The Good Samaritan Rule as a Procedural Control Device: Is It Worth Saving?

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This Article examines the good Samaritan rule, which states that a person need not aid a stranger in peril. The good Samaritan rule is an example of the many per se rules that courts use in negligence cases to achieve substantive goals, provide predictability, and foster administrative efficiency. The Article considers the good Samaritan rule both as a prototypical per se rule and on its own merits. The Article first traces the role of per se rules in the development of the law of negligence. It then reports on the original form of the good Samaritan per se rule and modern judicial retreat from close adherence to the rule. Finally, the Article proposes abrogation of the per se rule and its replacement by a multifactor approach for determining duty in good Samaritan cases, and argues for a simultaneous increase in plaintiffs' burden of proof on causation in good Samaritan cases.

INTRODUCTION

According to standard common law doctrine, a person has no duty to come to the aid of an imperiled stranger whose situation she did not create.[1] This "good Samaritan" rule survived relatively intact for many years, but recent decisions in many state courts raise serious doubts about the rule's future.[2] Inevitably, these decisions also raise an impor-

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[1] Buch v. Amory Mfg. Co., 69 N.H. 257, 260, 44 A. 809, 810 (1898); W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 56, at 375 (5th ed. 1984). RESTATEMENT (SECOND) OF TORTS § 314 (1965) provides: "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."

[2] Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985); Soldano v. O'Daniels, 141 Cal. App. 3d 443, 190 Cal. Rptr. 310

tant question: If the rule is indeed disintegrating, can the tort system adequately deal with a duty of affirmative action? This Article will address this question in the larger context of the application of what shall be called "per se" duty rules.

Courts' adoption of the negligence standard in the middle of the nineteenth century represented a fundamental change in the way tort cases would be viewed.[3] Whereas courts had previously followed relatively preset, concrete rules, the new standards for decision depended much more on the cases' individual facts. Those facts would now form the basis of the determination both of whether a duty of care existed and of what conduct that duty required. By embracing this kind of test, common law courts manifested a willingness to accept a measure of uncertainty in the rules governing conduct. In addition, they acquired the flexibility to do justice in individual cases.

Flexibility in determining the existence or nonexistence of a duty of care has permitted the tort law to change gradually to reflect evolving social values. When norms appear to change, judges are able to adjust the law — case by case — to account for those changes. Often, reflecting a greater social desire for compensation, courts have broken down barriers to recovery by deriving new duties or abrogating complete defenses. At other times, courts have sought to satisfy social values by creating entirely new liability standards.[4] Indeed, the very notion of the

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(1983); Pridgen v. Boston Hous. Auth., 364 Mass. 696, 308 N.E.2d 467 (1974); Farwell v. Keaton, 396 Mich. 281, 240 N.W.2d 217 (1976); De Long v. County of Erie, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). *See infra* notes 170-231 and accompanying text.

[3] Among the many instances in which courts have utilized their common law powers under the negligence standard to eliminate per se barriers to recovery are The T.J. Hooper v. Northern Barge Corp., 60 F.2d 737 (2d Cir. 1932) (abrogating the rule that industry custom was the measure of reasonable care); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (largely removing the privity barrier to recovery in products liability actions); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (removing the status category barriers to recovery by land entrants); and Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (eliminating the "zone of danger" test in actions for negligent infliction of emotional harm). The judicial adoption of comparative negligence is an example of the alteration of a former complete defense. *See, e.g.*, Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

[4] An example of the creation of new standards is the movement toward strict products liability. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

"reasonable person" is designed to take account of changing social values. What might once have been reasonable might now be considered manifestly unreasonable. To continue to do justice, tort law must possess the flexibility to adapt its principles to the facts of particular cases. Unless liability rules are fairly broad, judges (in determining the duty question) and juries (in analyzing the parties' conduct) will be unable to decide cases according to the demands of justice.

Despite courts' acceptance of the flexible negligence standard, pockets of single-factor duty tests (per se duty rules) remain.[5] Rather than determining the existence of a duty by careful review of the facts and policy implications of imposing a duty in a particular case, per se duty rules permit the court to look only for a narrowly defined set of facts. The presence or absence of those facts determines both the existence of a duty and its precise contours. Examples of such rules are the status categories of those who enter land,[6] the impact[7] and "zone of danger"[8] rules in actions for negligent infliction of emotional harm, and the "good Samaritan" rule.[9] In practice, these rules require the trial judge, who determines the existence of a duty, to dismiss cases that invoke the rule without submitting them to the jury.[10] Much of the recent movement toward removal of barriers to recovery has consisted of abrogating per se rules and replacing them with tests that allow courts to impose a duty of care if justified by the facts.[11]

This Article suggests that per se duty rules in negligence law serve two primary purposes: (1) to effectuate a social policy; and (2) to provide control over the litigation process, particularly by limiting the number of actions filed and by restraining jury discretion.[12] It argues, however, that these rules cannot be justified by their procedural purposes alone, and that if the substantive policy behind a particular per se rule has substantially dissipated, the rule can no longer be justified. In such situations, maintenance of the rule impedes courts' efforts to do justice and reflects a misplaced fear of their ability to weigh multiple

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[5] Twerski has used the term "single-factor no-duty tests." Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982) [hereafter *Middle Ground*].

[6] W. PROSSER & W. KEETON, *supra* note 1, § 58, at 393.

[7] *Id.* § 54, at 363-64.

[8] *Id.* at 365-66.

[9] *See infra* notes 107-21 and accompanying text.

[10] *See infra* notes 76-84 and accompanying text.

[11] *See supra* note 4.

[12] *See infra* notes 85-106 and accompanying text.

factors in reaching duty decisions in individual cases. The Article's thesis is that per se duty rules should be replaced by multifactor tests that require judges in reaching the duty decision to consider carefully the facts of the individual case, the policy implications of imposing a duty, and whether a duty rule could be administered without undue difficulty.[13]

This Article's critique focuses on the good Samaritan rule, the recent erosion of which demonstrates growing societal dissatisfaction with allowing callous behavior. The Article proposes a multifactor duty analysis that could replace the per se good Samaritan rule.[14] It also recommends that courts increase plaintiffs' burden of proof with respect to an element of the prima facie case to control the litigation process in the absence of the per se rule.[15] The Article demonstrates that responsible judicial application of the multifactor duty test will permit courts to reach just results without fear of unlimited liability or the creation of unadjudicable rules. Although the Article focuses primarily on the good Samaritan rule, its general theory can apply with equal force to other per se duty rules.

I. "PER SE" RULES AS DETERMINANTS OF DUTY IN NEGLIGENCE CASES

Most "rules" in tort law are quite imprecise.[16] Particularly when negligence concepts are involved, tort law generally does not inform in-

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[13] *See infra* notes 235-66 and accompanying text. This Article will primarily address the arguments raised by Professor Henderson in a series of articles, most notably Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) [hereafter *Judicial Review*]; Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976) [hereafter *Retreat*]; Henderson, *Should a "Process Defense" Be Recognized in Product Design Cases?*, 56 N.Y.U. L. REV. 585 (1981); Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982) [hereafter *Process Constraints*]; and Henderson, *Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845 (1983) [hereafter *Creative Judging*].

[14] *See infra* notes 267-94 and accompanying text. The argument made here is another aspect of the problem discussed in Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 23 SANTA CLARA L. REV. 427 (1983). There, I reviewed the negligence per se doctrine, by which a court in a negligence case replaces the duty analysis with a preset standard contained in a criminal statute. I argued that the doctrine improperly abrogates judicial responsibility to determine the duty question according to the particular facts of individual cases, often leading to unjust results.

[15] *See infra* notes 295-302 and accompanying text.

[16] The open texture of tort rules is one of the things which make torts an important

dividuals of their societal obligations with the precision found, for example, in cases involving property concepts. When one writes a document purporting to create a future interest in land, fairly specific rules will often govern what kind of interest has been created and whether the law will recognize that interest.[17] Because negligence rules are painted with a much broader brush, the law of negligence seldom provides actors with the same degree of certainty concerning their obligations. We are not (and realistically, cannot be) told in advance whether a duty would be imposed in a given situation, and if so, what the contours of that duty will be. Rather, the law often provides us with only broadly phrased rules by which we can predict the consequences of our acts. We are told that our conduct must be "reasonable under the circumstances,"[18] or must not be "reckless."[19] The effects of this kind of

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subject of study for first year law students. Requiring beginning students to come to grips with the open-endedness of such tort "rules" as the concept of "duty" and "causation" is one way to disabuse them of the misconception that learning "the law" is a matter of learning a set of rules. This is not to suggest that rules in other areas of law are absolutely clear, but only that the infinite variations of conduct with which tort law must deal forces rules in that area of law to be especially imprecise.

[17] An example is the Rule Against Perpetuities, which has been stated as follows: "[A] future interest which, by any possibility, may not vest within twenty-one years after a life or lives in being at the time of its creation is void in its inception." C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY § 10, at 204 (1962). Though the meaning of the rule may at first be difficult to grasp, it is nevertheless a very specific, narrow rule. An attorney reviewing a document that purports to create an interest in land will be able to determine with a great degree of certainty whether the rule has been violated.

Rules in contract law can also be fairly precise. An example is the familiar "mailbox rule": "Unless otherwise indicated by the language or the circumstances . . . an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received." RESTATEMENT (SECOND) OF CONTRACTS § 41(3) (1979); *see also* 1 A. CORBIN, CORBIN ON CONTRACTS § 78, at 333 (1963). Though at times open concepts such as reasonableness will come into play in contract doctrine, fairly specific rules such as the mailbox rule will govern many transactions.

[18] RESTATEMENT (SECOND) OF TORTS § 282 (1965) defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Section 283 provides that "the standard of conduct to which [the reasonable person] must conform to avoid being negligent is that of a reasonable man under like circumstances."

[19] RESTATEMENT (SECOND) OF TORTS § 500 (1965) states:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially

standard are fundamental and require explanation before turning to the problems of per se duty rules.

A. The Negligence Concept

To understand fully the effect of "per se" rules in negligence cases, it is important first to review briefly the origins and use of the negligence concept,[20] with particular emphasis on the role of duty in negligence actions.[21] Surviving reports of the earliest tort cases are difficult to decipher for a number of reasons,[22] but clearly the modern concept of "negligence" did not exist.[23] When a person harmed another, courts appear

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greater than that which is necessary to make his conduct negligent.

[20] For studies of the historical development of negligence law, see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970); Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 314 (1894); Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184 (1926).

[21] Among the many studies of duty and "proximate cause" are L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927); R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 AM. L. REG. 79, 148 (1901); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Green, *The Duty Problem in Negligence Cases (I)*, 28 COLUM. L. REV. 1014 (1928), *reprinted in* L. GREEN, THE LITIGATION PROCESS IN TORT LAW: NO PLACE TO STOP IN THE DEVELOPMENT OF TORT LAW 153-84 (2d ed. 1977) [hereafter *Duty Problem I*]; Green, *The Duty Problem in Negligence Cases (II)*, 29 COLUM. L. REV. 255 (1929), *reprinted in* L. GREEN, THE LITIGATION PROCESS IN TORT LAW: NO PLACE TO STOP IN THE DEVELOPMENT OF TORT LAW 185 (2d ed. 1977) [hereafter *Duty Problem II*]; Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189 (1952); Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1 (1953); Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1; and other authorities cited in W. PROSSER & W. KEETON, *supra* note 1, at 263.

[22] It is often difficult to determine when early cases were decided on substantive grounds and when their decisions rested solely in the complexities of common law pleading. *See* Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361, 374-75 (1979).

[23] At early common law, courts in actions on the case sometimes used the term "negligentia." However, the term apparently meant the failure to fulfill a legal obligation rather than the meaning which would be ascribed to the word today. *See* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 316 (1908), *reprinted in* F. BOHLEN, STUDIES IN THE LAW OF TORTS 291 (1926).

to have required the actor to compensate the victim, without regard either to the actor's state of mind or the court's characterization of the moral quality of the act under the circumstances of the case.[24] While it might be oversimplifying to state that the law's primary consideration was the causation of harm, causation apparently had much greater weight than it does today.[25] In comparison to modern tort law, early tort law imposed rather strict liability.[26]

Gradually, courts began to tolerate limited excuses. Actors were permitted to prove that they had used their best efforts to prevent the harm,[27] or that the harm was a result of "inevitable accident."[28] By the nineteenth century, courts separated actions to recover for accidental injuries into those brought under the writ of trespass, redressing harm "directly" caused on a largely strict liability basis,[29] and those for trespass on the case, which redressed "consequential" or "indirect" harm and required a showing of negligence.[30] This distinction was precarious, however, and was eventually abrogated by statute[31] and judicial decision.[32] By the second half of the nineteenth century, liability for accidental harms was almost universally based on the negligence

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[24] *See, e.g.*, The Thorns Case, Y.B. Mich. 6 Edw. 4, f. 7, pl. 18 (1466).

[25] *See* Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908); Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 152-53 (1973).

[26] One author, however, has recently argued that the traditional account of the development of tort liability, which has included the assumption of a long-standing tension between strict liability and negligence, is erroneous. Rabin, *supra* note 20, at 927.

[27] *See* Mitten v. Faudrye, Popham 161, 79 Eng. Rep. 1259 (K.B. 1626).

[28] *See* Weaver v. Ward, Hobart 135, 80 Eng. Rep. 284 (K.B. 1616).

[29] R. EPSTEIN, C. GREGORY, & H. KALVEN, CASES AND MATERIALS ON TORTS 63-67 (4th ed. 1984).

[30] *Id.* The distinction between "direct" and "indirect" was stated by Fortescue, J., in Reynolds v. Clarke:

> [I]f a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all.

1 Str. 634, 92 Eng. Rep. 410 (1726). The matter received extended debate in Scott v. Shepard, 2 Black. W. 892, 96 Eng. Rep. 525 (1773). At least one author has recently expressed doubt about the conventional view that absolute liability was the rule in trespass actions, while negligence was required for actions on the case. M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780 TO 1860, at 89-91 (1977).

[31] In England, this was partially accomplished by The Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76, § 41.

[32] Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); Williams v. Holland, 10 Bing. 112, 131 Eng. Rep. 848 (1833).

principle.[33]

Brown v. Kendall[34] is generally regarded as a pivotal American decision in the establishment of a universal negligence standard.[35] In one sweeping opinion, Chief Justice Shaw of the Massachusetts Supreme Judicial Court eliminated the substantive distinction between the writs of trespass and case, held that accidental harms could only be redressed when the defendant had failed to exercise "ordinary care,"[36] and declared that ordinary care "means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."[37] Also, Shaw stated that plaintiff would now bear the burden of proving that defendant's conduct failed to pass the test of "ordinary care."[38]

The effect of the negligence standard, so defined, was fundamental. The *Brown v. Kendall* rule grounded the law of negligence in the particular facts of each case more than the rules it replaced. People could no longer be as certain about the legal effects of harm they might accidentally cause; they could only be told that in general, they had a duty to use "ordinary care." Courts could no longer rely on preset, distinct rules in deciding whether to impose liability. Since the negligence concept would only be activated if the defendant had a duty under the circumstances of the case,[39] in borderline cases courts would have the complex task of deciding whether those facts (together with other considerations) gave rise to a particular duty.[40] The task of juries was also more difficult; deciding whether defendant breached a duty became a complicated and very imprecise undertaking.[41] With the negligence

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[33] Gregory, *supra* note 20, at 370.

[34] 60 Mass. (6 Cush.) at 292.

[35] Some earlier American cases had partially foreshadowed this development. *See, e.g.*, Harvey v. Dunlop, 39 N.Y.C.L. Rep. 193 (Hill & Dennio Supp. 1843); Vincent v. Stinehour, 7 Vt. 62 (1835); Gregory, *supra* note 20, at 368-69.

[36] *Brown*, 60 Mass. (6 Cush.) at 296.

[37] *Id.*

[38] *Id.* at 298.

[39] *See infra* notes 48-49 and accompanying text.

[40] In many cases, of course, the duty determination will be quite easy. For example, in a typical negligence case involving a collision between two automobiles, a court will have no difficulty determining that both drivers had a duty to exercise reasonable care in operating their automobiles. The issue of breach of that duty will perhaps be more difficult and will be decided by the jury.

[41] It is true that before the rise of the negligence standard, certain findings had to be made before one could be held liable, but those findings would be far more limited in scope. If plaintiff chose the correct writ and proved the alleged facts, and if none of the

standard the law truly embraced uncertainty, and that approach, adopted more than a century ago, continues to be followed.[42]

B. Consequences of Adopting a Broad Duty Principle

Courts' decisions to embrace the broad fact-based concept that people generally have a duty of "ordinary care" in place of a stricter, more fact-independent standard had both negative and positive consequences. On the one hand, the case-by-case approach to duty leaves people somewhat uncertain about their societal responsibilities. To the extent that any system of law should strive to promote predictability, the negligence standard adopted by American and English courts is deficient.[43] The general negligence standard also strains the system of adjudication itself. The standard encourages more people to institute legal actions; it renders lawyers less able to tell prospective plaintiffs that their actions should not be brought because they will fail as a matter of law. Under the new standard, lawyers can rarely state with certainty that filing a particular action would be fruitless,[44] as they could under more precise, predefined duty rules.

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narrowly confined excuses or justifications applied, defendant would be liable.

[42] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 283 (1965), providing that the standard in negligence cases is "that of a reasonable man under like circumstances." *Id.* § 283 comment c notes that the concept of the "reasonable man" has been defined in various ways:

> Sometimes this person is called a reasonable man of ordinary prudence, or an ordinarily prudent man, or a man of average prudence, or a man of reasonable sense exercising ordinary care. It is evident that all such phrases are intended to mean very much the same thing. The actor is required to do what this ideal individual would do in his place.

[43] Henderson has stressed the importance to the common law system of adjudication of having rules which carry predictable results. His view is that in order to guide both the behavior of persons acting in society and that of lawyers, judges, and jurors involved in resolving disputes, liability rules must possess clarity "such as to enable persons to distinguish between modes of conduct that will bring liability and modes that will not." *Process Constraints*, *supra* note 13, at 905. *See infra* notes 235-41 and accompanying text.

[44] Of course, even under a standard as imprecise as that involved in negligence cases, there will be situations in which rational lawyers could determine that as a matter of law, their client could not prevail if an action were to be filed. Our system greatly depends upon the ethical values of lawyers who, it is hoped, will not file groundless actions solely in the hope of achieving quick "nuisance" settlements. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983), which provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

Concomitantly, once actions are brought, the sensitivity of the negligence standard to the particular facts and circumstances of each case requires that more cases be submitted to the jury than would be submitted under a standard by which a judge could measure the pleadings or proof according to more precise, predefined rules. Under the prenegligence regime, the jury played its major role in cases in which the facts were in serious dispute. But under the broadly defined negligence standard, the jury is needed not only to determine what conduct actually occurred, but to *characterize* that conduct according to the "ordinary care" test. Thus, the jury will generally be needed even when the facts are not materially disputed. Once the court determines that a duty of care existed, only in unusual cases can it say that a litigant has failed to exercise "ordinary care" as a matter of law. Most often, the court will submit the case to the jury to determine the matter of breach according to this standard.[45] Many believe that juries overwhelmingly tend to compensate injured plaintiffs who are represented by skillful counsel.[46] Thus, the move to a standard so dependent on the facts of individual cases promotes both the initiation of litigation and the potential for jury abuse.[47]

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[45] California's pattern instruction is typical:

> Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.
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> It is the failure to use ordinary or reasonable care.
>
> Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

CAL. JURY INSTRUCTIONS, CIVIL 3.10 (6th ed. 1977). A pattern instruction for the federal courts reads similarly: "Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property, or to the persons or property of others." 3 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL § 80.04 (3d ed. 1977).

