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Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue

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BEYOND GOOD SAMARITANS AND MORAL MONSTERS: AN INDIVIDUALISTIC JUSTIFICATION OF THE GENERAL LEGAL DUTY TO RESCUE

INTRODUCTION

Recently, there has been movement away from the common law rule against recognizing a general duty to rescue.¹ It is too early to tell whether this indicates a reversal of the traditional resistance² towards recognizing this duty, but since portents of change have begun to appear,³ the present time may be propitious for rethinking the law of rescue.⁴ Such re-evaluation reveals important reasons for encouraging the movement.⁵ Our interdependence in contemporary society, the sophistication of the technology of rescue,⁶ and a reflective understanding of individualistic values suggest the desirability of recognizing the duty to rescue as a general legal obligation.

This Comment describes the controversy over recognizing a general legal duty to rescue,⁷ and then answers four major objections to recognizing this duty.⁸ The Comment's initial argument focuses on the idea that causation need not be required for general liability.⁹ A second argument suggests that the problem of identifying the tortfeasor when several bystanders passively observe the victim's death poses no more a problem than that which exists in ordinary cases of multiple tortfeasors, or in cases in which several people have special relationships with the victim.¹⁰ The Comment's third argument counters the objection that a defendant may not know in advance that he is legally required to attempt

1. *See infra* note 17; *see also infra* notes 49–53 and accompanying text.

2. *See infra* note 18.

3. *See infra* note 17 and accompanying text.

4. The goal of this Comment is less ambitious. The Comment will demonstrate that a certain type of rescue is supportable on individualistic grounds. *See infra* notes 149–231 and accompanying text.

5. *See infra* notes 149–231.

6. *See infra* note 32.

7. *See infra* notes 17–31 and accompanying text.

8. *See infra* notes 82–148 and accompanying text.

9. *See infra* notes 82–95 and accompanying text.

10. *See infra* notes 96–117 and accompanying text.

rescue, particularly if the emergency situation is ambiguous.¹¹ This objection need not be fatal, since the defendant may be required to act only as a reasonable person would, a standard already observed in most tort law.

Lastly, and most importantly, this Comment critically examines the claim that a general duty to rescue is incompatible with the individualistic values which condition the law.¹² This Comment proposes, as its final argument, that rather than being incompatible with these values, the general legal duty to rescue, properly understood, can be justified on individualistic grounds.¹³ Individualism may not only justify the general legal duty to rescue, but it may also define the content and scope of that duty.¹⁴

I. THE CONTROVERSY OVER RECOGNIZING A GENERAL LEGAL DUTY TO RESCUE

A. General Policy Issues

There is no general¹⁵ legal¹⁶ duty to rescue in most¹⁷ Anglo-

11. See *infra* notes 118–35 and accompanying text.

12. See *infra* notes 121–48 and accompanying text.

13. See *infra* notes 149–219 and accompanying text.

14. See *infra* notes 220–31 and accompanying text.

15. There are, of course, special relationships in which the law requires a duty to rescue. For example, a carrier has a legal duty to take reasonable steps to rescue a passenger (*Middleton v. Whitridge*, 213 N.Y. 499, 108 N.E. 192 (1915)) and an innkeeper must aid a guest in case of fire (*West v. Spratling*, 204 Ala. 478, 86 So. 32 (1920)). See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 341–42 (1971). Hence, there are specific legal duties to rescue. In contrast, the paradigmatic case of a general duty to rescue is one where the rescuer and victim are strangers.

16. Most discussions of the legal duty to rescue assume that there is a moral duty to rescue. See, e.g., Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112–13 (1908) (an early denunciation of legal decisions not requiring a general legal duty to rescue). A legal duty is a duty created by statute or common law decision. W. PROSSER, *supra* note 15, at 324. A moral duty is one which follows from a principle acceptable to all rational persons. See B. GERT, *THE MORAL RULES* 3–4 (1973).

17. The exceptions are Vermont and Minnesota. The relevant passages of the Vermont statute are:

(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.

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.

Duty to Aid the Endangered Act, VT. STAT. ANN. tit. 12, § 519 (1973).

The Minnesota law is an amendment to an already existing statute. The relevant passages are:

Subdivision 1. [DUTY TO ASSIST] Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to himself or others, give reasonable assistance to the ex-

American¹⁸ jurisdictions. A person may be liable, civilly and criminally,¹⁹ for intentionally injuring another, or for negligent and reckless conduct, but he is not required to be a Good Samaritan.²⁰ Anglo-American law reflects a minimalist conception of the state,²¹ whose salient function is proscribing harmful conduct,²²

posed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this section is guilty of a petty misdemeanor.

For the purpose of this section, the scene of an emergency shall be those areas not within the confines of a hospital or other institution which has hospital facilities, or an office of a person licensed to practice one or more of the healing arts.

Good Samaritan Law, ch. 319, 1983 Minn. Sess. Law Serv. 2329 (West) (amending MINN. STAT. ANN. §604.05 (West 1983)). One virtue of the Minnesota statute is that it explicitly states that the general legal duty to rescue applies only to emergencies. This makes it less vulnerable than the Vermont statute to the problem of restricting the scope of such a duty. See *infra* text accompanying notes 220–24.

In an editorial, the L.A. Herald Examiner called on the California legislature “to think about establishing” a statute creating a general legal duty to rescue. See L.A. Herald Examiner, Aug. 5, 1983, at A14, cols. 1–2.

Recently, a California court held that a bartender was negligent in not permitting a Good Samaritan to use a phone to call the police for the benefit of a man who had been threatened. *Soldano v. O’Daniels*, 141 Cal. App. 3d 445, 190 Cal. Rptr. 310 (1983). The court answered the charge that the law is not supposed to enforce a mere moral obligation by quoting approvingly Bohlen’s observation that moral conceptions which become a permanent part of the ethical convictions of the species necessarily influence the law. *Id.* at 448–49, 190 Cal. Rptr. at 313. The court further argued that it is a conspicuous feature of the common law to change, and that new torts are recognized continuously. *Id.* at 455, 190 Cal. Rptr. at 318.

18. For a useful general background of the legal duty to rescue in Anglo-American law, see *THE GOOD SAMARITAN AND THE LAW* (J. Ratcliffe ed. 1966) [hereinafter cited as *SAMARITAN*]; W. PROSSER, *supra* note 15, at 338–50.

19. The discussion will be limited to whether there should be a general duty to rescue in non-criminal contexts, although the argument for civil liability can be extended to criminal liability. For a useful discussion of the legal duty to rescue in criminal cases, see W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 182–91 (1972).

20. This, of course, refers to the Biblical parable of a Samaritan who ministered to a man who was beaten by thieves. The Good Samaritan, unlike the priest and Levite, both of whom ignored the victim, sacrificed time and effort to help him. This parable is presumably intended to indicate who counts as one’s “neighbor” and what it means to love one’s neighbor as oneself. *Luke* 10: 30–35. For a contemporary explication of what such love means, see generally Zemach, *Love Thy Neighbor As Thyself Or Egoism and Altruism*, 3 *MIDWEST STUD. PHIL.* 148 (1978).

21. A minimal state is one which provides only protection for its citizens and does not attempt to help the poor and powerless by, say, redistributing wealth. See Levin, *A Hobbesian Minimal State*, 11 *PHIL. & PUB. AFF.* 338, 339–41 (1982). See generally R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). Anglo-American law also contains other conceptions of the state, such as the welfare state.

22. The Anglo-American legal system is concerned—as any legal system must be—with protecting individuals from injury caused by others. For a representative exposition of this principle, see, e.g., T. HOBBS, *THE LEVIATHAN* 129 (M. Oakeshott ed. 1962).

not a person's failure to act morally.²³

In contrast, the legal systems of most European civil law countries include a general duty to rescue.²⁴ One explanation of this difference is that Anglo-American law is predicated on individualism as an underlying social value.²⁵ Individualism, which

23. This Comment will assume, though not argue for, a true, non-relativistic moral principle which requires an individual to help others. This is a fair assumption because the legal issue of whether there should be a duty to rescue depends on a belief that there is a moral, or otherwise non-legal, duty to act on another's behalf. It would be extremely odd to argue that there should be a legal duty to rescue, but that there is no moral or non-legal duty to do so. For arguments supporting non-relativistic ethics, see B. WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 20-27 (1972). For arguments against relativism in general, see R. TRIGG, *REASON AND COMMITMENT* (1973).

24. See Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in SAMARITAN, *supra* note 18, at 91-124; Tunc, *The Volunteer and the Good Samaritan*, in SAMARITAN, *supra* note 18, at 43-62.

25. This Comment construes individualism to require that certain rights, for example, liberty, privacy, and self-interest are irreducibly basic, and must be honored by any political and legal system. See *infra* notes 139-41 and accompanying text. For classical statements of individualistic political theories, see, e.g., E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (6th ed. London 1790); T. HOBBS, *supra* note 22; J. LOCKE, *SECOND TREATISE OF GOVERNMENT* (C. B. Macpherson ed. 1980).

For examples of two very different contemporary individualistic political theories, see generally R. NOZICK, *supra* note 21; J. RAWLS, *A THEORY OF JUSTICE* (1971). For an interesting critical evaluation of Rawlsian individualism, see Teitelman, *The Limits of Individualism*, 69 J. PHIL. 545 (1972).

Individualistic political theory maintains that (1) autonomous individuals are the causal forces that create society; (2) the individual has ontological priority over society; (3) individuals become socialized by rational persuasion and coercion; and (4) the motivation and behavior of individuals are the proper objects of political analysis. W. WENTWORTH, *CONTEXT AND UNDERSTANDING: AN INQUIRY INTO SOCIALIZATION THEORY 2* (1980).

Individualism, as political theory, may be contrasted with political theories that concentrate on the social group.

Individualism is the perception of the individual distinguished from his social group, the definition of the individual in terms of qualities that are distinctively his own as contrasted to group qualities, and the evaluation of the individual separate from the evaluation of his group. These perceptions, definitions, and evaluations are attributed both to the individuals themselves and to the culture

Lane, *Individualism and the Market Society*, in *LIBERAL DEMOCRACY: NOMOS XXV* 374 (J. Pennock & J. Chapman eds. 1983).

Individualism is often viewed as an economic conception. See H. ROBERTSON, *ASPECTS OF THE RISE OF ECONOMIC INDIVIDUALISM* 34 (1973) ("Individualism, as a doctrine, sees in the individual and his psychological aptitudes the necessary basis of society's economic organisation, believes that the actions of individuals will suffice to provide the principles of society's economic organisation, seeks to realize social progress through the individual by allowing him all the scope for his free self-development which is possible."). On this view, economic individualism is not the view that people should be crassly egoistic. Individualism does not ask "liberty for men to indulge their anti-social greed. It asked liberty for them to look after themselves in accordance with the rules which life and business both require to be respected and the observance of which was thought to be innate to man's nature" *Id.* at 212.

It should be pointed out that individualism is not merely a political or economic

includes championing a person's self-interest,²⁶ imposes severe limits on what the law can require of an individual.²⁷ In such a scheme, law may set necessary guidelines for social conduct,²⁸ but should not structure all of social life.²⁹ While morality may require much more from the individual, including altruism³⁰ and

theory; it is also a general theory of the nature of persons. American individualism has deep roots in Locke's epistemology, which holds that "[e]ach mind perceived the world for itself and developed according to the specific information imprinted on it through these perceptions." J. POLE, *AMERICAN INDIVIDUALISM AND THE PROMISE OF PROGRESS* 9 (1980). Hence, human consciousness "is wholly private, a self-enclosed continent, intrinsically independent of the ideas, wishes, purposes of everybody else." J. DEWEY, *DEMOCRACY AND EDUCATION* 297 (1966). Individualism holds each mind "is complete in isolation from everything else." *Id.* at 305 (Dewey's characterization of individualism).

As an ethical perspective, individualism contends that the individual has moral worth *qua* individual, not because he is related to other people. R. HISKES, *COMMUNITY WITHOUT COERCION* 12 (1982). Individualism maintains that people are unique and have a great capacity for self-development. *Id.* at 14. Autonomy and privacy are essential political and legal dimensions of individualism. *Id.* at 13. Finally, the authority or legitimacy of laws derives from the consent of the governed. *Id.* at 11 (discussing Steven Lukes' influential examination of individualism).

26. There is a healthy prudential component in individualistic political theories. Burke tells us that "[w]hatever each man can separately do, without trespassing upon others, he has a right to do for himself; and he has a right to a fair portion of all which society, with all its combinations of skill and force, can do in his favour." E. BURKE, *supra* note 25, at 87. For Burke "the first of all virtues" is prudence and "[m]en have no right to what is not reasonable, and to what is not for their benefit . . ." *Id.* at 92.

Enlightened self-interest or rational prudence is a cardinal principle of individualism. Tort law reflects this individualism in its conception of the appropriate standard of care as that action which would be performed by a reasonable, prudent person. W. PROSSER, *supra* note 15, at 149-51. Notice that this conception of a reasonable, prudent person is not necessarily a moral notion, though it is not inconsistent with morality. For illuminating discussions of the concept of rational prudence and its relationship to moral reasoning, see generally K. BAIER, *THE MORAL POINT OF VIEW: A RATIONAL BASIS OF ETHICS* (1958); D. GAUTHIER, *PRACTICAL REASONING: THE STRUCTURE AND FOUNDATIONS OF PRUDENTIAL AND MORAL ARGUMENTS AND THEIR EXEMPLIFICATION IN DISCOURSE* (1963).

27. See R. NOZICK, *supra* note 21, at ix (the state can require only that individuals refrain from stealing, using force, engaging in fraud, and breaking contracts). See also J.S. MILL, *ON LIBERTY* 13 (C. Shields ed. 1956). One necessary guideline, endorsed universally by all individualistic theorists, is the harm principle. Mill expressed this principle succinctly when he observed "[t]hat the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." *Id.*

28. See J.S. MILL, *supra* note 27, at 13.

29. A form of polity which structures all of social—and perhaps also personal—life is a totalitarian state. For a discussion of the emergence of totalitarianism, see generally H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1968).

30. Altruism is the view that there are direct reasons to act on another's behalf. Unfortunately, the term 'altruism' is often misapplied. Sometimes it is used to mean helping behavior for *any*—even egoistic—motives. For example, in discussing the possible economic advantages in having a legal duty to rescue, Posner writes:

This analysis ignores, however, the possible indirect effects of liability on the incentives of people who would attempt a rescue in a re-

additional duties to others, it is not the purpose of the law to maintain the entire fabric of morality.³¹

In contemporary post-industrial³² society there are many ac-

gime of no liability. These people are altruists, and one of the benefits that a person receives from engaging in altruistic conduct is to be known as an altruist.

