THE KINDNESS OF STRANGERS
AND THE LIMITS OF THE LAW:
THE MORAL AND LEGAL OBLIGATIONS OF
BYSTANDERS TO A VULNERABLE PERSON
IN NEED OF EMERGENCY ASSISTANCE

by

AMELIA J. UELMEN

A thesis submitted in partial fulfillment of the
requirements for the degree of
Doctor of Juridical Science (S.J.D.)
at the
Georgetown University Law Center
2015
Abstract

Reports of how some bystanders interact with victims on the scene of an emergency are shocking: instead of assisting or calling for help they take pictures of the victims on their cell phones. In the common law of torts much of the discourse regarding bystander interaction with victims needing help has focused on the relationships or circumstances that could render actionable the failure to aid. While the analysis of this Thesis is informed by this commentary, this issue is not its focus. Instead, it concentrates on the question of whether a bystander’s interaction with the victim in these circumstances, conduct which often consists in taking a picture, might constitute a distinct and legally actionable harm.

To illustrate the focus with a familiar hypothetical scenario: a passerby walking along a dock over shallow water comes upon a person drowning in the water below, shouting for help. The bystander notices a life-preserver at hand, but decides to sit on a bench, light a cigarette, and calmly watch as the person drowns. This Thesis does not focus on the question of whether the passerby had an obligation to rescue the drowning person or to call for help. Instead, it locks into that stare—which I imagine as steely and cold—and, from an observer’s perspective, the sense that it is a grievous wrong on the part of the bystander to turn a vulnerable person’s urgent and life-threatening need for assistance into a source of entertainment.

Fifty years ago, when Kitty Genovese was murdered in New York City, it would have been difficult to show proof of that stare, its underlying intent, and the distinct harm that it may have caused. But now, in many circumstances, potential
proof is in the hands of just about every ordinary passerby. Now it would not be rare in these circumstances for the bystander to take a picture, and for evidence of what is analogous to the stare to be locked into the memory of a cell phone. Evidence of what? It could be an indication of presence, time and date-stamped; of that fact that the bystander was paying attention long enough to engage the scene; of what the bystander actually saw; and in many circumstances, also an indication that the means to call for help were literally in hand, but the bystander chose not to use those means.

This Thesis argues that this conduct—treating a vulnerable person in need of emergency assistance as an object for one’s bemusement or entertainment—should be considered a legally cognizable harm and recognized with a new cause of action: an intentional tort of “exploitative objectification of a vulnerable person in need of emergency assistance.”

It is cognizant of the difficulties in the history of tort law in theorizing both the obligation between strangers and this form of intentional dignitary harm. For this reason it draws broadly on interdisciplinary resources from philosophy, theology, art and culture, to lay the foundations as well as to cabin its application to manageable limits. It is also cognizant of concerns about over-breadth and moral overload. The Thesis clearly distinguishes between those who cross the line of engaging the scene and the victim (“engaged spectators”) and those who do not (“pure bystanders”). It argues for ample space for discretion in making the decision whether to engage, respecting subjective assessments of risks and priorities as grounded in the emotional and interior life of the bystander. Drawing on the resources of civil recourse theory,
the Thesis also highlights the rhetorical frameworks that are particularly appropriate to articulate the nature of this form of dignitary harm and its remedy.

On this basis the Thesis then considers how the new tort might offer a strategic “end run” around some of the doctrinal difficulties in theorizing dignitary harm when the victim was unconscious at the time of an assault. In contrast to claims for infliction of emotional distress that often hinge on the reaction or response of the victim, the victim’s lack of consciousness would not pose an obstacle when the engaged spectator’s conduct can be articulated as objective assault on the victim’s dignity and personality.

Finally, the Thesis acknowledges circumstances in which the act of taking photographs of a person in need of emergency assistance may embody respect for the victim’s person and other social goods, as may be evident in the work of photojournalists engaged with the reality of human suffering. Thus the Thesis develops criteria to delineate these differing intentions and to distinguish these circumstances from “exploitative objectification,” providing a complete defense to liability under this tort.

**Key Words:** tort, bystander, emergency, objectification, cell phone
Dedication

For my parents, Gerald and Martha Uelman: in gratitude for your lives and careers devoted to the protecting the dignity of those most fragile among us, in their most fragile moments, and for your example of a “quality of mercy [that] is not strained…” (The Merchant of Venice, Act IV, Scene 1);

For my nephews, Thomas and Oliver: you are still too young for the party scene, but this work is for you and your friends, in the hopes that we can help to make it safer, and help you better understand what to do when it is not;

For my teachers and mentors at various points in my legal academic journey: Michael H. Gottesman, Howard Lesnick, Russell G. Pearce, and William Michael Treanor, in gratitude for being living examples of how a “richer conception of humanity” can permeate every aspect of law practice and academic work;


Washington, D.C.
November 23, 2015
Acknowledgments

I owe several debts of gratitude, many of which cannot be fully explicated in a short space. First, several people have commented on my incredible fortune to have a “dream committee” for this dissertation, and this is true. Starting with the thoughtful and attentive guidance of my advisor, David Luban, the intellectual journey was also greatly enriched by the comments, critique and support of Robin West, Benjamin Zipursky and Judith Lichtenberg. Thank you for your encouragement to be both ambitious and creative in this interdisciplinary venture; for your deep respect for the integrity of my own insights; for your illuminating suggestions when I was struggling with some particularly difficult nuts to crack; and also for your common sense and guidance on the boundaries that helped to contain a project that could have consumed an additional twenty years. I could not have asked for a better guides—and friends for this intellectual journey.

Heartfelt thanks to our program director Lexi Freeman and my fellow students in the S.J.D. program, which is a shining example of Georgetown Law as a “community of scholars.” Our sessions together were a constant source of mutual support, genuine care and concern, honest critique, and creative insight. Another great blessing in how the program is structured is its intersection with the Fellows’ Collaborative, which gathers into an intellectual community the various fellows and researchers who are in the process of developing a research agenda. Many of the major insights and organizational strategies for this Thesis find their genesis in discussions of the various chapters with this group. I am grateful to each of the participants for their deep engagement and generosity of spirit. Particular thanks also to Robin West, together with Greg Klass and Larry Solum for coordinating this workshop. Finally, many thanks the members of the Georgetown Law Faculty who shared their probing questions and helpful critique during the April 2015 and July 2015 workshops. Both sessions helped me to identify some of the deepest challenges in the argument and begin to work toward solutions. I am also very grateful to the staff of the Georgetown Law Library not only for their attentive assistance, but also for their kindness.

My work for this Thesis has also been sustained by the insight, support and encouragement of many colleagues and friends in the Fordham Theology Department where I completed my Master of Arts in 2009. Thanks especially to Telly Papanikolaou, for modeling how insights from Trinitarian theology can be situated in conversation with broader cultural themes, and for taking the time at an important fork in my road for conversations that instilled in me a certainty that doctoral work at this point in my career could be both a good experience and a helpful service. I am also grateful for the graciousness and hospitality that I have experienced from members of the Georgetown Philosophy Department. Particular thanks to Mark Murphy, who welcomed me into his Ethics Proseminar; to Karen Stohr, for the background I needed to begin to appreciate Kant in a new way; and of course to Judy
Lichtenberg, for the wonderful conversations that led to, as she put it, “joining the party” on the dissertation committee.

Behind a project of this duration and scope is an army of amazing personal support. I will come nowhere near to naming the many friends and colleagues whose encouragement and help have been important for me during this time. In addition to the support I have received from the closest mentors mentioned in the dedication, conversations with my dearest friends at Fordham Law and those connected with Fordham Law’s “Relational Perspectives” project have been a continued source of inspiration, hope, and great joy. Friendship with colleagues and students at the Sophia University Institute in Loppiano (Florence), Italy, where in the midst of the S.J.D. program I have taught a professional ethics class each summer, has been a wonderful source of respite, perspective, and light for the journey, as has the support and insight of the Focolare’s international “Communion and Law” scholarship group. Particular thanks also to my Georgetown seminar students during the academic years 2012-2015 and my team-teachers during this time, Michael Kessler and Fr. Paul Rourke, S.J., who have been so patient and accommodating with the juggling act of being a student and teacher at the same time; and most of all for their personal support.

For three people, personal support took the form of slogging through the manuscript in its entirety and offering painstakingly detailed comments, corrections, and big picture insights. Each read was at a point in which my eyes were too bleary to see what they saw. Sandra Sherman, it would be impossible to top how you embody what it means to be a friend. Heartfelt thanks for your care and your unbridled enthusiasm for this project and for the intellectual life. Dick Hibey, I have no words to express adequate thanks for sharing the gift of your eagle-eyes, keen insight, and personal support. Finally, Jerry Uelmen (Dad), it may be understandable for many that you are on this very short list. For me your comments and edits were the icing on the sweet and delicious cake of a lifetime of unconditional love, shared passion for justice, and love for humanity.

*Dulcis in fundo.* Extended and uninterrupted periods of “hibernation” in what is known in my house as “the thesis cave,” could not have been sustained without the love, sacrifice and incredible care of the local Focolare community, and in particular, of the women living in our community house during this time. Special thanks also to the young adults in our local community, not only for working with the limitations that this project placed on my time and availability (and teaching me to become a “beast texter”), but also for your enthusiastic participation as the ideas for this project developed. At the end of this process, I remain deeply touched by how when there is great love and openness, even an intensely personal creative project can become a source of enrichment for our life as a community and for our common hope to be of service to all our neighbors. As you all know, whatever good result or positive contribution emerges from these pages belongs to all of us. As our friend Chiara Lubich put it: *Sono grazie per tutto e per sempre*—I am “thank you” for everything and for always.
# Table of Contents

Abstract .................................................................................................................................................. iii  
Dedication ........................................................................................................................................... vi  
Acknowledgments .................................................................................................................................. vii  
Table of Contents ................................................................................................................................... ix  

Introduction: *Seinfeld’s Guide to Bystander Obligations* ................................................................. 1  

**PART ONE: MAKING SPACE IN THE LAW FOR THE INTERIOR LIFE OF BYSTANDERS** ............. 18  

I. Prosser’s Mythical Moral Monsters ...................................................................................................... 18  
   A. The Invisible Bystander: Not Sitting on the Dock, Not Close and No Cigar ............................... 21  
   B. In the Jaws of a Machine: Due (in Part) to a Language Barrier ................................................ 32  
   C. Swimming Pool Tragedy: Failure to Lock the Door to the Yard .............................................. 35  
   D. The Railroad Cases: The Duties of Landowners, Not Bystanders ......................................... 37  
   E. Bigan was a Bully, Not a Bystander ......................................................................................... 40  

II. Journalistic Accounts of Bystander Villains ..................................................................................... 45  
   A. Sensationalistic Reporting of the Genovese Murder ............................................................... 45  
      1. The Various Perspectives of the Genovese Witnesses .......................................................... 48  
      2. How Bystanders Did Help According to Their Capacities .................................................. 51  
      3. Subjective Perceptions of the Risks of Calling the Police .................................................. 53  
   B. Up Close to Brutal Violence: Reactions of Shock and Fear ..................................................... 55  
      1. David Cash’s Complex Relationship with the Perpetrator .................................................. 55  
      2. Bystanders to the Vanderbilt Gang Rape ............................................................................. 60  
   C. Meet the “Modern Day Kitty Genovese”: Bystanders with Cell Phones ................................. 66  

III. Reconceiving the Good Samaritan Hero .......................................................................................... 74  
   A. The Good Samaritan as “Moved from the Gut” ......................................................................... 74  
   B. Another Look at the Darley & Batson Social Psychology Experiment .................................... 82
PART TWO: PHILOSOPHICAL AND THEOLOGICAL FOUNDATIONS FOR DELINATING THE OBLIGATIONS OF BYSTANDERS

IV. Foundations of Respect for Discretion in Bystander Decision-Making
   A. Conceptual Limits in Some Utilitarian Accounts of Bystander Obligations
   B. Conceptual Strengths in Some Elements of Kantian Thought
   C. Distinctions between the Moral Obligations of “Pure Bystanders” and “Engaged Spectators”

V. Freedom as Autonomy—In What Sense?
   A. Libertarian Concerns about Other-Regarding Obligations
   B. Three Senses of Autonomy
      1. Fallon: Descriptive and Ascriptive Autonomy
      2. Nedelsky: “Relational Autonomy”
   C. Freedom: Relationality within Christian Trinitarian Theology

VI. Interpretations of “Neighbor” in Leviticus 19

PART THREE: LEGAL FOUNDATIONS FOR THE INTENTIONAL TORT OF “EXPLOITATIVE OBJECTIFICATION OF A VULNERABLE PERSON IN NEED OF EMERGENCY ASSISTANCE”

VII. Duty to a Stranger Grounded in Circumstances, Not Status
   A. The Tight Grip of “Special Relationships” in the Law of Torts
      1. The Argument that Duties Should Hinge on the Intensity of the Social Relationships
      2. Consequential Analysis of the Cheapest Cost-Avoider: A Special Circumstance, Not Relationship
   B. From “Special Relationships” to “Special Circumstances”
      1. Farwell v. Keaton
      2. People v. Beardsley
      3. Cash as Witness to the Assault of Iverson
   C. Theorizing Stranger-to-Stranger “Relational Duties”
      1. Between Vague Universality and Rigid Categorization
2. Bounded Sensitivity to Context and Circumstances ........................................ 194
3. The Relational Duties of Engaged Spectators .................................................. 196

VIII. “Exploitative Objectification” as a Legally Cognizable Harm .................. 200
A. Under-Theorization of Dignitary Harm: The Roads Not Taken .................. 200
   1. The Road Not Taken in Privacy Law ...................................................... 203
   2. The Road Not Taken in Laws Against Sexual Harassment .................. 210
   3. The Road Not Taken in the Law of Damages .................................... 213
   4. The Road Forward: Reflection on the Moral Foundations of Tort .......... 214
B. Interdisciplinary Conceptual Tools ......................................................... 223
   1. Kantian Insights on Objectification ..................................................... 223
   2. Insights on Objectification from Social Psychology .......................... 227
   3. Bridging the Gap between Bystander and Victim Perspectives ............ 231

IX. Elements of the Tort of “Exploitative Objectification of a Vulnerable Person in Need of Emergency Assistance” ......................................................... 236
A. The Victim is a Vulnerable Person .......................................................... 236
B. The Objective Need for Emergency Assistance ....................................... 238
C. The Bystander’s Objectification Rises to an “Exploitative” Threshold ...... 243
D. Face-to-Face Encounters, but Not Contingent on Victim’s Immediate or Emotional Response ................................................................. 247
E. Use of Technology is Evidence, Not a Required Element of the Tort ........ 251
F. A Word on Damages ................................................................................. 253

PART FOUR: EXPLORING THE CONTOURS OF THE TORT OF “EXPLOITATIVE OBJECTIFICATION” APPLIED TO ENGAGED SPECTATORS OF A SEXUAL ASSAULT .......................................................... 256
X. Why Tort? How Responsibility-Based Tort Theory Might Inform the National Conversation about Bystanders and Sexual Assault ........................................ 264
A. Potential Conflicts with Criminal Investigation and Prosecution ............ 264
B. Responsibility-Based Tort Theory and Bystander-Inflicted Dignitary Harm 267
C. The Conceptual Limits of Corrective Justice Theory ........................................... 272
D. The Conceptual Strengths of Civil Recourse Theory ........................................... 279
   1. Empowering Victims to Bring Suit ................................................................. 282
   2. A Critical Perspective on the Limits of Legal Remedies ................................ 286
E. Civil Recourse and the Provision of Legal Services ........................................... 289
F. Civil Recourse in Dialogue with Feminism ......................................................... 294

XI. Why A New Tort? “Exploitative Objectification” and Alternative Pleading to
     Overcome Current Doctrinal Hurdles ............................................................... 300
A. Stating a Tort Claim for Infliction of Emotional Harm ....................................... 302
B. Negligent Infliction of Emotional Harm: Doctrinal Hurdles .............................. 311
   1. Non-Contemporaneous Emotional Harm ......................................................... 315
   2. “Pre-existing Relationships” as the Sine Qua Non for NIED? ............................ 318
C. Invasion of Privacy for Publicized Pictures ....................................................... 335

XII. What about the Constitution? “Exploitative Objectification” and Freedom of
     Expression ........................................................................................................... 342
A. “Non-Communicative” Photography ................................................................... 344
B. An Appeal to “Common Decency” ...................................................................... 350
C. Criteria to Discern When Photography of a Vulnerable Person is Not “Exploitative
     Objectification” ................................................................................................. 354
   1. Attention to Physical Needs .............................................................................. 356
   2. Emotional Attention and Response to Human Suffering .................................. 358
   3. A “Witness” to Suffering in View of a Social or Political Response ............... 360
D. Criteria to Discern When Photography of a Vulnerable Person Constitutes
     “Exploitative Objectification” ............................................................................ 365
   1. When Shock is the Only Value ........................................................................ 366
   2. When Conduct Provokes or Exacerbates the Need for Emergency Assistance .. 370
   3. A Relational Critique of Arguments for Unlimited Access and Exposure ......... 372
E. A Comparison between the Tort of “Exploitative Objectification” and Other Schemes to Regulate or Criminalize Photography .................................................................................. 376

1. The Harm of “Exploitative Objectification of a Vulnerable Person” as Analogous to the Harm of Child Pornography .................................................................................. 376

2. The Harm of “Exploitative Objectification” Distinguished from Objectification when Interacting with an Image ..................................................................................... 381

3. The Harm of “Exploitative Objectification” Distinguished from Objectification Targeted in “Improper” or “Unlawful Photography” Statutes .............................................. 385

Conclusion ............................................................................................................................................. 391

References .............................................................................................................................................. 403
For all my foes I am an object of reproach,
   A laughingstock to my neighbors, and a dread to my friends;
   They who see me abroad flee from me.
I am forgotten like the unremembered dead;
   I am like a dish that is broken.

Psalm 31:12-13 (NAB)
Introduction: *Seinfeld’s Guide to Bystander Obligations*

For many law students it is almost a rite of passage. At some point in the first-year torts curriculum, discussion of the common law no-duty to rescue presents itself as kind of marker of whether or not they have entered into the realm of “thinking like a lawyer.” The problem of “easy” rescue, understood as a bystander’s response to an emergency situation that would impose no or miniscule risk to the bystander, lends itself to shocking hypothetical fact patterns.

For example: a two-year old child is drowning in a wading pool, and a passerby, with no danger to herself, could easily pull the child out of the water. Does the passerby have any legal duty to help? Or working with an example from the second *Restatement of Torts*: “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.”

Does A have any legal duty to prevent B from stepping into the street?

In almost all jurisdictions in the United States, the answer is no. When A does not alert B to the approaching automobile, and B is subsequently run over and hurt, because A is under no legal duty to prevent B from stepping into the street, A is not liable to B. And the drowning toddler? As leading torts commentator William Prosser graphically described, even an expert swimmer “who sees another drowning

---

1 *Restatement (Second) of Torts*, § 314 cmt. c, illus. 1 (1965).
2 As discussed *infra* at note 7, a few states have amended their penal codes to include a statutory duty to rescue.
3 *Restatement (Second) of Torts*, § 314 cmt. c, illus. 1 (1965).
before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette and watch the man drown."

Class discussions may also include the case of Kitty Genovese, brutally attacked and stabbed to death in her quiet middle-class Queens, New York neighborhood, while, the story goes, at least thirty-eight neighbors heard her screams as she lay bleeding for half an hour before the police received their first call. Whatever the vehicle for discussion, images of cold indifference to the dramatic suffering and need of another person are designed to help to get students’ blood boiling and brains moving to appreciate the distinction between acts and omissions, the nuances of causation, and, as an additional benefit, the extent to which legal categories are to be carefully distinguished from ordinary moral instincts.

In much of this discussion, the focus is on the action or inaction of A: what did A do or not do? What should A have done? What was the nature—moral or legal—of A’s duty to act, or not? In the Genovese case of a crowd, how might one determine which A should have done something?

The focal point of this Thesis is different. It turns its attention to the interior life of A to ask a difficult question: what may have been going on inside of A’s mind? And if A’s intention was to express extreme indifference to B’s plight or to exploit B’s vulnerability—for example, as indicated by A taking a cell phone picture of B stepping into the street—might that be a legally cognizable harm?

---

To illustrate this distinction, this introduction turns first to a venerable guide to U.S. law and culture: the *Seinfeld* television series, and specifically the well-known “Finale” which aired in May 1998. As noted above, common law systems have been reluctant to impose legal sanctions on bystanders for failure to assist in an emergency, but some states have experimented with criminal statutes. The *Seinfeld* “Finale” is perhaps one of the most interesting cultural commentaries on these efforts.

The four main characters in the series—hard-bitten cynical and sarcastic New Yorkers Jerry, George, Elaine and Kramer—find themselves in the fictional small town of Latham, Massachusetts, awaiting repairs on a plane that had made a safe emergency landing. Pausing on the sidewalk while deciding where to go to get a bite to eat, they look across the street and see in broad daylight an assailant holding up at gunpoint an overweight man, then taking his wallet and stealing his car.

---


7 See, e.g., VT. STAT. ANN., tit. 12, § 519 (a) (1973) (“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”); MINN. STAT. ANN. 640A.01(1) (1996) (requiring reasonable assistance at the scene of an emergency); R.I. GEN. LAWS 11-56-1 (1994) (same). In Massachusetts, bystanders are not required to provide assistance, but are required to report violent or sexual crimes to which they are a witness. MASS. GEN. LAWS ANN. Ch. 268, § 40 (West 1990) (“Whoever knows that another person is a victim of aggravated rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable.”). Similar statutes have been enacted in Florida, Hawaii, Washington, and Wisconsin. See FLA. STAT. ANN § 794.027 (West 1992); HAWAII REV. STAT. § 663-1.6 (1993); REV. CODE WASH. ANN § 9.69.100. (West 1998); WIS. STAT. ANN. § 940.34 (West 1996). California imposes a duty to report when the victim is a child. CALIF. PENAL CODE § 152.3. Ohio imposes a general duty to report a felony. OHIO REV. CODE § 2921.22 (West 1997). See generally Eugene Volokh, *Duty to Rescue / Report Statutes*, (Nov. 3, 2009) http://www.volokh.com/2009/11/03/duty-to-rescuereport-statutes/.
Jerry, in the midst of a conversation on a mobile phone, does not call for help. Kramer, video-camera in hand, says, “I want to capture this,” and films the event, which also records an audio of the other three observers making wise-cracks about the incident and about the man’s weight. When an officer appears on the scene, the crime victim gestures to the presence of the four witnesses. They are arrested for a violation of a recently enacted “Good Samaritan Law,” which, as the officer explained, “requires you to help or assist anyone in danger as long as it’s reasonable to do so.” They are taken to a holding cell at the local jail.

When they call to retain an attorney, Jackie Chiles (a parody of Johnnie Cochran), he exclaims, “Good Samaritan Law? I never heard of it. You don’t have to help anybody. That’s what this country’s all about. That’s deplorable, unfathomable, improbable.”

Because this was the first trial of its kind, an extremely zealous prosecutor digs up every possible bit of character evidence to show that their indifference in this

---

8 See, e.g., Finale Script, supra note 6 (Jerry: “Well, there goes the money for the lipo!” | Elaine: “See, the great thing about robbing a fat guy is it’s an easy getaway. You know? They can’t really chase ya!” | George: “He’s actually doing him a favor. It’s less money for him to buy food.”).

9 From their jail cell they glean more information: “Elaine: The Good Samaritan Law? Are they crazy? | George: Why would we want to help somebody? | Elaine: I know. | George: That’s what nuns and Red Cross workers are for. | Kramer: The Samaritans were an ancient tribe - very helpful to people. | Elaine: Alright – um, excuse me, hi, could you tell me what kind of law this is. | Deputy: Well, they just passed it last year. It’s modeled after the French law. I heard about it after Princess Diana was killed and all those photographers were just standing around. . . . Deputy: You’re the first ones to be arrested on it, probably in the whole country. | George: All right, so what’s the penalty here? Let’s just pay the fine or something and get the hell out of here. | Deputy: Well, it’s not that easy. Now see, the law calls for a maximum fine of $85,000 and as much as five years in prison.” See Finale Script, supra note 6.

10 Finale Script, supra note 6.
instance was simply a manifestation of a lifetime of “criminal indifference.” The opening statement for the prosecution captures well the moral outrage that seems to drive many proposals for enforcing a legal duty to rescue:

Hoyt: Ladies and gentlemen, last year, our City Council by a vote of twelve to two, passed a Good Samaritan Law. Now, essentially, we made it a crime to ignore a fellow human being in trouble. Now this group from New York not only ignored, but, as we will prove, they actually mocked the victim as he was being robbed at gunpoint. I can guarantee you one other thing, ladies and gentlemen, this is not the first time they have behaved in this manner. On the contrary, they have quite a record of mocking and maligning. This is a history of selfishness, self-absorption, immaturity, and greed. And you will see how everyone who has come into contact with these four individuals has been abused, wronged, deceived and betrayed. This time, they have gone too far. This time they are going to be held accountable. This time, they are the ones who will pay.  

The prosecutor’s statement builds on a kind of gut moral instinct that people should be held “accountable” for their “mocking and maligning,” especially when it reflects a deeper pattern of “selfishness, self-absorption, immaturity, and greed.” When it results in others being “abused, wronged, deceived and betrayed,” many are ready to entertain the idea that the behavior rises to the level of public censure and legal sanction.

---

11 Fortunately for Seinfeld fans, the episode’s portrayal through trial witnesses of vignettes of sarcasm, often at the expense of others, is also a humorous walk down the series’ memory lane.
12 Finale Script, supra note 6.
13 See also Finale Script, supra note 6 (the sentencing scene: “[Judge] Vandelay: Will the defendants please rise. And how do you find, with respect to the charge of criminal indifference? | Foreman: We find the defendants - guilty. | Vandelay: Order! Order in this court, I will clear this room! I do not know how, or under what circumstances the four of you found each other, but your callous indifference
In contrast, the opening statement of the defense taps into another kind of gut moral instinct—the unfairness of holding some people responsible for the consequences of another’s persons bad actions, especially when the perpetrator of the greater wrong is on the loose.

Chiles: I am shocked and chagrined, mortified and stupefied. This trial is outrageous! It is a waste of the taxpayers’ time and money. It is a travesty of justice that these four people have been incarcerated while the real perpetrator is walking around laughing—lying and laughing, laughing and lying. You know what these four people were? They were innocent bystanders. Now, you just think about that term. Innocent. Bystanders. Because that’s exactly what they were. We know they were bystanders, nobody’s disputing that. So how can a bystander be guilty? No such thing. Have you ever heard of a guilty bystander? No, because you cannot be a bystander and be guilty. Bystanders are by definition, innocent. That is the nature of bystanding. But no, they want to change nature here. They want to create a whole new animal—the guilty bystander. Don’t you let them do it. Only you can stop them.  

This humorous scene provides some guideposts to navigate the argument of this Thesis. Here I briefly note three: first, the distinction between the criminal statute and focus of the prosecutor’s argument; second, the defense strategy of latching onto the categorical status of bystanders; and finally, the now-famous quip from the defense attorney’s initial reaction to the case—“You don’t have to help anybody. That’s what this country’s all about.”

and utter disregard for everything that is good and decent has rocked the very foundation upon which our society is built. I can think of nothing more fitting than for the four of you to spend a year removed from society so that you can contemplate the manner in which you have conducted yourselves.”).

14 Finale Script, supra note 6.
First, note the large gap between the criminal statute under which the four characters were charged and the driving force of the prosecutor’s opening statement. This is illustrative of an important key to the whole Thesis. As the officer explained, the four were arrested for violation of a recently enacted law that would require them “to help or assist anyone in danger as long as it’s reasonable to do so.” Note that the statute does not a delineate a duty to “rescue” in the sense that one necessarily would have been required to physically intervene, or somehow make a difference in the causal chain of events that led to the initial harm. Remember also that in this case the assailant was armed, while the victim and the four witnesses were unarmed. “Reasonable” action under the circumstances would have had to account for these risks.

But note further how the prosecutor’s opening statement takes the case in a very different direction. It focuses not on their failure to intervene or to call for help. Instead, there is a clear tension between his description of the law—“Now essentially, we made it a crime to ignore a fellow human being in trouble”—and the driving force of his argument against the four. The theory of his case was not that they had ignored the victim, but that “they actually mocked the victim as he was being robbed at gunpoint.” According to the prosecutor, the conduct that was on trial was not so much how they had expressed an attitude of indifference, but the infliction of a distinct harm. This was further corroborated by character evidence of the extent to which they had inflicted similar harms on other portions of humanity: a record of “mocking and maligning” grounded in a “history of selfishness, self-absorption,
immaturity, and greed,” with the resulting damage that “everyone who has come into contact with these four individuals has been abused, wronged, deceived and betrayed."

This Thesis works precisely in the area of this gap between the Seinfeld statute and the prosecutor’s argument. It focuses not on the failure to help per se, but the aspect of a bystander’s conduct that may constitute “mocking and maligning,” and it works to theorize both the duty and the distinct harm that bystanders may inflict in similar circumstances. Of course this Thesis neither celebrates nor condones indifference to a victim in peril. It simply considers that question, and theorizing the nature of that specific harm, to be beyond its scope.

Instead, the focus of this Thesis is the bystander who engages the scene of an accident or assault, notices that the victim is a vulnerable person in need of emergency assistance, and instead of treating the person with the respect due to a human being in such circumstances (e.g., helping in some way), proceeds with a course of action that expresses disrespect for the humanity of the victim and this person’s particular need for assistance. It queries: might the law recognize that at some point these expressions of “selfishness and self-absorption” do constitute a kind of abuse of another person—a wrong—that should have a remedy in law?\(^\text{15}\)

Concerns about a particular form of “mocking and maligning” have crystallized with the advent of the pervasive presence of recording devices such as

\(^{15}\) One might query whether this is the concern at the heart of the “Good Samaritan” criminal statutes requiring bystander attention to victims in some circumstances, and so might provide a kind of interpretive key the distinct nature of this harm. While this Thesis does not exclude that hypothesis, careful consideration of this argument is beyond its scope.
cell phones. Liker Kramer with his video-camera in the Finale scene, those who take cell phone pictures are hardly “ignoring” the victim or doing “nothing”—they are engaging the attack by focusing on it, and filming or photographing it, and in that very act—when compounded with doing nothing to help—they are objectifying another human being precisely at a moment in which this person is vulnerable. The focal point of this Thesis is to lay the groundwork, define and begin to consider applications of what it terms a tort of “exploitative objectification of a vulnerable person in need of emergency assistance.”

Second, the Seinfeld defense strategy highlights what is one of the primary hurdles to be overcome in laying the groundwork for this new tort: a status-based frame that circumscribes the tort obligations on the part of otherwise-strangers. Note also how the defense’s opening statement latches on to a categorical argument: bystanders are, by definition, innocent. The defense works to turn attention away from the defendants’ actual conduct within the particular circumstances of their interaction with the victim in order to shift the spotlight on the question of status. It argues that the status of these onlookers as “bystanders” makes their actual conduct in the circumstances irrelevant.

Generally, in the absence of some previously defined “special relationship” status, “affirmative obligations” have long been a hard sell for the common law of torts. The general rule is that when a bystander has done nothing to create or exacerbate the risk which actually materialized and which caused the victim’s injury, the law will not impose on the bystander an affirmative obligation to assist, even
when such intervention would have posed no or miniscule risk to the bystander. Exceptions to the rule will be made when the bystander fits into one of the categories of an enumerated “special relationship” with the victim.

As the third Restatement of Torts summarizes: “An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in sections 38-44 is applicable.” Affirmative duties include those based on statutory provisions imposing an obligation to protect another; as well as prior conduct creating a risk of physical harm. Affirmative duties to third parties may also arise based on a relationship of custody or control over the person posing risks, for example, a parent responsible for the conduct of his or her minor child. Finally, affirmative duties may arise based on an undertaking to render services to another or to a third party, or simply by taking charge of another who appears imperiled and helpless.

---

16 Restatement (Third) of Torts § 37 (2012).
17 Restatement (Third) of Torts § 38.
18 Restatement (Third) of Torts § 39.
19 Restatement (Third) of Torts § 41. See id. § 41b (special relationships include: (1) a parent with dependent children; (2) a custodian with those in its custody; (3) an employer with employees when the employment facilitates the employee’s causing harm to third parties, and (4) a mental-health professional with patients). See generally Restatement (Second) of Torts § 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 to the other a right to protection”); Restatement (Third) of Torts § 37 cmt. d (“Section 315 of the Restatement (Second) of Torts contributed to frequent judicial pronouncements, contrary to the explanation above, that absent a special relationship an actor owes no duty to control third parties. Section 315, however, must be understood to address only an affirmative duty to control third parties. It did not address the ordinary duty of reasonable care with regard to conduct that might provide an occasion for a third party to cause harm.”).
20 Restatement (Third) of Torts §§ 42-43.
21 Restatement (Third) of Torts § 44.
In other words, as the *Seinfeld* defense put it, “Bystanders are by definition innocent. That’s the nature of bystanding.”22 If the relationship between the actor and the victim does not fit one of the descriptions in an enumerated categorical exception, then that should be the end of the inquiry. When bystanders are in the category of “strangers” and remain on the sidelines, with a connection neither to the victim by status, nor to the incident or risk by means of their own actions, under the common law of tort, they generally have no affirmative obligation to assist.

The focus of this Thesis is not to challenge or to refute—at least not directly—the current state of the law of affirmative obligation to aid a victim in need of emergency assistance. But it is important to note that tort law and scholarship related to the role of bystanders has been largely shaped by how the law of affirmative obligations circumscribes duties between strangers. Thus part of the task of laying the foundation for a new tort of “exploitative objectification” includes some work to dismantle aspects of how status-based and categorical frames tend to limit how we interpret bystander interactions with victims. Removing these obstacles will leave ample space to further articulate the circumstances in which bystanders may owe legal duties to victims, even in the absence of a pre-existing contract or other “special relationship.”

Finally, this Thesis will also work to address the Seinfeldian argument from liberty: “You don’t have to help anybody. That’s what this country’s all about.” As will be evident from the discussion of moral foundations for the new tort, this Thesis

---

does not set forth an argument that a person who has not caused or exacerbated the risk endangering the victim should be legally required to help. It remains agnostic on this point. But here too, the Thesis acknowledges that the argument from liberty has had a powerful and important influence on the broader legal and cultural discourse regarding bystander obligations. With this background in mind, the analysis moves forward to what may be a more difficult question: what understanding of freedom and autonomy might help to ground a more nuanced understanding of harm that could sustain the theoretical foundation of a tort of “exploitative objectification”?

With these guideposts in mind, here is the map of how the argument proceeds. A first challenge for articulating a tort claim for “mocking and maligning,” or as I later frame it, “exploitative objectification” is that the assessment of the wrong hinges less on the failure to perform a physically observable action, such as tossing a rope to a drowning person, and more on an interior subjective attitude. The action-oriented focus in the commentary on cases involving bystander obligations is a reflection of a broader quest for distilling objective rules and standards over subjective states of mind.23 This has in various ways obfuscated the potential focus on more subjective elements of the interior life of bystanders. In the common law of torts, when the decision-making process of bystanders is not caricatured as some form of moral monstrosity, it is often depicted as relatively flat. Step one for this Thesis is to

23 See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992) (reflecting on the influential origins of this trend in the work of Oliver Wendell Holmes, Jr.: “If there is a single, overriding, and repetitive theme running through Holmes’s writing, it is the necessity and desirability of establishing objective rules of law, that is, general rules that do not take the peculiar mental or moral state of individuals into account.”).
retrieve a space in the law of torts to bring into full consideration the complexity of the interior life of bystanders, including how emotional reactions to trauma and/or violence may have an impact on the decision-making process.

Part One explores three ways in which the interior life of bystanders has been flattened, and suggests paths for more complex and multi-dimensional reflections. Chapter One critiques William Prosser’s sleight of hand in the canonical no-duty-to-rescue cases, including his tendency to create from whole cloth “mythical moral monsters” in cases in which bystanders were otherwise invisible, or in which their actions may have been more comprehensible through the lens of a less dramatic gloss. Chapter Two takes a closer look at the journalistic accounts of the bystander villains who failed to help in the well-known case of the Kitty Genovese murder and some lesser-known cases as well. Here too it highlights the importance of a multi-faceted analysis that leaves room for the emotions, fears, and psychological limitations of those who find themselves face-to-face with brutal violence. Chapter Three considers the flip side of these scenarios: how the characterization of heroes such as the Good Samaritan also contributes to a psychologically flat caricature of the bystander role.

On the basis of this appreciation for the complexity of the interior life of bystanders, Part Two then delves into the speculative foundations for articulating a tort of “exploitative objectification of a victim in need of emergency assistance.” Chapter Four rejects some instrumental and deterrence-based accounts of bystander obligations such as the search for the cheapest cost-avoider, because of the extent to which they may give short shrift to the emotional life and decision-making process of
bystanders at the scene of an actual emergency. It adopts instead a set of distinctions and claims gleaned from Immanuel Kant’s explanation of the allotted space for discretion in the area of imperfect as compared with perfect obligations. On this basis, it proposes a philosophical framework that can simultaneously affirm the principle of respect for the humanity of the victim, the need for the bystander to exercise discretion based on the specific circumstances, and an appreciation for just how emotionally charged these encounters may be.

At this point the Thesis also introduces a term to describe those who potentially cross the line into conduct that may harm the victim: “engaged spectators.” The precise claim is that once a bystander decides to stop and engage the scene, and in so doing, encounters a vulnerable person in need of emergency assistance, at that point the “engaged spectator” assumes a duty to treat the vulnerable person as an end in himself or herself, and so with dignity and respect, neither objectifying nor exploiting this person’s vulnerability.

Chapter Five aims to strengthen the philosophical foundations of the new tort with an account of “relational autonomy” and a notion of liberty that could ground and sustain more extended reflection on dignitary harm. Chapter Six further sustains the moral argument for duty with a brief theological reflection on the meaning of “neighbor” in the Hebrew Scriptures.

Part Three focuses on the legal foundations of the proposed new tort of exploitative objectification. Chapter Seven aims to articulate a tort obligation between otherwise legal strangers grounded not on status or a pre-existing agreement,
but in the specific circumstances of the encounter with the victim and the need for emergency assistance. Chapter Eight works to theorize a distinct and legally cognizable harm that is grounded in the emergency circumstances, but is not parasitic on the primary injury or assault. Grounded in the philosophical harm of objectification—treating a person as a thing—the analysis acknowledges that a tort based on this element alone would be too vague and unbounded. Thus Part Three concludes with the Chapter Nine discussion of the elements of the proposed tort of “exploitative objectification of a vulnerable person in need of emergency assistance,” which focuses on a circumstantial assessment of victim’s state, as both vulnerable and in need of emergency assistance.

Chapter Nine also recognizes that there may be circumstances in which taking a picture or recording the accident or the attack may serve a public good. For this reason, for the case in which the bystander took a picture, it proposes analytic and evidentiary tools to distinguish when this act would constitute “exploitative objectification” from when it may express appreciation and concern for the victim’s needs and interests, for example, as part of cooperation with a criminal investigation; or as discussed more fully in the Chapter Twelve, in pursuit of the social goods within the bounds of ethical photojournalism.

How might this new tort of “exploitative objectification of a vulnerable person in need of emergency assistance” map onto current legal and tort theory debates in the United States? Part Four considers what it might offer to the ongoing discussions in the U.S. about the moral and legal obligations of bystanders to a sexual assault,
particularly in circumstances in which the victim was unconscious at the time of the assault. Of course sexual assault in the context of the teenage and college party scene is not a novelty. Nor is the act of photographing or filming victims of violence in this context. But the now ubiquitous photographic and recording devices in the hands of just about every partygoer creates a new social and legal landscape that is shaping and changing how we might address the harm of sexual assault and the role of bystanders in these circumstances.

Chapter Ten highlights how application of the tort in the context of sexual assault fits well within “responsibility based” approaches to tort theory, and in particular, within the frame of civil recourse theory rather than corrective justice theory. Chapter Eleven discusses the extent to which a tort for exploitative objectification might help to resolve some of the doctrinal difficulties inherent in a claim for negligent infliction of emotional distress, especially in circumstances where the victim was unconscious. Part Four concludes with Chapter Twelve’s discussion of how the new tort intersects with current constitutional protections for photographers and photojournalists, acknowledging circumstances in which the act of taking photographs of a person in need of emergency assistance may embody respect for the victim’s person and other social goods. Thus the Thesis develops criteria to delineate these differing intentions and to distinguish these circumstances from “exploitative objectification,” providing a complete defense to liability under this tort.

The Thesis concludes where it began, in the first-year torts classroom, with a few observations about incorporating into class discussions a more complex
appreciation of the interior life of bystanders and their moral and legal responsibilities in the face of violence. It hopes that this shift in the torts curriculum might offer a modest but important contribution to helping law students to reconcile “thinking like a lawyer” with “thinking (and feeling) like a human being.” The shift may also help students, professors, and citizens as well, to discover the ways in which law need not pose such a sharp and dichotomous conflict with common assumptions about morality and what we owe each other simply by nature of our shared membership in the one human family.
PART ONE: MAKING SPACE IN THE LAW FOR THE INTERIOR LIFE OF BYSTANDERS

I. Prosser’s Mythical Moral Monsters

The shocking hypothetical is well-known to students of the common law of torts: a passerby who with no danger to herself could easily pull a drowning toddler from a wading pool, instead “pulls up a chair and looks on as she perishes.”¹ In her discussion of the account of the canon of no-duty-to-rescue cases that follow this line, Mary All Glendon muses that the “facts” of this hypothetical are “no less bizarre” than the actual cases.² In hers and many other accounts, Osterlind v. Hill (1928), Handiboe v. McCarthy (1966), and Yania v. Bigan (1959), are all cited as authority for the lack of a duty to rescue a drowning “stranger.”

The opinion in Buch v. Armory (1898) is the source of a particularly shocking explanation:

I see my neighbor’s two-year-old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries . . . because the child and I are strangers, and I am under no legal duty to protect him.³

This gloss—that these cases reveal a particularly extreme level of individualistic obliviousness to humanity and human need—has helped to generate outrage and

¹ MARY ANN GLENDON, RIGHTS TALK 78 (1991). For the essay often credited for getting the discussion rolling in philosophy circles, see Peter Singer, Famine, Affluence, and Morality, 1 PHIL. & PUB. AFF. 229, 231 (1972) (“. . . if I am walking past a shallow pond and see a child drowning in it, I ought to wade in and pull the child out. This will mean getting my clothes muddy, but this is insignificant, while the death of the child would presumably be a very bad thing.”).
² Id.
³ Id. at 79 (citing Buch v. Amory Mfg. Co., 44 A. 809, 811 (N.H. 1989)).
bewilderment in generations of commentators and citizens alike. For many law students the discussion of these cases is an important moment in which they intuit a vast and unbridgeable chasm between the law they are learning and the moral considerations of ordinary human beings. And as a result of this chasm, the figure of a “bystander” and the bystander’s decision-making process can also lose its connection to common human experience, flattening out to a one-dimensional cartoon.

But is that chasm really grounded in the case law? Specifically, do these common law cases themselves shed any light on the moral qualities of the bystander or passerby who purportedly refuses to help? For example, what are the origins of the narratives which indicate cool indifference, analogous to the Olympic swimmer “pulling up a chair” in order to comfortably look, watching as someone struggles, suffers and drowns?

This Chapter compares the discussion of the canonical no-duty-to-rescue examples in the various editions of William Prosser’s important and influential treatise on the law of torts with a close reading of the facts of the cases themselves. As it turns out, the origins of the purported chasm between law and morality—between the reactions of the supposed bystanders in these cases and how most human beings would hope to respond to a person in need—is not in the common law itself, but in Prosser’s sleight of hand. Images of do-nothing bystanders appear in all their evil intent because Prosser imbedded these villains into the narratives. In the actual cases the facts are strikingly different, and where bystanders do actually appear, the
facts lend themselves to a more complex assessment of their action or inaction. By shoehorning the facts of the cases into his own legal category and agenda, Prosser’s analysis (or lack thereof) has greatly contributed to a distortion in how the law depicts bystanders.

In the legal literature, Prosser was not the first to come up with the “drowning stranger” hypothetical. In an article published in 1908, incorporating and building on earlier cases and commentary, James Barr Ames set forth what are now two-well known hypothetical “easy” rescue cases:

As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown. Or, again, I see a child on the railroad track too young to appreciate the danger of the approaching train. I might easily save the child, but do nothing, and the child, though it lives, loses both legs. Am I guilty of a crime and must I make compensation to the widow and children of the man drowned and to the wounded child?4

Both of these examples are included in each of the various editions of Prosser’s influential treatise on torts, as well as in the parallel explanations in the second Restatement of Torts. Both Prosser and the Restatement include in their notes cases that purport to stand as authority for the applicability of the no-duty-to-rescue rule in such scenarios. But when these narratives are compared with the actual facts

---

of the cases, it is striking to see which details are not evident from the cases themselves.

Further, it is even more striking to note that it is precisely these details that tend to caricature the bystanders, in some cases turning them into what one court termed “moral monsters.”

Precisely the aspects of the narratives that do so much work to depict the bystanders as coolly or cruelly indifferent emerge less from the facts of how people bumbled their way through the tragic events that led to the victim’s injury, and more from judicial *dicta* and the imaginative minds of treatise writers. The sections below trace three examples of how Prosser’s sleight of hand has embellished the narrative—the drowning stranger; the child in the jaws of a machine; and the baby in the pool. The analysis then considers the two remaining examples, those that emerge from railroad injuries, and what I would argue is a *sui generis* case of bullying, concluding that neither fit well within the analysis or fact patterns of bystander response.

**A. The Invisible Bystander: Not Sitting on the Dock, Not Close and No Cigar**

The first edition of Prosser’s *Handbook of the Law of Torts* (1941) includes the following principle in its summary of the law of “Acts and Omissions”: “For an omission to act, there is no liability unless there is some definite relation between the

---

5 For an early articulation of the “moral monster” image, see Buch, 44 A. at 810 (one who fails to aid “may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages...”).
parties which is regarded as imposing a duty to act.” Further, “The law has not recognized any general duty to aid a person who is in peril.” After explaining the early and still “deeply rooted” distinction between active misconduct working positive injury to others [misfeasance], and passive inaction, or a failure to take steps to protect them from harm [nonfeasance],” the discussion of “Duty to Aid One in Peril” provides a number of examples of the law’s reluctance to recognize “the moral obligation of common decency, to assist another human being who is in danger.”

The first example is as follows: “The expert swimmer, with a boat [and a rope] at hand, who sees another drowning before his eyes, may sit on the dock, smoke his cigarette, and watch him drown.” The authority cited for this example is a 1928 Massachusetts Supreme Court cases, Osterlind v. Hill. The example and cited authority are repeated in all five versions of the treatise.

As Prosser was the Reporter for the 1965 Restatement (Second) of Torts, it is no surprise that the example also appears in § 314, “Duty to Act for Protection of Others:” “The fact that the actor realizes or should realize that action on his part is

---

6 WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, Ch. 5, § 32b, at 190 (1941) (“PROSSER 1941”).
7 Id. at 190.
8 Id. at 191 (citing Francis H. Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. PA. L. REV. 217, 219 (1908)).
9 Id. at 192.
10 Id.
necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”\textsuperscript{13} The language and tone closely tracks Prosser’s, with the preference for a cigar over a cigarette:

The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule.\textsuperscript{14}

Without severe distortion of the case, however, neither the holding nor the facts of \textit{Osterlind} can be read as support for Prosser’s point. First, regarding the holding: according to the counts in the declaration, in the early morning of July 4, 1925, Osterlind and Ryan, both intoxicated, visited a business which rented pleasure boats and canoes to be used on Lake Quannapowitt in Wakefield, Massachusetts. The pair

\textsuperscript{13} \textit{RESTATEMENT (SECOND) OF TORTS, § 314 (1965).}

\textsuperscript{14} Id. § 314 cmt. c. As noted above, the details of the Restatement illustration for comment c further capture the sense of moral outrage. See id. cmt. c, illus. 1 (“A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.”). For a careful analysis of the extent to which case law supports this section of the \textit{Restatement (Second) Torts}, see two articles by Peter F. Lake, \textit{Recognizing the Importance of Remoteness to the Duty to Rescue}, 46 \textit{DePaul L. Rev.} 315 (1997) and \textit{Bad Boys, Bad Men, and Bad Case Law: Re-Examining the Historical Foundations of No-Duty-to-Rescue Rules}, 43 \textit{N.Y. L. Sch. Rev.} 385 (1999). An especially interesting dimension of the \textit{Bad Boys} analysis is its focus on the extent to which gender-correlated behavior has influenced no-duty to rescue law. See, e.g., id. at 449 (“When trespassing, criminal, miscreant, drunk, or foolish males ask for assistance from problems they created, courts are still reluctant to require another individual to affirmatively help them.”). Against this backdrop, Lake traces the extent to which older no-duty to rescue cases have been removed to new legal categories and have been over-generalized.
rented a canoe and went out on the lake. Shortly thereafter, the canoe capsized and Osterlind hung on to the overturned canoe, “making loud calls for assistance, which calls the defendant [boat owner] heard and utterly ignored.” After about half an hour, Osterlind released his grip and drowned. The declaration does not indicate what happened to Ryan. Osterlind’s estate sued the owner of the boat, and the issue before the court was not a purported duty to rescue, but a statutory obligation to have “a reasonable regard for the safety of the persons to whom he let boats and canoes.”

When the Osterlind opinion is read through the lens of the duty to rescue—an issue not before the court—it might seem that the case stands for a kind of glorification of rugged individualism. The discussion of Black v. New York Railroad, a case describing the duty owed to a local train passenger who was so intoxicated “that he was incapable of standing or walking or caring for himself in any way,” could be interpreted as asking, “how drunk do you have to be before someone is required to help you?” According to some interpretations of Osterlind, it seems that the reason a legal duty to rescue was not required was based on an assumption that an able-bodied man can care for himself: anyone who was in a good enough condition to hang onto the canoe for half an hour and shout for help did not really require assistance. And it seems brutally callous for the court to conclude that the failure of the defendant to respond to the plaintiff’s cries for help was “immaterial.”

---

15 Osterlind, 160 N.E. at 302.
16 Id.
17 Id. (citing Black v. New York R.R., 79 N.E. 797 (Mass. 1907)).
18 See discussion infra at notes 32-36.
19 Osterlind, 160 N.E. at 302.
In contrast, when the opinion is read through the lens of the issue actually before the court, what would now be termed negligent entrustment—whether the boat owner had reasonable regard for the safety of the person to whom he rented the canoe, given the manifest conditions of impairment at the time of the rental transaction—then the court’s focus and language makes sense. According to the opinion in Osterlind, it was the plaintiff who initially drew the analogy to Black, and framed the argument according to the duty of care owed to a person so intoxicated that he was incapable of standing, walking, or caring for himself.

