

Rescue Based in Liberty and Dignity

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Tagged as : [Immigration](#)

Date : November 11, 2020

Shalini Bhargava Ray, [The Law of Rescue](#), 108 **Cal. L. Rev.** 619 (2020).

[The Law of Rescue](#) connects aiding migrants to the body of law governing rescue generally. Professor Shalini Bhargava Ray proposes a new theoretical framework for the law of rescue based on her examination of prosecutions for migrant rescue. Her framework de-emphasizes economic interests and lifts up considerations of liberty and dignity.

While “[t]he law of rescue was not designed to express, promote, or protect the human dignity of beneficiaries or the liberty of rescuers,” (P. 623) Professor Ray argues that it should be redesigned to do so. Her new framework would balance three considerations: (1) the rescuer’s liberty to engage in the rescue; (2) the beneficiary’s need for rescue; and (3) the potential third-party harm flowing from a consensual rescue.

The law of rescue cuts across many substantive areas of law. Professor Ray identifies tort law, contract law, criminal law, public international law and maritime law, in addition to immigration law, as providing standards for rescue. Professor Ray examines how these substantive areas treat rescue in various circumstances and the historical motivations behind those rules. She is particularly interested in how the law of rescue treats both the person needing rescue and the (potential) rescuer.

Professor Ray finds that the law surrounding rescue mostly has developed around economic interests and commercial development. Existing theoretical frameworks are anchored in and dominated by the concerns of economic elites: economic efficiency and property rights. It is a mistake, according to Professor Ray, to ignore dignity interests of the rescued and liberty interests of rescuers. Because these considerations are not prominent, “the law of rescue leaves vast areas of important rescue work exposed to prosecution.” (P. 623.)

Migrant rescue, for example, can be subject to prosecution. Federal law prohibits transporting or smuggling an individual but also includes a prohibition on harboring. Harboring includes inducing or encouraging an authorized individual to remain in the United States. Some courts have interpreted the prohibition on inducing or encouraging to include any kind of assistance, including free housing and food.

The government does prosecute under the harboring laws. Professor Ray details the 2018 arrest and trial of Scott Warren. Mr. Warren was charged with harboring counts after he provided food, water, and shelter to two migrants in Arizona. While Mr. Warren was acquitted of the harboring charge, his arrest and trial serves as a powerful example of what is at stake for rescuers when rescue is illegal.

Applying her new framework to the rescue of migrants, Professor Ray concludes that prohibiting rescue in this context degrades both liberty and dignity. If the law protects the right not to rescue, as it does in torts, then it should equally promote the interests of those who want to rescue.

To Professor Ray, the rescuer’s liberty interest in rescuing connects to the freedom of association, both as a constitutional norm and a moral value. Professor Ray argues that this liberty interest is strongest when a rescuer seeks to prevent death, as is frequently the case in aiding individuals who recently crossed the US border illegally. The liberty interest is strongest in this situation because the individual already has crossed the border (the rescuer is not leading

the border crossing) and the rescuer is not affecting the ultimate decision whether the individual will be able to remain legally in the United States. Instead, the rescuer is promoting another human's life and welfare while satisfying the rescuers own moral values. In such a scenario, the beneficiary's dignity risks are high, as survival is at stake. As Professor Ray states, "[p]ermitting those migrants who do cross the border to survive the journey is the least the law can do." (P. 658.) Consideration of the risk of third-party harm incorporates externalities. This risk is low, and, in any case, outweighed when the migrant's life is at stake. Professor Ray considers externalities such as littering, trespassing on private land, damage to private land, property crimes, personal crimes, and the protection of sovereignty.

Professor Ray's article is an important contribution to a growing trend to link immigration law to other areas of law. Traditionally immigration law has been seen as an outlier and is often left out of conversations about mainstream legal developments. This has been changing somewhat in administrative law and constitutional law. *The Law of Rescue* builds another immigration law bridge.

The Law of Rescue also is an important contribution because it identifies and highlights the importance of dignity interests in the law. Dignity interests often are overshadowed by economic interests, but Professor Ray reminds us that they are just as important. In Professor Ray's new theoretical framework, dignity is a factor among three to be considered. In some ways, her proposal is in fact quite modest; one might argue that dignity should be the overriding consideration. Her proposal seems revolutionary, however, because dignity as a concept is waning in immigration law. Reimagining the law of rescue is a good place to start to inject dignity back into how the law treats migrants.

Cite as: Jill Family, *Rescue Based in Liberty and Dignity*, JOTWELL (November 11, 2020) (reviewing Shalini Bhargava Ray, *The Law of Rescue*, 108 **Cal. L. Rev.** 619 (2020)), <https://lex.jotwell.com/rescue-based-in-liberty-and-dignity/>.