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Moral Challenge to the Legal Doctrine of Rescue

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. . . a certain man . . . fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead. And by chance there came down a certain priest that way: And when he saw him, he passed by on the other side. And likewise a Levite . . . came and looked on him, and passed by on the other side. But a certain Samaritan . . . came where he was . . . and went to him, and bound up his wounds . . . and set him on his own beast and brought him to an inn . . . Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee . . .

St. Luke 10:30-35[1]

THE AGE-OLD DICHOTOMY between Anglo-American law and morality in one vital area of personal responsibility—the duty to aid one in dire peril—was revealingly demonstrated anew in the aftermath of the sordid Bronx events of March 13, 1964. At 3:25 A. M., in the fashionable Kew Gardens neighborhood, 28-year-old Catherine Genovese, while returning home from work, was accosted and stabbed. Her screams drove her assailant away but he returned minutes later and stabbed her again. Again she screamed for help and again he fled, only to return a second time to renew his attack. Repeatedly she called upon neighbors for help but although 38 acknowledged hearing her cries, none came to her aid and she died.[2]

The incident stunned the nation and provoked a spate of commentaries in the popular media,[3] including at least one dealing with legal questions related to rescue.[4] While the 38 wit-

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[1] As similarly quoted in Evans, Good Samaritan in Search and Rescue, 17 JAG 107 (1963).

[2] For the initial news report see The New York Herald Tribune, p. 10, March 14, 1964. Magistrate Bernard J. Dubin is quoted as saying: "I wonder how many lives could be saved in this city if people who ask for help were not ignored."

[3] Wainwright, The Dying Girl That No One Helped, Life, p. 21, April 10, 1964; Milgran and Hollander, The Murder They Heard, The Nation, p. 602, June 15, 1964; Gross, Who Cares, Look, p. 17, Sept. 8, 1964; Time, p. 21, June 26, 1964.

[4] Nizer, When Silence Is A Crime, McCalls, p. 95, October, 1964.

nesses were subject to that moral opprobrium of which the law so frequently speaks,[5] no one suggested that they bore any civil or criminal liability. Our legal code prescribes no general duty, other than moral, to come to the aid of another human being who is in danger,[6] even though the outcome is to cost him his life and even though no greater act is required of the putative rescuer, as in the Genovese situation, than phoning the police. This principle of law is so deeply established and solidly entrenched that there are no known reported cases directly controverting it.

Where an injured party has attempted to impose more than a moral responsibility on a would-be rescuer, the results were predictable. In one of the classic cases[7] an 8-year-old boy, a known trespasser, caught his arm in stationary machinery in a manufacturing plant. The question was whether the defendant company owed a duty to evict the boy promptly upon discovering him. The court found no such duty. To underscore its decision, the court conjured up an extreme hypothetical case where a landowner knowingly but silently watches a child climb into a garden and land on spikes. There would be no legal duty to give warning in such a case, declared the court, and no one had suggested that there should be such a duty.

In another case,[8] an employee of a laundry caught her hand in a mangle and her hand and wrist were crushed. A mechanic was on the scene and allowed her to remain so trapped for half an hour, in intense suffering. The court declared that no cause of action arose from the failure to perform an act of humanity since such failure involved no breach of duty imposed by law.

One case held that a physician was not under a duty to administer to his patient.[9] The physician gave no reason for refusing to respond to a call, there were no other doctors available and the patient died, but no liability attached to the doctor.

Some of the cases shock the judicial conscience but the same

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5 United States v. Knowles, 26 Fed. Cas. 800, No. 15, 540 (N. D. Cal. 1864); Kenney v. Hannibal and St. Joe R. R. Co., 70 Mo. 252 (1879); Buch v. Amory Mfg. Co., 69 N. H. 257, 44 A. 809 (1897).

6 Prosser, Torts, 336 (3rd ed., 1964).

7 Buch v. Amory Mfg. Co., *supra*, n. 5.

8 Allen v. Hixson, 111 Ga. 460, 36 S. E. 810 (1900).

9 Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058 (1901).

result obtains, nevertheless. In one such case,[10] a railroad worker, while removing ice and snow from the track, became exhausted. He informed his employer and asked for food, shelter and assistance in getting home. When this was refused, he crawled home on his hands and knees. His feet were so frozen that they had to be amputated. There was no liability for the railroad company.

In another well known case,[11] the decedent, a trespasser, had his arm and leg cut off by the car wheel of defendant's freight car. Defendant's employees failed to call a surgeon or to render him any assistance but permitted him to remain by the side of the tracks and bleed to death. In rejecting any legal duty owed by the railroad,[12] the court remarked, "With the humane side of the question, courts are not concerned." [13]

A criminal case involved a defendant who failed to aid his deathly ill paramour after a week-end orgy during which she consumed a large quantity of morphine.[14] His conviction for manslaughter was set aside when the court held that his omission to act did not make him legally responsible for the decedent's death.

Two especially shocking cases involved drownings. In one situation, the defendant let boats for hire.[15] Plaintiff's decedent rented a boat and it overturned. The drowning victim cried out for help for 30 minutes but the defendant, who heard the yells, ignored him. Judgment was for the defendant—there was no duty to aid.

In a more recent case, *Yania v. Bian*,[16] the drowning victim was a business invitee on defendant's land. It was alleged that the defendant had enticed him to jump into water that was eight to ten feet deep and that after he had jumped, the defendant failed to help extricate him. The Pennsylvania Supreme Court ruled that no cause of action had been shown since the defend-

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[10] King v. Interstate Consol. St. R. Co., 23 R. I. 583, 51 A. 301 (1902).

[11] Union Pac. Ry. Co. v. Cappier, 66 Kan. 649, 72 P. 281 (1903). The case is discussed in 69 L. R. A. 533.

[12] See 3 Elliot on Railroads, #1265 i: (2d ed., 1907). "The railroad company is under no legal obligation to take charge of the wounded man, however strong a moral obligation may be."

