Emergency Care: Physicians Should be Placed Under an Affirmative Duty to Render Essential Medical Care in Emergency Circumstances

I. INTRODUCTION

Physicians throughout the United States often refuse to render medical care at the scene of an emergency.[1] Although doctors concede they have a moral and professional duty to aid victims of accidents and other emergencies,[2] they have grounded their refusal to help on the fear of malpractice suits.[3] Physicians realize they may by-pass an emergency situation with legal immunity, whereas their medical assistance raises the possibility of potential tort litigation.[4]

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[1]Report, *First Results: 1963 Professional-Liability Survey*, 189 J.A.M.A. 859, 864 (1964) [hereinafter cited as *1963 Survey*]. There is no more recent survey by the American Medical Association. Letter from Richard P. Bergen, Director, American Medical Association Legal Research Department, April 4, 1974; Note, *Good Samaritans and Liability For Medical Malpractice*, 64 COLUM. L. REV. 1301 (1964) [hereinafter cited as *Good Samaritans*].

[2]The American Medical Association requires doctors to respond at the scene of an emergency. AMA PRINCIPLES OF MEDICAL ETHICS, ch. II, §4 (1953). At the outset it should be recognized that this article constantly uses the term "emergencies" to mean unexpected and unprepared for occurrences. The term does not encompass those situations where a duty to provide care has previously been established, as where a patient at a hospital takes a critical turn for the worse and his situation is commonly termed an emergency. *See* Lee v. State of Alaska, 490 P.2d 1206 (Alas. 1971), where it was held that the Alaska Good Samaritan statute could apply only to persons without a duty to rescue and hence did not free a state trooper from liability for negligence in effecting a rescue. Some of the state Good Samaritan statutes define the term emergency in a similar manner in the body of the statute. Two such examples are N.M. STAT. ANN. ch. 12-12-3, 12-12-4 (1968) and ORE. REV. STAT. 30.800 (1971).

[3]*See* STETLER & MORITZ, DOCTOR AND PATIENT AND THE LAW, 305 (1962); Korck, *The Sword of Damocles*, 27 AM. SURG. 295 (1961); Stetler, *The History of Reported Medical Profession Liability Cases*, 30 TEMP. L.Q. 366, 383 (1957).

[4]Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901) is the only reported decision directly on point, and concludes that physicians may refuse to give care with legal immunity; *cf. also*, Union Pac. R.R. v. Cappier, 66 Kan. 649, 72 P. 281 (1903); O'Keefe v. William J. Barry Co., 311 Mass. 517, 42 N.E.2d 267 (1942); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928), concluding there is no affirmative duty to rescue absent fault by the potential rescuer which has caused the plaintiff's damage.

The California legislature has realized that many victims in need of emergency care would suffer serious consequences if doctors refused to help for fear of litigation.[5] Thus in 1959 the Legislature enacted the first "Good Samaritan" statute,[6] which frees the physician from civil liability, in the absence of gross negligence or bad faith, for damages resulting from the care he renders at the scene of an emergency.[7] Following California's example, every state except Washington has enacted similar legislation.[8]

Despite such legal safeguards, there is reason to believe that a significant number of physicians would still refuse to provide medical attention at the scene of an emergency. A 1963 survey of physicians conducted by the American Medical Association in each of the fifty states indicated that: a) In those states that had enacted Good Samaritan statutes, approximately 50% of the responding doctors stated they would refuse to aid emergency victims should they encounter such a situation in the future. b) In those states without Good Samaritan statutes, the results were similar, about 50% of the

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[5]34 JOURNAL OF THE STATE BAR OF CALIFORNIA, 583 (1959); Note, *Torts: California Good Samaritan Legislation: Exemptions From Civil Liability While Rendering Emergency Aid*, 51 CALIF. L. REV. 816, 818 n. 12 (1963) [hereinafter cited as *Civil Liability*].

[6]CAL. BUS. & PROF. CODE § 2144 (West 1962).

[7]CAL. BUS. & PROF. CODE § 2144 (West 1962). There is some controversy whether liability may be predicated on gross negligence or solely on willful misconduct, and no reported decision has resolved the question. For a discussion of the interpretation of the statute, *see Civil Liability*, *supra* note 5, at 819-820.

[8]ALA. CODE tit. 7, § 121(1) (Supp. 1971); ALAS. STAT. § 08.64.365 (1972); ARIZ. REV. STAT. § 32-1471 (Supp. 1973); ARK. STAT. ANN. § 72-624 (Supp. 1973); COLO. SESS. LAWS § 66-39-6 (1973); CONN. STAT. ANN. § 52-557 (Supp. 1973); 24 DEL. CODE § 1767 (Supp. 1972); D.C. CODE ANN. § 2-142 (1973); FLA. STAT. ANN. § 768.13 (Supp. 1974); GA. CODE ANN. § 84-930 (1970); HAWAII REV. STAT. § 663-1.5 (Supp. 1972); IDAHO CODE § 39-1391 (Supp. 1973); ILL. ANN. STAT. ch. 91 § 2a (Supp. 1973); IND. STAT. ANN. § 34-4-12-1 (1973); IOWA CODE ANN. § 613.17 (Supp. 1973); KAN. STAT. ANN. § 65-2891 (1973); KY. REV. STAT. § 411.148 (Supp. 1972); LA. REV. STAT. § 37:1732 (1974); ME. REV. STAT. ANN. ch. 32 § 3291 (Supp. 1973); MD. CODE ANN. Art 43 § 132 (1971); MASS. ANN. LAWS ch. 112 § 12B (1971); MICH. STAT. ANN. § 14.563 (1969); MINN. STAT. ANN. § 604.05 (Supp. 1974); MISS. CODE ANN. § 8893.5 (Supp. 1972); MO. ANN. STAT. § 190.195 (Supp. 1974); MONT. REV. CODE § 17-410 (1972); NEB. REV. STAT. § 25-1152 (1964); N.J. STAT. ANN. § 2A-62A-1 (Supp. 1973); N.M. STAT. ANN. ch. 12-12-3, 12-12-4 (1968); N.Y. CONSOL. LAWS EDUC. § 6527 (Supp. 1973); N.C. GEN. STAT. § 20-166(d) (Supp. 1973); N.D. CENTURY CODE ANN. §§ 43-17-37, 43-17-38 (Supp. 1973); OHIO REV. CODE § 2305.23 (Supp. 1972); OKLA. STAT. ANN. tit. 76 § 5 (Supp. 1971); ORE. REV. STAT. § 30.800 (1973); PA. STAT. ANN. tit. 12 §§ 1641, 1642 (Supp. 1973); R.I. GEN. LAWS § 5-37-14 (Supp. 1973); S.C. CODE LAWS § 46-803 (Supp. 1973); S.D. COMP. LAWS §§ 20-9-3, 20-9-4 (1969); TENN. CODE ANN. § 63-622 (Supp. 1973); TEX. REV. CIV. STAT. ANN. Art. 1A (1969); UTAH CODE ANN. § 58-12-23 (Supp. 1973); VT. STAT. ANN. tit. 12 § 519 (1972); VA. CODE ANN. § 54-276.9 (Supp. 1973); W. VA. CODE ANN. § 55-7-15 (Supp. 1973); WIS. STAT. ANN. § 448.06 (Special Supp. 1972); WYO. STAT. ANN. § 33-343.1 (Supp. 1973).

responding physicians would not help the victim at the emergency scene.[9]

Because there is evidence that significant numbers of doctors will not respond to emergencies despite Good Samaritan legislation, this article will propose that the physician be *required* to render such care under penalty of civil and criminal sanctions. A statute will be proposed that would impose such liability on the doctor for his refusal to aid. This article will also explain how the statute should be interpreted and applied. A similar statute has been in effect in Vermont since March 22, 1968, with apparent success.[10]

However, the proposed California statute would differ from the Vermont statute in three important respects: 1) The California statute would require emergency aid from physicians only (Vermont's requires aid from all persons). 2) California judges could impose a stiffer criminal fine than that provided in Vermont's statute. 3) California's statute would expressly provide a civil remedy for the injured party against the violating physician. In this manner the proposed California statute, if enacted, would be a stronger and more realistic inducement for the physician to render assistance than the present Vermont statute.

