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"The Good Samaritan Is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire to Possess Concealed Weapons

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Cover Page Footnote

The author expresses deepest gratitude to his colleagues and their assistance in the preparation of the piece. Special thanks go to Michael Shwartz, Todd Brower, Sean Biggs, and his research assistant, Diane Jacobs.

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"THE GOOD SAMARITAN IS PACKING": AN OVERVIEW OF THE BROADENED DUTY TO AID YOUR FELLOWMAN, WITH THE MODERN DESIRE TO POSSESS CONCEALED WEAPONS

David C. Biggs[*]

I. INTRODUCTION

In the natural world, two seemingly benevolent forces can combine to create something dangerous. For example, neither a shallow river, nor gently sloping terrain, seems dangerous by itself, but the two combined may produce dangerous white water. At other times, the circumstances in which forces are combined determines whether the resultant mix will be useful, dangerous, or simply unpredictable. Nitroglycerine is composed of glycerine, harmless by itself, and nitric acid.[1] When ignited in the open air, this compound burns quietly, but when compressed it reacts with explosive force. When used in heart medication, nitroglycerine can save lives, but when used as an explosive, it can kill.

This article examines what happens when two social forces interact. One force, which almost all would agree is benign, is the movement by states to impose an affirmative duty to aid those who are victims of natural disasters or violent crimes through the enactment of so-called "Good Samaritan statutes." The second force is the seemingly unrelated trend to make it easier for ordinary citizens to qualify to carry concealed weapons. When these two forces are combined in the highly pressurized atmosphere of modern urban society, the result is at a minimum unpredictable, and quite possibly explosive.

Both of these legal trends arise from notions about how to make our society a safer and better place to live; both attempt to enhance personal security. Good Samaritan statutes mandate the social ideal that those able to help us cope with a difficult situation will do so. Concealed weapon statutes, by contrast, claim to enable the individual to help himself cope with dangerous situations. Since the two statues in conjunction give one increased legal ability to help oneself, combined with increased incentive for others to provide

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1. Nitroglycerin is "a heavy oily explosive poisonous liquid compound $C_3H_5(ONO_2)_3$ that is almost colorless when pure and has a sweet taste, that is obtained by nitrating glycerol, that burns quietly in the open air but explodes on heating in a closed vessel or [especially] on percussion with the formation of about 10,000 times its own volume of gas, and that is used chiefly in making dynamites and propellant explosives (a blasting gelatin) and in medicine as a vasodilator (as in angina pectoris)—called also *glyceryl trinitrate*." WEBSTER'S THIRD NEW INT'L DICTIONARY 1531 (1976).

assistance, the result of combining the two approaches would seem to be a significant increase in personal safety. In reality, however, combining these two legal trends, rather than increasing personal security, will have a destabilizing effect on society.

This article first addresses the historical perspective of these two forces: How did they arise? What do the statutes say,[2] and what are their perceived limitations?[3] The article then examines how Good Samaritan statutes actually work in practice,[4] and considers how the presence of concealed weapons affects the statutory analysis.[5] Several hypothetical factual situations will illustrate different possibilities.[6] Finally, the article will analyze what the author considers the best approach to handle the moral and social dilemmas that brought these two forces together, concluding that it is best for society to harness only one of these forces at a time.[7]

II. BACKGROUND

A. Good Samaritan Statutes

The broadening of the duty to aid injured or imperiled persons absent any special relationship or special responsibility is an area of increasing interest to legislatures reacting to social and political forces.

Generally speaking, however, as LaFave and Scott explain in their criminal treatise:

> One has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself. He need not shout a warning to a blind man headed for a precipice or to an absent-minded one walking into a gunpowder room with a lighted candle in hand. He need not pull a neighbor's baby out of a pool of water . . . though the baby is drowning. . . . A moral duty to take affirmative actions is not enough to impose a legal duty to do so.[8]

Technically speaking, the statement cited above is accurate, although in reality it is not. Criminal law is filled with obligations ascribing legal duties to all of us based upon the consensus of our elected officials as to what they believe is morally appropriate.[9] It is true, however, that one's moral obligations span a larger area of human conduct than do those that we, as a society, have

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2. *See infra* notes 8-79 and accompanying text.
3. *See infra* notes 8-79 and accompanying text.
4. *See infra* notes 80-138 and accompanying text.
5. *See infra* notes 139-70 and accompanying text.
6. *See infra* notes 171-211 and accompanying text.
7. *See infra* notes 212-22 and accompanying text.
8. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 203 (2d ed. 1986).
9. This point is expressed in the Model Penal Code § 2.01(3) which provides that liability may be based upon an omission where a duty of performance is "imposed by law." This is stated in varying ways as "required by law" or a violation of a "legal duty."

imposed as a criminal legal duty.[10]

1. When a Duty to Aid Arises

There are seven major avenues the courts have utilized to impose a criminal duty to act. These methods of ascribing criminal culpability for failure to aid have been cataloged by several commentators but bear repeating here.[11]

A duty to act based upon the relationship of the parties: This is the most common area of criminal imposition of a duty to aid another. This obligation arises from what society sees as a special and more complex relationship between the parties. This special relationship of the parties justifies the added burden of forcing action or penalizing inaction. Examples involve parents who have a legal duty to aid their children,[12] adult children who have a duty to aid their aging parents,[13] spouses who have a duty to care for each other,[14] and a ship's captain who has a duty to assist those under his care.[15]

A duty to act based upon contract: Sometimes the duty to act and the criminal responsibility imposed for failure to act are based upon contract. A security person hired to protect another cannot fail to perform the duties he contracted to complete. If his failure to act causes physical harm to another, the individual with the duty will be held criminally liable.[16]

A duty based upon a voluntary assumption of care: Sometimes, one comes to the aid of another in a "half-hearted" or ineffective way. In such situations, even if the helper initially had no duty to come to the aid of the victim, her act of voluntarily undertaking assistance may create a duty to continue to aid the victim until the victim is safe. For example, a person sees

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10. The New Hampshire Supreme Court stated:

> With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved.

Buck v. Amory Mfg. Co., 44 A. 809, 810 (1898).

11. *See* LAFAVE & SCOTT, *supra* note 8, at 203-07.

12. *E.g.* CAL. PENAL CODE §§ 270, 273(a) (West 1988 & Supp. 1997), § 11165.2 (1992). In these sections it is made clear that any parent that "willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child" can be guilty of either a misdemeanor or felony. § 270. It is a "wobbler" under California Law. Such laws are found in all of the states at this writing in some form or another.

13. *See, e.g.*, CAL. PENAL CODE § 270c (West 1988 & Supp. 1997) (providing that an adult child, "having the ability so to do, fails to provide necessary food, clothing, shelter, or medical attendance for an indigent parent, is guilty of a misdemeanor"). This obligation does not extend to non-relatives. *E.g.*, People v. Heitzman, 886 P.2d 1229 (Cal. 1994).

14. *E.g.*, Commonwealth v. Konz, 450 A.2d 638, 641-42 (Pa.1982); State v. Mally, 366 P.2d 868, 871-72 (Mont. 1961).

15. *E.g.*, United States v. Knowles, 26 F. Cas. 800, 802 (N.D. Cal. 1864).

16. *E.g.*, People v. Montecino, 152 P.2d 5, 13 (Cal. App. 1944) (stating that in a private home-care situation, the nurse hired cannot fail to render aid to one she has contracted to assist, and if she does fail to act appropriately, she will be liable for any consequence). Although most cases of this sort revolve around the duty of care owed to the contracting parties, it may extent beyond those parties to those that have not been involved in the contract formation. *See, e.g.*, State v. O'Brien, 32 N.J.L. 169, 172 (1867) (finding a railroad switchman's obligation as an employee extended to cover the "public").

an accident on the roadway and stops to render aid. While this initial volunteer is attempting to help the victim, several other motorists stop to see if "there is anything they can do." The initial volunteer tells the other would-be assistants that they can leave because the situation is under control. The other potential helpers leave. The initial volunteer then realizes she is late for an appointment and simply leaves. Criminal liability has been imposed on persons who, like the initial volunteer in the example, take on the responsibility to assist another but fail to do everything necessary to assist the victim.[17]

A duty may arise from the fact that the person created the risk from which the need for protection arose: The most obvious example of this type of legal responsibility is when the person engages in a physical altercation with another, rendering that person incapable of taking care of himself. When the person still standing simply leaves the scene without rendering assistance, criminal liability for the outcome may result.[18] In these circumstances, one can be held criminally liable for the consequence of not assisting the victim.[19]

A duty can arise from a special relationship that makes the non-acting partner criminally responsible for the actor's criminal action: The most often used example of this legal duty is where a parent is held criminally liable for the criminal conduct of a child when the parent fails to "control" the minor child.[20]

A duty can arise from the fact that one owns the real property upon which the victim is injured: A bar owner, for example, may be held criminally liable when his patrons die or suffer injury.[21]

The duty to act and the resulting criminal liability for failing to act, based upon statute: This duty to act is based upon a statute requiring such action rather than any special relationship between the victim and the assisting party. The legislature may, with some constitutional limitations,[22] impose the legal

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17. *See, e.g.*, Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962) (stating that a person who "volunteers" to take care of children for a time must render aid to those children or suffer criminally for failure to do so). *See also* People v. Beardsley, 113 N.W. 1128, 1129 (Mich. 1907) (stating the Defendant was drinking with victim and observed the victim taking morphine tablets).

18. Barry Siegel, *Just Beyond the Reach of the Law*, LOS ANGELES TIMES, Aug. 20, 1996, at A1. In this article two men who had involved themselves in a fight with the victim left the victim in a drainage ditch and went home. *Id.* Both defendants told others what they had done and several people went to the ditch and observed the victim sitting on the bank in an upright position. *Id.* Later, at an autopsy, it was learned that the victim had suffered a brain injury during the fight and later died from falling over in 2 inches of water at the bottom of the ditch and drowning. *Id.*

19. *E.g.*, People v. Fowler, 174 P. 892 (Cal. 1918) (finding that the defendant assaulted the victim and left him lying in a position where he was later run over by a car and was held to be responsible for murder of the victim so abandoned); Jones v. State, 43 N.E.2d 1017 (Ind. 1942) (finding defendant guilty of murder where he did nothing to help rescue the victim he had raped when the victim fell into a river and drowned).

20. *See, e.g.*, CAL. PENAL CODE § 490.5 (West Supp. 1997) (stating parents may be liable to a merchant from which the unemancipated minor steals merchandise).

21. Commonwealth v. Welansky, 55 N.E.2d 902 (Mass. 1944) (convicting a bar owner of manslaughter when he had ordered the bar's fire exits locked and the bar burned to the ground causing several people to die because someone else mishandled a light source inside the bar).

22. We will later talk about these limitation but they are similar to all legislative enactments. The law must be clear, concise, not too broad, give clear notice of the omissions that are proscribed, and be within

duty to come to the aid of others to whom the assisting party has no obvious connection or obligation.[23]

This article analyzes the attempt to make us all "our brother's keeper" through a statutorily imposed duty to aid. More specifically, if we have no legal duty based upon any familial, contractual, consensual or proprietary obligation, should we have an obligation based upon a moral imperative to come to the aid of another?[24] If we are not predisposed to become a Good Samaritan, these statutes impose upon us that duty, or criminally sanction us for not acting. Must the legislature, functioning as a general keeper of the moral flame of our society, enact such a duty to aid? An affirmative answer has been voiced several times by the families of victims left unaided by their fellow citizens.[25]

This expansion of a legal duty to aid by legislative enactment is not as odd a result as one might expect. In several European countries, the duty to render aid to anyone in need has, with certain expressed limitations, been around for many years.[26] In recent years, several states have begun to recognize this universal ideal through legislation that imposes a duty upon everyone to come to the aid of anyone in need, again, with some significant limitations.[27]

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the power of the legislature to legislate in that area. As an example, a story ran which indicated that the United States Congress attempted to legislate a rape victim's right to sue for money damages under the civil rights act; and a federal district court in Virginia ruled that Congress had no such power to so legislate. David Reed, *Violence Against Women Act Rejected*, ORANGE COUNTY REG., July 30, 1996, at A3.

23. *See, e.g.*, VT. STAT. ANN. tit. 12, § 519 (1973). The Vermont statute provides the following:

> (a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
>
> (b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.
>
> (c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

Id.

24. *See* Siegel, *supra* note 18, at A1.

25. *Id.* at A1 ("Maybe people can be held accountable . . . . Maybe we can send a small message that certain conduct isn't just morally wrong, but illegal. Maybe we can chip away at the notion that you can just turn your back on others. Maybe we can use the law to shape the cultural outlook.").

26. Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 59 n.56 (1972) (including the European countries of Czechoslovakia, Denmark, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Rumania, Russia, and Turkey).

27. On August 1, 1983, Minnesota passed and imposed a law that makes it a crime not to come to the aid of anyone who needs it if the assistance can be provided without jeopardizing oneself or others. MINN. STAT. ANN. § 604.05 (West Supp. 1983), *repealed by* Laws 1994, ch. 623, art. 5, § 3 (West 1996). Vermont has such a law as well. *See supra* note 23. Similar Wisconsin legislation provides:

> (2)(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.
>
> . . . .

2. State Approaches

Daniel B. Yeager has outlined the states that have enacted one of the three types of expanded duty to aid criminal statutes.[28] The three basic categories of statutes are as follow.

Duty to aid statutes that cover both "Acts of God" and Acts of criminal agents: Rhode Island,[29] Vermont[30] and Wisconsin [31] have enacted expansive statutes dealing with the duty to aid a stranger.

Duty to report a felony in progress and a victim in need: In these jurisdictions it is a crime not to report the observations of criminal conduct. Massachusetts,[32] Ohio[33] and Washington[34] have enacted duty to aid statutes that are less expansive than the first group, but have application to more than just a specified type of criminal conduct.

Duty to report only specific types of criminal behavior: In these jurisdictions it is required that the Good Samaritan report only certain types of criminal conduct. The covered conduct usually includes murder and most forms of sexual assaults. Florida[35] and Rhode Island[36] have this type of duty to aid statute.

This article analyzes the three types of duty to aid statutes in light of the desire to possess concealed weapons and focuses on the way these forces act and react with each other. It contends that expanding the duty to aid at the same time as society is broadening the right to possess concealed handguns may prove unsustainable. Combining the duty to aid and possession of concealed weapons in this era of increased urbanization, overcrowding, and crime may bring upon a community more negative consequences than initially anticipated.

Proponents argue that relaxing the rules for granting concealed gun

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(d) A person need not comply with this subsection if any of the following apply.

1. Compliance would place him or her in danger.

2. Compliance would interfere with duties the person owes to others.

3. . . . assistance is being summoned or provided by others.

4. . . . the crime or alleged crime has been reported to an appropriate law enforcement agency by others.

WIS. STAT. ANN. § 940.34(2)(a), (d) (West 1996). The similarly broadly drawn Rhode Island statute states:

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 or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person.

R.I. GEN. LAWS § 11-56-1 (1994).

28. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder To Opponents Of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q., 1 (1993).

29. *See supra* note 27.

30. *See supra* note 23.

31. *See supra* note 27.

32. MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990).

33. OHIO REV. CODE ANN. § 2921.22 (A) (Baldwin 1994).

34. WASH REV. CODE ANN. § 9.69.100 (West 1988).

35. FLA. STAT ANN. § 794.027 (West 1992).

36. R.I. GEN. LAWS § 11-37-3.1 (1994).

permits will satisfy two basic and important needs of our society. If we allow everyone to own, possess, and carry a concealed handgun, the incidence of violent crime will be reduced and the individuals in our society will feel safer and thereby react to others in a more positive way.

> What would happen if essentially all adults who passed a background check and safety test could qualify for a permit to carry a concealed handgun? About one-third of all states have adopted laws or practices that enable persons who are legally allowed to possess a handgun in their own home to be eligible for a license to carry a concealed handgun for protection. . . . If the application is rejected, the burden of proof is on the non-issuing sheriff, police chief, or judge to show that an applicant is either unqualified or a danger to public safety.[37]

As Cramer and Kopel make clear in their article, the reasoning behind the relaxation is to allow people to contribute to public safety.[38] They interpret a California study to suggest that the expansive use of concealed weaponry will "throw off" violent street perpetrators because it will increase the possibility that any type of violent confrontation will result in the death of the perpetrator.[39]

This article will examine the validity of this supposition that violent crime will be substantially reduced by the empowerment manifested by the possession of a concealed weapon. This supposition is altered when brought into application with the expanded duty to aid statutes. It is obvious that the intent of the concealed weapon possession advocates is that of personal safety. Nevertheless, when that same society mandates that these armed citizens come to the aid of their fellow citizens, this personal security argument is significantly reduced by this additional demand on the citizens.

When a society has a particularly awful human drama that unfolds, resulting in death of a vulnerable victim, the typical response is to pass a new law such as the expanded duty to aid statutes described above. Additionally, the response often is a request for possession of handguns to increase the feeling of personal autonomy. It is the combination of both responses that may be more than our society may want to cope with.

3. Historical Development and Subsequent Expansion

The criminal Good Samaritan statute[40] is of rather recent vintage in the

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37. Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave Of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 680 (1995).

38. *Id.* at 718-21.

39. *Id.* at 715.

40. This is to be distinguished from civil or tort Good Samaritan statutes that exist in almost all domestic state jurisdictions in order to protect people who come to the aid of an accident victim from being liable in tort law. *See, e.g.*, ALA. CODE § 6-5-332 (1993); CONN. GEN. STAT. § 52-557b (West 1991 & Supp. 1996); FLA. STAT. ANN. § 768.13 (West 1986); LA. REV. STAT. ANN. §§ 37.1731-.1732 (West 1988 & Supp. 1996); MINN. STAT. ANN. § 604A.01(subd. 2) (West Supp. 1997); MISS. CODE ANN. § 73-25-38 (1995); N.J. STAT. ANN. § 2A:53A-13 (West 1987); N.C. GEN. STAT. §90.21.14(a), (b) (1996); N.D. CENT. CODE § 32-

United States. This type of statute has gained favor with state legislatures in several jurisdictions.[41] An example of this type of statute indicates that "[a]ny person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim."[42]

Two questions then arise: How did society get to this point in the development of criminal omissions to act? How should this type of statute be used in light of the proliferation of personal handguns? That is to say, what happens when we demand that our citizens come to one another's aid and those citizens can now administer potentially lethal "aid" by the use of their concealed personal handguns?

Professor Feinberg, one of several proponents of broader duty to rescue legislation, has argued that "a sound system of social coordination would assign [positive duties] to everyone,"[43] where positive duties are defined as giving "assistance . . . [in] those cases of sudden and unanticipated peril to others that require immediate attention, and are such that a bystander can either make an 'easy rescue' himself or else sound the alarm to notify those whose job it is to make difficult rescues."[44]

The position expressed by Professor Feinberg is theoretically above reproach, based upon historical precedent that generations of moral thinkers and writers have espoused through the "Good Samaritan" creed.[45] Although, his position has high moral persuasiveness in the abstract, it is difficult to apply this high moral standard to the everyday workings of a large metropolitan population.

The proposition of Good Samaritanism, however, has not been without its detractors. Many have argued that there should be a point of legal demarcation between those who *act* with the requisite mental state, and can therefore cause the harm alleged in the criminal statute, versus those who have the requisite knowledge that someone else is committing a crime, or that others need aid, but neither caused nor were responsible for the evil, wrong or act which resulted in death or great bodily injury to another.[46]

It has been suggested that the argument for limited criminal responsibility in the area of omissions to aid strangers, far from destroying the moral persuasiveness of the broader duty to rescue, simply requires framers of such broadened duty to aid statutes to impose different levels of punishment on a

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03.1 (1996); OKLA. STAT. ANN. tit. 76, § 5 (West 1995); 42 PA. CONS. STAT. ANN. § 8331 (1982); TENN. CODE ANN. § 63-6-218 (1990 & Supp. 1996); TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-.002 (West 1986 & Supp. 1997); UTAH CODE ANN. § 78-11-22 (1996).

41. *See supra* notes 27-36 and accompanying text.

42. WIS. STAT. ANN. § 940.34(2)(a) (West 1996).

43. Joel Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, 3 CRIM. J. ETHICS 56, 68 (1984).

44. *Id.*

45. *See* Yeager, *supra* note 28, at 2-3 nn.10-15.

46. *See, e.g.*, ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 660-61 (3d ed. 1982).

party who acts to commit a crime than on one who may be penalized for inaction.[47] There would be a higher level of punishment for an act that resulted in criminal victimization, and a lesser penalty for those who failed to act. Thus, there could be two crimes—the original act, and the subsequent failure to assist, even though there may be only one victim.

There have always been advocates for both a broad duty to rescue and for the view that a clear line must remain between duties to act and criminal sanctions for intending an act that results in harm to others.[48] The practical impetus for broadening the duty to rescue seems to have developed as a response to a number of well-publicized stories of people who failed to help others in desperate need of such assistance.[49] These occurrences arguably suggest that we as a society have lost the moral center to our collective character.

In Minnesota, an expanded duty to aid statute's sponsor

> was moved to introduce the bill by reports of the gang rape earlier this year of a woman in a New Bedford, Mass., barroom who was hoisted onto a pool table and repeatedly assaulted while spectators stood by and some reportedly shouted "go for it!" More recently, a 14-year-old St. Louis girl was raped last month while bystanders did nothing for 40 minutes until an 11-year-old boy called police.[50]

In the Kitty Genovese case, Genovese was killed while more than thirty people listened to her screams but did not come to her aid or summon police.[51] As recently as August of 1996, a young man was beaten severely by two other young men and pushed into a ditch with two inches of water at the bottom. Both of the assailants went to their respective homes and told several people what they had done. These other people were taken to the crime scene and observed the victim in the ditch, but did nothing to aid the victim; no one called the authorities. An autopsy revealed that the victim did not die from the beating but fell unconscious and drowned in the two inches of standing water.[52]

Many such stories are apocryphal, but some like those described above are accurate and have been repeated over and over again until it seems that such moral ambiguity is a day-to-day occurrence. A study has indicated that the more people there are in the general proximity to an attack, the *less* likely it is

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47. *See* HELEN SILVING, CONSTITUENT ELEMENTS OF CRIME 88-92 (1967); LAFAVE & SCOTT, *supra* note 8, at 212 ("For example, causing the death of a stranger by failing to rescue him would not be considered homicide, and thus would not be punished as severely as affirmative acts with the same mental state and the same consequences. Some of the European 'Good Samaritan laws' operate in this way, and similar legislation has been adopted in a few states.") (citations omitted).

48. The Queen v. Instan, 1 Q.B. 450, 453 (1893) ("It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation.").

49. *See, e.g.*, People v. Beardsley, 113 N.W. 1128 (Mich. 1907). In *Beardsley*, an adulterer failed to summon aid for his paramour that had taken poison and died. *Id.*

50. Austin Wehrwein, *'Samaritan' Law Poses Difficulties*, NAT'L L.J., Feb. 22, 1983, at 5.

51. *See, e.g.*, A. M. ROSENTHAL, THIRTY-EIGHT WITNESSES (1964).

52. *See* Siegel, *supra* note 18, at A1.

that anyone will come to the victim's aid.[53] People in a group seem to believe that because there are so many other witnesses who could potentially aid the victim, each person's responsibility to act is minimal or non-existent.[54] Such group dynamics resulting in human inaction increase the number of crime victims and foster a political climate ripe for the promotion of the type of duty to aid statutes under consideration here.

There are also historical problems with the expansion of criminal responsibility in the area of omissions to act and the broader duty to rescue. In every criminal trial the burden is on the prosecution to establish the *mens rea* and *actus reus* necessary to convict. In that regard, an "act" is much simpler to prove than an attempt to establish why someone failed to act.[55] Action can, at the very least, imply intent. Inaction, on the other hand, does not communicate a state of mind in the same circumstantial way.

An example of this difficulty comes in a prosecution for murder. In several jurisdictions murder is defined as the killing of a human being by another human being with premeditation, deliberation, and malice aforethought.[56] Concepts like premeditation and malice are usually established through the circumstantial evidence of one's thoughts as the act which resulted in the death occurred.[57] Although trying to establish the existence of certain internal mental processes through tangential data is an admittedly imprecise manner of proof, it is the only way the proof can be accomplished given the fact that no one can see another's thoughts. When dealing in a prosecution that entails as its only act the absence of conduct, the elements of proof are almost non-existent. Such limits on circumstantial modes of proof make the prosecution of failure to act crimes more difficult.[58]

Thus, in the example of a murder prosecution, if the act is the taking of the life with the requisite mental state, one will try to prove the requisite mental state by reference to the acts committed by the perpetrator that resulted in the death of the victim. If one tries to prosecute a person for murder and the only proof of the "act" and the mental state is the perpetrator's inaction, the evidence is limited and open to alternate interpretations. A prime example of this is the

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53. *See* Bibb Latane & John M. Darley, *Group Inhibition of Bystander Intervention in Emergencies*, 10 J. PERSONALITY & SOC. PSYCHOL. 215, 215 (1968).