R. POSNER, *ECONOMIC ANALYSIS OF LAW* 132 (2d ed. 1977). What Posner seems to overlook is the possibility that there are *altruists* who are motivated by the needs of others, irrespective of whether they will gain recognition as a result of acting altruistically. See T. NAGEL, *THE POSSIBILITY OF ALTRUISM* 15-16 (1970) ("[O]ne has a *direct* reason to promote the interests of others—a reason which does not depend on intermediate factors such as one's own interests . . .").

31. The received view is that law should enforce only certain moral (or non-legal) values—those which establish order and protect the individual from harm. See J.S. MILL, *supra* note 27, at 13. One can understand these values as *moral* values or one can interpret them as values that any rationally prudent individual would espouse. Understood in the first way, law should enforce those generally accepted moral values; understood in the second fashion, law should not enforce morality, but should instead enforce the values of rational prudence.

The benefits of protection—freedom from force, theft and injury—are the chief goals of a legal system. See generally J. BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* 60 (C. Everett ed. 1945) (wherein Bentham describes the benefits of protection as "security" and "[p]ersonal liberty"); J. BENTHAM, *A FRAGMENT ON GOVERNMENT* 84 (W. Harrison ed. 1948) (here Bentham describes the purpose of the state as the "safety and convenience" of its members); H.L.A. HART, *THE CONCEPT OF LAW* 190 (1961) (restricting violence is the most important legal prohibition) [hereinafter cited as *CONCEPT OF LAW*]; H. KELSEN, *PURE THEORY OF LAW* 37 (1961) (law protects individuals from the use of force by other individuals).

The question of whether law should *enforce* morality has recently received a great deal of attention. Hart and Devlin have continued a debate originally involving Mill and Sir James Stephens. For useful background discussion of the Hart-Devlin debate, see generally P. DEVLIN, *THE ENFORCEMENT OF MORALITY* (1965); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963); J.S. MILL, *ON LIBERTY* (C. Shields ed. 1956); J. STEPHENS, *LIBERTY, EQUALITY AND FRATERNITY* (R. White ed. 1967); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966); Hart, *Solidarity and the Enforcement of Morals*, 35 *U. CHI. L. REV.* 1 (1967).

Typically, this debate centers around what is sometimes called "personal morality," that is, activities which affect only the agent or other consenting adults, or activities which merely offend people, but do not cause them physical harm. Few writers, if any, would be inclined to argue that it is not the law's job to enforce laws preventing harm, even if that is a moral value. It is morally wrong for Jones to strike Smith for no apparent reason, and no one contends that the law should not enforce the moral proscription against striking others. Moreover, it is to everyone's advantage for the law to enforce the proscription against injuring people. This is both a moral and a prudential value, which must be enforced by law. For discussions of the relationship between law and morals, see generally E. CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* (1981); D. RICHARDS, *THE MORAL CRITICISM OF THE LAW* (1977).

32. This Comment relies upon the fact that technology, the hallmark of a post-industrial society, structures much of modern life. Cf. D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* 197 (1976) ("This new fusion of science with innovation, and the possibility of systematic and organized technological growth, is one of the underpinnings of the post-industrial society."). There is a certain equalizing effect in this; anyone can find himself in need of rescuing. For example, one's car can break down or one can get stuck in an elevator or on a subway train. Technology can create emergencies, but more importantly, it can make what once were difficult or impossi-

cidents which cause permanent physical injury and loss of life.³³ The cost of these accidents provides compelling reason for discovering an effective and equitable way to reduce these losses.³⁴ A general legal duty to rescue would save lives and reduce the cost of rescue operations.³⁵ In addition, a general legal duty to rescue, surprisingly, may be required by individualistic values³⁶ underlying the law.³⁷

B. *Current Law Concerning The Duty To Rescue*

There are different types of rescues, some more difficult than others.³⁸ The controversy over whether to recognize a general legal duty to rescue is primarily a controversy about easy rescues.³⁹

ble rescues easy ones. Technology creates circumstances where rescues can be effected by almost anyone. In many cases an ordinary bystander can effect a rescue merely by calling the appropriate rescue officials—police officers, fire personnel, or paramedics. There are many circumstances—perhaps even the most common ones—where saving lives can be achieved at little financial cost and without significant cost to other important values, e.g., autonomy, privacy, or self-interest. *See infra* text accompanying notes 228–31.

This does not mean that the duty to rescue logically depends on a technological setting. There is a duty of easy rescue in any society. But the case for such a legal duty is strongest in societies having sophisticated technological means of rescue.

33. There are almost two million victims of automobile accidents yearly, of whom over fifty thousand die. Further, there are nearly nine million victims of other kinds of accidents annually, of whom over sixty thousand die. N. CHAYET, *LEGAL IMPLICATIONS OF EMERGENCY CARE* xiii (1969).

34. Posner sketches, though does not endorse explicitly, an economic argument that rescuing is often cost-efficient. R. POSNER, *supra* note 30, at 132.

35. This is not to suggest, of course, that a general legal duty to rescue will solve all the problems in this area. Obviously, the problems associated with accidents and emergency care are broader than the issue of whether to recognize a general legal duty to rescue. *See generally* G. CALABRESI, *THE COST OF ACCIDENTS* (1970) (where Calabresi approaches problems of fault from an economic perspective); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (where Fletcher argues for the paradigms of reciprocity and reasonableness as replacements for strict liability and fault).

36. One such value is an element of early American individualism, namely, the combined virtues of self-reliance and the inclination, if time and energy permit, to lend one's neighbor a helping hand. *See* W. DEXTER, *HERBERT HOOVER AND AMERICAN INDIVIDUALISM* 8–9 (1932).

37. *See infra* text accompanying notes 198–232.

38. *See infra* note 72.

39. For the purposes of this Comment 'a general legal duty to rescue' should have the following features: first, it must be obvious how to effect the rescue, e.g., by shouting a warning to someone that he is about to walk off a cliff, or by throwing a rope to someone drowning; second, the rescuer's cost (financial, moral, and personal) must be minimal or non-existent. A rescue of this sort will be called "an easy rescue" following Professor Weinrib's usage. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 250 (1980). Weinrib presents a moral justification of the duty of easy rescue. This Comment, on the other hand, gives a *prudential* justification in terms of individualistic values.

To argue in behalf of such a general legal duty is not to set up a straw man, since

This Comment will examine the reasons for and against legally requiring easy rescues.

Traditionally, the courts have maintained a doctrinaire allegiance to the common law rule against a general duty of easy rescue.⁴⁰ One court found a defendant not legally obligated to come to the aid of a person to whom he had just rented a canoe when the canoe capsized near the dock.⁴¹ Another court held that a de-

in current case law, there is *no* legal duty to rescue a stranger, even if the rescue is an easy one. See, e.g., W. PROSSER, *supra* note 15, at 340-41:

[T]he law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. Some of the decisions have been shocking in the extreme. . . .

Such decisions are revolting to any moral sense.

Id. See also W. LAFAVE & A. SCOTT, *supra* note 19, at 183 ("Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience A moral duty to take affirmative action is not enough to impose a legal duty to do so.").

40. It is hornbook law that, absent a special relationship, there is no general duty to rescue someone in danger of grave physical harm or death, even when doing so would not endanger the potential rescuer. See W. PROSSER, *supra* note 15, at 338-50 (the special relationships include proprietor-customer, carrier-passenger, innkeeper-guest, employer-employee, and shipmaster-crew); see also W. LAFAVE & A. SCOTT, *supra* note 19, at 182-91 (in criminal contexts the special relationships also include parent-child).

41. *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928), *overruled*, *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974). In *Osterlind*, the defendant rented a canoe to an intoxicated man (decedent). After the boat capsized, the decedent hung to its side for thirty minutes, calling to the defendant to rescue him. The defendant refused and the decedent drowned. *Osterlind*, 263 Mass. at 74, 160 N.E. at 302. Not only did the court find no legal duty to rescue here, but it used the fact that the decedent clung to the boat for some time as evidence that he could "exercis[e] . . . care for his own safety." *Osterlind*, 263 Mass. at 76, 160 N.E. at 302. According to the court, the defendant's failure to respond to the decedent's outcries was immaterial. No legal right of the decedent was infringed. *Id.* Hence, the court's decision did not depend on whether the defendant heard the decedent's cries or could have rescued the decedent had defendant chosen to do so. According to the court, common sense inquiries such as these are irrelevant. For a criticism of this decision, see Case Comment, *Torts—Negligence—Duty to Refrain from Renting a Canoe to an Intoxicated Person and to Go to His Aid in Case of Mishap*, 42 HARV. L. REV. 964 (1929).

The *Osterlind* opinion is a paradigmatic example of common law reasoning in the law of rescue. Though overruled forty-six years later, it helps us to understand how deeply entrenched the resistance has been to legally requiring rescue.

In expressly overruling the *Osterlind* decision, the court in *Pridgen* declared that an owner of property owes to a trespasser an affirmative duty to take reasonable, positive action in the latter's behalf. *Pridgen*, 364 Mass. at 711, 308 N.E.2d at 477. In so ruling, the court decided to hold an owner to such a standard whereby if "an ordinary and reasonably prudent person would have acted," so too must the owner of realty respond to a situation where a trespasser finds himself in physical peril. *Pridgen*, 364 Mass. at 711, 308 N.E.2d at 477.

It is unclear whether the court meant to restrict the case to the category of "special relationships" (see *infra* note 51 and accompanying text) or to imply a more general legal duty to rescue.

fendant had no legal duty to rescue a business invitee whom the defendant had enticed to jump into a pool of water, despite the defendant's failure to inform the victim that the water was over eight feet deep.⁴²

The same reasoning—denying a legal duty of easy rescue—comes into play in cases involving children. In one such case the court held that the failure of the defendant's servant to rescue a four-year-old child who fell into the defendant's swimming pool was not actionable.⁴³ In another case the court decided that, despite a factory foreman's failure to warn a child trespasser that dangerous machinery was in use on the premises, the factory owner had no legal duty to intervene for the protection of the child and to eject him from the factory.⁴⁴ Numerous cases support the

42. *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959).

43. *Handiboe v. McCarthy*, 114 Ga. App. 541, 151 S.E.2d 905 (1966). Here the court quotes from 65 C.J.S., *Negligence* § 63, at 104 (1966):

[W]here the injury is not due to the fault of the person sought to be charged, the fact that a person sees another who is injured does not, of itself, impose on him any legal obligation to afford relief or assistance, but he may have a strong moral and humanitarian obligation to do so.

The court added that "the failure of the defendant's servant to rescue the plaintiff's child from the perilous situation afforded no cause of action to the plaintiff." 114 Ga. App. at 543, 151 S.E.2d at 907. So eager were the judges to deny a general duty to rescue that the concurring judge maintained that the child's parents themselves were negligent. The judge's theory was that the child was an invitee and that the defendant's servant was in fact negligent, but that the servant's negligence should be imputed to the parents of the decedent child (plaintiff). 114 Ga. App. at 543-45, 151 S.E.2d at 907-08 (Felton, C.J., concurring).

44. *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809 (1897). This case represents a classical statement of the view that there is no general duty to rescue. Consider the court's remarks:

Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. . . . Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.

Id. at 260, 44 A. at 810.

As if this were insufficient to convince us of the court's determination not to recognize a general duty to rescue, the court argues that landowners "are not bound to warn [a trespasser] against hidden or secret dangers arising from the condition of the premises . . . or to protect him against any injury that may arise from his own acts or those of other persons." *Id.* The court insists that the only duty the landowner owes the trespasser is the duty not to injure him by some affirmative action. The court writes:

In short, if they do nothing, let him entirely alone, in no manner interfere with him, he can have no cause of action against them for any injury that he may receive.

There is a wide difference—a broad gulf—both in reason and in law, between causing and preventing an injury; between doing by negligence or otherwise a wrong to one's neighbor, and preventing him from

common law rule against a general duty of easy rescue⁴⁵ in cases of nonfeasance.⁴⁶ The general theme is the same: a person is liable only if he causes the victim's injury;⁴⁷ if he does nothing—no matter how ignoble the omission—he is above *legal* reproach.⁴⁸

Some cases have indicated a relaxation of the rule against recognizing a general duty of easy rescue.⁴⁹ One development is a readiness to permit the rescuer compensation for injuries incurred during the rescue attempt.⁵⁰ A more important development is

injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises The duty to do no wrong is a legal duty. The duty to protect against wrong is . . . a moral obligation only, not recognized or enforced by law. . . . I see my neighbor's two-year-old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law under the statute . . . because the child and I are strangers, and I am under no legal duty to protect him.

Id. at 260–61, 44 A. at 810–11.

45. See, e.g., *Handiboe v. McCarthy*, 114 Ga. App. 541, 151 S.E.2d 905 (1966) (the defendant's servant failed to rescue the plaintiff's child from a perilous situation); *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928), *overruled*, *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974) (where defendant rented a canoe to an intoxicated man and the boat capsized near the dock, but the defendant refused to come to the aid of the intoxicated man, who drowned); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897) (no liability where a defendant's foreman fails to eject a child trespasser who is injured by dangerous machinery); *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959) (defendant enticed a business guest to jump into a pool of water and let him drown). See also *supra* notes 41–44; Note, *The Duty to Rescue*, 47 IND. L.J. 321 (1972) (this Note examines, *inter alia*, the contention that not having a legal duty to rescue encourages non-rescue).

46. Distinguishing between act and omission or between misfeasance and nonfeasance are two different ways of drawing the distinction between causing harm and failing to prevent it. This way of conceptualizing the issue is fundamental to an argument purporting to establish that there is no general duty to rescue. See Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908) ("There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance" *Id.* at 219. "[D]uties of positive action for the benefit of others are not general to the common law" *Id.* at 221). See also G. FLETCHER, *RETHINKING CRIMINAL LAW*, 421 (1978) ("[T]he feeling persists that the distinction [between acts and omissions] is fundamental"); W. LAFAVE & A. SCOTT, *supra* note 19, at 182–86 (discussing failures to act and circumstances specifically invoking a legal duty to act); W. PROSSER, *supra* note 15, at 338–40 ("[T]here arose very early a difference . . . between 'misfeasance' and 'non-feasance'" *Id.* at 338.) The distinction between misfeasance and nonfeasance has medieval roots in the role that it played in the evolution of *assumpsit*. See A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 220–29 (1975). Liability for nonfeasance was recognized by the law through the action of *assumpsit*. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888).

