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Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*

Damien Schiff**

For two thousand years the story of the Good Samaritan has captivated the Western mind.¹ As an explication of the divine

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1. *Luke 10:25-37.*

And behold, a certain lawyer got up to test him, saying, "Master, what must I do to gain eternal life?" He said to him, "What is written in the Law? How dost thou read?" He answered, "Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole strength, and with thy whole mind; and thy neighbor as thyself." And he said to him, "Thou hast answered rightly; do thou this and thou shalt live."

But he, wishing to justify himself, said to Jesus, "And who is my neighbor?" Jesus answered, "A certain man was going down from Jerusalem to Jericho, and he fell in with robbers, who after stripping him and beating him went their way, leaving him half-dead. But, as it happened, a certain priest was going down the same way, and when he saw him, he passed by. And likewise a Levite also, when he was near the place and saw him, passed by. But a certain Samaritan as he journeyed came upon him, and seeing him, was moved with compassion, and he went up to him and bound up his wounds, pouring on oil and wine; and setting him on his own beast, he brought him to an inn and took care of him. And the next day he took out two denarii and gave them to the innkeeper and said, "Take care of him; and whatever more thou spendest, I, on my way back,

command to love one's neighbor, the parable represents Christ's answer to a lawyer's attempt at self-justification in asking who qualifies as a "neighbor."² The biblical account does not imply that the Levite and the Priest, both of whom passed by the injured man, had broken Hebraic law. That is its point. Charity begins where justice ends. The Good Samaritan parable teaches that justice alone is radically insufficient to bring human beings to the fullness of existence; that end can be achieved only when justice is supplemented by charity.³

In the West the primary purpose of justice was rendered in the maxim *unicuique tribuere jus suum*.⁴ The duties of justice could be compelled and were properly within the competence of the state, unlike the duties of charity; these the state left to "Him who searches the heart."⁵ This was the universal opinion in the West until the late eighteenth century, when the first bad Samaritan criminal statutes were enacted.⁶ By the early

will repay thee."

"Which of these three, in thy opinion, proved himself the neighbor to him who fell among the robbers?" And he said, "He who took pity on him." And Jesus said to him, "Go and do thou also in like manner."

Id.

2. *Id.*

3. See, e.g., *Whitesides v. Southern R. Co.*, 38 S.E. 878, 880 (N.C. 1901) ("...suffering and death appeal...to the feelings of humanity, for which the good Samaritan has always been revered and extolled, to the shame and condemnation of the priest and Levite...but history fails to show that a breach of the Levitical law could have been claimed...") (Cook, J., dissenting).

4. This maxim, along with *honeste vivere* and *alienum non laedere*, formed the basis of the Classical and Byzantine conception of civil justice. See, e.g., *THE INSTITUTES OF JUSTINIAN 3* (J.B. Moyle, D.C.L. trans., 4th ed. Gaunt 1999) [hereinafter *INSTITUTES*] ("Justice is the set and constant purpose which gives to every man his due. Jurisprudence is the knowledge of things divine and human, the science of the just and unjust."); *THE DIGEST OF JUSTINIAN 3* (Theodore Mommsen, Paul Krueger & Alan Watson eds., 1985) [hereinafter *DIGEST*] ("The basic principles of right are: to live honorably, not to harm any other person, to render to each his own."). Importantly, the focus of each of these principles is on the actor as one obliged to do something or to refrain from doing something; justice is thus duty—and not rights—based.

5. H.D. Minor, *The Moral Obligation as a Basis for Liability*, 9 VA. L. REV. 420, 431 (1923).

6. The phrase "bad Samaritan statutes" refers to those statutes that punish with criminal sanction persons who fail to assist or fail to attempt to

twentieth century, Russia, Italy, Portugal, Spain and Germany had all enacted statutes requiring citizens either to assist others in need of rescue or notify the authorities.

During the 1930s, when Communism had taken deadly hold of Russia, National Socialism Germany, and Fascism Italy, the affirmative duties that bad Samaritan statutes created were made more rigorous.⁷ In 1941 Marshall Petain brought occupied France into line with this trend by enacting the country's first duty-to-rescue provision.⁸ After World War II, Germany, France and Italy underwent considerable political changes, yet each retained its bad Samaritan statute. The countries then behind the Iron Curtain also uniformly adopted duty-to-rescue statutes.⁹ Despite this powerful movement, few common law jurisdictions followed suit, and those that did, did so only halfheartedly.¹⁰

Today, with the exception of five states,¹¹ no American jurisdiction recognizes a general duty to rescue in either criminal or private law. In contrast, almost every civil law jurisdiction in Europe, as well as in Latin America, recognizes various types of duties to rescue and related tort actions.¹² How to account for this

assist another in need. Likewise, a "bad Samaritan" is one who fails to assist another in need. For a more detailed but less-encompassing definition, see generally JOEL FEINBERG, *Harm To Others*, in 1 THE MORAL LIMITS OF THE CRIMINAL LAW 126 (1984). The phrase "Good Samaritan statutes" refers to those statutes that immunize would-be rescuers from tort actions by the person intended to be helped. Likewise, a "good Samaritan" is one who complies with the duty to assist, whether successful in lending assistance or not. The object of the good Samaritan's endeavors, or the bad Samaritan's failures, is the "victim."

7. See John P. Dawson, *Rewards for the Rescue of Human Life?*, in THE GOOD SAMARITAN AND THE LAW 63, 69 (James M. Ratcliffe ed., 1966) [hereinafter GOOD SAMARITAN].

8. 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120 (Edward A. Tomlinson trans., 1999).

9. F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630, 656-57 (1966).

10. See, e.g., WIS. STAT. ANN. § 940.34 (West 2005); HAW. REV. STAT. ANN. § 663-1.6 (LexisNexis 2002); R.I. GEN. LAWS § 11-56-1 (2002); VT. STAT. ANN. Tit. 12, § 519 (2002); MINN. STAT. ANN. § 604A.01(1) (West 2000).

11. Vermont, Minnesota, Wisconsin, Rhode Island and Hawaii. These states have criminal statutes imposing a duty to assist or to contact the authorities under certain circumstances. See *supra* note 10.

12. Alberto Cadoppi, *The Failure to Rescue in Continental Criminal Law*, in THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 93, 104 (Michael A.

incongruity? Several reasons come to mind: (1) The common law is individualistic and is repulsed by broad affirmative duties, no matter their inspiration, (2) the welfarist systems of most European countries naturally complement collective and affirmative legal duties, whereas the *laissez faire* model in common law countries generally conflicts with these same affirmative duties, (3) the enactment of duties to rescue represents a triumph of tort values in their "competition" with the values of contract and (4) differing conceptions of the nature of the state lead to duties to rescue *vel non*.

Whether the common law should adopt the civil law tradition of a general duty to rescue is a question requiring a comparative law analysis for a complete answer. This comparative inquiry also has the happy result of testing, in one highly specialized area, the convergence thesis,¹³ which maintains that the common law and the civil law are gradually shedding their differences to become indistinguishable. I begin my analysis in Part I with an historical introduction.¹⁴ Following that groundwork, I closely parse duty-to-rescue statutes from civil law and common law jurisdictions, and highlight important distinctions among the civilian examples in Part II.¹⁵ Subsequently, in Part III, I review the main objections to duties to rescue arising from psychology, history, culture, American constitutional law, causation theory, philosophy and theology.¹⁶ Along the way I demonstrate why at first glance a civil law-type duty to rescue, sounding in either tort or criminal law, appears incommensurable with Anglo-American jurisprudential fundamentals, and why the Europeans have traveled so far down the road of affirmative duties while the common law countries have "lagged."

I ultimately conclude in Part IV that a wholesale adoption of the civilian approach is unwarranted, but what is possible, and

Menlowe & Alexander McCall Smith eds., 1993).

13. For a variety of views, see, e.g., JAN SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW* 2-6, 28-33, 103-05 (Nicole Kornet trans., 2002). See generally Alan Watson, *A Common Private Law for Europe?*, 9 MAASTRICHT J. EURO. & COMP. L. 329 (2002); Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996).

14. See *infra* Part I and text accompanying notes 18-54.

15. See *infra* Part II and text accompanying notes 55-206.

16. See *infra* Part III and text accompanying notes 207-77.

indeed appropriate, is a limited statutory duty to inform the authorities or professional rescue personnel in emergencies. To that end I have appended a model statute and commentary. The model law encompasses the best of the European and civilian experience while tempering the whole in light of common law necessities.¹⁷ The model statute is drafted with an eye toward striking a fair compromise between, on the one hand, the legitimate bases for imposing a duty to rescue, and on the other, the equally legitimate reasons for preserving a substantial sphere of individual autonomy.

I. HISTORY

A. *From Ancient Times through the Nineteenth Century*

According to Pufendorf, the ancient Egyptians imposed a general duty to rescue.¹⁸ Plato's *Laws* had a bad Samaritan statute,¹⁹ but in Roman law there was no general duty to rescue.²⁰ Christian Europe was not deaf to Christ's parable: both St. Augustine and St. Thomas recognized the moral obligation to help another in need.²¹ Notwithstanding this moral duty, pre-modern

17. See *infra* Parts IV.A and IV.B.

18. Cadoppi, *supra* note 12, at 97.

19. THE LAWS OF PLATO 277 (Thomas L. Pangle trans., 1980) ("He who was a bystander in any of these cases and failed to give help according to the law must pay a penalty . . .").

20. Cadoppi, *supra* note 12, at 97. But Cicero believed that there were two types of injustice: that which one causes, and that which one allows to happen. See CICERO, DE OFFICIIS 25 (Walter Miller trans., 1968).

There are, on the other hand, two kinds of injustice—the one, on the part of those who inflict wrong, the other on the part of those who, when they can, do not shield from wrong those upon whom it is being inflicted. For he who, under the influence of anger or some other passion, wrongfully assaults another seems, as it were, to be laying violent hands upon a comrade; but he who does not prevent or oppose wrong, if he can, is just as guilty of wrong as if he deserted his parents or his friends or his country.

Id.

21. Cadoppi, *supra* note 12, at 97. For St. Thomas's opinion, see his SUMMA THEOLOGICA II-II, QU. 79, A.3:

I respond saying that an omission supposes the lack of a good, and not just any good, but an owed good. The good owed according to reason pertains to justice: to the legal type of justice, if the debt be accepted according to the order of divine or human law; to the special

Europe imposed no general duty to rescue, and, not surprisingly, given the chronic problem of the Middle Ages—lawlessness.²² For if the medieval state had a difficult enough time enforcing laws to *prevent* citizens from acting, how much more trying it would have been to enforce laws that required citizens to *act*.²³ In the Enlightenment's wake, European legal theorists generally opposed legal duties to assist: neither Pufendorf nor Kant advocated them.²⁴

The first European jurisdiction to impose any statutory duty to rescue was Bavaria in 1751; the duty applied, however, only in

type of justice, if it be considered as owing to one's neighbor. Wherefore it follows that justice is a special virtue, and a habit, and that an omission is a special type of sin distinct from those sins that are opposed to other virtues. Wherefore it follows that to do the good, to which is opposed an omission, is a certain and special part of justice distinct from the refusal to do evil, to which is opposed a transgression, and thus is an omission distinguished from a transgression.

Id. (translation mine).

This is not to say that interest in altruism is strictly Western. *See, e.g.,* THE WORKS OF MENCIUS 201-02 (James Legge trans., 1970).

Mencius said, "All men have a mind which cannot bear to see the sufferings of others. . . . [E]ven now-a-days, if men suddenly see a child about to fall into a well, they will without exception experience a feeling of alarm and distress. *They will feel so*, not as a ground on which they may gain the favour of the child's parents, nor as a ground on which they may seek the praise of their neighbours and friends, nor from a dislike to the reputation of *having been unmoved* by such a thing. From this case we may perceive that the feeling of commiseration is essential to man"

Id.

22. This is a natural result of the general absence of a strong central government. The one European exception to that—England—was not immune from civil strife and foreign intrigue during the reign of the Angevins. *See* WINSTON S. CHURCHILL, THE BIRTH OF BRITAIN 187-95 (1956) (contrasting the powerful central government of Henry I with civil strife during the reign of his successor, Stephen).

23. And there surely is a peculiar disjunction when we speak of enforcement of the law in the Middle Ages, because no police force existed; enforcement was self-help. But this is not to say that moral restraint was absent; quite the contrary, the feudal system was entirely founded upon a man's observance of his moral obligation to keep the peace, whether as lord or vassal. 2 HILLAIRE BELLOC, A HISTORY OF ENGLAND 41 (1927). And the more important the person, the graver the breach of "his peace." *See* CHURCHILL, *supra* note 22, at 216.

24. Cadoppi, *supra* note 12, at 98.

times of external aggression.²⁵ A broader duty was recognized in the *Constitutio Criminalis Theresiana* (1768) and the *Neue Bambergische Peinliche Gesetzgebung* (1792-95).²⁶ A similar provision was included in the proto-German Civil Code, the *Preussisches Allgemeine Landrecht* (1791).²⁷ The *Strafgesetzbuch* (1871) provided for a duty to rescue only when there existed a common danger or disaster; the statutory provision was referred to as the *Liebeparagraph*,²⁸ perhaps denoting its Christian inspiration.

For the composers of the French *Code Pénal* of 1810, the notion of affirmative duties imposed by law was repugnant to the classical liberal view then in vogue, which posited man as self-sufficient and autonomistic.²⁹ In this vein one French scholar has remarked that in the revolutionary slogan "*liberté, égalité, fraternité*," *fraternité* comes last.³⁰ Similar opposition to a legal duty to assist occurred in Italy, where a proposal for a general duty to rescue was attacked because it conflicted with the longstanding principle that such a duty should only be imposed on certain people at certain times and not generally.³¹

Early Spain (1822) adopted a duty to rescue in its Criminal Code,³² while Portugal (1867) was the first to provide a private cause of action based upon violations of the duty to rescue.³³ Peculiarly, Russia (1845) provided a duty to rescue but made it applicable only to Christians, reserving the issue for the ecclesiastical courts.³⁴ Thus, by the end of the nineteenth century, half the European continent recognized a general duty to rescue punishable by criminal sanction.

At common law no such duty developed. Although England

25. *Id.* at 98.

26. *Id.*

27. *Id.*

28. *Id.* at 100-01.

29. *Id.* at 102.

30. ANDRÉ TUNC, RECUEIL D.H., *quoted in* Josef Hofstetter & Wolfgang V. Marschall, *Amendment to the Belgian Code Pénal: The Duty to Rescue Persons in Serious Danger*, 11 AM. J. COMP. L. 66, 70 n.18 (1962).

31. Cadoppi, *supra* note 12, at 99.

32. *Id.* at 99-100.

33. *Id.* at 104.

34. *Id.*

was not without supporters for a general duty to rescue,³⁵ most common law jurisdictions adopted the view of Lord Macaulay, expressed in his *Notes on the Indian Penal Code*:

It is true that the man who, having an abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man, a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard-earned rice?³⁶

35. See e.g., JEREMY BENTHAM, SPECIMEN OF A PENAL CODE, in 1 WORKS 164 (J. Bowring ed., 1844) ("Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience. This obligation is stronger, in proportion as the danger is the greater for the one, and the trouble of preserving him the less for the other."). See also Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 3 nn.11-13 (1993) (citing Plato, John Stuart Mill and Jeremy Bentham as supporting the general duty to rescue).

