

## COMMENT

### “A SIGN OF THE TIMES:”<sup>1</sup> HOW THE FIREFIGHTER'S RULE AND THE NO-DUTY-TO- RESCUE RULE IMPACT CONVENIENCE STORES' LIABILITY FOR FAILURE TO AID A PUBLIC SAFETY OFFICER

In 1993, the Maryland Court of Special Appeals<sup>2</sup> imposed a duty on a convenience store clerk to protect a police officer from harm caused by criminal acts of a third party.<sup>3</sup> Shortly after midnight one evening, a group of “ruffians” attacked an off-duty police officer in the parking lot of a 7-Eleven convenience store.<sup>4</sup> The officer's son ran inside the convenience store and asked the store clerk to call for

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1. “A Sign of the Times” is a recent slogan of 7-Eleven convenience stores, owned by Southland Corporation. In *Griffith v. Southland Corp.*, 617 A.2d 598 (Md. Ct. Spec. App. 1992), *aff'd*, 633 A.2d 84 (Md. 1993), the principal case illustrated in this Comment, the Maryland judiciary imposed a duty on Southland Corporation (Southland) to rescue and protect an injured off-duty police officer by calling for emergency back-up assistance. *Id.* Notwithstanding the firefighter's rule which bars recovery for injuries attributable to the negligence which requires a public officer's intervention, the Court of Special Appeals justified expanding liability on the basis that such a rule “reflects the spirit of the times and . . . meets society's needs.” *Id.* at 605. Because this Comment addresses both opinions, the decision of the Court of Special Appeals, Maryland's intermediate appellate court, will be referred to as “*Griffith*” and the opinion of the Court of Appeal, Maryland's highest court, referred to as “*Southland*.”

2. For an explanation of Maryland's court system, see William L. Reynolds, II, *The Court of Appeals of Maryland: Roles, Work, and Performance* (pt. 1), 37 MD. L. REV. 1 (1977).

3. *Griffith*, 617 A.2d at 605.

4. *Id.* at 600–01. While “ruffians” may seem harsh, this is the language employed by the *Griffith* court. *See id.*

assistance.<sup>5</sup> The clerk allegedly scoffed at this request.<sup>6</sup> In *Griffith v. Southland Corp.*, the Maryland Court of Special Appeals held that the store clerk had an affirmative duty to help the police officer by calling for emergency assistance.<sup>7</sup> The Maryland Court of Appeals in *Southland Corp. v. Griffith* affirmed this result.<sup>8</sup> Analyzing the firefighter's rule<sup>9</sup> in conjunction with Maryland public policy,<sup>10</sup> the *Southland* court created a new exception<sup>11</sup> to the traditional proposition that a pure bystander has no duty to rescue another in need.<sup>12</sup>

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5. *Id.* It should be noted that Griffith's complaint alleged that Southland had a duty to call the police for assistance. Joint Record Extract at E-4. While a distinction may be made between directly calling the police and placing a call to 911, this comment adopts the language of the court of special appeals, "Call for assistance *via the 911 system.*" *Id.* at 601 (emphasis added).

6. *Id.* The off-duty police officer sued Southland for, among other things, the clerk's alleged failure to call 911.

7. *Griffith*, 617 A.2d at 600. See *infra* notes 175-76 and accompanying text for a more complete explication of *Griffith's* history.

8. 633 A.2d 84 (Md. 1993).

9. The firefighter's rule, also known as the "fireman's rule," generally bars firefighters' or police officers' recovery for injuries sustained as a result of the negligence that gave rise to their emergency duties. *Flowers v. Rock Creek Terrace Ltd. Partnership*, 520 A.2d 361 (Md. 1987). In Maryland, the firefighter's rule is based on public policy, as opposed to the alternate theories of assumption of risk or premises liability. See *infra* notes 27-93 and accompanying text for a discussion of the theories underlying the firefighter's rule.

10. In determining the question of duty, Maryland applies the duty analysis found in *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (en banc) as opposed to the traditional approach. One fundamental difference between these two approaches is the premise upon which each is based. The traditional approach assumes that no duty is owed to rescue or aid another. The modern approach, also referred to as the "*Tarasoff*" approach, asserts that a general duty of reasonable care is owed to all. See *infra* notes 94-147 and accompanying text for a more detailed discussion of different approaches.

11. The traditionally recognized exceptions which may give rise to a duty include special relationships, taking charge and control of the victim, and creating the danger or risk. See *infra* notes 106-20 and accompanying text for a full explication of these exceptions.

12. See *infra* notes 98-120 and accompanying text for a discussion of the traditional approach to questions of duty. While courts often assert that a pure bystander does not have a legal obligation to aid or protect another in danger, such a general statement may be guileful. Traditional exceptions abound, imposing a duty even though certain "behavior" — or lack thereof — is classified as nonfeasance. See *infra* notes 94-147 and accompanying text. In addition, commentators assert that courts often manipulate the traditional notion of no-duty and its exceptions in order to achieve a specific outcome. See generally John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867;

James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV.

This Comment shows how the *Southland* opinions, which on first impression seem simply tricky variations on the narrow firefighter's rule, impose a broad yet uncertain duty on a large class of businesses. This Comment also attempts to explore the difficulties the judiciary may face in fashioning a firefighter's rule suitable to today's society. The ramifications do not stop short of Maryland's jurisdictional boundaries. Rather, the impact of both opinions is generally instructional to all courts confronted with questions of affirmative duty, and particularly so to those that recognize some version of the firefighter's rule.<sup>13</sup>

The first section explores the history of the firefighter's rule, tracing the rule from its common law roots in traditional approaches to premises liability while noting how Maryland's interpretation of this rule has evolved.<sup>14</sup> The next section outlines the traditional principle that a bystander has no legal obligation to come to the aid of a stranger, contrasting that approach with the modern analysis defining duty.<sup>15</sup> The Comment next studies *Southland's* impact on the firefighter's rule.<sup>16</sup> Finally, the Comment analyzes *Griffith* and *Southland*, illustrating how these opinions twist the firefighter's rule into an ahistorical exception to the traditional no-duty rule. Now, because of the firefighter's rule, convenience store clerks in Maryland<sup>17</sup> must affirmatively aid police officers in the commis-

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147 (1980).

13. Nearly every state recognizes in some form the firefighter's rule. *But see infra* note 20. Additionally, courts frequently encounter cases which require them to determine whether a legal obligation should be imposed on one citizen to protect or rescue another in need. More often than not, a clear moral obligation is present in these situations, although the legal obligation remains less articulate. This dilemma is vital in realizing that even though *Southland* itself may not be primarily authoritative in a given jurisdiction, the effect of the *Southland* holding may still be of great importance. *Southland* may illustrate the upstart of a pivotal trend in the area of rescue law nationwide.

14. See *infra* notes 18–93 and accompanying text for a discussion of the firefighter's rule. Emphasis is given to Maryland case law for the purpose of better understanding the context of the *Southland* holding. Of course, subtle differences exist from one formulation of the firefighter's rule to the next. However, Maryland's formulation of the firefighter's rule does not differ from that of the overwhelming majority of states in any way significant to the arguments presented in this Comment. *See* *Flowers v. Rock Creek Terrace Ltd. Partnership*, 520 A.2d 361 (Md. 1987).

15. See *infra* notes 94–147 and accompanying text for a discussion of the traditional and modern approaches to issues of duty.

16. See *infra* notes 259–75 and accompanying text for a discussion of how *Griffith* creates another exception to the traditional no-duty-to-rescue rule.

17. Arguably, because many convenience store corporations have a national scope of business and because it is easier and “safer” for a corporation to require its employees to

sion of their duties on the business premises.

### I. THE FIREFIGHTER'S RULE

The judicial bar to recovery for injuries sustained by a firefighter while fulfilling his occupational duties has become known as the firefighter's rule.<sup>18</sup> When the fire is caused by ordinary negligence and injures a firefighter on the premises to extinguish the fire, the firefighter generally may not recover for those injuries.<sup>19</sup>

A precise and universally-accepted<sup>20</sup> definition of the firefighter's rule is impossible to formulate,<sup>21</sup> even though some justifications are almost always present. For instance, most courts reason that a firefighter should not be allowed a private right of action for injuries sustained while providing a public benefit.<sup>22</sup> Jurisdictions justify limiting a firefighter's right of action by distinguishing injuries sustained while protecting the public and those incurred as a private citizen. In this light, whether a firefighter is acting within his occupational capacity when injured becomes pertinent. For example, an off-duty firefighter asleep in his apartment ablaze as a result of faulty wiring might not be barred from recovery in most jurisdictions. On the other hand, if that same firefighter responded to a scene to *extinguish* a fire, the firefighter's rule might

conform to a uniform standard of conduct, the *Southland* decision may affect clerks' behavior in jurisdictions beyond Maryland.

18. Actually, a complex of such rules exists. *See, e.g., infra* note 21.

19. *Gray v. Russell*, 853 S.W.2d 928, 930 (Mo. 1993) (en banc). *See Flowers*, 520 A.2d at 361.

20. Indeed, jurisdictions remain, such as Arkansas, Massachusetts, Texas, and Pennsylvania, which have not adopted the firefighter's rule. Likewise, other jurisdictions that had previously adopted the firefighter's rule have subsequently abrogated it, *see Spencer v. B.P. John Furniture Corp.*, 467 P.2d 429 (Or. 1970) (en banc) (adopting the firefighter's rule on basis of assumption of risk), *overruled by Christenson v. Murphy*, 678 P.2d 1210 (Or. 1984) (judicially abandoning the firefighter's rule after legislature eradicated implied assumption of risk), or abolished it either by judicial opinion, *see Wills v. Bath Excavating*, 829 P.2d 405 (Colo. Ct. App. 1991), *aff'd*, 847 P.2d 1141 (Colo. 1993); *Banyai v. Arruda*, 799 P.2d 441 (Colo. Ct. App. 1990), or by statute, *see FLA. STAT. § 112.182* (1993); *MINN. STAT. § 604.06* (1988).

21. Some courts formulate the firefighter's rule in a slightly different manner. *See Lipson v. Superior Court of Orange County*, 644 P.2d 822 (Cal. 1982) (barring firefighters and police officers from recovery for injuries "directly resulting," but not "separate and independent," from the negligence which caused the emergency); *Winston v. BMA Corp.*, 857 S.W.2d 541 (Mo. App. 1993) (holding that an emergency call to burglary scene is not sufficient to invoke firefighter's rule).

22. STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 14.67, at 139 (1987).

deny any right of action.

Professional firefighters are not the only members of this special class of citizens denied a cause of action by virtue of their occupation. Some courts have held the firefighter's rule applicable to volunteer firefighters as well.<sup>23</sup> In addition, many courts have expanded the rule to bar police officers from recovery.<sup>24</sup> Here, however, the expansion ends. Even though many other public and private workers face daily on-the-job risks, firefighters and police officers are the only public officials systematically denied a right of redress for injuries resulting from occupational hazards. This apparent inconsistency in categorization forms the basis for several arguments that the firefighter's rule should be abandoned.<sup>25</sup> However, the entreaties for abrogation of the rule have rallied little response

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23. See *Baker v. Superior Court*, 181 Cal. Rptr. 311 (Ct. App. 1982); *Ferraro v. Demetrakis*, 400 A.2d 1227 (N.J. Super. Ct. App. Div.), *cert. denied*, 405 A.2d 834 (N.J. 1979). The extension of the rule to volunteer firefighters is disturbingly intriguing because of the way a court might often acknowledge, yet ultimately disregard, the rule's rationale. For instance, the *Baker* court openly recognized the availability of adequate alternative compensation as one justification for barring professional firefighters from a tort action. *Baker*, 181 Cal. Rptr. at 315. In addition, communities pay professional firefighters to encounter the risks posed by a raging fire. *Id.* Volunteer firefighters, on the other hand, often do not have access to all of the same benefits as professionals. *Id.* Despite this, the *Baker* court insisted on applying the firefighter's rule to bar a volunteer firefighter from recovery. *Id.* at 316. The *Baker* court did so perhaps only on the thin reasoning that the volunteer firefighter, like the professional firefighter, completed training on how to fight fires and encounter such risks. *Id.* at 315-16.

24. See *Walters v. Sloan*, 571 P.2d 609 (Cal. 1977); *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984); *Kreski v. Modern Wholesale Elec. Supply Co.*, 415 N.W.2d 178 (Mich. 1987); *Berko v. Fredo*, 459 A.2d 663 (N.J. 1983). The expansion of the rule to bar police officers from recovery stems from the pretense that police officers' tasks are theoretically quite similar to those of firefighters. Both firefighters and police officers are public officials who enter the landowner's premises, usually in emergency situations, in order to protect life, property, or both. By the very nature of their occupations, they anticipate certain dangers. As a result of the nature of their public duty, society as a whole should absorb any cost of injury. See *Flowers v. Sting Security, Inc.*, 488 A.2d 523, 527-28 (Md. Ct. Spec. App. 1985), *aff'd sub nom.*, *Flowers v. Rock Creek Terrace Ltd. Partnership*, 520 A.2d 361 (Md. 1987) (stating that firefighters must be compensated for injury through public remedies such as worker's compensation). See *infra* notes 81-93 and accompanying text for further discussion of policy considerations of the firefighter's rule.

25. To sample the arguments of critics and commentators who advocate the abolition of the firefighter's rule, see Ann M. Donio, Comment, *Torts — Negligence — Fireman's Rule Does Not Extend Immunity for Willful and Wanton Misconduct*, 18 RUTGERS L.J. 261 (1986); Michael W. Moss, Comment, *An Examination of the California Fireman's Rule*, 6 PAC. L.J. 660 (1975); Julianne Palumbo, Comment, *Equal Protection and the Fireman's Rule in Ohio*, 38 CASE W. RES. L. REV. 123 (1987-88).

in courts across the country which continue to apply the rule.<sup>26</sup>

The firefighter's rule has evolved as courts have applied the different theories of premises liability law, assumption of risk, or public policy to shape the rule. In 1892, the Illinois Supreme Court, utilizing the theory of premises liability, pronounced the first formulation of the firefighter's rule in *Gibson v. Leonard*.<sup>27</sup> In *Gibson*, the rope on a freight elevator in a burning building snapped, plummeting a firefighter to the basement while he attempted to quell the inferno.<sup>28</sup> Classifying the firefighter as a mere licensee, the *Gibson* court barred the firefighter's action against the landowner.<sup>29</sup> The landowner owed the firefighter only the duty to "refrain from willful or affirmative acts which are injurious."<sup>30</sup> The rule extrapolated from the *Gibson* holding was that firefighters may not recover in tort for injuries sustained as a result of performing their duties.

In the hundred years following the *Gibson* decision, courts have continued to use a premises liability theory in order to bar firefighters' recovery.<sup>31</sup> Under the premises liability theory, courts balanced the rights of the firefighter against those of the landowner by classifying the firefighter's presence on the land into one of three entrant-status categories.<sup>32</sup> Whether the court classified the

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26. See *Walters v. Sloan*, 571 P.2d 609 (Cal. 1977) (Tobriner, Acting C.J., dissenting); *Thomas v. Pang*, 811 P.2d 821 (Haw. 1991) (Padgett, J., dissenting); *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984) (Harris, McCormick, and Larson, JJ., dissenting); *Berko v. Freda*, 459 A.2d 663 (N.J. 1983) (Handler, J., dissenting); *Cooper v. City of New York*, 619 N.E.2d 369 (N.Y. 1993) (Titone, J., dissenting); Dinah M. Dale, Note, *Extinguishing the Common Law Fireman's Rule: Flowers v. Rock Creek Terrace*, 35 WASH. U. J. URB. & CONTEMP. L. 163 (1989); Moss, *supra* note 25; Palumbo, *supra* note 25; Joseph Scholz, Note, *Rosa v. Dunkin' Donuts: The Fireman's Rule Revisited*, 44 RUTGERS L. REV. 405 (1992).

27. 32 N.E. 182 (Ill. 1892), *overruled by* *Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960). While the firefighter's rule initially evolved through case law, statutes in some jurisdictions now supplant the original judicial interpretation of this rule. See *supra* note 20.

28. *Gibson*, 32 N.E. at 183.

29. *Id.*

30. *Id.*

31. See David L. Strauss, Comment, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031. "The [firefighter's] rule has *only* been applied [in California] to prohibit a fireman from recovering for injuries caused by the very misconduct which created the risk which necessitated his presence." *Lipson v. Superior Court of Orange County*, 644 P.2d 822, 826 (Cal. 1982).