54. *Id.*

55. *See* CAL. JURY INSTRUC. § 1.21 (West 1995). "The word 'knowingly,' means with knowledge of the existence of the facts in question. Knowledge of the unlawfulness of any act or omission is not required." *Id.*

56. *See* CAL. PENAL CODE § 187 (West 1988).

57. This assumes, of course, that the defendant charged with murder, who has entered a plea of not guilty and has therefore placed the issue of intent to kill in question, is not willing to take the stand and admit that he was thinking of killing and did, therefore kill the victim.

58. *See, e.g.*, Jones v. United States, 308 F.2d 307 (1962). In *Jones*, the court overturned a failure to provide conviction for children that were not those of the defendant. *Id.* The court had no problem indicating that the parents had an obligation to provide food and necessities, but ruled that the defendant child care provider was charged without detailing the legal theory upon which her prosecution could rest and the evidence of such was non-existent at trial. *Id.*

Genovese murder in New York.[59] In that murder, the victim was screaming for assistance while the perpetrator stabbed her repeatedly, eventually causing her death. This homicide took some moments to complete and took place outside several residences that were occupied by several potential rescuers. If New York had a law similar to the broad duty to aid statutes in several other states at that time, the prosecutor could have charged a number of the victim's neighbors for failure to come to the victim's aid. The prosecutor would have a problem, however, establishing, first, who actually "heard" the screams of the victim, and second, that those hearing the screams could have determined that the person screaming needed the defendant's assistance. Was the inaction the result of a conscious decision not to render aid, or was it based on some other factor: a desire for self-preservation, a lack of hearing, or an inability to determine from what direction the screams came? The number of possible explanations for inaction are limitless. The burden of the prosecution in such a circumstance is almost insurmountable.

Such criticism, by itself, is not sufficient to justify inaction in this area. Although the prosecution would be difficult, it would not be impossible. The decision to prosecute under these duty to aid statutes would have to be carefully constructed and monitored. There are several areas of criminal law which allow penalties to be imposed when the prosecutorial burden is increased due to the crime being one of omitting to act.[60] The United States Supreme Court was asked in *California v. Byers*,[61] whether the requirement to stop and provide information at an accident scene was a violation of the driver's Fifth Amendment privilege.[62] The court concluded it was not a violation of the defendant's Fifth Amendment privilege to force him to provide information that may later be used to prosecute him for a crime.[63] Additionally, the Court concluded that failing to stop and provide information at an accident scene could be used against the defendant as "consciousness of guilt."[64] To rule otherwise, the court indicated, would leave the prosecutor without sufficient inferences to prove the case against the accused.[65]

B. The History of Carrying Concealed Weapons in America

1. From Frontier to Metropolis

The Bill of Rights indicates the importance our founding fathers placed on the right to keep and own firearms. The Second Amendment states that: "A

59. *See supra* note 51 and accompanying text.
60. *See, e.g.*, CAL. VEH. CODE § 2001 (West 1971).
61. 402 U.S. 424 (1971).
62. *Id.* at 425.
63. *Id.* at 427.
64. *Id.* at 428.
65. *Id.* at 432-33.

well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[66]

In the early years of our country, the right to bear arms included the right to locate one's weapons in or on any part of the body as long as one was able to obtain the firearm for self-defense or for the defense of others.[67] The issue of whether one could bear a concealed weapon, as opposed to a weapon strapped to one's hip or hidden in or on one's mode of transportation, was not significant in American history.[68] It was, however, seen as going against "form" to attempt to shoot or defend oneself through the use of a concealed weapon.[69] The use and control of concealed weapons was not a matter of legislative interest in the expansion and settling of the United States in the late Nineteenth and early Twentieth century.[70] This lack of interest can be traced to the overwhelming need for personal weaponry in the settling of the central and western United States.

As urbanization became the norm in the middle and late Twentieth Century, the loss of space and the packaging of large numbers of citizens in a relatively small area gave rise to issues of relaxing the possession, individual use and concealment of firearms by the citizenry.[71] As American cities became more and more populated, the need to control the influx of weaponry used by citizens became imperative.[72] Many of the police chiefs and sheriffs around the country began to advocate the denial of concealed handgun permits to regular citizens unless there was a "special need" that could be articulated by the citizen.[73] This desire to limit the possession of handguns in the hands of private citizens comes from the desire of police officers not to be faced with a large armed population. A large metropolitan police force would prefer to have firepower equal to or greater than that possessed by the citizens it protects.

2. Some New Thinking

Into this historical mix comes David Kopel, the research director of the Independence Institute in Golden, Colorado, a modern advocate for the following position:

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66. U.S. CONST. amend. II.

67. *See generally* ROGER D. MCGRATH, GUNFIGHTERS, HIGHWAYMEN, & VIGILANTES: VIOLENCE ON THE FRONTIER (1984).

68. *Id.*

69. *Id.*

70. *See generally* W. EUGENE HOLLON, FRONTIER VIOLENCE: ANOTHER LOOK (1974); FRANK R. PRASSEL, THE WESTERN PEACE OFFICER: A LEGACY OF LAW AND ORDER 17 (1972).

71. *See* Richard M. Brown, *The American Vigilante Tradition, in* THE HISTORY OF VIOLENCE IN AMERICA: HISTORICAL AND CONTEMPORARY PERSPECTIVES 154 (Hugh D. Graham & Ted R. Gurr eds., 1969).

72. *See generally* GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991).

73. *See generally* James B. Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow up the Rule?*, 49 LAW & CONTEMP. PROBS. 5 (1986).

> A quiet revolution in gun policy is spreading throughout America. Ten years ago, only a half-dozen states routinely issued permits for trained citizens to carry concealed handguns for personal protection. Today, 31 states comprising more than half the nation's population grant concealed-carry permits to law-abiding citizens. In the long run, this movement will prove far more significant than either the Brady Bill waiting period or the ban on certain semiautomatics.[74]

Mr. Kopel concludes, based upon what he says is a "comprehensive" study, that where jurisdictions hand out concealed gun permits in a more liberal manner, violent crime is reduced, or the rise in violent crime statistics slows.[75] Additionally, Mr. Kopel indicates that in California, where concealed gun permits are given out by the local elected sheriffs, "permit policies vary widely by county, . . . counties that issue concealed-carry permits liberally had lower violent-crime rates than counties with restrictive policies; restrictive counties had lower rates than counties with prohibitive policies."[76]

What Mr. Kopel does not clarify, however, is the basis upon which local sheriffs decide to be either "restrictive" or "liberal" in the issuance of concealed-carry permits. For example, the different attitudes between the sheriff of Orange County and his counterpart in rural Calaveras County may stem from the level of violence in the two counties. In rural counties, where violent crime is minimal, a sheriff might be disposed to allow the citizenry to carry concealed weapons due to the relatively low level of violence in such counties. In urban Orange County, where the violent crime level is relatively high and violent deaths are a common occurrence,[77] a sheriff might be justifiably restrictive in the issuance of a permit that might result in the increase of violence due to the increase in gun usage.[78] It is much more likely that the difference in the violent crime rate stems from the difference in population rather than the number of weapons in the differing counties of the state.

Nevertheless, advocates of increased concealed gun usage rely on such statistics and a general belief that armed citizens will both feel and be safer than unarmed citizens. As Kopel argues,

> [s]ince criminals don't know which of their potential victims may be armed, even persons without concealed-carry permits would enjoy increased safety

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74. David Kopel, *Packing Heat: More People Are Carrying Guns, and Its Making the Streets Safer*, CHI. TRIB., July 21, 1996, at Commentary 19.

75. *Id.*

76. *Id.*

77. Stuart Pfeifer, *Gangs Gain in Violence, Members*, ORANGE COUNTY REG., Apr. 2, 1996, at Metro 1.

78. Kopel indicated:

> A comprehensive study by University of Chicago law professor John Lott and graduate student David Mustard examining crime data for 3,054 counties found that while concealed-carry reform had little effect in rural counties, in urban counties it was followed by a substantial reduction in homicide and other violent crimes such as robbery. At the same time, there was a statistically significant rise in non-confrontational property crimes, such as larceny and car theft.

Kopel, *supra* note 74, at Commentary 19.

> from any deterrent effect. Moreover, a Psychology Today study of "[G]ood Samaritans" who came to the aid of violent-crime victims found that 81 percent were gun owners, and many of them carried guns in their cars or on their persons.[79]

The lobby promoting the increase in concealed-carry permits maintains that not only the incidence of violent crime will decrease as the number of us that carry concealed weapons increases, but also that we will be empowered to be Good Samaritans by the feeling of personal security we have because we carry and therefore are able to use this lethal weaponry.

III. ANALYSIS

Although a few states such as Vermont,[80] Rhode Island[81] and Wisconsin[82] have enacted broad duty to aid statutes, there are just a few cases interpreting the constitutionality and breadth of coverage of those laws.[83] This analysis will further address duty to aid statutes that limit the Good Samaritan requirement by demanding only that the person who sees a crime[84] or knows that one is being committed report that knowledge to law enforcement or be penalized for not doing so. These limited duty to aid statutes include both the general duty to report all felonies and those that limit the notification duty to certain enumerated felonies. These limited duty to aid statutes do not require that the observer of the incident involve himself or herself in any manner; she may watch without acting, so long as she reports the incident to law enforcement.[85]

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79. *Id.*

80. *See supra* note 23.

81. *See supra* note 27.

82. *See supra* note 27.

83. This broader duty to rescue is still a minority position in the United States. As of this writing, there are three states that require a "duty to aid" a victim of some underlying criminal conduct by another. R.I. GEN. LAWS § 11-56-1 (1994); VT. STAT. ANN. tit. 12, § 519 (1973); WIS. STAT. ANN. § 940.34 (West 1996). A fourth state, Minnesota passed a duty to aid law in 1983, but repealed that law in 1994. *See supra* note 27.

84. In some jurisdictions only certain categories of crimes are included in the duty to report statute. *See, e.g.*, FLA. STAT. ANN. § 794.027 (West 1992) (requiring punishment of a person who observes the crime of sexual battery, or knows that it is happening and could report the event to law enforcement but does not).

85. *See, e.g., id.* (stating that anyone who sees or is aware of a sexual battery and does not report same is guilty of a misdemeanor and could be jailed for up to one year and or a fine of up to 1,000 dollars); MASS GEN. LAWS ANN. ch. 268 § 40 (West 1991). The Massachusetts law states:

> Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

Id. See also OHIO REV. CODE ANN. § 2921.2(A) (Baldwin 1994) (stating "[n]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities"); R.I. GEN. LAWS §§ 11-56-1 (stating failure to report "sexual assault, murder, manslaughter or armed robbery," is punishable by a maximum of 6 months in jail and or a fine), 11-37-1 (1994) (dealing with failure to report sexual assaults); WASH. REV. CODE ANN. § 9.69.100 (West 1988) (stating it is a gross misdemeanor punishable by up to one year in prison and fine of 5,000 dollars for non-reporting of a felony involving violence or threat of violence).

