

2010

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Repository Citation

D'Amato, Anthony, "The "Bad Samaritan" Paradigm" (2010). *Faculty Working Papers*. Paper 109.
<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/109>

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The "Bad Samaritan" Paradigm,

by Anthony D'Amato, 70 Northwestern University Law Review 798-812 (1976)

Abstract: This essay will attempt to show that the disparity between the rule of law and the dictates of morality is itself a product of the paradigmatic way in which the "Bad Samaritan" cases are analyzed. If we examine the cases in an entirely different way, many of the standard problems will dissolve and new alternatives will become apparent. The essay will also show that the "Bad Samaritan" paradigm is part of a larger paradigm linking the law of torts with the criminal law, which also needs to be reexamined. Finally a recommendation for dealing with the "Bad Samaritan" problem legislatively is offered.

Tags: Tort Liability, Criminal Liability, Bad Samaritan, Good Samaritan, Duty To Warn or Rescue, Genovese Killing

[pg798]** Sometimes the structure of a legal argument seems so natural and compelling that its conclusion survives for decades or even centuries. [FN1] The conclusion persists because its challengers fail to reject the logical structure of the argument. Rather, they employ the same structure in trying to refute the argument. The structure seems so natural that they cannot get "outside" of it and thus fail in their attempt to offer a convincing alternative solution. An example of this type of paradigm is the "Bad Samaritan" line of cases in American law, establishing a rule that there is no duty to warn or rescue. This particular chapter of our law is unsettling as well as unsettled because of the disparity between the rule of law and the dictates of morality. This essay will attempt to show that this disparity is itself a product of the paradigmatic way in which the "Bad Samaritan" cases are analyzed. If we examine the cases in an entirely different way, many of the standard problems will dissolve and new alternatives will become apparent. The essay will also show that the "Bad Samaritan" paradigm is part of a larger paradigm linking the law of torts with the criminal law, which also needs to be reexamined. Finally a recommendation for dealing with the "Bad Samaritan" problem legislatively will be offered, although the essay's purpose is less to recommend a specific solution than to indicate a means of reconceptualization.

THE STANDARD ANALYSIS

Articles and judicial opinions tend to begin their analysis from the viewpoint of the victim in a series of egregious cases where [pg799] strangers failed to utter a word of warning or lift a finger to help. Examples are numerous. Someone drowns while a man sitting on a dock simply witnesses the event without throwing down a rope that is at hand. [FN2] A man does nothing as his neighbor's child hammers on a dangerous explosive. [FN3] No warning is given to one who is walking into the jaws of a dangerous machine. [FN4] A boy, trespassing on a railroad, has a leg and arm cut off by the car wheels; the employees of the railroad fail to call a doctor or render any assistance and the boy bleeds to death. [FN5] In the most conspicuous recent example, a woman, Kitty Genovese, was attacked and beaten to death on a city street while 38 witnesses watched the killing from the safety of their apartments and failed to call the police. [FN6] In these and similar cases the courts have held that there is no tort liability for those who failed to warn, rescue, or call for assistance.

Without exception, commentators on these cases respond with moral if not legal

condemnation, finding these judicial results "morally barbaric" [FN7] and "revolting to any moral sense." [FN8] In a typical comment, one court said of a nonrescuer: "[H]e may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages...." [FN9] Searching for an analytical justification for the outcome of these cases, writers have suggested that the distinction between these and more typical tort cases is that these cases involve nonfeasance. [FN10] However, the apparent distinction between action [pg800] and inaction is no longer valid in such other areas of tort law as the manufacture of defective automobiles, or driving an automobile without prior inspection. [FN11] Another suggestion has been that the cases are anomalous in tort law, and that the courts are likely to close the gap between law and morality by finding a "special relationship" between the parties which justifies holding the defendant responsible to warn or rescue the plaintiff. [FN12] Specially related defendants now include, among others, carriers, innkeepers, employers, shopkeepers, jailers, schools, hospitals, and parents. [FN13] This characterization, however, has not been extended to include all licensors, [FN14] and an objective reading of the cases lends little support to the view that the courts are trying to close the gap, but rather affirms the theory of commentators McNiece and Thornton that the courts impose liability for nonfeasance only where a beneficial relationship exists on the part of the obligor towards the obligee. [FN15] Other writers express the hope that legislatures will correct the common law in the "Bad Samaritan" area by making it a statutory tort or crime to fail to warn or rescue. [FN16] Vermont has recently enacted such a statute. [FN17] A related class of statutes, increasingly common, makes it a crime to leave the scene of an automobile accident. [FN18]