[13] Union Pac. Ry. Co. v. Cappier, 66 Kan. 649, 72 P. 281, 282 (1903).

[14] People v. Beardsley, 150 Mich. 206, 113 N. W. 1128 (1907).

[15] Osterland v. Hill, 263 Mass. 73, 160 N. E. 301 (1928).

[16] 397 Pa. 316, 155 A. 2d 343 (1959).

ant was not charged with pushing his guest into the water and since the defendant had no legal, but only a moral, obligation and duty to prevent the drowning.[17]

These cases have two features in common: (1) The conduct of the defendants is violative of elemental community moral standards, a fact which the courts duly note; (2) The defendants, having violated no legal duty to act, are absolved of legal liability.

The genesis of the doctrine that one owes no duty to aid another in distress runs deep in the common law. Historically it has been explained as representing a distinction between misfeasance, where the defendant has created a new risk of harm for the plaintiff, and nonfeasance, where the defendant has not aggravated the situation.[18] It has also been urged that since the early common law was substantially occupied with overt acts of misconduct there was a natural neglect of cases involving an omission to act.[19]

Through the decades certain modifications and exceptions of a judicial and statutory nature have circumscribed the basic doctrine. The most important of these lies in the area of employer-employee relationships with the enactment of the Federal Employers Liability Act and state Workman Compensation Laws, complemented by non-statutory duties imposed on employers.[20] Where there is a marital relationship, a duty to aid one's spouse has been found.[21] Laws requiring parents to care for and protect their children have been enacted,[22] giving legislative form to a pre-existing common law duty.[23] Hit and run

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[17] The case is discussed in Seavey, I Am Not My Guest's Keeper, 13 Vand. L. Rev. 699 (1960).

[18] Bohlen, The Basis of Affirmative Obligations in The Law of Torts (pts. 1-3), 53 U. Pa. L. Rev. 209, 273, 337 (1905); Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. Pa. L. Rev., 217, 219 (1908); Studies in The Law of Torts 33 (1926).

[19] Prosser, Torts, 183 (2d ed., 1955).

[20] Anderson v. Atchison, T. & S. F. Ry., 333 U. S. 821 (1948); Carey v. Davis, 190 Iowa 720, 180 N. W. 889 (1921); Szabo v. Pennsylvania R. R., 132 N. J. L. 331, 40 A. 2d 562 (1945); Harris v. Pennsylvania R. R., 50 F. 2d 866 (4th Cir. 1931). Salla v. Hellman, 7 F. 2d 953 (S. D. Cal. 1925); Restatement (Second), Agency, #512 (1958).

[21] Territory v. Manton, 8 Mont. 95, 19 P. 387 (1888).

[22] N. Y. Penal Law #482, 483; Children and Young Persons Act, 1933, 23 Geo. V, C. 12, #1.

[23] Regina v. Conde, 10 Cox C. C. 547 (N. P. 1867); Regina v. Bubb & Hook, 4 Cox C. C. 455 (N. P. 1850); Rex v. Gibbons & Proctor, 13 Cr. App. R. 134

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statutes require the driver of a car who has hit another—whether through negligence or not—to come to the aid of the injured party.[24] Where contractual obligations exist, a duty to protect and rescue has been found.[25] Where the plaintiff is a patron[26] or a passenger of the defendant[27] and is in a position of peril, a duty to provide aid has been imposed. The existence of affirmative duties a landowner owes in respect to invitees, licensees and trespassers has become established law.[28] Of course where the defendant has negligently caused the plaintiff's predicament, there is a clear duty to aid so that the injury is not aggravated.[29]

Thus where there relationships involving contract, consensus, causation, commercial enterprise, employment or family, can be found, doors have been opened for the imposition of an affirmative duty to aid. Where defendants have been made liable for their failure to act, the rule of law is that the duty

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(1918); People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903); Stehr v. State, 92 Neb. 755, 139 N. W. 676 (1913); Rex v. Russell, Vict. L. R. 59 (1933); See Note on Recent Cases, 47 Harv. L. Rev. 531 (1934).

[24] *E.g.*, Ala. Code (1941) tit. 36 #31; Deering's Calif. Vehicle Code (1948) #482; Tex. Penal Code (1925) art. 1150; Va. Code Ann. (1950) tit. 46, #46-189. For cases interpreting hit and run statutes, see State v. Ray, 229 N. C. 40, 47 S. E. 2d 494 (1948); Summers v. Dominguez, 29 Cal. App. 308, 84 P. 2d 237 (1938); Brunfield v. Wofford, 102 S. E. 2d 103 (W. Va. 1958); Brooks v. E. J. Willig Truck Transportation Co., 40 Cal. 2d 669, 255 P. 2d 802 (1953). Annot. 80 A. L. R. 2d 305 and 69 L. R. A. 513-533, 534; Restatement, Torts, 2nd Vol., Section 322, comment d, p. 870; see also Boyer v. Gulf, Colorado and Santa Fe Railway Company, 306 S. W. 2d 215, 80 A. L. R. 2d 287 (Tex. Civ. App. 1957) where a Texas court rejects the theory that where a party by coming in contact with another, has been injured, such other party, upon discovering the injured person in a helpless condition, owes him a duty to render assistance, even though the injury was not due to any negligence of the other party.

[25] 65 C. J. S., Negligence #3, p. 344; Waters v. Anthony, 252 Ala. 244, 40 So. 2d 316 (1949); Franklin v. May Department Stores, 25 F. Supp. 735 (E. D. Miss. 1938); Landreth v. Phillips Petroleum Co., 74 F. Supp. 801 (W. D. Mo. 1947).

[26] Larkin v. Saltair Beach Co., 30 Utah 86, 83 P. 686 (1905). $10,000 for failure to properly aid an injured store patron. Devlin v. Safeway Stores, Inc., 235 F. Supp. 882 (D. C., N. Y., 1965).