[46] It is generally thought that juries often ignored the all-or-nothing rule of contributory negligence and adopted their own de facto comparative negligence rule. *See, e.g.*, J. ULMAN, A JUDGE TAKES THE STAND 31-32 (1933); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 508 (1962).

[47] This is somewhat ironic given the conventional view that the advent of the negligence standard in mid-nineteenth century America was intended in part to protect industry. *See, e.g.*, M. HOROWITZ, *supra* note 30, at 99-101 (1977); Gregory, *supra* note 20; *see also* Losee v. Buchanan, 51 N.Y. 476, 484-85 (1873). If indeed an important objective of judges in that era was to protect industry from ruinous liability by moving away from strict liability principles, then the choice of the negligence standard

The negligence concept is not standardless, however. On the contrary, it possesses built-in controls over the litigation process and permits courts to adjust the law to reflect changing social values. Even though more cases will go to the jury than under the previous regime, the duty concept serves as a filtering tool in the hands of the court. Before a judge can submit a case to the jury, the injured party must convince the court that the allegedly negligent party (assume it is the defendant) had a particular duty of care in relation to the injured party under the circumstances of the case.[48] The duty concept therefore works as a judicial filter through which all negligence cases must pass before submission to the jury.[49]

Leon Green argued that a trial court must consider at least five factors in determining whether a particular duty was owed under the circumstances of the case: (1) an administrative factor (the workability of the rule); (2) an ethical or moral factor (societal perspectives on the nature of the conduct); (3) an economic factor; (4) a prophylactic or preventive factor; and (5) a justice factor (inquiring which party has the greater capacity to bear the loss).[50] Determining whether defendant owed a certain duty therefore requires close judicial examination of the case;[51] the enumerated factors only acquire meaning in the context of

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was hardly the most efficient one. This view of the purposes and application of the negligence standard has, in any event, been challenged. Schwartz, *supra* note 20.

[48] Duty is one of the elements of the negligence cause of action. *See* RESTATEMENT (SECOND) OF TORTS § 281(a) (1965). The duty determination is clearly a task for the court. *Duty Problem I*, *supra* note 21, at 1022.

[49] Regarding the duty question, Gregory wrote:

> The duty issue gives the court a powerful control over the handling of negligence actions before a jury. For even if the evidence clearly indicates negligence on the part of the defendant, the court may still keep the case from the jury and direct a verdict for the defendant if it concludes, as a matter of law, that there was no duty on the defendant's part to exercise care. . . . In view of the generally acknowledged vagaries of laymen sitting on juries, this is an important element of control in keeping the common law consistent. . . . [S]ome believe that such power . . . keeps the law within reasonable bounds, since it enables the courts to spell out the rules of the game in a wisely conservative fashion and to expand the scope of liability step by step only in accordance with the actual needs of a changing society.

Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30, 32 (1951); *see also* James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 689 (1949).

[50] *Duty Problem I*, *supra* note 21, at 1034.

[51] The trial court's role in determining whether a duty was owed in a given case, and if so, its parameters, has been a matter of considerable confusion and debate. Dis-

each dispute that comes before the court.[52] Should the court then determine that defendant owed a duty of care, the court would normally submit the case to the jury to decide the question of breach according to the ordinary care standard.

Learned Hand conceived of the duty issue somewhat differently, although he also proposed a multifactor test. In *United States v. Carroll Towing Co.*, a barge broke away from a line of barges and struck a tanker, causing damage. Defendant did not have a bargee on board when this occurred; plaintiff claimed that defendant's duty included having a bargee on board at that time. Judge Hand held that a particular duty of care exists under the circumstances of a case if the burden of avoiding the harm is less than the gravity of the harm, discounted by the probability of its occurrence.[53] He held that under the circumstances of this case, defendant had a duty to have a bargee on board during daylight hours.[54]

In recent years, courts in some jurisdictions have developed other multifactor tests for determining the existence of a duty. In California, the duty question is determined by weighing a number of factors:

> [T]he major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[55]

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cussions of duty have often become intertwined with consideration of the "proximate cause" problem, thus creating greater confusion. W. PROSSER & W. KEETON, *supra* note 1, at 319-21. For scholarly discussion of duty and "proximate cause," see authorities cited *supra* note 21. The present discussion of duty will be limited to the question of the court's role in determining the existence and contours of any duty owed in a particular case.

[52] In the last edition of his torts treatise that Prosser himself edited, he stated: " '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." W. PROSSER, THE LAW OF TORTS § 53, at 325-26 (4th ed. 1971). The editors of the current edition have essentially repeated the quote, but have left out the word "particular." W. PROSSER & W. KEETON, *supra* note 1, at 358. This omission results in a subtle shift in emphasis (probably unintentional) away from the facts of the particular case.

[53] 159 F.2d 169, 173 (2d Cir. 1947).

[54] *Id.* at 174.

[55] Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968). This test, with minor variations, has been used repeatedly in California.

Implicit in these and other tests of duty[56] is that the court's role goes beyond simply holding that a duty of care existed. The court must take the additional step of precisely defining the duty under the circumstances of the case. In *Carroll Towing*,[57] for example, Judge Hand was not concerned merely with whether defendant had a duty to act reasonably; he also inquired whether that duty encompassed having a bargee on board at a particular time. When duty is conceptualized in this manner, the crucial function of the court becomes especially apparent. In a typical negligence case, the jury's role (deciding the question of breach) is critical, but the jury will only act after the court has performed the important task of defining the duty.

See, e.g., Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d. 112, 126, 695 P.2d 653, 658, 211 Cal. Rptr. 356, 361 (1985); J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 804, 598 P.2d 60, 63, 157 Cal. Rptr. 407, 410 (1979); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976); Soldano v. O'Daniels, 141 Cal. App. 3d 443, 451, 190 Cal. Rptr. 310, 315 (1983). The California test is discussed in Fischer, *Tort Law: Expanding the Scope of Recovery Without Loss of Jury Control*, 11 HOFSTRA L. REV. 937, 961-65 (1983). Interestingly, the California formulation provides that a duty will exist ***unless*** the weighing of these factors suggests that it should not. *See* Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968), in which the court said that "departure from [the] "fundamental principle" that all persons have a duty to use ordinary care "involves a balancing" of the enumerated factors. This might be viewed as a shift in emphasis from one suggesting that no duty exists unless a weighing of factors results in the conclusion that a duty should be imposed.

[56] Illinois courts have recently focused much attention on the question of duty and appear to have embraced a multifactor test. In Nelson by Tatum v. Com. Edison Co., 124 Ill. App. 3d 655, 465 N.E.2d 513 (1984), the court stated:

> [T]he imposition and scope of a legal duty is dependent not only on the factor of foreseeability . . . but involves other considerations, including the magnitude of the risk involved in defendant's conduct, the burden of requiring defendant to guard against that risk, and the consequences of placing that burden upon the defendant.

Id. at 662-63, 465 N.E.2d at 519 (citations omitted).

Prosser also conceived of the duty determination as multifaceted:

> In the decision whether or not there is a duty, many factors interplay: the hands of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

Prosser, *supra* note 21, at 15 (citing *Duty Problem I*, *supra* note 21; and quoting Andrews, J., dissenting in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 354-55, 162 N.E. 99, 104 (1928)).

[57] 159 F.2d 169 (2d Cir. 1947).

The filtering role of the duty element serves important social and adjudicatory functions. First, it helps to create more predictability in negligence law, since over time a body of case law will emerge generally outlining those circumstances in which a particular duty is owed. Also, the filtering role of the duty concept helps courts avoid the possibility of jury abuse in cases involving a badly injured, sympathetic plaintiff. In serving these functions, the limiting concept of duty corrects some of the problems that the negligence standard created.[58]

The duty concept also permits liability rules to change as social norms evolve. Because courts determine duty in light of the context of each case, they have broad power to make the law an instrument for enforcing current social values. Under the flexible duty concept, courts can even sweep aside prior customs by informing those engaged in the customary conduct that they may not do so without risking liability.[59] Thus, if a 1930's court could find that society no longer tolerated the absence of radio receivers on tug boats, it could hold that there was a duty to install receiving sets on such vessels.[60] Similarly, if contemporary courts believe that medical custom regarding administration of diagnostic tests[61] or the obtaining of informed consent[62] does not comport with evolving social norms, they can utilize the duty concept to reach socially acceptable results.

The power to determine the question of duty, even in the face of such strong indicators as industry custom, is crucial to the just determination of negligence cases. It performs the critical function of permitting decision according to the facts of individual cases and the policy implications of imposing the duty. At the same time, it permits courts to develop and preserve standards. Such flexibility is important because of the very nature of negligence cases, which concern controversies over practically the entire spectrum of human conduct. If instead of this flexible kind of standard, the law provided trial courts with preset duty

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[58] *See supra* notes 43-47 and accompanying text.

[59] Formerly, some courts treated custom as the "unbending test of negligence." *See, e.g.*, Titus v. Bradford, B. & K. R.R. 136 Pa. 618, 626, 20 A. 517, 518 (1890). Learned Hand essentially swept away that rule in The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

[60] The T.J. Hooper, 60 F.2d at 737.

[61] *See, e.g.*, Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974) (even though the incidence of glaucoma in patients under 40 is very small, opthalmologist had a duty to administer the risk-free, inexpensive test to the plaintiff).

[62] *See, e.g.*, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) (cast aside medical custom involving the obtaining of informed consent, and substituted a standard that took greater account of the individual autonomy and bodily integrity of the patient).

rules dependent solely upon the presence or absence of specifically defined facts, courts could not review each case to determine whether imposition of the duty would be proper under the circumstances. The court would merely determine whether the case fit into a preset category in which a duty exists, and if so, send the case to the jury if the facts are in serious dispute. Put simply, per se rules function efficiently, but as poor instruments of justice in negligence cases.[63]

Perhaps the most famous illustration of the inability of preset duty rules to function properly in negligence cases is Holmes' ill-fated attempt to devise a narrow duty rule for railroad crossing cases. Holmes believed that for recurring fact situations, the judiciary should develop "fixed and uniform standards of external conduct" to guide the future actions of individuals and inform courts of the proper way to adjudicate cases involving those recurring facts.[64] In railroad crossing cases, Holmes found what at first blush seemed a good candidate for derivation of such a "fixed and uniform standard." He pronounced the famous "stop, look, and listen" rule, which he assumed could be applied to railroad crossing cases in the future.[65] The problem, however, was that even such an apparently recurring fact pattern as that of railroad crossing accidents does not in fact recur enough to permit the application of preset rules. The Supreme Court repudiated Holmes' fixed standard less than ten years later.[66]

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[63] "There is no general answer to the question whether certain categories of action should be legally controlled and whether certain standards of conduct should be legally enforced. The question can only be resolved case by case." Nagel, *The Enforcement of Morals*, HUMANIST, May-June 1968, at 18, *reprinted in* MORAL PROBLEMS IN CONTEMPORARY SOCIETY 143 (P. Kurtz ed. 1969), *quoted in* J. FEINBERG, HARM TO OTHERS 125 (1984).

[64] In THE COMMON LAW, Holmes wrote:

> If, now the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at least be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.

O.W. HOLMES, THE COMMON LAW 111 (1881).

[65] Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927). The standard provided that in general, one should stop, look, listen, and even get out of his car to see if a train is approaching. *Id.* at 70.

[66] Pokora v. Wabash Ry., 292 U.S. 98 (1934). These cases are discussed at length in Leonard, *supra* note 14, at 454-55. Interestingly, some state courts still make use of a

The lesson is not that it is fruitless to speak of "rules" of duty in negligence cases. Rather it is that such rules cannot be set in advance of the adjudication of particular cases. If negligence law is to be fair to the parties and reflect social values, then any preset duty rule is suspect. These values do not require an entirely open, standardless duty concept, but neither can they be served by inflexible rules.

C. "Per Se" Duty Rules

This Article refers to preset duty rules in negligence cases as "per se" rules because these rules purport to establish the existence and contours of a duty based upon a narrowly prescribed set of circumstances defined in isolation of the facts of particular cases.[67] As negligence law evolved, a number of per se rules developed. Some rules establish that a specifically defined duty is owed irrespective of the peculiarities of each case. The best example of this kind of per se rule is the doctrine of negligence per se. The doctrine provides that if a criminal statute prohibits the conduct of the allegedly negligent party, and the statute is designed to protect a class of persons that includes the injured party, the statute conclusively establishes both the nature of the duty and its breach.[68] A court applying negligence per se in its pure form would not permit the allegedly negligent party to argue that she acted reasonably under the facts of the case.[69]

Other per se rules declare that a duty exists, but confine it within narrow parameters. One such rule was the rule that industry custom defined the limits of the duty of care.[70] Another example is the categorization of land entrants. Recovery for injuries caused by conditions on the land has, in such cases, depended almost entirely on whether the entrant is labelled an invitee, a licensee, or a trespasser.[71] Once again, the court inquires about certain kinds of preset facts (here, the status of

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"stop, look, and listen" rule. *See* Gasich v. Chesapeake & Ohio R. Co., 453 N.E.2d 371, 375-76 (Ind. App. 1983).

[67] "Per se" has been defined as follows: "By . . . itself; in itself; taken alone; . . . . in isolation; unconnected with other matters. The term 'per se' means by itself; simply as such; in its own nature without reference to its relation . . . ." BLACK'S LAW DICTIONARY 1028 (5th ed. 1979).

[68] *See* Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889); RESTATEMENT (SECOND) OF TORTS § 286 (1965).

[69] Leonard, *supra* note 14, at 466-82.

[70] *See, e.g.*, Titus v. Bradford, B. & K. R.R., 136 Pa. 618, 20 A. 517 (1890).

[71] The obligations of landowners to the various categories of entrants are defined differently by different jurisdictions. In general, however, those liabilities are described in W. PROSSER & W. KEETON, *supra* note 1, §§ 58-61.

the land entrant) and determines the nature of the duty based on that factor rather than the peculiarities of the case.

Some per se rules operate at the other end of the spectrum from those that establish the existence of a duty. These rules establish instead that no duty exists. Among them are the good Samaritan rule;[72] the "impact"[73] and "zone of danger"[74] rules in actions for negligent infliction of emotional distress; and the "privity" barrier in early product liability actions.[75] Each of these rules provided that in the absence of some distinct fact, the defendant owed no duty of care to the injured party, even if the injured party could demonstrate lack of reasonable care or other facts that would make a strong case for recovery.

Whether the per se rule establishes the existence of a fairly broad duty, the presence of only a limited duty, or the absence of duty, its effect on the adjudication of negligence cases is similar. In all cases, it removes the duty issue from the hands of the court. The only task left to the court is to determine the existence of the factor or factors that invoke the per se rule; once a court makes that finding, it has no remaining discretion on the duty issue. If, for example, a court adhering to the "zone of danger" test found that a parent watched from a kitchen window one hundred feet from the street as her child was struck and killed by a negligent driver, the duty inquiry would almost certainly be at an end. Regardless of the degree of emotional distress the parent suffers, and regardless of the presence of other factors that might militate toward the existence of a duty in the absence of the per se rule, the parent's case for negligent infliction of emotional distress will fail.

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[72] *See infra* notes 107-21 and accompanying text.

[73] W. PROSSER & W. KEETON, *supra* note 1, at 363-64.

[74] *Id.* at 365-66. An English court described this rule as follows: "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself." Dulieu v. White & Sons, [1901] 2 K.B. 669, 675.

[75] *See, e.g.*, Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). This rule, of course, has largely disappeared. *See, e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

Although privity barriers in tort law have generally been abrogated, courts in most jurisdictions continue to adhere to the rule that accountants who negligently prepare audited financial statements are not liable to parties with whom they were not in privity. This rule, laid down by Judge Cardozo in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), has stubbornly survived in most jurisdictions. However, the survival of even this per se rule is now in doubt, as courts in at least two states have abandoned it. Int'l Mortgage v. John P. Butler Accountancy, 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (1986); H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 461 A.2d 138 (1983).

A set of hypothetical facts, suggested by a recent case,[76] further illustrates the effect of applying a per se rule, the good Samaritan rule, to a negligence case. Assume that *X* is being threatened by a knife-wielding assailant in an alley. *D*, a motorist driving slowly past the alley, recognizes that *X* is in imminent danger. Assume further that *D*'s car is equipped with a mobile telephone, and that with little expense, and no danger to himself, *D* could use the telephone to summon the police. However, *D* does not call, but drives past. A few minutes later, the assailant kills *X*.

The law would find no special relationship between *D* and *X* upon which a duty of care could rest. Since *D* did not undertake to render aid, no duty could arise to fulfill the undertaking. Strict application of the good Samaritan rule could lead only to the conclusion that despite the ease with which *D* could have aided *X*, and despite the fact that in doing so, he would not have incurred any risk of harm to himself,[77] he had no duty toward *X* and therefore could not be held liable for *X*'s death.

The existence of the per se good Samaritan rule would serve as an effective deterrent even to filing an action against *D*. The lawyer consulted by *X*'s survivors should inform them of the rule of law that shields *D* from liability. Facing heavy and probably fruitless litigation expenses, *X*'s survivors would be unlikely to sue. If, however, they did file an action against *D*, the matter could proceed in a number of ways. Instead of answering the complaint, *D* might file a motion to dismiss on the ground that the complaint states no claim on which relief could be granted.[78] The court would probably grant the motion and dismiss immediately, thus saving defendant significant trial preparation costs, and avoiding the expenditure of additional judicial resources. If the case proceeds beyond the pleading stage, and D moves for summary judgment based upon the given facts, the court could grant that motion.[79] Such an action would also save resources. Finally, should the matter reach trial, the court could grant a motion for directed verdict at the close of plaintiff's evidence.[80]

As the illustration demonstrates, application of a per se rule prevents

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[76] Soldano v. O'Daniels, 141 Cal. App. 3d 445, 190 Cal. Rptr. 310 (1983). The actual case is discussed *infra* at notes 217-31 and accompanying text.

[77] It is always possible, of course, to imagine some risk that a rescuer might incur in "getting involved." One possibility in the instant hypothetical is that the assailant might learn defendant's identity and either threaten or actually attack him later.

[78] *See, e.g.*, FED. R. CIV. P. 12(b)(6).

[79] *See, e.g.*, FED. R. CIV. P. 56.

[80] *See, e.g.*, FED. R. CIV. P. 50.

the trial court from independently weighing the circumstances of the case (other than those that invoke the per se rule) and determining the scope of any duty owed. It also prevents the matter from being submitted to the jury for a determination of whether the duty has been breached. No matter how abhorrent the court or jury might consider the facts, the rule has prevented their imposing liability.

