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AFFIRMATIVE DUTY TO ACT IN EMERGENCY SITUATIONS — THE RETURN OF THE GOOD SAMARITAN

By JOHN H. SCHEID*

Why do people refuse to help? In the now famous Kitty Genovese affair thirty-eight people refused to call the police or intervene in any way simply because they did not want to become involved.¹ There is a great fear that involvement is likely to result in a lawsuit. The most natural response upon regaining consciousness is to look for the cause of one's injuries. A person rarely admits he caused his own injury and therefore looks elsewhere. The rescuer, hovering near the scene, is frequently accused of carelessness or worse. One experience of offering help, where kindness is not repaid in kind, dampens enthusiasm for humanitarianism.² When facing the prospect of either helping another in a particularly perilous situation or walking on by, the would-be rescuer instinctively seems to recognize that once he begins to help he must act with all reasonable diligence and complete the task.³ Therefore why begin?

For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.⁴

The court justified this admittedly inhumane⁵ statement by arguing that:

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¹ N.Y. Times, Mar. 27, 1964, at 1, col. 4.

² Clyde Decoux may feel it doesn't pay to be a Good Samaritan. He stopped his car to aid what seemed to be a motorist stalled on the road. But instead a man and a woman robbed Decoux of \$185, forced him to drive to the Orleans-Jefferson parish line, then took off in Decoux' car. N.Y. Post, June 30, 1969, at 42, col. 4.

³ RESTATEMENT (SECOND) OF TORTS §324 (1965). Slater v. Illinois Cent. R.R., 209 F. 480, (M.D. Tenn. 1911).

⁴ Union Pac. Ry. v. Capper, 66 Kan. 649, 653, 72 P. 281, 282 (1903).

⁵ "With the humane side of the question courts are not concerned." *Id.*

The duty [to aid] must be owing from the defendant to the plaintiff, otherwise there can be no negligence . . . and the duty must be owing to plaintiff *in an individual capacity*, and not merely as one of the general public.

This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues.⁶

The court espoused the principle that on earth we individuals should shift for ourselves and mind our own business, and no one else's. The court then affirmed a judgment for the defendant who had refused to help its dying employee. The court's attitude is one of consummate individualism, and the case is a perfect example of its excesses. Although there have been contrary statements that peril to one obliges another to aid, the principle never gained a foothold in the common law.⁷

The common law ostensibly has made a crisp and clear distinction between the moral and legal obligations incumbent on one who refuses to rescue another in peril. The Kansas Supreme Court, as have others, left the indifferent would-be rescuer to suffer the pangs of his conscience, which might fairly be described at less than keen, and committed him to the "swift and sure" punishment of a higher law. The victim is supposed to die content knowing that justice will be done later. However, if he does not believe in an afterlife, with a just judge righting all wrongs, a victim cannot be satisfied waiting for the next world's judgment. For the recreant will go unpunished and his conscience probably will not be affected. Most poignantly of all the victim dies. Given an age that is decidedly more concerned with the here than the hereafter, the law is woefully behind the times.

The law sometimes has disregarded this dichotomy between legal and moral obligations. Courts have held that because men so overwhelmingly acknowledge a principle as moral and ethical the law should similarly recognize it and create a legal duty reflecting this moral consensus. Thus in the fields of civil rights, discrimination based on sex, and even the abortive attempt at prohibition, the law attempted to express in legal norms the community's moral sense.

⁶ *Id.* at 654, 72 P. at 283 (emphasis added) *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897).

⁷ Brett, M.R. in *Heaven v. Pender* said,

[W]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

11 Q.B.D. 503, 509 (1883). Later, as Lord Esher, Brett rejected his own rule in *Le Lievre v. Gould*, 1 Q.B. 491 (1893).

Since most people are not lawyers we can fairly state that men analyze actions first in terms of morals, ethics, right and wrong before ever considering legal aspects. One need not know all the elements of theft before he can correctly condemn it. Similarly, most people know there is something wrong in failing to help another in serious peril. Otherwise we would dispense with the usual self-justifications for non-action.

The purpose of this paper is to describe the origin of and often compelling reasons advanced for the well-established rule that one has no legal duty to aid another in peril. It must be conceded at the outset that the arguments for refusing to impose a duty to aid another in danger at times seem to be irrefutable. Various proposed hypotheticals frequently admit of no logical or feasible stopping point as to the extent of the rescuer's obligations. Most people become quite cynical when criminal or civil reprisals are taken against the benefactor. Secondly, exceptions which have arisen in an attempt to avoid the rule will be described. Lastly, some suggestions will be offered which a court today could reasonably adopt in forming and implementing a different but viable rule of law that more accurately reflects contemporary community ethics.

