Toward a Theory of Justice within Trinitarian Theology: The Case for Duty to Rescue

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Abstract

When someone's life is imperiled and rescue would pose no danger to the rescuer, most agree that a passerby would certainly have a moral duty to rescue. But should there be legal consequences for failure to help? While most civil law jurisdictions have answered in the affirmative, this question has proven to be a difficult puzzle for common law countries.

The analysis explores two of the arguments for limiting the imposition of a legal duty to rescue: first, that such duty might interfere with the protection and promotion of individual liberty; and second, that the only non-arbitrary way to reasonably limit the duty is to circumscribe it to "special relationships." It then considers how both of these problems might be illuminated by the theological and anthropological framework of *Gaudium et Spes*, particularly its discussion of Trinitarian love as the revelation of the vocation of the human person. The analysis concludes with suggestions for further research on how a theory of justice may be grounded in Trinitarian theology.

The emergency begets the man.[1] *– Justice Benjamin Cardozo*

I. Introduction

A small child is drowning in a pool, and a passerby, with no danger to herself, could easily reach in and pull the child out of the water. Most people agree that the passerby would certainly have a moral duty to rescue. But should there be legal consequences for failure to help? While most civil law jurisdictions have answered in the affirmative,[2] this question has proven to be a difficult puzzle for common law countries.[3]

Many are familiar with the story of Kitty Genovese. In the spring of 1964, about 3:20 in the morning, twenty-six-year-old Kitty Genovese was returning home from work to her quiet middle-class Queens, New York neighborhood. As she walked 100 feet from her car to the apartment building, she was brutally attacked. When she screamed, "Oh my God, he stabbed me! Please help me!" one man called out from his apartment window, "Let that girl alone!" The assailant walked a short distance away, and then returned, and stabbed her again, and again she shrieked, "I'm dying!" The assailant drove away, and she crawled into the entrance of the closest apartment building. The killer returned a third time to stab her again—this time, fatally. It was 3:50, half an hour after the first attack, when the police received their first call. Later

investigations revealed that 38 neighbors had heard her screams, and done nothing.[4] None could be held legally responsible for failing to pick up the phone and call the police.

Another story, in some ways even more shocking: after their casual acquaintance at a Las Vegas casino, eighteen- year-old David Cash and his friend, nineteen-year-old Jeremy Strohmeyer began a game of hide-and-seek with seven-year-old Sherrice Iverson, who was waiting for her father to finish gambling. Sherrice ran into the ladies room, and Strohmeyer followed. After a few moments, Cash also went in, peered over from the next the stall, and saw Strohmeyer clutching the squirming girl, repeatedly telling her, "shut up or I'll kill you." Cash made a half-hearted attempt to distract him by tapping on his forehead and telling him to let go, but Strohmeyer ignored him. After two minutes Cash walked out of the restroom and left the arcade. Twenty minutes later Strohmeyer emerged, and Cash said, "Dude, let's go, my dad is waiting for us." Sherrice Iverson was left in the restroom, sexually molested and strangled to death. [5] Strohmeyer was charged with murder, kidnapping and sexual assault.[6] Under the laws of the State of Nevada, Cash could not be charged with anything—he was merely a witness to the beginning of a crime.[7]

It is not that Americans consistently and callously leave others to die. It would be enough to think of the countless acts of heroism that pervaded the streets of New York as the World Trade Center came crashing down on September 11, 2001.[8] Or to remember how eighteen-month old Jessica McClure became "Everybody's Baby" as the entire country gathered in rapt attention for three days as teams of rescuer workers labored to pull her out from the narrow well into which she had fallen.[9] But it would be safe to say that US jurisprudence, and common law jurisprudence more generally, includes a strong thread of resistance to legal imposition of an affirmative duty to rescue a stranger.

This analysis explores two of the arguments for limiting the imposition of a legal duty to rescue: first, that such duty might interfere with the protection and promotion of individual liberty; and second, that the only non-arbitrary way to reasonably limit the duty would be to circumscribe it to "special relationships." It then considers how both of these problems might be illuminated by the theological and anthropological framework of *Gaudium et Spes*, particularly its discussion of Trinitarian love as the revelation of the vocation of the human person. The analysis concludes with suggestions for further research on how a theory of justice may be grounded in Trinitarian theology.

II. Common Law Resistance to a Legal Duty to Rescue

A. Liberty as Autonomy

What is at the foundation of US reluctance to impose a legal duty to rescue? As Jewish scholar Robert Cover described, the key word in the American legal system is "rights," and "the story behind the term 'rights' is the story of social contract."[10] As Cover explained: "The myth postulates free and independent if highly vulnerable beings who voluntarily trade a portion of their autonomy for a measure of collective security . . . The first and fundamental unit is the individual and 'rights' locate him as an individual separate and apart from every other individual."[11]

According to this theory, "negative duties" that can be universalized (in Kantian terms, perfect duties)—such as the obligation not to cause harm to another—are the heart of a legal system based on the social contract.[12] In contrast, "positive duties"—affirmative obligations to help others that cannot be universalized (imperfect duties)—fall within the realm of morality or "beneficence," and with limited exceptions, such obligations are not generally encoded in law.[13] The concept of treating persons as ends and not means has been interpreted as a "right of self-ownership"—the right to use one's energy and one's possessions as one likes, and a prohibition against using persons as resources for others.[14] As a general principle, the law ought not to require a person to act in a way that restricts one's liberty for the sake of the needs of another except by voluntary agreement.[15]

Thus the central problem in imposing a legal duty to rescue is that it interferes with this notion of liberty in which the self and others are in fundamental tension. As Professor Richard Epstein wrote in his staunch defense of the no-duty-to-rescue rule, "Once one decides that . . . an individual is required under some circumstance to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty."[16] In other words, as philosopher Michael Menlowe summarized, "[t]he more I have to do for other people, the less I can do for myself . . . the more extensive the duty to rescue, the more an agent's individuality is threatened."[17] If I am required to promote to the good, I may be prohibited from regarding my own interests as special, then my integrity is threatened.[18]

Certainly David Cash had a moral duty to alert someone that a seven-year-old child was being attacked. But within this strain of liberal theory, legally Cash should not be coerced into acting as a "means" to assure the safety of a person who was a "stranger" to him. Certainly Kitty Genovese's neighbors had a moral duty to call the police—but legally it was up to them how to allocate their time, and it was their prerogative to go on watching TV or back to sleep.

B. Exceptions: "Special Relationships"

A second common-law concern with imposing an affirmative duty to rescue a stranger is the practical difficulty in defining and limiting the duty.[19] Where there were a large number of witnesses, such as in the Genovese case, how might one go about evaluating who should be held responsible? Any effort to draw a line, it seems, would be arbitrary. This is one of the reasons why the law of tort requires a clear causal link between the harm suffered and the defendant's conduct.[20]

One practical response to this dilemma has been to impose legal obligations only when there is a "special relationship" between the rescuer and the victim. Pre-existing responsibilities and protective relationships, such as that which a common carrier owes to passengers, or an innkeeper or landowner owes to guests, could trigger a duty to rescue.[21] Voluntarily assuming custody or relevant past conduct which may have contributed to creating the risk may also constitute a "special relationship" which could trigger a duty to rescue.[22]

In the common law system, when this kind of "special relationship" is lacking no legal duty should be imposed. As Lord Reid explained in the *Dorset Yacht* case: "when a person has done nothing to put himself in any relationship with another person in distress or with his property, mere accidental propinquity does not require him to go to that person's assistance."[23] In some cases, the very definition of "neighbor" has been circumscribed by the distinction between acts and omissions. Building on Lord Atkin's famous "neighbor principle,"[24] Justice Brennan of the High Court of Australia explained, "My neighbor is a person who is affected by my act, not by my omission."[25]

The witnesses to Kitty Genovese's murder may have lived next door, but as they had no "special relationship" to her in the eyes of the law, the fact that they realized she would die without help did not itself impose upon them any duty to act. Similarly, David Cash was not a "neighbor," for he had done nothing to put himself in any relationship with Sherrice Iverson. His mere "accidental propinquity" in the restroom as the attack began triggered no legal duty, for she was affected only by his omission, not by his act.

