

# William & Mary Law Review

---

Volume 26 (1984-1985)  
Issue 3

Article 3

---

April 1985

## The Duty to Rescue: A Reexamination and Proposal

Jay Silver

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Law and Society Commons](#)

---

### Repository Citation

Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 Wm. & Mary L. Rev. 423 (1985), <https://scholarship.law.wm.edu/wmlr/vol26/iss3/3>

Copyright c 1985 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

# THE DUTY TO RESCUE: A REEXAMINATION AND PROPOSAL

JAY SILVER\*

From time to time, national attention is drawn to the issue of a legal duty to assist those in distress. In 1964, accounts of the murder of Kitty Genovese on a New York City street horrified the nation. Over the course of thirty-five interminable minutes, the young woman was repeatedly stabbed as she cried for help and crawled toward the door of her apartment building. Thirty-eight of her neighbors looked on from the safety of their own apartments above the well-lighted street, but none summoned help. Well after her attacker had fled, a single caller notified the police, who were on the scene within two minutes.<sup>1</sup> A stunned public learned that Ms. Genovese's neighbors had violated no law. Legal commentators called for legislative reform, but within a few years the issue had faded from view.

Recently, a series of incidents involving callous bystanders has rekindled interest in creating a "rescue" duty. The most notorious incident, in which patrons of a bar near Boston cheered for over an hour as four men raped a female customer,<sup>2</sup> has already spurred passage of a public rescue duty in Minnesota and, in Massachusetts and Rhode Island, a duty on the part of witnesses to report certain crimes.<sup>3</sup> As similar legislation is introduced in other states,<sup>4</sup> the legal community and the public will sharpen their focus on the issue.

---

\* B.A., 1975, Washington University (St. Louis); J.D., 1981, Vanderbilt University; member of the Pennsylvania bar.

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

2. *The Tavern Rape: Cheers and No Help*, NEWSWEEK, Mar. 21, 1983, at 25.

3. Christian Science Monitor, Sept. 22, 1983, at 3, col. 1. The Minnesota statute can be found at MINN. STAT. ANN. § 604.05 (West Supp. 1984); the Massachusetts statute at MASS. GEN. LAWS ANN. ch. 268, § 40 (West Supp. 1983); and the Rhode Island statute at R.I. GEN. LAWS §§ 11-37-3.1 to -3.3 (Supp. 1984).

4. See Kiesel, *Who Saw This Happen? States Move to Make Bystanders Responsible*, 69 A.B.A. J. 1208 (1983); Christian Science Monitor, *supra* note 3.

## I. THE AMERICAN RULE

With limited exceptions, there is no duty under Anglo-American law to lend personal assistance to or obtain help for persons in distress, or to warn of imminent danger.<sup>5</sup> Although the duty to assist an injured or endangered person is commonplace throughout the world,<sup>6</sup> our law continues to rely solely on man's unselfish spirit. In leading American cases on the subject, however, that spirit has been wanting:<sup>7</sup>

The expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown.<sup>8</sup> A physician is under no duty to answer the call of one who is dying and might be saved,<sup>9</sup> nor is anyone required to play the part of Florence Nightingale and bind up the wounds of a stranger who is bleeding to death,<sup>10</sup> or to prevent a neighbor's child from hammering on a dangerous explosive,<sup>11</sup> or to remove a stone from the highway where it is a menace to traffic,<sup>12</sup> or a train from a place where it blocks a fire engine on its way to save a house,<sup>13</sup> or even to cry a warning to one who is walking into the jaws of a dangerous machine.<sup>14</sup>

## A. Early History

Our rule can be traced to several sources. The early common law was highly individualistic; it was feared that judicial intervention in social and economic affairs would sap men of their self-reliance

---

5. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 56, at 375 (5th ed. 1984).

6. See Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966); Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW* 91 (J. Ratcliffe ed. 1966).

7. W. PROSSER & W. KEETON, *supra* note 5.

8. *Id.* n.22 (citing *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928)).

9. *Id.* n.23 (citing *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901)).

10. *Id.* n.24 (citing *Allen v. Hixson*, 111 Ga. 460, 36 S.E. 810 (1900); *Riley v. Gulf, C. & S.F. Ry. Co.*, 160 S.W. 595 (Tex. Civ. App. 1913)).

11. *Id.* n.25 (citing *Sidwell v. McVay*, 282 P.2d 756 (Okla. 1955)).

12. *Id.* n.26 (citing *O'Keefe v. William J. Barry Co.*, 311 Mass. 517, 42 N.E.2d 267 (1942)).

13. *Id.* n.27 (citing *Louisville & N. R.R. Co. v. Scruggs & Echols*, 161 Ala. 97, 49 So. 399 (1909)).

14. *Id.* n.28 (citing *Toadvine v. Cincinnati, N.O. & T.P. Ry. Co.*, 20 F. Supp. 226 (D. Ky. 1937)).

and encroach upon their individual freedom.<sup>15</sup> The emerging spirit of capitalism<sup>16</sup>—the belief that “the struggle of selfish individuals automatically produces the common good of all”<sup>17</sup>—reinforced judicial reluctance to compel citizens to assist persons in trouble.

Partially from a desire to limit the scope of judicial intervention, and partially from necessity, a distinction arose between “misfeasance” and “nonfeasance.”<sup>18</sup> It was felt that the common law should be used “to prevent people from harming one another, rather than to force them to confer benefits on one another.”<sup>19</sup> At the same time, the early jurists were able to redress only the most severe breaches of the “King’s peace.” Generally, these incidents of social violence and commercial disruption consisted of affirmative acts, not omissions. Under the weight of *stare decisis*, this preoccupation with affirmative acts and the desire to limit judicial intervention evolved into the principle of not imposing liability for omissions.<sup>20</sup>

### B. Current Status

Over the years, this principle has been eroded,<sup>21</sup> and there are presently five situations in which our courts recognize a duty to render aid. First, the duty may be imposed by statute. An example found in many states is the “hit and run” statute requiring any driver involved in an automobile accident, whether or not he was at fault, to give assistance to those injured.<sup>22</sup>

Second, courts have imposed the duty to render assistance on those who stand in certain relationship to injured or endangered parties. These “special relationships” include parent to child, spouse to spouse, common carrier to passenger, innkeeper to guest, storekeeper to customer, host to social guest, employer to em-

---

15. Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 632 (1952).

16. *Id.*

17. Rudzinski, *supra* note 6, at 120.

18. See generally W. PROSSER & W. KEETON, *supra* note 5, § 56, at 373-75.

19. Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 242 (1971) (construing Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908)).

