

I AM MY BROTHER'S KEEPER: A TREND TOWARDS IMPOSING A GENERAL DUTY UPON A BYSTANDER TO ASSIST A PERSON IN DANGER

Since the early 1900's, legal scholars have argued that an individual should have a legal duty to save another individual from bodily harm if he can do so without inconvenience to himself.¹ This scholarly rule arose in reaction to the countless situations in our country where victims of accidents or sudden medical problems were left unattended by bystanders.² Despite the continued occurrence of such shocking incidents,³ our legal system has not yet prescribed any general legal duty to aid a person in danger.⁴ In this country only a moral duty to help another in distress exists.⁵ Recently, however, it appears that what has been recognized as merely a moral duty to help someone in a perilous situation may become a legal duty. A trend toward imposing a general duty upon the mere bystander to assist a person in danger has been gaining momentum. For example, Minnesota recently passed legislation requiring a bystander to render reasonable assistance during an emergency to anyone exposed to or suffering from grave physical harm.⁶ Rhode Island has enacted a statute requiring any person who has witnessed a rape to report that incident to the police.⁷ Similarly, Massachusetts recently passed legislation which requires any person who has witnessed a crime to report that crime to the police.⁸ In California, the Fifth District Court of Appeals recently modified the common law rule

¹ Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908) [hereinafter cited as Ames]; Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, (pts. 1-2), 56 U. PA. L. REV. 217, 316, 334-35 (1908) [hereinafter cited as Bohlen, pt. 1 and Bohlen, pt.2].

² See Ames, *supra* note 1 at 112; see, e.g., Allen v. Hixson, 111 Ga. 460, 463-64, 36 S.E. 810, 813 (1900) (employer not liable for failure to remove hand of employee from mangle); Hurley v. Eddingfield, 156 Ind. 416, 417, 59 N.E. 1058 (1901) (doctor not liable for refusal to aid sick person, although doctor knew that he was the only one available and that person's condition was serious).

³ In the Kew Gardens Section of New York City in 1964, 38 bystanders looked on while Catherine Genovese was attacked and beaten to death. N.Y. Times, March 27, 1964, at 1, col. 4. A year later, a seventeen year old boy was stabbed on a Brooklyn subway after coming to the rescue of some schoolgirls. N.Y. Times, March 14, 1965, at 1, col. 2. Even though the assailants had left the subway car, eleven other passengers failed to help or notify the authorities. *Id.* The boy bled to death. *Id.* In July 1983, a thirteen year old girl who wandered into a park area in St. Louis where other children were playing, was raped by two youths. N.Y. Times, July 30, 1983, at 5, col. 6. In spite of the girl's screams, several people stood by without helping. *Id.* An eleven year old boy who was passing by summoned the police. *Id.*

⁴ See, e.g., 57 AM. JUR. 2d *Negligence* § 41, at 389 (1971) (duties that are dictated merely by good morals, or by humane considerations, not within the domain of the law); see also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 56 at 338-43 (4th ed. 1971) [hereinafter cited as PROSSER].

⁵ As the New Hampshire Supreme Court in *Buch v. Amory Mfg. Co.* aptly noted:

Suppose A, standing close by a railroad, sees a two-year-old baby on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.

Buch v. Amory Mfg. Co., 69 N.H. 257, 260, 44 A. 809, 810 (1898).

⁶ MINN. STAT. ANN. § 604.05 (West Supp. 1983). See *infra* notes 177-84 and accompanying text.

⁷ 1983 R.I. Pub. Laws ch. 268 §§ 11-37.3.1-3.3. See *infra* notes 186-87 and accompanying text.

⁸ MASS. GEN. LAWS ANN. ch. 268, § 40 (West Supp. 1985). See *infra* notes 188-91 and accompanying text.

that a bystander owes no duty to a person in danger.⁹ In *Soldano v. O'Daniels*,¹⁰ the court held that a business establishment has a legal duty to let bystanders use its telephone in an emergency.¹¹ These legislative and judicial developments indicate that this country may at last be close to recognizing explicitly a legal duty to help someone in a perilous situation.

In the United States, the common law rule is that an individual has no duty to aid someone in a dangerous situation.¹² As one court expressed it, "under the law, a man need not act as a [G]ood Samaritan."¹³ The common law rule of no duty is partially based upon the individualistic philosophy of the early common law which regarded the individual as competent to protect himself without the help of others.¹⁴ Courts, however, have never been satisfied with the common law rule that no general duty to assist a person in danger exists.¹⁵ As a result, courts have developed exceptions which justify the imposition of a legal duty to render aid.¹⁶ For example, where a special relationship exists between the person endangered and the potential rescuer, courts will find a duty to render aid.¹⁷ In the absence of such a relationship, however, courts refuse to enforce what has been perceived as a moral duty to assist someone in danger.¹⁸ This moral duty to help someone in danger is the law in many European countries today.¹⁹ France, a country whose economic and social system is similar to that of the United States, has a law imposing a general duty to assist a person in a perilous situation.²⁰

This note will begin by examining briefly the history of the common law rule that no general duty to assist a person in danger exists, and the reasons why courts continue to adhere to this rule.²¹ Next, the note will discuss the major exception to the general rule which courts have created to justify the imposition of a legal duty to aid.²² The major exception to the common law rule is found where a special relationship between the parties creates a duty to act. The third section of the note will examine developments in

⁹ *Soldano v. O'Daniels*, 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983).

¹⁰ 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983).

¹¹ *Id.* at 453, 190 Cal. Rptr. at 317.

¹² See PROSSER, *supra* note 4, § 56 at 340. See also *infra* notes 27-75 and accompanying text.

¹³ *Davis and Shaw Furniture Co. v. Underwriter's Salvage Co.* of N.Y., 96 F. Supp. 963, 966 (D. Colo. 1951), *aff'd*, 198 F.2d 450 (10th Cir. 1952).

The concept of the "Good Samaritan" was developed from the biblical parable told by Jesus. According to the parable, a Jewish man on his way from Jerusalem to Jericho was robbed and beaten by thieves. The man was left half-dead by the side of the road. As the man lay bleeding by the side of the road, several people, including a priest and a Levite, passed by and saw the man but refused to help him. Then along came a man from Samaria. The Samaritan saw the wounded man, had compassion on him, proceeded to bind up his wounds, and took the injured man to an inn so that his wounds could be treated properly. *Luke* 10:30-37.

¹⁴ See Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946) [hereinafter cited as Hale].

¹⁵ See *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260-61, 44 A. 809, 810 (1878).

¹⁶ See *infra* note 78.

¹⁷ See PROSSER, *supra* note 4, § 56 at 340-43. See also *infra* notes 77-121 and accompanying text.

¹⁸ See Comment, *The Duty to Rescue*, 28 U. PITT. L. REV. 60, 63-64 (1966) [hereinafter cited as Comment, *The Duty to Rescue*].

¹⁹ These countries include Belgium, Czechoslovakia, Denmark, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Rumania, Russia, Switzerland, and Turkey. See generally Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW*, 91 (J. Ratcliffe ed., 1966) [hereinafter cited as Rudzinski].

²⁰ See *infra* notes 249-83 and accompanying text for a discussion of French rescue law.

²¹ See *infra* text accompanying notes 27-75.

²² See *infra* text accompanying notes 77-121.

both statutory and common law which indicate a trend toward imposing a general duty to rescue.²³ To show that imposing a legal duty to aid another in danger is a viable concept, this note will discuss comparative French law on rescue. In contrast to the United States, France has a law which imposes a general duty on its citizens to assist a person in a perilous situation.²⁴ Finally, this note will suggest that given the current trend in the United States toward imposing a duty to assist, a rule of law imposing a general duty to rescue is not only inevitable, but also desirable and workable.²⁵ The final section will propose a Model Act which state legislatures could adopt in formulating and implementing a rule of law imposing a general duty to assist persons in a dangerous situation.²⁶ This Act reflects the current trend in American law by incorporating many of the terms of the recent legislative and judicial developments into a duty to rescue.

I. ORIGIN AND REASONS FOR RULE IMPOSING NO DUTY TO AID

Courts have historically been unwilling to interfere in situations where an individual, who did not create the danger, failed to assist another in peril regardless of whether the potential victim was subsequently harmed as a result of this omission.²⁷ Very early in the law a distinction arose between misfeasance and nonfeasance.²⁸ Misfeasance is defined as active misconduct working a positive injury to others.²⁹ Nonfeasance is a passive inaction — failure to take positive steps to benefit others or to protect them from harm.³⁰ This judicial distinction is based on the belief that by "misfeasance" an individual has created a new risk of harm to the potential victim.³¹ By nonfeasance, however, an individual has left the potential victim in the same position — he has not created a new injurious situation for which he should be held responsible.³² Rather, the individual has simply failed to bestow a benefit on the potential victim. This distinction has led to the general rule that an individual has no duty to aid another in danger if he did not create the perilous situation.³³

The results of this general rule have often been rather shocking.³⁴ For example, in

²³ See *infra* text accompanying notes 122-248.

²⁴ See *infra* text accompanying notes 249-83.

²⁵ See *infra* text accompanying notes 285-311.

²⁶ See *infra* text accompanying notes 312-43; See also Appendix *infra*.

²⁷ See Ames, *supra* note 1, at 111-13; McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1283 (1949) [hereinafter cited as McNiece & Thornton].

²⁸ See Bohlen pt. 1, *supra* note 1, at 219-20. Bohlen thus notes:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action [sic], a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

Id. at 219.

²⁹ *Id.* at 220.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 220-21.

³³ See PROSSER, *supra* note 4, § 56, at 340. Courts, therefore, have imposed tort liability on acts of misfeasance rather than on those of nonfeasance. See Note, *The Bad Samaritan: Rescue Reexamined*, 54 GEO. L.J. 629, 630-31 (1966) [hereinafter cited as Note, *The Bad Samaritan*].

³⁴ See *Allen v. Hixson*, 111 Ga. 460, 463-64, 36 S.E. 810, 813 (1900) (employer not liable for failure to remove hand of employee from mangle); *Ficken v. Southern Cotton Oil Co.*, 40 Ga. App. 841, 151 S.E. 688, 689 (1930) (no legal duty to aid employee after fall); *Hurley v. Eddingfield*, 156

Union Pacific Ry. v. Cappier,³⁵ the decedent, a trespasser, had his arm and leg cut off by the car wheel of the defendant's freight car.³⁶ The defendant's employees failed to call a surgeon or to render him any assistance.³⁷ As a result, the decedent was left on the side of the tracks where he bled to death.³⁸ In refusing to find that the railroad employees had any legal duty to assist, the court stated that, "[w]ith the humane side of the question, courts are not concerned."³⁹ Similarly, in *Osterlind v. Hill*,⁴⁰ the plaintiff's decedent rented a boat from the defendant boat owner.⁴¹ Once in the lake, the boat overturned and the decedent cried out for help for half an hour before drowning.⁴² The defendant, who heard the cries, did nothing to help the decedent,⁴³ but the Supreme Judicial Court of Massachusetts did not find the defendant guilty of any tort or crime.⁴⁴ The court stated that the defendant's failure to respond to the cries for help after the boat overturned was not an infringement on any of the deceased's legal rights.⁴⁵ In the more recent case of *Yania v. Bigan*,⁴⁶ the Pennsylvania Supreme Court held that a landowner has no legal duty to prevent a visitor from drowning.⁴⁷ In that case, the drowning victim was a business invitee on the defendant's land.⁴⁸ The plaintiff alleged that the defendant had enticed the decedent to jump into water that was eight to ten feet deep and that after he had jumped, the defendant failed to help extricate him.⁴⁹ According to the court, no cause of action existed because the defendant was not charged with pushing his guest into the water.⁵⁰ The court stated that although the defendant may have had a moral duty to prevent the drowning, he had no legal obligation to do so.⁵¹

Ind. 416, 417, 59 N.E. 1058 (1901) (doctor not liable for refusal to aid sick person, although doctor knew that he was the only one available and that person's condition was serious); *Union Pacific Ry. v. Cappier*, 66 Kan. 649, 654-55, 72 P. 281, 283 (1903) (railroad not liable for failure to care for person hit by train); *Osterlind v. Hill*, 263 Mass. 73, 76, 160 N.E. 301, 302 (1928) (no liability for renting canoe and then refusing to rescue person who capsizes the canoe); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260-61, 44 A. 809, 811 (1898) (no duty to prevent child-trespasser from being injured by defendant's factory machinery); *Plutner v. Silver Associates, Inc.*, 186 Misc. 1025, 1027, 61 N.Y.S.2d 594, 595 (1st D. Munic. Ct., N.Y. 1946) (owner of premises had no legal duty to provide medical attention to patron who became ill); *Riley v. Gulf, C. & S.F. Ry.*, 160 S.W. 595, 597 (Tex. Civ. App. 1913) (railroad not liable for negligent care of boy whose foot had been injured by train, since negligent employees were outside scope of employment in rendering aid); See also RESTATEMENT (SECOND), TORTS § 314 (1965) [hereinafter cited as RESTATEMENT]. Section 314 reads as follows: "§ 314. Duty to Act for Protection of Others. 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." *Id.*

³⁵ 66 Kan. 649, 72 P. 281 (1903).

³⁶ *Id.* at 650, 72 P. at 281.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 653, 72 P. at 282.

⁴⁰ 263 Mass. 73, 160 N.E. 301 (1928).

⁴¹ *Id.* at 74, 160 N.E. at 301.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 76, 160 N.E. at 302.

⁴⁵ *Id.*

⁴⁶ *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959). This case is discussed in Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960) [hereinafter cited as Seavey].

⁴⁷ *Yania*, 397 Pa. at 322, 155 A.2d at 346.

⁴⁸ *Id.* at 320, 155 A.2d at 345.

⁴⁹ *Id.* at 318-19, 155 A.2d at 344-45.

⁵⁰ *Id.* at 321-22, 155 A.2d at 346.