32. *Sherman v. Suburban Trust Co.*, 384 A.2d 76 (Md. 1978); *Steinwedel v. Hilbert*, 131 A. 44 (Md. 1925). See *Pennebaker v. San Joaquin Light & Power Co.*, 112 P. 459

firefighter as a licensee or invitee<sup>33</sup> dictated the duty owed by the landowner to the firefighter entering his land.<sup>34</sup>

Classifying firefighters according to the entrant-based categories of premises liability results in a constrained analysis. Firefighters as a class present unique problems.<sup>35</sup> For example, firefighters enter property for the purpose of extinguishing fires or for other similar emergencies.<sup>36</sup> Yet, firefighters do not enter primarily for the landowner's concern. Arguably, firefighters enter the land to prevent a fire from spreading rather than to preserve the occupant's property. Consequently, firefighters cannot be classified strictly as invitees,<sup>37</sup> but rather appear to be licensees. As licensees, the landowner or occupant has no affirmative duty of care to make the premises reasonably safe for the firefighters' stay,<sup>38</sup> other than to exercise reasonable care in protecting them while they perform their duties, warn of hidden dangers about which the landowner knows, and avoid infliction of willful, wanton, or intentional injury.<sup>39</sup> Because firefighters "are likely to enter at unforeseeable times, upon

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(Cal. 1910); *Todd v. Armour & Co.*, 162 S.E. 394 (Ga. Ct. App. 1932).

33. Under the premises liability analysis, individuals entering land were "invitees if they entered the property for the owners economic benefit [and] . . . licensees if they entered with the owner's permission but not for the owner's economic benefit." Comment, *The New Minnesota Fireman's Rule — An Application of the Assumption of Risk Doctrine*: *Armstrong v. Mailand*, 64 MINN. L. REV. 878, 880 (1980).

34. This view is also the basis for the original Restatement of Torts, where a landowner was liable if the licensee became injured by a non-obvious condition on land when the landowner (1) knew of the condition, (2) realized it was an unreasonable risk of harm, and (3) neither corrected the condition nor warned the licensee. RESTATEMENT OF TORTS § 342 (1934). The second Restatement is much more expansive, announcing that the landowner is liable to an injured licensee if (1) the landowner knows or has reason to know of an unreasonably risky condition on the land, (2) the landowner fails to correct the condition or warn the licensee of it, and (3) the licensee neither knows nor has reason to know of the risky condition. RESTATEMENT (SECOND) OF TORTS § 342 (1965). *Accord* *Roberts v. Rosenblatt*, 148 A.2d 142 (Conn. 1959); *Baxley v. Williams Constr. Co.*, 106 S.E.2d 799 (Ga. Ct. App. 1958); *Aravanis v. Eisenberg*, 206 A.2d 148 (Md. 1965); *Wax v. Co-Operative Refinery Ass'n*, 49 N.W.2d 707 (Neb. 1951); *Drake v. Fenton*, 85 A. 14 (Pa. 1912); *Beehler v. Daniels*, 29 A. 6 (R.I. 1894); *Burroughs Adding Mach. Co. v. Fryar*, 179 S.W. 127 (Tenn. 1915).

35. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 61, at 431 (5th ed. 1984).

36. *See id.*

37. *See id.*; SPEISER ET AL., *supra* note 22, at 139–40.

38. *See* *Sanderson v. Freedom Sav. & Loan Ass'n*, 496 So. 2d 954 (Fla. 1st DCA 1986) (finding no liability for failing to warn police of potential dangers inherent in performance of duties), *aff'd*, 548 So. 2d 221 (Fla. 1989).

39. *See* KEETON ET AL., *supra* note 35, at 430, and cases cited therein.

unusual parts of the premises, and under circumstances of emergency . . . care in looking after the premises, and in preparation for the visit" cannot be expected.<sup>40</sup> Imposing a duty on the landowner to continuously guarantee reasonably safe premises might constitute a severe burden.<sup>41</sup>

However, some courts remained unpersuaded by this reasoning. Dissatisfied courts elected to classify firefighters as invitees rather than licensees.<sup>42</sup> These courts reasoned that while occupational duties obligate a firefighter to enter one's land during a fire, the landowner benefits from the extinguishment of the fire, even though the landowner's pecuniary interests may not be of primary concern to the firefighter.<sup>43</sup> In addition, no clearer indication of an invitation is seen than when a firefighter responds to an emergency call.<sup>44</sup> In *Dini v. Naiditch*,<sup>45</sup> a firefighter's estate brought a wrongful death action against a landowner, alleging negligent maintenance of the property.<sup>46</sup> Modifying *Gibson*,<sup>47</sup> the Illinois Supreme Court held that a landowner owed a duty of reasonable care to the firefighter.<sup>48</sup> By

40. KEETON ET AL., *supra* note 35, at 431-32. Note the argument furthered by the late Dean Prosser:

A person who climbs in through a basement window in search of a fire or a thief does not expect any assurance that he will not find a bulldog in the cellar, and he is trained to be on guard for any such general dangers inherent in the profession. But whether this requires a blanket rule limiting liability in every case is another question.

*Id.* at 432 (citations omitted).

41. *Id.* For similar rationales, see *Carpenter v. O'Day*, 562 A.2d 595, 597 (Del. Super. Ct.), *aff'd*, 553 A.2d 638 (Del. 1988); *Sherman v. Suburban Trust Co.*, 384 A.2d 76, 79 (Md. 1978); *Berko v. Freda*, 459 A.2d 663 (N.J. 1983); *Maryland Casualty Co. v. Heiot*, 540 A.2d 920 (N.J. Super. Ct. Law Div. 1988).

42. See *Briones v. Mobil Oil Corp.*, 501 N.E.2d 821 (Ill. App. Ct. 1986); *Walsh v. Madison Park Props., Ltd.*, 245 A.2d 512 (N.J. Super. Ct. App. Div. 1968); *Mistelske v. Kravco, Inc.*, 88 Pa. D. & C. 49 (Pa. 1953); *Strong v. Seattle Stevedore Co.*, 466 P.2d 545 (Wash. App. Ct. 1970).

43. KEETON ET AL., *supra* note 35, at 431.

44. *Id.* "The argument sometimes offered, that tort liability might deter landowners from uttering such cries of distress, is surely preposterous rubbish." *Id.* (citations omitted).

45. 170 N.E.2d 881 (Ill. 1960).

46. *Id.* at 886. The court predicated negligence on the landowner's violation of various fire ordinances, including the absence of fire doors and extinguishers, trash-littered hallways, and inadequately constructed stairwells. *Id.*

47. Note that the *Dini* court attempted to reconcile *Gibson* with the case at hand. *Id.*

48. *Id.* The *Dini* court viewed the rationale behind the licensee classification as nonsensical: "It is highly illogical to say that a fireman who enters the premises quite

virtue of his occupation, a firefighter has the public right to enter the property wherever the fire may be, regardless of the landowner's rights.<sup>49</sup> Therefore, the *Dini* court classified firefighters who enter the property by virtue of their jobs as invitees, rather than mere licensees.<sup>50</sup> Other courts soon followed.<sup>51</sup>

To many courts and commentators alike, classifying a firefighter as an invitee seemed as absurd as classifying a firefighter as a licensee.<sup>52</sup> Courts began to recognize the inherent difficulties in classifying a firefighter under any common law classification.<sup>53</sup> Par-

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independently of either invitation or consent cannot be an invitee because there has been no invitation, but can be a licensee even though there has been no permission." *Id.* at 885.

49. *Dini*, 170 N.E.2d at 885.

50. *Id.* The *Dini* court agreed that "an action should lie against a landowner for failure to exercise reasonable care in the maintenance of his property resulting in the injury or death of a fireman rightfully on the premises, fighting the fire at a place where he might reasonably be expected to be." *Id.*

The Illinois Supreme Court further limited the *Dini* holding in 1976 by confining the landowner's duty of reasonable care only to the extent "so as to prevent injury occurring to a fireman from a cause independent of the fire." *Washington v. Atlantic Richfield Co.*, 361 N.E.2d 282, 285 (Ill. 1976).

51. *See, e.g.*, *Strong v. Seattle Stevedore Co.*, 466 P.2d 545 (Wash. Ct. App. 1970) (classifying firefighters as invitees). *Cf. Cameron v. Abatiell*, 241 A.2d 310 (Vt. 1968) (refusing to follow *Dini* court's lead).

52. Note that although the *Dini* court had no apparent problem in finding fault behind the licensee categorization, the court failed to perceive any fallacious reasoning in classifying a firefighter as an invitee.

53. Perhaps this dissatisfaction with squeezing firefighters into a premises liability classification paralleled the discomfort many courts experienced with the common law categorization of all land entrants in general. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (en banc), is the landmark California case on this issue. After analyzing the same policy considerations employed in *Tarasoff* and discussed *inter alia*, the *Rowland* court noted, "[I]t is apparent that the classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land." *Id.* at 567. Instead of the common law approach, the *Rowland* court held that ordinary principles of negligence applied in determining a landowner's liability to an entrant injured while on the premises. *Id.* at 568. Many jurisdictions followed suit, judicially abandoning the common law distinctions of trespasser, licensee, or invitee. These jurisdictions refused to label the status of an entrant, instead favoring status based on a "fact-dependent situation." *Seward v. Terminal RR Ass'n*, 1992 Mo. App. LEXIS 1523 (Ct. App. Sept. 29, 1992). Under this and similar decisions, once a landowner becomes aware of an entrant's presence on his land, the landowner owes the entrant a uniform duty of reasonable care. SPEISER ET AL., *supra* note 22 § 14.67.

However, "dissatisfaction" and "discomfort" are not always mutually exclusive: Although the Delaware Supreme Court has generally refused to abandon the common law premises liability categories as determinative of a landowner's

ticularly bothersome was the fact that since an occupant had no right to prohibit a firefighter from coming onto the premises, a firefighter entered autonomous of and without regard to the occupant's authorization.<sup>54</sup> Indicative of this dissatisfaction is the 1960 New Jersey Supreme Court case of *Krauth v. Geller*.<sup>55</sup> While the *Krauth* court recognized that "much has been written" regarding how to classify a firefighter who enters private property as part of his occupational duties,<sup>56</sup> the court concluded that a firefighter was neither a licensee nor an invitee.<sup>57</sup> Instead, the *Krauth* court elected to label firefighters as *sui generis*, under which the landowner owed

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duty to a land entrant on the theory that to do so would be to engage in "im-permissible judicial legislation," I am satisfied that these classifications are not appropriate for a firefighter, since he enters a premises as a matter of right pursuant to his public employment, and not as a member of one of these rigidly defined classes.

Carpenter v. O'Day, 562 A.2d 595, 598 (Del. 1988) (citations omitted).

54. See *Buren v. Midwest Indus., Inc.*, 380 S.W.2d 96 (Ky. 1964); *Krauth v. Geller*, 157 A.2d 129 (N.J. 1960); *Jackson v. Ververay Corp.*, 198 A.2d 115 (N.J. Super. Ct. App. Div. 1964); *McCarthy v. Port of N.Y. Auth.*, 290 N.Y.S.2d 255 (App. Div. 1968); *McGee v. Adams Paper & Twine Co.*, 271 N.Y.S.2d 698 (App. Div. 1966), *aff'd*, 233 N.E.2d 255 (1968).

55. 157 A.2d 129 (N.J. 1960). See *Strauss*, *supra* note 31.

56. *Krauth*, 157 A.2d at 130.

57. *Id.* The court analyzed:

[A firefighter] is not a trespasser, for he enters pursuant to public right. Although it is frequently said he is a licensee rather than an invitee, it has been correctly observed that he falls within neither category, for his entry does not depend upon permission or invitation of the owner or occupier, nor may they deny him admittance. Hence his situation does not fit comfortably within the traditional concepts.

*Id.*

In refusing to employ the firefighter's rule strictly as a creature of premises liability, the *Krauth* court opted to explore the grounds of assumption of risk and public policy. *Id.* at 131. However, it seems that the *Krauth* court confused some of the issues surrounding these other grounds. While the reasoning in assumption of risk and public policy analyses chronically mirror each other, it should be noted that many courts as in *Krauth* struggle to disengage these two justifications, albeit often unsuccessfully. See *infra* notes 71–93 and accompanying text for discussion regarding these rationales.

In the recent case of *Gray v. Russell*, 853 S.W.2d 928 (Mo. 1993) (en banc), the Missouri Supreme Court did not address the traditional rationales of premises liability, assumption of risk, or public policy, but instead defined the firefighter's rule as an exception to the rescue doctrine. *Id.* at 930 (citing *Krause v. United States Truck Co.*, 787 S.W.2d 708 (Mo. 1990)). Therefore, the rule applied only in emergency situations, not barring a landowner's negligence while the officer performed routine duties. *Id.* at 931. Note that while the *Gray* court opted to explore an alternate premise for the firefighter's rule, the resulting rule, at least in the *Gray* case, is synonymous with the formulations premised upon public policy.

a firefighter a duty of reasonable care under the circumstances.<sup>58</sup> While many courts opted to dodge the problems inherent in strict classification as a licensee or invitee,<sup>59</sup> at least one court has noted that whether the judiciary categorizes a firefighter within one of the common law classifications or as *sui generis* is irrelevant, since “the rule of no liability is uniform.”<sup>60</sup>

As courts implemented the firefighter's rule, some became uncomfortable with its harsh effects. The rule often denied recovery when firefighters sustained injuries in unreasonably perilous circumstances. Perhaps due in part to the difficulties in shaping a premises liability-based rule that was fair in each individual case, courts crafted numerous exceptions.<sup>61</sup> As a practical result, courts

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58. *Krauth*, 157 A.2d at 130 (noting that “justice is not aided by appending an inappropriate label and then visiting consequences which flow from a status artificially imputed”). See *Calvert v. Garvey Elevators, Inc.*, 694 P.2d 433, 437 (Kan. 1985) (observing that “[w]hen classified as *sui generis*, one of that class is privileged to enter the land for a public purpose irrespective of consent”); *supra* note 53.

59. For the California Supreme Court's discussion of the difficulties of the common law classification system, see *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (en banc). See also *supra* note 53 for a brief explication of how *Rowland* relates to the problems with the premises liability-based firefighter's rule.

60. *Hass v. Chicago & N.W. Ry.*, 179 N.W.2d 885 (Wis. 1970). See *Moss*, *supra* note 25, at 663 (noting that the switch to *sui generis* resulted in little change in duty owed to firefighters). This blanket statement is problematic considering the definitional nuances of the firefighter's rule and the intricately-carved exceptions which generally accompany any given jurisdiction's rule. See *infra* notes 61–69 and accompanying text.

61. The case of *Cooper v. City of New York*, 619 N.E.2d 369 (N.Y. 1993), illustrates the periodic difficulty in separating the limits of the definition from an exclusion to the rule. The *Cooper* court centered a large part of its discussion around the rule in *Santangelo v. State of New York*, 521 N.E.2d 770 (N.Y. 1988) (superseded by GEN. MUN. § 205-e (1990)), which precludes recovery for injuries resulting from the special risks inherent in a public safety officer's occupational duties. The plaintiff in *Cooper* argued that an act of negligence which was “separate and distinct” from those special risks should be recognized as an exception to the *Santangelo* rule, thereby allowing recovery. *Cooper*, 619 N.E.2d at 371. The New York Court of Appeals, however, declined to adopt this proposed exception, asserting that “to do so would be inconsistent with the rationale in *Santangelo*.” *Id.* The determinative factor, the court continued, “is whether the injury sustained is related to the particular dangers which police officers are expected to assume as part of their duties.” *Id.* By reiterating the *Santangelo* rule in such a way and by refusing to pock New York's present firefighter's rule, the *Cooper* court implied that it recognized the “separate and distinct” analysis, only not as an exception, but as a factor which rendered the general rule inapplicable. Thus, *Cooper* shaped the *Santangelo* rule not by way of exception, but by way of definitional formation. However, the *Cooper* case epitomizes how analytically muddled the firefighter's rule is, even when courts fervently attempt to keep it clear.

generally identified various deviations<sup>62</sup> from the rule that imposed liability on the landowner for injury to the public officer while tending to queue the firefighter's rule with general principles of negligence.<sup>63</sup> One such exception often arises when firefighters must confront "ultra-hazardous" conditions, such as explosive or toxic chemicals. To counter harsh effects of the rule's application in this seemingly unreasonable and perilous situation, some courts turn to general principles of negligence commonly used with "imminently dangerous" risks.<sup>64</sup> Somewhat related is the situation where a landowner knows of a hidden risk or danger on the premises, has ample occasion to warn the firefighter, fails to do so, and as a result, the firefighter sustains injuries from the danger. In this instance, many courts have recognized a hidden danger exception and have permitted the firefighter to recover for those injuries.<sup>65</sup>

Other courts have recognized that even though a public officer's occupation obliges him to enter dangerous environments, the officer cannot reasonably expect to be injured by the landowner's intentional or willful and wanton conduct. Because neither the firefighter nor the police officer has the option of avoiding an emergency when called, neither should be trapped under a harsh rule denying recovery for an occupant's active negligence or intentional conduct.<sup>66</sup>

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62. Although selected departures from the firefighter's rule are explicated *inter alia*, in-depth illustration of these exceptions is beyond the scope of this Comment. For a more complete treatment of these exclusions, see articles cited *supra* notes 25–26.

63. FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 27.14, at 1505 (2d ed., 1986). See generally Scholz, *supra* note 26; Strauss, *supra* note 31.

64. See Walker Hauling Co. v. Johnson, 139 S.E.2d 496 (Ga. Ct. App. 1964); Langlois v. Allied Chem. Corp., 249 So. 2d 133 (La. 1971) (superseded on other grounds by 1979 LA. ACTS 431 § 1).

65. See Shypulski v. Waldorf Paper Prods. Co., 45 N.W.2d 549 (Minn. 1951); Johnson v. Miller, 388 N.W.2d 26 (Minn. Ct. App. 1986); Bartels v. Continental Oil Co., 384 S.W.2d 667 (Mo. 1964); City of Youngstown v. Cities Serv. Oil Co., 31 N.E.2d 876 (Ohio Ct. App. 1940); Wright v. Coleman, 436 N.W.2d 864 (Wisc. 1989). *But see* Lipson v. Superior Court, 644 P.2d 822, 827–32 (Cal. 1982) (examining hidden danger exception and distinguishing between it and independent acts); Carpenter v. O'Day, 562 A.2d 595, 601–02 (Del. Super. Ct.) (stating hidden danger exception in Delaware), *aff'd*, 553 A.2d 638 (Del. 1988).

66. See Lipson, 644 P.2d at 822; Krueger v. City of Anaheim, 181 Cal. Rptr. 631 (Ct. App. 1982); Whitten v. Miami-Dade Water & Sewer Auth., 357 So. 2d 430 (Fla. 3d DCA), *cert. denied*, 364 So. 2d 894 (Fla. 1978); Cameron v. Kenyon-Connell Commercial Co., 56 P. 358 (Mont. 1899); Mahoney v. Carus Chem. Co., 510 A.2d 4 (N.J. 1986); Lamb v. Sebach, 3 N.E.2d 686 (Ohio Ct. App. 1935); Houston Belt & Terminal Ry. v. O'Leary, 136 S.W. 601 (Tex. Civ. App. 1911). See, e.g., Doehring v. Wagner, 562 A.2d 762, 767 (Md. Ct. Spec. App. 1989) (noting that willful or wanton conduct must be of calculated

While jurisdictions vary, other generally recognized exceptions to the firefighter's rule include breach of statutory duty,<sup>67</sup> subsequent and intervening acts of negligence,<sup>68</sup> and negligent maintenance of a public way.<sup>69</sup>

When a court relies upon premises liability as the foundation for the firefighter's rule, any such exception might be used to soften the rule's rigidity and allow a public officer recovery. However, if a court adopts the firefighter's rule based on assumption of risk or public policy, the constraints of the rule become more flexible. Use of the rule grounded in assumption of risk or public policy allows the *conceptualization* of the rule to expand based upon policy reasons rather than mandating the use of an *exception* to expand liability.

Several jurisdictions have recognized this very point: the same effect was achieved whether an exception lifted the bar to recovery, or whether the firefighter's rule, by definition, allowed a public officer to recover in certain instances. While courts wanted to spare from liability a landowner whose only negligence was to create the need for the officer's presence, some courts exhibited a grave reluctance to be constrained by a rule stamped with loopholes and riddled with imperfection. Instead of grounding the firefighter's rule in premises liability, courts turned to the rationales of assumption of risk and public policy,<sup>70</sup> two theories offering similar and compel

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nature, "reasonably expected to lead to a desired result"). *See also* Kaiser v. Northern States Power Co., 353 N.W.2d 899, 905 (Minn. 1984) (holding that landowner's acts which "materially enhance[] the risk or create[] a new risk of harm" not shielded from liability).

67. *See generally* Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960); Aravanis v. Eisenberg, 206 A.2d 148 (Md. 1965); Drake v. Fenton, 85 A. 14 (Pa. 1912).

68. *See* Calvert v. Garvey Elevator, Inc., 694 P.2d 433 (Kan. 1985). *See also* Rosa v. Dunkin' Donuts, 583 A.2d 1129, 1134 (N.J. 1991) (holding that "subsequent acts of negligence [may be] entitled to the immunity afforded by the fireman's rule"). Acts of negligence must generally be independent and distinct from what caused the officer's presence on the land. *See* Garcia v. City of South Tucson, 640 P.2d 1117 (Ariz. Ct. App. 1981); Malo v. Willis, 178 Cal. Rptr. 774 (Ct. App. 1981); Griffiths v. Lovelette Transfer Co., 313 N.W.2d 602 (Minn. 1981); Trainor v. Santana, 432 A.2d 23 (N.J. 1981); Sutton v. Shufelberger, 643 P.2d 920 (Wash. Ct. App. 1982).

69. *See, e.g.,* Meiers v. Fred Koch Brewery, 127 N.E. 491 (N.Y. 1920).

70. One commentator fundamentally distinguishes the firefighter's rule as based in premises liability (and accompanied by the various exceptions) from the firefighter's rule formulated in terms of assumption of risk or public policy. Moss, *supra* note 25, at 660-63. Any firefighter's rule adopted on theories of assumption of risk or public policy he labels as the "second fireman's rule." *Id.* The distinction he makes is most likely the same point argued here, i.e., that some courts framed these limits to recovery in terms of exceptions to the general rule (premises liability theories) while other courts phrased

ling analyses.

In *Armstrong v. Mailand*, the Minnesota Supreme Court perceived three benefits in basing the firefighter's rule in theories of assumption of risk.<sup>71</sup> First, implementing principles of assumption of risk to determine whether the firefighter should recover effectively abolished the problems associated with the premises liability classifications.<sup>72</sup> Next, this analysis allowed firefighters to recover for injuries attributable to the negligence of those other than landowners or occupants.<sup>73</sup> In addition, such a modification expanded the firefighter's chance to recover for acts of negligence previously precluded. For instance, a defendant may be liable for hidden dangers present or created on the land even without knowledge of those dangers.<sup>74</sup>

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these same limits as definitional boundaries (assumption of risk or public policy). Primarily, no matter how the court defines these limits to recovery, the same outcome generally results.

71. *Armstrong v. Mailand*, 284 N.W.2d 343, 350 (Minn. 1979). "Under this approach [assumption of risk], we conclude that firemen are not classified as licensees, invitees, or sui generis. Rather, they are owed the same duty of care as all entrants, except to the extent they assume the risk . . ." *Id.* The *Armstrong* court held that a landowner is not liable to a firefighter if the firefighter's injury is caused by a reasonably apparent risk. *Id.*

72. *Id.* See *supra* note 53 for a discussion of land entrant classifications.

73. *Armstrong*, 284 N.W.2d at 350. The *Armstrong* court recognized the inherent limitations of the premises liability classifications in that landowners or occupants could be the only defendants held to a standard of duty. Under premises liability law, the relationship between landowner and land entrant gives rise to the duty and standard of care owed by the landowner. See KEETON ET AL., *supra* note 35, § 57-61. Another outside of this relationship will not be charged with a duty. Even when a third person on the land poses the harm, the landowner has the duty to protect the land entrant. *Id.* § 57, at 391-92. Therefore, the *Armstrong* court implied that while the firefighter's rule should be applied, it should not narrow potential recovery quite so drastically. See *Armstrong*, 284 N.W.2d at 350.

74. *Armstrong*, 284 N.W.2d at 350. The *Armstrong* court noted:

A third aspect to the change of focus is a change in the substantive law. Presently . . . a landowner is not liable to the fireman unless the landowner knows of the hidden danger and negligently fails to warn the fireman of that danger. By concluding that the sui generis classification is abolished . . . and that landowners owe firemen a duty of reasonable care with respect to risks that are hidden or unanticipated by the firemen, it is obvious that the . . . requirement of knowledge of the danger by the landowner and of opportunity to warn would be eliminated. In other words, a landowner could conceivably be held liable to the fireman for negligence in allowing the existence of a hidden danger even though the landowner did not know of the danger or have an opportunity to warn.

*Id.*

In adhering to the traditional scope of the firefighter's rule, the *Armstrong* court held that a firefighter was not denied all recovery.<sup>75</sup> In other words, the definitional scope of the firefighter's rule somewhat changed.<sup>76</sup> The *Armstrong* court reasoned that if a firefighter's injury is caused by "a hidden or unanticipated risk attributable to the landowner's negligence and such negligence is the proximate cause of the injury," a court may hold the landowner liable because the firefighter did not assume such a risk.<sup>77</sup>

Similar lines of reasoning compelled the attention of many courts. Assumption of risk became a valid theory behind the firefighter's rule.<sup>78</sup> Yet other courts, while accepting the reasoning behind the assumption of risk theory, recognized the limitations of this rule.<sup>79</sup> Still other jurisdictions became trapped when state legislatures abolished assumption of risk.<sup>80</sup> As a solution to these short-

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75. *Id.*

76. For example, see *supra* note 70 for a further discussion of how courts framed the limits to the firefighter's rule.

77. *Armstrong*, 284 N.W.2d at 350. Courts distinguish between "primary" and "secondary" senses of assumption of risk. Although the point is outside the scope of this Comment, understanding the distinction may be helpful for background purposes.

(1) In its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it.

(2) A plaintiff may also be said to assume a risk created by defendant's breach of duty towards him, when he deliberately chooses to encounter that risk . . . .

Hereafter we shall call this "assumption of risk in a secondary sense."

2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 21.1, at 1162 (1956) (footnotes omitted). In general, the assumption of risk rationale when applied to "firefighter litigation" centers around primary assumption of risk, that is, the encountering of dangers inherent with the occupation of fighting fires. Therefore, a firefighter will be deemed to have assumed "standard" risks, such as burns, smoke inhalation, and structural collapse. See, e.g., *Carpenter v. O'Day*, 562 A.2d 595 (Del. 1988); *Thomas v. Pang*, 811 P.2d 821 (Haw. 1991); *Flowers v. Sting Security, Inc.*, 488 A.2d 523 (Md. Ct. Spec. App. 1985), *aff'd sub nom.*, *Flowers v. Rock Creek Terrace Ltd. Partnership*, 520 A.2d 361 (Md. 1987); *Scholz*, *supra* note 26, at 408–10; *Strauss*, *supra* note 31, at 2033–34.

78. See *Bay Area Rapid Transit Dist. v. Superior Court*, 170 Cal. Rptr. 390 (Ct. App. 1980); *Romedy v. Johnston*, 193 So. 2d 487 (Fla. 1st DCA 1967); *Washington v. Atlantic Richfield Co.*, 361 N.E.2d 282 (Ill. 1976); *Buchanan v. Prickett & Son, Inc.*, 279 N.W.2d 855 (Neb. 1979).

79. Generally, these jurisdictions, while rejecting the "assumption of risk" label, adopted similar policy.

80. When the general principle of assumption of risk was abrogated, it eradicated the foundation for the firefighter's role in certain jurisdictions. See *Christenson v. Murphy*, 678 P.2d 1210 (Or. 1984).

comings, the recent trend among courts seems to be to salvage the policy theories while refraining from the label of assumption of risk.

As previously recognized, the firefighter's rule based on public policy encompasses many of the same considerations accepted under the assumption of risk analysis.<sup>81</sup> However, the Maryland Court of Appeals in *Flowers v. Rock Creek Terrace Ltd. Partnership*<sup>82</sup> postulated public policy as the best explanation for the firefighter's rule.<sup>83</sup> In *Flowers*, an accidental fall down an open elevator shaft injured a volunteer firefighter while he worked to extinguish a fire.<sup>84</sup> The firefighter sued not only the property owners, but also the apartment's security guard company and the elevator manufacturer.<sup>85</sup> Examining the history of the firefighter's rule, the *Flowers* court concluded that while precedent barred the firefighter's action, the premises liability justification did not seem appropriate.<sup>86</sup> The *Flowers* court also noted different veins of the public policy rationale. Some jurisdictions seemed to employ assumption of risk while labeling it as public policy.<sup>87</sup> Other jurisdictions advocated public policy as a derivation from the relationship between firefighters and the

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81. Courts and critics recognize the similarities between assumption of risk and public policy considerations. See *Thomas v. Pang*, 811 P.2d 821, 824 (Haw. 1991); Strauss, *supra* note 31. While some of the outcomes and reasonings may be similar, at least one court has further articulated the bar to recovery under public policy as "based on a relationship between firemen and policemen and the public that calls on these safety officers." *Flowers v. Rock Creek Terrace Ltd. Partnership*, 520 A.2d 361, 368 (Md. 1987) (emphasis added).

82. 520 A.2d 361 (Md. 1987).

83. *Id.* at 368.

84. *Id.* at 362-63.

85. *Id.* at 362.

86. *Flowers*, 520 A.2d at 366-67. It seems that one reason the premises liability rationale was not appropriate was the fact that *Flowers* asserted claims against parties other than the landowner to which the premises liability theory could not reach.

In addition, the court noted the prior point argued here: under the premises liability rationale, courts have begun to define the general rule by creating exceptions. However, the *Flowers* court took this point one step further and strongly criticized the premises liability rationale altogether: "[A]lthough prior cases sounding in premises liability law had begun to define the extent to which firemen are deemed to anticipate certain occupational risks, the premises liability rationale itself does not provide a basis for delimiting the duties owed to firemen." *Id.* at 367.

87. *Id.* Perhaps by labeling assumption of risk as public policy, courts may avoid the pitfalls of assumption of risk while reaping the advantages of its logical application to firefighters. By explicitly channeling a set of courts under this broad observation, the *Flowers* court seemed to point out how these courts are garnering the advantages of both justifications.

general public.<sup>88</sup> The *Flowers* court accepted a general public policy rationale, holding that firefighters and police officers “generally cannot recover for injuries attributable to the negligence that requires their assistance.”<sup>89</sup>

As other courts reasoned, since “liberal compensation”<sup>90</sup> is available to firefighters and police officers when on-the-job injury occurs, private action should not be allowed.<sup>91</sup> While some courts

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88. *Id.* at 368. Under this subset of policy rationales, landowners escape liability because it is the firefighter's duty to “take all reasonable measures to protect lives and property from fires.” *Id.* (citing *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984) (holding that “since government entities employ and train firefighters and policemen, at least in part, to deal with those hazards that may result from the actions or inaction of an uncircumspect citizenry, it offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services”); *Calvert v. Garvey Elevators, Inc.*, 694 P.2d 433, 438 (Kan. 1985) (“[f]ire fighters are present . . . because of the duty owed to the public as a whole”); *Buren v. Midwest Indus., Inc.*, 380 S.W.2d 96, 98 (Ky. 1964) (“in the performance of his official function the fireman is a part rather than an object of fire prevention and control”).

For explanations of what constitutes an occupational hazard that bars recovery, see *Johnson v. Teal*, 769 F. Supp. 947, 951 (E.D. Va. 1991); *Lenthall v. Maxwell*, 188 Cal. Rptr. 260 (Ct. App. 1982); *Christenson v. Murphy*, 644 P.2d 627 (Or. Ct. App. 1982), *rev'd*, 678 P.2d 1210 (Or. 1984).

89. *Flowers*, 520 A.2d at 368. In addition, the *Flowers* court expended much effort to carefully define the boundaries of the firefighter's rule which they carved:

We reiterate, however, that firemen and policemen are not barred from recovery for all improper conduct. Negligent acts not protected by the fireman's rule may include failure to warn the firemen of pre-existing hidden dangers where there was knowledge of the danger and an opportunity to warn. They also may include acts which occur subsequent to the safety officer's arrival on the scene and which are outside of his anticipated occupational hazards. As indicated by this Court in *Aravanis*, the fireman's rule should not apply “when the fireman sustains injuries after the initial period of his anticipated occupational risk, or from perils not reasonably foreseeable as part of that risk” . . . . In these situations a fireman or policeman is owed a duty of due care. Moreover, the fireman's rule does not apply to suits against arsonists or those engaging in similar misconduct.

*Id.* at 368–69 (citations omitted). This exact language is important to note. Six years later in *Griffith v. Southland Corp.*, 617 A.2d 598 (Md. Ct. Spec. App. 1992), *aff'd*, 633 A.2d 84 (Md. 1993), the Maryland Court of Special Appeals manipulated this quoted language and the *Flowers*' rationale to justify broad expansion of liability. See *infra* notes 179–205 and accompanying text.