I ORIGIN AND REASONS FOR THE DOCTRINE

Lawyers have long been reconciled to the idea that certain moral obligations are not legally binding. Courts have not enforced promises unsupported by consideration or given relief to an aged parent whose only child has rejected him. When faced with the question of whether to enforce the moral obligation to aid one in peril, courts have had a convenient precedent to deny relief. The parable of the Good Samaritan was inapposite as authority or precedent for a legal duty to act for another's benefit, since attention in that scriptural passage was primarily directed to the health of the rescuer's soul rather than the integrity of the victim's body. The courts then, relying on the distinction between misfeasance and nonfeasance, held that one has no duty to aid another in danger.⁸

One can easily appreciate the difference between committing an act and omitting an act. The former connotes action, the latter inaction. There could be liability if *A* acted carelessly because he then worsened *B*'s position; he contributed a negative or minus quality to *B*'s status.⁹ There can be no liability for

⁸ "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." RESTATEMENT (SECOND) OF TORTS §314 (1965).

⁹ See *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928).

inaction, the courts argued, for *A* merely failed to confer a positive benefit on *B*. After *A* refused to act, *B*'s status was the same. Of three possible alternatives, *viz.*, hurting *B*, helping *B*, or ignoring *B*, only the first creates liability. On the basis of this distinction between action and inaction, although the line between the two frequently is very indistinct, the courts authorized one human being to casually observe another human being die.¹⁰

Courts have argued that the imposition of a duty to act for the benefit of another would constitute a species of involuntary servitude. The notion is that such a rule runs counter to the traditional tenets of Anglo-American individualism. We are alone and we like it that way. Anyone who tries to help is described as a mere volunteer and one who intrudes is derided as an officious inter-meddler. Unquestionably, the idea that we are independent and capable of managing our own affairs is deeply inbred. We like to think, at least occasionally, that we are substantially autonomous and can protect ourselves if only we are left alone.¹¹ However, even granting that a duty to aid another would at times curtail liberty and one's sense of freedom, the preservation of another's health or life obviously outweighs the restriction.

The most cogent reason for refusing to adopt a rule that one has a duty to aid another in serious peril was the practical consideration of properly balancing the equities of both parties. Any rule would have had to establish a test to determine the gravity of the victim's danger before any duty arose, and further whether the test would be subjective or objective. There would have to be a balancing of the degree of the victim's peril against the degree of the rescuer's risk. The law might have concluded that one has a duty to rescue when his loss would be proportionately less than the victim's, or only when the rescuer would suffer no loss at all. The courts would have had to determine what degree of care a person, obliged to help another, must exercise, and whether it would be fair and/or advisable to lower the usual standard. Compensation perhaps should then be afforded to a rescuer for his injuries or loss of time. The courts would have to decide fur-

¹⁰ Because of this reluctance to countenance "nonfeasance" as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life.

W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 336 (3d ed. 1964).

¹¹ Self direction or personal autonomy is a mark of the English race. The Englishman, as opposed to one of Latin lineage, does not so easily coalesce with the mass. He distinctly wishes to live his own life, make his own contacts, or as he frequently says, "muddle through," in his own way.

Hope, *Officiousness*, 17 *CORNELL L. Q.* 25, 29 (1929).

ther if the compensation would be the same whether or not the imperiled person wanted to be rescued, or whether or not the effort was successful. Faced with the realization that it was impossible to take just one step into a bog, the courts simply stopped short.

II EXCEPTIONS TO THE RULE

Courts were very dissatisfied with a law that allowed a person to stand by and callously observe another perish, where only a slight effort could have averted the loss. Judges could not long continue to use as precedent a rule which produced results such as *Osterlind v. Hill*¹² where the court held that the defendant, who rented deceased a canoe, was entitled to sit on a pier, smoke his pipe and watch the plaintiff's intestate drown. When the law runs so counter to the layman's idea of what is right, the law is likely to fall into general disrepute. Therefore courts began to look for qualifications and exceptions to obviate the rule's application.¹³

Judges found an exception in those cases where a relationship existed between the plaintiff and defendant out of which arose defendant's duty to care for the plaintiff. Courts felt the harshness of the rule had to be ameliorated, but felt further that this would be proper only if they could find a form of contractual relationship between the parties. With such a relationship the court ascribed a benefit to the defendant, and hence a duty to act affirmatively for the plaintiff's welfare, more or less a *quid pro quo*.¹⁴

The existence of a benefit to defendant is not indispensable to the creation of duty, as is obvious in the ordinary tort. But nevertheless to find liability for nonfeasance courts looked for some definite relation between the parties "of such a character that social policy justifies the imposition of a duty to act,"¹⁵ a duty more exacting than society usually imposes on its citizens. The relationship was sometimes clear, sometimes extremely tenuous and contrived. However courts, and later legislatures, maintained the distinction between moral and legal duty, a distinction they need not have honored, and refused to impose a legal duty to act simply because conscience or morality prescribed it.