36. THOMAS B., LORD MACAULAY, NOTES ON THE INDIAN PENAL CODE, reprinted in THE LEGAL ENFORCEMENT OF MORALITY 161-62 (Thomas C. Grey ed., 1983) (the "line-drawing" objection to duties to rescue). Professor Malm terms this the "sorties" argument, which goes thus: The law can require that a person go one step in helping another; why not a second step? See Heidi Malm, *Civic Virtue and the Legal Duty to Aid*, in CIVILITY AND ITS DISCONTENTS 213, 219 (Christine T. Sistare ed., 2004) [hereinafter CIVILITY]. If the moral significance between not acting and step one is indistinguishable from the moral significance between step one and step two, then the law cannot make a principled stand at enforcing step one while leaving step two to the individual; therefore, the law must enforce step two. See *id.* What about step three? And four? And ad infinitum until one finds that the law requires step fifty-two because it required step two. See *id.* The typical response to the Macaulay-sorties argument is that the law must make arbitrary distinctions all the time; a line must be drawn if we are to have law at all; hence a line-drawing attack is really an attack on the principle of regulated conduct. See e.g., Lionel H. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 382-84 (1965). On the other hand, we do regulate by arbitrary line-drawing and accept the inescapable element of arbitrariness as inseparable from the act of regulation, but we are willing to tolerate the cost because we believe that *some regulation* of the conduct in question is appropriate; in the case of duties to rescue, the central issue is

Absent some special relationship between the rescuer and the one to be rescued, the common law did not impose a legal obligation on the would-be Good Samaritan. The New Hampshire Supreme Court's opinion in *Buch v. Amory Manufacturing*³⁷ exemplifies the common law position in American jurisdictions. An infant trespasser's hand was crushed by heavy equipment after the adult overseer had told the child to leave but made no further efforts to protect the minor from harm. The court commented on the legal-ethical question presented:

With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved. 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.³⁸

The common law made allowances for a duty to rescue in the following circumstances: (1) where a special relationship existed (e.g., spouse to spouse, parent to child, or landowner to licensee or invitee); (2) where a contract or statute imposed an affirmative duty upon the rescuer; (3) where the rescuer had voluntarily assumed the duty to rescue; and (4) where the rescuer had created the danger.³⁹ Under the heading of "special relationship," the

whether *any regulation* is appropriate, and therefore the cost of arbitrariness in line-drawing may outweigh the benefits of any regulation. See Joseph Ellin, *The Mind of a Bad Samaritan*, in *CIVILITY* 233, 242 ("Scrooge is better dealt with by the Spirit of Christmas than by the shadow of the hangman."). For sharp criticism of Lord Macaulay's argument, see FEINBERG, *supra* note 6, at 150-59.

37. 44 A. 809 (N.H. 1898).

38. *Id.* at 810. For a similar and nearly contemporaneous English view, see JAMES FITZJAMES STEPHEN, 3 *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 9-11 (1883).

39. For a collection of typical cases, see Paul H. Robinson, *Criminal*

common law adopted the continental principle of *commissio per omissionem*: a parent who wilfully failed to feed his child, wishing that it should die, would be guilty of murder.⁴⁰ But the common law did not impose a general duty to rescue paradigmatically applying between strangers.

B. Twentieth Century Developments

Once the Nazis assumed power in Germany, their totalitarian philosophy led, in 1935, to a great broadening of the existing duty to rescue.⁴¹ One commentator sees in this strengthening a typical difference between the liberal and authoritarian state: Whereas for the liberal state harm and offense form the basis of criminality, in the authoritarian state any ethical or political breach of duty can be criminalized because it threatens the social collective and elevates the individual over the group.⁴²

As a result of German occupation, Vichy France passed its own duty-to-rescue statute. The Germans wanted both to make Frenchmen help imperilled German soldiers and to foster rratting on the Gaullists.⁴³ At that time, French commentators were mixed on the new duty: some adamantly opposed it; others espoused it as the pinnacle of Christian charity.⁴⁴ Following

Liability for Omissions: A Brief Summary and Critique of the Law in the United States, 55 REVUE INTERNATIONALE DE DROIT PÉNAL 633, 638-39 (1984).

40. France has come to the opposite conclusion. F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630, 648 (1966).

41. Cadoppi, *supra* note 12, at 101.

42. *Id.* This principle is exemplified by the language of the Nazi statute, which included the phrase *gesundes Volksempfinden* [sound sense of the people]. *See id.*

43. Edward A. Tomlinson, *The French Experience with the Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 451, 462-63 (2000).

44. Cadoppi, *supra* note 12, at 102. The French experience must be understood in the background of the infamous Woman of Poitiers Case of 1897. *See* Tomlinson, *supra* note 43, at 464. Blanche Monnier was the insane daughter of the Dean of the local college; she was never seen outside the family home, although it was acknowledged that the Dean took good care of her. *Id.* at 464-65. Once the Dean passed away, Blanche Monnier's mother refused to provide for her needs. *Id.* The brother, who lived across the street, was aware of the squalid conditions in which Blanche lived, for he came over frequently and visited. *Id.* A few weeks following the mother's death, Blanche's condition was discovered and prosecutions for assault and battery were brought against, among others, the brother. *Id.* Although the trial

Germany's defeat, France repealed almost every piece of legislation passed during the occupation. One of the few statutes that survived was the duty-to-rescue provision.

After World War II, Belgium enacted its own duty to rescue, but not without opposition.⁴⁵ Spain and Portugal modified their provisions.⁴⁶ In Spain the duty was broadened slightly in the 1950s, while Portugal's new Civil Code (1982) followed the German model.⁴⁷ Austria adopted its first duty to rescue in 1975.⁴⁸ Whereas there is but one prominent European holdout, Sweden having rejected a bad Samaritan statute in 1972,⁴⁹ almost every Latin American nation has enacted a duty-to-rescue provision in its criminal code.⁵⁰

Presently there is no duty to rescue in England.⁵¹ Likewise, generally among U.S. jurisdictions there is neither a criminal nor a civil duty. Those states that have criminal provisions impose only slight penalties,⁵² and none recognizes a private cause of action by a victim against the bad Samaritan.⁵³ Every U.S. jurisdiction has a Good Samaritan statute, however, whereby the rescuer is made immune from a civil suit prosecuted by the rescuee

court convicted the brother, the appeals court reversed on the grounds that the brother had committed no affirmative act, that the French courts were not empowered to criminalize activity on their own; and that if an affirmative duty were to be imposed upon the brother, it would have to come from the legislature. *Id.* at 465-67.

45. See Hofstetter & Marschall, *supra* note 30, at 66-67. Those in favor of the provision argued that it would counteract moral laziness; those opposed rallied against the legal enforcement of morality. See Cadoppi, *supra* note 12, at 102-03.

46. Cadoppi, *supra* note 12, at 103.

47. *Id.* at 104. See Jorge de Figueiredo Dias, *Les Delits d'Omission dans le Droit Pénal Portugais*, 55 REVUE INTERNATIONALE DE DROIT PÉNAL 845, 849 (1984).

48. Cadoppi, *supra* note 12, at 104. See Manfred Burgstaller, *Omissive Offenses and Penal Responsibility for Omissive Conduct in Austria*, 55 REVUE INTERNATIONALE DE DROIT PÉNAL 535, 543 (1984).

49. *Id.*

50. Cadoppi, *supra* note 12, at 104.

51. See W. Douglas Cullen, *The Liability of the Good Samaritan*, 1995 JURID. REV. 20, 20-21 (1995). For the Australian experience, see generally Louis Waller, *Rescue and the Common Law: England and Australia*, in THE GOOD SAMARITAN AND THE LAW 141 (James M. Ratcliffe ed., 1966) [hereinafter GOOD SAMARITAN].

52. See *supra* note 10.

53. See *infra* Part II.A.2.

victim.⁵⁴

II. POSITIVE LAW

This Part sets forth the positive law of several civil and common law jurisdictions. The positive law of these jurisdictions consists of criminally enforceable duty-to-rescue statutes, private causes of action for failure to assist, private causes of action by Good Samaritans for damage incurred during rescue, and Good Samaritan immunity. Each piece of positive law is set forth in turn.

A. Statutes

Criminally enforceable duty to rescue statutes are found in modern day civil and common law jurisdictions alike.

1. Civil Law Jurisdictions

This Part identifies five criminally enforceable duty to rescue statutes, four existing and one former, representative of those found in European civil law jurisdictions: Germany, France, Italy, Spain and Communist Russia.

a. Germany

Germany's duty to rescue provision was amended following World War II, and it presently reads:

§323c. Failure to Render Assistance. Whoever does not render aid during accidents or common danger or need, although it is required and can be expected of him under the circumstances and, especially, is possible without substantial danger to himself and without violation of other important duties, shall be punished with imprisonment for not more than one year or a fine.⁵⁵

54. Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 387 n.9 (1998). These statutes generally apply to medical professionals. *Id.*

55. Compare 32 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN PENAL CODE 192 (Stephen Thaman trans., 2002) with Código Penal art. 219, reprinted in Dias, *supra* note 47, at 849 (the new Portuguese provision). Failure to assist is punishable "in case[s] of grave necessity,

b. *France*

The present provision in the French Criminal Code derives from the 1945 version of the Vichy law of 1941. It reads:

Article 223-6[2]. Any person who willfully abstains from rendering assistance to a person in peril when he or she could have rendered that assistance without risk to himself, herself, or others, either by acting personally or by calling for aid, is liable to [a penalty of five years of misdemeanor imprisonment and to a fine of 500,000 francs].⁵⁶

c. *Italy*

Italy's present duty-to-rescue criminal statute, dating from the 1930s, exemplifies to one Italian scholar the Fascist *Weltanschauung*.⁵⁷ Italy's statute reads:

Article 593. [Failure to help]. Whosoever, finding an abandoned child of less than ten years, or another person incapable of providing for himself through physical or mental illness, through old age or for other cause, omits to inform the authorities immediately, is punishable . . . [penalty]

The same penalty may be imposed on one who, finding a human corpse or a person who appears to be dead, or an injured person or a person in danger, omits to

caused namely by disaster, accident, public calamity or common danger that imperils the life, health, physical integrity or liberty of another [if the aid could have been rendered] without grave risk to one's life or physical integrity or without violating other important duties." Código Penal art. 219, reprinted in Dias, *supra* note 47, at 849 (translation mine). A study conducted in the 1960s found no German cases permitting recovery by the rescue victim against a bad Samaritan on the basis of a violation of the German Penal Code. See John P. Dawson, *supra* note 7, at 71 n.16.

56. 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120. The French cases dealing with civil liability are discussed *infra* Parts II.B & II.C. The Belgian Criminal Code, Article 422, requires personal assistance or seeking the help of others if the victim is in grave peril, whether or not the would-be rescuer personally observes the situation, but there is no duty where serious danger would be present to the would-be rescuer or to another. Cadoppi, *supra* note 12, at 127-28.

57. Cadoppi, *supra* note 12, at 112.

give immediate assistance or to inform the authorities without delay.⁵⁸

d. *Spain*

The Spanish Criminal Code has contained a bad Samaritan provision since the first half of the nineteenth century.⁵⁹ The present provision reads:

489 bis. He who does not help a person who finds himself unprotected and in manifest and grave danger, when he could help without risk to himself or to another, shall be punished with major arrest or a fine of 30,000 to 60,000 pesetas. [¶] The same penalty for him who, prevented from lending assistance, does not urgently seek outside help. [¶] If the victim finds himself in distress due to the actions of him who failed to lend assistance, the penalty shall be minor detention.⁶⁰

58. *Id.* at 128.

59. *Id.* at 103.

60. CÓDIGO PENAL [C.P.] art. 195 (Spain) (translation mine). The Penal Code for the Mexican Federal District, also applicable to the Republic in federal matters, contains a similar provision:

Upon finding abandoned in whatever place a minor unable to care for himself or a wounded person, disabled or threatened by any danger whatsoever, a punishment of from one to two months in prison or a fine of from 10 to 500 pesos shall be imposed, if the person does not give immediate notice to the authorities or fails to lend the necessary assistance, when he could have done so without personal risk.

CÓDIGO PENAL FEDERAL [C.P.F.] art. 340 (translation mine). The Guatemalan Criminal Code (1973) reads in pertinent part:

One who, encountering a child under ten who is lost or abandoned, a wounded person, or a person who is disabled or who is facing imminent danger, fails to give him the help which is necessary in the circumstances, when he could do so without personal risk, will be punishable with [penalty].

Cadoppi, *supra* note 12, at 128. The Cuban Criminal Code (1979) provides:

Whosoever does not help or provide the required aid to a wounded person or to one exposed to a danger which threatens his life, bodily integrity or health, when there would be no risk to his own person, is punishable . . . with a prison sentence of three to nine months and a fine, or both.

Id. at 129.

e. *Communist Russia*⁶¹

Article 130 of the Stalinist constitution of 1936 provided that all citizens had to “respect the rules of socialist intercourse.”⁶² Professor Agarkov was the first to argue that article 130 created

61. For an analysis of the affinity between Marxism and duties to rescue, see John Harris, *The Marxist Conception of Violence*, 3 PHIL. & PUB. AFF. 192, 197, 209-11 (1974). “Marx believes that where human intervention could prevent this harm, then failure to prevent the harm must be seen as a cause.” *Id.* at 197. Harris attempts to justify the Marxist conception of violence and provide a logical if not desirable intellectual underpinning for adopting that conception. He divides refrainings into two distinct groupings, that of *negative causation* and that of *negative action*. *Id.* at 209. Negative causation exists where a person could have prevented X by some action but refrained from that action, which action is “expected or required” of him, or where X involves harm to a human being. *Id.* Negative action exists where a person’s failure to act brought about X, and where the person did know or should have known this “causal” connection. *Id.* Harris argues that his distinction reflects H.L.A. Hart’s dichotomy between causal responsibility and “moral liability-responsibility.” *Id.* at 210. Harris concludes:

If we have a duty not to kill others, it would be strange indeed if the duty not to kill by positive actions was somehow stronger than the duty not to kill by negative actions. I do not see how we can escape the conclusion that in whatever sense we are morally responsible for our positive actions, in that same sense we are morally responsible for our negative actions.

Id. at 211.

Harris makes a fundamental conceptual error, however. In his defense it should be noted that Harris’s chief concern was not to differentiate between moral and legal responsibility, although if a Marxist’s decision to punish a person depends upon whether that person brought about a “morally” offensive state of affairs, then it matters little whether one terms Harris’s framework a moral or legal one. Regarding the merits of his argument, summarized in the quoted material above, Harris errs because he equates the act of killing with the non-act of refraining to prevent a death. Both actions can be morally repugnant, but they remain *separate* and *distinct* moral evils. To take innocent human life is gravely disordered; to refrain from saving another’s life can, depending upon the circumstances and the psychological variables of the actors involved, also be gravely disordered; but simply because two acts are evil does not mean that they are equivalent in every respect. And this is Harris’s error. When one refrains from saving another, he may be just as morally guilty as the one who kills, but he is not guilty for the same reason, because he has not caused a death; he has simply refrained from saving a life. The distinction is nice but crucial; Harris either overlooks or disregards it.

62. Kristin A. DeKuiper, *Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue*, 1976 UTAH L. REV. 529, 532 (1976).

an enforceable duty to rescue.⁶³ The question became somewhat academic when the following provision in article 127 of the 1960 Russian Criminal Code was adopted:

Failure to Rescue. Failure to render aid which is necessary and clearly not suffering of postponement to a person in danger of his life, if the offender knew that such aid could be given without serious danger to himself or other persons, or failure to inform the proper authorities or persons about the necessity to render aid, is punished with corrective labor not exceeding six months or with public censure, or entails the application of social-corrective measures.⁶⁴

2. Common Law Jurisdictions

Five U.S. jurisdictions have some form of a criminally enforceable duty to rescue: Hawaii, Minnesota, Rhode Island, Vermont and Wisconsin.⁶⁵

a. Hawaii

Hawaii's duty to rescue statute reads:

Duty to assist. Any person at the scene of a crime who knows that a victim of the crime is suffering from serious

63. *Id.* One textbook writer of the Soviet era argued that the constitutional duty to rescue was violated if a strong swimmer, standing on the bank of a river, observed a man drowning and failed to attempt to rescue him. See JOHN M. HAZARD, COMMUNISTS AND THEIR LAW 412 (1969). In an actual case from 1960s Russia, a group of neighbors were prosecuted under the duty-to-rescue statute for failing to enter a burning hut and rescue several children. *Id.* at 415. The neighbors were convicted, but the appellate court remanded for a determination of whether a causal link existed between their inaction and the children's death. *Id.* A Soviet reporter opined that the neighbors should be guilty because:

Russians have acquired from the long centuries of conflagrations of the Tartar-Mongol invasions the courage to enter the flames of burning huts, and this trait has been intensified by the experiences of the revolution and World War II. For these reasons entering a burning hut to save life is accepted as a civic duty

Id.

