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Kathleen M. Ridolfi

Santa Clara University School of Law, cookieridolfi@gmail.com

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SYMPOSIUM

LAW, ETHICS, AND THE GOOD SAMARITAN: SHOULD THERE BE A DUTY TO RESCUE?

Kathleen M. Ridolfi*

I. INTRODUCTION

Anyone who has ever been to law school remembers reading the 1884 case of *Regina v Dudley and Stephens*.¹ The predicament faced by the parties and the court is hard to forget.

Somewhere on the sea between England and Australia, four men found themselves floating on a thirteen-foot dinghy after their ship sank in a storm. All were starving and dehydrated, but worst off was the youngest, a boy named Parker who had ignored the warnings of the more experienced sailors and drank the deadly seawater.

On the twentieth day of this ordeal, Dudley, the captain of the crew, and Stephens, his first mate, decided their only chance for survival was to kill the near-death Parker, feed on his body, and hope for rescue. Four days later, as it turned out, a ship did come by and they were rescued. When the sailors reached shore, they told of their ordeal and what they had done, and were charged with murder.

In a sensational public trial, the horrifying facts captured worldwide attention. It was proven at trial that young Parker was so sick at the time he was killed that he would not have been alive four days later to be rescued. It was also true that had the defendants not killed and eaten the boy,

* Professor of Law, Santa Clara University School of Law. J.D., Rutgers University; B.A., Rutgers University.

1. *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (Q.B. 1884).

they probably would not have survived either.

The court grappled with the extraordinarily difficult question of whether killing Parker under these extreme circumstances was murder. Although the court sympathized with the defendants, it nonetheless convicted Dudley and Stephens of murder and sentenced them to death.² In the words of the court, "We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy."

The moral complexities of the judgment and the extreme underlying conduct of the seamen has continued to make *Dudley and Stephens* a lively subject of debate and scholarship more than a century after it happened.³ Some think the defendants were justified in their actions or at least should have been excused under the extraordinary circumstances. Others believe the court was right, that there is never a moral privilege that would grant a legal exception for taking an innocent life. In this introduction, I want to move away from these important questions about murder and on to another crucial, but less familiar, aspect of the case: the matter of Dudley's and Stephens' hope for and eventual *rescue*. I suggest that there are several things about this case that go beyond its dramatic facts to plague us still.

To underscore how little is owed by way of a duty to rescue under Anglo-American law, let us return to the raft for another hypothetical. Assume that young sailor Parker, while lying there dying, accidentally cut his wrist and needed a tourniquet to stop the bleeding. Seeing his helpless condition, Dudley and Stephens simply turn the other way, let him die, and, as in the actual case, feed on his body to sustain themselves until they are rescued.

While in its opinion the *Dudley and Stephens* court made clear that taking innocent life is absolutely wrong, had the same court been faced with the facts as presented in this hypothetical, the defendants would not have been convicted of

2. In December of 1884, the defendants were sentenced to death by hanging. It was the first time a death sentence had been pronounced in that court since 1745. However, after serving a short prison sentence, the death sentence was commuted and they were released. See NEIL HANSON, *THE CUSTOM OF THE SEA* 280-288 (1999).

3. Fascination with this case has given it a kind of "legal immortality." See A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* 271 (1984).

murder or, for that matter, faced any criminal responsibility for the death of the boy. Ironically, a society that draws such bold and certain lines to protect innocent life, even under the strained circumstances of *Dudley and Stephens*, refuses to impose even a minimal duty to rescue the same innocent life.

The central challenge of this symposium, *Law, Ethics, and The Good Samaritan: Should There Be A Duty To Rescue?*, is to consider why this distinction exists—and whether it is a good one. Comparing the two different scenarios in the real and hypothetical cases provides a useful starting point for discussion. Is the difference between the two cases a moral one—that is, is it immoral to murder someone, but acceptable to watch them bleed to death without rendering assistance?

