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**AN ECONOMIC RATIONALE FOR THE LEGAL
TREATMENT OF OMISSIONS IN TORT LAW**

by

ALON HAREL and ASSAF JACOB

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**CENTER FOR THE STUDY
OF RATIONALITY**

Feldman Building, Givat-Ram, 91904 Jerusalem, Israel
PHONE: [972]-2-6584135 FAX: [972]-2-6513681
E-MAIL: ratio@math.huji.ac.il
URL: <http://www.ratio.huji.ac.il/>

AN ECONOMIC RATIONALE FOR THE LEGAL TREATMENT OF OMISSIONS IN TORT LAW*

Alon Harel** and Assaf Jacob***

Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one.¹

Abstract

This paper provides an economic justification for the exemption from liability for omissions and for the exceptions to this exemption. It interprets the differential treatment of acts and omissions in tort law as a proxy for a more fundamental distinction between harms caused by multiple injurers each of whom can single-handedly prevent the harm (either by acting or failing to act) and harms caused by a single injurer (either by acting or failing to act).

Since the overall cost to which a group of injurers is exposed is constant, attributing liability to many injurers reduces the part each has to pay and consequently reduces one's incentives to take precautions. The broad exemption from liability for omissions is a way of carving a simple, practical rule to distinguish between the typical cases in which an agent can be easily selected and provided with sufficient incentives (typically, cases of acts) and cases in which there is a serious problem of dilution of liability (typically, cases of omissions).

The exceptions to the rule exempting from responsibility for omissions are also explained in terms of efficiency. The imposition of liability for omissions depends on the ability to identify a salient agent, i.e., to single out one or few legally responsible agents and differentiate their role from that of others. Tort law designs three types of "salience rules." It either creates salience directly (by attributing liability to a single agent), or it can exploit salience created "naturally", or it can induce injurers to create salience voluntarily.

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** The Faculty of law, The Hebrew University, Mt Scopus, Jerusalem, Israel 91905; A member of the Center of Rationality and Interactive Decision Theory; telephone: 972-2- 5882582; email: msalon@mscc.huji.ac.il

*** The Radziner School of Law, The Interdisciplinary Center Herzliya; P.O. Box 167, Herzliya 46150, Israel; telephone: 972-9-9527280, fax: 09-956-8605, email: ajacov@idc.ac.il.

¹ The Federalist Papers no. 15

I Introduction

What is the rationale justifying the differential treatment of acts and omissions in tort law? What can justify the broad exemption from liability for harmful omissions? This article provides an economic justification for the exemption from responsibility for omissions and for the exceptions to this exemption. In particular, this article interprets the differential treatment of acts and omissions in tort law as a proxy for a more fundamental distinction between harms caused by multiple injurers each of whom can single-handedly prevent the harm (either by acting or failing to act) and harms caused by a single injurer (either by acting or failing to act). The former cases – cases in which each agent can single-handedly prevent the harm -- are typically labeled in the literature as “alternative care situations.”

The Federalist Papers expressed the conviction that: “regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one.”² The advocates of economic analysis have long ago detected an analogous phenomenon in tort law. Attributing liability to too many injurers in alternative care situations leads to dilution of liability. Since the overall cost to which a group of injurers is exposed is constant, attributing liability to many injurers reduces the part each has to pay and consequently reduces the injurers’ incentives to take precautions. The broad exemption from liability for omissions is a way of carving a simple, practical rule to distinguish between the typical cases in which an agent can be easily selected and provided with sufficient incentives (typically, cases of acts) and cases in which there is a serious problem of dilution of liability (typically, cases of omissions).

After laying out, in section II and III, the foundations of the economic rationale for the special treatment of omissions, section IV provides an efficiency-based rationale for the numerous exceptions to this rule. Most importantly, it argues that a person is legally responsible for an omission when she can be, ex-ante, singled out, i.e., when her role in bringing about the harm can be clearly and unambiguously differentiated from that of others. The imposition of liability for omissions depends on the ability to identify a salient agent, i.e., to single out one or a few legally responsible agents and differentiate their role from that of others (and thereby avoid the risk of

² See *supra* note 1.

dilution of liability). Section IV differentiates among three types of “salience rules.” Tort law can either create salience directly, or it can exploit salience created “naturally” under the circumstances, or it can induce injurers to create salience voluntarily. Often therefore there is nothing that justifies the attribution of responsibility to one agent rather than to another other than the simple fact that she is distinct and therefore that she can be clearly and unambiguously singled out from others in a salient manner. Finally, section V investigates some objections to our proposal and refines our conclusions in order to address these objections.

II The Legal Differentiation Between Acts and Omissions: In Search for a Rationale

Traditionally, tort law treats acts and omissions differently. Tort law distinguishes sharply between “misfeasance” and “nonfeasance”, i.e., between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect others from harm.³

Some moral philosophers argue that this distinction is based on the moral difference between committing a harmful act, e.g., killing and failing to commit a beneficial act, e.g., letting die.⁴ Utilitarians (as well as economists) are bound to reject this view.⁵ As long as an act, or an omission prevents harm which exceeds the cost of the act or the omission, then utilitarian considerations dictate imposing a duty.⁶

³ See Prosser and Keeton, **On Torts** (5th ed., 1984) sec. 56. See also Dan B. Dobbs, **The law of Torts** (2000) p. 853. Francis Trindade and Peter Cane, **The Law of Torts in Australia**, (2nd ed. 1993) 375.

⁴ The most careful attempt to investigate the moral ramifications of the distinction was done by Frances Kamm, **Morality, Mortality** (vol II) chaps. 1-5 (Oxford University Press, 1996)

⁵ Indeed most utilitarians believe that individuals have a moral duty to act and also that such a duty should be enforced. The utilitarian defense of the duty to rescue provides a good example. Bentham argues that: “[I]n cases where the person is in danger, why should it not be made 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.” See Jeremy Bentham, **The principles of Morals and Legislation** ch. XVII, sec. 1.XIX (1789). Mill states: “There are also many positive acts for the benefit of others which he may rightfully be compelled to perform, such as ... saving a fellow creature’s life or interposing to protect the defenseless against ill usage—things which whenever it is obviously a man’s duty to do he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.” John Stuart Mill, **On Liberty from Prefaces to Liberty; Selected Writings of John Stuart Mill** ed. Bernard Wishy 239, 252 (1959). Last, Sidgwick supports a (moral) duty to rescue on the grounds that: “[T]he moral rule condemning the refusal of aid in such emergencies is obviously conducive to the general happiness.” See Henry Sidgwick, **The Methods of Ethics** 437 (7th ed. 1981). For a good survey of the utilitarian arguments, see Erenest J. Weinrib, The Case for a Duty to Rescue 90 **Yale L. J.** 247, 282-287 (1980).

⁶ See Richard A. Epstein, A Theory of Strict Liability 2 **J. Legal Stud.** 151 (1973); Richard L. Hasen, The Efficient Duty to Rescue 15 **Int’l Rev. L. & Econ.** 141 (1995); E.H. Grush, The inefficiency of the

A simple example provided by Ames in a classical article can illustrate the utilitarian reasoning. While I am walking on a bridge admiring the beauty of the sunrise, I see a person falling off the bridge and screaming for help. I am an excellent swimmer and can save him with no risk. Moreover, on the bridge there is a rope which I can use to save the person with no risk or special effort. Yet, being a person of a refined aesthetic sensitivity, I am reluctant to divert my attention from the beauty of the sunrise to the more earthly enterprise of saving lives.⁷

The cost of prevention are very low (throwing the rope, or even jumping to the water); the harm, in contrast, is very large. Hence, Epstein argues that:

“If one considers the low costs of prevention to B of rescuing A, and the serious, if not deadly harm that A will suffer if B chooses not to rescue him, there is no reason why... the general rules of negligence should not require, under pain of liability, the defendant to come to aid of the plaintiff.”⁸

Epstein’s argument can be extended far beyond this extreme case. From a utilitarian perspective, the duty to rescue should be much broader than that which is required by most moral philosophers, or that which is acceptable in any legal systems. Arguably utilitarianism dictates a duty to rescue even when the costs to the rescuer are marginally smaller than the benefits to the rescued.⁹ Hence, even if jumping to the water would impose a grave risk to my life; utilitarian considerations dictate that I do so if the benefits to the rescued are sufficiently high. Furthermore, a utilitarian perspective founded on these premises would reject the sharp principled distinction

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⁷ See James Barr Ames, Law and Morals 22 *Harv. L. Rev.* 97, 111-13 (1908).

⁸ See Richard A. Epstein, A Theory of Strict Liability, *supra* note 6 at 190.

⁹ See Michael A. Menlowe, The Philosophical Foundations of a Duty to Rescue in **The Duty to Rescue: The Jurisprudence of Aid** 5, 21 (eds. Michael A. Menlowe and Alexander McCall Smith). Indeed some utilitarians argued for a broad (moral) duty of rescue even when it requires extreme personal sacrifice. See W. Godwin, **Enquiry Concerning Political Justice and Its Influence on General Virtue and Happiness** 165, 192, 219, 327 (I. Kramnick ed. 1976). Yet, other utilitarians provided sophisticated arguments to limit the scope of the duty to rescue and duties of beneficence in general. Sidgwick, for instance, believed that “For human nature seems to require the double stimulus of praise and blame from others, in order to the best performance of the duty that it can at present attain: so that the ‘social sanction’ would be less effective if it became purely penal. Indeed, since the pains of remorse and disapprobation are in themselves to be avoided, it is plain that the Utilitarian construction of a Jural morality is essentially self limiting; that is, it prescribes its own avoidance.” See Henry Sidgwick, **The Methods of Ethics**, *supra* note 5 at 493. John Stuart Mill pointed out another problem with an extended duty of beneficence and argued that: “[T]here are two sets of consequences to be considered: the consequences of the assistance and the consequences of relying on the assistance. The former are generally beneficial, but the latter, for the most part injurious... There are few things for which is it more mischievous that people should rely on the habitual aid of others than for the means of

drawn in many legal systems between the duty to save lives and the duty to save property.