90. *Walters v. Sloan*, 571 P.2d 609, 612 (Cal. 1977) (“[w]hen injury occurs liberal compensation is provided”). See *Gray v. Russell*, 853 S.W.2d 928 (Mo. 1993) (listing worker's compensation, insurance benefits, and disability pensions as sufficient to cover cost of firefighters' or police officers' injuries).

91. See *Walters*, 571 P.2d at 612 (“[F]iremen and policemen are paid for the work they perform including preparation for facing the hazards of their professions and dealing with perils when they arise.”); *Steelman v. Lind*, 634 P.2d 666, 668 (Nev. 1981) (“[T]o allow actions by policemen and firemen against negligent taxpayers would subject

urge the adoption of public policy as the underlying grounds for the firefighter's rule,<sup>92</sup> some justices advocate complete abolition of the rule.<sup>93</sup>

## II. AFFIRMATIVE OBLIGATIONS TO AID

Prior to the imposition of liability, fundamental principles of negligence require a finding that the defendant breached a duty owed to the plaintiff.<sup>94</sup> However, courts generally display reluctance to impose an affirmative duty<sup>95</sup> on a defendant to aid<sup>96</sup> a stranger in need.<sup>97</sup>

them to multiple penalties for the protection.”); *Krauth*, 157 A.2d at 131 (“[F]ireman should receive appropriate compensation from the public he serves, both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling.”). See also *Flowers*, 520 A.2d at 368–69.

92. That is, public policy is the favored justification, as opposed to the other rationales of assumption of risk or premises liability.

93. See *Walters*, 571 P.2d at 620 (Tobriner, Acting C.J., dissenting) (stating that “[a]n examination of the numerous policy arguments used to justify the fireman's rule, then, fails to uncover a compelling reason for honoring this exception to the general principles of tort law”); *Thomas v. Pang*, 811 P.2d 821, 826 (Haw. 1991) (Padgett, J., dissenting) (stating that “[w]hen a rule of law is so difficult of explanation that courts adopting it have tried to buttress it with varying, shaky, legal explanations, and have shot it full of exceptions, it is usually because the rule is unjust”).

94. See *KEETON ET AL.*, *supra* note 35, at § 30.

95. Sometimes the courts frame the issue as one of proximate cause rather than one of duty. Explication of the subtle, yet important, distinctions between these two analyses is beyond the scope of this Comment. See *Adler*, *supra* note 12, at 912–14.

96. The duty imposed by courts has been framed not only as a duty to aid or protect, see *Stangle v. Fireman's Fund Ins. Co.*, 244 Cal. Rptr. 103 (App. Ct. 1988); *South v. National R.R. Passenger Corp.*, 290 N.W.2d 819 (N.D. 1980), but also as a duty to rescue, see *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), or a duty to warn, see *Semmelroth v. American Airlines*, 448 F. Supp. 730 (E.D. Ill. 1978); *Litz v. Hutzler Bros. Co.*, 314 A.2d 693 (Md. Ct. Spec. App. 1974). However, no matter how these legal obligations are articulated, each essentially has the same effect. The differences between the labels can be approached as one of semantics, dependent upon the particular facts of a given case.

97. See *Adler*, *supra* note 12, at 872. For an interesting argument grounded in psychological theory and in favor of an imposition of a legal obligation to rescue, see Mitchell McInnes, *Psychological Perspectives on Rescue: The Behavioural Implications of Using the Law to Increase the Incidence of Emergency Intervention*, 20 MAN. L.J. 656 (1991). For similar presentations, see Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993); Robert J. Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983).

### A. Traditional Approach to No-Duty Analysis

Traditionally, a bystander has no affirmative duty to aid another in danger, no matter how serious the peril or how easy such a rescue might be for the bystander.<sup>98</sup> In general, absent affirmative conduct or a special relationship, one does not have a legal duty to rescue another.<sup>99</sup> This lack of legal obligation is known as the “no-duty” or “no-duty-to-rescue” rule<sup>100</sup> and finds support in the Restatement of Torts, on which many courts seem to heavily rely.<sup>101</sup>

Conventionally, courts evaluate the question of duty based upon a distinction between misfeasance and nonfeasance.<sup>102</sup> If a plaintiff can characterize the defendant's act (or lack thereof) as misfeasance,<sup>103</sup> the court will allow the cause of action to proceed to the jury.<sup>104</sup> However, if the defendant can successfully present his behavior as nonfeasance,<sup>105</sup> the court is not likely to impose liability on the defendant for the plaintiff's injury.

The traditional no-duty rule, however, is subject to “limited”<sup>106</sup>

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98. See Adler, *supra* note 12, at 867–68.

99. See KEETON ET AL., *supra* note 35, § 56, at 375.

100. Adler, *supra* note 12, at 867.

101. The Restatement view states: “The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.” RESTATEMENT (SECOND) OF TORTS § 314 (1965).

102. See KEETON ET AL., *supra* note 35, § 56.

103. Distinguishing between misfeasance and nonfeasance is an intricacy which causes courts much difficulty. Since such characterization is the first step for courts, critics have argued stridently for the eradication of this analysis. See generally Adler, *supra* note 12.

104. KEETON ET AL., *supra* note 35, § 56. Compare *Weinberg v. Dinger*, 524 A.2d 366 (N.J. 1987) (action against private water company allowed to proceed when company failed to provide adequate water supply for fire extinguishment) with *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928) (private water company that contracted with city held to no duty to supply adequate pressure to extinguish fire).

105. Chief Justice Cardozo characterized nonfeasance as “merely . . . withholding a benefit,” “a refusal [by defendant] to become an instrument for good.” *Moch*, 159 N.E. at 898.

106. Adler, *supra* note 12, at 873. While Professor Adler disputes the contention that the exceptions to the no-duty rule have “swallowed” the rule of no liability, *id.* at 877 n.43, the exceptions have completely absorbed any clarity the rule may have once had, resulting in illogical and inconsistent outcomes of cases. Cf. LEON GREEN, *The Duty Problem* (pt. 1), in *JUDGE AND JURY* 38, 62 (1930) (“[a]s long as a person does nothing he comes under no duty imposed by law. This is one of the most dependable limitations upon duties . . .”).

exceptions. If a case falls within such an exception, the defendant owes a duty to the plaintiff and liability may result.<sup>107</sup> The principal exception<sup>108</sup> is that of the special relationship:<sup>109</sup> if the potential rescuer<sup>110</sup> and the victim share a relationship, the rescuer may be

107. This is true even though the case is one of nonfeasance and the defendant would not have been liable absent the applicable exception.

Thus, an adult who observes an infant in danger has no obligation to act affirmatively to protect the child unless the adult either: (1) has a pre-existing relationship with the child; (2) has become involved with the child by virtue of having created the risk initially (even if non-negligently); or (3) has become involved by virtue of taking initial, gratuitous steps to help.

Adler, *supra* note 12, at 874 n.32.

108. The special relationship is by far the most widely-recognized exception.

109. Under the Restatement view, special relationships between the rescuer and the victim seem to be quite limited in scope. Included are only the traditional relationships of common carrier/passenger, innkeeper/guest, and business invitee/landowner, although the restaters explicitly discounted such a definitive scope.

§ 314 A. Special Relations Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) 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 is under a similar duty to the other.

Caveat: The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

RESTATEMENT (SECOND) OF TORTS § 314A (1965). *See id.* § 314 A cmt. b and c. Additionally, the relationship between an employer and an employee may give rise to a duty to protect the employee from dangers. *Id.* § 314B.

But see *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976), for a more liberal application of the special relationship exception. In *Farwell*, two teenage boys embarked on a social venture one evening. *Id.* at 219. When one of the boys was found nearly dead the next morning as a result of a fight the previous evening, the other boy was charged with a duty to protect and rescue his friend because of the "special relationship" they shared: "[The boys] were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself." *Id.* at 222.

110. The potential rescuer may be the person best able to protect, warn, or aid the victim.

charged with a duty to protect the victim.<sup>111</sup> A variation on this exception may apply when a third person who shares a relationship with the potential rescuer<sup>112</sup> poses a threat of harm to the plaintiff.<sup>113</sup> Under these circumstances, the rescuer may have a duty to control the third person and prevent him from harming the plaintiff-victim.<sup>114</sup> The seminal case illustrating such a situation is *Tarasoff*

111. Illustrative of a court expanding the special relationship exception beyond the specific enumerations found in Restatement § 314A is the case of *Eisel v. Board of Educ.*, 597 A.2d 447 (Md. 1991). In *Eisel*, a student informed friends of a suicide pact. *Id.* at 449. When confronted by school counselors, the student denied such an intent, but later followed through with her plan. *Id.* at 449–50. The court held that because a mere phone call to the parents may have prevented such a tragedy, the counselors had a duty based upon their special relationship with the student to prevent this foreseeable suicide. *Id.* at 455–56. Besides defining the relationship between the student and the counselors as “special,” *id.* at 451–52, the court expanded the special relationship exception in another subtle way. Although the court formulated the relationship as one between the *student* and the *counselors*, the counselors did not owe a duty to “protect” directly to the child. *Id.* at 451. Instead, the court factored a *third party*, the student's parents, into the equation: the duty to protect the student was owed to the parents, a duty which may have been satisfied had the counselors alerted the parents of their child's intent. *Id.* at 456. For a more in-depth treatment of the *Eisel* case, see *infra* notes 140–46. But see *Mikialian v. City of Los Angeles*, 144 Cal. Rptr. 794 (Ct. App. 1978), where the court failed to find a special relationship between police officers and a tow truck driver called to an accident scene. In *Mikialian*, a third-party hit-and-run driver injured the truck driver when the officers failed to put flares around the tow truck area. *Id.* Note that the *Mikialian* court implied that a special relationship may have existed had the officer realized a foreseeable and unreasonable risk of harm to the truck driver. *Id.* at 803.

112. This relationship should be contrasted to that between the rescuer and victim.

113. The other exceptions discussed — “strict” special relationship, creation of the risk, and charge and control — arise in the factual situation where a dangerous condition poses the threat. Only when a third person, rather than a dangerous condition, poses the threat may this variation apply. See Adler, *supra* note 12, at 875–76.

114. See *Duarte v. State*, 151 Cal. Rptr. 727 (Ct. App. 1979); Adler, *supra* note 12, at 876.

Like the other exceptions, this duty to control is supported by the Restatement. § 315. General Principle

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965). Note that the relationship between the rescuer and the third person does not give rise to a duty to protect the victim from the harm. Rather, the duty is to *control* the dangerous individual. See Adler, *supra* note 12, at 876. See also RESTATEMENT (SECOND) OF TORTS §§ 316–319 (1965) (imposing duty on parent to control child, master to control servant, possessor of land to control licensee, and one in charge of dangerous person to control him).

*v. Regents of the University of California*.<sup>115</sup> Note, however, that several commentators advocate *Tarasoff* not as a case that implements the traditional analysis and its exceptions, but rather as a case instructive of the modern approach to the no-duty analysis.<sup>116</sup>

Common law recognizes a second exception to the no-duty rule if the defendant or his instrumentality created the harm.<sup>117</sup> In this scenario, the defendant may be held liable for failing to aid the victim. Thirdly,<sup>118</sup> an affirmative duty may be imposed on a defen-

115. 551 P.2d 334 (Cal. 1976) (en banc). In *Tarasoff*, the parents of a murdered girl sued the Board of Regents for a University of California psychologist's failure to warn of any impending danger after the murderer disclosed to the psychologist his plans to kill the girl. *Id.*

116. See Adler, *supra* note 12; Robert Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of in loco parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. (forthcoming 1994); Murphy, *supra* note 12; Andrew C. Greenberg, Note, *Florida Rejects a Tarasoff Duty to Protect*, 22 STETSON L. REV. 239 (1992); Peter F. Lake, *Revisiting Tarasoff* (March 11, 1994) (unpublished manuscript, on file with *Stetson Law Review*) (taking the argument further by proposing that *Tarasoff* actually unravels the traditional Restatement approach).

117. While some courts equate creation of a risk with "creation" of a special relationship, see *Johnson v. State*, 447 P.2d 352 (Cal. 1968) (en banc); *Mid-Cal Nat'l Bank v. Federal Reserve Bank*, 590 F.2d 761 (9th Cir. 1979), the Restatement treats the two as distinct.

§ 321. Duty to Act When Prior Conduct is Found to be Dangerous

(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

§ 322. Duty to Aid Another Harmed by Actor's Conduct

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

RESTATEMENT (SECOND) OF TORTS §§ 321-322 (1965).

The case of *South v. National Railroad Passenger*, 290 N.W.2d 819 (N.D. 1980), exemplifies an application of this exception. In that case, a collision with the defendant's train injured the plaintiff. *Id.* at 823. The engineer of the train refused to cover up the plaintiff with his new parka to help prevent shock. *Id.* at 835. The court affirmed the plaintiff's recovery. *Id.* at 823. A few cases reach beyond *South*, imposing a duty upon the defendant at the time the risk is created, even though the plaintiff had yet to be harmed. See, e.g., *Pacht v. Morris*, 489 P.2d 29 (Ariz. 1971).

118. Other exceptions exist in various jurisdictions but may not fit neatly into one of these primary exceptions. See generally *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961) (finding that hospital has no duty to run emergency ward, but if undertaken,

dant who takes charge or control<sup>119</sup> of the plaintiff, thereby effectively secluding the plaintiff from any benefit potentially available from others.<sup>120</sup>

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it has duty not to negligently turn away patient seeking emergency care); *Florence v. Goldberg*, 375 N.E.2d 763 (N.Y. 1978) (imposing liability based on reliance of a voluntarily-assumed duty). However, an explication of each instance is beyond the scope of this Comment.

119. This exception is also known as the “affirmative act” exception, since it requires active behavior on the part of the defendant.

120. The Restatement provides:

§ 324. Duty of One Who Takes Charge of Another Who is Helpless

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

- (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
- (b) the actor's 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.

Caveat: 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 his discontinuance of the aid or protection, where by doing so he leaves the other in no worse position than when the actor took charge of him.

RESTATEMENT (SECOND) OF TORTS § 324 (1965).

A case exemplifying this section of the Restatement is *Convery v. Maczka*, 394 A.2d 1250 (N.J. Super. Ct. Law Div. 1978). In that case, a five-year-old boy injured after falling in a neighbor's basement alleged that his mother and the neighbor had a duty to supervise him. *Id.* at 1250–51. In denying the mother's motion for summary judgment, the court held that the defendants had a duty to exercise reasonable care for the boy's protection against unreasonable risk of injury. *Id.* at 1253. A breach of that duty would include not warning the child against, or otherwise preventing, an injury to him during dangerous play. *Id.* In addition, the court noted that this cause was actionable within the limits of reasonable foreseeability against others with a special relationship to the child. *Id.* For an additional example of the section 324 exception, see *Regan v. Stromberg*, 285 N.W.2d 97 (Minn. 1979) (holding that a jury question existed as to whether husband who left intoxicated wife on highway at night had a continuing duty to protect her from foreseeable harm).

The celebrated case often noted in conjunction with section 324 is *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976), where a teenaged defendant was held liable after he put ice on his severely-beaten friend's head and drove him to his grandparents' house. The defendant left his friend in the backseat of the car, where he was found nearly dead the next morning. *Id.* at 219. Since the defendant sequestered his friend from any other possible means of help and then failed to continue aiding his friend, the court imposed a duty of care. *Id.* at 222. *But see* *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (finding police officers not liable when officers negligently attempted a rescue); *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947) (finding seaman not negligent for failing to attempt to rescue drunken invited guest who fell overboard and drowned), *cert. denied*, 332 U.S. 830 (1947). Note that the *Farwell* court also based its decision in part on an expansion of the special relationship analysis. See *supra* note 109 for a dis-

### B. Modern Approach<sup>121</sup> to the No-Duty Analysis

As noted above,<sup>122</sup> pegging the alleged behavior as misfeasance or nonfeasance is the first step taken by courts that follow the traditional approach in deciding whether a duty to rescue exists.<sup>123</sup> In recent years, however, some courts have altered their approach when deciding issues of liability. *Tarasoff*,<sup>124</sup> one of the most widely impacting cases of our time,<sup>125</sup> harvests credit as one source for this trend. In *Tarasoff*, Justice Tobriner of the California Supreme Court dispensed with the traditional approach of distinguishing between misfeasance and nonfeasance.<sup>126</sup> Utilizing *Tarasoff*, courts approach

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cussion of *Farwell* in this light.