III. The Trinity as a Social Model

Given the shocking nature of some of the failure to rescue stories, it is not surprising that the common law duty to rescue puzzle has engendered a vast literature of deep philosophical reflection. Some argue that the liberal tradition itself, properly understood, could embrace such a duty. Utilitarian, deontological, and other currents in jurisprudence have greatly enriched the discussion. It would be more than a slight understatement to say that theological models and critiques have not been prominent. Recently, however, there seems to be increasing openness to the insight that "[t]he theological dimension is needed both for interpreting and for solving present day problems in human society," as John Paul II put it in *Centesimus Annus*.[26]

I agree with Robert Cover, that while the liberal philosophical tradition of "rights" has definite strengths, it is "singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual."[27] And like Cover, who explored the Jewish foundations of jurisprudence, I believe that theories of justice have much to gain by delving into theological models and frameworks. The next sections focus on an aspect of the theological dimension as set out in *Gaudium et Spes*, and now amplified in the COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH: the description of Trinitarian love as the origin and goal of the human person. The analysis hopes to illustrate that this anthropological foundation can help not only to melt the paralysis of the "rights talk" that permeates many aspects of liberal legal structures, but also to open up vast horizons—for the particular jurisprudential problems in duty to rescue, and more broadly, for the foundations of legal theory.

In its opening chapter, the COMPENDIUM sets out: "The revelation in Christ of the mystery of God as Trinitarian love is at the same time the revelation of the vocation of the human person to love. This revelation sheds light on every aspect of the personal dignity and freedom of men and women, and on the depths of their social nature."[28] As the Council Fathers explained in *Gaudium et Spes*:

> Indeed, the Lord Jesus Christ, when praying to the Father, 'that they may all be one… as we are one' (Jn 17:21-22), has opened up new horizons closed to human reason by implying that there is a certain parallel between the union existing among the divine Persons and the union of the children of God in truth and love. [29]

Further, this parallel marks the foundations of a particular vision of anthropology. *Gaudium et Spes* continues: "It follows, then, that if man is the only creature on earth that God has willed for its own sake, man can fully discover his true self only in a sincere giving of himself. (cf. Lk. 17:33).[30] Thus, as the COMPENDIUM explains,

> Christian revelation shines a new light on the identity, the vocation, and the ultimate destiny of the human person and the human race. Every person is created by God, loved and saved in Jesus Christ, and fulfils himself by creating a network of multiple relationships of love, justice, and solidarity with other persons as he goes about his various activities in the world.[31]

How can this be concretely applied? What difference would it make for theories of justice? My work is this field has been greatly enriched by delving into the scholarship which is emerging from the Abba School, the Interdisciplinary Study Center of the Focolare Movement headquartered here in Rome.[32] Because the analyses have emerged from decades of practical experience in living what Pope John Paul II now terms the *spirituality of communion*,[33] the resulting descriptions of the Trinity as a social model are quite accessible, and one can intuit how they might be applied to the most varied disciplines.[34] To illustrate the application, the analysis that follows develops the contours of the anthropology in light of a Trinitarian model, and applies this model to the two issues discussed above: the definition of freedom, and the problem of limiting the scope of legal duties.

A. The Trinity as a Model of Freedom in Relationships of Openness to Others

An anthropology based on the model of a triune God whose very nature is communal and social offers a rich description of a union of persons without loss of individual identity—in theological terms, *pericoresis,* or "mutual indwelling."[35] Specifically, the commandment of love is "lived out and measured against Jesus' love for us, to the point of abandonment…"[36] He who was God "emptied himself"—*kenosis*.[37] Mutual indwelling is possible through an essential attitude of openness to the other, of "making room" for the other, even to the point of "emptying" oneself for the other.[38] In the life of the Trinity, this openness or emptiness is not a negative encroachment on one's personhood, but actually the positive key to self-fulfillment: "whoever loses his life will preserve it." (cf *Lk.* 17:33).[39]

Reflecting on the mysterious cry that Jesus addressed to the Father before dying, "My God, my God, why have you forsaken me?"[40] Focolare founder Chiara Lubich probes the paradox:

> There may be those who think that to affirm self is to struggle against all that is not self, because what is not self is perceived as limit and, what is more, as a threat to the integrity of the self. But Jesus forsaken, in that terrible moment of his passion, tells us that

> while the awareness of his subjectivity appears to be diminishing because it seems he is being annulled, in that very moment it is in all its fullness. [41]

Based on this example, she draws out striking implications for the philosophy of being: "[Jesus forsaken] shows us, by his being reduced to nothing, accepted out of love for the Father to whom he re-abandons himself . . . that I am myself not when I close myself off from the other, but when I give myself, when out of love I am lost in the other."[42] This, according to Lubich, is the inter-personal dynamic at the heart of the Trinity: "In the relationship of the three divine Persons, each one, being Love, *is* completely by *not being*, each one mutually indwelling in an eternal self-giving."[43] And as the "heart of Christian anthropology," this is the dynamic that can inform all human relationships and social structures. If "I am myself when I give myself," to make room for the other is neither a sad concession to the realities of the social contract, nor a simple nod of respect for the principle of equality. Rather, it is one's door to authentic freedom and human fulfillment. As *Centesimus* highlights:

> When man does not recognize in himself and in others the value and grandeur of the human person, he effectively deprives himself of the possibility of benefiting from his humanity and of entering into that relationship of solidarity and communion with others for which God created him. Indeed, it is through the free gift of self that man truly finds himself.[44]

B. The Universal and Specific Dimensions of Trinitarian Love

Trinitarian theology also offers a thick description of the universality of the human community, thus shedding light on the definition of "neighbor." As *Gaudium et Spes* specifies: "Everyone should respect his fellow-man without exception as 'another self' and have due regard for his life and for what he needs to live it worthily . . . Nowadays we have a special obligation to make a neighbor of any man."[45]

Similarly, in *Sollicitudo Rei Socialis*, John Paul II drew out the profoundly Trinitarian dimensions of solidarity as invitation beyond equality, beyond equal respect for the rights of others, to a more profound recognition of the fundamental unity of the human race:

> In the light of faith, solidarity seeks to go beyond itself, to take on the specifically Christian dimension of total gratuity, forgiveness and reconciliation. One's neighbor is then not only a human being with his or her own rights and a fundamental equality with everyone else, but becomes the living image of God the Father, redeemed by the blood of Jesus Christ and placed under the permanent action of the Holy Spirit.[46]

The consequence of this vision is clear, "[o]ne's neighbor must therefore be loved, even if an enemy, with the same love with which the Lord loves him or her; and for that person's sake one must be ready for sacrifice, even the ultimate one: to lay down one's life for the brethren (cf. *1 John.* 3:16). [47] The result of this love is a "new criterion" for interpreting reality: "[a]t that point,

awareness of the common fatherhood of God, of the brotherhood of all in Christ—'children in the Son'—and of the presence and life-giving action of the Holy Spirit will bring to our vision of the world a new criterion for interpreting it."[48]

This Trinitarian vision, then, is the ultimate source of inspiration for the universal dimensions of solidarity and "communion:"

> Beyond human and natural bonds, already so close and strong, there is discerned in the light of faith a new model of the unity of the human race, which must ultimately inspire our solidarity. This supreme model of unity, which is a reflection of the intimate life of God, one God in three Persons, is what we Christians mean by the word "communion."[49]

As distinguished from philanthropy, John Paul II explains, solidarity "is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all."[50]

IV. Toward a Theory of Justice Through the Lens of Trinitarian Theology

If, as *Gaudium et Spes* reflects, "Christian revelation contributes greatly to the promotion of this communion between persons, and at the same time leads us to a deeper understanding of the laws of social life which the Creator has written into man's moral and spiritual natures,"[51] how then, might an anthropology grounded in Trinitarian theology illuminate legal categories and interactions? And—a crucial question for any legal system—while the life of the Trinity may be fine as a description of the life of grace, wouldn't it muddle up the analysis to begin drawing connections to legal obligations?

