Sherrice Iverson described at the beginning of this note.⁵⁷ Statutory exceptions seem to be an “easy fix” for such problems, but oftentimes states do not enact such statutes until a tragedy of such momentous proportions has occurred that the legislature is spurred to action.⁵⁸ Why then, cannot the common law provide a resolution to the problem?

⁵⁰ *Id.* at 365. Groniger gives the example of a doctor who aids a hitchhiker by suturing his wounds, but does not clean the wound first (removing the dirt and gravel); subsequently, the doctor is not liable for resulting harm, “even though the doctor’s negligent care caused further harm.” However, “a rescuer cannot drag a victim halfway across the street and then decide to leave him.” *Id.* at 363.

⁵¹ *Id.* at 366.

⁵² Groniger, *supra* note 32, at 364, 367.

⁵³ Agencies such as the Department of Family Services, who may be required to assist children when an investigation has shown abuse. *Id.* 368.

⁵⁴ *Id.* at 367. A West Virginian court held a defendant liable for “failing to rescue the plaintiff ‘as quickly as possible’ upon hitting him.” *Id.*

⁵⁵ *Id.* at 367-68, n. 156. “An easy rescue is [a case] where a victim is in danger and a potential rescuer is in a position to alleviate the harm without any significant cost to himself.” *Id.* at 368. Vermont has a statute requiring such action, which states:

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.

Id.

⁵⁶ *See, e.g., Buch*, 44 A. 810 (Regarding the fact that the court found no duty to act).

⁵⁷ *See supra* note 3. These exceptions did not apply to David Cash because he did not cause the harm, he did not have a special relationship with the victim, nor did he voluntarily assume the duty to rescue her.

⁵⁸ *See supra* note 2.

C. Continuing Strength of the Rule

Is it only tradition that keeps the common law no duty to act rule alive? No. This common law principle continues to exist because the underlying philosophy of American common law is adverse to such a stringent regulation on an individual's actions.⁵⁹

From the founding of the United States, individual rights have been a focus of United States' politics and law.⁶⁰ The American mentality may be summed up by the statement, "a rugged, independent individual needs no help from others, save such as they may be disposed to render him out of kindness, or such as he can induce them to render by the ordinary process of bargaining, without having the government step in to make them help."⁶¹ In addition to this argument, there is the fear that once the common law steps in to enforce *this* moral act, it will not stop.⁶² As Levit phrases this objection as, "[i]f we require strangers to help each other, will the government next compel private citizens to donate to charity, feed the poor or house the homeless?"⁶³

The theory of economics argues that it is "efficient" to continue the no duty to act rule, because the "law should encourage self-reliance."⁶⁴ If the government required an affirmative duty to act, citizens may avoid activities in order to avoid necessary rescues.⁶⁵ Economic theory further rationalizes that the results would not justify the effort it would take to affect such a change.⁶⁶ The theory of "un-coerced compliance" states that there is no need for an affirmative duty to protect rule because most people would attempt "easy rescues" absent such a legal maxim.⁶⁷ Moreover, the existence of such a maxim would cause only a few people to change their behavior.⁶⁸

⁵⁹ See *infra* notes 98-99 and accompanying text.

⁶⁰ *Id.*

⁶¹ Levit, *supra* note 13, at 468, n.28.

⁶² *Id.*

⁶³ *Id.* at 468.

⁶⁴ *Id.* at 469.

⁶⁵ *Id.* at 469. "For example, someone who swims well might avoid beaches where poor swimmers are known to swim, or might choose to play racquetball instead of going for a swim to avoid all those pesky potential drowning victims." *Id.* (citing Eric H. Grush, *The Inefficiency of a No-Duty to Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U. PA. L. REV. 881, 882 (1998)).

⁶⁶ Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1464 (2008).

⁶⁷ *Id.* at 1464, 1469.

⁶⁸ *Id.*

Another theory of protecting the current status quo looks to the objectives and purposes of tort law itself.⁶⁹ This theory states that tort law is supposed to deter active, rather than passive harm.⁷⁰

Of these three different theories, the one that will be explored more in depth is that the philosophical basis of American common law, which, by emphasizing the individual, creates an obstacle to establishing an affirmative duty to act or protect.

D. Individualism in American Jurisprudence

It is a commonly held belief that Americans tend to be more individualistic than many of our international counterparts.⁷¹ This theory is supported by the fact that no affirmative duty to rescue has yet made it into American common law.⁷² Interestingly enough, individualism is not a “Western” phenomenon.⁷³ Rather, is it one of Anglo-American legal and political theory.⁷⁴ Civil law countries are much more likely to impose an affirmative duty to rescue,⁷⁵ so what is it about Anglo-American law that causes us to differ in this respect?

The emergence of social contract theory and the protection of individual rights marked a significant shift in Anglo-American thinking, and heavily influenced America’s founding fathers.⁷⁶ The underlying theme of all social contract theories is one in which individuals give up some of their rights to a governing body so that they may live in peace and relative social harmony.⁷⁷ This

⁶⁹ Levit, *supra* note 13, at 469

⁷⁰ *Id.* Levit characterizes this position as follows: “[t]ort law should handle affirmatively dangerous conduct—causing harm—not doing nothing.” *Id.*

⁷¹ Daniel J. Elazar, *Constitutional Rights in the Federal System*, 22 PUBLIUS 2, 1, 3 (1971). Elazar states, “[t]o think of the United States without its emphasis on individual rights would be to deny the history of the American civil society.”