20. Note, *supra* note 15, at 631-32. See generally C. MORRIS & C. MORRIS, JR., MORRIS ON TORTS 127-28 (1980).

21. See W. PROSSER & W. KEETON, *supra* note 5, § 56, at 373-74.

22. 7A AM. JUR. 2D *Automobiles and Highway Traffic* §§ 289, 294 (1980).

ployee, teacher or school official to student, and jailer to inmate.<sup>23</sup> The party on whom the duty is imposed need not have been responsible for the victim's peril. Courts have recognized this duty only in relationships of the greatest intimacy and dependence, or in which some economic benefit flows to the burdened party.

Third, the duty may be brought about by contract.<sup>24</sup> A lifeguard, for example, agrees to rescue drowning swimmers as one of the terms of his employment. Firemen, police, nurses, baby-sitters, and many others enter into agreements that require them to render aid.

Fourth, one who negligently injures or imperils another has a duty to render reasonable assistance.<sup>25</sup> Many courts have broadened this rule, placing the duty on anyone whose conduct—whether innocent or negligent—has caused injury or unreasonable danger.<sup>26</sup>

Finally, one who volunteers aid is under a duty to exercise reasonable care.<sup>27</sup> He may abandon the effort, but only if the victim's condition will not be worsened as a result.<sup>28</sup>

Two states, Vermont and Minnesota, have enacted statutes imposing on the general public a duty to aid those in distress.<sup>29</sup> Vermont's law, passed in 1967, requires anyone who knows that another is in grave danger to render reasonable assistance, unless such efforts would endanger the rescuer or interfere with "important duties owed to others." The statute grants civil immunity for all but "gross negligence"—in apparent contradiction to the requirement of "reasonable assistance"—and establishes a criminal

---

23. W. PROSSER & W. KEETON, *supra* note 5, § 56, at 376-77. Courts have gradually expanded this set of relationships, with some notable exceptions. The Pennsylvania Supreme Court, for example, refused to impose the duty on the hosts of business guests. *See Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959). The defendant coaxed his business guest to jump into a deep, water-filled ditch, and then watched impassively as the guest drowned. The court held there was no duty to render aid. 397 Pa. at 322, 155 A.2d at 346.

24. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 26, at 185 (1972).

25. W. PROSSER & W. KEETON, *supra* note 5, § 56, at 377.

26. *Id.*

27. 57 AM. JUR. 2D *Negligence* § 46 (1971).

28. *See id.*

29. MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973). Both statutes, along with a sampling of rescue statutes from other countries, are reprinted in the appendix, *infra*.

penalty of a fine not exceeding \$100.<sup>30</sup>

Minnesota's statute, enacted in 1983 in response to the previously noted rape incident near Boston,<sup>31</sup> resembles the Vermont statute. The Minnesota statute, however, differs in two respects. First, Minnesota imposes the duty to rescue only on persons who are "at the scene of an emergency," while in Vermont the duty falls upon anyone who "knows" of another in danger. Second, Minnesota does not explicitly suspend the duty when third parties are already providing aid. Otherwise, the statutes are virtually identical, with Minnesota granting civil immunity to the rescuer for anything short of "willful and wanton or reckless" conduct, and providing for a fine of not more than \$100.<sup>32</sup>

Also in response to the bar rape incident, Rhode Island and Massachusetts enacted more limited rescue statutes.<sup>33</sup> In Rhode Island, any witness to a sexual assault must immediately notify the police. Victims are exempt from this requirement, and failure to notify is classified as a misdemeanor, punishable by imprisonment for not more than one year, a fine not to exceed \$500, or both,<sup>34</sup> The Massachusetts statute is similar, but applies to witnesses of armed robberies and homicides as well as rapes, and carries a fine of between \$500 and \$2500, but no imprisonment.<sup>35</sup>

While Vermont and Minnesota are the only states to have imposed a comprehensive duty to render assistance, every state and the District of Columbia have enacted "Good Samaritan" statutes designed to encourage physicians to provide emergency aid.<sup>36</sup> Typi-

---

30. VT. STAT. ANN. tit. 12, § 519 (1973).

31. Christian Science Monitor, *supra* note 3.

32. MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973). The Minnesota statute provides that violation of the duty is a petty misdemeanor which, under Minnesota law, carries a fine of not more than \$100. MINN. STAT. ANN. §§ 604.05 and 609.02 (West Supp. 1984).

33. Christian Science Monitor, *supra* note 3; see also Note, *The Duty to Rescue in California: A Legislative Solution?*, 15 PAC. L.J. 1261, 1279 n.185 (1983).

34. R.I. GEN. LAWS §§ 11-37-3.1 to -3.4 (Supp. 1984).

35. MASS. GEN. LAWS ANN. ch. 268, § 40 (West Supp. 1983). Actually, the Rhode Island and Massachusetts statutes are "rescue" statutes only to the extent that police might be notified during the commission of a crime and might respond in time to prevent or mitigate harm. Since witnesses could comply with their duty by notifying police shortly after the commission of the crime, these statutes more closely resemble the common law ban against "misprision of felony."

36. These statutes (except for that of Kentucky) are reprinted in 2 D. LOUISELL & H.

cally, these statutes reduce the standard of care owed by physicians who volunteer emergency medical care, imposing liability only for gross negligence or bad faith.<sup>37</sup> Coverage may extend to in-state physicians, all physicians, all licensed medical personnel, or all persons rendering emergency aid.<sup>38</sup>

These statutes were enacted as a result of widespread concern that physicians were not volunteering their services in emergencies for fear of subsequent malpractice actions.<sup>39</sup> At least one study, however, indicates that Good Samaritan statutes are generally ineffective.<sup>40</sup> Physicians may fear any involvement in embarrassing malpractice litigation, not merely an unfavorable verdict, and may believe that these statutes do not sufficiently discourage the filing of suits.<sup>41</sup>

Despite recent judicial and legislative expansion of the rescue duty, its future is unclear. Some commentators predict the judicial creation of a universal duty, and there is movement in a number of states toward consideration of legislation similar to the broad Minnesota and Vermont statutes or the narrower Massachusetts and Rhode Island statutes.<sup>42</sup> Even so, progress toward a public rescue duty can only be characterized as slow and uneven.

## II. THE CASE FOR A DUTY TO RESCUE

The strongest argument for a universally applicable rescue duty is that lives would be saved and injuries avoided. The existence of a duty would encourage rescue in four subtly different ways: many

---

WILLIAMS, *MEDICAL MALPRACTICE* §§ 21.10-21.59 (1983). Kentucky's can be found at KY. REV. STAT. § 411.148 (1984).