In Black, when the visibly intoxicated passenger arrived at his destination, the employees of a local passenger train removed him from the car, carried him along the platform, and then left him half way up the flight of stairs that led to the station. He held steady for a moment, and then fell down the stairs and was injured.20 Black held that while the railroad had no obligation to remove the passenger from the car, or to provide for his safety after he left the car, once the railroad employees undertook to help him from the car, they were required to use ordinary care in both in the act of removing him from the train and in deciding where to leave him: “it was their duty to have reasonable regard for his safety in view of his manifest condition.”21

In contrast to the condition of the plaintiff in Black, the Osterlind court found that the plaintiff was not helpless—as it turned out, he was in good enough condition to hang onto a canoe for half an hour, and also had the wherewithal to shout for help. These facts helped to shed light on the actual issue in the case—the owner’s judgment

20 Black, 79 N.E. at 798.
21 Id.
call at the time that he rented the canoe. Focusing on the question at issue also clarifies why the actual drowning was, in some sense, “immaterial” to this determination. The case turned not on the defendant’s failure to act once Osterlind was out on the lake, but on the initial judgment of whether to rent a canoe to a person in light of how he presented himself at the time of the rental transaction.\(^2^2\)

I would not go so far as to say that this substantive posture should have necessarily removed the *Osterlind* case from Prosser’s consideration of the role that it might have played in an evolving tort doctrine.\(^2^3\) Rather, my concern is the extent to which the failure-to-rescue filter has led to a distorted interpretation and fundamental misunderstanding of the case, leading in turn to severe distortions in perceptions of the decision-making process of bystanders.

To this last point, recall that *Osterlind* is cited as authority for the principle that “the expert swimmer, with a boat [and a rope] at hand, who sees another drowning before his eyes, may sit on the dock, smoke his cigarette, and watch him drown.”\(^2^4\) Because rescue was not precisely at issue in the case, there was no discussion of the physical position of the boat owner or boat house employee relative to the plaintiff in distress. For example, in the declaration the plaintiff alleged that

---

\(^2^2\) Analyzing the Osterlind court’s “odd” emphasis on the decedent’s lack of helplessness, Lake surmises that the oddity is due to the historical mind-set: “At that time, the distinction between proactive prevention and re-active rescue was not as well formed as it is today.” See Lake, *Bad Boys*, supra note 14, at 403. One might also put forward a simpler explanation: when one focuses on the issue of whether the defendant should have rented the canoe to the plaintiff in the state that he was at the time of rental, evidence of whether the decedent was helpless in the water may have been relevant to this question of whether his intoxicated condition would have been evident at the time of the rental transaction.


the defendant could hear Osterlind’s shouts, but there is no indication that the owner or employee was on a dock, was watching the incident, or was close enough to throw him a rope. Nor was there any indication that in those undoubtedly dark early morning hours, the defendant was able to see Osterlind at all. And there was certainly no indication of anyone calmly smoking a cigar (or cigarette, or pipe) while a fellow human being was drowning. Neither does the case indicate how far out the canoe had drifted, what happened to Osterlind’s friend, Ryan, and why Ryan did not help. The 1925 report for the town of Wakefield indicates only one death on July 4, 1925, that of Osterlind.

Probing the question of whether the owner would have been able to hear Osterlind’s shouts from a distance, a picture taken in the 1930s of Hill’s Boathouse in Wakefield, Massachusetts, depicts a fairly large structure which includes not only boat rental facilities, but also a dance hall on the upper floor. Historical accounts indicate that the Boathouse was the center of town life from 1887 through 1963.


26 See generally Osterlind, 160 N.E. 301.


28 The cover of a Lake Quannapowitt picture book features Hill’s Boat House and Dance Hall with a large sign “Dancing Every Saturday Night.” From the picture one might also intuit the extent to which the lower boat rental part of the structure may have been impacted by the noise level of the upper level dance hall. See ALISON C. SIMCOX & DOUGLAS L. HEATH, LAKE QUANNAPOWITT (2011). See also Jayne M. D’Onofrio, Hill’s Boathouse, circa 1930’s, http://heritage.noblenet.org/items/show/12056 (NOBLE Digital Heritage, Item #12056).

29 Records indicate that the dance hall was added to the structure in 1912, and was in operation as a dance hall through the 1960s. See Nancy Bertrand, History: The Boathouse, Early Center of Life in Wakefield, WAKEFIELD PATCH (Sept. 6, 2011), http://wakefield.patch.com/groups/opinion/p/history-the-boathouse-early-center-of-life-in-wakefield (“In 1912, the Boathouse was substantially enlarged by
One inventory indicates that in the mid-1920s, Hill’s boat rental business was not a small operation—more than 120 boats were available for rent. The wee hours of Saturday, July 4, 1925, would have been the beginning of a holiday weekend. This may give some indication that even very late that evening the owner or employees may have been too busy to keep track of individual customers who ventured out onto the lake. Further, given that the most popular central dance hall in town was located on the floor above the boat rental space, it is not inconceivable that employees would have been unable to hear or distinguish Osterlind’s shouts, regardless of how close he was to the shore.

In sum, on the facts, Osterlind includes no details indicating that the boat owner or the owner’s agent was in a physical position to perform an “easy” rescue.

the addition of a dance hall. . . . In 1923, Mabelle Wiley sold the boathouse to Harold and Gertrude Hill. Under their stewardship, the boathouse flourished for many years, the home of special community events as well its ballroom, restaurant and boat rental and storage functions.”

30 See D’Onofrio, supra note 28 (describing the inventory of boat rental operation, including more than 100 canoes and more than 20 public rowboats).
Nor does the case include any indication of the details that have been so effective for turning the canoe renter into a callous and indifferent moral monster.

So how did Osterlind become the poster child for the cases indicating the most “bizarre” and unsavory behavior of bystanders? Perhaps Prosser was simply taken by the narrative quality of the expert swimmer hypotheticals published prior to this case, such as those described by Ames and Bentham. They make for great stories, and their shock value can certainly help to keep a law school classroom electric. The only problem was that there were no actual case citations for these kinds of examples. Perhaps Osterlind was as close as Prosser could come to finding some semblance of matching details (e.g., water and drowning?), and so he smashed the facts of the case into a no-duty-to-rescue format. With this, the court’s discussion became even more appalling because of the serious mismatch between the case and the categories of rescue—to the point that the “immaterial” cries of a dying man further emphasize how judicial opinions unwittingly foster moral callousness through their narratives.

And so an urban legend was born. One of my favorite renditions of the legend is as depicted by law students as part of the American Bar Association’s 2012 “Law

31 See Ames and Bentham, supra note 4.
32 Richard Weisberg critiques the Osterlind Court’s description of the failure of the defendant to respond to the intestate’s outcries as immaterial, arguing that this deliberately pushes “to the periphery what seems to most readers to be the heart of the matter in dispute.” He concludes: “And by the very weirdness of that displacement, the judge’s words survive and influence us.” See RICHARD WEISBERG, POETHICS: TOWARD A LITERARY JURISPRUDENCE 11-14 (1992). In light of the preceding analysis, I would argue that this is exactly backwards. The opinion in Osterlind seems weird because Prosser tried to shoehorn it into a category into which it does not fit. The reason why most readers consider the intestate’s cries to be the heart of the matter is because it was framed as such by Prosser and the Restatement (Second) of Torts.
in Peepular Culture” contest for dioramas featuring marshmallow Peeps. As the two students described their submission, *Osterlind v. Peep*:

This is a reimagining of the fateful 4th of July of 1928 on Lake Quannapowitt in the town of Wakefield, Massachusetts when a canoe seller rented a “frail and dangerous canoe” to two intoxicated individuals. One of the men hung on to the canoe for thirty minutes while calling for help before losing hold of the canoe and drowning. Although the canoe vender heard the man’s cries, he did not assist him. This case helped establish that there is no affirmative duty to rescue.\(^{33}\)

While the textual description is carefully limited to the vendor having “heard” the cries, the diorama itself reinforces the notion that the bystander was an eyewitness, and that the drowning occurred in the light of day, as frolicking picnickers looked on.

In addition to depictions by law students, many otherwise thoughtful and careful analyses also assume that the canoe vendor was close enough to see the plaintiff. Harold McNeice and John Thornton, for example, cite the case for the proposition that “one may stand idly by and watch another drown.” Thane Rosenbaum’s discussion of the case also incorporates detail of “watching” and doing nothing:

The person who rented the canoe watched the scene and did nothing . . . Perhaps the law shouldn’t necessarily have required the bystander to swim out and rescue his customer. But to do absolutely nothing, to be able to so callously witness a death—without such inaction carrying any consequence—once more demonstrates the way in which legal results are split from moral outcomes in American law.

Occasionally, scholarly accounts of the case include that ultimate detail which does so much to paint a picture of cool indifference—that the renter was smoking a cigarette or cigar. But this particular account and others like it are drawn not from the case, but from Prosser’s imagination.

---

35 ROSENBAUM, supra note 4, at 256-257. Compare WEISBERG, supra note 32, at 13 (while the discussion does not indicate that the renter was an eye-witness, the narrative is nonetheless richly embellished with some details not included in the actual case: “The defendant noted the incident from the shore, heard the screams, and although neither life not limb would have been risked, failed to act”).
36 See, e.g., John H. Scheid, *Affirmative Duty to Act in Emergency Situations—The Return of the Good Samaritan*, 3 J. Marshall J. Prac. & Proc. 1, 5 (1969) (“Judges could not long continue to use as precedent a rule which produced results such as *Osterlind v. Hill* where the court held that the defendant, who rented deceased a canoe, was entitled to sit on a pier, smoke his pipe and watch the plaintiff’s intestate drown. When the law runs so counter to the layman’s idea of what is right, the law is likely to fall into general disrepute.”). See also Liam Murphy, *Beneficence, Law and Liberty: The Case of Required Rescue*, 89 Geo. L.J. 605, 622 (2000-2001) (in an otherwise careful, insightful and in-depth analysis, the article’s description of *Osterlind* is lifted right out of Prosser: “In *Osterlind* the
In reality, there was no evidence that the bystander was close enough to watch, had pulled up a chair, or had lit a cigarette while watching Osterlind drown. Prosser’s lampoon of a callous and gawking bystander obfuscates not only more thoughtful and nuanced discussions of the contours of affirmative obligations, but also the broader considerations of the factors that were relevant to the canoe-renter’s decision-making process in this case—e.g., the extent to which one person should be responsible for the decisions or safety of another adult who was intoxicated; and how to determine legal responsibility for the point of intervention when intoxication levels are not always immediately evident.

B. In the Jaws of a Machine: Due (in Part) to a Language Barrier

In a second example, Prosser notes that one is under no duty “to cry warning to one who is walking into the jaws of a dangerous machine,” citing among other cases, Buch v. Armory. The opinion by the Chief Justice of the New Hampshire Supreme Court is thick with dicta that have become the stuff of moral monster legends in the no-duty-to-rescue literature. The Court makes an explicit link with the Good Samaritan story, drawing a sharp distinction between law and morality:

stock example of failing to effect an easy rescue of a drowning person came to life. The villain of the piece had rented a canoe to the evidently drunk victims. As the victims drowned, the villain, boat and rope close at hand, sat smoking on the dock.”); Arthur Ripstein, Three Duties to Rescue: Moral, Civil and Criminal, 19 LAW & PHILOSOPHY 751, 753 n.3 (2000) (describing Osterlind according to Prosser’s distortions, as “a case of an expert swimmer with a boat and rope at hand, who calmly watches another man drown.”).

37 Prosser 1941, supra note 6, Ch. 5, § 32 at 192; Prosser 1955, supra note 12, Ch. 6, § 38 at 184; Prosser 1964, supra note 12, Ch. 10, § 54 at 336; Prosser 1971, supra note 12, Ch. 9, § 56 at 341; Prosser & Keeton 1984, supra note 12, Ch. 9, § 56 at 375.

38 44 A. 809 (N.H. Sup. Ct. 1898).
Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved.\(^\text{39}\)

The baby on the railroad track is a particularly dramatic illustration:

Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury, or indictable under the statute for its death.\(^\text{40}\)

In explaining the “wide difference” between causing and preventing an injury, the Court returns to the two year old babe, this time, the child of his neighbor, “in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries . . . because the child and I are strangers, and I am under no legal duty to protect him.”\(^\text{41}\)

The court continues:

Now, suppose I see the same child trespassing in my own yard, and meddling in like manner with dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child’s trespass? The mere fact that the child is unable to take

\(^\text{39}\) Id. at 810. See generally LUKE 10:30-37 (the parable of the Good Samaritan, with references to the passing priest and Levite).

\(^\text{40}\) Id.

\(^\text{41}\) Id. at 811.
care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant, by coming unlawfully upon my premises, impose upon me the legal duty of a guardian? None has been suggested, and we know of none.\(^{42}\)

Standing alone, these illustrations do have an extreme quality. But the actual facts of the case are much less “bizarre.” The child in question was not two but eight, the brother of a thirteen-year-old employee in the mule-spinning room of a mill. While there was evidence that other boys had brought their younger brothers to the factory, there was no evidence in the record that the employer knew this. The court noted that about two hours before the accident, the overseer in charge of the other boys became aware that the eight-year-old boy was not an employee and he directed him to leave. “Thinking he might not understand English, [he] took him to an operative who spoke the plaintiff’s language, whom he told to send the plaintiff out.”\(^{43}\) It seems that the boy either did not understand or did not follow the directive. Subsequently his hand was caught in a gearing which the other boys had been instructed to avoid.\(^{44}\)

When the \textit{dicta} is compared with the facts, the actual case includes neither a baby nor a direct awareness on the part of the employer that a child was “walking into the jaws of a dangerous machine.”\(^{45}\) The facts do indicate some effort to remove the boy from the danger, and that the tragic bungle was at least in part a failure to

\(^{42}\) Id.  
\(^{43}\) Id. at 809.  
\(^{44}\) Id.  
\(^{45}\) See discussion of Prosser’s text at \textit{supra} note 37.
communicate effectively due to a language barrier. As the court summarized, the negligence charged to the employer was that “inasmuch as they could not make the plaintiff understand a command to leave the premises, and ought to have known that they could not, they did not forcibly eject him.”

As Prosser, Glendon, and other commentators emphasize, the image of Buch that remains fixed in our legal-cultural imagination is that of a law that remains callous and indifferent to a bystander watching a baby crawl into a machine. In reality, like in Osterlind, the facts of Buch include no reference to a bystander-witness coolly watching the accident unfold before his eyes. Further, the actions of the otherwise engaged-adult supervisor indicate some effort to take responsibility for the safety of the trespassing child.

C. Swimming Pool Tragedy: Failure to Lock the Door to the Yard

In the 1971 fourth edition of Prosser’s treatise, Handiboe v. McCarthy is included in the footnote with Osterlind as further authority for the idea that the expert swimmer is not required to do anything as a man drowns before his eyes. The summary notes that in Handiboe “it was held that there was no duty whatever to rescue a child licensee drowning in a swimming pool.” Like the Olympic swimmer

---

46 44 A. 810.
48 PROSSER 1971, supra note 12, Ch. 9, § 56 at 340; PROSSER & KEETON 1984, supra note 12, Ch. 9, § 56 at 375.
on the dock, the baby in a wading pool had long been a favorite stock narrative in the no-duty-to-rescue discussion.\textsuperscript{49}

\textit{Handiboe} does involve a small child and a swimming pool—but it is not a failure to rescue case, at least not in the sense of fitting into this line of hypotheticals. In \textit{Handiboe}, the plaintiff’s four-year old son had been a frequent visitor to the defendant’s home in order to play with the defendant’s son of the same age. The housekeeper was the only adult at home at the time of the accident. On the day of the accident a door had been left unlocked, giving the children access to an enclosed yard with a swimming pool. The deep end of the pool contained about three feet of water, together with a slippery and slimy “accumulation of leaves, moss, and other trash and scum.”\textsuperscript{50} When the little boy fell into the pool, he was unable to pull himself up because of the slippery condition.\textsuperscript{51}

The case is very sad, but not “shocking” or “bizarre.” The tragic consequences were the result of carelessly leaving a door unlocked. One might sustain a strong critique of the court’s reasoning, and the extent to which what seemed to be a fairly clear understanding about adult supervision should have informed the neighbor’s duty of care to the child. But this is hardly a case in which a bystander stood by doing nothing but watching as a child drowned. In fact, based on the facts as recounted in the case, it seems that there were no witnesses at all.

\textsuperscript{49} See, e.g., Fowler V. Harper & Fleming James, Jr., 2 The Law of Torts (“Harper & James”) 1046 (1956) (“No ordinary bystander is under a duty to attempt the rescue of a child from drowning in what he knows to be shallow water.”). See also Singer, supra note 1 at 231 (passerby who sees a child drowning in shallow point should wade in an pull the child out).

\textsuperscript{50} 151 S.E.2d at 907.

\textsuperscript{51} Id.
D. The Railroad Cases: The Duties of Landowners, Not Bystanders

In contrast to the previous three scenarios which indicate a gap between the facts of the cases and the explanatory narratives drawn out by courts or treatise authors, the railroad cases present a different framework.\textsuperscript{52} In the leading case, \textit{Union Pacific Railway v. Cappier}, a trespasser on a railroad track was struck and injured by a moving train, through no fault of the railroad.\textsuperscript{53} Suit was brought for failure to assist the injured, bleeding trespasser.

If the injured person had been a passenger, such would have constituted the kind of “special relationship” between passenger and carrier, triggering a duty of care. The usual course of action in these situations would have been for the crew to take charge of the hurt person, render first aid, and get him or her to a hospital or under a doctor’s care.\textsuperscript{54} This duty did not extend to trespassers. The court explained:

\begin{quote}
. . . the duty [to aid] must be owing from the defendant to the plaintiff, otherwise there can be no negligence…. And the duty must be owing to plaintiff \textit{in an individual capacity}, and not merely as one of the general public. This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues.\textsuperscript{55}
\end{quote}

\textsuperscript{52} See generally McNiece & Thornton, \textit{supra} note 34, at 1279-80; Sam B. Warner, \textit{Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless}, 7 \textit{Cal. L. Rev.} 312 (1919).

\textsuperscript{53} \textit{Union Pac. Ry. v. Cappier}, 72 P. 281, 282 (Kan. 1903). \textit{See also} Kenney v. Hannibal & St. Joe R.R. Co., 70 Mo. 252, 257 (1879) (duty “excludes from actionable negligence all failure to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. The moral law would oblige an attempt to rescue a person in a perilous position—as a drowning child—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril.”).


\textsuperscript{55} Cappier, 72 P. at 283.
The lack of a duty to injured trespassers was also emphasized by *Adams v. Southern Railway*, which held that a railroad employee had no authority to employ at the company’s expense a physician to care for three tramps who were injured while stealing a ride on the train.\(^{56}\) One case runs to the contrary of the general rule,\(^{57}\) but it has received no further following. Some states impose a statutory obligation to alert medical personnel in case of such accident.\(^{58}\)

Like *Buch* discussed above, *Cappier* is also infamous for its extremely broad *dicta* drawing sharp lines between moral and legal obligations.

> With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief to the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are not found in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.\(^{59}\)

This language—not the holding, and not even the principle that landowners should not be legally responsible for assisting trespassers who have been injured through no fault of the railroad—has been the source of opprobrium in the literature.

---


\(^{57}\) *Whitesides v. Southern Ry. Co.*, 38 S.E. 878 (N.C. 1901) (“If defendant knocked the intestate off the trestle and knew it had done so and went on without stopping to look or care for him, especially on such a night as that, that was such negligence as would make the defendant liable for the result.”). *See also* McNiece & Thornton, *supra* note 34, at 1280.

\(^{58}\) *Adkins v. Atlanta & C. Airline R. Co.*, 2 S.E. 849 (S.C. 1887) (discussing statute requiring railroad companies to notify physician most accessible in the event of an accident causing injury).

\(^{59}\) *Cappier*, 72 P. at 282.
As Scheid lamented: “The court’s attitude is one of consummate individualism, and the case is a perfect example of its excesses.”60

But in all of these cases, railroads owners and employees are not mere bystanders, they are landowners or agents of landowners who are dealing with trespassers. In all likelihood the reason that the railroad employees did not assist trespassers injured on the tracks was due to a company policy regarding injured trespassers. Certainly railroad employees could be critiqued for their failure to challenge the inhuman consequence of company policy.61 But, as Harper and James note, that the railway cases are not exactly analogous to the relationship between a bystander and a baby in a pool, “where there is no antecedent relationship between the parties and defendant has done nothing to create the risk.”62

In contrast, they submit, these cases seem to call for a more structural, institutional response: “As we have seen, there is growing belief that the beneficiaries of an enterprise which creates risks should pay for the casualties it inflicts without regard to fault.”63 Either way, like the other canonical rescue cases discussed above, the railroad cases shed little light on the decision-making process of bystanders.

60 Scheid, supra note 36, at 2.
61 Note that the harsh impact of these policies would be mitigated over time also due to changes in tort doctrine. See Gregory, supra note 54, at 43. See generally Warner, supra note 52. See also William H. Becker, The Humanitarian Doctrine, 12 Mo. L. Rev. 395 (1947) (discussing Missouri’s rule holding railroads under a duty to care to avoid harm trespassers in helpless peril on the tracks, finding that a landowner’s common law duty of care fits within the doctrine of last clear chance).
62 HARPER & JAMES, supra note 49, at 1047.
63 Id. at 1047.
E. **Bigan was a Bully, Not a Bystander**

Finally, the last canonical “easy rescue” example to consider is the strange case of *Yania v. Bigan*.\(^{64}\) In fact, the court noted at the outset of the case: “A bizarre and most unusual circumstance provides the background of this appeal.”\(^{65}\) Of all the cases, this is the only one that comes anywhere close to the cool indifference of the Olympic swimmer watching someone drown. According to the complaint, John Bigan and Joseph Yania were both operators of coal strip-mining operations in Pennsylvania. Together with another man, Ross, Yania came onto Bigan’s property in order to discuss a business matter. While they were there, Bigan asked them to help him get a pump started. The pump was submerged in a large trench which had been cut for the purpose of removing the coal underneath. The water was about eight to ten feet deep. The complaint alleges that while Yania was standing at the edge of the trench, Bigan and Ross were “urging, enticing, taunting and inveigling” him to jump into the water.\(^{66}\) Yania jumped and subsequently drowned. The complaint alleges that Bigan failed to take reasonable steps to assist him.\(^{67}\) Bigan filed preliminary objections in the nature of a demurrer, which the trial court sustained, and Yania’s estate appealed.

Taking the allegations in the complaints to be true, the appellate court acknowledged that had Yania been “a child of tender years or a person who was mentally deficient, then it is conceivable that taunting and enticement could constitute

---

\(^{65}\) Id. at 344.
\(^{66}\) Id. at 345.
\(^{67}\) Id. at 344.
actionable negligence if it resulted in harm.”\textsuperscript{68} But when he “undertook to perform an act which he knew or should have known was attended with more or less peril,”\textsuperscript{69} he was an adult in full possession of all his mental faculties. His own action, not Bigan’s conduct, was held to be the cause of his “unfortunate death.”\textsuperscript{70} Of the few actual onlookers in the canonical cases, the descriptions of Bigan’s conduct, at least as described in the complaint, may actually provide the most insight into his intentions and his decision-making process.

But it is precisely for this reason that this case is also a mismatch—not only for the duty-to-rescue discussion, but also for a discussion regarding the moral and legal obligations of bystanders. Bigan was hardly a bystander. On the contrary, the facts indicate that Bigan was very actively involved—and perhaps best characterized as a bully—actively contributing to the risk that ultimately led to Yania’s demise. This of course does not answer the question of whether Yania’s choices, made as a competent adult, would have eviscerated that contributing factor. But regardless, neither the case nor the commentary provide a good prototype for a discussion of the legal and moral obligations of bystanders.

****

When these canonical classics are examined carefully, it turns out that none of the facts turns on the failure of bystanders to assist a victim in need of emergency

\textsuperscript{68} Id. at 345.
\textsuperscript{69} Id. at 346.
\textsuperscript{70} Id.
assistance. Instead, they are more about—forgive the pun—run-of-the-mill questions regarding the care owed to those who do not seem to fit well within the neat categories of duties framed within clear and specific relational ties: a neighbor’s child when there is not a clear arrangement for supervision; the younger sibling of a teenage employee who was not supposed to be on the factory premises; a trespasser on the train tracks; and the person with whom one had just engaged in a business transaction. The more shocking details about the moral and legal obligations of bystanders emerge not from the cases themselves, but from judicial dicta and the embellishing imagination—and at times the sleight of hand—of journal and treatise authors.

What follows? This is not to say that the dicta in these cases is unimportant, or should be disregarded. Nor is it to argue that these sections of Prosser’s treatise should be ignored. The language in the cases and the various versions of Prosser’s treatise are significant texts which have exerted powerful influence on the legal and cultural narrative over the course of the twentieth century, and they should be analyzed as such.

At the same time, it is also helpful to acknowledge the extent to which these mischaracterizations and caricatures of the actions and decision-making process of seeming “bystanders” in these cases has exerted a broad and powerful influence over our common law discussion of bystanders. When perceptions of bystander behavior

---

71 See Lake, Bad Boys, supra note 14, at 420 (summarizing how the cases that form the foundation of Restatement (Second) of Torts § 314 “stand in ruin” as “overruled, discredited, superceded, over-generalized and misinterpreted”).
are unmoored from these anchors, we may be able to put out into the deeper waters of grappling with the more difficult questions regarding bystander decision-making that lurk just beneath the surface.

For example, some of the previously discussed cases involve serious tensions between the principle that competent adults should take responsibility for their own actions and the Principle of Beneficence. To make matters more complex, these tensions arise when considering the responsibilities of third parties who were not in a clearly defined relationship of legal responsibility to the injured party. For example, the harder question at the heart of Osterlind was the extent to which renters should be held responsible for assessing the “manifest impairment” of their customers before renting out the vehicle or boat. The harder question at the heart of Handiboe was the question of responsibility for accidents that emerge when arrangements for the supervision of children are only tacit. The harder question at the heart of Yania was how the law should analyze the relational complexity of bullying between otherwise competent adults. All of these questions are difficult, and to reduce to caricature the decision-making process of the actors who were actually present yields nothing for a serious effort to work these problems through.\(^\text{72}\)

\(^{72}\) For further exploration of the harder questions, David Hyman has amassed significant empirical data proving that the scenario on which much of the anxious rescue discussion is based—purported failure to execute a seemingly “easy rescue”—is extremely rare. See David Hyman, Rescue Without Law: An Empirical Perspective on the Duty to Rescue, 84 Tex. L. Rev. 653, 656 (2006) (factual instances of failure to make an effort to rescue a person in serious risk of danger are extremely rare; while cases of actual rescue, even in hazardous circumstances, are much more common). Our concerns, he argues, should focus instead on the tendency to “over-rescue” when, for example, non-experts step in to risky situations when it would have been better for them to wait or call for more expert help. Id. at 656. See also Richard A. Posner, The Problematics of Moral and Legal Theory 126 (1999) (“Such
But court cases and treatises writers are not the only source of distortion in the depiction of the interior life and decision-making process of bystanders. The next chapter explores the extent to which some journalistic accounts of bystanders’ encounters with violence have contributed to the obfuscation as well.

_____

cases are rare.”). Hyman also accomplishes the Herculean task of organizing the enormous literature on duty to rescue, and noting the highlights. See Hyman, supra at notes 15-17 (describing “the stack of law review articles focusing on the no-duty rule in my office is 1.5 feet tall.”).
II. Journalistic Accounts of Bystander Villains

A. Sensationalistic Reporting of the Genovese Murder

March 13, 2014 marked the fiftieth anniversary of a murder that rocked the world. As recounted by the New York Times article that went 1960s-style-viral,1 in the early morning hours of March 13, 1964, twenty-nine-year-old Kitty Genovese was returning from work to her middle-class neighborhood in Queens, New York. As she walked the few blocks to her apartment from the Long Island Railroad parking lot, she was brutally attacked and stabbed. Neighbors responded to her screams with lights and shouts and the attacker retreated. But then he returned two more times, continuing the attack, which resulted in her death. According to the Times, “For more than half an hour 38 respectable, law-abiding citizens in Queens watched a killer stalk and stab a woman in three separate attacks in Kew Gardens.”2 The article indicated that she lay bleeding for half an hour before the first call arrived to the police, who arrived immediately.3 The neighbor who finally made the belated call to the police sheepishly explained, “I didn’t want to get involved.”4

The incident generated a wave of deep angst and soul searching: how could so many witnesses failed to respond, even with something as easy as a call to the

1 See KEVIN COOK, KITTY GENOVESE: THE MURDER, THE BYSTANDERS, THE CRIME THAT CHANGED AMERICA 100 (2014) (“Under the banner of the world’s leading news source, the New York Times at the height of its influence, a two-week-old story became a sensation. Newspapers in England, Russia, Japan and the Middle East picked it up. As recast by Rosenthal and Gansberg, Kitty’s murder had elements of noir fiction: a gritty urban setting, craven bystanders, a defenseless young woman.”).
2 Martin Gansberg, Thirty-Eight Who Saw Murder Didn’t Call Police, N.Y. TIMES, March 27, 1964, at 1. See also COOK, supra note 1, at 78.
3 See Gansberg, supra note 2, at 1. See also COOK, supra note 1, at 80.
4 Gansberg, supra note 2, at 1.
police? The year following the attack, the University of Chicago hosted an interdisciplinary conference which brought together legal theorists, philosophers, sociologists and journalists to discuss the case and proposals for a change in the no-duty-to-rescue rule. The passive indifference and cold-hearted inhumanity of these “thirty-eight witnesses” became something of a mantra which generated intense interest on the part of the public.

The journalist keynote speaker for the conference, Alan Barth, surmised that the trends of urbanization, industrialization and “extraordinary mobility” presented a double barrier to bystander involvement: not only the isolation and anonymity that tends to emerge amidst the crowds of any large urban environments, but also the deliberate effort to seek and preserve a high degree of privacy. Conference speakers also noted how the sense of urban isolation may have been compounded by racial divisions and tensions. As sociologist Joseph Gusfield observed:

We cannot help concluding that much of the present concern about violence and the absence of the Good Samaritan has been

---

5 From a contemporary perspective, it seems strange that no one dialed a 911 emergency line. However, that system was not yet in place. See Gary Allen, History of 911, Dispatch Magazine Online, http://www.911dispatch.com/911/history/ (noting that the first 911 call was placed in February, 1968). See also Charles O. Gregory, The Good Samaritan and the Bad: The Anglo-American Law, in The Good Samaritan and the Law (“Good Samaritan”) 34 (James M. Ratcliffe ed., 1966, reprinted 1981) (noting that shortly after Genovese’s death New York instituted an easy-to-remember centralized number to contact the police).

6 See generally Good Samaritan, supra note 5 (volume collecting the conference papers and presentations).

7 Aleksander Rudzinski, The Duty to Rescue: A Comparative Analysis, in Good Samaritan, supra note 5, at 91.

8 Alan Barth, The Vanishing Samaritan, in Good Samaritan, supra note 5, at 159. See also id. at 165. See also Gregory, supra note 5, at 34 (quoting Margaret Mead: “our obsession with privacy has resulted in mass anonymity in our large cities—a dulling of our senses which kills neighborliness and caring about what happens to others.”).
heightened by racial hysteria. The public attention feeds into an atmosphere already tense with racial fears, stereotypes, guilts [sic], and hostility—the common stuff with which white and black Americans look out at each other from their distant communities.  

But as with the cases discussed above, the telling and re-telling of the Genovese story has been replete a tendency to create and re-create mythical moral monsters. Over the years, further investigation and scholarship have revealed that the initial New York Times article was in several respects factually wrong and seriously misleading. While sources for the revisionary account could be multiple, I will refer primarily to a study by Kevin Cook published on the fiftieth anniversary of the murder which incorporates much of the previous research and carefully sifts through what is fact and what is legend. Reconstructing the events and probing the witnesses’ varying perspectives, Cook’s account helps to correct the record in several respects: a neighbor actually did call the police immediately; probably a maximum of two

---

9 Joseph Gusfield, Social Sources of Levites and Samaritans, in GOOD SAMARITAN, supra note 5, at 187. See also id. at 191 (noting the racial tensions that generate mutual ignorance and cynicism, such that each group approaches the other “with perceptions that wall off both mutual identity and that tend to increase fear.”).

neighbors were in a position to understand that Genovese was in mortal danger; at least one of these two had objective reasons to fear contact with the police; and most significantly, Kitty Genovese did not die alone, but in the arms of one of her neighbors.\textsuperscript{11}

The next sections consider these elements as part of an examination of the distortion or caricature of the interior life of bystanders who are part of a crowd. In contrast to an \textit{en masse} indictment against “thirty-eight witnesses,” this analysis considers the extent to which the sensory and subjective perspectives of the various individual bystanders helps to explain and for the most part justify the instances in which it seems that there was a lack of response.

\section{The Various Perspectives of the Genovese Witnesses}

“For more than half an hour 38 respectable, law-abiding citizens in Queens watched a killer stalk and stab a woman in three separate attacks in Kew Gardens.”\textsuperscript{12} Abraham Rosenthal, editor of the \textit{New York Times} and the likely author of this first line, later admitted that he knew this was impossible.\textsuperscript{13} Thirty-eight was the number of entries in the police log of the people who were interviewed in the days following the crime.\textsuperscript{14} Reporters never identified the witnesses, but accepted the detective reports at face value.\textsuperscript{15} Instead, by the prosecutor’s count, no more than five or six

\begin{footnotes}
\footnote{See generally Cook, \textit{supra} note 1, 214-220.}
\footnote{Gansberg, \textit{supra} note 2 at 1.}
\footnote{See Cook, \textit{supra} note 1, at 98 (quoting Rosenthal later admitting: “Thirty-eight was impossible, I knew”).}
\footnote{Id. at 107.}
\footnote{Id.}
\end{footnotes}
could have seen or heard enough to know that Genovese was in mortal danger.\textsuperscript{16} Two of these were kept off of the witness stand so as not to distract the jury from the actions of the accused, Winston Moseley.

What is made extremely opaque by the \textit{New York Times} lead describing thirty-eight people who “watched” for “half an hour” is that two (not three) attacks took place in two different locations. Spatially and aurally it would have been impossible for the same group of people to see or hear both. The first attack took place on Austin Street, and from the Mowbray apartment building, several residents heard the ruckus on the street below. From the seventh floor, Robert Mozer saw a man bent over a woman, striking her. Assuming it was a domestic spat, not unusual just outside the pub, he lifted his window and shouted, “Leave that girl alone!” After Moseley ran away, Mozer watched Genovese stand up and walk around the corner out of sight. Then Mozer went back to bed.\textsuperscript{17}

After this, Moseley feared that he might be identified by association with his car, which was parked nearby. He left the scene to move the car.\textsuperscript{18} Genovese got up and staggered around the corner, out of the sight and earshot of those who may have seen from their windows the first attack. Because she had been stabbed in the lung, by the time she reached the second location, an indoor entrance to an apartment, she

\textsuperscript{16} Id.
\textsuperscript{17} Id. at 127.
\textsuperscript{18} Id. at 215.
did not have enough lung capacity to emit an audible scream when Moseley returned.\textsuperscript{19}

Of the seeming large number of witnesses, only two were likely to have understood that she was in mortal danger and need of immediate help. Joseph Fink worked nights as an assistant superintendent at the Mowbray apartment building. From an office on the ground floor he had a clear view of the scene of the first attack. From fifty yards away, “he had watched a slender man in a stocking cap plunge a knife into Kitty’s back. He remembered that the knife blade was shiny.” The thought occurred to him that he could go to retrieve a baseball bat from the basement, but in the end, he did nothing and went downstairs and fell asleep.\textsuperscript{20}

The other witness, Karl Ross, knew Genovese and was a frequent guest in her home. He had been drinking most of the night, but at 3:30 a.m. he heard the cries from the initial Austin Street attack. He did nothing, and the cries died down. A few minutes later he was startled by a noise coming from the back of his building. He heard scuffling and a muffled cry. After a few minutes he finally opened the door a crack, and saw a man with a knife on top of Genovese.\textsuperscript{21} But he was too drunk and too scared, both of the attacker and of the police, to make an immediate call from his own home: “he didn’t want the cops knocking on his door.”\textsuperscript{22}

\textsuperscript{19} See id. at 111 (initial cries were loud, but during the second attack there were no “full-throated screams” because “her punctured lungs could barely fill with air.”). See also id. at 85 (describing the cause of death as bilateral pneumothorax, in which air escapes from the lungs, fills the chest capacity, and compresses the lungs).
\textsuperscript{20} Id. at 107-108.
\textsuperscript{21} Id. at 108-109.
\textsuperscript{22} Id. at 111.
2. How Bystanders Did Help According to Their Capacities

According to the New York Times, it took half an hour after the attack for anyone to call: it was “3:50 by the time the police received their first call, from a man who was a neighbor of Miss Genovese. In two minutes they were at the scene.” As the Inspector lamented, “If we had been called when he first attacked, the woman might not be dead now.”

But according to Kew Gardens historian Joseph De May, reporters, the police, and everyone else missed a key witness, one who did call immediately after the first attack. Michael Hoffman, fourteen at the time of the attack, later executed a sworn affidavit that his father, Sam Hoffman, did call the police right after the first attack and reported what Michael had seen from his second floor apartment bedroom overlooking Austin Street. From the time that Genovese turned the corner, they did not see anything more. Both Michael and Sam were interviewed by the police the next day. “I remember my dad telling the police that if they had come when we called, she’d probably still be alive. For that he got a dirty look from the detective.”

Another neighbor, Andrée Picq, lived in the fourth floor of the Mowbray. After she heard the initial screaming, she stayed at her window, and saw the man come back, this time with a feathered hat. She watched him check the doors of the train station, and then lost sight of him. She dialed the police, but could not make herself understood because she “was gasping for breath.” As Cook recounts, “Unsure

---

23 See Gansberg, supra note 2, at 1. See also Cook, supra note 1, at 80.
24 See Gansberg, supra note 2, at 1; Cook, supra note 1, at 78.
25 See Cook, supra note 1, at 206-207; De May, supra note 10.
26 Cook, supra note 1, at 207-208.
of her English, unsure of what she had just seen, afraid to identify herself to the
authorities, she put down the phone."27 Finally, Sam Koshkin, from the sixth floor of
the Mowbray, wanted to phone the police, but his wife, Marjorie, discouraged him.
“I told him there must have been thirty calls already.”28

The New York Times article gives the impression that the two bystanders who
did emerge were simply milling about the street at four in the morning. “The
neighbor, a 70-year old woman and another woman were the only persons on the
street. Nobody else came forward.”29 In reality, in response to a round of calls set off
by Ross’s alert, Genovese’s friend Sophie Farrar rushed to the scene—and for all she
knew, to a murder in progress.30 When the police arrived, they found Genovese
cladled in Farrar’s arms; Farrar was saying, “It’s okay, they’re coming. It won’t be
long.”31

27 Id. at 127.
28 Id. at 161. What was termed by social psychologists as the “bystander effect” was the subject of
studies of staged emergency situations to measure whether participants would intervene to help, and if
so, the length of time that it took. The studies demonstrated that the presence of other people often
inhibits helping, by a large margin. See e.g., John Darley & Bibb Latané, Bystander Intervention in
Emergencies: Diffusion of Responsibility, 8 J. PERSONALITY & SOC. PSYCH. 377-383 (1968); Darley &
Latané, Bystander “Apathy,” 57 AM. SCIENTIST 244-268 (1969). See also COOK supra note 1, at 166
(discussing studies by Darley and Latané, suggesting “that situational factors may be of greater
importance. The failure to intervene may be better understood by knowing the relationship among
bystanders than that between a bystander and the victim.”).
29 COOK, supra note 1, at 80.
30 Id. at 219.
31 Id. at 220.
3. **Subjective Perceptions of the Risks of Calling the Police**

At the University of Chicago conference, general reference was made to a certain mistrust of the police.\(^{32}\) As Gregory urged, “we must get people to believe that the police will take them seriously and respect their anonymity when they telephone.”\(^{33}\) Cook’s account provides a much less sanitized version of the interactions at stake. First, it is important to note that the *New York Times* story, which appeared two weeks after the attack, finds its genesis in a lunch between *Times* editor Abraham Rosenthal and police commissioner Michael Murphy.\(^{34}\) One might extrapolate from these origins that it is not surprising that a detail such as Sam Hoffman’s initial call to the police might have slipped through the cracks of the investigative reporting.

It is also important to note that at the time many New Yorkers considered the police to be “bullies with guns.”\(^{35}\) To illustrate the point, Cook catalogues a series of letters to the *Times* recounting the police’s general lack of responsiveness to citizen complaints and reports.\(^{36}\) But perhaps most important for this case is how a key

---

\(^{32}\) See also Gregory, *supra* note 5, at 33 (“Why did the thirty-eight people in Kew Gardens, Queens, New York, behave as they did on the night of March 13, 1964? Because they were scared and did not want to get involved. Also because they did not have faith in the police and did not want to stick their necks out.”).

\(^{33}\) Gregory, *supra* note 5, at 35.

\(^{34}\) *Cook, supra* note 1, at 96-97.

\(^{35}\) Id. at 126. One might also note that the perception persists.

\(^{36}\) See id. at 126 (excerpts from letters to the *New York Times*: “Have you ever reported anything to the police? If you did, you would know that you are subjected to insults and abuse from annoyed police such as ‘why don’t you move out of the area?’ or ‘Why bother us?’ Or you will have a call answered forty-five minutes after it was put in”; “Nothing annoys a precinct desk captain more than a call after ten o’clock”; “I heard screaming on the street several times, called the police, and was politely told to mind my own business.”; noting that those who called the police “got quizzed. They want your name. Where you live, why you’re calling… and all this time nothing is happening.”)
bystander’s subjective perceptions of the police might have informed and determined his failure to act. Ross’s fear of calling the police that evening was probably in large part informed by the New York City Police Department’s invasive and brutal treatment of gays and lesbians at the time.37

According to Cook’s account, Ross, who was gay, and who was friends with Kitty Genovese and Mary Ann Zielonko, who were living together and in a lesbian relationship, had good reason to fear the police. To give some idea of the treatment that Ross might have expected from the police, it is interesting to note Zielonko’s description of the reactions of their other gay friends to the investigation: “My friends all stopped talking to me. They thought they were being watched. They thought their phones were tapped.”38 Already before the exposure to the trauma of the murder, Ross was, according to Zielonko, a “very nervous, frightened person.”39 Even in the midst of an alcohol-induced stupor he may have intuited that a call to the police might provoke an invasive police investigation, bringing him beyond his threshold for anxiety and stress.40

What is the upshot of this more complex account of the perspectives of the various witnesses to the Genovese murder? By my lights, it seems that just about all of the neighbors did their best with the information they had gleaned from what they

37 See generally id. at 15, 46-47 (recounting the violence and brutality of New York City Vice Squad raids on gay and lesbian bars in the early 1960s).
38 Id. at 86.
39 Id. at 56.
40 Zielonko herself was subject to an extremely invasive six-hour interrogation by a Queen’s homicide detective as a prime suspect based on the assumption that “homosexual romances produce more jealousy by far than ‘straight’ romances. More jealousy means more chance for violence.” Id. at 83-84.
were able to see and hear at the time. If one factors in both subjective perspectives and historical sensitivity to the relationship between the police and gay and lesbian individuals and communities in New York in the 1960s, it is far from clear that Ross’s failure to call the police was indicative of cruel indifference. This is not to negate that there may have been at least one “moral monster” in the mix: Joseph Fink, the eye-witness who from the first floor of the apartment building in front of the crime scene had from only fifty feet away watched Moseley plunge the blade into Genovese’s back, and even remembered that the blade was shiny. But then again, we do not have any further information that would help to understand his subjective perspective and particular fears.

B. Up Close to Brutal Violence: Reactions of Shock and Fear

1. David Cash’s Complex Relationship with the Perpetrator

It is admittedly difficult to know what to make of David Cash, the young man who from a neighboring stall of a ladies restroom of a Nevada casino watched his friend, Jeremy Strohmeyer, throttle seven-year-old Sherrice Iverson, repeatedly threatening “shut up or I’ll kill you.” After a half-hearted attempt to distract Strohmeyer, Cash left the restroom without bothering to call for help. When Strohmeyer emerged twenty minutes later, Cash simply said, “Dude, let’s go, my dad is waiting for us.” Strohmeyer was charged with murder, kidnapping and sexual assault. The facts indicate that Cash would have been uniquely positioned to do
something to help, and that he may also have been guilty of misprision. But he was not charged; he was treated as merely a witness to the beginning of a crime.41

In subsequent interviews, Cash coolly commented on his stance: “I’m not going to get upset about someone else’s life.”42 His own words seem to convict him of cruel indifference. Jeremy Waldron builds an excellent case for judgment of David Cash’s failure to help Sherrice Iverson based on the fact that Cash seemed to have intuited that his friend had crossed the line from play into violence, and that something bad was about to happen to the little girl. Waldron argues for a clear legal obligation to assist in this case:

Does anyone really want to say that Cash has a moral obligation to intervene only in some such situations that he finds himself in, but that he need not intervene in all? Does anyone really want to imply that there could be a number of situations—say three—just like this in David Cash’s adolescence, such that he would have a moral obligation to intervene to save little girls’ lives from the depredations of his friends in only one or two of them? Surely the moral truth of the matter is that he had a perfect duty to intervene in this case—there he was, on the spot, with some influence over


42 See Waldron, On the Road, supra note 41, at 1054.
his friend and no other help immediately available. And if this was
his moral situation, it is not at all clear why a legislature would be
distorting anything by making it his legal duty as well.\(^\text{43}\)

To pick up on Waldron’s question: does anyone really want to say that this
case could be imagined from a different angle? As shocking as these facts are, I
would submit that like the Genovese case, this one also deserves another look. The
fact that Cash was Strohmeyer’s best friend introduced enormous relational
complexity into the analysis. How do people react when they witness a family
member or close friend do something very wrong? What kind of psychological hold
did Strohmeyer have over Cash?\(^\text{44}\) Consider Cash’s statement to the grand jury of his
observation of the assault, as reported by the \textit{Los Angeles Times}:

\begin{quote}
“I was telling him to let go,” David would later tell a grand jury,
“trying to get him to come out of the restroom. I knew at that point
that the little game that they were playing kind of crossed the line.
… “I was tapping on his forehead. At one point, I accidentally
knocked off his hat. He looked up at me, kind of in a stare, you
know, like he didn’t care what I was saying.” … David walked out
of the restroom and left the arcade. “I didn’t know what to
expect—something bad,” he told the grand jury. “I probably feared
the worst.” He sat on a concrete bench in the courtyard. He had
been in the restroom two minutes.\(^\text{45}\)
\end{quote}

\(^{43}\) Waldron, \textit{On the Road}, \textit{supra} note 41, at 1074.
\(^{44}\) See Zamichow, \textit{supra} note 41, at A19 (“Almost all of Jeremy’s friends thought David was an
arrogant nerd, but for Jeremy he was an ideal companion: David looked up to him.”); id. (David was
considered “conceited, weird, a hanger-on” by Jeremy’s friends; “In party circles, Jeremy was cool,
David was not. But he tried. . . . Even though Jeremy used tweak, he declared that he never wanted to
see his friend do dope. ‘If there was a discussion of marijuana,’ David says, ‘he’d say, ‘I’d never let
you do that. You’re too smart.’ He was pretty much caring towards me. I looked up to Jeremy as much
as anyone else.’”)
\(^{45}\) Id.
That moment—when “he looked up at me, kind of in a stare”—may be one indication of the relational complexity in this case. Perhaps Cash simply could not absorb the idea that his friend had done something so wrong, and so brutal.46 Further, locked in that stare, perhaps he also began to fear for his own safety.

Once news of the assault had made its way onto local television stations and the search began for suspects, Cash phoned a friend, Jeremy Phillips, who urged Cash to turn Strohmeyer in. Cash said he could not. Later asked by the Los Angeles Times why he thought Cash had ignored his advice, Phillips reflected: “It’s a man thing. If your friend does something really bad or really wrong, you’re not going to go out and narc on them real quick.”47 In response to the question why he himself did not turn Strohmeyer in, Phillips responded:

Because I didn’t want to get Dave in trouble. I was waiting for Dave to do it. For men, it’s like a respect for your male friends. It’s like almost an oath, a pact that you take when you become best friends with a guy… I’ve talked with a lot of guys about it—what they would do if their best friend killed somebody. Every guy I’ve asked has said they wouldn’t say anything.48

46 Id. (describing the conversations that immediately followed the murder: “Conversations began, ‘Dude, can you believe this? Like, I mean, I can’t believe it.’”); id. (responding to the question of whether he had asked why Strohmeyer killed Iverson: “I never asked him why. He never explained. I didn’t see how there could be an explanation.”); id. (responding to the question of whether he thought he should have reported the murder right away: “Um, I probably should have, but I still, I didn’t, you know, at that point, I couldn’t fathom Jeremy, you know, giving physical harm.”)
47 Id.
48 Id. See generally Nancy Chi Cantalupo, Masculinity and Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State, 73 Md. L. Rev. 887, 923-924 (2014) (analyzing the characteristics of all-male student peer groups’ sexually harassing and/or sexually violent behavior, including fears of retaliation and being viewed as a “snitch.”) This psychological obstacle to bystander assistance has spurred the development of apps that enable anonymous reporting of violent behavior. See, e.g., Issie Lapowski, An App That Lets Kids Report Bullies Anonymously (Feb. 15, 2015) http://www.wired.com/2015/02/stopit/.
In this case, the problem with caricature, with flattening out the interior life of Cash as a bystander, is not that it exaggerates Cash’s callousness, cowardice and depraved indifference to human life. The problem is that the purported model for intervention so streamlines Cash’s relationship with Strohmeyer that the analysis fails to shed much light on how to analyze potential legal obligations in these kinds of circumstances.