Since the California statute would, in addition to its criminal sanctions, impose civil liability on the physician (in the form of a private cause of action by the damaged party against the physician for the latter's refusal to aid), this article will show that the imposition of such liability is in keeping with the current trend in the law of torts in this area. An examination of the case law will show that the distinction between misfeasance (traditionally resulting in tort liability) and nonfeasance (traditionally precluding tort liability) is today quite unclear. Analogies will be drawn between the physician-emergency victim situation and other areas of tort law where civil liability results from nonfeasance.

Several civil law countries have imposed criminal penalties on the physician for his refusal to aid the victim of an emergency.[11] The statutes of these nations will be examined, and they, along with the Vermont statute, will serve as a model for the proposed California statute.

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[9] *1963 Survey, supra* note 1.
[10] VT. STAT. ANN. tit. 12 § 519 (1972). This statute is printed in full in Section IV-B of this article. *See generally*, Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972) [hereinafter cited as Franklin].
[11] *See* Appendix A for a list of the jurisdictions studied and the statutes.

II. THE PRESENT RULE: THERE IS NO AFFIRMATIVE DUTY TO ACT

A. FAILURE TO ACT DOES NOT RESULT IN TORT LIABILITY

There is no legal duty placed on the physician to come to the aid of a person needing emergency medical treatment, even under the most morally shocking conditions. For example, around 1901, in Montgomery County, Indiana, George D. Hurley became terribly ill. He sent his messenger for his family doctor, George W. Eddingfield. The messenger informed Dr. Eddingfield of his master's violent illness, tendered the doctor his fee, and explained that no other doctor could be procured in time to be of any help to Hurley. Without any reason whatsoever (*e.g.*, other medical appointments or duties), the doctor refused to come to the aid of Hurley, and as a result Hurley died.

On April 4, 1901, the Supreme Court of Indiana refused to hold Dr. Eddingfield liable in tort for the death of Mr. Hurley, saying the doctor was under no duty to come to Hurley's aid.[12] To date no reported judicial decision has ruled to the contrary, and the result decreed in *Hurley v. Eddingfield* would likely be repeated today in every jurisdiction[13] except possibly Vermont, where it is still unclear whether their Title 12 section 519 would produce civil liability under these circumstances.[14]

This result is in conformance with the common law distinction between misfeasance and nonfeasance: that generally a person will be held civilly liable for another's harm only when that harm has been caused by the defendant's improper affirmative act. If the defendant has done nothing to cause the plaintiff's injuries, he is not required to aid the injured party, even though his help would prevent further injuries to the plaintiff. His inaction under such circumstances is termed nonfeasance, and is not tortious.[15]

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[12] 59 N.E. at 1058 (1901).
[13] Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952) [hereinafter cited as *Rescue*]; *Good Samaritans, supra* note 1, at 1301.
[14] Marc Franklin feels that a common law civil action might result from Vermont's criminal statute because their statute was intended to protect the type of plaintiff who was injured and who would be seeking a civil remedy. But as Franklin explains, no Vermont case has been called on to decide such a question yet, and he would prefer the civil remedy to be legislated. Franklin, *supra* note 10, at 56, 57.
[15] *Good Samaritans, supra* note 1, at 1031. A sample of some cases holding that there is no duty to rescue are: Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905 (1966); Louisville & Nashville R. Co. v. Scruggs & Schols, 161 Ala. 97, 49 So. 399 (1909); Abresch v. Northwestern Bell Tel. Co., 246 Minn. 408, 75 N.W.2d 206 (1956).

The Second Restatement of Torts expresses the rule another way: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."[16] In practice, this rule has produced shocking consequences. A strong swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, may sit on the dock and watch the man drown, without legal liability.[17] No person is required to bind up the wounds of a stranger who is bleeding to death,[18] to prevent a neighbor's child from hammering on a dangerous explosive,[19] or to even cry a warning to one who is walking into the jaws of a dangerous machine.[20]

One fairly recent decision, *Yania v. Bigan*,[21] has declared that a defendant will not be liable in tort for the drowning of a business invitee he has coaxed into a deep, water filled trench. In the words of the court, "The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position . . . The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue."[22]

Such decisions have long been severely criticized by legal writers,[23] and as Section III will show, the rule of no liability in nonfeasance situations has been slowly eroded by judicial decisions and legislative enactments.

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[16] RESTATEMENT (SECOND) OF TORTS § 314 (1965).
[17] Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928).
[18] 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); *cf. also*, People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907).
[19] Sidwell v. McVay, 282 P.2d 756 (Okla. Sup. Ct. 1955).
[20] *See* Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1897); Toadvine v. Cincinnati, N.O. & T.P.R. Co., 20 F. Supp. 266 (D. Ky. 1937).
[21] 397 Pa. 316, 155 A.2d 343 (1959).
[22] *Id.* at 346.
[23] Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Bohlen, *The Moral Duty to Aid Others As A Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908), *reprinted in* BOHLEN, STUDIES IN THE LAW OF TORTS, 291 (1926) [hereinafter cited as BOHLEN, STUDIES]; Bruce, *Humanity and the Law*, 73 CENT. L.J. 335 (1911); Snyder, *Liability For Negative Conduct*, 35 VA. L. REV. 446 (1949); McNiece and Thornton, *Affirmative Duties in Torts*, 58 YALE L.J. 1272 (1949); Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960); Rudolph, *The Duty To Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965) [hereinafter cited as Rudolph]. Linden, *Tort Liability for Criminal Nonfeasance*, 44 CAN. BAR. REV. 25 (1966) [hereinafter cited as Linden], *particularly* n. 32 of Justice Idington's remark, " . . . the sooner the distinction between non-feasance and misfeasance . . . is discarded, the better."

B. FAILURE TO ACT INCURS NO CRIMINAL LIABILITY

While the state of Vermont imposes a criminal fine of $100 for any person's (including a physician's) refusal to aid another in distress, it is the only United States jurisdiction to do so.[24] Numerous civil law countries, however, have enacted statutes imposing criminal sanctions on a person who refuses to render emergency care. These civil law provisions and the Vermont statute will be discussed in Section IV of this article, and Section V will draw on these provisions to urge that a similar law should be enacted by the California legislature.

III. THE MISFEASANCE/NONFEASANCE DICHOTOMY UNDER ATTACK

Francis H. Bohlen has written, "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant."[25] Historically, the rule developed in the early common law at a time when the King's courts were too busy with the more flagrant forms of misbehavior to be greatly concerned with a person who merely did nothing, even though another might suffer serious harm as a result."[26]

While this rule has been followed by many courts,[27] it has also been greatly criticized,[28] and there have been several recent decisions which have contradicted the rule. Furthermore, state legislatures have statutorily placed duties on their citizens to aid one another in certain nonfeasance situations.[29] In light of these developments discussed hereafter, it is a logical step to require physicians to aid the victim of an emergency.