Following the utilitarian tradition and yet, at the same time, having great faith in the efficiency of common law, advocates of law and economics provide numerous and sophisticated explanations why enforcing a legal duty to rescue is nevertheless inefficient. Most of those explanations are limited to specific circumstances, or rely on speculative premises.¹⁰ This paper, however, does not discuss these explanations;

subsistence, and unhappily there is no lesson which they more easily learn.” See: John Stuart Mill, **The Principles of Political Economy** 967 (W. Ashley ed. 1923).

¹⁰ One needs as fertile a mind as that of Richard Posner and William Landes to reconcile efficiency with the common law principle which rejects the duty to rescue. See William Landes & Richard Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 **J. Legal Stud.** 83, 101 (1978). Landes and Posner provide several arguments why imposing a duty to rescue is not necessarily efficient. Under their first argument, the duty to rescue is not necessarily justified because often the transaction costs between the rescuer and the rescued are relatively small. If a boat in a harbor facing a risk which is not imminent and a second boat can rescue it, the owners of the two boats can negotiate a rescue operation which will be efficient. Yet, this argument applies to a narrow range of cases -- ones which are typically not the ones covered by the statutes dictating a duty to rescue. Typically, these statutes apply to cases where the risk is immediate; so immediate that negotiations cannot be fruitfully conducted.

Landes and Posner provide an alternative explanation. In their view, if the costs of rescue are small and the benefits to the rescued are high, there will be sufficient incentives to rescue. Hence, imposing such a duty might be redundant. The incentives will typically include the feeling of gratitude of the rescued which are psychologically beneficial to the rescuer. Yet, if sufficient incentives already exist, then the costs of administering the law are negligible. If, on the other hand, the costs of administering the law are not negligible, it follows that in some cases people do not have sufficient incentives and the law can provide these incentives. Hence, Landes and Posner provide an interesting counterargument and claim that imposing a duty to rescue may weaken the incentives to rescue since a person who rescues would not be recognized as a hero, but merely as one who fulfilled his duty. This explanation is based on a dubious psychological conjecture. It is difficult to know what the effects of imposing a duty of rescue has on the attitudes towards rescue and it is particularly difficult to establish that the behavioral effects of the legal incentives would be outweighed by the psychological ones.

Jewish sources seem to disagree with Posner and Landes conjecture. The Talmud tells us about Rabbi Ulla who was asked: “To what extent does one have to honor his parents?”. Ulla answered by telling a story about a Gentile, who missed a great business opportunity because he didn’t want to take a key, which was under his father’s pillow. His reward for honoring his parents – a red cow – was immensely valuable at the time. The Sage learned from this story that if a Gentile, who is not commanded to honor his parents, was rewarded so profoundly, a Jew, who is commanded, would be rewarded even more. He bases this conclusion on a statement by Rabbi Hanina, who said: “He who is commanded and fulfils [the command], is greater than he who fulfils it though not commanded”. The Tosfoth, one of the important commentaries of the Talmud explains the rationale of this surprising claim. It argues that one who is commanded is anxious to obey the command. Someone who is not commanded obeys because of his own will to do so and consequently should not be rewarded in the same way. The Ritba (another influential commentary) provides an analogous interpretation. The reason in his view is that: “it is the devil which argues when he is commanded, and the devil does not argue when he is not commanded.” A natural understanding of the reference to the devil is the evil residing in every individual – evil which tempts a person to resist what he is commanded to do. One’s reward is larger because of the greater effort needed to resist the temptation to disobey. Last, Rabbi Elbo explains this Talmudic statement as follows: “And on this it was said he who is commanded and fulfills [the command] is greater than he who fulfills though not commanded since the man who is commanded and fulfills...performs two things. The one that he does the good deed or the honest deed, and the second that it is meant to do the will of his father in Heaven, and he who is not commanded and fulfills merely because it is the right deed and nothing else.” See Rabbi Elbo, *Sefer Ha’ikarim* Article

instead it provides an alternative efficiency-based explanation of the treatment of omissions which is broader and more general than traditional economic explanations. Moreover, in contrast to the traditional economic justifications, this paper investigates in detail the numerous exceptions to the general principle exempting from liability for omissions and provides an economic rationale for these exceptions. Last and most importantly, we show that the legal treatment of omissions should be regarded as an instance of a much broader phenomenon in tort law, namely the treatment of multiple injurers in alternative care situations.

After expressing their moral revolt at the absence of an affirmative duty to rescue, Prosser and Keeton point out a reason which explains the differential treatment of acts and omissions in tort law. In their view: the reason for the differential treatment is perhaps the difficulty in: “making any workable rule to cover possible situations where fifty people might fail to rescue one”.¹¹

The concern with the problem of multiple potential tortfeasors is often raised by scholars investigating the justifiability of punishing, or imposing liability for omissions. Some of these writers point out the doctrinal complications resulting from the multiplicity of tortfeasors while others emphasize fairness concerns. Arguably, if there are three non-rescuers A, B and C, it is unclear whether it is A, B or C who “caused” the harm.¹² Others pointed out the difficulties in developing doctrinal tools

III chapter 28. Elbo’s interpretation suggests perhaps that the Talmudic observation refers to divine commands and human commands should be treated differently. While obedience to divine commands is intrinsically valuable, there is no intrinsic value in obeying human commands.

Landes and Posner also argue that imposing a duty to rescue may deter people from participating in activities which may put them in a position in which the law could apply to them. Thus, if I know that I have a duty to rescue the drowning person, I may stay at home and watch the sunrise on television rather than search for it in nature. This may even worsen ex-ante the position of the drowning person given that the potential rescuers stay at home rather hike in the mountains. This argument is more compelling than the first two, but it still suffers from a major flaw. Typically the duty to rescue applies to cases in which the costs of rescue are minimal and their deterring effects are therefore inevitably limited. Nobody proposes seriously to expand the duty to rescue to cases in which the rescue imposes great costs on the rescuer.

Richard Hasen provided another compelling argument against Landes-Posner analysis. See Richard L. Hasen, *The Efficient Duty to Rescue*, *supra* note 6. Hasen attacks the presupposition that a person is either a victim or a rescuer and demonstrates that if this assumption is dropped and every individual has a significant probability of being either a victim, or a rescuer, both Pareto-efficiency and Kaldor-Hicks efficiency dictate the imposition of a duty of rescue.

¹¹ See Prosser and Keeton **On Torts**, *supra* note 3 at 376.

¹² Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose Duty to Help Endangered Persons or Abused Children* 40 **Santa Clara L. Rev.** 991, 1001 (2000); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations* 72 **Va. L. Rev.** 879 934 (1986); Alexander McCall Smith, *The Duty to Rescue and the Common Law in The Duty to Rescue: The Jurisprudence of Aid* 55, 57 (1993).

to apportion the resulting liability among the different potential tortfeasors.¹³ Last, some scholars question whether it is fair to attribute liability to one agent among many potential tortfeasors all of whom are similarly situated.¹⁴ Lord Hoffman succinctly summarized both the doctrinal and the moral considerations:

[D]ifficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might rescue one. A moral version of this point may be called ‘why pick on me?’ argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happens to be able to do something. Why should one be held liable rather than another?¹⁵

Yet, most of the writers raise this concern only in order to eventually dismiss it. Weinrib points out that even if there are many possible rescuers, the difficulties are not more surmountable than are those in cases of negligence involving multiple tortfeasors who committed actions rather than omissions.¹⁶ Woosley argued that “[T]he idea that it is not fair to one person if he is caught and punished for breaking the law where others who also broke it were not caught, **either** when they could have been caught **or** when they could not have been caught, rests on a very queer idea of fairness.”¹⁷ Both criminal and tort law develop mechanisms to address the problem of multiple agents in alternative care situations and there seems to be no reason why these mechanisms could not be extended to the case of the duty to act in general, or to the duty of rescue in particular.¹⁸

While these arguments address successfully the doctrinal complexities as well as the fairness concerns, they fail to address the efficiency concerns generated by the co-existence of multiple potential tortfeasors in alternative care situations. The case of multiple injurers in alternative care situations raises a difficult challenge for tort law – a challenge which is not merely doctrinal or moral. The attribution of liability to too many injurers each of whom could have prevented the harms single-handedly typically leads to “dilution of liability.” Since the overall cost to which a group of

¹³ Franklin & Ploeger, Of Rescue and Report: Should Tort Law Impose Duty to Help Endangered Persons or Abused Children, *ibid* at 1001; Weinrib, The Case for a Duty to Rescue, *supra* note 5 at 262.

¹⁴ See, e.g., A.D. Woosley, A Duty to Rescue: Some Thoughts on Criminal Liability 69 **Va L. Rev.** 1273, 1290-91 (1983); Weinrib, The Case for a Duty to Rescue, *ibid* at 262; Charles Fried, Right and Wrong-Preliminary Considerations 5 **J. Legal Stud.** 165, 181-82 (1976).

¹⁵ **Stovin v. Wise**, 1996 C.A. 923, 941.

¹⁶ Weinrib, The Case for a Duty to Rescue, *supra* note 5 at 262.