The same result would be required when a court applied a per se rule at the other end of the spectrum (one declaring that a duty of specific parameters exists). Suppose that a legislature, concerned about the number of deaths occurring when pedestrians are struck from behind by automobiles, enacted a statute requiring that pedestrians walk on the side of the road facing traffic.[81] By application of the doctrine of negligence per se, a person struck by a negligently driven automobile while walking on the prohibited side of the road would be unable to recover, since she would have violated the statute and would be contributorily negligent as a matter of law.[82] But might there not have been good reason for the violation under the circumstances of the case? For example, suppose that the accident occurred after a large snow storm, and that the side of the street on which the pedestrian was supposed to walk was covered with snow and very slippery, thus making it more dangerous to walk on that side than on the other side, which had been plowed.[83] A court adhering to the doctrine of negligence per se would not permit evidence that under the circumstances of the case the party's conduct was safer than that required by the statute (unless such a defense could be raised in a criminal prosecution for violation of the statute). Plaintiff would therefore still be unable to recover. The court would have no discretion to define the duty differently under the particular facts of the case, and, even assuming the case reached the trial stage, the jury would not have an opportunity to decide the issue of breach.[84]

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[81] *See, e.g.*, MICH. COMP. LAWS § 257.665 (1977); N.Y. VEH. & TRAF. LAW § 1156 (McKinney 1970).

[82] This assumes that the all-or-nothing rule of contributory negligence would apply. If it has been abrogated in favor of some form of comparative negligence, that doctrine would likely operate to reduce plaintiff's recovery.

[83] The hypothetical closely parallels the facts of Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976). *See also* Tedla v. Ellnan, 280 N.Y. 124, 19 N.E. 2d 987 (1939). This issue is discussed at length in Leonard, *supra* note 14, at 463-64.

[84] Because strict application of the doctrine of negligence per se would sometimes require courts to reach results which do not appear fair or reasonable under the facts of particular cases, courts have not in fact adhered closely to the doctrine. Instead, they have developed a number of excuses, many of which are inconsistent with the purposes

Per se rules thus stand as a roadblock to judicial consideration of factors that might lead to more just adjudication of individual cases. To analyze the continued justification for these rules, we must consider their functions in negligence cases and whether those functions require their continued presence.

II. The Dual Functions of "Per Se" Duty Rules

A. *In General*

Despite their facial differences, all per se duty rules in negligence cases serve two principal functions. First, they are designed to effectuate a substantive policy. Second, they are designed to provide procedural control over the litigation process, both by enunciating clear rules to prevent the filing of actions that fall outside the bounds of duty, and by limiting jury discretion by providing the trial judge with precise commands concerning which issues she can properly submit to the jury.[85]

If per se duty rules exist primarily to serve these functions, they do not differ from any determination of duty in negligence cases. However, there is one important difference: without a per se duty rule, the trial court should consider both the social purposes for adopting a particular rule and its procedural value. But with a per se rule, these determinations have already been made, and the trial court has no means of considering them in individual cases. A review of two of the approaches to determining duty will illustrate this point.[86]

Of Green's five factors for determining the existence of a duty of care in a given case, four explicitly consider the social policies and consequences of adopting a particular duty in a negligence case. These are the ethical or moral factor,[87] the economic factor,[88] the prophylactic

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behind the doctrine of negligence per se. Leonard, *supra* note 14, at 466-82.

[85] Henderson has made a similar suggestion with regard to traditional negligence rules (many of which were per se rules or at least more categorical than those which courts have recently embraced): "[M]uch of the formal content of traditional negligence law is as explainable in terms of the necessity of courts avoiding polycentric problems as it is explainable in terms of the desirability of courts furthering the substantive objectives of society." *Process Constraints*, *supra* note 13, at 481.

[86] The first approach, that of Green, is discussed *supra* at notes 51-52 and accompanying text. The second, developed by the California courts, is discussed *supra* at note 55 and accompanying text.

[87] Green stated that the ethical factor was "the most compelling influence upon judges when administration offers no obstacles." *Duty Problem II*, *supra* note 21, at 255. He found this factor hard to define, but in general stated that it is "that partly philosophical, partly religious, partly ethical texture of intellectual tenets which reached

factor,[89] and the justice factor.[90] Taken together, these factors require the court to consider the effects on society and on the litigants of adopting a particular duty in the case before the court. Thus, the court should consider how the duty would comport with the moral demands of society, what the duty's economic effects would be, whether imposition of the duty would serve to deter future similar conduct, and whether it seems just to impose the duty under the circumstances.

Green's final consideration, the "administrative" factor,[91] explicitly addresses the "workability" of the duty rule in the circumstances of the case and for future cases.[92] Particularly when a litigant asks a court to adopt a previously unrecognized duty, the court must carefully consider whether such a rule could be properly administered by the court in this and future cases. The question of the administrability of the rule includes consideration of whether trial courts could understand its proper scope. That is, in order for a rule to be administrable, trial courts should be able to determine when the facts merit submission to the jury. As Green stated, "Ease and certainty of performance are prime qualities of administration. . . ."[93]

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their crest in the eighteenth and nineteenth centuries." *Id.*

[88] In general reference to the economic factor, Green wrote:

> Not far behind [the ethical factor] are the practical affairs of everyday life. In fact, to what extent the demands of a bread and butter existence control morals themselves is not a soluble inquiry. The two influences are never found divorced. A feudal economy required a morality of trespass; an emerging industrialism a morality of negligence.

Id. at 255.

[89] About the prophylactic factor, Green wrote:

> But in contrast with both moral and economic factors, which focus primarily upon the past and immediate present, is found a very strong desire on the part of judges, as well as other people, to fashion rules for a healthful future. Judges are inveterate prophets and legislators. They scale their penalties, they impose damages, both punitive and compensatory, not merely for the individual offender's lesson, but as a preventive of future harms.

Id. at 255-56.

[90] Green wrote:

> Finally, when these other factors are not cramping, judges give attention to the parties before them. They place the loss where it will be felt the least and can best be borne. . . Other factors being in equilibrium, the hurt plaintiff captures the heart of judges and jury alike. This is justice.

Id. at 256.

[91] This factor comprises most of the discussion in *Duty Problem I*, *supra* note 21.

[92] *Id.* at 1038.

[93] *Id.* Green also wrote that "[a] court will not knowingly enter upon a course of dealing which it cannot finish, or that may bring down upon it an increase in business

The California duty formulation[94] has similarly been interpreted to require consideration of both policy and administrative factors. The criteria are clearly directed to the policy or justice implications of the adoption of a particular duty in a given case. While the criteria on their face do not refer to the administrability of the rule, California courts have nevertheless considered administrability in determining whether to impose a duty, particularly in cases in which the common law had previously not imposed one. For example, in *Dillon v. Legg*[95] (in which the court abandoned the "zone of danger" rule in actions for negligent infliction of emotional distress[96]) the court specifically stated that abandonment of the "artificial and indefensible barrier" to recovery[97] would not result in a flood of fraudulent claims.[98] In *Tarasoff v. Regents of University of California*,[99] the court considered the "workability" of a duty under the circumstances of the case. And in *Soldano v. O'Daniels*,[100] a California court of appeal, after reviewing the same set of criteria, explicitly referred to Green's administrative factor. Citing "the pragmatic concern of fashioning a workable rule and the impact of such a rule on the judicial machinery,"[101] the court held that to impose a duty "would not involve difficulties in proof, overburden the courts or unduly hamper self-determination or enterprise."[102]

Under both Green's formulation of duty and that of the California courts, trial courts have the tremendous responsibility of considering diverse factors in determining whether to impose a particular duty. Weighing those factors properly requires great skill.[103] Whether trial courts are able (or should be trusted) to perform these difficult balances will be considered later.[104] For now, suffice it to say that in the absence of preset duty rules, trial courts have the flexibility to consider the duty

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or a mass of problems which it is not prepared to handle." *Id.* at 1035.

[94] *See supra* note 55 and accompanying text.

[95] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[96] *See supra* note 74.

[97] 68 Cal. 2d at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.

[98] *Id.* at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78. Obviously, the possibility of fraudulent claims raises problems with the administrability of the rule.

[99] 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[100] 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983).

[101] *Id.* at 452, 190 Cal. Rptr. at 316.

[102] *Id.*

[103] Other tests of duty will also require courts to engage in careful analysis. The Hand test, for example, requires the measurement of factors which Learned Hand himself knew were difficult to quantify. Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949). *See supra* notes 53-54 and accompanying text.

[104] *See infra* notes 235-302 and accompanying text.

question in light of the particular facts of each case. As already noted,[105] this makes it more likely that the court can do justice in each case that it must consider. A court operating under the constraints of a preset, categorical rule, however, has no power to consider the many factors discussed above; its ability to apply the law of negligence to reach a just result in a given case is thus severely limited. This serious problem in the application of per se rules sometimes prevents the doing of justice and has in general impeded the law's ability to reflect society's evolving social views.[106]

B. The Good Samaritan Rule: Origins and Functions

The good Samaritan rule is an excellent example of a per se duty rule. Its existence clearly reflects deeply-rooted social policy, and its impact on the adjudication of negligence cases can be enormous. In order to fully support the theory that per se rules do not function properly in the context of negligence cases, it is necessary to review the development of the per se good Samaritan rule,[107] its social policy rationale,[108] and its purpose as a litigation control device.[109]

Above all else, the debate over the propriety of the good Samaritan rule concerns the imposition of an affirmative obligation, a matter about which there has been great controversy. In examining this problem almost eighty years ago, Bohlen concluded that the early common law based liability almost entirely on one's acts and thus did not generally recognize a duty to take affirmative action to protect others.[110]

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[105] *See supra* notes 59-66 and accompanying text.

[106] The California court stated this problem well in Dillon v. Legg: "We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future." 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

[107] *See infra* notes 110-21 and accompanying text.

[108] *See infra* notes 122-25 and accompanying text.

[109] *See infra* notes 126-28 and accompanying text.

[110] Care was the price of action. The early law was rather a police officer than a child's nurse or guardian for the incompetent. While no man was allowed to act so as to injure others, the early law recognized no general duty of protection . . . . Therefore, a mere failure to protect another from a threatened injury, whether an intentional or negligent omission, was not actionable unless some obligation had been intentionally assumed.

Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209, 214 (1905). Bohlen cited Willes, J., in Gautret v. Egerton, 3. L.R.-C.P. 271, who wrote: "No action will lie against a spiteful man who seeing another running into a position of danger merely omits to warn him."

Ames wrote that under early law, liability attached to a "mere physical act regard-

While Bohlen was able to identify some areas in which the common law imposed affirmative obligations,[111] it is clear that this development never proceeded far. Bohlen wrote that despite some exceptions to the general rule, the law continues to respect the "deeply rooted" distinction between "misfeasance and non-feasance, between active misconduct working positive injury to others and . . . a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant."[112]

Bohlen also argued that there is a fundamental difference between the consequences of misfeasance and nonfeasance:

> The final physical injury to the plaintiff may be the same. . . . But, there is a point intermediate between the plaintiff's actual harm, and the defendant's misconduct, where its consequences are substantially different. In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him. In the one case the defendant, by interfering with plaintiff or his affairs, has brought a new harm upon him and created a minus quantity, a positive loss. In the other, by failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation. There is here a loss only in the sense of an absence of a plus quantity."[113]

Bohlen concluded that affirmative duties "attach only to certain relations and are imposed only when absolutely necessary for the protection of others and only to the extent generally necessary to afford them protection."[114]

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less of the motive or fault of the actor." Ames, *supra* note 25, at 100. As a consequence, he viewed the early law as "formal and unmoral." *Id.* at 97. This perhaps ignores the then-existing morality of personal freedom, which may have given rise to the refusal to impose an obligation of affirmative action. *See infra* notes 122-25 and accompanying text.

[111] Bohlen identified four areas in which the early tort law imposed affirmative obligations. These were obligations (1) created by statute; (2) arising out of the family relation (primarily to furnish the necessities of life); (3) arising out of custom as an incident to ownership of real property or to holding an office; and (4) arising out of policy surrounding voluntarily assumed duties (especially in the exercise of trades, businesses, and professions; in the use of property; and in the master-servant relationship). Bohlen, *supra* note 110, at 215-20; *see also* McNiece & Thornton, *Affirmative Duties in Torts*, 58 YALE L.J. 1272, 1282 (1949).

[112] Bohlen, *supra* note 23, at 219.

[113] *Id.* at 220-21.

[114] *Id.* at 243.

The distinction between "misfeasance" and "nonfeasance" is unclear from both moral[115] and practical[116] perspectives. Many writers have argued that the law should impose an obligation to act in at least some circumstances.[117] Courts have at times made dubious findings of nonfeasance, resulting in judgments for defendants as a matter of law. Perhaps the best known example of the latter is *Buch v. Amory Manufac-*

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[115] From a philosophical point of view, it does not appear possible to distinguish between the man who does something and the man who allows something to be done, when he can interfere. Such a distinction would disregard the liberty of man, his freedom of choice, his creative power, his engagement in the world and among other men. A stone does not bear any liability if a murder is committed beside it; a man does. By his decision not to interfere or to intervene, he participates in the murder.

Tunc, *The Volunteer and the Good Samaritan*, in THE GOOD SAMARITAN AND THE LAW 45-46 (J. Ratcliffe ed. 1966); *see also* Fingarette, *Some Moral Aspects of Good Samaritanship*, in THE GOOD SAMARITAN AND THE LAW 220-21 (J. Ratcliffe ed. 1966); Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

[116] The concepts of misfeasance and nonfeasance often require the law to draw very difficult distinctions. *See* Bohlen, *supra* note 23, at 219; Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196, 213-14 (1946); Weinrib, *supra* note 115, at 251-58.

[117] For arguments that the law should impose a duty to act under at least some circumstances, see J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 292-93 (J. Burns & H. Hart eds. 1970); M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY 64-68 (1978); Ames, *supra* note 25, at 113; Fingarette, *supra* note 115, at 220-23; Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972); Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 509 (1965); Weinrib, *supra* note 115; Note, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 UTAH L. REV. 529, 542-45 [hereafter Note, *Stalking the Good Samaritan*].

Others have argued against imposition of a duty to act. Epstein, *supra* note 25, at 200-01; Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 121-24; *Process Constraints*, *supra* note 13, at 928-43; Note, *The Duty to Rescue*, 47 IND. L.J. 320 (1972).

RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965), calls attention to the severe criticism that the good Samaritan rule has received and predicts that it will eventually be laced with additional exceptions:

> The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. 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.

turing Co.,[118] in which a trespassing eight-year-old's hand was crushed by a weaving machine being operated by his brother, an employee of the defendant. Despite the obvious fact that the defendant (through its employee) was actively operating the machine, the court held that this was a case of nonfeasance and that the trial court should have granted defendant's motion for a directed verdict.[119]

The common law's refusal to impose an affirmative obligation to rescue allows a person to do nothing to aid a stranger in imminent peril, even if the rescue could be easily accomplished at no cost or appreciable risk to the rescuer.[120] This is the so-called "good Samaritan" rule which the common law has maintained through the centuries, contrary to most Continental systems[121] and in the face of a great deal of critical commentary.

Why does the law continue to uphold the traditional good Samaritan rule? The answer might lie in the dual purposes of per se rules. Most authorities examining the good Samaritan rule have focused on its substantive policy, stating that it arose out of a particular view of individual freedom. Bohlen wrote that the misfeasance-nonfeasance distinction "is founded on that attitude of extreme individualism so typical of anglo-saxon thought."[122] Fleshing out this view, Hale wrote:

> Perhaps judicial reluctance to recognize affirmative duties is based on one or both of two inarticulate assumptions. One of these is that a rugged, independent individual needs no help from others, save such as they may be disposed to render him out of kindness, or such as he can induce them to render by the ordinary process of bargaining, without having the government step in to make them help. All he is supposed to ask of the government is that it interfere to prevent others from doing him positive harm. The other assumption is that when a government *requires* a person to act, it is necessarily interfering more seriously with his liberty than when it places limits on his freedom to act — to make a man serve another is to make him a slave, while to forbid him to commit affirmative

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[118] 69 N.H. 257, 44 A. 809 (1897).

[119] *Id.* at 260-61, 44 A. at 810-11. Situations such as that presented in *Buch* have been called "pseudo-non-feasance." McNiece & Thornton, *supra* note 111, at 1272-73; Weinrib, *supra* note 115, at 253-55.

[120] It is almost always possible to argue that some cost or risk is involved. *See supra* note 77; *see also* Epstein, *supra* note 25, at 198-200.

[121] For discussions of laws in France, Portugal, and Czechoslovakia imposing a civil duty to rescue, see Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in THE GOOD SAMARITAN AND THE LAW 91 (J. Ratcliffe ed. 1966). For an updated discussion of the Czech law, see Note, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 UTAH L. REV. 529, 542-45.

[122] Bohlen, *supra* note 23, at 220.

> wrongs is to leave him still essentially a free man.[123]

Protection of individual freedom is, then, a substantive policy supporting the rule. Of course, there may be cases in which imposing an affirmative obligation would not, in any real sense, make a person a "slave." Perhaps these writers and others who have essentially mirrored their views[124] would agree that the substantive rationale of the rule might not require its application to all cases.[125] Nevertheless, it appears that the first purpose of per se rules in negligence cases — that they serve some strongly held public policy — supports the good Samaritan rule.

But authorities have also focused on a second purpose for the absence of a duty to rescue. Hale wrote: "It would not always be easy to determine *on whom* such duties should rest, or *under what circumstances.* Such difficulties do not arise to the same extent with duties to refrain from positive acts which are harmful . . . ."[126] Other writers have echoed this view.[127] While this concern may overlap with the policy considerations discussed above,[128] it is much more an administrative

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[123] Hale, *supra* note 116, at 214 (emphasis in original).

[124] *See* Gregory, *supra* note 49, at 34-35; McNiece & Thornton, *supra* note 111, at 1288.

[125] In the case of a rescue that can be carried out extremely easily and with little or no risk to the rescuer, the argument that the good Samaritan rule is needed in order to serve the policy of individual freedom is weaker. Nevertheless, to the extent that the concept of individual freedom means that the state has no right to force a person to take affirmative action to rescue a stranger, that concept is implicated at least to some degree even in the easy rescue case. Also, it may be that more is involved than the desire to protect individual freedom in the manner already described. Perhaps the good Samaritan rule also reflects a subtly different view: that while we value altruism we should not use the machinery of government to punish those who are unwilling or unable to act altruistically. The language of the court in Union Pac. Ry. Co. v. Cappier, 66 Kan. 649, 653, 72 P. 281, 282 (1903), bears this out. *See infra* text accompanying note 136. It may also be that we have some doubts about the value of liability rules to affect behavior in the kinds of emergency situations in which a duty to rescue would operate. *See infra* note 305.

[126] Hale, *supra* note 116, at 214 (emphasis in original).

[127] W. PROSSER & W. KEETON, *supra* note 1, at 376; Ames, *supra* note 25, at 112-13; Epstein, *supra* note 25, at 198-200.