While murder may be a more culpable act than failure to rescue, most moral ideals would recognize a duty to aid a bleeding boy who could not help himself. The explanation for the distinction therefore must lie elsewhere. I suggest that the answer lies within the subtext of two other questions. First, there is the morality/autonomy debate. That is, while there is no dispute about the right and the obligation of the state to protect citizens from harm, can the state police personal morality in the process? The second question, a more practical concern, is that even if legal prohibitions may properly track moral ones, does the very nature of an omission render its regulation or just enforcement impossible or at least unlikely?

The conundrum posed by these tensions raises a host of important and intriguing questions that are debated not in terms of a tragedy on the high seas, but in the more lurid context of a gambling casino in the outskirts of Las Vegas. It is within that context—as well as on the streets of ancient Jericho⁴—that the participants debate, though perhaps not resolve, the following issues:

1. Whether a legal duty to rescue would improperly impose a moral obligation on citizens in a society that values individual autonomy;
2. Even without philosophical objections, whether obstacles in the administration of a law punishing “Bad Samaritans” would make its just enforcement

4. See *Luke* 10:27–37 (King James).

unattainable; and

3. Whether the law should continue to be restricted to punish the *active* infliction of harm or whether those few situations where one is held responsible for a failure to act should now include a duty to rescue.

By raising these issues in the context of the hypothetical Dudley and Stephens, I do not mean to suggest that there is reason to equate an act with an omission, that killing and letting die are the same. Even an intentional omission does not make it equivalent to the active infliction of harm.⁵ Undeniably, taking life and failing to rescue are different, but are they different enough to justify conviction and death in the first instance, but no legal condemnation at all in the second?

II. MORALITY/AUTONOMY DEBATE

Many would claim that action and omissions are sufficiently distinct to warrant severe punishment in the first instance but none in second. They would say that the state is right to protect the public from anyone out to cause harm, but that the state has no business forcing someone to go to the aid of somebody else.⁶ The state can punish an *act*, but the state should not punish an *omission* because that amounts to monitoring an individual's personal moral code. They might also say a further justification stems from the conception of the state as neutral arbiter among conceptions of the good. Particularly where people do not agree about moral values, they would limit the state to prevention of harm.⁷ Nonetheless, most would allow state enforcement of moral values where the values emerge from an overlapping consensus of views. There is agreement, for example, that parents have a moral obligation to protect their children and, thus, no controversy surrounding a corresponding legal duty.

Proponents of these views oppose Good Samaritan laws because they believe these laws are inconsistent with a high

5. See Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 SANTA CLARA L. REV. 1053, 1082 (2000).

6. As Jeremy Waldron discussed, the state enforces citizen support of one another in a variety of ways, such as through taxes and the welfare system. See *id.* at 1073.

7. See JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* (1984).

regard for individual liberty. They argue that choosing whether or not to perform a good deed is a personal decision, a private matter for an individual and her conscience and that to invade that sphere is a threat to individual autonomy. Moral issues and legal duties are distinct and should stay that way.

American law schools may inadvertently promote the notion that moral issues and legal duties are distinct.⁸ When a group of entering law students begins their legal education, they are taught to “think like lawyers”: to analyze issues without interference from personal feelings, preconceptions, and cultural, political, or religious beliefs. Emphasis in American law schools on abstract analysis of legal issues is sometimes criticized as a deliberate effort to promote the law and morals distinction to a highly regarded principle, a canon to be valued on its own. Indeed, it may contribute to the public perception that lawyers are amoral, irresponsible, and unethical.

But, it is not true that teaching the skill of legal reasoning and stressing individual rights as a guiding legal principle is a rejection of moral values. Law cannot effectively be taught without also teaching an understanding and appreciation for the general truth that values are instilled through culture, religion, and other social institutions affecting our lives, including the legal system. A legal system makes sense only with an understanding of the society that it seeks to regulate.

Of course, social policy, the backdrop of law and sound legal education, is driven by who we are. Our beliefs, values, and expectations of one another are what drive lawmakers. In turn, the law shapes us. The influence of law in shaping public attitudes was the subject of an experiment conducted by Henry Kaufman in 1970.⁹ In Kaufman’s study, subjects were asked to evaluate the moral conduct of someone who refused to aid a drowning victim and he found that subjects judged that person more harshly when they believed the omission was unlawful than when they were told there was

8. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 85 (1991).