47. L. GREEN, *JUDGE AND JURY* 186 (1930).

48. *Id.* at 62.

49. See *infra* note 51.

50. A rescuee cannot claim voluntary assumption of risk as a defense against a rescuer's suit for damages for injuries suffered in his rescue attempt, and except in cases of extreme recklessness, the defendant cannot invoke contributory negligence on

that some courts are now inclined to increase the number of special relationships which may require a specific legal duty to aid the victim.⁵¹ The proliferation of the special relationship exceptions represents a marked contraction of the common law rule.⁵² Indeed, some might interpret this as evidence that there no longer is a general rule against easy rescue.⁵³

Still, there is very little movement toward explicitly recognizing a general legal duty of easy rescue.⁵⁴ The reason for this judicial⁵⁵ reluctance is that this duty seems incompatible with important conceptual and policy considerations underlying the

the part of the rescuer. See *Perpich v. Leetonia Mining Co.*, 118 Minn. 508, 512, 137 N.W. 12, 14 (1912) (a rescuer may recover for injuries incurred in a rescue attempt unless he acted recklessly); *Hammonds v. Haven*, 280 S.W.2d 814 (Mo. 1955) (it is a jury question whether a pedestrian's conduct to warn drivers of a dangerous condition was reasonable); *Guca v. Pittsburgh Rys.*, 367 Pa. 579, 583 (it is reasonable to stand on railroad tracks in order to warn of a car stuck on the tracks); J. FLEMING, *THE LAW OF TORTS* 267-68 (5th ed. 1977) (contributory negligence is a good defense only in cases of extreme recklessness).

51. See, e.g., *Anderson v. Atchison, T. & S.F. Ry.*, 333 U.S. 821, 823 (1948) (employer-employee); *Devlin v. Safeway Stores, Inc.*, 235 F. Supp. 882, 887 (S.D.N.Y. 1964) (proprietor-customer); *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974) (landlord-trespasser); *Farwell v. Keaton*, 396 Mich. 281, 290-91, 240 N.W.2d 217, 221-22 (1976) (companion to companion).

52. This presents a conceptual problem. With each special case there is the problem of classifying it under a recognized rationale or finding a new rationale. Recognizing additional special relationships tends to multiply rationales; it then is imperative to provide, if possible, some systematic account of the rule and its exceptions. For discussion of the special relationships see W. LAFAVE & A. SCOTT, *supra* note 19, at 184-86; W. PROSSER, *supra* note 15, at 341-43; Note, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 VT. L. REV. 143, 149-51 (1982).

53. But this would be a mistake. So long as there is no *general* duty to rescue, one type of case will be systematically excluded from those involving duties to rescue: cases involving strangers. This is just the case we are interested in.

While recognizing that there still is a rule against a general duty to rescue, one writer has maintained that "[f]rom any view, the absence at common law of a general duty to rescue is of small practical consequence. . . . More important, one comfortably can assume that even without a legal duty most persons will help others in distress whenever they can do so at little cost to themselves." Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 928 (1982). The problem is, of course, that one cannot make any such assumption. News stories are replete with cases of observers standing by while someone is injured or killed. In one recent case, neighbors watched a burglar climb into the window of the apartment of an eighty-eight-year-old woman. The observers knew she was alone and defenseless, but they did not call the police. The burglar stayed in the apartment for over thirty minutes during which time he bludgeoned the woman to death. The police said they could have arrived on the scene in three to five minutes had any of the neighbors called them. See *Nashville Banner*, Sept. 30, 1983, at 1, col. 1.

54. See *supra* note 17.

55. No court has recognized a general duty of easy rescue unless prompted by legislation. See *supra* note 17. One reason may be that doing so would be a sharp break with precedent. It is not clear that a court could make this break on its own. See generally J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* (1964) (discussing the doctrine of *stare decisis*).

law.⁵⁶ Before discussing this apparent incompatibility, it would be useful to consider both a rationale for, and a representative formulation of, the general legal duty of easy rescue.

C. *A Possible Rationale and Formulation of the General Legal Duty of Easy Rescue*

1. A Rationale for the Special Relationship Exception

It is important to articulate a rationale for the special relationship exception to the rule against a duty of easy rescue. Since the courts recognize a duty to rescue in some circumstances,⁵⁷ it may be possible to discover a common rationale for these exceptions,⁵⁸ and to extend it to cases involving strangers.⁵⁹ Typically, a special relationship involves a rescuer having the ability⁶⁰ to rescue a victim who is in some way dependent⁶¹ upon him. Consider

56. *See infra* text accompanying notes 57-148.

57. *See supra* note 18.

58. The special relationships are exceptions to the common law rule against a general duty of easy rescue; as such, they need to be justified. *See supra* note 52.

59. It may, of course, turn out that it cannot be extended. The special relationships may have a common rationale which is limited to just those relationships recognized by the common law. On the other hand, rationales for special relationships may be fitted to each exception arbitrarily, thereby presenting insuperable problems in systematizing the law of rescue. *See supra* note 52.

A neat, conceptual framework would help to explain both the common law rule against a duty of easy rescue and its exceptions. Ideally, this would involve having a justification or rationale for the rule which would also explain why there are exceptions. For example, a rule against lying can be justified on utilitarian grounds; such a rule maximizes welfare. And it is precisely this justification which permits us to make an exception to the rule when lying saves a person's life. Here both the rule and the exception are based on the same aim of maximizing welfare. The relevant rule would contain its own exceptions; it would be: "Don't lie except when doing so saves lives." In this way the exceptions are built into the rule. W. FRANKENA, *ETHICS* 23-25 (1963).

But what if the justification for the rule is not the same as the justification for the exceptions? Perhaps the rule and its exceptions reflect competing values. This might very well be the case. But before we embrace this conclusion we should, in the name of conceptual simplicity and coherence, try to find one value, one justification. *See* W. QUINE, *On Simple Theories of a Complex World*, in *THE WAYS OF PARADOX* 255 (1976). (Quine argues that *ceteris paribus* the simpler the theory the better a theory it is.)

60. *Cf.* M. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER & PUBLIC POLICY* 69 (1977) (a person has a duty to rescue when he has the ability or power to effect rescue).

61. Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551 (1980).

The notion of dependency is present in situations in which a legal duty to aid exists because of the relationship between the victim and the benefactor. . . .

Although the rationale in these [special relationship] cases is not explicitly stated in terms of dependency, dependency is a common denominator of these relationships. The defendant holds some power or control over the plaintiff, in that the defendant has the opportunity to

the following rationale:

a. *The ability condition.* When a person is thrust into life-threatening circumstances, he may lack the ability to remove the threat to his safety. Ordinarily each person has the ability to avoid danger; in emergencies, however, he may require rescue. In many of the special relationships,⁶² the potential rescuer has the ability to rescue the victim.⁶³ But the ability to rescue is not suffi-

take certain precautions to decrease the probability that harm will come to the plaintiff.

Id. at 553.

It should be pointed out that "dependency" is ambiguous. A depends upon B when either (1) A needs B's help, or (2) A has the right to expect B's help. Thus, a husband becomes dependent upon his wife for support when he loses his job and needs her support to live. A child is dependent upon his parent, since the child has a right to expect his parent to support him, even if he does not need the support. The first sense of dependency applies to anyone needing help. If Jones needs Smith's help to change a flat tire, Jones is dependent upon Smith. This "needs" sense of dependency does not provide a way of distinguishing between the special relationships and strangers. If adopted, it would likely mean abandoning the rule against a general duty to rescue. In the second, "rights" sense of dependency, Brown is dependent upon Smith if he has the right to expect Smith to help him. The "rights" sense of dependency allows us to keep the exceptions, but provides no reason why in just those relationships—and not in general—victims have the right to expect help. The "rights" sense of dependency does not provide an explanation of the source of this right. The response that the special relationships involve expectations and reliance by the victim is not a sufficient answer because it does not tell us whether the expectations and reliance are actual or presumed by law. If they are actual expectations and reliance, then not all the special relationships should include a duty to rescue, since some victims, despite the special relationships, do not *actually* expect or rely upon the defendant's help. Further, some cases of relationships between strangers should require a duty to rescue, since some strangers expect and rely on other strangers for help.

If one replies that the issue is not what a victim actually expects or relies upon but rather what the law presumes, then it is not obvious why the law cannot and should not presume expectations and reliance in rescues among strangers.

Finally, what a person expects and relies upon is not a function of some intrinsic feature of a relationship but rather what laws and social norms permit him to infer reasonably about his circumstances and the particular relationships he is in. There is nothing inherent in the relationship between a guest and an innkeeper, or an employee and an employer, which generates expectation and reliance. Rather, social policy considerations—e.g., who is best able to provide help and at what cost—generate legal obligations and social norms, which in turn generate expectations and reliance. Rather than being the source of a duty to rescue, expectations and reliance are instead the result of there being such a duty. Hence, no arguments based upon expectations and reliance can prevent the establishment of a general duty of easy rescue. *See infra* note 93.

To say that the potential rescuer, in the context of special relationships, is responsible for the victim is not much better than speaking about the rescuee's expectations, since one would like to know why a stranger is not responsible for a victim's life when saving the victim costs the rescuer nothing. To appeal to the absence of a special relationship to explain why strangers are not responsible for one another is circular.

62. *See supra* note 51.

63. There usually is no inquiry by the court as to whether the rescuer actually had the ability to rescue. Rather, the ability to rescue is assumed. *See supra* note 51.

cient to justify a legal duty to rescue. Something more is required.

b. *The dependency condition.* In all the special relationships where there is an established legal duty to rescue, one party depends on another for safety.⁶⁴ In emergencies, as well as in ordinary circumstances, the rescuer functions as a guarantor⁶⁵ of the victim's welfare; he must make sure that, whatever risk there may be to the victim, such risk remain at a minimum.⁶⁶ As a result, the victim may rely⁶⁷ upon the rescuer for safety.⁶⁸ Taken together, the ability and dependency conditions suggest⁶⁹ a formulation of

"Ability" may mean actually being able to rescue, or it may mean that society or the law expects or requires the potential rescuer to be able to rescue.

64. In most special relationships the victim is primarily dependent upon the rescuer for things other than safety. For example, a guest depends upon the innkeeper for room and board. See *supra* note 18. See also *supra* note 51.

65. Benditt, *Liability for Failing to Rescue*, 1 L. & PHIL. 391 (1982). Benditt uses the notion of a guarantor as a rationale for a restricted class of special relationships:

[F]or some relationships and for some matters involving these relationships, it is plausible to regard one individual as a partial guarantor of another's welfare or well-being, such that if he fails to (at least try to) rescue he must make the victim whole. . . . [O]ne person is a guarantor of the welfare or well-being of another only when (1) there is a relationship established prior to the event in question, which is either (a) voluntary, or (b) familial, or (c) involves some professional or official capacity, and (2) the event in question is connected with the relationship.

Id. at 415. According to this view, it may be that friends have a duty to rescue when the relationship exists in advance, when it was voluntarily entered into, and when the need for rescue is connected with the relationship, as may occur when two friends are visiting each other. What about passengers on a plane? Members of a television audience? Citizens?

66. A rescuer who has a special legal duty to rescue may be required to effect more than an easy rescue.

67. See *infra* text accompanying notes 93-95.

68. Some writers contend that the relationship between the rescuer and the victim must be formed before the emergency. Benditt, *supra* note 65, at 415. But it is not at all clear why the rescuer's ability to rescue and the victim's dependency upon the rescuer are not sufficient to require an easy rescue. In such a case the rescuer can guarantee the victim's safety. In general, it may be that each of us is the other's guarantor. We may be reciprocal guarantors. Benditt, *supra* note 65; cf. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35 (1971) (Trivers argues that reciprocal altruism is genetically based).

More importantly, the condition that the relationship exist prior to the emergency is not even a necessary condition in all the special relationships. For example, California requires a driver involved in an accident to give aid "to any persons injured in the accident." CAL. VEH. CODE § 20003(a) (West Supp. 1983). Failure to render reasonable assistance is a crime (CAL. VEH. CODE § 20001 (West Supp. 1983)) and makes the delinquent driver civilly liable to the victim. *Summers v. Dominguez*, 29 Cal. App. 2d 308, 312-13, 84 P.2d 237, 239 (1938). There is no prior relationship or pre-existing duty here. The relationship and the duty are created simultaneously at the time of the accident.

69. This does not mean that the ability and dependency conditions logically entail this formulation of the general duty of easy rescue. Both conditions lend support to such a formulation.

The dependency condition may also include an immediacy constraint. That is, it

the general legal duty of easy rescue.

2. A Possible Formulation of the General Duty of Easy Rescue

Following those commentators who believe that ability and dependency form the basis of the duty to rescue in the special relationships,⁷⁰ one can extrapolate from rescue in these cases to cases of easy rescue in general. Essentially, the general duty of easy rescue derives from the rescuer's ability to rescue a person whose physical integrity or life depends⁷¹ upon the rescuer. The duty may be stated as follows:

A person has a legal duty to rescue⁷² another when he encounters or witnesses⁷³ that person in an emergency situation,⁷⁴ in danger of grave physical harm or death, and the rescuer has the ability⁷⁵ to extricate the victim from the dangerous circumstances without endangering himself.⁷⁶

This Comment will suggest why courts⁷⁷ should recognize such duty. Many courts grant that there is a moral duty of easy rescue,⁷⁸ yet few American jurisdictions⁷⁹ consider a person obligated to rescue a stranger,⁸⁰ even if the rescue is an easy one. Part

is necessary for the rescuer to actually be in the same place as the victim. The Minnesota amendment is stated with such a constraint. *See supra* note 17. Stating the duty in this way helps avoid the problem of restricting its scope. *See infra* text accompanying notes 220-24.

70. *See supra* notes 60-61.

71. The duty arises at the scene of the emergency. *See supra* note 68.

72. There are four types of rescue. First, a person may rescue someone by physically intervening, such as when the rescuer jumps in the pond to save a drowning child. Second, a person may prevent an accident by not permitting dangerous equipment on his property. Third, a person may warn another that he is headed for a fall. Finally, a person may rescue another or initiate a rescue by calling the appropriate rescue and emergency authorities. *See supra* note 39.

73. The rescuer must actually know the victim is in danger. This helps avoid problems of restricting the scope of the duty. *See infra* notes 220-31.

74. This conforms to the Minnesota statute. *See supra* note 17.

75. *See supra* text accompanying note 60.

76. If others are already in the process of rescuing the victim, the dependency condition may not be met. *See* text accompanying note 61.