[pg801]The paradigm thus consists of moral outrage at the "Bad Samaritan" from the victim's viewpoint, relatively unsuccessful attempts to explain the cases logically, and a call for judicial and legislative relief. Rarely is consideration given to the Samaritan's situation. Some limited attention has been given the defendant in statutes lowering due-care standards in order to encourage physicians to provide emergency treatment to injured persons. [FN19] One valuable study has examined European cases in which the Samaritan-rescuer is hurt and sues the victim. [FN20] These situations occur frequently in non-common-law countries where it is illegal for a person to fail to warn or rescue. [FN21] But generally, little attention is paid to the question of whether or not it would be fair to coerce a person into being a "good" rather than "bad" Samaritan, or whether such coercion, if desirable, should be exercised through the civil or criminal law. This indifference to the Samaritan's situation is reflected in Professor Franklin's casual statement that Vermont courts could appropriately "supplement" the statutory, criminally sanctioned duty to rescue with "extensive civil liability." [FN22] Professor Franklin's statement is certainly not atypical, and is singled out for mention only because the idea is treated so off-handedly in a generally incisive article. The easy equation of civil and criminal liability seems to be an integral feature of the paradigm.

WHAT BASIS FOR TORT LIABILITY?

A starting point for the discussion of whether or not there should be tort liability is the following situation: a stranger S fails to [pg802] warn a victim V of impending peril, or to call for help, or to rescue him even though the rescue entails minimal risk. It is submitted that the courts are justified in holding that there should be no tort liability imposed upon S. However, in the next section it will be argued that criminal liability *should* be imposed upon S by statute.

In a civil action, V would basically be claiming an entitlement against S to be rescued by S. [FN23] If the law were to recognize such an action, S would either have to rescue V or be liable in damages. But, suppose V is a thrill seeker who wants to risk his life in such a way that someone else will be forced either to rescue him or to pay his hospital bills. For example, V decides to dive from a bridge into a river, even though he cannot swim, because S happens to be sitting on the bank of the river. Should the fact that S is sitting there, watching V dive into the river and then struggle to stay afloat, mean that S, a good swimmer, suddenly becomes liable to V's widow for damages unless he jumps in and rescues V? Would the situation be different if S, seeing V about to dive from the bridge, yells to him "Don't jump," or "If you jump, I won't rescue you"? What if S says, "I'm going to look the other way and put cotton in my ears"?

More generally, what can S do to avoid having the claimed entitlement arise? Since the entitlement V claims rests upon S's inaction (in this case S's failure to rescue), to escape liability S would have to act. If he runs away from the scene while V is still on the bridge, has S removed himself from the "Samaritan" relation? Surely V would argue that S unreasonably was evading his responsibilities. But if one concludes that V's action in jumping off the bridge automatically gives him an entitlement against S, we make S an insurer of every reckless act that he happens to see or that has been staged for his particular detriment.

[pg803] If the preceding hypothetical situation seems too unrealistic, consider a case where V does not deliberately risk injury. S and V are inspecting archeological ruins, and V approaches the edge of a precipice to get a better view. "Watch out," warns S, "there's loose footing and you might fall." V replies, "You're just too cautious," takes another step, and promptly falls. On these facts, should S be obligated either to rescue V or be subject to liability in damages?

Another question is whether S would be able to insure himself against the damages V might claim if the law were to give V an entitlement to be rescued. Such insurance would be more expensive for S₁ who is young, healthy, and a lover of the outdoors, than for S₂, who is hard of hearing, poor of eyesight, and inclined to stay indoors. This may well penalize an individual's freedoms of travel and association. [FN24]

It is possible that S would not even be able to get insurance for an act that could be an intentional violation of the law. [FN25] Assuming the law gives V an entitlement to be rescued, if S fails to rescue V, S has intentionally failed to do something required by the law, and an insurance company might not be willing to sell S an insurance policy to cover such situations. This, then, is a further reason for discrediting V's claimed entitlement. It is more likely that V would be able to get accident insurance than it is that S would be able to procure failure-to-warn or failure-to-rescue insurance.

Of course, V will argue that he would not have taken the risk that led to his imperilment but for the fact that S was nearby. In [pg804] other words he will assert that he relied to some extent on S's potential assistance, and that this reliance is the basis for his entitlement to be rescued. S can respond that under existing law he is under no legal obligation to rescue V, and a court should not fashion a legal obligation out of V's mistake of law. But this argument might prove unpersuasive to a court, which might hold that the obviously strong moral obligation upon S

could reasonably have been relied upon by V. Furthermore, a judge might find that these facts are precisely what he has been waiting for in order to change the old immoral common law anyway! Thus a better argument for S is a combination of the ones previously given: S's right to freedom coupled with the need to deter intentionally foolish or highly negligent and risky actions by persons in the vicinity of S. The courts should not impair S's freedom to travel by making him a walking insurer for foolhardy or thrill-seeking persons. Yet S's presence in the vicinity of V *should* make a difference to a legislature contemplating a statute making it a crime for S to fail to warn or to rescue.