¹² 263 Mass. 73, 160 N.E. 301 (1928).

¹³ We need not be surprised to find that in cases of recent date, a tendency is manifest to narrow it [the doctrine] or even to whittle it away. We cannot say today that the old rule has been supplanted. Sown, however, are the seeds of skepticism, the precursor often of decay. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 25 (1928).

¹⁴ "Liability, then, seems to be imposed as a 'price' for the benefits conferred; where there is no benefit, actual or potential, there is no duty to act." McNiece & Thornton, *Affirmative Duties in Tort*, 58 *YALE L. J.* 1272, 1287 (1949).

¹⁵ See W. PROSSER, *supra* note 10, at 335.

The early cases held that the defendant must have consciously assumed the relation.¹⁶ The courts then began to impose this duty of affirmative action upon a defendant because of his status or relative wealth in the community. If *A* owned a store the actual, and later even potential, benefit from a sale created an invitor-invitee relationship. Hence *A* had a duty to take affirmative action to make the premises safe for *B*, and to warn and protect him from danger.

An early, and quite obvious, example of duty to affirmatively act for the protection of others because of an existent relationship was in the law of admiralty. Sailors' activities were of great benefit to the ship's captain, and sailors' lives were utterly dependent on the whim or caprice of the captain. The latter therefore had an acknowledged duty to care for his men.¹⁷ Likewise an employer derived such a benefit from his employee that he had to take affirmative action to care for him.¹⁸ The employer was obligated to aid an employee who had collapsed from heat prostration,¹⁹ make reasonable efforts to locate an employee who unexplainably disappeared from his job,²⁰ and obtain surgical assistance for one whose legs had been traumatically amputated while working.²¹

A family relationship also created an affirmative duty to act. If *A* were the parent of *B*, *A* had to care for *B*. There was no contract between *A* and *B*, and frequently the parent could expect no monetary benefit. But because of their natural relationship and, perhaps, because of the slightest possibility that *B* could benefit *A*, the latter had a myriad number of obligations. He must feed, clothe, house, and educate his child, even after his spouse divorces him, takes the child away and turns him against his father. The father had this obligation not because the child was likely to be of any particular advantage to him, but because in some fundamental way the courts found it was simply right,

¹⁶ Affirmative duties are imposed only in situations where the one under a duty to act has voluntarily brought himself into a certain relationship with others from which he obtains or expects benefit. There is in a sense a "consideration" moving to the person under the affirmative duty. . . . McNiece & Thorton, *Affirmative Duties in Tort*, 58 *YALE L. J.* 1272, 1282-3 (1949).

"The present tendency is to recognize such duties as in all cases arising out of the relation by reason of some policy of law, and as based solely upon the consent of him upon whom they are laid." Bohlen, *The Moral Duty To Aid Others as a Basis of Tort Liability*, 56 *U. PA. L. REV.* 217, 229-30 (1908).

¹⁷ See *Harris v. Pennsylvania R.R.*, 50 *F.2d* 866 (4th Cir. 1931); *Di-Nicola v. Pennsylvania R.R.*, 158 *F.2d* 856 (2d Cir. 1946).

¹⁸ *Anderson v. Atchison, T. & S. F. R.R.*, 333 *U.S.* 821 (1948).

¹⁹ *Carey v. Davis*, 190 *Iowa* 720, 180 *N.W.* 889 (1921). See also *Rival v. Atchison, T. & S. F. R.R.*, 62 *N.M.* 159, 306 *P.2d* 648 (1957).

²⁰ *Anderson v. Atchison, T. & S. F. R.R.*, 333 *U.S.* 821 (1948). In this case a conductor disappeared off rear platform of train and defendant made no search.