9. See Henry Kaufman, *Legality and Harmfulness of a Bystander’s Failure to Intervene as Determines Moral Judgment*, in *ALTRUISM AND HELPING BEHAVIOR* 77–81 (J. Macauley & L. Berkowitz eds., 1970).

no legal obligation to help. Through his work, Kaufman demonstrated that law affects the attitudes of people when they are made aware of it.¹⁰

That morality is rooted in culture and religion is a truth as old as the “Ten Commandments” and, in a homogeneous society, citizens generally share views on moral issues. But in a diverse society like the United States, where religion and ethnic tradition are not the common denominator, common ground lies elsewhere. “[L]aw is now regarded by many Americans as the principal carrier of those few moral understandings that are widely shared by our diverse citizenry.”¹¹ For Americans, our commonality has its voice in the law.

The interdependence of law and morality, the circular influences of one on the other, puts us in a position to fear what we want the law to do. We embrace a legal system that promotes morality, that makes better citizens of us, but we worry that the law will cross an elusive line and infringe on individual rights. For this reason we are careful, and should remain so, in limiting enforcement of laws to reflect only those values that emerge from the overall agreement of the community where they will be enforced.

Enacting a law that requires a person to go to the aid of another may help to make that person a better citizen, but it does raise concern for some. Concern that a Good Samaritan law would make it impossible to determine what motivated a rescue—altruism or fear of legal sanction—was raised at the Symposium. Professor Jeremy Waldron called this a ridiculous objection, pointing out that identifying what motivates us to act is often difficult in the best of circumstances. Moreover, says Waldron, it is irrelevant. No one “should have to linger in danger so that the rest of us fine people can secure for ourselves a clearer sense of our own altruistic virtue.”¹²

Nevertheless, while it may be easy to move past the altruist argument, the disquiet of those who fear encroachment on individual rights does deserve our attention.

10. See also Hans Zeisel, *An International Experiment on the Effects of a Good Samaritan Law*, in *THE GOOD SAMARITAN AND THE LAW* 209-213 (James M. Ratcliffe ed., 1981).

11. GLENDON, *supra* note 8, at 87.

12. Waldron, *supra* note 5, at 1065.

Individual liberty, a much-guarded interest for Americans, is well-worth protecting. But, do Good Samaritan laws really put our liberty at risk?

In her talk, Professor Margalynne Armstrong argues that the American focus on the protection of individual rights does not mean doom for Good Samaritan laws.¹³ She asserts that Good Samaritan laws find support in American political history and tradition, particularly Jeffersonian and civic republicanism. A duty to rescue, Armstrong says, is not unlike the obligation to serve on jury duty, a civic responsibility also enforced by the criminal law. The idea at its core is that people invested in society make the best citizens, and the best citizens make decisions that go beyond their own self interest.

Moreover, there are other examples of forced civic duty. The law requires that we pay taxes. It even requires us to rescue in some circumstances, for example, if the person to be rescued is our charge or employee. The question is not whether the law may compromise our independence because it does that all the time. The question is when can it. There is always a balancing of interests at stake.

The enactment of Good Samaritan laws may be particularly beneficial as we enter the 21st Century. As technology advances, it seems we are becoming increasingly impersonal. We have entered a "dot.com" age of faceless electronic communication, where the office cubicle has replaced the old neighborly fence, the place where casual conversation took place in years past. Enforcing civic responsibility could prove helpful in reestablishing relationships and reinforcing identification with the people around us.