37. 2 D. LOUISELL & H. WILLIAMS, *supra* note 36, § 21.05.

38. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 52 n.12 (1972).

39. Note, *Physicians—Civil Liability for Treatment Rendered at the Scene of an Emergency*, 1964 WIS. L. REV. 494, 497; see also Holland, *The Good Samaritan Laws: A Reappraisal*, 16 J. PUB. L. 128, 132 (1967). Studies have confirmed the existence of this fear. See *id.* at 132 n.20.

40. Note, *1963 Professional-Liability Survey*, 189 J. A.M.A. 859, 864-65 (1964).

41. Whatever its source, this fear would seem groundless. Remarkably, there appear to be no recorded cases of malpractice arising from emergency medical aid volunteered by a physician outside of his office or hospital. 2 D. LOUISELL & H. WILLIAMS, *supra* note 36, § 21.01; Holland, *supra* note 39 at 133-34; Note, *California Good Samaritan Legislation: Exemptions from Civil Liability While Rendering Emergency Medical Aid*, 51 CALIF. L. REV. 816, 817 n.7 (1963).

42. See Kiesel, *supra* note 4; Christian Science Monitor, *supra* note 3.

people would act out of a desire to be law abiding; others would act out of fear of legal sanctions, particularly when witnesses were present; some who are timid would be provided with the necessary motivation to intervene; and still others would be moved to action by a heightened sense of the morality of rescue.

This last point rests on the premise that law not only reflects society's moral values, but also helps shape them. As one commentator asserts, "Legal and moral rules are in symbiotic relation; one 'learns' what is moral by observing what other people . . . tend to enforce."<sup>43</sup> Accordingly, a legal duty to rescue would increase the number of persons who feel morally compelled to offer emergency aid. This, in turn, would increase the likelihood that people would render assistance in situations in which the failure to do so would go undetected.

No one, however, disputes the need to promote rescue. Instead, the issue is whether such a duty places too great a burden on personal freedom or presents insurmountable administrative difficulties.<sup>44</sup>

One of the most common criticisms of a rescue duty is that requiring the performance of affirmative acts is unduly coercive and beyond the legitimate scope of government.<sup>45</sup> Omissions, it is ar-

---

43. D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 798, 809 (1975). Studies support the existence of this relationship. In one, a group was given a number of fact situations, such as that of a bystander who watched idly as a man drowned 10 feet from shore. They were told that an attempt to rescue was required by law. Another group was given identical facts, except that an attempt to rescue was not required. A greater proportion of the first group felt that the actions of the passive observer were morally wrong. The existence of a legal duty apparently helped the subjects define the failure to rescue as immoral. See Kaufmann, *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgment*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 77-81 (J. Macauley & L. Berkowitz eds. 1970).

44. An alternative which avoids the imposition of a coercive legal duty, yet has universal appeal, would be to offer cash rewards for rescue. Austria has adopted such a plan. When a rescuer risks his own life to save that of another, he is eligible for a cash award from a public fund. Rudzinski, *supra* note 6, at 117.

This approach presents some serious problems, however. It not only invites false claims and contrived rescues, but the powerful appeal of cash rewards would also induce some to take foolish risks in dangerous situations, and others to intermeddle when no real danger exists.

45. Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946).



gued, should not be punished. There are, however, two flaws in this argument. First, the distinction between acts of commission and those of omission is often meaningless. To use a grim example, most would agree that a mother who intentionally starves her healthy child should not be dealt with by the law any differently than the mother who intentionally poisons her child. Surely, no one would argue that the first mother is less morally culpable simply because starvation is an act of omission. Because the law should not (and does not<sup>46</sup>) distinguish between these situations, there seems little reason to exempt other acts of omission which lead to odious results.<sup>47</sup> Second, despite dicta to the contrary, omissions have long served as a basis for liability in our system. Failure to file one's tax return, to stop at a red light, or to install required safety devices in one's factory are just a few examples of punishable omissions.

A related argument against the duty is that, while it may be appropriate to compel certain affirmative acts, rescue is not one of them. To some, a rescue duty constitutes an attempt to enforce unselfishness and raises the specter of "Big Brother."<sup>48</sup> It is felt that the decision to intervene in an emergency should be left to an individual's conscience, even when something as simple as a call to the police could save a life. The rebuttal to this argument is simple. Certainly government should not be in the business of coercing kindness, and should require an individual to confer a benefit on another only when the value of the benefit sufficiently outweighs the cost of providing it. For example, our laws requiring parents to send their children to school<sup>49</sup> are generally accepted as legitimate exercises of governmental power. Both child and society derive significant benefit, and the deprivation of the parents' freedom to

---

46. 2 C. TORCIA, *WHARTON'S CRIMINAL LAW* § 173 (14th ed. 1979).

47. There is also a philosophical objection to punishing omissions. Some argue that because a victim's harm would have occurred even if the person who failed to act had not been present, it cannot be said that the omission caused the harm. Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30, 34-35 (1951). However, as in the leading American cases summarized earlier, people are frequently in a position to prevent harm, but simply choose not to. In such situations, it seems fatuous to assert that the failure to act has caused no harm.

48. See Morris, *Rescue and the Common Law: England and Australia*, in *THE GOOD SAMARITAN AND THE LAW* 142 (J. Ratcliffe ed. 1966).

49. See, e.g., N.Y. EDUCATION LAW § 3212 (McKinney 1981).

keep their children at home is an acceptable cost. Other examples are laws requiring employers to provide safe workplaces,<sup>50</sup> or medical personnel and other persons to report suspected child abuse.<sup>51</sup> In much the same way, the benefit provided by a legal rescue duty—the saving of lives—justifies the deprivation of our freedom to remain passive in emergencies.

One can always conjure up “worst case” scenarios in which prosecution under a rescue statute would work an injustice or inordinately drain state resources. This, however, can happen under any criminal law, and merely emphasizes the importance of the sound exercise of prosecutorial discretion not to bring charges and judicial discretion to dismiss *de minimis* infractions.<sup>52</sup>

Another criticism of the duty is that a bystander would be forced to imperil his own life for the sake of a stranger.<sup>53</sup> It is inconceivable, however, that a rescue law would require such a sacrifice. No existing statute does.<sup>54</sup> Further, most suspend the duty in the face of serious bodily harm, and some in the face of any harm at all to health or property, or any interference with obligations to third parties.<sup>55</sup>

Others have expressed the concern that, in many situations, there would be uncertainty about the need to intervene, and that this may lead to “officious intermeddling” in the affairs of strangers.<sup>56</sup> It is true that sometimes even the most carefully drawn rule

---

50. See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976).

51. See, e.g., Mo. REV. STAT. § 210.115 (1983). See generally Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1 (1967).