64. Feldbrugge, *supra* note 40, at 656-57.

65. See HAW. REV. STAT. ANN. § 663-1.6 (LexisNexis 2002); MINN. STAT. ANN. § 604A.01(1) (West 2000); R.I. GEN. LAWS § 11-56-1 (2002); VT. STAT. ANN. tit. 12, § 519 (2002); WIS. STAT. ANN. § 940.34 (West 2005).

physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a petty misdemeanor.⁶⁶

b. *Minnesota*

Minnesota's duty to rescue statute provides the following:

Duty to assist. A 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 the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.⁶⁷

c. *Rhode Island*

Section 11-56-1 of Rhode Island's General Laws provides for the following duty to rescue:

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 or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not more than five hundred dollars (\$500), or both.⁶⁸

d. *Vermont*

Vermont's duty-to-rescue statute reads:

66. HAW. REV. STAT. ANN. § 663-1.6.

67. MINN. STAT. ANN. § 604A.01(1).

68. R.I. GEN. LAWS § 11-56-1.

Emergency medical care. 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.⁶⁹

e. *Wisconsin*

Lastly, Wisconsin law provides:

Duty to aid victim or report crime. Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim. [¶] A person need not comply with this subsection if any of the following apply: 1. Compliance would place him or her in danger; 2. Compliance would interfere with duties the person owes to others; 3... assistance is being summoned or provided by others.⁷⁰

3. *Textual Comparison of Statutes*⁷¹

This Part provides a textual comparison by jurisdiction, civil and common, of the preceding statutes' common elements: persons in peril, failure to assist, degree of risk and knowledge of peril.

a. *Persons in Peril*

As a general rule applicable to both civilian and common law duty-to-rescue statutes, the duty does not arise unless someone's life, health or safety is at risk; a mere threat to property, however precious, is insufficient.

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

70. WIS. STAT. ANN. § 940.34.

71. Tomlinson uses a four-part analysis in parsing the French statute; I shall use the same in analyzing all the provisions here. See Tomlinson, *supra* note 43, at 475-87.

i. *Civil Law Jurisdictions*

The French statute requires that the victim be "in peril."⁷² French case law has interpreted that requirement to mean the following: (1) A dying person is in peril, even though no assistance could prevent the person from dying;⁷³ (2) The duty arises whether or not the peril was caused by the victim himself;⁷⁴ (3) The peril must be "imminent, patent, and requiring an immediate intervention";⁷⁵ and (4) a mere danger to physical health may give rise to a duty to assist.⁷⁶

The German Penal Code provision makes no specific reference to peril; the duty to rescue arises only during "accidents or common danger or need."⁷⁷ This language echoes the very first German provisions, which imposed a duty only in cases of foreign aggression.⁷⁸ Conceivably, the German statute could be more widely applied than the French version, as the former is not tied to a particular person's suffering: an entire village aflame, passengers trapped in a derailed train, or one injured in a bar-room brawl might fall within its scope. The language could even be applied to cases where only property is at risk. These possibilities, however, are not realized in practice, for the German statute has been applied less extensively than its textually more limited French equivalent.⁷⁹

72. 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120.

73. *Id.* at 476. The Court of Cassation reasoned that not to console a dying person by one's presence violates "the duty of humanity." *Id.*

74. *Id.* at 477. Tomlinson argues that the case law likely imposes a duty upon a homeowner who has justifiably shot a burglar to come to the aid of the burglar, who is considered to be "in peril." *Id.* at 477-78.

75. *Id.* at 478.

76. *Id.* at 479. Tomlinson cites a lower court case where the convicted doctor refused to treat the flu-suffering son of a judge whose rulings the doctor disliked. *Id.* Strangely, a lower court has refused to recognize a person contemplating suicide, absent some particular distress or depression, as being "in peril." *Id.* at 480-81.

77. 32 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN PENAL CODE 192.

78. Cadoppi, *supra* note 12, at 100-01.

79. One commentator interprets the German danger requirement as encompassing "any serious danger to bodily integrity and health." Aleksander W. Rudzinski, *The Duty To Rescue: A Comparative Analysis*, in GOOD SAMARITAN, *supra* note 39, at 98. See also Feldbrugge, *supra* note 40, at 633, 640.

The Russian provision is clear: there is no duty to rescue unless a victim's life is in danger.⁸⁰ Under the Italian provision, the duty arises when the victim is incapable of providing for himself, appears inanimate, wounded or otherwise in danger.⁸¹ Under the Spanish Criminal Code, the duty arises when the victim is defenseless and in manifest and grave danger.⁸² Under the Mexican provision,⁸³ a disabled, wounded or otherwise threatened victim is a necessary predicate to the duty.⁸⁴

Thus, the gamut runs from the most cabined duty, the Russian version requiring rescue only when the victim's life is in danger, to the most expansive, the German version requiring rescue in a general accident or disaster.

ii. *Common Law Jurisdictions*

In Minnesota, a duty arises when the victim is exposed to or has suffered grave physical harm.⁸⁵ The same standard applies in Rhode Island.⁸⁶ In Wisconsin, mere exposure to bodily harm is not enough; rather, the danger must arise from the commission of a crime.⁸⁷ Thus, dangers caused by an accident or by a non-criminal tort cannot give rise to a duty to rescue. In Vermont the duty arises with exposure to grave physical harm.⁸⁸ Lastly, in Hawaii, a duty arises only when there is serious physical harm concomitant to the commission of a crime.⁸⁹

b. *Failure to Assist*

The degree of assistance required of a Good Samaritan varies from country to country in the civil law jurisdictions, and state to state in the common law jurisdictions.

80. Feldbrugge, *supra* note 40, at 656-57.

81. Cadoppi, *supra* note 12 at 128.

82. C.P., *supra* note 60.

83. C.P.F., *supra* note 60.

84. *Id.*

85. MINN. STAT. ANN. § 604A.01(1) (West 2000).

86. R.I. GEN. LAWS § 11-56-1 (2002).

87. WIS. STAT. ANN. § 940.34 (West 2005).

88. VT. STAT. ANN. tit. 12, § 519 (2002).

89. HAW. REV. STAT. ANN. § 663-1.6 (LexisNexis 2002).

i. Civil Law Jurisdictions

In France the duty-to-rescue statute speaks only of rendering assistance.⁹⁰ The French courts have concluded that the duty to assist is not necessarily discharged by calling the authorities.⁹¹ The Court of Cassation has held that the “method which necessity demands” is the appropriate standard to determine whether the duty has been met.⁹² In one case, a father-in-law refused to offer a pole to his drowning son-in-law and instead went off to seek help.⁹³ The court convicted the father-in-law because, under the circumstances, he could have rescued his son-in-law himself.⁹⁴ In another case, a motorist with several passengers stopped at the scene of an accident where two soldiers lay bloodied on the ground.⁹⁵ The motorist refused to give the soldiers a lift to town, stating that his car was already full.⁹⁶ Once in town, the motorist contacted the authorities.⁹⁷ Another motorist picked up the soldiers and brought them to a hospital where they were treated for their injuries.⁹⁸ The Court of Cassation upheld the first motorist’s conviction on the ground that the statute requires would-be rescuers to act reasonably under the circumstances; the conviction was proper because the motorist’s conduct was unreasonable.⁹⁹ The courts have convicted parents who refused medical treatment for their children and healers who advised against medical treatment,¹⁰⁰ but have refused to convict parents who were ignorant of their child’s emergency.¹⁰¹

In Germany there is no clear standard regarding the degree of assistance required of the would-be rescuer,¹⁰² although the text of

90. 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120.

91. Tomlinson, *supra* note 43, at 482.

92. *Id.* at 483.

93. *Id.*

94. *Id.* at 482.

95. *Id.* at 483.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 483-84.

100. *Id.* at 484.

101. *Id.*

102. See Cadoppi, *supra* note 12, at 101-02, 111.

the German provision speaks only of rendering aid.¹⁰³ Presumably that aid could encompass notification of the authorities in place of personal rescue.

We can divine the scope of the Russian provision, notwithstanding the dearth of cases interpreting the Russian duty-to-rescue provision, because the text of the statute clearly requires the rendering of necessary aid,¹⁰⁴ but the would-be rescuer is given an absolute choice between personal rescue and notification of the authorities.¹⁰⁵

The Spanish provision speaks of “lending assistance.”¹⁰⁶ The option of notifying the authorities is permitted only when one is prevented from lending personal assistance.¹⁰⁷ Thus, the Spanish provision provides a set of mutually exclusive duties that are dependent upon the circumstances.

The Italian provision provides an absolute choice to the would-be rescuer: give immediate assistance or contact the authorities.¹⁰⁸ The Mexican federal provision requires the same.¹⁰⁹ Thus, the gamut runs from the “choice” jurisdictions, such as Italy and Mexico, to the French provision, for which notification is not always sufficient to discharge the duty to assist, and perhaps to the German provision, depending on its interpretation.

ii. *Common Law Jurisdictions*

Minnesota requires reasonable assistance, which “may” include notification of the authorities.¹¹⁰ Rhode Island demands only reasonable assistance.¹¹¹ Like the Spanish provision,¹¹² the Rhode Island statute refers to reasonable assistance in relation to the victim;¹¹³ consequently, notification to the authorities may not discharge the duty if that aid is not deemed to be assistance *to the*

103. See 32 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN PENAL CODE 192.

104. Feldbrugge, *supra* note 40, at 656-57.

105. *Id.*

106. C.P., *supra* note 60.

107. *Id.*

108. Cadoppi, *supra* note 12, at 128.

109. C.P.F., *supra* note 60.

110. MINN. STAT. ANN. § 604A.01(1) (West 2000).

111. R.I. GEN. LAWS § 11-56-1 (2002).

112. C.P., *supra* note 60.

113. R.I. GEN. LAWS § 11-56-1 (2002).

victim. The Wisconsin provision gives the would-be rescuer a choice between personal assistance and notification to the authorities.¹¹⁴ The Vermont statute requires reasonable assistance unless the assistance is being provided by others;¹¹⁵ perhaps notification to the authorities would discharge the Vermont duty, for once emergency personnel responded to the Good Samaritan's call, they would presumably qualify as persons providing "assistance or care" within the meaning of the statute.¹¹⁶ Hawaii's statute requires notification to the authorities only; no mention is made of personal rescue.

c. *Degree of Risk*

On this point the statutes vary greatly among the civil law jurisdictions; however, greater uniformity is found among the common law jurisdictions.

i. *Civil Law Jurisdictions*

On this point the statutes vary greatly. In France the duty to rescue arises only when the rescuer bears no risk by his intervention.¹¹⁷ This textual interpretation differs, however, from the gloss adopted by the French courts.¹¹⁸ Generally, the rule is that the risk perceived by the would-be rescuer must be one that a reasonable person in the same circumstances would have perceived.¹¹⁹ Hence, "the squeamish, panicky, or ignorant defendant must bear the risks a reasonable person would bear."¹²⁰ For example, a French lower court convicted several peasants of failing to rescue a bloodied and wounded bicyclist whom they had found in their barn, notwithstanding the peasants' claim that they had thought the man to be a burglar.¹²¹ In opposition to that case's result is one from the *Cour d'Appel Riom*, where a man was found not guilty when he failed to put out the fire on a mechanic's

114. WIS. STAT. ANN. § 940.34 (West 2005).

115. VT. STAT. ANN. tit. 12, § 519 (2002).

116. *See id.*

117. 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120.

118. Tomlinson, *supra* note 43, at 485.

119. *Id.* at 485.

120. *Id.* at 487.

121. *Id.* at 486-87.

clothes, instead putting out the fire in his car.¹²² The man's justification was that he believed that the car might have exploded had he not put out the fire when he did.¹²³

In Germany there is a triple qualification on the duty to rescue: (1) The contemplated action must be one that can be expected of the would-be rescuer; (2) The action must be capable of being rendered without substantial danger to the rescuer; And (3) the action must not violate other important duties.¹²⁴ The first qualification is a nod to the German criminal law doctrine of *Unzumutbarkeit*, namely that the law will not require an individual to act beyond what he is capable of doing.¹²⁵ This principle is also incorporated in the Austrian and Portuguese analogues of the German statute.¹²⁶ Interestingly, the third qualification is also found in Vermont's statute. Given these three qualifications, one may safely conclude that the German duty to rescue rarely arises.

The Italian provision provides for no exception to affirmative conduct,¹²⁷ although an exception is unnecessary if a Samaritan can fulfill the duty to rescue by notifying the authorities.¹²⁸ In Spain, a Samaritan can avoid the duty to rescue only if the rescue would create a personal risk or a risk to a third party, but the statute does not state the quantum of risk to be incurred that would excuse the duty.¹²⁹ Presumably some reasonable person standard, like that adopted in France,¹³⁰ would be applied to make that determination. The Mexican provision excuses the would-be rescuer if he would incur a personal risk.¹³¹ It is unclear whether the personal risk exception applies only to personal rescue or to notification of the authorities as well, but assuming that notification of the authorities rarely involves personal risk, the

122. Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 641 n.72 (1952).

123. *Id.*

124. 32 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN PENAL CODE 192.

125. Cadoppi, *supra* note 12, at 128.

126. *Id.* at 107-08.

127. *See id.* at 128.

128. *See id.*

129. *See C.P.*, *supra* note 60.

130. *See* 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120.

131. C.P.F., *supra* note 60.

question may be academic. The Russian provision does not require personal rescue that would entail a serious danger to the rescuer or to another.¹³²

ii. *Common Law Jurisdictions*

Greater uniformity is found among the common law jurisdictions. In Minnesota, the would-be rescuer is excused if the rescue would create danger or peril to himself or to others.¹³³ Presumably the danger would have to be real, or at least appear so to the would-be rescuer. The Rhode Island statute excuses the would-be rescuer on the same grounds.¹³⁴ The Wisconsin statute is absolute on its face (i.e., no allowance is made for danger to the rescuer), although the rescuer may discharge his duty by notifying the authorities.¹³⁵ The Vermont statute does not require rescue when the would-be rescuer would endanger or imperil himself or where a duty to rescue would interfere with other important duties.¹³⁶ Hawaii requires intervention unless it would create danger or peril to any person, but that intervention is textually limited to notification of the authorities.¹³⁷

d. *Knowledge of Peril*

Is the duty to rescue limited in application to those persons physically present at the scene, or does it extend to those not present but who have knowledge of the critical situation?

i. *Civil Law Jurisdictions*

The French provision does not address the foregoing question directly.¹³⁸ Case law indicates, however, that the duty extends to those not physically present at the scene.¹³⁹ Professor Tomlinson argues that in practice it is enough that the defendant should

132. Feldbrugge, *supra* note 40, at 656-57.

133. MINN. STAT. ANN. § 604A.01(1) (West 2000).

134. R.I. GEN. LAWS § 11-56-1 (2002).

135. WIS. STAT. ANN. § 940.34 (West 2005).

136. VT. STAT. ANN. tit. 12, § 519 (2002).

137. HAW. REV. STAT. ANN. § 663-1.6 (LexisNexis 2002).

138. See 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120.

139. Tomlinson, *supra* note 43, at 487.

have known of the peril.¹⁴⁰ The Court of Cassation has explained of the requirement that a doctor "informed of a peril of which he alone is able to judge the seriousness cannot refuse his assistance without doing what he can to assure himself that the peril does not require his personal attention."¹⁴¹ Another case reported by Tomlinson involved a doctor who was asked at his residence to come quickly to attend to a bleeding victim of a bar-room brawl.¹⁴² The doctor refused to leave his house but offered to help the injured person if he were brought to the residence.¹⁴³ The victim died from his wounds and the doctor was convicted of having failed to rescue.¹⁴⁴ Another case involved a mayor who while walking came across a cyclist lying in a ditch.¹⁴⁵ Thinking the man drunk or dazed, the mayor made the cyclist comfortable and left.¹⁴⁶ He returned to check on the man a few hours later, but other people had taken the cyclist to the hospital, where he died.¹⁴⁷ The mayor was acquitted, with the Court of Cassation affirming on the grounds that the mayor was not aware of the cyclist's peril and, consequently, was not obliged to render assistance.¹⁴⁸

The German provision contains no explicit requirement that the would-be rescuer be present.¹⁴⁹ One commentator interprets the German provision as not requiring geographical proximity,¹⁵⁰ but another takes the opposite view.¹⁵¹ Certainly the farther one is from an accident, the less one can be expected to do in the way of rescue. The Italian and Spanish provisions require that the

140. *Id.*

141. *Id.*

142. *Id.* at 488-89.