A. How the Good Samaritan Laws Work in Practice

The cases based upon the most inclusive duty to aid statutes reveal an area of analysis that is still in its infancy. The cases are few and limit themselves to an examination of the basic constitutionality of the statutes involved and the attempt at what one court sees as the misuse of the statute for a purpose it was not intended to cover.[86] The limited duty to report statutes have uniformly been upheld as constitutional.[87] Analysis of these duty to aid statutes is sparse; because of the difficulty in obtaining and presenting evidence, these statutes have not often been used by prosecutors.[88]

1. Wisconsin: *LaPlante*

Wisconsin has enacted a broad duty to aid statute.[89] The statute requires not only that the Good Samaritan notify law enforcement, but in addition, with certain restrictions, that he involve himself in a rescue attempt, if possible.[90]

In 1992, Karie LaPlante was charged with a violation of Wisconsin's Good Samaritan statute.[91] Ms. LaPlante decided to have a few friends over to the house for a party,[92] but was not particularly strict about who attended.[93] As a result, both the victim and another woman, who had started dating the victim's old boyfriend, appeared at the gathering.[94] This awkward mix produced a combination of jealousy and bad blood that spilled out onto the front lawn area of Ms. LaPlante's home.[95] Ms. LaPlante and several other people watched as the victim was severely beaten by her ex-boyfriend's new girlfriend.[96] Ms. LaPlante, the state showed, knew the two women might show up at the party and cause a conflict.[97] Ms. LaPlante did nothing to either prevent or stop the fight, notify the police, or aid the victim in any way.[98] Indeed, Ms. LaPlante watched the fight as a spectator along with the entire party.[99] The victim was eventually taken from the scene to the house next door by a friend and the police were then summoned.[100]

Ms. LaPlante was charged with a criminal violation for failure to come

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86. *See infra* notes 89-119 and accompanying text.
87. *See, e.g.*, Gardner v. Loomis Armored Inc., 913 P.2d 377, 383-87 (Wash 1996).
88. Yeager, *supra* note 28, at 8 n.37.
89. WIS. STAT. ANN. § 940.34 (West 1996).
90. *Id.*; *see supra* note 27.
91. State v. LaPlante, 521 N.W.2d 448, (Wis. Ct. App. 1994), *review denied*, 525 N.W.2d 733 (Wis. 1994).
92. *Id.* at 449.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 451.
99. *Id.*
100. *Id.*

to the aid of the victim. The victim in the case was not related to the defendant, but was a guest at the defendant's home at the time of the attack. Ms. LaPlante attacked the constitutionality of the statute on grounds of vagueness. The appellate court rejected this argument completely, holding that:

> A plain and reasonable reading of the statute reveals that any person who knows that a crime is being committed and knows that the victim is exposed to bodily harm must either call for a law enforcement officer, call for other assistance or provide assistance to the victim.
>
> "[T]o know" requires only that the actor believe that a specific fact exists. . . . To prove a case then, the state must convince the fact-finder that an accused believed a crime was being committed and that the victim was exposed to bodily harm.[101]

Ms. LaPlante further asserted that the statute violated her right of free speech and failed to define sufficiently who was a "victim" as that term was used in the statute.[102] The court indicated that a person is considered a victim under the statute when she has been attacked severely enough for the attack to be considered an assault or battery.[103] The court did not even attempt to analyze Ms. LaPlante's freedom of speech argument, finding the appellant's position on this point unintelligible.[104]

The result in this case can be seen as surprising because the court did not need to address the Good Samaritan issue. As indicated earlier in this article, many courts have held that a duty to aid attaches by the mere fact that one is a landowner who has invited another onto her property; the inviting landowner becomes responsible for her guests' well-being (to some extent) while they are on her property.[105] In this factual situation, Ms LaPlante was a landowner who was aware of the volatile conditions she was creating by the content of her guest list. Under those circumstances, it is clear a court could conclude that she would be responsible for the consequences of her intentional conduct.[106]

Additionally, the *LaPlante* court held that all of the exceptions where the duty to aid would not attach were "affirmative defenses."[107] Such affirmative defenses must be proved by the defendant at trial, not by the prosecution as

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101. *Id.*

102. *Id.* at 451-52.

103. *Id.*

104. *Id.* at 452 n.2. The court did not detail the appellant's argument on the free speech issue, but simply declared that it was not going to reach that issue since they could not understand how free speech was implicated by this statute given these facts. *Id.*

105. *See, e.g.*, Commonwealth v. Welansky, 55 N.E.2d 902 (1944) (holding the owner of a bar responsible for deaths at his club).

106. *See, e.g., id.*

107. Affirmative defenses are those that are not part of the elements of the offense and are therefore permitted to be placed upon the defense for presentment of proof. As a constitutional matter, the prosecution is required to prove all "elements" of a particular charge, not the affirmative defenses. How this division takes place in any given prosecution has far reaching impact on the presentation of evidence and outcome of the case. *Compare* Patterson v. New York, 432 U. S. 197 (1977) *with* Mullaney v. Wilbur, 421 U. S. 684 (1975).

elements of the offense.[108] The importance of this distinction cannot be overstated. In Wisconsin, after the *LaPlante* case, the state need simply prove the existence of a person who was "victimized" by a person or circumstance from which the defendant did nothing to extricate that victim. The prosecution need only wait to see if any of the exceptions in the law can be shown by the defendant.[109]

Ultimately, *LaPlante* established two major propositions. First, the attempt to expand a duty to aid into the area of protecting strangers considered victims is constitutional and enforceable. Second, the statute can be successfully prosecuted, given the appropriate factual circumstances. After cases like *LaPlante*, the state can successfully point to the prosecution of a citizen failing to come to the aid of one being victimized. Such cases help solidify the validity of the moral principles underlying the attempt to criminalize inaction as it regards one's responsibility to one's fellow man, and stands as the first road sign in how to accomplish a successful prosecution.

2. Vermont: *Joyce*

Vermont has a broad duty to aid statute similar to Wisconsin's.[110] In the Vermont statute, a person is required to come to the aid of anyone who "is exposed to grave physical harm," when the defendant "knows" of the situation.[111] If the potential rescuer fails to act, he violates the statute.

In 1981, the Vermont Supreme Court looked, tangentially, at the duty to aid statute in a case involving a father charged with several counts of assault and battery on his son.[112] In *State v. Joyce*, the Vermont Supreme Court evaluated the appropriateness of the following jury instruction: "There is no duty for a person to attempt to stop a fight from taking place in his presence, and the fact that he does not do so is not an excuse for engaging in such conduct."[113]

The issue giving rise to this instruction stemmed from the fact that, as the defendant beat and kicked his son, several people were watching and did not intercede.[114] The defendant argued that the inaction of the non-acting observers was "tacit" approval of the defendant's conduct, or at least indicated that he was not beating his son "too badly."[115] The court indicated that there was a duty, in some circumstances, to come to the aid of another, but the duty did not

108. *See* WIS. STAT. ANN. § 940.34(2)(a), (d) (West 1996). *See supra* note 27.
109. State v. LaPlante, 521 N.W.2d 448, 451 (Wis. Ct. App.), *review denied*, 525 N.W.2d 733 (Wis. 1994).
110. *See supra* notes 23-27 and accompanying text.
111. *See supra* note 23.
112. State v. Joyce, 433 A.2d 271, 273 (Vt. 1981).
113. *Id.* at 273.
114. *Id.* at 272-73.
115. *Id.* at 273.

arise in this particular circumstance. The court's reasoning is interesting in that the court, in dicta, stated that Vermont's duty to aid statute requires citizens to aid each other, but this duty is a limited one. "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 . . . ."[116]

The Vermont Supreme Court reasoned that, although the statute requiring one to come to the aid of another did apply, the "danger or peril" of intervening in this fight negated the onlooker's duty to attempt to stop the beating or to become involved in any way.[117] The Vermont court therefore stated that the duty to aid statute did not create a duty to "intervene in a fight."[118]

The Vermont court's position more closely resembles a response to the facts of *Joyce* than it does a reasoned legal conclusion. In fact, *Joyce* seems to dodge the legal issues even more than did the court in *LaPlante*. The *Joyce* court did not want the defendant to have a "defense" based upon the duty to aid statute. The duty to aid statute was created to save victims from assaults very much like the one the defendant was charged with committing on his son. Indeed, *LaPlante* makes it clear that standing by and doing nothing to intercede in a fight is one of the evils against which the duty to aid statutes are directed. In Wisconsin, one must assume that if someone like the defendant in *Joyce* was attempting to use the duty to aid statute as a shield to defend against a brutal attack, the Wisconsin Supreme Court would rule in conformance with the Vermont court.

Consequently, the seeming contradiction of the *LaPlante* and *Joyce* outcomes can readily be explained by the factual and legal distinctions between the cases. In *LaPlante*, Wisconsin used its duty to aid statute to prosecute a defendant who failed to defend or notify police that a victim of a beating was being abused. In *Joyce*, Vermont addressed its similar duty to aid statute only because a defendant attempted to rely on the statute to avoid liability for brutalizing his own son. The outcomes desired by the two courts were remarkably dissimilar and therefore explain the divergent results.[119]

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116. *Id.* (emphasis added) (quoting VA. CODE ANN. § 519(a))

117. *Id.*

118. *Id.*

119. To practicing attorneys in the field of criminal law, both on the side of the prosecution and the defense, it has long been clear that the moral "rightness" or "wrongness" of a party's position drives both the trial court and the appellate courts in their use of concepts and laws to come to the appropriate result. Indeed, even the United State Supreme Court has been involved in this type of "outcome" driven analysis. In the case of Harris v. New York, 401 U.S. 222 (1971), the Supreme Court said:

> Every criminal [of course, at the time of trial this should read "alleged criminal"] defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury [the court is assuming, however, that the trial testimony is untrue simply because it is different in some respects than the statement the defendant allegedly made to the police during an interrogation process]. Having voluntarily taken the stand, petitioner was

3. Does the Source of the Injury Matter?

Liability under the duty to aid statutes varies, within parameters defined by the statutes, depending on the source of the victim's injuries. The majority of statutes cover victims made so by an act of man;[120] only a few cover acts of man *and* God.[121] If an "Act of God" such as a raging river, a torrential downpour, a hurricane, tornado or earthquake create victims, the statutes in only three states would allow for the criminal conviction of a defendant that failed to come to the aid of someone caught in such an event.[122] However, all of the states that have the more limited notification type statutes would cover person-to-person victims of felonious attacks or conduct.[123]

A Massachusetts statute offers an example of a law specific to certain offenses.[124] In Massachusetts, and the several jurisdictions with similar statutes requiring only that a Good Samaritan call law enforcement, the duty only applies to specific types of crimes, not to "Acts of God."[125] Most such laws cover, in particular, sexual crimes,[126] but may also include many other violent felonies.[127]

Interestingly, the few commentators who have discussed the broad duty to aid statutes use, as their factual examples, "Acts of God," while, in the real world of legislation, "Acts of God" are covered under only three jurisdiction's statutes.[128] In all other jurisdictions that have passed legislation on the issue of a broadened duty to aid, the laws are limited to acts of another and further limited to a simple duty to report the victim's plight, but not to actively engage in any other conduct. This is curious because, of all of the factual dilemmas that create victims, the ones most worthy of Good Samaritan intervention are those that were in no way brought on by any conduct of another human being. If one has a wall fall on him because he was unfortunate enough to be in that position as a major earthquake hit, one would think that society would see his plight as being one which would be included in any broadened duty to aid statute. Such a conclusion would, however, be factually incorrect.[129] When

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under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

Id. at 225 (citations omitted). *See also* K.N. LLEWELLYN, THE BRAMBLE BUSH 62-64 (1973).

120. *See supra* notes 32-36 and accompanying text.

121. *See supra* notes 29-31 and accompanying text.

122. *See supra* notes 29-31 and accompanying text.

123. *See supra* notes 23, 27, 32-36 and accompanying text.

124. *See supra* note 85.

125. *See* R.I. GEN. LAWS § 11-37-3.1 (1994). Most of the jurisdictions favor such additional requirements in the area of sexual crimes. *Id.* Others add some but certainly not all violent felonies to the list of duty to call statutes. *See, e.g.*, WASH REV. CODE ANN. §§ 9.69.100, 9.92.020 (West 1988).

126. *E.g.*, R.I. GEN. LAWS § 11-37-3.1.

127. *E.g.*, MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990).

128. *See supra* notes 29-31 and accompanying text.

129. Of all the legislation in this area, only three states, Vermont, Rhode Island and Wisconsin require action in Act-of-God situations. *See supra* notes 29-31 and accompanying text. The overwhelming number of states that have legislation in this area cover only factual, "people-on-people," incidents. *See supra* notes

one looks at the statutes, one can see that this group of natural disaster victims are the least protected group under all of the broadened duty to aid statutes.[130] The victims that are within the group most protected by the broadened duty to aid statutes are those who have been made so by conduct of another.[131]

This rather anomalous result comes from the common law desire to limit the coverage of the criminal law to "acts," rather than failures to act.[132] Since one cannot control "Acts of God," perhaps society should not be involved in forcing action in response to them. Since no human conduct started the process that created victims of "Acts of God" requiring a duty to aid such victims should be beyond the reach of the criminal law.

4. Do the "Defenses" Swallow the Rule?

Each of these duty to aid statutes contains language such as the following, "[one must act or report] to the extent that the [aid] can be rendered without danger or peril to himself or without interference with important duties owed to others."[133] This language is meant to state the obvious. People should not be forced to trade places with the victim and become victims themselves or to put the lives of their families or friends in jeopardy to help the victim. This process of stating the obvious, however, may destroy the moral efficacy of the rule.