As will be discussed more fully below, Cash’s failure to assist or report was not an expression of “freedom” in any sense of a meaning of freedom that should be given value. But this torn, conflicted soullessness does not necessarily translate into a legal obligation to assist. The questions persist as to whether Cash’s immediate reaction was not due to the shock of his unexpected encounter with the extreme violence of his friend; and the extent to which subsequent explanations of his behavior in that moment were all attempts to rationalize his inability to handle this shock—and whether this should make a difference. Taking the interior life of bystanders seriously means at least allowing for the possibility that psychological limitations and emotional scars might interfere with one’s capacity to intervene, as well accounting for the influence of social and psychological relational dynamics when the bystander is in a close relationship to the perpetrator of a crime.49

49 Recent research on assessing the culpability of adolescents in light of how their cognitive development affects decision-making also adds a further layer to discussions of both moral and legal culpability of accessories and bystanders within these age brackets. See Barry C. Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. L. & FAM. STUD. 11, 55-56 (2007) (discussing Roper v. Simmons, 543 U.S. 551 (2005), which ruled that imposition of the death penalty on juveniles is unconstitutional: “Roper ascribed juveniles’ diminished responsibility, in part, to adolescents’ greater susceptibility than adults to negative peer group influences. Adolescents
2. Bystanders to the Vanderbilt Gang Rape

Like the journalistic accounts of the Genovese and Iverson murders, those reacting to the journalistic accounts of how bystanders interacted with various aspects of a gang rape that took place in June 2013 at Vanderbilt University, and to the testimony as it unfolded in the January 2015 trial, have been quick to condemn their inaction and failure to directly intervene.⁵⁰

On June 23, 2015 a mistrial in this case was declared on the grounds of “actual bias” due to the fact that the jury foreman had not revealed during jury

---

selection that he had been a victim of sexual crimes as a teenager. Reports indicate that the new trial will not commence until 2016. As the ruling does not in any way effect the existing evidence supporting the verdict, which the judge indicated was “overwhelming,” this Thesis proceeds with an analysis based on reports and evidence available as of Spring 2015.

The assault unfolded on the evening of June 22, 2013. A 21-year old student at Vanderbilt University had been out drinking at a college night spot with some friends, including Brandon Vandenburg, the 20-year old football player she had been dating for a couple of weeks. According to her testimony, the last thing she remembers of that evening is Vandenburg encouraging her to have a blue drink. She woke up the next morning in his dorm room. He told her that he had to take care

---

53 See Blinder, supra note 51.
55 See Stacey Barchenger, Alleged Vanderbilt Rape Victim: “That’s Me” in Video, THE TENNESSEAN (Jan. 28, 2015) http://www.tennessean.com/story/news/2015/01/22/alleged-vanderbilt-rape-victim-takes-stand-thats-me/22167013/ (recounting victim’s testimony during the January 2015 trial that at about midnight she and her friends had arrived at the Tin Roof bar where she saw Vandenburg, whom she had known for a couple of weeks and dated: “He gave her three drinks and a fourth—a blue drink—that she only sipped, she told jurors. . . . The alleged victim said she has never been as drunk as she was that night. She said she does not remember anything after the blue drink.”).
of her all night because she had been sick. She apologized, and the next day they had consensual sex.\textsuperscript{56}

A few days later, while fixing the smashed outer door of the dormitory where Vandenburg was lodged, university officials reviewed the surveillance video recording, which included images of men carrying an unconscious woman into a dormitory room. The subsequent police investigation, including graphic video images retrieved from the alleged attackers’ own cell phones, revealed that Vandenburg and three other football players had brutally gang raped the woman, violating her in multiple ways.\textsuperscript{57} Jaborian McKenzie, another player who was charged, described during the trial that Vandenburg had passed out condoms, but said that Vanderbilt himself was unable to have sex with the woman because of he was high on cocaine. McKenzie recounted: “He was like amped, demanding . . . He was hyper, like he was coaching us to do whatever.”\textsuperscript{58} The video shown at trial included the audio of Vandenburg laughing and encouraging the assault. At the end of the tape, Cory Batey proceeded to urinate on her.\textsuperscript{59} As the attack was unfolding, Vandenburg sent the video and photographs to two high school friends in


\textsuperscript{57} See Alan Blinder and Richard Pérez-Peña, \textit{Vanderbilt Rape Convictions Stir Dismay and Denial}, \textsc{N.Y. Times} (January 28, 2015).


\textsuperscript{59} Id. See also Blinder, \textit{supra} note 57.
California.\textsuperscript{60} After a twelve-day trial, Brandon Vandenburg and Cory Batey were convicted of aggravated rape and aggravated sexual battery.\textsuperscript{61}

Who else was involved—but not charged? Mack Prioleau, another football player, 18 at the time, had just arrived to the school a few weeks prior, and was Vandenburg’s dorm-mate.\textsuperscript{62} Asleep in the top bunk in of their dorm room, he was awakened by lights and noise as Vandenburg and the three other football players entered the room. He testified that he saw a woman lying face down on the dorm room floor, and could hear sexual talk among them and the audio of a pornographic video being played on a laptop computer. He rolled over, neither engaging the scene nor calling for help. As he told jurors, “I was scared and uncomfortable … I didn’t know what to do.”\textsuperscript{63} After the assault the woman had been placed in the lower bunk. Prioleau left the room to sleep in a friend’s room. He did not alert authorities as to what had happened, nor did he check on the woman’s welfare.\textsuperscript{64}

Later the victim’s naked body was moved out into the dorm hallway. Vandenburg called Chris Boyd, a former wide receiver, to help move her to his bed. It seems that Boyd had fairly complete information about how the victim had ended

\textsuperscript{60} Both high school friends, Joseph D. Quinzio and Miles J. Finley, were charged with tampering with evidence; after testifying in the case, both pleaded guilty to a lesser charge of attempted accessory after the fact, allowing probation and the possibility that the conviction be expunged if completed successfully. See Wadhwan, supra note 50; Hayley Mason, Suspect Takes Plea Deal in Vanderbilt Rape Case, WSMV (April 17, 2015) http://www.wsmv.com/story/28828669/suspect-takes-plea-deal-in-vanderbilt-rape-case.

\textsuperscript{61} Eliana Dockterman, The Vanderbilt Rape Case Will Change the Way Victims Feel About the Courts, TIME (January 29, 2015).

\textsuperscript{62} See Wadhwan, supra note 50 (listing bystanders and their varying connections to the events).

\textsuperscript{63} See id.

\textsuperscript{64} Id.
up in the hallway. He pleaded guilty to a misdemeanor charge of being an accessory after the fact. Another player, DeAndre Woods, was just returning to the dorm when he saw the victim lying naked in the hall. Woods helped to move her into the dorm room. It seems that he may not have had full information about what had happened to the victim—e.g., she could have been simply sleeping off a drunken stupor. Woods was not charged. Two other athletes, Michael Retta and Dillon van der Wal, also saw the woman in the hall and did not alert authorities. There was no indication that they knew she had been assaulted. They were not charged. 65

Shouldn’t some of these persons have been charged together with Boyd? As in the previous cases, here too a psychologically flat caricature would simply highlight the fact that these very able-bodied young men were all on the scene, they would have been able to help—and so they should have helped. In particular, it seems especially difficult to believe that Prioleau—literally perched on top of the scene of a violent attack on a completely helpless victim—could not have done anything to make a difference in the course of events that evening.

But what might Prioleau’s decision look like from the inside? What difference would it make to an assessment to consider the full range of emotions that might have impacted that decision to roll over and feign sleep? One could start with an appreciation for the fear that an 18-year old freshman football player who has just arrived at the college campus might have had before the commanding presence of his 20-year old colleague who was “amped” on cocaine and “demanding” and “hyper,” in

65 Id.
a small room together with the three other football players whose judgment was also severely impaired by drugs or alcohol.\textsuperscript{66} Given this fear, it does not seem too outlandish to query whether rolling over and feigning sleep so as to refrain from engaging the scene may have been the best that he could do in that moment.

This is \textit{not} to say that Prioleau, or Ross or Cash, for that matter, did the right thing. Nor is it to say that they should not have experienced pangs of conscience for having done the wrong thing. Nor would this analysis in any way condone Prioleau’s failure to do anything to assure that the young woman was not in medical distress after the others had left the room. Acknowledging the complexity of the subjective interior life of bystanders—for example, how they perceive the risks, their relationships with their peers and others, and the risks of interacting with authorities such as the police—would not preclude an argument that bystanders should under some circumstances be held morally responsible for their inaction.\textsuperscript{67}

From the outside, witnesses such as Ross, Cash and Prioleau seem to have been perfectly positioned to help. From the outside nothing may have seemed easier than calling the police or shouting for help. But from what we might intuit about the historical, circumstantial, social, and psychological factors in these cases, from inside


\textsuperscript{67} See discussion of the assessment of culpability in light of research on adolescent cognitive development \textit{supra} note 49. For insight into the pressures and fears that inform the interior life of gender-based violence, \textit{see generally} Cantalupo, \textit{supra} note 48, at 903-915.
the minds of Ross, Cash and Prioleau, their emotionally-charged decision-making process was probably much more fraught.

C. Meet the “Modern Day Kitty Genovese”: Bystanders with Cell Phones

In the Genovese case, for a very large number of the purported witnesses, it was not clear whether the bystanders had engaged the scene at all. In the Vanderbilt rape case, based on the news reports and the facts presented at the initial trial, it is not clear whether Prioleau psychologically engaged the scene of the violence, notwithstanding his physical presence. For Cash, given his subsequent reflections, that argument is more of a stretch, but nonetheless, his interaction with the perpetrator also raises questions about the nature of his psychological engagement and capacity to intervene.

Returning to the hypothetical of the Olympic swimmer, rope in hand, watching someone drown before his or her eyes, note the seemingly objective factors: a perfectly individuated bystander (there is only one bystander in the example); who is perfectly situated (watching with a clear view of what is happening); with the requisite expertise (Olympic); perfectly equipped and prepared (rope in hand); and we might even presume an otherwise ready disposition (where the Olympic quality of an athlete tends to convey a high level of confidence, focus and ability).

In its practical and technical simplicity, the hypothetical elides any reference to two factors that often come into play in a bystander’s response to an emergency: first, the subjective perspective of the bystander, which embraces not only sensory
conditions such as ability to see and hear, but also psychological factors such as how the bystander perceives and processes risks and fear; and second, the relational complexity that may permeate the various interactions on the scene, not only between bystanders, victims and perpetrators, but also all of their interactions with structures of authority, such as the police or emergency responders.  

It seems that in order to evaluate the role of bystanders in a way that neither caricatures nor flattens their subjective decision-making process, it would be very helpful to have a kind of entry point into one’s subjective state of mind. Might there be an instrument which could enable a fairer assessment of a purported bystander’s capacity to engage, whether this person actually engaged their scene, and the nature of their engagement with the victim in need of assistance? At the time of the Genovese and Iverson murders, this instrument was not yet in hand—but now it is. The following account illustrates how the ubiquitous presence of cell phone cameras might help to shed light on the bystander decision-making process.

****

On March 31, 2014, Jose Robles had taken an early morning bus from New Jersey into the main bus depot in Manhattan, Port Authority, as part of his regular commute to his job as a manager of the Carnegie Deli on 57th Street. At about 5:45 a.m., as he was trying to hail a cab outside of the bus terminal, an assailant...
approached him from behind. Robles recounted: “All of a sudden this guy got in front of me and dove at me. He hit me in the eye and I went down.” As the attacker started to kick him, he struggled to his feet to try to fight him off, but his left arm had been shattered. “He wouldn’t stop. I tried to get up again, but he grabbed my jacket and spun me around and he grabbed my shoes and threw them in the street and started kicking me again,” he said.69

The near-dawn street was not deserted. A number of bystanders were watching the incident unfold—some from behind their cell phones. As Robles described the scene: “People were watching and they were having a good time filming.” Dismayed that no one had tried to assist or shout for help, he managed to pull out his own cell phone and call the police. As he was dialing 911, the assailant yelled, “That’s my phone”—which Robles surmised was an effort to trick onlookers into believing the assailant was the victim. “I called for help, but people were just filming on their cell phones. I ran into the Port Authority and cops were coming down the escalator.” The assailant followed him inside the terminal and hid when he saw the police. Robles pointed him out and he was arrested. Interviewed from his hospital bed, Robles reflected that while the attack was bad enough, the behavior of witnesses was worse. “I want people to have a little more conscience.”70

70 Burke et al, supra note 69.
As one headline mused: “Deli Manager Mercilessly Beaten at NYC Onlookers Just Stare”—a “Modern Day Kitty Genovese”?  

****

As discussed above, it turns out that explosive detail of more than thirty gawking onlookers to the Genovese murder was an ill-founded and irresponsible embellishment that most likely emerged from the *New York Times* editing process. There were no recordings of any of the events of that evening. In contrast, when Robles was attacked in 2014, just about every bystander was carrying, and perhaps even operating, a portable device that could have visually and aurally recorded not only the bystanders’ presence, but also their perspective of the scene, and even what they may have said. Whether it takes the form of a cell phone, an iPhone, a Smartphone, or an iPad, the means to call for help, and the means to record an attack, are now at the fingertips of many people who are also other-wise uninvolved witnesses to a crime.

As noted above, when the Kitty Genovese story emerged, it sparked a national debate on the “bystander effect,” and whether there should be a duty to assist or at least call for help in an emergency situation when there are supposedly numerous witnesses. Should the whole neighborhood have been held responsible? How can

---


72 *See discussion supra at notes 10-19.*

73 *See supra note 28 for discussion of Darley & Latané studies of the bystander effect. See also COOK, *supra* note 1, at 169 (discussing studies by Latané and Darley suggesting “that situational factors may*
one pick out from a crowd the individuals who were actually paying attention and focused, and thus could have helped in some way? How can one pick out from a crowd who should have been able to discern—at a distance, through a closed window—the difference between the shouts of a lover’s spat and the scream from an attack? At what point in time would everyone have been off the hook since one person actually did call the police? The Genovese case indicates the complexity of a rush to judgment against numerous “pure” bystanders.

Consider how interactions between bystanders and victims have changed with the advent of cell phone technology. First, in many instances, at least for a certain set of bystanders, it is no longer a question of guessing who might have been paying attention. Breaking down the anatomy of a bystander on the street taking a cell phone picture or video: the act usually includes stopping and focusing—psychologically on the event; visually in order to capture the image; and technically, while engaging the media of the recording technology. The action also leaves a time and date-stamped recorded image, which is also some evidence of one’s visual perspective on the event. Captured in digital memory are data that also indicate elements such as lighting, proximity and view. Finally, as mentioned above, a cell phone picture is also usually evidence of having in hand the requisite technology not only to take a picture, but also to call for help. In other words, the act of taking a cell phone picture without using the same instrument to dial an emergency number may also reveal a choice—to take a picture rather than to call for help.

be of greater importance. The failure to intervene may be better understood by knowing the relationship among bystanders than that between a bystander and the victim.”).
The behavior of bystanders in the Robles attack is not an isolated incident. The daily papers carry not-infrequent accounts of bystanders gathering to snap cell phone pictures of assaults, rapes, and even murders, as well as more run-of-the-mill accidents. Robles was certainly not alone in registering his sadness and dismay for how bystanders respond to violence. One may in some sense understand how mental instability or extreme circumstances may have led the assailant, a homeless man, to snap into a violent rage. Robles’s real rage seems to be reserved for what he sensed was callous indifference on the part of the bystanders who from the other side of their phones seemed to be oblivious to his trauma and urgent need for help. Instead they engaged his urgent need as a spectacle, as if it were simply the scene of a


75 A comment to the New York Daily News web article about the Robles attack from a writer who identifies as “Pissedabout Everything” reads: “I am so tired of people and their cell phones. The worst invention ever. Society crumbles while people stare into their stupid phones.” See Burke, supra note 70 (first comment). Not surprisingly, the follow up comments chide the writer for overstatement and for neglecting the positive side of the invention, including that in this very case a cell phone was used to call for help. But we get the drift.
movie to be viewed. As Robles reflected, the attack was bad—but “the behavior of the witnesses was worse.” Should the law have any role to play in helping people, in Robles’ words, to develop “a little more conscience” for how they interact with these scenarios?

In contrast to the time of the Genovese murder, in the Robles case, we now have a potential record not only of who among the bystanders saw what and when, but also of their potentially deliberate decision to treat the incident as a show rather than a traumatic human emergency which would have required direct assistance or a call for help. If Cash, when he peered over the bathroom stall, had taken a cell phone picture of Strohmeyer attacking Iverson, might that have given some indication—some evidence—that his attitude was one of depraved and cruel indifference to her suffering, rather than a kind of stunned shock or fear? Might the fact that Prioleau did not start snapping cell phone pictures from the upper bunk indicate—provide evidence—that he was not engaged with the attack as a kind of spectacle? As discussed more fully in subsequent chapters, the act of taking a cell phone picture can help to distinguish “pure bystanders”—those who do not engage the scene of an accident or assault—from what this Thesis terms “engaged spectators,” those who do engage and focus the scene, and who decide not to call for help, notwithstanding that fact that they have the means to do so literally in their hands. Bystanders who

---

76 See Burke, supra note 70.
77 In the legal literature I have not found other examples of the phrase “engaged spectator” used in precisely this way. For examples of an incidental use of the term not referring to bystanders, see Louis D. Bilionis, Criminal Justice after the Conservative Reformation, 94 GEO. L.J. 1347, 1355 (2006) (referring to court-watchers as “engaged spectators”); Janet E. Lord and Michael Ashley Stein, Social
decided to engage—or to use John Adler’s turn of the phrase—to “venture forth” to encounter the scene of a crime or accident, and in so doing, also encounter the person of the victim in need of emergency assistance, should be held to a different standard.78
III. Reconceiving the Good Samaritan Hero

Just as psychologically and emotionally flat caricatures of the failure to respond to an emergency can lead to damaging distortions in the analysis, so too can the caricatures of a heroic response. This brief chapter focuses on one example of how depictions of the hero’s calm, cool, collected and rational response to the impact of violence tends to obfuscate the complexity inherent in emergency situations. In particular, the analysis zeros in on interpretations of the story of the Good Samaritan as recounted in the Gospel of Luke. It argues that certain caricatures miss the point of a much richer interpretation of the original parable, which is packed with all the power and punch of an emotionally charged reaction to an extremely risky venture.

A. The Good Samaritan as “Moved from the Gut”

In artistic portrayals of the Parable of the Good Samaritan, it is often hard to get a glimpse of the Samaritan’s facial expression. For example, in one of the earliest paintings of the parable, a work by Domenico Fetti, we see only the Samaritan’s back, as he lifts the victim onto his horse. Later works by Delacroix and Van Gogh give a glimpse of the Samaritan’s face but without much detail, as the focus of the painting remains on the action of lifting the victim onto a horse. Rembrandt’s 1644 pen and brush sketch foregrounds the activity of the caring for the victim, but the

---

1 See Domenico Fetti, *Parable of the Good Samaritan* (about 1662), Boston Museum of Fine Arts, http://www.mfa.org/collections/object/parable-of-the-good-samaritan-32989. See also Rembrandt, *The Good Samaritan at the Inn* (1633) http://www.artbible.info/art/large/487.html (depicting the Samaritan with his back turned as he negotiated with the innkeeper; eyes are also drawn to the fairly large detail in the foreground of a dog in the process of defecating).

Samaritan’s lightly detailed face seems focused on the bottle of oil, in concentration on the activity at hand.\(^3\) Similarly, in Delacroix’s 1852 work, the Samaritan’s face is visible as he leans over the man to tend his wounds; but the soft brush strokes do not give much detail of his facial expressions.\(^4\) Likewise, Bartholdi’s small bronze sculpture depicts the Samaritan as curved over the victim, with his face down and focused on his body as he cleans his wounds.\(^5\) One very striking exception to this pattern is Swiss painter Ferdinand Holler’s painting, in which the eye is immediately drawn to the fully depicted front view of the face of the Samaritan, old and wrinkled, but vibrant and expressive as he seems to be trying to communicate with the victim.\(^6\)

This difficulty of not seeing the Samaritan’s facial expression parallels the particularly sharp focus on action that permeates discussions of bystanders’ moral and legal obligations to assist a victim in an emergency setting. The emotional life of the potential rescuer is generally overshadowed by inquiries regarding what the bystander did or did not do, or how a particular bystander’s conduct compares with the action or inaction of others. As with the legal discussions, also in the artistic depictions of the Good Samaritan the more interior details are difficult to access: in the course of


\(^6\) See Ferdinand Hodler, *Good Samaritan* (1886) http://www.artbible.info/art/large/53.html. See also Ferdinand Hodler, *The Merciful Samaritan* (1875) http://art-now-and-then.blogspot.com/2014/07/ferdinand-hodler.html (the Samaritan seems to be in a modern business vest; eyes are lowered and focused on the victim’s face as he tries to give him something to drink). For other examples of Hodler’s capacity to capture the interior life of his subjects through facial expressions, see *A Troubled Soul* (1889) and *Las de la vie* (Tired of Life) (1892) on http://art-now-and-then.blogspot.com/2014/07/ferdinand-hodler.html.
assisting the victim, what was his emotional state? What was he thinking? What might have been the layers to the decision-making process? The following discussion considers the Lucan text of the Parable of the Good Samaritan with these questions in mind.

25 And behold, a lawyer stood up to put him to the test, saying, “Teacher, what shall I do to inherit eternal life?” 26 He said to him, “What is written in the law? How do you read?” 27 And he answered, “You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself.” 28 And he said to him, “You have answered right; do this, and you will live.” 29 But he, desiring to justify himself, said to Jesus, “And who is my neighbor?” 30 Jesus replied, “A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him, and departed, leaving him half dead. 31 Now by chance a priest was going down that road; and when he saw him he passed by on the other side. 32 So likewise a Levite, when he came to the place and saw him, passed by on the other side. 33 But a Samaritan, as he journeyed, came to where he was; and when he saw him, he had compassion, 34 and went to him and bound up his wounds, pouring on oil and wine; then he set him on his own beast and brought him to an inn, and took care of him. 35 And the next day he took out two denarii and gave them to the innkeeper, saying, ‘Take care of him; and whatever more you spend, I will repay you when I come back.’ 36 Which of these three, do you think, proved neighbor to the man who fell among the robbers?” 37 He said, “The one who showed mercy on him.” And Jesus said to him, “Go and do likewise.”

Parallel with the focus on action on artistic depictions, common translations of

the Samaritan’s primary motivation for action often seem to connote a kind of

7 LUKE 10:25-37 (REVISED STANDARD VERSION).
reasonable and controlled conferral of a benefit on the victim: he had compassion; he showed pity or mercy. But as recounted in Luke, the Greek verb which describes the Samaritan’s motivation, σπλαγχνιζεσθαι, is much stronger, rawer, and potentially boiling over with uncontrolled emotion. Based on the noun “splanchna,” which refers to “bowels” or vital organs such as the heart, the liver and the intestines, the verb ἐσπλαγχνισθῇ (“esplanchnisthē”) can be literally translated as “feeling a tug from the gut or the bowels.”

In the Bible, it is an unusual word with a somewhat complex history. A few studies note a distinction between the Hebrew and Greek conceptual streams that inform the metaphorical threads for interpretation. As Orsolina Montevecchi explains: “In the classical thread, ‘bowels’ (viscere) are conceived as the seat of strong and instinctive passions: anger, fury, anguished anxiety, suffering, passionate love; passions that disturb and consume man. The word corresponds more or less to ‘heart.’” A brief survey of the use of σπλαγχνιζεσθαι in ancient Greek literature also

---

8 The earliest Latin translation, the Vulgate, and later English translations generally fail to capture the deeper dimensions of the word, often translating it with the potentially cleaner and more rational “mercy” or “compassion.” See, e.g., LUKE 10:33 (VULGATE) (“Samaritanus autem quidam iter faciens venit secus eum et videns eum misericordia motus est.”); LUKE 10:33 (NEW INTERNATIONAL VERSION) (“when he saw him, he took pity on him”); LUKE 10:33 (KING JAMES VERSION) (“when he saw him, he had compassion on him”); LUKE 10:33 (NEW AMERICAN STANDARD BIBLE) (“when he saw him, he felt compassion”); LUKE 10:33 (NEW AMERICAN BIBLE) (“who came upon him was moved with compassion at the sight”).

9 See, e.g., KENNETH E. BAILEY, THE CROSS AND THE PRODIGAL 68 (2d ed. 2005) (“For the Greeks, the abdomen was the seat of the violent passions of anger and lust. The Hebrews, however, understood it to be the center of tender affections, such as kindness and compassion.”).

10 Orsolina Montevecchi, Viscere di misericordia, 43 RIVISTA BIBLICA 125, 126 (1995) (translation from the original Italian is my own).
indicates its association with raw emotion—for example, extreme anger\textsuperscript{11} or erotic desire.\textsuperscript{12} Montevecchi argues that this tradition runs parallel to—thus not touching—the semitic thread that is then incorporated into the New Testament. The meaning is still strong, physical, raw and expressive, but nonetheless adequately captured in the Greek word for “pity” or “mercy”—\textit{eleo}.\textsuperscript{13}

The Lucan texts, however, raise a further question. Given that Luke’s specific audience was the Gentile world, how should the cultural stream of Luke’s Greek

\textsuperscript{11}See \textit{Aeschylus}, \textit{Agamemnon} (995) (Loeb Classical Library, 1930) (Recitation of the foreboding chorus when King Agamemnon returns home from the Trojan War, and is about to be murdered by his wife, Clytemnestra, who has found a new lover in his absence: “Not for naught is \textit{my bosom disquieted as my heart throbs} against my justly aboding breast in eddying tides that presage [the coming doom]”); \textit{Hecules}, \textit{Mimiamboi} (\textit{The Mimes}) III:42 (Walter Headlam, ed., 1966) (exasperated mother making the case to the school master that her son should be flogged for his misdeeds: “What do you suppose \textit{I feel inside}—poor me—whenever I see him!”) (italics are my own, indicating the translation of \textit{σπλαγχνίζεσθαι}).

\textsuperscript{12}See, e.g., \textit{Dionysius of Halicarnassus}, \textit{The Roman Antiquities} XI 35:4 (Loeb Classical Library 1950) (description of a cruel and manipulative tyrant’s efforts to possess a young girl betrothed to another: “But Appius, inasmuch as he was not by nature sound of mind and now was spoiled by the greatness of his power, his soul turgid and \textit{his bowels inflamed} because of his love of the girl, neither paid heed to the pleas of her defenders nor was moved by her tears, and furthermore resented the sympathy shown for her by the bystanders, as though he himself deserved greater pity and had suffered greater torments from the comeliness which had enslaved him.”); \textit{Hecules}, \textit{Mimiamboi} (\textit{The Mimes}) I:57 (Walter Headlam, ed., 1966) (old nurse goading a married woman whose husband is on a long journey to turn her interests to a young man: “He saw you at the Descent of Mise, and \textit{his desire was fired with love}, and his heart goaded; he leaves not my house night nor day but weeps over me and coaxes me and is dying of desire.”); \textit{Theocritus}, \textit{Idyll VII: 99}, in \textit{2 Commentary to Theocritus} (ASF Gow, Cambridge 1950) (Simichidas expresses the depth of his love with reference to Aratus’s secret love for young boys: “But Aratus, far the dearest of my friends, \textit{deep, deep in his heart he keeps Desire},—and Aratus’ love is young! . . . Aristis knows how deeply love is burning Aratus to the bone.”); \textit{Moschus}, \textit{Idyl I:17} (Cypris’s description of her wandering child, Eros: “The body of Love is naked, but well is his spirit hidden, and winged like a bird he flits and descends, now here, now there, upon men and women, and \textit{nestles in their inmost hearts}.”). \textit{See also} Oliver Cromwell, Letter to the General Assembly of the Church of Scotland, August 3, 1650, in \textit{2 Writing and Speeches of Oliver Cromwell} 303 (Wilbur C. Abbot, ed., 1939) (“Is it therefore infallibly agreeable to the Word of God, all that you say? I beseech you, \textit{in the bowels of Christ}, think it possible you may be mistaken.”).

\textsuperscript{13}Montevecchi, \textit{supra} note 10, at 126. \textit{See also} E. MacLaurin & B. Colin \textit{The Semitic Background Use of “En Splanchnois.”} 103 \textit{Palestinian Exploration} Q. 42 (1971).
vocabulary be characterized—as Semitic or classical? It seems that in choosing between σπλαγχνίζεσθαι and eleo, Luke would have been sensitive to how it sounded for the classically trained ear as well.

Luke’s other references to σπλαγχνίζεσθαι seem to connote a kind of over-the-top sense of being completely carried away by strong emotions. For example, in the Parable of the Prodigal Son, the word is used to describe the father’s manner of welcoming home the younger son who had just frolicked away the family’s inheritance, living a life of ill-repute. Social and historical studies of the context indicate that the father was behaving in an extraordinary and perhaps even irrational manner. Knowing that upon his return to the village, the son would probably be subject to taunt songs and other verbal and perhaps even physical abuse, the father completely humiliates himself by running towards him.\textsuperscript{14} Generally, as Kenneth Bailey explains, “An Oriental nobleman with flowing robes never runs anywhere. To do so is humiliating.”\textsuperscript{15} At this point in the story, rational discourse completely breaks down. The son forgets his prepared speech, overwhelmed by the father’s physical demonstration of love.\textsuperscript{16}

\textsuperscript{14} \textsc{Kenneth E. Bailey, Poet and Peasant} 181 (1976).

\textsuperscript{15} Id. at 181-82. \textit{See also} id. (quoting Ben Sirach: “A man’s manner of walking tells you what he is.”; Weatherhead: “It is so very undignified in Eastern eyes for an elderly man to run. Aristotle says, ‘Great men never run in public.’”).

\textsuperscript{16} \textit{See also} Luke 7:13 (using σπλαγχνίζεσθαι to describe Jesus’ response to a widow in the city of Nain whose son had just died).
The word’s location at the center of the Good Samaritan parable indicates that it was chosen carefully. In the two other places where Luke used this word in his Gospel he followed a similar textual pattern. In both the Parable of the Prodigal Son (Luke 15:20), and in his description of Jesus’ healing of the widow’s son at Nain (Luke 7:13), the verb is placed at the center of the text, and in both instances the word marks a turning point in the account.

The raw, emotional depth of the word—the sense of being taken by an overwhelming reaction to the situation—also matches well the extreme risk that the Samaritan was taking in approaching the victim. As a general matter, Bailey notes, Samaritans were classified as heretics and schismatic, in bitter strife with the Jews: “The Samaritans were publicly cursed in the synagogues; and a petition was daily offered up praying God that the Samaritans might not be partakers of eternal life.”

Specifically, what did the Samaritan risk? Risks included contact with what could have been a corpse, which could have led to contamination extending to his animal and his goods. They also included further attack by robbers, who may have

---

17 See, e.g., Maarten J.J. Menken, The Position of σπλαγχνίζεσθαι and σπλάγχνα in the Gospel of Luke, 30 NOVUM TESTAMENTUM 107, 111-112 (1988) (numeric analysis locates the word at the center of the 136 words spoken by Jesus); BAILEY, POET AND PEASANT, supra note 14, at 72-73 (categorizing the parable as a “Parabollic Ballad” employing a series of three-lined stanzas in which each stanza introduces a new scene or significant shift of action and featuring a structure of “inverted parallelism,” in which the Samaritan reverses the actions of the three previous actors—the robbers, the priest and the Levite; the word σπλαγχνίζεσθαι is at the center of this “reversal,” representing the center of the text and the turning point in the story).
18 Menken, supra note 17, at 108-109.
stayed their hands upon meeting a more respected priest or Levite.\textsuperscript{21} In the process of administering the first aid, if the man came to consciousness the Samaritan risked the possibility of insult for his kindness, because “oil and wine are forbidden objects if they emanate from a Samaritan,” and because by accepting such objects the wounded man would be required to pay tithes for them.\textsuperscript{22} In bringing the victim to the inn, the Samaritan also risked retaliation from the families and friends of the very person he had aided.\textsuperscript{23} As Bailey explained:

The Samaritan, by allowing himself to be identified, runs a grave risk of having the family of the wounded man seek him out, to take vengeance on him . . . The stranger who involves himself in an accident is often considered partially, if not totally, responsible for the accident. After all, why did he stop? Irrational minds seeking a focus for their retaliation do not make rational judgments, especially when the person involved is from a hated minority community. . . . Caution would lead him to leave the wounded man at the door of the inn and disappear.\textsuperscript{24}

Considering these risks—contamination, attack, ingratitude, and violent retaliation—it would not seem to be a stretch to characterize the Samaritan’s response as emotional, impulsive, and irrational.

In this light, the difference between \( \sigma\pi\lambda\alpha\gamma\nu\iota\zeta\varepsilon\sigma\theta\alpha \) and eleo does have an impact on the interpretation of the parable. The discrepancy between the two words can be read to highlight the uniquely astounding dimensions of the kind of love to which Jesus was calling both the lawyer and his listeners, and that if one remains only

\textsuperscript{21} Bailey, Through Peasant Eyes, supra note 19, at 48.
\textsuperscript{22} Id. at 50.
\textsuperscript{23} Id. at 49.
\textsuperscript{24} Id. at 52.
on a “rational” level of engagement, it can be difficult even to perceive this
dimension of love. The use of the word σπλαγχνίζεσθαι conjures up not an elegant
kindness that bestows gifts of charity on others, but a gut-level, almost physiological
connection to other human beings in which one can do no other than to run the
irrational risks of getting involved, not so much because of a well-laid plan, but
because of the raw tug of an emotional connection.

In any case, a close read of the parable brings us to the conclusion that it is an
inapt metaphor for any kind of assistance which is clean, easy, reasonable and risk-
free. Which way does this cut? I do not think that Jesus is holding up as a moral
template that all passersby need to take on extraordinary risks in order to fulfill their
obligations under the moral law. But I do think the story stands as an invitation to
recognize that the substratum for a discussion about what bystanders owe to
vulnerable victims in an emergency situation is a common—and largely emotional—
connection to each other as human beings.

**B. Another Look at the Darley & Batson Social Psychology Experiment**

In the light of this exegesis, it is interesting to consider the famous social
psychology experiment by John Darley and Daniel Batson.25 The two researchers set
out to explore the correlation between helping behavior and personality variables.
The subjects were 40 students at Princeton Theological Seminary. Personality
measures focused on the subjects’ perceptions of how religiosity related to perception

---

25 John M. Darley & C. Daniel Batson, “From Jerusalem to Jericho”: A Study in Dispositional and
and action in the world. Some were instructed to give a short talk on the Parable of the Good Samaritan, while others were instructed to focus their talk on job-related prospects for seminary students. The other variable was the level of “hurry” infused in the instructions. When instructed to go to the next building, some of the subjects were averted to the “high-hurry” condition in which the assistant looked as his watch, and then said: “Oh, you’re late. They were expecting you a few minutes ago. We’d better get moving. The assistant should be waiting for you so you’d better hurry. It shouldn’t take but just a minute.” For the “intermediate-hurry” condition, the text was “The assistant is ready for you, so please go right over.” Finally, the low-hurry condition text was: “It’ll be a few minutes before they’re ready for you, but you might as well head on over. If you have to wait over there, it shouldn’t be long.” The experiment then tested who of the subjects in the experiment would stop along the path from one building to another to help a slumped “victim” planted in the alleyway, who coughs twice, groans, and if the subject stopped to ask if something was wrong, offered an explanation.

The results of the study were that the variables in the assigned message—a job related talk compared with a commentary on the Good Samaritan—made no significant difference in the decision to stop to offer help. Nor did the religious personality type. Instead, the most significant factor was the level of “hurry.”

---

26 Id. at 102-103.
27 Id. at 103.
28 Id. at 103-104.
29 Id. at 104.
30 Id.
31 Id. at 102.
low hurry group, 63% offered help; for the intermediate group, 45%; for the high hurry group, 10%. Darley and Batson query whether the subjects consciously noted the victims’ distress and consciously chose to leave him in distress. They muse whether another explanation is more apt: that the state of being in a hurry can generate a “narrowing of the cognitive map.”

Based on the subject’s own reflections during the debriefing, Darley and Batson concluded that it may not be accurate to interpret the subject’s response as having seen the victim’s distress and having chosen to ignore it. Instead, they submit: “because of the time pressures, they did not perceive the scene in the alley as an occasion for an ethical decision.” Further, for the group of subjects that decided not to stop, Darley and Batson perceptively note that the hurrying was also related to the subjects’ desire to help the experimenter, who was “depending on him to get to a particular place quickly.” Thus the decision not to stop may not have been a matter of indifference, but instead because the subject “was in conflict between stopping to help the victim and continuing on his way to help the experimenter.” The study notes: “And this is often true of people in a hurry; they hurry because someone depends on their being somewhere. Conflict, rather than callousness, can explain their failure to stop.”

32 Id. at 105.
33 Id. at 107 (citing E.C. Tolman, *Cognitive maps in rats and men*, 55 PSYCHOL. REV. 189-208 (1948)).
34 Id. at 108.
35 Id.
36 Id.
37 Id. See also id. at 101 (“One can imagine the priest and the Levite, prominent public figures, hurrying along with little black books full of meetings and appointments, glancing furtively at their
At first glance, the Darley-Batson experiment seems to be a gentle dig at religious folks: isn’t it interesting and ironic that it makes hardly any difference that the subjects were instructed to give a talk—a process that presumably includes some reflection on content—on the story of the Good Samaritan. But on further reflection, the experiment, like the Parable itself, indicates openness, and even a kind of gentleness, before the messy and conflicted reality of bystander decision-making.

An interpretation that emphasizes how the Samaritan was “moved from the gut” helps to avoid the trap of seeing the point of the Parable as dictating exactly what to do in this or that particular situation. Instead, the stance is one of a kind of gut-level awareness of an existential bond with all other human beings, regardless of their condition, and especially in their need. Of course the Parable is also a warning against the skewed sense of priorities that can lead to indifference to the needs of those we meet “on the road.” But such does not necessarily flatten out the interior decision-making process of bystanders as they sort through exactly what to do in a given situation, or how to navigate conflicts between varying requests or demands to help others.

sundials. In contrast, the Samaritan would likely have far fewer and less important people counting on him to be at a particular place at a particular time, and therefore might be expected to be less in a hurry than the prominent priest of Levite.”).
PART TWO: PHILOSOPHICAL AND THEOLOGICAL FOUNDATIONS FOR DELINATING THE OBLIGATIONS OF BYSTANDERS

In the discussion of the moral and legal obligations of bystanders to a vulnerable person in need of emergency assistance, why is it so important to make space for a more in depth account of the interior life of bystanders? A more complex account of the interior and emotional life of people who encounter the trauma or urgent need of others can help to ground the law in more realistic expectations about human behavior. Many people hope that they could respond with heroic generosity to the needs of others, but most would admit that in the face of danger, pressure, or other kinds of fear, the just-as-likely result might be paralysis, flight, or at least an instinct to pull back from engagement. Appreciation for the range of emotions and the reactive nature of decisions in these contexts can help to keep our perspective on moral and legal obligations grounded in the psychology of ordinary human beings: most people fall somewhere in the middle of that vast range between devious villains and super-heroes.

Building on the analysis in Part One, Part Two aims to fortify the philosophical foundations for delineating the obligations of bystanders. Holding steady these observations about the interior life of bystanders, the analysis now moves to the project of articulating conceptual foundations of a bystander decision-making process that accords full respect to the complexity of the interior life of the bystander, which may include fears, emotional reactions, and psychological
limitations. Chapter Four highlights a few of the conceptual limitations of some utilitarian accounts of bystander obligations, and some of the conceptual strengths in selected aspects of Kantian ethics, including the broad obligation to always treat humanity as an ends and never a means; as well as the acknowledgment of the need for ample space to discern what that duty might require in any given circumstance. It is at this point that the analysis proposes drawing a clear distinction between the moral obligations of bystanders who pass by or otherwise disengage from the scene of an assault or accident (“pure bystanders”), and those who choose to lock their attention on the scene and the victim (“engaged spectators”).

Chapter Five returns to the Seinfeldian defense argument from liberty in order to further explore what philosophical foundations might help to redefine notions of freedom and autonomy through a relational lens. As with reflections on the Parable of the Good Samaritan discussed above, here too the analysis introduces into the interdisciplinary conversation insights gleaned from theological reflection, particularly regarding conceptions of freedom and autonomy grounded in an understanding of the human person in which building relationships of love and respect are constitutive of human identity. In Chapter Six, this Part concludes with further reflections on a universal duty to otherwise strangers, focusing on interpretations of the concept of “neighbor” in Leviticus Chapter 19.
IV. Foundations of Respect for Discretion in Bystander Decision-Making

When considering a bystander’s encounter with a vulnerable person in need of emergency assistance, a frequent move in philosophical and legal analysis is to begin weighing interests. For example, when weighing the interests of a person whose life is at stake with the interests of a bystander who is in a position to help without undue risk to oneself, the calculus seems to point in the direction of dictating to the bystander exactly what he or she should do or should have done. Why resist that route? The sections below explore the conceptual limits of this approach and then work to articulate an alternative.

A. Conceptual Limits in Some Utilitarian Accounts of Bystander Obligations

It is interesting to note the parallels between the Seinfeld criminal statute discussed above\(^1\) and Jeremy Bentham’s classic argument to support an argument for the appropriateness of punishing a bystander’s failure to help a person in need of assistance. Like the Seinfeld prosecutor, Bentham queries: “in cases where the person is in danger, why should it not be the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?”\(^2\) In these circumstances, given the goal that legislation and policy should produce the greatest good for the greatest number of people, the gain in

\(^2\) JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 292-293 (J. Burns & H.L.A. Hart, eds., 1970) (1789) at 293. See Jeremy Bentham, Specimen of a Penal Code, in 1 WORKS OF JEREMY BENTHAM 164 (J. Bowring, ed. 1943) (“Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience.”).
utility through saving a life would certainly outweigh the slight cost to individual autonomy that follows from legal compulsion to act.\textsuperscript{3} Given the presumption that the risk and imposition would be minimal if not miniscule, and the obvious disparity between the value of the life of the victim and the inconvenience of the one in a position to assist, Bentham’s examples focus on the optimal positioning of the bystander to give immediate assistance:

A woman’s head-dress catches fire: water is at hand: a man, instead of assisting to quench the fire, looks on, and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation: lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another, knowing this, lets him go in without warning.\textsuperscript{4}

Bentham concludes with the rhetorical question: “Who is there that in any of these cases would think punishment misapplied?”\textsuperscript{5}

Note another parallel between Bentham’s example and the *Seinfeld* Finale: considering Bentham’s illustration of the woman with the headdress on fire, what is doing the work to drive a sense that punishment would not be misapplied? Not only does the man look on, but he also laughs as her predicament. Other interactions are more ambiguous. For example, all we know about the bystander to the drunken man


\textsuperscript{4} See BENTHAM, INTRODUCTION, supra note 2, at 292-293 (note also that in subsequent rescue discussions Bentham’s examples are occasionally confused with actual cases).

\textsuperscript{5} Id. at 293.
with his face in the puddle is that he “sees” him; we have no further information about the surrounding circumstances or about what else might be going on in the man’s mind that might have informed his decision not to intervene. Similarly, the decision-making process of the person observing the man with the candle entering the room with gunpowder remains opaque; we know only that he has observed the other man entering the room.

When one considers in depth the subjective perspective of a bystander, even the seemingly easy examples—e.g., lifting the face of a drunken man out of a puddle—pose difficult questions. What if the seemingly drunk man is lying in a dark alley, and I am alone? What if he is faking it and has a knife or gun? Or what if that scenario is unlikely as an objective matter, but subjectively I struggle with this fear because I am paranoid? What if that particular alley is for me an emotional trigger that could provoke a panic attack because I was assaulted there last summer? What if I am concerned that he might have a communicable disease and I do not have gloves? And I am a hypochondriac? What if I am late for work as a nurse in the emergency room, and on this particular day, I know that we are short-staffed, such that even a few minutes further delay could have a serious impact on someone else’s health?6

Especially as the cases become harder, more violent, perhaps including strong elements of fear and anxiety, how is one to measure the lengths to which a bystander must go? Should internal anxiety be measured by a subjective or objective standard?

6 See, e.g., John M. Darley & C. Daniel Batson, “From Jerusalem to Jericho”: A Study in Dispositional and Situational Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCH. 100, 108 (1973) (noting how the elements of “hurry” and conflicting commitments may influence a decision to help or not).
Both the *Seinfeld* criminal statute articulating a duty to aid “when it is reasonable to do so,” and Bentham’s rule that the duty to “save another from mischief” would apply “when it can be done without prejudicing himself,” leave open a host of serious and difficult questions. Further, the framework of “weighing interests” seems insufficient for the work of understanding how to grapple with these questions.

William Godwin, one of the first proponents of utilitarianism and anarchism, argued for a broad duty to assist, even to the point of personal sacrifice.\(^7\) Interestingly, private judgment also held an important place in his image of the ideal society, in which people would do their duties without any compulsion from the law, which would respect each person’s right to private judgment as essential for the development of the person’s moral capacities.\(^8\) Critiquing this effort, Ernest Weinrib observed that it is extremely difficult to hold together on the one hand the process of weighing an objective, even mathematical, calculation for the greater good and on the other, the subjective assessment that respect for private judgment entails. They stand in tension with each other.\(^9\)

Consider, for example, the difficulty of assessing the response of Kitty Genovese’s neighbor Ross in response to the attack on Genovese. Once it is clear that the case is not “easy,” it is difficult to begin drawing lines—was it enough to call a neighbor instead of the police? How should one measure the counterweight of Ross’s fear of an invasive police investigation? How might one account for

---

\(^7\) Godwin’s analysis is discussed in Weinrib, *supra* note 3, at 264, n.65.


\(^9\) Weinrib, *supra* note 3, at 265 (“Rights are always problematic for utilitarians.”).
impairment of judgment due to alcohol? The large number of variables required for a strict utilitarian analyses leaves much to purportedly objective but ultimately arbitrary assessments.

In the duty to rescue literature, it is interesting to note how balancing imagery also permeates proposals that aim to provide a more complex and more complete account of human interactions and relationships. For example, Leslie Bender eloquently describes how the “drowning stranger” would look from the perspective of a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation: “In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty.”10 Further, if one considers that the stranger is a human being, one may realize that “much more is involved than balancing one person’s interest in having his life saved and another’s interest in not having affirmative duties imposed on him in the absence of some special relationship.”11

“Contextualizing” the drowning stranger as “interconnected” with others, one realizes the “reverberating consequences” of the stranger’s death must include a “web of relationships and connected people” affected by a failure to act responsibly.12

11 Id. at 34.
12 Id. at 34-35 (“If the stranger drowns, many will be harmed. It is not an isolated event with one person’s interest balanced against another’s. . . . We forget that we are talking about human death or
From one angle, this analysis seems to focus on a deontological intuition: moving beyond the “cold, dehumanized algebraic equations,” what matters is that a human being is drowning. But from another angle, the central dynamic still seems to be a kind of balancing—perhaps “writ large” and more humanized in its sensitivity to context and “reverberating consequences” in the web of relationships—but a balancing nonetheless.

Critiquing feminist caricatures of liberalism, Linda McClain notes the paradox of Bender’s analysis: the relational interconnectivity of the potential rescuer is completely lost. She explains:

Bender focuses only on the situation of the person in need of rescue, ignoring the situation of the potential rescuer. To work within the terms of Bender’s model, the potential rescuer also (presumably) stands in a web of interconnected relationships with and has responsibilities to others. Risk or loss to oneself will likely also affect that web. Indeed, when the responsibility
analysis is broadened to include the responsibility and relationships of the potential rescuer, it might actually militate against rescue.\textsuperscript{16}

Notwithstanding the appeal of the “greater good for the greater number,” few people are truly comfortable with the idea of an unbounded duty to the point of self-sacrifice. As Liam Murphy explains, the core of the problem with the utilitarian argument is the concern about demands without limits. While utilitarian ideas may be attractive in theory, most people would not live by such extremely demanding criteria.\textsuperscript{17}

For Murphy this presents a major obstacle in the application of utilitarian theory. He explains: “We cannot breezily evaluate legal institutions such as tort law or the criminal law with the utilitarian criterion without thinking about the implications of that criterion in the realm of personal conduct.”\textsuperscript{18} As Murphy surmises:

If commitment to a duty to rescue brings with it a commitment to a general moral requirement of beneficence, and if the most

\textsuperscript{18} Id. at 647. See also Richard W. Wright, The Standards of Care in Negligence Law, in THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249 (David G. Owen ed. 1997) (“Owen”) (noting the tendency in utilitarian arguments to narrow an application to emergencies due to the risk of promoting inefficient general laziness (the economic ‘moral hazard’ problem) and the practical unenforceability of a duty to impose a significant risk on one’s own life or health.”). For an excellent recent discussion of the philosophical themes that weave through this topic, see generally Judith Lichtenberg, DISTANT STRANGERS: ETHICS, PSYCHOLOGY AND GLOBAL POVERTY 97-121 (2014) (Chapter on “Oughts and Cans,” discussing the moral problem of “demandingness”). See also Amy Uelmen, How Much is Enough? AMERICA MAGAZINE 42 (Nov. 9, 2015) (reviewing Lichtenberg’s Distant Strangers and David Cloutier’s The Vice of Luxury).
straightforward general requirement of beneficence is the optimizing requirement of the utilitarians, it would seem that the commitment to legal duties to rescue comes at the price of embracing the allegedly absurd demands of that requirement.\textsuperscript{19}

This objection was at the core of the seminal bystander analysis of Lord Macaulay, who illustrated his concerns with the question of whether a surgeon who was the only person who could perform a life-saving operation could be forced to travel some distance to do so.\textsuperscript{20} Lord Macaulay remarked:

\begin{quote}
It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man—a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save the beggar’s life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard earned rice? Again: If the rich man is a murderer for refusing to save the beggar’s life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar’s life at the cost of a thousand rupees?\textsuperscript{21}
\end{quote}

When more complex elements enter the scene such as violence, fear and anxiety, some lines of utilitarian reasoning run up against serious limitations, and may

\textsuperscript{19} Murphy, supra note 17, at 650.
miss aspects of the deeper story that emerges with a fuller account of more subjective factors that may factor into the decision-making process.

**B. Conceptual Strengths in Some Elements of Kantian Thought**

In contrast to the limits discussed above, certain aspects of Immanuel Kant’s thought may help to provide elements for a more complex assessment of the moral and legal obligations that may arise when a bystander encounters a vulnerable person in need of emergency assistance. This section explores the extent to which selected concepts from Kant can hold together three elements: 1) affirmation of the principle of respect for the humanity of the victim; 2) psychic space for the bystander to exercise discretion based on the specific circumstances; and 3) appreciation for just how emotionally charged these encounters may be.