⁵¹ *Id.* at 322, 323, 155 A.2d at 346. For recent cases holding that bystander has no duty to warn

In all of these cases, the courts refused to impose legal sanctions upon a bystander where he was not responsible for creating the original perilous situation. Courts have refused to enforce what was perceived as a purely moral obligation, reasoning that the anticipated spiritual suffering of the bystander would be sufficient sanction.⁵²

Judicial reluctance to require people to help their neighbors is based upon a recognition of several underlying policies and certain perceived practical difficulties involved in using a different rule. First among these policies is the spirit of independence and individualism inherent in the common law.⁵³ The common law has traditionally regarded the individual as competent to protect himself without the help of others.⁵⁴ Moreover, scholars have been concerned that the imposition of a general duty to aid would be a serious restraint on individual freedom and autonomy.⁵⁵ Indeed, one scholar has suggested that if the government can legitimately require one person to act for the benefit of another, "it becomes impossible to tell where liberty ends and obligation begins."⁵⁶

Furthermore, courts have a conceptual problem in imposing tort liability where no definite relationship exists between the parties.⁵⁷ In any negligence action, a court must determine that one party owes a legal duty to another,⁵⁸ otherwise an individual is not liable for an act which harms another.⁵⁹ In determining whether a legal duty does in fact exist, courts will look primarily to the nature of the parties' relationship.⁶⁰ Courts have

of impending danger, see *Mangeris v. Gordon*, 94 Nev. 400, 403, 580 P.2d 481, 483 (1978) (defendant had no legal duty to warn decedent that third party was dangerous fugitive); *Sidwell v. McVay*, 282 P.2d 756, 759 (Okla. Ct. App. 1955) (man observing his neighbor's child hammering explosives has no duty to warn the child of the danger); *Cramer v. Mengerhausen*, 275 Or. 223, 227, 550 P.2d 740, 743 (1976) (owner of pickup truck had no duty to warn a mechanic working underneath vehicle that truck was about to slip off jack); *Abalos v. Oil Dev. Co. of Texas*, 526 S.W.2d 604, 608 (Tex. Civ. App. 1975) (although bystander could warn employee of danger of entanglement in machinery, there was no legal duty to do so). For a case holding that rescuer need not alleviate dangerous condition to prevent harm to an unknown potential victim, see *Handiboe v. McCarthey*, 114 Ga. App. 541, 542-43, 151 S.E.2d 905, 907 (1966) (property owner has no duty to secure swimming pool to prevent child-invitee from entering and drowning in pool).

⁵² See *Union Pacific Ry. v. Capper*, 66 Kan. 649, 653, 72 P. 281, 282 (1903).

⁵³ See *Hale*, *supra* note 14, at 214; *McNiece & Thornton*, *supra* note 27, at 1288.

⁵⁴ *Id.* See *Bohlen* pt. 1, *supra* note 1 at 221. See also *Hope*, *Officiousness*, 15 CORNELL L.Q. 25, 29 (1929). Commenting on the spirit inherent in English jurisprudence, Professor Hope states: Self direction or personal autonomy is a mark of the English race. The Englishman, as opposed to one of the 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. *Id.*

⁵⁵ See *Minor*, *The Moral Obligation as a Basis of Liability*, 9 VA. L. REV. 420, 422 (1923); *McNiece & Thornton*, *supra* note 27, at 1288.

⁵⁶ *Epstein*, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 199 (1973).

⁵⁷ See *PROSSER*, *supra* note 4, § 56 at 338-43.

⁵⁸ See *Spurlin v. General Motors Corp.*, 528 F.2d 612, 615 (5th Cir. 1976); *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 45-46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975); *Cuppy v. Bunch*, 88 S.D. 22, 25, 29, 214 N.W.2d 786, 788 (1974); *Maxted v. Pac. Car & Foundry Co.*, 527 P.2d 832, 835 (Wyo. 1974); see also *RESTATEMENT*, *supra* note 34, at § 328B.

⁵⁹ See *PROSSER*, *supra* note 4, § 37 at 206.

⁶⁰ As Justice Cardozo pointed out in *Palsgraf v. Long Island R.R.*: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension . . . Negligence, like risk, is thus a term of relation." *Palsgraf v. Long Island R. R.*, 248 N.Y. 339, 344-45, 162 N.E. 99, 100-01 (1928). Having established a sufficient relationship between the parties, the courts then consider a second factor, whether the harm was foreseeable. See *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 93, 40 N.E.2d 334, 337 (1942). See also *RESTATEMENT*, *supra* note 34, § 328B.

usually found the relationship between a victim and a mere bystander insufficient to impose on the bystander a legal duty to act.⁶¹

In addition, the common law rule of no duty reflects the bystander's understandable hesitancy to undertake a rescue.⁶² Not only does the bystander risk injuring himself if he does undertake a rescue, but also he may find himself involved in a lawsuit if his well-intentioned efforts aggravate the victim's injury.⁶³ At common law, once an individual undertakes to aid another, even though he is under no duty to do so, he must conform to a standard of reasonable care to avoid liability for his actions.⁶⁴

Finally, and perhaps most importantly, the common law rule of no duty owes its survival to the belief that imposing an alternative rule would be difficult.⁶⁵ This belief is based upon a variety of problems in fixing liability on potential rescuers, such as: who among a crowd of potential rescuers should be legally obligated to assist;⁶⁶ how much risk to himself a bystander must incur;⁶⁷ what degree of care the bystander must exercise;⁶⁸ and whether a rescuer should be compensated for injuries he sustains as a result of his efforts.⁶⁹ The common law was not able to formulate a rule that would overcome these

⁶¹ See *supra* notes 27-52.

⁶² See Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 242 (1971) [hereinafter cited as Linden].

⁶³ *Id.*

⁶⁴ See *Glanzer v. Shepard*, 233 N.Y. 236, 237, 135 N.E. 275, 276 (1922). The *Glanzer* court noted: "it is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." See also RESTATEMENT, *supra* note 34, § 324; *Slater v. Illinois Central R.R.*, 209 F. 480, 483 (M.D. Tenn. 1911); *Black v. New York, N.H. & H.R. Co.*, 193 Mass. 448, 451, 79 N.E. 797, 798 (1907); *Smith v. Twin State Improvement Corp.*, 116 Vt. 569, 570-71, 80 A.2d 664, 665 (1951). If the rescuer is injured in his rescue attempt, he can recover damages from the third party tortfeasor. *Wagner v. International Ry.*, 232 N.Y. 176, 180, 133 N.E. 437 (1921). In *Wagner*, Justice Cardozo stated:

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 efforts within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.

Id. A rescuer can also recover damages from a victim who negligently creates the risk that prompts the rescuer's action. See *Brugh v. Bigelow*, 310 Mich. 74, 80-81, 16 N.W.2d 668, 671 (1944); *Britt v. Mangum*, 261 N.C. 250, 255-56, 134 S.E.2d 235, 239 (1964); *But see Butler v. New Jersey Coast News Co.*, 109 N.J.L. 255, 257-58, 160 A. 659, 660-61 (Ct. Err. & App. 1932).

⁶⁵ See *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5; 131 Cal. Rptr. 14, 23 n.5 (1976). The common-law rule is "[m]orally questionable [and] owes its survival to the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue" *Id.* (quoting PROSSER, *supra* note 4, § 56, at 341); see also Ames, *supra* note 1, at 112, McNiece & Thornton, *supra* note 27, at 1289.

⁶⁶ See PROSSER, *supra* note 4, § 56 at 341. Professor Weinrib, however, has offered the following solution for the problem:

Even if there are many possible rescuers, the difficulties are no less surmountable than are those in cases of negligence involving many tortfeasors. Though potentially more complicated on average, the rules could be the same: the victim has a right to only one recovery, and all tortfeasors are liable to the victim, but they are entitled to contribution among themselves.

Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 262 (1980) [hereinafter cited as Weinrib].

⁶⁷ Scheid, *Affirmative Duty to Act in Emergency Situations — The Return of the Good Samaritan*, 3 J. MAR. J. PRAC. & PROC. 1, 4 (1969) [hereinafter cited as Scheid].

⁶⁸ *Id.*

⁶⁹ *Id.* at 4-5.

perceived problems with establishing a legal duty to help someone in a dangerous situation.⁷⁰

Thus, the individualistic philosophy of the common law, the absence of a definite relationship between the parties, the bystander's risk of liability and the difficulty in formulating and administering a new rule are factors which have contributed to a judicial and legislative resistance to impose a general duty on bystanders to assist someone in danger.⁷¹ Nevertheless, commentators have sharply criticized this judicial and legislative resistance to change the common law rule that no duty exists to help someone in danger,⁷² contending that the rule is morally questionable⁷³ and outmoded.⁷⁴ Perhaps in response to such criticism, recent developments in both the common law and statutory law indicate a relaxing of the stringent judicial and legislative stance and a trend toward imposing a general duty to rescue.⁷⁵ An indication that the judiciary was moving in the direction of encouraging rescue was the creation of exceptions to the common law rule of no duty.⁷⁶

II. EXCEPTIONS TO THE COMMON LAW RULE

Despite the judiciary's consistent refusal to impose on bystanders a general duty to aid persons in danger, courts have never been completely satisfied with the common law rule of no duty.⁷⁷ One indication of dissatisfaction with the application of the general rule is evidenced by the judicial development of exceptions which justify imposing a legal duty to render aid.⁷⁸ The major exception⁷⁹ to the general rule that no cause of action is

⁷⁰ See *id.*

⁷¹ See Linden, *supra* note 62, at 242.

⁷² See generally, Ames, *supra* note 1; Bohlen, *supra* note 1; D'Amato, *The "Bad Samaritan" Paradigm*, 70 Nw. U.L. REV. 798 (1975) [hereinafter cited as D'Amato]; Edgar, *The Bystander's Duty and the Law of Torts - An Alternative Proposal*, 8 ST. MARY'S L.J. 302 (1976); Linden, *supra* note 62; McNiece & Thornton, *supra* note 27; Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965); Scheid, *supra* note 67; Seavy, *supra* note 46; Weinrib, *supra* note 66; Note, *The Bad Samaritan*, *supra* note 33; Note, *The Duty to Aid One in Peril in Good Samaritan Laws*, 15 HOW. L.J. 672 (1969) [hereinafter cited as Note, *The Duty to Aid*].

⁷³ See PROSSER, *supra* note 4, at 341.

⁷⁴ See Note, *Stalking the Good Samaritan: Communists, Capitalists & The Duty to Rescue*, 1976 UTAH L. REV. 529, 542 (1976).

⁷⁵ See *infra* notes 122-248 and accompanying text.

⁷⁶ See Linden, *supra* note 62, at 242.

⁷⁷ Even judges who have dismissed claims by victims against non-rescuers have indicated the moral revulsion with which they regard the defendant's inaction. See *Union Pacific Ry. v. Cappier*, 66 Kan. 649, 653, 72 P. 281, 282-83 (1903); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260-61, 44 A. 809, 810 (1878). For a detailed discussion of *Union Pacific Ry. v. Cappier*, see *supra* notes 35-39 and accompanying text.

⁷⁸ See, e.g., *Maldonado v. Southern Pac. Transp. Co.*, 129 Ariz. 165, 169, 629 P.2d 1001, 1005 (1981) (defendant has a duty to assist person injured by instrumentality under defendant's control); *Hardy v. Brooks*, 103 Ga. App. 124, 127, 118 S.E.2d 492, 495 (1961) (persons who non-negligently create dangerous condition on highway are under a duty to take reasonable precautions against injury to persons using the highway); *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 95, 40 N.E.2d 334, 337 (1942) (defendant has a duty to assist person injured by instrumentality under defendant's control); *Tubbs v. Argus*, 140 Ind. App. 695, 699-700, 225 N.E.2d 841, 843 (1967) (same); *Pridgen v. Boston Housing Auth.*, 364 Mass. 606, 609-10, 308 N.E.2d 467, 476 (1974) (special relationship between parties may give rise to a legal duty); *Zylka v. Leikvoll*, 274 Minn. 435, 447, 144 N.W.2d 358, 367 (1966) (persons who non-negligently create dangerous condition on highway are under a legal duty to take reasonable precautions against injury to those using the highway); *Simonsen v. Thorin*, 120 Neb. 684, 687, 234 N.W. 628, 629 (1931) (same); *Parrish v. Atlantic Coast Line R.R.*, 221 N.C. 292,

available for nonfeasance is where a special relationship exists between the parties.⁸⁰ Where it can be shown that a definite special relationship exists between the parties "of such a character that social policy justifies the imposition of a duty to act,"⁸¹ the courts have imposed a duty to act affirmatively.⁸² One example of such a relationship prompting a duty to aid is that of an employer and his employee.⁸³ In *Szabo v. Pennsylvania R.R.*,⁸⁴ the decedent employee suffered a heat stroke while working.⁸⁵ The employer ordered two of the employee's co-workers to take him home.⁸⁶ The co-workers did so, but subsequently left the decedent in the house alone.⁸⁷ The Court of Errors and Appeals stated that enough evidence was presented to raise a jury question of whether the employer had exercised due care in aiding the employee.⁸⁸ The court declared that when an employee becomes ill during the course of his work, "dictates of humanity" require that an employer provide the necessary medical assistance.⁸⁹ Another example of a relationship imposing a duty to act affirmatively for the protection of others is that of a common carrier and its passengers.⁹⁰ In *Yazoo, M.V. Ry. v. Byrd*,⁹¹ a passenger, through no fault of the railroad, fell from a train.⁹² The railroad employees left him lying near the tracks for more than three hours.⁹³ The railroad was held liable for failure to fulfill its duty to provide proper attention after an accident.⁹⁴ The court declared that "railroads owe to their passengers the consideration and care of common humanity."⁹⁵

Courts, therefore, have imposed a legal duty on an employer to come to the aid of his injured employee in an emergency, and of a carrier to come to the aid of its passengers. The existence of a special relationship between the parties was crucial to the courts' finding that there was a duty to act.⁹⁶ In the absence of a special relationship between the

300, 20 S.E.2d 299, 305 (1942) (tortfeasors have a duty to aid those injured by their conduct); *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 176, 195 S.E. 247, 251 (1937); (persons who non-negligently create dangerous condition on highway are under a duty to take reasonable precautions against injury to persons using the highway).

