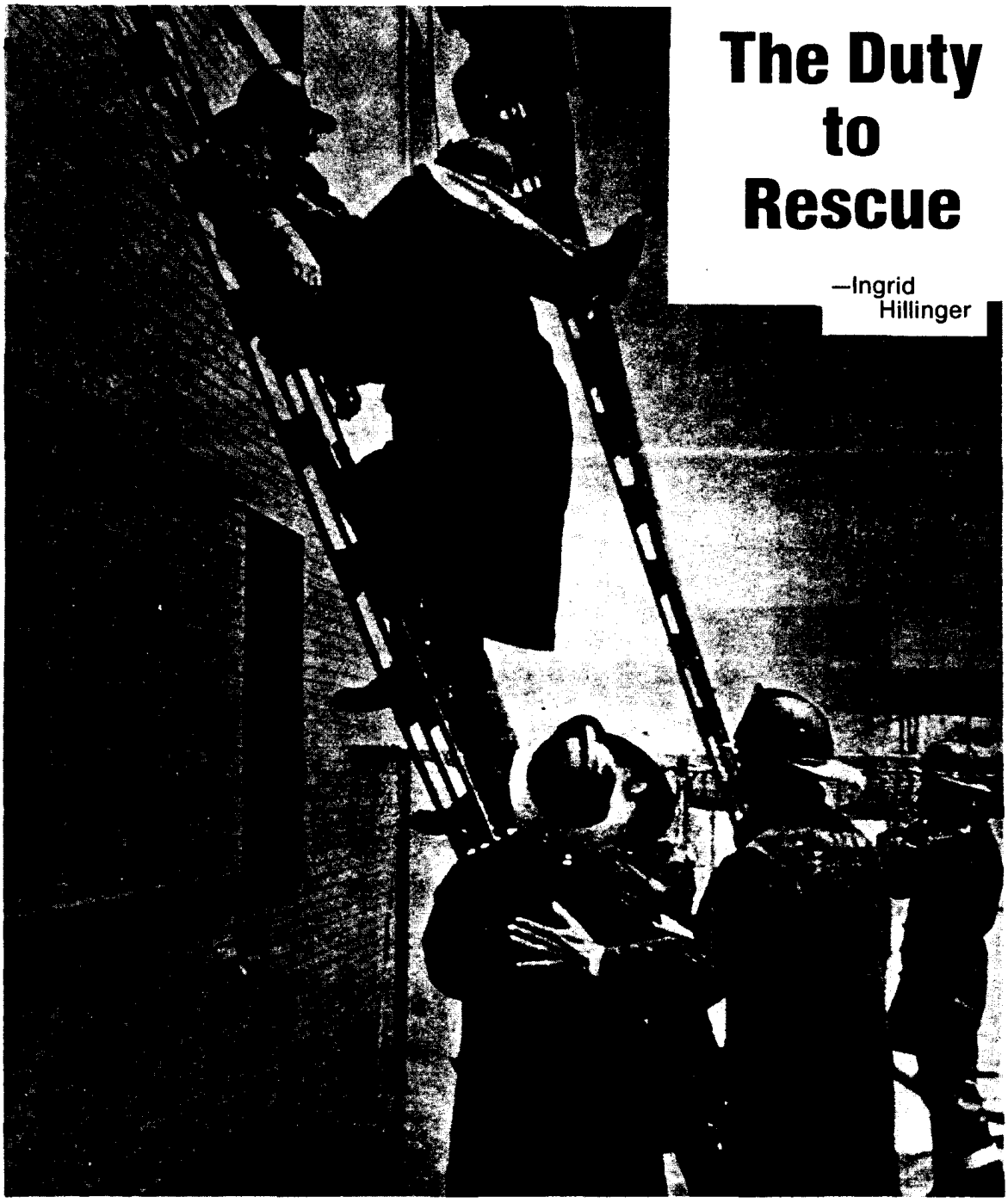


The Duty to Rescue

—Ingrid Hillinger

Any student of the law will undoubtedly remember the 1928 tort case *Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928)* where defendant, an amusement park employee, rented a canoe to a Mr. Hill, knowing that he was intoxicated and clearly incapable of safe navigation. Mr. Hill paddled out a bit and then inadvertently upset the boat. He clung to the overturned shell for half an hour, all the while uttering loud cries for help. There were boats available for a rescue attempt. Defendant, a peculiarly endearing type, smoked a cigarette on the dock as Hill drowned before him. In an apparently incomprehensible ruling, the court held that the defendant was under no legal duty to go to his aid. A 1966 case, *Handiboe v. McCarthy*, 114 Ca. App. 541, 151 S.E. 2d 905 (1966), similarly held that a servant was under no duty to rescue a small child drowning in his master's swimming pool.

In my Torts class, there was a visible reaction of horror to these unsavory cases. Our moral sensibilities were deeply offended. Almost instinctively we turned to the legal system. "There ought to be a law", we cried. Nor were we alone. Such noted legal commentators as Dean Prosser and Dean Pound have joined in condemning this, to them, obvious moral obtuseness in the law.

Prosser, considering as well the case of *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959), where the Pennsylvania Supreme Court found no legal responsibility upon a defendant for challenging deceased to jump a wide, dangerous ditch, has commented that "it would be hard to find a more unappetizing trio of decisions. W. PROSSER, LAW OF TORTS 340 (4th ed. 1971). He has argued that the results of these decisions derive from an "historical reluctance to countenance non-feasance as a basis of liability." W. PROSSER, *supra,* at 340. Pound suggests that they represent an atavistic remnant of nineteenth century jurisprudence which manfully tried to separate legal principles from moral ones R. POUND, LAW AND MORALS 71-88 passim (2d ed. 1926).