121. "Modern approach" loosely describes a recent, visible trend among courts to recognize that precedent is based on a general duty to the world, contrasted to the "traditional" formulation that no duty is owed to rescue. In fact, Professor Murphy traces English and American case law through the years, arguing that the "true" common law view is that a general duty of care is owed to all. Murphy, *supra* note 12. It is only a handful of popular cases which seem to discount this and which as a result, confused the state of no-duty law. *See id.* By employing the term "modern approach," the author does not mean to suggest that she rejects his arguments or analysis.

122. *See supra* notes 102–14 and accompanying text.

123. This analysis has been severely criticized, some arguing that this archaic approach should be abandoned in light of today's societal needs or that this approach is too confusing, complex, and leads to inconsistent outcomes. *See Adler, supra* note 12; Murphy, *supra* note 12.

124. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (en banc). One commentator has identified *Tarasoff* as actually unravelling the Restatement approach to no-duty issues, attacking the Restatement in the "jugular vein." *See Lake, supra* note 116 (manuscript at 52).

125. For recognition of *Tarasoff's* vast importance, see generally Adler, *supra* note 12; Steven C. Bednar, *The Psychotherapist's Calamity: Emerging Trends in the Tarasoff Doctrine*, 1989 B.Y.U. L. REV. 261; James E. George, et al., *The Therapist's Duty to Protect Third Parties: A Guide for the Perplexed*, 14 RUTGERS L.J. 637 (1983); Lake, *supra* note 116; Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982); Murphy, *supra* note 12; Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); Dianne S. Salter, Ph.D., Note, *The Duty to Warn Third Parties: A Retrospective on Tarasoff*, 18 RUTGERS L.J. 145 (1986); Leslie B. Small, Comment, *Psychotherapists Duty to Warn: Ten Years After Tarasoff*, 15 GOLDEN GATE U.L. REV. 271 (1985). *Cf.* Neil J. Squillante, Comment, *Expanding the Potential Tort Liability of Physicians: A Legal Portrait of "Non-traditional Patients" and Proposals for Change*, 40 UCLA L. REV. 1617 (1993); Shlomo Twerski, Note, *Affirmative Duty After Tarasoff*, 11 HOFSTRA L. REV. 1013 (1983).

126. *See Tarasoff*, 551 P.2d 334. Some read *Tarasoff* on a much narrower level. They argue that *Tarasoff* imposed a duty on a psychotherapist to warn a third-party victim of potential harm from his patient primarily on the basis of special relationship. *See*

issues of liability on the premise that a general duty of care is owed to all.<sup>127</sup> Whether that duty should be abandoned<sup>128</sup> is contingent upon analysis of several policy criteria or other considerations.<sup>129</sup> Variables<sup>130</sup> to consider include:

- (1) "the foreseeability of harm to the plaintiff,"<sup>131</sup>

Adler, *supra* note 12; Squillante, *supra* note 125; Twerski, *supra* note 125. While it is true that Justice Tobriner recognized such a relationship, another thought is that the "special relationship" analysis is tenuous at best. Such a stretch merely indicates that this alternate finding (based on a more accepted doctrine which imposes duty) insured that Tobriner's approach to duty would not be discarded.

A third view is the implication by Justice Tobriner that courts in fact have always approached issues of liability with the assumption that a general duty of care is owed to all. Only when policy considerations dictate that a duty should *not* be imposed should the doctrine of nonfeasance become applicable. Therefore, the approach under *Tarasoff* should not be shocking in that the court's considerations have not changed. The only thing that changed with *Tarasoff* is that courts began to expose the analysis they implemented. See Murphy, *supra* note 12.

While Justice Tobriner focused his analysis on the question of duty, the argument could easily have been built around the issue of proximate cause. In fact, many courts use the policy criteria to decide issues of proximate cause rather than duty. For one such example, see *Rodney v. Mansur*, 219 So. 2d 305 (La. Ct. App. 1969). But note the Maryland Court of Appeals' observation:

This factor [i.e., closeness of connection between conduct and injury] is the proximate cause element of a negligence action considered on the macroscale of policy. Consideration is given to whether, across the universe of cases of the type presented, there would ordinarily be so little connection between breach of the duty contended for, and the allegedly resulting harm, that a court would simply foreclose liability by holding that there is no duty.

*Eisel v. Board of Educ.*, 597 A.2d 447, 454 (Md. 1991).

127. See *Tarasoff*, 551 P.2d 334. Note that in this regard, the *Tarasoff* analysis is the opposite of the traditional no-duty approach. "[W]henever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *Id.* at 342 (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (en banc) (quoting *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883))). See KEETON ET AL., *supra* note 35 ("duty is not sacrosanct").

128. Therefore, the *Tarasoff* analysis reverses the traditional approach which begins on the premise of *no duty*.

129. One commentator notes that a hierarchy may exist among these factors, some criteria carrying more weight than others. He denotes this hierarchy with the language "meta-criteria." See Lake, *supra* note 116 (manuscript at 85 n.347).

130. The California Supreme Court enumerated these considerations in *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (en banc). In *Tarasoff*, the Supreme Court of California recognized these factors as a reflection of society's needs to be used in withdrawing a duty of care. *Tarasoff*, 551 P.2d at 342.

131. *Tarasoff*, 551 P.2d at 342. Foreseeability is the "most important of these considerations in establishing duty." *Id.* For an excellent discussion of the element of foreseeability, see *Florida Power Corp. v. McCain*, 555 So. 2d 1269 (Fla. 2d DCA 1989),

- (2) "the degree of certainty that the plaintiff suffered injury,"<sup>132</sup>  
 (3) "the closeness of the connection between the defendant's conduct and the injury suffered,"<sup>133</sup>  
 (4) "the moral blame attached to the defendant's conduct,"<sup>134</sup>  
 (5) "the policy of preventing future harm,"<sup>135</sup>  
 (6) "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach,"<sup>136</sup> and  
 (7) "the availability, cost and prevalence of insurance for the risk involved."<sup>137</sup>

Many courts recite these policy considerations in their decisions. However, not all jurisdictions dispense completely with the traditional analysis and implement explicitly the *Tarasoff* approach in its entirety.<sup>138</sup> As always, exceptions exist.<sup>139</sup> Maryland is one jurisdiction that specifically embraces the *Tarasoff* analysis.

In *Eisel v. Board of Education*,<sup>140</sup> the Maryland Court of Appeals addressed the issue of whether middle school counselors had a duty to warn the parents of a child who told friends that she intended to commit suicide.<sup>141</sup> Recognizing that no direct precedent dealing with a substantially similar issue existed, the *Eisel* court turned to previous Maryland decisions implementing the *Tarasoff* approach.<sup>142</sup> Analyzing in depth each of the seven policy criteria, the court concluded that because the school counselors had notice of the child's potential suicide, they owed a duty to the parents to use reasonable care in preventing the suicide.<sup>143</sup> The Maryland Court of Appeals added that on remand, a jury may find that such reasonable care

quashed, 593 So. 2d 500 (Fla. 1992).

132. *Tarasoff*, 551 P.2d at 342.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Tarasoff*, 551 P.2d at 342.

138. See Lake, *supra* note 116 (manuscript at 5-6 nn.13-15).

139. See *id.* (manuscript at 5-6 nn.14 & 15).

140. 597 A.2d 447 (Md. 1991).

141. *Id.* at 448.

142. *Id.* at 450-56. Included in the cases examined by the court was Village of Cross Keys, Inc. v. United States Gypsum Co., 556 A.2d 1126 (Md. 1989), which the *Eisel* court recognized as quoting the seven meta-criteria of *Tarasoff*. See *Eisel*, 597 A.2d at 452 (citing *Village of Cross Keys*, 556 A.2d at 1131 (quoting *Tarasoff*, 551 P.2d at 342)).

143. *Eisel*, 597 A.2d at 456.

may include warning a parent of his child's impending suicide attempt.<sup>144</sup>

With regard to Maryland's adoption of the *Tarasoff* approach, the *Eisel* concurrence is important. While agreeing with the *Eisel* majority's outcome, the concurring opinion seemed to uncover the majority's true motives. The *Eisel* concurrence objected to the majority's "overly broad general explication" of the *Tarasoff* analysis, beyond what was "necessary" to the case's outcome.<sup>145</sup> In this vein, the concurrence seemed to realize that the majority's use of this analysis effectively equaled an adoption of it.<sup>146</sup> Nevertheless, the *Tarasoff* approach has gained favor within the chambers of Maryland. Maryland courts now adopt the modern approach so comprehensively that they utilize the policies sometimes without even citing *Tarasoff*, typically labeling such analysis as "Maryland Public Policy."<sup>147</sup>

### III. CASE IN POINT: SOUTHLAND CORP. v. GRIFFITH

The recent Maryland opinions centering around the case of *Southland Corp. v. Griffith*<sup>148</sup> are illustrative of the vast impact that the *Tarasoff* approach has on jurisdictions presented with unusual issues of duty. By carefully dissecting the opinions, it becomes apparent how courts stretch and even mangle traditionally accepted rules, such as the firefighter's rule, by insistently<sup>149</sup> applying the *Tarasoff* analysis. The opposite also seems to be true. As a result of the "abuse" of the firefighter's rule, a liberal and ostensibly unpredictable duty arises for a convenience store when a police officer is on its premises. Also apparent is how courts may overstep the boundaries of the *Tarasoff* analysis.<sup>150</sup> By insistent application of the

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144. *Id.* It is interesting to note for the sake of comparison with *Southland* that the *Eisel* court found the school counselors' duty would have been discharged by a simple phone call, a rather "slight" burden. *Id.* at 455.

145. *Id.* (Murphy, C.J., dissenting).

146. *Id.* at 456.

147. *See, e.g., Griffith v. Southland Corp.*, 617 A.2d 598 (Md. Ct. Spec. App. 1992), *aff'd*, 633 A.2d 84 (Md. 1993).

148. 633 A.2d 84 (Md. 1993).

149. Arguably, the Maryland Court of Special Appeals applied *Tarasoff* in an overreaching way as well.

150. This is an intriguing and perhaps shocking assertion for Restatement-view advocates who might criticize, pigeonhole, and even dismiss *Tarasoff* as a mere liberalized expansion of liability.

*Tarasoff* analysis in conjunction with the Restatement of Torts, *Southland* demonstrates how such a superficial use might eventually cause problems for the traditional approach to questions of duty.

#### A. How the Case Developed

On May 15, 1988, shortly after midnight,<sup>151</sup> a pickup truck carrying off-duty police officer David Griffith, his son Matthew, and three others pulled into the parking lot of a 7-Eleven store in Ferndale, Maryland.<sup>152</sup> Griffith entered the 7-Eleven to purchase some snack food<sup>153</sup> before leaving for home.<sup>154</sup> While they ate in the back of the truck, another pickup pulled into the parking lot.<sup>155</sup> The three teenagers in the second truck became quite “boisterous,” shouting obscenities at Griffith and his companions.<sup>156</sup>

Griffith and his companions decided to leave,<sup>157</sup> but before they pulled out of the parking lot, one of the three “ruffians” from the other truck threw a beer can, striking Matthew.<sup>158</sup> When Griffith got out of the truck,<sup>159</sup> another of the delinquents threw a second beer

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151. Appellee's Brief and Appendix at 2, *Griffith v. Southland Corp.*, 617 A.2d 598 (Md. Ct. Spec. App. 1992) (No. 91-1314), *aff'd*, 633 A.2d 88 (Md. 1993).

152. *Griffith*, 617 A.2d at 600. With him that evening included his son, Matthew; two teenaged friends of Matthew's, one male and one female; and another adult who was driving. Joint Record Extract at E-181. Griffith and Matthew sat in the back of the truck. *Id.* at E-182.

153. *Griffith*, 617 A.2d at 600. Included in their purchases at 7-Eleven that evening were a pizza and a Big Gulp. Joint Record Extract at E-181. *Cf.* BILL & TED'S BOGUS JOURNEY (Orion 1991) (“hell hath no pizza”).

154. *Griffith*, 617 A.2d at 600. According to the record, Griffith was headed home from chaperoning a teen dance at the local YMCA. Joint Record Extract at E-180 to 181. Because Griffith was off-duty that night, he “did not have [his] service revolver, night stick, handcuffs, police radio, police patrol car or any other protective devices which [he] would have possessed if [he] had been on duty at the time.” *Id.* at E-66 to 67.

155. *Griffith*, 617 A.2d at 600.

156. *Id.* Actually, there was some belief that the delinquents directed the obscenities at the female teenager who accompanied Griffith's son, Matthew, that evening. *Id.*

157. Griffith testified that while the three aggressors were yelling to him and his companions, he “yelled back over at them to knock it off. And [because] it just started getting out of control . . . we decided to go ahead and just leave.” Joint Record Extract at E-182.

158. *Griffith*, 617 A.2d at 600.

159. Presumably, Griffith got out of the truck to quell the disturbance because the three ruffians directed their abuse towards his son. Joint Record Extract at E-183. It remains speculative whether Griffith would have approached the other individuals had his son not been singled out.

can, which struck Griffith on the face.<sup>160</sup> “Without warning,”<sup>161</sup> one aggressor lunged toward Griffith, knocking him to the ground.<sup>162</sup> At that point, Griffith told the antagonists that he was a police officer and attempted to place them under arrest.<sup>163</sup> From here the “savage” altercation intensified,<sup>164</sup> spilling over to the Shell station across the street.<sup>165</sup>

According to his affidavit, Matthew entered the convenience store twice, requesting that the 7-Eleven clerk call for police assistance.<sup>166</sup> On his third return to the store, Matthew “jumped over the

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160. *Griffith*, 617 A.2d at 600.

161. Brief for Appellant, *Griffith* (No. 91-1314).

162. *Griffith*, 617 A.2d at 600.

163. Griffith testified during the criminal proceedings against the three attackers that he later yelled, “I’m a police officer, knock it off. Quit.” Joint Record Extract at E-186; *Griffith*, 617 A.2d at 600.

164. The majority described the fight as a “savage beating,” lasting approximately seven minutes. *Id.* at 600–01. The other adult with Griffith that evening tried to help him but was also attacked by the three teens. Brief for Appellant at 4, *Griffith* (No. 91-1314). It seems that after the other adult who came to Griffith’s aid sustained injuries, he and Griffith’s other companions immediately left the scene and drove up the road, presumably to drop off one of the young companions at his house. Joint Record Extract at E-143 to 144. Why the driver did not instruct Matthew and his friends to stay in the truck while he continued to help against the brutal attack on Griffith or, in the alternative, why the driver did not drop off *all* of the young witnesses at the youth’s house if he was afraid for their safety, is not known. However, it is interesting to note that according to his affidavit, Matthew vividly accounts for nearly every minute of the seven-minute fight and does not admit to leaving the scene at any time during the fight. *See id.* at E-47 to 49.

165. *Griffith*, 617 A.2d at 600. The fight in the 7-Eleven parking lot itself lasted only 30 seconds to one minute before moving over to the Shell station. Appellant’s Brief and Appendix at 4, *Southland Corp. v. Griffith*, 633 A.2d 84 (Md. 1993) (No. 93-33).

While at the Shell station, the delinquents hit Griffith in the face and across the collarbone with a tire iron. Brief for Appellant at 3. Not only did the Shell station attendant try to physically assist Griffith when the fight began, but the attendant also called the police. *Griffith*, 617 A.2d at 600; Appellee’s Brief and Appendix at 3, *Griffith* (No. 91-1314). The record also reflects that Griffith himself called the police from the Shell station. Joint Record Extract at E-196. However, because of the limited discovery in this case, it remains unknown which call to 911 actually brought the police to the scene. Supplemental Brief of Appellee at 5, *Griffith*, (No. 91-1314). Regardless, immediately following Griffith’s phone call, the attendant tried to keep Griffith in the Shell station office, but Griffith insisted, “No, I must go out because my son’s out there. I must go back out and join the fight.” Joint Record Extract at E-216.

166. *Griffith*, 617 A.2d at 601. After Matthew asked the clerk to contact the police, he “immediately disappeared” both times from the store and therefore, according to Southland, “would not have known whether the police were called.” Supplemental Brief of Appellee at 3, *Griffith* (No. 91-1314). After his second visit, however, Matthew alleges that the clerk acknowledged his requests and actively chose to ignore them by moving a case of sodas which was propping the door, possibly in an attempt to keep him from

counter . . . pulled the female clerk over to the telephone and dialed 911 . . . yelled that . . . [an officer was down and needed assistance] and told the clerk to give the operator the [store's] address."<sup>167</sup>

Matthew's account of the facts conflicts significantly with the clerk's affidavit.<sup>168</sup> According to the clerk, Matthew requested only once that she call 911 and she complied immediately.<sup>169</sup> When the police "finally"<sup>170</sup> arrived, the fighting quelled.<sup>171</sup> The police apprehended and arrested the three aggressors as they attempted to leave the 7-Eleven parking lot.<sup>172</sup>

As a result of his injuries, Griffith filed a civil action against Southland Corporation<sup>173</sup> for negligence, claiming that the 7-Eleven clerk breached her duty owed to him by failing to contact the police as requested.<sup>174</sup> Shortly after Southland answered the com

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returning. Joint Record Extract at E-48, *Southland* (No. 93-33).