143. *Id.*

144. *Id.* As a result of the case the French Parliament attempted to amend the duty to rescue so as to apply only to persons present at the scene. *Id.* at 489. The Latin Quarter Riots of 1968 intervened and caused the disbanding of Parliament before the bill could be passed. *Id.*

145. *Id.* at 490-91.

146. *Id.*

147. *Id.*

148. *Id.* For more cases involving doctors, see Andrew Ashworth & Eva Steiner, *Criminal Omissions and Public Duties: The French Experience*, 10 LEGAL STUD. 153, 159-60 (1990).

149. 32 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN PENAL CODE 192.

150. Cadoppi, *supra* note 12, at 106.

151. Rudzinski, *supra* note 79, at 102.

would-be rescuer have come upon the victim.¹⁵² The same requirement is found in the Mexican analogue.¹⁵³ The Russian provision has no explicit nearness requirement.¹⁵⁴

ii. *Common Law Jurisdictions*

Minnesota explicitly requires that the would-be rescuer be present at the scene of the emergency.¹⁵⁵ Rhode Island and Hawaii do the same.¹⁵⁶ In Wisconsin and Vermont, knowledge is sufficient for the duty to arise.¹⁵⁷

e. *Conclusion*

Although almost every civil law European jurisdiction has a bad Samaritan law, these duty-to-rescue statutes vary widely in the scope of the duty that they impose. Generally, all require the victim to have suffered or be about to suffer some grave harm. No jurisdiction in practice requires intervention to save property, although the German provision is textually broad enough to be so applied. The danger to the victim need not be life threatening, however. The extent of the assistance required also varies according to jurisdiction. Some countries provide the would-be rescuer with a safe-harbor, permitting the notification of authorities to fulfill the duty to rescue in every instance.¹⁵⁸ At the other end of the spectrum is France, whose courts may hold would-be rescuers to have violated their duty notwithstanding their notification of the authorities. Every jurisdiction in practice excuses would-be rescuers from their duty if the contemplated rescue is sufficiently dangerous; most provisions refer to a "grave"

152. Cadoppi, *supra* note 12, at 128.

153. See C.P.F., *supra* note 60.

154. Feldbrugge, *supra* note 40, at 656-57.

155. MINN. STAT. ANN. § 604A.01(1) (West 2000).

156. See R.I. GEN. LAWS § 11-56-1 (2002); HAW. REV. STAT. ANN. § 663-1.6 (LexisNexis 2002).

157. WIS. STAT. ANN. § 940.34 (West 2005); VT. STAT. ANN. tit. 12, § 519 (2002).

158. See, e.g., Cadoppi, *supra* note 12, at 128 (Italian Good Samaritan provision); C.P., *supra* note 60 (Spanish Good Samaritan provision); Feldbrugge, *supra* note 40, at 656-57 (Russian Good Samaritan provision); 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120 (French Good Samaritan provision).

or "serious" danger.¹⁵⁹ While the French provision merely refers to "risk,"¹⁶⁰ in practice French defendants have been acquitted only when the risk allegedly perceived would also have been perceived by a reasonable person in the defendant's circumstances. Lastly, civil law jurisdictions are mixed on the question of knowledge of peril: some require the would-be rescuer to be present at the scene for the duty to arise, while others require only knowledge of the situation.

The American states' provisions are textually similar to their civil law analogues but differ most importantly in two crucial respects: the American statutes impose very slight penalties never greater than a petty misdemeanor;¹⁶¹ and none of the American statutes has been vigorously enforced.¹⁶²

B. *Private Causes of Action for Failure to Assist*

Although no civil or common law jurisdiction statutorily provides for a private right of action for the failure to provide assistance, bad Samaritans' victims can nevertheless maintain private causes of action in these jurisdictions under the appropriate circumstances.

1. *Civil Law Jurisdictions*

No civil law jurisdiction has a provision explicitly conferring a right to sue upon a victim who required assistance under the criminal statute but was not given assistance; however, this fact has not prevented the courts in these jurisdictions from providing bad Samaritans' victims with a cause of action. Indeed, in France the right of the victim to sue the bad Samaritan is well established. The suit is based upon one of two theories: (1) the breach of the criminal law duty to rescue is also a breach of duty for a simple tort action; or (2) the bad Samaritan's failure to act, even without the criminal duty, is actionable in tort because it

159. See *supra* note 10; Cadoppi, *supra* note 12, at 128-29; C.P., *supra* note 60; Feldbrugge, *supra* note 40, at 656-57.

160. 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 120.

161. See *supra* note 10.

162. Indeed, one American commentator has referred to these American statutes as "feel good" laws. Stewart, *supra* note 54, at 422.

was in itself unreasonable.¹⁶³ For example, in the case already mentioned of the bad Samaritan father-in-law who failed to help his drowning son-in-law,¹⁶⁴ the latter appeared as a *partie civile* in the criminal trial and recovered 25,000 francs.¹⁶⁵ On the other hand, if the criminal duty is not breached, and the conduct of the rescuer was reasonable under the circumstances, the French courts will generally not allow recovery even though the "victim" of the Good Samaritan has sustained injuries by the rescue.¹⁶⁶ In one case, a man suffered a heart attack while attending a circus; no doctor was available, but a nurse also in attendance came to the man's aid.¹⁶⁷ Her asepsis was faulty and the man developed an abscess.¹⁶⁸ The *Cour d'Appel Paris* sustained the man's action against the circus for not having a doctor, but dismissed the action against the nurse, holding that under the circumstances her actions were reasonable and therefore not actionable.¹⁶⁹ The German courts have not followed the French example.¹⁷⁰ Understandably, the principles that the French courts have enunciated would be generally applicable to other civil law jurisdictions: the victim's right to recovery must hinge upon either the principle that a duty to act in criminal law also creates a duty to act in private law, or, alternatively, that the failure to rescue is unreasonable and therefore actionable. The latter theory presents a causation problem by requiring that an omission serve as the cause of a harm, but the French have arguably circumvented this difficulty by concluding that the principle of human liberty requires that people be responsible for both their commissions and omissions.¹⁷¹

2. Common Law Jurisdictions

No common law jurisdiction, even among those that have had

163. See André Tunc, *The Volunteer and the Good Samaritan*, in GOOD SAMARITAN, *supra* note 51, at 49, 50.

164. See Dawson, *supra* note 7, at 72.

165. *Id.*

166. Tunc, *supra* note 163.

167. *Id.* at 51.

168. *Id.*

169. *Id.*

170. See generally Dawson, *supra* note 7.

171. Tunc, *supra* note 163, at 49.

Samaritan statutes, recognizes a private right of action sounding in tort for breach of a general duty to rescue.¹⁷² If, however, the victims of a failure to rescue can prove a special relationship between themselves and the bad Samaritan an action will lie against the latter according to the usual principles of duty, breach, causation and damages, where the breach is in the failure to act.¹⁷³

C. *Private Causes of Action by Good Samaritans for Damages Incurred During Rescue*

1. *Civil Law Jurisdictions*

As is the case with causes of action against bad Samaritans, civil law jurisdictions generally make no express provisions for action by Good Samaritans against their "victims." Nevertheless, some jurisdictions have interpreted other civil code provisions or general civil law principles to permit recovery in these instances.¹⁷⁴ In France, recovery by Good Samaritans against their victims is sustained on three theoretical grounds: (1) *negotiorum gestio*;¹⁷⁵ (2) implied contract;¹⁷⁶ and (3) simple tort.¹⁷⁷

*Negotiorum gestio*¹⁷⁸ is a civil law principle, derived from the Roman law doctrine of mandate, that allows recovery to a person who has incurred expenses in managing the affairs of another who

172. See *supra* note 10.

173. For an analysis of the common law rationale undergirding "special relationship" torts, see *infra* Part III.E.

174. See, e.g., Tunc, *supra* note 163, at 48-49.

175. See, e.g., DIGEST, *supra* note 4, at 99.

If any man has managed the affairs of an absentee, even though it is without his knowledge, he still has an action for whatever he has spent beneficially on his business and also for any obligation he has taken upon himself in furtherance of the business of the absentee. As a result, this situation gives rise to an action on both sides, which is called an action for unauthorized administration [*negotiorum gestorum*].

Id. See also CODEX JUSTINIANUS II.18(19); INSTITUTES, *supra* note 4, at 153-55. For a discussion of the doctrine's Roman origins, see RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 411-12 (James Crawford Ledlie trans., 3d ed. 1970). See also LEON SHELEFF, THE BYSTANDER: BEHAVIOR, LAW, ETHICS 130-32 (1978).

176. See Tunc, *supra* note 163, at 51-52.

177. See *id.* at 53.

178. See *supra* note 175.

is incompetent or otherwise unable to handle his business.¹⁷⁹ The theory is somewhat analogous to the common law principle of unjust enrichment. In the context of duty to rescue, both French and German courts have interpreted the doctrine to permit recovery by Good Samaritans against their victims. One famous German case decided before the *Reichsgericht* in 1941 involved a husband and wife who were being driven along a road.¹⁸⁰ The driver lost control of the automobile and the vehicle fell into a river.¹⁸¹ All three occupants escaped from the car, but only the husband and driver made it to the bank.¹⁸² The wife remained in the river and began to drown while calling out for help.¹⁸³ A nearby stranger dove into the river and kept the wife afloat until the driver rescued her, but the stranger drowned.¹⁸⁴ An action was brought against the husband and wife by the deceased's family for loss of support.¹⁸⁵ In the end the wife and husband were required to maintain the widow and minor children.¹⁸⁶ The *Reichsgericht* reasoned that, in calling out, the wife had impliedly made an offer for assistance which the fallen rescuer accepted.¹⁸⁷ Thus the deceased's estate could maintain an action for the cost of managing the wife's "affairs."¹⁸⁸

The French Court of Cassation arrived at a similar result in a 1955 case.¹⁸⁹ A car with several occupants caught on fire.¹⁹⁰ One of the occupants was able to escape, but returned to the burning vehicle to rescue the driver, who was insured.¹⁹¹ In the process the rescuer was badly burned and later died.¹⁹² The deceased's estate won a judgment against the driver's insurance company on the theory that the rescuer was the manager of the insurer's

179. See John P. Dawson, *Negotiorum Gestio: "The Altruistic Intermeddler,"* 74 HARV. L. REV. 817, 819-26 (1961).

180. Dawson, *supra* note 7, at 73.

181. *Id.*

182. *Id.*

183. *Id.* at 73-74.

184. *Id.* at 74.

185. *Id.*

186. *Id.* at 76.

187. *Id.* at 74.

188. *Id.* at 76.

189. See *id.* at 81.

190. *Id.*

191. *Id.*

192. *Id.*

affairs, which the Court of Cassation affirmed.¹⁹³

In the area of implied contract, French courts have afforded Good Samaritans a remedy for injuries or expenses incurred in coming to the aid of the rescue victim.¹⁹⁴ The theory presumes that the victim impliedly (or perhaps explicitly) called for help; that the request was an offer; and that the rescuer accepted the offer.¹⁹⁵

Lastly, recoveries have been upheld on the general civil law theory of tort. Typically in these cases the rescue victims have gotten themselves into the predicament through their own fault, and it is that fault which is deemed the cause of any injury that the rescuer subsequently suffers. One example comes from a 1955 *Cour d'Appel Paris* case in which a truck driver negligently stuck with his truck on a railroad track.¹⁹⁶ After a train collided with the truck two strangers came to the driver's assistance.¹⁹⁷ While they were trying to help, a train from the opposite direction collided with the truck, killing the would-be rescuers.¹⁹⁸ The driver survived, and the widows of the would-be rescuers sued the truck driver's employer.¹⁹⁹ The suit was upheld on the theory that the driver's negligent action caused the would-be rescuers' deaths.²⁰⁰

2. Common Law Jurisdictions

Generally, in common law jurisdictions a Good Samaritan, once having acted, is required to carry out the rescue effort reasonably or without gross negligence where a Good Samaritan statute applies; otherwise, the rescuer risks liability to the "victim."²⁰¹ Actions by Good Samaritans against their "victims"

193. *Id.* at 81.

194. *See* Tunc, *supra* note 163, at 51-52.

195. *Id.* at 52.

196. *Id.* at 52-53.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 53. At common law the action would probably be barred by either assumption of risk or *novus actus interveniens*. *Id.*

201. *See* Robinson, *supra* note 39, at 638-39; David C. Biggs, "The Good Samaritan is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, with The Modern Desire to Possess Concealed Weapons, 22 U. DAYTON L. REV. 226, 228 (1997).

may fail because of the doctrine of assumption of the risk: because they act voluntarily, Good Samaritans also voluntarily assume the risk of any harm to themselves or to others.²⁰² This reasoning applies irrespective of the rescue victim's fault in coming to the predicament.²⁰³

D. *Good Samaritan Immunity*

Although statutory immunity for Good Samaritans differs between civil law and common law jurisdictions, with no statutory immunity in the former and uniform immunity in the latter, Good Samaritans are generally protected in both.

1. *Civil Law Jurisdictions*

There is no particular code provision for Good Samaritan immunity in civil law jurisdictions. Nonetheless, courts generally protect Good Samaritans by applying a "totality of the circumstances" test.²⁰⁴ In France, for example, what might often be negligence in other circumstances is excused given the urgency of the situation requiring rescue.²⁰⁵ Similar results may well be expected in other civil law countries.

2. *Common Law Jurisdictions*

Every jurisdiction in the United States has a Good Samaritan statute.²⁰⁶

III. ANALYSIS

Can, and should, the European and civil law response to the "problem" of the Good Samaritan be adopted in American common law jurisdictions? And if so, wholesale or only in part? The issues raised by these questions are the subject of this section.

202. One example of this position is the fireman's rule. See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 352-53 (7th ed. 2000).

203. See *supra* notes 201-02.

204. See, e.g., Tunc, *supra* note 163, at 50-51.

205. See *id.*

206. Stewart, *supra* note 54, at 388 n.9. For a review of many of these statutes, see generally Note, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301 (1964).

A. *Considerations from Psychology*

A foundation of tort law is the reasonable person standard. This standard works well because society and its constituents justifiably expect that human beings have an intuitive rationality and act in ways consistent with that rationality. Therefore, we have no qualms about requiring all people to act reasonably in whatever they do, and we expect them to remedy the harm they have caused if they should fail to act reasonably. If duties to rescue are like any other legal duty, the same analysis should apply. But the bystander contemplating whether to be a Good Samaritan is no more likely to conduct a *Carroll Towing*²⁰⁷ analysis than any other actor. In fact, the bystander is probably in the worst position possible to make any rational analysis. The emotions of the bystander who wishes to intercede but remains undecided do not foster clear and reasonable thinking. Immediately upon witnessing an accident or violent crime, the would-be Good Samaritan experiences:

first, the intense emotional shock — characterized predominantly, but not exclusively, by anxiety; second, the cognitive perception and awareness of what has happened; third, an inertial paralysis of reaction, which as a non-act becomes in fact an act, and fourth, the self-awareness of one's own shock anxiety, non-involvement which is followed by a sense of guilt and intra-psychic and social self-justification.²⁰⁸

How can anyone be called upon to act reasonably if this is the mental state to be expected from the average person suddenly given the chance to play the role of the Good Samaritan? The extreme anxiety that often besets bystanders would argue for a *less stringent* duty than that imposed by the reasonable person standard. The form of that relaxed duty ought to be influenced by sociology and psychology, which disciplines have made considerable strides in analyzing human behavior in the context of altruism.²⁰⁹ Although care is needed when applying sociological

207. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

208. Lawrence Zelic Freedman, *No Response to the Cry for Help*, in GOOD SAMARITAN, *supra* note 7, at 175.

209. For research on altruism and human behavior, see generally GENETIC

research to the study of legal issues,²¹⁰ research data from non-legal disciplines in support of the following propositions may prove helpful in determining the proper scope of any duty to rescue.