²¹ *Hunicke v. Meramec Quarry Co.*, 262 *Mo.* 560, 172 *S.W.* 43 (1914).

fitting, and proper. Similarly, a parent must restrain his children from injuring others,²² not because of his relationship to the potentially affected, but because of his relationship to the cause of the potential injury. To find a relationship between the parent and the plaintiff from which the parent derives a benefit and therefore is under a corresponding duty to act affirmatively for the stranger's welfare is indulging in fiction. Only by some variation of a third party beneficiary contract could one apply the concepts of benefit, detriment, duty, and right to this factual situation. It seems reasonable that *A*, the father of *B*, protect *C*, a third person, from his son's unsocial acts. But it is impossible to discover any relation between *A* and *C* whereby *C* benefits *A*. Thus courts here began to recognize the principle that because one fortuitously is in a position to help another and can do so with little or no personal effort, he is then under an affirmative duty to afford that protection.

A relationship prompting a duty to act also occurs where *A* through his fault imperils *B*. There is no invitor-invitee, employer-employee, parent-child or similar relationship to create the requisite benefit to the actor. *A* has no conscious dealings with *B*. Yet through *A*'s carelessness *B* is endangered. There is every reason why *A* should act to protect *B*, and courts have imposed this duty on *A*.²³ Even where *A*'s action which endangers *B* is completely without fault, *A* must act affirmatively to protect *B*.²⁴ Many states have enacted statutes imposing a duty on drivers involved in accidents to stop and render assistance to the injured.²⁵ These statutes do not distinguish between pure accidents and those caused by fault. In *Meadows*

²² The allegations in the complaint, taken at their face value, show notice to the parents of the dangerous propensities of their minor son, an ability to control him in that regard. . . . The parents therefore owed a duty to society to guard their son closely to see to it that he did not indulge in his vicious propensities. *Linder v. Bidner*, 50 Misc. 2d 320, 322, 270 N.Y.S.2d 427, 430 (1966). See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1056 (1956).

²³ "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." *Trombley v. Kolts*, 29 Cal. App. 2d 699, 85 P.2d 541 (1938). See also RESTATEMENT (SECOND) OF TORTS §321 (1938).

²⁴ See *Hardy v. Brooks*, 103 Ga. App. 124, 118 S.E.2d 492 (1961). In *Hardy*, the defendant, without fault on his part, killed a cow. He did not remove the carcass and plaintiff's vehicle struck it. The court held that the defendant had a duty to warn plaintiff of the danger he created. See also RESTATEMENT (SECOND) OF TORTS §321, Comment *a* (1965).

²⁵ The driver of any vehicle involved in an accident resulting in injury to or death of any person . . . shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary or if such carrying is requested by the injured person. ILL. REV. STAT. ch. 95½, §135 (1967). See also W. VA. CODE ch. 17-C, art. 4, §§1 & 3 (Michie 1966); CAL. VEH. CODE §20003 (West 1959).

*v. State*²⁶ the court said: "The provisions of the statute are not limited in their application to the persons who . . . must be shown to have been at fault or to have been guilty of negligence . . ." ²⁷ Each driver involved must, "render humanitarian assistance to the persons injured, whether he was guilty of negligence in the operation of his vehicle at the time of the accident or not."²⁸ Legislatures have concluded that the mere happening of an automobile accident creates such a relation among all the parties involved that the healthy must assist the injured. Interestingly enough the statutes usually require that the driver carry the injured party to a doctor if the latter requests it. If the driver refuses and the victim is injured further as a result, the driver is civilly liable for any aggravation.²⁹ This obligation applies although most states do not excuse the actor for injuries negligently inflicted after the accident.³⁰ Hit-and-run statutes impose on each driver in an accident the duty to render aid, even though the injured party was the only legal cause of the accident. These statutes approach a general rule that when *B* is aware of *A*'s peril, *B* has a duty to help.

Should the fortuitous event that *A* carelessly crossed the center line at mid-block and collided with *B*, rather than at the end of the block where he would have hit *C*, impose burdens on *B* but not on *C*? Should the law hold that *A*'s negligence creates a relation between himself and *B*, but exclude *C* completely, so that only *B* has a duty to decide the gravity of *A*'s injuries, determine whether he should be moved, and be subject to liability for an error in judgment? It is unjust and illogical to apportion duties on a random basis, solely determined by the haphazard actions of the faulty party. It is anomalous that *B* must help *A* because of this fictitious relationship brought about solely by *A*'s actions, but *C* may drive by knowing *A* will bleed to death.

An excellent example of the conflict between the rule that no one has a legal obligation to help another and the moral consensus that help should be rendered involves the role of the physician. The necessary relationship, mentioned above, between doctor and patient may exist. But an early American case held that a doctor cannot be forced against his will to care for another.