It is arguable, however, that the legal system's failure to impose an active duty of rescue is perhaps not so reprehensible as may first appear. In fact, it can be at least partially explained in terms of contemporary moral, legal and practical considerations. Obvious moral failings are not necessarily cured by a reflexive dumping of the problem into the legal system's collective lap. At times, there surely must be non-legal solutions to a problem which are preferable to legal alternatives. The question is: is this such a time or should there be a legal duty to rescue?

Modern thinking would have no quarrel with Prosser if, in fact, old notions of non-feasance accounted for the absence of such a duty. The individual who is harmed because someone failed to act is no less injured than the individual who experiences an active assault. If the duty to rescue were rationalized away upon this basis, and this basis alone, it would represent a moral and legal abdication of societal responsibility. A further analysis of the problem, however, shows that the absence of such a duty derives from more than this archaic distinction. Pound's blithe explanation does not do justice to the complexity of the problem. Modern courts do not always blindly defer to past legal traditions when there is an obvious and compelling reason to depart therefrom. No—if modern courts fail to recognize an active duty to rescue, there must be other considerations which also come into play.

A starting point must be a consideration of the relationship between our moral and legal systems. Do we, even in theory, expect our legal system to encompass wholly our ethical system? Certainly we know that, in fact, one is not the mirror image of the other. Laws are not always the state's version of moral precepts although there are obvious and numerous overlaps. "Thou shalt not kill" appears in the legal code as a prohibition against killing with the added promise of state retribution should its law be violated. But the state, in regulating relationships between people, also must necessarily deal with situations devoid of moral content. Rules governing contractual relationships property relationships, allocation of risk, etc. have frequently developed without the aid of moral guidelines. So, too, there are moral rules which exist without the benefit of state sanction. Selflessness, the golden rule, the duty to honor one's parents have not found legal translation to date.