1. *Persons Are More Willing to Lend Assistance When They Believe That Victims Are Not Responsible for Their Own Predicament*²¹¹

Even without social research, this conclusion should not surprise any student of humanity. If one of the maxims of justice is to render to each person that person's due (*jus*),²¹² then in a crude, but not uncommon, calculus, the bystander who watches the drunk fall into a ditch, the workman who observes the disobedient child get into trouble,²¹³ or the man who sees his son-in-law tumble into a river²¹⁴ will conclude that the victim is not due anything but what he actually received. Consistent with this observation, duty-to-rescue statutes, to reflect existing social conditions, should not require substantial affirmative bystander conduct when the victim appears to be the cause of his own peril. Interestingly, none of the civil law jurisdictions' statutes analyzed above makes allowance for the origin of the victim's distress in constructing the duty. This failure of indulgence, so to speak, relates to these statutes' justification: If we wish to make people better, or at least force them to act in ways consistent with those of good people, we undercut our goal by making allowances for the morally deficient.

AND CULTURAL EVOLUTION OF COOPERATION (Peter Hammerstein ed., 2003); ALEXANDER J. FIELD, ALTRUISTICALLY INCLINED? (2001); NANCY EISENBERG, ALTRUISTIC EMOTION, COGNITION, AND BEHAVIOR (1986); MICHAEL SMITHSON, PAUL R. AMATO & PHILIP PEARCE, DIMENSIONS OF HELPING BEHAVIOR (1983); Jane Piliavin, et al., *Responsive Bystanders: The Process of Intervention*, in COOPERATION AND HELPING BEHAVIOR (Valerian J. Derlega & Janusz Grzelak eds., 1982); THE DEVELOPMENT OF PROSOCIAL BEHAVIOR (Nancy Eisenberg ed., 1982); DANIEL BATSON, THE ALTRUISM QUESTION (1981); JANE ALLYN PILIAVIN, ET AL., EMERGENCY INTERVENTION (1981).

210. To illustrate the point: it has been shown that women are more likely to offer assistance than men. See Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551, 552 n.3 (1980). Does it then follow that women should be held to a higher standard than men in failure-to-rescue prosecutions?

211. *Id.* at 554.

212. See *supra* note 4.

213. See generally *Buch v. Amory Mfg.*, 44 A. 809 (N.H. 1898), discussed *supra* at text accompanying notes 37-38.

214. See *supra* text accompanying note 93-94.

2. *Persons Are Much Less Likely to Lend Assistance When They Are Among a Group of People Present at the Scene*

This phenomenon has been explained as the “bystander effect”: Responsibility for affirmative conduct is perceived as diffused among all present; fear of being reproved by others or of impeding a better rescuer discourages rescue activity from individuals within a bystander group.²¹⁵ In light of the implications derived from bystander-effect research for predicting human conduct in emergency situations, statutes run the risk of ineffectiveness if they require substantial affirmative conduct from any particular bystander when a crowd is present at the scene of an emergency or crime. To avoid the undesirable results of the bystander effect, duty-to-rescue laws should require notification of authorities or other actions that can be done without the actors needing to dissociate themselves from the group. These limited duties would produce optimal results in that their fulfillment would likely materially assist the victim, but the duties would not require an “anticipatory” Good Samaritan to

215. See SHELEFF, *supra* note 175, at 14-23. Sheleff describes a multi-step cognitive process. First, the bystander must notice the event and then realize that a crisis exists which demands his response. *Id.* at 14. At this point the bystander effect thwarts most potential Good Samaritans: people generally ignore the hallmarks of an emergency, tending not to acknowledge the existence of a dangerous situation. *Id.* at 14-15. Second, the bystander who recognizes the dangerous situation must then decide whether he can attribute personal responsibility to the crisis. *Id.* at 15. At this point the “avoidance-avoidance” phenomenon emerges: the bystander is fearful not to intervene but is also fearful to intervene if his intervention proves unnecessary or unhelpful and he thereby humiliates himself before the group. *Id.* at 16. Third and last, the bystander, eager to intervene, must hit upon a means of intervention and then decide whether he can carry it out. *Id.* at 17. Even assuming that the would-be Good Samaritan bystander can successfully navigate through these mental obstacles, other psychological phenomena also militate against bystander intervention. The “difficult versus easy escape” conundrum exists where the potential rescuer must decide if he can render help and then “disengage” from the scene without extensive commitment; if he cannot, he will be less likely to intervene in the first place. *Id.* at 20. The “boomerang effect” describes the phenomenon of a potential bystander who, although originally altruistically directed, decides not to intervene for fear that the rescue victim will take advantage of him. *Id.* at 22-23. Sheleff notes that most examples of bystander intervention are simply types of vigilantism. *Id.* at 18. But for an endearing example of bystander altruism, see the actions of Mrs. Brown (in contrast to those of Mr. Brown) in MICHAEL BOND, *A BEAR CALLED PADDINGTON* 10-11 (1958).

overcome the psychological obstacles attendant to the bystander effect. The civil law duty-to-rescue examples discussed above do not account for the bystander effect.

3. *People Are More Likely to Lend Assistance When the Person in Need Is Perceived as Being "Dependent" on Another*²¹⁶

Obviously, parents will help their children, and a husband or wife will assist the other spouse. Existing law that enforces affirmative duties in special relationships is well-suited to prevailing social conditions,²¹⁷ but insofar as both the civil law and common law have made allowances for such duties either in tort doctrine or in criminal statutes, duty-to-rescue provisions need not be specially tailored to address these circumstances.

4. *Conclusion*

Depending on one's theory of altruistic behavior, each of the psychological impediments to encouraging affirmative rescue conduct noted above can be overcome through the law's power of definition and coercion. For example, the normative approach to altruistic behavior would advocate a legal duty to rescue because it would create a rule clarifying the ambiguities normally attendant to emergency situations, and this rule would thereby foster rescue efforts.²¹⁸ The social exchange theory would also argue for a legal duty to rescue because a breach of that duty would impose upon the bad Samaritan a cost in the form of a fine, imprisonment or tort recovery. Because non-action would be made costlier than action, affirmative rescue conduct would be fostered.²¹⁹ In contrast to the normative and social exchange theories, a socio-biologico-cultural theory would argue against a legal duty to rescue because any such duty would have little effect on behavior,²²⁰ but the theory's opposition may be inconsequential inasmuch as the socio-biologico-cultural approach assumes that human culture naturally fosters altruistic behavior.²²¹ In

216. Note, *supra* note 210 at 552-53.

217. See Biggs, *supra* note 201.

218. Note, *supra* note 210 at 557.

219. *Id.* at 558.

220. *Id.* at 559.

221. *Id.* For a sharply differing view, see GARRET HARDIN, *THE LIMITS OF ALTRUISM* 26-27 (1977). Hardin argues that pure altruism—a benevolent act

summary, although duties to rescue are not completely at odds with human behavior, to be effective they must take into account various human inadequacies and fears.

B. *Historical Obstacles*

To what degree are duty-to-rescue statutes the product of authoritarian or totalitarian governments? To what degree do they represent an advance in the law's development? The answer to these questions is found in part in history. Legally enforceable duties to rescue were first adopted in the aftermath of the Enlightenment as the European intelligentsia became enthralled with rationalism while the influence of Christian social and political thought waned.²²² Nation, not religion, became the glue of society.²²³ In the twentieth century many European countries either adopted their first duty-to-rescue provisions or substantially strengthened existing statutes while under the sway of totalitarian regimes.²²⁴ That development is not surprising in light of the totalitarian state's principles of criminality discussed above.²²⁵ As this history intimates, although an altruistic element is present in a bad Samaritan statute, merely because the idea behind the statute is good does not mean that the statute will produce good results.

In modern-day Western European liberal democracies the state approvingly takes an active role in economic and social affairs, whereas in common law jurisdictions the state has not hitherto been conceded as substantial a role in the direction of those same activities.²²⁶ They may not strictly speaking run

not caused by selfish motives—is possible only in small groups; the interests of the egoist, however, will always trump those of the altruist given a sufficiently large group of people. *Id.*

222. See W. Warren Wagar, *Introduction*, in *THE SECULAR MIND: TRANSFORMATIONS OF FAITH IN MODERN EUROPE* (W. Warren Wagar ed., 1982).

223. See, e.g., HILAIRE BELLOC, *CHARLES I* 23-24 (1933). The particular example cited is that of England at the close of the Tudor dynasty, but the same conclusion can be made of France during Richelieu's time, and certainly of the German princes as well as the Austro-Hungarian empire with the reign of Joseph II. See *id.* at 84.

224. See Part I.B.

225. For this principle in Soviet law, see *supra* note 61. For the same principle in Nazi law, see *supra* note 41.

226. See, e.g., E. DAMSGAARD HANSEN, *EUROPEAN ECONOMIC HISTORY: FROM MERCANTILISM TO MAASTRICHT AND BEYOND* (2001). Hansen describes a

definite shift to the Left by the 1950s in Europe and an accompanying preference for state intervention in the economy. *Id.* at 275-76. By the 1960s-1970s government intervention to regulate wages and prices was commonplace. *Id.* at 447. Concomitantly, Western European governments obtained a larger share of their nations' GDP because of extensive welfare and social security policies. *Id.* at 431. Although Hansen concedes that in the 1970s a shift from Keynesian to supply-side economics occurred in several European economies, *id.* at 446-47, most jurisdictions had by that time well-established duty-to-rescue statutes. *See e.g.*, Part II.A.1.

State economic interventionism was made legitimate in no small way by the thought and writing of John Maynard Keynes, although to a degree Keynesian economics had been anticipated in post-World War I continental Europe. *See* Robert Campbell, *The Keynesian Revolution 1920-1970* 364, 390, in 5 FONTANA, *ECONOMIC HISTORY OF EUROPE* (Carlo M. Cipolla ed., 1977) [hereinafter FONTANA]. But by the second half of the twentieth century, the full effects of Keynesianism in Europe were plain in the statistics. During the 1920s, public-sector spending accounted for less than ten percent of Europe's gross national product, and by the 1970s for one-third. *Id.* at 391.

Keynes's theories were purportedly developed in a world economy marked by less than full employment as well as an inequitable distribution of income. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 372 (1935). Keynes conjectured that "measures for the redistribution of incomes in a way likely to raise the propensity to consume may prove positively favourable to the growth of capital." *Id.* at 373. Keynes did not advocate state ownership of the means of production, so long as the state could determine how many resources should be allocated to any particular means and the appropriate rate of return for the means' owners. *Id.* at 378. He did advocate—and this is critical for tracking the shift in European thinking as to the role of the state in everyday life—central controls to balance the propensity to consume with the inducement to invest. *Id.* at 379.

Whilst, therefore, the enlargement of the functions of government involved in the task of adjusting to one another the propensity to consume and the inducement to invest, would seem to a nineteenth century publicist or a contemporary American financier to be a *terrific encroachment on individualism*, I defend it, on the contrary, both as the only practicable means of avoiding the destruction of existing economic forms in their entirety and as the condition of the successful functioning of individual initiative.

Id. at 380 (emphasis added). The italicized portion makes my point that the logical relationship between a government more active in what previously had been the private economic sphere, and a law imposing obligations on conduct previously considered supererogatory and within the realm of private concern is obvious. Both represent an erosion of individual liberty in favor of a transfer of social responsibility to the government.

This "take" on Keynesianism has been noted by the Europeans themselves. *See* Norbert Walter, *Development of a New Economic Policy Paradigm in West Germany in the 80's?*, in KEYNES AND THE ECONOMIC POLICIES OF THE 1980S 175, 175-76 (Mario Baldassarri ed., 1992).

For nearly two decades German economic policy followed a moderate Keynesian economic line. The general political acceptance of demand management policies was to a large degree due to their success in overcoming the 1966/67 recession, when Keynesian ideas or deficit spending were applied for the first time. . . .

. . . [A]fter two decades of unprecedented growth, economic prosperity increasingly became taken for granted. Almost any call for government subsidies or grants was considered affordable. The welfare state grew substantially with more or less the full approval of all political parties and of the general public. . . .

There was a general shift in attitude, away from a sense of individual responsibility towards a collectivist philosophy. With this change, the government came to be regarded as having all-encompassing responsibility for social—and economic—objectives.

Id. A similar expansion of government and social programs occurred in France. See Richard Arena & Christian Schmidt, *Keynes before and after the General Theory: the theoretical contents of French economists' reactions, 1929-69*, in *THE IMPACT OF KEYNES ON ECONOMICS IN THE 20TH CENTURY* 73, 90-96 (Luigi Pasinetti & Bertram Schefold eds., 1999) [hereinafter *IMPACT OF KEYNES*]. But see Piero Bini & Antonio Magliulo, *Keynesianism in Italy Before and After the General Theory*, in *IMPACT OF KEYNES* 131, 131.

Keynes, or Keynes's dummy, was in evidence everywhere. He could be given any position. Liberals could delude themselves that by his merit liberalism had not faded away. Catholics had named him patron of their perennial instincts for compromise, fusion or confusion of opposing demands, and manipulation of power. Socialists appreciated his anti-bourgeois and statist traits. The elderly believed they were rejuvenated. The young found reason to mock the old.

Id. (quoting SERGIO RICOSSA, *I FUOCHISTI DELLA VAPORIERA. GLI ECONOMISTI DEL CONSENSO* 43 (Nuova ed., 1978)).

Needless to say, there has been a substantial anti-Keynes reaction. See, e.g., Walter Eltis, *Has the Reaction Against Keynesian Policy Gone Too Far?*, in *IMPACT OF KEYNES* 51. Foremost among Keynes's critics was his intellectual rival and friend, the Austrian-born, English-educated and sometimes-American resident F.A. Hayek. For Hayek, Keynes's fundamental error was his assumption that general employment always positively correlates with aggregate demand for consumer goods, when in fact, argued Hayek, demand for goods is not demand for labor. F.A. Hayek, *Contra Keynes and Cambridge*, in *9 COLLECTED WORKS OF F.A. HAYEK* 249 (Bruce Caldwell ed., U. of Chi. Press 1995). Hayek dismissed the *General Theory* as a "tract for the times." F.A. HAYEK, *A TIGER BY THE TAIL* 100 (Sudha R. Shenoy ed., Institute of Economic Affairs 1972). He contended that Keynes erred in positing the existence of "full unemployment" (i.e., the constant presence of unused factors and commodities). See *id.* at 102-03. To have full employment in a Keynesian sense requires that all goods be in a state of excess in which the price system is redundant. *Id.* at 103. But what is the price system if not a quantification of aggregate individual preferences—the actions and wants of rational persons acting freely? See *id.* Thus, the spirit

command or socialist economies, but Western European democracies, which almost without exception impose legal duties to rescue, have adopted the welfare state without reservation.²²⁷ As a result, charity is no longer seen as the exclusive job of the churches or private activity; rather, citizens look to the state to provide for their needs. The opposite is true, if not in fact then in spirit, in common law jurisdictions, especially in the United States. The less active government is the better,²²⁸ and the

of Keynesianism is akin to the spirit enlivening the movement for imposing duties to rescue. In a somewhat halfhearted concession, Hayek noted that Keynes was “so many-sided that for his estimate as a man it seemed almost irrelevant that one thought his economics to be both false and dangerous.” *See id.* at 104.

For a view that all this is simply bickering at the margins, see HILAIRE BELLOC, *THE SERVILE STATE* 121-25, 199-200 (1913), in which Belloc argues that because capitalism is an inherently unstable system, all capitalist countries must eventually become communist, servile or distributivist states. *Id.* Belloc thought that England and Europe were headed toward servility. *Id.* I take Belloc to mean that one cannot infer anything enduring about a culture from its capitalist structure.