A CRIMINAL SANCTION

Theoretical Considerations

I now want to argue that it is not inconsistent both to reject civil liability and to advocate the passage of a statute making the failure to warn or rescue a criminal offense. One such statute is Vermont's "Duty to Aid the Endangered Act" which places a maximum fine of \$100 for willful violation of the following section: [FN26]

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.

Despite any implications to the contrary in the discussion to this point, I believe that it *is* immoral for S to refuse to assist V when there is no danger to S. But in examining my own reasons to support this ethical conclusion, I find the problem to be rather perplexing. This belief may result from the paradigm criticized earlier which starts by taking V's viewpoint and ignoring S's. However, S might argue that in an overpopulated world there should be a natural [pg805] selecting out of foolhardy risk-takers like V. V's reply is that S should rescue V because he should do unto others what he would have others do unto him. [FN27] But in the archeological ruins example, where S would not stand near the precipice and warned V not to do so, it would be false to argue that their situations could be reversed. [FN28] Moreover, one must consider the possible impact upon morality of enacting a rescue law such as Vermont's. As matters stand now, if S rescues V he does so purely out of moral considerations, and is deserving of praise for his altruistic actions. [FN29] Once a law is passed, S will not be acting out of altruism but out of his own self-interest in avoiding the criminal sanction of the law. Thus, the law has arguably destroyed the basis for altruistic behavior by requiring it. [FN30] However, the fact that a majority of the members of a state might find it in their self-interest to pass such legislation does not necessarily deprive any smaller class of people of the possibility of moral behavior. If the behavior is morally required, then it should not be significant that it be labelled "altruistic."

In any case, argument for a Vermont-type statute need not rest upon moral considerations but rather may be based on pure Hobbesian expediency. [FN31] Suppose V is drowning and above him on the dock is a coil of rope which S could easily push into the water. It was argued earlier that S should have no duty personally to V to push over the rope. Even if he had such a duty, S might be judgment-proof, and thus the potential tort liability would not induce him to save the [pg806] drowning man. Yet, should not V have some "claim" over S sufficient to require S to

throw down the rope? Suppose there are 15 S's sitting on the dock and none of them moves; should not V have some means of coercing them to act? V can argue: "I took a risk in these waters even though I cannot swim (or even though I knew I might get a sudden cramp) because I resolved to stay close to the dock, because I knew there was a coil of rope on the dock, and because there were some people around. I did not take the risk because I wanted them to insure me against injuries, since I have no civil entitlement against any of them. But there should be some law forcing them to throw me the rope to save my life at no risk to them." [FN32]

The next step in the argument is to note that V might be any citizen. Everyone is aware of the existence of other people around him and, at least subconsciously, relies upon that fact. Kitty Genovese walking a city street at night probably relied to some extent upon the fact that the street was lit and there were many neighbors around, some of whom would be at or near their windows and would hear and be responsive to any call for help. If she had been in the middle of a park surrounded only by trees, she would have been assuming a much greater risk. That risk may have deterred her from walking in a park late at night. But on a city street, even in the evening, she had a right to assume that part of her "environment" was a number of neighbors who could easily call for assistance. V expects strangers in the vicinity to warn or assist him not because they owe him a personal duty, but because they are members of society and ought to act responsibly. To be sure, a legal system might "teach" people that such reliance is unjustified, but here we are considering probable social attitudes in a prelaw hypothetical context. Thus the "Bad Samaritan" in the extreme cases cited at the beginning of this essay was acting antisocially in failing to do what society [pg807] felt he was ethically obligated to do, even though he was not violating a personal duty owed to the stranger-victim.

Since antisocial behavior constitutes a "public wrong," [FN33] it can appropriately be made the subject of a criminal statute. American law has too easily and automatically equated criminal wrongs with civil harms, "violation of statute" as a standard for negligence being one example. [FN34] Yet there is an important difference even in respect to strictly personal crimes. A murderer harms society as well as his victim. The distinction is recognized by the fact that the victim's consent does not justify the homicide from the criminal law standpoint. Furthermore, the decision whether to go ahead with the prosecution for any crime is the state's. [FN35] The victim cannot compel the state to drop the prosecution, since the state is vindicating a public wrong in addition to the victim's private injury, which the victim may or may not choose to proceed with in a civil action for damages. Therefore, if a state wishes to enact a Vermont-type statute, it can do so for reasons that are similar to those underlying any other criminal legislation—to protect a distinctly societal interest. [FN36]