[128] There is some overlap because to the extent that the substantive policy suggests that it is wrong to force a person to act, or to punish one who fails to act altruistically, that policy might also suggest that having to administer even a single case that would have fallen under the per se rule is an undue burden on the courts and litigants. From this perspective, the substantive and administrative purposes of the rule are almost identical. My argument, however, is that to conclude that even a single case is one too many overstates the reach of the substantive policy and that in some limited number of cases society would view it as appropriate to impose a duty to act.

concern, tracking the second purpose of per se rules in negligence cases: to provide control over the litigation process, both by limiting the number of actions filed and by providing guidelines to trial courts about which cases can properly be submitted to the jury. This reason for the good Samaritan rule does not in itself deny that there may be cases in which imposition of liability would be just; rather, it suggests that imposing liability in any case would require courts to attempt to draw nearly impossible lines in future cases.

As one might expect given the harshness of the results it mandates, the good Samaritan rule has not survived the common law process intact. The gradual breakdown of the rule, reflecting dissatisfaction with the substantive policy that forms part of its foundation, is the subject of the next section.

III. The State of the Good Samaritan Rule

Can per se duty rules survive in the environment of broadly stated, imprecise rules normally used in adjudicating negligence cases? The next two sections of the Article will demonstrate (1) that courts, affected by changing social views, have naturally moved away from strict adherence to the per se good Samaritan rule;[129] and (2) that such movement does not portend procedural or administrative disaster, because less drastic means will satisfy the purposes of the per se rule.[130]

This Article argues that once the policy basis underlying a per se rule has dissipated because of changing views of morality and social good, the procedural/administrative reasons supporting that rule do not justify its continued existence. Instead, in such instances per se rules only impede courts from doing justice.[131]

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[129] *See infra* notes 132-234 and accompanying text.

[130] *See infra* notes 235-302 and accompanying text.

[131] As the California Supreme Court wrote in *Dillon v. Legg*, after recognizing that courts at times have difficulty distinguishing the meritorious from the frivolous:

> But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier. Courts not only compromise their basic responsibility to decide the merits of each individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious.

68 Cal. 2d 728, 737, 441 P.2d 912, 918, 69 Cal. Rptr. 72, 78 (1968).

A. Common Law Retreat From the Good Samaritan Rule

The common law reluctance to impose affirmative obligations has already been discussed.[132] Despite the difficulty in distinguishing action from inaction,[133] courts still seek to enforce the good Samaritan rule.[134] This does not mean, however, that judges who apply the rule strongly support its substantive rationale. Indeed, history indicates that even those judges who enforce the rule are ambivalent about having to do so. For example, in *Union Pacific Railway Co. v. Cappier*,[135] a moving freight car nonnegligently struck a trespasser as he attempted to cross the tracks. A warning from railroad employees was too late to prevent the accident, and the man later died of his wounds. Though the railroad employees tried to bind the man's wounds sometime after the accident, the jury found that they did not act as quickly as they should have. The court, however, held that the railroad did not have a duty of care toward the trespassing decedent and therefore could not be held liable. But speaking of the employees' conduct, the court stated:

> With the humane side of the question courts are not concerned . . . . For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.[136]

Similar language appears in *Buch v. Amory Manufacturing Co.*,[137] in which the court declined to impose a duty upon the mill owner to protect a trespassing child from harm, but recognized that defendants may well have had a "moral obligation" to aid the child.[138] Again, in *Yania v. Bigan*,[139] in which Bigan invited Yania onto his property for business purposes, urged and enticed him to jump into a deep cut filled with water, then watched Yania jump into the cut and drown, the court

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[132] *See supra* notes 110-21 and accompanying text.

[133] *See supra* notes 115-19 and accompanying text.

[134] RESTATEMENT (SECOND) OF TORTS § 314 (1965) is still a statement of the common law good Samaritan rule. The rule in its pure form is not invoked very often in reported decisions. Perhaps people do in fact act to rescue others in peril; Henderson has asserted that "one comfortably can assume that even without a legal duty most persons will help others in distress whenever they can do so at little cost to themselves." *Process Constraints*, *supra* note 13, at 928.

[135] 66 Kan. 649, 72 P. 281 (1903).

[136] *Id.* at 653, 72 P. at 282.

[137] 69 N.H. 257, 44 A. 809 (1897).

[138] *Id.* at 260, 44 A. at 810.

[139] 397 Pa. 316, 155 A.2d 343 (1959).

imposed no duty upon Bigan to save Yania, but stated that Bigan had "a moral . . . obligation . . . to go to his rescue."[140]

These and other courts applying the good Samaritan rule assume that in this matter at least, the common law lacks the tools to enforce moral obligations. They do not say that society is better off if people do not come to the aid of others in peril; indeed, they imply the opposite.[141] What these judges believe is that to impose a duty to rescue in one case would open the door to potentially unlimited liability and an unacceptable degree of unpredictability as to when there is a duty to act. This reflects the goal of per se duty rules to provide procedural control over the litigation process.

Despite their claims that the law cannot make actionable the failure to aid a stranger in need, courts have for centuries sought ways to avoid the harsh results that the rule would dictate. As early as the sixteenth century, courts held that some relationships create a duty of affirmative

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[140] *Id.* at 322, 155 A.2d at 346. The *Yania* decision has been called "shocking in the extreme." W. PROSSER & W. KEETON, *supra* note 1, at 375. A set of facts sadly similar to those of *Yania* was recently reported in Indiana. A tall, skinny man whose model boat had stopped in the lagoon offered some children $10 to retrieve it. A 13 year old child responded by jumping into the deep water, but panicked. Another child jumped in to try to save the youth, but failed, and the youth drowned. During the rescue attempt, the would-be rescuer realized that he needed help, and called out to a tall, skinny man. The man "looked down real hard at me," but left. The youth believes it was the same man who offered the children the $10 to retrieve his boat. Indianapolis Star, July 14, 1985, at 3F, col. 2.

Another case in which a court has enforced the good Samaritan rule while speaking of a moral obligation to rescue is Handiboe v. McCarthy, 114 Ga. App. 541, 543, 151 S.E.2d 905, 907 (1966).

[141] That society wishes to encourage rescue attempts by at least some people is evidenced by the fact that all states have enacted some form of good Samaritan legislation. Often, these laws are specifically designed to encourage medical professionals to offer assistance; some are applicable to all persons. For a recent review of state legislation on the subject, see Note, *Good Samaritan Laws - The Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303 (1983). This Note sought to update an earlier analysis in Mapel & Weigel, *Good Samaritan Laws - Who Needs Them? The Current State of Good Samaritan Protection in the United States*, 21 S. TEX. L.J. 327 (1981).

To say that society wishes to encourage rescue efforts, however, is not necessarily to negate the view that society may not wish to *punish* the failure to rescue. That view, however, is most applicable when the reasonable person in the defendant's position would believe that a rescue attempt would expose her to the peril that the victim is facing. But even absent the good Samaritan rule, there would almost certainly be no liability in such a case, because either the court would find that no duty was owed or the jury would determine that the duty was not breached. In the situation in which no peril would be faced by the rescuer (and the reasonable person in the defendant's position would realize this), society may well wish to punish the failure to act.

action, and imposed a duty upon those engaged in certain trades or callings.[142] Innkeepers, for example, had the "absolute duty" of protecting guests and their property.[143] Somewhat less stringent duties attached to carpenters and farriers regarding the safety of their patrons.[144] Also, courts imposed a duty upon a father or husband to provide the necessaries of life to his children and wife.[145]

Over the years, the common law has retained duties such as that owed by innkeepers toward their guests,[146] and has recognized many other "special relationships."[147] Common carriers have a duty to take affirmative action to aid imperiled passengers.[148] Similar duties have been imposed upon operators of ships toward seamen who have fallen overboard,[149] employers toward employees injured or endangered in the course of their employment,[150] shopkeepers toward business invitees,[151] hosts toward social guests,[152] jailers toward prisoners,[153] and school of-

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[142] Bohlen, *supra* note 23, at 225. Bohlen relies on A. FITZHERBERT, DE NATURA BREVIUM, "the earliest authoritative abridgment of the common law." Bohlen, *supra* note 23, at 223.

[143] Bohlen, *supra* note 23, at 223.

[144] *Id.*

[145] *Id.* at 227.

[146] W. PROSSER & W. KEETON, *supra* note 1, at 376.

[147] C. MORRIS & C.R. MORRIS, MORRIS ON TORTS 128-29 (2d ed. 1980); W. PROSSER & W. KEETON, *supra* note 1, at 376. RESTATEMENT (SECOND) OF TORTS § 314 A (1965) lists several special relationships which give rise to a duty to aid or protect.

[148] W. PROSSER & W. KEETON, *supra* note 1, at 376.

[149] *Id.* Though it also arises from the special relationship between the crew member and the ship owner, the duty has a strong basis in implied contract. Note, *The Maritime Duty of Rescue: Beyond Contract and Privity* - Walsh v. Zuisei Kaiun K.K., 5 MAR. 81, 82 (1980); *see also* Bentley, *Shipowners' Responsibility for Rescue at Sea*, 3 J. MAR. L. & COM. 573, 574 (1972). Interestingly, there is some possibility that this duty extends even to the rescue of nonsailors found in the water. In Harris v. Pennsylvania R.R. Co., 50 F.2d 866 (4th Cir. 1931), the court stated:

> [I]t is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much whenever human life is in danger. The seaman's contract of employment requires it as a matter of right.

50 F.2d at 868-69.

[150] W. PROSSER & W. KEETON, *supra* note 1, at 376; *see also* RESTATEMENT (SECOND) OF TORTS § 314 B (1965).

[151] W. PROSSER & W. KEETON, *supra* note 1, at 376.

[152] *Id.*

[153] *Id.*

ficials toward pupils.[154] The list of special relations continues to expand as the law seeks to reflect social mores and conditions. The application of the doctrine is also the subject of much current litigation, particularly in two areas: (1) serving of alcohol to intoxicated persons by both commercial establishments[155] and social hosts;[156] and (2) the failure of businesses to protect patrons from third party attacks.[157] In both areas, courts have recently recognized a duty of care when earlier courts would have declined to impose a duty.

Some cases have carried the special relationship doctrine quite far. In *Tarasoff v. Regents of University of California*,[158] for example, a patient being treated by a psychotherapist threatened harm to a woman. The psychotherapist did not warn her, and after the patient was released from a brief confinement, he killed the woman, whose family brought a negligence action against the psychotherapist. The California Supreme Court held that when a psychotherapist believes or should believe (according to the standards of the profession) that a patient poses a serious risk of violence toward a certain person, the psychotherapist must use reasonable care to warn that person of the potential danger.[159] No special relation existed between the psychotherapist and

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[154] *Id.* at 376-77.

[155] *See, e.g.*, Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Nolan v. Morellie, 154 Conn. 432, 226 A.2d 383 (1967).

[156] *See, e.g.*, Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), in which an apartment owner and manager who served alcohol to an obviously intoxicated person were held liable to a third party injured by that person when they knew the person was planning to drive. This and other decisions extending liability to noncommercial and commercial suppliers of alcohol were overruled by statute. CAL. BUS & PROF. CODE § 25602 (West 1985). A number of states have recently decided in favor of imposing liability on social hosts. *See, e.g.*, Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985); Kelly v. Gwinnell, 95 N.J. 538, 476 A.2d 1219 (1984). The *Kelly* case has sparked a good deal of discussion. *See, e.g.*, Note, *Social Host Liability to Third Parties for the Acts of Intoxicated Adult Guests:* Kelly v. Gwinnell, 38 SW. L.J. 1297 (1985); Comment, Kelly v. Gwinnell: *The Social Host and His Visibly Intoxicated Guest: Joint Liability for Injuries to Third Parties and Proper Evidentiary Tests*, 60 NOTRE DAME L. REV. 191 (1984); Comment, 15 RUTGERS L.J. 1123 (1984).

[157] *See* Wilkins, *Proprietors' Liability to Patrons Injured in Robberies*, 47 TENN. L. REV. 743 (1980). There has also been much litigation concerning the duty of a landlord to protect a tenant from third party attacks. *See, e.g.*, Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); Comment, *Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275 (1971).

[158] 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[159] *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.

the potential victim; rather, the special relation between the professional and the patient was sufficient to impose this affirmative obligation upon the psychotherapist.[160]

A variant of the special relationship doctrine has also been applied to those cases in which one has nontortiously caused the plaintiff's peril. Suppose, for example, that a hunter nonnegligently discharges his weapon in a certain direction, and the bullet glances off of a rock and strikes a person who falls face down into a shallow pool of water. Assume that because he is stunned by the glancing shot, the injured person is unable to pull himself from the water and would drown unless the hunter saves him.[161] A century ago, the fault-free hunter would have had no obligation to save the stricken person from drowning. But modern courts[162] and the Restatement[163] have now rejected this rule and impose a duty upon even the nonnegligent hunter to take reasonable precautions to prevent further harm.

Another area of expansion in affirmative obligations has been the development of "promissory estoppel."[164] Under this doctrine, one may be held liable for failure to perform a promise that the promisor should reasonably expect will cause action or forebearance on the part of the

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[160] The ultimate fate and limits of the rule in *Tarasoff* remain to be decided. The California court refused to broaden its application in Thompson v. County of Alameda, 27 Cal. 3d 741, 755, 614 P.2d 728, 736, 167 Cal. Rptr. 70, 78 (1980), but a federal court broadly applied the decision in Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980); *see* Stone, *The* Tarasoff *Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); Note, *Affirmative Duty After* Tarasoff, 11 HOFSTRA L. REV. 1013 (1983).

[161] The hypothetical is drawn from Ames, *supra* note 25, at 111-13.

[162] Maldonado v. Southern Pac. Transp. Co., 129 Ariz. 165, 629 P.2d 1001 (Ct. App. 1981); L.S. Ayres v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942); Tubbs v. Argus, 140 Ind. App. 695, 225 N.E.2d 841 (1967). The duty has also been extended to situations in which defendant's innocent conduct has created a risk of harm to the plaintiff, but has not actually harmed him. In Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 195 S.E. 247 (1938), defendants' truck had, through no fault of defendants, stalled on an icy highway, completely blocking the road. The terrain prevented other drivers from being able to see the truck until not long before they were upon it, and the icy conditions prevented drivers from stopping in time to avoid a collision. Plaintiff's car struck the truck. Defendants could have placed warnings at a point in the road where they would have been effective, but failed to do so. The court held that defendants had a duty to place effective warnings on the highway.

Note that had Union Pac. Ry. Co. v. Cappier, 66 Kan. 649, 72 P. 281 (1903), been decided today, it might well have come out differently under this rule. *See supra* notes 135-36 and accompanying text.

[163] RESTATEMENT (SECOND) OF TORTS § 322 (1965).

[164] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

promisee and which actually induces such action or forebearance. The doctrine imposes duties on those who would otherwise be free of obligation.[165]

Finally, for some time the law has imposed affirmative obligations upon those who "undertake" to render assistance. Courts generally hold that one who undertakes a rescue must use reasonable care in effecting it.[166] Thus, a person cannot begin a rescue and then unreasonably abandon the effort without incurring liability for harm suffered by the victim if the aborted rescue increased the risk of harm to the victim. The existence of this long-standing exception is consistent with the policy behind the good Samaritan rule. That is, when the defendant's *actions* have worsened the victim's situation, we can no longer say that by imposing liability, the law has improperly invaded the defendant's individual freedom. However, the courts have steadily broadened the exception, finding "undertakings" in the slightest conduct[167] and permitting the defendant to be held liable even though the undertaking has not truly worsened plaintiff's condition.[168] Today, it is difficult to know exactly when one has incurred a duty of care by undertaking to aid another.[169] This broadening of the undertaking exception may be another indication of judicial dissatisfaction with the good Samaritan rule.[170]

B. Recent Cases Continuing the Trend

Recent case law suggests that courts are more boldly moving away from strict adherence to the per se good Samaritan rule. Some of these cases can be read as extended applications of the special relationship or undertaking doctrines, although the cases appear to stretch the doctrines well beyond their previous limits. At least one case does not even arguably involve either doctrine and is thus a failure to apply the rule in a more "pure" good Samaritan situation.

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[165] Cases arising under RESTATEMENT (SECOND) OF TORTS § 323 (1965) potentially raise the promissory estoppel problem, but in a Caveat to the section, the drafters note that they express no opinion as to whether "the making of a contract, or a gratuitous promise, without in any way entering upon performance, is a sufficient undertaking to result in liability under the rule stated in this Section . . ."

[166] RESTATEMENT (SECOND) OF TORTS §§ 323-24 (1965).

[167] W. PROSSER & W. KEETON, *supra* note 1, at 379-80. In some cases, a promise of some kind attends the conduct, thus providing an additional reason for imposing a duty of care.

[168] *Id.* at 381-82.

[169] *Id.* at 379.

[170] On the subject of undertakings, see Gregory, *supra* note 49.

In *Farwell v. Keaton*,[171] Farwell and Siegrist, two teenaged boys, consumed four or five beers while waiting for a friend to get off work. While the boys were waiting for their friend, two girls walked by, and after an unsuccessful attempt to engage the girls in conversation, the boys followed them to a drive-in restaurant. There the girls complained to some of their friends about their pursuers, and the friends chased the boys, eventually catching up with and severely beating Farwell. Siegrist found Farwell under his car, and gave him a bag of ice to put on his head. Uncertain about what to do, Siegrist then drove Farwell around for a couple of hours, stopping at a number of restaurants. At about midnight, Siegrist drove to the home of Farwell's grandparents, parked in the driveway, tried unsuccessfully to rouse Farwell, and, thinking that Farwell was in a "deep sleep," left him in the car. The grandparents discovered him there the next morning and took him to the hospital. Farwell died three days later of an epidural hematoma.[172] Siegrist apparently later admitted that he knew Farwell was badly injured.[173] Expert testimony suggested that had Farwell been taken to a hospital within a half hour of losing consciousness, he would probably have had an eighty-five to eighty-eight percent chance of survival.

Farwell's father brought a wrongful death action against Siegrist.[174] The judge submitted the case to the jury, which found for the plaintiff and awarded $15,000 damages. The court of appeals reversed on the ground that Siegrist had not assumed a duty of obtaining aid and neither knew nor should have known of the need for medical treatment.[175] The Michigan Supreme Court reinstated plaintiff's judgment, holding that the jury had sufficient facts upon which to find that Siegrist attempted to aid Farwell, and that therefore a duty arose to act as a reasonable person in rendering that aid.[176] It was then up to the jury to decide whether Siegrist used such care. Such a holding is not controversial; it follows existing law imposing a duty of reasonable care upon those who voluntarily render assistance to one in peril.[177] But,

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[171] 396 Mich. 281, 240 N.W.2d 217 (1976).

[172] *Id.* at 285, 293-94, 240 N.W.2d at 219, 222-23. The facts are drawn from both the majority and dissenting opinions.

[173] *Id.* at 285, 240 N.W.2d at 219.

[174] The suit also apparently named the boys who attacked Farwell, though the appeal concerns only the liability of Siegrist.

[175] 396 Mich. at 286, 240 N.W.2d at 219.