¹⁷ Woosley, A Duty to Rescue: Some Thoughts on Criminal Liability, *supra* note 14 at 1291.

¹⁸ See Liam Murphy, Beneficence, Law and Liberty: The Case of Required Rescue 89 **Georgetown L.J.** 605, 620-621, 623 (2001).

injurers in alternative care situations is exposed is constant, increasing the number of legally responsible tortfeasors reduces the compensation paid by each and consequently reduces the incentives of each to take precautions. Assigning legal responsibility to too many injurers in alternative care situations leads therefore to dilution of liability; the attribution of liability fails to provide sufficient incentives for each injurer to invest in precautions. At other times, the attribution of liability to multiple injurers leads to excessive investment in precautions when several agents each of whom would be sufficient to prevent the harm alone invests in precautionary measures for the fear he will have to carry the final burden of the loss.¹⁹ This is a typical case of a coordination problem and it can be resolved only by designing mechanisms which guarantee that one among the many agents becomes somehow conspicuous to the people involved,²⁰ owing to some specific feature it possesses and hence, in the language of game-theory, becomes “salient”.²¹

Arguably, this argument is vulnerable to two main objections: the doctrinal coherence objection and an efficiency-based objection. The doctrinal coherence objection is based on the fact that tort law has already established mechanisms to deal with multiple tortfeasors in alternative care situations who commit negligent actions. Given that tort law often imposes joint liability on multiple tortfeasors who commit

¹⁹ This analysis suggests that the problem raised by the co-existence of too many tortfeasors is premised on the fact that potential tortfeasors act in order to maximize their own utility. Yet, the same problem arises if potential tortfeasors idolize Bentham and act solely in order to maximize aggregate utility. In this case, each agent may reason that her participation is simply not necessary given the large number of other potential agents.

This argument could even be applied to the cases in which individuals are altruists. Leo Katz, for instance, argues that: “We are all altruists. We all derive pleasure from seeing the poor helped. But we also realize that we can enjoy that pleasure without actually contributing ourselves. As a result, however, we end up worse than if nobody had shirked his responsibility in the first place.” See: L. Katz **Bad Acts and Guilty Minds - Conundrums of the Criminal Law** (Chicago, 1987) 151-152

²⁰ And indeed in the field of social psychology many articles investigate the analogous phenomenon of diffusion of liability. Empirical studies show that the greater the number of people present in a situation in which help is required, the less likely it is that any one person will provide it. See: Robert S. Feldman, **Social Psychology** (3rd ed. 2001, N.J., Prentice Hall) 23-24, 267; Marilyn B. Brewer & William D. Crano, **Social Psychology** (2001) 282-286. The first to explore and to investigate the phenomena were Darley and Latane’ see: J.M. Darley & B. Latane’, Bystanders intervention in emergencies: Diffusion of responsibility 8 **J. of Personality and Social Psychology** 377 (1968); B. Latane’ & J.M. Darley, Group inhibition of bystander intervention 10 **J. of Personality and Social Psychology** 215(1968).

If each agent reasons in this way, no agent would prevent the harm even if all agents are solely concerned to maximize social utility.

²¹ For a discussion of salience, see Edna Ullmann-Margalit, **The Emergence of Norms** (Oxford University Press, 1977) pp. 83-84

negligent acts, why should it not impose joint liability on multiple tortfeasors who commit negligent omissions.²²

Despite its popularity, the doctrinal coherence objection is flawed for two reasons. First, it is often the case that multiple tortfeasors who commit negligent acts in alternative care situations are exempted from liability. Second, liability for omissions is often imposed when a specific agent can be identified in advance and thereby becomes conspicuous.

There are numerous doctrines in tort law which serve to exculpate multiple tortfeasors in alternative care situations who commit negligent acts. There are at least two main doctrines which can serve to limit liability in a way which overcome the risk of dilution of liability. First, the number of tortfeasors can be limited by narrowly defining the duty of care. By applying a narrow definition, the injurers (except perhaps one who was singled out in advance) will be deemed not liable for negligence, even though they acted unreasonably.²³ Second, the number of tortfeasors can be limited by using the doctrine of “legal causation.”²⁴ A ‘lenient’ doctrine of causation would dictate that each tortfeasor’s act is causally related to the harm. Consequently, there would be too many tortfeasors; none of whom has sufficient incentives to prevent the harm. In contrast, a ‘restrictive’ test of causation would ideally attribute liability only to one or a few of the tortfeasors and consequently would provide those who “cause” the harm sufficient incentives to prevent the harm.²⁵ Doctrines such as causation, proximity or foreseeability are often used to exempt some tortfeasors from liability for actions²⁶ because tort law is reluctant to attribute liability to too many tortfeasors.²⁷

²² See, e.g., Weinrib, *The Case for a Duty to Rescue*, *supra* note 5 .

²³ See Winfield & Jolowicz, **On Tort** 90 (Sweet & Maxwell, 5th ed. by W.V.H. Rogers, 1998).

²⁴ Winfield & Jolowicz, **On Tort**, *ibid* at 207 et seq.

²⁵ *Id. id.*

²⁶ See Dan B. Dobbs, **The law of Torts**, *supra* note 3 at 443 et seq.; Prosser and Keeton, **On Torts**, *supra* note 3 at 263 et seq.; Richard A. Epstein, **Torts** 258 (Aspen Law and business, 1999) et seq.;

²⁷ An example of a doctrine which serves to exculpate in cases of alternative care situations is the doctrine of *Novus Actus Interveniens*. If A negligently left her window open and B stole the pistol and killed somebody, A typically would be exempt from liability because of the action of B. The exemption can be rationalized as an effort to prevent the risk of dilution of liability. Another example in which tort law exempts actors from liability is the case of pure economic losses. The term pure economic loss has many definitions with different levels of abstraction. However it seems most scholars would agree to the following general definition: a pure economic loss is financial loss other than payment of money to compensate for physical injury to person or physical damage to property. See Robby Bernstein, **Economic Loss** 2 (2nd ed, Sweet & Maxwell, 1998). For more refined definitions see *id.* Often the common law denies recovery to plaintiffs for pure economic losses. See for example Epstein, **Torts**, *ibid* at 606 where he states the following: “The general legal position today denies recovery to P for

While legal doctrine often exculpates actors in cases of alternative care, it often imposes liability for omissions under certain circumstances. The attribution of joint liability to tortfeasors who commit omissions can often be explained as resting on specific circumstances which overcome the risk of dilution of liability and, in our view, is thus analogous to the treatment of acts. Thus, often tort law attributes responsibility for omissions to people who hold certain positions, or have certain relationship with the victims. Section 314a to the Restatement provides that a duty to aid or to protect against an unreasonable risk of physical harm arises in cases of a common carrier and its passengers; An innkeeper and his guests; A possessor of land and its invitees and numerous other cases.²⁸ By narrowly defining the identity of the responsible agents, tort law prevents the risk of dilution of liability. It seems therefore that a more thorough examination of legal doctrine demonstrates that the differences between the doctrinal treatment of acts and omissions are not as dramatic as implied by the advocates of the doctrinal coherence objection.

The efficiency-based argument is based on the view that economic analysis includes already a principle which overcomes the risk of dilution of liability and selects among the numerous potential tortfeasors a single one, namely the principle of the cheapest cost avoider.²⁹ Unfortunately, this objection is subject to two primary objections. First, there are cases in which there are numerous “cheapest cost avoiders”. The principle of the cheapest cost avoider fails therefore to single out a

pure economic loss as a result of D’s Negligence”. Numerous explanations have been provided to the reluctance to impose liability for economic losses.

Some have argued that economic loss is too arbitrary and difficult to implement and administer. Epstein believes that: “The reluctance to extend... compensation to economic losses rests, broadly speaking, on the fear that countless plaintiffs will clog the system with expensive lawsuits of dubious merit.” Epstein *Id*, at 606. Another explanation is based on the fear that economic loss leads to over deterrence. Economic loss often involves a chain reaction of injurers and victims. If A negligently harms B who in turns harms C who later inflicts harm on D, attributing responsibility to A for all resulting harms may lead to over deterrence. As was noted in the literature this argument is not persuasive. If indeed A caused these harms, why should attributing liability to her lead to over deterrence? Epstein provides an answer by pointing out the administrative costs involved in attributing liability for economic loss. When losses are large and concentrated their recovery should be allowed but granting relief for parties who are indirectly affected widely increases administrative costs of the tort system. Epstein *Id*, at 606-610.

Dilution of liability could provide a plausible explanation for the reluctance to attribute liability for economic loss. The more remote the harm is the more people can be found liable. In the case in which A harms B who, in turn, harms C who inflicts harms on D, the harms to D could have been prevented by either A, B or C. Imposing a duty upon all of them inevitably leads to dilution of liability. The case of economic loss is an example in which the legal system differentiates between harms (typically) committed by multiple injurers (e.g., economic loss) and harms committed by a single injurer.

²⁸ Restatement of the Law, Second, Torts, § 314.

²⁹ See Murphy, Beneficence, Law and Liberty: The Case of Required Rescue, *supra* note 18 at 621.

single agent to whom liability should be attributed. Second, even if there is a single “real” cheapest cost avoider, it is not always clear to the potential tortfeasors who the cheapest cost avoider is. If there is an uncertainty as to the identity of the cheapest cost avoider, responsibility could be diluted even if, as a matter of fact, a single agent can be identified (ex-post) as the cheapest cost avoider. It seems therefore that while, other things being equal, it is better to select among the potential tortfeasors the cheapest cost avoider; it is often the case that selecting a less ideally situated agent is necessary to assure the provision of sufficient incentives. At other times, the fact that an agent is the cheapest cost avoider is what makes her salient and serves therefore to differentiate that agent from others, so that the principle of the cheapest cost avoider and considerations of salience operate in tandem.