⁷⁹ Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 633 (1952) [hereinafter cited as Note, *Comparative Study*].

⁸⁰ See PROSSER, *supra* note 4, § 56 at 340-43; RESTATEMENT, *supra* note 34, § 314A.

⁸¹ See PROSSER, *supra* note 4, § 56 at 339.

⁸² *Id.* at 340-43.

⁸³ *Id.* at 341-42; see also *McNiece & Thornton*, *supra* note 27, at 1278.

⁸⁴ 132 N.J.L. 331, 40 A.2d 562 (Ct. Err. & App., 1945).

⁸⁵ *Id.* at 332, 40 A.2d at 562.

⁸⁶ *Id.* at 334, 40 A.2d at 564.

⁸⁷ *Id.* at 335, 40 A.2d at 564.

⁸⁸ *Id.* at 334, 40 A.2d at 564.

⁸⁹ *Id.* at 333, 40 A.2d at 563. See also *Anderson v. Atchison, T. & S.F.R.R.*, 333 U.S. 821, 823 (1948); *Carey v. Davis*, 190 Iowa 720, 724, 180 N.W. 889, 891 (1921); *Hunicke v. Meramec Quarry Co.*, 262 Mo. 560, 599, 172 S.W. 43, 54 (1914); *Rival v. Atchison*, 62 N.M. 159, 163-64, 306 P.2d 648, 651 (1957).

⁹⁰ See RESTATEMENT, *supra* note 34, § 314A; PROSSER, *supra* note 4, § 56 at 341; *McNiece & Thornton*, *supra* note 27, at 1279.

⁹¹ 89 Miss. 308, 42 So. 286 (1906).

⁹² *Id.* at 317; 42 So. at 287.

⁹³ *Id.*

⁹⁴ *Id.* at 321, 42 So. at 288.

⁹⁵ *Id.* See also *Layne v. Chicago & Alton Ry.*, 175 Mo. App. 34, 41, 157 S.W. 850, 852 (1913); *Kambour v. Boston & Me. Ry.*, 77 N.H. 33, 50, 86 A. 624, 633 (1913); *Middleton v. Whitbridge*, 213 N.Y. 499, 510-11, 108 N.E. 192, 197 (1915).

⁹⁶ See *Szabo v. Pennsylvania R.R.*, 132 N.J.L. 331, 334-35, 40 A.2d 562, 563-64 (1945); *Yazoo & M.V. Ry. Co. v. Byrd*, 89 Miss. 308, 321, 42 So. 286, 288 (1906).

parties, courts refuse to impose a legal duty to assist the one in danger.⁹⁷ It seems somewhat anomalous, however, for a court to speak in terms of "the dictates of humanity"⁹⁸ where it can identify a special relationship, and to state that with "purely moral obligations the law does not deal"⁹⁹ where the court cannot identify a special relationship. Courts appear more likely to find a special relationship in situations in which the parties derive an actual or potential economic benefit.¹⁰⁰ Commentators have suggested that courts are less reluctant to impose a duty to act affirmatively in those types of situations because the person placed under the obligation derives some economic advantage from the relationship.¹⁰¹ According to these commentators, the benefit that the party under the obligation expects to obtain justifies the requirement of a duty to act.¹⁰² Under the "benefit principle" theory,¹⁰³ an employer has an affirmative duty to act because his business is enhanced by the services of his employees.¹⁰⁴ The duty to aid, therefore, is a "price" to be paid for the benefit. Similarly, the common carrier obtains an economic benefit from its passengers.¹⁰⁵ This economic benefit justifies imposing a duty on the carrier and its employees to aid a passenger.¹⁰⁶

Recently, courts have been expanding the concept of special relationships beyond those situations involving the flow of an economic benefit to the alleged defendant. For example, in *Farwell v. Keaton*,¹⁰⁷ two friends out for a social evening became involved in a fight with a group of six youths.¹⁰⁸ One of the two escaped, but the other was severely beaten.¹⁰⁹ The friend who had escaped did not obtain any medical assistance for his friend nor did he notify anyone of his condition.¹¹⁰ Instead, he left his friend unconscious in a car at his grandparents' home.¹¹¹ The friend who had been beaten died as a result of his

⁹⁷ See *supra* notes 27-74 and accompanying text.

⁹⁸ *Szabo v. Pennsylvania R.R.*, 132 N.J.L. 331, 333, 40 So. 562, 563 (1945).

⁹⁹ *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 810 (1897).

¹⁰⁰ See *McNiece & Thornton*, *supra* note 27, at 1282-87; See also *Scheid*, *supra* note 67, at 5-6.

¹⁰¹ See *McNiece & Thornton*, *supra* note 27, at 1282-87. See also *Bohlen*, *The Basis of Affirmative Obligations in the Law of Tort*, 44 AM. L. REG. (n.s.) 209, 227 (1905), reprinted in F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 33 (1926).

¹⁰² *McNiece & Thornton*, *supra* note 27, at 1282-83.

¹⁰³ *Id.* at 1282.

¹⁰⁴ *Id.* at 1286.

¹⁰⁵ *Id.* at 1285.

¹⁰⁶ *Id.* Similarly, the activities of a sailor are of such benefit to the ship's captain that admiralty law has long held that a ship has a duty to save its seamen who have fallen overboard. *Id.* at 1286. See also *Harris v. Pennsylvania R.R.*, 50 F.2d 866, 868 (4th Cir. 1931); *Salla v. Hellman*, 7 F.2d 953, 954 (S.D. Cal. 1925). Courts have also found a special relationship meriting a duty to assist between an innkeeper and a guest, *Scholl v. Belcher*, 63 Or. 310, 323, 127 P. 968, 973 (1912); a jailer and a prisoner, *Thomas v. Williams*, 105 Ga. App. 321, 326, 124 S.E.2d 409, 413 (1962); an invitor and an invitee, *Weinburg v. Hartman*, 65 A.2d 805, 809 (Del. 1949); *Custer v. Atlantic & Pac. Tea Co.*, 43 A.2d 716, 717 (D.C. 1945); *L.S. Ayers & Co. v. Hicks*, 220 Ind. 86, 95, 40 N.E.2d 334, 337 (1942); *Depue v. Flatau*, 100 Minn. 299, 303, 111 N.W. 1, 2 (1907); *Connelly v. Kaufman and Baer Co.*, 349 Pa. 261, 265, 37 A.2d 125, 127 (1944); a doctor and a patient, *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976); *McIntosh v. Milano*, 168 N.J. Super. 466, 489, 403 A.2d 500, 511-12 (1979). See also *Restatement*, *supra* note 34, at § 314A; *Prosser*, *supra* note 4, § 56, at 340-43.

¹⁰⁷ 396 Mich. 281, 240 N.W.2d 217 (1976).

¹⁰⁸ *Id.* at 285, 240 N.W.2d at 219.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

injuries.¹¹² The decedent's father brought a wrongful death action against his son's friend.¹¹³ The father contended that his son would not have died if his friend had taken him to the hospital or notified someone of his condition.¹¹⁴ In finding for the plaintiff, the Supreme Court of Michigan held that the defendant had a duty to obtain medical assistance or at least to notify someone of his friend's condition.¹¹⁵ The court found that because the defendant and the decedent were companions on a social venture, a common undertaking constituting a special relationship was involved.¹¹⁶ The court concluded that implicit in such a relationship was the understanding that one companion would help the other in peril.¹¹⁷

These decisions indicate that courts have been diminishing the scope of the common law rule of no duty to assist a person in peril by creating an exception based upon the relationship between the parties.¹¹⁸ The courts have also been expanding the list of special relationships which will justify a departure from the common law rule of no duty.¹¹⁹ The Restatement (Second) of Torts has recognized that "special relationship" is an expanding concept in tort law.¹²⁰ According to the Restatement, the law appears to be heading toward a recognition of the duty to aid or protect in any relationship of dependence or mutual dependence.¹²¹ In addition to the expansion of the special relationship concept, recent legislative and judicial developments recognizing a duty to aid others regardless of the relationship between the parties, represent a further diminishing of the scope of the common law rule.

III. THE TREND TOWARDS IMPOSING A GENERAL DUTY TO AID

American scholars and commentators have long argued for laws imposing an affirmative duty to rescue one in peril.¹²² For example, in his treatise on torts, Harper hoped for the day when some "courageous court" would abandon the customary approach and hold that "the helplessness of the plaintiff and the ability of the defendant to aid or mitigate the injury is of sufficient significance to create a legal duty to give such reasonable aid as the circumstances of the parties require and permit."¹²³ Recent devel-

¹¹² *Id.*

¹¹³ *Id.* at 281, 240 N.W.2d at 217-18.

¹¹⁴ *Id.* at 285, 240 N.W.2d at 219.

¹¹⁵ *Id.* at 292, 240 N.W.2d at 222.

¹¹⁶ *Id.* at 291, 240 N.W.2d at 222.

¹¹⁷ *Id.*

¹¹⁸ See *Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 1000 (D.C. Cir. 1980) (recent holdings suggest that courts eroding general rule that no duty to help another in distress exists by creating exceptions based upon a relationship between the actors).

¹¹⁹ *Pamela L. v. Farmer*, 112 Cal. App. 3d 210, 169 Cal. Rptr. 282, 285 (1980) (citing *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); *Mann v. State of California*, 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977)). Parent-child relationship is also considered a special relationship. See, e.g., *Linder v. Bidner*, 50 Misc. 2d 320, 322, 270 N.Y.S.2d 427, 430 (1966) (parents owed duty to society to guard son closely to ensure he did not indulge in his vicious propensities).

¹²⁰ See *RESTATEMENT*, *supra* note 34, § 314A, comment b; see also *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 435, n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5 (1976); *Pamela L. v. Farmer*, 112 Cal. App. 3d 206, 211, 169 Cal. Rptr. 282, 285 (1980); *Mann v. State of California*, 70 Cal. App. 3d 773, 779-80, 139 Cal. Rptr. 82, 86 (1977); *PROSSER*, *supra* note 4, at § 56; 339-40; .

¹²¹ *RESTATEMENT*, *supra* note 34, § 314A, comment b.

¹²² See *supra* note 72 and accompanying text.

¹²³ F. HARPER, *THE LAW OF TORTS* § 80, at 199 (1938). See Note, *The Bad Samaritan*, *supra* note 33, at 639.

opments in both statutory and common law indicate that the view espoused by these commentators is becoming generally accepted and that this country is moving towards imposing a general duty to aid a person in distress. This trend had its origin in statutes creating a duty to aid others in certain narrowly defined circumstances.¹²⁴ Some states have enacted statutes extending the duty to help others in danger to more varied situations.¹²⁵ The courts, too, have been more willing to recognize a general duty to aid others.¹²⁶ These various legislative and judicial developments represent a movement towards recognizing a general duty to aid others in peril, regardless of any special relationship between the victim and the would-be rescuer.

A. Public Welfare Statutes

One of the first indications that the law is moving towards encouraging rescue is the expansion of the affirmative duties one party owes another where public safety is concerned. For example, many states have enacted hit-and-run statutes¹²⁷ imposing a duty on a driver involved in an accident to stop and render assistance to any person injured in an accident.¹²⁸ The hit-and-run statutes usually require that a driver provide reasonable assistance, including transporting the injured party to a hospital if necessary.¹²⁹ Courts have interpreted hit-and-run statutes to impose a duty on either party to the accident, regardless of fault. For example, in *Brooks v. E.J. Willig Transport Co.*,¹³⁰ the Supreme Court of California upheld a jury instruction that to knowingly refuse to stop after an accident was a breach of a civil duty independent of the driver's negligence or the victim's contributory negligence.¹³¹ Similarly, in *Meadows v. State*,¹³² the Supreme Court of Mississippi stated that one of the main purposes of its hit-and-run statute was, "to compel the driver of the car involved to 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."¹³³

The effect of hit-and-run statutes, therefore, is to impose on each driver involved in an accident the duty to render aid, even though the injured party may have been the one who caused the accident.¹³⁴ If the driver refuses to assist and the victim is further injured

¹²⁴ See text accompanying notes *infra* 126-49.

¹²⁵ See *infra* text accompanying notes 163-90.

¹²⁶ See *infra* text accompanying notes 198-247.

¹²⁷ See CAL. VEH. CODE § 20003 (West 1971 & Supp. 1984); ILL. REV. STAT. ch. 95 1/2, § 11-403 (Smith-Hurd 1971 & Supp. 1983); W. VA. CODE § 17-C (Michie 1974 and Supp. 1983).

¹²⁸ See, e.g., CAL. VEH. CODE § 20003 (West 1971 & Supp. 1984). Section 20003 reads in part: 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 the accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if such carrying is requested by the injured person.

Id.

¹²⁹ *Id.*

¹³⁰ 40 Cal. 2d 669, 225 P.2d 802 (1953).

¹³¹ *Id.* at 678-79, 225 P.2d at 808-09.

¹³² 211 Miss. 557, 52 So. 2d 289 (1951).

¹³³ *Id.* at 563, 52 So. 2d at 291.