52. MODEL PENAL CODE § 2.12 (Proposed Official Draft 1962).

53. Linden, *supra* note 19, at 242.

54. See MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973); Feldbrugge, *supra* note 6, at 636-38; Rudzinski, *supra* note 6, at 105-07.

55. See *supra* note 54.

56. One commentator, for example, poses a hypothetical in which “a potential rescuer observing a young man and woman struggling in the back seat of an automobile may not be sure whether he is watching a rough-and-tumble courtship or imminent rape.” Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 934 & n.163 (1982). The writer suggests that, since one could not be certain whether calling the police would prove helpful or embarrassing, a rescue duty would be inappropriate in this situation. *Id.* Such a scenario, however, actually underscores the need for a rescue duty. Our police should be called to investigate not only unambiguous instances of criminal activity, but also situations in which there is reasonable suspicion that a crime is occurring. In the above hypothetical, for example, the benefit of possibly preventing a rape would certainly outweigh the risk of causing some embarrassment to the acrobatic lovers.

may leave doubt about the necessity of intervention, and that inappropriate intervention may occur. However, as Dean Prosser notes:

[T]he infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court.<sup>57</sup>

With a rescue duty, the consistent application of a sound formula governing the necessity of intervention would minimize the risk of intermeddling.

Another concern involves situations in which two or more potential rescuers are present. If no one attempts rescue, critics ask, which of them would be held liable?<sup>58</sup> The answer would appear to be that all should be held liable. There is no reason to limit individual liability simply because others have simultaneously engaged in the same unacceptable conduct. When a group of persons commits a robbery, for example, each is no less morally or legally responsible than if he had acted alone.<sup>59</sup>

A related question arises when only one of a number of bystanders renders aid: would the others be liable? The answer found in most existing statutes is that as soon as one person provides assistance, all others are relieved of the duty.<sup>60</sup> If, however, that assistance were reckless or otherwise inadequate, would the other bystanders still be relieved of their duty? A sensible answer would be "no," that only the rendering of reasonable assistance would suspend the duty. Since reckless or inadequate aid is little better than no aid at all, and might even aggravate a victim's condition, it

---

57. W. PROSSER & W. KEETON, *supra* note 5, § 32, at 173.

58. *See, e.g.*, Linden, *supra* note 19, at 242.

59. A related criticism is that rescue litigation stemming from Kitty Genovese-type incidents may involve large numbers of defendants, and that such proceedings would be unmanageable. *See, e.g.*, Henderson, *supra* note 56, at 936-37. This criticism has three flaws. First, the Kitty Genovese tragedy was quite unusual. Rescue situations will more typically involve only one or a small number of potential defendants. Second, it is precisely incidents such as the one involving Kitty Genovese which we find most offensive and must take steps to deter. Finally, our system has demonstrated over time that it is quite capable of accommodating large numbers of defendants in both civil and criminal actions.

60. VT. STAT. ANN. tit. 12, § 519 (1973); Feldbrugge, *supra* note 6, at 641.

makes little sense to suspend the duty until reasonable assistance has been provided.<sup>61</sup>

Finally, it is feared that if many persons simultaneously attempt rescue, the result will be chaos and failure.<sup>62</sup> This is unlikely, however. It seems more probable that the tendency of people to cooperate during an emergency would actually increase the chance of a successful rescue.

Some critics question the enforceability of the duty. They worry that nonrescuers would often be difficult to trace, and nearly impossible when not witnessed by others. While this concern has merit, our law enforcement agencies are well accustomed to dealing with problems of detection.

Other critics suggest that individuals may take foolish risks knowing that bystanders have a duty to come to their aid.<sup>63</sup> This concern seems unwarranted. Certainly people would realize that the existence of a rescue duty would not in itself assure that bystanders would act, or that the rescue would be successful even if they did.

Others have noted that, in a criminal prosecution, it might be difficult to establish that a bystander knew of injury or peril.<sup>64</sup> However, the problem of proving what was on a defendant's mind exists in nearly every criminal prosecution, and is simplified by the use of circumstantial evidence.<sup>65</sup>

---

61. Two nagging questions remain from this type of situation. First, if there were an inordinate delay before one member of a group of bystanders offered aid, could the others be held liable for the failure to act? The answer would seem to be "usually not." It would be difficult to prove the negative proposition that ultimately these observers would not have intervened. A more troublesome question arises if injury to the victim resulted during the delay and could have been prevented by timely assistance. Could, under these circumstances, the bystanders or even the rescuer be held liable? The answer to this question would depend upon the degree of care required under the applicable rescue law. If, for example, one must offer "reasonable assistance," an unreasonable delay would be the basis for liability. If, however, liability were imposed only for gross negligence, liability would be less likely.

62. See, e.g., Hale, *supra* note 45, at 215.

63. See, e.g., D'Amato, *supra* note 43, at 808.

64. See, e.g., Wehrwein, *Samaritan Law Poses Difficulties*, NAT'L L.J., Aug. 22, 1983, at 5, col. 1.

65. There are two other concerns associated with criminal prosecutions. One is the possibility that a nonrescuer might be convicted even though the victim's assailant is acquitted. See, e.g., Kiesel, *supra* note 4, at 1208-09. This, however, would not necessarily be an unjust result. The duty to aid would be triggered whenever a victim was injured or imperiled, and

A final concern is that a rescue duty would deprive society of clear examples of heroic conduct by making it uncertain whether rescue had been occasioned by altruistic impulses or by fear of legal sanctions.<sup>66</sup> However, any rescue law would almost certainly provide—as is the case in Vermont, Minnesota, and Europe<sup>67</sup>—that a would-be rescuer need not imperil his own life. As such, there would be ample opportunity for heroism.<sup>68</sup>

The creation of a legal rescue duty, whether through case law or statute, would come at a time when social forces favoring rescue are at an ebb. As our society has become more mobile, individuals have tended to lose their community identity and their dependence upon other community members. Unlike earlier times, one's set of primary acquaintances often excludes neighbors, merchants, and local public servants. As the bonds among community members weaken, so must the social pressure and individual desire to assist members in distress. A legal duty to rescue would, in part, replace the waning social duty.