77. Legislation may be required here. *See supra* note 17. Courts may be reluctant to break with precedent. *See supra* note 55.

78. *See, e.g.,* Handiboe v. McCarthy, 114 Ga. App. 541, 543, 151 S.E.2d 905, 907 (1966); Buch v. Amory Mfg. Co., 69 N.H. 257, 261, 44 A. 809, 811 (1897); Yania v. Bigan, 397 Pa. 316, 321-22, 155 A.2d 343, 346 (1959).

79. *See supra* note 17.

80. The closest any court has come to recognizing such an obligation is a Michigan court's holding that a friend may have a legal duty to rescue his companion. Farwell v. Keaton, 396 Mich. 281, 290-91, 240 N.W.2d 217, 221-22 (1976). Here the court held that the defendant in a wrongful death action should have sought medical attention for his companion (decedent) after the companion had been badly beaten. *But cf.* People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907) (where the court

Two examines four important reasons for this resistance.⁸¹

II. THE CASE AGAINST THE GENERAL DUTY OF EASY RESCUE

A. *The Problem of Causation*

Anglo-American law considers an individual liable in tort for injuring another only if the alleged injurer is found to be the proximate cause of that injury.⁸² The conception of causation that informs our tort law may be stated as follows: for X to be the cause of Y, X must be a positive occurrence⁸³ which directly brings about Y. The failure to do something Z—even if Z is certain to prevent Y—does not qualify as the cause of Y.⁸⁴ Such failure, therefore, cannot be the basis of tort liability.

Since liability depends on actually doing something which results in injury, so-called “negative causation”⁸⁵ has no place in tort law. This is a good thing, so the argument goes, since “negative causation” opens a Pandora’s box of insuperable difficulties. For example, if non-occurrences can be causes, then since a person fails to—or more neutrally, does not—do a great many things which, if done, would prevent injuries, he is now the cause of all these injuries. But this conclusion is absurd. Hence, it is conceptually unwise to permit failure—even moral failure—to function as the cause of injury.

Other writers believe that it is possible to describe someone as causally responsible for an injury if he is morally expected to perform a certain action, but does not.⁸⁶ For example, suppose a person should help others on certain occasions; if he does not, and a preventable injury occurs, he is morally culpable. It is his blameworthiness⁸⁷ which permits his failure to be characterized as the

held a man not criminally liable for failing to seek medical assistance for his mistress who became helpless after taking poison in his presence).

81. There is something bewildering about not requiring easy rescues. In our highly technological society, individuals are interdependent. Since we are so dependent on others to get us through a normal day, is it so outrageous to suggest that our relations with them require that we effect an easy rescue, should the need arise? As will be argued later, individualistic ethics cannot suggest otherwise. Cf. Scheid, *Affirmative Duty to Act in Emergency Situations: The Return of the Good Samaritan*, 3 J. MAR. J. PRAC. & PROC. 1, 13 (1969) (Scheid argues that “if individualism here runs counter to current needs, the individual must yield”).

82. W. PROSSER, *supra* note 15, at 143. See also text accompanying note 47.

83. See Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980) (Mack examines the claim that nonfeasance causes the injury).

84. *Id.*

85. *Id.* at 237.

86. The following writers endorse this thesis. E. D’ARCY, HUMAN ACTS 46-56 (1963); J. THOMPSON, ACTS AND OTHER EVENTS 212-18 (1977); Casey, *Actions and Consequences*, in MORALITY AND MORAL REASONING 187 (J. Casey ed. 1971).

87. Casey, *supra* note 86, at 161.

cause of the injury.⁸⁸

Whatever one's conclusions about these conceptual issues,⁸⁹ the problem of causation fails as an argument against the general duty of easy rescue for this reason: if causation is not required for

88. Other writers are more reluctant to say that a failure to act causes the injury. Instead, they argue that there is a positive duty to help someone in distress, and that this duty should be reflected in the law. See, e.g., B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 25-26 (1928); Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Bohlen, *supra* note 46, at 217; D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 798 (1975) (D'Amato argues for criminal, not civil, liability); Honore, *Law, Morals and Rescue*, in SAMARITAN, *supra* note 18, at 225; Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 537 (1965) (Rudolph argues for a duty of easy rescue which "will simply protect the man [the Good Samaritan] who acts as society expects him to act"); Note, *The Duty to Rescue*, 28 U. PITT. L. REV. 61, 75 (1966) (arguing that the movement toward recognizing a general legal duty is gaining ground).

Two articles involving discussions of negative causation and arguing for liability for refraining from preventing harm are: Harris, *The Marxist Conception of Violence*, 3 PHIL. & PUB. AFF. 192 (1974); Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382 (1976).

89. The requirement in tort that a person's conduct be the cause of the injury is based on the moral intuition that letting preventable harm occur is not so serious a moral wrong as actually doing the harm. In *Louisville & N. R.R. Co. v. Scruggs & Echols*, 161 Ala. 97, 101, 49 So. 399, 400 (1909), the court expresses this intuition as follows: "The law imposes no duty on one man to aid another in the preservation of the latter's property, but only the duty not to injure another's property in the use of his own." *Id.* at 101, 49 So. at 400. In this case the defendant failed to remove a locomotive from that part of the track needed by the plaintiff (fire department) to pass a hose over so that he could connect the hose to a fire pump in order to put out a fire. When asked to remove the train the defendant refused, though he could have done so easily without damaging his property. The dissenting opinion takes note of this and finds that the defendant violated a legal duty to remove the train. *Id.* at 105-07, 49 So. at 402 (McClellan, J., dissenting).

The moral intuition that failing to help someone is not as serious a moral wrong as harming him has recently received a great deal of discussion in the debate over euthanasia and the controversy about what a person's obligations should be regarding famine relief. Some of the important articles that discuss these issues are: Rachels, *Active and Passive Euthanasia*, in *KILLING AND LETTING DIE* 63 (B. Steinbock ed. 1980) [hereinafter cited as *LETTING DIE*]; Russell, *On the Relative Strictness of Negative and Positive Duties*, in *LETTING DIE*, *supra*, at 215; Singer, *Famine, Affluence, and Morality*, in *WORLD HUNGER AND MORAL OBLIGATIONS* 22 (1977) [hereinafter cited as *WORLD HUNGER*]; Tooley, *An Irrelevant Consideration: Killing Versus Letting Die*, in *LETTING DIE*, *supra*, at 56. See also Arthur, *Rights and the Duty to Bring Aid*, in *WORLD HUNGER*, *supra*, at 37.

The general issue is this: if someone refuses to share his food with a starving person, and the latter dies, is the person's failure to share just as serious a moral wrong as taking the starving man's last morsel? The relevance of the problem of causality to this issue is that one can explain why these two acts are not equally serious wrongs by appealing to causality. The reason why not sharing one's food is not as bad as taking the person's last morsel is that only the latter causes the person's death. Still, there is room to wonder just how different these acts really are. If Jones is the only person from whom Smith can get food, and Jones has enough to share with Smith without injuring himself, and there is no other significant reason for not sharing his food with Smith, then the issue of causation aside, isn't Jones' refusal to share just as bad as his taking Smith's last morsel?

liability in the area of the special relationships,⁹⁰ why should it be required in cases involving strangers? If the problem of causation is not a problem in holding an innkeeper liable for his failure to rescue a guest,⁹¹ it should not be an insurmountable problem regarding a general duty of easy rescue.⁹²

The reply that the guest expects and relies upon the innkeeper to keep the premises safe and to come to his rescue should an emergency arise is irrelevant.⁹³ It is irrelevant because, although the victim's reliance may explain why there is liability in this case and not in general, it does not solve the problem of causation. In neither case does the defendant cause the injury. If the victim's expectations and reliance are sufficient to overcome the problem of causation in the special relationships exception,⁹⁴ it is not at all obvious why the victim's reliance and expectations, given the appropriate notice, cannot overcome the problem of causation in situations which fall outside that exception.⁹⁵

90. *Dove v. Lowden*, 47 F. Supp. 546 (W.D. Mo. 1942). An innkeeper must help his guest in case of fire. The issue is not whether the innkeeper's failure to rescue is the cause of the injury. The court simply recognizes a legal obligation on the part of the innkeeper.

91. *Id.*

92. Causation is not so easy a determination as it is sometimes thought to be. The reason for this is that the phrase "causes the injury" is ambiguous. It might refer to physical causation—which denotes the pushes and pulls of objects, for example, billiard balls hitting one another—or to the notion of responsibility, that is, to say someone caused the injury means that he is to be held accountable for the damage done, irrespective of whether he caused it in a physical sense. Since this latter, normative notion is the one more closely tied to questions of liability, the fact that a person does not cause the injury in a physical sense (in cases of nonfeasance) does not prove that he should not be held liable. In any event, the normative sense of causation—accountability—is our ultimate concern.

93. What sort of expectations and reliance are involved? If actual expectations, it then becomes a factual question whether the victim actually had the requisite expectations. If not actual expectations, it may be that a person has a right to expect the innkeeper's help, whether or not the person actually expects this. The question is what gives the victim the right to expect help. *See supra* note 61.

94. It is not clear that they can. How do expectations and reliance explain liability in all cases of special relationships? Infants do not expect or rely upon their parents to rescue them from danger. Yet in some circumstances the parent is obligated to come to the infant's aid. *State v. Williams*, 4 Wash. App. 908, 484 P.2d 1167 (1971) (failure to supply medical attention).

95. It is important to remember that the existence of a legal duty is a question of law. "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions [formulated by courts] that, in cases of a particular type, liability should be imposed for damage done." *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976). It is usually policy considerations which determine whether a legal duty exists in a certain type of case. *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968). To say there is a legal duty in the special relationships but not otherwise "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id.* The recognition of a duty "is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized

B. *The Problem of Identifying the Tortfeasor*

The problem of identifying the tortfeasor in cases of nonfeasance arises when there is more than one potential rescuer present,⁹⁶ such as when several people stand on the beach and watch a swimmer drown. The problem is how to identify the wrongdoer. Which one of the many bystanders is to be held liable?

Cases of this sort are of more than academic interest. In one case,⁹⁷ a boy's arm and leg were cut off in a railroad yard. Several railroad employees stood by without calling a physician and watched as the boy bled to death. In another case a woman was gang raped in a bar while several people observed. No one called the police.⁹⁸

Perhaps, the most notorious example of this problem is the case of Kitty Genovese, who was killed on the street in front of her apartment house while thirty-eight people watched from their windows without calling the police.⁹⁹ The killer attacked her three separate times¹⁰⁰ over a period of thirty-five minutes.¹⁰¹ Only after she was dead did one neighbor finally call the police.¹⁰² The reason most of these witnesses gave for not calling the police was that they did not want to get involved;¹⁰³ one person said he was awakened by the commotion, but did not call the police because he just wanted to go back to sleep.¹⁰⁴

If there were a general duty to come to the aid of others, it is unclear which one of the railroad employees, bar patrons, or aloof neighbors would be liable. In cases of misfeasance, where the defendant's action causes the injury,¹⁰⁵ there is no problem of identifying the wrongdoer.¹⁰⁶ The person who caused the injury is

that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." W. PROSSER, *supra* 15, at 325-26.

With this in mind, it is easier to see that the causation thesis, if taken literally, might prove too much; it might deny liability in the special relationships when causality is not present. Weinrib, *supra* note 39, at 260.

96. W. PROSSER, *supra* note 15, at 341.

97. *Union Pac. Ry. v. Cappier*, 66 Kan. 649, 72 P. 281 (1903).

98. Kisel, *Who Saw This Happen?*, 69 A.B.A.J. 1208 (1983).

99. See generally A. ROSENTHAL, *THIRTY-EIGHT WITNESSES* (1964).

100. *Id.* at 30.

101. *Id.* at 32.

102. *Id.* at 36.

103. *Id.* at 44-45.

104. *Id.*

105. Bohlen, *supra* note 46, at 219-20.

106. There still may be many wrongdoers, each of whom causes the injury. The problem of identification is really two different problems. On the one hand, it is a general problem about the difficulties in holding many people liable for the same injury. It is difficult to punish or seek damages from a great many people. This is a problem even when you are certain that each person caused the injury. Traditionally,

liable. But in cases of nonfeasance, or so the argument goes, since it is impossible to discover the wrongdoer, it is pointless to require rescue.¹⁰⁷

One possible solution to the identification problem is to make the several bystanders joint tortfeasors.¹⁰⁸ This permits the victim to make any one of the several bystanders a defendant from whom the victim can recover damages. The defendant can then in turn recover the appropriate share from each of the other bystanders.¹⁰⁹

Presumably, this approach would be adopted when there is a recognized legal duty to rescue¹¹⁰ that has been violated by multiple tortfeasors.¹¹¹ While it is unlikely there would be a great number of tortfeasors in a special relationship situation,¹¹² mere numbers do not present an intractable conceptual problem.¹¹³ It is improbable that many cases will involve an unworkable number of possible defendants; that some cases may present problems is insufficient reason to deny recognition of a rule compelling easy rescue.¹¹⁴

this problem is resolved by making the defendants co-defendants. The other problem arises when a multitude of people obscures who is really liable—when one hides behind many.

Neither problem successfully shows why the problem of identification should loom so large in cases of nonfeasance. The first problem can be handled in the same way courts handle cases of multiple defendants—by making them joint tortfeasors. The second problem can be solved by finding who, if anyone, had the best chance, at no cost to himself, to rescue the victim. Perhaps the source of difficulty here is the erroneous belief that when everyone can be held equally liable, no one is liable. This is simply a *non sequitur*.

107. The law can require conduct only when that conduct can be required of clearly identifiable tortfeasors. Unless a person can know what the law requires of him as an individual, he cannot know what he should do. To meet this problem, lawmakers must set forth standards which articulate *who* shall be required to rescue an imperilled victim when several potential rescuers are present. The issue then becomes a problem of promulgation: the citizenry must be informed if the law is to work. See L. FULLER, *THE MORALITY OF LAW* 49-50 (1964) (discussing the problem of promulgation).

108. One writer suggests this, though not wholeheartedly. Benditt, *supra* note 65, at 410. See generally W. PROSSER, *supra* note 15, at 291-323 (discussing joint tortfeasors and apportionment of damages).

109. See generally W. PROSSER, *supra* note 15, at 291-323.

110. Such cases involve the special relationships. See *supra* note 51.

111. W. PROSSER, *supra* note 15, at 293-97 (discussing two or more persons being joined as defendants in the same action at law).