A. The Moral Fabric of the Common Law

As a common law litigator, my eye is often drawn to questions about whether rhetoric resonates with the common moral sense of a judge or jury. In many aspects, I believe that a model informed by Trinitarian theology is actually closer to the heart of the common law than some of the interpretations of freedom and duty that have emerged from liberal theory. For example, Justice Brennan's definition of "neighbor" as "a person who is affected by my act, not by my omission"—simply defies the ordinary use of language. An 1897 case from the state of New Hampshire illustrates this well. Explaining the "broad gulf" between causing and preventing an injury, the Chief Justice explained:

> I see my neighbor's two-year-old baby in dangerous proximity to the machinery of his windmill in the yard, and easily might, but do not, rescue him. I am not liable in damage to the child for his injuries . . . because the child and I are strangers, and I am under no legal duties to protect him.[52]

When the language of the common law moves beyond the reach of ordinary understanding—when the neighbor's baby is no longer a neighbor but a stranger—it is perhaps a signal that the analysis has lost its grounding.[53] Or, as Ernest Weinrib put it in an early article,

> More affirmatively, the role of the common-law judge centrally involves making moral duties into legal ones. The disqualification of moral considerations from the judge's decision would leave him with very sparse resources. [54]

The Reporters for the Second Restatement of Torts described as "revolting to any moral sense" this genre of cases in which "one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown." They predicted that "sooner or later such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule."[55]

As Alexander Smith summarized, the common law's hostility to imposing duties of affirmative action is "a product of an individualistic ideology which is no longer widely supported . . . It would do no great violence to the common law if a duty to rescue were to be imposed in certain cases."[56] Might the theological model of the Trinity as expressed in the anthropology of *Gaudium et Spes* help make the inroads in articulating a more broadly supported framework for a common law duty to rescue?

B. A Thick Description of "Positive" Liberty

Few would seriously contend that a duty to call for help, perhaps as easy as punching 911 into a cell phone, is a real threat to an ordinary understanding of freedom. As philosopher Jeremy Waldron notes, it is hard to see how the "freedom" of David Cash to leave his best friend killing Sherrice Iverson in a bathroom is the kind of freedom we should value. As Waldron observes:

> Even if we grant that a legally enforced duty of easy rescue would be a restriction on people's choices, it is likely to be a restriction only upon a "choice" that is already torn and conflicted between the impulse to help and the aversion to getting involved, a choice whose cheerful autonomy is most likely already drained or polluted by bad conscience.[57]

Further, Waldron reflects, the kind of liberty that libertarian opponents of duty to rescue retain is one "that they themselves hope will be more or less worthless to its possessor, as he turns away from another's need 'into the bleak wilderness of his soul.'"[58]

In contrast, the definition of freedom in *Gaudium et Spes* may be closer to an ordinary citizen's sense of social life and commitments. The Council's definition of freedom certainly includes an aspect of autonomous choice: "man's dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within, not under blind internal impulse nor by mere external pressure."[59] But it is also directed toward the good: "Man achieves such dignity when, emancipating himself from all captivity to passion, he pursues his goal in a spontaneous choice of what is good, and procures for himself through effective and skilful action, apt helps to that end."[60]

This understanding of freedom is further "fortified" in its social dimension:

> [H]uman freedom is often crippled when a man encounters extreme poverty just as it withers when he indulges in too many of life's comforts and imprisons himself in a kind of splendid isolation. Freedom acquires new strength, by contrast, when a man consents to the unavoidable requirements of social life, takes on the manifold demands of human partnership, and commits himself to the service of the human community.[61]

Certainly a theory of justice based on this definition of freedom would require a shift away from the conception of liberty as the absence of coercion toward some notion of positive liberty. But in proposing such a shift, *Gaudium et Spes* is in good company. As Waldron has observed, many of the philosophers "who have thought most deeply about liberty have ended up adopting some version of the positive or moralized view." [62]

C. Beyond Balancing

As Ernest Weinrib has suggested, a case for a legal duty of easy rescue can be justified philosophically by recourse to either of the two dominant traditions of moral philosophy, the utilitarian and deontological.[63] For proponents of utilitarian and consequentialist theories of "the greatest happiness for the greatest number," it is not difficult to see how a duty of easy rescue makes sense. As Jeremy Bentham argued, although "benevolent acts" are not generally the purview of the law, "in cases where the person is in danger, why should it not be the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?"[64] In these cases, the gain in utility through saving a life would certainly outweigh the slight cost to individual autonomy that results from legal compulsion to act.[65]

The deontological argument would start with a different point: that life, and consequently, health and safety, are of distinctive importance. Physical integrity is not merely one end, but a requirement and precondition, the "basic stuff," as Kant would put it, without which one may not realize one's ends, and thus an appropriate subject for mutually restraining duties.[66] As Weinrib summarizes:

> An individual contemplating his actions from a moral point of view must recognize that all others form their project on a substratum of physical integrity. If he claims the freedom to pursue his projects as a moral right, he cannot as a rational and moral agent deny to others the same freedom.[67]

As Weinrib explains, the duty to effect an easy rescue would fit readily within this framework. In response to concerns that such duty could be extended to extremely burdensome limits, Weinrib argues that it could be manageably controlled by the nature of an "emergency"—a situation in which a particular person is endangered in a way that is not "general or routine throughout society."[68]

In an original contribution to the discussion, Professor Leslie Bender eloquently describes how the "drowning stranger" would look from the perspective of a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation:

> In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty.[69]

Further, if one considers that the stranger is a human being, one may realize that "much more is involved than balancing one person's interest in having his life saved and another's interest in not having affirmative duties imposed on him in the absence of some special relationship."[70] "Contextualizing" the drowning stranger as "interconnected" with others, one realizes the "reverberating consequences" of the strangers death must include a "web of relationships and connected people" affected by a failure to act responsibly.[71] From one angle, this analysis seems to latch onto the deontological intuition: what matters is that a human being is drowning.[72] From another angle, for all the concern about "cold, dehumanized algebraic equations,"[73] the central dynamic still seems to be a kind of balancing—perhaps "writ large" and more humanized in its sensitivity to context and "reverberating consequences" in the web of relationships—but a balancing nonetheless.[74]

What might looking at the issue through the lens of Trinitarian theology bring to these proposals? To posit the Trinity as a social model applicable to analysis of legal duties is not so much a matter of warming up the criterion for a more humanized balance, but rather of a completely different framework—or better, a completely different description of reality which then informs descriptions of legal obligations.

As anthropologist Clifford Geertz poetically described, the heart of religious perspective, "of this way of looking at the world," is not so much to posit the theory of "an invisible world beyond the visible; nor the doctrine of a divine presence; nor that there are "things in heaven and earth undreamt of in our philosophies."[75] Rather, according to Geertz, the heart of religious perspective is:

> [T]he conviction that the values one holds are grounded in the inherent structure of reality, that between the way one ought to live and the way things really are there is an unbreakable inner connection. What sacred symbols do for those to whom they are sacred is to formulate an image of the world's construction and a program for human conduct that are mere reflexes of one another.[76]

With the "intimate life of God"[77] as a model for human communion, there is, to paraphrase Geertz, an "unbreakable inner connection" between the life of communion at the heart of the Trinity and the "the way one ought to live."