Although V can reasonably expect to be safer in the presence of others than if alone in a park or dark alley, the argument for a Vermont-type statute certainly cannot rest upon this expectation, since the argument ultimately begs the question. Indeed, one might suggest that it is foolish of V to have any such expectation; perhaps the Kitty Genovese killing "taught" the public that it is unreasonable to expect a measure of safety on a public street. To justify the Vermont-type statute, therefore, one should look at a more universal self-interested basis for criminal legislation. This comes from the ability of each citizen to see himself in the role of V. Even the "Bad Samaritan" can imagine being an accident victim someday, in which case he would want anyone in the vicinity to be forced by law to be a "Good Samaritan." [FN37] This

potential role reversal does not have the [pg808] same application in the tort-law situation discussed previously. First, if S is rich and V judgment-proof, S might be induced to save V, but when the roles are reversed V might have no similar incentive to save S. Second, tort liability is subject to abuse: V might deliberately engage in risky conduct in S's presence because he wants S to be his insurer or wants to have a final reckless fling knowing that if he dies his survivors can recover a considerable amount in damages by suing S for wrongful death. Third, and more generally, imposing tort liability gives a monetary reward to risk takers and penalizes risk avoiders; such personality traits are not role reversible, and hence the argument that S might be in V's position someday is not persuasive.

On the criminal side, the positions are reciprocal precisely because the element of monetary compensation for the accident is removed. V may be more accident prone than S because V may be a risk taker and S a risk avoider, but there is no tort law that compensates V at S's expense. Rather, V is penalized for his risk taking (and hence deterred) by the injuries he receives. S is penalized only by the criminal law if he fails to assist V when he easily could have done so. This sort of penalty is *fair* to S because he may someday be in V's position although that possibility may be small compared to V's own likelihood. [FN38]

A criminal statute makes sense, therefore, because it deters antisocial conduct on the part of the "Bad Samaritan." Civil liability, however, cannot be justified because there is no moral reason why S should have to compensate V for actions which S did not cause and which S even may have tried to prevent. S's failure to help should be punished by the criminal law, and that sanction should be appropriately related to what S did or failed to do. [FN39] The sanction should not [pg809] be tied to V's injury for which S's omission was *causally* unrelated [FN40] and for which V alone should be responsible. Moreover, it would be ill-considered to argue for tort liability as an *additional* deterrent factor; the criminal penalty can be set by society at any level necessary to strike the correct balance between the need for deterrence and other values such as S's freedom of mobility. Furthermore, tort liability would operate as an uneven penalty in addition to the statutorily determined criminal penalty; it is ineffective against the poor or the judgment-proof. [FN41]

Practical Considerations

Legal and moral rules are in symbiotic relation; one "learns" what is moral by observing what other people (initially, parents) tend to enforce. [FN42] Professor Franklin has cited statistically significant surveys indicating that more of the public will regard the duty to rescue as morally required in jurisdictions where it is also legally required. [FN43] Even the Vermont statute prescribing only a \$100 fine for failure to give assistance should heighten the public's moral sense. Thus we may assume that a Vermont-type statute will be a factor in helping people in distress even when the Samaritan is the only other person on the scene and the appeal must be to his sense of ethics.

A criminal statute will also work in more traditional ways. S will certainly be motivated to help if a policeman is in the vicinity, and he will also give assistance to the victim if there are nonofficial witnesses around who could later testify in a criminal proceeding against S. Even where S and V are alone, if S refuses to give [pg810] assistance and V escapes with his life, V

can later report S's violation to the authorities. The criminal statute, unlike tort liability, has the effect of making S's behavior a matter of public interest.

In addition, prosecutorial discretion provides an important safeguard for potential Samaritans. For example, assume a jurisdiction has a Vermont-type statute as well as a civil action for tort based upon the statutory standard. V gets a cramp in turbulent waters and calls for help. S, a wealthy person but a poor swimmer, decides he probably would not be able to rescue V himself, so instead he runs to get help. But when the people he summons arrive, S has drowned. On these facts, it is extremely unlikely that a prosecutor would indict S for violation of the statute. But V's heirs might not be similarly deterred from bringing a civil action for wrongful death since there is a possibility that a jury might disbelieve S's assessment of his own swimming ability. Furthermore, the possibility of such jury action, coupled with the notoriety that the case might engender, might induce S to settle with V's heirs for a significant amount to avoid the litigation and publicity. Or consider the example of V deliberately taking a risk because a rich S is nearby. Here, too, the state would probably decide not to prosecute but V's heirs might not have similar reservations. Prosecutorial discretion is, of course, a general safeguard for defendants in criminal cases. In the Samaritan situation, because the defendant's difficult-to-assess *judgment* whether or not to act is the essence of the crime, the prosecutor's discretion appears to be vitally important.