112. In principle, though, there is nothing that precludes thirty-eight people from volunteering to baby sit. If the child is endangered and each fails to rescue, then each would be liable.

113. Of course, when there is a failure to avert an injury, everyone fails, and this poses a problem of delimiting the class of people who in principle can be considered possible rescuers.

114. It is conceivable, of course, that certain policy considerations may militate against such recognition. This Comment's thesis, however, is that these considera-

In these cases the plaintiff would still have to meet the burden of production.¹¹⁵ Merely pointing out that the defendant was on the beach when the victim cried for help would not be enough to get the case to the jury. The plaintiff must show that the defendant knew the victim was in danger and that the defendant could have helped the victim at no cost to himself.¹¹⁶ Recognizing a general duty of easy rescue will make the question of liability, in every case of rescue, a jury question—which, perhaps, is what it should be.¹¹⁷

C. *The Problem of Prior Knowledge*

For an action to be a legal obligation, a person must be able to know beforehand that the action is legally required.¹¹⁸ If not, the obligation does not qualify as a legal requirement.¹¹⁹ Since the circumstances surrounding a rescue—even an easy one—are complex, the potential rescuer could conceivably agonize over whether the victim was in grave danger, whether he could save the victim at little or no cost to himself, and whether anyone else was presently attempting rescue.¹²⁰ Similarly, plaintiffs would have no way of knowing if they had been wronged by a potential rescuer

tions—the realization of individualistic values—militate in favor of recognizing a duty of easy rescue. *See infra* text accompanying notes 198-231.

115. What meets this burden will depend on the particular circumstances of each case. *See* F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 245-49 (2d ed. 1977).

116. Of course, the best evidence here is that the defendant knew or had reason to believe that the rescue would be an easy one, yet failed to act.

117. This must be qualified. The general duty to rescue applies to easy rescues. There may still be duties in the special relationships requiring more than easy rescues. Hence, in such an event the court would still determine whether such a special relationship exists.

118. *See supra* note 107.

119. *Id.*

120. Consider:

The most cogent reason for refusing to adopt a rule that one has a duty to aid another in serious peril was the practical consideration of properly balancing the equities of both parties. Any rule would have had to establish a test to determine the gravity of the victim's danger before any duty arose, and further whether the test would be subjective or objective. There would have to be a balancing of the degree of the victim's peril against the degree of the rescuer's risk. The law might have concluded that one has a duty to rescue when his loss would be proportionately less than the victim's, or only when the rescuer would suffer no loss at all. The courts would have had to determine what degree of care a person, obliged to help another, must exercise, and whether it would be fair and/or advisable to lower the usual standard. Compensation perhaps should then be afforded to a rescuer for his injuries or loss of time. The courts would have to decide further if the compensation would be the same whether or not the imperiled person wanted to be rescued, or whether or not the effort was successful. Faced with the realization that it was impossible to take just one step into a bog, the courts simply stopped short.

Scheid, *supra* note 81, at 4-5.

who failed to act. In addition, courts would need to develop a test for determining whether a rescue was an easy one.¹²¹ The practical difficulties would be enormous.¹²²

People usually know what they are supposed to do in circumstances where they may cause positive harm. If a person is tempted to strike another, he knows both the practical effects and legal consequences that will ensue; a person can know with practical certainty¹²³ that punching someone in the nose violates a legal duty.¹²⁴ When contemplating whether to act, a person usually knows or can discover the nature and consequences of his action. But failing to act, or simply not acting, precludes such knowledge.¹²⁵ After all, what are the probable consequences of one's not getting up from one's chair? Is it *everything* that subsequently happens? If so, in order to be held liable for inaction, a person must be able to discover the infinite consequences of his action. However, since he can never have such knowledge, he cannot be required legally to act. In order to meet the condition of prior knowledge, so the argument concludes, nonfeasance should not be a ground for liability.

When a person is contemplating acting in a situation where it is difficult to make all the appropriate cost-benefit calculations, it may be preferable for him to decide not to act at all.¹²⁶ When the proposed action may seriously harm someone and the individual cannot make the appropriate calculations, prudence counsels one to refrain from acting. However, if nonfeasance is a ground for liability, one never has this option. One is forced to act even without practical certainty of the effects of one's action.

A proponent of the general duty of easy rescue would reply that practical certainty is not required in cases of misfeasance, and therefore need not be required in cases of nonfeasance. A person knows¹²⁷ that his icy sidewalk is likely to cause accidents; hence,

121. *Id.* See *supra* note 39.

122. *Id.*

123. Here "practical certainty" means that the individual's belief is based on those evidentiary procedures for forming beliefs which would be used by a more than merely reasonable person—say, by a circumspect "reasonable person." In tort contexts the circumspect "reasonable person" is one who is careful above and beyond the call of epistemic duty. Still, a circumspect "reasonable person" may form a belief, which, in some circumstances, is false. If he were to form such a belief, the presumption is that no one could expect anyone to have formed the correct belief in those circumstances.

124. Usually this is true. However, it is conceivable that a person could strike another in the mistaken belief that self-defense is necessary, when, in fact, it is not. For example, the defender could undertake such action based on false information supplied by a usually reliable third party.

125. See *supra* note 83.

126. Nonetheless, a cost-benefit calculation applies to this sort of decision also.

127. W. PROSSER, *supra* note 15, at 157.

he should remove the ice if he wants to avoid liability for injuries the ice causes. He may not be certain that an accident will occur if the ice is not removed, but he should remove it nonetheless. In tort contexts, what is required is reasonableness¹²⁸ and foreseeability.¹²⁹ The question in cases of nonfeasance is this: given knowledge of the circumstances, is it likely that the victim will be injured if the potential rescuer fails to act? If a person knows that, by not getting up from his chair, a child playing across the room will injure herself, and if he then fails to act, he is liable for only this failure, not for every injury which occurs after his inaction.

The potential rescuer must ask himself whether a drunken man clinging to the side of a capsized canoe,¹³⁰ or a boy bleeding profusely,¹³¹ will be permanently injured or will die if the rescuer fails to effect an easy rescue. In cases of easy rescue all that is required is common sense knowledge of how things work. Almost anyone would know what to do in cases such as these. Making a phone call to the appropriate rescue authorities is often all that is required to effect an easy rescue, and even children can do that.¹³²

Of course, effecting an easy rescue often requires more than simply making a phone call. Additionally, it may not be possible to specify in advance just what one must do to effect an easy rescue in all cases. But a duty of care is necessarily vague and indeterminate.¹³³ The problem of prior knowledge is not a problem which is unique to cases of nonfeasance. In all cases of negligence, misfeasance, and nonfeasance, the defendant may not have known with absolute certainty the consequences of his action, but then he need not have such knowledge. All that is required in cases of easy rescue is the application of the reasonable person standard.¹³⁴ Reasonableness functions here in a manner similar to the way it does in cases of ordinary negligence.¹³⁵

128. *Id.* at 149-66.

129. *Id.* at 250-89. One difference between the rescue situation and cases of ordinary negligence is this: in the former cases injury is very likely. If a person *needs* help and does not receive it, he will be injured. In the latter cases, there is no definite person who is harmed (until, of course, the accident happens).

130. *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928), *overruled*, *Pridgen v. Boston Hous. Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974). See *supra* note 41 for case history.

131. *Union Pac. Ry. v. Cappier*, 66 Kan. 649, 72 P. 281 (1903).

132. See *infra* note 214.

133. A well-stated principle of easy rescue will not be any more vague than any other principle of law; all legal principles and legal systems are indeterminate to some extent. We cannot overcome all semantic uncertainty. CONCEPT OF LAW, *supra* note 31, at 124-32.

134. See generally W. PROSSER, *supra* note 15, at 149-80 (discussing the application of the "reasonable person" standard in various tort contexts).

135. The reasonable person standard functions here as an upper limit. In cases of nonfeasance a person cannot be required to know more than what a reasonable per-

III. THE POLITICAL, THEORETIC FOUNDATIONS OF THE GENERAL LEGAL DUTY OF EASY RESCUE: AN INDIVIDUALISTIC JUSTIFICATION

A. *The Problem of Individualism*

This section concerns a different sort of objection from those

son would know. The concern is with what the defendant actually knew, not with what he should have known were he a reasonable person. The general duty of easy rescue is not intended to make unreasonably ignorant people liable because they should have known that the victim was in trouble. However, if a defendant claims that he did not hear the victim's screams while sitting on a bench two feet away from the pond in which the decedent drowned, a jury might find it difficult to conclude that he is telling the truth, because no one with normal hearing could fail to hear the screams.

The problem of identifying the tortfeasor and the problem of prior knowledge have been characterized by Professor James A. Henderson, Jr. as process constraints which have substantive implications for tort law. Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 928-43 (1982).

Professor Henderson argues that

Weinrib overstates the moral basis for a general duty to rescue by ignoring the relevance of the comprehensibility, verifiability and conformability constraints [process constraints] on primary behavior. Moreover, by focusing on the moral side of the question, he ignores the difficulties in judicially administering [also a process constraint] a rescue rule. When the administrative difficulties of applying such a rule in court are adequately considered, the traditional no-general-duty-to-rescue rules seems the fairest and most efficient course.

Id. at 943.

Henderson tries to show that there should be no general duty of easy rescue by arguing that process constraints defeat such a duty. He does this by invoking the worst possible examples of how such a duty operates: when there is a defendant who is psychologically too timid to rescue (*id.* at 935) or when special observers appeal—like Alphonse and Gaston—to the presence of the others as excusing their failure (*id.* at 937). Whatever one may conclude from these examples, Henderson fails to show how such process constraints militate against holding liable the psychologically healthy, solitary observer for his failure to effect an easy rescue. Process theory is no doubt a rich and illuminating framework within which to evaluate issues in tort, but it is not obvious that Henderson's use of these constraints convincingly closes the case against a general duty of easy rescue. If a given case is replete with process considerations, then a good attorney will advise his client against bringing suit. However, where process considerations are absent or less formidable, the attorney will advise his client to go forth with the action.

Professor Henderson might reply that where process constraints are minimal, most people would attempt rescue. This is illustrated in his discussion of manageability. Since easy rescues involve little or no cost, judges and juries would know that a defendant could have effected an easy rescue only when "[t]he overwhelming percentage of individuals presented with the opportunity to effect life- or limb-saving rescue at practically no cost to themselves will choose, almost by hypothesis, to act irrespective of any incentives provided by tort law." *Id.* at 939. This is an intriguing supposition, but nowhere does Professor Henderson provide evidence that it is true, and there is evidence that it is not true. See *supra* text accompanying notes 48-104. See also *supra* note 53.

Furthermore, Henderson offers no evidence for the following contention:

Exposing would-be rescuers to liability for refusing to act under these unusual circumstances [circumstances in which the would-be rescuer

we have just discussed. The previous section demonstrates that those objections are surmountable. This Comment presupposes that the most important and interesting objection to recognizing a general duty of easy rescue is that it is incompatible with the individualistic values at the heart of Anglo-American law.¹³⁶ This section describes individualism as a political¹³⁷ theory and explains why it is believed to defeat a general duty of easy rescue.¹³⁸

Individualism, as a general theoretic construct, holds autonomy, privacy, and self-interest as paramount values.¹³⁹ These values¹⁴⁰ and the rights which protect them may not be abridged by other people or by a system of law.¹⁴¹ In most individualistic theories, autonomy, privacy, and self-interest are at once descriptive aspects of behavior and moral ideals.¹⁴² That is, these values have

could effect a no-cost rescue] probably would fail to reach the few truly sociopathic individuals who would refuse to effect no-cost rescues, and might have negative effects on some of the majority who would rescue voluntarily. Thus, a general duty to rescue limited to "no cost" situations would yield little if any benefits. Imposition of such a duty, therefore, would not justify the process problems that it would generate.

Id. at 939-40.

One questions whether Henderson can offer any evidence that "no cost" rescues would yield few benefits. The existence of such a duty might even motivate a non-sociopathic, but indifferent, individual not to go back to sleep without first calling the police to inform them that a woman is being killed in front of his apartment building. *See supra* text accompanying note 104.

Furthermore, if a duty of easy rescue is required by morality, as Weinrib contends, or by individualistic values, as proposed by this Comment, and if such values are vital to the law, then process considerations aside, the law should recognize such a duty.

136. This presupposition is based upon another: that the problems of causation, identification, and prior knowledge are mechanical problems which are only as persuasive as one wants them to be. The real issue is what kind of society or what type of individuals would reject or embrace a principle of easy rescue. This issue is the one that compels us to rethink the law of rescue and to cast individualistic political theory in modern terms. *See supra* note 25.

137. The term "political" is intended here to refer to a theory which provides the rationale or justification of a legal system.

138. *See infra* text accompanying notes 146-47.

139. An individualistic conception of personality makes autonomy the primary value. One can limit one's privacy and self-interest, if one does so autonomously. One can limit certain kinds of autonomous conduct, if the net result is a gain in autonomy. One cannot, however, severely limit one's autonomy in exchange for other values. *See J. LOCKE, supra* note 25, at 17 (one cannot choose to become a slave). *Cf. S. HOOK, THE PARADOXES OF FREEDOM* 133 (1962) (discussing the plausibility of freely giving up one's freedom).

140. Individualism also includes the belief that a person is responsible to and for himself. The virtue of self-reliance is possible only because people are autonomous. *See supra* note 36; *see infra* text accompanying notes 146-47.

141. R. SCRUTON, *THE MEANING OF CONSERVATISM* 71-93 (1980).

142. Some individualistic theories such as Locke's have been based on natural law. All one need mean by "natural law" is that people have certain rights by virtue of being human. *See A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 62-63 (1979). One need not believe in any of the theological or ontological assump-

both descriptive and normative features. They describe facts about people: that they desire autonomy and privacy and have a concern with their self-interest. But individualistic values do more than merely describe human beings; they also function as moral ideals toward which human beings should strive.¹⁴³

Because individualism considers autonomy to be a primary value, the formation of the state is justified only if it reflects the individual's autonomous choices.¹⁴⁴ The legitimacy of the state is based upon the consent of the governed. Consent theory,¹⁴⁵ then, is the hallmark of individualistic political theories. Social and political structures and the body of laws which define them are legitimate only if they can be explained and justified in terms of the autonomous choices of individuals whose lives they govern.