²⁶ 211 Miss. 557, 52 S.2d 289 (1951).

²⁷ *Id.* at 563, 52 S.2d at 291.

²⁸ *Id.* at 563, 52 S.2d at 291.

²⁹ *Boyer v. Gulf, Colo. & Santa Fe Ry.*, 306 S.W.2d 215 (Tex. Civ. App. 1957).

³⁰ One state that does immunize the actor for his negligent acts at any emergency is Texas.

"No person shall be liable in civil damages who administers emergency care in good faith at the scene of emergency for acts performed during the emergency unless such acts are wilfully or wantonly negligent. . . ." VERNON'S ANN. CIV. ST. art. 1:1 (1961).

Although only a doctor is licensed to practice medicine, no one can force him to practice, not even on behalf of a former patient who will die without treatment. The court expressly discarded arguments that a doctor, being licensed by the state, had no choice but to perform his licensed profession.³¹ In this case, which has been followed down to the present, the court honored freedom of contract above all other social values.

Doctors realize the inconsistency of their refusing to give medical assistance. The Hippocratic Oath³² enjoins physicians only from committing acts of wrongdoing, such as administering deadly drugs. It refrains from ordering affirmative action. It suggests activity on behalf of the sick and, certainly, on behalf of the patient who requests a physician's aid. Nevertheless, approximately 50 per cent of physicians polled in a survey³³ said they would refuse to help a victim at the scene of an emergency. They would be deterred by fear of malpractice suits, knowing that once they begin treatment they must carry it through to a reasonable conclusion.³⁴ As an incentive to aid, California enacted the first Good Samaritan law in 1959.³⁵ Its purpose was both to benefit accident victims in need of immediate medical assistance, and to shield physicians from liability. Most states have enacted similar legislation applicable mainly to medical practitioners.

Society has decided that, on the balance, immunizing physicians from liability because of their own wrongful conduct promotes humanitarianism although it is a kind of preferred class legislation. Society will benefit if along with immunity from liability the law receives widespread publication among the medical profession. The law should promote expert care. Whatever pro-

³¹ Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901). In this case the court said:

In obtaining the state's license [permission] to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark. *Id.* at 417, 59 N.E. at 1058.

³² The Hippocratic Oath in part states "the regime I adopt shall be for the benefit of my patients according to my ability and judgment, and not for their hurt or for any wrong." 15 ENCYCLOPAEDIA BRITANNICA, *History of Medicine and Surgery*, 94-95 (1968).

³³ Medical Tribune, Aug. 28, 1961, at 23.

³⁴ Mehigan v. Sheehan, 94 N.H. 274, 51 A.2d 632 (1947).

³⁵ "No [physician or surgeon] who in good faith renders emergency care at the scene of the 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, §2144 (West 1959).

Some statutes apply only to licensed physicians, some for limited kinds of aid, some protect in the event of negligence whereas others provide blanket immunity. Some others, of course, combine a number of those aspects. For a general discussion of Good Samaritan laws, see Comment, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301 (1964).

tection the law grants doctors will be outweighed in increased care of the injured. Indeed, a good argument can be made that a doctor, licensed as only he is to minister to the sick, and granted immunity from suit for his labors, has become a quasi-public agent, and could excuse himself from aiding another in an emergency only for the most extraordinary reasons. However, the courts are not presently willing to extend this argument, recently applied against a hospital,³⁶ to a physician.

Most continental European countries,³⁷ both Western and Eastern, have formally recognized the duty to rescue others in peril. The tendency in Europe is to praise and reward the volunteer, and to some extent like our Good Samaritan statutes protect him from loss because of his efforts. The concept of "*negotiorum gestio*," or being the manager of another's affairs, which is derived from Roman law and found throughout the civil law, has prompted this kind of legislation.³⁸

One example is found in France. The Vichy Government in 1941 enacted a statute obliging persons to intervene to prevent crime and rescue persons in peril. The killing of 50 hostages as a reprisal for the murder of a German officer produced this statute. Despite the law's origin, the French Government in 1945 revised and re-enacted the statute.³⁹ Under the French Code it is irrelevant whether *B*'s predicament arose through the fault of *A*, *B*, or *C*, or through no one's fault. In each case if *A*, a person who could aid without risk to self or others, knows of the danger, he is designated a rescuer. France does not differentiate between nonfeasance and misfeasance, the common lawyer's nice distinction between not doing and doing badly. When *A* can help *B*, provided *A*'s risk is minimal compared to *B*'s peril, not doing is equivalent to doing badly. Their law assumes a societal interdependence and finds a relationship, which decrees humanitarian service, from the simple fact that one human being is capable of helping another.