¹³⁴ But see RESTATEMENT, *supra* note 34, § 322, comment a (if actor's conduct, whether tortious or innocent, causes bodily harm to another, actor under duty to exercise reasonable care to prevent future harm).

as a result, the driver is civilly liable for any aggravation of the injuries.¹³⁵ Hit-and-run statutes are a means of protecting the general welfare of the public because they encourage an individual to render necessary aid to accident victims who might otherwise be left unattended by the roadside.¹³⁶ Professor Prosser suggests that the hit-and-run statutes are one indication of a gradual movement towards a general rule that mere knowledge of another person in a serious or life threatening situation which an individual can avoid with slight inconvenience may impose a duty to aid.¹³⁷

Another example of the trend toward imposing a general duty to rescue are statutes requiring individuals to report incidents of child abuse.¹³⁸ State legislatures have recognized that to treat the problem of child abuse adequately, state agencies need the public's help.¹³⁹ All fifty states have imposed an affirmative duty on certain individuals to report incidents of child abuse.¹⁴⁰ The early reporting statutes required only physicians to report instances of child abuse.¹⁴¹ Recognizing that other nonmedical professionals also had regular contact with children, states began to expand the list of mandated reporters.¹⁴² Currently, several states require that "any person" who knows or has reasonable cause to suspect an incident of child abuse to report that incident.¹⁴³ Sanctions for violating such

¹³⁵ See, e.g., *Boyer v. Gulf C., and S.F. Ry.*, 306 S.W.2d 215, 220 (Tex. Civ. App. 1957) (defendant found liable for failure to render aid even though jury exonerated him of all misfeasance relating to the original accident).

¹³⁶ *Meadows v. State*, 211 Miss. 557, 563, 52 So. 2d 289, 291 (1951). In *Summers v. Dominguez*, 29 Cal. App. 2d 308, 312-13, 84 P.2d 237, 239 (Cal. Ct. App. 1938), the court stressed the existence of two distinct causes of action and stated that the liability under section 20003 of the California Vehicular Code "is not imposed as a penalty for the actor's original misconduct, but for a breach of a separate duty to aid"

¹³⁷ See PROSSER, *supra* note 4, § 56 at 343.

¹³⁸ See CAL. PENAL CODE §§ 11165-11174 (West 1983); FLA. STAT. ANN. §§ 827.01-07 (West 1976 & Supp. 1983); ILL. ANN. STAT. ch. 23, §§ 2051-2061.1 (Smith-Hurd 1983); MASS. GEN. LAWS ANN. ch. 119, §§ 51A-51F (West 1983 & 1984 Supp.), MICH. STAT. ANN. §§ 25.248 (1)-(16) (Callaghan 1983); N.Y. SOC. SERV. LAW §§ 411-428 (McKinney 1983 & Supp. 1984); PA. STAT. ANN. tit. 11, §§ 2201-2224 (Purdon Supp. 1983-84); R.I. GEN. LAWS §§ 40-11-1 -40-11-16 (Supp. 1983); TEX. FAM. CODE ANN. §§ 34.01-08 (Vernon 1975 & Supp. 1983).

¹³⁹ The magnitude of the child abuse problem was not fully perceived by the public, however, until an article describing the problem was published in the *Journal of the American Medical Association*. See Comment, *Civil Liability for Failure to Report Child Abuse*, 1 DET. L. REV. 135, 138-39 (1977) [hereinafter cited as Comment, *Civil Liability*]. According to the article, proper treatment of the child abuse problem includes the reporting of such incidents to the authorities. *Id.* (citing Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 24 (1962)).

¹⁴⁰ *Id.* See Freiman, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 250 (1982) [hereinafter cited as Freiman]; Paulsen, *The Legal Framework for Child Abuse Protection*, 66 COLUM. L. REV. 679, 711 (1966). Paulsen notes that in the history of the United States, few legislative proposals have been so widely accepted in so little time as the mandatory reporting of incidents of child abuse. *Id.*

¹⁴¹ See Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 3 (1967).

¹⁴² See Freiman, *supra* note 140, at 256-57.

¹⁴³ States that require any person to report include Delaware, Florida, Rhode Island and Texas. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI-KENT L. REV. 641, 658 n.113 (1977) [hereinafter cited as Fraser]. Typical of these statutes is the following provision from the Rhode Island Statute:

§ 40-11-3. Any person who has reasonable cause to know or suspect that any child has been abused or neglected . . . shall, . . . transfer such information to the department for children and their families

statutes vary from state to state.¹⁴⁴ Although some states have chosen to impose criminal sanctions for failing to report,¹⁴⁵ others have chosen to impose only civil penalties.¹⁴⁶ In addition to the statutory penalties, a recent court decision indicates that nonreporters may be subject to civil liability for subsequent injuries to the child.¹⁴⁷

Child abuse reporting statutes requiring anyone to report incidents of child abuse are significant to the development of a rule requiring rescue because they impose an affirmative duty on everyone to aid children in peril regardless of their relationship to the child.¹⁴⁸ Liability in this instance is imposed not for an act but for an omission.¹⁴⁹ Child abuse reporting statutes, therefore, represent another step toward a general recognition that liability may be imposed for nonfeasance as well as misfeasance.¹⁵⁰

In addition to the enactment of statutes imposing a duty to act in the limited situations of car accidents and child abuse, other developments in the law encourage rescue. For example, many states have enacted Good Samaritan statutes which protect physician rescuers from liability.¹⁵¹ State legislatures enacted such statutes because of the

§ 40-11-6.1. Any person . . . required by this chapter to report known or suspected child abuse . . . who knowingly fails to do so or who knowingly prevents any person acting reasonably from doing so shall be guilty of a misdemeanor and upon conviction . . . thereof shall be subject to a fine of not more than five hundred dollars (\$500) or imprisonment for more than one (1) year or both.

R.I. GEN. LAWS §§ 40-11-3, 40-11-6.1 (Supp. 1983).

¹⁴⁴ See Freiman, *supra* note 140, at 261.

¹⁴⁵ See, e.g., ALA. CODE § 26-14-13 (1977) (misdemeanor); ARIZ. REV. STAT. ANN. § 13-3620(E) (West 1978 & Supp. 1983-84) (misdemeanor); CONN. GEN. STAT. ANN. § 17-38a(b) (West 1975 & 1983 Supp.) (\$500 fine); FLA. STAT. ANN. § 827.07 (18)(a) (West 1976 & 1983 Supp.) (misdemeanor).

¹⁴⁶ See, e.g., ME. REV. STAT. ANN. tit. 22 § 4009 (West 1983-84) (civil violation).

¹⁴⁷ See *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976). In this case, child's guardian ad litem sued the child's physician in the plaintiff's name, claiming that the defendant was liable to plaintiff under the California reporting statute for failure to report, and under common-law malpractice for failure to diagnose the battered child syndrome. *Id.* at 405, 555 P.2d at 390-91, 131 Cal. Rptr. at 70-71. The trial court sustained defendant's demurrer to the complaint. *Id.* On appeal, the California Court of Appeals held that liability for failure to report could not be based on malpractice. *Landeros v. Flood*, 123 Cal. Rptr. 713, 717-20 (Ct. App. 1975). The Supreme Court of California vacated the lower court's judgment and held that recovery could be had on either basis. 17 Cal. 3d at 412-13, 551 P.2d at 396, 131 Cal. Rptr. at 76. See generally, Comment, *Civil Liability*, *supra* note 139, at 135; Brown & Truitt, *Civil Liability in Child Abuse Cases*, 54 CHI-KENT L. REV. 753 (1977).

¹⁴⁸ See, e.g., FLA. STAT. ANN. § 827.07 (3) (West 1976 & Supp. 1983): "Any person, including, but not limited to, any physician, nurse, teacher, social worker, or employee of a public or private facility serving children, who has reason to believe that a child has been subject to abuse shall report or cause reports to be made to the department."

¹⁴⁹ See, e.g., N.Y. Soc. Ser. Law § 420 (1) (McKinney 1983) (any person, official or institution required by title to report a case of suspected child abuse or maltreatment who willfully fails to do so is guilty of a class A misdemeanor). At common law, no liability existed for omissions. See Ames, *supra* note 1, at 112.

¹⁵⁰ Fraser notes that the number of reported cases of child abuse has increased on a yearly basis since the first reporting statute was enacted in 1962. Fraser, *supra* note 143, at 646.

¹⁵¹ ARIZ. REV. STAT. ANN. § 32-1471 (1976); ARK. STAT. ANN. § 72-624 (1979); COL. REV. STAT. § 13-21-108 (Supp. 1983); FLA. STAT. ANN. § 768.13 (West-Supp. 1983); MAINE REV. STAT. ANN. tit. 14, § 164 (West 1980); N.H. REV. STAT. ANN. § 508:12 (Equity 1983); N.J. STAT. ANN. § 2A:62A-1 (West Supp. 1983-84); OHIO REV. CODE § 2305.23 (Baldwin 1982); OKLA. STAT. ANN. tit. 76, § 5 (West Supp. 1983-84); WIS. STAT. ANN. § 895.48 (West 1983); WYO. STAT. § 33-26-143 (Michie 1977 & 1983 Supp.). A typical relevant provision reads as follows: "A physician . . . who in good faith renders

growing concern that the threat of malpractice suits was preventing many physicians from rendering emergency aid at the scene of an accident.¹⁵² Good Samaritan statutes seek to encourage prompt treatment of accident victims by exempting physicians from civil liability when their conduct is less than grossly negligent.¹⁵³ Recently, several states have extended the protection of Good Samaritan statutes to exempt all volunteers from civil liability.¹⁵⁴ These statutes provide that individuals who render emergency care shall not be liable in civil damages for any act or omission not amounting to gross negligence.¹⁵⁵ One commentator has noted that these statutes come very close to a legal recognition of a duty to aid by granting immunity to all persons who render emergency care.¹⁵⁶ The effect of these statutes, therefore, is to encourage rescue.¹⁵⁷

Another example of a legislative development encouraging rescue is the enactment of statutes indemnifying individuals who are personally injured or suffer property damage in aiding the prevention of a crime or in the apprehension of a criminal.¹⁵⁸ Citizens who help prevent crime are assuming some of the responsibilities of state officials.¹⁵⁹ In recognition of this service, several states indemnify citizens for any injuries or damages they sustain in preventing crime.¹⁶⁰ California has extended the coverage of its indemnification law. Under California law, the state will also indemnify individuals for injuries or property damages they sustain in rescuing someone in a life threatening situation, such as a "fire, drowning or other catastrophe."¹⁶¹ The statute specifically states that the state

emergency care at the scene of an emergency . . . shall not be liable for civil damages as a result of acts or omissions . . . in rendering the emergency care, except acts or omissions amounting to gross negligence or willful and wanton misconduct." MICH. STAT. ANN. § 14.563(1) (Callaghan 1980). See generally, Note, *The Duty to Aid*, *supra* note 72, at 672; Note, *Good Samaritan Legislation: An Analysis and a Proposal*, 38 TEMP. L.Q. 418 (1964). See also Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 52-53 (1972) [hereinafter cited as Franklin].

¹⁵² Franklin, *supra* note 151, at 52. Physicians were aware that they had to conform to the usual standard of care in providing emergency care. *Id.*; see also *supra* note 64. If they failed to provide reasonable care they would be subject to liability. Franklin, *supra* note 151, at 52-53. Thus, physicians lobbied the legislature to reduce the standard of care during an emergency. *Id.* at 53. See generally, Note, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301 (1964).

¹⁵³ See Note, *The Duty to Aid*, *supra* note 72, at 676; see *supra* note 151 and accompanying text.

¹⁵⁴ See OKLA. STAT. ANN. tit. 76 § 5 (West Supp. 1983-84); NEV. REV. STAT. § 41.500 (1979); FLA. STAT. ANN. § 768.13 (West Supp. 1983); W. VA. CODE § 55-7-15 (Michie 1981).

¹⁵⁵ *Id.*

¹⁵⁶ See Note, *A Duty to Aid*, *supra* note 72, at 651.

¹⁵⁷ *Id.*

¹⁵⁸ See CAL. GOV. CODE § 13970 (West 1980); ILL. ANN. STAT., ch. 70, § 71 (Smith-Hurd Supp. 1983-84); MASS. GEN. LAWS ANN. ch. 258A, §§ 1-8 (West 1983 & 1984 Supp.); NEV. REV. STAT. §§ 217.010-217.270 (1983); N.J. STAT. ANN. tit. 52, ch. 4B, 1-25 (West Supp. 1983-84); R.I. GEN. LAWS ch. 25, § 12-25-1-13 (Michie 1981).

¹⁵⁹ See Comment, *The Duty to Rescue*, *supra* note 18, at 68.

¹⁶⁰ See, e.g., CAL. GOV. CODE § 13970 (West 1980).

¹⁶¹ *Id.* Section 13970 of the California Code reads as follows:

§ 13970 DIRECT ACTION OF CITIZENS AS BENEFITING PUBLIC; INDEMNIFICATION IN CERTAIN CASES.

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, or rescuing a person in immediate danger of injury or death as a result of fire, drowning, or other catastrophe, benefits the entire public. In recognition of the public purpose served, the state may indemnify such citizens, their surviving spouses, their surviving children, and any persons dependent upon such citizens for their principal support in appropriate cases for any injury, death, or damage sustained by such citizens, their surviving

indemnifies the rescuer because of the important public purpose he has served.¹⁶² By extending its coverage to situations not involving criminal activity, the California statutes explicitly recognize the desirability of encouraging rescue in our modern society.¹⁶³

B. Recent Rescue and Reporting Statutes

In a growing number of instances, state legislatures have been actively encouraging rescue. This is illustrated by the enactment of the Good Samaritan statutes and the Indemnification statutes. Various state legislatures have imposed a duty to assist injured automobile accident victims and abused children by enacting hit-and-run statutes and child abuse reporting statutes. Recent statutory developments in some states, however, go beyond imposing a duty in the limited situations of injured automobile accident victims and abused children and impose liability on bystanders who do not rescue persons in a perilous situation when they have the ability to do so. Additionally, various states impose a duty on its citizens to report a crime they have witnessed to the police.