### III. PROPOSED STATUTE

The resistance of Anglo-American law to a rescue duty is not typical of other legal systems. Nearly all of continental Europe, for example, has adopted the duty. Portugal did so first, including it in

---

would not require that his plight result from the commission of a crime. Another concern is that eyewitnesses to crime who did not comply with their duty to render aid might be reluctant to come forward or to testify truthfully for fear of incriminating themselves. *See, e.g.,* Wehrwein, *supra* note 64. Some potential witnesses might indeed be reluctant to come forward, and an occasional prosecution might be lost as a result. This, however, may be the unavoidable price of a law which would save lives and prevent injuries. Those witnesses who did come forward or who otherwise could be placed at the scene could be encouraged to testify truthfully through a grant of immunity from prosecution.

66. *See, e.g.,* Rudzinski, *supra* note 6, at 120; Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1292 (1983).

67. MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973); Feldbrugge, *supra* note 6, at 636-37; Rudzinski, *supra* note 6, at 105-07.

68. One writer speculates that a duty to rescue might play into the hands of those staging "phony accidents." D'Amato, *supra* note 43, at 811 n.47. Typically, in such a scheme an individual along a roadside will pretend to be in distress. When a well-intentioned driver stops to help, he is robbed. The writer suggests that the duty to render aid might increase the number of people susceptible to such a scheme. He concludes, however, that the increase in the number of drivers pulling over is just as likely to discourage this practice. The phony-accident perpetrator, dependent on the goodwill of only an occasional passerby, would be overwhelmed by witnesses. *Id.*

the Portuguese Civil Code of 1867. Since then, these European countries have followed suit: the Netherlands (1881), Finland (1889), Italy (1889 and 1930), Norway (1902), Russia (1903-1917 and 1960), Turkey (1926), Denmark (1930), Poland (1932), Germany (1935 and 1953), Rumania (1938), France (1941 and 1945), Hungary (1948 and 1961), Greece (1950), Czechoslovakia (1950), Bulgaria (1951), Yugoslavia (1951), Albania (1952), Switzerland (in several "cantons" at various times), Spain (1960), and Belgium (1961).<sup>69</sup>

Based on the strong case for a duty to rescue, the following model statute is proposed:

### DUTY TO RENDER AID

#### § 1. Criminal Liability

Any person who knows that another is in imminent danger of or has sustained serious physical harm, and who fails to render reasonable assistance, shall be imprisoned for not more than one year, fined not more than \$2500, or both.

#### § 2. Civil Liability

Any person who knows or reasonably should know that another is in imminent danger of or has sustained serious physical harm, and who fails to render reasonable assistance, shall be liable in a civil action for damages.

#### § 3. Scope of Reasonable Assistance

Reasonable assistance may include rendering or attempting to render any of the following types of assistance: direct personal assistance, summoning law enforcement or medical personnel or other qualified persons, warning of imminent danger, or other appropriate assistance.

#### § 4. Defenses

It shall be a defense to an action brought under section 1 or section 2 that rendering reasonable assistance would have posed a substantial risk of serious physical harm to the defendant or third parties, or that reasonable assis-

---

69. Feldbrugge, *supra* note 6, at 655-57; Rudzinski, *supra* note 6, at 91-92. Both articles present a comprehensive review of European rescue statutes.

tance was being provided by others.

§ 5. Effect On Liability For Criminal Homicide

Nothing contained in this Act shall alter existing law with respect to liability for criminal homicide.

§ 6. Compensation For Injury To Rescuer

Any person who is physically injured as a result of rendering assistance required under sections 1 and 2 shall be compensated for such injuries by the state, provided that the party seeking compensation exercised reasonable care and was not under an independent duty to render assistance. This section shall not be construed to limit existing civil remedies for injuries incurred by a party attempting rescue, except that a person shall be limited to either pursuing such civil remedies or seeking compensation under this section.

*A. To Whom Duty Applies*

Unlike Good Samaritan statutes, the model statute imposes a duty to render aid and is applicable to all persons. The desirability of a public rescue duty has been discussed above.

*B. Situations in Which Duty Applies*

Under the model statute, the duty applies whether the victim's plight was caused by an unavoidable accident or by wrongful conduct. This feature is consistent with most existing statutes,<sup>70</sup> and includes danger or injury brought about by a victim's own negligence. It would be undesirable to remove the duty in such situations. First, society's interest in the preservation of life includes the lives of those who are careless. Second, the statute provides that no rescuer will be called upon to risk life or limb in a rescue effort. Finally, few potential rescuers have the factual information or legal expertise necessary to determine whether a victim had been negligent.

The duty to render aid under the model statute is triggered

---

70. MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973); Rudzinski, *supra* note 6, at 95.

when "another is in imminent danger of or has sustained serious physical harm." Many existing statutes, however, impose the duty only in the face of life-threatening risk.<sup>71</sup> The more demanding approach of the model statute can be justified in two ways. First, the duty is suspended whenever rescue poses the risk of serious injury to the rescuer; the potential benefit to the victim, therefore, would always exceed the sacrifice demanded of the rescuer. Second, a rescuer is often unable to distinguish a life-threatening risk from one which threatens only serious injury. By requiring that the danger a victim faces be "imminent," the statute is applicable only in true emergency situations. As with almost all existing statutes, the mere risk of damage to the victim's property does not actuate the duty.<sup>72</sup>

Under the model statute, the rescue duty is not suspended even when the death of the endangered party appears certain. Admittedly, it is important to limit the instances in which a potential rescuer is called upon to make sacrifices on behalf of a stranger. In emergency situations, however, it is often difficult to judge the certainty of death: an onlooker may believe that someone is hopelessly trapped, when in fact an effort at rescue would reveal a way to set the endangered party free; a layman might conclude that an unconscious or bloody victim has no chance of survival, when actually his injuries are far less severe. Removing the need for a determination of the certainty of death would eliminate many mistaken judgments.

The duty also remains in force when an endangered party is attempting to take his own life. Since a rescuer is not required to face serious harm, however, the model statute would not call upon him to risk grave injury for the sake of one who did not wish to live.

### *C. Type of Liability*

Of the Vermont, Minnesota, and European statutes, nearly all provide for criminal liability, and many provide for criminal and civil liability.<sup>73</sup> The model statute establishes both.

---

71. Rudzinski, *supra* note 6, at 96.

72. See Feldbrugge, *supra* note 6, at 633.

73. MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12 § 519 (1973); Rudzinski, *supra* note 6, at 108, 111-15.



The argument for criminal sanctions is clear. A strong, well-publicized criminal penalty would be a deterrent to nonrescue,<sup>74</sup> and would constitute the only deterrent for judgment-proof individuals. The proposed statute provides for a criminal penalty of imprisonment for up to one year, a fine of up to \$2500, or both. Currently in the United States and Europe, criminal sanctions range in severity from the French penalty of imprisonment for up to five years<sup>75</sup> to the Vermont and Minnesota penalties of a fine not exceeding \$100.<sup>76</sup> The proposed penalty—not excessive, yet strong enough that the duty will be taken seriously—falls somewhere in between. As with most rescue statutes,<sup>77</sup> criminal sanctions could be imposed whether or not harm resulted from a failure to rescue. This is consistent with the bulk of our criminal statutes, which require only a culpable state of mind and a voluntary act or omission, not harm.