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[24] VT. STAT. ANN. tit. 12 § 519 (1972). Although the Missouri statute may seem to impose criminal liability for refusal to aid, since MO. ANN. STAT. § 190.180 says, "any person violating, or failing to comply with, the provisions of sections 190.100 to 190.195 is guilty of a misdemeanor . . . ", the language of § 190.195 is clearly discretionary, "Any person . . . *may* render emergency care . . . " (Supp. 1974).

[25] BOHLEN, STUDIES, *supra* note 23, at 293.

[26] RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965); Linden, *supra* note 23, at 28.

[27] *See* Section II of this article.

[28] *See* note 23.

[29] *See* discussion section III-B of this article.

A. OWNERS AND OCCUPIERS OF LAND ARE PLACED UNDER AFFIRMATIVE DUTIES

It was once held that the landowner had no duty to warn known trespassers of concealed dangers they were about to encounter.[30] This has apparently given way to the rule that has developed since the 1930's that the landowner must at least warn the known trespasser of the danger,[31] although he is under no duty to maintain his land in a condition that is reasonably safe for the reception of these uninvited visitors.[32] This development in the law of torts can be seen as a departure from the strict misfeasance/nonfeasance rule. The landowner has done nothing to bring himself into a relationship with the trespasser, (as the physician has done nothing to bring himself into a relationship with a person needing emergency medical treatment) and yet the landowner is required to affirmatively act (by giving a warning) in the trespasser's behalf.

The rule of no liability for nonfeasance has been justified as essential to a free society.[33] Yet social and moral pressures have resulted in the abrogation of this rule where landowners can warn trespassers of imminent dangers. These same social and moral pressures should also result in a further departure from the misfeasance/nonfeasance rule by requiring the physician to render aid at the scene of an emergency.

B. SPECIAL RELATIONS REQUIRE AN AFFIRMATIVE DUTY

Certain special relationships have dealt a blow to the no-liability-for-nonfeasance rule, by punishing inaction with civil liability. Carriers must take reasonable affirmative steps to aid a passenger in peril,[34] as must the shopkeeper aid his business visitor.[35] A similar duty is placed on the employer to aid an injured employee, where the employee is unable to care for himself and the injury occurs

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[30] Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1898).

[31] THE RESTATEMENT (FIRST) OF TORTS § 335 expressly rejected the rule of Buch v. Amory in 1934, and found a duty to warn of concealed dangers. Martin v. Jones, 122 Utah 597, 253 P.2d 359 (1953) agreed with the First Restatement; RESTATEMENT (SECOND) OF TORTS § 337 (1965) reiterates the First Restatement § 335.

[32] RESTATEMENT (SECOND) OF TORTS § 333 (1965).

[33] Linden, *supra* note 23, at 29.

[34] Yu v. New York, N.H. & Hartford Ry. Co., 145 Conn. 451, 144 A.2d 56 (1958); Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192 (1915); Kambour v. Boston & M.R.R., 77 N.H. 33, 86 A. 624 (1913). Even where the passenger has been injured through his own negligence. Continental Southern Lines v. Robertson, 241 Miss. 796, 133 So.2d 543 (1961); Southern R. Co. v. Sewell, 18 Ga. App. 544, 90 S.E. 94 (1916).

[35] L.S. Ayres & Co. v. Hicks, 200 Ind. 86, 40 N.E.2d 334 (1942); Connelly v. Kaufman & Baer Co., 349 Pa. 261, 37 A.2d 125 (1944); Blizzard v. Fitzsimmons, 193 Miss. 484, 10 So. 2d 343 (1942).

within the scope of the employment.[36] In each of the aforementioned situations, affirmative assistance is required of one party even if there was no act by that party causing an injury to the other.

All of these requirements of affirmative aid may be justified under the present misfeasance/nonfeasance rationale by claiming that the parties are already within the confines of a relationship, and thus a duty to aid is warranted, probably on the theory that this duty is a societal cost of doing business.[37] Notwithstanding such explanations, there still has been no misfeasance by the carrier, shopkeeper, or employer; rather the duty and liability are imposed on these parties due to social and moral principles.

As expected, it has long been recognized that if the defendant's own negligence has been responsible for the plaintiff's peril, a relation has arisen between the parties which imposes a duty on the negligent actor to make a reasonable effort to give assistance and avoid any further harm.[38] It was formerly the rule that if the defendant innocently created a danger to the plaintiff, no duty of assistance arose;[39] but the present rule seems to require the defendant to aid the plaintiff if his innocent conduct creates an unreasonable risk of harm and does in fact injure the plaintiff.[40]

Recently, hit and run statutes in several jurisdictions have extended this doctrine by requiring an innocent driver involved in an automobile accident to render aid to any party injured as a result of the accident. A violation of this duty is punishable by criminal sanctions.[41] There is to be no distinction between misfeasance and nonfeasance in the application of these statutes, the duties are imposed regardless of fault.[42] These statutes have also been held in a number of states to mean that a failure to give aid is negligence per se.[43] A

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[36] *See for example*, Carey v. Davis, 190 Iowa 720, 180 N.W. 889 (1921); Rival v. Atchison, T. & S.F.R. Co., 62 N.M. 159, 306 P.2d 648 (1957); Anderson v. Atchison, T. & S.F.R. Co., 333 U.S. 821 (1948).

[37] L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942).

[38] Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 20 S.E.2d 299 (1942); Trombley v. Kolts, 29 Cal. App. 2d 699, 85 P.2d 541 (1938).

[39] Griswold v. Boston & M.R.R., 183 Mass. 434, 67 N.E. 354 (1903); Union Pac. R. Co. v. Cappier, 66 Kan. 649, 72 P. 281 (1903); Turbeville v. Mobile Light & R. Co., 221 Ala. 91, 127 So. 519 (1930).

[40] Hollinbeck v. Downey, 261 Minn. 481, 113 N.W.2d 9 (1962); Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 195 S.E. 247 (1938); Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961); Chandler v. Forsyth Royal Crown Bottling Co., 257 N.C. 245, 125 S.E.2d 584 (1962); Zylka v. Leikvoll, 274 Minn. 435, 144 N.W.2d 358 (1964); *see* RESTATEMENT (SECOND) OF TORTS § 321 (1965); Note, *Torts: Nonnegligent Participant Liable for Creation of Hazard*, 51 MINN. L. REV. 362 (1966).

[41] CAL. VEH. CODE §§ 20001-20003 (West 1971), *see also* Linden, *supra* note 23, at 48.

[42] People v. Bammes, 265 Cal. App. 2d 626, 71 Cal. Rptr. 415 (1968).