A real-life situation offers some insight into the potentially elastic nature of the exceptions:

> A Good Samaritan was shot and killed by a suspected purse snatcher he was pursuing Sunday afternoon.
>
> Witnesses said the unidentified victim . . . began chasing the teen-age suspect on foot after the youth snatched a purse and keys from a 61-year-old woman.
>
> . . . .
>
> The witnesses heard the woman scream for help, and saw the man chase the suspect as he fled. As he got within about 20 feet of the suspect . . . the suspect fired and missed, but the man kept chasing him.
>
> The suspect turned and fired again, striking his pursuer in the chest. He shot him again in the head, then fled.
>
> [Police] found the incident especially sad since the victim was apparently just trying to help.
>
> "Your damned if you do and damned if you don't," [police] said.[134]

The Good Samaritan, under most of the duty to aid statutes discussed in this article, would have been required to at least notify law enforcement unless he knew the police had been called by someone else. If he could have aided the

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32-36 and accompanying text.

130. *See supra* notes 23, 27.

131. *See supra* notes 23, 27, 32-36.

132. LAFAVE & SCOTT, *supra* note 8, at 211-12.

133. VT. STAT. ANN. tit. 12, § 519(a) (1973).

134. Leslie Berestein, *Man Shot to Death As He Chases Suspect in Purse Snatching*, ORANGE COUNTY REG., July 8, 1996, at B3.

victim, he would have had a duty to come to the "assistance" of the victim. The term assistance is ambiguous. On the lowest level, assistance might involve simply helping the victim up from the sidewalk. A similar level of assistance might involve yelling "stop thief!" A slightly higher level of assistance would include following the thief at a distance, while a high level might require running after the perpetrator and tackling him. All of these possibilities might come out differently if the Good Samaritan became aware that the perpetrator was armed.

One can see that the analysis of what is "assistance" or "aid" must revolve around the type of incident giving rise to the need for intervention and the level of involvement required by the underlying statute. The level of involvement required under the most extensive duty to aid statutes is almost impossible to predict. Where the duty begins and ends would be strictly premised upon the facts of each case. The problem is, that there is no statute in force in the United States today that would require any direct action towards the perpetrator of a violent felony.[135] This is due to the fact that a violent felony, by definition, is a class of crime that is seen by society as especially horrendous because of its actual or inherent level of violence. In those situations, every law enacted that broadens the duty to aid allows the Good Samaritan to stop helping the victim as soon as his personal safety or the safety of others for whom he has an obligation to protect is put in danger.[136] Although this conclusion is reasonable, the moral proposition upon which duty to aid statutes rest is that one ought to be involved in assisting others even at the risk of the loss of some personal safety. Indeed, if one looks at all of the true stories that have been expressed in these pages, one sees that in none of them would the victim have been rescued due to the intervention of a potential Good Samaritan unless such Samaritan would have gotten involved despite the risk of personal injury.

Consequently, even in the most wide ranging statutes covering the duty to aid, the language and the limitations written into the statutes allow for all but the easiest rescues to be aborted by the would-be Samaritan.[137] Additionally, it is clear that in those states limiting the duty to aid to a notification requirement, such notification is only required if it can be done without placing the Samaritan, or someone for whom he is responsible, in danger.[138]

B. Adding Handguns to the Equation

The increase in persons carrying concealed weapons would impact the duty to aid statutes in force in a minority of the jurisdictions and would increase the possible levels of response options that Good Samaritans would

135. *See, e.g., supra* notes 23, 27, 32-36.
136. *See supra* notes 23, 27, 32-36.
137. *See supra* notes 23, 27.
138. *See supra* notes 32-36.

have upon observing a violent event. Presumably, the commentators advocating the easing of restrictions on concealed weapons permits[139] probably do not consider the parallel broadening of the requirement of permit holders to aid the victims of violent felonies. The mix of these two legal trends, however, seems likely to broaden any future duty to aid and portends a general increase in societal violence.

1. Effect on Duty to Aid Statutes

The possession of lethal weapons by a large segment of the potential Good Samaritans in any given community is likely to alter the meaning of the idea underlying the duty to aid statutes. Kopel argues generally that the private sector may be no better than the government in providing the security people want.

> Liberalized carry concealed [weapons] laws are essentially a response to intensifying doubt about the capacity of government—the police, the courts, and the corrections system—to deliver adequate levels of public or personal security. Serious questions remain, however, concerning the ability of private sector practices to deliver the goods where the public sector has failed.[140]

A recent New Jersey shopping mall incident illustrates this point:

> A would-be robber and an armored car guard traded gunfire inside a shopping mall in Deptford, N.J., on Monday, killing one shopper and injuring another. The gunman also was killed and the guard was in critical condition.
>
> Shoppers ran screaming for the exits and took cover inside stores after the bullets sprayed across the second floor of the mall, in an atrium near an entrance to a PNC Bank branch.
>
> . . . .
>
> Two shoppers were caught in the crossfire: a man who was dead at the scene and a 15-year-old girl who [police] saw bleeding profusely from her head.[141]

A security guard, presumably trained and certified to carry a firearm on his hip, was not any more effective, and probably was less effective, at protecting himself and others in the line of fire than law enforcement personnel who have been roundly criticized for their use of firearms in law enforcement situations. This issue raises a difficult fact of legal social engineering. Though those who advocate relaxing the law of concealed weapons believe that this change would result in a reduction of violent crime, the proof of that premise does not exist. Because of the difficulty of establishing the number of murders, rapes, robberies, or aggravated assaults *not* perpetrated in a jurisdiction that has loosened its concealed weapon law, proving a correlation between an increase

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139. *E.g.*, Cramer & Kopel, *supra* note 37, at 680.

140. Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207, 208 (1995).

141. ORANGE COUNTY REG., Aug. 6, 1996, at A10.

in concealed guns and a decrease in violent crime is virtually impossible.[142]

The most widely publicized study in the area of a correlation between gun ownership and the incidence of violent crime was published in the New England Journal of Medicine.[143] The results, although open to some criticism, indicate that taking guns out of the hands of people was analogous to reducing death by reducing a "disease vector" in the medical environment. Such a reduction meant that if you take guns out of the hands of people, fewer people will be killed with guns. Additionally, a companion study indicated that ownership of a gun actually increased one's chance of becoming a homicide victim.[144]

Concealed weapons are arguably more dangerous than unconcealed weapons because they increase uncertainty. Rather than assuming the other party is unarmed, it is less risky to assume that the other party is armed, and undertake a preemptive strike. The increase in concealed handgun possession, therefore, does not bode well for decreasing the violence level of any given population. This general observation, however, does not answer the question of whether an increase of concealed weapons may result in the increase of Good Samaritan activity either in a jurisdiction that has a duty to aid statute or in jurisdictions without such statutes. This question is not easy to answer for a number of reasons.

First, given the number of jurisdictions that recently have relaxed their concealed weapons restrictions,[145] one might believe it possible to obtain sufficient information to prove the hypothesis of the gun possession advocates. Theoretically, if possessing concealable weapons enhances personal and societal security, that hypothesis could be tested by compiling crime statistics before and after a switch to a relaxed concealed weapons standard. The answer is elusive, however, because of the many factors that might either increase or decrease the incidence of violent criminal behavior. Even among the many factors perceived to influence violent crime rates, it is unclear which factors ought to be considered in future studies, in light of the growing population of certain areas of the country and the impact each possible factor has on the rate of criminal behavior among citizens.[146] Given the amount of uncertainty in

142. *See, e.g.*, Polsby, *supra* note 140, at 208 ("Because the techniques of social science are clumsy, the information generated is often nebulous and hard to interpret."). Clearly, such leads to the misapplication and misinterpretation of data to suit whatever end one wishes to advocate.

143. *E.g.*, Arthur L. Kellermann et al., *Gun Ownership As a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084 (1993).

144. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615, 1620 (1991).

145. *See, e.g.*, Cramer & Kopel, *supra* note 37, at 687-708 (furnishing a state-by-state analysis of concealed weapons restrictions by reviewing Alaska, Arizona, Florida, Georgia, Idaho, Mississippi, Montana, Oregon, Pennsylvania, Tennessee, Virginia, West Virginia, Washington and Wyoming). Most recently California has reduced the waiting period for possessing concealed handguns. *See* CAL. PENAL CODE § 12072(a)(6)(c)(1) (West Supp. 1997) (adopting 10 or 15 day waiting period, depending on type of concealed weapon purchased).

146. Polsby, *supra* note 140, at 209.

social science circles regarding the effectiveness of relaxing concealable gun permit restrictions, the debate over the effect of such relaxation becomes one of amorphous conjecture, apocryphal relating of personal experiences,[147] and heartfelt attitudes that were fashioned long before the debate on this issue began.

Second, some commentary connected with increased handgun possession addresses the effect of a "first strike capability" brought on by the possession of a lethal device such as a handgun. Professor Polsby expressed it quite well in his article when he wrote:

> Hostile confrontations between latent antagonists, each of whom estimates that the other is (with some probability) armed, may catastrophically degenerate into gunplay as each recognizes the advantage of beating the other to the draw and the detriment of being beaten. Environments in which "first movers" possess a strategic edge—what in international arms reduction talks would be called a "first strike capability," are well understood to be intrinsically unstable.[148]

It is not clear that a would-be Good Samaritan, coming upon the scene of a violent felony, armed with a concealed weapon and not the primary subject of the violent felon's attention, would suffer from this head-to-head confrontation problem. Indeed, it would seem that such a well-armed Good Samaritan would be able to surprise the perpetrator and halt the attack. The problem with this hypothesis is similar to all social event equations: The proof is theoretical and very difficult or even impossible to obtain.[149]

2. The "Rational Criminal" Fallacy

The relaxed restrictions on concealed weapons possession analysis suffers from what might be called the "rational criminal hypothesis." This fallacious hypothesis, shared by writers, legislatures, politicians, and law enforcement officials who ought to know better, assumes that individuals involved in violent crime have the same or similar thought processes as the rest of us. As an example, legislators promote and institute laws based upon the common misconception that people involved in crime are deterred by the same thing that deters the general body of society. That hypothesis has never been established; the reality is quite the opposite.[150] Most criminals who commit crimes do so

147. *See, e.g.*, Cramer & Kopel, *supra* note 37, at 719.

148. Polsby, *supra* note 140, at 209.

149. *Id.*

150. *See generally* J. DOWNSON & A. GROUNDS, PERSONALITY DISORDERS, RECOGNITION AND CLINICAL MANAGEMENT (1995). The author tried several cases which prove the fallacy. In one case, several young gang members were in a car and were "flashed" (showing of gang signs by the use of hand motions) by two young males in the front portion of a house. Before the two could get behind a tree, the youths in the car opened up with a small machine pistol. The 9 mm weapon spit out over 20 shots in less than 10 seconds. Two blocks away, in a grocery store parking lot, a female victim was getting into her car after shopping for her family and dropped dead with just one of those 9 mm slugs in her skull. Another case was a man in his 40s that had married badly. His wife was a methamphetamine addict and had been involved in activity that

based upon an overactive emotional state brought on by youth, aggressiveness without a lawful outlet and an egocentric personality.[151] Violent criminals tend towards an amazing short-sightedness, and a "me-oriented" perspective.[152] If a violent felon wants to go see his girlfriend and cannot find transportation, his next thought may be to steal what he needs to accomplish his short term goal, with little regard for the consequences. If a violent felon needs money, he may try to get it in the most expedient way possible. If that means someone dies, or a gun goes off, that is often a possibility the violent felon has not contemplated in any way.

The impact of that mind set on the degree to which a hypothesis is followed in the real world cannot be overstated. Certainly those that fashion public policy and law ought to consider the entire range of consequences that the relaxation of concealed gun permits may have. However, those that involve themselves in violent crime often consider none of these positions or ideas when they commit the crimes. If there is any constant in violent felonious behavior, it is the total lack of perspective of the consequences from the vantage point of the perpetrator.[153] As stated by Polsby in his article:

> This theory is based on the observation that many homicidal assaults are not accompanied by a specific intention to kill but rather are mercurial outbursts whose lethality will depend on the virulence of the weapons at hand. Guns are much more lethal, wound for wound, than other weapons. When the ratio of firearms to non-firearms weapons increases, one should expect to see increases in the rate of homicide . . . .[154]

The basic reason this issue becomes so overwhelming in the analysis is that one cannot make assumptions, at least generally valid ones, about how violent criminals will react in any given situation. The argument that the increase in the possession of concealable weapons by regular citizens will increase not only their personal security, but the security of those they aid as Good Samaritans, is only valid if the resultant aid is brought to bear upon a violent felon who responds to the show of force in a predictable way. If the violent felon reacts like many young adults do in non-lethal pursuits, as if he is immortal, then all bets are off and the policy basis for the loosening of concealed weapons laws—a safer society—bears no relation to the actual effect of the change. Instead, violent confrontations may increase.