As John Paul II explained in *Sollicitudo rei socialis*, "awareness of the common fatherhood of God, of the brotherhood of all in Christ—'children in the Son'—and of the presence and life-

giving action of the Holy Spirit will bring to our vision of the world a new criterion for interpreting it."[78] Looking through this lens, or paradigm shift, as Thomas Kuhn might describe it, legal theorists may see "new and different things when looking with familiar instruments in places they have looked before."[79]

What emerges is not so much a list of criteria, or an extra weight on one side of the balance, but a conviction about the "inherent structure of reality" which then informs the definition of legal duties. An anthropology grounded in Trinitarian theology avoids altogether the tensions of "balancing" which run through utilitarian and some aspects of the feminist analysis discussed above. In a model of human relationships based on the inter-personal dynamic at the heart of the Trinity, in which "each one, being Love, *is* completely by *not being*, each one mutually indwelling in an eternal self-giving,"[80] individuality and sociality are not in tension, but in profound harmony.[81] The definition of being, identity itself, is fully discovered in "being Love," in relationships of self-giving openness to others.[82]

Through the lens of Trinitarian theology, the full consequences of the notion that the drowning stranger is "a part of us" come into relief, resolving the central tension between the needs of the victim and the freedom of the rescuer. If "I am myself when I give myself," then the central dynamic is not a question of balancing, because in the life based on the model of the Trinity, openness to another's needs, in this case, the need for emergency assistance, is not an inconvenience, but an opportunity for human fulfillment.[83]

Further, on the flip side, if I walk away from the drowning person, the problem is not only the drastic impact on the "stranger" and his or her "web of relationships," but also for me. To paraphrase John Paul II, if I do not recognize in others the value and grandeur of the human person, I effectively deprive myself of the possibility of entering into a relationship of solidarity and communion with others for which God created me.[84] If I walk away, I deny the essence of who I am and of what it means to be human.[85]

Much of this analysis resonates deeply with the deontological approach. But the lens of Trinitarian theology, I believe, thickens the "rationality" of protecting the physical integrity of others not only because I owe to others the same freedom that I claim, but because the other is "a part of me," and my own fulfillment and happiness hinge on the possibility of "creating a network of multiple relationships of love, justice, and solidarity" with others.[86] If it is through the free gift of self that one finds oneself, then to preserve another's physical integrity is to express the depths of one's own humanity.[87]

D. From "Special Relationships" to Universal Brotherhood

Utilitarian, deontological and feminist critics of the no-duty-to-rescue rule tussle with problem of limiting the duty to rescue to "special relationships." There is something stiff, rigid and sad about a society in which others may be left to die because "mere accidental propinquity" is not enough to establish a relationship of duty.[88]

The anthropology of *Gaudium et Spes*, especially its Trinitarian dimensions, can provide a robust framework for moving beyond "special relationships" in order to articulate universal duties. As

Gaudium et Spes specifies: "Everyone should respect his fellow-man without exception as 'another self' and have due regard for his life and for what he needs to live it worthily . . . Nowadays we have a special obligation to make a neighbor of any man . . . and actively serve him where need is."[89]

The seminal duty to rescue story seems especially set on driving home this point. In the context of a discussion with Jesus about the "love commandments"—"You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself,"[90] the lawyer "wanting to justify himself," queried, "And who is my neighbor"? Jesus' Good Samaritan story reframes the question to drive home his own point—that the crucial question is not so much "who is my neighbor," for that should be obvious, but rather the scope of what it means to be neighbor to others we meet on the road.[91]

As the Council fathers reflected, "God, who is a father to everybody, wants all men to be one family and behave to each other as brothers."[92] In this framework, it is too restrictive to ask, "who is my neighbor," for the family of God is universal. Thus, as John Paul II framed it in *Sollecitudo*, a Trinitarian vision brings one "[b]eyond human and natural bonds," in order to discern "a new model of the unity of the human race, which must ultimately inspire our solidarity."[93]

But are these principles at all useful for a theory of justice and the elaboration of compulsory legal obligations? How could the idea of "universal brotherhood" possibly be translated into workable evenly applicable compulsory standards? Distinctions between duties owed to "strangers" and duties owed to members of one's own family seem to be a bedrock principle for keeping the law within manageable limits, of course leaving room for morality and beneficence to freely permeate other social interactions. It seems that to require that I treat everyone as I treat my family members would result in "moral overload,"[94] bringing the invasive and unwelcome presence of the law into every corner of life. There seems to be something disconcerting about extending the intensity of family relationships and obligations to a broader sphere. As Bender explains, "we all care differently for family and friends than we do for strangers."[95] In fact, she argues, "The closer or more intimate the relationship, the greater our duty of care to that person."[96]

Here it is helpful to remember just how easy the examples are. In cases of "easy rescue" the action required is minimal in every sense of the word—a moment to reach into the pool and pull the baby out; a quick phone call from the safety of one's apartment to alert the police of the attack; a simple shout for help upon emerging from the casino restroom. But to pull a baby out of a pool, to make a quick phone call, or to shout for help does not require caretaking of the type that could result in "moral overload." Such is closer to simple awareness of the existence and dignity of others.[97] The category of "emergency" restricts the action required both in terms of how often one might be called upon to help, and in terms of the kind of help required.[98] Is it too much to ask this kind of awareness for every person who crosses our path, including "strangers?"

John Rawls didn't think so. In his argument for a natural "duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself"[99] Rawls discusses two reasons for the duty. The first, suggested by Kant, is that "situations may arise in

which we will need the help of others, and not to acknowledge this principle is to deprive ourselves of their assistance."[100] But it is fascinating to note that according to Rawls this is neither the only nor the most important argument.

Instead, in what seems to me a potentially rich parallel with the anthropology of *Gaudium et Spes*, and in particular Trinitarian theology, Rawls explained:

> A sufficient ground for adopting this duty is its pervasive effect on the quality of everyday life. The public knowledge that we are living in a society in which we can depend upon others to come to our assistance in difficult circumstances is itself of great value . . . The primary value of the principle is not measured by the help we actually receive but rather by the sense of confidence and trust in other men's good intentions and the knowledge that they are there if we need them . . . Once we try to picture the life of a society in which no one had the slightest desire to act on [this] dut[y], we see that it would express an indifference if not disdain for human beings that would make a sense of our own worth impossible . . . [W]e should note the great importance of publicity effects.[101]

The parallel is even more robust in light of Rawls' description of a "social union" which closely tracks the description in *Gaudium et Spes* of the extent to which human fulfillment is fortified by attention to "requirements of human fellowship" and service to the common good.[102] Rawls writes, "it is through social union founded upon the needs and potentialities of its members that each person can participate in the total sum of the realized natural assets of the others."[103] Further, according to Rawls, social union is indispensable to self- realization: "[P]ersons need one another since it is only in active cooperation with others that one's powers reach fruition. Only in a social union is the individual complete."[104] Only through such union do we "cease to be mere fragments" or "but parts of what we might be."[105]

Rawls' horror at the "indifference if not disdain for human beings that would make a sense of our own worth impossible," and his appreciation for the interdependent needs and potentialities of persons in society is quite far from Hale's description the "rugged, independent individual" who "needs no help from others," the anthropology which grounded the development of the no-duty-to-rescue rule.[106]

Although not in the context of his discussion of the duty of mutual aid, Rawls also recognized the potential for developing the concept of "fraternity" as a category of justice. Acknowledging fraternity's "lesser place" in democratic theory thus far, he reaches for the extent to which it may correspond to a definite requirement of justice.[107] He sees a "natural meaning of fraternity" in what he terms the "difference principle," "namely, not wanting to have greater advantages unless this is to the benefit of others who are less well off." [108] As he explains:

> The family, in its ideal conception and often in practice, is one place where the principle of maximizing the sum of advantages is rejected. Members of a family commonly do not wish to gain

> unless they can do so in ways that further the interests of the rest.[109]

If distribution in society of "advantages"—a much more complex topic—might be illuminated with a comparison to the ideal conception of a family, it does not seem to be a stretch to apply a category of "fraternity" to the issue of "easy" duty to rescue. Although beyond the scope of this essay, it would be interesting to compare the principles of social union and fraternity as set out in Rawls' A THEORY OF JUSTICE with the Trinitarian anthropology undergirding GAUDIUM ET SPES. Such might be an opportunity for both the Church and liberal theorists to discover "hidden treasures" which may help to ground a fuller and more authentically human theory of justice.[110]

Finally, one might query the extent to which a "universal duty" may be too unmanageable for the legal system.[111] As Ames observed in one of the earliest and most powerful cases for an affirmative duty of easy rescue, the difficulty of line-drawing "has continually to be faced in the law."[112] Open-textured "reasonableness" standards are just one example of flexible line-drawing that pervades the common law. Especially over the past century, tort law has developed extraordinary tools to hone in on particular contexts, and to carefully analyze the nature of obligations between citizens even when contact and activities are generally anonymous.[113]

V. Conclusion

This brief analysis highlights just one example of how, as the COMPENDIUM describes, the revelation of God as Trinitarian love sheds light "on every aspect of the personal dignity and freedom of men and women, and on the depths of their social nature."[114] Admittedly, "easy" rescue in an emergency is, in some ways, an easy case. In Richard Epstein's words, it can be decided with "intuitive appreciation of the persistent features of ordinary language."[115]

But the Trinity as a social model would reach far beyond the "easy rescue" example in which by definition the bypasser would take no risks. Broader extensions of the application of Trinitarian theology to a theory of justice would require thorough discussion of how application of the "self-annihilation" at the heart of Trinitarian *kenosis* would not swallow up important protections of personal dignity that the law must assure. Similarly, broader extensions of the duty to rescue beyond the realm of easy rescue in an emergency would also require much more extensive discussion of a workable distinction between beneficence and legal obligations.