[43] Brumfield v. Woodford, 143 W. Va. 332, 102 S.E.2d 103 (1958); Hallman v. Bushman, 196 S.C. 402, 13 S.E.2d 498 (1941); Brooks v. E.J. Willig Transp. Co., 40 Cal. 2d 669, 255 P.2d 802 (1953).

similar duty is required of boat operators in California.[44]

Maritime law has long recognized the duty of a ship to save one of its seamen who has fallen overboard,[45] and the United States Code requires a shipmaster to render aid to every person found at sea in danger.[46] The statute imposes criminal sanctions for a willful violation, and by its language requires that assistance be given to every person who is found at sea in danger. There are many similarities between a situation where a shipmaster unexpectedly finds a victim of a sea accident and a physician inadvertently encounters a person in need of emergency medical treatment. Both the physician and the shipmaster possess unique skills which enable them to help the imperiled individual, and both have inadvertently encountered the person in danger. Furthermore, in both situations, serious consequences may result to the victim if aid is not rendered.[47]

C. THE HOSPITAL'S AFFIRMATIVE DUTY

It is now the generally accepted view that hospitals which customarily provide emergency services are required to admit all patients presenting themselves at the hospital's emergency room.[48] Nonfeasance (refusal to admit and preliminarily examine the patient) leads to civil liability,[49] and in some cases is punishable by criminal sanctions if the refusal is by a public hospital.[50]

The courts which have found civil liability for a hospital's refusal to admit and treat a patient needing emergency medical care have used a rationale that has not entirely shattered the misfeasance/nonfeasance rule. Most courts have justified liability on the ground that the maintenance of an emergency ward becomes a well-known adjunct to the main business of a hospital, and a seriously hurt person, relying on the hospital's established custom to render emergency care, is placed in a worse position when the hospital turns him

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[44] CAL. HARB. & NAVIG. CODE § 656 (West Supp. 1974).
[45] Harris v. Penn. R. Co., 50 F.2d 866 (4th Cir. 1931); Di Nocola v. Penn. R. Co., 158 F.2d 856 (2d Cir. 1946); Pacific-Atlantic S.S. Co. v. Hutchison, 242 F.2d 691 (9th Cir. 1957); Kirincich v. Standard Dredging Co., 112 F.2d 163 (3rd Cir. 1940); *cf. also*, Cortes v. Baltimore Insular Lines, 287 U.S. 367 (1932); Scarff v. Metcalf, 107 N.Y. 211, 13 N.E. 796 (1887). *See* Note, *Torts: Duty of Vessel to Rescue Seaman Who Has Fallen Overboard*, 17 CORN. L.Q. 505 (1932).
[46] 46 U.S.C. § 728 (1958).
[47] *Good Samaritans, supra* note 1, at 1301.
[48] Wilmington General Hospital v. Manlove, 54 Del. 15, 174 A.2d 135 (1961). Powers, *Hospital Emergency Services and the Open Door*, 66 MICH. L. REV. 1455 (1968) [hereinafter cited as Powers]; Note, *Hospital's Duty of Emergency Care: A Functional Approach*, 6 COLUM. J. L. & SOC. PROB. 454 (1970) [hereinafter cited as *Hospital's Duty*].
[49] Wilmington General Hospital v. Manlove, 54 Del. 15, 174 A.2d 135 (1961).
[50] *Hospital's Duty, supra* note 48, at 474; N.Y. PUB. HEALTH LAW § 2805-a (McKinney Supp. 1969).

away than he would be if he had not taken the time to come to the hospital.[51]

Such reasoning is dubious, since tort liability for the negligent termination of gratuitous services is usually found only after a relationship (either a promise to give aid and reliance thereon, or the actual initiation of aid) between the parties is first established and then negligently terminated.[52] In the hospital cases there were no primary relationships which were later terminated. The patient presented himself and was refused, a nonfeasance situation, as the early cases which denied hospital liability under such circumstances explained.[53]

Legal writers are, therefore, convinced that *Wilmington General Hospital v. Manlove*[54] has done more to weaken the distinction between misfeasance and nonfeasance than the courts wish to admit and that judicial language to the contrary is merely an attempt to fit a socially warranted result into a prior legal framework.[55] However, despite such a development in the field of law and medicine, there is little reason to hope that a judicial opinion will impose a duty on the physician to render his services at the scene of an emergency. Hospitals may be held liable (according to cases like *Manlove*) for their refusal to admit a patient in need of immediate care because they regularly maintain emergency services. Physicians, on the other hand, do not hold themselves out in any way as dispensers of emergency treatment. They do not usually maintain offices solely for the receipt of those patients in need of immediate medical attention, nor do they travel around looking for those who may be in need of medical help. It is likely that a court would conclude that an emergency victim has no reasonable expectation that a doctor will either pass by and help him, or that the doctor will come to his aid after being summoned. It may be said that the hospital emergency room normally provides such services, whereas the typical doctor does not. Yet *Manlove* does demonstrate judicial recognition of a social need, the availability of emergency medical treatment to the public, and the willingness to overcome an ancient rule in pursuit of this result.

For quite some time courts have been imposing tort liability in these *special* situations where they felt such liability was socially

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[51] 174 A.2d at 140, RESTATEMENT (SECOND) OF TORTS § 323 (1965). If a hospital begins to render aid and then refuses to continue it unjustifiably, then the hospital may be liable. *See* Powers, *supra* note 48; RESTATEMENT (SECOND) OF TORTS § 323 (1965).

[52] RESTATEMENT (SECOND) OF TORTS § 323 (1965).

[53] Birmingham Baptist Hospital v. Crews, 229 Ala. 398, 157 So. 224 (1934); Costa v. Regents of the University of California, 116 Cal. App. 2d 445, 254 P.2d 85 (1953); Le Juene Road Hospital, Inc. v. Watson, 171 So.2d 202 (Fla. D.C.A. 1965).

[54] 54 Del. 15, 174 A.2d 135 (1961).

[55] Powers, *supra* note 48; *Hospital's Duty, supra* note 48.

justifiable, even if their decisions virtually contradicted the common law misfeasance/nonfeasance rule.[56] Legislatures have been enacting statutes in violation of the traditional rule because they felt the aid of one's fellow man was essential under some circumstances.[57] Thus there is reason to suspect that the distinction between misfeasance and nonfeasance is being slowly overthrown.[58] In view of this movement away from the rule, there should be less legislative reluctance to a statutorily created duty on physicians to render emergency medical care. If one is to balance the social benefit of such medical attention against the temporary deprivation of the physician's liberty, the societal need should prevail.

IV. THE AFFIRMATIVE DUTY IN CIVIL LAW COUNTRIES AND THE UNITED STATES

A. THE DUTY TO AID IN THE CIVIL LAW

Civil law countries have shown a general willingness to impose affirmative duties to rescue on those with knowledge of and an ability to help others in peril.[59] Appendix A contains translations of statutory requirements of affirmative aid from twenty-one foreign nations, all of which punish inexcusable inaction with criminal sanctions.[60] Criminal consequences for refusal to aid one in distress are not new concepts to civil law countries; for example, such statutory requirements are found in the Russian Criminal Code of 1845, and the criminal codes of Toscany (1853), the Netherlands (1881), and Italy (the Zanardelli Code of 1889.)[61] Only since World War II, however, have such provisions found their way into the codes of virtually every European civil law country.[62] These statutes can serve as a model for similar California legislation, and therefore it is helpful to examine the application and interpretation they have received at the hands of their respective legal systems.