In our view, the broad exemption from liability for omissions is a way of carving a simple practical rule which distinguishes between cases in which an agent can easily be selected and being provided with sufficient incentives (typically in cases of acts) and cases in which there is a serious problem of dilution of liability (typically in cases of omissions). While actions leading to harm are typically committed by one or a small group of people, omissions are typically committed by a large group of individuals; none of whom has distinct attributes which differentiate between her and others. Hence, the problem of dilution of liability emerges much more frequently in the case of omissions than in the case of actions. It is the fear of dilution of liability which provides an economic rationale for the reluctance to attribute responsibility for omissions.³⁰ This finding has numerous ramifications.³¹

³⁰ An indirect support for this hypothesis can be found in the example used by Sir James Fitzjames Stephen to illustrate the treatment of omissions in criminal law. Stephen argues that:

“**A number of people** who stand round a shallow pool in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the water, are no doubt shameful cowards, but they can hardly be said to have killed the child.” (Emphasis ours) See J F Stephen, **History of Criminal Law** (1883) vol. III p. 10. Stephen uses an example which involves multiple potential rescuers although the principle could be demonstrated by using an example involving only one person.

³¹ Let us mention only two significant ones. First, it suggests that the treatment of omissions in tort law can usefully be analogized to the treatment of actions involving multiple agents in alternative care situations. See Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, *supra* note 12 at 938. The doctrinal tools used to narrow liability in the case of omissions have doctrinal equivalents in the context of actions involving multiple tortfeasors. Yet, unlike the case of omissions, the exemption from liability in the case of actions with multiple tortfeasors in alternative care situations is often done in a more conscious and deliberate manner since exempting from liability for an action is regarded as an exception to the principle which attributes responsibility for harmful actions. Hence, an investigation of the legal treatment of harmful actions in alternative care situations can shed light on the legal treatment of omissions.

Second, it suggests that the exceptions to the rule exempting individuals from liability for omissions should be explained as cases which somehow overcome the risk of dilution of liability. While, in principle, the problem of dilution of liability is particularly serious in cases of omissions,

In their persistent attempts to explain the rationale for the numerous exceptions to the broad principle exempting from liability for omissions, legal theorists were looking the wrong way. More specifically, legal theorists were drawn to rationalize these rules as resting upon specific features of an agent – features which arguably explain why sometimes a particular agent is the **most suitable** agent to whom responsibility should be attributed either because (in contrast to other agents) the agent is morally more deserving than other agents,³² or because she is the cheapest cost avoider.³³ In contrast, our analysis demonstrates that the pursuit for specific features of an agent which makes her the most suitable agent is often futile. Often there is nothing that justifies the attribution of responsibility to one agent rather than to another other than the plain fact that she is distinct and therefore that she can be clearly and unambiguously singled out from others in a salient manner.

III *The General Rule of (No) Liability for Omissions*

100 people are present while a car is burning. Each of them can use a fire extinguisher to extinguish the fire. The cost for the person who uses the extinguisher is 10 and the expected damage (if the extinguisher is not used) is 900.

This example is a paradigmatic example of an alternative care situation. Arguably, in such a case society should encourage one person to make an investment of 10.³⁴ Why, then, does the law not require an active interference on the part of the bystanders? Why does the law exempt each one of the spectators from liability and thus arguably fails to provide them an incentive to prevent the harm?

there are types of omissions in which the problem can be overcome. A doctrinal examination of tort law demonstrates that tort law carves exceptions to the general exemption from – exceptions will be analyzed in section IV.

³² A good example is the libertarian analysis of the Good Samaritan cases provided by Epstein. While Epstein believes that a person has no duty to act, in cases in which a person creates a risk (even innocently) and fails to prevent its realization, she should be liable because she created the risk in the first place. See Epstein, *A Theory of Strict Liability*, *supra* note 6 at 191-192. For the same reason, Epstein believes that when a person helps somebody and causes risk, she cannot discontinue her efforts. See Epstein, *ibid* at 194-195.

³³ See in general Guido Calabresi, *The Costs of Accidents* (1970); G. Calabresi and J. T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *Yale L. J.* 1055 (1972).

³⁴ If there is more than one, there would be an excessive investment which should be discouraged.

In order to demonstrate the economic rationale for this rule, assume that all 100 spectators are jointly liable since the damage is indivisible.³⁵ In the absence of specific data showing a greater degree of fault of the part of one of the spectators, the cost each spectator would bear if the damage occurs is 9. Since the cost of preventing the damage for each spectator is 10, no one would attempt to extinguish the fire. Thus, the imposition of liability is unlikely to provide sufficient incentives to intervene.

Assume that a single person among the 100 is in fact the cheapest cost avoider because, for instance, she is stronger than the other spectators and therefore can more easily operate the fire extinguisher. Yet, this fact is unknown to any of the potential rescuers and consequently it cannot resolve the deadlock. The ex-post imposition of liability on the cheapest cost avoider cannot provide her with sufficient incentives to intervene. Dilution of liability in this case is the byproduct of the difficulty in identifying who the cheapest cost avoider is.

Last, it is possible that there is a single cheapest cost avoider and that the cheapest cost avoider knows that she is the cheapest cost avoider and so do other potential tortfeasors. Yet, the injured may find it too difficult to prove ex-post who the cheapest cost avoider is, or she may find it preferable to sue a group of tortfeasors rather than a single tortfeasor. The injured has typically an interest ex-post that the court imposes liability on a group of individuals rather than on a single individual. The cheapest cost avoider knows therefore that ex-post her special status would not be acknowledged by the court. Dilution of liability in this case is the byproduct of the difficulty in identifying ex-post (in court) who the cheapest cost avoider is.

However, if a more restrictive test was used, -- one which picked among the participants one or a few bystanders and impose liability on them alone, the fire would have been extinguished. Selecting on the basis of simple criteria (even if arbitrary) a single individual, making him salient, would have provided incentives for that person to act. This would overcome the risk of dilution of liability as well as the opposite risk, namely the risk that few spectators would intervene and consequently that the costs of interference would be higher than necessary.

Before we examine the rationale for the numerous exceptions to the rule, namely cases in which liability is attributed for omissions, let us first briefly contrast

³⁵ The main feature of indivisible harm is that there is only one unit of damage and it is impossible to attribute any part of it to any specific agent among the various tortfeasors. See for example Margaret Brazier and John Murphy, **Street on Torts** 595 (Butterworths, 10^{ed}, 1999).

the case of the fire extinguisher with analogous cases involving actions (rather than omissions).

Assume that a 100 people holding torches burn a car (rather than fail to extinguish an existing fire.) It seems that all participants would, under current principles of tort law, be found liable. What arguably can explain the difference between the two cases is the fact that the first involves an omission (failing to use a fire extinguisher) while the second involves an act (using the torch). Yet, this alleged explanation is too hasty and ignores a fundamental difference between the two cases. The latter example is not an alternative care situation. Each one of the individuals holding the torch would be sufficient to cause harm to the car. The analogous case would be one in which a hundred people emit a spark and it is the accumulation of the hundred sparks which causes fire. This is a real alternative care situation involving actions. Yet, it is also a far-fetched example, which demonstrates that while cases of alternative care situations involving omissions are ubiquitous, cases of alternative care situations involving actions are rare. The broad exemption of liability for omissions is therefore indicative of the fact that omissions are typically cases of alternative care situations while actions typically do not fall into this category.³⁶

Section IV examines in detail the exceptions to the rule exempting agents for responsibility for omissions and demonstrates how the legal system sometimes overcomes the risk of dilution of liability by creating salience, or by exploiting “natural salience”, or last by inducing self-generated salience.

IV Attribution of Liability for Omissions: The Case of Salience Rules

There are many ways to classify the exceptions to the rule exempting from liability for omissions. We suggest to regard all the exceptions to the rule as mechanisms for creating salience and distinguish among them in accordance with the way salience is originated. There are three types of rules which can create salience: salience-creating rules, rules which exploit “natural salience”, and rules which induce self-generated salience.

³⁶ Of course we do not deny that there are realistic cases of alternative care situations involving actions. A realistic case would be one in which several factories pollute the water; yet it is only the accumulation of the pollution of all factories, which cause significant damage to the water. These cases might justify exculpating the injurers in order to prevent the risk of dilution of liability.

First, salience-creating rules select among the multiple injurers an agent and imposes liability on her. Such a selection serves to single out one injurer, attribute liability to her and thus prevent the risk of dilution of liability.³⁷

Second, tort law sometimes relies on salience which “naturally” exists under the circumstances -- circumstances in which individuals are most likely to be the only agents who are capable of preventing the harm. If there are very few potential rescuers, tort law can be more demanding and impose more extensive duties without leading to dilution of liability.

Third, tort law can induce self-generated salience, or voluntaristic salience, i.e., salience which is generated by an agreement between the potential tortfeasors. The third category applies in circumstances in which potential tortfeasors can overcome the risk of dilution of liability by transacting among themselves and allocate ex-ante the expected costs of an accident. The imposition of liability on multiple tortfeasors serves therefore to induce the tortfeasors to allocate among themselves the costs. The doctrinal exceptions to the general exemption of liability for omissions can therefore typically be rationalized a way of overcoming the risk of dilution of liability.