Vermont was the first state¹⁶⁴ to pass a law requiring an individual who sees another in danger to give reasonable assistance.¹⁶⁵ Such assistance is required by law only when no risk is involved for the rescuer.¹⁶⁶ The Vermont statute was adopted in response to reported incidents of persons refusing to render aid in emergency situations for fear of legal liability.¹⁶⁷ Of particular concern to the Vermont legislature was the reported hesitancy of physicians to respond to emergency situations.¹⁶⁸ One of the goals of the Vermont legislature, therefore, was to enact a law which would provide physicians and the general public with protection from civil liability.¹⁶⁹ More importantly, the legislature wanted to encourage rescue by imposing criminal sanctions on reluctant rescuers.¹⁷⁰ The

spouses, their surviving children, and any persons dependent upon such citizens for their principal support as a direct consequence of such meritorious action to the extent that they are not compensated for the injury, death, or damage from any other source .

Id.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Franklin, *supra* note 151, at 55.

¹⁶⁵ VT. STAT. ANN. tit. 12, § 519 (Equity 1973 & 1983 Supp.). Entitled the "Duty to Aid the Endangered Act," section 519 of title 12 of the Vermont Statute provides:

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration [sic]. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.

Id.

¹⁶⁶ *Id.* at § 519(a).

¹⁶⁷ See Comment, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 VER. L. REV. 143, 145 (1982) [hereinafter cited as Comment, *Endangered Act*]. See generally Franklin, *supra* note 151, at 53-61.

¹⁶⁸ See Comment, *Endangered Act*, *supra* note 167, at 145.

¹⁶⁹ *Id.* at 156.

¹⁷⁰ *Id.*

Vermont legislature accomplished its goals by adopting the "Duty to Aid the Endangered Act," which both provides immunity to rescuers and imposes a criminal penalty on bystanders who refuse to come to the rescue of individuals in danger.¹⁷¹ An individual who willfully fails to render aid is subject to a fine of not more than \$100 under the statute.¹⁷² The statute, however, does not state whether a civil action may be brought against an individual who has failed to assist someone in danger.¹⁷³

As a means of further encouraging rescue, the Vermont legislature adopted a standard lower than the traditional standard of reasonable care.¹⁷⁴ Under the statute, an individual who provides "reasonable assistance" during a rescue is immune from civil liability for any damages he causes as long as his conduct is not grossly negligent.¹⁷⁵ Thus, the Vermont statute seeks to encourage rescue by penalizing individuals who fail to assist someone in danger and by granting civil immunity to rescuers whose conduct is less than grossly negligent.¹⁷⁶

Minnesota recently passed a law similar to the Vermont statute imposing a fine on bystanders who do not aid persons in a perilous situation.¹⁷⁷ The law requires a bystander to render reasonable assistance during an emergency to anyone who is exposed to or has suffered from grave physical harm.¹⁷⁸ Included in the statute's definition of reasonable assistance are such acts as calling the police and obtaining medical help.¹⁷⁹ The statute does not, however, require a bystander to act if he would risk danger to himself.¹⁸⁰

¹⁷¹ VT. STAT. ANN. tit. 12, § 519 (Equity 1973 & 1983 Supp.). One commentator has pointed out that "both characteristics are intended to promote the altruistic purposes of the statute." Comment, *Endangered Act*, *supra* note 167, at 144.

¹⁷² VT. STAT. ANN. tit. 12, § 519(c) (Equity 1973). D'Amato states that criminal sanctions are more appropriate than tort liability because: a) the duty to rescue is owed to society and not to the individual; b) when society has been wronged a criminal sanction is appropriate; c) criminal sanctions heighten the public moral sensibility while the safeguarding of prosecutorial discretion promotes fairness; and d) tort actions are subject to abuse and are ineffective against judgment proof defendants. D'Amato, *supra* note 72, at 806-08.

¹⁷³ See *St. Johnsbury & Lamoille Co. R.R. v. Canadian Pac. Ry. Co.*, 341 F. Supp. 1368, 1373 n.5 (D. Vt. 1972) (section 519 does not mention civil liability). See also Franklin, *supra* note 151, at 57.

¹⁷⁴ VT. STAT. ANN. tit. 12, § 519(b) (Equity 1973). See Franklin, *supra* note 151, at 57. Franklin states that Vermont chose a lower standard since the bill was initially designed only to lower the standard of care. *Id.*

¹⁷⁵ VT. STAT. ANN. tit. 12, § 519(b) (Equity 1973). When the Vermont Legislature was considering enacting a rescue law, it was apparently aware of the French rescue law. See Comment, *Endangered Act*, *supra* note 167, at 158-60. Given the similarities between the Vermont statute and the French rescue law, the Vermont legislature may have chosen the French statute as a model in creating its rescue law. For the exact language of each statute, see *supra* note 165 and *infra* note 264.

¹⁷⁶ See Comment, *Endangered Act*, *supra* note 167, at 144.

¹⁷⁷ MINN. STAT. ANN. § 604.05 (West 1983 Supp.). Section 604.05(1) of the Minnesota statute reads as follows:

(1) DUTY TO ASSIST. Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to himself or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this section is guilty of a petty misdemeanor.

Id.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Additionally, the statute exempts the rescuer from liability for civil damages resulting from his rescue efforts.¹⁸¹

The Minnesota law was passed as an amendment to the state's Good Samaritan statute.¹⁸² The sponsor of the bill pointed out that the bill was enacted as a result of the alleged gang rape of a woman in a New Bedford, Massachusetts tavern.¹⁸³ In March 1983, a woman who entered a tavern to buy a pack of cigarettes was reportedly raped by four men in the presence of cheering patrons.¹⁸⁴ The New Bedford incident has prompted other state legislatures to consider making it a crime for a witness to fail to report a rape or other felony to the police.¹⁸⁵ In May 1983, Rhode Island enacted a law making it a misdemeanor for anyone, other than the victim, to fail to report a rape that takes place in his or her presence.¹⁸⁶ Failure to report a rape is now punishable in Rhode Island by up to one year in jail, a \$500 fine or both.¹⁸⁷ Similarly, Massachusetts enacted a law in December 1983 which requires any person witnessing a crime to report that crime to the police.¹⁸⁸

¹⁸¹ *Id.* at § 604.05(2).

¹⁸² MINN. STAT. ANN. § 604.05 (1982) amended by MINN. STAT. ANN. § 604.05 (West 1983 Supp.).

¹⁸³ See THE NATIONAL LAW JOURNAL, August 22, 1983, at 5, col. 1.

¹⁸⁴ *Id.* In the New Bedford case, six men were charged with aggravated rape in Massachusetts Superior Court. Commonwealth v. Bieira, No. 12265 (Mass. filed March 16, 1983); Commonwealth v. Silvia, No. 12266 (Mass. filed March 16, 1983); Commonwealth v. Cordeiro, No. 12267 (Mass. filed March 16, 1983); Commonwealth v. Raposo, No. 12268 (Mass. filed March 16, 1983); Commonwealth v. Medeiros, No. 13796 (Mass. filed March 16, 1983); Commonwealth v. Medeiros, No. 13795 (Mass. filed March 16, 1983). On March 17, 1984, a jury found four of the men guilty and two of the men not guilty.

¹⁸⁵ See Kiesel, *Who Saw This Happen? States Move to Make Crime Bystanders Responsible*, 69 A.B.A.J. 1208 (1983) [hereinafter cited as Kiesel].

¹⁸⁶ R.I. GEN. LAWS §§ 11-37.3.1-3.3 (1983). Pertinent provisions of section 11-37 read as follows:
11-37-3.1. Duty to Report Sexual Assault. — Any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his/her presence shall immediately notify the state police or the police department of the city or town in which said assault or attempted assault is taking place of said crime.

11-37-3.3. Failure to Report — Penalty — Any person who knowingly fails to report a sexual assault or attempted sexual assault as required under section 11-37-3.1 shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than one (1) year or fined not more than five hundred dollars (\$500) or both.

Id. at §§ 11-37-3.1 & 3.3.

¹⁸⁷ *Id.* at § 11-37-3.3. The author of the Rhode Island bill stated that the statutory penalties were derived from the state's child abuse reporting statute which makes it a crime to fail to report an incident of child abuse. Telephone interview with former Rhode Island State Senator Gloria Kennedy Fleck on October 5, 1983. See *supra* note 143 for relevant provisions of Rhode Island's child abuse reporting statute, R.I. GEN. LAWS §§ 40-11-3, 40-11-6.1 (Supp. 1983).

¹⁸⁸ MASS. GEN. LAWS ANN. ch. 268, § 40 (West Supp. 1985). The Massachusetts statute reads as follows:

§ 40. Reports of crimes to law enforcement officials

Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

Id.

The statute makes it a misdemeanor, punishable by a fine, for any witness to a rape, aggravated rape, homicide or armed robbery to fail to report such an incident to the police.¹⁸⁹ Such reporting is required by law only when no risk is involved for the witness.¹⁹⁰ At the same time, Massachusetts' Good Samaritan statute was amended to exempt from civil liability any person who provides or attempts to provide assistance for a victim of a crime.¹⁹¹ Pennsylvania is considering passing legislation requiring any person witnessing a crime to report that crime to the police.¹⁹²

The Minnesota, Rhode Island and Massachusetts statutes, therefore, follow the trend set by the Vermont legislature. The main difference between the Rhode Island and Massachusetts crime reporting statutes and the Vermont and the Minnesota rescue statutes is that in Rhode Island¹⁹³ and Massachusetts,¹⁹⁴ witnesses would need only to summon assistance by making a telephone call, whereas actual intervention is required when necessary under the Vermont¹⁹⁵ and Minnesota¹⁹⁶ statutes. It is too early to tell what impact these recent rescue and reporting statutes will have in encouraging bystanders to help persons in danger. One commentator has suggested that the Vermont statute would be more effective in promoting rescue if, in addition to the statutory penalty, civil liability were imposed.¹⁹⁷ According to this commentator, a statute imposing civil liability would further encourage rescue and would at least compensate the victim for injuries resulting because the bystander did not provide assistance.¹⁹⁸ Although the effectiveness of these statutes has yet to be demonstrated, their existence alone signifies a recognition by some state legislatures that imposing a general duty to aid others in trouble is desirable and feasible.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ MASS. GEN. LAWS ANN. ch. 258A, § 9 (West Supp. 1985). The Massachusetts statute reads as follows:

§ 9. "Good Samaritans"; liability

No person who in good faith provides or obtains or attempts to provide or obtain assistance for a victim of a crime as defined in section one shall be liable in a civil suit for damages as a result of his acts or omissions in providing or obtaining, or attempting to provide or obtain said assistance unless said acts or omissions constitute willful, wanton or reckless conduct.

Id.

¹⁹² H.B. 1114, 1983 Pa. Laws (1983). See Kiesel, *supra* note 185, at 1209. Unfortunately, House Bill 1114 never came out of the Judiciary Committee. The bill died at the end of the session, November 30, 1984.

¹⁹³ See R.I. GEN. LAWS §§ 11-37.3.1-3.3 (1983), *supra* note 186.

¹⁹⁴ See MASS. GEN. LAWS ANN. ch. 268, § 40 (West Supp. 1985), *supra* note 188.

¹⁹⁵ See VT. STAT. ANN. tit. 12, § 519 (Equity 1973 & 1983 Supp.), *supra* note 165.

¹⁹⁶ See MINN. STAT. ANN. § 604.05 (West 1983 Supp.), *supra* note 177.

¹⁹⁷ See Comment, *Endangered Act*, *supra* note 167, at 176-81. The commentator further asserts that section 519 is difficult to enforce because a) prosecutorial resources are limited and prosecutors handling a full caseload may not have the time or money to handle a section 519 prosecution; b) the elements of a section 519 offense are not easily discernable; and c) section 519 has not been interpreted by courts in the context of a criminal prosecution. *Id.* at 161 n.119, 172 & n.178. Similarly, Franklin states that while the Vermont statutory scheme is criminal in nature, civil liability for statutory violations may be desirable because a) the criminal penalties need reinforcement, b) civil liability is no less appropriate here than in cases of negligence or violations of other statutory duties, and c) a criminal statute puts the public on notice of proper social behavior and thus later high civil awards are not unexpected. Franklin, *supra* note 151, at 56-57.

¹⁹⁸ Comment, *Endangered Act*, *supra* note 167, at 176-81.

C. *Judicial Developments in Rescue Law*

Courts, like the legislatures, have recognized increasingly that bystanders have an affirmative duty to act when someone is in danger. For example, in *Tarasoff v. Regents of University of California*,¹⁹⁹ the Supreme Court of California held that psychotherapists owe an affirmative duty of reasonable care to third parties who are threatened by patients under the psychotherapist's treatment.²⁰⁰ In *Tarasoff*, a psychologist at a university hospital was informed by one of his patients that he intended to kill a certain young woman.²⁰¹ Although the psychologist notified campus police that the patient was dangerous and should be committed, he failed to warn the intended victim.²⁰² The patient subsequently killed the young woman.²⁰³ In a suit brought by the young woman's parents against the therapists,²⁰⁴ the campus police, and the Regents of the University of California as their employer, the California Supreme Court considered whether a psychologist has a duty to warn third parties of threats made toward them by patients during therapy.²⁰⁵ Although the court acknowledged that the common law rule imposed no duty to warn individuals endangered by such conduct,²⁰⁶ the *Tarasoff* court nevertheless found that the relation-

¹⁹⁹ 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). This case vacated the opinion in *Tarasoff v. Regents of the Univ. of Calif.*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).

²⁰⁰ *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. The ruling in *Tarasoff* has been criticized as a dangerous and unwarranted extension of liability. See *id.* at 452-64, 551 P.2d at 354-62, 131 Cal. Rptr. at 34-42 (Clark, J., dissenting); see also Note, *Imposing a Duty to Warn on Psychiatrists — A Judicial Threat to the Psychiatric Profession*, 48 U. COLO. L. REV. 283 (1977); Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); Note, *Medical Malpractice, The Liability of Psychiatrists*, 42 NOTRE DAME LAW 693 (1973).

²⁰¹ *Tarasoff*, 17 Cal. 3d at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19.