III. HISTORICAL DEVELOPMENT AND THE NATURAL EVOLUTION OF A DUTY TO RESCUE

Some believe that our current day legal system's unwillingness to enforce a duty to rescue is grounded in a longstanding concern for individual liberty. While no doubt as Americans we place a high value on individual liberty, the

13. See Margalynne Armstrong, *Can Good Samaritan Laws Fit Into the United States Legal/Political Framework?: A Brief Response to Elspeth Farmer, Joshua Dressler, and Marc Franklin*, 40 SANTA CLARA L. REV. 1027 (2000).

absence of duty to rescue laws did not grow out of considered reflection and debate about liberty. In its earliest formulation, our legal system did not punish any omissions, including failure to rescue. Early law addressed only affirmative acts.¹⁴ There was no concern for what one intended to do or with what one should have done. Law was formal and morally neutral, concerned only with the act itself and identifying the one who committed it. Moreover, there were no legal defenses. All crimes were strict liability. Thus, without regard to the intent of the actor, if a criminal act was committed, the charged party had only a King's pardon to turn to for relief.¹⁵ Pardons were essential in a system in which most crimes were felonies punishable by death.

A perfect example is the thirteenth-century story of four-year-old Katherine Passeavant.¹⁶ Young Katherine was taken and held at the Saint Albans jail, charged with murder after she accidentally opened a door, sending another child to his death in a vat of hot water. There was no infancy defense in Katherine's day nor was there a requirement that prosecutors prove intent. Her family had no choice but to go to the King and beg for mercy. The courts, at that time, were charged with the application of unequivocal rules. Only the King, as the personal embodiment of the state, could exercise individualized judgment and show mercy. In Katherine's case, her family did successfully prevail upon the King and eventually the child was released. Still, even in cases where pardons were granted, the accused or her family was required to pay restitution to the victim or his family, again without regard for fault.

In time however, the fundamental injustice of this system was recognized and strict liability was rejected in favor of a criminal system based on proof of *mens rea*. Although the evolution away from strict liability in civil cases took much longer, eventually a civil system based, at a minimum, on negligence also took hold. Today, for someone accused of a

14. See James Barr Ames, *Law and Morals*, in *The Good Samaritan and the Law*, *supra* note 10, at 1.

15. See KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC EXPERIENCE* (1997).

16. See Kathleen M. Ridolfi, *Not Just An Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 48 (1998).

civil or criminal wrong, we ask not only “did you do the act?” but also, “was the act blameworthy?” In our modern system of law, “the ethical quality of the defendant’s act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor.”¹⁷

If the focus of the law has shifted away from the strictly technical question of whether the act was committed to an ethical or moral concern for whether the actor was blameworthy, should there not also have been a corresponding move away from technical distinctions, based on act and omission, to questions regarding whether the conduct or failure to act was blameworthy? If so, our hypothetical seamen’s unwillingness to reach over and tie the tourniquet would be judged on the basis of their moral blame and not based on a distinction regarding whether the harm resulted from their act or their willful non-act.

IV. PRACTICAL CONCERNS

If moral culpability is the proper basis for legal responsibility, what reasons remain to justify the vast divide that continues to exist in the law and continues to set apart the culpability of people like Dudley and Stephens from their hypothetical counterparts? None of these men harbored bad feelings toward the boy or wanted him to die. All were motivated by the same desire, to save themselves and perhaps put the dying boy out of his misery.

Moreover, if legal responsibility rests on moral blame, why would the law distinguish between the culpability of the hypothetical Captain Dudley and that of shipmate Stephens by holding the captain of a ship legally obligated to assist another sailor but not others in a position to help him? Obviously, concern that a Good Samaritan law would make it impossible to know where to draw the line has not prevented us from creating some legal duties. As a matter of fact, we have imposed duties to act in many situations: when there is a contract, special status relationship, if someone creates a risk to another person then fails to act to prevent harm from occurring, and if someone comes to the aid of another person but then abandons the effort, leaving the victim in a worse

17. Ames, *supra* note 14, at 5.

position.¹⁸ Are these relationships different enough to set them apart from the obligations of the rest of us to a fellow citizen? Or, are they the best we can do, given the practical difficulties in administering a law that punishes omissions?

It is nice and tidy to hold a captain liable for his crew, just as it is to hold a parent liable for a child, but Anglo-American law has thus far been unwilling to move beyond easily defined relationships for fear that to do so would create ambiguity, making it impossible to ever know where liability begins and where it ends. As citizens, we would not know what was expected of us.