[27] Yazoo & M. V. R. R. v. Bryd, 89 Miss. 308, 42 So. 286 (1906).

[28] Prosser, Torts, 358-425 (3rd ed. 1964); Brandywine Hundred Realty Co. v. Cotillo, 55 F. 2d 231 (3d Cir. 1931); Smith, Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor, 17 Col. L. Rev. 383 (1917); Restatement, Torts, # 332, 337, 339; McNiece and Thornton, Affirmative Duties In Tort, 58 Yale L. R. 1272 (1949); Parsons v. Drake, 347 Pa. 247, 32 A. 2d 27 (1943).

[29] Prosser, Torts 338 (with cases cited) (3rd ed. 1964).

neglected must have been a legal duty arising out of the relationship of the parties and not a mere moral obligation.[30] But where no special relationship exists between the parties, where they are strangers—or even neighbors—the old common law rule negating a legal duty to aid one in peril still prevails.[31]

Protection for the Rescuer

What protection does the law offer the rescuer who, motivated by a humanitarian impulse, seeks to render aid to another in distress or in imminent peril and thereby risks injury to himself? Under the rescue doctrine, the Samaritan is excluded from the general rule of assumption of risk. Thus, the Samaritan who is aware of a danger and fails to exercise ordinary care to avoid injury is not guilty of contributory negligence and is not precluded recovery from the person whose negligence was responsible for the peril.[32] If the rescuer is injured or killed while risking his life to save another, recovery from the original tortfeasor will not be denied unless the rescuer has acted rashly or recklessly.[33]

The justification for this doctrine rests upon the principle that it is commendable and meritorious to save life and that moral and humanitarian considerations require a greater latitude of conduct for the rescuer.[34] The law has so high a regard for human life, say the courts,[35] that it will not impute negligence in an effort to preserve it unless made under such circumstances as to constitute rashness.

The rescue doctrine attempts to fuse certain fundamental moral values with the law. But in doing so it lays bare the

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[30] Bishop's Crim. Law Vol. 1, #217, Vol. 2 #695 (6th ed.); 21 Am. & E. Enc. Law 99 (2d ed.); State v. Noakes, 70 Vt. 247, 40 A. 249 (1897); Wharton's Crim. Law 1011 (7th ed.); Clark & M., Crimes 931 (6th ed. 1958).

[31] But see Depue v. Flateau, 100 Minn. 299, 111 N. W. 1 (1907) where a court found a host liable for failure to aid an ill invitee by expanding the existing doctrine applicable to the relationship. The case is discussed in 120 A. L. R. 1529.

[32] 38 Am. Jur., Negligence # 228, p. 912 ff.

[33] Annot. 19 A. L. R. 5; 65 C. J. S. Negligence #124, p. 738; Restatement, Torts, Vol. 2, Negligence, #472, p. 1241 ff; 38 Am. Jur. Negligence #228, p. 912 ff.

[34] 38 Am. Jur. Negligence #228, p. 912 ff.

[35] Great Northern R. Co. v. Harman, 217 F. 959 (CCA 9, 1914); Corbin v. Philadelphia, 195 Pa. 461, 45 A. 1070 (1900); Jobst v. Butler Well Servicing, 190 Kan. 86, 372 P. 2d 55 (1962); Eckert v. Long Island R. Co., 43 N. Y. 502 (1871).

fundamental contradiction which permeates the law as applied to rescue situations. If humanitarian considerations are germane in sustaining the rescue doctrine in respect to the rights of rescuers, then why are the same considerations irrelevant in respect to the DUTY to rescue? [36] If the law has so high a regard for human life as to exonerate a non-reckless but negligent rescuer from contributory negligence, how justify the refusal to impose a general duty upon one to aid another in peril, at least in those situations where the would-be rescuer would not be incurring any serious risk to himself?

The rescue doctrine does provide the rescuer with an enlarged sphere within which he may attempt his rescue without forfeiting his right to recover for injuries he may suffer. While the cases on the subject are legion,[37] one example at least is indicative of the possible sweep of the doctrine's application. In *Brock v. Peabody Cooperative Equity Exchange*,[38] an 11-year-old boy wandered into defendant's warehouse which had recently been sprayed with deadly cyanide gas. When his mother was informed, she rushed to the building, climbed an attached ladder, fell inside and died from the gas fumes. In a wrongful death action, the Kansas Supreme Court, in reversing, quoted the following stirring words:

> The instincts of a mother, when she sees her child in distress, will lead her to rush headlong to its rescue, without stopping to count the cost or measure the risk which she is incurring; and to say that an act to which her affection irresistably impelled her should be charged against her as something imprudent and unnecessary would be to shock a sentiment which is as universal as mankind. The law is not the creature of cold-blooded, merciless logic, and its inherent justice and humanity will never for a moment permit the act of a mother in saving her offspring, no matter how desperate it may have been, to be imputed to her as negligence, or at any time or in any manner used to her detriment.[39]

The *Brock* case stands at one pole of the rescue spectrum. The decision in the case was obviously the expression of a court

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[36] Union Pac. Ry. Co. v. Cappier, *supra*, n. 13.

[37] For a list of citations see 38 Am. Jur. p. 912, n. 3.

[38] 186 Kan. 657, 352 P. 2d 37 (1960).

[39] Walters v. Denver Consolidated Electric Light Co., 12 Colo. App. 145, 54 P. 960, 962 (1898).

profoundly moved by a mother's tragic plight. The rescue doctrine provided the necessary legal tool to defeat the attempt to attribute contributory negligence to her conduct.

To conclude from this, however, that the rescuer is suitably protected by the law would be unwarranted. For the fact is, as will hereafter be shown, the path of the rescuer is strewn with numerous obstacles and caveats, and neither the scope of the existing rules nor their implementation can offer him any real assurance should he require legal relief.