A. Salience-Creating Rules

Salience-Creating rules are rules which single one individual among many and mark her as liable for the damage resulting from the omission. Often what is distinctive about a person is simply her potential salience, namely the ability to single her out among the potential injurers and attribute liability to her. While great efforts are made by moral theorists and economists to identify non-arbitrarily features which provide special reasons to single out a person and attribute responsibility to her, our model abandons these heroic efforts and suggests instead that arbitrariness in

³⁷ Prosser and Keeton identified in their treatise on tort law a continuous process of carving exceptions to the general principle exempting from liability for omissions. They primarily referred to the continuous process of adding salience-creating rules. In their view: “[T]here is reason to think that ... [this process] continue until it approaches a general holding that the mere knowledge of serious peril threatening death or great bodily harm to another, which an **identified** defendant might avoid with little inconvenience, creates a sufficient relation to impose a duty of action.” (Emphasis added). See Prosser and Keeton **On Torts**, *supra* note 3 at 377. Levmore also believes that: “The presence of a single nonrescuer is at present a necessary but not a sufficient condition for liability; it is the growing number of special relationships that indicates an increasing likelihood of liability on the single nonrescuer.” See Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, *supra* note 12 at 936.

attributing responsibility may be justified on efficiency-based grounds. The person to whom liability is attributed need not necessarily be the person who is at fault, or the person who is the cheapest cost avoider. She may simply be the person who can be most easily singled out among the numerous potential tortfeasors.

1. Singling Out Responsible Agents On the Basis of special Professions or Relations

While the law exempts bystanders from responsibility for omissions, it does not recognize such an exemption when simple and easily applied criteria can be developed to single out one, or a selected group of tortfeasors. The Restatement (second) on torts recognizes several categories of personal relationship that impose upon the tortfeasor a duty of care – a duty which includes an affirmative duty to act and rescue another.³⁸ Section 314a provides that a duty to aid or to protect against an unreasonable risk of physical harm, arises in cases of a common carrier and its passengers; An innkeeper and his guests; A possessor of land and its invitees. Section 314a also imposes a duty upon the one who is required by law to take, or who voluntarily takes, the custody of another under circumstances such as to deprive the other of his normal opportunities for protection. Similar duties are imposed by section 314b, which deals with an employer (master) and a servant (employee). Section 314a ends with a caveat in which the Institute expresses no opinion as to whether there may not be other relationships, which impose a similar duty. However, other scholars have pointed out that these cases are only examples and that there are other duties not specified explicitly in this section. Thus, for example, a parent- minor relationship would impose the same, or even more extensive duties.³⁹

A recent Israeli case can illustrate the complexity of the considerations involved in creating salience. While waiting for a bus in the Egged central bus station in Jerusalem, a passenger was severely beaten. The victim sued Egged, claiming the injuries were the result of Egged's negligence for it failed to take precautions to prevent acts of aggression by third parties. The district court dismissed the claim in a summary judgment procedure, mainly because the defendant (Egged) had no specific duty of care towards the plaintiff. Arguably, this judgment is supported by the traditional reluctance to attribute liability for omissions in particular when the

³⁸ See Dan B. Dobbs, **The law of Torts**, *supra* note 3 at 857.

³⁹ Dan B. Dobbs, **The law of Torts**, *id* at 858.

omission in this case involves a failure to prevent an intentional activity by a third party.⁴⁰

The Supreme Court, however, rejected this conclusion; it overruled the district court's decision and remanded the case to be tried on its merits. In its reasoning, the Supreme Court surveyed Israeli and American case law and pointed out an exception to the general rule exempting individuals from liability for omissions. The Court found out that liability is often imposed if there is a special relationship between the plaintiff and the defendant, in particular, liability is imposed if the injury was a foreseeable risk. It also mentioned that even if liability for failing to prevent crimes is not often imposed, it is not enough that the assault by a third party was spontaneous and un-provoked to exempt the defendant, *ex definicio*, from liability.

The Court specified a few parameters that should be taken into account in attributing liability. In particular, it mentioned the defendant's foreseeability of the criminal activity. Foreseeability depends on several factors such as: whether such activity or other criminal activity of a similar type was prevalent prior to the specific case; whether the situation was common or exceptional in its character; whether the defendant had control and supervision over the criminal act or over the place in which the criminal act was perpetrated and whether, while taking into account the relationships between the parties, the plaintiff could have reasonably relied on the defendant to take reasonable precautions against criminal activity. Last, the court stated that under the appropriate circumstances, broader issues of public policy should also be taken into account.

Arguably this case as well as numerous other exceptions to the rule exempting from liability for omissions can be explained on the basis of a presumption that the person to whom liability is attributed is often "the cheapest cost avoider". The criteria used by the Court in the Egged case such as foreseeability, control and supervision seem to be correlated with the costs of prevention. Other exceptions recognized by the common law also support such an interpretation. The innkeeper has better knowledge and information concerning the relevant risks; similarly, the employer often has better ability to prevent risks which relate to the employment. Hence, arguably, it is not the fact that a single agent can be selected among the numerous potential tortfeasors

⁴⁰ See AC 350/77 **Kitan v. Wiese**, PD 33(2) 785; AC 796/80 **Ohana v. Avraham**, PD 37(4) 337;

which justifies the imposition of liability, but the fact that the selected tortfeasor is the cheapest cost avoider which explains why a duty is imposed these cases.

Yet, this explanation is insufficient. Each one of the bystanders who can operate the fire extinguisher in the burning car example is also a “cheapest cost avoider”. The mere fact that a person is the cheapest cost avoider is not sufficient to justify the imposition of duty. In addition, it is necessary that she could be singled out, under the circumstances, as distinct. Moreover, the fact that a person is the cheapest cost avoider is also not a necessary condition for attributing liability to her. It is sometimes the case that the law imposes liability on a person who is not the cheapest cost avoider if such an imposition helps to generate salience.

The decision in the Egged case could provide a useful example why the mere fact that X is not the cheapest cost avoider is not necessary in order to justify the attribution of liability to it. Assume that Egged was able to prove that the cheapest cost avoiders are the bystanders in the station. Hiring guards is perhaps too expensive while reliance on the interference of bystanders is a much cheaper way to prevent harms. However the plaintiff could justifiably address this argument and claim that the imposition of liability upon bystanders may not be effective because of the dilution of liability. It is likely under these circumstances that even if Egged is not the cheapest cost avoider, imposing liability on it is preferable to the imposition of liability upon the bystanders.

While in the Egged case, the need to identify a salient agent may have shifted liability from one potential defendant (bystanders) to another potential defendant (the bus company), sometimes the need to select a salient agent shifts the costs from one defendant to the plaintiff. The example provided in the last section – the case of the bystanders who fail to use the fire extinguisher should be characterized in these terms.

Each of the bystanders is the cheapest cost avoider, but none of them is salient.

Hence, the cost is imposed on the plaintiff who, under these circumstances, has stronger incentives to take precautions against fire.⁴¹

⁴¹ Moreover, even when the law attributes liability to the cheapest cost avoider, it does not necessarily require the cheapest cost avoider or even permit the cheapest cost avoider to act in a way which maximizes social utility. Woosley provides an imaginative example of a father who lets his child drown in order to save the lives of two other unknown children. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, *supra* note 14 at 1284. The father cannot exempt himself from his duties to save his son in order to save others towards whom he does not have obligation despite the fact that by doing so, the father maximizes social utility. Considerations of salience explain this anomaly. There is no attribute which clearly differentiates the father’s role with respect to the two children from

We emphasized so far the potential conflict between the principle that liability should be imposed on the cheapest cost avoider and the necessary salience required in order to guarantee the provision of efficient incentives. It is perhaps important to add that in the typical case the two factors operate in tandem.

The factors specified by the Supreme Court as relevant to the attribution of liability in the *Egged* case serve therefore two goals. On the one hand, they are relevant factors in determining who the cheapest cost avoider is. Control and supervision can be regarded as a proxy for the defendant's ability to prevent the harm and serve to determine whether it is the cheapest cost avoider. At the same time, these factors also serve to single out among the numerous potential tortfeasors a single one who will be responsible and consequently to provide her sufficient incentives to prevent the harm. It is quite difficult to tell in advance whether the bus company is indeed the cheapest cost avoider rather than the bystanders who witness the violence. Yet, there are numerous bystanders and their sheer number suggests that attributing liability to them may lead to dilution of liability. Being in charge of a bus station, or in charge of another business is an easy means to select among the many potential defendants a single actor.

Moreover, sometimes it is the fact that a person is the cheapest cost avoider which serves to differentiate between her and other potential tortfeasors who could have prevented the damage. The common sense observation that: "the nearer to home the need for help is, the worse we think of a person... for not responding to it; and the further away it is, the harder to think of those in need of help as having a moral claim on him... or as being responsible for them" serves to harmonize the principle of the cheapest cost avoider and considerations of salience.⁴² Physical proximity serves both as a proxy for the costs of prevention as well as a way salience-creating rule.

A critic would point out that this argument leads to counterintuitive implications. If indeed **any** salient rule can resolve the deadlock, why does not tort law adopt a rule which imposes the liability on the oldest injurer, or the blue-eyed injurer, or the tallest person, or any other capricious criterion?⁴³ Even if our examples

that of other potential rescuers. In contrast, there is a clear factor which singles him out with respect to his son.

⁴² See Woolzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, *id* at 1282. The criterion of nearness is often used by continental legal systems. See F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue* 14 **American Journal of Comparative Law** 630, 634-35 (1966).