One need only look at the gang violence of Los Angeles of the past decade to see that two opposing forces of well-armed young male adults does

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put a strain on the marriage. One night, the defendant took out one of his several handguns and shot his wife in the forehead, killing her instantly. He then went back to bed, only to call his work in the morning and report that he would not be in because he had killed his wife the previous evening.

151. *Id.*

152. *Id.*

153. Ronald J. Rychlack, *Society's Moral Right to Punish: A Further Explanation of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 301-10 (1990).

154. Polsby, *supra* note 140, at 209-10.

not make for peace, but, rather, an appalling show of violent behavior and death.[155] Death does not limit itself to the participants: the carnage and firepower is non-discriminate in its application. Contrary to a statement attributed to the famous author Robert Heinlein, an armed society is not necessarily a "polite society."[156] The fallacy of the "rational criminal" is important to keep in mind as one is fashioning public policy based upon premises that do not hold true in the real world. An example of the appalling lack of acknowledgment of this fallacy is evident in many advocates' writings. For example, Professor Polsby argues:

> In principle, the expected value of the sort of street crime that is facilitated by brandishing a firearm should decrease as the chances of being shot by a victim, a [G]ood Samaritan or a police officer, increases. The use of a firearm confers a decisive tactical advantage on a criminal predator whether his victim is armed or not, but from the predator's point of view, use of a firearm would undoubtedly have greater net utility in a world in which he had the only gun than it would in a world where some potential targets were secretly armed. Increasing the chances that a predator may encounter armed prey—or may have to deal with an armed Good Samaritan—might very well diminish the value of a firearm to him rather than increase it.[157]

The cogency of such arguments pales in light of the thought processes employed by the vast majority of street criminals. The category of people that would be persuaded by Professor Kopel's position would not be those that would be involved in violent street crime in the first instance. Criminals do not engage in a reasoned calculation of odds of failure before acting and do not consider the possibility of an increased pool of armed Good Samaritans.[158] Many times, the increase in the danger simply increases the "high" that these criminals get from perpetrating the crime.[159] The greater the danger, the bigger the reputation they obtain by continuing to perpetrate their violent criminal behavior.[160]

3. A Deadly Mix

The use and abuse of controlled substances such as heroin, cocaine, crack, and methamphetamine also add to this rather violent mix. All assumptions

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155. The gang violence in and around south central Los Angeles is legend and varied. There is no need to recount it here. The only conclusion that can be drawn is that armed gangs do not offer the best example of those who have weapons for "protection." Indeed, the advocates of relaxed concealed gun permits seem to ignore the "example" this recent such history verifies.

156. Polsby, *supra* note 140, at 215-16.

157. *Id.* at 214-15.

158. Based upon this author's twenty years of experience as a criminal trial attorney, young adult males (who comprise the vast majority of violent felons) simply do not react to the Good Samaritan deterrent or threat of death or violence in the same manner as others.

159. *See* DOWNSON & GROUNDS, *supra* note 150, at 151-52.

160. *See "Gangs Grow in America as We Fail To Tackle the Causes,"* LOS ANGELAS SENTINEL, Sept. 9, 1995, at A9.

about the manner and consequence of violent behavior must be modified when drugs have been added to an already violent felon. Violent behavior tends to become totally irrational violent behavior when the additional element of "speed"[161] is mixed with criminal conduct.[162] Unfortunately for architects of social conduct, the use of controlled substances will continue to be a factor that will alter any well intentioned plan to make our society safer and less violent.

The analysis is also flawed from the standpoint of gun safety and training. Even the best trained gun carriers, policeman on the beat, have been susceptible to errors in judgment in the use of weapons.[163] Indeed, as one author has described the problem:

> [W]hile the vast majority of police officers are likewise competent, police officers are not immune from the foibles and stresses that can lead to unlawful or accidental shootings.
>
> One study of 911 incidents involving police use of deadly force concluded that 125 innocent civilians (16%) were killed in error.
>
> . . . .
>
> Not only are police misuses of firearms in the line of duty far from uncommon, police misuse of guns outside the line of duty is all too frequent. When an off-duty New York City policeman fires a gun, one out of four firings will be an "accident, a suicide, or an act of frustration."[164]

If the police have that much difficulty with the use and abuse of handguns which they are presumably trained to use and control, an armed civilian population creates a large potential for violence. Although some might argue that the only change would be for the better,[165] it is hard to fathom how a marginally trained, increasingly irritated, increasingly stressed urban population would react with lethal weaponry at hand. Unfortunately humans often descend to the lowest common denominator rather than rising above our petty destructive tendencies.[166]

Finally, the concern must be voiced that the use of legally possessed firearms is open to a number of abuses. The author of this article was, for a time, a prosecutor in both Davis and Salt Lake Counties in the State of Utah. Under Utah law, the restrictions on possession and application of handgun usage are very limited. One of the duties of prosecutors in Utah is to go to the scene of "unattended deaths" in order to determine if any criminal conduct was involved. Early one evening, I was requested to come to the quiet town of Bountiful, Utah, to supervise the investigation of the firearm death of a 16-year-

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161. This is the street name for methamphetamine, a drug produced in motel rooms and basements by street chemists and sold at a reduced rate. It has been called, the "poor man's cocaine," and often results in violent and irrational behavior on the part of those that take it regularly.

162. *See* BUREAU OF JUSTICE STATISTICS: DRUGS AND CRIME FACTS, 1994.

163. Cramer & Kopel, *supra* note 37, at 739-41.

164. *Id.*

165. *See id.* at 679.

166. This is based upon my twenty year experience in both prosecution and defense of criminal trials numbering in the hundreds.

old girl. As the police officers and I entered the middle-class home and went down into the basement, we could hear the muffled crying of the victim's mother in one of the upper rooms of the home. As we proceeded down the stairs, the first officer to arrive at the scene led us into a bedroom full of pretty pictures on the walls and the dead body of the young girl. She had taken her father's deer rifle, taken off her left shoe and sock, placed a stick into the trigger housing and placed the muzzle of the gun under her chin. The result was predictable and unforgettable, both to this author, the police, and the parents of this young girl.

The easy access to lethal weaponry led directly to the death of this young girl, as it has to many others. Liberalized concealed weapons statutes, to the extent that they encourage people to obtain firearms those people otherwise might not choose to own, could exacerbate the problem. Obviously, it can be argued that one wanting to end his own life could do so without the use of firearms, but it can also be argued as forcefully that without the presence in households of significant numbers of firearms, successful suicide rates would diminish.[167]

It seems incumbent on the proponents of relaxed concealed weapons statutes not only to look at what they hope will be the positive outcome of such relaxation, but also to prepare to acknowledge that some very negative outcomes may, and probably will, result. A Saturday night argument between husband and wife, that in the past may have resulted in a phone call to police to quell the noise, may, with the addition of lethal firearms in the home, become a call to "911" and then to the homicide squad. Lest anyone believe that this is far fetched, the author has spent over a decade as a public defender in several jurisdictions; the overwhelming number of homicides have not been "stranger versus stranger," but rather, homicides involving family members, friends, associates, or others that knew and had reason to be with each other in the first place.

Advocates of relaxed concealed gun permits have not confronted, in any meaningful way, the fact that a gun that is purchased as a defensive concealed weapon may be used in a non-concealed circumstance against someone known and in the presence of the weapon's owner rather than as intended against a violent street felon. Ironically, the mere presence of such weaponry in large numbers in our society creates more "violent felons" while the victims of such felonious attacks are the very people the relaxed permit laws were promulgated to protect.

An argument between participants who know each other can quickly become violent and result in a deadly outcome when combatants possess

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167. As indicated by Professor Polsby, violence towards others and one's self is usually based upon an immediate, cataclysmic event full of emotions that are difficult to contain. If one had access to lethal weaponry, such as a concealed weapon of the type described in this article, it is often impossible not to use such firepower in the overwhelming heat of the moment. Whereas, if such weapons were not available, the passage of time and cooling of emotions could save lives.

firearms.[168] It is true that the United States Constitution protects gun ownership by its citizenry,[169] but the Constitution does not condone or require that *all* types of gun possession to be promoted as a good thing.[170]

C. The Possible Outcomes of Combining a Broadened Duty to Aid Statute in the Same Jurisdiction with Reduced Permit Restrictions for the Possession of Concealed Weapons

It is important to analyze the possible combination of these two forces in a given jurisdiction. As has been pointed out, often the combining of two disparate social objectives may have results that were not anticipated by the advocates of the separate social modifications. If a group of individuals in a society wants to institute an expanded duty to aid statute in any of the three forms detailed in this article, the way that statute is affected by the possession and possible use of concealed firearms should be considered. Thus, this article evaluates possible permutations that may result from placing into society both an expanded duty to aid statute along with the right for most people to possess a concealed firearm.

1. Armed Perpetrator Versus Armed Good Samaritan

In a jurisdiction like Vermont[171] that has a broad duty to aid in all situations brought on by "Acts of God" or by violent felons, the interplay between such a statute and an increase in the number of citizens possessing concealed weapons is curious; add an armed perpetrator and a curiosity becomes an astonishment. The expansive nature of the Vermont statute language,[172] coupled with an increase in armed Good Samaritans, would obviously increase the pool of potential rescuers. If the Good Samaritan possesses similar firepower to the perpetrator, he would have less justification for walking on without lending assistance. The issue of rendering assistance "without danger or peril to himself" substantially shifts when the citizens of

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168. Nicholas D. Kristof, *Guns Galore v. Guns No More: Two Opposing Models for the U.S.*, ARIZ. REPUBLIC, Mar. 25, 1996, at A1.

> Japan is the opposite end of the gun-owning spectrum . . . . Only about 50 private citizens, all expert marksmen, are allowed to own handguns, and they must leave them at the shooting ranges.
>
> [In 1995], there were only 32 gun murders reported in Japan, compared with 15,456 in the United States in 1994, the last year for which a figure is available. "There's no question that the current prohibition on guns has contributed to public safety in Japan," said Shigeru Yotoriyama, a senior police official.

Id.

169. *See* U.S. CONST. amend. II.

170. *See, e.g.*, CAL. PENAL CODE §§ 12101(a)(1) (prohibiting minors from possessing a concealed weapon), 12021.1, 12025 (West Supp. 1997) (excluding certain categories of felons and drug possessors from owning or possessing concealable firearms).

171. *See supra* note 23 and accompanying text.

172. *See supra* note 23.

any community are armed. Studies seem to indicate that individuals' willingness to get involved in rescue activities increases when they possess personal handguns.[173] When people feel safer, they tend to react by involving themselves in activities they normally would have avoided had they felt fearful and apprehensive.[174] Additionally, the use of deadly force to fend off a lethal attack is legal in all fifty states. Consequently, the use of deadly force to come to the aid of a crime victim also would be legally, as well as morally justified.[175]

If a victim is being lethally assaulted *and* a Good Samaritan is carrying a lawfully concealed handgun, the excuses one would have for not assisting are severely restricted. Of course, a potential Good Samaritan who was armed and chose not to assist a victim in peril would always have the affirmative defense that intervening was too dangerous for himself or others. However, the combination of the statute and the concealed weapon alters the balance and creates an ambiguity, especially because the prosecutor could go forward in many more situations under the broadened duty to aid statutes than he could absent such statutes. A Good Samaritan would need to prove her excuse for failing to aid, especially in light of her newfound sense of well-being brought on by the possession of the concealed weapon. Thus, it would seem clear that the confluence of these two influences could and should result in criminal sanctions being imposed more often for the failure of one so armed in not coming to the aid of a victim.[176]

In those states that require only that the Good Samaritan notify law enforcement of the victim's plight, without actually coming to his aid,[177] the armed Samaritan who does not aid a victim but merely makes the required call to law enforcement ought to have less justification for his inaction. Condemnation of his inaction by the imposition of criminal sanctions should be seen as appropriate under many more circumstances than it would be for an unarmed Good Samaritan.[178]

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173. Cramer & Kopel, *supra* note 37, at 718-20.

174. James D. Wright, *The Ownership of Firearms for Reasons of Self-Defense, in* FIREARMS AND VIOLENCE 327 (Don B. Kates, Jr. ed., 1984).

175. State v. Hennessey, 90 P. 221 (Nev. 1907); *see also* CAL. JURY INSTRUC. § 5.13 (5th ed. 1988).

176. "In written response to a questionnaire that I sent to 387 prosecutors in the eight states that impose duties to render easy aid or duties to report serious crimes, . . . none of the 139 prosecutors who responded could recall filing a complaint under the relevant statute." Daniel B. Yeager, *supra* note 28, at 8 n.37. It is a matter of practical concern that it seems that the prosecutors are not now taking advantage of the statutes they have. Possibly this should be taken into consideration before additional legislation is enacted.