To some readers and students of Kant, it might seem odd to turn to Kant for a project that aims to incorporate appreciation for the emotional and interior life. For example, to some readers the foundational work for Kant’s ethical system, the *Groundwork for the Metaphysics of Morals* may read like a scientific experiment focused precisely on stripping out of the analysis anything that is not stable, including anything related to feelings and emotions. But does this effort to eliminate the

---

22 See, e.g., IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (“GROUNDWORK”) (Mary Gregor, trans., revised ed. 2012) at Ak. 4:388 (a metaphysics of morals “would have to be cleansed of everything empirical.”). See also id. at Ak. 4:425 (distinguishing between a “subjective principle on which propensity and inclination would fain have us act” and “an objective principle, on which we would be instructed to act even if every propensity, inclination and natural arrangement of ours were against it.”); id. at Ak. 4:434 (“The practical necessity of acting according to this principle, i.e. duty, does not at all rest on feelings, impulses or inclinations, but merely on the relation of rational
“contingent and precarious” element that may render conformity to moral duties uneven necessarily connote that in Kant’s thought these aspects of human experience are undervalued? Or more bluntly, is Kant for this reason a cold and unfeeling sourpuss?

In this Chapter I argue that several of the concepts that ground his *Metaphysics of Morals* would help to form a framework that could be especially sensitive to the interior life of bystanders. I work with a distinction that I believe renders at least these aspects of his ethics open and flexible in front of the messy reality of how bystanders may interact with victims in an emergency context—feelings and all. In fact, two aspects of Kant’s ethics strike me as particularly close to the Lucan account of the Good Samaritan—first, the idea that concern for neighbors’ well-being should reach beyond the bonds of affection, loyalty, and prior agreement; and second, appreciation for the fact that given the sway that emotions have, ordinary people generally should be allotted a wide realm of latitude and discretion to decide exactly what to do in precise situational contexts.

beings to one another, in which the will of a rational being must always at the same time be considered as legislating, since it could not otherwise be thought as an end in itself.”).

23 See e.g., id. at Ak. 4:390.

24 Recent scholarship on Kant’s ethics challenge these and similar assessments. For a thoughtful and thorough reevaluation of the role of duty in Kant’s philosophy, see e.g., MARCIA W. BARON, KANTIAN ETHICS ALMOST WITHOUT APOLOGY (1995); BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT (1993); Sally Sedgwick, *Can Kant’s Ethics Survive the Feminist Critique?* in FEMINIST INTERPRETATIONS OF IMMANUEL KANT 80-85(Robin May Schott ed. 1997) (describing recent defenses of Kant against objections that Kantian morality degrades “the significance of the feeling, affective side of our natures). For an in depth and readable tour-de-force on the history of moral philosophy that may have shaped Kant’s own questions and projects, see J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY (1998). See also J.B. Schneewind, Autonomy, Obligation, and Virtue: An Overview of Kant’s Moral Philosophy in KANT ON MORAL AUTONOMY 309 (Oliver Sensen ed., 2013); id. at 333 (“Kant is often thought to hold that happiness is not valuable, and even to have ignored it wholly in his ethics. This is a serious mistake.”).
Applying Kant’s distinction between perfect and imperfect obligations and his further explanation of wide and narrow duties to an analysis of bystander response to a vulnerable person in need of emergency assistance, an important distinction may be drawn between the maxims that a subject is required to hold, and the process of discernment to decide what to do in a given situation. For example, returning to the scene of the Genovese murder, Ross would have undoubtedly had the duty to hold the maxim that a person should do all he could to help another person in Genovese’s situation. But did he, Ross, necessarily have the particular duty to call the police in that specific circumstance? I argue that Kant would not make that move. The discussion below fleshes out this claim.

25 See IMMANUEL KANT, METAPHYSICS OF MORALS, Ak. 6:411 (Mary Gregor, trans. 1991) (. . . the doctrine of Right has to do only with narrow duties, where ethics has to do with wide duties . . . But ethics, because of the latitude it allows in its imperfect duties, inevitably leads to questions that call upon judgment to decide how a maxim is to be applied in particular cases, and indeed in such a way that judgment provides another (subordinate) maxim (and one can always ask for yet another principle in applying this maxim to cases that may arise). So ethics fall into a casuistry, which has no place in the doctrine of Right.”). For an explanation of the difference between wide and narrow duties, see Christine M. Korsgaard, “Introduction,” in IMMANUEL KANT, METAPHYSICS OF MORALS, XX, n.9 (Mary Gregor, trans. 1997) (explaining the distinction between narrow and wide duties as discussed in the Metaphysics of Morals, Ak. 6:390-294 (“we have a duty of narrow obligation when required to perform a particular action, while we have a wide obligation when we are required to adopt a general maxim (e.g., to promote the happiness of others) but have leeway as to how to carry it out.”). For an explanation of the distinction between perfect and imperfect duties, see SCOTT ROULIER, KANTIAN VIRTUE AT THE INTERSECTION OF POLITICS & NATURE: THE VALE OF SOUL MAKING 38, n.13 (2004) (“Duties of justice are all perfect and require specific omissions or actions. And in most instances, duties of virtue are imperfect or allow for some latitude in the selection of actions to match one’s maxim. . . . But while most duties of virtue are imperfect, Kant also states that there are perfect duties of virtue. ‘Perfect duties arise,’ notes Korsgaard, because we must refrain from particular actions against humanity in our own person of that of another. Suicide, physically destructive habits, and the failures of self respect exhibited in self deception and servility violate perfect duties to ourselves. (TL 213-238; Ak. 6:421-44). Failure of respect, such as calumny, mockery, and pride, violate perfect duties to others. (TL 254-59, Ak. 6:462-68).”) (quoting Korsgaard, at 20-21, see supra).
In the *Groundwork*, Kant depicts the man for whom things are going well who refuses to help others whom he could help:

“[he thinks]: what’s it to me? May everyone be as happy as heaven wills, or as he can make himself, I shall take nothing away from him, not even envy him; I just do not feel like contributing anything to his well-being, or his assistance in need!” . . . But even though it is possible that a universal law of nature could very well subsist according to that maxim, it is still impossible to will that such a principle hold everywhere as a law of nature. For a will that resolved upon this would conflict with itself, as many cases can yet come to pass in which one needs the love and compassion of others, and in which by such a law of nature spring from his own will, he would rob himself of all hope and the assistance he wishes for himself.26

Or as expressed in the Formula of Universal Law: “Act only according to that maxim by which you can at the same time will that it should become a universal law.”27

---

26 *Groundwork*, *supra* note 22, at Ak. 4:423. *See also Metaphysics of Morals*, *supra* note 25 at Ak. 6:393 (“The reason that it is a duty to be beneficent is thus: Since our self-love cannot be separated from our need to be loved (helped in case of need) by others as well, we therefore make ourselves an end for others; and the only way this maxim can be binding is through its qualification as a universal law, hence through our will to make others our ends as well. The happiness of others is therefore an end that is also a duty.”); id. at Ak. 6:453 (“To be beneficent, that is, to promote according to one’s means [Vermögen] the happiness of others in need, without hoping for something in return, is every man’s duty. For every man who finds himself in need wishes to be helped by other men. But if he lets his maxim of being unwilling to assist others in turn when they are in need become public, that is, makes this a universal permissive law, then everyone would likewise deny him assistance when he himself is in need, or at least would be authorized to deny it. Hence the maxim of self-interest would conflict with itself if it were made a universal law, that is, it is contrary to duty. Consequently the maxim of common interest, of beneficence toward those in need, is a universal duty of men, just because they are to be considered fellow men, that is, rational beings with needs, united by nature in one dwelling place so that they can help one another.”); id. at Ak. 6:458 (musing the loss if the world were limited to duties of Right, without benevolence: “a great moral adornment, love of man, would then be missing from the world. Love of man is, accordingly, required by itself, in order to present the world as a beautiful moral whole in its full perfection, even if no account is taken of advantages (of happiness).”).

27 *Groundwork*, *supra* note 22, at Ak. 4:421.
As described in the Groundwork, the duties are not minimalist. For example, with regard to the duty to oneself, “it is not enough that the action not conflict with humanity in our person as an end in itself; it must also harmonize with it.”\(^{28}\) Neglecting the predisposition to greater perfection might “perhaps be consistent with the preservation of humanity, as an end in itself, but not with the advancement of this end.”\(^{29}\) Similarly, duties to others cannot be reduced to not “intentionally detracting” from the happiness of others—because such would be only a “negative and not positive agreement with humanity, as an end in itself” which requires that everyone tries, as far as one can, “to advance the ends of others.”\(^{30}\) As Kant summarizes: “For if that representation is to have it full effect in me, the ends of a subject that is an end in itself must, as much as possible, also be my ends.”\(^{31}\)

That sounds pretty demanding. But in the Metaphysics of Morals, Kant clearly explains that setting maxims is only half of the project. He draws an important distinction between setting maxims and the process of discernment for deciding how one is to act in particular circumstances.

If the law can prescribe only the maxim of actions, not actions themselves, this is a sign that it leaves a latitude (latitudine) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do by the action for an end that is also a duty. But a wide duty is not to be taken as permission to make exceptions to the maxim of actions, but only as permission to limit one maxim of

\(^{28}\) Id. at Ak. 4:430.
\(^{29}\) Id.
\(^{30}\) Id.
\(^{31}\) Id.
duty by another (e.g., love of one’s neighbor in general by love of one’s parents), by which in fact the field for the practice of virtue is widened.\textsuperscript{32}

In the \textit{Metaphysics of Morals}, this explanation is followed by a number of examples that clarify the shape of Kant’s space for discretion. For example, when considering the question of choosing an occupation, one has a clear duty to cultivate one’s own talents, but the variety of circumstances in which people find themselves leave wide latitude for discussion: “No rational principle prescribes specifically \textit{how far one should go in cultivating one’s capacities.}”\textsuperscript{33} Similarly, for the cultivation of morality, the duty prescribes “only the \textit{maxim of the action}, that of seeing the basis of obligation solely in the law and not in sensible impulse (advantage or disadvantage), and hence not the \textit{action itself.}”\textsuperscript{34}

Nancy Sherman discusses how this distinction explains the difference between virtue (\textit{ethica}) and justice (\textit{ius}). While justice has “an external outer aspect that can be more easily specific and externally regulated or enforced,” in the case of imperfect duty or virtue proper, “there is an obligatory end that leaves considerable discretionary latitude in how and when an agent chooses to satisfy that end. Here,

\textsuperscript{32} \textit{METAPHYSICS OF MORALS, supra} note 26, at Ak. 6:390.
\textsuperscript{33} Id. at Ak. 6:392. \textit{See also} id. (“the different situations in which men may find themselves make what a man chooses as the occupation for which he should cultivate his talents very optional.”); id. at Ak. 6:445-446 (“Which of the natural perfections should take precedence, and in what proportion one against the other it may be a man’s duty to himself to make these natural perfections his end, are matters left for him to choose in accordance with his own rational reflection about what sort of life he would like to lead and whether he has the powers necessary for it … But a man’s duty to himself regarding his \textit{natural} perfection is only a \textit{wide} and imperfect duty; for while it does contain a law for the maxim of actions, it determines nothing about the kind and extent of actions themselves but allows a latitude for free choice.”). For an explanation of the distinction between wide and narrow duties and the distinction between perfect and imperfect duties, \textit{see supra} note 25.
\textsuperscript{34} Id. at Ak. 6:392.
there is not specific outer aspect to look for; there is no determinate limit or target that must be hit.”

According to Sherman, the room that Kantian ethics allows for the exercise of practical wisdom renders the decision-making process far less formalized “than many Kantian critics and proponents have presupposed.” For example, while “deliberative presumptions” may serve as “standing rules against exemptions from self-interest,” these are “more supple than rules in that they can be defeated in deliberation by moral considerations embodied in conflicting deliberative presumptions.” As discussed below, conflicting grounds of obligations to self and others are a case in point.

At this juncture, Kant’s system evinces a profound respect for the interior life, and the fact that human beings remain mysteries even to themselves: “For a man cannot see into the depth of his own heart so as to be quite certain, in even a single action, of the purity of his moral intention and the sincerity of his disposition, even when he has no doubts about the legality of his action.” Also for this reason it is especially difficult to prescribe particular actions for specific circumstances.

---

35 NANCY SHERMAN, MAKING A NECESSITY OF VIRTUE 330 (1997). See also Menlowe, Philosophical Foundations, supra note 20, at 15; Waldron, On the Road, supra note 21, at 1071-74 (discussing the distinction between perfect and imperfect duties in duty to rescue analysis); PATRICIA SMITH, LIBERALISM AND AFFIRMATIVE OBLIGATION 1-23 (1998) (overview of positive and negative duties in the liberal tradition).
36 SHERMAN, supra note 35, at 288. See id. at 289 (discussing the deliberative model formulated by Nell, and also by John Rawls: “the procedure tests from the bottom-up individually proposed maxims of action.”). See generally JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY (Barbara Herman, ed., 2000).
37 Id. at 290.
38 METAPHYSICS OF MORALS, supra note 26, at Ak. 6:392. See also id. at Ak. 6:446-447 (duties are narrow and perfect in terms of quality; “but it is wide and imperfect in terms of its degree, because of
Most directly related to the question of bystander assistance, Kant explains both the impossibility of determining the extent to which one should sacrifice one’s own needs, and the potential for a conflict between the maxim of care for one’s own true needs, and that of care for the happiness of others.

But I ought to sacrifice a part of my welfare to others without hope of return because this is a duty, and it is impossible to assign specific limits to the extent of this sacrifice. How far it should extend depends, in large part, on what each person’s true needs are in view of his sensibilities, and it must be left to each to decide this for himself. For a maxim of promoting others’ happiness at the sacrifice of one’s own happiness, one’s true needs, would conflict with itself if it were made a universal law. Hence this duty is only a wide one; the duty has in it a latitude for doing more or less, and no specific limits can be assigned to what should be done. The law holds only for maxims, not for specific actions.\(^\text{39}\)

The exercise of judgment, therefore, is inevitable—both in determining which maxim should apply to a particular case, and exactly how that maxim should be applied.\(^\text{40}\)

In the exercise of determining exactly what to do, as Sherman explains, emotions can actually help in the process: “in a fallible way, they may give some access to values and concerns that might otherwise remain veiled from one’s reports

the frailty of human nature. … | The depths of the human heart are unfathomable. Who knows himself well enough to say, when he feels the incentive to fulfill his duty whether it proceeds entirely from the representation of the law or whether there are not many other sensible impulses contributing to it that look to ones advantage (or to avoiding what is detrimental) and that, in other circumstances, could just as well serve vice?”\(^\text{39}\)

Id. at Ak. 6:393.

\(^{40}\) See id. at Ak. 6:411 (“ethics, because of the latitude it allows in its imperfect duties, inevitably leads to questions that call upon judgment to decide how a maxim is to be applied in particular cases, and indeed in such a way that judgment provides another (subordinate) maxim (and one can always ask for yet another principle in applying this maxim to cases that may arise)). See also Kyla Ebels-Duggan, *Moral Community: Escaping the Ethical State of Nature*, 9 PHILOSOPHER’S IMPRINT 14 (August 2009) (discussing the “playroom” and indeterminacy of wide duties).
about what motivates one’s action.” Further, much of the work of deliberation is not projecting out toward the abstract dimension of a universal maxim, but “reflecting on what respect for rational agency requires of us in the circumstances before us.” Sherman explains:

On this view of deliberation, the Categorical Imperative functions not as a formal universalization procedure but, rather, as a more substantive norm prescribing positive and negative respect for rational agents generally, and more specifically, through specific norms such as non-deception or beneficence. The norms are supple in that they stand ready to be transformed and thickened by the circumstances themselves.

A final element of Kant’s analysis addresses the interaction with what he describes as “subjective conditions of the receptiveness to the concept of duty, not as objective conditions of morality.” His examples include moral feeling, conscience, love of neighbor, and respect for self. These are “moral endowments”—gifts—which means that “anyone lacking them could have no duty to acquire them.” The same applies to “sympathetic joy and sadness”—“sensible feelings of pleasure or pain at another’s state of joy or sorrow.” For the mere susceptibility, given by nature itself, to feel joy and sadness in common with others, there is no imperfect duty. In contrast, the capacity and the will to share in other’s feelings are based on practical reason, thus one can parse out an indirect duty to “share in the fate” of others.

---

41 SHERMAN, supra note 35, at 304.
42 Id. at 310.
43 Id. at 312.
44 METAPHYSICS OF MORALS, supra note 26, at Ak. 6:399.
45 Id.
46 Id. at Ak. 6:456.
cultivating “the compassionate natural feelings in us, and to make use of them as so many means to sympathy based on moral principles and the feelings appropriate to them.” Specific examples include not avoiding the poor, the sick, and debtors with the excuse of avoiding sharing painful feelings, but rather to seek these people out.”

In other words, feelings and emotions are not always in our control, and within Kant’s framework there is no specific duty to feel a certain way—even to feel compassion. On the other hand, this can be distinguished from the cultivating of an attitude of callous indifference to the others and to their needs.

According to Karen Stohr, Kant’s ethical framework would contemplate a narrow duty to avoid this. She parses beneficence as a “two-part duty,” embracing not only “the familiar obligation to adopt the wide maxim of helping others on occasion,” but also “a narrow duty parallel to the narrow duties of respect, which prohibit contempt, arrogance, defamation, and mockery.”

For example, to mock someone, treating her as a mere means to the end of the entertainment of my friends, is to fail to acknowledge the other person’s status “as an end in the negative sense.”

Stohr proposes that “we interpret beneficence as implying a narrow duty to avoid indifference to others as ends in the positive sense or as setters of ends.” Helping actions, therefore, would be obligatory in circumstances in which “helping is the only

---

47 Id. at Ak. 6:457.
49 Id.
50 Id.
way to acknowledge the other’s person’s status as a positive end.”\textsuperscript{51} She explains: “although we are not always required to help, we are always required not to be indifferent. When helping someone is the only way not to be indifferent to her, we are required to help.”\textsuperscript{52}

Returning to the cases and examples discussed in Part One, what might Kant make of the Good Samaritan being “moved from the gut?”\textsuperscript{53} Such would seem to be a moral endowment—a susceptibility to sharing in the pain of another, which perhaps also helped to create a certain receptivity to the needs of the victim. To the extent that Kant’s thought seems to downplay this dynamic, such is not necessarily to discredit or debunk it, but to emphasize that care for neighbors in need should not depend on these feelings or reactions.

What might Kant make of Karl Ross’s decision not to call the police but to call a neighbor instead? Note that Ross did not neglect to engage in some helping action—calling a neighbor. The circumstances presented numerous ways for him to act on his obligation not to be indifferent, and in this way, to express as he was able respect for humanity present in Genovese.

Further, as Kant explains, “Imperfect duties are, accordingly, only duties of virtue. Fulfillment of them is merit; but failure to fulfill them is not in itself culpability. But rather a mere deficiency in moral worth, unless the subject should

\textsuperscript{51} Id. at 62-63.
\textsuperscript{52} Id. at 63.
\textsuperscript{53} See discussion \textit{supra} at note 9 ff.
make it his principle not to comply with such duties.”

If Ross did fall short of his moral obligations, then from the further details in Cook’s account it seems that it might have been more due to weakness, want of virtue or lack of moral strength, rather than an intentional transgression which reflected a principle, and thus vice. A Kantian ethical system would have both accorded him the latitude to discern what he was able to do in light of his emotional state in these specific circumstances, and then act accordingly. It could very well be that in calling the neighbor he did all he could have done under the circumstances, and as evaluated from the complexity of his subjective perspective.

C. Distinctions between the Moral Obligations of “Pure Bystanders” and “Engaged Spectators”

What are the implications of these Kantian concepts for an analysis for the moral obligations of bystanders in varying circumstances? In Chapter Two, this Thesis introduced a distinction between an “engaged spectator” and a “pure bystander”—a person who may notice something about the incident, but who does

54 Metaphysics of Morals, supra note 26, at Ak. 6:390.
55 Id.
56 One might note examples in Kant indicating that failure grounded in lack of moral strength is culpable, and so to doubt excuses in this regard. For example, in his famous “gallows” example, Kant challenges: “Suppose someone asserts of his lustful inclination that, when the desired object and the opportunity are present, it is quite irresistible to him; ask him whether, if a gallows were erected in front of the house where he finds this opportunity and he would be handed on it immediately after gratifying his lust, he would not then control his inclination.” Immanuel Kant, Critique of Practical Reason, Ak. 5:30. See also Immanuel Kant, Religion Within the Limits of Reason Alone, Ak. 6:19 ff. (Part One: “Of the radical evil in human nature,” arguing that the “radical evil” in human beings is precisely their tendency to give in to inclination over duty). Note, however, the difference between Ross’s incapacity or failure to perform a specific act and Kant’s example of the “assertion” of a lustful inclination.
not stop to focus on it.\textsuperscript{57} When considering the moral obligations of persons in these categories, a first question to address is whether bystanders who for various reasons do not stop and do not focus on the incident and the victim’s need for assistance should really get off scot-free. It seems odd to treat more favorably a kind of passive and perhaps even cowardly non-engagement. Here it is important to note that to acknowledge the respect inherent in a Kantian space for discretion for a bystander to decide whether and/or how to engage a victim in need of emergency assistance is not equivalent to letting a bystander off scot-free.

Consider the circumstances of Mack Prioleau who awoke to find himself in the bunk above an ongoing rape. My argument is \textit{not} that he necessarily did the morally right thing in this moment, nor that he should necessarily be free from moral opprobrium for the decision not to intervene. Instead, my thesis \textit{is} that, given the circumstances—that this 18-year-old freshman was facing four extremely large, intoxicated and obviously violent football teammates—and in light of the fears and uncertainties that these circumstances may have generated, it is very difficult to tell whether the decision not to intervene in that moment was the best that he could manage. Notwithstanding his proximity to the violence, within my framework Mack Prioleau, like Karl Ross as witness to the Genovese murder, may be categorized as a “pure bystander.”\textsuperscript{58}

\textsuperscript{57} See Chapter II, Part C, Meet the “Modern Day Kitty Genovese”: Bystanders with Cell Phones.
\textsuperscript{58} In contrast to the legal conceptual toolkit, I do believe that the theological category of \textit{sin} would be particular apt to probe the interior life of a bystander in these circumstances. In the words of the “Confiteor” penitential rite which is part of the Catholic liturgy, the category of sin probes varying aspects of consciousness and decision-making: “in my thoughts and in my words, in what I have done
The concepts from Kantian ethical analysis discussed above can help to hold together respect for needs of victims, and respect for the discretionary space that bystanders require to decide whether to engage a particular scene and what to do in particular circumstances, without neglecting the gamut of circumstantial and emotional factors that might influence a person’s encounter with a vulnerable person in need of emergency assistance.

At what point, though, might a narrow duty that prohibits “contempt, arrogance, defamation, and mockery”—be triggered for a bystander?\(^{59}\) In what circumstances might an interaction between a bystander and a vulnerable person become a failure on the part of the bystander to treat that vulnerable person as an end in himself, and as a positive setter of his own ends? In other words, when does a bystander cross the line, moving out of the pure bystander’s discretionary space into the category of an “engaged spectator”?

One potential distinguishing mark may be the use of technology such as a cell phone. Cell phone technology and its analogies generally require one to stop and focus, and so to directly engage a person who is in a vulnerable state. The decision to stop and focus is itself an exercise of discretion which has led to a form of direct contact with another human being. Distinctions in the assessment follow not from a preference for passive disengagement, but from a recognition that this kind of contact between a bystander and a victim calls for a separate analysis.

---

59 See Karen Stohr’s discussion of this narrow duty, supra note 48.
In his analysis of bystander obligations, Jeremy Waldron highlights the importance of proximity and the nature of a more direct and focused encounter with a victim in a vulnerable state. At the outset, he recognizes that the categories of proximity and distance raise a number of important moral questions:

Do moral concerns and requirements diminish over distance, so that our duties are stronger to those who are near to us, and weaken to vanishing point as possible beneficiaries of our actions and inactions are found further and further away? And what does “distance” mean in these circumstances? When is a person near to me? When is a person far away? Is it a matter of who they are, and of their relation to me? Or is it sheer geography?60

One need not answer all of these questions in order to discern that particular duties and harms may emerge on the basis of physical proximity. In his interpretation of the Good Samaritan parable, Waldron urges that we resist the temptation to reduce the message to one of a fairly straightforward form of moral universalism in which “we owe a duty of neighborly love to each and every person on the face of the earth in virtue of their simple humanity.”61 Waldron argues:

So is it wrong to see the “moral” of the parable as prescribing nothing but a diffuse and universal concern? It is not altogether at odds with that, but what it prescribes—and the reason it hangs onto the idea of ‘neighbor’—is openness and responsiveness to actual human need in whatever form it confronts us.62

61 Id. at 338. See id. at 339 (discussing the classic lampoon of the “universalist” stance in the Dickens *Bleak House* character Mrs. Jellyby, who was so taken with concerns about a vague and abstract “humanity” that she woefully neglected care for her own children).
62 Id. at 343 (emphasis added). Waldron also articulates the moral shortcomings of the bystanders in the Good Samaritan parable for having crossed to the other side of road. He makes much of their
For Waldron, *focus* on the victim’s predicament is an important threshold.

Always in the context of an argument for an obligation to rescue, he explains:

In almost all situations where rescue might plausibly be required by morality (or for that matter by law), all the agents concerned—potential helpers and potential victims—are likely to have their attention *focused* on the victim’s predicament, and they have to make a serious effort of will to shift from that orientation to going about their ordinary business with no thought of the victim’s plight. It is not a question of our being made to pay attention by a universalist morality—our being distracted, as it were by universalism from our own legitimate pursuits. Humans, being what they are, their attention is focused already, and—in the case of non helpers—it is just a question of how quickly and decisively they can repudiate that focus, and *return* to their self-absorbed concerns.63

Thus, for Waldron, there is something “morally special” about being “on the spot”—in the narrative of the Good Samaritan, where the man had fallen among thieves; and as distinguished from a broad and universal general obligations.64 The Good Samaritan story has a grip on us, Waldron explains, because of that element of recognition—the “immediate visibility,” being close enough to hear, and if conscious, to see his eyes: bystanders “would know he knew that they were the ones in a position to help him when it appeared no one else could or would (and that he knew that they

---

63 Id. at 344. See also Waldron, *On the Road*, supra note 21, at 1081.
64 Waldron, *Humanity*, supra note 60, at 346.
knew, etc.)." In sum, to focus more sharply on the obligations of engaged spectators is not to make a definitive statement about the moral obligations of pure bystanders, but only to submit that the circumstances require different categories for analysis.

What about the category of spectators who stop and engage the scene, aware of the victim’s vulnerability and immediate need, and then simply watch, doing nothing to help—but that watching just happens not to be mediated by recording technology? Considering, for example, the case of David Cash, who did not have a camera in hand—might he nonetheless be fairly described as an engaged spectator? The smudgy line that this example highlights illustrates that the moral evaluation of a bystander’s interaction with a victim in an emergency context does not necessarily hinge on the use of the technology in and of itself, but what that use signifies about both the complex circumstances and about the interior life and decision-making process of the engaged spectator.

What does it signify? That question, together with the question of moral evaluation, involves interpretation as well as openness to other factors that may change the narrative of meaning in substantial ways. What does it mean to take a cell phone picture of an ongoing assault on a victim? Obviously, it need not necessarily be indicative of intent to harm the victim’s dignity. In the Robles incident, we should

---

65 Id. at 349-50. See also Barbara Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 Mich. L. Rev. 982, 998, 1022, 1026 (1996) (noting patterns in which a government special relationship exception is theorized for incidents when emergency worker are “on the scene”; surmising that these claims do not necessarily require courts to probe larger questions of resource allocation).

66 See also discussion of harm *infra*, Chapter Eight, “Exploitative Objectification” as a Legally Cognizable Harm.
entertain at least the possibility that someone in the crowd was taking pictures with
the intent to help the victim and the community—perhaps on the assumption that
someone had already called for help; and perhaps with the idea of turning them over
to a police investigation, in order to find or confirm the identity of the perpetrator or
as a record of what happened. Or motives may have been mixed.

Thus I do not submit that a person who snaps a cell phone picture in
circumstances such as the Robles assault is automatically subject to moral
condemnation or legal liability. Nor will I argue that a cell phone necessarily makes
all the difference. The moral significance of taking a picture of an assault victim can
vary greatly, depending on one’s intent. As noted above, on the far end of the
spectrum (moving from good to bad to worse), one might have thought that someone
else already called for help, and the greatest service that one could provide for the
victim and for the safety of the community is to record the event in order to assist
with a future police investigation. Slightly more ambiguous, perhaps the intent was
to mark in some way—to witness, to acknowledge—the reality of violence in the
community, as part of one’s own effort to help heal these maladies when possible.
For example, a university professor of sociology may have planned to show the
picture to his or her class as part of a discussion aimed at understanding the
challenges of urban violence. Or to introduce a further layer, one may have intended
to take a picture of people taking pictures, as part of a critique of this phenomenon.

Picture-taking may also have been an almost automatic and mindless act of
image capture, one more sight or sound to take in on the way to work, together with a
a bagel and morning coffee, and an indication of being on auto-pilot, not intending to harm the victim, not intending anything, really. If we do take seriously the interior life of bystanders, what happens when we find in that interiority neither good purpose nor malice, nor any intent to harm, but simply a mindless reaction?

Further down the spectrum, how do we account for the portion of the population for whom taking a picture of someone who is suffering provokes an addictive pleasure, and for whom continued private viewing of the pictures might be a further source of pleasure? Or worse, one’s intent may have been to post the pictures to a Facebook account, accompanied by sneeringly brutal remarks that aimed to bully and shame the victim—perhaps, like in the Seinfeld Finale, even alluding to his ethnicity, his weight, or other personal characteristics that could work to continue the assault on his person and his integrity.

Or motives may have been mixed and shifting—perhaps starting to record as a somewhat mindless reaction, becoming horrified by the violence, and then ending up with resolve to share the pictures with the police. Or vice-versa—starting out with resolve to go to the police, but worries of somehow becoming more involved in an investigation, and questions about one’s own role as a witness prevent me from doing so. With the realization of having done nothing to help, one may also feel ashamed, as so delete the pictures as part of an attempt to delete the incident from one’s mind and heart. Or one may simply forget about the incident if for some reason it did not really engrave itself into one’s psyche, but was received as a fairly banal and trivial
incident that blends into other weird sights and smells that one takes in during the morning commute.

In light of this complexity, the moral analysis could go something like this: generally bystanders should be allotted wide discretion in making the decision of whether or not to engage the scene of a violent or life-threatening emergency. Such is not to condone callous indifference, but simply to acknowledge the subjective nature of the decision and the difficulty of defining bright-line rules for engagement. Use of technology, such as taking a cell phone picture, is one indication that the bystander has crossed the line—becoming, so to say, a “engaged spectator”—connecting oneself directly engaging not only to the scene of an accident or an assault, but also in some way the vulnerable person in need of emergency assistance.

However they engage, those who do stop are then morally obliged to treat the victim as end in himself or herself, not as a thing or an object, but as a human being. Cell phones may be used to do just that: for example, calling for help and recording the attack as potential evidence or leads for a subsequent police investigation are both potentially signs of respect for the humanity of the victim. Cell phones may also be used as instruments of harm: to objectify, to humiliate and to exploit a victim at his or her most vulnerable moment. Those who decide to stop, focus and engage and emergency scene, and to use their cell phones to record images of a victim at the scene of an assault or an accident, have a moral obligation to treat the victim with dignity, which includes neither objectifying nor exploiting this person’s vulnerability.
V. Freedom as Autonomy—In What Sense?

In what sense is freedom a concern for delineating the moral and legal obligations of an engaged spectator? Note first that in comparison with how the question is usually framed in arguments for or against a duty to rescue, the tension is taken down at least a notch. The “pure bystander” distinction allots wide discretion for the initial decision of whether to engage the scene or the particular needs of the victim, thus the claim here is not that a person should be coerced to go out of their way in order to stop to help a stranger. Neither is the claim that a bystander should necessarily be required to do anything specific to rescue the victim from a risk or danger that the bystander did not create or exacerbate. Finally, note also that this narrowing of the question also sidesteps a number of concerns related to freedom and equality that permeate the duty-to-rescue literature and debates, such as unfair and unequal imposition of burdens on others and the extent to which otherwise generous and meaningful altruistic acts may be cheapened by the rigors of coercive state power.

Instead, the precise claim is that once a bystander otherwise unrelated to and not responsible for the accident or assault decides to stop and engage the scene, and in so doing, encounters a vulnerable person in need of emergency assistance, thus becoming by one’s own choice and decision an “engaged spectator,” at that point this person assumes a set of moral and legal obligations. These obligations include: to treat the vulnerable victim as an end in themselves, and so with dignity and respect,
neither objectifying nor exploiting their vulnerability. From the perspective of incursions on freedom, that does not seem too much to ask—does it? I believe that this claim is fairly modest. Nonetheless, I would anticipate objections that an obligation so described might in some circumstances constitute an invasive infringement on freedom.

Consider the case of Jose Robles, assaulted outside of the bus station on a public street as “engaged spectators” stood by, taking pictures, but not calling for help. To what extent would a moral or legal obligation to refrain from “exploitative objectification”—based, for example, on conduct which transpired between engaged spectators taking pictures and a vulnerable victim in need of emergency assistance—bump up against a libertarian claim that one has the right to use one’s energy (including one’s interest in taking pictures) and one’s possessions (including a camera) according to one’s own tastes and preferences? To what extent would a legal requirement to refrain from desired action or expression, such as photography, clash with some understanding of freedom?

Setting to the side a more probing query regarding the First Amendment protections regarding the regulation of photographers and photojournalists (a topic which is given extensive treatment in Chapter Twelve of this Thesis), this Chapter explores the theoretical bases of libertarian claims against non-interference with the freedom to take a picture in a public setting. The analysis then moves to substantiate a constructive claim: that the imposition of moral and legal obligations which sanction “exploitative objectification of a vulnerable person in need of emergency
“assistance” would actually be a step ahead for both autonomy and freedom, when both of those categories and concerns are interpreted through what I describe below as a “relational lens.”

A. Libertarian Concerns about Other-Regarding Obligations

The third Restatement of Torts Section 37 sets out some of the philosophical foundations for the arguments for a general rule against affirmative obligations, and which would also ground concerns regarding bystander obligations more generally. One comment to this section surmises: the limit on requiring affirmative conduct “in turn relies on the liberal tradition of individual freedom and autonomy. Classical liberalism is wary of laws that regulate conduct that does not infringe on the freedom of others.”¹

One of the primary libertarian objections to the imposition of other-regarding obligations is that all persons, not only victims, are ends in themselves; thus persons who are bystanders should not be “instrumentalized”—used as means for the interests of others. Richard Wright explains this foundational norm as “equal individual freedom” as contrasted with “maximization of aggregate social welfare”:

… given the Kantian requirement of treating others as ends rather than merely as means, it is impermissible to use someone as a mere means to your ends by exposing him (or his resources) to significant foreseeable unaccepted risks, regardless of how greatly the benefit to you might outweigh the risk to him.²

¹ Restatement (Third) of Torts, § 37 cmt. e.
It follows, then, from the principle of protecting “negative freedom”—the principle which guards against “unjustified interference with one’s use of one’s existing resources to pursue one’s project or life plan”—that such freedom would be “completely undermined if one must always weigh the interests of all others equally with one’s own when deciding how to deploy existing resources.”

Arthur Ripstein’s “equal freedom” argument against a civil duty to rescue is similar. Within a realm in which all persons bear a “special responsibility for their own lives” in order to pursue their own ends as they see fit, “equal freedom” also includes the notion that “one person’s liberty will not be limited unilaterally by another’s vulnerability, nor one person’s security limited unilaterally by another person’s choices.”

One can understand how this analysis might inform the articulation of limits to a positive obligation to assist another. For Wright, Kantian moral theory provides a key to understanding the distinction between moral and legal obligations to assist:

No person can be used solely as a means for the benefit of others, which means that no one can be legally required to go beyond the requirements of Right (corrective justice and distributive justice) if such obligation would require a significant sacrifice of one’s autonomy or freedom for the alleged greater good of others.

Any extension of the obligation would fall under the realm of ethics, namely beneficence, rather than law, “because it is only specifiable as an indeterminate

---

3 Id. Note, however, that this concern about treating the interests of others equally does not necessarily contrast with a duty to rescue in weaker forms.


5 Wright, *supra* note 2, at 272-73.
‘broad’ duty, which varies depending on each would-be benefactor’s own resources and needs, rather than as a determinate (and hence legally enforceable) ‘strict’ duty.”

Some of the libertarian claims come to a rather sharp point. As philosopher Michael Menlowe summarized, the Kantian concept of treating persons as ends and not means is considered by some as support for a “right of self-ownership”—the right to use one’s energy and one’s possessions as one likes—and a prohibition against using persons as resources for others. As a general principle, the law ought not to require a person to act in a way that restricts one’s liberty for the sake of the needs of another except by voluntary agreement. On the contrary, if I am required to promote the good, I may be prohibited from regarding my own interests as special, and then

---

6 Id. at 273.
7 Michael Menlowe, The Philosophical Foundations of a Duty to Rescue, in The Duty to Rescue: Jurisprudence of Aid (“JURISPRUDENCE OF AID”) 10 (Michael Menlowe & Alexander McCall Smith eds. 1993). See Richard A. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 198 (1973); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA ix, 33 (1974); Robert L. Hale, Prima Facie Torts, Combination, and Non-Feasance, 46 COLUM. L. REV. 196, 214 (1946) (discussing objection to affirmative duties: “when a government requires a person to act, it is necessarily interfering more seriously with his liberty than when it places limits on his freedom to act—to make a man serve another is to make him a slave, while to forbid him to commit affirmative wrongs is to leave him still essentially a free man); Eric Mack, Bad Samaritanism and the Causation of Harm, 9 PHIL. & PUB. AFF. 230 (1980).
8 See, e.g., Menlowe Philosophical Foundations, supra note 7, at 26; Epstein, supra note 7, at 199; Hale, supra note 7, at 214 (assumption behind the no-duty-to-rescue rule is that “a rugged, independent individual needs no help from others, save such as they may be disposed to render him out of kindness, or such as he can induce them to render by the ordinary process of bargaining, without having the government step in to make them help.”); Francis H. Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability (Part I), 56 U. PA. L. REV. 217, 218-20 (1908) (“There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon thought.”). But see Steven J. Heyman, Foundations of the Duty to Rescue, 47 VAND. L. REV. 673, 682 (1994) (arguing it is myopic to generalize common law trends only from the law of trespass and tracing ancient public law duty to prevent criminal violence).
my integrity is threatened.\textsuperscript{9} Summarizing how concerns in this genre have been expressed as a kind of zero-sum game, he quips: “[t]he more I have to do for other people, the less I can do for myself.”\textsuperscript{10} Similarly, in \textit{A Theory of Strict Liability}, Richard Epstein reasoned: “Once one decides that . . . an individual is required under some circumstance to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty.”\textsuperscript{11}

But isn’t it an incredible mismatch to compare the relatively trivial interest in taking a picture with the pressing needs of a vulnerable person whose life or health is in serious danger? For libertarians, though, it is not about weighing, measuring, comparing, or matching interests, but about protecting the principles that the individual holds the right to decide what to do or not to do in a circumstance like this—without state coercion. Arguments about balancing frequently lead to a kind of “ships in the night” exchange in which more instrumentally inclined tendencies to balance costs and benefits never actually meet the concerns of rights-based frameworks that refuse to engage in that kind of calculus. In part for this reason, the next sections work hard to avoid the conceptual apparatus of “balancing” in order to explore models of the content and substance of freedom that might converse more productively with these rights-based claims.

\textsuperscript{9} See Menlowe, \textit{Philosophical Foundations}, supra note 7, at 38. See Bernard Williams, \textit{A Critique of Utilitarianism}, in J.J.C. \textsc{Smart} \& \textsc{Bernard Williams}, \textit{Utilitarianism: For and Against} 115-17 (1973).

\textsuperscript{10} Menlowe, supra note 7, at 38.

\textsuperscript{11} Epstein, supra note 7, at 198.
B. Three Senses of Autonomy

1. Fallon: Descriptive and Ascriptive Autonomy

A 1994 analysis by Richard Fallon, “Two Senses of Autonomy,” can help to parse many of these questions.\(^\text{12}\) Fallon’s reflection on autonomy is against the backdrop of an inquiry into central values underlying the First Amendment commitment to freedom of expression.\(^\text{13}\) As our case also features concerns with freedom of expression—namely, photography—the specific features of Fallon’s system are doubly helpful. Recognizing autonomy as a “protean concept” that means “different things to different people,” and at time appearing “to change its meaning in the course of a single argument,”\(^\text{14}\) Fallon parses the different “senses” in which autonomy is used, and how these interpretations interact with concepts of negative and positive liberty.\(^\text{15}\)

In a “descriptive” sense, autonomy refers to the actual conditions that enable people to be meaningfully self-governed—for example, freedom from coercion, manipulation, and temporary distortion of judgment. Fallon notes, “[s]omeone who is drugged or hallucinating or who acts in panic has reduced autonomy and may not be

\(^{13}\) Id. at 875.
\(^{14}\) Id. at 876.
\(^{15}\) See id. (“In rough terms, negative liberty is freedom from external interference in doing or determining what one wants. By contrast, positive liberty signifies rational authorship of one’s ends in action, and in some broader views, main entail empowerment to pursue those ends effectively under laws that reflect a consensus of rational wills.”).
autonomous at all.”¹⁶ The presence or absence of these factors is a matter of degree, and can be mapped along a continuum.¹⁷

In an “ascriptive” sense, autonomy “represents the purported metaphysical foundation of people’s capacity and also their right to make and act on their own decisions, even if those decisions are ill-considered or substantively unwise.”¹⁸ In this sense, Fallon explains, “Ascriptive autonomy—the autonomy that we ascribe to ourselves and others as the foundation of a right to make self-regarding decisions—is a moral entailment of personhood.”¹⁹ The image that captures well this notion of autonomy is one of a sphere of “personal sovereignty” bounded by respect for the rights of others.²⁰ This quality is not a matter of degree, but inheres in one’s person.²¹

Fallon then analyzes how varying emphases on either negative or positive freedom make a difference in discussions about autonomy in the law of freedom of expression. For example, for those who emphasize “negative” liberty, descriptive autonomy was often assumed to be a baseline feature of interactions in a market economy.²² For that reason, the bar for prohibition of certain aspects of freedom of expression was placed at freedom from interferences such as coercion, manipulation,

¹⁶ Id. at 877.
¹⁷ Id.
¹⁸ Id. at 878.
¹⁹ Id.
²⁰ Id. at 878, 890.
²¹ Id. at 891.
²² Id. at 880.
or temporary distortion of judgment.”\textsuperscript{23} Thus, “only coercive speech or speech that is used to invade the private rights of others can justifiably be prohibited under autonomy-based principles.”\textsuperscript{24}

As Fallon notes, “positive” libertarians would critique this notion as somewhat thin:

To be an ethically attractive concept, autonomy must imply some degree of critical awareness and self-control. A person who acts entirely voluntarily, but without self-awareness or self-control, is not self-governing in any ethically attractive or descriptively useful sense.\textsuperscript{25}

But a remaining weakness of the arguments for autonomy as viewed through a positive libertarian lens is the difficulty in articulating how competing claims on contested questions should be compared or weighed: “A merely quantitative comparison seems inadequate; positive freedom connotes not just power, but moral reasonableness under shared standards.”\textsuperscript{26}

Addressing the weaknesses and weaving in the strengths of each perspective, Fallon attempts to synthesize the criteria for descriptive autonomy as depending on these four conditions: 1) critical and self-critical ability; 2) competence to act; 3)

\textsuperscript{23} Id. at 881. \textit{See also} Kyla Ebels-Duggan, \textit{Moral Community: Escaping the Ethical State of Nature}, 9 PHILOSOPHER’S IMPRINT 10 (August 2009) (discussing Kant’s analysis of primary threats to internal freedom emerging from inclinations or passions).

\textsuperscript{24} Id. at 881.

\textsuperscript{25} Id. at 885.

\textsuperscript{26} Id.
sufficient options; and 4) independence of coercion and manipulation. He then develops each of these points.

For example, the development of critical and self-critical ability brings the subject beyond slavish reactions to an impulse of the moment: “Autonomy requires the capacity to reflect upon, order, and self-critically revise the tastes, passions, and desire that present themselves as reasons for action. It is this human capacity that enables persons to experience a sense of rational authorship of their ‘higher-order plans of action.’” Freedom from “coercion” zeroes in on “the deliberate and wrongful subjecting of one human being to the will of another or domination that disrespects the other’s equal moral worth.”

He then queries: which sense of autonomy ought to receive priority, and in which contexts? It would seem, he argues, that the distinctions between self-regarding and other-regarding action would offer a promising method for distinguishing the domains. “Descriptive autonomy matters exclusively in cases of other-regarding action, where the boundaries of private rights must be defined; ascriptive autonomy matters most, and possibly exclusively, in cases of self-regarding action.”

\[^{27}\] Id. at 886.  
\[^{28}\] Id. at 887.  
\[^{29}\] Id. at 889.  
\[^{30}\] Id. at 893.  

Fallon admits that this concept is difficult to apply in a principled way, but notes that “[s]ome help comes from treating coercion and manipulation as intentional concepts, defined not just by their consequences, but also by the contempt or disregard that they display for others.” Id. at 889.  

Kant, who defines autonomy as free self-legislation, would recognize only the positive version of autonomy, not the libertarian version. See IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORAALS (“GROUNDWORK”) (Mary Gregor, trans., revised ed. 2012) Ak. 4:431 (“... all maxims are rejected that are not consistent with the will’s own universal legislation. Thus the will is not just subject to the law, but subject in such a way that it must also be viewed as self-legislat[ating], and just on account of this as subject to the law (of which it can consider itself the author) in the first place.”).
action and contemplated paternalistic responses.”31 However, given the fluidity of some aspects of these boundaries and the not-surprising difficulties in defining “harm,” Fallon admits that neat categories prove to be elusive.32 He concludes: “Descriptive and ascriptive autonomy are both fundamental to our understanding of ourselves and of personhood. When their claims pull in different directions, there is no reliable formula for assigning priority.”33

Notwithstanding this tension, this framework sheds much light on the central questions of this Thesis. First, ascriptive autonomy helps to explain the distinction between pure bystanders and engaged spectators. The law should not pry into that space of personal sovereignty in which pure bystanders make and act on their own decisions whether to engage the scene or not—regardless of whether this decision is grounded in having other priorities, regardless of how those priorities are weighed, and regardless of the power of emotional obstacles or other kinds of affective input. But once a bystander has made the autonomous decision to engage, obligations arise, and the bystander’s liberty (in the sense of descriptive autonomy) shrinks.

Second, what is especially helpful about Fallon’s synthesis of descriptive autonomy is how it highlights certain features of the encounter between an engaged

31 Id. at 894.
32 See id. at 898 (“In sum, the suggestion that ascriptive autonomy should yield to descriptive autonomy in cases of other-regarding action, even if it were formally accepted, turns out to have rather limited bit, due to the need of ascriptive theories to define the ‘harms’ on which the line between self- and other-regarding action depends.”). Similarly, neither can ascriptive autonomy be deemed absolute: “even John Stuart Mill favored interference with someone about the step onto an unsafe bridge.” Id. at 898. In sum: “the line between self- and other-regarding action is often vague and contestable. Once this is acknowledged, a categorical preclusion of descriptive autonomy from the self-regarding sphere could only seem arbitrary.” Id. at 898.
33 Id. at 899.
spectator and a vulnerable person in need of emergency assistance. By definition of being a “vulnerable person in need of emergency assistance,” the victim exemplifies the far end of the spectrum of the lack of descriptive autonomy: unable to act; foreclosed from the usual range of options, and for this reason, also highly vulnerable to coercion and/or manipulation by others.

It is interesting to note that the engaged spectator may also be deficient in some aspects of descriptive autonomy as well. To what extent is instinctive and mindless image-capture a slavish reaction to impulse—and so in need of self-critical reflection? In these circumstances, the duty to avoid “exploitative objectification” of another human being may actually increase the descriptive autonomy of the engaged spectator, because it may open the person to a deeper sense of “rational authorship” over one’s own conduct and one’s the interaction with another human being. To the extent that there is a crowd or gang-type coercive effect on the spectator interacting with other engaged spectators, a tort obligation may help to free the individuals in the crowd from this kind of coercion and manipulation.

2. Nedelsky: “Relational Autonomy”

Can we push the envelope even further—to support an argument that a tort claim for “exploitative objectification” would not only not hinder ascriptive or descriptive autonomy, but also that it could actually foster freedom? Or on the flip side, to argue that the very act of the “exploitative objectification” of another person detracts from the freedom—and harms—not only the victim, but also the engaged spectator?
Note how this possibility is easily obfuscated by starker versions of the libertarian claim: If I am required to promote to the good, I may be prohibited from regarding my own interests as special, and then my integrity is threatened.\textsuperscript{34} Tight analysis can distinguish the varying elements—for example, the problem is not in promoting the interests of others, but in being \textit{required}—and perhaps \textit{legally} obliged—to do so. Interests are not necessarily in tension. Notwithstanding these distinctions, the analysis still pulls toward a certain tension between “the good” (including the good of others) and “my special interests,” and so easily lends itself to distortion. Framed in this way, it is easy to slide into a kind of zero-sum game balancing act: at the heart of my integrity is the promotion of my own interests as special, and in particular, the promotion of my own interests over those of others.

What alternative philosophical foundation might help to avoid this zero-sum game? I am on the lookout for models that discern an \textit{ontological} connection and harmony between the interests of the self and those of others. I will proceed with caution to avoid what I consider to be the excesses of some communitarian theorists who seem more comfortable than I am in harnessing state power for the purpose of regulating such harms.\textsuperscript{35}

Recall Linda McClain’s thoughtful survey of the feminist critique of liberalism noted above.\textsuperscript{36} McClain notices the tendency of feminists and liberals to

\textsuperscript{34} See Menlowe, \textit{Philosophical Foundations}, supra note 7, at 38.

\textsuperscript{35} See generally Heyman, \textit{supra} note 8 (articulating a communitarian theory of duty to rescue, grounded in a Hegelian philosophical framework).

\textsuperscript{36} See Linda C. McClain, “Atomistic Man” Revisited: \textit{Liberalism, Connection, and Feminist Jurisprudence}, 65 S. CAL. L. REV. 1171 (1992); and discussion \textit{supra} at Chapter Four, note 16.
talk past each other when it comes to defining and understanding the role of autonomy. She recounts: “Negative valuation of autonomy is crucial in assessing feminist critiques of liberalism . . . Feminist critics have associated autonomy with indifference, isolation, separation, and lack of connection.”

But autonomy, McClain submits, need not be atomistic. In fact, as it turns out, responsibility to others “resembles autonomy in the sense of freedom to make choices about one’s life.”

Let us see why.