⁷² Despite such a duty having made it into many civil law codes. *See supra* notes 10-11 accompanying text. *See also infra* note 76.

⁷³ Sarah Harkness, Charles M. Super & Nathalie van Tijen, *Individualism and the “Western Mind” Reconsidered: American and Dutch Parents’ Ethnotheories of the Child*, 87 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 23, 37 (Spr. 2000).

⁷⁴ Schiff, *supra* note 16, at 120-21.

⁷⁵ *Id.* at 121. Schiff points to civil law countries’ tendency toward social welfare states, and their belief that the state is able to intervene and do good in people’s lives.

⁷⁶ Andrew Woodcock, *Jacques Maritain, Natural Law and the Universal Declaration of Human Rights*, 8 J. HIST. INT’L LAW 245 (2006). *See infra* n. 92.

⁷⁷ MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 102 (2004) (discussing the development of social contract theory).

philosophy begins and ends with the individual, while discussing how the individual interacts vis-à-vis the government in the middle.⁷⁸ Examples of such can be found in the philosophies of John Locke, John Stuart Mill, and Jean-Jacques Rousseau.⁷⁹

While Thomas Hobbes invented the idea of a social contract, John Locke altered it so as to become the basis of modern political thought.⁸⁰ Locke focused his *Second Treatise of Government* on the notion of “consent.”⁸¹ Locke states that “[n]othing can make any man . . . [a member of a commonwealth] but his actually entering into it by positive engagement, and express promise and contract. . . . [c]oncerning the beginning of political societies, [it is] . . . *consent which makes any one a member of any commonwealth.*”⁸² For Hobbes, man entered a social contract to avoid violence and war,⁸³ but Locke believed that man’s motivation was much more individual—that is, the “preservation of their property.”⁸⁴

John Stuart Mill continued the evolution of social contract by adding a utilitarian aspect to the theory.⁸⁵ Concerned that Locke’s version of the social contract would lead to a “tyranny of the majority,”⁸⁶ Mill developed his own theory that gave strong protections to minorities and individuals. In his essay, *On Liberty*, Mill states:

the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . He cannot rightfully be compelled to do or forbear because it will be better for him to do so, [or] . .

⁷⁸ See *infra* discussion on notes 81-82.

⁷⁹ See *infra* discussion on notes 81-99.

⁸⁰ ISHAY, *supra* note 77, at 285.

⁸¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305 (photo. reprint 1794) (1690).

⁸² *Id.* (emphasis added).

⁸³ ISHAY, *supra* note 77, at 285.

⁸⁴ Locke, *supra* note 81, at 307.

⁸⁵ Phillip W. Romohr, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule*, 55 DUKE L.J. 1025, 1038 (2006).

⁸⁶ JOHN STUART MILL, ON LIBERTY 13 (London, 189-?), available at <http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F104427827&srchtp=a&ste=14>.

. in the opinions of others, to do so would be wise, or even right.⁸⁷

Later in his essay Mill goes even further when he says “[o]ver himself, over his own body and mind, the individual is sovereign.”⁸⁸ Though Mill allows room for an affirmative duty to act in his essay,⁸⁹ he dedicates the majority of his work on the limits of governmental control over the individual.⁹⁰

Rousseau continued the discussion of a social contract. Even though he talks of the “general will,” this thought is used only to advance the “view of political representation as representation, not of order[,] . . . estates, . . . social functions or social classes, but of individual interests.”⁹¹ Rousseau is most famously quoted to have said, “Man is born free, and everywhere he is chains.”⁹² According to the scholar Frances Svensson, “[t]he chains to which Rousseau refers are those of the group, the social unit which superimposes itself on the individual.”⁹³ This is because medieval governance provided no rights or place for the individual,⁹⁴ “[t]hus community *per se* came to be branded with the stigma of oppression.”

The philosophies of Mill, Locke, and Rousseau are often attributed to have influenced the Founders of the Constitution.⁹⁵ When looking at the Bill of Rights, one is struck by the numerous occurrences of the phrases, “the right of the people,”⁹⁶ and “by the people.”⁹⁷ While “the people” may seem like a collective social

⁸⁷ *Id.* at 13.

⁸⁸ *Id.* at 14.

⁸⁹ *Id.* at 15-16. Mill states, “[t]here are also many positive acts for the benefit of others, which he may rightfully be compelled to perform . . . such as saving a fellowcreature’s life . . . things which whenever it is obviously a man’s duty to do, he may rightfully be made responsible to society for not doing.” However, Mill continues that “[t]o make any one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception.”

⁹⁰ *Id.* at 12.

⁹¹ Frances Svensson, *Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes*, XXVII POL. STUD. 3, 421, 424 (citing S. LUKES, *INDIVIDUALISM* 79-80 (Oxford, Blackwell 1973)).

⁹² *Id.* (citing JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 3 (G.D.H. Cole trans., 1950)).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See U.S. CONST. amends. I, II IV, X.