The issue of whether to impose civil liability is not as simple. In most jurisdictions, the existence of a criminal statute would render the issue moot. The doctrine of "negligence per se," making the violation of a criminal statute conclusive evidence of negligence,<sup>78</sup> would make failure to rescue tortious. Nevertheless, there are questions about the desirability of a private remedy.

First, some critics feel that forcing a nonrescuer to compensate a victim may be unfair. They point out that the peril a victim faces may have been brought about by his own carelessness or willingness to take risks,<sup>79</sup> or by the wrongdoing of a third party,<sup>80</sup> and that other nonrescuers may not have been joined in the action.<sup>81</sup> The counterargument is that there are safeguards against such un-

---

74. As used herein, *nonrescue* denotes a substandard rescue effort as well as a complete failure to act.

75. Rudzinski, *supra* note 6, at 110. *But see* A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN 1961 arts. 293 & 296 (carrying a more severe penalty than the French statute if death or injury results from a failure to rescue), *reprinted in* appendix *infra*.

76. MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973).

77. *See* MINN. STAT. ANN. § 604.05 (West Supp. 1984); VT. STAT. ANN. tit. 12, § 519 (1973); Rudzinski, *supra* note 6, at 108-10.

78. C. MORRIS & C. MORRIS, JR., *supra* note 20, at 61. The doctrine rests on the premise that one who violates a criminal statute has acted unreasonably. *Id.*

79. *See, e.g.*, Rudzinski, *supra* note 6, at 114.

80. *See, e.g., id.*

81. *See, e.g.*, Henderson, *supra* note 56, at 936.

fairness. A nonrescuer could assert the defense of contributory or comparative negligence against a careless victim, and may be able to raise assumption of risk against a foolhardy victim.<sup>82</sup> A nonrescuer may also be entitled to seek contribution<sup>83</sup> or indemnity<sup>84</sup> from the wrongdoer who originally injured or endangered the victim, or contribution from others who failed to rescue.<sup>85</sup>

Next, allowing civil recovery for nonrescue has been criticized as a method of rewarding risk taking.<sup>86</sup> It is by no means clear, however, that emergency victims are greater risk takers than other persons. A victim's peril is often caused by an act of nature, a latent danger, or the wrongdoing of a third party.

Finally, it is feared that the causal link between a failure to rescue and a victim's harm would be too difficult to prove.<sup>87</sup> This link, however, has been sufficiently demonstrated in cases arising from our current limited duty to rescue. Further, the causation problems stemming from rescue situations would be no more severe than those routinely encountered in traditional negligence litigation.

Whatever the merit of these concerns, it is outweighed by the need to promote rescue and to compensate victims. Accordingly, the model statute establishes civil as well as criminal liability.

The measure of damages should be all injuries incurred by the victim from the moment the potential rescuer violated his duty,

---

82. In situations in which a nonrescuer warned a venturesome victim that he would not come to his aid, assumption of risk could be asserted. It is unclear, however, whether the defense could be raised by a victim who was unaware of the presence of a potential rescuer or of his unwillingness to render aid. The victim might argue that, without such knowledge, it would be logically impossible for him to appreciate or accept the risk of the nonrescuer's behavior. The nonrescuer, on the other hand, might contend that when the foolhardy victim assumed the risk of injury associated with his activity, he also assumed the risk that he might not be rescued. Unfortunately, there is little case law on this point.

The defenses of contributory and comparative negligence cannot be raised if a defendant's conduct was intended to cause harm. 57 AM. JUR. 2D NEGLIGENCE §§ 304, 438 (1971). These defenses, and that of assumption of risk, will often be unavailable if a defendant acted recklessly, *id.* §§ 286, 304, 438, or if his negligence is imputed from the violation of a criminal statute. *Id.* §§ 286, 308, 438.

83. See 1 J. DOOLEY, MODERN TORT LAW: LIABILITY & LITIGATION §§ 26.21-26.22 (1977).

84. See W. PROSSER & W. KEETON, *supra* note 5, § 51, at 343.

85. See 1 J. DOOLEY, *supra* note 83.

86. D'amato, *supra* note 43, at 808.

87. See, e.g., Note, *The Bad Samaritan: Rescue Reexamined*, 54 GEO. L.J. 629, 640 (1966). Since harm from nonrescue would not be an element of criminal liability, this criticism would not apply to criminal prosecutions.

but only to the extent that such injuries would have been prevented by reasonable assistance. Under this formula, a nonrescuer would bear no responsibility for an injury that he could not have prevented or to which he did not contribute.<sup>88</sup> The issues of whether a victim's cause of action survives his death and whether his survivors may bring a separate action on their own behalf are settled by each jurisdiction's "survival" and "wrongful death" acts, respectively.

#### *D. Rescuer's State of Mind*

To be criminally liable under the model statute, a person must "know" that another is injured or endangered. He may be liable for civil damages, however, if he "knows or reasonably should know" of injury or danger. This scheme is consistent with the common law view that the harsh sanctions of criminal law should be reserved for those who act with some degree of mens rea.

The Minnesota statute, as well as a number of European statutes, imposes a duty to rescue only on those who actually witness an emergency.<sup>89</sup> This rule needlessly limits the scope of the duty. For example, a physician who is told of a seriously injured man a block away would be under no obligation to render aid, and an individual who learns of people trapped in a burning building would be under no duty to summon help.

#### *E. Standard of Care for Rescue Effort*

Under the proposed statute, a would-be rescuer must provide "reasonable assistance," which "may include rendering or attempting to render any of the following types of assistance: direct personal assistance, summoning law enforcement or medical personnel or other qualified persons, warning of imminent danger, or other appropriate assistance." Since the duty is suspended whenever a potential rescuer faces the threat of serious physical harm, he would rarely if ever be called on to intervene physically during the

---

88. Of course, if responsibility for a victim's harm cannot reasonably be apportioned between the event which initially injured or endangered him and the failure to rescue, the nonrescuer may be liable for the entire harm. See W. PROSSER & W. KEETON, *supra* note 5, § 52, at 345.