⁴³ We are grateful to Barak Medina for raising this objection.

demonstrate that sometimes tort law uses arbitrary rules to attribute liability -- rules which cannot be fully rationalized in terms of greater culpability on the part of a specific agent, or in terms of the economic standard of the cheapest cost avoider, it is hard to think of capricious examples of this type. Arguably, however, under this explanation, such criteria could be equally conducive to the purposes of tort law.

Partly the reluctance to adopt capricious criteria of this type is that legal rules which create salience need to be internalized and accepted by the public. Because of their seemingly capricious nature, rules of this type are unlikely to be internalized. Moreover, while efficiency may dictate the adoption of arbitrary criteria to guarantee salience, there may be moral constraints which preclude the use of capricious criteria. They can be justifiably condemned as discriminatory and arbitrary and consequently be rejected despite the fact that they are conducive to efficiency.

To sum up, salience-creating rules can often exploit the traditional notions of moral theorists (relying on culpability), or those of law and economics theorists (using the principle of the cheapest cost avoider). Yet, these principles are not sufficient and sometimes need to be supplemented by using additional criteria. Moreover, it was argued that the traditional moral or economic principles to select among the numerous potential tortfeasors are not necessary; tort law selects a person who is not the cheapest cost avoider simply because there are too many indistinguishable cheapest cost avoiders. Yet, there are societal and perhaps normative constraints on the criteria used to select a tortfeasor. Some criteria are simply too capricious, too offensive, or too arbitrary and therefore cannot provide the basis for salience-creating rules.

2. Singling Out Responsible Agents on the Basis of Special Chains of Causation

The common law sharply distinguishes between a person who creates a risky situation or causes the damage without fault and a person who is a mere bystander and has no connection to the damage whatsoever. An innocent driver who collides into a horse and kills it may be obliged to warn other drivers of the resulting risks, or to have it removed,⁴⁴ while an innocent bystander, who can be equally effective in preventing further damage has no correlative duty to act.

⁴⁴ **Pacht v. Morris** 489 P.2d 29 (1971).

It seems as if one could explain the attribution of liability to the person who causes the harm by pointing out that this person is typically the cheapest cost avoider. The driver who collided into the horse has information about the accident and is typically in a better position to prevent future harms. Nevertheless other examples of causation do not substantiate the conjecture that a person who causes the harm is typically the cheapest cost avoider. If, due to some natural disaster and without any fault on my part, my car starts rolling and poses risk to others, I have an obligation to prevent the materialization of these harms even if the costs to myself are much higher than the costs of prevention to others.

Arguably, the attribution of liability to a person who innocently (non-negligently) caused the risk is puzzling. The person who brought about the risk is not necessarily, or even typically the cheapest cost avoider; neither is he necessarily the most culpable, agent. An innocent bystander who did not cause the damage would be equally effective in warning other drivers. Yet, relegating responsibility to the agent who innocently caused the accident is a way to avert the risk of dilution of responsibility and thus guarantee the effectiveness of the imposition of a duty to rescue. By singling out an innocent agent and differentiating between her responsibility and the responsibility of others, tort law singles out a single agent and prevents the risk of dilution of liability.⁴⁵

3. Singling Out Responsible Agents on the Basis of Voluntary Undertaking

What are the obligations of a person who volunteer to help another? When should she be liable for harms caused to the victim? The question has raised considerable interest among practitioners and scholars. Some believe that the only duty the rescuer has is not to worsen the position of the victim while others believe that the duty is much broader, namely that a person who volunteers to rescue another is under a duty to invest reasonable efforts in completing the rescue. Our analysis supports the latter view and explains why even if the potential rescuer did not worsen the victim's position, efficiency may require imposing liability on her and thereby making her salient.

⁴⁵ Compare: Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, *supra* note 12.

Section 324 of the Restatement clearly endorses the first duty. This section dictates that a bystander who, being under no duty to do so, takes charge of another is subject to liability to the other for any bodily harm caused to him by the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge. The rescuer is also subject to liability for discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

One example of such ruling is the case of *Farwell v. Keaton*.⁴⁶ Two friends consumed some beer and flirted with two girls. Six boys chased the two friends. While one escaped unharmed, the other was severely beaten. The former found the latter underneath his automobile in the lot and applied ice to his head. Then he drove him around for two hours before the victim fell asleep. Around midnight the defendant drove the car to the home of his friend's grandparents, parked it in the driveway, unsuccessfully attempted to wake up his friend, and left. The friend's grandparents discovered him in the car the next morning and took him to the hospital where he died. The court concluded that the relations between the two were sufficient to impose an affirmative duty of the unbeaten one towards his friend. The court stated that the two friends were companions on a social venture. The defendant knew, or should have known that no one would provide the victim with the necessary medical assistance. Under these circumstances, to say that he had no duty to obtain medical assistance, or at least to notify someone of his friend's condition would be "shocking to humanitarian considerations" and fly in the face of "the commonly accepted code of social conduct". More generally, Epstein argues that if a defendant removes the plaintiff's body from a public to a private place, where she is allowed to languish without needed medical care, she might be held liable for depriving the victim of an opportunity to be rescued by a third party.⁴⁷

One extension of this principle concerns the case of reliance. Section 323 of the Restatement imposes a duty whenever the defendant undertakes to help the plaintiff and the victim relied upon that undertaking. Dobbs provides the following illustration:

⁴⁶ 240 N.W.2d 217 (1976).

⁴⁷ The facts of the above mentioned example are borrowed from *Zelenko v. Gimbel Bros.* 287 N.Y.S. 134 (1935) case. Epstein points out that in the *Zelenko* case the isolation took place without undertaking to assist. For a discussion of this case, See Epstein, *Torts*, *supra* note 26 at 291-295.

“If a child is struck in an unguarded crosswalk where guards have always been provided before, liability for negligently failing to provide guard follows if the parents has knowledge of the undertaking and a choice whether to provide some other means of protection...In the same circumstances however, the reliance requirement can defeat the claim for the child’s injury if the child’s parent did not know that guards had been provided...So if two children are struck in the same crosswalk at the same time because the protection of a crossing guard had been discontinued, only the one whose parents could have themselves escorted the child could recover for withdrawal of the guard”.⁴⁸

Arguably the explanation for the attribution of liability is that by relying on the guard the parents worsen the child’s position because had they not relied on her, they would have used some other precautions. Yet, this explanation is insufficient. Parents who do not know about the guard could argue that they rely on the voluntary activity of bystanders. Yet, the court is reluctant to acknowledge reliance of this sort. Why does therefore reliance on the guard give rise to liability while reliance on the voluntary activities of bystanders have no such legal ramifications?

One explanation is that a guard is typically more reliable than bystanders. A guard, after all, was hired to do so and reliance on her is therefore typically more justified. However, the Restatement does not restrict the duty to a guard and imposes the same duty on any potential tortfeasor who undertakes or assume a duty. Moreover, the alleged greater effectiveness of the guard may be attributed to the fact that the court refuses to recognize reliance on the bystanders. If the court recognizes such a reliance and attribute liability to the bystanders arguably bystanders may become more effective and reliable. Last, in an altruistic community reliance on the interference of bystanders could be equally reliable. Instead, this reluctance to recognize reliance on a community can be rationalized in terms of salience. Reliance can operate as a salience-creating mechanism only when reliance is focused on a well defined agent. In order that reliance be an effective mechanism to create salience, it needs to single out a particular individual; it cannot be a broad diffuse reliance on the public as a whole.

Reliance can serve therefore as a salience-creating mechanism and to single out particular agents among the numerous potential tortfeasors. Reliance of potential tortfeasors on the interference of a single agent among them could be sufficient to create salience even when the victim herself is oblivious to the existence of that agent.

⁴⁸ See Dan B. Dobbs, **The law of Torts**, *supra* note 3 at 863.

This observation explains the feeling shared by many scholars that the case of *Kircher v. The city of Jamestown*⁴⁹ is wrongly decided.⁵⁰ In this case, a bystander saw the plaintiff being accosted by a person, and then forced into a car. The witnesses reported these facts to a police officer who promised he would make a report, but failed to take any action at all. The woman was repeatedly raped and beaten; yet the court concluded that the police is not liable for the harms because although the witnesses relied upon the officer's promise, the plaintiff did not.

Under our analysis, this result is mistaken. Reliance can single out an agent even when the reliance is not of the victim, but of other potential rescuers. If indeed potential rescuers, (e.g., in this case the witness) expects X to act and X is aware of this expectation, the imposition of liability can be justified (even if the victim herself does not share this expectation).

Section 324 ends with an important caveat which supports even more radical legal ramifications. This section specifies that the Institute expresses no opinion as to whether there may not be situations in which an actor who has taken charge of a helpless person may be subject to liability for harm resulting from discontinuing the aid or protection, where by doing so he leaves the other in no worse position than when the actor took charge of him. For example, if the rescuer throws a drowning person a rope, pulls him to shore and suddenly changes his mind, going to drink a cold beer while leaving the victim unattended, he should be liable even if, under the circumstances, he did not worsen the victim's prospects.⁵¹

Why should responsibility be attributed if the "rescuer" does not worsen the plaintiff's opportunities to be rescued by another? Why should the liability of a person who attempts to rescue another be different than that of a bystander? Arguably, the attribution of liability in this case is counterproductive since it deters people from interfering knowing that if they do, they may eventually be subjected to liability. Moreover, moral intuitions resent the attribution of liability to a good-willed person who tried to help, but found that the provision of aid is simply too costly while, at the same time, the indifferent bystander is exempted from liability. A possible

⁴⁹ 74 N.Y.2d 251.

⁵⁰ See Dan B. Dobbs, *The law of Torts*, *supra* note 3 at 863.