[176] *Id.* at 288, 240 N.W.2d at 220-21.

[177] *See supra* notes 166-70 and accompanying text. There was also an interesting disagreement between the majority and dissent on the question of whether the jury plays a role in the determination of duty. The majority held that when there are factual

more importantly for present purposes, the court determined that a special relationship existed between Siegrist and Farwell that imposed upon Siegrist a duty to aid Farwell once Siegrist became aware or should have become aware of Farwell's peril:

> Farwell and Siegrist were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself. Siegrist knew or should have known when he left Farwell, who was badly beaten and unconscious, in the back seat of his car that no one would find him before morning. Under these circumstances, to say that Siegrist had no duty to obtain medical assistance or at least to notify someone of Farwell's condition and whereabouts would be "shocking to humanitarian considerations" and fly in the face of "the commonly accepted mode of social conduct." "[C]ourts will find a duty where, in general, reasonable men would recognize it and agree that it exists."[178]

It is inaccurate to characterize the case as one involving a previously recognized special relationship.[179] Rather, in this case the court greatly extended the concept of special relationships. Siegrist's conduct shocked its conscience and flew in the face of "the commonly accepted mode of social conduct." Believing that "reasonable men" would accept its judgment on this matter, the court did not view the good Samaritan rule as an impediment and allowed the case to go to the jury.[180] Even if the

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issues that must be decided before the existence of a duty can be determined, those issues should be determined by the jury. 396 Mich. at 286-87, 240 N.W.2d at 219-20. The dissent claimed that the existence of duty is always a matter solely for judicial determination. 396 Mich. at 297, 240 N.W.2d at 225.

[178] 396 Mich. at 291-92, 240 N.W.2d at 222 (quoting Hutchinson v. Dickie, 162 F.2d 103, 106 (6th Cir. 1947); W. PROSSER, THE LAW OF TORTS § 53, at 343 (4th ed. 1971)). In *Hutchinson*, the court held that a boat owner had a duty to make a reasonable effort to rescue his invitee, who fell overboard as the owner was executing a turn. 162 F.2d at 106. The owner had this duty even though decedent's fall was not brought about by any negligence by the owner. (The court found, however, that the record did not support the trial court's finding that the owner failed to exercise reasonable care in his attempt to rescue the decedent. *Id.* at 108.)

[179] Indeed, in a strong dissenting opinion, two justices argued that Siegrist did not voluntarily assume a duty to care for Farwell, 396 Mich. at 295, 240 N.W.2d at 224, nor was there a cognizable special relationship between the parties that gave rise to an initial duty of care. *Id.*

[180] It is interesting that the jury award was only $15,000. Perhaps the jury believed that Siegrist's conduct, though negligent, was understandable under the circumstances, and that a larger award would be too harsh. Such reasoning, if used by the jury, may not be supportable in law, but does suggest a sensitive review of the facts. It might also suggest that if the good Samaritan rule is abrogated, juries would show at least some sympathy for defendants when their conduct seems understandable, even if unreasonable.

case is viewed as involving an "undertaking" (since Siegrist gave Farwell some ice and put him in his car), it still represents a broad use of the court's power to determine the duty question according to the peculiar facts of the case rather than with a preset, per se standard.

In *Pridgen v. Boston Housing Authority*,[181] the eleven-year-old plaintiff was playing with a friend in an elevator in a building owned and operated by defendant Housing Authority. The boys climbed through an escape hatch in the elevator's ceiling and got onto the platform on its roof. The friend then caused the elevator to move up and down by pushing a button on the top of the car. Plaintiff slipped off the roof and became caught on metal brackets extending out from the walls of the elevator shaft. Apparently, plaintiff's mother was summoned to the scene, and asked a Housing Authority maintenance person to help, but he answered that there was nothing he could do. When she asked again, he did not respond at all. The woman then asked him to turn off "the lights" in the elevator shaft (presumably meaning the power to the elevator). A police officer entered the building and asked the man how to turn off the lights. The man answered "down these stairs." At the officer's order, the maintenance man headed down the stairs to turn off the lights. By then, however, the elevator had moved, severely injuring the plaintiff.[182]

Following a $175,000 jury verdict for plaintiff, the trial court granted the Authority's motion to set aside the verdict and entered judgment for the Authority.[183] On appeal, the Massachusetts Supreme Judicial Court reversed. The court acknowledged that plaintiff was a trespasser when he went onto the roof of the elevator,[184] but held that the Authority owed a duty of reasonable care toward plaintiff once it learned he was trapped in the elevator shaft.[185] The court held the Authority had not only a duty to refrain from acting so as to injure plaintiff, but also a duty to take reasonable affirmative action to protect plaintiff (which here would have involved turning off the power to the elevator more quickly):

> It should not be, it cannot be, and surely it is not now the law of this Commonwealth that the owner in such a situation is rewarded with immunity from liability as long as he ignores the plight of the trapped trespasser and takes no affirmative action to help him. . . . [I]t is unthinkable to have a rule which would hold the authority liable if one of its employ-

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[181] 364 Mass. 696, 308 N.E.2d 467 (1974).
[182] *Id.* at 699-700, 704, 308 N.E.2d at 469-70, 472.
[183] *Id.* at 700, 308 N.E.2d at 470.
[184] *Id.* at 706, 308 N.E.2d at 474.
[185] *Id.* at 706, 308 N.E.2d at 475.

> ees, acting in the course of his employment, pushed the "go" button on the elevator although he knew Joseph Pridgen was trapped in the elevator shaft, but would not hold it liable if, being reasonably able to do so, the employee knowingly failed or refused to turn off the switch to the electrical power for the same elevator.[186]

The court then more specifically enunciated the policy justification supporting its conclusion, stating that its ruling "is in part a recognition by the law of the ever changing concepts of each individual's rights and duties in relation to all other members of our society, and it reflects current standards of concern for the personal safety and well being of each individual."[187]

The Massachusetts court had previously rejected an attempt to impose upon landowners the same duty of care to all persons coming onto the premises, including trespassers.[188] In *Pridgen*, the court was moving further away from the per se good Samaritan rule, acknowledging that in some cases, even in the absence of a traditional special relationship, a duty to take affirmative action can arise.

A number of recent cases involving landowners and occupiers have also imposed duties in situations in which strict adherence to the per se rule would dictate that no duty was owed. Many of those cases impose upon land occupiers (particularly business establishments) an affirmative obligation to protect business visitors from third party attacks. For example, in *Isaacs v. Huntington Memorial Hospital*,[189] plaintiff, a physician affiliated with the defendant hospital, was shot by an assailant in a hospital parking lot across the street from the physicians' entrance to the hospital. Plaintiff alleged that defendant had failed to provide adequate security measures to protect invitees and licensees against such criminal assaults.[190]

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[186] *Id.* at 711, 308 N.E.2d at 476-77.

[187] *Id.* at 711, 308 N.E.2d at 477.

[188] Mounsey v. Ellard, 363 Mass. 693, 706-07, 297 N.E.2d 43, 51 n.7 (1973). In that case, however, the court held that a land owner or occupier owes a common duty of reasonable care toward all "lawful visitors," which included licensees and invitees. *Id.* at 707, 297 N.E.2d at 51.

[189] 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

[190] The hospital had three guards on duty at the time of the shooting, but all were unarmed, and none was stationed in that parking lot. Plaintiff also alleged that a previous hospital decision to disarm its security guards directly contributed to the inadequacy of the security. At trial, a security consultant called by plaintiff testified that the hospital was located in a "high crime area" in which numerous assaults and threatened assaults had occurred during the previous three years. Plaintiff produced other evidence of criminal conduct in the vicinity. However, there was no evidence of any prior attacks in the parking lot where the incident took place. Other experts testified that the secur-

The trial court granted defendant's motion for nonsuit at the close of plaintiff's case and entered judgment for defendant on the ground that there was insufficient evidence for liability. The court largely based this determination on a finding that the attack was not foreseeable because there had been no prior similar incidents.[191] The California Supreme Court apparently viewed the foreseeability of criminal conduct as the primary consideration in the creation of a duty,[192] but reversed:

> [A] possessor of land who holds it open . . . for business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.[193]

The court then directly addressed the absence of prior similar incidents. Appellate decisions had created a rule that in the absence of prior similar events, owners need not anticipate the criminal actions of third parties.[194] The court, however, held that this rule was "fatally flawed" for various reasons: (1) It leads to results contrary to the public policy of preventing future harm because it discourages landowners from taking adequate measures to protect premises they know are dangerous; (2) it contravenes the policy favoring compensation of injured parties because the first victim will always lose; (3) a rule limiting evidence of foreseeability of criminal conduct to other similar acts "leads to arbitrary results and distinctions"; (4) it incorrectly equates the foreseeability of an act with the past occurrence of similar acts; and (5) it improperly takes too many cases from the hands of the jury.[195]

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ity measures on the night of the shooting were "totally inadequate;" one said that the research parking lot was "totally devoid of any deterrents or security" that night. *Id.* at 120-23, 695 P.2d at 655-57, 211 Cal. Rptr. at 358-60.

[191] *Id.* at 123, 695 P.2d at 657, 211 Cal. Rptr. at 360.

[192] *Id.* at 124, 695 P.2d at 657, 211 Cal. Rptr. at 360.

[193] *Id.* (*quoting* RESTATEMENT (SECOND) OF TORTS § 344 (1965)). The court also cited Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 807, 685 P.2d 1193, 1197, 205 Cal. Rptr. 842, 846 (1984) (involving a third party attack upon a college student which took place on a stairway near a campus parking lot).

[194] 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361 (citing Wingard v. Safeway Stores, Inc., 123 Cal. App. 3d 37, 43, 176 Cal. Rptr. 320, 324 (1981) and other California authority). Note that the rule requiring prior similar incidents before a landowner would have a duty to anticipate criminal activities on the land was itself a per se rule. Its application to the facts of this case would have been unduly formal and mechanical.

[195] 38 Cal. 3d at 126-27, 695 P.2d at 658-59, 211 Cal. Rptr. at 361-62.

This case may also be interpreted as a fairly broad application of the undertaking

Other cases have reached similar conclusions based on this kind of analysis,[196] and the Restatement (as noted in *Isaacs*) would now also impose a duty under these circumstances.[197] Some courts still adhere to the rule that land occupiers owe business invitees either no duty or only a very limited duty to protect them from the criminal attacks of third persons.[198] But this position is certainly not universally held. Adoption of a duty by some states and the Restatement demonstrates courts' discomfort with the limitations of the "special relationship" doctrine as a device to curb the harshness of the good Samaritan no-duty rule.

Other recent cases have imposed liability on municipalities for failure to render assistance to persons in emergency situations. In *De Long v. County of Erie*,[199] the city of Buffalo and the County of Erie had established a "911" emergency number. One morning, a woman heard a burglar and telephoned the 911 number for aid. The operator recorded the wrong address, and then failed to perform required follow-up procedures when the police were unable to find the address that the operator recorded. Meanwhile, the caller was murdered by the intruder.[200] A wrongful death action was brought against both the city and county, and the jury returned a verdict in the amount of $800,000, holding

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doctrine. *See supra* notes 166-70 and accompanying text. Defendant had at one time armed its security guards, but withdrew that protection. Some cases have held that a party who has undertaken to render aid may not withdraw it without exercising reasonable care to warn of the discontinuance, if the provision of aid in the past had induced reliance on the part of the plaintiff. *See, e.g.*, Erie R.R. v. Stewart, 40 F.2d 855, 857 (6th Cir. 1930).

[196] Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984); Taylor v. Centennial Bowl, Inc., 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 561 (1966); Winn-Dixie Stores, Inc. v. Johnstoneau, 395 So. 2d 599 (Fla. Dist. Ct. App. 1981).

[197] RESTATEMENT (SECOND) OF TORTS § 344 (1965).

[198] *See, e.g.*, Cook v. Safeway Stores, Inc., 354 A.2d 507 (D.C. 1976) (store owner owed only limited duty to protect patron from criminal attack); Goldberg v. Hous. Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962) (landlord owed no duty to one delivering milk to protect him from criminal attack in the apartment complex); Davis v. Allied Supermarkets, 547 P.2d 963 (Okla. 1976) (grocery store owed no duty to protect shopper from criminal attack in store parking lot); Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (limited duty). *See generally* Bazyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727 (1979); Wilkins, *supra* note 157; Note, *Tort Law - Merchant's Duty to Protect Its Customers from Third-Party Criminal Acts*, 18 WAKE FOREST L. REV. 114 (1982).

[199] 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983).

[200] *Id.* at 300-05, 457 N.E.2d at 718-20, 469 N.Y.S.2d at 613-15.

each fifty percent responsible for the loss.[201]

A divided New York Appellate Division affirmed,[202] and the Court of Appeals also affirmed. The court recognized an established rule that the failure of police to offer assistance when the situation seems to require aid does not render the municipality liable for resulting harm.[203] The court held, however, that because defendants had established the 911 emergency number and encouraged people to use it for quick response instead of calling the local police, and because of the specific conduct of the 911 operator in handling the deceased's call, a special relationship arose between the deceased and the defendants. Defendants then had a duty to exercise ordinary care with regard to the 911 number.[204] Although *De Long* can be seen as a case involving an undertaking,[205] it nevertheless appears to extend the law.[206]

A final case demonstrates how far some recent decisions have stretched previously established doctrine. In *Otis Engineering Corp. v. Clark*,[207] plaintiffs sued a construction company following a two-car collision between the decedents' car and one driven by Matheson, an employee of defendant whose habit of drinking on the job was well known and whose intoxication on the day of the accident was suspected. On that day, another employee noticed that Matheson appeared intoxicated or ill. Matheson's supervisor suggested that he go home,

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[201] *Id.* at 304, 457 N.E.2d at 720, 469 N.Y.S.2d at 615.

[202] *Id.*

[203] *Id.* at 304, 457 N.E.2d at 721, 469 N.Y.S.2d at 616 (citing Pinkney v. City of New York, 40 N.Y.2d 1004, 359 N.E.2d 1001, 391 N.Y.S.2d 411 (1977); Evers v. Westerberg, 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (1973)).

[204] 60 N.Y.2d at 305, 457 N.E.2d at 721, 469 N.Y.S.2d at 616. The court saw this case as different from ones involving mere failure to protect unidentified persons or the mere withholding of a benefit. *Id.* (citing, *inter alia*, Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) (Cardozo, J.)).

[205] In *De Long*, of course, there was no question that defendant affirmatively acted.

[206] In another recent case, a federal jury awarded $2.3 million to a woman who was brutally attacked by her estranged husband, part of the attack occurring in the presence of police officers. The action was against city police and was based largely on equal protection grounds under the federal Constitution. Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). The trend toward permitting recovery from police or other public bodies for negligent failure to provide adequate protection is additional evidence of public dissatisfaction with the policy justification for the good Samaritan rule. For other examples, see Ryan v. State of Ariz., 134 Ariz. 308, 656 P.2d 597 (1982) (state liable for injuries caused to plaintiff by violence-prone inmate who escaped from correctional facility); City of Jacksonville v. Florida First Nat'l Bank of Jacksonville, 339 So.2d 632 (Fla. 1976) (city liable for negligent failure to protect children from violence-prone individual).

[207] 668 S.W.2d 307 (Tex. 1983).

escorted Matheson to the company parking lot, and asked him if he could make it home. Matheson answered that he could make it home, but the collision occurred thirty minutes later. At trial, evidence showed that Matheson had a blood alcohol content of .268 percent, indicating that he had ingested the equivalent of sixteen to eighteen cocktails in an hour.[208]

The trial court granted defendant's motion for summary judgment on the ground that defendant owed no duty to plaintiffs.[209] The intermediate court reversed, holding that the case should be tried.[210] A divided Texas Supreme Court affirmed the ruling of the intermediate court,[211] holding that "when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others."[212] About the duty issue, the court stated:

> What we must decide is if changing social standards and increasing complexities of human relationships in today's society justify imposing a duty upon an employer to act reasonably when he exercises control over his servants. Even though courts have been reluctant to hold an employer liable for the off-duty torts of an employee, "[a]s between an entirely innocent plaintiff and a defendant who admittedly has departed from the social standard of conduct, if only toward one individual, who should bear the loss?". . .
>
> If as Prosser asserts should be done, we change concepts of duty as changing social conditions occur, then this case presents the court with the opportunity to conform our conception of duty to what society demands.[213]

Otis Engineering is another example of judicial attempts to avoid the per se rule's harsh results.[214] The court stretched far to find either a

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[208] *Id.* at 308.

[209] *Id.* at 309.

[210] *Id.* at 308.

[211] *Id.* at 311.

[212] *Id.*

[213] *Id.* at 310 (quoting W. PROSSER, PROSSER ON TORTS § 43, at 257 (4th ed. 1971)).

[214] *Otis* contained a sharp dissent, which offers an alternative analysis of the duty question. Stating that "no jurisdiction has ever suggested that an employer may be held liable for the off-duty, off-premises torts of an intoxicated employee when the employer has not contributed to the employee's state of intoxication," and that defendant neither created the dangerous situation nor took charge of Matheson, the dissenters asserted that no duty was owed. 668 S.W.2d at 312-13. In fact, the dissenters believed that this was a case of inaction on the part of defendants, with the "only conceivable affirmative act committed by Otis" being the supervisor's suggestion to Matheson that he go home.

special relationship or, perhaps, an undertaking on the part of defendant. As a result, the court found that a duty of care existed and that it could properly submit the case to the jury. While the matter is obviously quite controversial, other courts have also indicated a willingness to broaden existing exceptions and therefore extend potential liability beyond traditional bounds.[215]

Yet another case must be considered in order to understand the depth of modern dissatisfaction with the per se good Samaritan rule.[216] *Soldano v. O'Daniels*[217] does not involve or extend a previously recognized special relationship and is therefore the purest "good Samaritan" case to be discussed. Plaintiff Dustin Soldano's father was a patron at a saloon across the street from the Circle Inn restaurant, which was owned by defendant O'Daniels. Villanueva, another bar patron, was threatening the elder Soldano. Another patron went across the street to the Circle Inn, told an employee about the threats, and asked either that the employee call the police or that he be permitted to use the telephone to make the call. The employee refused both requests. Villanueva shot and killed Soldano, and his son sued O'Daniels.[218]

O'Daniels was not the owner of the bar[219] and therefore had no spe-

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Id. at 314. They viewed the defendant's negligence as merely failing to discover and put an end to Matheson's drinking. *Id.* at 317-19. The dissenters also found the court's ruling defective for other reasons: (1) employers will not know under what circumstances they will be deemed to have "taken control" over their employees; (2) it is unclear what a "reasonably prudent employer" should do to avoid liability; (3) satisfying a public policy of reducing the number of accidents caused by drunk drivers and compensating victims should be accomplished by legislation rather than judicial decisionmaking; and (4) this decision will add to public cynicism about tort liability by reinforcing the view that liability is not based upon fault, but upon the defendant's ability to pay a judgment.

[215] *See, e.g.*, Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968); Leppke v. Segura, 632 P.2d 1057 (Colo. App. 1981); Robertson v. LeMaster, 301 S.E.2d 563 (W. Va. 1983). The dissent in *Otis Engineering* attempted to distinguish each of these cases. 668 S.W.2d at 314-16.