177. *See supra* note 32-34 and accompanying text.

178. John Stuart Mill, the author of the philosophy of Utilitarianism describes it this way:

> [T]hose duties in virtue of which a correlative *right* resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right. I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality.

John S. Mill, *Utilitarianism, in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 61 (1951).

2. A Good Samaritan Carrying a Concealed Weapon Versus a Perpetrator Whose Armed Status is Unknown

The difficulties start to multiply when one analyzes duty to aid statutes in this factual situation. A potential Good Samaritan who is armed, but does not know whether the perpetrator is armed, faces a potentially lethal dilemma. The standard for assessing whether or not a person acted reasonably or, in the alternative, was behaving inappropriately in the area of criminal omissions is the following:

> The prevailing rule is that one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger. Deadly force is reasonable force only when the attack of the adversary upon the other person reasonably appears to the defender to be a deadly attack.[179]

Additionally, there is a requirement in a minority of jurisdictions that one cannot claim self-defense unless she can prove that she could not have safely retreated rather than resort to the use of force.[180] Quite clearly, however, the retreat doctrine should not apply to the same degree if the defense is of another rather than oneself.[181] There are some interesting variations in the retreat doctrine area[182] and how it might apply in the context of the defense of another.[183] Though these issues are beyond the scope of this article, it is apparent that the only standard a potential Good Samaritan must follow is to be reasonable in the use of force and not to overreact in such use. In this context, the focus is whether a Good Samaritan may use deadly force (i.e., her concealed handgun) when she does not "know" that the assailant is armed with some type

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179. LAFAVE & SCOTT, *supra* note 8, at 463.

180. *See, e.g.*, King v. State, 171 So. 254, 256 (Ala. 1936); State v. Marish, 200 N.W. 5, 8 (Iowa 1924); State v. Cox, 23 A.2d 634, 642 (Me. 1941); State v. Austin, 332 S.E.2d 21, 24 (Minn. 1948). "It merely states the obvious conclusion that, if the actor may retreat in complete safety, then the use of defensive force is not necessary." 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c) (1984).

181. LAFAVE & SCOTT, *supra* note 8, at 460-61. *See also* State v. Felton, 434 A.2d 1131, 1132 (N.J. Sup. Ct. App. Div. 1981) (upholding the duty to retreat); People v. White, 484 N.Y.S. 2d 994, 996 (N.Y. Sup. Ct. 1984) (ruling no duty to retreat in a dwelling).

182. A substantial number of state statutes dealing with the use of force by a person in self-defense or defense of others do not even mention retreat. *See, e.g.*, COLO. REV. STAT. ANN. § 18-1-704 (West 1990); FLA STAT ANN. §§ 776.012 to .013 (West 1992); GA. CODE ANN. § 16-3-21 (1996); ILL. ANN. STAT. ch. 720, para 5/7-1 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-3-2 (West 1986); KAN. STAT. ANN. § 21-3211 (1995); KY. REV. STAT. ANN. § 503.070 (Baldwin 1996); MINN. STAT. ANN. § 609.06 (West Supp. 1997); MONT. CODE ANN. § 45-3-102 (1995); OR. REV. STAT. § 161.209 (1990); UTAH CODE ANN. § 76-2-402 (1995); WASH. REV. CODE ANN. §§ 9A.16.020, .050, .110 (West 1988 & Supp. 1997); WIS. STAT. ANN. § 939.48 (West 1996). Other states, however, require a reasonable retreat if it can be accomplished without danger to the person attempting it. *See, e.g.*, ALA. CODE ANN. § 13A-3-23 (1994); ARK. CODE ANN. §§ 5-2-605 to -607 (Michie 1993); CONN. GEN. STAT. ANN. § 53a-19 (West 1994); DEL. CODE ANN. tit. 11, §§ 464, 465 (1995); HAW. REV. STAT. §§ 703-304, -305 (1993); ME. REV. STAT. ANN. tit. 17-A, § 108 (West Supp. 1996); N.H. REV. STAT. ANN. § 627.4 (1996); N.Y. PENAL LAW § 35.15 (McKinney 1987); N.D. CENT. CODE §§ 12.1-05-03, -04, -07 (1985); 18 PA. CONS. STAT. ANN. § 505 (1983).

183. *See* MODEL PENAL CODE § 3.05(2) (1962).

of deadly or dangerous weapon. In general, the statutes and cases have held she could not use such deadly force unless it seemed to her, and to a prosecutor assessing her conduct or inaction after the fact, that the exercise of deadly force was reasonable,[184] proportionate,[185] and appropriate[186] under the facts of the case. It would not therefore be advisable to suggest that, in every situation involving a potential Good Samaritan who is armed with a concealable weapon, the use of the weapon would be acceptable under the broadened duty to aid statutes, such as Vermont's statute.[187] In most factual situations, the use of force may be seen as unreasonable if the Good Samaritan lacked adequate facts upon which to base her choice to use such deadly force. In the majority of situations, the Good Samaritan would be placing herself in a very difficult legal position which would be reviewed after the fact by law enforcement and possibly even a jury. As a practical matter, however, in those jurisdictions that have enacted these duty to aid statutes, the threat of prosecution may be more imagined than real.

The policy encouraging the defense of others reflected in these statutes suggests that these jurisdictions would not closely scrutinize use of deadly force by a Good Samaritan who acted to protect one of her fellow citizens; to do so would be to question the very basis of the duty to aid statutes. One well-publicized prosecution of a Good Samaritan for use of excessive force on behalf of another might halt the progress made by the enactment of the duty to aid statute. Of course, a potential Good Samaritan could, without actually firing the concealed handgun, threaten the use of deadly force without running afoul of the limitation on excessive and unreasonable force, as long as the threat to the third party victim was imminent.[188] It is not an assault and battery to threaten deadly force if the basis for such limited use is the protection of another in imminent danger.[189]

3. The Good Samaritan Possesses a Concealed Weapon and the Perpetrator is Known Not to Have a Deadly or Dangerous Weapon

Generally, the criminal law does not allow for the use of deadly force to thwart a non-deadly attack of oneself or of another.[190] The addition of the duty to aid statutes augments or changes the law of proportional response to

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184. MODEL PENAL CODE § 3.08, Cmt. (Tentative Draft No. 8, 1958). Under these statutes, only reasonable force was allowed. *E.g.*, State v. Kinney, 25 N.W. 705 (Minn. 1885).

185. MODEL PENAL CODE § 3.08(5) (1962).

186. The harm that the third party is suffering must be immediate and not yet over. Commonwealth v. Monico, 366 N.E.2d 1241, 1244 (Mass. 1977).

187. *See supra* note 23 and accompanying text.

188. MODEL PENAL CODE § 3.04(1) (1962); *see also* State v. Daniels, 682 P.2d 173, 181-82 (Mont. 1984).

189. LAFAVE & SCOTT, *supra* note 8, at 458-59.

190. MODEL PENAL CODE § 3.04 (1962). *See also* State v. Woodward, 74 P.2d 92, 96-97 (Idaho 1937); Caldwell v. State, 49 So. 679, 680 (Ala. 1909).

felonious attack, and therefore changes the outcome in potential situations. There have been several cases dealing with the use of deadly force in the effort to halt a felonious attack;[191] these cases have basically been decided based on a uniformly agreed-upon standard: one can use such force in defense of others as one would have been allowed to use had she been in the victim's stead.[192]

Although there is an absence of case law using the standard expressed above in the duty to aid statute jurisdictions, there is no reason to think it would not be applied since the underlying reasoning in both situations is very similar. This line of authority does not, however, answer the legitimate question as to the use of deadly force to prevent or end a felonious attack.[193] The question would be answered only when one looks at the *type* of felony being attempted by the perpetrator upon the third party victim. As the North Carolina Supreme Court stated in *State v. Robinson*,[194] each citizen has both a "right and duty as a private citizen to interfere to prevent a felonious assault. [This] right is recognized in the decisions of this court."[195]

If the crime being attempted is one of the several violent felonies, such as rape, sexual assault, robbery, murder, attempted murder or aggravated assault, the Good Samaritan with a deadly concealed weapon may be warranted in utilizing that hardware if the weapon is the only reasonable avenue to stop the attack. The perpetrator's lack of deadly or dangerous weapons may be irrelevant in such circumstances. The type of crime committed can activate the reasonableness and necessity of the use of deadly force, as could the perpetrator's possession of a deadly weapon. If the crime being perpetrated upon the victim is a crime against property that is not one of the violent felonies described in most jurisdictions' criminal codes, the analysis would change.[196]

A related issue arises when a Good Samaritan mistakenly interprets the interaction between the victim and the perpetrator. In a few jurisdictions the

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191. *See* State v. Hennessey, 90 P. 221 (Nev. 1907). As in the broadened duty to aid statutes, the *Hennessey* court went on to state that the following jury instruction was a correct statement of law:

> The law makes it the duty of every one, who sees a felony attempted by violence, to prevent it, if possible, and allows him to use the necessary means to make his resistance effectual. One may *kill* in defense of another under the same circumstances that he would have the right to kill in defense of himself.

Id. at 227 (emphasis added).

192. In *State v. Menilla*, 158 N.W. 645 (Iowa 1916), the defendant killed her husband reasonably but erroneously believing her husband was about to kill his son unless she was able to use deadly force to stop the attack. It was learned later that the son was not under a state of facts that would have warranted him using deadly force against his father, the wife was allowed to be justified in the use since she reasonably believed the use was necessary to save the son. *Id.* at 647; *see also* Commonwealth v. Martin, 341 N.E.2d 885 (Mass. 1976); State v. Fair, 211 A.2d 359 (N.J. 1965).

193. *But see* Tennessee v. Garner, 471 U.S. 1 (1985). In *Garner*, a case brought under the civil rights act, the Court concluded that a police officer may not use deadly force to stop a fleeing felon that turned out to be unarmed, unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Id.* at 11-12.

194. 195 S.E. 824 (1938).

195. *Id.* at 829-30.

196. *See, e.g.*, CAL. PENAL. CODE § 1192.7c (West Supp. 1997) (giving a "shopping list" of such felonies).

Samaritan takes the place of the perceived victim who was, in actuality, the aggressor. In such jurisdictions, a mistaken Good Samaritan will be held responsible to the same degree as the aggressor.[197] This result is, however, a minority position. Most jurisdictions hold the potential Good Samaritan only to a standard of how a "reasonable person" would perceive the situation, regardless of how the actual facts turn out.[198]

Ultimately, the addition of a broadened duty to aid statute and the increase in potential Good Samaritans with concealed weapons could result in an increase in the use of deadly force. This addition may not culminate in criminal prosecutions of the Good Samaritan for the use of deadly force if the crime being perpetrated was one which would allow the victim himself to use deadly force to stop the completion of the felonious attack.[199] In most jurisdictions, the Good Samaritan can decide how to act and what level of force to bring to bear based upon her perception of the situation, even if later it is determined that the victim was the original aggressor.[200]

In those jurisdictions where the broadened duty to aid has been instituted by statute, one would believe and hope that, given this additional "incentive" to act, such action would not give rise to an increased risk of criminal liability, unless the Good Samaritan's conduct was totally unreasonable and excessive given the facts as they were perceived to be when the action was taken.[201] The additional burden placed upon potential Good Samaritans would or should bring with it society's broadened tolerance in its factual application.[202]

What can readily be seen, however, is that each application of deadly force by the potential Good Samaritan possessing a concealed weapon would bring the scrutiny of the state as to whether or not such force was necessary and reasonable.[203] If the perpetrator was not armed with a deadly weapon and the

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197. State v. Wenger, 390 N.E.2d 801, 803 (Ohio 1979) ("A person who intervenes in a struggle and has no duty to do so, acts at his own peril if the person assisted was in the wrong.").

198. State v. Penn, 568 P.2d 797 (Wash. 1977). The actual test is not how the facts actually are, but how they appeared to a reasonable person in the stead of the Good Samaritan who comes to the aid of the third person.

199. Storey v. State, 71 Ala. 329 (1882) (finding that although it was not justifiable to use deadly force to stop a nonforceable theft of a horse, one would be allowed to use deadly force for the "atrocious felonies," such as murder, robbery, house-breaking at night, rape, mayhem, and any felony on the person); *see also* State v. Terrell, 186 P. 108 (Utah 1919); State v. Nyland, 287 P.2d 345 (Wash. 1955); MODEL PENAL CODE § 3.07(5)(a)(ii) (1985).