As Richard Epstein warned, when a $10 contribution would save the life of a starving child in a war-ravaged county, and the child would surely die without it, why shouldn't the same logic apply?[116] Discussing a similar example of moral obligation and the chain of causal responsibility, *Gaudium et Spes* makes no distinction between acts and omissions: "[H]e who is in extreme need has a right to supply this need from the riches of others. Since so many in the world suffer from hunger, the Council urges men and authorities to remember that saying of the Fathers: 'Feed a man who is dying from hunger—if you have not fed him you have killed him.'"[117]

To probe the depths and the limits of a theory of justice within Trinitarian theology, much more extensive research and discussion would be needed. Thus, perhaps more than drawing a conclusion, this analysis hope to paper hopes to simply point in the direction of Trinitarian

theology as a rich and profound resource for the continuing dialogue to develop a fully human theory of justice.

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[1] *Wagner v. Int'l R.R.*, 133 N.E. 437 (N.Y. 1921).

[2] *See* Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in MICHAEL A. MENLOWE AND ALEXANDER MCCALL SMITH, THE DUTY TO RESCUE: JURISPRUDENCE OF AID 93 (1993) (outlining the history and development of criminal sanctions for failure to rescue in continental criminal law). *See also* Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 451 (2000) (contrasting common law opposition with civil law recognition of a general duty to rescue).

[3] *See, e.g.*, *Handiboe v. McCarthy*, 114 Ga. App. 541, 151 S.E.2d 905 (1966) (no duty to rescue child drowning in pool). As one of the leading US torts commentators summarized the rule: "the expert swimmer who sees another drowning before his eyes is not required to do anything at all about it, but may sit on a rock, smoke his cigarette and watch the man drown . . . [one is not] required to play the part of Florence Nightingale and bind up the wounds of a stranger bleeding to death, or to prevent a neighbor's child from hammering on a dangerous explosive . . . or even to cry a warning to one who is walking into the jaws of a dangerous machine." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 340 (4th ed. 1971). The current version of the "Restatement" (an effort by leading scholars to summarize the general principles in a given area of law and compile illustrative cases) confirms that such is still the general rule. The RESTATEMENT (SECOND) OF TORTS § 314 (1965) reads: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *See also* id. *comment c* ("The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection); id. *comment c, illustration 1* ("A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B."). Note also that a few states have amended their penal codes to include a statutory duty to rescue. *See, e.g.*, VT. STAT. ANN., tit. 12, sec 519 (1973) (Supp. 1989) (general duty to assist another in peril, punishable by $100 fine); MINN. STAT. ANN. 640A.01(1) (1996) (requiring reasonable assistance at the scene of an emergency); R.I. GEN. LAWS 11-56-1 (1994) (same).

[4] Martin Gansberg, *Thirty-Eight who Saw Murder Didn't Call Police*, N.Y. TIMES, March 27, 1964 at 1; Charles Mohr, *Apathy is Puzzle in Queens Killing*, N.Y. TIMES, March 28, 1964, at 21. *See generally* ABRAHAM M. ROSENTHAL, THIRTY-EIGHT WITNESSES (1964).

[5] *See* Nora Zamichow, The Fractured Life of Jeremy Strohmeyer, L.A. TIMES (July 19, 1998) A1. For extensive discussion of the case, see Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 SANTA CLARA L. REV. 1053 (2000).

[6] Zamichow, *supra* note 5.

[7] Zamichow, *supra* note 5.

[8] CNN.com, *America Remembers: Faces of September 11th – Heroes* gives brief sketches of the ordinary people's acts of heroism. http://www.cnn.com/SPECIALS/2002/america.remembers/subsection.heroes.html (last visited February 18, 2005). *See also* JAMES B. STEWART, HEART OF A SOLDIER: A STORY OF LOVE, HEROISM, AND SEPTEMBER 11 (2002) (story of the head of security for Morgan Stanley's offices in the World Trade Center who lead lead hundreds of people to safety but lost his life in the process).

[9] *See* EVERYBODY'S BABY: THE RESCUE OF JESSICA MCCLURE (1989) (Laser Light television drama).

[10] Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. LAW & RELIGION 65, 66 (1987).

[11] Cover, *supra* note 10 at 66. *See also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 133 (1982); MARTHA MINOW, MAKING ALL THE DIFFERENCE 151 (1990). *See generally* MARY ANN GLENDON, RIGHTS TALK (1991).

[12] Michael A. Menlowe, *The Philosophical Foundations of Duty to Rescue*, in MENLOWE & MCCALL SMITH, *supra* note 2 at 12-13.

[13] Menlowe, *Philosophical Foundations*, in *supra* note 12 at 15. *See generally* Waldron, *supra* note 5 at 1071-74 (discussing the distinction between perfect and imperfect duties in duty to rescue analysis); PATRICIA SMITH, LIBERALISM AND AFFIRMATIVE OBLIGATION 1-23 (1998) (overview of positive and negative duty in the liberal tradition).

[14] Menlowe, *Philosophical Foundations*, *supra* note 12 at 10. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198 (1973); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA ix, 33 (1974); Robert L. Hale,

Prima Facie Torts, Combination, and Non-Feasance, 46 COLUM. L. REV. 196, 214 (1946) (discussing objection to affirmative duties: "when a government *requires* a person to act, it is necessarily interfering more seriously with his liberty than when it places limits on his freedom to act—to make a man serve another is to make him a slave, while to forbid him to commit affirmative wrongs is to leave him still essentially a free man); Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUBLIC AFFAIRS 230 (1980).

[15] *See, e.g.*, Menlowe *Philosophical Foundations*, *supra* note 12 at 26; Epstein, *supra* note 14 at 199; Hale, *supra* note 14 at 214 (assumption behind the no-duty-to-rescue rule is that "a rugged, independent individual needs no help from others, save such as they may be disposed to render him out of kindness, or such as he can induce them to render by the ordinary process of bargaining, without having the government step in to make them help."); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PENN. L. REV. 217, 218-220 (1908) ("There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon thought."). *See generally* RESTATEMENT (THIRD) OF TORTS (Tentative Draft no.4) § 37 *No Duty Of Care With Respect To Risks Not Created By Actor*, *comment e* ("Several justifications have been offered for the no-duty-to-rescue rule. The most common relies on the distinction between placing limits on conduct and requiring affirmative conduct. This distinction in turn relies on the liberal tradition of individual freedom and autonomy. Liberalism is wary of laws that regulate conduct that does not infringe on the freedom of others). *But see* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 682 (1994) (arguing it is myopic to generalize common law trends only from the law of trespass and tracing ancient public law duty to prevent criminal violence).

[16] Epstein, *supra* note 14 at 198.

[17] Menlowe, *Philosophical Foundations*, *supra* note 12 at 38.

[18] Menlowe, *Philosophical Foundations*, *supra* note 12 at 38. *See* Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 115-117 (1973).