Simply put, the individualistic objection to a general duty of easy rescue is that such a duty deprives the rescuer of his liberty to choose whether to rescue the victim. If he wants to rescue the victim, he may; if not, that is his business. His decision precludes any legal inquiry. True, he may be "styled a ruthless savage and a moral monster,"¹⁴⁶ but then that is *his* business. Liberty is fundamental, and

when a government *requires* a person to act, it is necessarily interfering more seriously with his liberty than when it places limits on his freedom to act—to make a man serve another is to make him a slave, while to forbid him to commit affirmative wrongs is to leave him still essentially a free man.¹⁴⁷

But why does forcing a person to effect an easy rescue of a stranger enslave him any more than forcing him to rescue someone with whom he has a special relationship? If he does not want to rescue either person, but is legally compelled to rescue both, his liberty is sacrificed in both cases. Furthermore, law, at its very

tions of natural law theorists like Aquinas. See C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVES* 42-50 (1963).

143. This Comment interprets "natural law" as having descriptive and prescriptive features. Natural law describes how people behave and provides a standard of how people *should* behave. On this view, the way people should act is a refinement of the way they do act.

144. This view is common to Locke, Rousseau, and Rawls. There are two important kinds of autonomy. First, a person is autonomous when his decisions are not externally compelled. Second, a person is autonomous when he is able to make informed, critical decisions about how to live. Individualism usually, but not necessarily, focuses on the first kind of autonomy.

145. For an interesting discussion of consent theory as a philosophical doctrine, see A. SIMMONS, *supra* note 142, at 57-74. For a detailed discussion of the relationship between consent theory and democracy, see J. LIVINGSTON & R. THOMPSON, *THE CONSENT OF THE GOVERNED* (1966).

146. *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 810 (1897).

147. Hale, *Prima Facie Torts, Combination, and Non-feasance*, 46 COLUM. L. REV. 196, 214 (1946). Hale is describing individualism, not necessarily endorsing it.

inception, limits a person's liberty. A person cannot legally injure another, irrespective of whether he wants to do so. Such limitation constitutes a curtailment of liberty.

In order to examine these questions, it is useful to inquire into the political, theoretic foundations¹⁴⁸ of individualism in order to determine what implications these foundations have for the general duty of easy rescue. This Comment attempts to show that the same individualistic values which support legally proscribing misfeasance also suggest recognizing a general duty of easy rescue.

B. *The Political, Theoretic Framework*

As suggested above,¹⁴⁹ laws and legal principles are justified or established if they reflect the choices of autonomous individuals. This is the standard sort of justification for individualistic theories.¹⁵⁰ Whatever else may be morally required, only those principles that are or would be¹⁵¹ autonomously chosen can be required by the state. This suggests a test for determining the substantive legal implications of individualism:¹⁵² *a law or legal principle¹⁵³ is justifiable on individualistic grounds if it would be unanimously¹⁵⁴ endorsed by autonomous individuals¹⁵⁵ who structure their social interactions according to general¹⁵⁶ principles.* The central idea in this test is that the justification of legal principles, on individualistic grounds, must be based on what people would

148. The "political theoretic foundations" of individualism refer to those values (autonomy, privacy, and self-interest) which reveal its distinctive character and the way those values generate legal principles. *See infra* text accompanying notes 153-74.

149. *See supra* text accompanying notes 144-45.

150. *See, e.g.,* J. LOCKE, *supra* note 25, at 32.

151. Obviously, not everyone—or even almost everyone—explicitly chooses the laws of society. What is required is that the person would consent to them if asked.

152. *See* R. HISKES, *supra* note 25, at 13 (laws derive their authority from the consent of the governed).

153. A "law" is a statute or common law decision; a legal principle is a rationale for explaining particular laws. For example, the principle of beneficence is, from this perspective, a legal principle. A particular statute, like Minnesota's Good Samaritan statute, is a law.

154. The reason for the unanimity condition is that each person's autonomy must be reflected in the choice of principles. Individualism, as construed here, does not permit enhancing the autonomy of some by enslaving others. In this way the unanimity condition follows Rousseau's view of political reality. *See generally* J. ROUSSEAU, *THE SOCIAL CONTRACT* (G.D.H. Cole trans. 1950) (Rousseau contends that unanimous consent is required to justify the formation of the state).

155. The correct description of these individuals is "autonomous, rational contractors." *See infra* note 190.

156. Laws must be general for two reasons. First, the notion of "law" already incorporates the notion of a general rule. L. FULLER, *supra* note 107, at 46-49. Second, in choosing principles, each person must realize that the principle will be generally acted upon by others. CONCEPT OF LAW, *supra* note 31, at 25. In evaluating the harm principle (*see infra* note 158) an individual considers the consequences and

freely choose in forming a political society. The rules governing such a society must reflect and nurture the individualistic values of autonomy and self-interest. If they do not, an individualist cannot rationally endorse those rules. This Comment will inquire whether there exist any principle which would be fully¹⁵⁷ justified by individualistic considerations.

C. *The Harm Principle*

A likely candidate for such a general principle is the harm principle,¹⁵⁸ which forbids interfering with or injuring others.¹⁵⁹ Any autonomous individual will accept the harm principle as a limitation on his freedom¹⁶⁰ on the condition that others do likewise.¹⁶¹ The individual gives up his unbridled "right to every thing"¹⁶² in exchange for the assurance that he will be free to realize his life plans, as long as these plans do not interfere¹⁶³ with the life plans of others.¹⁶⁴

By accepting¹⁶⁵ the harm principle a person sacrifices some

value to him of everyone obeying such a principle. In the case of the harm principle, the benefits to any given person of everyone obeying it are enormous.

These interactions are reciprocal. In choosing principles it is as if the autonomous individuals were contracting with one another concerning the laws which govern them.

157. For a principle to be "fully" justified on individualistic grounds, its justification must not require any supplementary principles. Furthermore, when individualists can reasonably disagree over the choice of principle, then that principle is not fully justified on individualistic grounds.

158. Briefly, the harm principle proscribes physically injuring someone's person or property, or interfering with his interests. The harm principle may not proscribe all acts which injure or interfere with others. *See infra* note 169. For a fuller explanation of the harm principle, see J. FEINBERG, *SOCIAL PHILOSOPHY* 26-31 (1973).

159. *Id.*

160. Unless, of course, one was omnipotent or desired to live in a hostile world. *See infra* notes 166, 171-73 and accompanying text.

161. The notion of reciprocity is part of any inter-personal, rule-guided activity. *See, e.g.*, D. LEWIS, *CONVENTION* 4 (1968) (where Lewis suggests that conventions imply the concept of reciprocity). Recently, reciprocity has received a great deal of discussion as an essential ingredient in practical reasoning. *See, e.g.*, Gauthier, *Morality and Advantage*, 76 *PHIL. REV.* 460 (1967) (discussing the relationship between morality and enlightened self-interest).

162. T. HOBBS, *supra* note 22, at 103.

163. There is both a descriptive and normative sense to the locution "interfering with others." Descriptively, the term may mean "injuring another person." Normatively, the term may mean "justifiably injuring another," for example, injuring an attacker in self-defense. There is a similar distinction to be made with regard to the concept of harming others. A person may harm another by interfering with his interests (the descriptive sense), or he may harm another by unjustifiably interfering with his interests (the normative sense). In this Comment, I do not explore the relations between the descriptive and normative uses of these terms.

164. J. RAWLS, *supra* note 25, at 407-16.

165. This is not to say we ever consciously choose the harm principle prior to interacting with others.

liberty¹⁶⁶—the liberty to do whatever one wants regardless of whose interests are trampled—but, as a result, he creates a sphere of self-regarding activities within which he is completely¹⁶⁷ free. The harm principle therefore informs any reflective¹⁶⁸ individualistic political theory.¹⁶⁹

166. Given a rough equality of capabilities, no one person can dominate others. Renouncing conflict is a necessary condition of living a good life. As Hobbes explains:

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.

T. HOBBS, *supra* note 22, at 100.

Compare Hobbes' comments with Locke's account of how civil society expands freedom:

[T]he end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: (for who could be free, when every other man's humour might domineer over him?) but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.

J. LOCKE, *supra* note 25, at 32. Cf. F. HARPER, SOME REFLECTIONS ON LAW IN DEMOCRATIC SOCIETY 40 (1945) ("Law provides the framework within which men compete for the attainment of person and property").

167. Typically, "self-regarding activities" refer to those activities which primarily affect the individual agent, such as smoking marijuana or riding a motorcycle without a helmet. See J. FEINBERG, *supra* note 149, at 31-32.

To say that within the sphere of self-regarding activities a person is "completely" free is to suggest that his self-regarding decisions are not subject to the review of others or the state. See *supra* note 31.

168. It is useful to distinguish between *naïve* and *reflective* individualism. Naïve individualism maintains that a person is responsible for his own life, his own conduct; he neither receives nor grants quarter. Reflective individualism, on the other hand, contends that a person is responsible primarily for himself, though he has minimal obligations to many people. None of these obligations, however, includes a duty to act beneficently towards others. In this view, extreme or significant self-sacrifice is not required of the individual.

Reflective individualism, deployed in contemporary American society, may differ slightly from the sort of individualism existing prior to the Industrial Revolution. Today, a reflective individualist—realizing his interdependency—may believe that we have mutual obligations regarding safety, something a naïve individualist would never countenance. But that is because naïve individualism often is "mechanical, egoistic and smug." D. NORTON, PERSONAL DESTINIES: A PHILOSOPHY OF ETHICAL INDIVIDUALISM 43 (1976).

169. Any informed individualistic political theory includes the harm principle as a

The harm principle will be unanimously chosen by autonomous individuals only after they rationally and realistically appraise the circumstances of social life. They must know what to expect from others as well as the requirements for physical survival. A person's limitations, the strength of others, and one's desire for social contact must all be considered. After evaluating the facts of social life, an autonomous, rational individual will choose the harm principle, since this is the reasonable choice to make.¹⁷⁰

Without this last constraint—that a person will choose legal principles only after examining the facts of social life—autonomous individuals might not unanimously choose the harm principle. Without reflecting on the facts of social life, a person might underestimate the benefits and overestimate the burdens of accepting the harm principle. Reflection is required if an individual is reasonably to choose principles governing his interactions with others. Moreover, the person's choice of a principle must be based on his understanding of the conditions of social life. If such choice were not so based, a person might gamble that he is more powerful, more clever, and more able to dominate others than in fact he is.¹⁷¹ He might choose to live in a world where stealth, guile, and ruthless competition are virtues.¹⁷² Only by knowing the facts of social reality and basing one's choice of principle on that knowledge will a person choose the harm principle as a principle for governing his interactions with others.¹⁷³

fundamental legal principle. Although the precise content of the principle, particularly concerning what counts as "harm," might vary in different legal systems, certain conduct, such as murder, theft, rape, assault, and other crimes against person and property, will be proscribed by any individualistic legal system. Other kinds of harmful conduct, like victory in the marketplace—where it could be argued that the victor harms the loser by winning—may not be ruled out by the harm principle. In fact, competition and its attendant harm may be encouraged by individualistic political theory.

170. See *supra* note 166.

171. Perhaps this is a way to characterize what certain kinds of criminals do, especially those figures involved in organized crime.

172. For the wisdom of such a choice, see *supra* note 166.

173. Even Social Darwinists accept the harm principle. See generally H. SPENCER, *SOCIAL STATICS* 103–05 (London 1851) (a statement of Spencer's moral and social philosophy). In fact, Spencer was a strange kind of utilitarian. The survival of the fittest was for the betterment of the species and society. See 1 H. SPENCER, *THE PRINCIPLES OF ETHICS* 465–66 (1904). One writer was prompted to characterize such a utilitarian as "ludicrously mistaken about the nature of the world." Medlin, *Ultimate Principles and Ethical Egoism*, *AUSTRALASIAN J. PHIL.* 111, 117 (1957).

In a broader sense, Social Darwinism may be understood as the view that there should be no restrictions on some human interactions. Extreme competition may be acceptable. In this sense a Social Darwinist may not even accept the harm principle. Consider the following description of circumstances where such Social Darwinists abound:

By the late [eighteen] seventies, the theory within which men would maneuver for the balance of the century was already more or less com-

To summarize, individualism contends that legal principles are justifiable only if they reflect the choices of autonomous, rational individuals choosing principles to govern their interactions with others. Such individuals will choose the harm principle because it enhances their liberty by protecting them from injury and by providing them with the security necessary for successfully implementing their life plans.¹⁷⁴ This raises the following question: what kind of theory of liability would be chosen by an individualist?

One possible theory of liability is Professor Richard Epstein's theory of strict liability.¹⁷⁵ According to Epstein, "rules of liability should be based upon the harm in fact caused" by the defendant.¹⁷⁶ This position has sweeping implications for the duty to rescue, since "theories of strict liability explain and justify. . . the common law's refusal to extend liability in tort to cases where the defendant has not harmed the plaintiff by [the defendant's] affirmative action."¹⁷⁷ Under Epstein's regime of strict liability, "the act requirement has to be satisfied in order to show that the defendant . . . caused harm to the plaintiff. . . . Only the issue of causation, of what *the defendant did* is material to the . . . prima facie case."¹⁷⁸ Epstein's theory, emphasizing an individualistic characterization of tort law, echoes Mill:¹⁷⁹

plete. Appropriate to the age, it was impressive for the spread of its canvas, the simplicity of its principles, and the dehumanization of its contents. All men, the theory read, applied themselves in the search for wealth and found rewards according to their ability. A few, the highest types of their race, discovered more effective ways to combine land, labor, and capital, and drew society upward as the rest reorganized behind their leaders. The large majority, possessing no more than ordinary talent, divided a fund that was fixed by the requirements of the dearer resources, land and capital. The weakest simply disappeared.

R. WEIBE, *THE SEARCH FOR ORDER 1877-1920* 134-35 (2d ed. 1968).

Presumably, it was not important that "[t]he weakest simply disappeared." *Id.* This describes a laissez-faire system of human interaction, where anything goes and the most able survive, giving and accepting no quarter.

174. See *supra* note 164.

175. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

176. *Id.* at 189.

177. *Id.*

178. *Id.* at 190.

179. Both Epstein and Mill believe that a person's liberty is justifiably restricted only when his action causes harm to others. Consider Mill's words:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others.

J.S. MILL, *supra* note 27, at 13. Consider also: "If anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law or, where legal penalties are not safely applicable, by general disapprobation. *Id.* at 14.