One eloquent and in-depth exploration of autonomy understood in these constructive terms is Jennifer Nedelsky’s opus, *Law’s Relations*. Like McClain, Nedelsky critiques the superficial and snarky tendency to utter the catch phrase “autonomous individuals” with a derisive sneer. Rather than giving up on the concept of autonomy, Nedelsky’s strategy is to re-theorize it within the rubric of “relational autonomy.” Aware of quips that “relational autonomy” is an oxymoron she recognizes the challenge of the project. “Why choose a value that is

---

37 Id. at 1190. McClain also acknowledges important variations within the feminist accounts of autonomy, ranging from the critique of disconnected and isolating “atomism” to appreciation for the need for responsible self-government. See id. at 1175-76; id. at 1190 (discussing Carol Gilligan’s work at the intersection of gender and moral development, noting Gilligan’s assessment of her subjects as “caught colloquially by the difference between being ‘centered in oneself,’ and being ‘self-centered’: Autonomy as self-government shifts from acting consistently with one’s believes to ‘not attending or responding to others.’”)

38 McClain, supra note 37, at 1190.

39 JENNIFER NEDELSKY, LAW’S RELATIONS (2011).

40 Id. at 123.

41 Id. at 38.

42 Id. at 42.
practically synonymous with the liberal, individualistic approach I want to supplant or at least shift?"  

Nedelsky argues that much is at stake:

> I think that feminism, and indeed all other emancipatory projects I know of, cannot do without an adequate conception of autonomy. It is too central to our aspirations not to let others define our lives, constrain our opportunities, or exclude us from the power to shape collective norms . . . I argue that we cannot afford to cede the meaning of autonomy to the liberal tradition and that we should redefine rather than resist the term.  

Noting the reality of our pervasive dependence on others for the possibility of autonomy, she surmises that the concept of autonomy can be reduced neither to independence, nor to control.  

Instead, in contrast to a “separative self,” who “clinging to the rights that affirm its separateness” establishes boundaries according to the harm principle, and in contrast to a “simple plurality of independent beings whose inherent rights and obligations mediate their encounters with each other,” Nedelsky articulates a “relational” view of persons based on an ontological claim that persons are constituted in their identity—which includes the development of autonomous self-governance—in and by their relationships. She explains: “On a relational view, the

---

43 Id.
44 Id. at 43-44.
45 Id. at 46. Compare Martha Albertson Fineman, The Vulnerable Subject and the Responsive State, 60 EMORY L.J. 251, 255 (2010) (describing vulnerability as “the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual.”)
46 NEDELSKY supra note 39, at 116.
47 Id. at 121.
48 Id.
persons whose rights and well-being are at stake are constituted by their relationships such that is it only in the context of those relationships that one can understand how to foster their capacities, define and protect their rights, or promote their well-being.”

According to Nedelsky, Hannah Arendt’s theory of judgment, which builds on Kant’s, is a promising resource for this project—and it captures many aspects of the circumstantial analysis that this Thesis requires. For Arendt, she explains:

Judgment requires taking into account the perspectives of others in forming one’s own judgment. It is a cognitive ability that is only possible in a social context. . . . One cannot be autonomous without doing the work of exercising judgment about how one engages with the inevitable conditions, desires, interests, or aspirations one has.

Arendt’s framework opens out toward the informative and corrective input of other’s perspectives, which can also be a path to a deeper notion of freedom. As Nedelsky explains:

One can learn to exercise judgment well, to use the perspectives of others to become conscious of one’s presuppositions and biases. For Arendt, to exercise judgment is to exercise it autonomously. As we use the perspectives of others to liberate ourselves from our private idiosyncracies, we become free to make value judgments. Indeed, I see a reciprocal relation between judgment and autonomy. Each requires the other, and experience with one enhances the other: as we exercise judgment about the values we

---


50 NEDELSKY *supra* note 39, at 58.

51 Id.
want to embrace, we become more fully autonomous; as we become more autonomous, our capacity for judgment increases.\textsuperscript{52}

Assessing theories which describe autonomy as the “internal” dimension of freedom, which is a combination of self-creation and what happens to a person,\textsuperscript{53} Nedelsky critiques: “. . . not everything that is internal is either arrived at autonomously or conducive to autonomy. Indeed, some of what is internal, such as fears, anxieties, and even a sense of duty, can interfere with the exercise of judgment.”\textsuperscript{54} Instead, distinguished from the core of “agency”—making a choice—the concept of autonomy includes self-governance.\textsuperscript{55}

The process of developing autonomy—finding “one’s law”—is inherently relational. The law becomes one’s own, but it is not self-made: “the individual develops it but in connection with others; it is not simply chosen, as if from an unlimited market place of options, but recognized, developed and affirmed.”\textsuperscript{56} Nedelsky opens out the relational dynamic of this process:

The idea that there are commands that one recognizes as one’s own, requirements that constrain one’s life but come from the meaning or purpose of that life, captures the basic connection between law and freedom—which is perhaps the essence of the

\textsuperscript{52} Id. at 59.
\textsuperscript{53} Id. at 60-61.
\textsuperscript{54} Id. at 62. \textit{See also} id. at 60 (“Many things that people may experience as ‘their own,’ such as consumeristic desires or concern with professional status, may come to be seen by them as limitations to their autonomy.”). Conversely, spiritually structured obedience may be a path to freedom from illusion, obsession, false values, other inferences with true freedom. Id. at 60.
\textsuperscript{55} Id. at 63. Kant would agree. \textit{See e.g.}, GROUNDWORK, \textit{supra} note 30 at Ak. 4:431 (“… all maxims are rejected that are not consistent with the will’s own universal legislation. Thus the will is not just subject to the law, but subject in such a way that it must also be viewed as self-legislating, and just on account of this as subject to the law (of which it can consider itself the author) in the first place.”).
\textsuperscript{56} NEDELSKY \textit{supra} note 39, at 123.
concept of autonomy. The necessary social dimension of the vision that I am sketching has two components. The first is the claim that the capacity to find one’s own law can develop only if the context of relations that nurture this capacity. The second is that the “content” of one’s own law is comprehensible only with reference to shared social norms, values and concepts.57

Within the framework of “relational autonomy,” autonomy is perceived not so much as space to protect one’s own interests to the exclusion of others, but rather an exercise in discernment of how, in this particular circumstance, to best apply the maxim of caring about the humanity of others—including the particular others who are close to me—as I care about my own. Returning to our bystander cases, respect for the needed space for bystander discretion to exercise autonomy can be analytically distinguished from grander claims about promotion of or interference with freedom in the broader sense of an existential or ontological state.

When autonomy is understood within a relational framework, it is easier to see that reasons to refrain from imposing rescue obligations on pure bystanders need not be grounded in an ontological claim about autonomy, and certainly need not be framed as an affirmation of unfettered liberty to disregard the urgent needs of vulnerable others. Instead, what becomes clearer is that one reason the coercive power of the law should stay its hand is because of the limits of the law—and more precisely, because of the law’s incapacity to clearly define how in an emergency a given subject should discern the contours of his or her own response to the needs of another human being.

57 Id. at 123-24.
For example, when assessing Prioleau’s judgment call from the upper bunk in that moment and his decision not to intervene, the reason that in these circumstances moral censors should refrain from pronouncing—and the reason that law should refrain from a criminal indictment or allowing a tort cause of action in these circumstances—is grounded *not* in a generic hands-off claim about Prioleau’s *freedom*. Rather it is grounded in awareness that in these circumstances, in the face of violence, it is difficult for *the law* to probe the thoughts and emotions that would have informed the risks as Prioleau perceived them. Because respect for autonomy in making decisions is just one aspect of freedom, to claim that the law should leave room for a bystander’s discernment—especially in the face of violence—is not to equate “freedom” with the “right” not to be bothered by the urgent needs of others.

As Nedelsky summarizes, “A relational approach always directs attention to context and consequences. In asking how a law structures relationships it directs attention to the difference context makes, to how the law affects different people in different circumstances.”\(^\text{58}\) With what I find to be a lovely touch of personal and institutional modesty, Nedelsky explains the potential impact of relational habits of mind:

> I think habits of relational thinking, in the realm of rights as in others, would foster both compassion and intelligent responsibility. Seeing ourselves in relation to others would not generate inflated and overwhelming ideas about the scope of our responsibilities to cure all evils. It could be the basis for a more reasonable judgment

---

\(^{58}\) Id. at 221.
about the limits of our power as individuals as well as the desirable forms of power we exercise collectively.\textsuperscript{59}

I agree, and suggest that a relational conception of autonomy provides a firm foundation for the arguments of this Thesis. A relational conception of autonomy can hold together respect for the interior life and decision-making process of bystanders and appreciation from a subjective point of view for the limitations that might inform their engagement with the needs of others, with a concept of the human person as finding both freedom and meaning in attention to the needs and realities of others.

\section*{C. \textit{Freedom: Relationality within Christian Trinitarian Theology}}

A recent body of work in Christian theological scholarship and commentary offers a further resource for reflection on relationality as constitutive of identity, and therefore also in harmony with human freedom. The reflection begins with the premise that to understand the attribute of God as \textit{love} implies that God is a community of Persons—Father, Son and Holy Spirit—a Trinity, bound together as One in relationships of love. Thus the interior life of God is constituted by relationships of love. Because God’s own identity is love, it is at its core a relational reality.

Building on an interpretation of Genesis 1:26-27, which describes humankind as made in the divine image (\textit{imago Dei}), Christian theology extends the analogy between the life of God and human relationships. Humanity is made in the image of a God who loves, finds its own identity, and therefore its freedom, in building and

\footnotesize{\textsuperscript{59} Id. at 223.}
living within relationships of love with other human beings. Because relationality is constitutive of identity for human beings made in the image of God, so also autonomy—discovery of one’s own law—would be in accord with this ontological ground. As a recent Catholic Church summary of the social teaching explains: “The revelation in Christ of the mystery of God as Trinitarian love is at the same time the revelation of the vocation of the human person to love. This revelation sheds light on every aspect of the personal dignity and freedom of men and women, and on the depths of their social nature.”

The summary reflects that fact that the analogy was also an important feature of the Second Vatican Council’s principal reflection on the Church’s dialogue with the modern world, Gaudium et spes. Referring to the text from the Gospel of John in which Jesus prays to the Father “that they may all be one,” the Council Fathers explained that this horizon implies “that there is a certain parallel between the union existing among the divine Persons and the union of the children of God in truth and love.” This document also draws out the anthropological and ethical implications: “This likeness reveals that man, who is the only creature on earth which God willed for itself, cannot fully find himself except through a sincere gift of himself.”

Within this vision, the ultimate identity, vocation and destiny of the human person is to fulfill oneself by “creating a network of multiple relationships of love,

---

61 JOHN 17:21-22.
63 Id. at ¶ 24 (cf. Lk. 17:33).
justice, and solidarity with other persons,” as one goes about one’s various activities in the world.\footnote{Compendium, supra note 60, at ¶ 35.} In a later reflection on the application of this model under the rubric of a “spirituality of communion,” Pope John Paul II explained how the connection between “contemplation of the mystery of the Trinity dwelling in us” should bring Christians to discern that same light “shining on the face of brothers and sisters around us.”\footnote{John Paul II, Novo millennio ineunte ¶ 43 (2001).} Specifically, “a spirituality of communion also means an ability to think of our brothers and sister in faith within the profound unity of the Mystical Body, and therefore as ‘those who are a part of me.’”\footnote{Id.} On the flip side, when the human person does not recognize in oneself and in others the value and grandeur of the human person, one effectively deprives oneself of the possibility of benefiting from his humanity and of entering into that relationship of solidarity and communion with others for which one was created by God.\footnote{John Paul II, Centesimus annus ¶ 41 (1991).}

Although Kant’s framework is generally understood to be more individualistic than these Catholic teachings, their conception of freedom and dignity are surprisingly similar to Kant’s. As Gaudium noted, autonomous discernment is an important aspect of human dignity: “man’s dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within, not
under blind internal impulse nor by mere external pressure.” 68 Like a Kantian understanding of autonomy discussed above, dignity is grounded in emancipation from “all captivity to passion,” in order to pursue one’s goals “in a spontaneous choice of what is good.” 69

Social isolation weakens freedom, while attention to the obligations inherent in social life fortifies it:

. . . human freedom is often crippled when a man encounters extreme poverty just as it withers when he indulges in too many of life’s comforts and imprisons himself in a kind of splendid isolation. Freedom acquires new strength, by contrast, when a man consents to the unavoidable requirements of social life, takes on the manifold demands of human partnership, and commits himself to the service of the human community. 70

What may be some of the philosophical implications of this framework as it addresses libertarian arguments regarding what engaged spectators can do with their cell phones? To paraphrase John Paul II, if I do not recognize in others the value and grandeur of the human person, I effectively deprive myself of the possibility of entering into a relationship of solidarity and communion with others—which is my destiny and identity as a human being. 71 “Exploitative objectification” of a vulnerable person harms not only to the person who is exploited and objectified, but also the

68 Gaudium, supra note 62, at ¶ 59. See also Dignitatis humanae (Declaration on Religious Freedom, 1965).
69 Gaudium, supra note 62, at ¶ 60.
70 Id. at ¶ 61.
71 Centesimus, supra note 67, at ¶ 41. See also Chiara Lubich, The Charism of Unity and Philosophy, in ESSENTIAL WRITINGS: SPIRITUALITY, DIALOGUE, CULTURE 211 (2007) (“I am myself not when I close myself off from the other, but rather when I give myself…”).
person who exploits and objectifies—for to do so is to deny a core aspect of what it means to be human—that is, to recognize the humanity of others.72

Looking at relationships through a Trinitarian lens thickens the “rationality” of respecting the dignity of others not only because I owe them the same freedom that I claim, but because the other is “a part of me,” and my own fulfillment and happiness hinge on the possibility of “creating a network of multiple relationships of love, justice, and solidarity” with others. If it is through the free gift of self that one finds oneself, then to respect another person’s dignity and integrity is to express the depths of one’s own humanity.

The analogy to Trinitarian theology also provides a lens to re-envision the seeming tautology undergirding structures for analyzing altruism. To recognize the humanity of a vulnerable person in need of assistance is not so much a matter of reaching beyond the boundaries of myself and my own identity in order to determine how aware or how generous to be. Rather, such recognition is a logical consequence of an ontological claim about the nature of my own being, and what it means to act in accord with my own identity as a human being fundamentally connected to other human beings.73

72 Cf. Gaudium, supra note 62, at ¶ 27 (acts inimical to life and human dignity “defile those who are actively responsible more than those who are the victims”).
The Trinitarian analogy can help to articulate a critique not only of atomistic individualism, but also of the seemingly positive flip side—altruism, understood as “true” only if it cuts against my own selfish interests. I realize that neither line of argument must necessarily be attributed to a libertarian philosophical stance; but the creep from a stance in political theory to a larger cultural claim is nonetheless frequent. Pushing the envelope on how to articulate the content of a bystander’s freedom, one might query the extent to which these kinds of claims regarding altruism actually exacerbate a tautological tension between the self and others.

Through the lens of the Trinitarian analogy, what comes into focus is the reciprocal quality of human interactions. As John Paul II explained the dynamic in his encyclical letter, *Dives in Misericordia* (Rich in Mercy):

> In reciprocal relationships between persons merciful love is never a unilateral act or process. Even in the cases in which everything would seem to indicate that only one party is giving and offering, and the other only receiving and taking (for example, in the case of a physician giving treatment, a teacher teaching, parents supporting and bringing up their children, a benefactor helping the needy), in reality the one who gives is always also a beneficiary. In any case, he too can easily find himself in the position of the one who

---

74 See Luigino Bruni, *The Wound and the Blessing* 64-68 (2012) (building on the work of Antonio Genovesi and the civil economy tradition, critiquing as incomplete models of altruism which do not fully account for human sociality); id. at 46-62 (reconciling *eros*, *philia*, *agape* and the common good); Luigino Bruni & Amelia J. Uelmen, *The Economy of Communion Project*, 11 J. CORP. & FIN. L. 645, 662-665 (2006) (distinguishing civil economy concepts from some theories of corporate social responsibility and altruism); Amelia J. Uelmen, Caritas in veritate and Chiara Lubich: Human Development from the Vantage Point of Unity, 71 THEOLOGICAL STUD. 29, 38 (2010) (“Through the lens of the spirituality of unity, many theories of altruism would be merely the tautological flip side of individualism, for they are grounded in an assumption that the other’s interests are in fundamental tension with one’s own.”).
receives, who obtains a benefit, who experiences merciful love; he
too can find himself the object of mercy.  

It is interesting to return to the Parable of the Good Samaritan in light of this framework. The parable is frequently read as a model of altruism, as the quintessential example of what it means to go out of one’s way in order to serve another’s needs. For example, Martin Luther King, Jr., in the sermon he delivered on the eve of his assassination, referred to the Good Samaritan story as part of a powerful plea for the support of the striking sanitation workers in Memphis, Tennessee. King held up the Good Samaritan as a model of one who on that “dangerous curve” from Jerusalem to Jericho, was able to move beyond fear in order to “project the ‘I’ into the ‘thou’ and to be concerned about his brother.” King pointed out the contrast with the Levite who asked: “‘If I stop to help this man, what will happen to me?’” But the Good Samaritan was able to “reverse the question”: “‘If I do not stop to help this man, what will happen to him?’”

The theological models discussed above suggest still other ways to reverse the question. Another way to frame what is at stake is to see that it is not only the well-being, health, safety or survival of another human being, but also my own identity and integrity as a person. Thus the question becomes not only what will happen to the victim if I do not stop to help, but what will happen to me? What will become of my own identity, my own humanity, if I fail to recognize the humanity of the other?

---

75 John Paul II, Dives in misericordia ¶ 14 (1980).
77 Id. at 285.
Through this lens, one can discern how the seminal rescue story, the Parable of the Good Samaritan, seems especially set on driving home this point. Recall that Jesus seems to shift the question—from an inquiry into the categorical definitions of “who is my neighbor” to what it means to be a neighbor. Recall that Jesus and his interlocutor were using two different words to refer to the action of the Samaritan.\footnote{See discussion supra, Chapter Three, Part A, \textit{The Good Samaritan as “Moved from the Gut”}} In the text of the parable itself, the word σπλαγχνίζεσθαι, often translated as “moved with compassion,” is better translated with the rawer and more reactive “moved from the gut.” Instead, in discussing the parable with Jesus, the lawyer persisted in expressing himself with the elegant eleo—to show mercy.\footnote{For this reason some scholars have argued that the parable is best understood as extracted from its frame, attributing the different choice of words to a seam in the redaction of the text. \textit{See, e.g., JAN LAMCRECHT, S.J., \textit{ONCE MORE ASTONISHED: THE PARABLES OF JESUS} 79 (1981) (arguing that a seam in the redaction could also explain the potentially unintended tension in the text between defining one’s neighbor (part of the frame) and what it means to be neighbor (part of the parable); JOHN DOMINIC CROSSAN, \textit{IN PARABLES: THE CHALLENGE OF THE HISTORICAL JESUS} 59 (1973) (arguing that the divergent uses of neighbor “in a passive (one to whom help is offered) sense in 10:27, 29 and in an active sense (one who offers help) sense in 10:36 indicates that the unity of the complex is not that of an authentic and original dialogue between Jesus and a questioner.”). Similarly, Lambrecht argues that Luke tacked on the introduction to the parable with the help of parallel passages in Q and in what now appears in \textit{MARK} 12:28-34, concerning the Great Commandment. \textit{See LAMCRECHT, supra} at 68.}

The Trinitarian analogy helps to highlight an important dimension of the text and the meaning of σπλαγχνίζεσθαι. Shocked, the lawyer was able to move a few steps in Jesus’ direction by recognizing that a hated enemy could demonstrate kindness. But “to show mercy” is not the same as σπλαγχνίζεσθαι. In comparison with σπλαγχνίζεσθαι, “mercy” retains a certain sense of control in which one reaches out, from one’s power, to assist the needy. Perhaps the lawyer was unable to move beyond his own structures of power in order to fully appreciate the depth dimension
of σπλαγχνίζεσθαι. It may have been the best that the lawyer could do, and in any case to “do” mercy would have been an improvement over the lawyer’s superficial recitation of the principle at stake. But it would be reductive to conclude that eleo fully captures the full involvement of the entire core of the person—including one’s emotional core—to which Jesus is referring with the word σπλαγχνίζεσθαι. The text of the parable illustrates how the lawyer was not yet able to reach the depths of love that Jesus was demonstrating in his story.

In this light, it would also be helpful to revisit Jesus’ invitation to shift one’s perception of an encounter with a neighbor’s needs—to move away from seeing others as simply a passive object of merciful attention toward an appreciation of a deeper “gut level” connection. This can help to explain the meaning of Jesus shifting the question from “Who is my neighbor?” to “What does it mean to be neighbor?” The verb σπλαγχνίζεσθαι indicates that the work of the disciple is no longer to define passive objects of mercy, but to completely shift one’s orientation toward the world, and therefore to every human being. If “mercy” is not the punch line, then perhaps neither is the core question how to determine the boundaries for who should be the passive object of one’s assistance, “who is my neighbor?”

---

80 See Howard Lesnick, The Consciousness of Religion and the Consciousness of Law: Some Implications for Dialogue, 8 U. PA. J. CONSTIT. L. 335, 343 (2006) (noting Jesus’ capacity to “reach under the argument, and under the lawyer’s motivation, to a quality that the lawyer had not exhibited,” and describing how Jesus “shifts the question” in such a way that a universal definition of neighbor is assumed: “And the lawyer didn’t keep his grip on his analytic powers and object to the relevance of the Parable, as any good lawyer might have, as glibly shifting the question from, ‘To whom am I obligated to act as a neighbor?’ to, ‘What does it mean to act as a neighbor’? For the moment at least, he was unable to hold onto his premise, that I am free to choose not to be a neighbor to anyone who isn’t already ‘my neighbor’; unable also simply to allow the ‘sterner’ part of his character to lead him to
The verb σπλαγχνίζεσθαι suggests that the stance Jesus describes implies the recognition of one’s fundamental—physiological, emotional, and intellectual—bond to every human being, and then on this basis, the work of understanding what it means to be a neighbor in various circumstances as they present themselves. In this story, it seems that the one who exemplified the fulfillment of the law is a person who let himself be seized by an overwhelming emotional and perhaps even irrational response to the sight of another human being in need, to the point of taking some extraordinary risks to meet his needs.

So wouldn’t this model of human freedom and fulfillment point in the direction of a clear moral obligation to help in any and all circumstances? Christian scriptures and tradition are certainly not void of exhortations, examples, and encouragement to find meaning and personal fulfillment in self sacrifice, with the model par excellence being that of the sacrificial love of Christ who risked contact with a hostile humanity to the point of being sentenced to die on a cross: “Greater love has no man than this, that a man lay down his life for his friends.”

And perhaps that is the point: the models are offered to people and communities who have had a long track record of severe limitations in the extent to which we recognize each other’s humanity and treat each other according to that grandeur. The image of the Good Samaritan as “moved from the gut” is compelling because it illustrates both

shrug off the question as therefore of no concern to him. He quietly answered Jesus’ question, ‘The one who showed him mercy.’ Like the listeners to the dialogue, he was left in the power of his own moral sense, the existence and latent power of which Jesus presumed and, by his story, brought to the surface.”

81 John 15:13 (Revised Standard Version).
Jesus’ appreciation for the extent to which human beings act on impulse. But it also shows that he was not a moralist. Numerous other stories in the Christian scriptures recount God’s mercy when human beings fail to live up to the relational nature of their own identity. All of this can inform a searching “examination of conscience” on the extent to which one may or may not have exercised one’s discretion in order to meet one’s moral obligations to respond to the needs of others.

Strong models for relational identity and relational autonomy rooted in both secular and theological sources help to dislodge libertarian claims that freedom may be found in the absence of connections to others or in neglect of their needs. These models may also further strengthen a sense of moral obligation to respond to other’s needs when at all possible and within one’s physical and psychological capacities. But neither the secular nor the theological models of relational autonomy constitute a necessary incursion on the exercise of discretion. Both leave space to discern what to do in a given situation in which a vulnerable person is in need of emergency assistance. And neither model answers the question about what should be required of a bystander by the coercive force of state law.
VI. Interpretations of “Neighbor” in Leviticus 19

A Biblical text that would seem to speak most directly to the question of bystanders, and perhaps even “engaged spectators,” is from the “Holiness Code” in Leviticus: “Do not stand idly by the blood of your neighbor.” (Lev. 19:16). The text seems to provide a clear injunction against “standing by” while anyone is injured. But the tiniest scratch beneath the surface of the scholarship reveals that the text also raises a number of challenges, including the ancient question, “who is my neighbor”? To whom is such a duty owed; how was such a duty understood at the time; and how has it been interpreted over time? For this question, it is helpful to probe the meaning of the verse that follows: “Love your neighbor as yourself” (Lev. 19:18b).

It is interesting to consider the debate over the meaning of “neighbor” in light of the seeming polarities between, on the one hand, stringent obligations grounded in community membership, and on the other, a universal duty to the world. Some of the authority discussing Leviticus 19:18 indicates that up until fairly recently, “neighbor” (re’a) has been understood to mean a fellow Jew, a member of the community of Israel, and would probably not encompass those outside of the community. As Neudecker outlined, according to early rabbinic interpretations and the commentary from the middle ages, the word re’a referred to a fellow Jew. Most pointedly, one

---

1 Note that the phrase has been translated in a variety of ways. Some indicate what could be interpreted as an activity (e.g., “do not do anything against” and “do not stand against”), while others contra-indicate a stance of passivity: “do not stand idly.”

commentary on Leviticus reads: “you shall not take vengeance or bear a grudge against the children of your people” (Lev. 19:18a); you may take vengeance and bear a grudge against others.” As Piper describes, “. . . the commandment to love falls short of including the average non-Israelite, for [sojourner] denotes a non-Israelite who has become a part of the Israelite community.”

Other analyses have probed the use of re’a, for example, in Exodus, as referring to those on the margins of society, and thus providing some basis for a more universal definition. Commentators such as Jacob Milgrom point to the injunction a few verses down, claiming that: “The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself; for you were strangers in the land of Egypt: I am the LORD your God” (Lev. 19:34) is the “true ethical summit of the Hebrew Bible.” Others point to the books in the Bible that hold up for

term re’a appears to be used in a variety of ways with no single meaning as its controlling center;” but concluding that “with few exceptions, they seem consistently to have construed our moral duties restrictively, giving special status and claims to other Jews, rather to men in general.”]; JOHN PIPER, LOVE YOUR ENEMIES 30-31 (1979) (“There is general agreement that ‘neighbor’ in Leviticus 19:18 is a command to love, not men in general, but fellow Israelites.”). See also Neudecker, supra note 2, at 500, 505 (discussing commentaries on both “neighbor” and “as yourself” as pointing toward the more limited application of obligations, possibly as restrictive as to observant Jews).

3 Neudecker, supra note 2, at 500 (quoting Sifra, Qedoshim 4). See also Jonathan Magonet, THE STRUCTURE AND MEANING OF LEVITICUS 19, 7 HEBREW REV. 151, 161 (1983) (noting the “outside-in” quality to Leviticus 19:8-18, beginning with “remote” neighbors, the poor and needy, for whom property is to be left but no action is required, to improper behavior to those who are weaker (vv. 13-14), to the more personal dimensions of feelings and emotions, and the task of removing the sources of misunderstandings).

4 PIPER, supra note 2, at 31. See also Simon, supra note 2, at 34-35; Laurence Edwards, HOW DO YOU READ? JESUS IN CONVERSATION WITH HIS COLLEAGUES, in JESUS THOUGH JEWISH EYES 137, 144 (Beatrice Bruteau, ed., 2001).

5 Moshe Benovitz, YOUR NEIGHBOR IS LIKE YOURSELF: A BROAD GENERALIZATION WITH REGARD TO THE TORAH, in A HOLY PEOPLE: JEWISH AND PERSPECTIVES ON RELIGIOUS COMMUNAL IDENTITY 127, 131 (Marcel Poorthuis and Joshua Schwartz eds., 2006).

emulation those who were not Israelites. Maimonides, the great scholar and sage of the twelfth century, also spoke with a universal vision:

Not only the tribe of Levi but every single individual from among the world’s inhabitants whose spirit moved him and whose intelligence gave him the understanding to withdraw from the world in order to stand before God—to serve and minister to Him, to know God—and he walked upright in the manner in which God made him, shaking off from his neck the yoke of the manifold contrivances which men seek—behold! this person has been totally consecrated and God will be his portion and inheritance forever and ever.

Analogous to the lines that emerge in debates regarding unbounded universal obligation, some have drawn a sharp contrast between Jewish interpretations of the text and Christian mandates to universal love. A line from the Gospel of Matthew would seem to be a good jumping off point for this leap. Jesus teaches:

You have heard that it was said, “You shall love your neighbor and hate your enemy.” But I say to you, love your enemies, and pray for those who persecute you, that you may be children of your heavenly Father, for he makes his sun rise on the bad and the good, and causes rain to fall on the just and the unjust.

A universal understanding of neighbor is also evident from Luke’s account of Jesus’ interpretation of Leviticus 19:18 through his story of the Good Samaritan. To get the

---

7 See e.g., RUTH (positive depiction of Ruth, who is not an Israelite); JOB 1:8 (“no one is like him on earth”—and he was not an Israelite); Jonah 4:11 (“should I not care about Nineveh, that great city?”). See also GENESIS 12:3 (“…all the families of the earth shall bless themselves by you”); ISAIAH 2:1-4 (all the national shall flow to the mountain of the Lord). Many thanks to David Luban for expanding my horizon on this point.


9 MATTHEW 5:43-45.
story rolling, the lawyer quotes, among other duties, Leviticus—“you shall love your neighbor as yourself.” And the punch line, of course, is the question “Which of these three, do you think, proved neighbor to the man who fell among the robbers?”

It is clear that there are tensions, even significant ones, between how Rabbis through the centuries have interpreted Leviticus 19:18, and how these square with interpretations of passages from the Christian scriptures. Some of the conflicts, I believe, emerge when one fails to recognize that all traditions move through time. Conflicts may be especially intense when interpretation is grounded in a tendency to freeze one or another tradition in time, while the other moves through time, creatively responding to historical challenges. The analysis below works to avoid this dynamic with a focal question of whether in line with Maimonides there are other resources within Jewish interpretation over time which are both true to the original meaning of Leviticus and which might open out to some obligation to respond to the needs of a wounded stranger, or at least not “stand by” idly.

One illustration of this flexibility within Jewish reflection is the famous discussion (circa 100 CE) between Rabbi Avika and his disciple Ben Azzai about which basic principle underlies the entire Torah and the commandments. There are various versions of the story, depending on their placement in the commentary. It seems that the older is in the commentary to Leviticus, Sifra, Kedoshim:

“You shall love your neighbour as yourself” (Leviticus 19:18).

Rabbi Akiva says: This is the greatest principle of the Torah. Ben

---

12 See Neudecker, supra note 2, at 512.
Azzai says; ‘This is the book of the generations of Adam’ (Genesis 5:1) is a greater principle.\(^{13}\)

Another version appears in slightly inverted form to accommodate its placement as a commentary to Genesis, *Bereshit Rabbah*:

Ben Azzai said: “‘This is the book of the descendants of Adam’ (Genesis 5:1) is a great principle of the Torah.” Rabbi Akiva said: “‘And you shall love your neighbour as yourself’ (Leviticus 19:18) is an even greater principle.” Hence, [from Ben Azzai’s statement you can deduce that] you must not say: ‘Since I have been put to shame, let my neighbour be put to shame. Rabbi Tanchuma said: If you do, know Whom you put to shame, [for] ‘in the likeness of God did [God] make him’ (Genesis 5:1).\(^{14}\)

The version in the *Yerushalmi, Nedarim*: is similar to the Genesis commentary:

Rabbi Avika says “Love your neighbor as yourself” is the great principle of the Torah. Ben Azzai disagrees, and says “God made humans in the divine image” is an even greater principle, for then you cannot say, “since I despise myself I can despise my fellow as well; since I curse myself, let my fellow be accursed as well”. Rabbi Tanchuma said, “Ben Azzai is right, for if you act thus, know whom you are despising God, for God made humans in the divine image.”\(^{15}\)

Neudecker surmises that in this conversation Rabbi Akiva and Ben Azzai had only fellow Jews in mind. But noting other texts of Rabbi Akiva: “Beloved [of God] is man, for he has been created in the image [of God]” (Av 3,14) and of Ben Azzai, “Do not despise any man,” (Av 4,3), he surmises, “had they been specifically asked

---

\(^{13}\) *Sifra, Kedoshim* 4:12.

\(^{14}\) *Bereshit Rabbah* 24:7.

\(^{15}\) *Yerushalmi, Nedarim* 9:4.
about non-Jews, these and probably other sages might have included non-Jews in the commandment to love one’s neighbor.”

In a project to read “Do not stand idly by the blood of your neighbor” through a lens that would also embrace concern for a stranger, the discussion between Rabbi Avika and Ben Azzai is by no means dispositive. But it does indicate a potential “canonical” move—Ben Azzai’s position can be read as an argument that Leviticus 19:18 should be read against the backdrop of Genesis 5:1, in which “Adam” represents all humanity, created in the image of God: “This is the book of the generations of Adam. When God created man, he made him in the likeness of God.” It seems that Ben Azzai would not be alone. Neudecker notes another second century example of what could be a similar canonical move: Rabbi Simeon ben Eleazar, “And you shall love your neighbor as yourself—I, the Lord have created him.”

A potential connection also appears in a second century Christian text by Tertullian, *On the Resurrection of the Flesh*. The example is not directly on point because of the context, but it might indicate some evidence of a perceived link between Leviticus 19:18 and Genesis 5:1. Tertullian wrote:

> The flesh, which God with his own hands constructed in God’s image, which from his own breathing he made animate in the likeness of his own abounding life . . . shall this not rise again, so many times over a thing of God? He who enjoins love, first of himself, and afterwards towards one’s neighbour, himself also performs that which he commands. He loves the flesh, which in so

---

16 Neudecker, *supra* note 2, at 512.
17 Id. at 507 (citing ARN A 16).
As Eric Osborn explained the passage: “The concern of God for the flesh depends on his command that the neighbor should be loved and his acceptance of the flesh as his neighbor.” While the interpretations are by no means consistent, the second century sources suggest the potential for a more complex “canonical” interpretation of Leviticus 19:18 in light of Genesis 5:1.

The canonical link carries through in Rabbinic texts of the middle ages. Simon notes a shift already evident in some of the late-medieval interpretations. “Under the force of the social and economic realities of life in a predominantly non-Jewish environment, Jewish thinkers began to regard gentiles in a new light.” The oldest text he found in which the distinction between Jew and non-Jew is completely eliminated is a Midrash from Seder Eliahu Rabba (circa the ninth century): “I call heaven and earth to witness that whether one be a gentile or Jew, man or woman, male slave or female slave, in accordance with the merit of his deeds does the Holy Spirit rest on him.”

Simon outlined the contribution of Rabbi Manachem Meiri (1249-1306), whom he describes as “a pioneer in developing the juridical and theological structures that transformed the status of gentiles in Jewish law,” especially through the category

---

18 TERTULLIAN’S TREATISE ON THE RESURRECTION OF THE FLESH (De Resurrectione Carnis Liber) 27 (Ernest Evans, trans. 1960).
20 Simon, supra note 2, at 46.
21 Id.
of “nations restricted by the ways of religion.”

For example, interpreting Deuteronomy 22:3, the law to return “every lost thing of thy brother’s,” he ruled that the duty to return lost articles “of your brother, and everyone who is restricted by the ways of religion is your brother.”

An anonymous fourteenth-century text from the Sefer HaQanah may be interpreted as taking a similar step, but again, the implications are not completely clear. A commentary on “You shall love your neighbor as yourself” recalls: “Our sages of blessed memory were aroused to say this: ‘Whatever is hateful to you, do not do to anyone else’ (Talmud, Shabbat 31a), and in Nedarim [cf. Talmud Yerushalmi, Nedarim 9:4].

It then interprets Leviticus 19:17 with a “body” metaphor that suggests connections to Genesis 5:1:

If someone cut their hand with a knife, is it conceivable that that person would cut the hand that cut [in retaliation]? Do not both belong to the same person? [This must apply] particularly [to] ‘your neighbour’ in Torah and mitzvot, but [Proverbs (8:13) says: the fear of GOD is hatred of evil;] pride, arrogance, the way of evil and perverted speech do I hate.’ So, it is a mitzvah to hate such a person and there is nothing here of ‘You shall not hate [your brother in your heart]’ (Leviticus 19:17).

“Your neighbor in Torah and in mitzvoth” would seem to suggest a description of the Jewish community, and further, an observant member of the

---

22 Id. at 47.
23 Id. at 49.
24 For an online version of this text see http://www.tabick.abel.co.uk/love_of_neighbour.html.
community. But the next portion of the commentary suggests a potentially broader application.25

[Then] he said to me: My son, a person is *ipso facto* to be honoured by another, for, look here, humanity was created in the image of God . . . When [one realizes] that this is so, one truly knows that any annoyance, blow or curse that one brings to a person affects [what is] above. Thus, the law does not even allow spitting in front of someone. This is what it means: Just as one hand which has cut its mate with a knife is unable to cut the other, so too one who strikes, or curses, a fellow human being, [the other] may not return to pay him back, for the only pay-back is above. Truly, my son, the outer, inner and physical realms are all interconnected (*‘achuzim zeh bazeh*), like branches or a chain. And all of them have a Sovereign Who issues decrees. Therefore, my son, be careful of the humanity’s form (*tzurah*), and do not treat it lightly.

Some commentaries suggest that images of the body would refer to the Israelite community. A Jerusalem Talmud commentary on Leviticus 19:18a, “you shall not take vengeance not bear a grudge against the children of your people” reads:

If someone is chopping meat and in doing so cuts one hand, does he then avenge himself on the hand which held the knife by cutting that hand too? Since all Israelites form one single body, anyone who takes vengeance on his neighbor punishes himself. Therefore the answer to any injustice one has suffered is not revenge, but love: ‘and you shall love your neighbor as yourself.’26

25 Here full consideration of the passage would require an in depth analysis of the Hebrew as the application might be grounded on the flimsy basis of a mistranslation. The Hebrew, however, is beyond my reach.
26 Neudecker, *supra* note 2, at 509.
As with the second century sources, the medieval texts are by no means consistent. But they do suggest that a “canonical” interpretation of Leviticus 19:18 in light of Genesis 5:1 may have been a live part of the discussion.

In the eighteenth century, interpretations of Leviticus 19:18 in light of Genesis 5:1 (or similar references) became increasingly common. By the nineteenth century, this was in some circles almost the unquestioned norm. Mathys suggested that a disciple of Mendelssohn, Naphtali Hirz Wessely (aka Weiss), in his 1782 commentary on Leviticus (Biur), was the first to set forth the explicit connection.27 Wessely wrote: “And you shall love your neighbor, for his is like you, equal to you and similar to you, for he too has been created in God’s image and behold, he is a man like you.”28

As Simon traces, by the nineteenth century a number of Rabbinic figures were treating the issue of “‘who is my neighbor’ as if it constituted no problem at all.”29 For example, David Hoffman (1843-1921) treated Meiri’s legal categories as if they had always been present.30 Rabbi Meir Loeb ben Yehiel Michael Malbim, who served as the rabbi of a small congregation of Russian Jews in Koenigsburg, the city of Immanuel Kant, interpreted Leviticus 19:18 as a form of Kant’s categorical imperative.31 Similarly, Jacob Zvi Mecklenburn (1785-1865), also a rabbi of Koenigsburg, interpreted the passage to mean that “whatever good things a man

27 Id. at 502, 505 n.39.
28 Id. at 506.
29 Simon, supra note 2, at 49.
30 Id. at 50.
31 Id.
would like to have done to him by his fellowmen, ‘he should do to his neighbor, who
is every human being.’”

In light of the longer history, a commentary by Eliezer Ben-Yehuda (1858-
1922) that scholars “without any justification whatsoever” to interpret neighbor as
referring to “to the Jewish neighbor only” seems exaggerated. But it also helps to
illustrate the nature of the shift.

\[32\] Id. at 51.
\[33\] Id. See also Neudecker at 503.
At this point it may be helpful at this point to sum up the heart of my claims thus far. Like many people, I have been disturbed by reports of what seems to be brutal indifference when bystanders physically encounter persons in need of emergency assistance. At the same time, I remain unconvinced by the breadth of some arguments that bystanders should have affirmative moral or legal obligations to assist or call for help simply by virtue of their circumstantial presence on the scene. Part One of this Thesis argues for a more fine-tuned assessment of moral and legal obligations that appreciates the multi-layered and subjective nature of a bystander’s encounter with a trauma or act of violence that this person has neither caused nor exacerbated. On this basis, I propose that the analysis of duties distinguish between “pure bystanders” and “engaged spectators.”

For a host of reasons, some of which have been explored in the Chapters above—shock, fear, indifference, hurry, or simple mere distraction—“pure bystanders” may choose not to engage the scene. I make no claim about the morality of that choice. Or better, my argument allows ample space for strong moral condemnation of that choice. I do not believe that “moral monsters” are as ubiquitous as Prosser seems to indicate in his treatise discussion of “easy rescue” cases, but I will admit that they do exist. For example, consider the cases discussed above, in which
David Cash witnessed the assault of Sherrice Iverson, and Mack Prioleau witnessed the rape of the Vanderbilt student. Both chose to disengage from the scene, literally walking away from the vulnerable victims’ clear physical need for emergency assistance. Both situations probably call for very strong moral condemnation. Nonetheless, I also argue that people in this category of bystanders—those who choose to disengage—should not be *legally* coerced to intervene. I believe the law lacks the fine-tuned instruments needed to probe the interior life of bystanders that shapes the subjective contours of those choices. This is why the title of this Thesis includes appreciation for “the limits of the law.”

At some point, however, a bystander crosses an objective line, and I argue that crossing this line brings the person into a territory where *legal* obligations should attach. The line consists in a visible manifestation of *engagement* with the victim in need of emergency assistance. Bystanders may pass by the scene of a victim in need for many reasons, but those who stop to engage the scene in order to watch and observe indicate by their very stopping that they are not afraid, they are not in so much of a hurry, and they are paying attention to the scene.

Fifty years ago, when Kitty Genovese was murdered, it was difficult to determine exactly who had crossed that line into engagement with the scene and with the victim. Now many spectators have in hand an instrument that can make a difference for this analysis: a cell phone camera. When a cell phone is used to take pictures of the scene of an assault, it can document and therefore also serve as evidence of engagement, focus, and even intentions.
Part Two worked to lay a philosophical and theological foundation for a claim that an engaged spectator would have both a moral and legal obligation to treat the victim in need of emergency assistance with dignity and respect—thus, at minimum, not objectifying or mocking this person’s pain or predicament. I argue that such a claim could be in harmony with important values in the liberal tradition, and that only what I would consider to be a distorted understanding of liberty (i.e., “freedom” to treat persons as objects) might get tripped up at this point.

On the basis of this foundation, Part Three now considers the legal foundations for the new tort of “exploitative objectification of a vulnerable person in need of emergency assistance.” By way of introduction, the new tort situates itself somewhat uncomfortably in the realm of intentional torts, and specifically, recourse for dignitary harms. Generally intentional torts such as battery, assault, false imprisonment, invasion of privacy and intentional infliction of emotions distress aim to protect the person and personality.

One might consider, for example, an tort cause of action for intentionally spitting on someone. As the second Restatement of Torts delineates, “An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the

---

other directly or indirectly results.2 The act of spitting on another person, an action normally associated with an intention to insult, could constitute an offensive contact, and thus bringing the harm within the definition of a battery. It also seems clear that the core of this harm is dignitary. Saliva may be wiped away with no further materially measurable damage; the offensive harm of the indignity is not so easily wiped away.

This Thesis submits that taking a cell phone picture of a vulnerable person in need of emergency assistance—with no accompanying acknowledgment of their humanity or their need, in essence treating their predicament as a source of entertainment or bemusement—is like spitting on that person. Or actually, in many circumstances it would be worse that spitting on that person, because it also preys on the particular circumstance of their vulnerability.

But the fit within the framework of intentional torts is uncomfortable for several reasons. First, the fact patterns discussed above are replete with large gaps in perception and experience between victims and spectators. What to make of the intentions of those who snapped pictures of the attack on Robles outside of Port Authority? For the spectators the conduct may have been almost mindless, while for Robles the experience of objectification may have been even worse than the attack itself. Second, as will be discussed more fully in Part Four, what to make of the intentions of extremely intoxicated spectators who engage in image capture of a victim? Third, at times the indignity is inflicted when the vulnerable person is

---

2 Restatement (Second) of Torts § 18 (1965).
unconscious, and so unaware of the harm at that point in time. In these cases, how might the objective harm be distinguished from the victim’s reaction or response to the indignity? Finally, to further compound the discomfort, in the common law of torts, the closest analogue to the proposed tort, intentional infliction of emotional distress, is rarely litigated. Because insurance policies often bar coverage of intentional torts, and therefore the potential for recovery that plaintiffs often need to cover legal expenses, resources in case law for drawing out analogies remain spare.

Part Four dips a toe into the waters of some of these difficult questions.

For the foundational analysis in Part Three, I have identified two areas of tort law that require extended discussion: first, the nature of stranger-to-stranger obligations in tort; and second, the nature of the dignitary harm at the heart of this new tort. Chapter Seven, which addresses stranger-to-stranger obligations, is something of a ground-clearing exercise. Unlike an argument for an affirmative obligation to rescue, the proposed tort of “exploitative objectification” is intentional and grounded in an allegation of distinct infliction of harm on the victim—and this would be enough to articulate a relationship of duty, even between strangers.

The reason for the ground-clearing exercise is that there are aspects of the law of affirmative obligations, namely the articulation of “special relationships,” that may muddy the waters of such an effort to clarify stranger-to-stranger obligations. First, in some cases, certain patterns in the special relationships discourse have obscured the harm that defendants have inflicted on victims when not in the context of clear relational or contractual obligations. Second and related, these patterns also obscure
the extent to which stranger-to-stranger obligations may emerge not from a pre-existing relationship, but from *circumstances* in which a duty of care clearly emerges. Chapter Seven works through these patches so as to leave ample room to articulate the extent to which stranger-to-stranger obligations may arise in an emergency circumstance.

Chapter Eight turns to the difficulty that emerges because our eyes are not yet trained to fully appreciate—or even see—the dignitary harm inflicted in these circumstances. Against the backdrop of an emphasis over the long twentieth century on *materially* measurable damages, such as economically measurable harm to one’s reputation, or a lost opportunity for an economic advantage, and so on, torts debates have maintained a steady focus on an affirmative obligation to rescue as a response to the *primary* injury of an attack or an accident.

To surface the nature of the intentional and distinct harm of “exploitative objectification” requires more finely-tuned interdisciplinary tools that can bring into relief previously obscured aspects of the harm at issue. Chapter Eight works to lay the groundwork for recognition of this harder-to-measure harm that forms the core of the tort of “exploitative objectification.” Here too the analysis recognizes the challenges that emerge because of vast differences in perspective between bystanders and victims.

Notwithstanding the difficult remaining questions, on the basis of these legal foundations, Part Three concludes with the discussion in Chapter Nine of the elements and the limits of the tort of “exploitative objectification,” focused on an
engaged spectator’s circumstantial assessment of victim’s state, as both vulnerable and in need of emergency assistance. Recognizing that there may be circumstances in which taking a picture or recording the accident or the attack may serve a public good, the Chapter also proposes analytic and evidentiary tools to distinguish “exploitative” intent from attentive concern for the victim’s needs and interests, which could include cooperation with a criminal investigation; or, as explored more thoroughly in Chapter Twelve, social goods within the bounds of ethical photojournalism.
VII. Duty to a Stranger Grounded in Circumstances, Not Status

This Chapter works to clear the ground for a robust articulation of a duty not to inflict dignitary harm in a stranger-to-stranger relationship. I submit that certain patterns in the discourse regarding the “special relationships” that may trigger an affirmative obligation have muddied the waters of a clear understanding of potential obligations between strangers, such as that which would ground a tort of “exploitative objectification.” After surfaced those concerns, this Chapter then proceeds to clarify the shape of an obligation grounded not in a pre-existing relationship, contract, or other formal category, but in the course of a stranger’s engagement with particular circumstances. In this section, I hope not to overplay my hand: my focus is on the relationship between strangers, not the nuances that special relationship discourse brings to quasi-contractual or other kinds of relationships that might generate different expectations.

The argument proceeds in three steps. First, it describes the tight grip that the category of “special relationships” has had on the interpretation of bystander obligations, at times constraining the flexibility needed to fully understand the nature of stranger-to-stranger obligations. Second, it works to loosen that hold by surfacing the extent to which cases which purport to hinge on “special relationships” are better analyzed under the rubric of “special circumstances” that conditioned particular conduct. This shift, it argues, leaves more room for a circumstantial analysis of the interaction between bystanders and vulnerable persons, regardless of their pre-existing relationships or agreements. Finally, it further shores up the arguments for a
circumstantial analysis of duty with theoretical insights on the “relational” nature of stranger-to-stranger tort obligations.

A. The Tight Grip of “Special Relationships” in the Law of Torts

The topic of “special relationships” brings to mind the categorical nature of the Seinfeld defense: “Bystanders are by definition, innocent. That is the nature of bystanding.” If bystanders are by definition innocent, then it follows that for a harm to be legally cognizable, one must have been in a relationship with the victim other than bystanding. It seems to be but a short step to argue, as the Seinfeld defense did, that only those in a pre-existing or otherwise “special” relationship with the victim would have a duty of care.

As the Restatement of Torts explains, generally “special relationship” duties of reasonable care regard “risks that arise within the scope of the relationship.” A comment to Section 40 of the third Restatement explains that the list is not exclusive, but that courts may identify additional relationships to be recognized as a basis for affirmative duties. In light of the fact that the list has grown over the years, rather

---

3 Seinfeld, Final Episode (“Finale”) Season 9, Episode 23/24 (aired May 14, 1998). The script for this episode (“Finale Script) is available at http://seinfeld-episode.blogspot.com/2013/07/the-finale.html. 4 Restatement (Third) of Torts § 40. The list includes: 1) a common carrier with its passengers; (2) an innkeeper with its guests; (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises; (4) an employer with its employees who, while at work, are: (a) in imminent danger; or (b) injured or ill and thereby rendered helpless; (5) a school with its students; (6) a landlord with its tenants, and (7) a custodian with those in its custody, if: (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and (b) the custodian has a superior ability to protect the other. 5 Restatement (Third) of Torts § 40 cmt. o (“Courts may, as they have since the Second Restatement, identify additional relationships that justify exceptions to the no-duty rule contained in §37. One likely candidate for an addition to recognized special relationships is the one among family members. This relationship, particularly among those residing in the same household, provides
than working to articulate a separate intentional tort, wouldn’t it be easier to simply add to the list?