Caveat: Recklessness

An initial question concerns the rescuer's rashness and recklessness. Under the rescue doctrine the rescuer may be acting in an entirely selfless manner; he may be motivated by the highest humanitarian considerations; he may be risking his life to protect another whom he might not even know—yet, if he crosses that legal boundary which separates rational and reasonable conduct from reckless and rash conduct, he may be denied recovery for his injuries.[40] And a court may hold that any antecedent negligence of the defendant has been effectively removed as a critical factor from the case.[41]

In *French v. Trace*,[42] the rescuer, a truck driver, came upon an overturned car with one of its riders pinned beneath. He placed his shoulder under the hood of the car and, with the assistance of three others, succeeded in raising the car and freeing the man. The rescuer soon after developed a bursitis condition in the shoulder and brought his action against the driver of the overturned automobile. While there was some conflict in the evidence, the truck driver testified that the trapped man was bleeding, his leg badly scraped, and that he was screaming for help. He further stated that the car's engine was smoking, battery acid was leaking and there was the smell of gasoline. The trial court instructed the jury to disregard the defense of contributory negligence and verdict was for the plaintiff. The Washington Supreme Court reversed, declaring the instruction was erroneous and questioning whether "the extreme physical exertion" employed by the rescuer was really necessary.

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[40] *Supra,* n. 33.

[41] *Infra,* n. 42, 43 and 44.

[42] 48 Wash. 2d 235, 297 P. 2d 235 (1956).

In *Chattanooga Light and Power Co. v. Hodges*,[43] an engineer made the ultimate sacrifice in attempting to give the alarm when a fire broke out in his place of employment. He was burned to death when he returned to the building in an effort to reach a phone. An action by his administrator resulted in verdict and judgment for plaintiff. The Supreme Court of Tennessee reversed, holding that his action, however heroic, was one of extreme rashness.

In *Elliot v. Pennsylvania Transport Co.*,[44] a fire broke out and the plaintiff became apprehensive that there might be a collision between an approaching trolley car and a fire truck. Though without authorization to assume the function of a traffic officer, he went out on the car track and signalled the trolley car to stop so that the fire truck could pass. The trolley was 400 feet away, the motorman saw the plaintiff and there was ample opportunity to stop in time had the motorman been so disposed. However, he kept coming, and the trolley struck the plaintiff. The jury and an appellate court found for the plaintiff, but a divided Pennsylvania Supreme Court reversed, holding that plaintiff's reckless conduct in remaining on the tracks barred his recovery.

In contrast to the *Brock* case, these three jury decisions for the plaintiff-rescuer based on a recital of the facts were subsequently reversed on the ground that there was, or might have been, rash and reckless conduct which precluded recovery. These cases illustrate the lack of explicit legal guide lines for the rescuer. Conduct which to him or the jury seems necessary and reasonable in an emergency may not be so regarded by a reviewing court.

Caveat: Timing

The cases suggest a further problem area for the rescuer. He must properly time his rescue efforts. If he is a premature rescuer and acts before the danger has fully materialized or if he is a tardy rescuer and acts after the danger has passed, he may find himself beyond the pale of the rescue doctrine.

The former was the situation in *Cooper v. Teter*.[45] Following an automobile accident, plaintiff's decedent came out on the

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[43] 109 Tenn. 331, 70 S. W. 616 (1902).

[44] 356 Pa. 643, 53 A. 2d 81 (1947).

[45] 123 W. Va. 372, 15 S. E. 2d 152 (1941).

highway waving his hands to give warning to approaching drivers. He was struck down and killed. The court held that the would-be rescuer was not exempt from the law of contributory negligence or the assumption of risk and that these defenses could be interposed to defeat a wrongful death action. The application of the rescue doctrine was denied on the basis of a distinction between the act of giving a warning and the act of attempting a rescue.[46]

Other cases illustrate the plight of the tardy rescuer. A truck driver in *Jobst v. Butler Well Servicing*[47] came upon an overturned car at night. He pulled his truck over to the side of the road, leaving the lights on but failing to set flares, and went to give aid. He found one victim of the accident bleeding profusely. While the truck driver was engrossed in rendering assistance, the plaintiff's car plowed into the truck. The action was against the truck driver. The court refused to permit the application of the rescue doctrine by way of defense, holding that there was no rescue here, that the initial accident had already occurred and the truck driver was "merely" engaged in rendering aid and assistance to persons already injured.[48]

If, then, the intervening party acts before an accident in an effort to avert it, he is held not to be rescuing but merely giving warning; if he acts after the accident in an effort to save the victim, he is held not to be rescuing but merely rendering aid and assistance. In neither case is he afforded the protection of the rescue doctrine.

Caveat: Knowledge

Another tightrope the rescuer may be compelled to walk relates to his knowledge of the circumstances involved in the rescue. Paradoxical though it may seem, he may find his legal cause frustrated if he knows too little—or too much.

In *Hawkins v. Palmer*,[49] the rescuer, while driving his auto-

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[46] For cases involving volunteers standing in the road to warn motorists of approaching peril, see Annot., 53 A. L. R. 2d 1003.

[47] 190 Kan. 86, 372 P. 2d 55 (1962).

[48] The facts in the case suggest an interesting question: If the negligence of the rescuer were held excusable under the rescue doctrine, could that negligence, nonetheless, be imputable to the wrongdoer responsible for the initial car accident? For cases holding that the rescue of a rescuer is foreseeable, see Richards v. Kansas Elec. Power Co., 126 Kan. 521, 268 P. 847 (1928); Brown v. Ross, 345 Mich. 54, 75 N. W. 2d 68 (1956).

[49] 29 Wash. 2d 570, 188 P. 2d 121 (1947).

mobile, discovered a man and his wife lying injured from a motorcycle crash. He drove to a nearby city and requested police to send an ambulance. He returned to the scene of the accident and was assisting the ambulance attendants in placing the injured motorcyclists on stretchers when he was hit by an automobile which sideswiped the ambulance. His action against the defendant, the owner of the ambulance allegedly negligently parked, was dismissed. The court held that the plaintiff's knowledge of the dangerous condition of the highway created by the ambulance driver's alleged negligence equalled that of the ambulance driver. Since he knew or should have known of the danger, the rescuer had voluntarily assumed the risk.