227. For an overview of welfarism in Western Europe, see Ian Gough, *Welfare Regimes in East Asia and Europe Compared*, in *NEW SOCIAL POLICY AGENDAS FOR EUROPE AND ASIA: CHALLENGES, EXPERIENCE, AND LESSONS* 27, 29-30 (Katherine Marshall & Olivier Butzbach eds., 2003). Gough identifies four variants of the welfare state: (1) the liberal, marked by little labor regulation and few government benefits; (2) the social democratic, which typically requires high government expenditure; (3) the continental, as developed in Germany, Austria and France; and (4) the southern continental, unique in its emphasis on income transfer and extensive labor market regulation. *Id.*

For a *tour d'horizon* of twentieth-century European planned economics, see Benjamin Ward, *National Economic Planning and Policies in Twentieth Century Europe 1920-1970*, in 5 FONTANA, *supra* note 226, at 698-99, 722-23 (discussing planned economies in Czarist and Soviet Russia, the Netherlands, Scandinavia and Yugoslavia, French nationalizations and welfare-state econometrics). For history specific to the Lowlands, see Johan De Vries, *Benelux 1920-1970*, in 6 FONTANA, *supra* note 113, at 1, 30-42; for France, see Claude Fohlen, *France 1920-1970*, in 6 FONTANA, *supra* note 226, at 92-100 (discussing French nationalizations, social security and the *planiste* economic program); for Italy, see Sergio Ricossa, *Italy 1920-1970*, in 6 FONTANA, *supra* note 226, at 266; for the Scandinavian countries, see Lennart Jorberg & Olle Krantz, *Scandinavia 1914-1970*, in 6 FONTANA, *supra* note 226, at 377, 440-43; for Spain and its period of liberalization followed by economic “stabilisation,” see Josep Fontana & Jordi Nadal, *Spain 1914-1970*, in 6 FONTANA, *supra* note 226, at 460, 525.

228. *Cf.* JOSEPH LOCONTE, *GOD, GOVERNMENT AND THE GOOD SAMARITAN: THE PROMISE AND THE PERIL OF THE PRESIDENT'S FAITH-BASED AGENDA* 63 (2001) (“Americans increasingly believe that the surest road to moral and

encouragement of *private* charitable efforts is considered a proper role for government.²²⁹ When viewed through the lens of charity, the possible incommensurability of European-type duties to rescue with common law jurisprudence emerges. Isn't an enforceable duty to rescue a form of forced charity? Admittedly, the charitable aspects of an easy rescue are well hidden, for the benefit the victim receives is potentially tremendous (i.e., one's life), and the cost incurred to the Samaritan is usually minimal (e.g., tendering a pole to one's drowning son-in-law). But at some point of abstraction we cannot fail to notice the somewhat uncanny resemblance between duties to rescue and the Marxist principle: "from each according to his ability, to each according to his needs[.]"²³⁰ It is obviously not a sufficient reason to refuse to adopt a duty to rescue simply because other non-democratic states

social uplift is by way of Jerusalem, not the U.S. Department of Health and Human Services."); State of the Union Address of President George W. Bush, February 2, 2005, http://www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2005 (last visited Nov. 14, 2005) ("Our second great responsibility to our children and grandchildren is to honor and to pass along the values that sustain a free society. . . . Government is not the source of these values, but government should never undermine them.").

229.

America, at its best, is compassionate Where there is suffering, there is duty. Americans in need are not strangers, they are citizens, not problems, but priorities, and all of us are diminished when any are hopeless. Government has great responsibilities for public safety and public health, for civil rights and common schools. Yet compassion is the work of a nation, not just a government. Some needs and hurts are so deep they will only respond to a mentor's touch or a pastor's prayer. Church and charity, synagogue and mosque lend our communities their humanity, and they will have an honored place in our plans and in our laws. Many in our country do not know the pain of poverty, but we can listen to those who do. I can pledge our nation to a goal, "When we see that wounded traveler on the road to Jericho, we will not pass to the other side."

First Inaugural Address of President George W. Bush, Jan. 20, 2001, <http://www.yale.edu/lawweb/avalon/presiden/inaug/gbush1.htm> (last visited Nov. 14, 2005). See also LOCONTE, *supra* note 228, at 55. It is not without some significance that, in emphasizing the primary place of personal charity, the President referenced the Good Samaritan. See *id.* at 55 (quoting President George W. Bush at his inaugural: "I ask you to be citizens: citizens, not spectators . . . responsible citizens, building communities of service and a nation of character.").

230. KARL MARX, *CRITIQUE OF THE GOTHA PROGRAMME* 10 (C.P. Dutt ed., Int'l Publishers 1938) (1875).

have enacted similar provisions. All the unwanted trappings of the other society do not necessarily come along with one of its statutes. Totalitarian regimes have statutes against murder and theft, yet we do not hesitate to keep our own correlative laws. Yet the fact should give us pause that not until relatively recently in jurisprudential history has a legal system imposed a general duty to rescue, even though presumably the "need" for these duties has remained constant throughout time.²³¹ And we should pause again when we notice that the adoption of these statutes was contemporaneous to the wave of fascist, communist, socialist and totalitarian theories of government sweeping throughout Europe.

C. *Ideological and Cultural Obstacles*

Commentators have argued that an enforceable duty to rescue conflicts with the individualistic or utilitarian thread running throughout the common law.²³² These objections are generally answered either by reference to the harm principle or on some other equally utilitarian ground.²³³ For example, a pro-duty-to-rescue utilitarian would argue that it is reasonable to agree to the coercive power of criminal law sanctions because the cost incurred (e.g., a restriction on the license to do anything) is small compared to the gain to be had (e.g., freedom from others' violent or otherwise injurious acts and, in the case of bad Samaritan laws, rescue).²³⁴ Of course not every utilitarian is an advocate for duties

231. One might even argue that the need for duties to rescue was greater in pre-modern times, before the advent of police forces and emergency medical services.

232. See, e.g., Charles O. Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, in GOOD SAMARITAN, *supra* note 51, at 23-27; Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 L.Q. REV. 424, 427-30 (1989); A.D. Woolley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1278, 1293-94 (1983); John Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382, 400-07 (1976). *But see* MARY ANN GLENDON, RIGHTS TALK 82 (1991) ("In fact, there is nothing especially individualistic or Anglo-Saxon about the *origins* of the rule [of no duty to rescue, because affirmative legal duties to come to the aid of another were unknown, not only in early English law, but to most other primitive legal systems.]").

233. Robert Justin Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 U.C.L.A. L. REV. 252, 279-82, 287-91 (1983).

234. *Id.* at 279-82.

to rescue. Character utilitarians are strongly opposed to such duties; they argue that “forcing people to do good, even if there are some very clear cases where such a policy is justified, inhibits character development, restricts the scope of individuality, opens the door to arbitrariness and unfairness, and should not be imposed without significant social gain.”²³⁵ The pro-duty utilitarian view also can justify the duty’s appearance in tort law. Persons agree to act reasonably because they wish to avoid the consequences of other persons’ negligent acts. This logic in turn arguably supports an enforceable duty of *easy* rescue because the cost incurred by an easy rescue is slight compared to the value of the life that may be saved.²³⁶

Just as the utilitarians are not in universal agreement as to the propriety of legally enforceable duties to rescue, neither are the civilians. One European scholar argues that, in light of modern emergency services, it is in fact counter-productive to require citizen rescues given the risks involved. The better policy is to require citizens to contact the authorities and no more.²³⁷ Surprisingly, in France the number of convictions under its bad Samaritan statute has increased sharply in recent years despite the advent of the *Service Aide Medicale d’Urgence* (SAMU), the French equivalent of 911 emergency medical services.²³⁸ Dispute among civil law experts as to the appropriateness of bad Samaritan statutes is no doubt due in some measure to the revulsion that some civil law commentators, imbued with the old liberal ideal of the autonomistic human being, voiced when duty-to-rescue statutes were first proposed.²³⁹

The common law’s repugnance to forced charity also speaks against a wholesale importation of civil law duties to rescue. Anglo-American jurisprudence is individualistic because common law countries’ cultures tend toward individualism.²⁴⁰ Community

235. Ellin, *supra* note 36, at 234.

236. A possible compromise solution is a national insurance program for Good Samaritan rescue expenses modeled after maritime salvage, where one might obtain the same result that duty-to-rescue statutes are meant to produce but without the direct restriction on individual freedom. See Dawson, *supra* note 7, at 87.

237. Cadoppi, *supra* note 12, at 123.

238. Tomlinson, *supra* note 43, at 493-94.

239. See Cadoppi, *supra* note 12, at 99 n.14, 102 n.24, 103 n.27.

240. A variation of this thinking can be found in Max Weber, who argued

action is encouraged mainly only in the private sphere.²⁴¹ Government is not seen as a good in itself but as a necessary evil; the less government needs to act and does act, the better.²⁴² This cultural antipathy toward government is not present in those European jurisdictions having duties to rescue. To the contrary, the state traditionally has been viewed there as properly active. Whether the state be an absolutist monarchy, socialist regime or parliamentary democracy, government is granted a wide swath of action, including functions traditionally considered in countries of the Anglo-American tradition as charitable.²⁴³ Thus, in civil law countries citizens are more prepared to accept state-enforced pity, in the form of social welfare programs, and state-enforced beneficence, exemplified by duties to rescue.

D. *Constitutional Obstacles*

Unconstitutional vagueness presents one significant obstacle to creating a duty to rescue sounding in criminal law in American jurisdictions. The Due Process Clause of the Fourteenth Amendment precludes the states from enacting penal statutes whose offenses are defined in such a manner that a citizen cannot reasonably know which activities are proscribed.²⁴⁴ A criminal

that the Calvinist *Weltanschauung*, which became in effect the secular mindset of the English and American capitalist, held poverty to be almost sinful because it intimated too much leisure, begging sinful because the result of slothfulness, and the spontaneous enjoyment of goods repugnant because an occasion of sin. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 157-71 (Talcott Parsons trans., Schibner 1958). "Not leisure and enjoyment, but only activity serves to increase the glory of God." *Id.* Extrapolating from this ethos to the example of the bad Samaritan, a society steeped in Weber-like individualism clearly will be averse to duties to rescue if for no other reason than a nagging subconscious judgment in the bystander that the victim either should help himself or, if he cannot, that he deserves his fate. *See id.*

241. *See supra* notes 228-29.

242. In this regard Madison's counsel, "[i]f men were angels government, no government would be necessary," *THE FEDERALIST* NO. 51 337 (James Madison) (Sherman F. Mittell ed., 1937), and Jefferson's apocryphal remark, "that government is best which governs least," strike a resonant chord. *But see* Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 *HARV. J.L. & PUB. POL'Y* 489, 492 n.11 (2004) (crediting Thoreau with the phrase).

243. *See supra* note 226.

244. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public

statute must not be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."²⁴⁵ No less a legal luminary than Supreme Court Justice Bushrod Washington, sitting as a circuit justice, concluded in *United States v. Sharpe* that criminal statutes must be plain to be valid. *Sharpe* involved the prosecution of three Frenchmen for instigating a revolt against the captain of a vessel. The statute creating the offense did not define the word "revolt," which was an integral part of the charge. Addressing this issue, Mr. Justice Washington stated:

If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature. Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid.²⁴⁶

Questions of vagueness necessarily arise in prosecutions for failure to rescue. Even where the statute may be textually clear, not admitting of more than one interpretation, bad Samaritan statutes, especially as enforced in France, are a "loose cannon."²⁴⁷ For example, although the French provision provides dispensation whenever a risk would be present to would-be Good Samaritans if they were to lend assistance, the courts have applied a "reasonableness" gloss to the language, such that fears and worries peculiar to a particular defendant are not exculpatory if not to be expected from a reasonable defendant in the same

uncertain as to the conduct it prohibits." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966), *quoted in Chicago v. Morales*, 527 U.S. 41, 56 (1999). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), *quoted in Morales*, 527 U.S. at 58.

245. *Whitney v. California*, 274 U.S. 357, 368 (1926); *accord U.S. v. Brewer*, 139 U.S. 278, 288 (1891).

246. 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) (No. 16,264).

247. *Tomlinson*, *supra* note 43, at 457.

circumstances.²⁴⁸

Moreover, bad Samaritan statutes always present the troublesome question of just how much danger must threaten the imperiled person before a duty to rescue will arise. One commentator dismisses this objection by arguing that what is presented to the courts is just a run-of-the-mill determination of reasonableness.²⁴⁹ But the objection runs deeper than the uncertainty of a reasonableness determination because it is fundamentally unfair to judge a person's action with perfect hindsight when the situation in which that person was placed by a string of events over which the person had no control was so unsettling as to have seriously diminished the would-be Good Samaritan's perceptive faculties.²⁵⁰ And not only are we confronted, in a bad Samaritan prosecution, with bystanders who were not psychologically "at their best," but we also run right up against the profoundly American attitudes of "live and let live," "keep to yourself" and "mind your own business" that find expression in our legal culture.²⁵¹ There are few epithets more eagerly avoided in everyday life than that of "busybody"²⁵² yet that is the very label would-be Good Samaritans risk, recognizing that turning an eye to another's distress may no longer be considered good manners in a modern urban and individualistic society; it may in fact be a crime. Thus, the combination of a bad Samaritan statute's textual ambiguity, coupled with this conflict between the purpose of the statute and an innate feature of the American mind, creates vagueness of a constitutional magnitude.

E. *Theoretical Obstacles*

Broad duties to rescue wreak havoc with traditional tort causation theory. The special relationship torts are the exception

248. See *supra* text accompanying notes 119-23.

249. Kleinig, *supra* note 232, at 402-03.

250. See *supra* Part III.A.

251. See FRANCIS H. BOHLEN, *STUDIES IN THE LAW OF TORTS* 294 (1926) (noting "the attitude of extreme individualism so typical of anglo-saxon legal thought"); FEINBERG, *supra* note 6, at 129. Cf. BOHLEN, *supra*, at 340-41 (commenting on common law courts' conservatism).

252. The fear of being called a busybody no doubts plays a role in the bystander effect, see *supra* Part III.A.2., and surely influenced Professor Dawson in his article, *Negotiorum Gestio: "The Altruistic Intermeddler."* See Dawson, *supra* note 7.

that proves the rule, for the common law rule of no duty to rescue, although normally presented under the heading of torts, is more fittingly located under the heading of contract. In contract the aggrieved party need not show that the breaching party affirmatively harmed him. So long as the other party was required to act under the contract and failed so to act, the aggrieved party may sue for breach.²⁵³ Usually these contractual responsibilities involve affirmative duties that confer a benefit on the other party. When a plaintiff sues for breach of contract, he in effect is suing for a benefit which the defendant, *by his failure to act*, deprived the plaintiff. The special relationship between contracting parties is closely analogous to the special relationship between husband and wife or parent and child, and these are the kinds of special relationships wherein the common law courts have found a duty to rescue, the breach of which is actionable. The contract rationale which supports the common law duty to rescue can be applied equally aptly to the other recognized special relationship torts, as well as to the exceptions to the no duty-to-rescue rule.²⁵⁴

But the theory that supports, in civil law countries, tort recoveries for failure to rescue is not easily translated to common law jurisdictions because the notion of causation upon which the civil law theory is predicated is at odds with the common law principle of proximate causation. One respected commentator who has advocated a move to strict liability for torts in general objects to tort recoveries based on a failure to rescue for the very reason that causation in the traditional sense is lacking.²⁵⁵ Another

253. See generally RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 68-78 (2d ed. 1999); *RESTATEMENT (SECOND) OF CONTRACTS* § 347 (1981) (Measure of Damages in General).

254. *E.g.*, voluntary assumption of duty, the duty from landowner to guest and, of course, contract. This contract-tort convergence does not include the tort law "creation of danger" test because that exception to the no-duty rule more closely hews to the conceptual framework underlying traditional tort doctrine, according to which harm is actionable if created by an unreasonable act. See *e.g.*, *RESTATEMENT (SECOND) OF TORTS* § 283 (Conduct of a Reasonable [Person]: The Standard). One commentator has termed this type of tort as "pseudo-nonfeasance" to emphasize that it in fact is a type of misfeasance. See Theodore M. Benditt, *Liability for Failing to Rescue*, 1 L. & PHIL. 391, 401-02 (1982).

255. Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 189-204 (1973).

commentator notes that:

The prevailing view seems to be that it is an attempt to rescue that is due — nothing less, but nothing more. We are outraged if a person stands by when he could help someone else at no risk to himself, but we are not outraged by the idea of his not compensating the victim. Notice, by way of contrast, that when one person intentionally or negligently harms another (by a “positive”) act, we *are* outraged by a denial of any obligation to compensate.²⁵⁶

Those who advocate a common law duty to rescue argue that the causation problem which the duty presents is not an insuperable obstacle to its adoption since the existing special relationship torts do not require positive causation, yet the law has been content with these limited affirmative duties.²⁵⁷ This answer to the causation problem ignores that “special relationship” torts are, conceptually speaking, contracts imposed by the state for various reasons. Because these torts rely on a contract causation analysis, and not a traditional proximate causation theory, the “special relationship” exception carries no weight in arguing for a broad duty to rescue in tort.

Joel Feinberg has argued that negative causation theory can bridge the gap between common law causation theory and liability under bad Samaritan statutes.²⁵⁸ Feinberg expressly avoids the trap of framing the bad Samaritan causation analysis by reference to duty and right, obligation and charity. He instead creates a *tertium quid*, a “moral requirement,” which is neither a duty nor an obligation, “but . . . can be every bit as incumbent upon us.”²⁵⁹

256. Benditt, *supra* note 254, at 410.

257. Lipkin, *supra* note 233, at 267-69. In the same vein, another commentator has argued that a duty to rescue is especially appropriate *because* at the time of peril the contract values that would be vindicated without a duty to rescue are comparatively small in comparison to the tort values to be gained by imposing such a duty. See E.J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 272-77 (1980).

258. FEINBERG, *supra* note 6, at 159-63.

259. *Id.* at 162. Feinberg, in the following sentence, retreats somewhat from his anti-duty stance: “Alternatively . . . we can think of the requirements as *duties* derived from the not-so-special relationship of ‘common humanity.’” *Id.*

Having crafted this supposed linchpin, and after having taken several dozen pages to debunk traditional opposition to bad Samaritan statutes, Feinberg asks us to follow him on trust:

The rest of the argument for the 'moral requirements' of Samaritans must rest with intuition. It seems beyond question to me, as a matter both of critical morality and the morality that governs us here and now for better or worse, that a mere Samaritan *is* morally required to come to the aid of another party who is in dire peril of losing his life or suffering severe physical injury, if there is no person willing and able to effect the rescue who has a prior duty or obligation to the endangered party and can do so without help, and if the Samaritan has, and knows that he has, the ability and reasonable opportunity to do so without unreasonable risk, etc., to himself or to others.²⁶⁰

From this somewhat attenuated *cri de coeur*²⁶¹ Feinberg concludes that bad Samaritan statutes can be "morally legitimate."²⁶²

Feinberg errs in two ways, however. First, he misconceives the opposition. Most persons who object to duties to rescue do so while maintaining that it is morally incumbent upon the Samaritan to intervene. Feinberg does an admirable job of showing us that the bad Samaritan's failure to act is immoral, but that is beside the point, for it is one thing to say "this act is immoral," and quite another to say "there ought to be a law."

Second, Feinberg errs in his causation analysis by equating result with cause. Simply because one person is liable for the same quantum of damages that another person is liable for does not mean that the act by which the one incurred liability is identical to the other's. Suppose a gourmand wishes to protect his substantial collection of *Veuve Clicquot-Ponsardin*.²⁶³ He therefore contracts with another to guard his house and its

260. *Id.* at 163.

261. I say attenuated because I count about a dozen conditions in the passage quoted that must be met before a duty to rescue will arise.

262. FEINBERG, *supra* note 6, at 163.

263. Let us assume that our gourmand keeps his *Dom Perignon* in a secure and undisclosed location.

vitiferous treasure. A thief with good taste comes along while the guard is asleep on the job, manages successfully to steal the whole lot, and later consumes it with oysters. Now, the guard is liable *in contract* to the gourmand for the value of the spiritous beverages. The thief is liable *in tort* to the gourmand for the value of the same libations. The guard's liability is equal to the thief's in quantity, even though the former in no way "caused" the theft. The same is true of the bad Samaritan. The Priest and Levite who did not intervene to help the injured traveler might be liable for the man's subsequent injuries. That is what Feinberg wants. Presumably the robbers would also be liable to the man. But have the Priest and Levite caused the harm? By no means; yet their liability in theory is quantitatively identical to the robbers' liability.

Feinberg's causal error can also be analyzed with reference to the Classical maxims of justice. Feinberg would have the Priest and Levite liable in justice both under *alienum non laedere* and *unicuique tribuere jus suum*. The latter presupposes some pre-existing duty, which for the sake of argument is posited. The former forbids one from causing harm; yet under Feinberg's analysis, by failing to render to the injured traveler his *jus*, both the Priest and the Levite actually harmed the traveler in addition to failing to make good on their societal "moral requirement." Thus for a single "act" they incur a type of double liability. To impose liability for a failure to rescue does not require the adoption of Feinberg's theories; one need only expand the number of special relationships to include a "special relationship" between oneself and one's "neighbor." In this way a "social contract" to which all members of society are parties would impose a duty whose breach would be actionable just like any other contract. This result may not be desirable for policy reasons, but at least it would not require the abandonment of traditional concepts of causation.

F. *Philosophical Objections*

We may move beyond legal causation and address directly the philosophical complication in maintaining that the failure to

rescue is the (or a) cause of the victim's subsequent injuries.²⁶⁴ To hold that a bad Samaritan's refrainment (i.e., failure to intervene when intervention is possible), makes the Samaritan a causal factor in the imperiled person's danger requires that there exist some important distinction between the bad Samaritan who cannot help and would not help if called to, and the bad Samaritan who can help but refuses to help.²⁶⁵ The language of everyday speech does not consider refraining to be a causal factor in another's harm. Suppose *A* is driving and falls asleep at the wheel and crashes into a parked car owned by *B*. Certainly *B* would have a cause of action against *A* in negligence, because *A* caused the harm. When asked what the set of necessary and sufficient causal elements of the harm is, *B*'s counsel will say: (1) *A*'s driving, including pressing the accelerator with his foot; and (2) *A*'s falling asleep. Note that *B*'s counsel will not add a third element, *A*'s failure to remove his foot from the accelerator, or *A*'s failure to refrain from falling asleep. These refrainments are not causally necessary to the harm.²⁶⁶ In the same way a bad Samaritan's refrainment is not causally necessary to the imperiled person's harm; it *is* necessary to the caused state of "failure to rescue," but that is not the harm for which the bad Samaritan's victim seeks compensation.

To take the Good Samaritan Parable as a case in point, it is much more "natural" to maintain that the cause of the injured man's suffering is neither the Priest nor the Levite, but instead the robbers. At most the Priest and Levite are the cause of the state of "non-assistance," from which the victim's injury might be the psychological torment suffered in watching the Priest and Levite go by without offering help. But the victim's damages cannot include the wounds suffered at the hands of the robbers, or the suffering endured between the time of the Priest and Levite's passing and the arrival of the Good Samaritan, because these

264. See Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230, 254-59 (1980). For a rebuttal to Mack, see FEINBERG, *supra* note 6, at 181-85.

265. Mack, *supra* note 264, at 255-56. Professor Feinberg argues that even if a bad Samaritan does not cause any harm to the "victim," laws criminalizing bad Samaritanism are nonetheless legitimate. See FEINBERG, *supra* note 6, at 129.

266. For the original example, see Mack, *supra* note 264, at 258-59.

wounds and suffering remain attributable to the acts of the robbers, notwithstanding the Priest and Levite's failure to rescue.²⁶⁷

The civil law jurisdictions having duties to rescue that are enforceable in criminal law tacitly recognize the attenuated causal link between a bad Samaritan and the victim's injuries by the penalties that these statutes provide. None of the European statutes treat the failure to act as a *comissio per omissionem*. If they did, then bad Samaritans who failed to assist when required to, whose victims subsequently died of their injuries and whose assistance would have produced a different result, would be held to have caused the victims' deaths. This result is not obtained because European jurisdictions with duty-to-rescue criminal provisions treat the offense as purely omissive (i.e., not result-oriented). If the European statutes recognize in criminal law the causal separation between the failure to act and subsequent injury, it is strange that this obstacle does not preclude, in France for example, the imposition of civil liability.²⁶⁸

267. At common law the inaction of the Priest and Levite would not be *novus actus interveniens* severing the erstwhile causal connection between the robbers and their victim's suffering. See RESTATEMENT (SECOND) OF TORTS §§ 448 & 431 (1965). Section 448 provides: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime . . ." Section 431 states, in part, that to be a legal cause negligent conduct must be a substantial factor in bringing about the harm. I recognize that this section of the Restatement puts the case backwards, in that the bad Samaritan's inaction *follows* earlier affirmative wrongdoing, but the principle behind the rule applies regardless of the order. See EPSTEIN, *supra* note 202, at 491-95.

268. These causation difficulties can be avoided by adopting a contract analysis, for the principle is well-established that if a failure to act is a breach of contract, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981), the party in breach will generally be liable for all the foreseeable damages that would not have occurred had the party not breached. See, *e.g.*, RESTATEMENT (SECOND) OF CONTRACT § 351 (1981). The classic case for this proposition is *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Exch. 1854), in which the defendant argued that he was not responsible for the plaintiff's lost profits on account of his breach of contract, because the lost profits were not a foreseeable result of the breach. *Id.* at 145-51. The Exchequer Court agreed, holding that the normal damages for breach of contract are those arising naturally from the breach, or which were contemplated by the parties in their contract. *Id.* at 151.

G. *Theological Objections*

One argument why anything but a minimal duty to rescue is a poor fit in the law is found in the Good Samaritan parable itself. The lawyer's own answer to his question, "Who is my neighbor?", was "The one who took pity on him." The key to understanding Good Samaritanism is in the lawyer's use of the word pity. Justice does not require pity. Pity takes up where justice leaves off. Pity is supererogatory. Pity belongs to the province of God, not of Caesar. The Good Samaritan parable explains the scope of the obligation of charity, not justice. The Priest and the Levite, in declining to help the injured traveler, transgressed the commandment to love one's neighbor as one's self. Although that commandment imposes a duty, it is a duty sounding in charity.²⁶⁹

I do not mean to imply that the aversion of Anglo-American jurisprudence to duties to rescue is rooted in a Christian notion of charity, but only that the undeniable individualistic or autonomistic strain that colors the common law is at least fortuitously commensurate with a Christian conception of charity. To determine whether the state should take a hand in the enforcement of charitable activity and therefore whether the law ought to enforce duties to rescue, we should have recourse to the history of Christian social teaching as implemented in the European private sector and, latterly, by European governments.

In the early Church the aim of charity was not to right social wrongs but to awaken love in others and thereby bring them to God.²⁷⁰ Christians of the Apostolic and Patristic eras emphasized

269. See ST. THOMAS AQUINAS, 7 CATENA AUREA: COMMENTARY ON THE FOUR GOSPELS, COLLECTED OUT OF THE WORKS OF THE FATHERS 377 (John Henry Parker ed., Oxford 1841).

CYRIL; After what has gone before, or Lord fitly questions the lawyer; *Which of these three thinkest thou was neighbor to him who fell among thieves?* But he said, *He that shewed mercy on him.* For neither the Priest nor Levite became neighbor to the sufferer, but he only who had compassion on him. For vain is the dignity of the Priesthood, and the knowledge of the Law, unless they are confirmed by good works.

Id. Perhaps the reason for the Priest and Levite's failure to help was their fear of ritual impurity, which might have resulted from touching the victim if he had been a Samaritan. The parable thus counsels the supremacy of the law of charity over the rabbinical laws of first-century Judaism.

270. ERNEST TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN

the philanthropic and private aspects of charity and thus were of necessity limited to small-scale ventures with which government did not trouble itself.²⁷¹ By the Middle Ages Christianity had arrived at a *modus vivendi* with the state: the Church conceded that charity cannot renew the world entirely and that some societal ills must be tolerated in the interests of the greater good.²⁷² Nevertheless, the Church's societal presence had a profound transformative effect on European culture. Personality and individuality were lauded as examples of the divine fecundity. A community of believers developed to serve socialistic ends without needing to abolish private property or remove incentives for wealth creation. Society rationalized and explained inequality by ascribing it to God's will: if God allowed the rich and the poor to coexist, it was to foster among the former redemptive charitable impulses. Most importantly, the Christian ethos arguably nurtured an "active helpfulness," "something which no social order—however just or rational—can dispense with entirely, because everywhere there will always remain suffering, distress, and sickness for which we cannot account—in a word, [the Christian ethos] produce[d] charity."²⁷³

The pre-modern state took no hand in the "production of charity." The modern welfare state, as a governmental charity producer, dominates the European continent and has supplanted the former charity producer, the Church.²⁷⁴ Post-Enlightenment Europe can be understood as a battle between the two Gelasian swords, a battle whose immediate victor undertook the responsibility of providing for the least of society and who became

CHURCHES 134 (Olive Wyon trans., 1931).

271. *Id.* at 135-36.

272. *See id.* at 303-04. Troeltsch hypothesizes that this "truce" came about because law was viewed as drawing its authority not from the sovereign but from the will of God as understood through human reason. *See id.* at 305-06.

273. *Id.* at 1004-05.

274.

It was rather the decline of religion, the impact of Protestantism and the rise of the secular nation-state as a consequence of the 'surrender' of the Church to the state or as a result of the retreat of the Church into the "private realm"—that have governed welfare state development.

KEES VAN KERSBERGEN, *SOCIAL CAPITALISM* 193-94 (1995).

responsible for *promoting* charitable activity. This tremendous shift in the respective social roles of Church and State began in the wake of the Reformation.²⁷⁵ By the nineteenth century continental European society thought of charity not as an obligation but instead as a *social right* susceptible to legal enforcement.²⁷⁶ If charity is not strictly speaking within the domain of private initiative—if rather the charitable act is the fulfilment of a legal duty and not a supererogatory benevolence—then it was incumbent upon the state to support the charitable act by enforcing it.²⁷⁷ Consequently, the moral obligation to play the Good Samaritan, not to pass by the injured traveler, became in modern-day Europe a right of the injured traveler to require the Priest, the Levite and the Samaritan to intercede on his behalf lest the state should punish them and the injured “victim” seek compensation.

As I have stressed above, this argument does not depend upon the premise that Christian social principles undergird Anglo-American jurisprudence. The major premise of my position subsists in this: duties to rescue, as a form of legally enforceable charity, are incommensurable with juristic systems that seek to maintain a substantial sphere of liberty for the private individual. The minor premise: Anglo-American jurisprudence is marked by a keen effort to maintain a substantial sphere of liberty for the private individual. And the conclusion of my neat syllogism: legally enforceable duties to rescue are incompatible with Anglo-

275. I should make clear that I do not imply *post hoc ergo propter hoc*; I merely use the Reformation as a point of reference along the course of European history.

276. KERSBERGEN, *supra* note 274, at 196. Along these lines I am reminded of Chief Justice Marshall's remark in *Marbury v. Madison* that a right requires a remedy. 1 U.S. (1 Cranch) 137, 162-63 (1803). *But see* FEINBERG, *supra* note 6, at 148-49 (arguing that, in the case of bad Samaritan statutes, a duty without a correlative right is conceptually acceptable).

277. Professor Feinberg adopts this view. *See* FEINBERG, *supra* note 6, at 130-31. I cannot disagree more strongly with his position as expressed in the text. He argues that a person who fails to help save a child from drowning is not just “moral slime”; he is an outlaw because he has violated the “child's right to be saved.” *Id.* In contrast, I argue that the child has neither a legal nor a moral right to be saved; indeed, even to speak of “rights” in this context betrays a profound theoretical chasm between Feinberg and me. The would-be rescuer has a profound moral *obligation* to intervene. Professor Feinberg's view in effect approves of the state supplanting the Church as fomentor of charity.