[19] W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § __ at 373(5th ed. 1984). *See also* Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991, 1001-1002, 1006 (2000) (listing practical reasons why courts do not impose civil liability for failure to rescue); James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982) (supporting the no-duty-to-rescue rule on process rather than substantive grounds); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 938 (1986) (contending that the problem of determining which of multiple potential rescuers should have a duty to rescue is the strongest ground in support of the no-duty rule); William C. Powers, *A Methodological Perspective on the Duty to Act*, 57 TEX. L. REV. 523 (1979) (explaining justifications for general no-duty-to-rescue rule with existing exceptions). *See also* Cadoppi, *supra* note 2 at 115-117 (noting legitimate common-law concern that duty to rescue laws could leave too much discretion for the judge to decide which bystanders are responsible; in contrast, the process of deliberating a civil code generally allows more flexibility in designing consistent penalties and definitions). Other practical considerations such as the extent to which fear of liability may discourage witnesses from coming forward with valuable information about the crime, or that in certain circumstances a rescuer's lack of expertise may cause further harm. *See* Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L. J. 105, 110 (1999) ("Making the legal system into the citizens' adversary, rather than their protector and servant, jeopardizes this relationship and can deprive the legal system of the citizens' assistance."). *See also* RESTATEMENT (THIRD) OF TORTS (Tentative Draft no.4) § 37. *No Duty Of Care With Respect To Risks Not Created By Actor*, *comment e* (justifications for the no-duty-to-rescue rule include concern that there may be many potential rescuers and no basis for choosing one on whom to place a rescue duty and doubts that a duty of easy rescue would have any significant impact on the incidence of such rescues given the effect of non-legal influences to engage in such rescues).

[20] As Lord Macaulay famously worried, without such a clear causal link a surgeon who is the only doctor in India who can perform a lifesaving operation on a man who lives hundreds of miles away might be obliged to travel at great distance and expense to save a suffering stranger. Thomas B. Macaulay, *Notes on the Indian Penal Code* in 7 LORD MACCAULAY'S WORKS 429 (Lady Trevelyn, ed., 1866); Menlowe, *Philosophical Foundations*, *supra* note 12 at 18.

[21] *See* RESTATEMENT (SECOND) OF TORTS § 314A. (1965).

[22] Id. *See* RESTATEMENT (SECOND) OF TORTS § 322 (causing harm or putting the victim in peril); § 324 (taking charge of one in peril and leaving in a worse position). *See also* Alexander McCall Smith, *The Duty to Rescue and the Common Law*, in MENLOWE & MCCALL SMITH, *supra* note 2 at 78.
[23] *Dorset Yacht Company v. Home Office*, AC 1004 at 1027 (1970).
[24] *Donoghue v. Stevenson*, AC 562 at __ (1932) ("You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."). *See also* PROSSER & KEETON, *supra* note __ § 54 at 358-359 and n. 20.
[25] *Sutherland S.C. v. Heyman*, 157 CLR 459 (1985). *See generally* McCall Smith, in MENLOWE & MCCALL SMITH, *supra* note 22 at 76-79.
[26] John Paul II, CENTESIMUS ANNUS ¶ 55 (1991)
[27] Cover, *supra* note 10 at 71.
[28] Pontifical Council for Justice & Peace, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ("COMPENDIUM") ¶ 34 (2004).
[29] GAUDIUM ET SPES ¶ 24. *See also* COMPENDIUM, *supra* note 28 at n.34
[30] GAUDIUM ET SPES ¶ 24. *See also* COMPENDIUM, *supra* note 28 at n.34
[31] COMPENDIUM, *supra* note 28 at ¶ 35.
[32] The Focolare Movement is one of the relatively new ecclesial movements in the Roman Catholic Church. Founded in Italy in 1943, it is now known especially for its work in inter-religious dialogue, and more generally as an effective instrument to build unity between people of different cultures races and social backgrounds. *See generally* http://www.focolare.org. For the most comprehensive history in Italian, *see* ENZO FONDI & MICHELE ZANZUCCHI, UN POPOLO NATO DAL VANGELO: CHIARA LUBICH E I FOCOLARI (2003). In English, thus far the most comprehensive biography of the movement and its founder is JIM GALLAGHER, A WOMAN'S WORK: CHIARA LUBICH (1997). The Interdisciplinary Study Center's bi-monthly journal, NUOVA UMANITÀ often includes essays and analyses on the application of the Trinity as a social model. *See, e.g.*, Symposium: *La Trinità – Esperienza di Dio* [The Trinity: Experience of God], 24 NUOVA UMANITÀ 127-390 (2002), which includes analyses of Lubich's seminal text, *Vita Trinitaria*, 24 NUOVA UMANITÀ 135 (2002). Among the books published by the Focolare's publishing house, Città Nuova, ENRIQUE CAMBÓN, TRINITÀ MODELLO SOCIALE [The Trinity as a Social Model] is an excellent and quite accessible overview. In the same series, KLAUS HEMMERLE, PARTIRE DALL'UNITÀ: LA TRINITÀ COME STILE DI VITA E FORMA DI PENSIERO [Starting From Unity: The Trinity as a Lifestyle and Form of Thought], (1998) is a seminal and profound analysis. To date, the North American publishing house New City Press has translated into English only a small morsel of this scholarship, but it is a good start. *See, e.g.*, AN INTRODUCTION TO THE ABBA SCHOOL: CONVERSATIONS FROM THE FOCOLARE'S INTERDISCIPLINARY STUDY CENTER ("ABBA SCHOOL") (2002); THE ECONOMY OF COMMUNION: TOWARD A MULTI-DIMENSIONAL ECONOMIC CULTURE ("ECONOMY OF COMMUNION") (Luigino Bruni ed., Lorna Gold trans., 2002).
[33] *See* John Paul II, NOVO MILLENNIO INEUNTE ¶ 43 (Jan. 6, 2001) ("A spirituality of communion indicates above all the heart's contemplation of the mystery of the Trinity dwelling in us, and whose light we must also be able to see shining on the face of the brothers and sisters around us. A spirituality of communion also means an ability to think of our brothers and sister in faith within the profound unity of the Mystical Body, and therefore as 'those who are a part of me.'").
[34] The Focolare Movement's Abba School is not alone in developing scholarship on how models of Trinitarian theology might be applied to legal structures. *See, e.g.*, MICHAEL J. HIMES AND KENNETH R. HIMES, OFM, FULLNESS OF FAITH: THE PUBLIC SIGNIFICANCE OF THEOLOGY 59 ("A public theology grounded in the Trinity provides the deepest foundation possible within the Christian tradition for the rejection of the individualistic bias which can distort the ethics of human rights as it is commonly understood."); Kathryn Tanner, *Trinity* in THE BLACKWELL COMPANION TO POLITICAL THEOLOGY 319-332 (2004). The fact that the COMPENDIUM takes the Trinity as its launching point forebodes well for applications of Trinitarian theology to reflection in various disciplines.
[35] CAMBÓN, *supra* note 32 at 30.
[36] Chiara Lubich, *Toward a Theology and Philosophy of Unity* in ABBA SCHOOL, *supra* note 32, at 25.
[37] *Philippians* 2:6-7.
[38] *See* NOVO MILLENNIO, *supra* note 33 ¶ 43 ("A spirituality of communion means . . . knowing how to 'make room' for our brothers and sisters, bearing 'each other's burdens.") (*citing Galatians* 6:2).
[39] *Matthew* 10:39, 16:25.