⁹⁷ *Id.* at amend. IX.

entity, a look at the other amendments shows that “the people” are only a collection of individuals.⁹⁸

It is easy to understand how the Founders were impressed with liberal political theory that emphasized the individual. Because America was founded based on a break from the British monarchy, the founders distrusted a strong centralized government.⁹⁹ If the government is to be limited, then it is logical for individual rights to fill the vacuum that is remaining. However, this focus on individual rights has created a conflict of competing rights when it comes to the establishment of a duty to rescue.¹⁰⁰ While the rescuer has a right not to be needlessly bound by moral duties imposed by the state, the victim has a right to life, which may be violated if the failure to rescue results in death.¹⁰¹

The protection of the rescuer from excessive government interference is demonstrated in the common law between misfeasance and nonfeasance.¹⁰² Misfeasance, when the harm is caused by a positive action of the rescuer,¹⁰³ can be regulated because the rescuer has reached the limit established by Mill.¹⁰⁴ Nonfeasance, on the other hand, involves no wrong doing by the rescuer, but by another person entirely.¹⁰⁵ The only action taken by the rescuer is that of *inaction*, which may cause or worsen the harm to the victim.¹⁰⁶ In such situations, the rescuer has committed no legal wrong, and though a moral wrong may have been committed, “[l]egal duties are enforceable; moral duties are not.”¹⁰⁷

But by protecting the rights of the rescuer, the law fails to protect the rights of the victim.¹⁰⁸ However, many argue that to

⁹⁸ See *id.* at amend. III, V, and VI. These amendments provide specific rights to specific individuals in specific situations.

⁹⁹ Richard Bellamy & Dario Castiglione, *Constitutionalism and Democracy—Political Theory and the American Constitution*, 27 B.J.POL.SCI. 595, 599 (Oct. 1997).

¹⁰⁰ Romohr, *supra* note 85, at 1044.

¹⁰¹ *Id.* Romohr makes a similar argument in terms of positive versus negative rights.

¹⁰² *Id.* at 1030. See *supra* notes 70-71 and accompanying text.

¹⁰³ *Id.* at 1030-31.

¹⁰⁴ See *supra* notes 90-91 and accompanying text.

¹⁰⁵ Romohr, *supra* note 85, at 1030.

¹⁰⁶ *Id.* at 1030.

¹⁰⁷ *Id.* at 1029.

¹⁰⁸ To take Mill’s theory literally, it could be argued that there exists no right that the law may enforce because to require a rescue would not *prevent* harm, as harm has most likely already been done. It may be possible to imply that

protect the rights of the victim, the law would drift into the realm of morality, “allowing courts to enforce moral obligations [that] would let them substitute the law with ‘varying ideas of morals which the changing incumbents of the bench might from time to time entertain.’”¹⁰⁹ It is somewhat ironic that the most vehement objection to establishing an affirmative duty to act is that it would require the enforcement of “moral obligations.”¹¹⁰ With the assumption that many laypeople believe that law and morality are closely related,¹¹¹ there are two significant worries that American jurists have regarding the intertwining of the two.¹¹² When discussing morality, it is important to ask, “whose morality?” Is it the job of the law to reflect society’s morality as the majority views it,¹¹³ or is there a morality that is beyond public opinion, which makes it law’s obligation “to actively encourage better behavior[?]”¹¹⁴ This debate concerning the relationship to law and morality is a long standing one, and one that this note attempts to continue in a limited way. While not advocating a legislating of morality, the remainder of this note will argue that American tort law should more closely resemble the relationship between morality and law as found in the “Responsibility to Protect” doctrine in international law.

II. THE RESPONSIBILITY TO PROTECT DOCTRINE

A. *History and Development of the Doctrine*

The Responsibility to Protect Doctrine, or R2P as it is commonly called, is a relatively recent doctrine within the realm of international law. The actual doctrine was developed in 2001 by the International Commission on Intervention and State Sovereignty (“ICISS”), a commission the government of Canada

preventing harm also means preventing *further* harm, in which case Mill’s theory is not as incompatible with an affirmative duty as it once seemed.

¹⁰⁹ Romohr, *supra* note 85, at 1029 (citing *Union Pac. R.R. Co. v. Cappier*, 72 P. 281, 283 (Kan. 1903)); *but see*, Anthony D’Amato, *Legal Realism Explains Nothing*, 1 WASH. U. JUR. REV. 1 (2009) (regarding the assertion that legal realism has allowed for courts to take on such a moral-enforcing role.).

¹¹⁰ Because many Americans believe that law and morality interact.

¹¹¹ This combination of law and morality is admittedly a more “natural law” tendency, much separated from positivist theory.

¹¹² Romohr, *supra* note 85, at 1037.

¹¹³ Where public opinion defines the majority view.

¹¹⁴ Romohr, *supra* note 85, at 1036. This morality beyond public opinion would be what is considered natural law, to be discussed in relation to international law in Part III, *infra*.

initiated.¹¹⁵ Four years after the commission introduced the notion, the United Nations adopted the doctrine at its 2005 World Summit.¹¹⁶ In fact, the General Assembly unanimously adopted the R2P doctrine in adopting the Outcome Document of the 2005 World Summit.¹¹⁷ The Outcome Document adequately summarizes the doctrine, stating:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations¹¹⁸

The World Summit also led to discussion and resolution of the enforcement of R2P, stating that, “[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means”¹¹⁹ If these peaceful means fail, the doctrine also allows the use of force,¹²⁰ on which the Outcome Document elaborated, stating:

we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity¹²¹

¹¹⁵ Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?* 22 INT’L REL. 283, 285 (2008).