A PROPOSAL

On the basis of the foregoing considerations, the adoption of a Vermont-type statute coupled with a statutory provision explicitly prohibiting any private action based upon violation of the statutory standard is the proper solution to the "Bad Samaritan" problem. The Vermont statute does not contain such a prohibition. Upon reflection, however, a legislator should determine that the same moral considerations which prompt him to require S to give assistance to V also should bar V from obtaining compensation or restitution from S. The criminal sanction is fair provided that there is no additional civil liability. It is possible that the tendency to assume that torts can be fashioned out of crimes accounts for the reluctance of other states to pass a Vermont-type statute. Legislators may feel that, while the common law presently works a hardship [pg811] upon V, a crime-plus-tort package would work a hardship upon S. If this is so, then an explicit statutory prohibition of the tort action would be an important part of the legislation.

Another important part of the statutory solution, only alluded to here since it has been discussed at length elsewhere, [FN44] is the need to provide S with compensation from V if S is injured in the act of helping V. Without this potential for compensation, S's decision to act would be affected by his calculation of the comparative costs of violating or complying with the statute. Despite Professor Posner's analysis, [FN45] it is unwise to view the criminal law in cost-benefit terms. Rather, it should be a set of rules with which one ought to comply, apart from economic calculations, precisely because legal rules should be congruent with rules of morality. S's first thought ought to be compliance with the statute, but he should not be penalized for complying by an injury sustained in the process of rescuing V. If he were so penalized, S would undoubtedly be inclined to assess the criminal law in economic terms. Thus, the statute I propose would provide that S is entitled to compensation from V for any time, trouble, or injury incurred in rescuing V. [FN46] This should be so even if S is a doctor who renders unsolicited emergency

aid to V. [FN47]

[pg812] One possible objection to the proposal presented here is that it requires adding to an already overlong list of crimes in our society. I am indeed reluctant in principle to propose a new crime, but a more important consideration is that of reducing the gap between criminal and moral rules. In the Samaritan case, this dictates adding to the criminal rules; in the victimless crime context, on the other hand, this consideration requires decriminalizing conduct no longer regarded as immoral. [FN48]

CONCLUSION

This essay has offered an alternative paradigm to that which is typically employed in the "Bad Samaritan" cases. Instead of beginning with the victim's viewpoint and regarding the law as a fitful attempt to catch up with twentieth century morality, it has attempted to show that from the potential Samaritan's perspective there are compelling reasons why he should not be required to compensate the victim. Moreover, it is suggested that there is a critical difference between the impact of criminal law and tort law upon this problem, and, surprisingly, the former may be far more desirable. Such a conclusion is inconsistent with the usual American approach of finding equivalences between public and private harms, but this may be the exceptional case which illuminates that important distinction. Legislatures cannot be expected to adopt quickly the proposal suggested here, largely because their thinking is the same as that of legal writers and judges. As Professor Kuhn has noted, new paradigms do not replace old ones in the history of science because they are more logical; rather, the old ones persist until those holding them die of old age. Hopefully, the progress of the law is not quite so slow, because the stakes are high. There is a need for help from a stranger when an accident occurs, and the law should attempt to meet that need without going so far as to make everyone his brother's insurer.

FOOTNOTES

*Copyright by Anthony D'Amato, 1976. A.B., Cornell, 1958; J.D., Harvard Law School, 1961; Ph.D., Columbia University, 1968; Professor of Law, Northwestern University School of Law. This article is part of a jurisprudential research project on the relation of law and morality. The author wishes to thank Professor Martin Redish, Assistant Professor of Law, Northwestern University School of Law, for suggestions on the drafting of this essay.

**Numbers in the format pg798 etc. refer to the paging of the original article.

[FN1] The operations of paradigms in scientific thought have been described by Professor Kuhn. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). *See also* S. TOULMIN, *HUMAN UNDERSTANDING* 261-477 (1972).

[FN2] *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928). *Cf. Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959).

[FN3] *Sidwell v. McVay*, 282 P.2d 756 (Okla.1955).

[FN4] *Gautret v. Egerton*, L.R.2 C.P. 371, 375 (1867) (dictum); *Buch v. Amory Mfg. Co.*, 69

N.H. 257, 44 A. 809 (1898).

[FN5] Union Pac. R.R. v. Cappier, 66 Kan. 649, 72 P. 281 (1903).

[FN6] See A. ROSENTHAL, THIRTY-EIGHT WITNESSES (1964). The witnesses said they did not want to get involved, and a year later they still did not see why they should have acted. See N.Y. Times Mar. 12, 1965, at 35, col. 6, 37.

[FN7] Reckseen, *The Duty to Rescue*, 47 IND.L.J. 321, 321-22 (1972).