²⁰² *Id.* at 430, 551 P.2d at 339-40, 131 Cal. Rptr. at 19-20.

²⁰³ *Id.* at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19.

²⁰⁴ The therapist defendants included the psychologist who examined the patient and concluded that the patient should be committed; two other psychiatrists who concurred with the examining therapist's decision; and the chief of the department of psychiatry, who countermanded the examining psychologist's decision and directed that no further action be taken to confine the patient. *Id.* at 430 n.2, 551 P.2d at 340 n.2, 131 Cal. Rptr. at 20 n.2.

²⁰⁵ *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21. In addition, the California Supreme Court had to consider whether as the therapists' employer, the University of California, could be held liable for the therapists' failure to warn the intended victim of the patient's threats. *Id.* at 430, 551 P.2d at 340, 131 Cal. Rptr. at 20. The court held that the plaintiffs' complaint could be amended to state a cause of action against the Regents for the therapists' breach of their duty to exercise reasonable care to protect plaintiffs' decedent. *Id.* at 442, 551 P.2d at 348, 131 Cal. Rptr. at 28. The California Supreme Court also had to consider whether the campus police had a duty to warn the intended victim of the patient's violent intention. *Id.* at 444, 551 P.2d at 349, 131 Cal. Rptr. at 29. The court held that the campus police did not have a duty to warn because they did not have a special relationship with either the victim or the patient. *Id.*

²⁰⁶ *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23. See *Richards v. Stanley*, 43 Cal. 2d 60, 65, 271 P.2d 23, 27 (1954); and cases cited *supra* note 51. See also RESTATEMENT, *supra* note 34, § 315. Section 315 reads as follows:

Title A. Duty to Control Conduct of Third Persons.

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

ship between a psychotherapist and his patient was of a sufficiently special nature to impose an affirmative duty for the benefit of third persons.²⁰⁷ The court held, therefore, that a psychotherapist has an affirmative duty to exercise reasonable care to protect the foreseeable victim from danger even though no special relationship exists between the therapist and the intended victim.²⁰⁸

Given the nature of the relationship between a psychotherapist and his patient, the holding in *Tarasoff* is a significant indication that courts are recognizing a general duty to assist others in peril regardless of the relationship between the parties. Traditionally, the law has afforded special protection to doctor-patient relationships because of the trust and confidence implicit in the relationship.²⁰⁹ In *Tarasoff*, however, the court was apparently more concerned with public safety than with protecting the doctor-patient relationship.²¹⁰ In reaching its decision, the *Tarasoff* court carefully weighed the competing interests of public safety against the need for confidentiality in psychotherapy.²¹¹ The court stated that the obligation to protect a patient's confidences must yield where the public peril begins.²¹² Furthermore, the court noted: "Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society, we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal."²¹³

The *Tarasoff* court held that the psychotherapist's duty to a potential victim outweighed his duty to keep his dangerous patient's confidences.²¹⁴ In *Tarasoff*, no special relationship existed between the psychotherapist and the intended victim.²¹⁵ This decision, therefore, is an example of judicial recognition of the principle that one can owe a duty to rescue to another regardless of the relationship between the rescuer and the person in danger.

The principle of *Tarasoff* was further extended under California law in *Soldano v. O'Daniels*.²¹⁶ A California Court of Appeals held in *Soldano* that a public establishment had a legal duty to let a Good Samaritan use its telephone in an emergency.²¹⁷ In *Soldano*, a bar patron rushed into a nearby restaurant and informed an employee that a man had been threatened in the bar.²¹⁸ The patron asked the restaurant employee either to call the

²⁰⁷ *Tarasoff*, 17 Cal. 3d at 436-37, 551 P.2d at 343-44, 131 Cal. Rptr. at 23-24. The court emphasized that the psychotherapist's position of trust and authority, his potential power to initiate commitment proceedings and his special knowledge of his patient were sufficient to establish the special relationship required to impose a duty for the benefit of the third person. *Id.* at 436 n.6, 551 P.2d at 343 n.6, 131 Cal. Rptr. at 23 n.6.

²⁰⁸ *Id.* at 436, 551 P.2d at 344, 131 Cal. Rptr. at 24. According to the *Tarasoff* court, whether this duty takes the form of a duty to warn, a duty to call the police or some other form will depend on the circumstances. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

²⁰⁹ See e.g., *Horne v. Patton*, 291 Ala. 701, 708-09, 287 So. 2d 824, 829-30 (1973); *Anker v. Brodmittz*, 98 Misc. 2d 148, 152-53, 413 N.Y.S.2d 582, 585 (1979); *Clark v. Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564, 566-67 (1960); *Alexander v. Knight*, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962); *Schaff v. Spicer*, 214 N.W.2d 134, 136 (S.D. 1974).

²¹⁰ See *Tarasoff*, 17 Cal. 3d at 439-42, 551 P.2d at 345-48, 131 Cal. Rptr. at 26-28.

²¹¹ *Id.*

²¹² *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

²¹³ *Id.*

²¹⁴ *Id.* at 442, 551 P.2d at 347-48, 131 Cal. Rptr. at 25-26.

²¹⁵ *Id.* at 436-37, 551 P.2d at 343-44, 131 Cal. Rptr. at 23-24.

²¹⁶ 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983).

²¹⁷ *Id.* at 453, 190 Cal. Rptr. at 317.

²¹⁸ *Id.* at 446, 190 Cal. Rptr. at 312.

police or to allow him to do so.²¹⁹ The employee refused, and subsequently the man being threatened was shot.²²⁰ A wrongful death action against the owner of the restaurant was brought by the decedent's son.²²¹

The issue before the *Soldano* court was whether the restaurant or any of its employees had a legal duty to assist the Good Samaritan.²²² In *Soldano*, the defendant restaurant argued that the request that its employees either call the police or allow the third party the use of its telephone required affirmative action on its part.²²³ The defendant relied on the established rule that absent a special relationship, no affirmative duty exists to assist someone in danger in contending that it was not liable for the decedent's death.²²⁴ The *Soldano* court admitted that no special relationship existed between the restaurant and plaintiff's decedent,²²⁵ but stated in a unanimous opinion that the common law rule of no duty needed to be "re-examined in light of the circumstances of the case."²²⁶ The court subsequently found a strict application of the general rule unsatisfactory and held that the restaurant owed the plaintiff's decedent a duty either to call the police or permit the Good Samaritan to call the police.²²⁷ According to the *Soldano* court, the bystander's duty arose because the harm to the victim appeared to be "abundantly foreseeable."²²⁸ The court noted that the bartender's alleged conduct displayed a "disregard for human life that can be characterized as morally wrong."²²⁹

The *Soldano* court based its decision on several factors. First, the court examined several recent California statutes which recognized the importance of citizen involvement in crime prevention and were designed to stimulate active public involvement in crime control.²³⁰ The court noted that the statutes demonstrate that "that attitude of extreme individualism so typical of anglo-saxon [sic] legal thought may need limited re-examination in light of current societal conditions."²³¹ Second, the *Soldano* court examined elements the Supreme Court of California had previously considered in determining whether a duty is owed to third persons.²³² These elements included the foreseeability of harm,²³³ the connection between the defendant's conduct and the harm,²³⁴ the moral

²¹⁹ *Id.*

²²⁰ *Id.* at 445-46, 190 Cal. Rptr. at 311-12.

²²¹ *Id.* at 445, 190 Cal. Rptr. at 311.

²²² *Id.*

²²³ *Id.* at 447, 190 Cal. Rptr. at 313.

²²⁴ See PROSSER, *supra* note 4, § 56 at 338-43.

²²⁵ 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314.

²²⁶ *Id.*

²²⁷ *Id.* at 453, 190 Cal. Rptr. at 317.

²²⁸ *Id.* at 451, 190 Cal. Rptr. at 315.

²²⁹ *Id.* at 451, 190 Cal. Rptr. at 316.

²³⁰ *Id.* at 449-50, 190 Cal. Rptr. at 314-15.

²³¹ *Id.* at 450, 190 Cal. Rptr. at 315.

²³² *Id.* at 450-51, 190 Cal. Rptr. at 315. See *Rowland v. Christian*, 69 Cal. 2d 108, 117-18, 443 P.2d 561, 567-68, 70 Cal. Rptr. 97, 103-104 (1968); see also *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 307-08, 379 P.2d 513, 520-22, 29 Cal. Rptr. 33, 40-42 (1963); *Biakanja v. Irving*, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958); *Wright v. Arcade School District*, 230 Cal. App. 2d 272, 278-80, 40 Cal. Rptr. 812, 814-16 (1964); *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 8-9, 31 Cal. Rptr. 847, 851-52 (1963).

²³³ *Soldano*, 141 Cal. App. 3d at 451, 190 Cal. Rptr. at 315. The court found that the harm to the defendant was abundantly foreseeable; it was imminent since the employee was expressly told that a man had been threatened. *Id.*

²³⁴ *Id.* at 451, 190 Cal. Rptr. at 315-16. The court further found that the employee's conduct and the injury were connected. *Id.* at 451, 190 Cal. Rptr. at 315. The Good Samaritan wanted to use the

blame attached to the defendant's conduct,²³⁵ the policy of preventing future harm,²³⁶ the extent of the burden to the defendant²³⁷ and the consequence to the community of imposing a duty to exercise care.²³⁸ In light of such factors, the court found that the defendant was under a duty to let the bystander use the telephone.²³⁹ Third, the court found that the facts of the case came very nearly within the provisions of Section 327 of the Restatement (Second) of Torts.²⁴⁰ That section states that liability may be imposed when a person interferes with another's efforts to render assistance.²⁴¹ According to the court, the restaurant employee interfered with the Good Samaritan's efforts to obtain help by not allowing him to call the police.²⁴² The *Soldano* court thus concluded that, under the facts of this case, the restaurant owed a duty to the plaintiff's decedent.²⁴³

The *Soldano* decision is a further indication that courts are recognizing that bystanders have an affirmative duty to assist someone in danger. In *Soldano*, the court looked beyond the special relationship concept in determining whether a duty to assist existed.²⁴⁴ In this respect, the court departed from the customary approach taken by courts in determining whether a duty to assist is owed.²⁴⁵ The *Soldano* decision imposes a duty on business establishments to let bystanders use business telephones in an emergency.²⁴⁶ Although this decision does not represent a "global change"²⁴⁷ in the common law rule that bystanders have no duty to assist, it does at least modify the rule. The *Soldano* decision is thus further evidence of a movement by courts and legislatures towards establishing a general rule that mere knowledge of another person in a serious or life threatening situation may generate a duty to assist.²⁴⁸

phone to call the police. *Id.* at 451, 190 Cal. Rptr. at 315-16. The bartender's refusal prevented the police from helping. *Id.* at 451, 190 Cal. Rptr. at 316.

²³⁵ *Id.* The court found that the employee's conduct displayed a disregard that could be characterized as morally wrong; he was callously indifferent to the possibility that the victim would die as a result of his refusal to allow a Good Samaritan to use the telephone. *Id.*

²³⁶ *Id.* The court emphasized that finding a duty in these circumstances would promote a policy of preventing future harm. *Id.*

²³⁷ *Id.* The court found that the burden to the defendant was minimal and exposed him to no risk. *Id.*

²³⁸ *Id.* at 451-52, 190 Cal. Rptr. at 316. The court concluded that imposing a duty on business establishments would not "overburden the courts." *Id.* at 452, 190 Cal. Rptr. at 316.

²³⁹ *Id.* at 453, 190 Cal. Rptr. at 317.

²⁴⁰ *Id.* See RESTATEMENT, *supra* note 34, at § 327.

²⁴¹ See RESTATEMENT, *supra* note 34, at § 327.

²⁴² *Soldano*, 141 Cal. App. 3d at 451, 190 Cal. Rptr. at 316.

²⁴³ *Id.* at 453, 190 Cal. Rptr. at 317.

²⁴⁴ *Id.* at 449, 190 Cal. Rptr. at 314.

²⁴⁵ See *supra* notes 79-121 and accompanying text.

²⁴⁶ 141 Cal. App. 3d at 452, 190 Cal. Rptr. at 316-17.

²⁴⁷ *Id.* at 455, 190 Cal. Rptr. at 318. Although the *Soldano* court held that business establishments have a duty to let good samaritans use the business telephone when informed of an emergency, the court's ruling is very limited. *Id.* at 452, 190 Cal. Rptr. at 316. The court thus stated that "a citizen would not be required to summon the police." *Id.* The court should have gone further, however, and imposed a duty on business establishments to call the police when informed of an emergency. Such a holding would not have been burdensome on the defendant and would have resulted in a benefit to society.

²⁴⁸ See *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). In *O'Hara*, the appellate court imposed liability upon a landlord for failing to warn or take other precautions on behalf of his tenants to avert the possibility of another rape occurring in the rented premises. *Id.* at 803-04, 142 Cal. Rptr. at 490-91. The court held the landlord liable for failure to

IV. FRENCH RESCUE LAW

In contrast to the law of the United States, most European countries currently impose on their citizens a duty to rescue.²⁴⁹ Although the European statutes imposing such a duty vary in scope, they all require that individuals assist a person in a perilous situation.²⁵⁰ This section of the note will focus specifically on French rescue law because of the many similarities between the French and the American experience in the area. First, prior to 1941, the French judicial position regarding the legal imposition of a legal duty to aid was similar to the law in this country — no legal duty existed to render aid.²⁵¹ Second, the French legislative developments that eventually led to a law requiring rescue were similar to developments in the United States discussed earlier.²⁵² The forty-year history of the French statute requiring rescue²⁵³ illustrates that a general duty to rescue does not entail the difficulties thought to be prohibitive in creating a duty to aid in this country.²⁵⁴ The French experience demonstrates that a rule imposing a general duty to assist someone in danger is possible in the United States.