1. THE DUTY TO AID IS REQUIRED OF ALL PERSONS

A preliminary reading of the statutes shows that affirmative action is required of all persons, not physicians alone. However, all of the

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[56] PROSSER, LAW OF TORTS 346 (1971).
[57] Linden, *supra* note 23, at 48.
[58] PROSSER, *supra* note 56, at 346.
[59] *Good Samaritans, supra* note 1, at 1317.
[60] These translations first appeared in Feldbrugge, *Good and Bad Samaritans, A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966) [hereinafter cited as Feldbrugge].
[61] *Id.* at 631.
[62] The nations which have passed their statutes after 1945 are Albania (1952), Bulgaria (1951), Czechoslovakia (1961), Ethiopia (1957), Greece (1950), Hungary (1961), Soviet Union (1960), Ukraine (1960), and Yugoslavia (1951).

countries whose statutes are examined herein require the physician to act.[63] In France, doctors are a proportionally large number of violators of Article 63(2) of the Code Pénal, and in some countries the fact that the violator is a physician is considered an aggravation of the offense.[64]

2. WHEN THERE IS A DUTY TO RESCUE

Generally, a potential rescuer must act to help another who is in immediate danger of serious harm or death when the rescuer is aware of the victim's predicament and when his action will not subject the rescuer to great danger. Disagreement exists among the civil law nations concerning the circumstances under which the duty to aid arises,[65] but it is uniformly agreed that: 1) The potential rescuer must be aware that another person is in danger[66] (whether this awareness is to be judged by objective legal standards is not clear)[67] and, 2) The danger to the imperiled person must be immediate and direct.[68]

At one time these statutes were interpreted as applying only to those people who were physically present at the scene of an emergency.[69] The present view seems to be that aid is required of one who is in the vicinity of the danger and to whom the dangerous situation has been described.[70] A potential rescuer is not required to risk his life to save another,[71] but he usually must act if he can do so with little danger to himself or without abandoning other important duties.[72]

3. THE RESCUER'S STANDARD OF CARE

Once a potential rescuer realizes that a person is in need of help, she must act to the best of her ability. However, there is no uniform rule that one must investigate an unclear situation to ascertain if their aid is needed. Some statutes do not require a potential rescuer

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[63] Feldbrugge, *supra* note 60, at 643.
[64] *Id.*
[65] Some statutes require aid when an individual is threatened with serious injury (*e.g.*, Germany, France, Italy), and others require one to help only when death is threatened (*e.g.*, Denmark, Finland, Netherlands).
[66] Feldbrugge, *supra* note 60, at 642.
[67] A German commentary maintains that the standard is objective [Schönke-Schroder, *Strafgesetzbuch*, KOMMENTAR 1385 (1935)], whereas French scholars cannot agree. Compare Guillon, *L'Omission de Porter Secours (Article 63, § 2 du Code Pénal) et la Profession Medicale*, SEMAINE JURIDIQUE 1294 (1956) with Thiron, *Cour de Cassation (Ch. Crim.)*, SEMAINE JURIDIQUE 8050 (1954).
[68] Feldbrugge, *supra* note 60, at 632.
[69] *Id.* at 635.
[70] *Id.* at 634.
[71] The majority of the statutes specifically mention this rule. *See* Appendix A.
[72] Feldbrugge, *supra* note 60, at 635.

to investigate, but require assistance only when the danger is obvious.[73] On the other hand, France and Germany require the passerby to examine that danger scene.[74] Once the potential rescuer realizes that help is needed, most jurisdictions generally agree that the rescuer must perform to the best of her abilities. As the reasonable man test varies according to one's individual capabilities,[75] similarly most civil law countries interpret their statutes to require help "to the best of the rescuer's ability."[76] Often times this duty involves procuring help from another.[77]

4. SANCTIONS FOR REFUSAL TO AID

The statutes listed in Appendix A punish those persons who, without incurring serious risks upon themselves, were able to help another person in grave peril, and refused to do so.[78] Liability occurs, in the main view, when the rescuer, on realizing his help is needed, fails to act.[79] Furthermore, liability attaches immediately upon the rescuer's inaction, and therefore: a) It has no bearing on the offender's liability whether the victim dies, is injured, or escapes unharmed; b) A deliberate delay is a violation of the statute; and c) It is of no consequence to the offender's liability that the victim is subsequently rescued by a third person.[80]

Crime by omission, or criminal omissions as they have often been called, are not totally foreign to the American experience.[81] Once a relationship has been established between two persons which the law recognizes warrants ongoing action by one party, inaction is a criminal offense. Examples of this are the duties of parents and guardians to care for their children,[82] the duty to admit persons to the hospital emergency ward,[83] the duty to reveal one's identity to the other participant in an automobile accident,[84] and the duty to assist a police officer in making an arrest when such assistance is requested.[85] This last duty, to help a police officer, is a type of emergency aid that applies even to the passerby, regardless of his prior relationship to the peace officer.

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[73] *See* Danish statute, Appendix A.
[74] Feldbrugge, *supra* note 60, at 644.
[75] *Id.* at 644.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 652.
[79] *Id.* at 645.
[80] *Id.*
[81] *See generally*, Kircheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942).
[82] Feldbrugge, *supra* note 60, at 624. CAL. PEN. CODE §§ 270, 271(a) (West 1970).
[83] N.Y. PUB. HEALTH LAW § 2805-a (Supp. 1969).
[84] CAL. VEH. CODE § 20003 (West 1971).
[85] CAL. PEN. CODE § 150 (West 1971).

Under special circumstances these statutes punish, as a criminal omission, a person's refusal to help another in danger. The physician is also placed in a special relationship when he learns that a nearby person needs emergency medical attention. It is time that an American jurisdiction recognize the validity of the European rule and impose an affirmative duty on the physician to render his assistance under such circumstances.

B. VERMONT REQUIRES EVERYONE TO AID

One American jurisdiction, Vermont, followed the civil law example and passed into law Title 12 section 519 which requires all persons to help those in need of emergency care.[86] The statute reads:

> (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.

No civil remedy is provided for the injured party, presumably because the Vermont legislature was plowing new ground in the United States and did not wish to move too quickly.[87] As previously mentioned, it is not clear whether a court would find that an injured party had a civil cause of action against a potential rescuer who refused to act, based on the criminal statute.[88] Franklin suggests that a civil remedy should be expressly provided by statute,[89] and his suggestion is incorporated into the proposed California statute contained in section V of this article.

There are two standards of care involved in Vermont's Title 12 section 519: 1) Only a willful refusal to give aid is a violation of the statute, and 2) Once aid is administered, any conduct short of gross negligence will be considered proper and not tortious. It has been suggested that the standard should be reasonable care under the cir-

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[86] The Vermont Legislature was aware of the statutes in civil law nations which punish the failure to aid. Franklin, *supra* note 10, at 55 n. 28.
[87] Franklin, *supra* note 10, at 55 n. 30.
[88] *See* note 14.
[89] Franklin, *supra* note 10, at 56.

cumstances, but the Vermont legislature apparently felt it would be unfair to require laymen to act in emergencies and hold them to such a high standard.[90] However, Franklin believes that this explanation is not applicable to physicians, who have been trained in emergencies,[91] and consequently the proposed California statute requires reasonable care under the circumstances.