[FN8] W. PROSSER, TORTS 341 (4th ed. 1971) [hereinafter cited as PROSSER]. For similar views see the various essays in THE GOOD SAMARITAN AND THE LAW (J. Ratcliffe ed. 1966) [hereinafter cited as THE GOOD SAMARITAN]. See also Ames, *Law and Morals*, 22 HARV.L.REV. 97 (1908); [hereinafter cited as Ames]; Dyke, *The Duty to Aid One in Peril Good Samaritan Laws*, 15 HOW.L.J. 672 (1969) [hereinafter cited as Dyke]; Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB.L.REV. 499 (1965); Scheid, *Affirmative Duty to Act in Emergency Situations—The Return of the Good Samaritan*, 3 JOHN MARSHALL J. PRACT. & PROC. 1 (1969) [hereinafter cited as Scheid]; Note, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM.L.REV. 1301 (1964) [hereinafter cited as COLUMBIA NOTE].

[FN9] Buch v. Amory, 69 N.H. 257, 260, 44 A. 809, 810 (1898).

[FN10] PROSSER, *supra* note 8, at 338-40; Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U.PA.L.REV. 217, 219-21 (1908).

[FN11] See McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1273-77 (1949) [hereinafter cited as McNiece]; Wright, *Negligent Acts or Omissions*, 19 CAN.B.REV. 465 (1941).

[FN12] F. HARPER & F. JAMES, THE LAW OF TORTS § 18.6 (1956).

[FN13] PROSSER, *supra* note 8, at 342.

[FN14] McNiece, *supra* note 11, at 1274-75.

[FN15] *Id.* at 1284, citing F. BOHLEN, STUDIES IN THE LAW OF TORTS 220 (1926). One writer finds this notion of "consideration" to be "an afterthought by way of justification." Scheid, *supra* note 8, at 11. Perhaps it is if the cases are analyzed on contract principles. To say that S, a teacher, has a duty to rescue V, her pupil, simply because V confers an economic benefit to S hardly distinguishes S from a stranger standing nearby who also could have rescued the drowning pupil. But in tort terms, *cf.* G. GILMORE, THE DEATH OF CONTRACT 87-89 (1974), V could legitimately expect and rely upon his teacher to aid him in a situation that was structured largely by the teacher (*e.g.*, S decided to take the class on an outing by the lake) while there can be no similar reliance upon a stranger standing nearby. This expectation-reliance factor, symbolized by the "special relationship" terminology of the cases, is strengthened by the causal connection involved (the teacher, but not the stranger, was responsible for the child being there

at that particular time). See L. GREEN, JUDGE AND JURY 63-64 (1930).

[FN16] See Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN.L.REV. 51 (1972) [hereinafter cited as Franklin]; THE GOOD SAMARITAN, *supra* note 8, at 243, 279.

[FN17] VT.STAT.ANN. tit. 12, § 519 (1973).

[FN18] See, e.g., ILL.REV.STAT. ch. 95½, § 11-403 (1973); W.VA.CODE ch. 17-C, art. 4, §§ 1, 3 (Michie 1974); CAL.VEH.CODE § 20003 (West 1971).

[FN19] See COLUMBIA NOTE, *supra* note 8. For a speculative treatment see Rudolph, *supra* note 8, at 512-19. Should the passerby be forced to intervene only when there is no personal peril to him at all, or when his risk is merely proportionately less than the victim's harm? This requires a legislative decision if a criminal statute is considered. For a brief discussion see Scheid, *supra* note 8, at 13-14. Cf. Dawson, *Rewards for the Rescue of Human Life?* in THE GOOD SAMARITAN, *supra* note 8, at 63 [hereinafter cited as Dawson, *Rewards*].

[FN20] Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV.L.REV. 817 (1961) [hereinafter cited as Dawson, *Negotiorum Gestio*]. See also Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in THE GOOD SAMARITAN, *supra* note 8, at 91 [hereinafter cited as Rudzinski].

[FN21] Rudzinski counts 15 European countries with criminal code provisions stipulating a duty to rescue. Rudzinski, *supra* note 20, at 92. See also Hofstetter & Marschall, *Amendment of the Belgian Code Pénal: The Duty to Rescue Persons in Serious Danger*, 11 AM.J.COMP.L. 66 (1962).

[FN22] Franklin, *supra* note 16, at 56. However, Professor Epstein has recently attempted to support the common-law result in the Samaritan cases in a thought-provoking article. See Epstein, *A Theory of Strict Liability*, 2 J.LEG.STUD. 151, 189-204 (1973) [hereinafter cited as Epstein].