⁵¹ The illustration is taken from Dan B. Dobbs, *The law of Torts*, *supra* note 3 at 859-860. Keeton and Prosser also observe that while many of the decisions attributing liability presuppose that the defendant aggravated the risks facing the victim, there are also cases in which this requirement has been deemed unnecessary. See Prosser and Keeton *On Torts*, *supra* note 3 at 381-2. See also Levmore, *Waiting for*

explanation is that the rule which imposes liability on the good-willed rescuer and exempts from liability the indifferent one singles out some agents and prevents thereby the dilution of liability.

B. Rules which exploit “Natural Salience”

There are cases in which the problem of multiple tortfeasors is unlikely to arise simply because there are unlikely to be more than a single potential rescuer. In these cases, liability can be attributed without specifying any criteria limiting the scope of rescuers. The rescuer becomes salient by virtue of his being the only potential rescuer. In these cases, it is not the law which creates salience by singling out a potential rescuer, but the circumstances surrounding the event select a “natural rescuer.” Admiralty law provides an example of such a case.

Admiralty law imposes duties which are based not on the characteristics of the rescuer, but on the characteristics of the rescued. Under Admiralty law, a person is liable for the injuries caused due to refusal of aid to an individual found in the sea. Section 2304 titled “Duty to provide assistance at sea” states that: “A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board.” Many scholars believe section 2304 deviates sharply from the no-duty-to-rescue rule. By imposing an affirmative obligation upon individuals who are in charge of boats to rescue those in peril, the statute runs counter to the sharp distinction in tort law between misfeasance and nonfeasance.⁵²

Why then, did the legislator choose to change the traditional common law rule and to adopt instead a new rule in the field of admiralty? What is the difference between the duty to rescue in the sea and the duty to rescue in the city? Why should sailors be privileged relative to mountain climbers, or innocent victims of other catastrophes?

Unlike other cases, the probability of rescue in the sea is quite low. The ocean is vast and it is not likely that several potential rescuers would be in the same vicinity

Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations, *supra* note 12.

of the drowning ship at the same time. This is even less likely in case someone falls overboard. These cases can therefore be characterized as cases of “natural salience.” The low likelihood of the co-presence of several rescuers guarantees that the imposition of liability will not lead to dilution of liability.

Another useful example is the liability of an owner of land or property. It is often the case that an owner is the only potential rescuer in case of a catastrophe. One’s ownership of land or property grants her privileges to take precautions which others are physically barred from taking. Analogous principles can be observed also in the field of social norms. It is common to observe rules which require nomads to help the needy stranger. The harsh conditions in which some nomads live give rise to the hypothesis that if a person is in a position to save another, she is most likely to be the only potential rescuer. Hence, the imposition of a duty of rescue is unlikely to bring about the risk of dilution of liability.

C. Rules Inducing “Self generated” Salience

Sometimes the very attribution of liability to multiple potential tortfeasors in alternative care situations induces the tortfeasors to allocate liability among themselves. In these cases, the law need not create salience by singling out one tortfeasor. Instead, it can rely on the parties to decide who would bear the costs in case of an accident. Typically these are cases in which the potential tortfeasors know each other and consequently can allocate the risks among themselves. The lower the transaction costs among the injurers are, the more likely it is that the parties would be capable of allocating the risks among themselves.

1. Vicarious Liability

Vicarious liability of an employer is rarely discussed in the context of the duty to rescue; yet conceptually it represents a similar problem.⁵³ Often, the employer can prevent the damage to a third party by stricter supervision, or by increasing his investment in precautions. Yet, failing to do so is an omission on the employer’s part

⁵² See for example Patrick J. Long, COMMENT: The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea 48 **Buffalo L. Rev.** 591 (2000).

and in the absence of a specific rule imposing liability on the employer, the employer would be exempted from liability. Hence, the attribution of liability to employers can be conceptually characterized as an exception to the general rule exempting liability for omissions.

There are two reasons why the attribution of responsibility to the employer is unlikely to lead to dilution of liability. First, typically the employee is too poor and consequently cannot be effectively deterred by the imposition of liability. The employer knows therefore that joint liability does not effectively dilute his liability. The victim typically prefers to sue the employer and given the insolvency of the employee, the employer would bear the full cost of the injury.

Second transaction costs between employers and employees are typically low. If the transaction costs are low, the parties would assign the risk to the cheaper cost avoider who would, under these circumstances, have sufficient incentives to prevent the harm.

This explanation also illuminates the exceptions to the attribution of liability of employers. The traditional explanation for exempting employees from liability when the employees deviate from the tasks assigned to them by the employer is that the employer's costs of prevention in those cases are high relative to those of the employee's. Thus, if an employee takes his employer's pistol and uses it to commit an assault, the employer is exempt from liability.⁵⁴ In such cases the common law would refuse to regard the two as joint tortfeasors and impose liability only upon the employee.⁵⁵ We provide an alternative explanation in terms of the transaction costs between the employer and the employee. The less related to the course of the agency the agent's acts are and the more the employee deviates from his duties, the higher the parties' transaction costs.⁵⁶

This rationale also explains the reluctance of the legal system to expand the doctrine of vicarious liability to independent contractors. It is the high transaction

⁵³ See Alexander McCall Smith, *The Duty to Rescue and the Common Law in The Duty to Rescue: The Jurisprudence of Aid*, *supra* note 12 at 69.

⁵⁴ See AC 350/77 *Kitan v. Wiese*, PD 33(2) 785.

⁵⁵ Unless specific conditions are being established. See in general Winfield & Jolowicz, *On Tort*, *supra* note 23 at 224. See also section 25 of the Israeli Civil Wrongs Ordinance, which says: "Notwithstanding anything contained in this Ordinance, no principal or employer shall be liable for any assault committed by his agent or employee unless he has expressly authorised or ratified such assault." See Statutes of the State of Israel vol 1-2 (1968-1972)

⁵⁶ The relations among the contractor's employers are also those of alternative care. Moreover in these situations the transaction costs are high. See Richard A. Epstein, *Torts*, *supra* note 26 at 245.

costs which prevent an ex-ante efficient allocation of risk between the employer and the independent contractor. The independent contractor, unlike the employee, does not always have long lasting relations with the employer. It is therefore inevitably more costly for the parties to allocate ex-ante the risks in these cases. Last, an independent contractor often works for a number of people. Finding all of them liable as principals exacerbates the risk of dilution of liability.

2. Agents Realizing a Common Goal

When several individuals act to realize a common goal, tort law typically attributes liability to all of them. Fleming specifies the conditions for the attribution of liability in these cases.

“The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. There must be ‘concerted action to a common end’, not mere parallel activity or ‘a coincidence of separate acts which by their conjoined effect cause damage’. Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong...”⁵⁷

Arguably these cases fall outside the scope of our discussion since typically they involve actions rather than omissions. Yet, under our model, the exemption of liability for omissions is justified on the grounds that joint liability in alternative care situations may lead to dilution of liability. There is no intrinsic difference between acts and omissions which justifies the exemption; instead it is based on the generalization that omissions raise more often problems of dilution of liability. It is therefore valuable to point out that our model explains why responsibility is typically attributed in cases involving common design despite the fact that these cases typically involve alternative care situations. It seems reasonable to presuppose that common law would adopt the same approach towards individuals who seek to achieve an intentional goal by committing an omission.

⁵⁷ John J. Fleming, **The Law of Torts** 255 (The Law Book company, 8th ed, 1992).

V *Objections*

The claim that ultimately what distinguishes acts and omissions is that omissions are attributable to multiple agents in alternative care situations may raise numerous objections. Some of the objections challenge the economic rationale; others are based on the observation that other doctrinal tools could be developed to prevent the risk of dilution of liability. Last, some objections point out that this explanation cannot accurately explain existing doctrines.

1. The Imposition of Liability in Alternative Care Situations Undermines the Pursuit of Efficiency

It seems as if the imposition of liability, even if ineffective, cannot be harmful either. If no liability is imposed, the incentives to act are even lower than when liability is diluted. This is, however misleading; the imposition of liability on multiple injurers in alternative care situations has negative effects. More specifically, the attribution of liability in alternative care situations is likely to induce the plaintiff to fail to take precautions knowing that she would be fully compensated if the harm materializes. The failure of the injurers to invest in precautions (because of dilution of liability) and the failure of the victim to invest in precautions (because she would be compensated by the injurers) would inevitably lead to an inefficient outcome.

Assume for instance, that there are 100 potential rescuers who can each prevent an expected harm of \$50 by investing \$10 in precautions. Assume that the victim can prevent the harm by investing \$20. Under these circumstances, if liability is imposed, none of the potential rescuers would prevent the harm since the cost of prevention for each potential rescuer of preventing the harm (\$10) are larger than the expected costs of the accident for each potential rescuer (\$0.5). Moreover, if liability is imposed, the victim herself has no incentives to invest in precautions since she would be fully compensated if an accident materializes. Hence, under such a legal rule, nobody would invest in precautions and the expected costs would be \$50. In contrast if liability is not imposed, the victim herself would invest in precautions and the overall cost would be \$20. It is better therefore, under these circumstances, to exempt potential rescuers from liability.⁵⁸ Thus, the attribution of liability to multiple

⁵⁸ Moreover, the imposition of the duty has its own costs and if the duty is ineffective the costs may be greater than the benefits. Imposing a duty may lead to multiple investments in precautions. It is often

injurers in alternative care situations is not merely futile. It may also provide inefficient incentives to the victim herself to take optimal precautions.

