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CAN GOOD SAMARITAN LAWS FIT INTO THE UNITED STATES LEGAL/POLITICAL FRAMEWORK?: A BRIEF RESPONSE TO ELSPETH FARMER, JOSHUA DRESSLER, AND MARC FRANKLIN

Margalynne Armstrong*

Do Good Samaritan statutes fit into the American legal system? Professors Dressler and Franklin have argued that a duty to rescue—enforced by either criminal sanctions or civil liability—would not fit easily into United States law. They question whether it is possible to reconcile Good Samaritan liability with United States legal and political traditions. This response argues that narrowly and carefully crafted criminal statutes could fit into American law pursuant to traditions of civic republicanism and civil reciprocity.

There is certainly statutory precedent for duty to rescue laws. Professors Dressler and Franklin described the mandatory “safe rescue” statutes of Vermont, Minnesota, and Rhode Island,¹ arguing against their extension. Elspeth Farmer has described the history and content of Germany’s criminal proscriptions for failure to lend assistance to a stranger in danger.² Such a failure to assist can result in punishment of up to one-year imprisonment, if several key conditions exist.³ Despite the existence of this established

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1. See Joshua Dressler, *Some Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 977; 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, 1002 n.44.

2. See Elspeth Farmer, Address at the *Santa Clara Law Review Symposium: Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?* (Mar. 24, 2000) (on file with Professor Kathleen Ridolfi, Santa Clara University School of Law).

3. The obligation to render assistance arises if help is clearly necessary,

German model, Ms. Farmer concludes that Germany's legal and political expectations center around the obligations of citizens and government to each other, rather than focusing on the protection of individual rights from government interference as is the case in the United States. Ms. Farmer finds the German and American legal cultures to be sufficiently different from each other as to preclude successful duty to rescue laws from arising stateside.

Ms. Farmer is quite validly concerned about the ability of legal transplants to take root in societies that are dissimilar to that in which those rules were originally created. But despite the differences between an American society more focused on individualism than communitarianism, an American duty to rescue law would not be doomed to rejection because there are areas of American political history and tradition that would accommodate a duty to rescue. If we look at the duty to rescue, not so much as a duty that involves an obligation to another individual, but as an obligation to society, we find where these laws could fit into United States law. A duty to rescue as civic obligation has roots in our American tradition, particularly the Jeffersonian tradition of civic republicanism.⁴ A duty to rescue might be construed as a form of civic reciprocity, something we owe to other members of our society as needed because we would want to receive the same from others were our positions reversed.

We already have a major instance of civic reciprocity in the American legal tradition of jury duty. Why is it that we punish people with potential criminal sanctions if they fail to show up for jury duty? Well, the Fifth Amendment to the Constitution promises the right to trial by jury. Only by

could be reasonably expected under the circumstances, and could be rendered without increased personal danger to the rescuer. See Dressler, *supra* note 1, at 982-83.

4. "[A] civic republican reading of American citizenship emphasizes not individual rights but participation in the forms of democratic self-governance and public service the nation provides. In this view involvement in American public life is not just the occasional price of preserving individual liberties, but is our prime civic duty, part of a shared commitment to help shape our lives in common and serve our common interests." Rogers M. Smith, *American Conceptions of Citizenship and National Service*, 3 THE RESPONSIVE COMMUNITY 14, 15 (1993). Rodgers goes on to note that Americans generally downplay this conception of citizenship. See also Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976).

calling upon citizens to protect each other's individual rights can that Fifth Amendment right be protected. A person accused of crime would presumably want to exercise his or her constitutional right to a jury trial. So as the reciprocal to that right, we are required to serve on a jury when selected. In order to have a system in which we are judged by people (rather than authorities) from our communities, we also have a duty to make that same resource available to other citizens in the position of being on trial.

Participation in community is an important aspect of civic reciprocity. Community is also central to the theme of this Symposium and I wanted to mention that Professor Dressler raised an interesting point in his statement that we probably would not be here at all had it not been for David Cash's remarks. Specifically, Cash's statements about how he observed the relationship between himself and Strohmeyer as opposed to the relationship, or lack of relationship, he observed between himself and Sherrice Iverson. I think this is true in terms of the idea that we would not be here, but the public reaction to what Cash has said is something that I think allows us to understand why the law could impose some kind of narrowly defined criminal obligation, or criminal duty to intervene, in these kinds of situations.