[FN23] See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV.L.REV. 1089 (1972). See also Epstein, *supra* note 22. Despite his admission that the common-law Samaritan rule "does not appeal to our highest sense of benevolence and charity," *id.* at 197, Professor Epstein tries to justify or rationalize the rule by taking a position that seems to lie uneasily between morals and economics. He insists that the defendant physically must have caused the plaintiff's injury (even if nonnegligently), but this in itself is hardly a conclusive moral test and, as criticized by Posner, hardly a rational economic test either. See Posner, *Strict Liability: A Comment*, 2 J.LEG.STUD. 205, 217-19 (1973) [hereinafter cited as Posner, *Strict Liability*]. Neither Epstein nor Posner suggest a criminal-law remedy, Epstein because he has rationalized the common-law tort approach and Posner because he seems to view criminal law as limited by economic considerations. See text accompanying note 45 *infra*.

[FN24] Such freedoms in the Samaritan context are sometimes treated as nineteenth century

anachronisms. In a famous early article, Dean Ames saw a wide ambit for individual freedom as characteristic of legal systems which have not reached maturity. *See* Ames, *supra* note 8. *Cf.* McNiece, *supra* note 11, at 1288. Dean Prosser, citing Leon Green, writes that "the highly individualistic philosophy of the older common law ... shrank from converting the courts into an agency for forcing men to help one another." PROSSER, *supra* note 8, at 339, citing L. GREEN, JUDGE AND JURY 62 (1930).

But a more insightful approach would appear to be that advocated by Professor Nozick—namely, to view the state as a minimal mutual protective association. R. NOZICK, ANARCHY, STATE AND UTOPIA 26-119 (1974). If the majority of citizens feel the need for forcing others to rescue them, let them secure a legislative majority and pass a statute. But to achieve such a result judicially might be to impose a distinctly minority solution that would undamentally endanger individual freedom.

Note, however, that legislative and judicial solutions are not and, as we shall see, should not be interchangeable. Most obviously, the statutory solution would probably be a criminal statute, a remedy which the courts cannot create judicially.

[FN25] *See* Franklin, *supra* note 16, at 56 n. 35.

[FN26] VT.STAT.ANN. tit. 12, § 519 (1973).

[FN27] *See* R. HARE, FREEDOM AND REASON 86-111 (1963).

[FN28] In the Biblical case, Luke 10:29-37, the "Good Samaritan" not only bound up the stranger's wounds, but took him to an inn, fed him, and left the innkeeper a sum of money. Perfect altruism would seem to require one to give all he possesses to the poor and spend his life assisting others without pay.

[FN29] *See* D. HUME, ENQUIRY CONCERNING THE PRINCIPLES OF MORALS § 2 (1777).

[FN30] This argument seems persuasive until one realizes that universal altruism is self-contradictory. Suppose four perfectly altruistic persons are stranded on a desert island: A gives his hut to B, who simultaneously has given his hut to C, who gives his to D; and D gives his to A. Each person is now living in a hut, the only difference being that the hut, moments before, belonged to another. These transactions or swaps can occur constantly, but the resulting "altruism" is indistinguishable from self-interest.

This situation is even more circular if each person declares that he will only be altruistic toward those who deserve it. Thus, B will give his hut to C only if C gives his hut to someone else. Not only does this "lock in" the altruism, but curiously it sets up the expectation of reward for one's altruism, which is self-contradictory.

[FN31] T. HOBBS, LEVIATHAN chs. 13, 21 (1651) (to the effect that security is the only, and ultimate, value).

[FN32] This sort of argument, incidentally, parallels the self-interested contractual reasoning of those in Rawls' construct of an "original position" which he offers as the moral basis of a just society. J. RAWLS, A THEORY OF JUSTICE 11-22 (1971). *See also* E. CAHN, THE MORAL DECISION

190-97 (1955). Posner recognizes a related situation as having high transaction costs. *See* Posner, *Strict Liability*, *supra* note 23, at 219. But his economic analysis seems inappropriate: in "warning" cases, any transaction would be absurd since the negotiations would give away the warning, whereas in "rescue" cases, while negotiations are feasible, the "bargain" ultimately struck would probably be absurd (what is the coiled rope worth to the drowning person? A million dollars? Five million? What if he is poor? Or if he reneges once he is saved?) The noneconomic criminal-law approach seems preferable to Professor Posner's economic solution.

[FN33] Thayer, *Public Wrong and Private Action*, 27 HARV.L.REV. 317 (1914) [hereinafter cited as Thayer].

[FN34] *See* Thayer, *supra* note 33; Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM.L.REV. 456 (1948).

[FN35] P. DEVLIN, *THE ENFORCEMENT OF MORALS* 8 (1965).

[FN36] Not all crimes, of course, have definable individual victims; consider counterfeiting, espionage, flag desecration, etc.

[FN37] Rousseau in his *Social Contract* pointed out that even a thief wants the laws of private property enforced; the very point of his act is to transfer property to his own exclusive enjoyment which he then expects the police to safeguard like any other property. J. ROUSSEAU, *THE SOCIAL CONTRACT* I, vii-ix (1762).