¹¹⁶ *Id.* at 284.

¹¹⁷ *Id.* There are currently 150 countries in the General Assembly.

¹¹⁸ The General Assembly, *2005 World Summit Outcome*, ¶ 138, U.N. Doc. A/60/L.1 (Sept. 20, 2005).

¹¹⁹ *Id.* at ¶ 139.

¹²⁰ According to Chapter VII of the United Nations Charter.

¹²¹ *Id.*

A year later, the Security Council approved the R2P doctrine when it adopted Resolution 1674, which is “a thematic resolution on the Protection of Civilians in Armed Conflict . . . specifically invoking this is the context of . . . Darfur.”¹²² The resolution itself reaffirmed such provisions of the Outcome Document as mentioned above.¹²³ The R2P continued to gain strength under Secretary General Ban Ki-moon’s leadership.¹²⁴ He even went so far as say to at the African Union Summit in 2008, “I am fully committed to keeping the momentum that you the leaders have made at the 2005 World Summit and will spare no effort to operationalize the responsibility to protect.”¹²⁵ In 2007 and 2008, the doctrine gained even more recognition as the outbreaks of violence in Kenya were classified as an “R2P situation.”¹²⁶

However, R2P is not without its opponents. Most significantly were the delegates to the United Nations Budget Committee from Latin America, the Middle East, and Africa.¹²⁷ In early 2008, they stated “the World Summit rejected R2P in 2005” and “the concept of the responsibility to protect [had] not been adopted by the General Assembly.”¹²⁸ The sudden shift of opinion is thought to be linked to the colonial influences in the developing world, whose independence from colonial rule is still too close for comfort when it comes to the weakening of state sovereignty. These concerns were voiced when Secretary General Ban Ki-moon attempted to further the institutional strength of the doctrine by proposing the creation of a position of Special Adviser on the Responsibility to Protect, which would provide “teeth” to the doctrine.¹²⁹ It appears that the international community is more than willing to accept the doctrine in words, but many nations balk when it comes to actual application and enforcement of the R2P.

B. Specifics of the Doctrine

The R2P doctrine was specifically developed to counteract the humanitarian and security concerns related to intra-state conflict. The doctrine has two basic principles—state sovereignty

¹²² Evans, *supra* note 115, at 287.

¹²³ S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (April 28, 2006).

¹²⁴ Evans, *supra* note 115, at 286.

¹²⁵ *Id.*

¹²⁶ *Id.* at 287.

¹²⁷ Evans, *supra* note 115, at 288.

¹²⁸ *Id.*

¹²⁹ *Id.*

and international responsibility.¹³⁰ State sovereignty is transformed from the Westphalian notion as held for the last four hundred years and becomes not a *right*, but a *responsibility*.¹³¹ The doctrine states that “the primary responsibility for the protection of its peoples lies within the state itself.”¹³² In this way R2P does not attempt to override a state’s sovereignty, or even weaken it. It respects a general principle of non-intervention¹³³—international responsibility is only triggered when “a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it”¹³⁴ This respect for sovereignty is present because it is essential to recognize that “[f]or many states and peoples, [sovereignty] is also a recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny.”¹³⁵ On the other hand, international action is also essential because the events of the 1990s led many people to believe “that, for all the rhetoric about the universality of human rights, some human lives end up mattering a great deal less to the international community than others.”¹³⁶ It is also important for the international community to avoid “the risk of becoming complicit bystanders in massacre, ethnic cleansing, and even genocide.”¹³⁷

The sources and foundations of the doctrine are state sovereignty, the Security Council’s role under Article 24 of the United Nations Charter, international legal obligations included in treaties and customary international law, and the “developing practice of states.”¹³⁸ There are three elements of the R2P doctrine: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.¹³⁹ The top priority, the responsibility to

¹³⁰ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001), xi. State sovereignty is the idea that states should be free from interference into their domestic affairs. However, in recent years international responsibility has emerged because the world feels that it is responsible for responding to genocides like what happened in the former Yugoslavia and Rwanda.

¹³¹ Evans, *supra* note 115, at 284.

¹³² ICISS, *supra* note 130, at xi.

¹³³ Non-intervention is the idea that sovereignty is absolute and states should not intervene into the internal affairs of other states at any time.

¹³⁴ *Id.*

¹³⁵ ICISS, *supra* note 130, at ¶ 1.32.

¹³⁶ *Id.* at ¶1.1.

¹³⁷ *Id.* at ¶ 1.22.

¹³⁸ ICISS, *supra* note 130, at xi.

¹³⁹ *Id.*

prevent, is a responsibility of both states and the international community to address the causes, both root causes and current causes, of the civil unrest and violence.¹⁴⁰ The responsibility to react is a responsibility for the international community “to respond . . . with appropriate measures.”¹⁴¹ Such measures “may include coercive measures like sanctions and international prosecutions, and in extreme cases military intervention.”¹⁴² Finally, the responsibility to rebuild is a responsibility of both the state and the international community “to provide . . . full assistance with recovery, reconstruction and reconciliation.”¹⁴³ During this stage of rebuilding, there also must be actions and policies to address “the causes of the harm the intervention was designed to halt or avert.”¹⁴⁴ In all, the responsibilities form a type of circle, because the responsibility to rebuild requires the establishment of a system that fulfills the responsibility to prevent.