In his affidavit, Matthew's request to call for help was prompted by his father yelling, "call the police." *Id.* It is unknown whether the store clerk heard Griffith's shout. Supplemental Brief of Appellee at 3, *Griffith* (No. 91-1314). Likewise, it is unclear why Matthew insisted upon asking the clerk to call 911 when three public phones with free access to emergency lines were outside of the convenience store.

167. Joint Record Extract at E-48. Matthew could not remember if he yelled into the phone that an officer needed help or whether he yelled at the clerk to tell that to the operator; but he did remember the clerk cooperating upon instructing the clerk to give the operator the address of the store. *Id.*

168. *Griffith*, 617 A.2d at 601.

169. *Id.*; Joint Record Extract at E-37 to 38. According to her affidavit, the clerk was "completely unaware" of any altercation either on the premises or across the street. *Id.* at E-37.

170. Brief for Appellant at 4, *Griffith* (No. 91-1314). According to Matthew's affidavit, the police arrived within a couple of minutes. Joint Record Extract at E-48.

171. Joint Record Extract at E-196 to 197.

172. *Griffith*, 617 A.2d at 601.

173. Southland Corporation is the "alleged owner and operator" of the 7-Eleven convenience store in Ferndale, Maryland where Griffith sustained injuries. Supplemental Brief of Appellee at 1, *Griffith* (No. 91-1314).

The three boys answered to criminal charges. Joint Record Extract at E-11. Each was also made party to the civil suit against Southland and default judgments were obtained against them. Appellant's Brief and Appendix at 1, *Southland* (No. 93-33). In addition, Griffith also filed for and received Worker's Compensation benefits. *Id.*

174. Joint Record Extract at E-4. Griffith's complaint also alleged that Southland breached its duty owed to Griffith by failing to (1) remove the three teens from the parking lot premises when they became unruly, (2) aid Griffith after the fight began, and (3) exercise reasonable care to prevent the teens from assaulting Griffith in the first place. *Id.* at E-3.1 to 4. See Brief for Appellant at 1, *Griffith* (No. 91-1314). However, as far as can be gathered from the record and the attorneys' briefs, this appeal centered around the clerk's alleged failure to aid Griffith by calling 911. See generally *Southland*, 633 A.2d 84; *Griffith*, 617 A.2d 598; Joint Record Extract; Appellant's Brief and Appen-

plaint, the trial court granted summary judgment<sup>175</sup> for Southland Corporation and Griffith appealed to the Maryland Court of Special Appeals.<sup>176</sup> The Court of Special Appeals held that:

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dix, *Southland* (No. 93-33) (Southland's appeal to Maryland Court of Appeals); Brief of Appellee, *Southland* (No. 93-33) (appeal to Maryland Court of Appeals); Supplemental Brief for Appellant, *Griffith* (No. 91-1314) (Griffith's re-argument brief ordered by Court of Special Appeals); Supplemental Brief of Appellee, *Griffith* (No. 91-1314) (Southland's re-argument brief ordered by Court of Special Appeals); Brief for Appellant, *Griffith* (No. 91-1314) (Griffith's original brief to Court of Special Appeals); Appellee's Brief and Appendix, *Griffith* (No. 91-1314) (Southland's original brief to Court of Special Appeals).

175. In fact, the trial court granted summary judgment so early in discovery that it is not known for certain if the convenience store clerk in fact called 911 or how many times she was requested to do so. See *supra* notes 166–69 for a discussion as to discrepancies between Matthew's and the clerk's recounts. The trial court granted summary judgment solely because the court agreed that the firefighter's rule precluded a police officer from suing for injuries attributable to negligence. Joint Record Extract at E-236 to 238.

176. The Court of Special Appeals is Maryland's intermediate appellate court; the Court of Appeals is the state's court of last resort. For a comprehensive discussion of Maryland's court system, see Reynolds, *supra* note 2.

Procedurally, this case is fascinating. Griffith originally appealed directly to the Court of Appeals, bypassing the appellate level altogether. While the Court of Appeals may grant certiorari directly from the trial level in cases of public policy or public interest, the court denied certiorari.

When the Court of Special Appeals first heard argument on this case, both parties limited their arguments exclusively to the issue upon which the trial court granted summary judgment, i.e., “Does the fireman's rule preclude an action by an off-duty police officer against a store owner when he is assaulted and battered due to the negligence of an employee of the store?” *Griffith*, 617 A.2d at 601. The Court of Special Appeals waited almost five full months before responding, and then did so by scheduling reargument on the following issues:

- (a) When a police officer is in danger, in the performance of his or her duties protecting patrons on the premises of a business, and requests, directly or indirectly, that an employee of the business call for assistance via the 911 system, (see MD. ANN. CODE art. 41, § 18-101) or otherwise, does that employee, qua employee (as agent of the owner of the premises) have a duty to do so if he or she can do so without danger to the owner or employee?
- (b) If such a duty exists, is a breach of that duty a negligent act not protected by the “fireman's rule” in that the failure to summons aid occurred after the commencement of the officer's protective function and was, therefore, “outside his anticipated occupational hazards”? See *Flowers v. Rock Creek Terrace*, 308 Md. 432 [520 A.2d 361] (1987).
- (c) If such a duty exists, is a breach of that duty, i.e., the failure to call for assistance, wilful or wanton misconduct, thus removing the case from the protection of the “fireman's rule”?

*Id.* In effect, the Court of Special Appeals carved out and identified a duty issue which was not addressed or argued previously by either party. Once the case blatantly depend-

[W]hen a police officer is in danger during the performance of his or her duties protecting patrons on the premises of a business, and requests, directly or indirectly, that an employee of the business who is not in the path of the danger summon aid via the 911 system, then that employee has a legal obligation to do so promptly.<sup>177</sup>

The Maryland Court of Appeals affirmed the lower court's holding, imposing a duty on the store clerk to aid the injured police officer.<sup>178</sup>

## B. How the Case was Shaped: The *Griffith* Court's Analysis

### 1. *Should a Duty be Imposed?*

The Court of Special Appeals began its opinion with an analysis of whether a legal obligation should be imposed, notwithstanding the firefighter's rule which may limit liability.<sup>179</sup> First, the *Griffith* court addressed Southland's arguments against imposing a duty which Southland had framed in terms of the Restatement of Torts section 314.<sup>180</sup> Citing as authority *Flowers v. Rock Creek Terrace Ltd. Partnership*,<sup>181</sup> the court dismissed Southland's contention that "there is not now, and should not be . . . a duty" in any way to aid Griffith.<sup>182</sup> The court then addressed Southland's "seven point attack" based upon the *Tarasoff* approach<sup>183</sup> while turn

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ed upon issues of public policy, the Court of Appeals granted certiorari when Southland appealed the ruling by the Court of Special Appeals. *Southland Corp. v. Griffith*, 624 A.2d 954 (Md. 1993). The Court of Appeals then handed down an opinion in less than two months after arguments. *Southland*, 633 A.2d at 84.

177. *Griffith*, 617 A.2d at 606.

178. *Southland*, 633 A.2d at 91–92.

179. *See Griffith*, 617 A.2d at 602.

180. *Griffith*, 617 A.2d at 598.

181. 520 A.2d 361 (Md. 1987). For a discussion of the *Flowers* case, see *supra* notes 81–89 and accompanying text. Based upon the *Flowers* case, the *Griffith* court stated that a "policeman is owed a duty of care when confronted with a peril which is neither reasonably foreseeable nor part of his anticipated occupational hazard." *Griffith*, 617 A.2d at 602. Because of the availability of weighty precedent, the *Griffith* court did not criticize Southland's contention as erroneous due to the fact that Maryland employs the *Tarasoff* approach. However, this would have been an equally true reason to dismiss Southland's argument.

182. *Griffith*, 617 A.2d at 602.

183. These issues are the *Tarasoff* factors, yet that case is never cited, directly nor indirectly, in the opinion. Instead, the *Griffith* court refers to the considerations as "Maryland Public Policy." The *Griffith* court also mentioned the factors nearly word for word later in a discussion about the firefighter's rule. *Griffith*, 617 A.2d at 604–05. See

ing each of the arguments around to support the holding that the clerk had a duty to assist Griffith by dialing 911.<sup>184</sup> The court superficially treated Southland's policy arguments, dismissing the arguments quickly,<sup>185</sup> even dispensing of one as "ludicrous,"<sup>186</sup> as if these policy considerations were a checklist exercise.<sup>187</sup>

## 2. Does the Firefighter's Rule Relieve this Duty?

Maryland precedent from *Flowers* grounds the firefighter's rule in public policy rather than premises liability.<sup>188</sup> Recognizing this, the Court of Special Appeals in *Griffith* determined that the firefighter's rule could conceivably apply to the case at bar.<sup>189</sup> The *Griffith* court framed the firefighter's rule from *Flowers* as barring public safety officers from recovery for "injuries attributable to the negligence that requires their assistance."<sup>190</sup> However, the *Griffith* court acknowledged certain deviations from the general rule. In

*infra* note 193 for a discussion of the interplay between the *Tarasoff* approach and the firefighter's rule. Such is indicative of how accepting Maryland seems to the modern approach to questions of duty. See *supra* text accompanying notes 130–37 for a recitation of these seven meta-criteria.

Interesting to note is how Southland first argued that the clerk did not owe a duty to Griffith to call 911 by presenting the traditional approach, turning then to a modern-approach argument. See Lake, *supra* note 116 (manuscript at 85–98) (discussing the "hierarchy" of actors who may implement the meta-criteria).

184. *Griffith*, 617 A.2d at 602–03.

185. *Id.*

186. *Id.* at 603.

187. The *Griffith* majority could have stopped its duty analysis at two junctures. The court could have ended with the conclusion that a general duty of care is owed to all. However, as Judge Bloom recognized, to do so would risk the effect of expanding duty, and also the *Tarasoff* analysis, to extremes. *Griffith*, 617 A.2d at 609 (Bloom & Cathell, JJ., dissenting). Instead, the *Griffith* majority opted to stretch the firefighter's rule so as to justify imposition of a duty on the Southland employee to call 911. Therefore, for the protection of the *Tarasoff* approach to no-duty issues, the court chose to twist the firefighter's rule in application almost beyond recognition.

Not only did the court expose the decision as outcome-oriented, but the majority perhaps pushed *Tarasoff* too far. By adhering to the *Tarasoff* analysis so persistently, the majority spread *Tarasoff* to its outer limits. Paradoxically, the majority adheres to the seams of the modern analysis so closely that the analysis, in effect, returns to the traditional approach, exposing the outer boundaries of the *Tarasoff* analysis when stretched beyond reasonable comprehension. See generally *id.* at 602–07.

188. 520 A.2d 361 (Md. 1987).

189. *Griffith*, 617 A.2d at 603–06.

190. *Id.* at 603 (citing *Flowers*, 520 A.2d at 368). The *Griffith* court continued: "[S]omeone who negligently creates the need for a public safety officer will not be liable to a fireman or policeman for injuries caused by this negligence." *Id.*

particular, the court pinpointed the hidden danger exception, which allowed recovery based upon the landowner's failure to warn the officer of "pre-existing hidden dangers where there was knowledge of the danger and an opportunity to warn."<sup>191</sup> The majority equivocated the clerk's refusal to call 911 to a "hidden danger" that Griffith could not anticipate.<sup>192</sup> This interpretation construed the firefighter's rule as too limited to protect Southland when the clerk negligently failed to call 911.<sup>193</sup>

To reach this conclusion, the *Griffith* court wrested the application of the firefighter's rule. The court equated "hidden dangers" with any event unanticipated by the officer. The court concluded that even an act of negligence, such as the clerk's failure to call for emergency assistance, may be a "hidden danger."<sup>194</sup> Yet the majority masqueraded the pragmatic problems of such a conclusion. By definition, if the clerk failed to warn Griffith of the pre-existing danger (her failure to call 911),<sup>195</sup> and she (1) knew of the danger,<sup>196</sup> and (2) had the opportunity to warn Griffith of the danger,<sup>197</sup> Griffith

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191. *Id.*

192. *Id.* at 603–04.

193. *Griffith*, 617 A.2d at 604. Before considering the firefighter's rule, the *Griffith* court analyzed the facts under the modern analysis and concluded that the clerk owed a duty to Griffith. However, the *Griffith* court reenumerated the *Tarasoff* factors to examine the implications of *not* exacting a duty on the clerk. *Id.* at 604–05. By reverting once again to the *Tarasoff* analysis, the court exemplified how engrained the modern approach is in Maryland.

194. *Id.* at 603–04. The court also failed to adequately address the issues of what a hidden danger has traditionally meant. Applying precedent, Griffith may be allowed to recover if the clerk failed to warn him of a pre-existing danger and the clerk was both aware of the danger and had the opportunity to warn him. But in no way does this imply that a hidden danger may be an act by a person rather than a physical condition on the premises. The *Griffith* court reasoned that since the *Flowers* court took the firefighter's rule out of premises liability, all elements of the analysis were no longer chained to existing conditions on the premises. *See id.*

While the *Griffith* court enumerated hidden dangers as a definitional boundary of the firefighter's rule, other courts have classified hidden dangers as an exception. However, the practical outcome is the same, as both would allow recovery.

195. Of course, here one must also assume retrospectively that the clerk never had any intent to call 911 if a police officer on the premises ever so requested, i.e., the danger, the refusal to aid, must be "pre-existing."

196. Here again, the idea is ludicrous that the clerk had to be "aware" of the fact that she was not going to call 911.

197. This part of the definition has wide implications when applied to the facts. For instance, would the "opportunity" aspect be satisfied if Southland had posted a sign announcing that no clerk would be permitted to call for assistance if a police officer on the premises so requested?

could recover.

In his dissent with which Judge Cathell concurred, Judge Bloom first attacked the majority's posture in the *Griffith* opinion as "policy-making"<sup>198</sup> as opposed to "error-correcting."<sup>199</sup> The dissent formulated a more liability-restricting definition of the firefighter's rule. The landowner or occupant "owes no duty of care to a fireman or policeman who comes upon his property in the performance of his duties except to abstain from willful or wanton misconduct or entrapment."<sup>200</sup> Since Southland "injured" Griffith through neither willful and wanton means nor entrapment, the dissent argued that the firefighter's rule should bar Griffith's recovery.<sup>201</sup>

Judge Bloom criticized this reasoning as "circuitous."<sup>202</sup> Unless the clerk had a duty to call 911 in the first place, her failure to do so could not be labeled an "unanticipated risk" or a "hidden danger."<sup>203</sup> The dissent called attention to the fact that perhaps the majority sought to end its analysis with an imposition of duty on Southland.<sup>204</sup> Failure to carefully insulate its decision carried the risk of quick reversal.<sup>205</sup>

### C. Where Do We Go from Here: The *Southland* Court's Analysis

#### 1. *Firefighter's Rule Inapplicable*

In affirming the lower court's decision, the Maryland Court of

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198. *Griffith*, 617 A.2d at 607 (Bloom & Cathell, JJ., dissenting).

199. *Id.* In this respect, one commentator has criticized the dissent's position with regard to the *Tarasoff* approach. See Lake, *supra* note 116 (manuscript at 75). Lake argues that besides the difficulty in visualizing appellate courts as purely "error-correcting courts" in difficult cases, the *Griffith* majority merely *implemented* policy while considering the factor of moral blame, a matter to be considered under both Maryland case law and *Tarasoff*. *Id.*

200. *Griffith*, 617 A.2d at 607 (Bloom & Cathell, JJ., dissenting).

201. *Id.* at 608.

202. *Id.*

203. *Id.* "Obviously, unless one has a duty to summons help for a police officer in trouble when requested to do so, the failure to call for help can hardly be deemed to be an unexpected risk or hazard of the policeman's job." *Id.* In this light, it seems that Judge Bloom stood opposed to finding a duty from the outset, without even considering the effect of the firefighter's rule.

204. The *Griffith* dissent did this while giving the impression that all avenues which would release Southland from a duty had been thoroughly explored. This may be another example of how this case is outcome-oriented.

205. Compare the argument in note 126 that Justice Tobriner similarly insulated the *Tarasoff* opinion to insure longevity.