In an early article arguing for a duty to rescue, Ernest Weinrib noted that increasing numbers of “special relationships” seemed to be chipping away at the no-duty rule, flanked also by the enactment of Good Samaritan statutes in a number of states. At that point Weinrib argued:

> These developments have made the general absence of a duty to rescue seem more eccentric and isolated. They have also raised the possibility that the general rule is in the process of being consumed and supplanted by the widening ambit of the exemptions, and that the relationship between the general rule and the exceptions may be fundamentally incoherent.⁶

Outlined below are descriptions of two different arguments for expansion of the special relationship category: first, that duties should hinge on the intensity of social relationships; and second, that they should hinge on a consequentialist assessment of which bystander would be the cheapest cost avoider in a given circumstance. In some of the case law, analysis of bystander response to a victim in need of emergency assistance is overly constrained by these models. The discussion below aims to clear the ground for a more careful assessment of the circumstances

---

that may give rise to a stranger-to-stranger obligation to avoid a distinct harm under certain conditions.

1. The Argument that Duties Should Hinge on the Intensity of the Social Relationships

In a first category, some scholars argue for an expansion of the “special relationship” exceptions based on the intensity of a particular moral or social relationship. For example, as part of his analysis of friendship as a legal category, Ethan Leib notes that there is something jarring about the contrast between how we understand the word “relationship” in the ordinary use and meaning of the word, and the refusal to include these social mores, expectations and arrangements within our legal understanding as well. A paradigmatic example would be friendship, and the expectations that normally permeate these relationships—such as that friends generally take care of each other.7

For Leib, the 1976 Supreme Court of Michigan case, *Farwell v. Keaton*,8 is a good example of the positive development of the category of “special relationships.” In that case, two friends, Richard Farwell, eighteen, and David Siegrist, sixteen, identified by the court as “companions” on a “social venture,” were returning a car to a trailer rental lot. After drinking four or five beers each, they attempted to engage in conversation two teenage girls who had entered the rental lot. They followed the girls to a restaurant down the street, and the girls complained about them to their friends in the restaurant. The two boys were subsequently chased by six boys back to the rental

---

lot where Farwell was severely beaten. Siegrist escaped into the rental office, and returned to the lot to find Farwell under his car. He took him to the rental office where he was given a bag of ice for his head.

Between ten in the evening and midnight, the two boys drove to four different drive-in restaurants. Between the third and the fourth restaurant, Farwell stated that he wanted to lie down, crawled into the back seat of the car, and fell asleep. About midnight Siegrist drove the car to the home of Farwell’s grandparents. After an unsuccessful attempt to awaken Farwell, Siegrist left him in the car without alerting anyone as to what had happened. The next day Farwell’s grandparents discovered their grandson in the car and they brought him to the hospital, where he died three days later of an epidural hematoma.9

At trial, evidence was offered that Farwell would have had a high chance of survival if he had been taken to a hospital within a half an hour after losing consciousness, and that Siegrist had understood both that Farwell was injured and that he should have done something. The trial court entered judgment on a jury verdict for Farwell’s estate and the appellate court reversed.10

On appeal, the Supreme Court of Michigan considered two separate but interrelated questions: first, whether the existence of a duty in a particular case is always a matter of law to be determined solely by the court; and second, whether on the facts of this case the trial judge should have ruled as a matter of law that Siegrist

---

9 Id. at 219.
10 Id.
owed no duty to Farwell.\textsuperscript{11} The court held that there was ample evidence that Siegrist had failed to exercise reasonable care after voluntarily coming to the aid of Farwell; and also that Siegrist “had an affirmative duty to come to Farwell’s aid.”\textsuperscript{12} As the court explained, “Farwell and Siegrist 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.”\textsuperscript{13} As “companions engaged in a common undertaking . . . there was a special relationship between the parties.”\textsuperscript{14} As such, “[b]ecause Siegrist knew or should have known of the peril Farwell was in and could render assistance without endangering himself, he had an affirmative duty to come to Farwell’s aid.”\textsuperscript{15}

Analyzing \textit{Farwell}, Leib appeals to the ordinary language notion of “relationships.” According to Leib, there is a strikingly odd disconnect in finding that because there is no “special relationship” between brothers, there is no duty to rescue a family member.\textsuperscript{16} Like the court in \textit{Farwell}, he sees no reason why the law should not reinforce the moral obligations that arise due to strong affective ties. He explains:

\footnotesize
\begin{align*}
\text{\textsuperscript{11} Id.} \\
\text{\textsuperscript{12} Id.} \\
\text{\textsuperscript{13} Id. at 222.} \\
\text{\textsuperscript{14} Id.} \\
\text{\textsuperscript{15} Id. The Court’s analysis of “special relationships” in Farwell has remained a touchstone for several lower court opinions in Michigan as well as a few other state courts, and has been widely discussed in the secondary literature. \textit{See}, e.g., Sierocki v. Heiber, 425 N.W.2d 477, 478 (Mich. Ct. App. 1988) (“The appellate courts of this state have also imposed a duty based on a special relationship in settings other than a physician-patient relationship. In \textit{Farwell} the Michigan Supreme Court recognized that social companions engaged in a common undertaking assume a special relationship that may create an affirmative duty of one to render assistance to the other.”).} \\
\end{align*}
Perhaps we do not need the law to tell us to save our friends. But why shouldn’t the law confirm what we already know to be true? It is perfectly acceptable for the law to reinforce our well-accepted duties; it contributes to the law’s affective resonance, and may have broader effects in facilitating compliance with the law’s commands more generally.¹⁷

In addition, Leib appeals to a cost-benefit balance paradigm, arguing that there would seem to be “little cost” to having the law recognize a duty to rescue as between friends. He explains:

> It is plausible to imagine that the duty to rescue friends could and should be recognized by the law. This may, of course, be one of the areas where legal protection is least needed—after all, it is a pitiful friend that would not undertake a rescue. But for just that reason there would be little cost to recognizing such a duty in law.¹⁸

As will be discussed more fully below, this paradigm—legal duties should be theorized on the basis of the intensity of social relationships—has in some cases obfuscated a more organic and immediate obligation arising from a circumstantial interaction between an otherwise bystander and a person in need of emergency assistance.

¹⁷ Leib, supra note 7, at 686. See also Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2024-2025 (1996) (discussing the idea that the no-duty-to-rescue rule might be understood as condoning a failure to render aid to someone in mortal danger, distinguishing between the role of law in affecting primary behavior and in providing expressions of moral principle).

¹⁸ Leib, supra note 7, at 685.
2. Consequential Analysis of the Cheapest Cost-Avoider: A Special Circumstance, Not Relationship

Other proposals for expansion of the category of special relationships rest on consequentialist foundations. The argument generally runs that since the cost-benefit calculus is obvious—the risk or effort to call for help carries little or no weight in comparison with the good of saving another person’s life—a duty to aid should be obvious. Nonetheless, theorists also recognize the difficulty of administering the duty in certain circumstances. For example, as Saul Levmore recognizes, when there are multiple potential rescuers, it remains unclear who in the group should be held responsible.19

Working within a paradigm in which the focus of tort law is to determine who might be the single best accident avoider in a given situation, Levmore proposes that the category of “special relationships” be employed to help identify the cheapest cost-avoider, especially as economic efficiencies become increasingly clear in a given circumstance.20 As such, “special relationships” have little to do with the qualities of pre-existing relationships—and in sharp contrast with Leib’s analysis, have little to do with the relationships at all, in the ordinary meaning of the word.

20 Levmore, supra note 19, at 899-900. See also id. at 933 (“As a descriptive matter tort law can be characterized as searching for a single best avoider, but increasingly imposing liability when there are multiple avoiders and no single best avoider”).
Instead, for Levmore, the most important quality of a would-be rescuer is his or her singularity. The category works to clarify which person would be the single best accident avoider, thus resolving the problem of bargaining between multiple accident avoiders. He explains:

If the threat of liability hangs over multiple potential avoiders, then they may undertake duplicative precautions or may hope that someone else avoids the accident so that no one in fact takes the necessary precaution. In short, when transaction costs are substantial, not only is the need for legal intervention clear but also the advantage of aiming that intervention at a single avoider are apparent.

Within this framework, the singularity of a non-rescuer also resolves the problem of defining responsibility when there are multiple potential rescuers.

According to Levmore, the quality of singularity thus enables a broad extension to the category of “special relationships” as between a single non-rescuer and a stranger. Levmore’s examples include the following:

Liability has been found appropriate for an innkeeper who could have protected a stranger from injury by one of the innkeeper’s guests, a safety engineer who could have prevented an injury to a laborer he did not employ, a psychologist who might have warned an identifiable stranger his patient was intent on harming, and

---

21 Id. at 935.
22 Id. at 930-931.
23 Id. at 933-934. (“When a victim’s call for help goes unanswered, there may be more than one potential rescuer within hearing range. Indeed, it must often be the case that when B could have rescued A, B’s presence at the scene only comes to the attention of the law because other potential (and often unhelpful) rescuers, C and D, were also at the scene of A’s trouble. Such multiple potential rescuers pose a doctrinal problem; if no rescue is attempted, it will be unclear whether B, C, or D ‘caused’ A’s injury—and misbehavior without causation of an injury is traditionally an insufficient basis for liability.”).
similarly, a parole board acting as a single entity that might have warned someone who was the target of a released convict. In these cases, there is of course no “relationship” at all. Instead, these cases contain three elements: First, there is a single nonrescuer. Second, this nonrescuer could with little effort have prevented serious loss. Third, this nonrescuer had no reason to think that someone else would save the day.24

It seems that Levmore’s method could be easily expanded to embrace yet another “special relationship”—which, within a consequentialist frame, need not be a “relationship” in the ordinary sense of the word.25 With the development of ubiquitous visual and aural recording technology, we would now have an easily producible time-stamped record of a bystander’s presence and focus—potentially resolving some of the previous conundrums regarding the indeterminacy of focus and availability. Would it be so difficult to imagine a “special relationship” exception based on a cost-benefit assessment that anyone focused enough to aim a camera and shoot a picture could have—with negligible or no cost—turned that same focus toward calling for help? Technological developments seem to make instrumental arguments for a bystander duty to rescue more powerful than ever.

Levmore’s analysis is both over-inclusive and under-inclusive. First, Levmore’s framework is over-inclusive in the sense that it risks a kind of “tag you’re

---

24 Id. at 935-936.
25 Levmore himself draws the parallel, noting the correlation between courts finding a special relationship and the presence of an identifiable or best-situated rescuer. See id. at 936 (“Most significantly, these special relationships have one thing in common: when there is a special relationship there is no multiple nonrescuer problem, for such a relationship is pronounced only in circumstances in which there is one identifiable or best-situated nonrescuer.”). Although it is not completely clear from the text, it seems that Levmore’s definition of “single” implies one person who is salient, not necessarily that there is only one other person on the scene.
it” quality—liability may be based not on the moral quality of the bystander’s conduct, but on the mere fact of presence on the scene, and in this way, a presumption that such person could have made a difference. The interior nature of the exercise of discretion and the bystander’s decision-making process discussed above remain invisible and irrelevant to this kind of analysis.  

Further, a seemingly objective “cheapest cost-avoider” calculus is over-inclusive in the sense that bystanders seem to be connected into the scene based on speculation about the difference that they would have or could have made, not based on their own choices and conduct.

The analysis is under-inclusive in the sense that a focus on the actors who could have made a difference in the course of the predicate primary injury (e.g., the initial assault in Robles or the robbery in Seinfeld) elides the responsibility of other actors. For example, in the context of the Robles facts, if one bystander had stepped up to intervene or help, that would not foreclose the question of whether the others who were taking pictures should be held legally responsible for the harm they inflicted on Robles by objectifying his trauma.

B. From “Special Relationships” to “Special Circumstances”

Like Leib, I am drawn to the ordinary language use and understanding of words like “relationship” and to a theory of law which connects to how ordinary people use language in their everyday lives.  But in order to articulate a relational duty between strangers, I focus less on the categories that in daily life move us toward

---

26 See, e.g., discussion supra, Chapter IV.C, Distinctions between the Moral Obligations of “Pure Bystanders” and “Engaged Spectators”

27 See discussion supra at note 7.
a sense of obligation (such as an agreement, or a friendship), and zero in instead on the circumstances that might give rise to such obligation. In fact, examining the case law, it is interesting to note how courts’ articulation of a “special relationship” tends to coincide with the presence of particular circumstances in which the defendant did in some way contribute to the risk that actually materialized in harm. In these cases, excising the category of “special relationships” actually makes it easier to explain the nature of the duties that strangers owe to each other in the context of particular circumstances and the resulting harms when such duties are breached.

As noted above, in a 1980 article, Ernest Weinrib set out an extensive argument to make the case for a duty of “easy” rescue, based largely on a proposal to expand the “special relationship” exceptions, and sustainable within legal theory grounded in both utilitarian and deontological philosophical traditions. But by 1995 it was clear that Weinrib had changed his mind. Indicative of this shift, *The Idea of Private Law* includes material for a strong critique of the category of special relationships. After outlining this argument in some detail, the subsections below apply this circumstantial analysis to three cases ordinarily analyzed under the rubric of “special relationships.”

Weinrib’s critique of affirmative obligations is best understood against the backdrop of his analysis of the overarching structure of private law. He explains:

On the conceptual side, private law embodies a regime of correlative rights and duties that highlights, among other things, the centrality of the causation of harm and of the distinction

---

between misfeasance and nonfeasance. For lawyers working within this system, these institutional and conceptual features are the stable points within which their thinking moves when engaged in the consideration of private law.  

Thus in contrast to a deterrence-based “forward looking” calculation, the focus is “backward looking”—on what did or did not happen between the parties.  

Within Weinrib’s corrective justice framework, the tight connection between plaintiff and defendant is expressed both in procedure and in doctrine. Procedurally, litigation in private law takes the form of a claim that a particular plaintiff presses against a particular defendant. Doctrinally, requirements such as the causation of harm attest to the dependence of the plaintiff’s claim on a wrong suffered at the defendant’s hand. In singling out these two parties and bringing them together in this way, private law looks neither to the litigants individually nor to the interests and the community as a whole, but to “the bipolar relationship of liability.” In short, Weinrib explains, “the master feature characterizing private law” is “the direct connection between the particular plaintiff and the particular defendant.”

In the 1995 analysis, Weinrib frames his later discussion of affirmative obligation not under the rubric of “special relationships,” but of “special circumstances.” “Except under special circumstances, defendants are not liable.

30 See id. at 19 (drawing on Aristotle’s explanation of corrective justice to explain “the pattern of justificatory coherence latent in the bipolar private law relationship of plaintiff to defendant”; and on Kant’s concept of right as an explanation for its normative force: “Corrective justice is the justificatory structure that pertains to the immediate interaction of one free being with another. Its normative force derives from Kant’s concept of right as the governing idea for relationships between free beings.”).
31 Id. at 1-2.
32 Id. at 10.
unless they have participated in the creation of the risk that materialized in the plaintiff’s injury.”

The footnote reference for this sentence lists four categories. The first group consists of public authority under a statutory duty for the benefit of a class including plaintiff. The second “is comprised of situations of particular intimacy or dependency,” including family situations, which in Kant’s *Metaphysics of Morals* entail special applications of the principle of right. Weinrib frames the rationale for these two groups as “governed by considerations peculiar to their situation.”

Splicing the various categories, he finds that for the most part they can be categorized as *applications* of the rule rather than exceptions—it is enough to reframe one’s notion of conduct. Exceptions seemingly based on status or role are more comprehensible when one focuses on what the actor did or did not do in light of that status or role. For example, Weinrib’s third group of circumstances includes an obligation that arises from having taken charge of an injured person not to worsen that person’s condition. The fourth circumstance considers when the failure to act takes place in the context of the defendant’s risk creating activity, such as owning and operating a boat, a building, or a resort. Notice that the emphasis is not directly on one’s status, but specifically on the *activity* which is a part of that role or assumption,

---

33 Id. at 153.
34 Id. at 153, n.16.
35 Id. *See also* IMMANUEL KANT, *METAPHYSICS OF MORALES*, Ak. 6:276-282 (Mary Gregor, trans. 1991).
36 WEINRIB, *PRIVATE LAW*, *supra* note 29, at 154, n.16.
37 Id.
38 Id.
39 Id.
and thus directly related to the potential for generating risk, whether by one’s action or inaction. For this reason, seeming affirmative obligations that could be framed as in tension with the general negligence rule are actually applications of the rule.

For cases in the third group, when one’s conduct has made the injured person’s condition worse, liability may be grounded not in the “special relationship” of having assumed this obligation, but rather because through one’s breach of the obligation to use due care, one has participated in the creation of the risk that materialized in the plaintiff’s injury. In contrast to a theory of liability based on a “failure to rescue,” the harm at issue would not be parasitic on another person’s breach which caused the injury, but each of the elements of the tort stands on its own. Once the defendant commences assistance, he or she owes a duty of care not to worsen the injury; the breach is grounded not in an omission or “failure” to rescue, but in the freestanding obligation to use reasonable care in undertaking the rescue. It is the breach of this duty, and the resulting injury, that is the wrong that “binds” the defendant (doer) and the plaintiff (sufferer) through the phenomenon of liability. These cases are applications of the rule because they do involve the “doing” of a “risk creating activity.”

---

40 See, e.g., id. (discussing a failure to act which “takes place in the context of the defendant’s risk-creating activity.”). See also John C.P. Goldberg & Benjamin C. Zipursky, Tort Law and Responsibility, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 23 (John Oberdiek, ed. 2014) (“Oberdiek”) (noting the “increased willingness of courts to allow plaintiffs to look past an immediate injurer (such as an assailant) to a background actor whose carelessness is alleged to have set the stage for the injury (e.g., the owner of a parking garage or apartment building who fails to provide adequate security”).

41 WEINRIB, PRIVATE LAW, supra note 29, at 154, n.16.
In other words, in these cases, situations of liability seemingly grounded in “special relationships” are just not that special. And no strain is required: these scenarios fit quite well within the classic elements of a tort: duty, breach, causation, injury. One need not reach for a policy-driven or policy-informed exception. The basic negligence rule remains intact and fairly consistent: a person should be held responsible for the extent to which one has contributed to the materialization of the risk. Further, this frame also dissipates any tension regarding liability for omissions and nonfeasance. When framed against the backdrop of responsibility for contributing to the materialization of the risk, the category is best articulated as “conduct”—and it matters very little whether such conduct is omissive or commissive, because both can be considered a “doing” or an “action” that contributes to the materialization of a risk for which one may be held responsible.

As mentioned above, Weinrib gives an expansive interpretation of “risk creating activity.” For example, the general operation of a building is considered not from the angle of one’s status as a landowner or one’s “special relationship” with tenants, but from the angle of a “doing,” a risk creating activity, which fits neatly into an analysis of participation in the creation of the risk that materializes in injury. As “applications of the rule,” through this rubric it seems that both of these seeming “exceptions” are simply examples of ordinary negligence. Liability may be imposed because of a “doing”—a breach of a specific duty to care in regards to the risk that materialized in plaintiff’s injury—and a “suffering” as a consequences of that breach.

42 Id.
43 See id.
How about the other categories typically included in “special relationships”? Consider a voluntarily assumed custodial arrangement: a babysitter agrees to supervise a small child while the parents are out for the day, but she distractedly leaves the front door unlocked and falls asleep on the couch while the child naps. The child awakes, opens the door, and before she can catch him, he runs out into the street, is hit by a passing car, and is injured. According to Weinrib’s analysis, there would be no need for any mental gymnastics regarding omissions or status-based special relationships. The babysitter owed a duty of care to the child, which included protection from foreseeable risks, certainly including the risk of escaping from the house and as a consequence of that escape being injured in some way. The babysitter breached that duty of care by carelessly failing to keep herself awake, and carelessly leaving the door unlocked. The breach need not be framed specifically as the omissive failure to run out into the street and rescue the child from the impact of the car. As a direct result of the failure to protect the child from foreseeable risks, the child was exposed to the risk and was injured.

In light of Weinrib’s analysis, and in contrast to those who would propose an ever expanding set of special-relationship obligations to embrace various categories of other-wise bystanders, I believe that for the category of stranger-to-stranger obligations, it would be more helpful to simply move to an analysis of how circumstances inform an assessment of responsibility for risk.  

---

44 For a similar critique, see Jean Elting Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth through the Twentieth Centuries*, 33 DUQUESNE L. REV. 807, 847-848, n.177 (1995) (critiquing the
from status to circumstances will better illuminate when one has deliberately inflicted injury or increased the risk of material harm.

What happens when the focus of the analysis shifts away from the formal categorical query of who might be owed an obligation under the rubric of “special relationships” toward actual conduct in light of the circumstances? The subsections below probe three cases that frequently surface in the duty-to-rescue debates, which generally have been framed through the lens of the categories of affirmative obligation due to a special relationship. It suggests that they might be better framed as examples of negligence for contribution to the risk that actually materialized in injury, and thus on all fours with the elements of a tort. Understood in this way, the cases could also help to illuminate the nature of bystander obligations more broadly.

It is also interesting to note how rare and astounding it would be for a person such as a friend or a lover deemed to be in a close relationship with the victim to have no response or reaction to the victim’s injury, or to have done nothing at all to attempt to help. With the distraction of the “special relationships” category removed, the response or reaction need not be analyzed according to the categorical quality of the relational bond, but may be assessed according to the elements of ordinary negligence: did the person’s response or reaction to the situation contribute to the risk that actually materialized in injury to the victim?

second Restatement of Torts for offering “no insight” into what makes the listed relations “special,” what they might have in common, or by what criteria courts might enlarge their number); id., at 832 n.9 (special relationships reflect long-standing common law doctrines, purporting to impose otherwise unrecognized duties of care on those who practiced “common callings”).
1. Farwell v. Keaton

As noted in the discussion of Farwell v. Keaton above, the Supreme Court of Michigan held that there was ample evidence that Siegrist had failed to exercise reasonable care after voluntarily coming to the aid of his injured friend, Farwell; and also that Siegrist “had an affirmative duty to come to Farwell’s aid.” The affirmative obligation was grounded in their relationship, described as being “companions on a social venture,” which implied “the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself.” As such, “[b]ecause Siegrist knew or should have known of the peril Farwell was in and could render assistance without endangering himself he had an affirmative duty to come to Farwell’s aid.”

Note that the holding is grounded in two findings: first that there was ample evidence that Siegrist had failed to exercise reasonable care after voluntarily coming to the aid of Farwell; and second, that Siegrist “had an affirmative duty to come to Farwell’s aid.” As to the first question, and regardless of a general duty to aid a person in distress, the court noted that “there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse.” Ample evidence of Siegrist having voluntarily assumed Farwell’s rescue included procuring and applying an ice pack and driving him to a place of safety. There was

45 See discussion accompanying supra notes 8-15.
46 Farwell, 240 N.W.2d at 219.
47 Id. at 222.
48 Id.
49 Id. at 219.
50 Id. at 220.
also ample evidence that Siegrist unreasonably botched the job by neglecting to seek immediate help, and by leaving his unconscious friend out of the sight of others who might have come to his aid. There was no need to consider the moral quality of their relationship or the duties that may have emerged from that bond; the negligence claim stands on its own.

But what is even more interesting is the extent to which the court’s analysis of liability seemingly based on a “special relationship” is actually driven by the principles of ordinary negligence. Note the blend in the court’s explanation:

Farwell and Siegrist 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. Siegrist knew or should have known when he left Farwell, who was badly beaten and unconscious, in the back seat of his car that no one would find him by morning.51

At this point the court appeals to that standard of what would be “shocking to humanitarian considerations,” and to the “commonly accepted code of social conduct” to conclude that Siegrist had a duty to seek medical assistance or notify someone of Farwell’s condition.52 It seems, then, that the case stands for the proposition that as “companions engaged in a common undertaking,” there was a “special relationship” between the parties, therefore Siegrist had an affirmative obligation to come to Farwell’s aid.

51 Id. at 222.
52 Id.
What happens when the category of “special relationship” is excised from the analysis? It is interesting to note how little work it does, and how little is lost. For example, it becomes clear that leaving the badly beaten and unconscious Farwell in the back seat of his car where no one would find him until morning was unreasonable not because of the standard of care imposed due to the fact that they were companions in a social venture, but negligence pure and simple. The fact that they were “companions on a social venture” adds nothing to the analysis.

The duty in this case has nothing to do with a freestanding affirmative obligation, nor with the status of their relationships as friends or companions. Instead, it had everything to do with the question of whether Siegrist should have been responsible for the extent to which his own actions contributed to the risk that actually materialized in injury and death. Their friendship may have been a circumstance that led Siegrist to act in the first place, but the question of liability for negligence turns on his failure to take due care in the voluntary undertaking of a rescue underway, thus contributing to the risk that actually materialized. This is what crystallizes when the categorical frame of “special relationships” is excised from the analysis.

2. **People v. Beardsley**

Another case that occasionally surfaces in the discussions of affirmative obligations, *People v. Beardsley*, is not in the tort canon, but a criminal case. The analysis is nonetheless instructive and relevant. In this case, Carroll Beardsley, a

---

53 *People v. Beardsley*, 113 N.W. 1128 (1907). See Murphy, *supra* note 17, at 612. Many thanks to Gerald Uelmen for signaling to me the relevance of this criminal case to the tort analysis.
married man, was in a hurry to clean up his apartment before his wife’s return, eliminating evidence of drinking and the presence of his mistress, Blanche Burns. In the midst of the clean-up efforts, Burns consumed three to four grains of morphine and fell into a stupor. At this point Beardsley, who was also intoxicated, asked the young man who was helping him clean up to take Burns to a room in the basement, which was rented by another tenant, Mr. Skoba, who in the meantime had arrived on the scene. Beardsley asked Skoba to look after Burns and let her out the back way when she awoke. That evening Skoba became alarmed at her condition and called the city marshal and the doctor, who discovered that Burns was dead.\footnote{Beardsley, 113 N.W. at 1129.}

The case was prosecuted on the theory that Beardsley had a duty to care for Burns, and that his failure to do so rendered him legally responsible for her death.\footnote{Id.} Beardsley was convicted of manslaughter, and the Supreme Court of Michigan reversed. The issue on appeal was whether Beardsley had a legal duty to protect and care for Burns, or merely a moral obligation. Cases discussed included a number of circumstances in which criminal negligence was found for failure to care for members of one’s family; as well as the principle that once a person voluntarily assumes the care of a helpless human being, this person will be held to an implied legal duty to care for this person.\footnote{Id. at 1130.}

The analysis in Beardsley is an especially interesting example of how a categorical analysis of the relationship blinded the court to the most essential aspects

\footnotesize{\textsuperscript{54} Beardsley, 113 N.W. at 1129.} 
\footnotesize{\textsuperscript{55} Id.} 
\footnotesize{\textsuperscript{56} Id. at 1130.}
of the conduct at issue. There certainly would have been a question of fact as to whether Beardsley exercised “reasonable care” when he entrusted Burns to Skoba, and particularly whether, under the circumstances, Beardsley’s failure to convey crucial information about the suspected morphine consumption constituted criminal negligence. Further, a focus on conduct also would have led to an inquiry analogous to that in Farwell—to what extent did Beardsley’s instructions to Skoba constitute a botched rescue? In other words, did Beardsley’s voluntary undertaking—causing Burns’ transfer to the basement with probably inadequate information about her actual condition, and out of the sight of others who may have provided more adequate medical attention—constitute criminal negligence?

Instead, the court’s focus on the categorical analysis of the relationship at issue brings the case to turn on two elements that distract from these conduct-based questions: Burns’ sexual history and familiarity with intoxicants; and how the duty of care owed to her would be distinct from that owed to one’s wife.57 Rejecting the argument that Beardsley “stood toward this woman for the time being in the place of her natural guardian and protector,” the facts of the case were reduced to a question of status: “The fact that this woman was in his house created no such legal duty as exists in law and is due from a husband toward his wife.”58 It is fascinating to note how this

57 Id. at 1131 (“The record in this case discloses that the deceased was a woman past 30 years of age. She had been twice married. She was accustomed to visiting saloons and to the use of intoxicants. She previously had made arrangements with this man in Detroit at least twice. Thus there is no evidence or claim from this record that any duress, fraud, or deceit had been practiced upon her. On the contrary, it appears that she went upon this carouse with respondent voluntarily, and so continued to remain with him. Her entire conduct indicates that she had ample experience in such affairs.”).
58 Id.
focus on status led to the distortion of the facts that should have been central—what
Beardsley actually did with the body of a person who had fallen into a stupor. The
court completely missed this point, finding instead: “Respondent had assumed either
in fact or by implication no care or control over his companion.”59

3.  Cash as Witness to the Assault of Iverson

A final example of “special relationship” blinders emerges from a fact pattern
in which the witness-bystander had no previous connection to the victim of an assault,
but did have a bond of friendship with the perpetrator. As discussed above, David
Cash witnessed his best friend, Jeremey Strohmeyer, assaulting a seven-year-old girl,
Sherrice Iverson, as he peered over the stall in the ladies room after Strohmeyer had
followed Iverson in during “game” of hide-and-seek at a Las Vegas casino.60 Cash’s
relationship with Strohmeyer was such that it was not within the enumerated
categories for which the person would be legally responsible to control the
perpetrator’s actions, such as the parent of a minor child, in some circumstances.61

In the duty-to-rescue discussions of this case, analyses have generally focused
on Cash’s lack of a categorical connection to either Iverson or to Strohmeyer, and the

59 Id. See also id. (comparing the facts to a voluntary suicide attempt: “Had this been a case where two
men under like circumstances had voluntarily gone on a debauch together, and one had attempted
suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other
criminally responsible for omitting to make effort to rescue his companion. How can the fact that in
this case one of the parties was a woman change the principle of law applicable to it?”).
60 See discussion of the facts of this case supra, Chapter II.B.1, David Cash’s Complex Relationship
with the Perpetrator. See generally Nora Zamichow, The Fractured Life of Jeremy Strohmeyer, L.A.
61 See generally supra, Introduction (to the Thesis), at note 19 (discussing RESTATEMENT (SECOND) OF
TORTS § 315).
extent to which these categories should or should not have posed an insurmountable obstacle to liability for failure to rescue. What has remained obscure is that simpler, more direct, and perhaps more significant “plain vanilla” negligence question: to what extent did Cash contribute in some way to a risk that actually materialized in injury? Cash had followed Strohmeyer into the restroom and had witnessed the beginning of the violent turn of events. What seems to have escaped more detailed investigation is whether other people were standing outside the restroom who would have otherwise been suspicious or concerned about this movement of teenage boys and a little girl into the ladies room; and whether such witnesses could have interpreted Cash’s emergence from the restroom without comment as a signal that there was no foul play.

Consider how the case might be framed if Cash had entered the restroom after hearing the little girl scream. Such might have signaled to other hotel patrons that he was undertaking to see if the girl was safe, thus negatively influencing their own decisions whether to intervene. Under this scenario, Cash would not have done “nothing”—instead, his response could be framed as having undertaken to respond to a potential emergency, and once assumed, he did so negligently. Within this framework, Cash could have been held liable for failing to complete with due care a rescue he had undertaken, thus contributing to the risk of injury and death—and like

---

62 See Zamichow, supra note 60, at A18-19.
63 This is my embellishment, not a fact that is in the various accounts of what Cash saw or heard that night. See generally Zamichow, supra note 60.
Farwell and Beardsley, making it less likely that someone else would engage the scene.

*****

In each of these cases, the “special relationship” analysis leads to a kind of cul-de-sac: if the plaintiff and defendant are not connected through the defendant’s conduct which created or contributed to the risk that materialized in injury, then the only other way to establish a duty of care is by showing, as Cardi and Green put it, some form of “ex ante relationship or other dealing” between the parties.64 From the perspective of this cul-de-sac, it seems difficult to imagine circumstances in which one may have done nothing formal to put oneself into a pre-existing or “special” relationship with the other, yet one is nonetheless responsible for the extent to which one’s actions or omissions directly harm another person.

Is there a way out of the ex ante relational cul-de-sac? If the category of pre-existing or contractually grounded “special relationships” is excised from the analysis, is there a way to distinguish between the relationally-grounded duties that strangers such as engaged spectators may owe to others and an overly-broad “duty to all the world” that may lead to arbitrary line-drawing? The answer is yes, and fortunately, much of the difficult foundational theoretical work is well underway.

C. Theorizing Stranger-to-Stranger “Relational Duties”

An analytical framework that distinguishes between, on the one hand, manageable duties between strangers and on the other, unbounded meaningless “duty to all the world” has been eloquently theorized in the 1998 analysis by Goldberg and Zipursky, *The Moral of MacPherson*. The following section opens out their concept of “relational duty,” and explores the extent to which it might serve as a theoretical key to unlock some of the puzzles that “special relationships” tends to leave unresolved in the realm of stranger-to-stranger obligations.

1. Between Vague Universality and Rigid Categorization

In *The Moral of MacPherson*, Goldberg and Zipursky articulate a powerful set of distinctions that open up a fruitful terrain between a vague and unmanageable “universal duty” and the potential rigidity in the application of the category of “special relationships,” discussed above. The challenge, as Goldberg and Zipursky put it, is to reconcile the seemingly different halves of Cardozo’s jurisprudence. On one hand, in *MacPherson v. Buick*, Cardozo stated that courts should “put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.” On the other hand, Cardozo also announced a “relational concept” of duty in *Palsgraf*, insisting:

---

66 Id. at 1813.
“the duty to act reasonably is not a duty owed to the world at large, but a duty owed to the plaintiff in particular.”

How might the breakdown of the privity requirement—the need for recognition of a specific bond between two parties to a transaction—be distinguished from the imposition of a vague “duty to the world?” Goldberg and Zipursky explain a notion of “relational duty” can strike the balance between, on the one hand, the vagueness of a duty to the world at large, with concordant concerns about crushing liability; and on the other hand, the cramped sense that only pre-existing relationships and formal contracts can determine the scope of liability.

As they explain, the concept of “relational duty” can be understood as relational in three ways. First, the duty is relational in the sense that it is not general, but “owed by specific defendants or classes of defendants to specific plaintiffs or classes of plaintiffs, rather than by each individual to the world at large.” Second, it is relational in the sense of being “relationship-sensitive,” that is, standing in contrast to concepts of duty that are “abstract, transcendental, or context-independent.” Third, duty is relational in the sense that it is a deontological and non-instrumental concept, “taking seriously the idea that ‘duty’ carries with it a notion of obligatory force.” In contrast to instrumental theories of tort law, the inquiry is framed not according to

---

67 Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928) (“What the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right.”). See Moral of MacPherson, supra note 65, at 1813. See also WEINRIB, PRIVATE LAW, supra note 29, at 159-64 (discussing how Palsgraf rejects the universalist conception of duty in negligence law).

68 Moral of MacPherson, supra note 65, at 1744. See also id. n.44 (sources discussing relational nature of tort law); Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 VAND. L. REV. 1, 59-60 (1998) (distinguishing between relational and non-relational norms, and arguing that tort law is made up of relational norms).
questions such as whether liability is socially desirable, but as part of an analytical inquiry into the nature of a basic element of a tort claim: whether defendant’s conduct breached an obligation to the plaintiff.69

Goldberg and Zipursky discern two components to the analysis which led to the shift in MacPherson away from the nineteenth-century negligence rule “that each person’s duties of due care ran only to a limited set of persons with respect to whom he or she stood in a pre-established, socially-recognized relationship.”70 In what they define as the “Relationality Thesis,” the first component is “the idea that duties run to persons or classes of persons—that they are in this analytic sense relational, rather than non-relational or simple.” The second, termed the “Special-Relationship Thesis,” is that “these relational duties of due care run only to persons with whom one has a pre-existing, socially-structured relationship that fits into one of a limited set of forms.”71

According to Goldberg and Zipursky, denial of privity as the basis for tort obligations in MacPherson was a rejection of the Special-Relationship Thesis, but not of the Relationality Thesis. In other words, MacPherson does not entail the adoption of a meaningless “duty to the world,” but instead leaves room for the articulation of “duties to take care not to harm others, even if one’s relationship to those persons does not fit into one of the traditional categories with respect to which courts have

---

69 Moral of MacPherson, supra note 65, at 1824.
70 Id. at 1821.
71 Id.
announced such duties.” This would be fully in line with *Palsgraf’s* articulation of duty: “the duty to act reasonably is not a duty owed to the world at large, but a duty owed to the plaintiff in particular.”

It is precisely here that we can find the theoretical resources to articulate the contours of “stranger-to-stranger” obligations. As Goldberg and Zipursky explain, “one may have duties of care to each other person in society, even to strangers.” Under this theory, to say that one may have a “relational obligation” to a “stranger” is not an oxymoron, because these duties of due care “involve obligations to particular persons or classes of persons to take care not to injure them.” In sum:

... one need not embrace Holmes’s notion of a duty to the world in order to conclude that strangers owe one another duties of care. Conversely, the fact that strangers do owe each other duties of care is no reason to believe that negligence law is appropriately reduced to a generic, non-relational directive instructing actors to avoid acting unreasonably.

---

72 Id.
73 Id. at 1813.
74 See id. at 1748 (noting cases in which courts recognized basic duties of care between strangers even in the absence of any business or social relationship).
75 Id. at 1822. See Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 Fordham L. Rev. 649, 661 (1998) (“stranger-stranger is a particular category of relationship in which a relatively modest duty of care is owed.”).
76 Id. at 1822. See id. at 1821 (a person who does not fall within the class of persons to whom the defendant owes a duty of care cannot recover for her injuries, even if those injuries are caused by the defendant’s breach of duty to others.”); id. at 1823 (a bystander pedestrian injured by an automobile could be permitted a cause of action against the auto manufacturer because the bystander was part of the class of persons to whom the manufacturer owed a duty of vigilance). Note that this analysis focused on avoiding injury would not extend to an affirmative obligation to rescue, but it would apply to the actions of an engaged spectator when complimented by a theorization of the harm.
77 Id. at 1824. See John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 Ind. L. J. 569, 595 (2013) (discussing the analysis of *Heaven v. Pender* in the *Lauer v. City of New York* dissent: duty in negligence, as in morality, turns primarily on how an actor is positioned relative to another: “whenever one person is by
2. **Bounded Sensitivity to Context and Circumstances**

A second concern in articulating duties between strangers is that the analysis will simply melt into the vagaries of a stand-alone analysis of foreseeability or proximate cause, which in turn will lead to the arbitrary process of instrumental line-drawing.\(^\text{78}\) The second element of Goldberg and Zipursky’s relational duty theory, that the determination of duty is “relationship-sensitive, as opposed to abstract, transcendental, or context-independent”\(^\text{79}\) helps to respond to this quandary.

When the Special-Relationship Thesis is distinguished from the Relationality Thesis, a new horizon emerges, offering a contextually grounded approach to the question “who, then, in law is my neighbor”: the set of persons to whom I owe a duty of care, the persons who are “so closely and directly affected by my act,” are those circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances 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.”\(^\text{78}\).

\(^{78}\) See, e.g., Richard W. Wright, *The Standards of Care in Negligence Law*, in *THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 249, 274 (David G. Owen ed. 1997) (discussing scholarship arguing that the application of affirmative obligations would be impeded by the indeterminateness and impracticability of their application; the intractability of deciding who should be liable when multiple people present; and the general impossibility of distinguishing easy from not-easy cases); James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 911-913, 930-934 (discussing concerns about line-drawing under the rubric of process constraints) (1982); Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991, 1001-1002, 1006 (2000) (listing practical reasons why courts do not impose civil liability for failure to rescue). In one of the earliest arguments for an affirmative duty to rescue, James Barr Ames noted that the difficulty of line-drawing “has continually to be faced in the law.” See James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908), discussed in Chapter One at note 4. The mantra appears frequently in the rescue literature, but rarely gestures beyond a thinly supported assertion. But see Peter K. Unger, *Living High and Letting Die*, 53-54 (1996) (grappling directly with the line-drawing question: “the upshot of this is that there is nothing morally special about rescue cases; the widespread assumption to the contrary is due entirely to the psychological effect that a dramatic confrontation with a particular person’s needs has on our futility thinking.”).

\(^{79}\) *Moral of MacPherson, supra* note 65, at 1744.
that “I ought reasonably to have in contemplation as being so affected when I am
directing my mind to the acts or omissions which are called into question.”80 Such
persons are not necessarily limited to those with whom I have a pre-existing
relationship; but neither does it consist of a vague “universal duty to the world.”
Instead, the Relationality Thesis clarifies that the duty embraces the specific persons
that I should have in mind as I move about my daily activities, people whom I can
reasonably contemplate being affected by my actions. The analysis is bounded—
because subject to a contextual and common-sense understanding of the nature of the
relationships within contemplation.81

Turning to Jeremy Waldron’s analysis of the Good Samaritan parable, his
emphasis on the category of proximity—itself a circumstantial and contextual
feature—can further strengthen the foundations of a relational duty between
strangers. Not impeded by the lack of an antecedent “special relationship” between
the crime victim and the rescuer in that story, Waldron describes how the particularity
of their encounter rendered their relationship concrete: “Their relationship at that time
and in that place was morally significant in its particularity, and special by virtue of
the immediate concrete circumstances of their encounter at that particular moment in

80 Id. at 1749 (quoting Lord Atkin’s opinion in Donoghue v. Stevenson).
81 See Benjamin C. Zipursky, Philosophy of Tort Law (Zipursky, Philosophy of Tort Law”) in
BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 131 (2005) (“If contemporary
moral philosophers are right to suggest that the abstractness and acontextuality of the framing of moral
problems often plays a large role in their evolution into conundrums—and I think they are—then
philosophical examination of legal aspects of these problems will also illuminate their moral aspects.”)
that particular place." The “important work in the story,” he surmises, “is done not by any general cosmopolitan universalism, but by the sheer particularity of the accidental conjunction in time and space of two concrete individuals.”

Applying this framework to the encounter between David Cash and Sherrice Iverson, a situation in which there was clearly no “antecedent relationship,” Waldron draws out the distinction, arguing that their relationship was not “wholly abstract”:

. . . the relation of one instance of common humanity or of one anonymous citizen of the world to another. Their relationship at that time and in that place was morally significant in its particularity, and it was special by virtue of the immediate concrete circumstances of their encounter. Cash was close enough to touch the little girl, in circumstances in which she desperately needed someone’s help and he was the only one at hand.

3. The Relational Duties of Engaged Spectators

In light of the conceptual framework discussed above, how might the element of duty be analyzed in the case of engaged spectators—those who record an accident or assault and do not call for help? Note that in these circumstances proximity and engagement dissipate concerns about an infinite number of plaintiffs battering down the “floodgates” of litigation against an infinite number of defendants.

82 Jeremy Waldron, Who is My Neighbor?: Humanity and Proximity [“Waldron, Humanity”], 86 MONIST 333, 346 (2003). See also id. at 347 (“the sheer fact of proximity (to a person in desperate need) gives rise to special duties, because of what proximity to need is like.”); Jeremy Waldron, On the Road: Good Samaritans and Compelling Duties (“Waldron, On the Road”), 40 SANTA CLARA L. REV. 1053, 1097 (2000) (“Instead of saying that Jesus’ parable establishes an all-purpose neighborhood as between any two members of the human race, we focus instead on the specialness of the Samaritan’s proximity to the man who fell among thieves.”).
83 Waldron, On the Road, supra note 82, at 1098.
84 Id. at 1102.
Note also that the threshold of the bystander’s decision to engage safeguards against the specter of the moral overload of having to concern oneself with random and numerous strangers. Of course one cannot possibly take the same high level of care toward each person in every circumstance; people generally construct “differentiated notions of obligation in order to prioritize our caretaking efforts.”

But engaged spectators have already prioritized: by stopping to focus on the incident, they have indicated that other priorities are not pressing at that moment. To hold engaged spectators accountable for how they engage the scene and the person of the victim is not to demand that they should have gone out of their way to focus on the situation at hand—they have already made the decision to stay or to place themselves on the scene. To articulate the contours of a duty owed to a victim by an engaged spectator who stops to engage the scene of an emergency is not to demand a vast and unbounded “universal duty to the world.” Instead, based on a prior decision to engage, it is to demand a particular kind of attention to the human being in a particular circumstance of urgency and vulnerability.

A further limiting circumstance is the category of “emergency” itself, in which the life and/or bodily integrity of another person is at risk—which by definition is not an ordinary occurrence. This qualifier constitutes an additional safeguard against swamping legitimately differentiated priorities, and it also adds an important element to the contextual analysis. As Goldberg and Zipursky note, “a category of

---

85 Cardi & Green, supra note 64, at 719. See Moral of McPherson, supra note 65, at 1831-36.
‘emergency’ does not threaten to swamp each of us with pressing responsibilities, thereby undermining the capacity of the sense of duty to prioritize.”

In the Robles case, the bystanders outside of the Port Authority bus depot were, under any analysis, legal strangers to Jose Robles. They certainly did not fall into any of the categories of a “special relationship” with him. But those who did step up to the scene and who stopped to focus their cell phones on him as a subject—or as an object—for their photography—were undoubtedly connected with him in a particular way in that moment. A duty of would attach not because of a vague connection to all the world, but because of indicia of a specific connection between this named bystander who decided to engage the scene and this named victim, Jose Robles.

A final concern would be that from a moral perspective there is something odd and anomalous about the way that legal duties are spliced up within this framework. Is the upshot of this analysis that a pure bystander who simply walks by an unfolding tragedy without engaging at all ends up less culpable than a person who engages the scene and the victim, but only in a partial or incomplete way? In other words, does the lack of a legal duty say anything determinate about the moral duty? As discussed above, the answer is no. The reason for the distinction between “pure bystanders” and “engaged spectators” is grounded not in a commentary on the shape of the moral obligations, but on an assessment that the law is a clumsy and invasive instrument to probe this kind of bystander decision-making. To allow for discretion

86 Moral of MacPherson, supra note 65, at 1836-37.
on the question of whether to engage a scene or situation is not the same as condoning, approving or celebrating non-engagement. It is simply to acknowledge that within the interior life of bystanders, there are areas of discernment which the law should neither probe nor invade.

In contrast, the shape of the duty owed by the engaged spectator would be in conformity and proportion to the bystander’s engagement with the circumstances and consequent relationship with the victim. It would not be parasitic on the primary injury, or a “duty to rescue,” per se, because the engaged spectator was not responsible for the risk that materialized in the predicate injury or assault. But the duty would be shaped by the specific circumstances at issue—including the assault, and including the bystander’s direct engagement with the assault. In these circumstances, the engaged spectator would have the duty to act reasonably toward the vulnerable person—including not inflicting on the victim a distinct harm. It is to this question of theorizing that harm that Chapter Eight now turns.
VIII. “Exploitative Objectification” as a Legally Cognizable Harm

This Chapter works to flesh out the concept of “exploitative objectification” as a legally cognizable harm. This part of the analysis is challenging not because the proposed description of a harm is counter-intuitive or unreasonable, but because it pushes mighty against the weight of the history of tort law in the United States, for many decades grounded in an understanding of damages as based almost exclusively in economically measurable harm. Given the nature of this challenge, the Chapter begins with an analysis of some of the “roads not taken” in the history of U.S. tort law in order to expose how the paths chosen have led to a severely constrained conceptual and imaginative horizon for articulating the contours of a harm that is at its core a violation of dignitary and personality. Hoping to recover some of these broader possibilities, the Chapter then turns to various interdisciplinary conceptual resources that highlight one or more aspects of the dignitary harm to a vulnerable person in need of emergency assistance when engaged spectators who have the means to call for help stand by and take pictures instead.

A. Under-Theorization of Dignitary Harm: The Roads Not Taken

Giving a vivid image of some of the roads not traveled in tort law, Robin West probes the invisibility of tort law in F. Scott Fitzgerald’s depiction in *The Great Gatsby* of interactions following automobile accidents in the 1920s. As West recounts, the novel is replete with clearly tortious conduct, especially evident in the cruel indifference and brutality of the main characters, Tom and Daisy, who in the
novel’s climax are responsible for a hit-and-run death. As the narrator, Nick, describes: “They were careless people, Tom and Daisy—they smashed things and creatures and then retreated back into their money or their vast carelessness, or whatever it was that kept them together, and let other people clean up the mess they had made.”

Why has tort law not been more present in efforts to clean up the mess? As West highlights, historically, efforts to shift the focus of tort law to a more efficient, accessible, and functional mechanism for compensation has made the connection between “tort” and “wrong” extremely attenuated. Moving through the twentieth century, various streams of law and economics theory have helped to further erode tort concepts of “wrong” through the incursion of contract into tort. Tort was gradually transformed into “a body of default contract rules, in which the idea of ‘wrong’ obviously has no place, displaced by the idea of hypothetical contractual

---

1 Robin West, *Gatsby and Tort*, in *AMERICAN GUY: MASCULINITY IN AMERICAN LAW AND LITERATURE* 87 (Saul Levmore & Martha C. Nussbaum eds., 2014) (quoting F. SCOTT FITZGERALD, *THE GREAT GATSBY* 187-88 (1925)). See id. at 116 (“Carelessly wrecking lives is a private wrong that deserves recompense, and corrective justice does demand that a state not permit a wrongdoer to retreat into his or her private money and let others clean up the mess.”); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (“WEINRIB, PRIVATE LAW”) 152-53 (1995) (“To refuse to mitigate the risk of one’s activity is to treat the world as a dumping ground for one’s harmful effects, as if it were uninhabited by other agents…”).

2 West, *Gatsby*, supra note 1, at 112. See also id. at 122 (tort law “is no longer really about fault, or wrongs, at all.”); id. at 108 (“That the word ‘tort’ means ‘wrong’ is better known by crossword puzzle mavens than tort students or lawyers.”); Robin West, *Cyber-Sexual Harassment*, JOTWELL (January 21, 2015) (reviewing Danielle Keats Citron, *HATE CRIMES IN CYBERSPACE* (2014)), http://juris.jotwell.com/cyber-sexual-harassment/ (describing tort law as “a body of law that seeks to provide redress for private wrongs, has been widely discredited and its efficacy badly compromised by all sorts of forces, and consequently, it simply doesn’t present itself to the minds of victims or their counselors as a credible vehicle for pursuing justice against those who wrong them).
intent.” As G. Edward White summarized the movement from “admonition to compensation”: “Doctrines whose purpose was to confine tortiously liable conduct to ‘blameworthy’ conduct would lose their influence and be replaced with policies whose purpose was to secure the efficient and fair compensation of injuries.”

As Goldberg and Zipursky explain in a full-length article treatment of the subject, *Torts as Wrongs*, at this point torts scholarship is dominated by “a conception of Torts as law for the allocation of accidentally caused losses.” The jurisprudential, moral, political and conceptual reasons for placing losses at the center of tort theory now present “a challenge for those who wish to retain a tort theory centered on wrongs.”