The most controversial aspect of the R2P doctrine is the enforcement power to the doctrine: the permissibility of military action.¹⁴⁵ This aspect of the doctrine is similar to humanitarian intervention.¹⁴⁶ However, R2P is not humanitarian intervention.¹⁴⁷ The key difference between R2P and traditional notions of humanitarian intervention is that humanitarian intervention refers only to military operations after widespread violence has already begun.¹⁴⁸ R2P, on the other hand, prioritizes prevention. If at all possible, the doctrine tries to avoid military action, preferring that the international community work with the State to solve the problems *before* violence breaks out.¹⁴⁹ In addition, the doctrine sets out guidelines and considerations that must be met before military action can even become an option.¹⁵⁰

First, there must be “just cause.”¹⁵¹ Just cause arises only when there is actual or apprehended large scale loss of life and/or

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* This addition seemingly takes the state (and international community) back to the responsibility to prevent such an occurrence from happening again, creating a kind of circle of responsibilities.

¹⁴⁵ Evans, *supra* note 115, at 290.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 291.

¹⁵¹ ICISS, *supra* note 130, at xii.

large scale “ethnic cleansing.”¹⁵² Also, the considerations of right intention, last resort, proportionality, and reasonable prospects of success must be discussed and debated.

As to right intention, the purpose of the intervention “must be to halt or avert human suffering.”¹⁵³ Although notions of political expediency and state self-interest are involved in decisions made by the international community, such purposes are secondary to the primary purpose mentioned above.

Secondly, the principle of last resort must be considered.¹⁵⁴ The principle of last resort states that military action may only take place “when *every* non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser grounds would not have succeeded.”¹⁵⁵ The second part of this consideration allows military action to be taken before all other avenues have been acted upon when a State has “reasonable grounds” or proof that those avenues would not stop the crisis.¹⁵⁶ Though this may raise concerns regarding hasty action, it also allows the international community not to be bound to spend money and manpower on attempts at resolution that will likely fail. Because it is important to remember that during these abstract discussions, the fact is that people are dying on the ground.

Thirdly, the principle of proportionality must be within every military action taken by the international community.¹⁵⁷ Proportionality involves not only the amount of force, but also the duration and intensity of the action.¹⁵⁸ Lastly, there must be reasonable prospects of success.¹⁵⁹ This utilitarian consideration looks to the “reasonable chance of success in halting or averting the suffering” as well as the requirement that “the consequences of action [are] not likely to be worse than the consequences of inaction.”¹⁶⁰

The authority for enforcing R2P is through traditional U.N. processes.¹⁶¹ When an “R2P situation” arises, it is the

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ ICISS, *supra* note 130, at xii.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

responsibility of the Security Council to take action.¹⁶² Ideally, “[t]he Permanent Five . . . should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.”¹⁶³ Should the Security Council fail to be able to pass a resolution, there are two other alternatives.¹⁶⁴ The General Assembly could convene in an Emergency Special Session under the “Uniting for Peace” procedure, or the responsibility to react can fall solely to regional and sub-regional organizations, as allowed for in Chapter VIII of the U.N. Charter.¹⁶⁵

C. State Sovereignty and R2P

Because international military intervention is a controversial matter, R2P is not without its own supporters and opponents. For many countries in the developing world, those most likely to be unable to fulfill their state responsibility because of lack of resources, state sovereignty, and its seeming weakening under R2P is a major concern.¹⁶⁶ A journalist in Colombo is reported saying, “the so-called responsibility to protect is nothing but a license for the white man to himself intervene in the affairs of the dark sovereign countries, whenever the white man thinks it fit to do so.”¹⁶⁷ This concern regarding sovereignty is not completely without merit. The doctrine certainly creates a paradigm shift in how sovereignty is viewed and when it can be legally pre-empted.¹⁶⁸

For almost four hundred years, state sovereignty has been a foundation of the international system.¹⁶⁹ This is not a negligible concept—the state represents the building block of the international order. It “provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of comparative size or wealth.”¹⁷⁰ At the beginning, this notion of sovereignty was absolute.¹⁷¹ There was

¹⁶² *Id.*

¹⁶³ *Id.* at xiii. This is important because a single veto from a permanent five member of the Security Council can stop any resolution from passing.

¹⁶⁴ *Id.*

¹⁶⁵ ICISS, *supra* note 130 at xiii.

¹⁶⁶ Evans, *supra* note 115, at 285.

¹⁶⁷ *Id.* at 289.

¹⁶⁸ ICISS, *supra* note 130, at ¶¶ 1.35, 2.14

¹⁶⁹ Evans, *supra* note 115, at 284.

¹⁷⁰ ICISS, *supra* note 130, at ¶ 2.7.