[216] Arguably, *Otis Engineering* and other cases discussed above represent judicial satisfaction with the reach of the undertakings exception as much as they do dissatisfaction with the good Samaritan rule. If this is true, however, the result is truly liability without standards. Rather than stretch an exception whose parameters are already impossible to define, the courts should work with the underlying rule itself. The results of some cases would be the same, but clearer standards would emerge as courts tackled the difficult issues and established boundaries to the duty.

[217] 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983).

[218] *Id.* at 445-46, 190 Cal. Rptr. at 311-12. The action against O'Daniels was brought on a theory of respondeat superior. *Id.* at 446 n.3, 190 Cal. Rptr. at 312 n.3.

[219] One author has apparently misread the facts of this case, suggesting that

cial relationship with Soldano upon which a duty of care could rest.[220] Also, since O'Daniels' employee did not undertake to render aid, no duty could arise in that manner. Strict application of the good Samaritan rule could only lead to the conclusion that despite the ease with which O'Daniels' employee could have assisted the rescuer,[221] and despite the fact that in doing so he would not have incurred any risk of harm to himself,[222] he could not be held liable for Soldano's death.

Applying the common law rule, the trial court granted defendants' motion for summary judgment and dismissed the action.[223] A California court of appeal reversed, however, holding that under the circumstances, defendant owed a duty of reasonable care toward Soldano. The court began its analysis by citing the emphasis that the California legislature had placed on the policy of diminishing criminal activity and the degree to which citizen reporting is needed to accomplish this "societal imperative."[224] The court then noted "the importance of the telephone system in reporting crime and in summoning emergency aid,"[225] and that the legislature had recognized this fact by enacting laws regarding the use of telephones, as well as establishing a "911" emergency calling

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O'Daniels was the owner of both the bar and the restaurant. Note, *Creation of a Duty Absent a Special Relationship - Legal Duty Based on a Moral Obligation*, 6 WHITTIER L. REV. 605, 607 (1984). The court's opinion indicates that the attack took place at "defendant's Happy Jack's Saloon," and that "defendant owns and operates the Circle Inn. . . ." 141 Cal. App. 3d at 445, 190 Cal. Rptr. at 311-12. It also notes that there was only one cause of action against defendant O'Daniels, implying that there were other defendants. *Id.* at 445 n.1, 190 Cal. Rptr. at 311 n.1. While the opinion could have been much clearer on this point, it is nevertheless clear that had O'Daniels owned the bar, the court would not have undertaken the kind of analysis it used in the case. Rather than viewing the case as it did, the court would have discussed the obligations imposed upon the owner as a result of the special relationship between himself and the patrons of his bar. In the opinion, the court makes clear that there was "no special relationship between the defendant and the deceased." *Id.* at 449, 190 Cal. Rptr. at 314.

[220] 141 Cal. App. 3d at 449, 190 Cal. Rptr. at 314.

[221] The court states, however, that the record does not disclose the location of the telephone in the restaurant. *Id.* at 446, 190 Cal. Rptr. at 312. Also, the causal relationship between the defendant's refusal to allow the person to use the telephone and the elder Soldano's death has not yet been shown. *Id.* at 451, 190 Cal. Rptr. at 315-16. These matters will be taken up at trial.

[222] As previously noted, one can generally imagine the possibility that the rescuer incurs some risk by accomplishing the rescue, in this case perhaps a risk of vengeance by Soldano's attacker. *See supra* note 77.

[223] 141 Cal. App. 3d at 445, 190 Cal. Rptr. at 311.

[224] *Id.* at 449, 190 Cal. Rptr. at 314.

[225] *Id.* at 450, 190 Cal. Rptr. at 315.

system.[226]

The court then examined the factors that California courts had used previously to determine whether a duty should be imposed under the circumstances.[227] The court concluded that the harm to the deceased was "abundantly foreseeable"; that the certainty of the injury was undisputed; that there was arguably a close connection between defendant's employee's conduct and the injury (although this would be an issue at trial); that the employee's conduct "displayed a disregard for human life that can be characterized as morally wrong"; that the burden on the employee was minimal and exposed him to no risk; and that declaring the existence of a duty would promote a policy of preventing future harm by discouraging people from impeding others who have chosen to render aid.[228] Finally, reviewing the community consequences should a duty be imposed, and equating this with Green's "administrative factor," the court stated that it understood that many persons do not wish to become involved, and that no rule should be adopted that would require people to open their homes to strangers who claim to need emergency help. But

> It does not follow . . . that use of a telephone in a public portion of a business should be refused for a legitimate emergency call. Imposing liability for such a refusal would not subject innocent citizens to possible attack by the "good samaritan," for it would be limited to an establishment open to the public during times when it is open to business, and to places within the establishment ordinarily accessible to the public. Nor would a stranger's mere assertion that an "emergency" situation is occurring create the duty to utilize an accessible telephone because the duty would arise if and only if it were clearly conveyed that there exists an imminent danger of physical harm.
>
> Such a holding would not involve difficulties in proof, overburden the courts or unduly hamper self-determination or enterprise.[229]

Noting that the good Samaritan rule was a creation of the courts, and that the courts "have a special responsibility to reshape, refine and guide legal doctrine they have created,"[230] the court held that the case should be permitted to go to trial.[231]

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[226] *Id.*

[227] *Id.* at 450-51, 190 Cal. Rptr. at 315.

[228] *Id.* at 451, 190 Cal. Rptr. at 315-16.

[229] *Id.* at 452, 190 Cal. Rptr. at 316.

[230] *Id.* at 453, 190 Cal. Rptr. at 317.

[231] The court never makes clear the precise basis of its holding. The court briefly examined the possibility that by refusing to allow the individual to use the telephone, defendant's employee was negligently interfering with a rescue being attempted by another. 141 Cal. App. 3d at 447 n.5, 190 Cal. Rptr. at 313 n.5. If so, the case might fall

This section has demonstrated that over time, courts have steadily broadened the exceptions to the good Samaritan rule and that some decisions create doubt about whether the courts will continue to enforce the per se rule at all. The section also has shown that even judges who strictly adhere to the good Samaritan rule are ambivalent about the policy ramifications of their decisions. These developments, supported by much scholarly argument,[232] show great dissatisfaction with the substantive policy of the good Samaritan rule, a sense that while there is value to insulating the individual from obligations to act affirmatively to save others, we *should* be "our brothers' keepers"[233] to some extent at least.[234] This erosion in support for the substantive purpose of the good Samaritan rule would seem to require that courts take a new approach to good Samaritan cases. Such an approach, however, should strive to preserve the procedural purposes of the rule. The next section

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under RESTATEMENT (SECOND) OF TORTS § 327 (1965), which prohibits such conduct. The court did not hold that this case fit within § 327. In fact, the court recognized that its opinion expands the reach of that section. 141 Cal. App. 3d at 453, 190 Cal. Rptr. at 317.

While the court's position as to the true effect of its ruling is unclear, the duty imposed in this case clearly goes beyond the mere duty not to interfere with a rescuer. Defendant argued that the case involved a failure to aid the good Samaritan, and at one point in its opinion, the court seemed to accept this argument. 141 Cal. App. 3d at 447, 190 Cal. Rptr. at 313. Certainly, a duty in this case includes the obligation to make a telephone available to the good Samaritan, which has the earmarks of an affirmative duty.

[232] *See supra* note 117.

[233] *Cf.* Seavey, Comment, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960).

[234] The growth of social programs beginning with the New Deal suggests that after the misery brought about by the Depression of the 1930's, our society began to adopt a collective morality of caring for others in need. As one author stated:

> [W]e have recognized and accepted a collective responsibility as our brothers' keepers in a degree never before manifested. The diminution of individual concern for the hapless and helpless has been balanced by the growth of a common concern.
>
> However inadequate may be our public welfare programs, our old-age assistance, our aid to dependent children, our public health clinics, public hospitals, public schools, our unemployment compensation and manpower rehabilitation systems, all these constitute, nevertheless, a general acknowledgment by the community that we are our brothers' keepers.

Barth, *The Vanishing Samaritan*, in THE GOOD SAMARITAN AND THE LAW 168 (J. Ratcliffe ed. 1967).

Though this attitude appears to be waning in the 1980's, the resistance to elimination of these social programs may perhaps indicate that we still view caring for our neighbors as an important social value.

proposes a multifactor test that will reflect modern values without abandoning the litigation control functions of the good Samaritan rule.

IV. Reforming the Good Samaritan Rule

This Article has shown that per se duty rules prevent courts from determining the existence or nonexistence of a duty by reference to the facts and policy implications of imposing a duty in individual cases. Instead, they resolve the duty question by reference to a single criterion or limited set of factors established in advance and therefore without reference to the particular facts of the case. Their hands thus tied, judges lack discretion to determine that in a given case, they ought or ought not to impose a duty. Application of this kind of rule serves the values of predictability and consistency, but sometimes at the price of justice and compensation of innocent parties.

Because of this weakness in per se duty rules, I have suggested that when the substantive policy behind the rule abates, courts must carefully scrutinize the need for this particular rule to serve procedural goals. If the procedural purposes of the rule can be served by other means, then the costs of the rule are too great and it should be discarded. I will show that the procedural purposes of the good Samaritan rule can be adequately served by a multifactor duty analysis, together with a tightening of plaintiff's burden. These devices should replace the per se rule.

A. The Adjudicability of Multifactor Duty Tests

In the last decade, some scholars have begun to focus on the subject of torts from a rather new perspective. While continuing to examine substantive doctrine, some writers have also begun to review the effects which that doctrine may have on the process of adjudication. Professor Henderson has led the way,[235] sharply criticizing courts for expanding liability rules without considering the effects this expansion will have

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[235] *See supra* note 13. Among the other works which contain a process focus are Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. Rev. 643 (1978); Fischer, *supra* note 55; Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 Utah L. Rev. 15; *Middle Ground*, *supra* note 5; Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 Hofstra L. Rev. 861 (1983); Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. Rev. 347 (1980); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 Duq. L. Rev. 425 (1974).

on the process of deciding tort cases.[236] His primary attack appears to be on the abrogation of relatively specific rules of decision, including per se rules such as the status categories of land entrants and the zone of danger test in actions for negligent infliction of emotional distress, as well as the move away from accepting medical custom as the standard of care in malpractice actions.[237] He argues that the open-ended standards that have replaced the more specific common law rules seriously strain the traditional adjudicatory process by introducing "polycentricity"[238] into the tort system and inviting courts to engage in a "managerial" form of decisionmaking rather than the traditional process of adjudication.[239] The result, he claims, is the absence of clear rules and the

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[236] Henderson has also criticized torts scholars for lauding these developments without considering their effects on process. *Retreat*, *supra* note 13, at 522-24.

[237] This "retreat from the rule of law," Henderson argues, has grave consequences:

> Gradually, step-by-step, the traditional limitations upon liability in negligence, which gave sufficient specificity to the negligence concept to allow it to be the subject of adjudication, have been eliminated. With increasing frequency, courts have abandoned traditional doctrines and have embraced the idea of a single, unified, most general principle upon which to determine liability. Many torts scholars and commentators have encouraged and praised these developments. I do not. . . . I submit that this judicial expansion and purification of the negligence concept has proceeded to the point where courts are beginning routinely to confront the sorts of open-ended, polycentric problems described above. As a consequence, the integrity of the judicial process in these cases is very much threatened.

Id. at 477.

[238] A problem is "polycentric" if its solution depends upon the consideration of many interrelated and unmeasurable factors, none of which are determinative of the issue. *Id.* at 475; *Process Constraints*, *supra* note 13, at 907. Examples of such problems are the issue of how much police protection a municipality should provide, *id.* at 908, or how much product safety is enough. *Creative Judging*, *supra* note 13, at 846.

Henderson notes that he has borrowed the term "polycentric" from Lon Fuller, who may in turn have borrowed it from Michael Polanyi. M. POLANYI, THE LOGIC OF LIBERTY 170-84 (1951); Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOCY. INT'L. L. 1, 3; Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 33. Henderson does not claim that polycentric problems are not subject to intelligent solution; he claims only that they cannot be effectively solved by means of the adjudicative process. *Retreat*, *supra* note 13, at 471; *see also Creative Judging*, *supra* note 13, at 847-48.

[239] "Managerial" decisionmaking involves reliance "on a combination of experience and intuition." *Process Constraints*, *supra* note 13, at 907. The adjudicatory process, on the other hand, presupposes that "the affected parties are guaranteed the opportunity of presenting proofs and arguments to an impartial tribunal which is bound to find the facts and to apply recognized rules to reach a reasoned result." *Retreat*, *supra* note 13, at 469; *see also Judicial Review*, *supra* note 13, at 1535; *Process Constraints*,

emergence of a vague "all the circumstances" test that courts are unsuited to utilize and that fails to guide both societal behavior and the efforts of litigants in the presentation of cases.[240] Henderson believes the problem is so serious that he "doubt[s] seriously that our common law system of negligence-based liability will survive to the end of this century."[241]

Henderson's argument that the adjudicative effects of changes in tort doctrine must be carefully considered is unassailable. It is irresponsible for tort theorists or judges to speak of new areas of potential liability without considering how the proposed developments would affect the law's important goals of predictability and consistency. However, two things that the need for a flexible standard in negligence cases clearly does *not* mean are: (1) that the universe of choices is limited to prefixed, per se rules on the one hand, and a "reasonableness under all the circumstances" test, specific to each case, on the other hand; and (2) that an acceptable price of abrogation of per se duty rules is loss of control over the litigation process. The question is whether in order to preserve the adjudicability of cases raising the spectre of the good Samaritan rule, it is necessary to maintain that rule in its per se form. Both the requirements of the adjudicatory process and the need for the law to adapt its substantive doctrine to current social values can be satisfied in the absence of per se duty rules in general, and the per se

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supra note 13, at 906.

[240] Henderson argues that tort law accomplishes its aims mostly by providing guides to "the primary behavior of those persons whose activities generate the accident costs upon which liability issues focus," *Process Constraints*, *supra* note 13, at 903, as well as "the adjudicative behavior of the lawyers, judges, and jurors who have responsibility for officially resolving liability disputes." *Id.* Liability rules must therefore help to guide both kinds of behavior, and in order to do so, they must be comprehensible, verifiable, conformable, and manageable. *Id.* at 911-16. Interestingly, Henderson believes that the traditional good Samaritan rule is the "clearest example of the process constraints at work," and he argues that abrogation of the rule could not be accomplished without seriously compromising the requirements of comprehensibility, verifiability, conformability, and manageability. *Id.* at 928-43.

[241] *Retreat*, *supra* note 13, at 477. Henderson has written that he is not specifically criticizing the substance of the recent judicial expansion of tort liability, but is only pointing out that these changes have had a negative impact on the adjudicatory process and that process constraints must be considered. *Id.* at 477-78; *Process Constraints*, *supra* note 13, at 948.

It is interesting that in reviewing a book that argues for creation of a duty to rescue, the reviewer praises the author's proposal for its "explicitly polyvalued" focus, "accounting both for efficiency and 'humanitarianism.'" Powers, *A Methodological Perspective on the Duty to Act* (Book Review), 57 TEX. L. REV. 523, 535 (1979) (reviewing M. SHAPO, *supra* note 117).

good Samaritan rule in particular.

Some authorities agree with Henderson's view that courts should avoid polycentricity in the decision of tort cases,[242] but have argued that adjudicatory problems can be largely avoided through creative judicial application of multifactor standards.[243] Professor Twerski claims that wise trial court employment of defendants' directed verdicts would prevent the jury abuse that might result in excessive plaintiffs' verdicts, and would help to establish the boundaries of duty, even absent per se rules.[244] Focusing primarily on design defect cases,[245] Twerski reviewed the considerations at the "core" of previous directed verdict decisions and concluded that a ten-factor approach could determine whether a case is appropriate for submission to the jury without rendering the case unadjudicable.[246] According to Twerski, the trial court should consider each of the factors before permitting plaintiff's case based on an

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[242] At least one author who has written in opposition to some of Henderson's ideas (and continues to do so) pays homage to Henderson's important contribution in this area:

> It is no secret that since the *anschauung* of Professor Henderson's classic article *Judicial Review of Manufacturers' Conscious Design Choices: the Limits of Adjudication* [73 COLUM. L. REV. 1531 (1973)], I have been preoccupied with the unsettling questions which he propounded. In fact, a good case can be made for the proposition that I have become more Hendersonian than Henderson. Although differences remain between us, the common ground upon which we tread is the deeply held belief that the tort litigation system cannot stand the strain of a totally unstructured standard of reasonableness.

Twerski, *supra* note 235, at 863-64.

[243] *See, e.g., Middle Ground*, *supra* note 5. Similar analyses can be found in Fischer, *supra* note 55; Hawkins, *supra* note 235.

[244] *Middle Ground*, *supra* note 5. Henderson disagrees, claiming that "what is required is not more creative law-applying, but more creative lawmaking — that is, the establishment, either legislatively or judicially, of more specific legal rules and standards that will help judges and juries reach consistent, sensible results." *Creative Judging*, *supra* note 13, at 848-49; *see also* Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978) (proposing specific design defect legislation). Henderson now feels that his proposal could be changed somewhat, though he stands behind its central idea. *Creative Judging*, *supra*, at 849 n.14.

[245] Though doctrines used in design defect litigation differ in some respects from those employed in general negligence litigation, similar considerations often come into play, and types of standards developed for use in design cases can therefore serve as useful analogies for negligence cases.

[246] Twerski, *supra* note 235; *Middle Ground*, *supra* note 5; Twerski, Weinstein, Donaher & Piehler, *supra* note 235; Weinstein, Twerski, Piehler & Donaher, *supra* note 235.

argument for an alternative design to go to the jury.[247]

Twerski's ten factors require the court to consider the duty question from a number of perspectives rather than the very limited perspectives required under the application of a per se rule. Importantly, the ten factors go beyond a mere weighing of the reasonableness of the design according to the risk-utility formula,[248] centering also on the policy and adjudicative implications of the imposition of a duty of care in the particular case.[249] Because of its concern for both policy and adjudication, the ten-factor test is forward-looking; it helps courts to build guidelines for future cases, thereby instructing product producers and consumers of the likely consequences of their actions. Twerski argues that his test helps trial courts to do five specific things:

> (1) the court identifies policy concerns that transcend the resolution of the case at bar; (2) the court takes cases that it knows raise difficult policy issues and places them, so to speak, in a "suspect category," thus ensuring that these cases will be the object of "heightened" judicial scrutiny before being permitted to go to the jury; (3) the court consciously performs a

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[247] Twerski's 10 factors are (1) polycentricity (the degree to which the proposed design would affect cost, utility, safety, or aesthetics of the products; (2) closeness of risk-utility proof (whether plaintiff's evidence strongly indicates a better risk-utility balance than defendant's design); (3) the state of the art; (4) the causal connection between product defect and injury; (5) the degree to which independent decisionmakers may have played a role in reviewing and using the product; (6) consumer choice (the availability of a similar product with a different design and the degree to which the marketplace can be trusted to weed out unsafe products); (7) the obviousness of the danger; (8) the cost of the alternative design; (9) the extensiveness of the safety review process that led to the formulation of the defendant's design; and (10) the existence of legislation regulating the product's design. *Middle Ground*, *supra* note 5, at 551-78.