Mere inconvenience to the rescuer is not risk. *A* may have to run 50 feet down a railroad track and snatch a child from death even if this delays him from a pressing appointment. Where the common law stops short before that supposed chasm

³⁶ *Wilmington Gen. Hosp. v. Manlove*, 54 Del. 14, 174 A.2d 135 (1961).

³⁷ "Fifteen countries, all but one on the European continent, now recognize such a duty" to aid others in peril. *THE GOOD SAMARITAN AND THE LAW* 92 (Ratcliffe ed. 1966).

³⁸ For the European development and implementation of the concept of *negotiorum gestio* see Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817 & 1073 (1961).

³⁹ "[A]ny person who wilfully fails to render or to obtain assistance to an endangered person when such was possible without danger to himself or others, shall be subject to like punishments (imprisonment for 3 months to 5 years, and a fine of 300 to 15,000 francs)." FRENCH PENAL CODE of 1810, as amended 1959, art. 63 (trans. by Gerhard O. W. Mueller, 1960).

between omission and commission, France looks beyond the logical, the metaphysical, to the human being on the other side. Like other European countries, France considers the end rather than the means. Our focus is quite the opposite. France avoids the defense of nonfeasance by disregarding it, and holds that defendant's inaction, where action is desirable, is the legal cause of plaintiff's injuries.

American courts obviously are unhappy with the rule and have attempted to circumvent it. Only by finding a relation between victim and rescuer where some benefit, actual or potential, accrues to the latter have they been able to evade the defense of nonfeasance. Most Americans would be shocked to learn that one person has no duty to help another escape serious bodily injury or death; and that this is still true although the former undergoes no risk whatever. Indeed, most people think otherwise. When *A* sees *B*, the victim of a serious automobile accident, lying on a road but drives on, *A* does not relieve his conscience by recalling the law but rather by rationalizations such as "It's none of my business; I'm not a doctor; I might worsen the situation; maybe help is already on the way; I might be sued." This inner conflict signifies the moral obligation that most feel when confronted with an injured fellow human. The objection that imposing a legal duty to help is the enforcement of morals, and nothing else, is inaccurate. Law and morals are interdependent and affect each other. The prohibition against murder is not only the enforcement of morals. It is a manifestation of the community's shared attitude towards the sanctity of life.⁴⁰ A rule imposing a duty to aid would simply reflect the common ethic.

When courts depart from the rule their opinions, if analyzed, are not logical but moral and ethical. Some courts speak as though the defendant's duty springs out of mere knowledge of peril and a corresponding ability to help. They frequently couch their opinions in purely humanitarian terms, equating legality with morality. The reference to a relation between the parties, to an actual or potential benefit accruing to the defendant, is an afterthought by way of justification.⁴¹ But it is incongruous for

⁴⁰ "It should not be forgotten that a system of law which lags too far behind the universally received conceptions of abstract justice, in the end must lose the sympathy, the confidence, perhaps even the respect of the community." F. BOHLEN, *STUDIES IN THE LAW OF TORTS*, 342 (1926).

⁴¹ *Hunicke v. Meramec Quarry Co.*, 262 Mo. 560, 172 S.W. 43 (1914). In that case the court said:

[w]hen we get down to the real facts in all such cases, there is an unexpressed humane and natural understanding existing between them to the effect that, whenever any one in such a case is so injured that he cannot care for himself, then the employer will furnish him medical or surgical treatment, as the case may be. . . .

The same principle underlies all other avocations of life. Even arm-

the law to hold an incompetent humanitarian liable for the victim's aggravated injuries but acquit the indifferent third party who saw but walked away. In each instance the victim suffered the same injuries. Similarly, the law is inconsistent when it holds a teacher accountable for disregarding her drowning pupil, but absolves a stranger for the same action. Would it not be reasonable to say that the stranger, like the teacher, was also related to the imperiled pupil when he was aware of the child's danger? According to the Restatement, if *A* intentionally restrains *B*, an able bodied man, from helping *C* and thus frustrates rescue, *A* is liable to *C*.⁴² We can logically argue that when *A*, an able bodied man, restrains his better instincts and disregards *C*, then *A* just as surely prevents *C*'s rescue and is liable for *C*'s injuries. In both cases an able bodied man does not intervene, and *C* suffers the same harm.