For many of us, this lack of identity is welcomed, for one man's morality may well be another man's sin. Who is to decide which moral precepts shall have the force of law? Should those believing abortion to be immoral have access to state sanctioning power to impose their beliefs upon those who believe differently, or has the legal system wisely left some matters to the realm of moral persuasion alone? Contrary to Pound's insinuation that attempts to separate law and morals hark back to Neanderthalic times, POUND, *supra,* at 77), many modern thinkers applaud this trend, at least with respect to laws regulating sexual mores. Many feel that consenting adults should be free to determine their own conduct and moral standards without state interference. This demonstrates at the very least that there is some danger in assuming that the legal and moral systems should be ultimately coterminus.

This conclusion does not necessarily resolve our problem as to a duty to rescue. That morality and the legal system sometimes cover areas unto themselves does not mean that a duty to rescue should not find expression in both. Is there *any* justification for this glaring omission? There is. It is the intervention of practical considerations which accounts for the law's apparent callousness. At its most fundamental level, the duty to rescue defies sound legislation.

It should be noted that those clamoring for the imposition of such a duty are addressing themselves only to the situation where rescue would be danger-free for the rescuer. The law recognizes that it cannot command an individual to risk, gratuitously, his own life to save another. (It is interesting to note, however, that our moral system does ask this of us. Such acts are lauded as truly heroic, wholly selfless in fact the ultimate moral act; for what more can a society exact from an individual than his life?) While imposing a legal duty to rescue would not be difficult in the above-mentioned cases, the ramifications of such a duty would be perplexing in two regards: one- how far does this duty extend; and two- what standards are we to establish to determine whether or not any danger is present?

It is impossible to delineate rationally the outer limits of this duty. Should each friend or casual acquaintance of the individual who smokes be held ultimately liable for his death from lung cancer? What about the alcoholic who sits next to you at work? We cannot dismiss these possibilities by saying that the individuals consciously choose to kill themselves and that the duty, therefore, does not extend to them. Few would ever suggest that we should say to the man about to leap from the ninth story, "Be my guest."

In addition, is it reasonably possible to limit liability to an ascertainable group? What about the boulder in the middle of the road which hundreds of people pass by during the daytime which becomes a fatal obstacle that night? If we find one passerby, can we fairly hold him and only him responsible for the death that ensued?

What standards should be used to determine whether the would-be rescuer was in danger? Should there be an objective standard (e.g., reasonable apprehension of fear) or a subjective one? Delineation of such a standard would seem to present enormous difficulties. Consider the Genovese death several years ago where a large group of New Yorkers watched and listened to a young woman being murdered below their windows when help was only a phone call away. Afterwards, people said that they had not wished to get involved. Involvement for them probably meant becoming the next victim, an irrational fear perhaps, but a very real one to many living in urban America. In the Genovese case, should the actual on-lookers alone have been condemned? Should not the city have borne part of the responsibility? If New Yorkers had felt that they would have been protected, perhaps they would have been less reluctant to become "involved."

If we assume that the duty to rescue presents serious legislative obstacles, can we content ourselves in its absence, or should we risk the unknown and attempt to legislate anyway? Let us return to our defendant who so calmly smoked his cigarette while another human being

begged for help to save his life. Let us keep in mind that the same moral sensitivity which is so shocked by defendant's inaction also recoils from the idea of punishment of "criminals" because it does little to resolve the problem of crime. What kind of man is our defendant canoe keeper? Certainly not someone we would care to dine with. Can we suppose that a legal sanction would motivate this obviously callous, if not sick, individual to act? (We no longer believe that laws forbidding murder in fact prevent murders.) Perhaps legislation would make *us* feel better, e.g. "if one amongst us be that indifferent, know ye that he shall pay"? But what would a law against indifference accomplish? Aren't we, in fact, saying, how could *anyone*, with *no* danger to himself, *not* rescue another? But this is just the point. Those who would not rescue under such circumstances are, more likely than not, sick, highly anti-social individuals who are in need of mental help rather than legal directives.

Should we draft a law which would essentially address itself to this small, rather unusual class of people, and which well may not have any affect on it at all?