While the case involved other issues—the timing of the ambulance driver's negligence in relation to the rescue and the question of the proximate cause of the initial accident—the court's emphasis on the rescuer's knowledge indicates, all assurances to the contrary notwithstanding, that a rescuer may be held to assume the risk even when his conduct is not deemed to be rash or reckless.

Caveat: Imminence of Danger

The rescuer's lack of knowledge, while it may prove disastrous in a personal sense, may also prove fatal in a legal sense. In order to justify his risking his life or incurring serious injury in rescuing another person from danger, the danger threatened to the latter must be imminent and real and not merely imaginary or speculative.[50] If the rescuer predicates his action on what appears in his judgment to be a perilous, emergency situation, he may, nonetheless, find himself without legal recourse if his judgment proves fallible.

Such was the situation in *Wilson v. New York, N. H. & H. R. Co.*[51] A railroad brakeman became concerned about the safety of children who were holding onto and running alongside a freight train. His shouts failed to drive them away and he descended a ladder and waved his hands at them. In so doing he was pushed from the train by a fence post near the track and

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[50] 38 Am. Jur., Negligence #228, p. 913; Devine v. Pflaelzer, 277 Ill. 255, 155 N. E. 126 (1917); Tyler v. Barrick, 178 Iowa 985, 160 N. W. 273 (1916); Eversole v. Wabash, 249 Mo. 523, 155 S. W. 419 (1913); Wright v. Atlantic Coast Line R. Co., 110 Va. 670, 66 S. E. 848 (1910); 65 C. J. S., Negligence #124, p. 738; Annot. 19 A. L. R. 11.

[51] 29 R. I. 146, 69 A. 364 (1908).

was killed. The jury in a wrongful death action found the defendant negligent in maintaining the fence post and verdict was for the plaintiff. The Supreme Court of Rhode Island reversed, holding there was no such imminent danger to the children as to justify the brakeman's action. The court considered his estimate of the danger so far removed from the actuality as to prevent recovery.

Caveat: Foreseeability

Can a rescuer be denied recovery if his rescue effort was not foreseeable by the original tortfeasor? The vast majority of American courts will not bar the rescuer on this basis, holding, with Cardozo,[52] that even if the wrongdoer may not have anticipated a rescue attempt, he is accountable as if he had. Nevertheless, it cannot be said that the issue of foreseeability is entirely and everywhere excluded.

In the controversial *Saylor v. Parson*[53] case, the rescuer was a workman who jumped from a position of safety to prevent a brick wall from falling on his employer. The court, in rejecting the workman's claim for damages for injuries suffered, ruled that no negligence by the employer had been shown. In discussing the question of foreseeability, the court noted that since rescue efforts are relatively rare, they should not be considered anticipatory.[54] The *Saylor* case remains good law in some jurisdictions and was a principal authority for one 1964 decision.[55]

Even when the rescuer has prevailed, the question of foreseeability may be prominent in the court's thinking. In *Talbert v. Talbert*,[56] a man, injured while frustrating his father's suicide attempt, was permitted to bring an action. However the court greatly emphasized that since the father knew that the son was in the immediate vicinity, the rescue effort was foreseeable. Professor Bohlen's rule on the subject of rescue and

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[52] "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had." Cardozo, C.J., in Wagner v. International R. C., 232 N. Y. 176, 133 N. E. 423 (1921).

[53] 122 Iowa 679, 98 N. W. 500 (1904).

[54] *Id.* at p. 502.

[55] Betz v. Glaser, 375 S. W. 2d 611 (Mo. App. 1964).

[56] 22 Misc. 2d 782, 199 N. Y. S. 2d 212 (1960).

suicide also emphasizes foreseeability as a prerequisite for an injured rescuer's recovery.[57]

Caveat: The Rescuer's Negligence

If the rescuer's negligence has been the proximate cause of the perilous situation, recovery for the rescuer's injuries is excluded.[58] This rule, where properly applied, can hardly evoke objection; where improperly applied, it may provide another formula for defeating an injured rescuer's legitimate efforts to obtain relief.

In *DeMahy v. Morgan Louisiana & T. Railroad & Steamship Co.*,[59] a two-year-old girl was thrown from a train as the result of a sudden jolt. The mother, a passenger, jumped from the train, reached her arm under the car and saved the child. In the process, the mother's arm was badly crushed. A verdict against the railroad company was reversed by the Louisiana Supreme Court. The court said that it was not called upon to decide the question of the defendant's negligence since the mother's negligence in not watching the child was the proximate cause of her injury. The court's reasoning is strained. It seems to be holding that once the child wandered away, whatever harm might subsequently befall her was necessarily the mother's responsibility. The fact that the child might not have been thrown from the train—thus obviating the mother's rescue —if the railroad had properly performed its duty in protecting its passengers was missed by the court.

Caveat: The Rescued As Defendant

May the party rescued be liable for the rescuer's injuries if his negligence was the proximate cause of his plight? No such suggestion is contained in the rescue doctrine but the question has been under examination by the courts.

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[57] "The rescuer's right of action, therefore, must rest upon the view that one imperils another, *at a place where there may be bystanders*, must take into account the chance that some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue . . . a person . . . who attempts to take his life in a place *where others may be expected to be*, does commit a wrongful act towards them in that it exposes them to a recognizable risk of injury." (Emphasis added), Bohlen, Studies in the Law of Torts, p. 569 (1926).

[58] Restatement, Torts, #472, note p. 1242; 38 Am. Jur. Negligence #229, p. 914; 65 C. J. S. Negligence #124, p. 738.

[59] 45 La. Ann. 1329, 14 So. 61 (1893).