Again, we are wise to be cautious—but is it really so difficult to draw lines? Courts routinely engage in individualized determinations that depend on subjective intent and a range of excuses and mitigating considerations. Why not trust the legal system to reach individualized judgments just as fairly where omissions are concerned?

Several reasons have been suggested, including the fundamental question of whether workable Good Samaritan legislation is even possible. Professor Joshua Dressler believes those who advocate such laws often “punt” when it comes to bearing the burden of formulating defensible and workable criteria for the imposition of duties to act.¹⁹ Opponents of Good Samaritan laws believe that such legislation could lead to serious problems, some of which are potentially insurmountable.

Among the serious concerns raised by Professor Dressler is the fear that Good Samaritan laws would allow “police and prosecutors too much discretion to determine whether and whom to prosecute.”²⁰ Race, background, or even physical attractiveness of the victim might make some victims “rescue worthy” but others not. Moreover, the race, background, or physical attractiveness of the one who failed to rescue might also influence the decision about whether or not to bring charges in the first place. Dressler also expressed concern that prosecutors might be more vulnerable to the pressures of public outrage, causing political pressures to drive the decision of whether and whom to prosecute rather than a fair

18. See Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad” Samaritan Laws*, 40 SANTA CLARA L. REV. 971, 975–76 (2000).

19. See *id.* at 983 n.55.

20. *Id.* at 983.

evaluation of the case.

Unquestionably, these are serious issues but they are in no way unique to Good Samaritan legislation. Police and prosecutorial abuses are reported daily in our newspapers. While there may be good reason to continue policing the police, should these concerns stop us from enforcing a duty to rescue? With every new law there are new restrictions on freedom, and there is additional room for new abuses in enforcement. Nonetheless, laws regulating conduct continue to be necessary. Always, there is the need to balance the cost of implementing those laws with the benefits to be gained by their imposition.

In this paper, I have focused primarily on Good Samaritan laws in the context of the criminal law, in part because of my own interest and experience, but also because there has been more attention paid to the issue in the criminal law context. Nonetheless, there is still a separate question of whether such a duty should be required under tort law.

Professor Marc Franklin addressed the issue of an affirmative duty to rescue in the civil law context. He raised two distinct issues. First, if the criminal law decides to impose an affirmative obligation to rescue, might tort law reach a different result? Second, even if no criminal obligation is imposed, should there nonetheless be a civil obligation? Beyond obligations, suggests Franklin, should tort law or any other area of the civil law develop doctrines that seek to encourage rescues and warnings? Marc Franklin considered each of these questions, as well as their relationships to one another. Focusing on practical concerns—such as the severity of civil damages, administration concerns, and the complexity of cases involving multiple defendants—Franklin concluded that no case for a civil law duty has been established.²¹

V. CONCLUSION

Questions that surround law and ethics and the debates for and against Good Samaritan laws are not new. They are

21. See Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991 (2000).

reignited every time another shocking incident occurs and lands on the front pages of our newspapers. In the past few years, the issue captured international attention once again when Princess Diana and three others were killed in a car accident in France. What shocked the world then were the actions of reporters who stood around at the scene of the crash and recorded the event, rather than helping the seriously injured people.

In this country, the murder of seven-year-old Sherrice Iverson brought the issue back home. All of us remember the murder of that child in a casino just outside of Las Vegas. But, more than the victim or her killer, Jeremy Strohmeyer, we remember Strohmeyer's friend, David Cash, who watched Strohmeyer assault the child, then left the bathroom and waited outside while his friend killed the little girl.