But Mill probably would not agree with the rule against a duty of easy rescue:

[T]he first task of the law of torts is to define the boundaries of individual liberty. To this question the rules of strict liability based upon the twin notions of causation and volition provide a better answer than the alternative theories based upon the notion of negligence, whether explicated in moral or economic terms. In effect, the principles of strict liability say that the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others.¹⁸⁰

There are several problems with Epstein's argument. First, Epstein's conclusion that there is no obligation to rescue conflicts with his avowed goal of developing "a systematic [theory] which refines, but . . . does not abandon, the shared impressions of everyday life."¹⁸¹ One of "the shared impressions of everyday life" is that a person should rescue another under some circumstances.¹⁸² Epstein's theory, therefore, is not a refinement of this impression but rather its abandonment.¹⁸³

Second, shared impressions aside, the law recognizes that certain circumstances may exist in which a person does have a legal duty to rescue.¹⁸⁴ One consequence of Epstein's position is that there should be no exceptions to the common law rule against rescue, since causation need not be present in these exceptions.¹⁸⁵ In Epstein's view only positive conduct can give rise to liability;¹⁸⁶ a

There are also many positive acts for the benefit of others which he may rightfully be compelled to perform, such as to give evidence in a court of justice, to bear his fair share in the common defense or in any other joint work necessary to the interests of the society of which he enjoys the protection, and to perform certain acts of individual beneficence, such as saving a fellow creature's life or interposing to protect the defenseless against ill usage—things which whenever it is obviously a man's duty to do he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.

Id. at 14–15.

180. Epstein, *supra* note 175, at 203–04.

181. *Id.* at 151.

182. The issue of rescue has force only when it is believed on a commonsensical level that there are some circumstances in which a person should rescue another. This Comment assumes that it is generally believed that there are circumstances in which a person should help others. See *supra* note 23.

183. If we agree that it is appropriate to require rescue in some circumstances and that such agreement constitutes a "shared impression," then Epstein's view must be considered an abandonment. Some might welcome just such an abandonment.

184. See *supra* notes 40 and 51.

185. More precisely, "Epstein's defense of the common-law position on rescue poses the dilemma of abandoning that part of the position requiring rescue in special circumstances or acknowledging that tort liability is not based solely on causation." Weinrib, *supra* note 28, at 260.

186. See Epstein, *supra* note 175, at 203–04.

duty to rescue, in any situation, is never legally required.¹⁸⁷

Third, if Epstein's theory is intended as an explanation and justification of the common law position on rescue, it would be far more profitable to invoke the distinction between act and omission, not as a denial of the general legal duty to rescue, but rather as a constraint on defining the content of that duty. In other words, the distinction between act and omission may function as a constraint on a theory of rescue by informing us that the more one has to do—that is, the more complex the rescue—the less likely the rescue will be deemed an easy one. By fashioning a dividing line here, one can say only that rescues requiring very little on the rescuer's part are easy rescues. In this way one can determine which kind of rescue—easy or difficult—is required, and what remedies or penalties there should be for failing to rescue.¹⁸⁸

Finally, Epstein's argument does not go deeply enough. Epstein assumes that the harm principle is a legitimate restriction on individual liberty, while compelling rescue is not.¹⁸⁹ But this is precisely what requires proof. To prove this, one needs to inquire into the political, theoretic foundations of acting on behalf of others—first, in terms of beneficence and then in terms of a principle of easy rescue.¹⁹⁰

187. Unless it can be shown that the failure to rescue caused the harm. *But see supra* note 83.

188. Weinrib, *supra* note 28, at 261.

189. Consider Epstein's words:

[M]ost systems of conventional morality try to distinguish between those circumstances in which a person should be compelled to act for the benefit of his fellow man, and those cases where he should be allowed to do so only if prompted by the appropriate motives. To put the point in other terms, the distinction is taken between that conduct which is required and that which, so to speak, is beyond the call of duty.

Epstein, *supra* note 175, at 200–01.

Though this distinction is unproblematic, it simply begs the question to describe an easy rescue as "beyond the call of duty." Only if we first decide that all rescues are required, if at all, by morality and not by law can we conclude that easy rescues are beyond the call of duty. This is precisely what is at issue. Perhaps the same sort of considerations (a concern about autonomy, privacy, and self-interest) which justifies the harm principle also justifies a principle of easy rescue. *See infra* text accompanying notes 209–19.

190. In deciding whether to adopt a legal principle, the individualist asks himself what the benefits and burdens (especially regarding autonomy) would be if every person acted upon such a principle. The individualist conceives of himself as contracting with others to act upon the principles chosen. Hence, whatever principles are decided upon, they derive from the autonomous choice of individuals contracting with one another to order their social and legal interactions. No principle chosen in these circumstances can be incompatible with the individualistic values of autonomy and self-interest. So, if the principle of easy rescue is chosen, it cannot be incompatible with individualistic values.

The choice to adopt a legal principle must be unanimous, for if it is not, someone's freedom is abridged. An individualistic theory cannot account for any principle

D. *The Principle of Beneficence*

Beneficence is the view that a person ought to do what furthers the interests of others.¹⁹¹ To endorse a principle of beneficence entails that a person acknowledge that there are irreducibly basic reasons to act on another's behalf. Such a view can be contrasted with a view claiming that all reasons must be explained and justified in terms of egoistic reasons. It is important to determine whether individualists would accept such a principle.¹⁹²

One feature commonly associated with individualism is self-

that commands less than unanimous consent. This constraint is a formal constraint which Rawls incorporates into the description of the original position. J. RAWLS, *supra* note 25, at 122.

The choice of principle must be based on the individual's knowledge of general facts about social life as well as his own needs and aspirations. What results is a description of an individual as an autonomous, rational character. This description provides a model for evaluating legal principles. If one can plausibly show that a person described in a certain fashion—that is, having certain characteristics—would, as a result of those characteristics, choose certain legal principles, those principles can be regarded as justified with respect to the description. In other words, this provides a way of showing that certain principles are justifiable relative to the kind of person one is. If the principle of easy rescue is chosen by persons described in individualistic terms—that is, as rational, autonomous, self-interested individuals—and their choice of these principles results from their having these characteristics, then the principle of easy rescue is justifiable on individualistic grounds.

191. See I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* 112–16 (J. Ellington trans. 1964). For Kant, the duty of benevolence is “the practical love of mankind.” More germane to the purposes of this Comment is his conception of “beneficence,” which is the duty “to be helpful to men.” *Id.* at 117. Cf. Hume, *An Enquiry Concerning the Principles of Morals*, in *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 178–82 (L. Selby-Bigge and P. Nidditch eds. 1975) (For Hume “beneficence” expresses the *feeling* of sympathy for others.)

192. The general strategy regarding this sort of question is to describe the psychology of people according to the conception under evaluation—in this case individualism—and then try to determine whether there are any arguments which show that such individuals would choose certain principles for ordering their relations with one another. The individuals must evaluate the principles on the supposition that everyone or almost everyone obeys them. See, e.g., J. RAWLS, *supra* note 25. There is no doubt an element of intuitionism here, but it need not be pernicious. But cf. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 349–55 (1980) (Ackerman argues against intuitionism). Cf. Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1201 (“Eclectic Liberalism therefore contends that a theory of rights not rooted in basic intuitions and human specifics cannot be maintained in a real society. A political theory that depends upon the triumph of abstractions over persistent intuitions is utopian.”).

The question of how much intuitionism is permissible in an ethical or political theory is related to the question of whether such theories are monistic or pluralistic in their justificatory schemes. Ethical pluralism, as illustrated in the work of W.D. Ross, contends that there is more than one fundamental, “prima facie,” ethical duty, and that no prima facie duty is reducible to any other. See generally W. ROSS, *THE RIGHT AND THE GOOD* (1930). Hence, in this view, justifying moral judgments often involves a plurality of considerations. This view is similar to that expressed by Shiffrin. See Shiffrin, *supra*, at 1201.

reliance.¹⁹³ An individualist views himself as independent of others, capable of attaining by himself his important goals. The individualist wants to be able to determine these goals for himself, and, more importantly, he wants to achieve these goals for, and by, himself. Although there may be some room for variation,¹⁹⁴ no individualist wants to depend upon others for the satisfaction of a large number of his goals. It is an anathema for an individualist to require self-sacrifice by others in order for him to obtain

193. See P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 278-83 (1979) (discusses the role of self-reliance from an individualistic perspective). See also *supra* note 132.

194. It may be that some individualists would want slightly more dependency than others. And perhaps every individualist would accept help in some circumstances. The kind of individualism relevant to political theory is not the kind that heralds the right to be arbitrary—when such arbitrariness is at the expense of individualistic values. See *supra* note 26.

It is unreasonable, from an individualistic perspective, to sacrifice individualistic values due to obduracy. So, for the purposes of this Comment, Professor Hope's description of an "individualist," besides being objectionable on other grounds, is ambiguous.

Self-direction or personal autonomy is a mark of the English race. The Englishman, as opposed to one of Latin lineage, does not so easily coalesce with the mass. He distinctly wishes to live his own life, make his own contacts, or as he frequently says, "muddle through" in his own way. He dislikes volunteered offerings—even of a conversational sort. Interference with his choice or freedom of movement is resented.

Hope, *Officiousness* pt. 1, 15 CORNELL L.Q. 25, 29 (1929). If this means that the "Englishman" chooses to "muddle through" or refuses "volunteered offerings" at the expense of individualistic values, then he is no individualist. If the "Englishman" would refuse someone's rescuing him because "[h]e distinctively wishes to live his own life," then he does not have a realistic understanding of his own limitations. If he would view an unsolicited easy rescue as an "[i]nterference with his choice or freedom of movement," then his resentment is irrational from an individualistic point of view.

The need to have an unbridled right to be arbitrary may be part of the psychological structure of a Social Darwinist, Hippie, or Yippie, but it is not an ingredient in individualistic political theory as that theory has evolved in Western political philosophical thought. See *supra* notes 15, 16, and 148.

Western individualism is concerned *inter alia* with limiting arbitrary power; it is a concern with liberty and the flourishing of human development. See 1 F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 55 (1973). Hayek's thesis

is that a condition of liberty in which all are allowed to use their knowledge for their purposes, restrained only by rules of just conduct of universal application, is likely to produce for them the best conditions for achieving their aims; and that such a system is likely to be achieved and maintained only if all authority . . . is limited in the exercise of coercive power by general principles to which the community has committed itself. Individual freedom, wherever it has existed, has been largely the product of a prevailing respect for such principles . . . Freedom has been preserved for prolonged periods because such principles . . . have governed public opinion. The institutions by which the countries of the Western world have attempted to protect individual freedom . . . have always proved inadequate when transformed to countries where such traditions did not prevail.

Id.

some benefit.¹⁹⁵ Individualists could reasonably disagree over just how much beneficence, if any, morality requires, but few could want the law to force us to make extreme sacrifices for others. Individualists would not unanimously endorse a principle legally requiring self-sacrifice.¹⁹⁶ The general adoption of a principle of beneficence would be incompatible with an individual's autonomy, privacy,¹⁹⁷ and self-interest. Therefore, the principle of beneficence cannot be fully justifiable on individualistic grounds.

E. *The Principle of Easy Rescue*

Since individualists will not endorse the principle of beneficence, they will not want the law to force us to engage in dangerous rescues. Individualism precludes forcing people to be Good Samaritans.¹⁹⁸ To compel people to risk bodily harm or death radically restricts the individual's autonomy and self-interest, without any bargained-for compensation in terms of autonomy, self-interest, or other individualistic values.¹⁹⁹

This last point is critically important. Individualism does not imply that a person's autonomy may never be restricted. The harm principle restricts a person's autonomy every minute of every day of his life.²⁰⁰ But this does not betray individualistic values, since restricting a person's freedom to interfere with or injure others benefits each individual by making his freedom more

195. Consider Hale's characterization that "a rugged, independent individual needs no help from others" See Hale, *supra* note 147, at 214.

196. It is not obvious that any individualist could want legally required acts of self-sacrifice.

197. See T. COOLEY, COOLEY ON TORTS 29 (1879) ("The right to one's person may be said to be a right . . . to be let alone."). See also Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 387 (1982) (privacy interest centers on the right to live a private life); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219 (1890) (an early and influential statement to the effect that an invasion of privacy should be a tort). For a rich and illuminating discussion of privacy, personal autonomy, and intimacy see Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

198. See *supra* text accompanying note 146.

199. Of the individualistic values, autonomy is first among equals, although it is hard to see how autonomy and self-interest could be conceptually independent. Preserving a person's autonomy is almost always in a person's self-interest.

200. It is rarely pointed out that, in one sense—from the point of view of the Social Darwinist, say—the restriction placed on one's freedom by the harm principle is an enormous restriction. A person is always required not to harm another, whereas the restriction placed on one's freedom by the principle of easy rescue is minimal. One does not often have a chance to effect an easy rescue. Most people may never find themselves in a position to do so. When one is in such a situation, since the rescue is easy, it cannot take much time and effort. Hence, on balance, the harm principle restricts one's liberty much more than the principle of easy rescue. Surprisingly, then, an individualist might be more inclined to endorse the principle of easy rescue than the harm principle. See also *supra* note 166.

secure.²⁰¹ The most ardent individualist understands this trade-off or balancing.²⁰² He gives up the right to do whatever he pleases by adopting the harm principle, but he obtains, in exchange, an even greater benefit: the security that within a certain sphere of activities he will be able to formulate, implement, and achieve his goals undisturbed.²⁰³ Adopting the harm principle restricts the individual's freedom to interfere with and injure others, but enhances his overall freedom by rendering the avenues traversed through life relatively safe and predictably free from avoidable injury and death. This sort of calculation is the hallmark of individualism and the first principle of prudential reasoning.

On the other hand, compelling a person to attempt dangerous rescues entails risking loss of life and permanent injury in exchange for the knowledge that others are required to attempt a dangerous rescue on his behalf.²⁰⁴ In dangerous rescues there is always the chance that the rescuer will fail in his rescue attempt.²⁰⁵ The benefit in a dangerous rescue—saving the victim—is considerably less than certain;²⁰⁶ the burden—injury to the res-

201. An individualist is a rational calculator—though he need not be a utilitarian. He insists on the right to maximize his chances for freedom consistent with the same right for others. J. RAWLS, *supra* note 25, at 60.

202. An individualist can trade-off some freedom for more freedom; he can trade some freedom for some non-individualistic value such as contentment. What he cannot do is exchange the essential conditions of his freedom for contentment or some other non-individualistic value. He cannot autonomously choose to become a slave. See J.S. MILL, *supra* note 28, at 125 (argues that a person is not free to decide to give up his freedom). See also S. HOOK, *supra* note 139 (discusses the relationship between freedom and democracy).

203. See *supra* note 166.

204. If the government forced people to engage in self-sacrificial conduct, there certainly would be a violation of individualistic values. But this is not so in the case of the principle of easy rescue, since a duty of easy rescue is based on individualistic or prudential concerns.