In deciding on these factors, Twerski discusses (but ultimately does not adopt) a seven-factor test suggested by Dean Wade. *Id.* at 546-48; *see* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 838 (1973).

[248] *Middle Ground*, *supra* note 5, at 530-32. The risk-utility test is stated in RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965); *see also* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), in which Learned Hand formulated this test. To the extent that courts direct verdicts based on a risk-utility balance, they are making law for future cases, but only based on the facts of the particular case. Thus, the precedential value of the decision is quite limited. Twerski refers to this as "low-level lawmaking." *Middle Ground*, *supra* note 5, at 528-29. Twerski calls directed verdicts reached through a multifactor analysis such as that which he has developed "high-level lawmaking." This is "because, by clearly identifying the policy grounds for removing the case from litigation or the consideration of the jury, the court establishes principles for screening cases that should have significant precedential value." *Id.* at 529.

[249] Twerski's "polycentricity" and "close risk-utility proof" factors seem especially geared toward consideration of the adjudicative implications of the case. *Middle Ground*, *supra* note 5, at 551-56.

> screening function: at the pleading stage, the dispute is removed from litigation entirely; at the directed verdict stage, the case is screened from the reasonableness test; (4) the court decides the case in light of a consideration of the precedential value of its decision; and (5) the court balances important policy considerations rather than concentrating on weighing sensitive factual distinctions.[250]

Of course, not all of the factors enumerated in Twerski's list are relevant to the typical negligence case in which the good Samaritan rule is implicated.[251] However, the list is an excellent example of a formula that requires the court to consider the duty question from many different perspectives. Application of the factors over a period of time will permit the gradual construction of standards that courts can apply in subsequent cases, thus setting the limits of liability.

The key to a reliable multifactor duty test would thus appear to be that it serve both the substantive goals of the tort law and the needs of adjudication. This is what Leon Green had in mind when he suggested that five factors should always be considered when a court is deciding the duty question in negligence cases,[252] and it is what the California courts have attempted to do by developing and using their multifactor duty analysis.[253] Multifactor tests differ from per se rules in that no single factor will as a matter of law always tip the scale and determine the existence or nonexistence of a duty. While it is possible that a court utilizing such a test in a particular case will decide that one factor weighs so heavily against the imposition of a duty that no duty should be declared, that holding in itself would not require the same finding in all roughly similar cases. The finding (and resulting directed verdict) will of course help to establish standards for subsequent cases by suggesting the contours of a duty, but the finding is not conclusive. If it were, the multifactor test would in reality operate in the same manner as a per se rule.

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[250] *Id.* at 531 (footnotes omitted).

[251] Factors such as state of the art, consumer choice, and design safety review process are specifically geared to design defect cases. In formulating a multifactor test for good Samaritan cases, factors particularly suited to those cases can also be developed. *See infra* notes 273 & 279-81 and accompanying text.

[252] *See supra* notes 51-52 & 91-93 and accompanying text. Twerski criticizes Green's test, however, noting that while the broad considerations mentioned in the test "may help the trial or appellate judge confront the duty question with greater honesty, they add little predictability to the outcome of that confrontation." *Middle Ground*, *supra* note 5, at 534.

[253] *See supra* notes 57 & 94-102 and accompanying text. A multifactor test for good Samaritan cases based on the California duty criteria is discussed *infra* at notes 267-94 and accompanying text.

Multifactor tests are appealing if seriously applied by trial courts (in the first instance) and appellate courts (in reviewing rulings on motions for directed verdict). There is good reason to believe that courts have at their disposal the tools to apply multifactor tests effectively in cases that would formerly have been governed by per se rules. In a recent article, Professor Hawkins studied what has occurred in jurisdictions that have repudiated the status categories in actions against land occupiers.[254] He was keenly aware of the need to consider the "administrative or procedural consequences" of the repudiation of the status categories,[255] and he closely examined whether abrogation of the status categories had led to the disappearance of standards and to the potential for unlimited liability. While his review of results in jurisdictions that repudiated all or part of the common law construct revealed somewhat mixed results,[256] he remained convinced of "the capacity of the general negligence formula to provide limits on premises liability without the use of status rules."[257] He was especially confident of this conclusion after his review of the results in some states (including California, New Hampshire, and Louisiana), which "show a disposition to use jury control mechanisms in the general negligence formula effectively to maintain responsible limits on premises liability."[258]

Drawing largely on Green's duty-risk analysis,[259] Hawkins argues that trial courts have at their disposal three important jury control devices. These are the power to determine as a matter of law (1) the scope of duty; (2) breach of duty; and (3) causal relationship.[260] Re-

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[254] Hawkins, *supra* note 235.

[255] *Id.* at 17-19. He recognizes the procedural purposes of the status categories:

> Whatever one thinks of their substantive value, the formal status rules have served an administrative function by providing a structure for the relationship between judge and jury. Using the specific and limited duty formulations applicable to licensees and trespassers, judges have kept many cases from juries. Those that have been given to juries have turned upon specific and narrowly defined issues. Only invitee cases have traditionally reached the jury under the more open instructions applicable to negligence cases.

Id. at 18 (footnotes omitted).

[256] While some states had successfully moved toward the setting of standards in premises cases, courts in two states showed "signs of abdicating judicial responsiblity in favor of unlimited jury discretion." *Id.* at 35. In the remaining states which had wholly or partially abolished the status categories, it is too early to tell what will happen.

[257] *Id.*

[258] *Id.*

[259] *See* authorities cited *id.* at 36 n.164.

[260] *Id.* at 35-53. The latter two factors (breach of duty and causal relation) might be seen as factual issues. Hawkins, however, defines the breach question as including the

sponsible use of this power, he argues, permits standard setting and thus prevents jury abuse:

> We agree with Professor Henderson that in the absence of some structure for fixing the limits of premises liability, the law would be reduced to "a conceptual conduit through which all cases are funneled into the jury room." However, overruling the status categories has not resulted in wholesale abandonment of premises liability cases to unfettered jury discretion. Rather, it has produced significant constraints based on the judges' calculus of risk under the general negligence formula. The issue is apparently reduced to a choice between a structure for jury control based on formal status rules and a structure for jury control based on a process of risk analysis.[261]

Another recent study concluded that the California duty criteria can work quite well in place of single-factor no-duty rules.[262] The author examined the California Supreme Court's decision in *J'Aire Corp. v. Gregory*,[263] which applied its familiar duty test and created a cause of action for negligent interference with prospective business advantage. While taking no position on the wisdom of expanding liability into this area, the author supported the court's approach:

> By using a six-factor test to determine the duty question as a matter of law, the court has taken responsibility for defining the scope of liability. Each trial judge must use the same factors to resolve individual cases. All decisions at the trial level are subject to review by intermediate appellate courts and ultimately by the state's highest court. While it is too early to tell how the factors will be applied, it is quite possible for courts to apply them consistently to a wide variety of cases. If this approach were taken, then over a period of years, the case law should become sufficiently devel-

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judicial power to determine the applicable standard of conduct and the causation issue as including the question of whether the duty included the particular risk that materialized.

[261] *Id.* at 61 (footnotes omitted). Hawkins concludes, however, with a word of caution to judges:

> Green contemplated judges able and willing, in applying the general negligence formula to the particular circumstances of each premises liability case, to assume their responsiblity for fixing the limits of the landowner's duty to guard against particular risks and to determine whether there has been sufficient evidence of negligence. The tendency of some courts to abdicate this responsibility after repudiation of the status categories must be guarded against with diligence.

Id. at 63 (footnotes omitted).

After review of 80 cases decided in jurisdictions which had abandoned the status categories, Hawkins' ultimate conclusion was that in a majority of cases, the outcome would probably have been the same had the status rules been applied. *Id.* at 56.

[262] Fischer, *supra* note 55, at 961-64.

[263] 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979).

> oped that a degree of predictability is achieved.[264]

Even in the absence of per se duty rules, then, courts possess the tools to exercise litigation control in negligence cases. Standards are required, however, and a multifactor approach can inform courts of specific matters upon which they must focus in reaching the duty decision in each case. It is true that abrogation of per se no-duty rules will remove some certainty about the boundaries of the law. As a result, a greater amount of litigation will be commenced, necessitating the expenditure of more judicial resources as trial courts reach difficult duty determinations and appellate courts review these decisions. But an important goal of multifactor duty tests is to require the kind of decision-making that will result in the gradual setting of standards.[265] Experience has shown that careful use of those tests will have this precise result.[266] The choice is *not* between pre-fixed, inflexible standards and unfettered jury discretion.

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[264] Fischer, *supra* note 55, at 963-64. The test used in *J'Aire* actually differed slightly from that used in previous cases in that it made no mention of the cost and availability of insurance. 24 Cal. 3d at 804, 548 P.2d at 63, 157 Cal. Rptr. at 410.

[265] The multifactor test is in fact designed to promote the gradual evolution standards. Twerski's 10-factor test, aimed at what he called "high-level lawmaking," should have this effect. *See supra* notes 250-52 and accompanying text. And about the California criteria as utilized in J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 804, 548 P.2d 60, 63, 157 Cal. Rptr. 407, 410 (1979), Fischer writes:

> By using a six-factor test to determine the duty question as a matter of law, the court has taken responsibility for defining the scope of liability. Each trial judge must use the same factors to resolve individual cases. All decisions at the trial level are subject to review by intermediate appellate courts and ultimately by the state's highest court. While it is too early to tell how the factors will be applied, it is quite possible for courts to apply them consistently to a wide variety of cases. If this approach were taken, then over a period of years, the case law should become sufficiently developed so that a degree of predictability is achieved.

Fischer, *supra* note 55, at 963-64.

[266] *See* Hawkins, *supra* note 235. Fischer reviewed the later use of the duty factors developed for cases of negligent infliction of emotional harm in Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968), and concluded that they had been successful in evolving predictable guidelines. Fischer, *supra* note 55, at 942-48. (Fischer was, however, quite critical of the California court for its open-ended, largely standard-free analysis in Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (eliminating the physical harm requirement in actions for negligent infliction of emotional harm). Fischer, *supra* note 55, at 950-60.)

B. The Multifactor Duty Approach in Good Samaritan Cases

If the courts that abrogated other per se rules have succeeded in setting reasonable standards for jury submission, the same should be possible for good Samaritan cases. *Soldano v. O'Daniels*[267] provides an excellent example of the application of a multifactor duty analysis. The court's application of well-established standards permitted it to make a rational decision; the court considered the fairness of imposing a duty under the facts of the case, the substantive policy implications of such a decision (including the effects on the community of the imposition of a duty), and the administrative factor.[268] Summing up its duty analysis, the court stated that a decision that defendant owed a duty of care "would not involve difficulties in proof, overburden the courts or unduly hamper self-determination or enterprise."[269]

Both the methodology used by the *Soldano* court and its conclusion seem basically correct. The facts of the case did not clearly bring it within any recognized exception to the no-duty rule.[270] The facts do nonetheless spark a sense of outrage, particularly given the imminency of the peril and the fact that rendering aid (by allowing the person to use the telephone) would have been such a simple, risk-free matter. In this sense, the *Soldano* court's decision is quite limited. While opening the door to recovery for nonfeasance in the absence of a special relationship raises questions about the boundaries of the duty,[271] the common law process must work one case at a time. If the social consensus that gave rise to the no-duty rule has eroded, courts must possess the flexibility to find a duty when society would now demand it.[272] If

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[267] 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983); *see supra* notes 217-31 and accompanying text.

[268] 141 Cal. App. 3d at 456, 190 Cal. Rptr. at 316. The court called the administrative factor "simply the pragmatic concern of fashioning a workable rule and the impact of such a rule on the judicial machinery." *Id.*

[269] *Id.*

[270] *See supra* note 231.

[271] *See* Epstein, *supra* note 25, at 198-200. Since the *Soldano* decision, however, no reported California cases have sought to extend the limits of the good Samaritan rule in the same manner.

[272] Green wrote:

> The whole system of equity jurisdiction found its chief sustenance in the timidity of common law judges towards giving the reliefs which a growing society demanded. In turn when the chancellors had created their own scheme of things they became obsessed with a similar timidity, and equity then became as stale as law. The common law judges were afraid that they would be "flooded with litigation" and find themselves unable to prevent fraudulent use of the court's machinery . . . . Again and again some

courts know they can reach this conclusion only after they have considered both the social policy underlying the imposition of a duty and the effects of such a decision on the adjudicatory process, we should have little to fear in the breakdown of the per se rule.

The only troubling aspect of the California courts' multifactor duty test is that rather than being oriented to a particular kind of fact pattern (the good Samaritan problem, for example), its factors apply to all duty determinations in negligence cases. Trial courts would be better guided if the test contained factors specifically geared to the general problem raised by a certain class of case.[273] A multifactor test for determining the existence of a duty in failure to rescue cases should therefore take into account matters that might at times motivate courts to grant defendants' motions for directed verdicts. Such a test should also contain factors that go beyond the particular facts of each case, thus assuring that a directed verdict decision has an effect beyond the case and becomes a part of the gradual process of constructing standards to guide future conduct.[274] Because it has proved helpful for promoting the creation of standards, however, the California duty test is a good place to start in constructing a set of criteria for failure to rescue cases. The proposed test will also take into account certain factors that others have identified as posing roadblocks to the imposition of a duty in these cases.

The following factors should be considered by trial courts in determining the appropriateness of imposing a duty of care in a failure to rescue case:[275]

(1) the foreseeability of harm to the victim should defendant

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> of our greatest judges have shown a hostility towards new methods of giving the law's protection, even after their utility has been demonstrated beyond a peradventure by other courts, which can be explained only on the theory that an institution like a court, as well as the individual human mind, may reach a stage in its development when it closes its books and lives alone on its accumulated wealth.

Duty Problem I, *supra* note 21, at 1038-40.

[273] Recall that Twerski's 10-factor test focused specifically on the issues in design defect cases. Those factors, moreover, reflected concerns that had motivated previous courts in reaching directed verdicts in that type of case. *See supra* note 247 and accompanying text.

[274] Designing the test in this manner would promote what Twerski has called "high-level lawmaking." *See supra* note 248 and accompanying text.

[275] The list is not necessarily exhaustive. The California test by its terms recognizes this when it provides that the "major" factors to be considered are those enumerated. Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

> choose not to attempt a rescue;
>
> (2) the closeness of the causal link between defendant's failure to rescue and the victim's injury;
>
> (3) the ease with which defendant could have accomplished a rescue, and the cost to defendant of doing so;
>
> (4) the identifiability of defendant (as opposed to a possibly large group) as a potential rescuer;
>
> (5) the moral blameworthiness of defendant under the circumstances of the case;
>
> (6) the similarity of the facts of the case to those which invoke a traditionally recognized exception;
>
> (7) the degree to which imposing a duty in this case will further the social policy of preventing future harm; and
>
> (8) the consequences to the community of imposing a duty in this case.[276]

A brief description of the content of each of the factors will demonstrate its usefulness in the good Samaritan context.

Foreseeability of harm. One of the primary factors that courts apply in all negligence cases when determining the duty question is the degree to which one in the defendant's position should have foreseen that her actions would create a risk of harm to one in the plaintiff's position.[277] In the context of failure to rescue, the court should focus primarily on the imminence of the victim's harm, the degree of harm which could reasonably be foreseen by the defendant, and the degree to which one in the defendant's position should foresee that her failure to rescue would assure that the harm would come about.

Closeness of causal link. As will be discussed,[278] one of the most troubling aspects of cases in which a duty might be imposed for the failure to act is demonstrating that the inaction was a cause in fact of

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[276] Two of the California criteria are not included in the proposed test: (1) the certainty that the plaintiff suffered injury (in rescue cases, plaintiff's injury will be clear); and (2) the availability, cost, and prevalence of insurance to cover this kind of risk (even in different kinds of rescue cases, it is likely that the same types of insurance — life and health — would likely have been available to the victims, thus making consideration of the factor in different rescue cases unnecessary).

[277] "Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968); *see also* Nelson by Tatum v. Commonwealth Edison Co., 124 Ill. App. 3d 655, 661, 465 N.E.2d 513, 519 (1984).

[278] *See infra* notes 296-302 and accompanying text.

the harm that later occurred. Although this issue will normally be decided by the jury as a question of fact, the court should first examine the case to determine whether the causal connection is so weak that it would be inappropriate from a policy standpoint to impose a duty.

Ease of rescue. Some writers have suggested that the duty only be imposed when the rescue could be accomplished with little or no burden upon the rescuer.[279] This factor, motivated both by a concern over the infringement upon the rescuer's individual freedom and over the administrability of a rescue duty, should be part of the multifactor test. In considering the ease of rescue question, the court should review the steps that one in defendant's position would have thought necessary in order to accomplish the rescue, the time required to do the job, the extent to which defendant would be exposed to risk by attempting the rescue, and other similar factors.

To the extent that the court engages in a risk-utility analysis in determining the appropriateness of imposing a duty under the circumstances of the case, it is under this factor that the analysis would most naturally occur. Though the balance would be quite fact-specific, one can assume that appellate review of directed verdict decisions in which the ease of rescue factor played an important role would lead to the development of standards for future cases. Like the other factors in the duty analysis, however, this element should not be accorded per se status. While a court in a particular case might justifiably direct a verdict on the basis of the ease of rescue factor, that particular decision should be fact-specific rather than an announcement that trial courts should always direct verdicts when the rescue could not have been accomplished easily, or without any cost to the rescuer.

Identifiability of defendant. Another issue that writers have identified as a roadblock to the imposition of a duty in failure to rescue cases

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[279] An argument in favor of the "easy rescue" forms the core of the analysis in Weinrib, *supra* note 115. At the turn of the century, Ames suggested the following rule, embodying the concept of a risk-free or low-risk rescue:

> One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death.

Ames, *supra* note 25, at 113; *see also* J. BENTHAM, *supra* note 117, at 292-93; M. SHAPO, *supra* note 117, at xii, 64-68; Franklin, *supra* note 117, at 51; Rudolph, *supra* note 117, at 499, 509. Some Continental countries impose a duty to rescue in situations in which the rescuer would incur little or no risk. *See* Rudzinski, *supra* note 121. The ease of rescue was also considered in *Soldano*. *See supra* note 221 and accompanying text.

is the ability to identify one person or a very limited group of people as potential rescuers, as distinguished from a more amorphous group.[280] This issue, motivated by concerns similar to those involved in the "easy rescue" problem,[281] could also be addressed in the multifactor test. Generally speaking, the larger the group of potential rescuers situated similarly to defendant, the less likely it is that the court will impose a duty of care.

Moral blameworthiness of defendant. The ease of rescue and identifiability factors already require the court to consider issues that implicitly test the degree to which society will consider defendant's failure to act morally blameworthy. The court should also look at other factors that might affect the question of defendant's moral position. If, for example, defendant and victim bear some relation to each other, but not one that has been recognized as a "special relationship," the court might find that failure to act is more blameworthy than in a situation in which no prior relation existed between the two parties.