Enforcing a duty to rescue was a radical change in French law.²⁵⁵ Before 1941, France

warn based upon his superior knowledge as the defendant alone knew of past assaults and conditions making future assaults likely to occur. *Id.* at 804, 142 Cal. Rptr. at 490. Although the alleged tortious act was an omission, the court did not feel obligated to determine explicitly that a special relationship existed or that the affirmative duty to warn was based upon the landlord's control of the common area. *Id.* at 803, 142 Cal. Rptr. at 490. The court, instead, imposed liability because the landlord was in a position of superior knowledge and failed either to provide added security or warn the tenant of the danger. *Id.* at 803-04, 142 Cal. Rptr. at 490-91. Similarly, the Massachusetts Supreme Judicial Court has held that a land owner has a legal duty to rescue a trespasser in a perilous situation. *Pridgen v. Boston Housing Authority*, 364 Mass 696, 308 N.E.2d 467 (1974). The *Pridgen* court noted:

The rule which we have stated is in part a recognition by the law of the ever changing concepts of each individual's rights and duties in relation to all other members of our society, and it reflects current standards of concern for the personal safety and well being of each individual.

Id. at 711, 308 N.E.2d at 477. See also *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 99 (D.C. Cir. 1972), cert. denied, 412 U.S. 939 (1973); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 546-48, 489 P.2d 308, 313-14 (1971).

²⁴⁹ See *supra* note 19 for a list of the European countries imposing a duty to rescue. Some of these countries have accepted such a duty as a "matter of course." See Rudzinski, *supra* note 19, at 122. For a discussion on Soviet and French rescue law, see Note, *A Comparative Study*, *supra* note 79, at 635-41.

²⁵⁰ See Rudzinski, *supra* note 19, at 92.

²⁵¹ See Note, *A Comparative Study*, *supra* note 79, at 639.

²⁵² For example, the 1941 Vichy statute required citizens to inform the authorities on would-be criminals. See text accompanying notes 260-61 for a discussion of the Vichy statute. Similarly, the Rhode Island and Massachusetts statutes and the pending bill before the Pennsylvania legislature require citizens to report a rape or felony they have witnessed. See *supra* notes 186-92 and accompanying text. Additionally, the Vichy legislation imposed a duty to help persons in peril. See *infra* notes 260-61. Similarly, the Vermont and Minnesota statutes impose a duty to help persons in a perilous situation. See *supra* notes 165 and 177. Given these similarities, perhaps this country is moving closer to recognizing a legal duty to help someone in danger.

²⁵³ Art. 63, CODE PENAL [C. PÉN.] 59th ed., Petits Code Dallog, Paris 1962 p. 40. See Note, *A Comparative Study*, *supra* note 79, at 640 n.66.

²⁵⁴ See *supra* notes 67-71 and accompanying text.

²⁵⁵ Recent Cases, *French Statute Imposing Criminal Liability for Voluntary Failure to Assist Persons in Peril Applied to Physicians*, 63 HARV. L. REV. 866, 887 (1950) [hereinafter cited as Recent Cases, *French Statute Imposing Criminal Liability*].

did not recognize that an individual had a legal duty to rescue someone in peril.²⁵⁶ An omission did not give rise to civil liability unless the omission constituted the breach of a contractual duty.²⁵⁷ Under French tort law, one of the first exceptions to the rule of no duty was created imposing a duty to rescue on certain individuals such as landowners and manufacturers.²⁵⁸ This exception is analogous to the exception developed under American tort law where a duty to assist has been imposed on the defendant when the relation between the parties is of some economic advantage to the defendant.²⁵⁹

In 1941, the Vichy government enacted a statute providing punishment of citizens who failed to inform on would-be criminals and citizens who failed to assist someone in peril.²⁶⁰ The statute imposed a duty to inform or assist, however, only if to do so did not involve a serious risk to the rescuer or any third party.²⁶¹ The French Government declared this statute void in 1945,²⁶² but later enacted Article 63 of the Penal Code which is very similar to the 1941 legislation.²⁶³ Article 63 imposes a duty to render aid on those persons who know that another is in serious danger.²⁶⁴ If an individual cannot personally perform the rescue, the statute requires that he obtain help.²⁶⁵ As under the 1941 statute, a rescue is required only where no risk is involved for either the rescuer or other persons.²⁶⁶ Furthermore, the statute only applies where the potential rescuer is aware that a person is in danger and that the aid is urgently needed.²⁶⁷ Finally, no violation of the statute occurs unless the failure to rescue is voluntary and intentional.²⁶⁸ In determining whether a breach of the statutory duty to aid occurred, French courts have considered whether the potential rescuer's behavior was reasonable and necessary under the particular circumstances.²⁶⁹ Individuals who are found to have voluntarily refrained from rescuing someone in danger may face criminal sanctions — a jail sentence as well as a fine.²⁷⁰ In

²⁵⁶ See Note, *A Comparative Study*, *supra* note 79, at 639.

²⁵⁷ *Id.*

²⁵⁸ See *id.*

²⁵⁹ See *supra* notes 79-121 and accompanying text.

²⁶⁰ Note, *A Comparative Study*, *supra* note 79 at 639-40. The Vichy Government was the name given to the French government during the German occupation of France from 1940 to 1944.

²⁶¹ *Id.* According to Rudzinski, this early statute was enacted to quell the activities of the anti-Nazi underground. See Rudzinski, *supra* note 19, at 94.

²⁶² See Tunc, *The Volunteer and the Good Samaritan*, in *THE GOOD SAMARITAN AND THE LAW*, 43, 46 (J. Ratcliffe ed., 1966) [hereinafter cited as Tunc].

²⁶³ *Id.*

²⁶⁴ Art. 63, C. PEN. 59 ed., *Petits Code Dallog*, Paris 1962 p. 40, reprinted in Rudzinski, *supra* note 19, at 130-31. Article 63 states in relevant part:

Whoever abstains voluntarily from giving such aid to a person in peril that he would have been able to give him without risk to himself or to third persons by his personal action or by calling help . . . shall be punished by imprisonment of a month to three years and/or a fine.

Id.

²⁶⁵ See Tunc, *supra* note 262, at 48; Rudzinski, *supra* note 19, at 107. France extends the duty to rescue to every person, even persons not present, who have reason to know that a person is in serious danger. Rudzinski, *supra* note 19, at 102.

²⁶⁶ Rudzinski, *supra* note 19, at 106.

²⁶⁷ *Id.* See also Tunc, *supra* note 262, at 47.

²⁶⁸ See Tunc, *supra* note 262, at 48.

²⁶⁹ *Id.* at 50.

²⁷⁰ See Rudzinski, *supra* note 19, at 110.

addition to the criminal penalties, violation of Article 63 gives rise to civil liability.²⁷¹ French courts will impose civil liability whenever they determine that a reasonable man under similar circumstances would have helped the person in danger.²⁷² The injured party's claim is usually handled as part of the criminal proceedings against the individual who failed to rescue.²⁷³ Thus, the consolidation of the criminal and civil actions saves time and money for the court and the parties involved.

In France, if an individual in his efforts to rescue the victim further injures him, French courts will compare the rescuer's behavior with the behavior of an ordinary person under similar circumstances to determine liability.²⁷⁴ In determining whether the rescuer is responsible for any damages caused by his actions, French courts will also consider the emergency conditions under which the rescuer acted.²⁷⁵ If the rescuer is the one who is injured, French courts will indemnify him for any expenses or injuries he incurred as a result of the rescue.²⁷⁶ Possible sources of indemnification under French law include the individual who was rescued,²⁷⁷ and the individual who caused the negligent situation prompting the rescue.²⁷⁸

In France, the judiciary has resolved various problems thought to be inherent in imposing a general duty to aid. For example, problems in fixing liability on potential rescuers, such as who among a crowd of potential rescuers should be legally obligated to assist,²⁷⁹ and how much risk to himself a bystander must incur,²⁸⁰ have been considered by French courts. In cases where more than one bystander witnessed an accident, French courts have held that each bystander was under a legal duty to assist the individual in peril.²⁸¹ French courts have held that assistance is required by law only when no risk is involved for the rescuer.²⁸² Judicial resolution of these issues in France illustrate that a working rule for rescue situations is possible.

One French commentator has noted that Article 63 of the French Penal Code has served "as an incentive to everybody to behave like the good samaritan."²⁸³ The French experience demonstrates that the imposition of a general duty to aid could be accom-

²⁷¹ *Id.* at 113, n.61; Tunc, *supra* note 262, at 48-49. Tunc states that "when the failure to rescue constitutes a crime, it can no longer be disputed that civil liability is incurred." *Id.* at 49.

²⁷² See Note, *The Bad Samaritan*, *supra* note 33, at 641. As this commentator pointed out, by using this analysis in determining whether a bystander is civilly liable for not rendering aid to a person in distress, French courts thus avoid having to determine the causation element. *Id.* Similarly, Tunc notes: "Since causal connection is now undisputed in the application of penal law, it can no longer be disputed in the application of civil law." Tunc, *supra* note 262, at 49.

²⁷³ See Rudzinski, *supra* note 19, at 115.

²⁷⁴ See Tunc, *supra* note 262, at 50-51.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 52. In this situation, French courts will find an implied contract under which the beneficiary of the person rescued must indemnify the rescuer. *Id.*

²⁷⁸ *Id.* at 52-53.

²⁷⁹ *Doto v. Maida*, Correctional Tribunal Aix, March 27, 1947, [1947] *Recueil Dalloz*, J. 304. For a discussion of this case, see Recent Cases, *French Statute Imposing Criminal Liability*, *supra* note 255, at 887.

²⁸⁰ Judgment of March 20, 1947, *Cour d'Appel de Riom*, [1947] *Dalloz Jurisprudence* 304 (Fr.). For a discussion of this case, see Note, *The Bad Samaritan*, *supra* note 33, at 635-36.

²⁸¹ See *supra* note 279.

²⁸² See *supra* note 280.

²⁸³ See Tunc, *supra* note 262, at 62. In 1962 alone, 52 persons were imprisoned and 12 were fined under Article 63 for failure to rescue. *Id.* at 58.

plished in the United States without difficulty and could produce similarly desirable results.

V. ARGUMENT FOR A LAW REQUIRING RESCUE

The United States appears to be moving closer toward explicitly recognizing a legal duty to help someone in a perilous situation.²⁸⁴ In a growing number of instances, the law has imposed a duty to assist.²⁸⁵ State legislatures have enacted statutes creating a duty to assist others.²⁸⁶ In addition to enacting such statutes, legislatures have explicitly recognized the merits of rescue by exempting the rescuer from liability²⁸⁷ and by compensating him for any injuries and expenses he incurred as a result of the rescue.²⁸⁸ Similarly, the courts have begun to impose a more general duty to aid others, regardless of the existence of any special relationship between the parties.²⁸⁹ These developments indicate that states' law imposing a general duty to help others in a perilous situation would be effective and workable. Such a rule, declared by statute and enforced by the courts, would reflect the current trend in American law by incorporating the intent of these developments into a general duty to rescue. Concern over the personal safety and well-being of each individual in our society prompted various state legislatures to enact laws creating a duty to aid others in specifically defined circumstances.²⁹⁰ A law requiring rescue would reflect this concern in a more authoritative and effective way. Incidents where individuals could have helped others in danger but failed to do so²⁹¹ have inspired various legislatures to prohibit such omissions.²⁹² Similarly, a law imposing a general duty to assist persons in a dangerous situation would perhaps help prevent the reoccurrence of such events. The judicial branch has recognized that our current societal conditions compel interdependence among people.²⁹³ A law requiring rescue would reflect this awareness.

Recent developments in both case²⁹⁴ and statutory law²⁹⁵ imposing upon a bystander a general duty to assist persons in danger have made traditional arguments against a law requiring rescue lose their significance. For example, critics of a legal rule requiring rescue have argued that requiring a person to act is more of a constraint on a person's liberty than is limiting his ability to act.²⁹⁶ State legislatures, however, have been steadily

²⁸⁴ See text accompanying notes *supra* 122-247.

²⁸⁵ See *supra* notes 127-248 and accompanying text.

²⁸⁶ See *supra* notes 127-50 and accompanying text. See also *supra* notes 164-87 and accompanying text.

²⁸⁷ The Good Samaritan statutes enacted in many states exemplify this recognition of the merits of rescue. See *supra* notes 151-57 and accompanying text.

²⁸⁸ The rescuer compensation statutes enacted in some states exemplify this recognition of the merits of rescue. See *supra* notes 158-63 and accompanying text.

²⁸⁹ See *Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976); *Soldano v. O'Daniels*, 141 Cal. App. 3d 443, 190 Cal. Rptr. 310, 317 (1983). See also *supra* notes 199-248 and accompanying text.

²⁹⁰ These laws include the hit-and-run statutes and the child abuse reporting statutes. For a discussion, see *supra* notes 127-50 and accompanying text.

²⁹¹ See discussion on the New Bedford incident, *supra* notes 182-83 and accompanying text.

²⁹² See MASS. GEN. LAWS ANN. ch. 268, § 40 (West Supp. 1985); MINN. STAT. ANN. § 604.05 (1983 West Supp.); R.I. GEN. LAWS §§ 11-37.3.1-3.3 (1983). See also *supra* notes 177-92.

²⁹³ *Tarasoff*, 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

²⁹⁴ See *supra* notes 199-248 and accompanying text.

²⁹⁵ See *supra* notes 127-98 and accompanying text.

²⁹⁶ See *supra* notes 55-56 and accompanying text.

increasing the instances in which an individual is required to act. This trend is evidenced by the enactment of the hit-and-run statutes,²⁹⁷ the child abuse reporting statutes²⁹⁸ and the recent rescue and reporting statutes.²⁹⁹ A law requiring rescue would be but a short extension of the legislative trend increasing the instances in which one party must affirmatively act for the benefit of others.