[FN38] Incidentally, if criminal-law penalties could be made an exact science, the amount of the penalty in a Vermont-type statute should be computed, in part, (the most important factor being an assessment of what it will take to deter "Bad Samaritan" behavior) on the probability of S being an accident victim and not on V's (that is, the risk taker's) probabilities, for the more V's situation is taken into account the more the criminal law would tend to operate as compensation to V and as a redistribution of values from risk avoiders to risk takers.

[FN39] As Professor Franklin points out, there could be criminal liability for failure to act even though later events show that the rescue in fact would not have succeeded. Franklin, *supra* note 16, at 55. Although he did not pursue this thought, it might be added that his observation further distinguishes tort from criminal liability in as much as prosecution might attach even if V's death appeared certain and imminent, as French and Polish decisions have affirmed. *See* Rudzinski, *supra* note 20, at 101 nn. 28, 29. It is hard to imagine that a jury would reach the same result in a civil action for damages.

[FN40] This is, of course, excluding for the present discussion any "special relationship" between S and V. The text here does not fully accept Professor Epstein's insistence upon physical causation. *See* Epstein, *supra* note 22. Causation or lack thereof is not conclusive of the moral issue. But it does serve to differentiate the tort approach from the criminal remedy in an argument that recognizes the latter as normatively essential.

[FN41] Apparently, so far only the German courts have reached the result that there is no tort

liability in addition to the criminal-code duty to rescue. *See* Dawson, *Negotiorum Gestio*, *supra* note 20, at 1107 n. 80. The French courts, in contrast, add the tort liability to the criminal sanction. *Id.* at 1107-08.

[FN42] *See* J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1952).

[FN43] Franklin, *supra* note 16, at 58-60, citing *inter alia* ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES (J. Macaulay & L. Berkowitz, eds. 1970). *See also* Gusfield, *Social Sources of Levites and Samaritans*, in *THE GOOD SAMARITAN*, *supra* note 8: "The very passage of a law is an act of public definition of what is moral or immoral." *Id.* at 196.

[FN44] *See* Dawson, *Rewards*, *supra* note 19; Dawson, *Negotiorum Gestio*, *supra* note 20.

[FN45] R. POSNER, *ECONOMIC ANALYSIS OF LAW* 357-60 (1972).

[FN46] European sources consulted by Professor Dawson indicate no disposition for compensating the rescuer for his time spent and risk incurred when the risk did not result in loss. *See* Dawson, *Rewards*, *supra* note 19, at 84. But clearly it is in the public's self-interest to have some such compensation mechanism. The Kitty Genovese killing (*see* note 6 *supra*) raises the basic issue. A witness might well ponder the fact that if he calls the police he will set in motion a personal involvement that would include police questioning, pretrial depositions, line-up inspection, appearing as a witness at the trial of the assailant, perhaps death threats if the defendant has "mob" connections, newspaper publicity and loss of privacy. In light of these noncompensable costs, is it any wonder that each of the 38 witnesses concluded, "Let someone else notify the police"?

[FN47] A number of "Good Samaritan" statutes lower the standard of due care for rescuers so that they will be encouraged to perform the rescue operation in the first place. *See* COLUMBIA NOTE, *supra* note 8, at 1308-12; Dyke, *supra* note 8, at 680-83. These statutes attack a symptom of the Samaritan problem while ignoring its cause. If we were to have a criminal statute requiring rescue, one sees no reason why a reasonable man standard cannot be applied to the rescue attempt. Why should the law encourage bumbling or negligent rescues once the duty has devolved upon *everyone* to render assistance to an imperiled victim?

One problem that may arise if Vermont-type statutes become widespread is the "phony" accident designed to lure a driver into stopping his car. Scheid, *supra* note 8, at 1 n. 2, discusses a news story concerning a driver stopping to aid what seemed to be a stalled motorist, and getting robbed of his car for his pains. However, it is not clear that Vermont-type statutes will *add* to the phony accident set-up which already is fairly common absent those statutes. Indeed, such statutes might result in *every* driver along the road stopping to investigate the "accident," with the result that the would-be robbers would be deterred! Conceivably the "phony accident" ploy works better when only one out of every 50 or 100 drivers who are uncommonly altruistic will stop their cars; a law "forcing" everyone to be "altruistic" could help deter the phony accident scheme.

[FN48] Once the public begins to regard certain acts as no longer immoral (*e.g.*, acts of sexual

"perversion" that still are proscribed criminally in most jurisdictions) decriminalizing them will accelerate the public's view that they are not immoral acts; the symbiotic relation between law and morals works in this direction as well.