American jurisprudence. Although continental European legal systems were not as strongly marked by the individualistic theme observable in the common law, nevertheless there was a European force that argued for a substantial sphere of individual liberty for the private individual—the Church. Once the Church receded from its position of prominence and was replaced in its charitable aspects by the welfare state, the force that theretofore had maintained this sphere of liberty vanished. The state replaced it. As a consequence charity ceased to be an obligation and became instead a right. Charity moved from the private to the public sphere, from the province of the Church to the province of the State. Whether the identical process happened in common law countries is irrelevant, for there the Church was not the only force militating against a shrinking of the sphere of individual liberty; the common law itself served that purpose and continues to do so. Because it continues to do so, bad Samaritan laws are, on the whole, inappropriate to our legal system.

IV. CONCLUSION

At the risk of merely contriving a legalistic *deus ex machina* to resolve the jurisprudential-ethical quandary presented by the duty to rescue, I describe below what is in my opinion a possible solution to that problem. Clearly the common law is not so opposed to the notion of affirmative duties that it will not tolerate any statute enforcing a duty to rescue, for it already imposes affirmative duties, even among strangers in the case of an emergency-creator.²⁷⁸ Furthermore, the criminal law in common law countries enforces some affirmative duties which usually map to pre-existing common law duties: hit-and-run statutes are a good example; misprision of felony a somewhat antiquated one. These tort and criminal law special relationship duties demonstrate that Anglo-American jurisprudence is not at root opposed to an affirmative duty to rescue. The special relationship torts also reveal that, if we are to preserve legal causation in its traditional sense, any duty to rescue must harmonize with contract principles of bargain, duty and breach.²⁷⁹ I argue that as part of the social

278. See WILLIAM A. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 143 (1987).

279. See William A. Landes and Richard A. Posner, *Salvors, Finders, Good*

contract, by accepting the benefits of community and government, each citizen assumes the duty to render a minimal degree of assistance to a person in grave distress.²⁸⁰ Although the extent of the duty for which I argue is quite small, given the duty's social contract justification, a more substantial burden on the would-be Good Samaritan cannot be justified without some additional bond supporting the "special relationship" between rescuer and victim.

A. *An Acceptable Compromise—A Proposed Model Statute*²⁸¹

Based on the foregoing, the task is to find an appropriate compromise between the legitimate promotion of the common good and the preservation of individual freedom. This balance can be best struck by crafting a penal statute that requires notification of the authorities and nothing more.²⁸² An example of such a statute

Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. LEG. STUD. 83, 125 (1978).

280. I recognize that by extending the obligation to rescue to non-citizens who are not party to the social contract I go beyond my social contract justification, but not by much. The benefit to be gained by imposing the duty regardless of the identity of the victim far outweighs the benefit derived from the modicum of individual liberty preserved by limiting the duty to citizens. Besides, because citizenship is not determinable by appearances, rational Samaritans would not risk the chance of punishment on the gamble that the victim were a non-citizen.

281. For other model statutes, see, e.g., Lipkin, *supra* note 233, at 266; Wallace M. Rudolph, *The Duty to Act: A Proposed Rule*, in GOOD SAMARITAN, *supra* note 51, at 243; Rudzinski, *supra* note 79, at 123-24; Benditt, *supra* note 254, at 415.

282. Thus I disagree strongly with Professor Malm, who argues that a bad Samaritan statute enforcing only slight penalties is worse than no law at all. See Malm, *supra* note 36, at 215. Professor Malm contends that bad Samaritan statutes must be rigorously enforced with especially punitive punishments or they should be removed from the books. *Id.* at 228. She comes to this conclusion based upon her analysis of what bad Samaritan statutes are attempting to accomplish: they are supposed to serve deterrence, and they are to have a norm-enforcing or norm-creating effect. See *id.* at 226-28. I agree with Professor Malm that bad Samaritan statutes ought to have a deterrent effect lest they become mere "feel good" laws. See *id.* at 226. I also agree partially with her second justification: that these statutes are meant to have a norm-enforcing value, see *id.* at 226, 228, but I part company with her in the way she quantifies the sufficient level of punishment for deterrent purposes. Certainly a punishment of one year's imprisonment is less severe than a punishment of five years' imprisonment, but I am sure that Professor Malm is not a partisan of the Hammurabi Code, and that she would not assent to truly draconian punishments for bad Samaritans, such as million-dollar fines or life imprisonment. What any bad Samaritan statute

is the following:

Duty to assist. (1) Whenever a person witnesses another person suffering from or in imminent danger of suffering from grave physical harm, the person shall immediately contact the local emergency response authorities or local law enforcement or both, as required by the circumstances as perceived by the person.

(2) For the purposes of fulfilling the duty imposed by subsection (1), a promptly placed call to 911 shall always discharge the duty to assist.

(3) Whether a person has discharged his duty under subsection (1) shall be determined irrespective of any harm suffered by the person whose suffering or then-imminent suffering gave rise to the duty to assist.

(4) It shall be a defense to a prosecution brought under subsection (1) that the defendant actually believed, however unreasonably, that the person was not suffering from or in imminent danger of suffering from grave physical harm.

(5) It shall be a defense to a prosecution brought under subsection (1) that the defendant made a good faith effort to contact the local emergency response authorities or local law enforcement or both and was unable to reach either or both due to circumstances beyond the defendant's control.

(6) The penalty for violation of subsection (1) shall be a fine not exceeding \$X or the fulfillment of Y hours of court-ordered community service or both.

(7) This section shall not create nor form any part of any private cause of action.

(8) This section shall not prejudice, alter or in any way change the present state of the law as it relates to private causes of action that any party had prior to this section's adoption or would have now or in the future were this section not to exist.

accomplishes that cannot be done in the absence of the statute is the imposition of the *social opprobrium* that accompanies a criminal conviction.

Professor Malm also refers to the argument that failing to create duties to rescue is tantamount to a societal declaration that the life of the person who is in need of rescue is worthless. *Id.* at 217. Ellin offers the rejoinder that opposition to bad Samaritan statutes says nothing about what the potential Good Samaritan's opinion is of the person whom he may help; the absence of the legal duty simply means that society believes the burden of rescue should fall elsewhere. Ellin, *supra* note 36, at 241.

Gloss and Rationale

The model statute answers the societal call for the protection of the common good but also gives due deference to the legitimate concerns for the maintenance of individual liberty, theoretical consistency in tort law and constitutional objections to vagueness. The model statute incorporates the civil law precedent for permitting notification of authorities to fulfill the duty to rescue without falling into the quagmire of determining just how much personal action is enough to satisfy the duty or whether a particularly timid or impressionable defendant should be held to answer for his social weakness. The statute adopts the position that the only proper place for a modern duty to rescue is a penal statute requiring notification of authorities under limited circumstances. In this respect the model statute is consistent with the few existing American examples, but the statute goes considerably beyond these in accounting for the civilian experience and constructing the duty in light of the myriad social, cultural, historical, philosophical and theological factors discussed above.

Subsection (1) imposes a duty to assist only when a person actually observes another requiring assistance. This element precludes the unfortunate French practice of holding persons accountable who were not present at the scene, a result that is also possible under the Wisconsin and Vermont statutes. Of course persons may still have a strong moral obligation to assist even though they be not present at the scene; but lines must be drawn, and it has been thought preferable here to err on the opposite side of the line drawn by the French courts. The duty arises only when the imperiled victim is observed by the would-be rescuer to be suffering from or in imminent danger of suffering from grave physical harm. This language precludes conviction when the danger would come about in a week's time; it also precludes conviction when the relevant harm is neither physical nor grave. Consequently, one cannot be convicted for having failed to assist when the harm is to property. This language thus avoids the German statute's textual broadness.

Subsection (1) also adopts the Hawaiian precedent of requiring only notification of authorities. It completely omits references to personal intervention and thereby precludes the French practice, exemplified by the father-in-law case, of

convicting the bad Samaritan notwithstanding his notification of the authorities. The phrasing of the model statute is broad enough, however, to permit conviction when the defendant called the police but knew that he ought to have called the paramedics, or vice versa. Moreover, the phrasing normally would permit conviction when the defendant contacted a non-emergency government authority, knowing that such a response was inappropriate under the circumstances.

Subsection (2) merely makes explicit the obvious, namely, calling 911 where available is the simplest and most natural response of the citizenry, and therefore is appropriately supported by the criminal law. The statute's safe-harbor is a considerable advance over both the civilian and common law jurisdictions' provisions because it defines precisely what the law will affirmatively require of a bystander.

Subsection (3) makes clear that violation of subsection (1) is a purely omissive offense in no way tied to any other harm. In this manner the causal difficulties rampant in civil law jurisdictions are avoided.

Subsection (4) provides an affirmative defense to avoid the French practice as observed in the case of the peasants convicted of failing to assist when the victim was thought by them to be a burglar. Granted that the allowance made for the defendant's intentions is broad, perhaps too broad for most, nevertheless the protection afforded the timid but not malevolent bad Samaritan seems justified.

Subsection (5) provides an affirmative defense to ensure that the defendant need not be successful in his attempt to assist. This provision follows the civil law precedents.

Subsection (6) breaks with European practice by not affording the sentencing judge the option of imprisonment. The amount of the fine is left to the good sense of the adopting jurisdiction; perhaps an exceptionally high fine might be warranted in cases where the defendant's failure is especially egregious. But in all cases the sentencing judge should make due allowance for the peculiar diffidence or pusillanimity of the defendant. As for the community service requirement, it may appear inapt that the statute should punish with *forced charity*, but as the principle of mandated community service is now well established in penal law, its inclusion here has not been thought inappropriate.

Subsection (7) completely avoids the French and German practice of affording private remedies to those "injured" by the bad Samaritan. This decision has been motivated mainly by the concerns already discussed of theoretical difficulties in causation as applied to torts at common law. It also avoids the practice of allowing Good Samaritans to recover against their "victims."

Subsection (8) ensures that the statute will not affect existing common law as it has developed to allow private causes of action for failures to act under certain circumstances.

The statute's rationale is based upon the prevalence of cellular phones and the well-established and efficient emergency response services found throughout the country. The citizenry generally has the former, and has become accustomed to using (or at least aware of) the latter. The model statute thus builds upon this social condition. The statute, it is hoped, will be more than a feel-good law, and afford sufficient protection to individual liberty and idiosyncratic defendants.

B. *Value of the Civil Law—Common Law Comparison*

A comparison between civil law and common law jurisprudence produces three benefits: it provides fodder for legal reform; it invites analytical assistance from other disciplines; and it emphasizes cultural differences otherwise unnoticed. The comparative analysis is particularly useful in the area of bad Samaritan statutes, as nearly every European jurisdiction has a legally enforceable duty to rescue, whereas only five American jurisdictions have any legal duty to rescue, and even for these states, the punishment for being a bad Samaritan is slight. The jurisprudential differences between the two legal systems reveal a profound social and cultural chasm between Europe and America that cautions against any wholesale adoption of legal theory by one system from the other.

1. *Legal Reform*

Anglo-American commentators, since the time of Bentham,²⁸³ have argued for affirmative duties at common law, especially for the duty of easy rescue. Many scholars have proposed model

283. See *supra* note 35.

statutes along these lines, based in part on European provisions.²⁸⁴ Unquestionably, the common law's adherence to the "no duty" theory has become attenuated in today's society of urbanization, telecommunication and professional emergency services.²⁸⁵ Moreover, the common sensibilities of the American people clearly favor some enforceable duty.²⁸⁶ A legally enforceable duty that requires notification of authorities in limited circumstances is well-suited to the times and is a fair response to the modern European commentators.²⁸⁷ As the product of comparative law research, the proposed law provides a double benefit: it capitalizes on the experience of other jurisdictions, and it rejects what is incompatible with the American spirit.

2. *Interdisciplinary Research*

It is a reasonable assumption that the number of bad Samaritans in any particular country does not vary greatly from the number of bad Samaritans in any other country. If that is true, then the existence of legally enforceable duties to rescue in civil law jurisdictions cannot be explained solely on deterrent grounds; these duties must have some additional purpose. Until the twentieth century, most Western nations left the duty to rescue to morality. The sanction of social opprobrium and the eternal consequences of sin were considered deterrent enough. Since that time many European countries have enacted duty-to-rescue statutes to remedy the law's "insufficiency." The overwhelming majority of common law jurisdictions has retained the old attitude of leaving the matter to morality. I have argued that this split between the civil law and the common law represents a significant cultural difference between Europe and America that, if existent before the twentieth century, was not

284. See *supra* notes 232, 281.

285. The relatively late appearance of enforceable duties to rescue may be due to the effectiveness of reciprocal altruism in encouraging Good Samaritanism in pre-urban societies (i.e., the rescuer acts because he wants the victim to perform the same service should the rescuer need it). See William M. Landes & Richard A. Posner, *Altruism in Law and Economics*, 68 AM. ECON. REV. 417, 420 (1978).

286. GLENDON, *supra* note 232, at 78, 80-81. "In recent years . . . uneasiness with the no-duty-to-rescue rule has grown." *Id.* at 88.

287. See, e.g., Cadoppi, *supra* note 12, at 123.

obvious until now. The European looks to the state as a source of moral precepts and civic duties, the first enforcer and source of charity.²⁸⁸ In America private initiative is still lauded and considered the primary and best source of charitable activity.²⁸⁹ Thus, the bad Samaritan statute comparison reveals a difference in *mentalité*²⁹⁰ between the European and the American concerning the role and nature of the state in modern life.

3. *Cultural Enrichment*

Bad Samaritan comparative research also produces a greater awareness of the theories supporting contract and tort at common law. The causation problem as it relates to duties to rescue²⁹¹ is significant, for it demonstrates the civil law's willingness to discard the but-for causation theory for a much more inclusive but less rigorous concept of responsibility causation.²⁹² The adoption of the European approach in common law jurisdictions would require a deep-rooted transformation of the common law sense of causation. As is always the case with bad Samaritans, their "refraining" is in no sense a causal factor in the harm of the "victim,"²⁹³ but the requirement that the act be a causal factor in the harm is central to common law torts.²⁹⁴ One commentator answers this objection by citing the various "special relationship" exceptions in American tort law to the general absence of a duty to rescue.²⁹⁵ The common law courts permit recovery here, even though but-for causation is absent.

As I have stated earlier,²⁹⁶ making a theoretical differentiation between contract and tort parries this rejoinder. The special relationship torts at common law must be understood through the lense of contract: owing to a pre-existing relationship

288. See, e.g., Walter, *supra* note 226.

289. See *supra* notes 228-29.

290. Legrand, *Against a European Civil Code*, *supra* note 13, at 45.

291. See *supra* Part III.E.

292. See, e.g., Tunc, *supra* note 163, at 45-46; Ashworth, *supra* note 232, at 431-33.

293. Mack, *supra* note 264, at 259.

294. See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 92-102 (1985) (reviewing the various causation theories, including proximate cause, last wrongdoer, natural consequence and the *Palsgraf* test).

295. Lipkin, *supra* note 233, at 268-69.

296. See *supra* Part III.E.

that society deems especially important (e.g., husband and wife, parent and child, employer and employee), the law will impose a quasi-contract upon the parties to act affirmatively in certain circumstances, including when the other party to the relationship is in danger. Although the special relationship torts are not treated in the books explicitly in this fashion, I believe that they are best comprehended by a contract analysis, and in that way they harmonize better with the common law system. And, if one will concede the affinity between special relationship torts and contract theory, the causation problem disappears, for recovery by the injured party can be based upon a breach of contract which will lie even in the absence of affirmative wrongdoing. Nonfeasance thus may be actionable.

C. Conclusion

Absent substantial theoretical revision, the common law will not support a *general* duty to rescue; but a *minimal* duty to inform the authorities in an emergency, enforceable only in the criminal law, is consistent with the ethos of Anglo-American jurisprudence. The model statute discussed above describes such a duty. A more far-reaching duty would create considerable theoretical and practical problems. And for the egregious cases of bad Samaritanism that the statute does not cover, one must leave the enforcement to "Him who searches the heart."²⁹⁷

297. Minor, *supra* note 5, at 431.