One of the real horrors of what Cash said was how it objectified Sherrice Iverson, and made her a part of the "other," someone who was not defined as a part of his community. So Cash could find that he had an obligation to his friend Strohmeyer, his obligation was not to intervene. But Sherrice was someone who Cash saw as akin to people in another country, "Egypt," or "Panama," someone to whom he had no relation. And this construction of Sherrice as being somebody completely outside the frame of community connection with David Cash, I think, was a concern to people. It shocked and horrified people. People rightfully saw that construction of Sherrice as the "other" as a danger to society. And when the public or their officials recognize behavior that is dangerous to society, we often impose criminal liability or restrict the ability of people to engage in that kind of behavior.

So what is the danger to society, what is it that we expect of each other in a society such as ours? Going back to the idea of civic republicanism, there is an advantage to having a

citizenry of people who have an investment in society. These people who have this kind of investment in society make the best citizens. To underscore this point, Jefferson advocated land ownership in small amounts for a wide number of people to make them feel invested in the larger society. That idea of getting people invested in society can be applied to this situation—in that society consists of people, neighbors, and citizens who are in the same geographic framework as you are. Thus, if you are invested in these people, invested in each other, you are invested in society and will make a better citizen. And so the idea of civic republicanism has at its core that all of society will participate and have a stake in reaching the best kind of decisions, rather than just self-interested decision making that benefits individuals.

Thus, I think that there are precedents in the United States that can help us to see a place for a responsibility to rescue under the criminal law. Any criminal duty to assist would have to be fairly narrowly defined, and very carefully crafted to avoid the kind of problems that Professor Dressler mentioned, particularly in the Jack and Jill hypothetical. The Jack and Jill hypothetical found a duty to actually do or perform some kind of action to save Jill which might have resulted in an injury to Jack. But if you carefully craft a statute that imposes a duty to rescue, or a duty to intervene in some way, then you should avoid some of the scope problems that Professor Dressler was concerned about.

A carefully enough crafted statute would say that one could not hurt another in the attempt to rescue. You are not obliged to hurt Jack in order to save Jill. You have not violated your duty if the only way to save Jill is to injure Jack. And so not only are we protecting the individual rescuer from liability for injuries that happen, but we are also protecting people who are facing the situation so that there is not a choice imposed upon the rescuer to prefer one person over the other.

This too is a really basic premise of American jurisprudence. That is, if the law is requiring us to do something with respect to helping another person, we are not supposed to favor—and the law does not favor—one person over another. You see this kind of analysis in the abortion cases where the law does not say you have to go ahead with a late term pregnancy if the mother's life is in danger. Society

is generally not going to prefer one specific life over another. So I do think that there is a way to fit the duty to rescue into our tradition that addresses the concerns we have that somehow someone can walk through a situation like that in the casino and not do anything. It is not just that Cash failed to act, but the idea that failure to do something really hurt the larger society, not just Sherrice Iverson.

Finally, I agree with Professor Franklin that tort liability is not really a concern here. In framing the obligation to rescue in criminal terms, it is an obligation that is really owed to society, as opposed to just the individual. Our civil court system looks at compensation, the redress of claims by an individual, as opposed to redressing society. Thus, we can let the criminal law take care of this and not have any type of individual compensatory liability on the part of someone who fails to rescue.

Such an approach helps us fit this whole analysis into the story of the Good Samaritan, but in a kind of secular way. The point of the story of the Good Samaritan is to answer the question, "who is your neighbor?" Who can be a neighbor? And the story informs us that we each have the capacity to act as a neighbor to whomever we encounter. In the religious tradition, this is what God demands of people who wish to be judged as righteous. If we secularize this idea and require treating whomever we encounter as a neighbor, as one of our obligations as a member of this society, then we are really in touch with the idea of the story of the Good Samaritan. It is not just that we have a duty to rescue, but that we have the ability to find a connection between ourselves and strangers who face peril. David Cash's inability to make that connection was fatal to Sherrice Iverson, and harmful to all of us. As citizens, we each have the capacity to treat whomever we encounter as a constituent member of our society. This is what we should demand of each other in the name of civic responsibility.