In *Betz v. Glaser*,[60] the rescuer sustained serious injuries when he fell from a ladder while engaged in cutting a limb from a tree on defendant's property. As he would cut the branches, the defendant, ignoring his warnings, would run under the tree, pick them up and carry them away. As one branch was about to fall, he saw her under the tree. He released his hold on the ladder, grabbed the branch and fell. A jury found for the plaintiff but a judgment n.o.v. for defendant was sustained. The court's theory of the rescue doctrine was that it could be applied only when there was actionable negligence by a third party. Missouri courts do not permit the rescuer to recover from the party rescued.

There are cases to the contrary. Injured rescuers have been permitted to recover from motorists who were freed from beneath cars.[61] A guest who helped save his host from fire and then sued him for injuries suffered was held to have stated a cause of action.[62] But the cases are too few to reach definitive conclusions and to erase this further element of uncertainty which confronts the rescuer.

Caveat: No Negligence

In the absence of proven negligence, the rescuer has no recourse for his injuries.[63] On this basic rule, there is unanimity. The injured rescuer, while his act may represent the highest of heroics, may, nevertheless, never be indemnified, even though he may have avoided every legal pitfall in respect to his own conduct. To determine his rights, the injured rescuer will have to investigate. Since his cause of action is strictly derivative, he will have to probe into the background of the event to ascertain who or what brought it about. He will have to prove that the third party was negligent toward the rescued party in order to establish a sufficient case in his own behalf.

By way of illustration, the rescuer in *Neal v. Home Builders*,[64] was a mother, who went to her death when she rushed to save her child, who was trapped on a stepladder in a semi-com-

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[60] 375 S. W. 2d 611 (Mo. App. 1964).

[61] Britt v. Mangum, 261 N. C. 250, 134 S. E. 2d 235 (1964); Brugh v. Bigelow, 310 Mich. 74, 16 N. W. 2d 668 (1944).

[62] Clayton v. Blair, 117 N. W. 2d 879 (Iowa 1962).

[63] *Supra*, n. 58.

[64] 232 Ind. 160, 111 N. E. 2d 280, 111 N. E. 2d 713 (1953).

pleted building. In an action for wrongful death, the plaintiff tried to show that the defendant-builder was maintaining an attractive nuisance. A divided court rejected the plea. It held there was no attractive nuisance and hence no violation of any legal duty owed the child. If there was no violation of a duty owed the child, there could be no violation of a duty owed the child's rescuer. The rescue doctrine was ruled inapposite and the plaintiff's case failed.

Summary of the Problem

In summary then, if the rescuer has not acted in a rash or reckless manner; if he has timed his rescue so that he is neither too early nor too late; if he does not know too much so that he has assumed the risk or too little so that his estimate of the risk was faulty; if the danger threatened was imminent and real and not imagined or speculative; if his rescue was foreseeable either in law or in fact; if his action did not proximately cause the perilous situation; if the defendant was not the person he rescued, or if he is in a jurisdiction where this is not a bar; if there is a tortfeasor whose negligence was the proximate cause of the peril—then the rescuer may have legal recourse in the event of injury. Such is the rescuer's legal situation.

As a practical matter, the rescuer in the moment of crisis is probably oblivious to what he would otherwise regard as esoteric legal formulae.[65] He perceives a person in peril and—because he is part of a special breed of humanity—he intervenes to help. Often he does so at a tremendous personal sacrifice. It is only in the aftermath of the rescue where the rescuer has been injured or where he otherwise finds himself a party to a legal action that problems may arise. If he seeks compensation for an injury, he may find that his conduct, however heroic and well-intentioned, has violated one or another legal norm. Or, conceivably, he will discover that while his conduct was impeccable, he may still not recover since he cannot prove actionable negligence by another. Thus he may be left solely to the magnanimity of the person he saved.

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65 ". . . when one sees his fellow man in such peril, he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptings of a generous nature and extend help which the occasion requires." Norris v. Atlantic Coast Line R. R., 152 N. C. 505, 67 S. E. 1017, 1021 (1910).

The Good Samaritan Laws

Since the preservation and protection of human life is or should be a major social objective, it ineluctably follows that those who voluntarily and altrustically act to implement this objective deserve a better fate than they frequently receive. During the past five years, laws have been enacted in 28 states[66] designed to improve the legal position of the rescuer. Commonly known as the Good Samaritan Statutes, these laws liberalize the standard of care required of the rescuer and protect him from law suits brought by persons aided.[67] By allaying the fear of liability for those administering help, it is theorized that the Good Samaritan laws will furnish additional incentives for the putative rescuer to act.

Yet the limitations of the Good Samaritan laws are patent. They reach only gratuitous rescuers, eschewing altogether the imposition of a general duty to aid another in peril. They do not purport to deal with the problem of the rescuer's injuries. Fully two-thirds of the laws protect doctors and nurses exclusively,[68] and they, rather than the ordinary rescuer or person in distress, are the intended beneficiaries. Since there are no reported cases dealing with a physician's malpractice in rendering emergency care or treatment outside of his office or hospital,[69] the laws represent basically a form of insurance for the medical profession. While much has been written on the subject,[70] there is no solid, convincing evidence that a dedicated physician will avoid tendering to one in distress in the absence of a Good Samaritan law, or that a physician who is not so dedicated will extend such aid as the result of the enactment of such legislation.

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[66] Alaska, Ark., Calif., Conn., Ga., Ind., Md., Mass., Mich., Miss., Mont., Neb., Nev., N. H., N. J., N. M., N. D., Ohio, Okla., Pa., R. I., S. D., Tenn., Tex., Utah, Va., Wis., Wyo.

[67] Introductory Statement, N. J. Stat. Ann. 2A:62A-1, 2A:62A-2 (Supp. 1963).

[68] Shannon, Good Samaritan Statutes—Adrenalin for the "Good Samaritan," 13 De Paul L. Rev. 297, 299 (1964).