¹⁷¹ Evans, *supra* note 115, at 284.

never an appropriate time to enter into a state's territory or to tell a state how it should govern its peoples.¹⁷² In fact, "state sovereignty [was] a license to kill . . . it [was] no one's business but their own if states murder[ed] or forcibly displac[ed] large numbers of their own citizens."¹⁷³ In the view of absolute state sovereignty, the only time that intervention is even remotely considered is when the internal conflict within a state threatens to destabilize a region.¹⁷⁴ This theory is similar to the idea of self-defense, but does not require government sanctioned military intervention.¹⁷⁵ The modern view of sovereignty, however, is established in Articles 2(1) and 2(7) of the U.N. Charter.¹⁷⁶

R2P does not completely erase state sovereignty—sovereignty of states remains the norm, but the definition of sovereignty has changed under the doctrine.¹⁷⁷ Rather, "sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state."¹⁷⁸ This notion of sovereignty as a responsibility becomes binding on a state when they gain membership to the United Nations.¹⁷⁹ This re-characterization of sovereignty is not a completely novel idea.¹⁸⁰ Rather, it is an idea that has developed over the past fifty years through international law and state practice.¹⁸¹ It is here that several distinctions must be made. A tendency exists to equate R2P with "humanitarian intervention." This, R2P is not.¹⁸² This distinction is essential to the discussion of sovereignty because humanitarian intervention implies a right of *other nations* to intervene, rather than the right of *humans* not to suffer.¹⁸³ Because of this, R2P does not pose nearly the threat to sovereignty that the

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ David M. Muttart, *To Intervene or Not to Intervene, That is the Question*. 2 GLOBAL JURIST ADVANCES 2, 7 (Sept. 2002).

¹⁷⁵ *Id.*

¹⁷⁶ ICISS, *supra* note 130, at ¶2.7; Evans, *supra* note 115, at 284. Article 2(7) of the UN Charter states, "Nothing should authorize intervention in matters essentially within the domestic jurisdiction of any State." U.N. Charter art. 2, para. 7.

¹⁷⁷ ICISS, *supra* note 130, at ¶¶ 1.35, 2.14.

¹⁷⁸ *Id.* The UN Charter Article 2.1 simply states, "The [UN] is based on the principle of the sovereign equality of all its Members." U.N. Charter art. 2.1.

¹⁷⁹ ICISS, *supra* note 130, at ¶ 2.14

¹⁸⁰ *Id.* at ¶2.15

¹⁸¹ *Id.*

¹⁸² Evans, *supra* note 115, at 290.

¹⁸³ ICISS, *supra* note 130, at ¶ 2.33.

doctrine of humanitarian intervention creates.¹⁸⁴ According to the Commission, the doctrine was called the responsibility to protect specifically because of the connotations that humanitarian intervention possesses—it “effectively operate[s] to trump sovereignty with intervention at the outset of the debate: it loads the dice in favour of intervention before the argument has even begun, by tending to label and delegitimize dissent as anti-humanitarian.”¹⁸⁵ In this way, R2P attempts to create a doctrine in which both state sovereignty and human rights are respected. Another way in which R2P attempts to protect state sovereignty is through the process in which the use of the doctrine is enacted.¹⁸⁶ A state cannot unilaterally “intervene” and attempt to use the doctrine as a justification.¹⁸⁷ The favored way of authorizing the doctrine is in the same way that all coercive measures are to be authorized—through the consent of the Security Council.¹⁸⁸

In this way the strongest critique and concern for the doctrine is able to be resolved. R2P is not out to “Westernize” the world, or to intervene wherever one or more countries see fit for political reasons.¹⁸⁹ State sovereignty is to be respected at all times, and intervention is not to be the immediate reaction to atrocities.¹⁹⁰ It is the general idea that the principles of state sovereignty and human protection can and should coexist in harmony, but when they cease to be able to do so, whether because of the failure of the state or internal war, the international community has a duty to take measures to right the balance.¹⁹¹

D. Does the R2P Doctrine Create a Double Standard?

Another argument that is made by opponents of the R2P doctrine is that the doctrine will only be used “against” those states that are developing, weak, and friendless.¹⁹² This argument is also not without merit. Supporters of this argument point to the state of

¹⁸⁴ *Id.* at ¶2.28.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at ¶6.14.

¹⁸⁷ *Id.* It is important to note that the intervention of the United States into Iraq in 2003 was *not* an example of R2P in action. *See* Evans, *supra* note 115, at 295.

¹⁸⁸ ICISS, *supra* note 130, at ¶ 6.14, stating: “It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty.” This is how use of force and coercive measures is *supposed* to be authorized, not how it actually *is* always authorized.

¹⁸⁹ *See supra* note 153 and accompanying text.

¹⁹⁰ *See supra* note 154 and accompanying text.

¹⁹¹ ICISS, *supra* note 130, at ¶¶8.31, 8.32.

¹⁹² Evans, *supra* note 115, at 293.

international politics and the role that state power plays in it.¹⁹³ What if a state such as China, Russia, or even the United States became an “R2P situation”? Is it feasible that the international community would really be able to use coercive measures, and in an extreme situation, military intervention against them? Unfortunately, there is little that can be done to conclusively rid international politics of this double standard.¹⁹⁴ In addressing this argument the Commission stated that even though “the reality that interventions may not be able to be mounted in every case where there is justification for doing so, [it] is no reason for them not to be mounted in any case.”¹⁹⁵ Though to the cynic this statement seems to be nothing but hollow encouragement, under the theory and belief that states follow international obligations because they feel morally obligated to do so, and they desire the respect of their fellow nation states, this argument seems to have more force.¹⁹⁶ The international “peer pressure” that occurs in world politics can, and has, influenced state behavior.¹⁹⁷ Even though states with strong military power are not likely to have their sovereignty breached because of the R2P doctrine, one can hypothesize that they have the most to lose in terms of international good will and respect. Therefore, while the double standard cannot be completely eradicated at this point (or perhaps ever), all hope should not be lost on the enforcement of R2P against stronger states.