V. PROPOSED CALIFORNIA LEGISLATION REQUIRING THAT PHYSICIANS RENDER EMERGENCY CARE

It is not a new concept that professionals must occasionally render gratuitous services as a societal obligation. Attorney's have been required to represent indigent criminal defendants on appointment by the court, without compensation, for 300 years.[92]

Powell v. Alabama,[93] a landmark case on the right of the indigent criminal defendant to counsel, addressed itself to the attorney's duty to represent such defendants by concluding, "Attorneys are officers of the court, and are bound to render service when required by such an appointment."[94]

In 1966, the Ninth Circuit Court of Appeals upheld the long-standing rule that an attorney, when performing services pursuant to court appointment, is not entitled to compensation as a matter of constitutional right.[95] The court reasoned, " . . . representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court."[96] The Ninth Circuit's holding is the majority rule,[96] and only three states have held that appointed counsel have a nonstatutory right to just compensation.[98]

While the analogy between a situation where an attorney gratuitously represents an indigent criminal defendant and a physician gives medical care at the scene of an emergency is not perfect, there is a basis for comparison between the two professions. As already noted, attorneys are *required* to serve on court appointment, and the discharge of this duty is a legally recognized societal obligation. As the law compels attorneys to serve the interests of society, it should also be willing to compel the medical profession to do the same, since both fields are, by their very nature, dedicated to helping other

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[90] *Id.* at 57, 58.
[91] *Id.* at 58.
[92] Anon. v. Scroggs, 1 Freeman 389, 89 Eng. Rep. 289 (K.B. 1674); Trevianon v. Anon., 12 Mod. 389, 89 Eng. Rep. 1535 (K.B. 1702).
[93] 287 U.S. 45 (1932).
[94] *Id.* at 73.
[95] U.S. v. Dillon, 346 F.2d 633 (9th Cir. 1965).
[96] *Id.* at 635.
[97] *Id.* at 637.
[98] *Id.* at 638.

individuals. The AMA's Principles of Medical Ethics and the Hippocratic Oath have long required the physician to render emergency aid, indicating that a statutorily dictated affirmative duty to do the same would merely be a legal recognition of a responsibility the medical profession itself has acknowledged.[99] Legislatures have indirectly expressed their belief that doctors should give emergency care by their passage of the Good Samaritan statutes.

In light of these developments, and the Vermont statute, it is today very difficult to justify the ancient common-law rule which permits a doctor to ignore a seriously injured person with complete legal immunity. The California legislature, the first to enact a Good Samaritan statute, should again take the lead and pass the first law requiring physicians to render emergency care. The statute would be constitutional, as an extensive power of the state over the medical profession and the practice of medicine has long been recognized.[100]

The suggested statute is based on the German Criminal Code, Article 330c,[101] Vermont's Title 12 section 519 and New York's Dram Shop Act.[102]

> 1. Any physician who willfully fails to render medical services to a person involved in an accident, common danger, or other emergency situation, whenever there is reason to believe such aid may be necessary to prevent loss of life or serious injury, unless he would subject himself thereby to considerable danger, or violate other important duties, shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars.
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> 2. A physician providing assistance in compliance with subsection (1) of this provision shall not be liable in civil damages if he performs to the best of his abilities under the circumstances.
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> 3. Any individual who shall be injured in person, property, means of support, or otherwise by any physician who fails to render medical care as required by subsections (1) and (2) of this provision, shall have a right of action against such physician to recover actual and exemplary damages.

Both civil and criminal liability are created by the statute, for reasons that will be developed below. The interpretation and administration of such a statute can be guided by the European civil law experience and the Anglo-American common law as follows.

A. CRIMINAL LIABILITY

The civil law countries have found that their statutes imposing criminal sanctions for the refusal to aid another in distress have been

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[99] AMA PRINCIPLES OF MEDICAL ETHICS, ch. II, § 4 (1953).
[100] Lambert v. Yellowley, 272 U.S. 581, 596 (1962); Dent v. West Virginia, 129 U.S. 114, 121 (1889).
[101] *See* Appendix A.
[102] N.Y. GEN. OBLIG. LAW § 11-101 (1964).

beneficial and entirely workable.[103] If physicians were faced with the prospect of criminal liability in California for their refusal to aid in emergencies, they would probably be motivated in greater numbers to help those in imminent distress. As proposed, the statute would not create an onerous burden on them.

1. All physicians (licensed M.D.'s), practicing and non-practicing, would be required to aid. Unlike the Vermont and Civil Law statutes, the duty is not required of all persons (even though it has been suggested that it should[104]) in order to give the proposed statute a better chance of becoming law. Hopefully, even those elected representatives who oppose such statutorily created duties in general will be able to recognize that physicians possess special skills and training and consequently are uniquely qualified to save the life of another person.[105] Because their special training is one of the rationales for imposing this duty only on licensed M.D.'s, it should not be extended to medical students or nurses who have not had the same training.

2. The danger to the threatened person must be one of serious injury or loss of life as specified in the proposed statute. This seems more a policy decision than a legal one. However, in view of the fact that today's society constantly subjects people to dangers (pollution, energy shortages, minor automobile accidents, minor assaults, to name a few), it would be unreasonable to expect a physician to respond to every non-medical crisis that could conceivably be called an emergency. The requirement that the doctor respond when serious injury is at stake (as opposed to a required response *only* when loss of life is at jeopardy) is also a policy decision based partially on the reality that if a physician is to evaluate an emergency situation to ascertain whether loss of life is a possibility, then he may as well spend the extra moments that are needed to give medical aid, rather than terminate his attention immediately on deciding that a person's life is not at stake.

3. The physician must be aware of the danger, although this awareness would be judged by an objective test. The statute's wording indicates that the review is objective by requiring the physician to act, " . . . whenever he has reason to believe . . . " his aid is immediately needed. The physician must also stop and investigate a situation which would cause him to suspect that another person *may* be in need of his attention. If the physician were only required to respond to obvious medical emergencies, it logically would be too

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[103] Rudolph, *supra* note 23, at 509. Franklin, *supra* note 10, at 59, documents findings in Europe and the United States that more people will aid in emergency situations if they are aware that the law requires them to act.
[104] Rudolph, *supra* note 23, at 509, 510.
[105] In agreement is Franklin, *supra* note 10, at 60-61.

easy for him to defeat the purpose of the statute by saying he was not subjectively aware that his aid was needed. For example, a physician, driving 55 miles-per-hour down a freeway, on passing a multi-car accident, would likely not be immediately aware that a person needed emergency medical care unless he stopped his car and ascertained whether any of those involved in the accident needed medical help. It should not be a defense to the statute that the physician, on driving past the accident scene, did not see anyone lying on the ground bleeding, and so assumed everything was all right.

4. The statute should also be interpreted to apply to physicians who are not present at the danger site. Such an interpretation would be in accord with the modern trend of the civil law nations in this regard,[106] and seems necessary for the statute to be widely effective. If the doctor were required to be physically present at the danger, the statute would not be of much benefit in the *Hurley v. Eddingfield*[107] situation and would draw an arbitrary and unfounded distinction among those who were entitled to receive medical help. It seems unreasonable to say that one who is injured and lying on the roadside will be given medical help if a doctor chances to pass by, but that if the injured party's friend summons a doctor down the street, the doctor may refuse to help. However, the physician must be in the general vicinity of the injured party, and cannot be expected to travel great distances when another doctor is near. Such a burden on the physician would be too great, and would probably be of little benefit to the injured person anyway if he had to wait an extended period for a physician to travel to the scene of an emergency.