[69] 50 Calif. L. Rev. 816 (1963); Letter dated Aug. 26, 1963, from Hon. Otto Kerner, Governor, State of Illinois, addressed to Secretary of State, vetoing House Bill No. 1489 (proposed Illinois Good Samaritan bill, passed by House and Senate).

[70] Kearney, Why Doctors Are "Bad" Samaritans, Readers Digest, p. 87, May, 1963; Medical Tribune, p. 23, Aug. 28, 1961; Notes, 75 Harv. L. Rev. 641 (1962); 51 Cal. L. Rev. 816 (1963); Howell, Statutes—Torts—Negligence —Good Samaritan Not Liable for Negligent Emergency Care Unless Willfully or Wantonly Negligent, 40 Tex. L. Rev. 909 (1962).

Starting Point: The Duty to Aid

If relief for the rescuer is warranted and is to be found, the search must proceed in a different direction. The logical starting point leads directly to a re-examination of the whole concept of duty as applied to rescue.

As indicated, from the earliest days of the common law, no general duty has been imposed upon one individual to come to the aid of another who is in danger.[71] Despite the fact that this doctrine has long been subject to sharp attack by the most distinguished legal authorities[72]—and all the exceptions to it notwithstanding—it continues to reign supreme with a virtually unblemished tenacity. The legal ratiocinations sustaining it invite analysis.

Where the subject has been specifically discussed,[73] these arguments have been advanced:

1. The circumstances giving rise to a duty of aid are difficult to delineate and recognize.
2. Of several witnesses to the peril of another—who would be liable for the failure to give aid if possible?
3. The law should not attempt to enforce unselfishness.
4. It is a form of slavery to make one man serve another. It runs counter to our Anglo-American individualistic tradition.

The first of these objections involves the problem of delimiting the rescue area. Concern is expressed, for example, for the surgeon who is miles away and receives an emergency call. Under what circumstance would the law require him to respond? What distance is reasonable? One, two, or five miles?

In reply, it should be parenthetically noted that the law of

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[71] *Supra,* n. 6 through 16.

[72] Bentham, Specimen of a Penal Code, in 1 Bentham's Works 164 (Bowring's ed. 1843); An Introduction to the Principles of Morals and Legislation 322-23 (1823); Theory of Legislation (Hildreth's Transl. 1931); Livingston, Code of Crimes and Punishment in II Complete Works 126-27 (1873); Bruce, Humanity and the Law, 73 Cent. L. J. 335 (1911); Bohlen, Studies in the Law of Torts, 342 (1926); Cardozo, Paradoxes of Legal Science, 25-26; Pound, Law and Morals, 67-68 (2d ed. 1926); Prosser, Torts, 336-37 (3rd ed. 1964); Ames, Law and Morals, 22 Harv. L. Rev. 97 (1908); Warner, Duty of a Railroad to Care for a Person Rendered Helpless, 7 Cal. L. Rev. 312 (1919).

[73] Macauley's Speeches and Poems; Reports and Notes on the Indian Penal Code pp. 404-408 (1837); Gregory, Gratuitous Undertakings and the Duty of Care, 1 De Paul L. Rev. 35 (1951).

torts is permeated with the problem of drawing lines.[74] Were every doctrine confronted with such a problem to be withdrawn, our legal system would be in shambles. In the present instance, the Italian law provides what is probably the most intelligible boundary: *presence*.[75] The rescuer must be in the vicinity and must see or hear before liability attaches.

The second objection is usually illustrated by the following hypothetical: If fifty men, all capable swimmers, see a child drowning and none acts to save the child, which of the fifty shall be liable? This presents no insuperable problem—all fifty would be liable.

The third objection involves a choice of values. Selfishness need not be clothed with a sacrosanct legal robe in the name of preserving freedom. All law involves a weighing and balancing of interests and if "enforcing unselfishness" means to affirm, for example, this duty on the expert swimmer to rescue the drowning child, who shall argue the swimmer's right to look the other way?

The fourth objection is clearly the crux of the entire controversy. It is the same objection that is invariably voiced in opposition to proposals for progressive change in the socio-political sphere. It is the voice of the past seeking to maintain the present and making its claim on the future. Individualism in the law as elsewhere is made a fetish and the right to ignore a fellow human being's plight is considered inviolate.

The affirmation of a duty to aid one in peril is neither slavery nor the negation of a healthy individualism. Rather it is the recognition that man is a social animal, that our modern society is interdependent and that the days of unrestricted individualism are behind us. The argument for the new doctrine is rooted in the conviction that a truly civilized society cannot abide a situation where one man turns his back and lets another die when by a safe and simple act he could have saved his life. Its advocacy is grounded on the axiom that the common law is not static; that its traditions are constantly enriched and refurbished by the experience of life. As Dean Prosser has remarked, in a very vague general way, the law of torts reflects current

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[74] See the classic case, Palsgraf v. Long Island Railroad Co., 248 N. Y. 331, 162 N. E. 99 (1928).

[75] Article 593 of the Penal Code.

ideas of morality and when such ideas have changed, the law has kept pace with them.[76]

Legislation

A few countries have elevated the moral obligation to aid another in distress into a legal responsibility. The Dutch Penal Code provides:

> One who, witnessing the danger of death with which another is suddenly threatened, neglects to give or furnish him such assistance as he can give or procure without reasonable fear of danger to himself, is to be punished, if the death of the person in distress follows, by a detention of three months at most and an amende of three hundred florins at most.[77]

France had a similar statute during the Vichy period. Upon liberation, a broader law was enacted abrogating as a condition of liability the requirement that the perilous situation actually result in serious bodily injury or death.[78] Under Soviet law, the duty to aid one in peril is imposed in particular instances; the provision attaching a general duty,[79] however, smacks somewhat of the contract concept.[80] Italian law is primarily concerned with abandoned or misplaced children under 10 years of age or a person incapable of providing for himself because of sickness of mind or body or old age. Failure to inform the authorities promptly upon discovery of such individuals may lead to imprisonment or fine.[81] The following rule has been suggested for the United States:

> One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death.[82]

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[76] Prosser, Torts, 16 (3rd ed., 1964).