Appeals began its analysis with the firefighter's rule.<sup>206</sup> Citing to the *Flowers* case, the *Southland* court acknowledged the rule's roots in public policy.<sup>207</sup> The *Southland* court formulated the *Flowers* rule as follows: "[I]f the act of negligence that causes the injury is something other than what necessitated the presence of the safety officer, then the fireman's rule does not apply."<sup>208</sup> However, the *Southland* court challenged the lower court's analysis that the clerk's failure to call 911 constituted a hidden danger or unanticipated risk.<sup>209</sup> The court reasoned instead that police officers are trained to encounter and could even expect that an individual might resist arrest.<sup>210</sup> Moreover, a store clerk's refusal to summon aid could not be reasonably considered an "unanticipated or unforeseeable occupational risk."<sup>211</sup>

The *Southland* court found the firefighter's rule inapplicable not by virtue of an exception to the rule, but rather, inapplicable to the facts at hand.<sup>212</sup> Using the definition of the firefighter's rule as previously formulated, the *Southland* court reasoned that the clerk's alleged negligence, i.e., her refusal to call 911, was not the reason for Griffith's presence at the 7-Eleven that evening.<sup>213</sup> Griffith entered the premises because his hunger summoned him, not his job description.<sup>214</sup> Because the alleged negligence that arguably aggravated Griffith's injuries did not necessitate the officer's presence at the convenience store, the firefighter's rule could not bar liability.<sup>215</sup> The firefighter's rule simply did not apply. Instead, the Maryland Court of Appeals framed as the only issue the question of whether *Southland's* clerk had a legal obligation to aid Griffith by placing an emergency call.<sup>216</sup>

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206. *Southland Corp. v. Griffith*, 633 A.2d 84, 88 (Md. 1993).

207. *Id.* (citing *Flowers*, 520 A.2d at 361).

208. *Id.* at 89.

209. *Id.*

210. *Id.*

211. *Southland*, 633 A.2d at 89. Note that the court never analytically considered the fact that the clerk had notice of the danger when Griffith's son requested that she call 911. See generally *id.* This careful omission by the court supports the argument *inter alia* that the Maryland court might be preparing for the next no-duty case from which the court may sculpt a more resounding image of *Tarasoff*.

212. *Southland*, 633 A.2d at 89.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

## 2. Duty to Rescue Imposed

The Maryland Court of Appeals took an approach to duty seemingly at odds with the *Griffith* court's analysis.<sup>217</sup> The *Southland* court flatly stated that absent a statute or "legally cognizable special relationship," one did not owe another a duty to aid or rescue.<sup>218</sup> The court turned to Restatement of Torts section 314A and shuffled the situation presented under a shopkeeper/business invitee special relationship.<sup>219</sup> In an effort to make the Restatement "fit," the Court of Appeals stated that *Griffith* never terminated his status as an invitee, even when he ceased his civilian activity by attempting to place the attackers under arrest.<sup>220</sup> Holding that a shopkeeper has a legal obligation to take affirmative action to protect a business invitee on the premises, the *Southland* court "adopted" section 314A.<sup>221</sup> After *Southland*, the only instances where a shopkeeper's duty may not materialize are where the shopkeeper fails to realize that an invitee is injured or where the shopkeeper is "in the path of danger."<sup>222</sup> However, because neither of these instances existed in the *Southland* fact pattern, the Maryland Court of Appeals charged the clerk with a duty.<sup>223</sup>

At first glance, it might seem that the *Southland* court nearly abandoned the modern approach to questions of duty in favor of the Restatement approach.<sup>224</sup> Yet the *Southland* court began its opinion

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217. See *supra* notes 179–87 and accompanying text for a discussion of *Griffith's* treatment of the duty issue.

218. *Southland*, 633 A.2d at 90. It seems that the *Southland* court bluntly ignored the other exceptions to the traditional no-duty approach, including charge and control or creation of the risk, by strictly limiting the implementation of duty to statutes and special relationships. Perhaps this was a mere oversight by the court in that the facts did not give rise to application of the other exceptions so mention of them might confuse the issues. A second argument is that such inattention is another hint that the court is concerned only with the outcome of this case, reserving for another day the opportunity to more seriously scrutinize the issue of duty.

219. *Id.*

220. *Id.* at 91. On this point, the *Southland* court's analysis stalely reeks of premises liability, hauntingly reminiscent of the tension surrounding the firefighter's rule within the *Flowers* case. See *supra* notes 81–89 for a discussion of *Flowers*.

221. *Southland*, 633 A.2d at 91.

222. *Id.*

223. *Id.* at 91–92.

224. See *id.* at 91.

by citing to the policy criteria in *Tarasoff*.<sup>225</sup> The court noted that only with these considerations in mind could the issues in *Southland* be analyzed.<sup>226</sup> In this light, the *Southland* court implied that perhaps it was not “adopting” the Restatement approach as wholeheartedly as it professed.<sup>227</sup>

In its analysis the Court of Appeals stretched the Restatement of Torts and applied an exception to the no-duty rule that arguably should not apply. Every member of the Court of Special Appeals agreed that the shopkeeper/invitee relationship terminated when Griffith attempted to arrest the ruffians.<sup>228</sup> It would be questionable to assert that a public safety officer could never be considered a business invitee, especially when the officer is out of uniform and not acting in conformity with his professional duties, because to do so would consistently prohibit a class of citizens recovery for any injury, regardless of the circumstance. Just as shocking is the conclusion that the same officer cannot terminate the business invitee relationship, even when the officer attempts to place another under arrest.<sup>229</sup> If an officer does not terminate his business invitee status by actively placing another under arrest, it is difficult to imagine what would end the relationship. Further scrutiny supports the argument that *Southland* seemed so easily reconcilable by the Restatement route that it was easier for the court to stretch section 314A than to risk the potential backlash of implementing the *Tarasoff* approach with fuller force. Arguably, the *Southland* court succeeded, perhaps intentionally so, in undermining the Restatement by twisting it beyond recognition.<sup>230</sup>

Another intriguing facet of the *Southland* opinion is how the court used the Restatement to *impose* a duty on the clerk,<sup>231</sup> whereas

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225. *Id.* at 88.

226. *Southland*, 633 A.2d at 88.

227. In the alternative, the *Southland* court implied that at the very least, it was not completely discarding the *Tarasoff* approach.

228. This is despite the entire *Griffith* court's failure to agree on much else. *See Griffith v. Southland Corp.*, 617 A.2d 598 (Md. Ct. Spec. App. 1992).

229. After all, if a police officer originally entered the premises to conduct an arrest, shouldn't the officer who performs the same duties while on the premises receive consistent treatment? This argument is furthered subsequently.

230. The *Southland* court's legal gymnastics here are reminiscent of the way the Court of Special Appeals twisted the firefighter's rule in the *Griffith* opinion. *See supra* notes 188–205.

231. *Southland*, 633 A.2d at 91–92.

traditionally, section 314A had only been thought to limit legal obligations. By doing so, the court utilized a tool in a way strangely incarnate of the *Tarasoff* approach. In addition, the court concluded that “we cannot say . . . that the store clerk had no legal duty to phone for emergency assistance.”<sup>232</sup> Yet the *Southland* court could not muster the assertion that as a matter of law, the clerk had a duty to call 911.<sup>233</sup>

#### D. Effect of *Southland* and *Griffith*: The Upswing of a Trend

The questions remain: what is *Southland*'s potential impact on Maryland case law and how does it illustrate a current trend in tort law?<sup>234</sup> Because the case is so recent, its long-term effect may only be theorized. However, two observations prevail. First, both the *Griffith* and the *Southland* courts refused to abolish the firefighter's rule,<sup>235</sup> but at what cost? This section theorizes what trend these opinions may set for the plight of the firefighter's rule. Second, the *Southland* court “adopted” Restatement of Torts section 314A.<sup>236</sup> Yet the *Southland* court's application of section 314A to this factual situation directly contradicts the restaters' intent. This section explores the court's misapplication of section 314A and postulates the purpose behind the court's actions as well as the trend that *Southland* might establish.

##### 1. *The Plight of the Firefighter's Rule*

After the *Griffith* court's coiling of the firefighter's rule in order to reach a certain outcome, the *Southland* court needed to polish that rule so as to make it clear and recognizable once again. The Court of Special Appeals' analysis had stretched the hidden danger

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232. *Id.* at 92.

233. Such a bold statement would completely mutilate the Restatement. Therefore, what seemed at first like a plug for the traditional approach may be, in actuality, a decoy.

234. The effect of this case on nonfeasance law is tremendous, despite the “narrow rule” which the intermediate court intended to impose. *Griffith v. Southland Corp.*, 617 A.2d 598, 606 (Md. Ct. Spec. App. 1992). The Court of Special Appeals cautioned: “Our holding today does not impose upon our citizenry a duty under *all* circumstances to come to the aid of a stranger in need.” *Id.*

235. See *Southland Corp. v. Griffith*, 633 A.2d 84 (Md. 1993); *Griffith*, 617 A.2d 598.

236. *Southland*, 633 A.2d at 91.

exception by interpreting it as applicable to more than mere physical conditions.<sup>237</sup> After all, the *Griffith* majority acted consistently with *Flowers v. Rock Creek Terrace Ltd. Partnership*.<sup>238</sup> Since Maryland no longer justified the firefighter's rule in premises liability,<sup>239</sup> the entire rule coupled with its exceptions, should be removed from that realm.

Perhaps the crucial difficulty lies in the fact that *Flowers* neglected to fashion a rule workable with the many years of precedent which firmly roots Maryland's firefighter's rule. In 1987 when the *Flowers* court transplanted the firefighter's rule from premises liability into public policy,<sup>240</sup> the court took with it the same definitions and exceptions that precedent had pruned for a premises liability rule. Instead of cultivating a new definition of the firefighter's rule grounded exclusively in public policy, the *Flowers* court opted to cling to the existing definition of the firefighter's rule.<sup>241</sup>

Yet the *Southland* court seemingly failed to remedy the situation, and as a result, a concrete interpretation of the firefighter's rule remains unknown. Using the same language cited by the *Griffith* court,<sup>242</sup> the Court of Appeals spritely reconciled the facts of the case with the firefighter's rule. While the court sharply disapproved of the lower court's manipulation of the hidden danger exception, the Court of Appeals also refused to reconcile the policy behind *Flowers* with the rule and its exceptions. Hence, the firefighter's rule escapes no more intelligible than it was prior to *Southland*.<sup>243</sup>

Nevertheless, the *Southland* opinion remains important with regard to the firefighter's rule in two respects. First, the decision recognizes the inherent difficulties that any jurisdiction may encounter when drastically changing the rationale behind a rule without shaping a consistent definition. Second, and quite related to the

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237. For a discussion of how the *Griffith* court treated the firefighter's rule issue, see *supra* text accompanying notes 188–205.

238. 520 A.2d 361 (Md. 1987). For a discussion of *Flowers*, see *supra* text accompanying notes 81–89.

239. For a discussion of the premises liability rationale for the firefighter's rule, see *supra* text accompanying notes 27–69.

240. For a discussion of the public policy rationale for the firefighter's rule, see *supra* text accompanying notes 81–89.

241. See generally *Flowers*, 520 A.2d at 361.

242. For the exact language of the *Flowers* court, see *supra* note 89.

243. In addition, many arguments for the rule's abolition in modern society remain unaddressed.

first, is why the Court of Appeals escaped without further clarifying the rule. The *Southland* court tipped its hand several times to suggest the result-oriented nature of its opinion.<sup>244</sup> If a certain outcome is within reach, why undertake such a massive reconstruction of the firefighter's rule?<sup>245</sup> Undoubtedly, after addressing the parties' arguments and the *Griffith* court's analysis, the Maryland Court of Appeals realized that the legal community needed a clarification of the firefighter's rule. Yet the *Southland* court did little more than straighten the crooked reasoning of the lower court's analysis while sweeping the remains under the carpet. In doing so, the court refused to preview the future of the firefighter's rule.

Perhaps the rule itself will be abolished in the future as an answer to many commentators' pleas. Or maybe public safety officers will be treated as *sui generis*, consistent with other jurisdictions. As *Southland* may be an indication of the unrest and confusion surrounding the firefighter's rule, *Southland* and the immediate cases that follow may indicate a trend as to the future of the firefighter's rule.

## 2. *The Future of Legal Obligations to Rescue*

The *Southland* case encourages inquiry with respect to whether the clerk had a duty to call for emergency assistance when so requested.<sup>246</sup> The lower court presented an opinion complete with a point-by-point analysis true to the *Tarasoff* approach.<sup>247</sup> While affirming the *Griffith* holding, the *Southland* court seemed to nearly disregard the modern approach, "adopting" instead the Restatement analysis.<sup>248</sup> In fact, a cursory glance at the *Southland* decision re-

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244. Note that the appellate courts were forced to take the facts in the light most favorable to the plaintiff since the appeal was one from summary judgment in favor of *Southland*. This meant that the courts had to assume two important factual issues: (1) that the 7-Eleven clerk twice refused to phone for help, and (2) that the clerk laughed at the son's request to do so. In this light, allowing the plaintiff, an injured public safety officer, his day in court arguably became the only nonmorally-reprehensible outcome.

245. The easier route taken by the *Southland* court is its mere untwisting of the lower court's analysis without attempting to go any further.

246. While an in-depth study of the duty issues surrounding the *Griffith* and *Southland* opinions is more ambitious than the scope of this Comment, this section briefly explores some of the larger implications, focusing in particular upon the interplay between the duty issue and the firefighter's rule.

247. See *supra* notes 179-87 and accompanying text.

248. See *Southland Corp. v. Griffith*, 633 A.2d 84, 91 (Md. 1993).

veals that the court merely mentioned the seven policy considerations at the beginning of the opinion.<sup>249</sup> Yet a closer reading of the *Southland* opinion suggests that Maryland did not wholly adopt the Restatement approach to duty.<sup>250</sup>

The juxtaposition of the policy considerations in the *Southland* opinion to the remainder of the court's analysis supports that *Southland* did not dispense with the *Tarasoff* approach. Although the *Southland* court did not expressly explicate a point-by-point consideration of those factors, the court still used them. After simply listing each consideration, the court added: "It is with these principles in mind that we consider the question of duty in the instant case."<sup>251</sup> This careful language placed at the beginning of the *Southland* opinion suggests that while the court did not explicitly hash out the *Tarasoff* considerations, the court nevertheless recognized the *Tarasoff* approach in reaching its decision.

The inherent flaws in the court's application of Restatement of Torts section 314A create a second foundation for the argument that the *Southland* court may not completely favor the traditional approach. The *Southland* court classified Griffith as a business invitee when he entered 7-Eleven that evening. The problem arose when the court insisted that Griffith never terminated his status as an invitee, even after he attempted to arrest the three delinquents.<sup>252</sup>

The court's assertion that Griffith never ended his business invitee status is troublesome on two accounts. First, the *Southland* court effectively undermined the restaters' intent by supposedly "adopting" section 314A. Comment c states that a possessor of land has no duty to a land entrant who has ceased to be an invitee.<sup>253</sup> In addition, a shopkeeper is only under a duty to protect a business

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249. *Southland*, 633 A.2d at 88.

250. *See supra* notes 217-33 and accompanying text.

251. *Southland*, 633 A.2d at 88. It might be added that "the question of duty" should probably be read loosely to mean both the no-duty issue as addressed in this Comment and the firefighter's rule issue, as a rule relieving a duty in the instant case.

252. An argument can be advanced that Griffith terminated his status as an invitee even before he attempted to arrest the boys. When he chose to sit in the truck and eat snack food, he used the parking lot at *Southland*'s consent rather than at its invitation. Therefore, his status at that time declined from an invitee to that of a licensee. *See Figueroa v. Evangelical Covenant Church*, 698 F. Supp. 1408, 1411 (N.D. Ill. 1988), *aff'd*, 879 F.2d 1427 (7th Cir. 1989).

253. RESTATEMENT (SECOND) OF TORTS § 314A cmt. c (1965). It is argued *inter alia* that Griffith was not an invitee when injured.

invitee where the “risk of harm, or of further harm, arises in the course of [the shopkeeper/invitee] relation.”<sup>254</sup> Because Griffith sustained injuries while he “loitered” in the parking lot and not from an incident that arose out of the shopkeeper/invitee relationship, it would follow that the clerk owed no duty to Griffith under section 314A. A further limitation to the duty under section 314A is found in comment f: A shopkeeper is “not required to give any aid to one who is in the hands of apparently competent persons . . . or whose friends are present and apparently in a position to give him all necessary assistance.”<sup>255</sup> Assuming that the 7-Eleven clerk knew of the danger facing Griffith, the clerk would also know that several other people accompanied him that evening because all of them had been in the store a few minutes earlier. Therefore, section 314A would relieve the clerk of the duty to protect Griffith, not impose a duty on her to call 911.