E. Community and Morality in International Law

A strong sense of morality and valuing others is found in the theory of Natural Law, which, simply put, is the belief “that there is a revelation of law beyond that defined by the institutional sources of law, and that there are certain basic concepts which ought to underlie all legal principles.”¹⁹⁸ At its inception, natural law had a theological tilt to it, as evidenced by Cicero’s natural law

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ ICISS, *supra* note 130, at ¶ 4.42. This statement seems to be a hollow attempt at leveling the playing fields. Perhaps appearances are influential enough, but the Commission appears to be saying the equivalent of an encouraging parent to their son or daughter— “even if you know that you won’t win, it’s not winning that’s important, it’s trying and playing the game!”

¹⁹⁶ Evans, *supra* note 115, at 294.

¹⁹⁷ *Id.* Evans points to the events in East Timor in 1999 as evidence of this. Indonesia, because of diplomatic and international pressure, allowed Australia in to protect the people of East Timor.

¹⁹⁸ Woodcock, *supra* note 76, at 245.

theory.¹⁹⁹ Believing “that the world was the work of a divine entity,”²⁰⁰ Cicero saw man “as the highest of the divine creations”²⁰¹ and thought the “preservation of the welfare of [m]an [was] the primary purpose of natural existence.”²⁰² Modern thinkers of natural law do not emphasize the religious aspect, as much as they put forth the idea of the moral nature of law.²⁰³ Despite where this morality comes from, a divine being or simply a shared psyche of the universe, natural law emphasizes the importance of the individual, but as an individual within society.²⁰⁴ It is worth mentioning that Cicero does not posit that the preservation of *society* is the basis of the world’s existence, but *man*. The idea of a shared humanity is nothing new to international thought. The term “cosmopolitanism,” though the meaning has changed somewhat over time, has existed since the time of the Cynics, in the fourth century B.C.E.²⁰⁵ It continued to evolve throughout the Roman Empire, then fell away until Immanuel Kant and Christopher Martin Wieland revived it during the Enlightenment.²⁰⁶ While literally translated to “citizen of the cosmos,” the idea has taken on a new depth in recent thought, intertwining two notions, one being “the idea that we have obligations to others . . . that stretch beyond those to whom we are related by ties of kith and kind . . . or citizenship” as well as the idea “that we take seriously the value not just of human life but of particular human lives.”²⁰⁷ This view suggests a strong sense of justice, which is what, under natural law, best preserves mankind.²⁰⁸

The response that this “justice” seems like an abstract concept is not untrue. Natural law, unlike positivism, looks not to texts to find justice, but believes that there are underlying principles, and that the texts and treaties are only helpful to the

¹⁹⁹ *Id.* at 249.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 251.

²⁰⁵ Appiah, Anthony, *Cosmopolitanism: Ethics in a World of Strangers*, New York: W.W. Norton & Company (2006), xiv.

²⁰⁶ *Id.* at xiv-xv.

²⁰⁷ *Id.* at xv.

²⁰⁸ Henry F. Carey, *Naturalism vs. Positivism: Debates Over Coercive Protection of Human Rights in Haiti, Bosnia, and Kosovo*. 5 CIVIL WARS 2, 25, 34 (2002).

point that they help us to determine those principles.²⁰⁹ Perhaps mankind has spent its entire history attempting to find these principles, and after many successes, as well a few mistakes, they codified these ideas in the Universal Declaration of Human Rights (“The Declaration”).²¹⁰ Despite the fact that The Declaration is meant to codify those rights that are given to all simply by their reason of being human, and is not meant to originate from any one philosophical viewpoint, the phraseology and terms used convey a sense of community, and an underlying sense of some strain of natural law.²¹¹

While endowing rights on all people as *individuals*, The Declaration uses a different semantic than the United States Constitution. The Declaration begins with a preamble that sets forth that these rights are “rights of all members of the human family,”²¹² and that such rights are “the foundation of . . . justice.”²¹³ These rights are the aspirations of the “*common people*.”²¹⁴ The Declaration’s first article states, “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and *should act towards one another in a spirit of brotherhood*.”²¹⁵ The Declaration then goes on to list political and social rights in terms of those rights that are guaranteed to every individual human being, but applies a condition to such rights in Article 29.²¹⁶ Article 29(1) states that “[e]veryone *has duties to the community* in which alone the free and full development of his personality is possible.”²¹⁷ While the United States Constitution endeavors to ensure individual rights and limit the role of the government, The Declaration provides for individual rights in the context of community, establishing duties to which a government owes to its people, and people to each other. These rights have been considered to be *jus cogens* norms,²¹⁸ that is, norms that are so entirely fundamental that they are

²⁰⁹ *Id.* at 41.

²¹⁰ Woodcock, *supra* note 76, at 245.

²¹¹ Unlike the wording of the Bill of Rights, *see supra* notes 93-95, which conveys individualism.