[77] Article 450 of the Penal Code. This provision was enacted in 1881.

[78] Article 63 of the Penal Code.

[79] Article 156 of the Penal Code.

[80] For a discussion of the French and Soviet laws, see Comp. Law-Note, 52 Col. L. Rev. 631 (1952).

[81] Article 593 of the Penal Code. The Italian law is discussed in Nizer, When Silence Is A Crime, *supra*, n. 4.

[82] Ames, Law and Morals, 22 Harv. L. Rev. 113 (1908).

These laws and proposals impose no insufferable burdens. They are not designed to subject the rescuer to an unreasonable risk but are restricted to situations where he may safely act and avert serious injury or death to another. They are neither impractical nor utopian—the Dutch law has been in operation for more than ¾ of a century. They intrude upon no known fundamental right and they violate no known basic freedom. They are necessary precisely because the alternative, the total reliance on the volunteer rescuer, has proven so inadequate. The *Genovese* incident, and others like it,[83] offer ample confirmation.

A legislative enactment affirming a duty to aid another in peril, while patently not a panacea, would at least place the stamp of law on a duty which the courts uniformly recognize as owing, albeit in the moral sphere. New guide lines would be created in promoting a higher form of human conduct geared to making America a community of genuine neighbors.

Aid to the Rescuer—Conclusion

Irrespective of the existence or non-existence of a legal duty to assist another in a crisis situation, the law today does not deal generously with the voluntary or gratuitous rescuer. Since he frequently risks life and limb in an altrustic act, the standard of conduct by which his actions are calibrated should differ qualitatively and not quantitatively from standards imposed in the non-rescue situation. That this is not the case is attested by the remarks of one court which referred to the "so-called rescue doctrine" as not affecting the ordinary standard of care other than applying it to a situation where an attempt is being made to save human life.[84]

While the argument for giving increased legal aid to the rescuer would seem merited in any case, the case for it would be ineffably strengthened if made within the context of an affirmative duty to aid. The reason for this is self-evident: So

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[83] See for example the Associated Press story of January 18, 1965, describing the drowning of a man in Norfolk, Virginia, while 30 to 40 persons watched but refused to help. The one man who attempted a rescue is quoted as saying: "I just keep thinking about those three little kids left without a daddy. It busted me up. I can't see how those people could stand and watch a man die without trying to help him." Cleveland Plain Dealer, p. 5, January 18, 1965.

[84] Henjun v. Bok, 261 Minn. 74, 110 N. W. 2d 461, 463 (1961).

long as the rescuer is a gratuitous agent who has voluntarily chosen to intervene when he is not required to do so, he runs the risk of being tagged a meddler,[85] particularly if his well-intentioned efforts eventuate in disaster. If on the other hand, there exists a compulsion to act, then the rescuer has the right to demand of the law a greater beneficence in its judgment of his conduct. Where his act involves personal risk—though the law does not require him to assume that risk—he may at least argue that he has acted in the spirit of the law, transcending its minimal imperatives to achieve its stated objective: the protection and preservation of human life.

How then may the rescuer be aided? First, by excusing acts and omissions made in good faith and thus narrowing the permissive application of contributory negligence. The rescuer who applies his sinew to lift a car and free the man trapped beneath, is excused from the judgment that this act was extreme since it was executed in good faith. So, too, is the rescuer, who descends to his death while trying to wave off children, exonerated for his alleged recklessness since he demonstrably acted in good faith. The good faith criterion, so common to the Good Samaritan statutes, should be incorporated into the rescue doctrine and given a general application.

Secondly, some of the legal barriers erected to prevent the injured rescuer from obtaining recompense should be expunged from the law. Where the rescued party is negligent, he should be explicitly included as a proper defendant; questions involving timing of the rescue and knowledge of the rescuer should be resolved in the rescuer's favor so long as he has acted in good faith. Rescue should be made unequivocally foreseeable as a matter of law. The rescuer's responsibility for creating the perilous situation should be measured against the defendant's prior or subsequent negligence and where close questions involving intervening cause arise they should be decided for the rescuer.

Third, where the rescuer is injured in the scope of his rescue and where neither negligence nor magnanimity is present, he should as a matter of right be entitled to the assistance of public agencies. While the laudatory comments of the press may be salutary, the more mundane need of the injured rescuer may

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[85] Note the tenor of the court's remarks in Elliot v. Pennsylvania Transport Co., *supra*, n. 44.

be competent medical attention with the expense socially absorbed.

Conclusion

When law and morality travel divergent roads, one of three conclusions appears irresistible:

(1) either the moral principle, while susceptible to universal acceptance, lacks tangibility and definiteness, precluding its translation into law—no one yet has suggested enacting the Golden Rule;

(2) or, a standard of conduct, while acceptable as a moral guide, is objectionable as a law—a proposal to outlaw prevarication would not be well received;

(3) or, the law, for historic or socio-political reasons, lags behind the moral principle, awaiting a confluence of pressures and events to create the necessary consensus and unification. Here lies the rescue problem.

If change is to come, from which source may the first initiative be anticipated? The likelihood is in the civil side of the law and by way of judicial pronouncement. The common law in the rescue area is not so ossified as to seal its frontiers to the boldness of a pioneering court. The court in the *Yania* case[86] had a propitious opportunity to break new ground by imposing liability for failure to rescue an invitee, but it declined to do so. Another court may choose a different tack.

Wherever people live or work or play or travel, unpredictable events will trigger crises into the lives of unsuspecting persons. The Levites on the scene will shake their heads, shrug, and pass to the other side; the Samaritans will roll up their sleeves and move quickly to the rescue; and the law, its doctrine under challenge, will be standing in the wings, waiting for the summons to find justice.

[86] *Supra*, n. 16.