Interest in the story of Sherrice Iverson's murder centered less on her tragic death than on David Cash, the only person besides her killer who was in a position to prevent her murder, but who did nothing to help her. That story generated more than 300 published newspaper accounts nationwide.²² The sheer volume of news accounts of what is now more commonly called the "David Cash case" is by itself worth noting. But, fascination with the case and public thirst for stories and information about Good and Bad Samaritan issues raises yet another important ethical question. Does the news media have a responsibility to report in a way that assists citizens in understanding their communities and institutions, and in thinking through and reaching considered judgment on major social issues? As part of this Symposium, Journalism Professor Edmund Lambeth analyzed this issue in the specific context of the Sherrice Iverson murder case.²³

So profound has been the impact of the subject of duty to rescue on American culture, that the issue became the catalyst for the final episode of the popular television show *Seinfeld*. In that episode, the main characters, Jerry, Elaine, Kramer, and George were taking a walk in a small New Hampshire town when, just a few feet from them, a stranger was robbed at gunpoint. The victim cried for help, but rather

22. See generally Edmund Lambeth, *The News and the Good Samaritan Statute Controversy: Covering the "Ethics of Others"*, 40 SANTA CLARA L. REV. 1033, 1034 (2000).

23. See *id.*

than do anything to help him, the four characters continued their conversation, part of the time commenting and joking about the crime they were witnessing. A moment later, a police officer walked up and announced that they were under arrest. "But, why?" Elaine asked, "We didn't do anything." To which the officer answered, "That's just it, you didn't do anything."²⁴

For Jerry, Elaine, Kramer, and George, they had the misfortune of "doing nothing" in a place that had just enacted a Good Samaritan statute. This was extraordinarily bad luck as it turned out, since there is no duty to rescue in most of the United States. New Hampshire represents only a very small minority of jurisdictions imposing a criminal duty to rescue.

In most of the rest of the country, the issue of Good Samaritan laws remains unsettled. In fact, there is considerable inconsistency in the treatment of a failure to rescue throughout much of the world. Notably, there is a wide divergence of views in Anglo-American countries, where the issue is still largely regarded as a moral as opposed to legal issue, and views in European countries where failure to rescue is a crime.

To underscore this divergence, please allow me to take you out to sea and to the case of Dudley and Stephens just one last time.

As Neil Hanson explained in his new book, *Custom of the Sea*,²⁵ the rescue of Dudley and Stephens was most fortuitous, as their chances of being rescued were slim indeed. There was no way to call for help, their own ship had been blown off the course traveled by others, and even when ships did come across shipwrecks, the vagaries of winds and clumsiness of maneuvering made rescue in the days of sailing vessels highly unlikely.

But, Dudley and Stephens (if no longer Parker) lucked out. A German ship, the *Moctezuma*, appeared on the horizon and managed to pull the men aboard and to safety. But let us assume a slightly different set of facts. Imagine that the ship appears and from the crow's-nest, their lookout spots the miserable raft of Dudley and Stephens. "Shipwreck

24. Interestingly, as part of the story line of this final episode, the defendants' trial was a highly publicized case, acknowledgment by the show's writers that such a case would capture the nation's attention.

25. HANSON, *supra* note 2.

ahoy!" yells the lookout. Upon hearing this, the Captain looks at his watch and realizes that if they sail off course to investigate the bobbing raft, they will lose the wind, delay their arrival in port, and lose a promised reward for timely delivery of their cargo. "Sail on, fellows," orders the Captain. "We haven't time to investigate." "But Captain," answers the lookout, "there are survivors aboard." "Yes, I know," answers the Captain, "but if we divert our course, we lose our bounty. Sail on, mate, sail on!"

Is the Captain permitted to disregard the troubled raft? If the ship was the German *Moctezuma*, as in the actual case, or a ship from another European country,²⁶ the Captain would not be privileged to sail on. However, in the United States, except (as *Seinfeld* and friends learned) in just a few jurisdictions, the Captain's actions are permitted. Should the future of others like Dudley and Stephens, Sherrice Iverson, and Princess Diana depend on the point of origin of a passing ship or any other place for that matter?

26. Portugal, the Netherlands, Finland, Italy, Norway, Russia, Turkey, Denmark, Poland, Germany, Romania, France, Hungary, Greece, Czechoslovakia, Bulgaria, Yugoslavia, Albania, Switzerland, Spain, and Belgium all recognize a duty to rescue. See Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 392 n.35 (1998).