It begs the question to say that a person has no duty to aid a stranger. No authority on high has immutably fixed the scope of duty. It shifts and readjusts to the exigencies and mores of the times.⁴³ Duty is often what a legislature or court says it is, and nothing more.⁴⁴ Legislatures, in response to changing times, have imposed duties where none previously existed. The duty of an employer to compensate his employee through workmen's compensation is a creature of statute. Similarly legislatures have required citizens to assist the police in capturing a felon.⁴⁵

ies while engaged in actual warfare observe and obey this rule when possible. The soldier who refuses to render surgical or medical aid to the victim of his own sword, is eschewed by all decent men; while upon the other hand, all who administer to the wants and necessities of the sick and wounded, are considered as God's noblemen and as princes among men. So universally true and deep-seated is this humane feeling among men, and so universally recognized and practiced among them, that it has become a world-wide rule of moral conduct among men, brothers, friends and foes; and it says to one and all, You must exercise all reasonable efforts and means at hand to alleviate the pain and suffering and save the lives and limbs of those who have been stricken in your presence.

Id. at 597-98, 172 S.W. at 54.

⁴² "One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving." RESTATEMENT (SECOND) OF TORTS §326 (1965).

⁴³ "The creation of the right of privacy, unprotected by earlier law, is the response of modern courts to morally outrageous conduct." Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699, 700 (1960).

⁴⁴ An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments.

Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851 (1963).

⁴⁵ NEB. REV. STAT. §28-728 (Reissue 1964):

Whoever, having been called upon by the sheriff or other ministerial officer, in any county in this state, to assist such officer or other officer

Courts have imposed strict liability on manufacturers of defective products introduced into the stream of commerce, and have thus enlarged manufacturers' duties as society grew more complex. There would be no prohibition against a court imposing a duty on all citizens to assist others in times of peril.⁴⁶

In response to the contention that this is enforced socialism, we might simply admit it. The law adjusts to meet the changing, reasonable needs of society. If individualism here runs counter to current needs, the individual must yield. Although the law cannot enforce morals and thus make men good, it can at least encourage and even compel them to do good for others. If the law remains indifferent to the problem, the law itself will discourage and deter civilized conduct.

III SUGGESTIONS FOR A NEW RULE

In 1908, Professor James Barr Ames advocated a rule that one who, with little inconvenience to himself, could save another from great bodily harm must do so. If he failed to act he should be criminally punished and made to compensate the injured.⁴⁷ More recently, in 1965, Professor Rudolph proposed a modification of Ames' rule. He suggested, *inter alia*, that the duty to aid arises when the risk to the rescuer is "disproportionately less" than the harm sought to be avoided, and when there is no other aid available.⁴⁸ Although basically correct, there are certain omissions that should be corrected before the rule is fair and workable.

A's duty to act for B's protection should arise only when the danger to B is that of death or serious bodily harm. Protection should not be extended to property. A new rule should be addressed only to the most pressing problem, the most flagrantly immoral.

Regarding the passerby's own danger in intervening, must he attempt to aid only if he would incur a moderate risk to prevent great harm? Or when his risk is merely proportionately less than the victim's harm? Or lastly, should the passerby be forced to intervene only when there is no personal peril whatsoever? The last alternative seems most feasible. A jury's

in apprehending any person charged with or convicted of any offense against any of the laws of this state, or in securing such offender when apprehended . . . neglects or refuses to render such assistance, shall be fined in any sum not exceeding fifty dollars. See generally Note, *The Private Person's Duty to Assist the Police in Arrest*, 13 WYO. L. J. 72 (1958).

⁴⁶ "There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform . . . such as saving a fellow creature's life." J. MILL, *ON LIBERTY*, 11 (A. Castell ed. 1947).

⁴⁷ See Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

⁴⁸ Rudolph, *The Duty To Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965).

balancing of defendant's risk vis-à-vis plaintiff's danger would be inappropriate to the evil we are trying to eradicate, *i.e.*, a belief and practice, unfortunately widespread, that "I am not — nor need I be — my brother's keeper." There is a clear cut problem and it can be met only by an equally clear standard. The strong should help the weak; thus help might be simply phoning a doctor, the police, or the spouse of the affected person, and could be rendered with no risk whatever. When the passerby, without risk to himself, can save another from serious injury or death, he must act. If he refuses, he should be condemned. Opponents of change in the law ask which person among fifty who watched the victim drown had the duty to aid? Are all liable for one man's death? The answer is straightforward and simple. Each is liable if he were unreasonable in failing to attempt a rescue. The inhumanity of forty-nine does not excuse that of the fiftieth.