89. MINN. STAT. ANN. § 604.05 (West Supp. 1984); Rudzinski, *supra* note 6, at 101-02.

commission of a crime.

In contrast to the model statute, Vermont provides a civil remedy only for gross negligence.<sup>90</sup> Minnesota does so only for "willful and wanton or reckless" acts.<sup>91</sup> This lower standard of care can hardly be viewed as a method of promoting rescue attempts since rescue is required.<sup>92</sup> A better explanation is that "it is unfair both to require a person to act and to hold him to a standard that he cannot meet because of some personal limitation that is not traditionally taken into account when the law judges the reasonableness of behavior."<sup>93</sup> Nonetheless, there are a number of reasons to require reasonable assistance. First, there are well-developed tort principles which address the problem of an individual who, because of mental or physical deficiency or infancy, is unable to exercise reasonable care.<sup>94</sup> Second, reasonable care is defined in light of all circumstances. Thus, courts would consider the fact that even the most prudent rescuer would be forced to make hasty decisions in an emergency.<sup>95</sup> Third, the notion that there are distinct degrees of negligence and corresponding degrees of care has been generally discredited as illogical and unworkable.<sup>96</sup> Fourth, although many

---

90. VT. STAT. ANN. tit. 12, § 519 (1973).

91. MINN. STAT. ANN. § 604.05 (West Supp. 1984).

92. Franklin, *supra* note 38, at 57-58.

93. *Id.* at 58.

94. See generally W. PROSSER & W. KEETON, *supra* note 5, § 32, at 175-85.

95. Dean Prosser states that:

The courts have been compelled to recognize that an actor who is confronted with an emergency is not to be held to the standard of conduct normally applied to one who is in no such situation . . . [T]he basis of the special rule is merely that the actor is left no time for adequate thought, or is reasonably so disturbed or excited that the actor cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess. Under such conditions, the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could possibly have made after due deliberation. The actor's choice "may be mistaken yet prudent."

W. PROSSER & W. KEETON, *supra* note 5, § 33, at 196.

96. W. PROSSER & W. KEETON, *supra* note 5, § 34, at 209-11. Whenever a court or legislature raises or lowers the degree of care owed in certain situations or by certain actors, it is because of the belief that requiring reasonable care under those particular circumstances is inappropriate. Such a belief, however, reflects a misunderstanding of the term. Reasonable care means care which is reasonable under all the circumstances. 65 C.J.S. *Negligence* § 11(3) (1966). This would necessarily include any extenuating circumstances which a court

emergencies require specialized medical or rescue skills, the untrained rescuer would be responsible only for skills possessed by the imaginary "reasonable man."<sup>97</sup> Fifth, reasonable care is the standard of behavior normally required under tort law,<sup>98</sup> and to require less may well encourage carelessness.

Under criminal law, there is generally no liability for the omission of an act which an individual was physically incapable of performing.<sup>99</sup> In addition, the traditional defenses of insanity, diminished responsibility, incompetency to stand trial, and automatism would be available to the mentally deficient criminal defendant, and the defense of infancy may be available to the young defendant.

The proposed statute does not contain the provision found in some European statutes relieving a rescuer of further obligation upon informing appropriate authorities of an emergency.<sup>100</sup> Such provisions remove the duty prematurely. There are many emergency situations in which informing local authorities would not avert danger or further injury, yet providing personal assistance might. For example, a child drowning in shallow water could not wait for help to be summoned, but might be saved by the immediate efforts of a bystander. Similarly, a man lying severely injured in the woods may not survive until medical personnel arrive, yet might be saved if given immediate attention.

### *F. Defenses*

The model statute establishes two defenses against liability for failure to rescue. First, a failure to act is excused if rescue entails a "substantial risk of serious physical harm" to the rescuer or third parties. The model thus requires rescuers to confront an intermediate degree of risk: one existing statute suspends the duty only in the face of life-threatening risk, while others suspend it with any

---

or legislature might contemplate. The standard is relative, requiring different amounts of care in different situations, and thus is applicable to all situations.

97. RESTATEMENT (SECOND) OF TORTS § 299 comment e (1965).

98. 65 C.J.S. *Negligence* § 11(1) (1966). Reasonable care is synonymous with "ordinary care." *Id.*

99. W. LAFAYE & A. SCOTT, *supra* note 24, § 26, at 188.

100. Rudzinski, *supra* note 6, at 108.

risk to life, health, or property.<sup>101</sup> It seems reasonable to demand more than the latter. After all, there are few situations which involve no risk at all to the health or property of a rescuer. Requiring a rescuer to face the threat of less than serious harm in order to protect human life seems to strike the fairest balance between the interests of rescuer, victim, and society.

Nonrescue is also excused when others are already providing reasonable assistance. The purpose of the statute is not to force everyone present to participate in a rescue attempt, but simply to ensure that some attempt is made. It is, however, no defense that other potential rescuers failed to act; the passivity of others would make the nonrescuer no less blameworthy.

In a tort action, the defendant would have the burden of persuasion with regard to these defenses.<sup>102</sup> In a criminal prosecution, he would have at least the burden of producing evidence, and sometimes the burden of persuasion, as well.<sup>103</sup> This is appropriate because the defendant would often be in a superior position to demonstrate that the risk he faced was excessive or that others were providing aid. The plaintiff or prosecution may, for example, be hard pressed to prove the negative proposition that the defendant suffers from no medical condition which would have made rescue especially risky. Similarly, a victim who was unconscious or distracted, or whose view was obstructed, might have difficulty establishing that no one attempted rescue. In both types of situations, the defendant may well have exclusive access to information needed by the fact-finder.

### *G. Liability for Criminal Homicide*

Criminal homicide is the unlawful taking of another life.<sup>104</sup> One might expect that if rescue were required by law, any death resulting from failure to rescue would constitute criminal homicide, subjecting a nonrescuer to severe sanctions.<sup>105</sup> This, however, would

---

101. For a discussion of the risk a rescuer must face under existing statutes, see Feldbrugge, *supra* note 6, at 636-38; Rudzinski, *supra* note 6, at 105-07.

102. 86 C.J.S. *Torts* § 57 (1954).

103. W. LAFAVE & A. SCOTT, *supra* note 24, §8, at 46-48.

104. 2 C. TORCIA, *supra* note 46, § 112.

105. Depending upon its classification, failure to rescue might also constitute the felony necessary for "felony-murder" or the misdemeanor necessary for "misdemeanor-

abrogate the intent of the model statute—to fairly and evenhandedly penalize nonrescue—and even breed contempt for the new law. To avoid this result, the model contains the proviso that existing liability for criminal homicide shall not be altered.