This duty, on the other hand, must be limited by the basic intent of the statute, and not by arbitrary rules. The tort standard of the reasonable man should apply in these situations, and the physician should act as a reasonable doctor in light of the circumstances.[108] For example, if a doctor is called to aid a sick man in the isolated regions of the Los Padres National Forest, and the doctor is informed or realizes that he can travel to the sick party in time to be of assistance and that no other physician is in a better position to help the sick man, then the doctor must act. On the other hand, if the same doctor is aware that another physician who is physically closer to the sick man is available to help, he may refer the call to the other physician. As the civil law countries have realized, occasionally the duty to help requires that assistance be sought from a third party.[109]

5. The physician must have the ability to act; he need not subject

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[106] *See* section IV of this article.
[107] 156 Ind. 416, 59 N.E. 1058 (1901).
[108] *See* Evans, *The Standard of Care in Emergencies*, 31 KY. L.J. 207 (1943); Elmore v. Des Moines City R. Co., 207 Iowa 862, 224 N.W. 28 (1929); Pennington's Adm'r. v. Pure Milk Co., 279 Ky. 235, 130 S.W.2d 24 (1939).
[109] Feldbrugge, *supra* note 60, at 644.

himself to great danger nor must he neglect other important duties, as specified by the language of the statute. The doctor should not be required to stop at an emergency if he is on his way to the hospital to operate on a patient that has taken a sudden drastic turn for the worse. The requirement is based on the European experience and an ordinary sense of fairness.

6. The physician would be held to a bifurcated standard of care. He would be criminally punished and civilly liable if he willfully refused to give aid upon realizing that it was needed. Once the physician initiated aid, he would be criminally fined and liable in tort only if his aid was not reasonable under the circumstances. However, this standard of assistance is not difficult to meet, since the "emergency doctrine" would apply.[110] The physician would not be required to render the same quality of care at the scene of an automobile accident as he would render in a hospital operating room. He must merely perform as well as he can under the circumstances.[111] The "reasonable man" test will also account for the fact that a physician who specializes in eye surgery will not be as competent in handling a lower back injury as a physician specializing in back injuries.[112] This very same standard will apply to the civil cause of action to be discussed in the section on civil liability.

7. A fine only (rather than imprisonment) is proposed since the statute's main purpose is to promote a type of conduct, rather than punish a type of misconduct. In California, under a similar statute,[113] the refusal to aid a police officer is punishable only by a fine, and such a sanction is likely to find broader legislative acceptance than discretionary imprisonment.

B. CIVIL CONSEQUENCES OF THE PHYSICIAN'S FAILURE TO ACT

Although the enactment of a criminal statute alone might give rise to civil liability against the physician by the victim should he refuse to give aid,[114] it is far better that the statute expressly provide a civil remedy. When a statute creates civil liability, the strict requirements of proximate cause need not be met to sustain a valid cause of action, and the injured victim is thus given a stronger remedy against the physician for the latter's non-compliance than if the criminal statute existed alone.[115] Indeed, the injured party may be in the best

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[110] PROSSER, *supra* note 56, at 168-170.
[111] *See* notes 108, 110, and Franklin, *supra* note 10, at 57.
[112] PROSSER, *supra* note 56, at 168-170.
[113] CAL. PEN. CODE § 150 (West 1970).
[114] RESTATEMENT (SECOND) OF TORTS §§ 285, 286 (1965); PROSSER, *supra* note 56, at 190.
[115] RESTATEMENT (SECOND) OF TORTS § 285, *note especially* comment b. (1965).

position to maintain the integrity of the statute since he will have a personal motivation to utilize it. As was said in *Daggett v. Keshner*,[116] " . . . it is within the permissible scope of legislation to impose liability for wrongful acts which have a practical or reasonable causal connection with injuries sustained, although the sequence of events would not satisfy the rule of proximate cause in the law of negligence."[117]

The civil liability portion of the statute would be administered under the same criteria delineated in the criminal liability section of this discussion. The physician would commit a tort if he either willfully refused to stop and render aid on realizing that it was needed, or if the aid rendered was not reasonable under the circumstances.[118] Although such extensive tort liability may at first impression seem harsh, the physician often would be only "secondarily liable," and thus he would have a cause of action himself for indemnity from the principal tortfeasor.[119]

In the emergency care situation, the physician would not be the party causing the initial injury, but a party aggravating the injury by either refusing to act or acting improperly. If the injured person sued and collected his full damages from the tortious physician, the physician could seek indemnity from the principal tortfeasor to the extent the damage award could be attributed to the principal wrongdoer. As the court said in *Cobb v. Southern Pacific Railroad*,[120] "The right of indemnity rests upon a difference between the primary and secondary liability of two persons, each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence — a doctrine which, indeed, is not recognized by the common law; it depends on a difference in the character or

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[116] 134 N.Y.S. 2d 524 (1954).
[117] *Id.* at 529.
[118] Under the standard proposed in the criminal liability section of this article (V-A), the physician is required to investigate a situation which would lead a reasonable man to feel medical attention was immediately needed. Since a reasonable man test is involved, a physician could be found to have negligently failed to investigate the dangerous situation.
[119] Even though the parties do not expressly contract with respect to indemnity, the right of indemnification may nevertheless arise by implication as a matter of law either as a result of a contract or as a result of equitable considerations. Peters v. City and County of San Francisco, 41 Cal. 2d 419, 431, 260 P.2d 55 (1953); City and County of San Francisco v. Ho Sing, 51 Cal. 2d 127, 130, 330 P.2d 802 (1958); Alisal Sanitary District v. Kennedy, 180 Cal. App. 2d 69, 76 (1960).
[120] 251 Cal. App. 2d 929, 59 Cal. Rptr. 916 (1967).

kind of wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person."[121]

VI. CONCLUSION

Doctors maintain that they refuse to help emergency victims because they fear malpractice suits,[122] even though there is evidence that this fear is greatly exaggerated.[123] It is lamentable there is such mistrust of the legal profession by the medical profession,[124] for this will make it more difficult to enact a statute requiring emergency care from physicians. However, the imposition of affirmative obligations on any group of individuals is not historically unjustifiable[125] and would in this case be of enormous benefit to victims of emergencies.

William Prosser has said, "Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made than that courts will find a duty where, in general, reasonable men would recognize it and agree it exists."[126] The reporter's comments to the Second Restatement of Torts, Section 314, (which states the misfeasance/nonfeasance rule) say, "It appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule."

This article has suggested one further inroad. The imposition of a duty on physicians to help those in need of immediate emergency medical attention is in keeping with judicial and legislative trends toward greater protection and aid of imperiled citizens. European nations have long been in agreement with this suggestion, and Vermont, since 1968, has required all persons to aid emergency victims, although their sanction is minimal. California, a state which considers itself an innovator of social trends, should again take an innovative lead by enacting a strong statute which requires physicians to provide emergency care.

Cyrus Vincent Godfrey

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[121] *Id.* at 933.
[122] *Good Samaritans, supra* note 1, at 1301.
[123] From the time California passed the Good Samaritan statute into law in 1959 not one appellate case has been reported in any of the 50 states on the issue of a physician's liability for the aid he rendered under the statute. *See also* the statement of AMA attorney Richard P. Bergen that, "The risk of liability for furnishing emergency medical care has been greatly exaggerated." 180 J.A.M.A. 706 (1962).
[124] *See generally,* Meador, *The Mind Of The Physician, Or Why Lawyers Have Trouble With Doctors,* 22 ALA. L. REV. 495 (1970).
[125] *Good Samaritans, supra* note 1, at 1322.
[126] PROSSER, *supra* note 56, at 327. *See also* Fingarette, *Some Moral Aspects of Good Samaritanship* in RATCLIFFE, THE GOOD SAMARITAN AND THE LAW, 213 (1966), agreeing, on a philosophical level, that there is a moral duty to rescue.