But one could object that compelling a person to be prudent is a form of paternalism and incompatible with individualistic values. But is not the harm principle also a form of paternalism? What if the individualist would like to live in a world where battle is the order of the day? To convince him that he should give up this unreasonable desire one would appeal to the benefits of adopting the harm principle. This sort of argument, however, is paternalistic.

205. Arguably, it may be preferable on policy grounds to educate the public not to attempt rescue when one has reason to believe it is not an easy one. Some observers contend that it is difficult or impossible to know where to draw the line. See, e.g., McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1288 (1949).

It may be that there are no bright lines separating easy from difficult rescues. But that does not show that there are no discernible lines at all. Some of the more notorious cases, where an easy rescue was possible, would have involved nothing more than picking up an available phone and calling the police. See *supra* text accompanying notes 99–104 and *supra* note 53. Even if a duty of easy rescue only required a person to notify the appropriate rescue authorities, it would go a long way toward preventing loss of life and permanent injury at almost no cost.

206. The benefits are less certain because the rescue is difficult and the bystanders may not have the necessary skills for effecting a dangerous rescue. For example, a

cuer—is more than just possible. It is precisely this trade-off which is not entailed by individualistic values.²⁰⁷ Individualists may reasonably disagree over whether a principle of dangerous rescue is desirable;²⁰⁸ hence, such a principle is not fully justified on individualistic grounds.

The result is different when we turn to easy rescues.²⁰⁹ Since

person may be trapped in his car; a bystander cannot help him because even if a metal-cutting saw were available, the bystander would not know how to use the special metal-cutting saw required in these circumstances. Such rescues should be a governmental function. Other rescues, such as surgical operations, should be left to the contractual arrangements of the parties concerned. Easy rescues do not fit this pattern—primarily because anyone can effect one at little or no cost to himself.

One might even consider reimbursing professional rescuers on the basis of the market value of their services—as if there had been a bargain struck by the rescuer and victim. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* 74 HARV. L. REV. 1073, 1126 (1961).

207. The reason self-sacrifice is not required is that individualists could disagree over a principle of self-sacrifice. The central argument of this Comment is that they could not reasonably disagree over a principle of easy rescue which is not based on self-sacrifice.

What if a person does not want the burden of rescuing someone and believes that should he require an easy rescue, there will probably be someone around who will voluntarily rescue him? He will not endorse a principle of easy rescue. In that case, it is also likely that someone other than he will rescue the victim and so he will not have the burden of doing so. The chances of his being the only rescuer and his requiring rescue from only one rescuer are the same. Endorsing a duty of easy rescue, therefore, will not cost him anything.

208. Some individualists may choose to contract with professional rescuers such as security guards, lifeguards, or firefighters to protect them against *dangerous* rescues. Others might choose to go it alone. Still others might prefer to limit their activities in order to reduce the chances of needing *dangerous* rescues.

209. There is a sociobiological argument in favor of a principle of easy rescue.

Assume the chance of [a] drowning man dying is one-half if no one leaps in to save him, but that the chance that his potential rescuer will drown . . . is . . . one in twenty. Assume that the drowning man always drowns when his rescuer does and that he is always saved when the rescuer survives the rescue attempt . . . [I]f the drowning man reciprocates at some future time, and if the survival chances are then exactly reversed, it will have been to the benefit of each participant to have risked his life for the other. Each participant will have traded a one-half chance of dying for about a one-tenth chance. If we assume that the entire population is sooner or later exposed to the same risk of drowning, the two individuals who risk their lives to save each other will be selected over those who face drowning on their own. Note that the benefits of reciprocity depend on the unequal cost/benefit ratio of the altruistic act, that is, the benefit of the altruistic act to the recipient is greater than the cost of the act to the performer. . . .

See Trivers, *supra* note 68, at 35–36.

Trivers' argument applies to rescues more dangerous than easy ones; thus, if his argument is correct, it applies *a fortiori* to easy rescues. Sociobiological explanation of human social behavior has caused a stir in both scientific and political settings. For a comprehensive discussion of the issues involved, see THE SOCIOBIOLOGY DEBATE: READINGS ON ETHICAL AND SCIENTIFIC ISSUES (A. Caplan ed. 1978).

The sociobiological conception of "reciprocal altruism" is really a form of reciprocal egoism; that is, it is a theory which shows how the helper helps himself by

an easy rescue involves minimal danger, and with modern technology can usually be achieved quickly and with certainty,²¹⁰ the individualist receives two kinds of benefits from a law requiring easy rescue. First, pertaining to actual rescues, such a law increases the likelihood²¹¹ of his being rescued should he need to be. In exchange for this the individual suffers only minor inconvenience should he ever be required to rescue someone else.²¹² Second, even if a person is never in need of rescue himself, the individualist still benefits from a law requiring easy rescue. In this case, the existence of such a law gives the individualist reason to believe that, should he be in need of rescue, the law requires action on his behalf. This knowledge makes him better able to plan his activities and, therefore, enhances his freedom. It is arbitrary and irrational²¹³ for an individualist not to accept as a general legal duty the principle of easy rescue.²¹⁴

The principle of easy rescue is justified *in the same way as is the harm principle*;²¹⁵ both are *fully* justified on individualistic

helping others. This is just the sort of reasoning employed by individualistic political theories.

In contrast, one can have a moral theory which is primarily altruistic—a theory which holds that duties to others cannot be explained egoistically. *See generally* Nagel, *supra* note 30 (altruism is derived from the conception we have of ourselves as persons). For a moral theory which collapses the dichotomy between egoism and altruism—arguing that a vivid concern and respect for others enables us fully to realize ourselves as persons, see Lipkin, *The Theory of Reciprocal Altruism*, 30 PHIL. STUD. (Ireland) (forthcoming). The author's argument has been that the duty of easy rescue is justifiable on individualistic grounds, not that individualism is ultimately the correct political theory.

210. Once notified, it took police *two* minutes to arrive at the scene of the crime in front of Kitty Genovese's apartment building. A. ROSENTHAL, *supra* note 99, at 36.

211. It would be an arbitrary refusal to relinquish the possible benefits—saving one's life—of a generally obeyed principle of easy rescue because one did not want the possible minimal burdens. Such arbitrariness is not an implication of an individualistic political theory. *See supra* notes 26 and 194.

212. *See supra* notes 26, 194, 211.

213. *See supra* notes 26, 194, 211.

214. In a post-industrial, highly technological society there are increased risks of injury, but there are also increased means of rescue. With the advent of 911 phone numbers, many rescues can be initiated by almost any bystander. Emergency police and fire department phones can be used by strangers to call paramedics or to notify the police.

Warning rescue authorities sometimes is itself sufficient to satisfy the general legal duty of easy rescue. In August 1983, a 13-year-old girl was raped repeatedly for forty minutes by two youths as several bystanders watched without calling the police. An 11-year-boy saw the incident and notified the police. The 11-year-old's response certainly satisfies the general legal duty of easy rescue. *See* L.A. Herald Examiner, Aug. 3, 1983, at A7, col. 1. This is a good example of an easy rescue which almost anyone could effect. According to this Comment's thesis, the other bystanders should be liable for the girl's injuries.

215. Discussions of a general legal duty of easy rescue usually contrast the foundations of justification of the harm principle as non-moral, legal, individualistic, egoistic, or prudential with the foundations or justification of any principle of rescue as

grounds in terms of autonomy and self-interest.²¹⁶ Adopting the principle of easy rescue does not make one a Good Samaritan; failing to accept it does not brand one a moral monster.²¹⁷ A person should accept the principle of easy rescue because it enhances his liberty;²¹⁸ he should accept this principle because it is in his rational self-interest to do so.²¹⁹

F. *The Scope and Limits of the Duty of Easy Rescue*

The principle of easy rescue, unlike the principle of beneficence, is self-limiting.²²⁰ If one accepts the principle of beneficence,²²¹ not only must one attempt dangerous rescues, one must also try to remedy disease, poverty, famine, and so forth.²²² Under a regime of compelled beneficence, the freedom and desire to engage in supererogatory acts²²³ could conceivably vanish; such freedom would then become obligation; all contract would be

moral, beneficent, altruistic, humanitarian, or Good Samaritanistic. This Comment has shown that this contrast is specious.

216. No supplementary principle is needed to justify either principle.

217. It might, however. The point is that despite being a moral monster for not effecting an easy rescue, a person is irrational from an individualistic perspective.

218. It enhances one's liberty because it gives one the security of knowing that should one require an easy rescue, one is more likely to be rescued than if there was no legal duty to effect such a rescue.

219. It is in one's rational self-interest to accept such a principle, since recognizing the legal duty to effect an easy rescue might in fact be just what prompts a stranger to save one's life.

220. One of Epstein's arguments against the duty to rescue is that charity will be indistinguishable from obligation.

[I]t will no longer be possible to delineate the sphere of activities in which contracts (or charity) will be required in order to procure desired benefits and the sphere of activity in which those benefits can be procured as of right. Where tests of "reasonableness"—stated with such confidence, and applied with such difficulty—dominate the law of tort, it becomes impossible to tell where liberty ends and obligation begins; where contract ends, and tort begins.

Epstein, *supra* note 175, at 199.

Some writers believe that the line separating contract and tort has already been fatally obscured. See G. GILMORE, *THE DEATH OF CONTRACT* 90 (1974).

221. This is the problem with Weinrib's justification of a general legal duty to rescue in terms of either a Benthamite beneficence or a Kantian-Gerwithian respect for persons—including for Weinrib the right to life and health. These notions show that duties to help others are much greater than ordinarily supposed, and that one should effect *dangerous* rescues. Since some people are not utilitarians or Kantians, Weinrib's attempted justification will not convince them; it proves too much. See Weinrib, *supra* note 39, at 279–82. But since every rational person must be prudent, a duty of easy rescue, based on individualism, will convince them.

222. Singer, *supra* note 89, at 22. It is unlikely that rescue entails relieving world famine.

223. A "supererogatory act" is one beyond the call of duty. For discussions of the role of supererogation in ethics see Urmson, *Saints and Heroes*, in *ESSAYS IN MORAL PHILOSOPHY* 198–216 (A. Melden ed. 1958). See also D. HEYD, *SUPEREROGATION* (1982).

transformed into tort.²²⁴

This objection is misplaced against a principle of easy rescue justified by individualistic values. A person is legally obligated to attempt rescue only when he encounters a person in distress and has sufficient reason to believe that the rescue would be successful at little or no cost to himself.²²⁵ Such a limited duty makes it clear that society does not want people attempting rescues when they are ill-suited to the task²²⁶ or when there are extraordinary circumstances making the chances for success unlikely or indeterminate.²²⁷

Individualistic principles of easy rescue are designed to produce the greatest benefit in terms of autonomy and other individualistic values²²⁸ at little or no cost. When a reasonable person²²⁹ has reason to doubt the success of the rescue, it is *ex hypothesi* not an easy rescue.²³⁰ But when a reasonable person would conclude

224. Epstein, *supra* note 175, at 199.

225. There could be danger to the rescuer which would make the rescue a more than easy one, or there may be possible danger to the victim. In cases of the latter type, barring extreme recklessness, the rescuer doubting his chances of success should still act. RESTATEMENT (SECOND) OF TORTS § 323 comment b (1965). Many states have "Good Samaritan Laws" which provide immunity for people participating in medical emergencies. For constitutional issues raised by such laws, see Sullivan, *Some Thoughts on the Constitutionality of Good Samaritan Statutes*, 8 AM. J.L. & MED. 27 (1982).

226. When a rescuer is or should be uncertain about the risks and probability of success of rescue, he probably should not act. For example, in July, 1983, Joe Delaney, a star running back for the Kansas City Chiefs, attempted to rescue three drowning boys from a pond. One boy swam to shore on his own. A second boy drowned, and the third boy died later in a hospital. Joe Delaney, a poor swimmer, drowned in his effort to rescue the boys. According to this Comment's thesis, he need not have tried rescuing the boys himself, since the rescue entailed danger to the rescuer. See *Football Hero*, SPORTS ILLUSTRATED, July 11, 1983, at 18.

227. On July 24, 1983, a rampaging elephant from Lion Country Safari in southern California escaped and killed a ranger. When paramedics arrived, they waited before attending to the ranger because, in one observer's words, "[i]t was almost like the elephant was guarding [the body]." Indeed, waiting was the prudent thing to do even for professional rescuers. Surely in such circumstances one would want the rationally prudent bystander to do nothing at all except call for help. See L.A. Herald Examiner, July 25, 1983, at 1, col. 2.

228. See *supra* notes 201-02.

229. Epstein inveighs against this standard, and surely it needs some refining legally and philosophically. But it is doubtful that any substitute will be found to make the courts' and commentators' job any easier. These are vague and imprecise areas, and our conceptualization of their contours may never be pellucid, but that may be due to the subject matter itself. See THE ETHICS OF ARISTOTLE: NICOMACHEAN ETHICS 27 (J. Thomson trans. 1953).

230. Still, it may be that a person should try the rescue anyway, if doing so costs little to the rescuer and would benefit the victim but may also possibly kill him. If death is certain without an attempt at rescue and even a botched rescue would likely save the victim's life (though perhaps cause him permanent injury), the rescuer should still act. See *supra* note 225. Such a rescue is not an easy rescue, and therefore does not lend itself to the sort of justification proposed by this Comment.

that a rescue is an easy one, and there are no special excusing conditions, the reluctant rescuer violates a legal duty in failing to act.²³¹

CONCLUSION

In contemporary society, numerous emergencies arise when rescues can be effected safely and easily by observers who have no special relation to the victim. Requiring easy rescue will save lives and reduce injury at virtually no cost. Commonly raised problems of causation, identification of the tortfeasor, and the constraint of prior knowledge do not, upon examination, pose insurmountable obstacles to acknowledging this duty.

Anglo-American law is now ready to fulfill its individualistic heritage by recognizing a general duty of easy rescue. A comprehensive understanding of individualistic values—most notably, autonomy and self-interest—suggests, therefore, the propriety of legally requiring easy rescue. Morality and Good Samaritanism need not be invoked²³² in support of this duty, just the individual's appreciation of the autonomous pursuit of his own self-interest.

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231. *See supra* note 135.

232. Of course, if one believes that the law should express altruism, at least with respect to easy rescues, then one can appeal to morality. This Comment's point is that one need not appeal to morality.

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† This piece is dedicated to Carolyn Marie Dunphy, my wife and best friend, and to the cherished memory of Freeman Dunphy, her father.