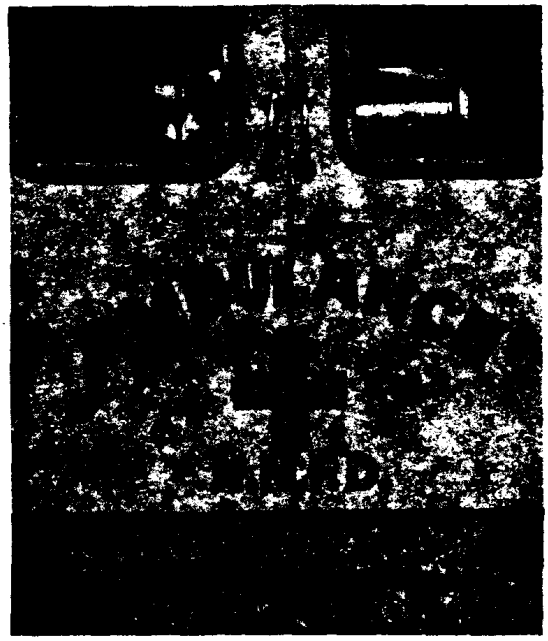
Clearly, priorities must be considered. One author compares the law to a vigilant sheep dog. He points out:

> many middle-class Americans feel secure enough from personal aggression that they forget the wolves around them and demand that their sheep dog act more like a solicitous veterinarian. Perhaps he should: nevertheless, statistics and case histories of violent crime indicate that our society still needs canine teeth in guard to protect it—not against the passive indifference of the passer-by but against the active assault of the robbers, rapists and murderers." EDMOND CAHN, THE MORAL DECISION (1955).

If we assume that criminal laws do affect behaviour, and that the imposition of a duty to rescue would save lives, then perhaps the question is one of selectivity. Obviously, any legal code cannot cover all instances of injury to another. Are the circumstances here such as to warrant a law or are there other acts, more destructive of the social fabric, which occur more frequently and thereby demand priority treatment? In the last analysis, one might conclude that the situations where there is no danger—real or imagined—are infrequent and therefore not totally deserving of legal sanction. On the other hand, one life saved is probably reason enough for a law.

Casting aside practical considerations, one must finally ask philosophically what such legislation would do to us as moral beings. Mr. Cahn provides a valuable insight as he discusses an episode from Fielding's *Joseph Andrews* (CAHN, *supra*, at 187-91), Joseph had been set upon by thieves and stripped of all possessions, including his clothes. A stagecoach passed by and, at first, none of the passengers expressed the slightest inclination to help.

Afterwards, people said that they had not wanted to get involved.



The coachmen wanted a fare, the woman passenger was offended by his nakedness, and an elderly passenger was afraid of being robbed. "However, it happened that one of the unsympathetic passengers was a young lawyer, a very cautious lawyer at that. He warned the others that if Joseph should die, they might be proved to have been the last in his company and might be called to account for his death." (*Supra*, at 188). Fear of prosecution rather than any moral impulse finally convinced the passengers to take Joseph in.

As Cahn points out, the passengers' initial decision not to let Joseph in was *un*enlightened selfishness while their ultimate decision to let him ride with them was merely enlightened selfishness. Any attempt to impose a legal sanction may curb behaviour such as with the Fielding story but it will not elevate man's morality. It will provide one more instance of doing something because it is required by law rather than by an individual's moral dictates. In a sense, it robs the individual of his moral satisfaction—it takes the fun out of being moral. On the other hand, it would surely be ridiculous to sacrifice lives for the sake of any moral gratification. The question is really, would such a law save lives? Would Mr. Canoe Keeper have behaved any differently if there had been a law on the books?

On further reflection, the question of imposing a legal duty to rescue is more difficult than it would first appear. The absence of the legal duty does not automatically make the common law immoral or amoral. Rather, it could show that the law is, above all else, practical and it would prefer to remain silent rather than to speak badly. Perhaps the law has deferred to other social mechanisms recognizing that law alone cannot solve all human problems or achieve all desired social objectives. Can we really say that in making this choice, the law was unwise?