APPENDIX A*

Albania, Crim. Code 1952, Art. 157: Not giving help to a person whose life was in danger when it was possible to help him, if the failure to help him results in his death or injury, is punishable by social censure or corrective work.

Belgium, Crim. Code 1867, Art. 422*bis* (1961): Whoever fails to render or procure aid to a person in great danger, [regardless of] whether he has observed this person's position himself, or whether this position has been described to him by those who invoked his aid, shall be punished by imprisonment of from eight days to six months and a fine of from fifty to five hundred francs or by one of these penalties alone. For the commission of this crime it is required that the offender could have helped without exposing himself or others to serious danger. When he has not observed personally the danger in which the victim finds himself, he cannot be punished if on the basis of the circumstances in which he was asked to help, he could believe that the request was not serious or that there was no danger [to the victim].

Bulgaria, Crim. Code 1951, Art. 148 (1): Whoever leaves a person, deprived of the possibility to take measures to save himself because of his youth, old age, illness, or generally as a result of his helplessness, in such a situation that the life of that person may be endangered, and being aware of this does not render him help, is punished by deprivation of liberty for a period of up to three years.

Czechoslovakia, Crim. Code 1961, Art. 207: Whoever does not render the necessary aid to a person whose life is in danger or who shows the signs of a serious disturbance of health, although he may do so without danger to himself or to others, will be punished by deprivation of liberty not exceeding six months or by corrective measures.

Denmark, Crim. Code 1930, Art. 253: Any person who, though he could do so without particular danger or sacrifice to himself or others, fails (1) to the best of his power to help any person who is in evident danger of his life, or (2) to take such action as is required by the circumstances to rescue any person who seems to be lifeless, or as is ordered for the care of persons who have been victims of any shipwreck or any other similar accident; shall be liable to a fine or simple detention for any term not exceeding three months.

Ethiopia, Crim. Code 1957, Art. 547: *Failure to lend aid to another.* (1) Whoever intentially leaves without help a person in imminent and grave peril of his life, person or health, when he could have lent him assistance, direct or indirect, without risk to himself or to third parties, is punishable with simple imprisonment not exceeding six months, or fine.

Finland, Crim. Code 1889, Chapter 44, § 2: Whoever knows that another person finds himself in actual danger of his life and nevertheless fails to render or procure him such aid as would be possible without danger to himself or third parties, is punished with a fine not exceeding three hundred marks.

France, Code Pénal 1810, Art. 63 (2) (1954): Any person who wilfully fails to render or to obtain assistance to an endangered person when such was possible without danger to himself or others, shall be [punished with imprisonment of three months to five years and a fine of 360 to 15,000 francs].

Germany, Crim. Code, Art. 330c (1953); Anybody who does not render aid in an accident or common danger or in an emergency situation, although aid is needed and under the circumstances can be expected of him, especially if he would not subject himself thereby to any considerable danger, or if he would not thereby violate other important duties, shall be punished by imprisonment not to exceed one year or a fine.

Greece, Crim. Code 1950, Art. 307: *Failure to rescue.* Whoever intentionally fails to rescue another person who is in danger of his life, although he could have done so without danger to his own life or his health, is punished with imprisonment not exceeding one year.

Hungary, Crim. Code 1961, Art. 259 (1), (2): (1) Whoever does not lend such assistance as could be expected from him to an injured person, to the victim of an accident, or a person in a situation which directly endangers life or corporal integrity, shall be punished with loss of liberty not exceeding one year. (2) Punishment shall be loss of liberty not exceeding three years, if the injured

person died and his life could have been saved through assistance.

Iceland, Crim. Code 1940, Art. 221 (1): Whoever fails to render aid to a person in danger of his life, although he could have done so without endangering his own life or health is punished with simple detention, or imprisonment not exceeding two years, or in case of extenuating circumstances with a fine.

Italy, Crim. Code 1930, Art. 593 (2), (3): [A penalty of up to three months imprisonment or a fine of up to 120,000 lire] may be imposed on a person who finds a human body which is or seems inanimate, or a person who is injured or otherwise in danger, and fails to render the necessary aid or to inform the authorities without delay.

Where the above mentioned conduct of the guilty person results in bodily harm, the penalty will be increased; if it results in death, the penalty will be doubled.

Netherlands, Crim. Code 1881, Art. 450: Whoever, being witness to the immediate danger of life in which another person finds himself, fails to render or procure such aid as he could render or procure without reasonably having to fear danger to himself or third parties, is punished, if the death of the person in need of aid occurs, with detention not exceeding three months or a fine not exceeding three hundred guilders.

Norway, Crim. Code 1902, Art. 387: Punishment by fines or imprisonment up to three months shall be imposed upon anybody who omits, although it was possible for him without any special danger or sacrifice to himself or others, (1) to help according to his ability a person whose life is in obvious and imminent danger, or (2) to prevent, by timely report to the proper authorities or otherwise according to his ability, fire, flood, explosion or similar accident, which may endanger human lives. If anybody dies due to the misdemeanor, imprisonment of up to six months may be imposed.

Poland, Crim. Code 1933, Art. 247: *Failure to render aid in a danger.* Whoever fails to render aid to a person who is in a situation which directly imperils his life, although he could have done so without exposing himself or persons close to him to personal danger, is punished with imprisonment not exceeding three years or detention not exceeding three years.

Poland, Draft Crim. Code, Art 211 (1): Whoever fails to render aid to a person who is threatened by a direct danger of death, grave bodily harm or a serious disturbance to his health, although he could do so without exposing himself or another person to personal danger, is punished with deprivation of liberty not exceeding three years.

Rumania, Crim. Code 1936, Art. 489 (3): [The same p]enalty is applicable to [one] who seeing a person seriously injured or in danger of his life, does not render him aid, if he could have done so without danger to his own life or to the lives of other persons, or does not promptly inform the authorities accordingly.

Russia, Crim. Code 1960, Art. 127 (1): *Failure to rescue.* 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].

Spain, Crim. Code 1944, Art. 489*bis* (1960): Whoever fails to render aid to a helpless person in obvious and grave danger, although he could have done so without danger to himself or third parties, is punished with strict detention or a fine of from 5,000 up to 10,000 pesetas. Whoever, unable to render aid himself, fails to procure promptly aid from others, is liable to the same punishment.

Turkey, Crim. Code 1926, Art. 476 (2): Whoever finds a person who is injured or otherwise in danger of his life, or a person who is or seems to be dead, and fails to render the aid he could give or to inform promptly the proper authorities or their officials, is liable to the same punishment [fine between 5 and 50 Turkish £].

Ukraine, Crim. Code 1960, Art. 112: *Failure to render aid to a person who is in danger of his life.* Failure to render aid to a person who is in danger of his life,

where it was possible to render such aid, or failure to inform the proper authorities or persons accordingly, if this resulted in the death or grave injuries [of the person in danger] is punished with corrective labor not exceeding six months or with public censure.

Yugoslavia, Crim. Code 1951, Art. 147: *Failure to Extend Assistance.* Whoever fails to extend assistance to a person finding himself in direct danger to life whereas he could have done so without danger to himself or another, shall be punished with imprisonment of up to one year.

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