Second, treating a police officer performing duties on a business premises as a business invitee is problematic.<sup>256</sup> While Griffith was an invitee when he purchased food at the counter, it might be questionable to peg him as such minutes later when he struggled in the parking lot with criminals. If a police officer does not cease being a business invitee when he clearly acts in accordance with his occupation, conjecturing when an officer is no longer considered a patron is difficult. If the line between “customer” and “police officer” is so difficult to draw, the corporations behind the convenience stores are the ones who should panic. While the *Southland* opinion hammers the point that a duty was owed, it blurs the line as to when that duty arose. By treating a public safety officer as an invitee under these circumstances, *Southland* seems to revert the firefighter's rule back to a premises liability-type justification. As a result, *Southland*

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254. *Id.*

255. *Id.* at cmt. f.

256. See 65A C.J.S. *Negligence* § 63(111) (1966). Another argument (and one similar to that advanced by the defense in this case) is that Maryland police officers are always considered to be on duty. Language from the Anne Arundel County Police Department's Rule 4.2.17 states that “members of the Department are held to be always on duty, although periodically relieved from their routine performance . . . . The fact that they may be ‘off-duty’ shall not be held as relieving them from the responsibility of taking proper police action in any matter coming to their attention.” Because the department rule treats Griffith as technically on duty when he came to 7-Eleven, he cannot be classified as a business invitee when he acted outside of the shopkeeper/invitee relationship by attempting to arrest the ruffians.

effectively squelches the firefighter's rule by undermining *Flowers*<sup>257</sup> in a way that creates broad but uncertain duties on a large class of businesses.<sup>258</sup>

If *Southland* does not demonstrate an explicit adoption of the common law approach to issues of duty, a compelling question remains: How can a case decided by implicit implementation of the *Tarasoff* approach create an exception to the traditional no-duty rule?<sup>259</sup> Restated, application of the *Griffith* and *Southland* holdings add another instance in which a bystander<sup>260</sup> is legally obligated to come to the aid of another.<sup>261</sup>

If a bystander<sup>262</sup> is asked to aid or protect a stranger by calling 911, that bystander must do so under the traditional exceptions to the no-duty rule if (1) a special relationship exists,<sup>263</sup> (2) the by-

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257. Undermining *Flowers* clearly was not the court's intent. However, the *Southland* court may have intended to set precedent that a public safety officer on a premises in some capacity other than to discharge his professional duties would always be held to the invitee status. This ruling would inadvertently undermine the policy-based firefighter's rule in *Flowers*, turning the rule back into one determined in accordance with the premises liability rationales.

258. This systematic undermining of § 314A by the *Southland* court, in conjunction with the recitation of the *Tarasoff* factors at the beginning of its analysis, should be read as an indication that the modern approach is still implemented in Maryland courts. In addition, it could also be a sign that the Court of Appeals is waiting for a more "difficult" case, one not so clearly outcome-oriented, to employ with full and explicit force the *Tarasoff* approach.

259. See *supra* notes 94–147 and accompanying text for a discussion of these two approaches to questions of duty.

260. One point to consider is how the term "bystander" describes *Southland*'s clerk. While it is true that *Griffith* fit the classification of a business invitee when he purchased food at 7-Eleven, the entire *Griffith* court concluded that the business invitee relationship (pegged as a special relationship under § 314A) ended once *Griffith* identified himself as a police officer and attempted to place the hoodlums under arrest. That is, *Griffith* terminated his status as a business invitee before the hoodlums injured him. It is true, therefore, that *Southland*'s clerk might not be considered a "pure" bystander since the corporation and *Griffith* shared a relationship immediately preceding his injuries. Yet, the clerk might be deemed a bystander nevertheless, sharing no special relationship with *Griffith* that would give rise to a duty under the Restatement view at the time of the injuries for which *Griffith* sues.

261. Or, arguably, if the bystander does not come to the aid of another in peril, the bystander must permit someone else to aid the other. See *Soldano v. O'Daniels*, 190 Cal. Rptr. 310 (Ct. App. 1983).

262. It is worth repeating, at least hypothetically speaking, that the clerk claims her only indication of danger was the word of *Griffith*'s son, asking her to call 911 for his father.

263. See *supra* notes 108–11 and accompanying text for a discussion of the special relationship exception.

stander caused the danger,<sup>264</sup> (3) the bystander starts to help in any other way,<sup>265</sup> or, after *Southland*, (4) the person in danger is a police officer in performance of his duties.

To illustrate, suppose a man is in his car in a convenience store parking lot. He witnesses a woman being struck by an automobile. The man has no legal duty or obligation under the traditional rules to come to the woman's aid by physically helping her or by calling 911, even though he may have a readily accessible car phone and the emergency call would cost nothing.<sup>266</sup>

Suppose, however, that the injured woman is his daughter. Then the special relationship exception may give rise to a duty on the part of the man to aid or rescue her. Or perhaps the woman was injured because the *man himself* struck her with his car; in that instance, because he caused the harm, he would have a duty to aid the victim.<sup>267</sup> Suppose instead that the man yelled to the gathering crowd not to call 911 because he would take the woman to the hospital. Then, for whatever reason, he does not. The man may be held liable because the fact that he took charge and control of the woman, effectively sequestering her from any other possible means of aid, gives rise to a duty to continue to aid her.

Assume that the injured woman was a plain-clothes police officer, injured while pursuing a robber, and that the man was an employee of the convenience store acting within the scope of his employment.<sup>268</sup> Traditionally, such facts would not affect the man's

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264. See *supra* note 117 and accompanying text for a discussion of this exception.

265. See *supra* notes 118–20 and accompanying text for a discussion of this exception.

266. Instructive of the Restatement view regarding this point is this illustration:

A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.

RESTATEMENT (SECOND) OF TORTS § 314, illus. 1 (1965).

267. The innocent-cause-of-risk rule might also find that the man had a duty — if reasonable under the circumstances — to yell a warning to the woman once he realized that she was in the path of his car and before he actually injured her.

268. The fact that the woman was performing her duties as a police officer at the time she sustained injuries is vital. *Griffith's* holding is specific in the respect that the officer must be in performance of her duties at the time she requests help. *Griffith v. Southland Corp.*, 617 A.2d 598, 606 (Md. Ct. Spec. App. 1992). It is also imperative that the injury occur on business premises and that an employee is requested, either directly or indirectly, to call for help. *Id.* See also *Southland Corp. v. Griffith*, 633 A.2d 84 (Md. 1993).

legal obligation, absent one of the above exceptions. However, since the clerk is an agent of the convenience store, a court may charge the man under *Southland* with a duty to rescue the woman by, at the very least, calling 911.

The repercussions of the *Southland* exception are shocking. Formally under the traditional approach, an individual might have a duty to aid another, but only when the particular circumstances implicate a certain exception to the no-duty rule. In other words, the exceptions to the no-duty rule have conventionally been “holes of liability” into which the defendant might fall. With the *Southland* exception, however, a convenience store seems to be continuously open to potential liability. Every time a public safety officer enters the premises of a convenience store, the business and its agents must be prepared to assist the officer if requested, directly or indirectly. The *Southland* exception, unlike the others, cannot be described as a “hole of liability.” Rather, the *Southland* exception is a landmine of liability.<sup>269</sup>

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269. This last exception can cause further troubles. For instance, how would the man have known whether the person in danger was a police officer? Must he ask the injured woman to produce identification? If he does so and she is not a police officer, is he “safe” in walking away, refusing to aid her? Or could such an “affirmative act” be sufficient, at least in some jurisdictions, to give rise to the fact that the man arguably began to rescue and confer benefit to the injured woman?

Assume for a moment that the man asked the woman if she was a police officer and the woman responded negatively. Up until this point, the man has shown intent to help the woman *if* she identified herself as an officer, and by doing so, he has arguably begun to aid and rescue her. If he simply walks away from the woman knowing that he has no legal obligation to aid her since she is not an officer (and assuming they share no special relationship), one may theorize that the man has begun to aid the woman and thus has an affirmative obligation to continue. Therefore, one problem with the *Southland* departure is that by simply attempting to determine whether one owes a duty to help another when the injured is a police officer, a potential rescuer may be *automatically* trapped into an obligation by falling prey to a different exception. The troublesome point is that the addition of the “*Southland* exception” does not work well at all with an area of law that courts already have trouble applying with much consistency. (Note, on the other hand, that if the man's action is simply walking away once he determines the injured is not an officer, that may be categorized as merely withdrawing a gratuitous benefit. Such a label is strongly tied to Cardozo's opinion in *Moch* and is one definition of nonfeasance with which even traditional courts may not be enamored to be identified.) See H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928).

In addition, how “indirectly” must the police officer ask for help? Is the fact that the police officer is injured enough to “imply” that she needs help? Does a legal obligation arise simply because the jewel thief had a gun? Is it safe to assume that each time an officer is outnumbered by criminals that a duty to call for emergency assistance exists? It is important to remember that *Griffith* imposed a duty only on store employees

Besides this problematic practicality, the *Southland* exception causes further troubles. Note that the other traditional exceptions all center in some way around the bystander, i.e., whether the *bystander* had a special relationship with someone, or took charge of the victim, or somehow created the risk. The exception created by *Southland*, which gives rise to a duty to protect a police officer in danger, centers around the identity of the person in peril, not the bystander. It is not a situation or circumstance that the bystander can help, prevent, or control. Whether the *Southland* court realized that it was creating another exception to the traditional no-duty rule may be irrelevant.<sup>270</sup> No matter what the court's motives, the effect remains the same.

With all of this in mind, *Southland* should be read as part of a trend in the area of no-duty-to-rescue rules. While *Southland* presented a set of facts unique to Maryland, it harkens back to the 1983 California case of *Soldano v. O'Daniels*.<sup>271</sup> In *Soldano*, a man entered a restaurant, told the bartender that his father was being threatened at a bar across the street, and asked the employee if he would either call the police or allow him to do so.<sup>272</sup> The employee refused both requests.<sup>273</sup> The *Soldano* court held that the bartender owed a duty to the man's father to either call for emergency assistance or allow the man to place the call himself.<sup>274</sup> Until *Southland*,

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to call 911 when so requested. *Griffith*, 617 A.2d at 608. See *Southland*, 633 A.2d 84. By carving the language of the holding in such a way, the majority dodged the persisting concerns presented by *Southland*'s attorney: Does not this also theoretically impose a duty on everyone, not just store clerks (because remember, it supposedly is irrelevant that Griffith was once an invitee) to call 911? Does that mean that Griffith's driver also had a legal duty to call 911 — instead of leaving the scene with the other companions — when Griffith yelled for someone to do so?

270. However, it is not irrelevant, assuming that the court clearly recognized the implications that its holding might have, hoping that such an absurd and far-reaching result might make it much easier to completely dispose of the common law approach when next faced with the issue.

271. 190 Cal. Rptr. 310 (Ct. App. 1983). Note that the *Southland* court did not explicitly cite to the *Soldano* opinion, although the *Griffith* court did.

272. *Id.* at 311–12.

273. *Id.* at 312.

274. *Id.* at 317. In so holding, the *Soldano* court asserted: "It bears emphasizing that the duty in this case does not require that one must go to the aid of another. That is not the issue here. The employee was not the good samaritan intent on aiding another. The patron was." *Id.*

A couple of other contrasts should be made between *Southland* and *Soldano*. The *Southland* court assumed that the clerk should have heeded the son's requests to call 911, even though that might require her to take only the boy's word that there was

*Soldano* was usually dismissed as overreaching. However, ten years later, *Southland* marks the first jurisdiction to accept and follow *Soldano*, perhaps indicating a trend towards increasing legal obligations to rescue others.<sup>275</sup>

## V. CONCLUSIONS

The simplest interpretation of *Southland* is (1) a neglect to clarify the firefighter's rule, and (2) a whole-hearted adoption of the traditional approach to duty, leaving *Tarasoff* by the wayside. However, such interpretations foil the decision's implications.

While the *Flowers* court changed the rationale of the firefighter's rule over five years ago, the court in that case failed to

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indeed an emergency situation. The *Soldano* court would disagree: "Nor would a stranger's mere assertion that an 'emergency' situation is occurring create the duty to utilize an accessible telephone because the duty would arise if and only if it were clearly conveyed that there exists an imminent danger of physical harm." *Id.* at 316 (citations omitted). In addition, the *Soldano* holding centered around a "logical extension of Restatement section 327," *id.* at 318, while the *Southland* court cited to § 314A for support of their holding. It is also worth mentioning that the *Soldano* court recognized that "[t]he courts have a special responsibility to reshape, refine and guide legal doctrine they have created," *id.* at 317, an assertion with which Judge Bloom of the *Griffith* court might sharply disagree.

275. While *Southland* may indicate a developing trend, it should be noted that cases in other jurisdictions contemporaneous with *Southland* reach a different result. For example, one month after the *Southland* decision, the Minnesota Court of Appeals affirmed a summary judgment against a customer injured in the parking lot of a 7-Eleven. *Errico v. Southland Corp.*, 509 N.W.2d 585 (Minn. Ct. App. 1993), *rev. denied*, 1994 Minn. LEXIS 65 (Jan. 27, 1994). Notwithstanding a strong dissent, the *Errico* court held that no special relationship existed between the convenience store clerk and the business invitee sufficient to warrant reversal of the summary judgment. *Id.* at 588-89. Perhaps the apparent inconsistencies between *Errico* and *Southland* may be indicated by close comparison of the two cases' facts. While the factual scenarios are strikingly similar (from the number of attackers to the time of evening, right down to the same convenience store), one seminal fact varies: *Errico* was not a police officer. *Compare Errico*, 509 N.W.2d at 585 *with Southland*, 633 A.2d at 84. This "subtlety" might explain further the *Southland* holding, i.e., *Southland* was the Maryland judiciary's way to provide special "protection" to public safety officers in an ever-increasingly violent society.

Besides indicating a trend towards increasing obligations to aid another in danger, *Southland* may also mark an additional trend towards dispensing of the common law approach to no-duty issues in favor of the *Tarasoff* approach. While in-depth explication of this argument deserves separate treatment, a brief sketch of this assertion is in order. Both *Soldano* and *Southland* seem to "adopt" different sections of the Restatement, while at the same time employing the *Tarasoff* considerations. Yet, the argument could be developed that both courts stretched the Restatement so far that it was effectively undermined, and once collapsed, the pathway clear to implement with fuller force the modern approach to questions of duty.

tailor its definition in order to fashion a workable precept.<sup>276</sup> In this respect, both *Griffith* and *Southland* are illustrative of the difficulties courts may face when keeping the traditional firefighter's rule of their respective jurisdictions while changing the rationales on which it is based.

Therefore, if Maryland wishes to retain the firefighter's rule, courts need a clearer definition. If Maryland desires that the firefighter's rule recognize some connection to the law of premises liability, then unlike the analysis in *Griffith*, the firefighter's rule should bar only physical conditions on the premises.<sup>277</sup> Such a limitation would constrain the firefighter's rule, expanding liability for landowners or occupants, yet it would prevent outlandish reasoning such as that found in *Griffith*.

In the alternative, Maryland and other jurisdictions posed with similar dilemmas could completely cut all ties with the definition of the firefighter's rule as originally formulated under the rationale of premises liability. In its place, the courts should form a more flexible, yet workable, firefighter's rule based only upon public policy rationales. To ensure the rule's purity, the courts should create this new definition with the attitude that a "second" firefighter's rule will completely supplant the original. To do so would mimic the exercise that jurisdictions which first adopted the firefighter's rule grounded in public policy had to complete.

However, a reading of *Southland* without recognition of the interplay between it and *Griffith* may miss the case's more fundamental and far-reaching points. *Griffith* exposes the limits of the *Tarasoff* analysis as the majority bulges the seams of this approach. Likewise, *Southland* carves away some of the effectiveness of the Restatement of Torts. Rather than being anti-*Tarasoff*, both opinions instead may be another small chip at the traditional approach. In particular, *Southland* uses the Restatement in such a superficial way that it bares the somewhat arbitrary analysis of the traditional

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276. See *supra* notes 81–89 and accompanying text.

277. Logically, as the dissent points out, a rule which relieves a duty (firefighter's rule) and a concept which requires a duty (negligence) cannot reasonably co-exist. In addition, a firefighter or police officer, like any other citizen, always has the right to recover for acts which cause intentional harm.

approach. If the traditional analysis can so easily be ignited, especially by using the *Tarasoff* approach, its fundamental weaknesses are apparent.<sup>278</sup>

Amy J. Fanzlaw

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278. In this light, *Griffith* parallels the attempts of Justice Tobriner in *Tarasoff* to unravel the Restatement. See Lake, *supra* note 116.