Similarity to facts invoking a recognized exception. When the facts of a case bring it nearly within a recognized exception to the good Samaritan rule, it is more likely that society would wish that a duty be imposed. Also, litigants would be familiar with the kinds of arguments that the court would consider persuasive, and the court could effectively adjudicate the case. This was the situation in *Soldano v. O'Daniels*,[282] in which the court held that the facts of the case brought it "very nearly within" an exception providing that one who is aware that a third person is ready to aid a victim may be liable for negligently interfering with the rescue.[283] Another situation in which a court might favor imposing a duty is one in which the parties bear some close relationship, but courts have not yet declared that relationship to be a "special relationship" for purposes of the good Samaritan rule.

Preventing future harm. Some courts consider the prevention or

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[280] *See* Hale, *supra* note 116, at 214-15. This concern is echoed in Epstein, *supra* note 25, at 198-99, in which he poses the hypothetical of one who refuses to donate $10 in order to save the life of a starving child in a war-torn country. In that situation, defendant is only one of a very large group of people who could conceivably rescue the child. (Also, of course, the child in peril is part of a group, and not specifically identified.) Under the proposed multifactor test, imposition of a duty in this case would not be justified.

[281] Identification of a proper nonrescuer defendant is perhaps an even more difficult administrative/adjudicative problem than the question of "easy" rescue. Difficulties in locating potential defendants and in bringing them into the action could easily arise.

[282] 141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983).

[283] *Id.* at 452-53, 190 Cal. Rptr. at 317.

minimization of future harm an important goal of tort law. In *Tarasoff v. Regents of University of California*,[284] the California Supreme Court weighed this policy against the need for confidentiality in the psychotherapist-patient relationship, and held that the need for confidentiality "must yield to the extent to which disclosure is essential to avert danger to others."[285] In some failure to rescue cases, judicial determination that a duty of care existed will more effectively encourage future rescue efforts than in other cases. In cases in which the effect might be greater, this factor should weigh in favor of imposing a duty.[286]

Consequences to the community of imposing a duty. While the *Soldano* court equated this factor in the California duty test with Green's "administrative" factor,[287] two issues actually fall under this heading: (1) the effects a finding of duty would have on people's actions; and (2) the effects a finding of duty would have on the processes of the court itself (and the litigants presenting cases to the court).

Considering first the effect of a duty rule on the future actions of individuals in society, the court should inquire whether the rule satisfies what Henderson has termed "process constraints."[288] Specifically, the court should inquire whether a duty rule is (1) *comprehensible* (whether it accurately notifies people of the conduct subject to the rule);[289] (2) *verifiable* (whether it is capable of objective verification by the people whose conduct is being regulated — whether people can determine, by reference to observable facts, that the rule requires them to act);[290] and (3) *conformable* (whether people will be capable of following the rule).[291] By focusing on these issues, the court should be able to make a reasonable judgment about the effects which a finding of a duty of care would have upon actors in society.

The second issue to be addressed under this factor is the effect on the litigants and the court itself of determining that a duty of care existed. Here, reference can be made both to Green's "administrative" factor and to what Henderson has called the process constraint of "managea-

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[284] 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[285] *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

[286] It should be mentioned, however, that the extent to which future behavior is actually affected by liability rules in general (and imposition of a duty to rescue in particular), is a difficult question. *See infra* note 305.

[287] *See supra* note 229 and accompanying text.

[288] For a full discussion of this concept, see *Process Constraints*, *supra* note 13.

[289] *Id.* at 911-13.

[290] *Id.* at 913-14.

[291] *Id.* at 914-15.

bility."[292] Taken together, these concepts require the court to examine the adjudicability of the case should a duty of care be found. The court should examine whether the litigants will be able to address effectively the issues for decision, and whether the court will be able adquately to control the litigation process in this and future cases. To a great extent, the matters considered here will overlap with those examined under the other headings. Nevertheless, after reviewing the other factors, the court should consider this factor explicitly.

The court's consideration of each of the factors discussed above will not be accomplished in isolation from the parties. By making explicit the factors that go into the duty decision, courts will invite the litigants to assist it in making that decision. Since the duty question will likely be addressed in connection with a motion to dismiss, a motion for summary judgment, or a motion for directed verdict,[293] it can be expected that the parties will provide both written and oral argument for the consideration of the court.

With the passage of time and judicial consideration of numerous cases, courts will fine-tune the multifactor test. They may incorporate other factors into the test. It may become apparent that some of the factors should generally be given greater weight than others. The key is that over time, the limits of the duty will become clearer. Potential plaintiffs will have a better idea of whether it would be wise to institute suit, and trial courts will be better informed about whether particular cases can appropriately be submitted to the jury. All of this, moreover, will have occurred within the time-honored common law process, allowing the courts to account for changing social values and the peculiarities of the facts of each case. A decision quoted near the close of *Soldano* stated this proposition well:

> The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country. . . .
>
> In short, as the United States Supreme Court has aptly said, "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." . . . . But that vitality can flourish only so long as the courts remain alert to their obligation and opportunity to change the common law when reason and equity demand it.[294]

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[292] *Id.* at 916-17.

[293] *See supra* notes 76-80 and accompanying text.

[294] Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 394, 525 P.2d 669, 676,

C. Providing Further Protection for the Adjudicatory Process: Increasing the Burden on Plaintiffs

Diligent use of a multifactor test to determine whether to impose a duty of care can serve as an effective device to control both the litigation process and, once the test has been in use for a time, the initiation of litigation. However, the movement toward broader liability rules in tort cases does carry with it greater potential for the dissolution of standards than do the per se rules that this movement replaces. Moreover, despite the erosion of the good Samaritan rule, there is still some force behind the view that it is more improperly coercive for the law to demand the taking of action than it is to demand care when one chooses to act. Perhaps, therefore, potential defendants in this type of case are entitled to greater protection from the initiation of litigation or the finding of liability should an action be filed. One way to provide such protection is to erect an additional barrier that plaintiff must overcome before she can succeed. This can be done by increasing the burden of proof that plaintiff must bear with regard to certain factual matters.[295]

One of the most troublesome proof problems in cases of failure to rescue is the establishment of a causal link between the defendant's inaction and the subsequent harm that the plaintiff suffered. In essence, plaintiff will have to prove what would have happened had the defendant taken reasonable rescue action. Generally this will be much more difficult than the establishment of a causal link between actions one has actually taken and subsequent harm. Even relatively simple failure to rescue situations can raise complex causal problems.[296]

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115 Cal. Rptr. 765, 772 (1974), *quoted at* 141 Cal. App. 3d at 454-55, 190 Cal. Rptr. at 317 (citations omitted).

[295] This possibility was briefly suggested in Fischer, *supra* note 55, at 995.

[296] Suppose, for example, that a person is drowning in a lake near a pier. Defendant, who is fishing on the pier, fails to throw an available line to the person and she drowns a few minutes later. According to common law negligence principles, plaintiff will have to prove that defendant's failure to render assistance was a "substantial factor" in bringing about the decedent's death. RESTATEMENT (SECOND) OF TORTS 431 (1965). While "substantial factor" is difficult to define, the Restatement suggests a number of considerations that might go into such a decision, among which are the number of other factors contributing to the harm, the extent of the effect each has in producing it, and the lapse of time. *Id.* at 433. In the hypothetical case (as in all cases of inaction), this determination will be extremely difficult to make. Many questions come to mind: Was it already too late to save the deceased? If there was still time to save the deceased, could defendant have thrown the rope near enough to the deceased for her to grab it? Would she in fact have been able to grab the rope? If the deceased could have grabbed the rope, would defendant have been able to pull her to safety?

The causal problems of this hypothetical are reminiscent of those involved in New

In failure to rescue cases, however, juries might not always be sufficiently attentive to the causation issue. Particularly when defendant's failure to render assistance is especially callous, one might expect the jury to pay little attention to the causation question and simply assume that had defendant acted, the victim would have been saved.[297] Motivated by a desire to compensate an innocent victim when defendant has demonstrated such callousness, the jury may well find for the plaintiff unless its attention is specifically drawn to the causation issue. But because causation is a central element of the negligence action, extra precautions might be appropriate to force the jury to consider this question in types of cases in which jurors might otherwise be inattentive to the issue.

Increasing plaintiff's burden to prove causation will help to accomplish this. One method would be to require plaintiff to prove by *clear and convincing evidence* instead of merely by a preponderance of evidence that defendant's action was a substantial factor in plaintiff's loss. The court would then instruct the jury as to this increased burden and would draw the jury's attention to the question.[298] Another way to ac-

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York Central R.R. v. Grimstad, 264 F. 334 (2d Cir. 1920), in which decedent barge operator drowned after falling into the water. Plaintiff alleged that the barge owner was liable for equipping the barge with proper life saving appliances. *See also* Kirincich v. Standard Dredging Co., 112 F.2d 163 (3d Cir. 1940). Each of the questions raised requires speculation, and though it is generally held that plaintiff need not negative all inferences of no causation in order to satisfy this element of the negligence cause of action, *see* Stimpson v. Wellington Serv. Corp., 355 Mass. 685, 691, 246 N.E.2d 801, 806 (1969), these unanswered questions will make proof of causation difficult.

[297] It is even possible that in especially egregious cases, some jurors might consciously disregard the requirements of the prima facie case and find for the plaintiff purely in order to punish the defendant and compensate the plaintiff. This, however, may be an intractable problem with which courts will have to deal as long as society wishes to retain the jury in tort actions. And abrogating the jury trial in those cases because of a fear of an unmeasured amount of lawlessness would be a serious overreaction. If jurors present even a rough reflection of society's changing views, the jury system is needed in order to provide courts and legislatures with vital information about the desirability of law reform. If juries more often compensate plaintiffs at the expense of nonrescuers, for example, judges can make appropriate adjustments in the duty analysis (whether it be to expand or contract the jury's role), and legislators can determine the need for statutory reform.

[298] In negligence cases, as in most other civil matters, the standard of proof is a "preponderance of the evidence." MCCORMICK ON EVIDENCE § 339, at 956 (W. Cleary ed. 1984). As to the meaning of the term:

> Certainly the phrase does not mean simple volume of evidence or number of witnesses. One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence. . . .

complish this is to create a "presumption" of lack of causation. The term "presumption" has been the source of enormous confusion in the courts,[299] however, and it has recently been argued with much force that a true purpose of presumptions is, in any event, to allocate burdens of persuasion and production.[300] Thus, a cleaner and more comprehensible manner in which to accomplish the task of drawing the jury's attention to the causation question is to increase the burden on the plaintiff. Negligence law provides precedent for adjusting burdens of persuasion.[301]

> The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.

Id. at 957 (footnotes omitted).

The standard of "clear and convincing evidence," or a variant of that term, is also well known in the law. Among the kinds of actions in which this standard is sometimes applied are actions for fraud and undue influence, suits on oral contracts to make a will, suits to establish the terms of a lost will, and suits for the specific performance of oral contracts. *Id.* § 340. This standard is perhaps somewhat more difficult to define than the preponderance standard, but it has been suggested that the jury simply be told that in order to find that the standard has been satisfied, it must be "persuaded that the truth of the contention is 'highly probable.' " *Id.* at 959-60 (quoting McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246, 253-54 (1944)).

[299] TePoel v. Larson, 236 Minn. 482, 485, 53 N.W.2d 468, 470 (1952); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 351 (1898); Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 843-44 (1981); Ladd, *Presumptions in Civil Actions*, 1977 ARIZ. ST. L.J. 275, 275.

[300] "In all of its various manifestations, a presumption is simply a label applied to a choice concerning the evidentiary relationships of the parties that is reached for policy reasons having nothing to do with any independent meaning of the word 'presumption.' " Allen, *supra* note 299, at 862; *see also* Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 332-38 (1980).

[301] *See, e.g.*, Summers v. Tice, 33 Cal. 2d 80, 85, 199 P.2d 1, 4 (1948) (involving two negligent hunters either one of whom could have fired the shot which struck the plaintiff; the court shifted the burden of persuasion on the causation issue to defendants); *see also* Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), also involving the burden of persuasion on the causation issue. Since plaintiff already bears the burden of proof on causation in the normal negligence case, a shift of burden in the good Samaritan situation would obviously be inappropriate to accomplish the purpose being discussed. However, making plaintiff's burden somewhat heavier will serve the intended purpose.

Another example of an adjustment of burdens of proof is provided by Tuttle v. Raymond, Law Docket No. AND-84-79 (Maine 1985). In that case, the Maine Supreme Judicial Court held that in order to recover punitive damages, plaintiff must now prove the foundational facts of actual or implied malice by clear and convincing evidence. This decision is expected severely to reduce the number of cases in which plaintiffs will

Increasing plaintiff's burden of persuasion on the causation issue to clear and convincing evidence should also give the court more control over jury discretion. I have already argued that one of the factors that the trial court should consider when determining the duty question is the closeness of the connection between the defendant's failure to act and the plaintiff's harm.[302] Increasing plaintiff's burden of proof on this issue will result in more directed verdicts for defendants. It will be considerably easier for a court to hold that no reasonable jury could find that plaintiff has shown by clear and convincing evidence that defendant's lack of action was a substantial factor in his harm than it would be if the standard were merely a preponderance of the evidence. The result will be that fewer cases will go to the jury.

The increased burden would also serve as a device to control the initiation of litigation, one of the most difficult issues to be confronted whenever a new area of potential liability is opened. Potential litigants will likely initiate fewer actions if they know that in addition to the quantum of proof they must offer in any negligence action, these cases require especially convincing evidence of a causal link between defendant's failure to act and the harm that occurred. This, together with the litigation control that should result from the use of a multifactor test and the gradual development of clearer standards, should help to deter the filing of some actions.

In sum, should courts believe that abrogation of the per se good Samaritan rule would lead to a flood of litigation or the inability to determine which cases should be submitted to the jury (even in the presence of carefully crafted and employed multifactor duty tests), the common law adjudication system can gain additional protection by increasing plaintiff's burden of proof on the causation issue.

CONCLUSION

Society can encourage rescue attempts in a number of ways. One is to provide monetary and other rewards to those who attempt rescues. A second method, which has been attempted by every state in one form or another, is at least partially to immunize rescuers from potential liability for failed rescue attempts.[303] A third way is to punish those who refuse to act under circumstances in which society believes action should have been taken; a few states have recently enacted criminal

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be able to recover punitive damages. Nat'l L. J., Aug. 5, 1985, at 3, col. 1.

[302] *See supra* note 278 and accompanying text.

[303] *See supra* note 141 and accompanying text.

statutes requiring action.[304] Another way to accomplish this is to create a civil duty to rescue.

Although the common law has long resisted adopting this last method of encouraging rescue efforts, the values that stood in the way of imposing a duty to rescue have eroded, and the no-duty rule now has a substantial number of exceptions. Nevertheless, some situations do not fall even within the expanding exceptions. In those cases, plaintiff faces the insurmountable barrier of a per se no-duty rule preventing recovery. Per se rules effectively serve the important value of promoting predictability, essentially meaning that they provide control over the commencement of litigation and (once actions have been filed) the discretion of juries. But they do so at the price of refusing compensation to some innocent victims whom society feels deserve to recover, and at the price of not creating the additional incentive to rescue that would exist if liability for failure to act were a possibility.[305]

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[304] Vermont was the first state to enact such legislation. VT. STAT. ANN. tit. 12, § 519(a) (1973) provides, in relevant part:

> 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.

A violation of the statute carries a fine of not more than $100. *Id.* at § 519(c); *see* Franklin, *supra* note 117; Note, *supra* note 141, at 328. More recently, Minnesota enacted similar legislation:

> Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to himself or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this section is guilty of a petty misdemeanor.

MINN. STAT. ANN. § 604.05(1) (West Supp. 1985). It has been reported that Pennsylvania is considering similar legislation. *Who Saw This Happen?* 69 A.B.A. J. 1208, 1209 (1983).

Other states have enacted statutes imposing a much more limited duty upon those who have been involved in motor vehicle accidents. *See, e.g.*, CAL. VEH. CODE § 20003 (West Supp. 1984); N.Y. VEH. & TRAF. LAW § 600(2.a) (McKinney Supp. 1983); N.C. GEN. STAT. § 20-166(b) (1983). *See* Note, *Good Samaritan Laws—The Legal Placebo: A Current Analysis*, 17 AKRON L. REV. 303, 328-29 (1983).

[305] One question beyond the scope of this Article is the degree to which liability rules in fact affect behavior, particularly in the kinds of emergency situations that call for rescue action. Some psychologists who have studied behavior in emergency situations believe that such behavior is not significantly affected by moral norms. B. LATANÉ & J. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP?

In this Article, I have attempted to demonstrate that our choices are not limited to the extremes of inflexible per se rules on the one hand, and litigation without standards on the other. Rather, by careful employment of a multifactor duty analysis (aided, perhaps, by a heightened burden on the plaintiff), courts can effectively serve all values of the tort system. Deserving victims can be compensated, people in general can be encouraged to act in a humanitarian manner, and the adjudicatory process can be preserved. Of course, the solution proposed here places great faith in the abilities of lawyers and judges,[306] but the common law system has relied on lawyers and judges for centuries, and there are no strong indications that the law has reached a point at which this trust can no longer be justified. Our negligence-based system can survive through this century, and probably a good deal longer.

(1970); Darley & Latané, *Norms and Normative Behavior: Field Studies of Social Interdependence*, in ALTRUISM AND HELPING BEHAVIOR 83 (Macaulay & Berkowitz eds. 1970). Another author has spoken of the psychological effects of witnessing an event such as an attack on another person or a serious highway accident, attempting to explain the inaction of many witnesses. Freedman, *No Response to the Cry for Help*, in THE GOOD SAMARITAN AND THE LAW 171 (J. Ratcliffe ed. 1967).

Aware of the possibility that people often tend to be unresponsive in these kinds of situations, one author recently wrote that a legal duty to rescue might nevertheless help to induce action:

> The psychological conflict produced in an emergency situation, which often leads to inaction, could be partially resolved by an awareness of a legal duty to rescue. The added impetus of a legal duty with immediate and direct sanctions could tip the balance of costs and rewards enough to induce an attempted rescue in many cases.

Note, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 UTAH L. REV. 529, 542-45.

Interestingly, courts at times assume that the rescue of others in peril is a natural human reaction. In Wagner v. International Ry. Co., 232 N.Y. 176, 176, 133 N.E. 437, 437 (1921), for example, Judge Cardozo held that an attempt to rescue was a foreseeable event, writing that "[d]anger invites rescue. The cry of distress is the summons to relief." And in workers' compensation cases, courts often assume that an injury incurred while aiding another in peril has "arisen out of and in the course of employment" because of the "natural" tendency to rescue. *See, e.g.*, Checker Taxi Co. v. Industries Comm'n, 33 Ill. 2d 264, 267, 211 N.E.2d 273, 275 (1965); Edwards v. Louisiana Forestry Comm'n, 221 La. 818, 831-32, 60 So.2d 449, 454 (1952).

[306] *See* Hawkins, *supra* note 235, at 63.