### *H. Compensation for Injury to Rescuer*

The proposed statute provides that a rescuer may be compensated from a public fund for physical injuries incurred in a rescue attempt.<sup>106</sup> To be eligible, the rescuer must have exercised reasonable care and must not have been under an independent duty to render aid.<sup>107</sup> The statute states that this method of recovery "shall not be construed to limit existing civil remedies [for a rescuer's injuries]." Accordingly, a victim or third party whose negligence created an emergency would, under the "rescue" doctrine, remain liable to an injured rescuer who had acted reasonably.<sup>108</sup>

Despite the partial overlap, it is desirable to provide both methods of recovery. An advantage of the rescue doctrine is that it allows a rescuer's loss to be borne by the party whose wrongdoing brought about the need for rescue. It does not, however, cover situations in which a victim's peril is created by a natural act or unavoidable accident, or the negligent party cannot be located or is judgment proof. The model statute would enable these equally deserving rescuers to be compensated; and, because they nobly served the state's interest in the preservation of life, the state is an appropriate party to bear their losses.

To prevent double recovery by a rescuer, the model would limit a rescuer to the election of a single remedy. In addition to preventing double recovery, this would limit the number of actions

---

manslaughter."

106. It is debatable whether nonphysical injuries and other losses should be included. Justice might seem to require that an injured rescuer—acting at the behest of the state and on behalf of a stranger—be compensated for all losses. However, nonphysical injuries are more difficult to prove than physical injuries, and would require the establishment of a more sophisticated administrative apparatus to sort through such claims. Nonphysical injuries are also more difficult to disprove, a fact that would invite false claims. The cost of this more sophisticated apparatus, higher compensation awards, and fraud might constitute an inordinate burden on state resources.

107. For a discussion of the five situations in which an independent duty arises, see *supra* text accompanying notes 22-28.

108. 1 J. DOOLEY, *supra* note 83, § 3.08.50.

brought, minimizing the administrative burden.<sup>109</sup>

#### IV. CONCLUSION

Outside of the common law countries, there has been little resistance to a public rescue duty. Nearly all of continental Europe, for example, has adopted the duty. In Portugal and the Netherlands, it has been in force for over one hundred years.

Within our own system, commentators have roundly condemned our rule requiring no assistance to those in distress, and courts have long ago abandoned the highly individualistic approach that fostered the rule. Despite this, only Vermont and Minnesota have enacted comprehensive rescue duties, and only then with token penalties. The remaining forty-eight states still subscribe to a rule that is, in the words of Dean Prosser, "revolting to any moral sense."<sup>110</sup>

---

109. An alternative approach would be to place the following limitations on recovery: an award from the state would be reduced by an amount equal to any prior award in a civil action for the same injuries; when an award in a civil action is received subsequent to an award from the state, the rescuer would be required to reimburse the state up to the amount of the prior state award. This method of preventing double recovery, while not limiting the number of actions filed, would tend to conserve state funds expended directly for compensation.

110. W. PROSSER & W. KEETON, *supra* note 5, § 56, at 375.



## APPENDIX

## Examples of Rescue Statutes

## Vermont

(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. 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.<sup>111</sup>

## Minnesota

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 shall be guilty of a petty misdemeanor [and subject to a fine of not more than \$100].

2. *General immunity from liability.* Any person, including a public or private nonprofit volunteer firefighter, volunteer police officer, volunteer ambulance attendant, and volunteer first provider of emergency medical services, who without compensation or the expectation of compensation renders

---

111. VT. STAT. ANN. tit. 12, § 519 (1973).

emergency care at the scene of an emergency or during transit to a location where professional medical care can be rendered, is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care unless that person acts in a willful and wanton or reckless manner in providing the care. Any person rendering emergency care during the course of regular employment, and receiving compensation or expecting to receive compensation for rendering such care, shall be excluded from the protection of this section.

For the purposes of this section, the scene of an emergency shall be those areas not within the confines of a hospital or other institution which has hospital facilities, or an office of a person licensed to practice one or more of the healing arts . . . .

For the purposes of this section, compensation does not include nominal payments, reimbursement for expenses, or pension benefits.<sup>112</sup>

## France

Any person who willfully fails to render or to obtain assistance to an endangered person when such was possible without danger to himself or others, shall be subject to [imprisonment for no less than three months nor more than five years, a fine from 36,000 to 1,500,000 francs, or both].<sup>113</sup>

## Italy

Anyone, finding a human body which is or appears to be lifeless, or a person who is wounded or otherwise in peril, who fails to provide necessary assistance or to give immediate notice to the authorities, shall be subject to [imprisonment for up to three months or a fine of up to 120,000 lire].

If such behavior on the part of the offender results in personal injury, the punishment shall be increased; if it results

---

112. MINN. STAT. ANN. § 604.05 (West Supp. 1984).

113. Translation of the relevant part of art. 63 of the Code Penal (1810 as amended, 1959), appearing in *THE FRENCH PÉNAL CODE* 38 (The American Series of Foreign Penal Codes, vol. 1, G. Mueller ed. 1960).

in death, the punishment shall be doubled.<sup>114</sup>

### Russia

Failure to render aid which is necessary and clearly not suffering of postponement to a person in danger of his life, if the offender knew that such aid could be given without serious danger to himself or other persons, or failure to inform the proper authorities or persons about the necessity to render aid, is punished with corrective labor not exceeding six months or with public censure, or entails the application of social-corrective measures. [Identical provisions in Armenia, art. 128; Belorussia, art. 125; Georgia, art. 130; Lithuania, art. 128; Kirgizia, art. 124; Tadzhikistan, art. 136.]<sup>115</sup>

### Japan

Article 293. A person who abandons another in need of help because of age, immaturity, deformity, injury or illness or for any other reason shall be punished by imprisonment for one year or less.

. . . .

Article 296. A person who violates this chapter and thereby causes bodily injury to or endangers the life of another shall be punished by imprisonment for not less than one year nor more than ten years. If the death of another thereby results, punishment shall be imprisonment for three years or more.<sup>116</sup>

---

114. Translation of the relevant part of art. 593 of the Codice Penale (1930), appearing in *THE ITALIAN PENAL CODE 199* (The American Series of Foreign Penal Codes, vol. 23, G. Mueller ed. 1978).

115. Translation of art. 127 of the Russian penal code (1960), appearing in Feldbrugge, *supra* note 6, at 656-57 app.

116. Translation of arts. 293 & 296 of the draft of the revised Japanese penal code, appearing in *A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN 1961 88* (The American Series of Foreign Penal Codes, vol. 8, B. George ed. 1964).