2. Apportionment of Damages Among Tortfeasors as a Possible Solution for Dilution of Liability

Can dilution of liability be overcome by using more sophisticated rules of apportionment of liability? Our assumption so far was that if liability is imposed upon multiple tortfeasors, the damage is divided equally among all of them. Yet, tort law often endorses more sophisticated rules for the apportionment of liability. For instance, instead of exempting injurers from liability, tort law can impose joint and several liability upon all injurers, yet select a single agent which has to indemnify the others. Arguably, by using apportionment mechanisms, society provides potential tortfeasors with optimal incentives, while at the same time, providing the victim with “insurance”. If the victim can’t sue the chosen defendant for some reason, she can still sue the others and let the tortfeasors sue one another for indemnification.

Consider the following example: two persons A and B are involved in a dangerous activity with an expected cost of 20. Either A or B could invest in precautions and prevent the harm. While A’s precaution costs are 15, B’s are only 13. If they were both severally liable for 50% of the costs, none of them would act because each one of them is liable only for 10. Yet, the law sometimes adopts a more sophisticated principle under which the plaintiff could sue either A or B or both. However, once sued, A could indemnify herself and sue B. If B knows he would ultimately have to bear the entire expected cost of the activity, he would take the proper precautions at the cost of 13 rather than bear the expected cost of 20.⁵⁹ Landes and Posner suggested a solution along these lines and argued that joint tortfeasors should be fully indemnified by the “cheapest cost avoider”, thus giving him an incentive to prevent the damage.⁶⁰

better therefore to develop mechanisms to single out among the numerous potential tortfeasors a single tortfeasor and impose liability upon her.

⁵⁹ This would also be the case when one of the parties is judgment proof. If A knew that B is insolvent and consequently that he would bear the full burden, he would invest optimally in precautions. The insolvency of one party reduces the number of potential tortfeasors and solves therefore the problem of diluted liability.

⁶⁰ William Landes & Richard Posner, **The Economic Structure of Tort Law** 198-201 (Harvard, 1987).

Yet, Landes and Posner themselves, concede that the “full indemnification solution” is dubious for reasons which were raised earlier. It is often the case that there are many “cheapest cost avoiders” or even if the costs of prevention are not equal, the potential tortfeasors often do not have sufficient information to know ex-ante who the cheapest cost avoider is. The alleged solution raises therefore precisely the same problems which motivate the discussion in the first place.

These problems lead either to dilution of liability, or to an excessive investment in precautions. Potential tortfeasors may assume, in the absence of specific information and the high costs of obtaining it, that the probability that they are the cheapest avoiders is $1/N$ (where N is the number of people involved). The bigger the N is, the smaller their risk exposure is and the larger the prospect that they would prefer to bear the expected costs of the accident rather than invest in precautions. Alternatively, the uncertainty may induce the parties to invest excessively in precautions especially in case they are risk averse.

The indemnification solution is useful only when a single injurer can be easily identified at the time the potential tortfeasors are expected to invest in precautions. This is, however, precisely the difficulty giving rise to dilution of liability in the first place. Indemnification presupposes mechanisms to differentiate among potential tortfeasors and it presupposes therefore a salience-creating mechanism of the type analyzed above.

3. Apportionment of Precautions Costs Among Injurers as a Possible Solution for Dilution of Liability

The analysis so far ignored one possible solution for the problem of dilution of liability, namely the apportionment of precautions costs. We shall argue that there are cases in which the efficient rule is to let one or more potential tortfeasors invest in precautions and later sue other potential tortfeasors who would have been jointly and severally liable had the damage not been prevented. A person who invested in (efficient) precautions should be allowed to indemnify herself and retrieve her costs from other potential injurers.

This claim can be demonstrated by using the following example. A hundred potential injures can each prevent an expected harm of \$50 by investing \$10 in precautions. Under these circumstances, if liability is imposed, none of the potential

injures would prevent the harm since the cost of prevention for each potential injurer (\$10) are larger than the expected costs of the accident for each potential rescuer (\$0.5).

In the absence of transaction costs no legal intervention is needed for the parties would prevent the harm. Yet, given the realistic assumption of transaction costs, the harm would not be prevented. In section III we argued that under these circumstances, it would sometimes be efficient to impose liability not on the potential injurers, but on the victim herself.⁶¹ Yet, this example provides an opportunity to investigate another proposal – one which seems to reconcile the conflict between the principle of the cheapest cost avoider and the principle of salience. Ideally, the conflict could be resolved by adopting the following two principles. First, liability is imposed on potential injurers; second, a potential injurer should be indemnified for her costs in preventing the harm by all other potential injurers. All potential injurers share the costs equally among themselves. If both principles are adopted, the actual rescuer's cost is only \$0.1 and it is equal to the cost borne by every other potential rescuer. If all potential rescuers fail to rescue, the cost for each one of them is \$0.5.

4. *Criminal Law*

Criminal law also treats differentially acts and omissions. The principles governing the attribution of liability in criminal law are similar in many ways to the principles recognized in tort law. Andrew Ashworth classifies five group of cases in which criminal law enforces a duty to act.⁶² These include the case of a person who inadvertently creates a potentially harmful situation, the case of relationship duties including the relations between parents and children, the case of duties arising from ownership or control of property and others. Some of these categories are strikingly similar to the exceptions of tort law. Yet, arguably our analysis is inapplicable to criminal law because criminal law can impose sanctions, which exceed the harm caused by the omission. Hence attributing criminal responsibility to multiple

⁶¹ If, for instance, the victim can prevent the harm by investing \$20 in precautions, attributing liability to the injurers would be inefficient. If liability is attributed to the injurers, neither the victim nor the injurers would invest in precautions. The victim would not invest because she is “insured” by the injurers; the injurers, on the other hand, would not invest because of dilution of liability. Hence, we argued the legal system should exempt the injurers from liability in order to induce the victim to invest in precautions. If liability is not imposed, the victim herself would invest in precautions and the overall societal cost is \$20.

tortfeasors in alternative care situations does not typically lead to dilution of liability. The size of the criminal sanction is independent of the existence of other offenders.

There are two ways to explain the similarity between tort law and criminal law in this context. First, one could argue that although the doctrinal exceptions recognized in both fields of law are similar, the underlying reasons for the doctrinal principles are different. Hence, there is no structural similarity between criminal law and tort law; it is merely a coincidence that the exceptions to the rule are so similar in these two fields. A more compelling explanation is based on the fact that although the co-presence of multiple offenders in alternative care situations does not give rise to the risk of dilution of liability, it raises other structural problems, more particularly, it is likely to bring about excessive investment in precautions. Cases of alternative care are ones in which the investment of a single person in precautions is sufficient to prevent the harm. Investment of two or more people in precautions is therefore wasteful. Hence, the use of criminal law to overcome the problem of dilution of liability leads inevitably to excessive investment in precautions. Since the cases under investigation are ones in which none of the injurers is clearly a “cheapest cost avoider”, criminal law would have to treat all of them equally and impose a sanction which would be sufficient to induce each one of them to act. Hence, such a sanction would induce all of them to act rather than one and consequently would lead to excessive precautions.

While this argument demonstrates why the structure of liability for omissions in criminal law is analogous to that of tort law, it is still the case that criminal law can afford to be more lenient in attributing liability to multiple offenders in alternative care situations. This is because there are circumstances in which dilution of liability is a serious concern while excessive investment is not. In cases in which a rescue operation is initiated by one rescuer, other rescuers can acquire the relevant information and consequently are unlikely to invest in excessive resources. Criminal law can also mitigate the risk of excessive investment by using as a defense the reasonable belief of a potential rescuer that another potential rescuer is already engaged in a rescue operation.⁶³

⁶² Andrew Ashworth, *The Scope of Criminal Liability for Omissions* 105 *LQR* 424 (1989)

⁶³ See Murphy, *supra* note 18 at 620-21; Feldbrugge, *supra* note 43 at 641.

Conclusion

While typically acts are committed by a single or a small number of potential tortfeasors, omissions are typically committed in alternative care situations. The exemption from liability for omissions can be justified on the grounds that attribution of liability for omissions would typically lead to dilution of liability. The exceptions to the rule exempting from liability for omissions can also be rationalized as ways of overcoming the risks of dilution of liability. Sometimes tort law can narrow liability by using salience-creating rules which single out a single tortfeasor among the many potential ones. At other times, omissions are committed under circumstances labeled as “natural salience” – circumstances in which the attribution of liability does not lead to dilution of liability. Last, the rules of tort law can sometimes induce potential tortfeasors to allocate ex-ante liability among themselves.

Our analysis could raise the following objection. Why should the law use proxies to resolve the problem of dilution of liability? Could not judges simply examine in every particular case whether it is an alternative care situation and design the rule accordingly? The answer is probably that such a solution would not be efficient. The use of proxies is desirable to prevent uncertainty. It is difficult of course to establish that the distinction drawn between acts and omissions is indeed the best possible proxy. Yet, the carving of exceptions to the attribution of liability for actions (by limiting duty of care or using strict concepts of causation) as well as carving exceptions to the exemption from liability for omissions by creating salience-rules serve to improve the accuracy of the proxy and guarantee efficiency.

Our analysis was framed solely in terms of economic efficiency; yet the reluctance to attribute liability to multiple injurers in alternative care situations can also be justified on alternative grounds. Law is a tool for attributing liability and the attribution of liability typically requires differentiating the status of one person from another. It is this differentiation which is a key feature of concept of responsibility. A person is responsible if she is perceived as more affiliated to the harm than others. The idea that responsibility is a concept serving to differentiate the status of one person from another makes economic sense but it also coheres with pre-existing non-economic understanding of the concept.