[40] *Matthew* 27:46.
[41] Lubich, *Toward a Theology and Philosophy of Unity*, ABBA SCHOOL, *supra* note 32 at 33.
[42] *Id*. *See also* Luigino Bruni, *Etica ed economia politica: oltre l'individualismo* [Ethics and Political Economics: Beyond Individualism], 19 NUOVA UMANITÀ 113, 132 (1994) ("The individual is oneself in oneself; the person is oneself in the other. Metaphysically, the individual, in order to be oneself needs only oneself; the other is an external, functional help. The person, in order to be oneself needs (not in a functional sense, but in an existential sense) the other, who opens up one's individuality, and brings it beyond itself, in order to complete itself in the person.") (*quoting* philosopher Giuseppe Maria Zanghì); Mario Gecchele, *L' "altro" indispensabile* [The Indispensable "Other"], 18 NUOVA UMANITÀ 577, 580 (1996) ("[T]o refer to the other is not a limit, but a possibility to escape from the vicious circle of the self (individualism) in order to enter into the richness of the dimension of the *we*.").
[43] Lubich, *Toward a Theology and Philosophy of Unity*, *supra* note 32 at 34. *See* Chiara Lubich, *The Spirituality of Unity and Trinitarian Life*, University of Trnava, Slovakia (June 2003) ("In the light of the Trinity as revealed by Jesus Forsaken, God who is Being reveals himself, we could say, as safe-keeping in his innermost recesses the non-being of self-giving: not the non-being which negates Being, but the non-being which reveals Being as Love. Herein lies the dynamic of the life within the Trinity, which is revealed to us as unconditional reciprocal self-giving, as mutual self-emptying out of love, as total and eternal communion."). *See also* David Schindler, *Introduction, in* ABBA SCHOOL, *supra* note 32 at 8 (2002) (summarizing Lubich's analysis: "The fullness of each person [in the Trinity] coincides with the 'self-emptying' entailed in being *wholly for* the other").
[44] CENTESIMUS ANNUS, *supra* note 28 ¶ 41.
[45] GAUDIUM ET SPES ¶ 27.
[46] SOLLICITUDO REI SOCIALIS ¶ 40 (1987).
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*. at ¶ 38.
[51] GAUDIUM ET SPES, ¶ 23.
[52] *Bush v. Armory Mf'g. Co.*, 69 N.H. 257, __ (1897).
[53] *See generally* GLENDON, *supra* note 11 at 171-83.
[54] Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 263 (1980). *See also* id. at 260, ¶ 48 (noting cases in which judges dismissing claims by victims against callous non-rescuers express moral revulsion). It is interesting to note the extent to which the process legal education may distance students from this important resource. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUCATION 3, 32-33 (1988) (noting students' reactions to the no-duty-to-rescue cases as "reprehensible," and their subsequent absorption of liberalism's concerns for autonomy and liberty which lead them to accept a legal rule that "intuitively had seemed so wrong to them."); GLENDON, *supra* note 11 at 80-81, 85-86 (same).
[55] RESTATMENT (SECOND) OF TORTS § 314 *Duty To Act For Protection Of Others, comment c*. The current Tentative Draft of the RESTATEMENT (THIRD) OF TORTS, however, seems to indicate that no substantial change is on the horizon. *See* Tentative Draft no.4 (September 2004) § 37. *No Duty Of Care With Respect To Risks Not Created By Actor* ("Subject to [exceptions], an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other.").
[56] McCall Smith, *The Duty to Rescue and the Common Law*, *supra* note 22 at 87.
[57] Waldron, *supra* note 5 at 1082.
[58] Waldron, *supra* note 5 at 1083.
[59] GAUDIUM ET SPES ¶ 17.
[60] GAUDIUM ET SPES ¶ 17.
[61] GAUDIUM ET SPES ¶ 31.
[62] *See* Waldron, *supra* note 5 at 1083-84 ("although conceding that [the move to positive liberty] is often regarded as the end of the debate, it is striking how many of those who have thought most deeply about liberty have ended up adopting some version of the positive or moralized view: I mean not just the usual suspects, like Rousseau, Hegel, and T.H. Green, but also St. Paul, John Locke, and (in some moods) even Isaiah Berlin himself. All of these thinkers are disposed, one way or another, to deny that there is a genuine trade-off of liberty in cases where the law prohibits an action that is wicked, depraved, or unjust. (Certainly this is the upshot of the Jewish tradition invoked in the Good Samaritan story.) Those who take this approach need not deny that there is restriction, constraint, even

coercion when penalties are imposed to get people to do things that (they know) they ought to do. What they usually do deny is that there is any liberty- cost, any loss of liberty, in the sense in which liberty is a value").

[63] Weinrib, *supra* note 54 at 272.

[64] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 293 (J. Burns & H. Hart eds., 1970); John Stuart Mill, *On Liberty* (PAGE) (YEAR). *See also* Jeremy Bentham, *Specimen of a Penal Code*, J. Bowring (Ed.) Works v.1 (1943) p. 164 ("Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience."). For one of the earliest utilitarian proposals for a change in the rule, see James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908) ("One who fails to interfere to save another from impending death or great bodiliy harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death.").

[65] Weinrib, *supra* note 54 at 265-66.

[66] Weinrib, *supra* note 54 at 287-88. *See also* id. at 286 (observing the limits of the utilitarian version of duty to rescue: "The person in need of rescue stands in danger of serious physical injury or loss of life, harms not quite comparable by any quantitative measure to other losses of happiness. Health and life are not merely components of the aggregate goods that an individual enjoys. Rather they are constitutive of the individual, who partakes of them in a unique and intimate way; they are the preconditions for the enjoyment of other goods. Moreover, there is something false in viewing an act of rescue as a contribution to the greatest happiness of the greatest number. If there is any obligation to rescue, it is owed to particular persons rather than to the greatest number.").

[67] Weinrib, *supra* note 54 at 288.

[68] Weinrib, *supra* note 54 at 291-92 ("An imminent peril cannot await assistance from the appropriate social institutions. The provision of aid to an emergency victim does not deplete the social resources committed to the alleviation of more routine threats to physical integrity. Moreover, aid in such circumstances presents no unfairness problems in singling out a particular person to receive the aid. Similarly, emergency aid does not unfairly single out one of a class routinely advantaged persons; the rescuer just happens to find himself for a short period in a position, which few if any others share, to render a service to some specific person. In addition, when a rescue can be accomplished without a significant disruption of his own projects, the rescuer's freedom to realize his own ends is not abridged by the duty to preserve the physical security of another."). Note also that Weinrib's current theory of private law has shifted quite a bit since his 1980 Yale analysis. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 10 (1995) ("On the conceptual side, private law embodies a regime of correlative rights and duties that highlights, among other things, the centrality of the causation of harm and of the distinction between misfeasance and nonfeasance. For lawyers working within this system, these institutional and conceptual features are the stable points within which their thinking moves when engaged in the consideration of private law."). *See* Heyman, *supra* note 15 at 676-77 (summarizing and challenging Weinrib's later argument that imposing an affirmative duty to rescue would be inconsistent with the inherently negative structure of private law).

[69] Bender, *supra* note 54 at 34-35.

[70] *Id.* at __.

[71] *Id.* at 34-35 ("If the stranger drowns, many will be harmed. It is not an isolated event with one person's interest balanced against another's. When our legal system trains us to understand the drowning-stranger story as a limited event between two people, both of whom have interests as least equally worth protecting, and when the social ramifications we credit most are the impositions on personal liberty of action, we take a human situation and translate it into a cold, dehumanized algebraic equation. We forget that we are talking about human death or grave physical harms and their reverberating consequences when we equate the consequences with such things as one person's momentary freedom to act.").

[72] Bender *supra* note 54 at 31 (lamenting a system in which cost-benefit and risk-utility analyses "turn losses, whether to property or to persons, into commodities in fungible dollar amounts . . . People are abstracted from their suffering; they are dehumanized."); id. at 31 ("The recognition that we are all interdependent and connected and that we are by nature social beings who must interact with one another should lead us to judge conduct as tortious when it does ot evidence responsible careor concern for another's safety, welfare or health.")

[73] Bender *supra* note 54 at 35.

[74] *See, e.g.*, Bender *supra* note 54 at 31 (tort law should begin with a premise of "a priority of safety rather than profit or efficiency"); id. at 32 ("Just as we can now evaluate behavior as negligent if its utility fails to outweigh its risks of harm, we could evaluate behavior as negligent if its care of concern for another's safety or health fails to outweigh its risks of harm."); id. at 35 ("Why should our autonomy or freedom not to rescue weigh more heavily in law than a stranger's harms and the consequent harms to people with whom she is interconnected?"); id. at 36

(proposing that an "elevated sense of importance be given to physical health and safety; and a "strong legal value" be placed on care and concern for others."). Bender is not alone in expressing her proposal for change in the language of cost-benefit balancing. *See, e.g.*, Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, ["Davis, *Standard of Responsibility*"] 39 WAYNE L. REV. 1217, 1269-70 (1993) (proposing that the cost-benefit formula be amended to include additional consideration of insufficiently valued responsibility to the relationship, as represented by an "R" factor: B < (PL)R).