The conceptual fallout is especially problematic for projects like this Thesis, an attempt to theorize more subtle harms in a way that builds on and is not disconnected from moral foundations. As West describes:

> [B]y jettisoning the moralistic understanding of tort law, and the moralistic, tort based duty of reasonableness at its core, we lose the content, and hence the teaching, of an elastic legal norm of minimal, required, civil conduct toward each other . . . Likewise, when we trade a moral reckoning of conduct, backed by law, for greater compensation for victims, we lose not only a conception of the character flaws behind negligent conduct, but also a robust conception of the virtue of reasonableness it requires: non-brutish

---

6 Id. at 920.
carefulness in one’s conduct, with a due regard for the consequences of one’s conduct might visit upon others.⁷

The reduction of much of tort law to a focus on the losses that generally result from accidents—and what is in essence a deterrence-based search for the cheapest cost avoider—has made invisible or left underdeveloped large swaths of private wrongs for which there should be private redress. The sections below discuss two examples of this road not taken, at different points in the historical journey, followed by a map of where we might travel from here.

1. The Road Not Taken in Privacy Law

One of the most striking examples of the redaction from tort law of a vocabulary of “wrongs,” and its replacement with depictions of materially measurable components, is in the history of the privacy torts. In 1890, Samuel D. Warren and Louis D. Brandeis penned “The Right to Privacy,” the first modern articulation of a tort remedy for invasion of privacy.⁸ According to treatise author William Prosser, the article was sparked by their concern with the extent to which the “yellow journalism” was invading the personal lives of the Boston elite.⁹ They examined the

---

⁷ West, Gatsby, supra note 1, at 116. See generally Morton J. Horwitz, The Transformation of American Law 1870-1960, 109-143 (1992) (describing the war of Oliver Wendell Holmes for objectivism over subjectivism and amoralism over moralism and how the success of his battles on this front helped to dislodge the idea of moral fault from the legal imagination). See generally Torts as Wrongs, supra note 5, at 921-22 (describing the project of Oliver Wendell Holmes to de-moralize the law, consciously focusing on accidents and liability without fault).


⁹ See William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 423 (1960) (noting that the “tree” of privacy analysis was to grow out of the press coverage of the wedding of Warren’s daughter). This is yet
“unauthorized circulation of portraits of private persons”¹⁰ and mined the common law of tort for a remedy distinct from property or contract.

Seventy years later, Prosser systemized the concept into four distinct “interests” held together only loosely by the common umbrella of “an interference with the right of the plaintiff . . . ‘to be let alone.’”¹¹ According to Prosser, tortious intrusion into these interest areas include: 1) Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; 2) Public disclosure of embarrassing private facts about the plaintiff; 3) Publicity which places the plaintiff in a false light in the public eye; 4) Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.¹² Thus, as one commentator critiqued, in Prosser’s view the “interest” that we label “privacy” is not an independent social value, but only “a composite of the interests in reputation, emotional tranquility and intangible property.”¹³ As Prosser was also the Reporter for the second Restatement of Torts, this structure for examining the law of privacy was incorporated into the Restatement, and gained traction in just about every jurisdiction across the country.¹⁴

---

¹⁰ Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193: Demystifying a Landmark Citation, 13 SUFFOLK L. REV. 875, 892-893 (1979) (also discussing 1890 coverage of the wedding of Warren’s cousin in the “Table Gossip” section of the Boston Globe, surmising that the reports were hardly invasive or embarrassing). Thanks to Joseph Page for the lead into this critique of Prosser in privacy law.

¹¹ Prosser, Privacy, supra note 9, at 389.

¹² Id.


¹⁴ Neil M. Richards & Daniel J. Solove, Prosser’s Privacy Law: A Mixed Legacy, 98 CAL. L. REV. 1887, 1890 (2010) (“Even today most courts look to the Restatement’s formulation of the privacy torts as the primary authority.”). See also Mary Margaret Giannini, Slow Acid Drips and Evidentiary
Why does this systemization of privacy law represent a road not taken in tort law’s theorization of harm? Right on the heels of Prosser’s 1960 “Privacy,” Edward J. Bloustein argued that Prosser had entirely missed the point of Warren and Brandeis’s articulation of the tort and their efforts to articulate a unified theory of “inviolate personality.” By reducing the gravamen of the harm to mere protection of external or material factors such as protection of reputation and economic interests, Prosser failed to capture the “spiritual interest” at the core of the Warren and Brandeis analysis: that of protecting “the individual’s independence, dignity and integrity,” as part of that which “defines man’s essence as a unique and self-determining being.”

Even Prosser’s articulation of emotional harm, which would seem to allow for a slightly more spiritual dimension, remained tethered to an analogy to physical harm, thus also missing attention to a more interior dimension.

In his project to systemize privacy law, Prosser’s technique was the same as that unmasked in the Chapter One discussion of the “easy rescue” canon. He took what seemed to be a formless mass of data in the cases, shoehorned it into categories

---


15 Bloustein, Human Dignity, supra note 13 at 968. See also Harry Kalven, Jr., Privacy in Tort Law—Were Warren and Brandeis Wrong? 31 LAW & CONTEMP. PROBS. 326, 333 (1966) (“the deadening common sense of the Prosser approach cuts the tort loose from the philosophic moorings Warren and Brandeis gave it, from, that is, the excitement of association with the grand norm of privacy. Bloustein’s gallant article is in effect an attempt to return analysis of the tort to the moral tone of Warren and Brandeis.”); Edward J. Bloustein, The First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 RUTGERS L. REV. 41, 54 (1974) (discussing privacy as a violation of the self: “the innermost region of being—the soul if you will—has been bruised by exposure to the world.”).
that reflected his own particularistic lens, and then he complained about the shallowness of the courts’ analyses when the cases did not exactly fit his formula.16

Prosser’s categorization of *DeMay v. Roberts* is indicative of this reductive distortion.17 In that case, a woman brought suit against an unwanted spectator in her giving birth to her child. For Prosser, the core “interest” implicated in this case was emotional equanimity. While that may have been a factor, it was not at the core of the complaint. A Bloustein critiques:

… the intrusion is demeaning to individuality, is an affront to personal dignity. A woman’s legal right to bear children without unwanted onlookers does not turn on the desire to protect her emotional equanimity, but rather on a desire to enhance her individuality and human dignity. When the right is violated she suffers outrage or affront, not necessarily mental trauma or distress. And even where she does undergo anxiety or other symptoms of mental distress as a result, these consequences themselves flow from the indignity which has been done to her.18

Why is it important to identify the dignitary interest at the core of the wrong?

First, in working toward a more robust theorization of the nature of the harm, it is

16 See, e.g., Bloustein, *Human Dignity*, supra note 13 at 972 (lamenting how in the intrusion cases Prosser superimposes his own sense of the “gravamen” of harm, but “in no case in this group is the mental distress said by the court to be the basis or gravamen of the cause of action.”). See also WHITE, *supra* note 4, at 161 (noting that Prosser created “pseudo-rules,” “classifications that purported to summarize the ‘state of the law’ in a given area of Torts, but were in fact simply devices that aided in summary and synthesis of a disparate mass of material. Unlike the classifications attempted by legal scientists, which were intended to function as working doctrinal principles, Prosser’s efforts were only to rest some surface intelligibility from the chaos of the cases before him.”). See also Vernon Valentine Palmer, *Three Milestones in the History of Privacy in the United States*, 6788-89 (2011) (noting the “liberties” Prosser took with the privacy cases, “retrofitting them for his purposes, and boldly reading in a rationalization that the judges had not considered, or realized they needed.”).
17 See *DeMay v. Roberts*, 9 N.W. 146 (Mich. 1881).
helpful to distinguish the *wrong* of the intrusion from the effects of that intrusion. The objective nature of the harm inflicted (intrusion) is not reducible only to its effects (e.g., embarrassment or distress), but can stands on its own, as in and of itself a wrong because of the violation of dignity and personality.\textsuperscript{19}

Similarly, in the public disclosure cases, Prosser’s analysis reduced the harm to its result or effect: “that the public has been led to adopt a certain attitude or opinion concerning them—whether true or false, hostile or friendly.”\textsuperscript{20} Instead, the gravamen of the harm in these cases is much broader: in the fact that “some aspect of their life has been held up to public scrutiny at all.”\textsuperscript{21} For example, in a case in which a woman who was not a public figure, and whose effort to turn over a new leaf had been destroyed by publication of a story regarding her distant past, the wrong should not have been reduced to the impact on one’s reputation; instead, “the damage is to an individual’s self-respect in being made a public spectacle.”\textsuperscript{22}

\textsuperscript{19} Bloustein emphasizes: “They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma. Bloustein, *Human Dignity*, supra note 13 at 973. See also Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law of Tort*, 77 CAL. L. REV. 957, 959-960 (1989) (discussing Hamberger v. Eastman, 206 A.2d 239 (1964), analyzing the narrowness of a focus on “mental distress” for the tort of intrusion for installation of an eavesdropping device in their bedroom—the invasion was such not merely because plaintiffs were “discomforted,” but because it was “offensive to any person of ordinary sensibilities,” and thus policing the “limits of decency.”). Note also the parallel to the analysis of harm under the Fourth Amendment constitutional protection against unlawful search and seizure in the Brandeis dissent in *Olmstead v. United States*, explaining that the constitutional violation should hinge not on physical trespass but on protection that encompasses “man’s spiritual nature,” and so protect persons in “in their beliefs, their thoughts, their emotions and their sensations,” so as to protect the principle of “inviolate personality.” Bloustein, *Human Dignity*, supra note 13, at 976-77. See also Olmstead v. United States, 277 U.S. 471, 483 (1928).

\textsuperscript{20} Bloustein, *Human Dignity*, supra note 13, at 979.

\textsuperscript{21} Id. (discussing Melvin v. Reid, 112 Cal. App. 285 (Cal. Ct. App. 1931)).

\textsuperscript{22} Id. at 981. Cf. Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 487 (2010-2011) (noting the irrelevance of a reputational attack in
As will be discussed more fully below with the example of the hacking of Jennifer Lawrence’s intimate pictures, there is something especially offensive about the reduction of a claim grounded in the unauthorized use of a photograph to the harm of interference with a proprietary interest. In some cases the gravamen of the harm may be better expressed as mortification, humiliation, degradation, or a broader “right to be protected against the commercial exploitation of one’s personality.” In other words, the harm could be compounded by the suggestion that it necessarily boils down to a missed business opportunity. Those pictures are none of your business, and no, I wasn’t planning on selling them myself. Dignity is prior to the proprietary interest, and constitutes the foundation for the protection against the various forms of invasion. As Bloustein explains, every person “has a right to prevent the commercial exploitation of his personality, not because of commercial worth, but because it would be demeaning to human dignity to fail to enforce such a right.”

In sum, as Bloustein observed, the case law too often confuses concepts that should be distinguished: “distress, anguish, humiliation, despair, anxiety, mental illness, indignity, mental suffering, and psychosis.” Prosser’s categories, focused for the most part on materially measurable harm, have hampered the development of

---

23 See discussion infra at note 60 ff.
24 Bloustein, Human Dignity, supra note 13, at 987.
25 Id. at 988, n.144 (citing Hill v. Hayes, 240 N.Y.S.2d 286, 290 (1st Dep’t 1963), and other cases).
26 Id. at 989.
27 Id. at 1002.
more sophisticated and nuanced conceptions of harm, especially to the extent that the harm is not easily expressed in material terms.\footnote{See Richards & Solove, supra note 14, at 1922 (lamenting how Prosser’s categorizes hamper the field’s work of coming to a “more sophisticated conception of harm.”); id. at 1923 (contrasting the “bold and generative spirit” of Warren and Brandeis with Prosser’s “rigid and ossifying” account that had a “stultifying effect” on the privacy torts); id. at 1916-17, discussing Jonathan Kahn, Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity, 17 CARDOZO Arts & Ent. L. J. 213, 223 (1999) (“early association of appropriation claims with such intangible, non-commensurable attributes of the self as dignity and the integrity of one’s persona seems to have been lost, or at least misplaced, as property-based conceptions of the legal status of identity have come to the fore.”)
}

This turn in U.S. tort law was not inevitable.\footnote{See Paul M. Schwartz & Karl-Nikolaus Peifer, Prosser’s Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept? 98 CAL. L. REV. 1925, 1943 (2010) (study comparing U.S. and German privacy law discussing the extent to which Warren and Brandeis themselves may be been influenced by a concept from German philosophy, “the right of personality.”)} Several authors had proposed alternative paths, rallying around the idea of “the right of personality” as a foundation for a privacy tort.\footnote{Id. at 1944-45 (in addition to Bloustein, authors proposing alternatives included Roscoe Pound and Louis Nizer). See also Post, supra note 19; Anita L. Allen, What We Must Hide: The Ethics of Privacy and the Ethos of Disclosure, 25. ST. THOMAS L. REV. 1, 5-6 (2012) (listing of the non-material goods of privacy); JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 18 (2000) (discussing the Jewish law concept of hezek re’iyah, defined as the injury caused by seeing or the injury caused by being seen, the offense to individuals and their community to observe others’ intimacies: “To whatever extent the unwanted gaze establishes its sway [over the private domain of another], there is injury, because the damage caused by the gaze has no measure.”) (discussed in Anita L. Allen, The Wanted Gaze: Accountability for Interpersonal Conduct at Work, 80 GEO. L.J. 2013, 2015 (2001)).} We would certainly have resources within our legal imagination to articulate the harm of invasions to privacy on the foundation of dignity, rather than shoeorning the contours of harm into the constraints of a loss recompensable in market terms.

What Brandeis and others bring into relief is “that the interest served in the privacy cases is in some sense a spiritual interest rather than an interest in property or
reputation.” Further—and especially important for the analysis in this Thesis—“the spiritual characteristic which is at issue is not a form of trauma, mental illness or distress, but rather individuality or freedom.”

For tort law, an important upshot of these distinctive features of the harm is that is that it may not be repaired, and “the loss suffered is not one which may be made good by an award of damages.” Instead, and as will be explored further below, because “the injury is to our individuality, to our dignity as individuals,” the legal remedy takes on a different meaning, representing “a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.”

2. The Road Not Taken in Laws against Sexual Harassment

A second example of the road not taken in tort law can be traced to a step in the historical journey to address gender-based sexual harms, and in particular, the choices that Catharine MacKinnon and the feminist legal reformers made for theorizing remedies for sexual harassment in the 1970s. MacKinnon’s extremely influential arguments helped to set the tone, direction, and strategy for legal reform with a conscious turn away from the law of tort toward equality-based arguments about the economic harm caused to working women as a group. As a result, the terrain of the torts which might have served as a foundation for the further

31 Bloustein, Human Dignity, supra note 13, at 1002.
32 See discussion infra at VIII.A.3, The Road Not Taken in the Law of Damages.
33 Bloustein, Human Dignity, supra note 13, at 1003.
theorization of dignitary harm have remained disfavored, under-developed, and in some cases completely blocked.\(^\text{34}\)

In her ground-breaking work, *The Sexual Harassment of Working Women*, MacKinnon noted a number of limitations of tort law that rendered the field “inadequate” to address the problem of sexual harassment.\(^\text{35}\) First, the mismatch between how women and men perceive offensive sexual contact would seem to call for a more individuated standard of assessment, requiring something of a stretch beyond the contours of tort’s “reasonable man” framework.\(^\text{36}\) Second, and “most broadly considered”:

\[\text{[T]ort is conceptually inadequate to the problem of sexual harassment to the extent that it rips injuries to women’s sexuality out of the context of women’s social circumstances as a whole. In particular, short of developing a new tort for sexual harassment as such, the tort approach misses the nexus between women’s sexuality and women’s employment, the system of reciprocal sanctions which, to women as a gender, become cumulative.}\(^\text{37}\)

According to MacKinnon, the “unsituated” and “one at a time” quality of the torts assessment of sexual injury ran the risk of having injuries appear as “incidental or deviant aberrations which arise in one-to-one relationships gone wrong”—thus missing the larger and more pervasive patterns characteristic of a “group-defined

---

\(^\text{34}\) Thanks to Robin West for the insight into this connection to Catharine MacKinnon’s strategy. *See also* CHAMALLAS & W R I G G I N S at 87 (“The continued separation of torts and civil rights, moreover, threatens to stunt the development of general tort principles.”)


\(^\text{36}\) Id. at 171. *See also* Bender, *supra* note 10, at 20-25 (critiquing the reasonable man standard in tort law).

injury.” As MacKinnon observes, other defects of tort law include the inability to free the analysis from a “disabling (and cloying) moralism” which works to exclude women from social life. In sum, MacKinnon argues,

The major difference between the tort approach and the discrimination approach, then, is that tort sees sexual harassment as an illicit act, a moral infraction, an outrage to the individual’s sensibilities and the society’s cherished but un-lived values. Discrimination law casts the same acts as economic coercion, in which material survival is held hostage to sexual submission.

As will be discussed more fully below, these two avenues for redress need not have been held in such strong tension. It would certainly be possible to imagine a torts scheme sensitive both to the systematic impact, including the reality of economic coercion, and to sexual harassment as a wrong to the person. This however, remained a path not taken, as harms to the psyche were overshadowed by the regulatory scheme’s emphasis on economic harm.

---

38 Id. at 172.
39 Id.
40 Id. at 173.
41 West, Cyber-Sexual Harassment, supra note 2 (a claim for sexual harassment “...requires a showing of cognizable harm to pocketbook interests, rather than harm to the psyche, reputation, or emotional wellbeing. The very idea of the civil right to be free of sexual harassment is consequently tied to economic equality, and hence to the workplace, where incomes are threatened, rather than to psychic or physical injury, wherever it occurs.” See also id. (explaining the missed educational and political opportunity for tort actions to help educate “an otherwise oblivious public to the harms of sexual harassment that go beyond the monetary, and well beyond the particular and peculiar locale of the workplace.”)). It would be interesting to explore further the extent to which this move would necessarily push up against the concept of these harms as having a gender-specific impact. See e.g., CHAMALLAS & WRIGGINS supra note 3, at 91 (arguing that cases involving sexual exploitation, reproductive injury, and harm to close family members deserve special scrutiny “in part because of their close connection to women’s interests and to gender equality.”); id. at 189 (argument for heightened protection in tort law grounded in the crucial importance for women’s equality—damage is to well-being in context central to one’s identity “as a woman, mother, or family member;” thus the
What has been the consequence of this turn away from tort toward civil rights? The road not taken in sexual harassment law has lead to a reduction in the development of legal instruments that could have helped to theorize the harm of sexual harassment and assault in a variety of settings, not just work environments.\textsuperscript{42} As with privacy law, here too, comparative work illustrates that the U.S. legal regime for addressing the harm of sexual harassment need not have taken this turn.\textsuperscript{43}

3. The Road Not Taken in the Law of Damages

The patterns discussed above are also evident in the law of damages. One reason that tort law has such a difficult time recognizing harms to personality and dignity is that they are difficult to quantify. It seems both easier and more comprehensible to calculate in monetary terms a lost business opportunity, or how damage to one’s reputation might impact employment opportunities. Returning to the example of intentionally spitting on another person as a sign of one’s disrespect, how

\begin{quote}
project is to name sexual autonomy and reproduction as special interests that trigger a duty of care in negligence law).
\end{quote}

\textsuperscript{42} See West, Cyber-Sexual Harassment, supra note 2 (“…feminist reformers forewent the opportunity to focus on the physical and psychic injuries occasioned by harassment and assault in all spheres: employment, the home, the street, and cyberspace all.”). An analogy could be drawn to concerns about sustaining the public school system when the people with innovative and creative insights to improve the system as a whole pour all of their resources into charter or private schools. See also Chamallas & Wiggins, supra note 3, at 65-68, 76-86 (suggesting avenues for a more robust theorizing of torts for sexual harassment); id. at 83 (noting the under-theorization of older particularized torts, thus failing to capture the contours of sexual harassment).

\textsuperscript{43} L. Camille Hérbert, Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort, 75 Ohio St. L. J. 1345, 1352 (2014) (discussing Canadian Supreme Court interpretation of a provincial provision which is grounded in the core value of dignity and self-respect, not simply economic harm: “By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.”).
might one quantify the damage of that wrong? While there was certainly a loss of respect, a calculation of “loss” in quantifiable terms seems out of place.

As the driving rationale for tort law moved from “admonition to compensation,” “blameworthy” conduct also began to slip under the radar. So too, a rationale for damages geared toward addressing blameworthy conduct began to slip out of sight. To extract payment as an expression of revenge or vindication seems too irrational in a system where it seems to be within the exclusive power of the state to execute punishment through the system of criminal law. Over the course of twentieth century history, tort law seems to have traveled so far down the road of deterrence and efficient compensation that it is difficult to imagine how tort damages may also express censure and punishment, declaring that while certain conduct may not rise to the level of criminality, it is nonetheless reprehensible, and thus damages should follow.

4. The Road Forward: Reflection on the Moral Foundations of Tort

As many scholars have recognized, tort law is now at a crossroads. For the decades when law and economics theories reigned, they seemed to offer, as John Oberdiek describes, “the culmination of various strands in the history of torts, providing a coherent and seemingly powerful lens through which tort law could be

44 See WHITE, supra note 4 at 152; id. at 231, 237-38 (discussing increasing distance from the public dimension of tort actions).
45 Jon Elster, Norms of Revenge, 100 ETHICS 862, 862 (1990). See generally Anthony J. Sebok, Punitive Damages: From Myth to Theory, 92 IOWA L. REV. 957 (1997) (arguing that the rationale of efficient deterrence has obscured the meaning the theory of punitive damages and that the point is better understood as a form of private retribution).
46 See WHITE, supra note 4 at 237.
viewed.” Oberdiek’s “comeback kid” story is grounded in the limitations of legal ethical theories in which normative judgments are evaluated exclusively on the basis of the consequences of a particular course of action. As he describes the turn:

That efficiency and the maximization of aggregate wealth guided economic analysis, however, revealed the approach to be a particular, and particularly crude, version of consequentialism. Consequentialism in its various forms had long ruled moral and political philosophy, so it was only natural that it would penetrate the normative domain of tort law. But in the 1970s the tide began to turn. And it was in the wake of a general revival of non-consequentialism that George Fletcher, Jules Coleman, and Ernest Weinrib staked out non-consequentialist alternatives to the economic analysis of tort law.48

As Oberdiek surmises, each of the theorists he mentions would probably have a slightly different explanation of the limitations of the economic analysis of law. Weinrib, for example, sees the turn as grounded in economic theories’ failure to respect the framework and categories of thought that are distinctive to private law: “economic theories failed because they were instrumental theories. They did not respect the modes of reasoning internal to tort law, but sought to explain or justify the law of torts by reference to an extrinsic goal.”49

As noted above, in their understanding of Anglo-American tort law, Goldberg and Zipursky place the accent on torts as wrongs, each of which “stems from a norm

47 John Oberdiek, Introduction, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 1 (John Oberdiek, ed. 2014). See also WHITE, supra note 4 at 289 (after detailing evidence of the “unexpected persistence of negligence,” noting that in the 1970s, many scholars would have anticipated a reduced role for traditional negligence-based theory given their intuitive attraction to “government-sponsored distributive approaches to injury in a modern industrial society.”).
48 Oberdiek, supra note 47, at 1.
49 Id. at 2.
of conduct that enjoins us not to interfere with the well-being of others in certain ways, or to act for their benefit in certain ways."^{50} Further, “Torts are also distinctive as legal wrongs in that they are injury-inclusive and relational wrongs.”^{51} To put it bluntly, “Without wrongs at the center,” theories that focus on reallocation of losses “are doomed to fail.”^{52}

For Scott Hershovitz, the wrong turn in torts can be traced to what he describes as the limited “conception of humanity” that emerges from the lens of viewing tort law as a regulatory regime. He explains:

> In taking the objective stance, economists obscure something vital about tort. In the wake of *The Costs of Accidents*, it has become fashionable to think of tort law as a substitute for regulation, or even as a kind of regulatory regime. However, tort relies on a richer conception of humanity than regulation does. Through tort law, we address each other as moral agents. We press claims and proffer defenses, offer justifications and assert privileges. In the end, we may be held liable, but before that, we are held answerable. Torts treats us a people with rights and responsibilities, not simply as entities to be managed, handled, or “incentivized.”^{53}

If these alternative frameworks—based on the internal structure of tort law; on a concept of torts as wrongs; or grounded in a “richer conception of humanity”—are to take flight within tort theory, it may be helpful to reflect on ideas for a

---


^{51} *Civil Recourse Defended*, supra note 50, at 571.

^{52} *Torts as Wrongs*, supra note 5, at 986.

methodology for navigating the shoals of this historical turn. As is evident from the discussion above, over that past several decades much of the analysis in tort case law, regulatory schemes, text books and classroom discussions has been saturated with a “conception of humanity” viewed through an economic lens. Claims about duty and harm, such as the ones advanced by this Thesis—a circumstantial duty between legal strangers for a harm that is difficult to monetize—may for some seem marginal if not invisible, or perhaps even outlandish. And what is even more difficult, the framework undoubtedly rests on a moral foundation—an element which seems to have been discarded by skeptics as “disabling” and “cloying”—leaving little room for exploration of more interior—or as some put it, “spiritual”—resources within the humanities to enrich our descriptions and discussions about the fabric of tort law.

In these circumstances, it may be helpful to consider Thomas Kuhn’s method for reflection as explained in *The Structure of Scientific Revolutions*. What is the nature of a conversation in the scientific community during a paradigm shift? First, it consists in coming to agreement that current theories demonstrate certain severe limitations in the work of understanding and resolving particular problems. Second, it offers a possibility to look at the problem from a different angle, to see if that angle might shed light on previously unresolved questions. Kuhn explains:

Led by a new paradigm, scientists adopt new instruments and look in new places. Even more important, during revolutions scientists see new and different things when looking with familiar instruments in places they have looked before. It is rather as if the professional community had been suddenly transported to another
planet where familiar objects are seen in a different light and are joined by unfamiliar ones as well.\textsuperscript{54}

The theoretical turn in law is of course not the only historical current to navigate. Another important element of this analysis is how it intersects with the question of how we shape or are shaped by technology—in this case, the pervasive presence of recording devices and the increasing tendency in our culture toward reactive image capture. As discussed above, torts theorists specializing in privacy law submit that current structures of tort law are woefully inept for theorizing the pervasive harms that we encounter in this brave new world.\textsuperscript{55}

Considering an analogous crossroads in the law of biomedical technology and healthcare in 1991, Margaret Jane Radin reflected on methodological approaches to social and conceptual transformations.\textsuperscript{56} She cautioned against accepting the status quo “as given morally, not just empirically.”\textsuperscript{57} In contrast, new practices and interactions in technology can also “awaken” in us concerns about the problematic nature of previously tolerated practices. For example, “If being used to seeing wage labor makes us see surrogacy one way, seeing surrogacy might also invite us to see wage labor in a slightly different way, not quite the way we are used to.”\textsuperscript{58}

\textsuperscript{55} Richards & Solove, supra note 14, at 1923.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 343.
about old practices in light of new ones” can serve as a “focal mirror,” opening our minds to possibilities for social change.59

How might this method for evaluating the harms of new social practices inform a look into the “focal mirror” of the social practice of pervasive image capture as it applies to assault victims on a public street? First, the fact that a myopic focus on the monetizable aspects of injury have limited our theorization of harm in tort law need not condition our efforts to now re-imagine the extent to which these new social practices—and in particular, our interactions with communications technology—might prompt us to re-energize theorization of dignitary harm in tort. The particularly invasive and damaging quality of these new social practices need not be swallowed up into a narrative that we are so far gone down the path toward objectifying brutalization of other human beings that there is nothing more to do. Further, the more disturbing aspects of these practices can also help us to articulate those inchoate worries about longer-standing limitations in our theorization of dignity-based harms—in privacy law, or in the theorization or the harms of sexual harassment, and not only—in order to discern, in Hershovitz’s turn of the phrase, what “conception of humanity” should inform how we address one another as moral agents.

To take a test run, let’s examine the theorization of harm in the August 2014 incident in which intimate pictures of the actress Jennifer Lawrence, intended only for

59 Id. at 343-344. (“Social policy decisions about these practices that become focal mirrors of the cross-currents of our culture cannot help but symbolize how we view ourselves now, and how we envision our future. In pursuit of our vision of the future, we might see certain changes as desirable for our culture as a whole.”).
the lover with whom she had been in a long-distance relationship, were hacked from her computer and published on the internet. Lawrence would certainly have a privacy claim against the hackers—in this case, it does not seem to be difficult to articulate the harm. Or is it? What exactly is the harm? In contrast to Prosser’s systemization of privacy law, in an interview with Vanity Fair, Lawrence puts the accent neither on reputation nor on emotional distress—and in this case it would be deeply offensive to take as a point of reference her own missed economic opportunity to publish the pictures. Everything about how Lawrence articulates the harm points to an angry vindication of personal dignity. Here is how she put it: “Just because I’m a public figure, just because I’m an actress, does not mean that I asked for this,” she says. “It does not mean that it comes with the territory. It’s my body, and it should be my choice, and the fact that it is not my choice is absolutely disgusting. I can’t believe that we even live in that kind of world.”

In response to the media frenzy about the disclosure, shame and consequent damage to her reputation were not her narrative: “every single thing that I tried to write made me cry or get angry. I started to write an apology, but I don’t have anything to say I’m sorry for. I was in a loving, healthy, great relationship for four years. It was long distance, and either your boyfriend is going to look at porn or he’s going to look at you.”

---

61 Id.
Neither, it seems, does the paralysis of emotional distress quite capture how Lawrence herself comes out swinging on the legal and cultural ramifications of the hack.

It is not a scandal. It is a sex crime . . . It is a sexual violation. It’s disgusting. The law needs to be changed, and we need to change. That’s why these Web sites are responsible. Just the fact that somebody can be sexually exploited and violated, and the first thought that crosses somebody’s mind is to make a profit from it. It’s so beyond me. I just can’t imagine being that detached from humanity. I can’t imagine being that thoughtless and careless and so empty inside.  

Analogous to the challenge of articulating the harm of pervasive image capture of an assault victim, Lawrence’s case also runs up against the extent to which the law has not been able to fully theorize the harm.  

In a narrative thickly laden with a call to moral accountability, Lawrence fires back:

Anybody who looked at those pictures, you’re perpetuating a sexual offense. You should cower with shame. Even people who I know and love say, ‘Oh, yeah, I looked at the pictures.’ I don’t want to get mad, but at the same time I’m thinking, I didn’t tell you that you could look at my naked body.

---

62 Id.

63 See generally Anthony J. Sebok, Punitive Damages: From Myth to Theory, 92 IOWA L. REV. 957, 1016-17 (1997) (discussing analysis of nineteenth century theorist Theodore Sedgwick of the limitations of what was analogous to emotional distress: “Disrespect of the plaintiff’s rights may produce strong emotional reactions on her part, or it may not—the plaintiff could be quite stoic about the defendant’s conduct . . . Still courts would understand that the attitude of disrespect instantiated by the defendant produced an injury that was independent of the emotional distress that the plaintiff may or may not have suffered. We can see now that the nineteenth-century courts were identifying without naming it as such—the objective harm that arises when a private right is violated or denied.”).

64 Kashner, Huntress and Prey, supra note 60.
Throwing down the gauntlet to the decision-makers in the tabloids that publish such images, she says: “You have a choice. You don’t have to be a person who spreads negativity and lies for a living. You can do something good. You can be good. Let’s just make that choice and—it feels better.”

Lawrence’s “moralistic” account of the harm that she suffered due to the actions not only of the hackers but all those who mindlessly clicked on the pictures seems to capture the opposite of MacKinnon’s worries about a “disabling (and cloying) moralism” which works to exclude women from social life.” In fact, the moral quality of Lawrence’s claims to privacy and dignity gives a powerful driving force to her legal call to account. It is with this in mind that the next sections turn to the interdisciplinary conceptual tools that can help to strengthen assessment of the harm in this case from both moral and legal perspectives, proceeding on the theory that a strong moral foundation for articulating the harm need not be either “cloying” or “disabling.”

65 Id.
66 MACKINNON, supra note 35, at 172.
67 For an extraordinarily powerful illustration of the difference between shame and indignation, see ARTURO PÉREZ-REVERTE, THE PAINTER OF BATTLES 98-101 (2009) (translated from Spanish, Pintor de battalas, 2006), a novel about a war photographer working through the trauma of his career by painting a large mural of battle scenes, while at the same time in a psychological duel with one of the subjects of his photographs whose life was ruined as a consequence of the publicity. In this scene, he realizes there is something not quite right about the look of terror in the face of one of the depiction of the “emotions of the man about to be killed”: “He wasn’t looking at his executioner but at the viewer, at the camera become the brushes and eye of the painter, the imaginary eye that was preparing so brazenly to witness his death; the condemned man’s expression shouldn’t reflect fear, but indignation. Indignant surprise was the exact nuance.”). I believe that I can say without a spoiler alert that at the heart of the novel is the observation that the systematic—and professional—objectification of anyone, including random strangers, gravely wounds one’s capacity to love anyone, especially and including one’s closest intimates.
B. Interdisciplinary Conceptual Tools

What conceptual equipment might help to theorize the harm inflicted by engaged spectators who snap pictures of an accident or assault victim in need of immediate emergency assistance? In light of MacKinnon’s first concern—a perception gap in how harms are interpreted and experienced—the analysis queries what philosophical conceptual tools might help to theorize the gap between the blithe disregard of casual bystanders and the intense pain of victims who experience this disregard in their state of vulnerability. The concept of objectification, understood as when one treats a human being as a thing, captures not only the perception gap but also the difficulty of theorizing the infliction of harm across such wide variants in subjective perceptions. Other aspects of the analysis continue the work initiated above to create room for spacious consideration of how specific circumstances should inform not only the contours of the duty but also our understanding of the harm itself. Throughout, the aim is to help flesh out, again to use Hershovitz’s turn of the phrase, that “richer conception of humanity,” which can illuminate how we address one another as moral agents.

1. Kantian Insights on Objectification

This subsection returns to the distinction outlined in Chapter Four between pure bystanders and engaged spectators, and in particular, the nature of a proximate physical encounter with a victim in need of emergency assistance. As Jeremy Waldron notes, the work of Immanuel Kant is a notable resource for theorizing the “moral relation between people where they actually are,” shedding light on what it
means to “recognize one another not just as potential predators but as moral subjects and, even in the midst of our competition, deal with one another on that basis.”

In fact, a passage from the *Metaphysics of Morals* provides a particularly strong foundation for moral censure of “objectification”—defined as treating another human being as an object rather than a person who is an end in him or herself. Analyzing this question under the rubric of the duty of respect owed to others, Kant explains: “The respect that I have for others or that another can require from me is therefore recognition of a dignity in other men, that is, of a worth that has no price, no equivalent for which the object evaluated could be exchanged.”

It follows, then, that others hold a claim to be treated with respect, and specifically, not as a thing to be used in accord with another’s instrumental purposes. Kant explains:

> Every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other. Humanity is itself a dignity; for man cannot be used merely as a means by any man (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not men and yet can be used, and so over all things. But just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the equally necessary self-esteem of others, as men, that is, he is under obligation to acknowledge, in a

---

68 Jeremy Waldron, *Who is My Neighbor?: Humanity and Proximity* [“Waldron, Humanity”], 86 *MONIST* 333, 349 (2003). See Radin, *supra* note 56, at 345 (“when we use the term objectification pejoratively, as in ‘objectification of persons,’ we mean, roughly, ‘what Kant would not want us to do.’ The person is a subject, a moral agent, autonomous and self-governing. An object is a non-person, not treated as a self-governing moral agent.”).

69 *METAPHYSICS OF MORALS, supra* note 26, at Ak. 6:462 (Latin included in translation omitted).
practical way, the dignity of humanity in every other man. Hence there rests on him a duty regarding the respect that must be shown to every other man.\textsuperscript{70}

Lack of respect—contempt for the humanity of another—is thus not just a moral weakness, but a vice.\textsuperscript{71} The specific description of this action as “objectification”—to make of oneself or another an object or a “thing” to satisfy an appetite—emerges in the context of a discussion of the satisfaction of sexual desire.

... to allow one’s person for profit to be used by another for the satisfaction of sexual desire, to make of oneself an object of demand, is to dispose of oneself as of a thing and to make of oneself a thing on which another satisfies his appetite, just as he satisfies his hunger upon a steak. But since the inclination is directed towards one’s sex and not towards one’s humanity, it is clear that one thus partially sacrifices one’s humanity and thereby runs a moral risk. Human beings are, therefore, not entitled to offer themselves, for profit, as things for the use of others in the satisfaction of their sexual propensities.\textsuperscript{72}

Much of the philosophical reflection on the question of objectification is in the difficult and often ambiguous area of sexual relationships, and in particular, the perception of women’s bodies and sexuality. In an article discussing objectification, for the most part this context, Martha Nussbaum argues that it is a “slippery, but also multiple concept.”\textsuperscript{73} For this reason, different dimensions of objectification should be

\textsuperscript{70} Id. at Ak. 6:462.
\textsuperscript{71} Id. at Ak. 6:464.
distinguished. Under some specifications, she argues, it is always problematic, but “not all types of objectification are equally objectionable,” and “it is especially important to carefully evaluate context and circumstance.” Nussbaum lists a number of features that capture some aspect of the tendency to treat another human being as a thing rather than as another person. Features include: instrumentality, denial of autonomy, inertness, fungibility, violability, ownership and denial of subjectivity.

When considering the circumstance of a bystander’s encounter with violence, many of the features seem to pose a mismatch, because they rest on an assumption about an ongoing or potential relationship, not an interaction between strangers. Especially against the backdrop of urban anonymity where many relationships are fleeting or merely instrumental, and where most city-dwellers would have no expectation of profound recognition of their subjectivity on the part of total strangers, can the concept of objectification help to delineate the contours of what human beings owe to each other? The challenge is two-fold: first, how to distinguish moral harm of a certain weight and depth against the backdrop of the pervasive slights that permeate daily life; and second, how to bridge the enormous chasm in perception between, on one side, mindless image capture, and on the other the experience of life-threatening trauma.

---

74 Id. at 251.
75 Id. at 256. See also id. at 271 (“context is everything… in many cases if not all cases, the difference between an objectionable and a benign use of objectification will be made by the overall context of the human relationship in question.”).
76 Id. at 257.
2. **Insights on Objectification from Social Psychology**

Social psychologist Lee Budesheim captures well the phenomenon of objectification in the course of ordinary interactions in most medium and large cities. Querying whether on your last visit to the grocery store you thought at all about the interior life of the check-out clerk, he wonders: “What was your impression of this person? Did you give much thought to what he or she was experiencing? Would it have mattered to you if that person had been replaced with someone else to perform the task?”

To further complicate the inquiry, these kinds of interactions are pervasive: “In urban environments, people encounter countless strangers, forming almost no impression at all. Such is the ‘dark matter’ that fills much of our social lives.”

To what extent are certain forms of objectification—in particular, the denial of subjectivity—so pervasive and at the same time so invisible that they are difficult to address? Further theorizing the roots of the problem, Budesheim discusses studies exploring how what we think and feel about others is shaped by two fundamental judgments—warmth (friend or foe?) and competence (ability to help me or hurt me?). He explains:

---

77 Thomas Lee Budesheim, *Exploring the Dark Matter of Objectification*, in *Justice, Conflict and Wellbeing: Multidisciplinary Perspectives* 97, 100 (Brian H. Borstein & Richard L. Wiener eds. 2014). The chapter opens with an interesting comparison to the “dark matter” in the universe, which because it emits neither light nor energy it goes undetected and unstudied. Id. at 97 (“While we [in social psychology] have spent decades studying the thoughts, feelings and behaviors we can readily detect, we have often overlooked the absence of thoughts, feelings, and behavior between people.”).

78 Id. at 113.

79 Id. at 108.
Groups that are judged low in both warmth and competence (e.g., the homeless) are frequently the targets of active harm (e.g., abusive treatment) and passive harm (e.g., neglect and ostracism). … And yet scorn is often overlooked . . . “precisely because scorn is thoughtless, it does not bother us. … we do not give scorned individuals a second thought.”

Work on “mind perception”—the activity of thinking about the thoughts and feelings of another person—also indicates how particular forms of the denial of another’s subjectivity can become both pervasive and invisible. Budesheim summarizes:

Intriguing work on mind perception indicates that perceivers are likely to think about the contents of another’s mind when (a) they have a desire for social connection with that person, an/or (b) they are motivated to understand, predict, or even control the other person’s behavior. Both of these motivations are lacking when interacting with strangers, but particularly so if they are viewed as having little or nothing to offer with regard to warmth and competence.81

Measurements of neural activity confirm the conundrum. Findings indicate that when subjects viewed persons in the low warmth-low competence quadrant there was “significantly less of the neural activity associated with forming impressions of a person, and thus neurologically appeared as if they were forming an impression of an object.”82

When interaction takes place against this backdrop, Budesheim categorizes the objectification as “asocial”: “one gives little or no thought to the target’s thought,  

80 Id. (quoting studies by Fisk, Cuddy, Glick, et al.).
81 Id. at 109.
82 Id. at 109.
feelings, or behavior intentions; and behavioral interactions with the target, if any, are highly scripted and routinized." For example, customers and fast-food servers tend to engage in “mindless, asocial objectification of the other. In short, asocial objectification occurs when the social world is operating on autopilot.”

Returning to the example of the attack of Jose Robles outside of Port Authority, one response might be: What?! How can witnessing a person being severely beaten possibly be a situation in which to operate on autopilot? Budesheim’s categories help us to articulate the core of the problem: a severe disconnect in the perceptions of victims and bystanders. For Robles, the incident was obviously neither scripted nor routinized; according to his perspective, the only human response on the part of the engaged spectators should have been to do something to help or call for help. Not to do so, instead to stand by and take pictures, was a severe affront to his human dignity. In contrast, for some, and perhaps even all of the bystanders, Robles was in the “low warmth-low competence” quadrant. To paraphrase Budesheim, it was predictable that that they would give relatively little thought to his inner life—because his feeling, traits, attitudes, and goals were

---

83 Id. at 115.
84 Id. at 116. For an outline of feminist analyses on how objectification (also referred to as “separation”) leads to a capacity to inflict suffering on others, see Jennifer Nedelsky, Law’s Relations 205 (2011) (“Part of what sustains the human capacity to inflict suffering is the move to abstraction, the transformation of a suffering person into an “other,” into a category such as “black,” prisoner, or enemy. It is easy to feel separate from a category and thus to avoid feeling of compassion that might be aroused by the sufferings of a person like oneself). See generally Nell Noddings, Women and Evil 120, 211 (1989) (discussing separation as a condition and category of evil sustained by the move to abstraction).
irrelevant to their lives.\textsuperscript{85} And what, in 2014, would have been an excellent demonstration of scripted autopilot behavior on the part of bystanders? To engage the world—regardless of its actual, present and pressing trauma—from behind the lens of one’s cell phone or iPad.

In the Robles case, let us assume that the engaged spectator was on auto-pilot, moving through her early-morning commute as ordinarily scripted. Coming out of Port Authority with cell phone and bagel in hand, she was drawn by curiosity to the gathering crowd, moved in close enough to see the victim, and then reacted to the scene as others were reacting, beginning to mindlessly snap pictures. Then she withdrew and proceeded on her way to work and didn’t give the incident much further thought.

Is this interaction more like the failure to acknowledge the subjectivity of a fast-food worker when I buy a hamburger—a sad but seemingly inevitable part of the anonymity of urban life? The presence of a life-threatening emergency seems to bring this into the realm of, to use Lina Papadaki’s formulation, conduct that rises to the level of having harmed or diminished the other’s humanity.\textsuperscript{86}

But from whose perspective should this determination be made? From the perspective of the commuter, it seems to be something of a stretch to say that what crystallized in her mind was intent to harm the other’s humanity; brushing past the incident with the quick snap of a cell phone might have been more akin to ignoring it,

\textsuperscript{85} Budesheim, supra note 77, at 111.

\textsuperscript{86} See, e.g., Budesheim, supra note 77, at 100 (discussing Papadaki). See generally Lina Papadaki, \textit{What is Objectification?} 7 J. MORAL PHIL. 16, 32-33 (2010).
at least in her mind. Or perhaps it was analogous to rubber-necking an accident on the highway. Do we really want to say that this almost instinctual reaction—this combination of horror and curiosity—is so deserving of opprobrium?\footnote{See discussion in Chapter Twelve at notes 54-55 (discussing example from Plato’s Republic).} From the perspective of Robles, the bystanders’ decisions to take pictures rather than call for help was an outrageous and severely degrading diminishment of his humanity. The intense conflict between the two perspectives—on the one hand, mindless oblivion, and on the other, wounded outrage—seems to be a difficult knot: whose perspective should control the moral analysis? How to bridge this chasm?

3. **Bridging the Gap between Bystander and Victim Perspectives**

In order to bridge the chasm between perspectives, it would be helpful to identify some conceptual tools that focus on the interaction between the victim and the engaged spectator. For the construction of this bridge, an insight from philosopher Stephen Darwall’s work on the “Second-Personal Standpoint” is helpful. Darwall’s project revolves around a linguistic image—that of the direct address—which necessarily puts the spotlight on the relational dimension. As he explains:

> Call the second-person standpoint the perspective you and I take up when we make and acknowledge claims on one another’s conduct. . . . whether explicit and voiced—“You talkin’ to me?”—or only implicit and felt, as in a resentful sulk, the I-you-me-structure of reciprocal address runs throughout thought and speech from the second-person point of view.\footnote{STEPHEN DARWALL, SECOND PERSONAL STANDPOINT 3 (2006).}

Darwall explains that moral theory emerging from this standpoint is one of “mutual
accountability between equals,” entailing “an equal authority we have to address claims and demands to one another and ourselves.”

What can help to resolve a standoff between the perspectives of engaged spectators and victims and the resulting mindless infliction of harm is a vocalized calling to account. The second-person standpoint helps to ground this calling to account: “. . . we can intelligibly address a demand to someone to regulate her will appropriately only if we suppose that she can so regulate it as a result of recognizing our demand’s legitimacy.” “Blame” becomes a prod for an awakening to a perspective on these interactions that should prevent the mindless infliction of harm and pervasive objectification of other human beings. The form of reciprocal address is not merely to express disdain or contempt, but it demands a response, it includes a dimension of “accountability or answerability” to another subject: “they presuppose an authority to address the demand and bid for the other’s recognition of that authority. They have an implicit R.S.V.P.”

---

89 Stephen Darwall & Julian Darwall, Civil Recourse as Mutual Accountability, 39 Fla. St. Univ. L. Rev. 17, 17 (2011). See also Jason M. Solomon, Civil Recourse as Social Equality, 39 Fla. St. U. L. Rev. 243, 257 (2011) (“. . . in exercising the right to recourse—in the doing of justice—the one empowered is able to remind the wrongdoer that she is worth respect and attention, and thus her status is that of an equal.”).

90 Darwall & Darwall, supra note 89, at 23.

91 Id. at 21. (“When we blame someone in speech, indeed, we normally intend to express, and to be taken by our interlocutor to express, the distinctive attitude of blame. [The Second Personal Standpoint, “SPS”] follows [P.F.] Strawson in arguing that reactive attitudes have a special role in mediating human practices of responsibility—more precisely, accountability or answerability—because they are essentially “interpersonal,” as Strawson put it, or “second personal,” in the terms of SPS. They implicitly address demands to their objects in a way that other critical attitudes like disdain or contempt need not.”)
Returning to the encounter between Jose Robles as he was being beaten up on a public street and the surrounding engaged spectators, at least some of whom were engaged in mindless image capture, what is needed to bridge the gap is an explicitly interpersonal call to account: “Hey! Snap out of it! This is not a fast-food purchase. Don’t you see that what you are doing is turning my real-time life-threatening trauma into a movie or a video-game, an object for your consumption? Can’t you see how this is hurting me?”

The Second-Personal Standpoint also helps to clarify that the demand on another’s will is legitimate: to require a more humane response to the emergency is neither to ask the bystander to carry the potential moral overload of deeply engaging the subjectivity of every grocery clerk; nor to ask this person to step out of their way any more than he or she has already chosen to do so by stopping to observe the scene. The fact that mindless scorn for those in the low-warmth and low-competence quadrants of our lives has become so pervasive, and for this reason, invisible, does not mean that this response is in accord with our moral obligations. In fact, from a Kantian perspective, the pervasive nature of this harm may be one of the most powerful indicators of the need for a wakeup call to address the fact that we risk displacing a crucial linchpin of our ethical world: to hold a maxim that the ends of any person, who is an end in him or herself, must as far as possible be also my ends.92

Budesheim notes that when objectification is asymmetrical—as in the case of engaged spectators denying the subjectivity of an assault victim, and not vice versa—

---

92 See discussion of Kant in Chapter Four at note 31.
there seems to be an even stronger case for taking active steps to eliminate or combat any recurrences of the objectification.”

Darwall’s Second-Personal Standpoint helps to explain the conceptual frame that can break through the paralysis of an interior life that has thus far failed to recognize the real harm that objectification of another person might cause, especially in the context of a life-threatening emergency.

As discussed above, Martha Nussbaum pointed out how the concept of objectification is both “slippery” and “multiple.”

Some forms of objectification—such as interacting with a grocery store cashier in a purely instrumental way, thus failing to appreciate his or her subjective life and humanity—are pervasive, especially in the midst of the seemingly banal and anonymous daily interactions. The results are often sad and stressful, but it is difficult to imagine how to articulate this as a legally cognizable harm. Further, according to Nussbaum, “not all types of objectification are equally objectionable,” and so “it is especially important to carefully evaluate context and circumstance.” But such does not preclude identifying some conduct as always problematic.

What might be the criteria for discerning the difference?

Papadaki would evaluate conduct based on whether it rises to the level of having harmed or seriously diminished the other’s humanity. For example, if a bystander was taking pictures of an assault with the intention of helping further a

---

93 See Darwall & Darwall, supra note 89, at 118.
94 Nussbaum, Objectification, supra note 73, at 251.
95 Id. at 256.
96 Id. at 251.
97 See, e.g., Budesheim, supra note 77, at 100 (discussing Papadaki).
police investigation, or for the purpose of assisting the victim in some other way, this would not be the type of conduct that would constitute a legally cognizable harm—on the contrary. But as we move further down the spectrum—toward mindless image capture, and then sadistic pleasure in viewing another person being injured, and further down to intent to use the pictures to bully or shame the victim, this kind of conduct does cry out for a call to account. At some point, this form of objectification—treating a person in a moment of extreme vulnerability and need solely as an object, a thing to be photographed—rather than a subject in dire need of assistance, crosses the line into the “always problematic” realm. In this sense, the harm could be further theorized as “exploitative”—engaging a human being, who should be treated as subject, as an object for the purpose of one’s own curiosity or pleasure.