Another objection to a rule requiring rescue is that such a rule would run counter to the common law concept of individualism.³⁰⁰ Recent decisions, however, point to an increasing judicial awareness of the need for interdependence among members of our society.³⁰¹ For example, in *Tarasoff* the California Supreme Court held that a psychotherapist must exercise reasonable care to protect third parties who are threatened by patients under the psychotherapist's care.³⁰² The court made it clear that the confidential relationship between a psychotherapist and his patient must yield "where the public peril begins."³⁰³ Similarly, a California Court of Appeals in *Soldano* stated that the individualism inherent in the common law needed to be "re-examined in light of our current societal conditions . . ."³⁰⁴ A law imposing a general duty to help persons in danger would be a logical extension of the judicial awareness that our complex society compels the need for its members to help one another in times of distress. As one commentator suggests, "the law exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed."³⁰⁵

Attempts to create a law requiring a general duty to rescue have succeeded.³⁰⁶ Most European countries today have a law recognizing a legal duty to come to the aid of one in peril.³⁰⁷ Many of these countries have had such a law since the 19th century³⁰⁸ and have accepted the imposition of such a duty as a matter of course.³⁰⁹ France, a country which has an economic and social system similar to that of the United States, has a law requiring rescue.³¹⁰ France's rescue law, in effect now for over forty years, illustrates that such a law is workable.³¹¹ The French experience, therefore, should serve as a paradigm for the recognition in America of a general duty to rescue.

VI. A PROPOSED MODEL ACT

Given this background, therefore, it should not prove too difficult for states to enact a law imposing a general duty on citizens to help others in a perilous situation. To assist

²⁹⁷ See *supra* notes 127-37 and accompanying text.

²⁹⁸ See *supra* notes 138-50 and accompanying text.

²⁹⁹ See *supra* notes 165, 177, 186, and 188.

³⁰⁰ See *supra* notes 53-54 and accompanying text.

³⁰¹ See *Tarasoff*, 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27; *Soldano*, 141 Cal. App. 3d at 450, 190 Cal. Rptr. at 315. See also *supra* notes 199-248 and accompanying text.

³⁰² 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 20.

³⁰³ *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

³⁰⁴ 141 Cal. App. 3d at 450, 190 Cal. Rptr. at 315.

³⁰⁵ See Ames, *supra* note 1, at 110.

³⁰⁶ Most European countries today have a law requiring rescue. See *supra* note 19.

³⁰⁷ *Id.*

³⁰⁸ These countries include Belgium, Czechoslovakia, Denmark, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Rumania, Russia, Switzerland and Turkey. See generally, Rudzinski, *supra* note 19.

³⁰⁹ *Id.*

³¹⁰ See Art. 63 CODE PENAL [C. PEN.] 59th ed., Petits Code Dallog, Paris 1962 p. 40. See also *supra* note 264.

³¹¹ See *supra* notes 249-83 and accompanying text.

state legislatures, this section proposes a Model Act which legislatures could adopt or use as a point of reference in formulating and implementing such a rule of law.³¹² This Act provides that an individual who sees another in danger must give reasonable assistance.³¹³ The Act reflects the current state of the law in the United States by incorporating many of the terms of the public welfare statutes³¹⁴ and the rescue and reporting statutes³¹⁵ in effect in many states.

The Act contains limitations which should be imposed on a rule creating a duty to assist so that such a rule does not oppress the rescuer.³¹⁶ For example, the Act provides that an individual has a legal duty to assist only in cases of extreme danger to the life or the health of another.³¹⁷ Under the Act, the form of assistance required would depend upon the type of emergency involved.³¹⁸ Sometimes a warning of impending danger would suffice. Other times, as under Rhode Island law, a call to the police or proper authorities would be appropriate.³¹⁹ At times, personal intervention will be necessary.³²⁰ No one, however, would be required to assist another when to do so would involve a serious threat to either himself or others.³²¹ The rescuer's standard, as suggested in the Act, both in recognizing the gravity of the danger involved and in assessing the form of assistance required, should be that of the reasonably prudent person under the same or similar circumstances.³²²

The Act provides that once a rescue is undertaken the standard of care required would be lower than that of a reasonably prudent person.³²³ Through Good Samaritan laws, legislatures have recognized the injustice of holding a volunteer to a high standard of care when he renders assistance in an emergency situation.³²⁴ The effect of these statutes is to lower the standard of care that a rescuer must observe when rendering emergency care. These Good Samaritan statutes, therefore, relieve the volunteer from liability for all but gross negligence.³²⁵ This principle is reinforced in the Act by making the rescuer conform to a lower standard of care.

The Act also addresses situations in which more than one bystander witnesses an

³¹² See Appendix *infra*.

³¹³ *Id.*

³¹⁴ See *supra* notes 127-63 and accompanying text.

³¹⁵ See *supra* notes 164-98 and accompanying text.

³¹⁶ See Appendix *infra*. "If the encouragement of [a law requiring rescue] and the discouragement of its breach would be a hardship to some . . . the law should not endorse it." Honore, *Laws, Morals and Rescue*, in *THE GOOD SAMARITAN AND THE LAW*, 225, 233 (J. Ratcliffe ed., 1966) [hereinafter cited as Honore].

³¹⁷ See MINN. STAT. ANN. § 604.05 (1) (West 1983 Supp.); VT. STAT. ANN. tit. 12, § 519 (a) (equity 1973). See also *supra* notes 164-84.

³¹⁸ See Appendix *infra*.

³¹⁹ See R.I. GEN. LAWS §§ 11-37.3.1-3.3 (1983). See also *supra* note 186.

³²⁰ See MINN. STAT. ANN. § 604.05 (1) (West 1983 Supp.); VT. STAT. ANN. tit. 12, § 510 (a) (Equity 1973). See also *supra* notes 164-84.

³²¹ *Id.* See Appendix *infra*.

³²² See Appendix *infra*. This standard is analogous to the standard used by French courts both in recognizing the gravity of the danger involved and in assessing the form of assistance required. See *supra* note 272 and accompanying text.

³²³ See Appendix *infra*. See also VT. STAT. ANN. tit. 12, § 519 (b) (Equity 1973). See also *supra* notes 164-76. The standard of care required under the Vermont rescue legislation appears to be lower than the traditional standard of care. *Id.* See *supra* notes 64 and 174 and accompanying text.

³²⁴ See *supra* notes 151-57 and accompanying text.

³²⁵ *Id.*

accident or criminal attack.³²⁶ Under the Act, each bystander would be bound to assist the individual in peril in a reasonable manner.³²⁷ If no one helps the person in danger, each bystander will be liable but only for the amount of injury directly resulting from his failure to assist.³²⁸ The victim would have a right to one recovery from all the bystanders, who would be entitled to contribution among themselves.³²⁹

Recognition of a general duty to rescue, however, does not mean that liability will automatically be imposed. Liability will depend upon whether a statutory duty to rescue has been breached. Courts can determine whether a bystander breached his statutory duty to render assistance by adopting the approach taken by the French courts.³³⁰ American courts should impose liability whenever they determine that a reasonable man under similar circumstances would have helped the person in danger.³³¹ All that the court would have to determine is that the defendant knew of the dangerous situation threatening the plaintiff, and refused to act even though such action would not have resulted in harm to himself or others.³³² If the court does find that the bystander did breach his statutory duty to assist the person in danger, a fine, similar to the one provided in the Vermont or Minnesota statute, should be imposed.³³³ As a supplement to the fine, legislatures may want to consider creating a statutory action for civil damages as well³³⁴ so that a potential victim could bring a civil action against the individual who failed to assist him. Civil liability encourages rescue by compensating the injured party as well as by penalizing the wrongdoer.³³⁵

As a means of further encouraging rescue, the proposed Act exempts the rescuer from liability for any damages he causes to persons or property while rendering aid as long as his conduct is less than grossly negligent.³³⁶ The protection from civil liability currently provided by Good Samaritan statutes is reflected in the Act.³³⁷ The Act extends civil immunity to anyone who undertakes a rescue as long as his conduct is not grossly negligent.³³⁸ Similarly, the Act compensates a rescuer for any injuries and expenses he

³²⁶ See Appendix *infra*. As the *Tarasoff* court pointed out: "Morally questionable, the [common law] rule owes its survival to the difficulties of setting any workable standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue" 17 Cal. 3d at 435 n.5, 551 P.2d at 343 n.5, 131 Cal. Rptr. at 23 n.5.

³²⁷ See Appendix *infra*. See also Weinrib, *supra* note 66, at 262.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ See *supra* note 272 and accompanying text.

³³¹ *Id.*

³³² In determining the duty issue this way, courts will eliminate the causation problem. See Note, *The Bad Samaritan*, *supra* note 33, at 641.

³³³ See Appendix *infra*. See also VT. STAT. ANN. tit. 12, § 519 (Equity 1973), *supra* note 165.

³³⁴ See Appendix *infra*. Civil liability is also incurred in France for failure to rescue. See *supra* notes 271-72 and accompanying text.

³³⁵ See Comment, *Endangered Act*, *supra* note 167, at 145. Professor Franklin states that civil liability "is no less appropriate here than in cases of negligence or violation of other statutory duties." See Franklin, *supra* note 151, at 55.

³³⁶ See Appendix *infra*. See also VT. STAT. ANN. tit. 12, § 519 (b) (Equity 1973). See also *supra* notes 165, 174-76 and accompanying text. The Vermont rescue statute exempts the rescuer from liability for any damages he causes while rendering aid. *Id.* See MINN. STAT. ANN. § 604.05 (2) (West 1983 Supp.). See also *supra* notes 177, 181 and accompanying text.

³³⁷ See *supra* notes 151-57.

³³⁸ See Appendix *infra*.

incurs as a result of the rescue.³³⁹ Possible sources of indemnification would include the person who caused the dangerous situation,³⁴⁰ the victim³⁴¹ and the state.³⁴² In those cases where the victim or the negligent tortfeasor lack the sufficient funds to compensate the rescuer, the state should indemnify the rescuer for any injuries and or expenses he incurred as a result of the rescue. This indemnification policy would be a logical extension of the statutes which currently indemnify rescuers for their injuries and expenses.³⁴³ By exempting the rescuer from civil liability and by compensating him for his injuries and expenses, legislatures will explicitly recognize the merits of rescue.

CONCLUSION

In the United States no general duty to assist someone in a dangerous situation exists. Courts have refused to enforce what is arguably a moral duty to assist someone in peril. Nevertheless, a trend in both state legislatures and state courts toward imposing upon a bystander a general duty to assist a person in danger has been gaining momentum. The cumulative effect of these legislative and judicial developments indicates that this country is moving closer toward recognizing a legal duty to help someone in a perilous situation. Given the current trend in the United States toward imposing a duty to assist others in danger, a rule of law imposing a general duty to rescue is desirable and workable. This note has proposed a Model Act state legislatures could adopt or use in formulating such a law.

A law imposing a general duty to rescue would reflect the moral obligation of common decency and humanity to come to the aid of another human being who is in danger. Such a law would reflect that shared morality of our community³⁴⁴ — that members of our society have a moral responsibility to help one another in times of emergency.³⁴⁵ As one commentator so aptly points out: "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."³⁴⁶

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³³⁹ See Appendix *infra*. See also CAL. GOV'T. CODE § 13970 (West 1980), *supra* note 161.

³⁴⁰ See Appendix *infra*. See also *Wagner v. International Ry.*, 232 N.Y. 176, 180, 133 N.E. 437 (1927). See also *supra* note 64.

³⁴¹ See Appendix *infra*. See also *Britt v. Mangum*, 261 N.C. 250, 255-56, 134 S.E.2d 235, 239 (1964). See also *supra* note 64.

³⁴² See Appendix *infra*. See also CAL. GOV'T. CODE § 13970 (West 1980), *supra* note 161.

³⁴³ *Id.* See also *supra* notes 158-63.

³⁴⁴ See *Honore*, *supra* note 316, at 231.

³⁴⁵ One American judge has stated:

[I]t is undoubtedly the moral duty of every person to extend to others assistance when in danger; to throw, for instance, a plank or rope to the drowning man, or make other efforts for his rescue, and if such efforts should be omitted by anyone when they could be made without imperilling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men

U.S. v. Knowles, 26 Fed. Cas. 800, 801 (D.C.N.D. Cal. 1864)(No. 15,540).

³⁴⁶ *Bohlen* pt. 2, *supra* note 1, at 337.

APPENDIX

The Model Act provides the following:

- (a) Any person at the scene of an emergency, who knows or has reason to know that another person is exposed to grave physical harm, has a duty to provide reasonable assistance. Such assistance is required only where no serious risk is involved for the rescuer. The standard required in recognizing the gravity of the danger involved and in assessing the form of assistance required should be that of the reasonably prudent person under the same or similar circumstances.
- (b) Reasonable assistance may include notifying the appropriate authorities of the dangerous situation or obtaining assistance from the proper authorities. At times, personal assistance will be required if no serious risk is involved for the rescuer or any other third party.
- (c) Where several witnesses are present at the scene of an accident or other dangerous situation, each witness is legally bound to provide assistance in a reasonable manner.
 - (i) If none of the witnesses assists the injured party, each witness is liable, but only for the amount of injury directly resulting from his failure to assist.
 - (ii) The injured party has the right to only one recovery from all the witnesses, who are entitled to contribution among themselves.
- (d) Any person willfully violating this Act shall be fined not more than \$500.00.
 - (i) Any person willfully violating this Act must compensate the injured party for damages arising from his failure to help.
- (e) A person who provides reasonable assistance in accordance with this Act shall not be liable in civil damages unless his acts constitute gross negligence.
- (f) A person who provides reasonable assistance in accordance with this Act is entitled to be compensated for any injuries or property damage he sustained as a result of his rescue efforts.
 - (i) The rescuer is entitled to reasonable compensation from either the victim or from the person who originally created the dangerous situation prompting the rescue.
 - (ii) In those situations where either the victim or the person who originally created the dangerous situation prompting the rescue lacks the sufficient funds to provide compensation, the state shall compensate the rescuer for his injuries and damages.