²¹² Universal Declaration of Human Rights, G.A. Res. 217A, at 1, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

²¹³ *Id.*

²¹⁴ *Id.* (emphasis added).

²¹⁵ *Id.* at 72 (emphasis added).

²¹⁶ *Id.* at 78.

²¹⁷ *Id.* (emphasis added).

²¹⁸ *See* Woodcock, *supra* note 76, at 263.

considered to be preemptory.²¹⁹ This is important because it shows just how deeply morality is engrained in international law. While social contract theorists speak of consent of the parties, international law speaks of moral duties that are owed to one another. This is perhaps the most striking difference between the founding document of the United States and the founding of document of the international order as we know it today.

CONCLUSION

In first-year Torts and Criminal Law classes, law students are faced with one of the most difficult aspects of American Common Law—duty. Many are shocked that there is no affirmative duty to rescue someone, even when it would come at little to no cost to the rescuer. Casebooks present horrible cases such as the one described in the first paragraph of this note to illustrate just how strict this American tradition is.

However, when one looks to the international world, there seems to be something different about the concept of duty. Perhaps it is because the world is made up of more than just common law legal systems, but perhaps it is something more. Social contract theory is able to be successfully applied to a small number of people, but a theorist has yet to develop a working model for the international world. States are guided by self-interest that is not determined only by one person (as in the social contract), but by many. So politics get in the way, and agreement and harmony seem to be elusive, yet desperately sought after aspirations. This never-ending search for common ground and community can be explained in the basis of natural law. Because of the lack of order in the international sphere, players in it are much more comfortable discussing the common morals and tenets to which they can all agree. Gone is the time of individualist state behavior; instead, one sees the world working together because it is the only way to achieve such lofty goals. It is for these reasons that international law has been able to develop such a duty as the R2P doctrine—because community and morality are important, and assigning duties is nothing new.

American common law however, does not seem to share this sense of duty. Instead, the rugged individualism as found in Locke, Mill, Rousseau, and the Constitution stress the importance of freedom from duty, and complete self-determination, regardless of the community. The government is not seen as a force for good

²¹⁹ *Id.* at 261.

or as an organization that can encourage the humankind to be their best selves; rather, it is constantly limited and restricted for the fear of what such duties would require of the average citizen. However, the Restatement has predicted that the no-duty-to-act rule in American law will continue to diminish because of the “extreme cases of morally outrageous and indefensible conduct” that goes unpunished because of it.²²⁰

It is possible to model a revision of the American rule after the R2P doctrine. If one takes the analogy of states representing individuals in a global society, parallels between both doctrines emerge. The R2P doctrine has not emerged from a long history of affirmative duty. Prior to the formation of the United Nations, one could characterize the state of the international system as one of complete individual liberty, with no affirmative duty to act to prevent harm.²²¹ However, as efficiency in regulating international politics grew, an affirmative duty began to emerge.²²²

Each of the exceptions that are found in the American no-duty rule also has a parallel in the R2P doctrine.²²³ The first two exceptions found in American law, which deal with negligent and innocent injury by the defendant²²⁴ can be paralleled to the fact that an R2P situation is triggered when the international community has failed in their responsibility to prevent. Whether the harm is a direct result of Western colonization or of a more “innocent” failure, the international community may have some causal relationship to the humanitarian situation. The “special relationship” exception can be found in the relationship of an individual state to its population, in the definition of sovereignty as responsibility. This is why a duty exists for a state to attempt to stop the harm that is occurring within its own borders (if it is not the government perpetrating such crimes), because it owes a duty to its people to keep them safe.²²⁵ The principle of proportionality

²²⁰ Romohr, *supra* note 86, at 1035 (citing RESTATEMENT (SECOND) OF TORTS § 314 cmt. c. (1965)).

²²¹ *See supra* notes 66-70, 170-75 and accompanying text.

²²² This efficiency developed as a result of the establishment of the United Nations. Prior to the attempt at the League of Nations and the United Nations, states did not have a global forum in which to address many of the world’s problems. The U.N. allowed such a forum, bringing more community and establishing a greater sense of duty.

²²³ *See supra* note 34.

²²⁴ *See supra* notes 34-39 and accompanying text.

²²⁵ If the government is the one perpetrating the crimes, the first two exceptions would be triggered: first in the instance of the state itself, and then in the instance of the international community.

in the R2P doctrine²²⁶ parallels to the fourth exception found in American tort law—voluntary assumption. Similar to how a rescuer who voluntarily assumes a duty to rescue cannot leave a victim in a worse condition than they were found, the international community cannot intervene and leave the state in a more dire condition than it was. The fifth exception, statutory duty, can parallel to the requirement of a Security Council or General Assembly resolution in order for the international community to intervene into a state's domestic affairs.

The discussion above shows that the exceptions to the traditional no duty to act rule are broader than they may seem at first, and that it would not be an overwhelming change to take one further step and develop an affirmative duty to act. Such a duty would resemble the R2P doctrine in that there would exist an affirmative duty to rescue when specific factors were present.²²⁷ Therefore, creating an affirmative duty to rescue in American law is not as drastic a step as some may think, but would create a drastically improved common law rule.

²²⁶ See *supra* note 158 and accompanying text.

²²⁷ This assuages the concern that people will avoid situations as discussed in note 68, *supra*, because certain factors would have to be present in order for an affirmative duty to apply.