200. See Model Penal Code § 3.07(5), which basically states that an "honest belief" in the necessity of the use of force is all that is required, it does not need to be reasonable.

201. Of course, a "ruse" of crime control cannot be used to circumvent liability when the actor has a preconceived intent to kill the perpetrator of the felony. *E.g.*, Laws v. State, 10 S.W. 220, 221 (1888) (holding that the excuse of crime prevention could not be utilized if the defendant had premeditated the death of the victim before the victim engaged in the felonious conduct).

202. "A plain and reasonable reading of the statute reveals that any person who knows that a crime is being committed and knows that the victim is exposed to bodily harm *must* either call for a law enforcement officer, call for other assistance or provide assistance to the victim." State v. LaPlante 521 N.W.2d 448, 451 (Wis. Ct. App.) (emphasis added), *review denied*, 525 N.W.2d 733 (Wis. 1994).

203. This does not seem too onerous a burden since this same standard has been applied to the reasonable and proportional use of force in both self-defense and defense of property and others for quite some time. *See,*

Good Samaritan's use of the handgun resulted in great bodily injury or death, such scrutiny seems reasonable and appropriate. Again, given the broadened duty to aid, the Good Samaritan faces a legitimate dilemma of "damned if you do and damned if you don't." If society promotes Good Samaritanism, it will have to accept the inevitable increases in violent reactions from Good Samaritans in the protection of their fellow citizens.[204]

4. The Obligation for the Potential Good Samaritan to Proceed with a Rescue if Not Armed and the Perpetrator is Not Believed to be Armed

Although this issue is somewhat less important to this analysis as it regards the use and possession of concealed weapons by a large percentage of the population, it is clearly the scenario upon which the broadened duty to aid statutes seem to be based. The only cases dealing with these broadened duty to aid statutes deal with this fact pattern.[205]

It is quite clear that the legislative intent of duty to aid statutes that include a duty to intervene rather than just to notify, take as their paradigm the situation where neither party was armed and the risk to the potential Good Samaritan therefore was slight.[206] The unfortunate reality, however, is that our society has increased its violent tendencies and its desire for lethal types of protection.[207] With that additional element, the moral paradigm of protection for all based upon a duty to aid all, brings with it an unfortunate combination of baggage. Invoking the Good Samaritan parable[208] or simply pronouncing duty to aid statutes to be good law ignores this baggage. In the abstract, comments such as the following have great appeal:

> Legal recognition of duties among strangers is not about coercion, involuntary servitude, or charity. Like the Good Samaritan parable, it is about "reconcilia-

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e.g., KY. REV. STAT. ANN. § 503.070 (Baldwin 1995).

> The use of deadly physical force by a defendant upon another person is justifiable when:
>
> (a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person; and
>
> (b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified . . . in using such protection.

Id.

204. *See* State v. Hedgepeth, 265 S.E.2d 413, 416 (N.C. Ct. App.), *review denied*, 301 N.C. 100 (N.C. 1980). The court, analyzing a defense of habitation with a state statute allowing for the use of deadly force in such circumstances said:

> [O]ne of the most compelling justifications for the rules governing defense of habitation is the desire to afford protection to the occupants of a home under circumstances which might not allow them an opportunity to see their assailant or ascertain his purpose, other than to speculate from his attempt to gain entry by force that he poses a grave danger to them.

Id. So, it would seem, that if the jurisdiction has gone to the trouble and debate necessary to pass a broadened duty to aid statute the probable analysis of the utilization of that statute by a Good Samaritan coming to the lethal aid of a victim would be similar to the above.

205. *See LaPlante*, 521 N.W.2d 448; State v. Joyce, 433 A.2d 271 (Vt. 1981).

206. *See supra* note 23.

207. Cramer & Kopel, *supra* note 37, at 685-86.

208. *Luke* 10:25-37.

> tion, about the healing of social wounds, about wholeness in the organism of society." . . . Ultimately, rescue and reporting laws do no more than enforce the norm of reciprocity by recognizing an acute, situational asymmetry between people temporally and spatially brought together by chance.[209]

Unfortunately, the duty to aid statutes, combined with the increase in the number of lethal devices held by the citizenry, have much broader and more significant effects than merely setting things "right." The combination of these two forces, coming along at the same time and in the same society, creates a dangerous mix which will ultimately result in the increase in violence in our society and an increase in the opaque nature of the analysis of whether deadly force was "necessary" in any given circumstance.

A society might be able to absorb each of these forces separately at different times and thus avoid their highly negative impact[210] but, there is a danger that the society cannot effectively or rationally deal with both forces at the same time.[211] Ultimately, the three types of duty to aid statutes work most effectively to complete their intended purpose when an unarmed Good Samaritan comes to the aid of an unarmed victim who is being accosted by an unarmed perpetrator. In that limited, non-lethal atmosphere, the duty to aid statutes of all three types seem to make sense, and their application is uncomplicated and morally clear. When aid is necessary in such situations, Good Samaritans can and should be urged to take action and make the society we live in a better place to be. When other factors are brought to bear, however, the required actions, the types of conduct, and the varied results become an unfathomable social problem.

D. The Illusion of Security Carries Too High a Price

A society that promotes, through legislation, Good Samaritan duties in us all, but allows for the increase in concealed handgun possession by those who desire the "safety" of such possession, takes a risk.[212] An increase in the number of concealed weapons may or may not increase the crime rate in the area of violent felonies,[213] but crime rate statistics are only one facet of the gun

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209. Yeager, *supra* note 28, at 57-58.

210. Nicholas D. Kristof, *Can Other Cultures Provide Ammo in U.S. Gun Debate?*, N.Y. TIMES, *reprinted in* ORANGE COUNTY REG., Mar. 10, 1996, at A10. Martin Killias, Dean of the law school at Switzerland's University of Lausanne, analyzed murder rates in 18 countries and concludes that the possession of guns by a large portion of the population has one overwhelming result: "Violence in [countries with large portions of their populations possessing guns] seems to be unusually fatal." *Id.*

211. *Id.*

212. *Id.*

> Killias found a much stronger correlation between gun ownership [here, rifles of the submachine gun type] and suicide than between gun ownership and murder. This is significant because although people tend to worry about being murdered by a stranger, they are more likely to kill themselves. The average American is 65 percent more likely to commit suicide than to be murdered.

Id.

213. *See* Cramer & Kopel, *supra* note 37, at 247-57.

use equation. The increase in gun ownership and use increases the violence against those that live in close proximity to the owner of the handgun.[214] Moreover, suicide rates increase with increased availability of handguns, concealed and otherwise.[215]

One should ask, "[w]hen is the price too high for the 'advantages' intended?" Do we want a society of individuals ready and willing to end a dispute in a lethal manner with their concealed handguns? Is the use of such lethal weapons an activity society should promote?

Police officers, those with the most experience with violence in our society, generally do not want to face an increased number of people who may be armed with concealed handguns.[216] Advocates for a relaxed concealed weapons stance generally have failed to acknowledge the probable increase in the use of those concealed weapons upon persons that this lethal weaponry was initially intended to protect.[217]

The reason that this debate has never fully been engaged in is because the advocates of relaxed concealable gun possession rarely acknowledge that concealed guns are ever utilized inappropriately by the owners. The advocates argue that if you train the citizen to use the handgun, he will use it only in the appropriate manner and in the appropriate circumstance.[218] This hypothesis has never been adequately proven and goes against personal experience on several levels. Human beings react irrationally, emotionally, and excessively to events in their lives. The addition of lethal weaponry to an already violence-prone populace only increases the danger. Simply withdrawing gun possession from society will not end the violence that human beings inflict on one another, but the involvement or non-involvement of a lethal weapon does have a significant impact on the outcome of each individual event.[219]

As this analysis involves the additional element of the expansion of duty to aid statutes like the ones described in this article,[220] when considering both statutes that require active intervention and those that merely require notification of law enforcement, the argument for their existence and moral

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214. *See supra* notes 165-70 and accompanying text.

215. Carl T. Bogus, *Pistols, Politics, and Product Liability*, 59 U. CIN. L. REV. 1103, 1118-20 (1991).

216. *See* Mike Carter, *Police Nervous About Concealed Guns; Concealed Guns, Cops Don't Mix*, SALT LAKE TRIB., Sept. 9, 1996, at D1. Several officers were questioned over the procedure used by them when they realize that someone is carrying a concealed weapon. They stated the following:

> Some lawmen want to offer a little friendly advice to Utahns who see the need to carry a concealed gun: It's a good idea to wear old clothes while packing heat.
>
> Because there is a chance -- a good chance, in fact -- that if a police officer sees the gun, its carrier will end up face down in the dirt and handcuffed, regardless of any permit.
>
> "All any of us want to do is go home at night to our home and families," said Salt Lake County sheriff's Lt. Lloyd Prescott, who heads the agency's training division. "I guess that means that if we err, we err on the side of caution and offer any apologies later."

Id.

217. For example, husbands, wives, children, employees, and employers.

218. *See* Cramer & Kopel, *supra* note 37, at 739.

219. Wright, *supra* note 174, at 329.

220. *See supra* notes 23, 27, 32-36 and accompanying text.

relevancy must be tempered with the reality of the proliferation of handguns in our society and the lethal potential weapons bring to society. A moral pronouncement of the utility of such statutes cannot be made in a vacuum. These statutes are being applied to real people in real situations that create true dilemmas in the applications of such laws.

As Plato indicated long ago, not only must the laws be "pure,"[221] but their application must be accomplished by those that have the necessary wisdom and expertise.

> Well, there can be no question whether a guardian who is to keep watch over anything needs to be keen-sighted or blind. And is not blindness precisely the condition of men who are entirely cut off from knowledge of any reality, and have in their soul no clear pattern of perfect truth, which they might study in every detail and constantly refer to, as a painter looks at his model, before they proceed to embody notions of justice, honour, and goodness in earthly institutions or, in their character of Guardians, to preserve such institutions as already exist?
>
> . . . .
>
> Is there not another trait which the nature we are seeking cannot fail to possess—truthfulness, a love of truth and a hatred of falsehood that will not tolerate untruth in any form?
>
> Yes, it is natural to expect that.
>
> It is not merely natural, but entirely necessary that an instinctive passion for any object should extend to all that is closely akin to it; and there is nothing more closely akin to wisdom than truth. So the same nature cannot love wisdom and falsehood; the genuine lover of knowledge cannot fail, from his youth up, to strive after the whole of truth.
>
> . . . .
>
> And if a man is temperate and free from the love of money, meanness, pretentiousness, and cowardice, he will not be hard to deal with or dishonest. So, as another indication of the philosophic temper, you will observe whether, from youth up, he is fair-minded, gentle, and sociable.
>
> . . . .
>
> Well then, when time and education have brought such character as these to maturity, would you entrust the care of your commonwealth to anyone else?[222]

Our legislatures, courtrooms, and prosecutorial agencies are, unfortunately, not filled with such men. If Plato's Philosopher Kings are not the keepers of our destinies, then possibly we, as a society, ought to keep the interference with personal autonomy to a basic minimum. Until that day when those possessing the best our society has to offer in the way of human qualities become those that run and create our laws, those laws ought to stay in as basic a form as possible in order to reduce the injustice that can result from the application of those laws in any given circumstance.

IV. CONCLUSION

Thus, we come to the end of our analysis with an inescapable conclusion,

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221. Meaning true, good, of general application.

222. THE REPUBLIC OF PLATO 185-88 (Francis M. Cornford trans., Oxford Univ. Press 1961).

"[t]wo [possible] rights" do not necessarily make something better by their combination. The betterment of society to which we aspire by imposing a duty to aid to persons to whom we formerly owed no such legal duty fails in light of today's uptight, overaggressive, and fearful society with its over-adrenal reliance on lethal weapons such as concealed handguns. Although there may be certain benefits to the concepts of both imposing a duty to aid and having an armed citizenry, the confluence of these ideas occurs at the wrong time in history to be a force for the betterment of the society.

The combination of the use and proliferation of expanded duties to aid statutes with the push to allow a zone of safety attributed to a greater possession of concealed weapons will ultimately eliminate the best aspect of each. The expanded duty to aid statutes will fall by the wayside as our society becomes less altruistic and more aggressive in its application of brute force to solve complex problems. It is this unfortunate byproduct of the combining of these two forces that must and should be avoided if possible.

We, as a society, should pick the best possibility for betterment of the whole. This selection process would result in the expansion of the duty to aid statutes with an elimination of the expansion of concealed handguns. While the former has the potential of making us better people and a safer society, the latter carries only the potential to destroy our safety while creating the illusion of invulnerability.