[75] *See* Clifford Geertz, *The Struggle for the Real in* ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA 97 (1968).

[76] *Id*.

[77] SOLLICITUDO REI SOCIALIS *supra* note 46 at 40.

[78] *Id*.

[79] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111 (2d ed. 1970) ("Led by a new paradigm, scientists adopt new instruments and look in new places. Even more important, during revolutions scientists see new and different things when looking with familiar instruments in places they have looked before. It is rather as if the professional community had been suddenly transported to another planet where familiar objects are seen in a different light and are joined by unfamiliar ones as well.").

[80] Lubich, *Toward a Theology and Philosophy of Unity*, in ABBA SCHOOL *supra* note 32 at 34. *See also* David Schindler, *Introduction, in* ABBA SCHOOL, *supra* note 32 at 8 (summarizing Lubich's analysis: "The fullness of each person [in the Trinity] coincides with the 'self-emptying' entailed in being *wholly for* the other").

[81] *See* Vera Araújo, *Personal and Societal Prerequisites of the Economy of Communion*, in THE ECONOMY OF COMMUNION, *supra* note 32 at 23.

[82] Gerard Rossé, *The Charism of Unity in the Light of the Mystical Experience of Chiara Lubich*, in ABBA SCHOOL, *supra* note 32 at 64 ("In the gift of one to the other, each becomes for the other a source for the fullness of divine life.")

[83] Some have expressed concern that duty-to-rescue provisions could have a negative impact on altruistically motivated behavior. *See, e.g.*, Epstein *supra* note 14 at 200 (to expand the scope of the positive law to include a duty to rescue would "reduce the moral worth of human action" for "no act can be moral unless it is performed free from external compulsion."); Anthony D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U. L. REV. 798, 803 & n.30) (discussing concern that rescue may be no longer motivated by altruism but by the self-interested motive of avoiding criminal sanctions). More generally, some worry that "true altruism" can never exist, for one's seemingly altruistic acts may be rooted not so much in genuine care for the happiness of others, but in the desire for the personal pleasure that results from such gestures. An analysis of altruism based in Trinitarian theology could go a long way in resolving these tensions, for it explains how personal happiness and living for others are inextricably intertwined in the very design of human nature. *See* Chiara Lubich, *The Experience of the Economy of Communion*, in THE ECONOMY OF COMMUNION, *supra* note 32 at 14 ("Since every person is made in the image of God, who is one and three, all people have this model of the Creator within them, expressed in the instinct to enter into a relationship with others.").

[84] CENTESIMUS ANNUS, *supra* note 28 ¶ 41. *See also* Lubich, Trnava, *supra* note 43 ("I myself understood . . . that "I had been created as a gift for the person next to me and the person next to me had been created as a gift for me—just as the Father in the Trinity is everything for the Son and the Son is everything for the Father.")

[85] *Cf.* GAUDIUM ET SPES ¶ 27 (acts iniminal to life and human dignity "defile those who are actively responsible more than those who are the victims").

[86] COMPENDIUM, *supra* note 28 at n.35.

[87] As mined by Linda McClain, John Rawls' concept of "social union" could also be a formidable ally in thickening the "rationality" of protecting the physical integrity of others. *See* Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1210-11 (1992), discussing JOHN RAWLS, A THEORY OF JUSTICE 522-23 (Rev. ed., 1999). *See* discussion *infra* at notes ___.

[88] *See Dorset Yacht Company v. Home Office*, AC 1004 at 1027 (1970) and discussion *supra* at notes ___.

[89] GAUDIUM ET SPES ¶ 27.

[90] Luke 10:27.

[91] Fill in biblical references, plus cite Howard Lesnick, *The Consciousness of Religion and the Consciousness of Law: Some Implications for Dialogue* (NEW CITE).

[92] GAUDIUM ET SPES ¶ 24.

[93] SOLLICITUDO REI SOCIALIS, *supra* note 46 ¶ 40.

[94] PATRICIA SMITH, *supra* note 13 at ___.

[95] Bender, *supra* note 54 at 32. *See* id. at 32 ("Of course we could not possibly have the energy to care about every person as we do our children or lovers.")
[96] Bender, *supra* note 54 at 32.
[97] Bender, *supra* note 54 at 32.
[98] *See* Waldron, *supra* note 5 at ___; Smith *supra* note __ at __.
[99] RAWLS, *supra* note 87 at 98. *See generally* McClain, *supra* note 87 at ___ (discussing Rawls' duty of mutual aid).
[100] RAWLS, *supra* note 87 at 297-98. *See* McClain, *supra* note 87 at 1216. Tracing similar arguments in both Lockean social contract theory and Hegel's THE PHILOSOPHY OF RIGHT, Steven Heyman articulates the foundations for duty to rescue within liberal-communitarian theory. *See* Heyman, *supra* note 15 at 697 ("Through the social contract, each individual agrees to relinquish his power to enforce the laws of nature on his own authority, but at the same time commits himself to assist the state in enforcing the law, insofar as the law directs him to do so. This commitment is made to other individuals who are party to the social contract, and is made for their benefit, to insure that the community will have sufficient power to protect each of its members."); id. at 730-31 (tracing the duty from Hegel's first stage of "abstract right" in which "the universal is separate from and stands above the particular" and "the individual's duty to the state requires a sacrifice of his own particular interests in order to submit to the will of the universal" through the second concrete stage of "morality": "Fulfilling one's duty toward the universal does not inherently require a sacrifice of one's own particular interests . . . in fulfilling that duty one attains the protection of one's rights and the satisfaction of one's material needs. The reason is that the duties that one owes the state are imposed for the benefit of its members, including oneself." Finally, in the synthesis of the ethical life of community, the duty to rescue expresses a relationship not only between the citizen and the state, but also between citizens themselves: When I perform my duty to assist in preventing criminal violence, I gain protection for my own person and property by upholding a legal order that affords me that protection. In performing this duty, however, I obtain protection not only for myself but also for my fellow citizens in general, and for the potential victim in particular. Thus in fulfilling my duty to the state I also fulfill a duty owed to the victim.")
[101] RAWLS, *supra* note 87 at 298. *See also* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (distinguishing between role of law in affecting primary behavior and providing expressions of moral principle; discussing the extent to which the no-duty-to-rescue rule might be understood as condoning a failure to render aid to someone in mortal danger); Frank Michaelman, *Property, Utility and Fairness: comments on the ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-16 (1967) (discussing negative social implications of the "demorlalization costs" of certain rules).
[102] GAUDIUM ET SPES ¶ 31.
[103] RAWLS, *supra* note 87 at 459.
[104] RAWLS, *supra* note 87 at 460, n.4.
[105] RAWLS, *supra* note 87 at 464.
[106] Hale, *supra* note 14 at 214.
[107] RAWLS, *supra* note 87 at 90 ("In comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory. It is thought to be less specifically a political concept, not in itself defining any of the democratic rights but conveying instead certain attitudes of mind and forms of conduct without which we would lose sight of the values expressed by these rights. Or closely related to this, fraternity is held to represent a certain equality of social esteem manifest in various public conventions and in the absence of manners of deference and servility. No doubt fraternity does imply these things, as well as a sense of civil friendship and social solidarity, but so understood it expresses no specific requirement.")
[108] Id. at 90.
[109] Id. at 90.
[110] *See* GAUDIUM ET SPES ¶ 44.
[111] *See e.g* Henderson, *supra* note 19 (supporting the no-duty-to-rescue rule on process rather than substantive grounds).
[112] *See* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908).
[113] For an especially thoughtful discussion, see John C.P. Goldberg & Benjamin Zipursky, *The Moral of McPherson*, 146 U. PENN. L. REV. 1733, 1826 (1998) (denoting a relational concept of duty that distinguishes between "relationality" and "special-relationships"; sensitivity to context avoids the problems associated with a vague and general "duty to the world").
[114] COMPENDIUM, *supra* note 28 at n.34.
[115] Epstein, *supra* note 14 at 151.
[116] Id. at 199.

[117] GAUDIUM ET SPES ¶ 69.