The rescuer's standard of care, both in recognizing danger and assessing its gravity, should be that of the reasonable prudent man under the same or similar circumstances. The court should allow free and liberal inquiry into the defendant's mind. The defendant also should have the benefit of a strong presumption, incorporated in a jury instruction, that he acted with reasonable care, and plaintiff should have to overcome this by clear and convincing evidence, not by a mere preponderance. A's duty should arise not only when he knows of B's peril, but also when he should have known of it. Admittedly it would be unjust to convict A under a hit-and-run statute unless he had actual knowledge of the collision. But the gist of a civil action is failure to act carefully and A should be held liable for his constructive knowledge of B's peril.

Further, when a victim sues his rescuer the law should adopt new rules of damages. There is a distinction in fact between a person who acts not in accord with the required standard of care and the negligent Samaritan. This distinction in fact should be recognized at law. If damages are restricted to the victim's medical bills and lost wages, excluding amounts for pain and suffering, there would be added incentive for the passerby to stop and more than adequate protection when he does. We should discard the antiquated collateral source rule.⁴⁹ This would further limit the Good Samaritan's exposure. With these protections, a passerby would have little fear of a retaliatory lawsuit that could bankrupt him for his attempted kindness.

⁴⁹ "Compensation or indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance cannot be set up by the latter in mitigation or reduction of damages" 25 C.J.S. *Damages* §99 (1) (1966).

Another important consideration when constructing a rule that imposes a duty to aid is that of compensation for the rescuers' injuries. A general duty to aid would be a radical change in the law. For such an innovation the law should not only immunize the Good Samaritan to some degree, but it should also provide compensation in case of injury. The law cannot be indifferent in its attitude toward encouraging rescue. If the law imposes a duty to aid on a stranger but affords no means of compensating him, the law simultaneously orders and discourages rescue.

Who should pay? The person causing the danger, the person benefitted by the intervention, and the state, when all other pockets are empty, are possible sources of indemnification. Injured rescuers can now recover damages from either a third party tortfeasor⁵⁰ or from the victim who negligently created the risk which prompted the rescuer's action.⁵¹ But in the absence of proven negligence, the injured rescuer recovers from no one. The rescuer should be compensated for his injuries regardless of negligence. It would be fair to place this burden on the victim. Admittedly this is liability without fault, imposed because the victim was endangered. But such an imposition is worth the price. One who receives the benefit of rescue should pay for its procurement. However, if the victim must pay, it should be according to his means. The financial burden should not be so great that *B* would have preferred that *A* had not undertaken the rescue. The victim should be subject to liability for his rescuer's injuries only after payment from the third person tortfeasor who created the danger, the state under its compensatory programs, and other collateral sources of income such as private insurance. Some states now pay citizens for injuries they sustain in preventing crime.⁵² If the law concludes that *A* has a duty to rescue *B*, although no crime is involved, then society in turn ought to bear *A*'s losses, whether or not fault can be established and further whether his attempt succeeded or failed.

CONCLUSION

Tort obligations have usually arisen independent of contractual relations, *i.e.*, not because one voluntarily assumed a duty but because society decided he owed a duty, that it was

⁵⁰ *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921).

⁵¹ *Britt v. Mangum*, 261 N.C. 250, 134 S.E.2d 235 (1964).

⁵² Direct action on the part of private citizens in preventing the commission of crimes against the person or property of others, or in apprehending criminals, benefits the entire public. In recognition of the public purpose served, the state may indemnify such citizens in appropriate cases for any injury or damage they may sustain as a direct consequence of their meritorious action. CAL. PEN. CODE, §13600 (West 1965).

part of the price of living. When courts first determined that society's needs would best be served by evading the harsh results of the original rule they did so by inventing an exception where a beneficial relationship existed between the parties. This rationale has been overworked and cannot reasonably be used to create a universal duty to aid.

There is nothing sacrosanct in the notion of "relation." The law should strike off in a different direction and formally acknowledge the contemporary moral consensus that we are all necessarily interdependent and that each member of society has a duty to aid his brother in danger. When a person knows of danger, threatening another with serious injury or death, he must act to alleviate that peril when he can do so with no risk to himself. The courts perhaps feel that a duty to take affirmative steps cannot be sharply defined and consequently hesitate to draw any lines at all. However, courts constantly draw lines. This is their job. Further, no lines are indelible and if any change proves so radical as to be unworkable, the lines can be redrawn or erased.