With this spectrum in mind, the next Chapter pursues further definition of the elements of the tort of “exploitative objectification of a vulnerable person in need of emergency assistance.”
IX. Elements of the Tort of “Exploitative Objectification of a Vulnerable Person in Need of Emergency Assistance”

As discussed in Chapter Eight, daily life in our society presents a number of scenarios in which people objectify and exploit each other in some way. An attempt to subject all of these to tort liability would be unrealistic and undesirable for many reasons. For this reason, the proposed tort of “exploitative objectification of a vulnerable person in need of emergency assistance” includes a number of necessary features that aim to capture the circumstances in which the coercive force of tort law, an exercise of state power, could step in. The sections below parse these elements.  

A. The Victim is a Vulnerable Person

In what circumstances might standing on a public sidewalk taking a picture of someone constitute a legally cognizable harm under the common law of torts? The short answer is, not very many. To draw a contrast, the proposed new tort would not encompass taking pictures of people in their bathing suits lounging or playing at the beach. Although this form of potential objectification may also be problematic and morally wrong, for the purposes of this tort analysis, there is an important difference between a person who suits up or strips down in order to relax or play at the beach and an injured victim of an assault or accident who finds him or herself exposed because of an accident or assault. In a way that the beachgoer is not, the victim of an

---

1 For developments in Chapters Eight and Chapter Nine, I would like to express particular gratitude to the Georgetown Law faculty members who participated in the April 2015 workshop discussion of this part of the Thesis, and also to Deborah Cantrell, Sheila Foster, Jane Aiken and David Koplow who took the time for extended conversations on this topic. The questions raised and suggestions offered during these discussions were an important source of insight and clarity for this portion of the analysis.
accident or violence is vulnerable—understood as “open to physical or emotional harm”—and generally has no control over circumstances that brought him or her to be splayed out for public visual consumption.\textsuperscript{2}

At the heart of exploitative objectification in these circumstances is not so much the image capture itself, but a power dynamic, in which one who is in control of his or her faculties preys on a person in a vulnerable state who is not in control. It is this interaction between power and helplessness that generates the problematic nature of the encounter, and that constitutes a specific kind of harm. Photography of both subjects (the person in a bathing suit at a public beach, and the victim in need of emergency assistance) without consent may result in exploitative objectification, and both scenarios may be not only distasteful but disturbing. However, I argue that only the latter crosses the line into the kind of harm that should be legally cognizable under the rubric of this proposed new tort.

\textsuperscript{2} Martha Fineman’s work fleshes out how legal theory might be informed by an understanding of vulnerability deeper and broader than this working definition. See \textit{e.g.} Martha Albertson Fineman, \textit{Equality and Difference—The Restrained State}, 66 \textit{Ala. L. Rev.} 609, 614 (2015) ("Often narrowly understood as merely ‘openness to physical or emotional harm,’ vulnerability should be recognized as the primal human condition. As embodied beings, we are universally and individually constantly susceptible to harm, whether caused by infancy and lack of capacity, disease and physical decline, or by natural or manufactured disasters. This form of dependency, although episodic, is universally experienced and could be thought of as the physical manifestation or realization of our shared vulnerability as human persons, which is constant throughout the life course."). I believe that the narrower meaning—openness to physical or emotional harm—is sufficient for this particular application; but such would certainly not exclude deeper theorization on the comparative advantages of vulnerability over equality in these context as well. See also id. at 618-19 (distinguishing between the vulnerability that arises because we are \textit{embodied} beings and that which arises \textit{embedded} in social relationships); Martha Albertson Fineman, \textit{The Vulnerable Subject and the Responsive State}, 60 \textit{Emory L.J.} 251, 267 (2010) (describing the pervasive nature of vulnerability, and variety of forms in which it arises from embodiment).
B. The Objective Need for Emergency Assistance

We live in a world filled with immense need but very few people would actually sign up for a life program of unbounded duties of self-sacrifice.³ This Thesis does not argue that the immense or even urgent need of other human beings would necessarily trigger obligations to help. It does submit that there is something extremely problematic about venturing forth to encounter a particular person in urgent need of assistance, and then doing nothing to help this person. One way to imagine this is as an extreme form of a tease, but the circumstances of urgent need make it not only not funny, but cruel.

How might the concept of “urgent need” help to ground the tort? First, the category of the need for emergency assistance works to ground the harm in an objective source. As will be discussed in Chapter Eleven, harms that run parallel to claims for emotional distress are likely to be met with the skeptical assessment that the law should not cater to the feelings of those who are super-sensitive to every slight. As Goldberg and Zipursky explain, courts hold plaintiffs “to an external standard that, to some extent, ignores their particular vulnerabilities.”⁴ To state a “wrong” that was inflicted by the defendant, it is important that the injury not be the plaintiff’s responsibility—“for she is using the legal system to obtain recourse for something done to her by someone else.”⁵

³ See discussion of the limits of utilitarianism in Chapter Four at note 17 and ff.
⁵ Id. at 1683. See generally Erica Goldberg, Emotional Duties, 47 CONN. L. REV. 809 (2015).
The backdrop of a need for emergency assistance helps to distinguish contexts in which one could describe the victim’s harm as “self-inflicted.” As in the context of an assault—apprehension of imminent harmful or offensive touching—as Goldberg and Zipursky explain:

When a bullet or fist whizzes past someone’s head and he or she feels fright that is an emotional response, but it is quite different from the example of the schoolyard taunt. The response is visceral, immediate, and unthinking. In this context, it makes little sense to hold the plaintiff responsible for the response and makes much more sense to think of the plaintiff as a victim who exercised little or no agency.

By limiting the tort to “vulnerable persons in need of emergency assistance,” it would by definition embrace only those persons who could not be reasonably expected to “steel themselves” against the distress of exploitative objectification. In some contexts where people experience the harm of objectification it might be reasonable to expect that they reframe in some way their perceptions. But a serious or life-threatening emergency is not one of those contexts.

---

6 I recognize that circumstances such as a suicide attempt would constitute a situation in which “urgent need” and self-inflicted harm would coincide. Further research could probe a distinction between the initial harm which was self-inflicted and the shock, fear or panic that may have emerged in the wake of unanticipated consequences of that self-inflicted harm. The objective need for emergency assistance may flow from the latter.

7 Unrealized Torts, supra note 4, at 1685-86. Cf. Frederick Schauer, The Phenomenology of Speech and Harm, 103 ETHICS 635, 650 (1993) (Examining an argument for a distinction between “belief-mediated” and “non-belief-mediated” reception of hostile speech, Schauer probes the extent to which responsibility for the reaction should be transferred from the inflicter to the victim when the victim can “steel himself” against the distress. Skeptical of the capacity to “steel oneself” in certain contexts, Schauer explains: “Beliefs cannot be switched on and off at will, and even if the distress that is felt when being the target of an insult or epithet is dependent on a belief that could have been and yet could be different, that does not diminish the distress then felt.”).

8 See Schauer, supra note 7 at 650.
Limiting the tort to those in objective need of emergency assistance also helps to distinguish situations in which a victim may be over-reacting—making a mountain out of a molehill—from situations in which a strong emotional reaction is not only expected but appropriate.⁹

But note also that the tort emphasizes the emergency nature of the assistance needed, which should be distinguished from the emergency nature of the circumstances which led to such need. Of course emergency circumstances (such as an ongoing assault or accident in course) and the need for emergency assistance may coincide, and they often do. But the foundation for this tort is a spectator’s exercise of discretion in order to deliberately encounter with a vulnerable person’s urgent need.

This framework is slightly different from how other theorists employ the concept of emergency. Note the function of the category of emergency in Weinrib’s early proposal for an affirmative obligation: it is the emergency itself that sorts out who would be required to respond. In the words of Cardozo, “the emergency begets the man.”¹⁰ For Weinrib, it is the unusual circumstances of an emergency that draw

---

⁹ See Unrealized Torts, supra note at 4, at 1686-87 (there are situations in which “a mountain is a mountain,” and where it is not appropriate to suggest that the victim should “get over it”: “Indeed, it is quite unreasonable to expect anything other than a visceral response to an episode of extreme imperilment and serious injury to another.”).

¹⁰ Wagner v. International R. Co., 133 N.E. 437, 437-38 (N.Y. 1921) (Cardozo, J.) (defendant whose conduct created an unreasonable risk may be liable not only to the person who was injured as a result, but also to one who responded to the emergency with an attempt to rescue: “Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable . . . The risk of rescue, if only if be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.”).
lines around what would otherwise be moral or social overload, or concerns about fairness in the social distribution of resources. Weinrib explains:

An imminent peril cannot await assistance from the appropriate social institutions. The provision of aid to an emergency victim does not deplete the social resources committed to the alleviation of more routine threats to physical integrity. Moreover, aid in such circumstances presents no unfairness problems in singling out a particular person to receive the aid. Similarly, emergency aid does not unfairly single out one of a class routinely advantaged persons; the rescuer just happens to find himself for a short period in a position, which few if any others share, to render a service to some specific person. In addition, when a rescue can be accomplished without a significant disruption of his own projects, the rescuer’s freedom to realize his own ends is not abridged by the duty to preserve the physical security of another.\(^{11}\)

I share all of these concerns and questions, but stop short of the conclusion that the emergency circumstances provide the answers. Respect for the decision-making process of the bystander as well as the subjective and personal qualities that notwithstanding the emergency may render an intervention extremely burdensome, lead me to draw a distinction between those who remove themselves from the scene and the spectators those who decide to engage.

One might also query whether distinctions should be drawn regarding the nature of the victim’s needs as they relate to the primary source of injury and the

timing of the engaged spectator’s encounter with the victim. Might the obligation to help be particular acute when the attack or accident is in course—time is of the essence—and timely assistance could mean, for example, the difference between slighter and graver injury, or even the prevention of death? Further, when time is of the essence and a particular engaged spectator is the only available source of potential help, might that element also render an obligation to help even more intense? In other words, how might the particular circumstances of the injury and timing inform the duty that an engaged spectator may cause; and the harm that one may cause?

As discussed above, a bystander’s act of prioritization as made manifest in the decision to stop and to focus at the scene of a vulnerable victim may or may not align with the objective circumstances of an emergency. For example, in the case of Karl Ross, the fact that a true emergency was in course—Genovese’s murder—did not negate the fact that because of his particular anxieties and fears he might also have been experiencing a kind of moral overload such that it would have been unreasonable to demand of him the specific response.

In contrast to circumstances in which “the emergency begets the man,” here the man is already begotten and is a multi-dimensional human being with an interior life and decision-making process of his own. This person has certain qualities and perhaps also fragilities which may make it difficult or impossible to move toward an emergency circumstance. Obligations are triggered not because a person “just
happens to find himself” in a position to render aid, but because this person has *decided* to move toward the person in these circumstances.

Particular concerns about how the bystander conducts him or herself in the encounter with another human being are contingent on the victim’s particular state of vulnerability, due to the need for urgent assistance. But within this framework at no point would the circumstances of an emergency legally coerce any particular bystander to go out of his or her way to engage the situation, or to prioritize the victim’s needs over one’s own. However, a bystander’s decision to engage the scene indicates that he or she has already “prioritized” their time and attention. Once this person has decided to venture forth toward an encounter with a vulnerable person in need of emergency assistance, at that point the engaged spectator is responsible for conducting him or herself in a way that does not objectify the victim in an exploitative way.

**C. The Bystander’s Objectification Rises to an “Exploitative” Threshold**

Practices and habits of objectification between strangers are prevalent in many pockets of urban life, especially in those quadrants of “low warmth” and “low competency” in which we feel little affective connection to the other’s interior life, nor expect to receive anything from a connection with the other. Limiting the tort to encounters with a vulnerable person in need of emergency assistance helps to keep the harm complained of within judicially cognizable limits.

---

12 Weinrib, *Duty to Rescue*, supra note 11, at 292.
13 See discussion in Chapter Eight at note 77.
But the analysis also requires a further sorting mechanism. Even when a victim is in need of emergency assistance, pictures or recordings may be taken for reasons that foster good citizenship, humane concern for the victim, or both. For example, pictures or recordings might be submitted to the police in order to initiate or further an investigation ultimately aimed at affirming the dignity of the person who was injured as well as the safety of the larger community. If on the other hand, pictures were distributed or posted on the internet with comments that amount to bullying, or assembled into a calendar for sale, such would be evidence that the intent was to exploit.

Karen Stohr’s theorization of the moral obligations that emerge from a face-to-face encounter with another’s needs adds an important dimension to this discussion. As noted above, Stohr offers an interpretation of Kantian beneficence as including not only “the obligation to adopt the wide maxim of helping others on occasion,” but also “a narrow duty” which prohibits “contempt, arrogance, defamation, and mockery.” For Stohr the duty not to be “indifferent” sometimes translates into an obligation to help: “When helping someone is the only way not to be indifferent to her, we are required to help.”

The descriptor “indifference” would seem to register a notch down from “exploitative objectification.” It would be fascinating to parse whether this might be a case for a hair-line distinction between a narrow duty not to be indifferent to the

15 Id. at 63.
ends of others—one which is always required—and a perfect legally enforceable duty—not to exploit others.16 Behavior rising to the level of exploitation seems to hold more promise for some kind of external measure of a behavior which indicates contempt or mockery. Indifference, on the other hand, seems more difficult to measure. For example, when Ross shut the door in the face of Genovese’s murder, an outside observer may have interpreted the action as conveying morally objectionable indifference. From a subjective perspective, however, Ross may have been doing his best to manage an impending panic attack. Because this Thesis aims to preserve a space of respect for the interior of life of the bystander, and the corresponding space to exercise the discretion needed to protect this space, the tort would require some external manifestation as evidence that the conduct rises to the level of being “exploitative.”

Does the nature of the primary harm make a difference for how an engaged bystander’s conduct is assessed? First, for situations arising from violence, note that there is a double edge to the analysis of how bystanders interact with technology. Assessing the circumstances of the attack on Robles outside of the Port Authority, we should be concerned not only about the engaged bystander’s failure to call for assistance in response to his medical needs, but also the failure of co-citizens to care

16 See Scott Roulier, Kantian Virtue at the Intersection of Politics & Nature: The Vale of Soul Making 38, n.13 (2004) (... while most duties of virtue are imperfect, Kant also states that there are perfect duties of virtue. ‘Perfect duties arise,’ notes Korsgaard, because we must refrain from particular actions against humanity in our own person of that of another. Suicide, physically destructive habits, and the failures of self respect exhibited in self deception and servility violate perfect duties to ourselves. (TL 213-238; Ak. 6:421-44). Failure of respect, such as calumny, mockery, and pride, violate perfect duties to others. (TL 254-59, Ak. 6:462-68).”)
for the safety of the community as a whole, by helping to arrest and contain further violence on the part of an assailant who had proved himself to be dangerously unstable. At the same time, photographs and video recordings of violence—including violence and abuse of power by the police—have proven to be important instruments for citizens not only to contribute to public safety, but also to demand systematic improvement in the criminal justice system.

Second, it may also be important to distinguish between the types of violence that produced the initial harm. For example, when the emergency due to violence is sexual assault, as opposed to a robbery or other kind of attack, is there something unique about the type of harm engaged spectators may cause? In particular, is there something potentially even more disturbing about the exploitative nature of the interaction and the bystander’s participation in the event? These questions open the door to consideration of whether engaged spectators to a sexual assault should simply all be swept into the category of vicarious liability for the sexual assault itself, because the nature of the harm in this context necessarily renders those taking pictures an active and integral part of attack itself, as participants and not merely bystanders. Under this theory, “engaged spectators to a sexual assault” may very well be an empty set—because in this context, they become the participative audience

---


18 See Chapter Twelve, infra at note 20 (discussing citizens’ First Amendment rights to film the police).

that actually affirms and perpetuates the violence itself. While Part Four of this Thesis turns its attention to the analysis of cases and incidents in this context, full exploration of the potential overlap between this proposed common law tort and vicarious liability in these circumstances is beyond the scope of this Thesis. But in any case, the exploitative nature of the engagement will depend not only on the circumstances of how the incident or accident arose, but on other indications of the bystander’s respect—or not—for the humanity and dignity of the victim.

D. Face-to-Face Encounters, but Not Contingent on Victim’s Immediate or Emotional Response

The combination of three elements—one on the part of the victim, 1) vulnerability and 2) the need for emergency assistance; and on the part of the engaged bystander, 3) objectification that rises to the level of exploitation—will generally narrow the application of this tort to face-to-face encounters. The tort hinges on presence on the scene, the encounter between the victim and the bystander, and the bystander’s exploitative objectification of the victim in this context.

The first question this structure raises is whether this line is too artificial, missing something important about a host of other scenarios about which we should also be concerned. To narrow the circumstances of this tort to a face-to-face encounter with a victim in need of emergency assistance is not to downgrade or marginalize broader ethical questions about what is owed to those we do not physically encounter. It is simply to submit that direct engagement with another
person in need of emergency assistance requires a different set of moral and legal categories for analysis.

One might imagine a number of scenarios in which this element is absent, but various forms of exploitation are nonetheless present: for example, the person who takes pictures of a vulnerable person on the scene is not the person who posts them, sells them, or uses them for gain in some explicit way. This tort would draw the line at physical presence—and conduct in the encounter with the victim. Depending on the nature of the pictures, other torts or regulatory schemes may address the question of whether the person’s conduct provides the foundation for a different tort.

The distinctions that Judith Lichtenberg draws out in her philosophical study of “exploitation” in the context of ethical responses to global poverty are especially helpful at this juncture:

So what is the moral basis for thinking that exploitation violates respect while complete neglect does not (or at least not necessarily?) One difference follows almost inevitably from the fact that two people are in a relationship. Once you enter into relations with another person you cannot fail to be aware of him and thus in some sense to acknowledge his existence; his humanity and his interests come within your purview. At least as important is what is implicit in the idea of exploitation: taking advantage of another. To take advantage of another is to benefit from or even celebrate their bad circumstances—even if one does not make them worse off than they would have been in the absence of interaction—and that seems to amount to using them as a means in a way that is objectionable. By contrast, simply to fail to aid poor
people on the other side of the world is not to use them, however
else it might be described.20

A second question that emerges from the analysis of a face-to-face encounter
is whether the tort would be contingent on the immediate response of the victim to
the experience of exploitative objectification. On one hand, one might note the
particular acuity of the pain of exploitative objectification when coupled with the
public humiliation. As David Luban explains: “The meaning of pain and suffering,
their communicative content—and therefore the nature of the pain as experienced by
a being that is sapient as well as sentient—depends on the context in which we
experience them.”21 The contextual element of experiencing intense vulnerability
against the backdrop of bystanders not only ignoring one’s urgent needs, but preying
on the spectacle as a source of curiosity or entertainment, might be characterized as a
unique dimension of the particular harm. As Luban notes: “The world of intense pain
is a world in which we are incredibly diminished . . . This is degrading in itself, but
when it happens in front of spectators, the experience is doubly shameful and
humiliating.”22

20 Judith Lichtenberg, Distant Strangers: Ethics, Psychology and Global Poverty 41
(2014). See also Stohr, supra note 14, at 66 (noting that when one fails to help nameless others who
are starving, “my indifference is not directed toward any particular individual and it is not ordinarily
communicated to them.”). Cf. Henry S. Richardson, Moral Entanglements: Ad Hoc Intimacies and
Ancillary Duties of Care, 9 J. Moral Phil. 376 (2012) (exploring innocent transactions with
vulnerable persons that could lead to “moral entanglements” which trigger special obligations).
22 Id. at 151. See also Robert C. Post, The Social Foundations of Privacy: Community and Self in the
demeaning, even if not experienced as such by a particular plaintiff. This is because dignitary harm
does not depend on the psychological condition of an individual plaintiff, but rather on the forms of
respect that a plaintiff is entitled to receive from others.”).
That said, the tort would not hinge on the immediate response or reaction of the victim to exploitative objectification and humiliation. As will be discussed more fully in Chapter Eleven, in contrast to the varying versions of the tort of infliction of emotional distress, this tort defines “exploitative objectification” of a vulnerable person in need of emergency assistance as a wrong in and of itself, regardless of the immediate reaction or response of the victim.

Probing the question of whether the standard for humiliation is objective and universal, or subjective and victim-relative, Luban considers an example of an interaction when the victim is physically unconscious:

A student drinks too much at a party and passes out. Some malicious wiseacres proceed to undress her and exhibit her naked body to everyone at the party—friends, acquaintances, dormmates and strangers. Then they put her clothes back on, and when she wakes up and sobers up, nobody tells her what happened.23

Luban draws out an objective standard for humiliation, even if, in a case like this, the victim “never finds out and never has any subjective experience of humiliation.”24 Along similar lines, I would argue that the harm of exploitative objectification of a vulnerable person in need of assistance can be measured objectively, as a wrong in and of itself, regardless of the victim’s actual awareness or response.

23 LUBAN, supra note 21, at 145.
24 Id. See also id. at 146 (exploring the contours of Jewish ethics, Luban offers a further example of when the victim has certain psychological barriers to processing the humiliation as humiliation. A line of rabbinical commentary would insist that this too is still humiliation: “Declaring forcefully that ‘using an insulting nickname for someone in public is the moral equivalent of murder,’ the rabbis also add, ‘Even when he is accustomed to the nickname’ and therefore experiences no (subjective) humiliation.”).
In other words, and as will be discussed in greater detail in Part Four of this Thesis, the harm as articulated in this tort could encompass not only a face-to-face encounter, but also a “face-to-body” encounter, where, for example, the victim was drugged or unconscious such that he or she was not aware of the humiliation of his or her person at the time. Exploitative objectification of a victim in these circumstances is a wrong in and of itself, regardless of the victim’s immediate reaction or experience of trauma.

E. Use of Technology is Evidence, Not a Required Element of the Tort

Would the harm necessarily be limited to bystanders using recording devices? Theoretically, no. Recall discussions in earlier Chapters regarding the extent to which cruel objectification was the driver for moral outrage in response to Bentham’s example of the man with water at hand laughing at the lady with the headdress on fire;\(^{25}\) Prosser’s image of the man on the dock coolly smoking a cigarette while another person drowns before his eyes;\(^{26}\) and of course the Seinfeld characters “mocking and maligning” the robbery victim.\(^{27}\) Theoretically, each of these could exemplify the harm of “exploitative objectification.”

Practically, however, the snap of a cell phone picture, especially when unaccompanied by any sign of effort to help or to recognize in some way the gravity of the harm and the subjective experience of the victim’s trauma, may make the tort case much easier to prove. The Seinfeld scene of recording the robbery is a good

\(^{25}\) See discussion of Bentham’s example in Chapter Four at note note 4.


\(^{27}\) See discussion of Seinfeld Finale, Introduction at note 12.
example of how the use of technology may be parsed. Note how the operation of the technology was distributed among the characters: only Kramer has a video camera in hand; and only Jerry has a mobile phone (in the late 1990s, a means to call for help) in hand. Yet all four participate in the “mocking and maligning” of the victim of assault and robbery. Technology in the hand of one character (Kramer) fixes the attention and the gaze of all four, and all four engage the scene as a source of sarcastic entertainment.

Note also that the tort does not hinge only on how the images or recordings are used. The use of the technology is indicative of intent. The tort itself focuses on the conduct of the bystander when face to face with a victim in need of emergency assistance. For example, Kramer’s video also includes a recording of their “mocking and maligning,” and utter indifference to the victim’s need for assistance. Regardless of whether the video was subsequently posted or marketed in some way, the content of the video contains proof of the characters’ exploitative intent—that Kramer and the others were engaging the scene for the satisfaction of their curiosity or sarcastic pleasure.

At the same time, how the images or recordings were used may be important evidence for a defense.28 In this regard, the pleadings and evidentiary implications are as follows:

1. Any time an engaged spectator chooses to photograph a vulnerable person in need of emergency assistance, it is presumptively an exploitative objectification.

---

28 For an extensive discussion of this question, see Chapter Twelve.
2. It is a complete defense for the spectator to show a) that the photograph was being taken for a benign reason (e.g., to provide evidence for a police investigation of the accident or assault); and b) that the photograph was not used in an objectifying way (e.g., posted on Facebook accompanied by sarcastic comments).

**F. A Word on Damages**

The introduction to this Part Three compared the target harm that the new tort aims to address to the act of spitting on someone, and submitted that to take a cell phone picture of a vulnerable person in need of emergency assistance in the circumstances described above, in the absence of acknowledgment or attention to the victim’s humanity, is like spitting on that person. How should damages be calculated for a harm analogous to spitting on someone—or better, spitting on someone in need of emergency assistance?

As noted in the discussion of “The Road Not Taken in the Law of Damages,” work to theorize the rationale and methods for calculating damages for “exploitative objectification of a vulnerable person in need of emergency assistance” could hone in on the project of carving out space within tort law to appreciate its role, in certain contexts, for a punitive function. If torts are “wrongs,” then the rationale for tort law damages need not be limited to compensation or efficient deterrence. When a cause of action consists in recourse for a socially reprehensible course of

---

29 See discussion supra, Chapter VIII.A.3.

conduct, regardless of the economic harm, the rationale for damages may serve to express moral censure—a public declaration that such conduct is reprehensible.

When an engaged spectator objectifies in an exploitative manner the pain of a vulnerable person in need of emergency assistance, that person has inflicted, to use Jean Hampton’s term, “moral injury.” The injury consists in a real harm: it is form of “diminishment,” a failure to recognize this person’s equal worth. Regardless of the victim’s response, this is a wrong in its own right. As Hampton argues, the response to an injury of this kind need not be grounded in a rationale for deterrence. Within a retributivist frame, damages may also be understood as part of “a commitment to asserting moral truth in the face of its denial.” Hampton explains:

> If I have value equal to that of my assailant, then that must be made manifest after I have been victimized. . . . A false moral claim has been made. Moral reality has been denied. The retributivist demands that the false claim be corrected.

Loaded words such as “retribution,” “vindication,” “revenge,” and even “punitive” may seem to pull in the direction of an irrational and emotional over-reaction. But the case for this new tort argues that there should be a space in civil litigation for these sentiments and “reactions” as an appropriate and even healthy response to certain socially reprehensible conduct. Further, the person who suffered such indignity should have the right to extract from the person who inflicted such

---


harm damages that admit the need to correct the false moral claim that had been asserted.

Thus further theoretical work to develop the new tort should also include more in depth study of how to normalize within the tort law the role of damages that have a punitive rather than compensatory quality. As will be discussed more fully in Chapter Ten, within the current landscape of tort theory, civil recourse theory may present the most promising terrain for these developments to flourish.
PART FOUR: EXPLORING THE CONTOURS OF THE TORT OF “EXPLOITATIVE OBJECTIFICATION” APPLIED TO ENGAGED SPECTATORS OF A SEXUAL ASSAULT

The introduction of a new legal remedy such as the tort of “exploitative objectification of a vulnerable person in need of emergency assistance” presents a number of questions. Most broadly, surveying the landscape of other modes for the protection of vulnerable persons and other legal remedies for harms inflicted, one might query: why tort? Why not criminal law? In fact, given potential conflicts between the systems, wouldn’t our system be better ordered if criminal law were given exclusive domain over this province? Chapter Ten takes this question as a springboard to explore the specific contribution of responsibility-based tort theory. A second question would be: why a new tort? Doesn’t established tort doctrine already provide a remedy to address this particular form of harm? Chapter Eleven delves into the closest analogue, infliction of emotional distress, and in light of the analysis in Chapter Eight, explores how the new tort addresses some of the intractable doctrinal obstacles embedded within that analysis. Finally, as part of its initial debut, this Thesis also addresses the question: would this tort run up against any Constitutional limitations? For example, given that this tort potentially implicates what people can do with their cameras on a public street—in a time when anyone can claim to be a free-lance photojournalist—to what extent would the scheme of this new tort conflict with First Amendment protections of the freedom of expression? Chapter Twelve works to both acknowledge and dispel these concerns.
The focal test case for answering some of these questions will be the fact pattern of engaged spectators to the sexual assault of an unconscious victim. Particular aspects of these fact patterns present an especially compelling case for tort, for the need for this particular tort, and for recognition of this particular tort within our Constitutional landscape.

Sexual assault in the context of teenage and college party scenes is not a novelty. Evidence is mounting that accusations of sexual assault or rape in these contexts has been widely underreported.\(^1\) Some cases are fraught with the difficulties of interpreting consent, especially when perpetrators and/or victims are intoxicated with alcohol or drugs. Images and recordings may provide some additional and possibly objective clues, but in many cases they will never fully resolve conflicts that hinge on communication and interpretation.

The act of photographing or filming victims of violence in these contexts is also not a novelty. But how these realities—the party scene and sexual assault—interact with the now *ubiquitous* nature of photographic and recording devices in the

hands of just about every partygoer, is contributing to the creation of a relatively new
social and legal landscape not only for analyzing and proving allegations of sexual
assault, but also for recognizing the new kinds of harm emerging in these contexts.
For cases in which the victim was extremely incapacitated or unconscious, images
and recordings can make all the difference in building and bringing a case. From the
victim’s perspective, it is the difference between no record—because no memory—
and a potentially permanent record of some aspect of how the incident unfolded in the
form of a visual and/or audio recording.

Before the advent of ubiquitous recording devices, in many cases the victim
might have remained forever in the dark as to what happened that night; and the
perpetrator(s), whose own judgment may also have been clouded or blocked by drugs
and/or alcohol, might never again unlock that corner of his or her memory. Now,
images and recordings can serve as an indication, and in some cases a clear and
powerful indication, that something terrible indeed did happen. These images can
also provide evidence of whether the victim was actually unconscious or
unresponsive. They record who was present, who was involved, some aspect of what
they did, and in the case of audio recordings, also what they said. When circulated to
other people and posted in the internet, they may also record further indications of the
underlying intent that informed the act of recording—sadly, at times for the purpose
of bullying, shaming, stalking, blackmailing, or worse.

Photographs and recordings also facilitate closer scrutiny of a world that in
many circumstances has not yet come fully into focus: who else, aside from the
perpetrator(s) and the victim(s), was at the party? What were they doing? Were they engaged in the violence or not? What were they saying? What else was going on that might indicate why these others did not help?

Sadly it is not difficult to find news reports detailing several recent incidents of the sexual assault of an unconscious victim.\(^2\) Discussions in this Part will focus largely on a case in which following the alleged drugging and rape of a minor at a teenage house party in Texas, photographs of the victim’s unconscious nude body were posted on social media. The discussion also draws on the facts from the June 2013 Vanderbilt gang rape and the role that bystanders and filming played in that case.

\(^2\) See, e.g., Nate Schweber & Juliet Macur, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (December 16, 2012) http://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html?_r=0 (account of Steubenville, Ohio August 2012 sexual assault of an incapacitated sixteen-year old girl; several of her peers photographed the incident and later circulated the account together with jocular comments); Julia Prodis Sulek, *Boys Admit Sexually Assaulting Saratoga Teen Who Committed Suicide*, SAN JOSE MERCURY NEWS (January 14, 2014) http://www.mercurynews.com/crime-courts/ci_24913018/audrie-pott-boys-admit-sexually-assaulting-saratoga-teen (account of September 2012 Saratoga, California sexual assault of an incapacitated teenager who committed suicide after photographs of the rape were distributed by peers via social media); Al Baker, *Sex Charges in Connecticut are Dissected on Internet*, N.Y. TIMES (March 20, 2013) http://www.nytimes.com/2013/03/21/nyregion/sexual-assault-charges-in-torrington-conn-are-dissected-in-social-media.html (account of March 2013 Torrington, Connecticut sexual assault of two thirteen-year old girls by two 18-year-old football players after which girls were blamed and viciously cyber-bullied on social media for having reported the assault); Anne Claire Stapleton and Josh Levs, *Allege d Gang Rape on Crowded Beach is “Not the First,” Sheriff Says*, CNN (April 16, 2015) http://www.cnn.com/2015/04/14/us/florida-panama-city-gang-rape-case/ (account of March 2015 Panama Beach City, Florida alleged gang rape in daylight on a crowded beach of unconscious woman; as sheriff recounted, bystanders did nothing to stop it: “Within feet of where the attack was happening, ‘There’s hundreds, hundreds of people standing there—watching, looking, seeing, hearing what’s going on;’ woman realized she had been attacked when watching the video on local news and seeing her own tattoos).
as the facts emerged in the initial trial and in the media. A description of the Texas case follows.

****

Houston, Texas, June 1, 2014: Jada, a 16-year-old girl, went with three friends to a party at the home of a friend of a high school friend. At some point in the festivities, she and one of her friends were taken upstairs, where she said that she was offered a drink, which she accepted. That is the last thing that she remembers of the events of that evening. The next morning she woke up at another friend’s house with her clothing askew and no memory of anything that had happened while she was unconscious. When she got home, she realized that her underwear was on backwards and that she had a bruise under her eye. She called a classmate who had also been at the party to ask what happened, but received no explanation.

About two weeks later Jada received text messages showing photos that seem to have been taken at the party. One of the images depicted her lying on the floor with her eyes closed, clothed only from the waist up. Eventually these and other images began to appear on social media with the hashtag #jadapose, depicting individuals lying on the floor, presumably in the position that her body had been in.

---

3 In light of the mistrial declared for this case in June 2015, this discussion will be revised in light of the facts that emerge in the new trial current scheduled for 2016. See discussion of mistrial, supra II.B.2 at notes 51-53.

that evening.\(^5\) Social media posts also included bragging about what had happened that evening, indicating that she had been sexually assaulted.\(^6\)

On June 22, Jada and her mother filed a police report on the incident. Jada also fired back against the cyberbullying with her own hashtag, #IAMJada, in which the defiant teen is pictured with her arm raised, hand in a fist.\(^7\) “I’m just angry,” she said.\(^8\) #IAMJada expressions of outrage and solidarity have since swamped the #JadaPose hashtag. While the identity of a rape victim is usually kept anonymous in the press, Jada granted radio and television interviews, requesting that she be identified by her first name. “There’s no point in hiding,” she said. “Everybody has already seen my face and my body, but that’s not what I am and who I am.”\(^9\)

During an interview with “The View,” Jada was asked what she wanted to happen to the alleged perpetrators at this point. She said: “That they go to jail and get justice.”\(^10\) In December 2014, Clinton Onyeahialam, nineteen, was charged with two felony counts of sexual assault of a minor. An unnamed minor, sixteen, was charged as a juvenile.\(^11\)

\(^5\) See Oh, supra note 4; Stewart, supra note 4.
\(^6\) Ehrlinger, supra note 4.
\(^7\) Ehrlinger, supra note 4.
\(^9\) Stewart, supra note 4.
What might it mean, as Jada put it, to “get justice”? For many, the first and most obvious path for justice in these kinds of cases is a call to rigorously enforce the criminal law. As Jada said, she would like to see her assailants “go to jail.” As of this writing, Jada’s case has not yet gone to trial. As of this writing, there is no further public information regarding the case, leaving opaque questions such as who else may have been at the part, and whether those charged with the assault were the same individuals as those who took the pictures. For the purpose of this analysis, I will suppose that they are not—that there were others present during the assault who took the pictures. I will also suppose that their conduct did not rise to the goading and active participation required for vicarious liability, and that the extent of their engagement was focused presence coupled with active recording. Should there be “justice” also against these actors?

Or considering the facts of the Vanderbilt gang rape, to put the question even more starkly: what if Mack Prioleau, remaining in the upper bunk, instead of rolling over and trying to ignore the scene, had taken out his cell phone to record or photograph the scene? Suppose further that this engagement did not rise to the level of goading, so as to fall within the notion of harm under a theory of vicarious liability.

---

As of October 24, 2015, Harris County District Clerk Court Records in indicate an active case for a felony indictment for the sexual assault of a child ages 14-17. Hearings have been reset by the agreement of both parties, with the next scheduled for November 17, 2015. See “Settings” for Case Number 145041101010, State of Texas vs. Onyeahialam, Clinton (Court 209), at http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx.
Under what circumstances does an engaged spectator who photographs or records an unconscious victim in need of emergency assistance inflict a *distinct* harm—one that is not parasitic on failure to mitigate the consequences of the primary harm of the assault?
X. Why Tort? How Responsibility-Based Tort Theory Might Inform the National Conversation about Bystanders and Sexual Assault

A. Potential Conflicts with Criminal Investigation and Prosecution

Looking at the legal system as a whole, are there reasons why a tort focused on the harm inflicted by engaged spectators has not yet been developed? In cases of violent crime, one reason why tort claims against “engaged spectators” have not yet been developed could be because of the low priority of focusing investigative resources on these actors relative to the attention on the actual perpetrator(s) of the assault. To put an even sharper point on the concern, tort claims against bystanders may have remained undeveloped because of concerns that they could interfere with criminal investigation or enforcement.

In the context of the duty-to-rescue debates, Eugene Volokh, for example, draws out a powerful argument regarding the anti-cooperative effects of law—namely, that if people know they might be civilly liable for failure to help they might be less likely to engage the system at all.1 He submits: “Making the legal system into the citizens’ adversary, rather than their protector and servant, jeopardizes this relationship and can deprive the legal system of the citizens’ assistance.”2 In sum,

---


2 See Volokh, supra note 1, at 110. See also Martin Roger Scordato, Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law, 82 TULANE L. REV. 1447, 1478 (2008).
Volokh surmises that the anti-cooperative effects of such laws would outweigh their social utility.³

One might imagine, for example, that regardless of one’s initial frame of mind in snapping the cell phone picture on the scene, the potential for civil liability would certainly preclude bringing the picture to one’s local precinct in aid of the criminal investigation. Similarly, Melody Stewart notes: “Speculation, misunderstanding, intermeddling, and the fear of being ‘set up’ and victimized are just some concerns a potential rescuer might have under a general duty-to-assist situation.”⁴

From a different angle, Scordato surmises that the exercise of prosecutorial discretion would be the best “sorting” mechanism both to reinforce the appropriate moral obligation, and to decide which cases are truly egregious enough for recourse of any kind. He argues that in this way, on the one hand, “a criminal duty to rescue can formally exist in the statutes, reinforcing the moral standard so articulated,”⁵ and on the other, through the exercise of prosecutorial discretion, the application of the full force of the rule could be limited to cases of “exceptional callousness or unquestionably reprehensible conduct.”⁶ Thus the filter of prosecutorial discretion

---

³ Volokh, supra note 1, at 111. See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 WASH U. L. Q. 1, 37 (1993) (discussing the tendency of prosecutors to prefer having witnesses to sexual assault as parties who cooperative in the prosecution of the principle, or in the alternative, pursuing a separate prosecution: “Seldom is there a witness to a sexual battery . . . who is not prosecuted as a codefendant or an accessory, which are felony offenses.”).


⁵ Scordato, supra note 2, at 1497.

⁶ Id. at 1496-97.
could help to maintain social control over decisions regarding which instances of failure to rescue are appropriate to address through the legal system.\(^7\)

For this reason, some authors argue that criminal law is the best framework for articulating duties to report or assist, and should therefore have exclusive reign over regulating the consequences of bystander conduct. For example, Arthur Ripstein makes a compelling case for a criminal duty to assist or alert grounded not in duties owed to the person in need of assistance, but in citizens’ obligations to support the coordinated response of public institutions, analogous to the duty to report a fire.\(^8\)

These concerns—especially the extent to which fear of a potential tort claim could impede the cooperation of witnesses in a criminal investigation; and the extent to which the potential for criminal liability would be sufficient to serve the purposes of public safety and deterrence—highlight the pressing nature of the question: why \textit{tort}? The next section explores both sides of the equation: the limits of criminal law and enforcement for this kind of dignitary harm; and the benefits of certain currents of tort theory for addressing this harm.\(^9\)

\(^7\) See id. at 1455 (“The primary advantage that a criminal law duty would have over a tort law duty is the presence of prosecutorial discretion. Such discretion permits social control of the pursuit of liability for failure to rescue in a way not available with a tort cause of action.”).

\(^8\) See Arthur Ripstein, \textit{Three Duties to Rescue: Moral, Civil and Criminal}, 19 LAW & PHILOSOPHY 751, 773-779 (2000). It would be interesting to further explore in the criminal context the use of pictures recorded on a cell phone as evidence of presence on the scene and failure to assist. In other words, cell phone technology might help to advance the case for the practicability and enforceability of a duty as articulated by Ripstein.

\(^9\) Beyond the scope of this thesis is more extensive exploration of the extent to which a tort action against “engaged spectators” could harmonize, intersect or clash with prosecution for criminal vicarious liability or with the criminal enforcement of child pornography schemes. For a thoughtful discussion of criminal liability for spectators of a gang rape, see Kimberley K. Allen, Note, \textit{Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes}, 99 GEO. L.J. 837 (2011). Chapter Twelve of this Thesis considers the parallel between the proposed new tort and certain aspects
B. Responsibility-Based Tort Theory and Bystander-Inflicted Dignitary Harm

Regarding the limits of criminal enforcement, it is interesting to consider the situation in the jurisdiction of Jada’s alleged rape. According to some reports, the investigative infrastructure in Houston can most charitably be described as dysfunctional.10 When systems for criminal investigation of sexual assault are at best disorganized and overwhelmed, and at worst corrupt, the responsibilities of bystanders would seem to rank far down on the list of remedial priorities to pursue.11 Further, many victims of rape and sexual assault simply refuse to engage any criminal investigative system, whether because of a generalized lack of trust and a sense that the system will fail to take their claims seriously, or fear of “blame the victim” counter accusations.12 Notwithstanding the arrests in Jada’s case, narrative and empirical evidence also demonstrates severe under-reporting, under-arrest and under-

---

10 For an anecdotal account of the dysfunctional nature of the Houston Police Department procedures for investigating rape, see Emily DePrang, Crimes Unpunished: The Houston Police Department, a lax discipline system keeps negligent cops on the streets. TEXAS OBSERVER (July 10, 2013) http://www.texasobserver.org/crimes-unpunished/ (discussing failures to make a report, failures to collect evidence and failure to treat victims with basic respect).

11 Untested rape kits, for example, are one indication of broken links in the chain of investigation. See e.g., Caitlin Dickson, How the U.S. Ended Up with 400,000 Untested Rape Kits (Sept. 23, 2014) DAILY BEAST, http://www.thedailybeast.com/articles/2014/09/23/how-the-u-s-ended-up-with-400-000-untested-rape-kits.html. See also THE HUNTING GROUND (2015) (interviews surmising that school and team loyalty interfered with police investigation of alleged sexual assault by University of Florida football player).

prosecution in cases where the victim of sexual assault is African-American. If direct sexual assault is under-investigated and under-prosecuted, that does not forebode well for “getting justice” against engaged spectators—persons whose conduct is at least a notch down from the direct violence of an assault.

For this question—providing redress, “getting justice”—would a tort claim promise any better? As discussed in earlier chapters, there are several reasons why tort remedies are either under-theorized or do not even come to mind in response to what is essentially a dignitary harm. In this context, if the driving force for tort theory is deterrence or compensation for harm, there may be more efficient or otherwise better ways to pursue these goals.

This section submits that when it comes to articulating remedies for dignitary harm, some foundational explanations of the nature and purpose of tort theory give better answers than other currents of thought. It opens out in some detail some recent and promising developments in tort theory to articulate a responsibility-based rhetorical frame for tort law. Exploring how these theoretical currents mesh with a claim against an engaged spectator for having inflicted a dignitary harm in the context of a sexual assault, the following sections discuss the conceptual limits of corrective justice theory and the conceptual strengths of civil recourse theory.

From a deontological perspective, when treating persons as ends is placed at the foundation of tort theory, the focal point of a torts system is not the instrumental engineering of social incentives, but justice between the parties, and justice on the

---

basis of what actually happened or did not happen between them in a given case. As George Fletcher explained in a foundational essay, justice means fairness, including fair treatment of the specific parties in a cause of action.\textsuperscript{14} In the years following Fletcher’s essay, often incorporating the foundational conceptual work of H.L.A. Hart and Antony Honoré, torts theorists such as Stephen Perry, Ernest Weinrib, and Jules Coleman have developed variations on this theme. Much of the current debate within tort theory has been cast as a duel between what Perry, Weinrib, and Coleman term “corrective justice,” and the dominant strains of “efficient-deterrence theory.”\textsuperscript{15} Over the past fifteen years, however, John Goldberg and Benjamin Zipursky have also amassed an impressive corpus of scholarship articulating a theory of “civil recourse,” which they argue is not simply their particular riff on corrective justice, but a tort theory in its own right.

Reflecting on these recent developments Goldberg and Zipursky describe how the concept of “responsibility” should function as an umbrella, embracing a number of versions of tort theory that stand in contrast to instrumental or deterrence based versions. They also describe the extent to which the various contenders, including corrective justice and civil recourse, are positioned fully or partially under that theoretical umbrella.\textsuperscript{16} They explain: “Tort law is best understood as law that defines

\begin{itemize}
  \item \textsuperscript{14} See generally George P. Fletcher, \textit{Fairness and Utility in Tort Theory}, 85 HARV. L. REV. 537 (1972).
  \item \textsuperscript{15} See John C.P. Goldberg & Benjamin C. Zipursky, \textit{Tort Law and Responsibility}, in \textit{PHILOSOPHICAL FOUNDATIONS OF TORT LAW} 17 (John Oberdiek, ed. 2014).
  \item \textsuperscript{16} See id. at 17 (noting that while there are overlaps between responsibility-based theories and corrective justice theories, “the responsibility view is not best described as a version of corrective
\end{itemize}
duties not to injure others, and that holds those who have breached such duties vulnerable to their victim’s demands for responsive action.”

Thus at the heart of responsibility-based tort theories are two basic claims: “First, for any successful tort claim in which a defendant is deemed liable to a plaintiff, the court is holding the defendant responsible to the plaintiff. Second, the defendant’s responsibility rests on the defendant’s being responsible for having injured the plaintiff.”

Responsibility-based tort theories focus on what actually happened between the parties, and on accountability and personal responsibility for actual injuries inflicted on other human beings. This, according to Goldberg and Zipursky, packs huge rhetorical punch. They explain:

Few normative ideas are more basic than the thought: “This is your responsibility!” It is huge advantage of responsibility theories over other approaches that it engages the language of the participants in the legal system, and engages the quotidian discourse of lawyer and judges about what they are doing when they structure and resolve a battle over tort liability: they are determining who shall be held responsible.

Within responsibility-based tort theory, two conceptual streams—“corrective justice” and “civil recourse”—are currently engaged in vigorous argument regarding the extent of their similarities and their differences. The heart of corrective justice theory, it seems, is that “in requiring that the defendant pay compensation to the...
plaintiff for injuring the plaintiff,” tort law “is said to see to it that the wrongful
injuring of the plaintiff is corrected.” While responsibility theorists need not
necessarily reject this concept, neither would this conceptual anchor be a requirement
for coming under the umbrella of responsibility theory. Goldberg and Zipursky
explain:

One could, for example, take the position that what is demanded of
a tortfeasor, in light of his having wrongfully injured the plaintiff,
is to take responsibility by apologizing, and that tort law, by
requiring that damages be paid, is requiring something akin to an
apology rather than requiring the defendant to correct the wrong or
the loss.\footnote{Id.}

The analysis below explores the hypothesis that claims for civil liability
related to dignitary harm, particularly in the context of sexual assault, may be one
area where the differences between corrective justice and civil recourse come into
sharper focus. Examples aim to illustrate how aspects of the civil recourse rhetorical
frame highlight features of the torts system that might otherwise remain opaque or
inaccessible when viewed through the lens of corrective justice.\footnote{Id.}

\footnote{Note how this assessment sharply contrasts with the analysis of Cardi and Green. \textit{See} W. Jonathan Cardi & Michael Green, \textit{Duty Wars}, 81 S. CAL. L. REV. 671, 706-707 (2008) ("In our view, the Achilles’ heel of [Goldberg and Zipursky’s] critique is that it stems from an intellectually vibrant, but
under-inclusive and ultimately misguided attempt to provide a unified theory of tort law. . . . In fact, large swaths of negligence law—rescue, emotional harm, and economic loss—are regulated through
duty, based substantially on instrumentalist concerns.")}. 
C. The Conceptual Limits of Corrective Justice Theory

In *The Idea of Private Law*, Ernest Weinrib outlines the theoretical foundations of corrective justice, including its grounding in Aristotle’s descriptions of the transactional features of justice and the analogy to arithmetic. Weinrib explains:

Corrective justice features an equality of quantities. It focuses on a quantity that represents what rightfully belongs to one party but is now wrongfully possessed by another party and therefore must be shifted back to its rightful owner. Corrective justice embraces quantitative equality in two ways. First, because one party has what belongs to the other party, the actor’s gain is equal to the victim’s loss. Second, what the parties would have held had the wrong not occurred provides the baseline from which the gain and the loss are computed. That baseline, accordingly, functions as the mean of equality for this form of justice.23

Aristotle’s descriptions of corrective justice emphasize the transactional character of the relationship. As Weinrib notes:

Aristotle observed that what we would now call private law has a special structure of its own. Justice is effected by the direct transfer of resources from one party to the other. The resources transferred simultaneously represent the plaintiff’s wrongful injury and the defendant’s wrongful act. Corrective justice thus treats the wrong, and the transfer of resources that undoes it, as a single

---

23 **ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW** ("WEINRIB, PRIVATE LAW") 62 (1995). See also id. at 63 (explaining the centrality of this feature: “Presenting corrective justice as a quantitative equality captures the basic feature of private law: a particular plaintiff sues a particular defendant. Unjust gain and loss are not mutually independent changes in the parties’ holdings; if they were, the loss and the gain could be restored by two independent operations. But because the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost.”). Note that the discussion that follows focuses largely on the corrective justice theory of Ernest Weinrib. Future research on this topic will include more attention to the nuances of other important theorists who focus on the duty of repair, including Jules Coleman, Richard Wright and Stephen Perry.
The wrong, the injury, and the corrective “transfer” between the parties is what make up the nexus: “Only if the plaintiff and defendant are linked in a single and coherent justificatory structure can one make sense of the practice of transferring resources directly from the defeated defendant to the victorious plaintiff.”

Weinrib admits that Aristotle’s exposition, standing alone, is “seriously incomplete.” Thus he fills in the gaps with Kant’s concept of right: “On this interpretation, the bipolar structure of corrective justice represents a regime of correlative right and duty, with the disturbance of equality in Aristotle’s account being the defendant’s wrongful infringement of the plaintiff’s rights.”

From a critical perspective, it is important to note that any case of negligence introduces a certain strain on this model. Weinrib acknowledges, for example, that it is problematic to speak in terms of “gain” on the part of the defendant, because “the plaintiff’s suffering of an unintended injury in no way improves the situation of the defendant.” Even within the paradigm of intentional torts, what is it exactly that you gain when you hurt someone else? Weinrib admits that the image based on arithmetic is representational and not literal, and so it illustrates something, not

---

24 Id. at 56.  
25 Id. at 57.  
26 Id.  
27 Id. at 58.  
28 Id. at 117.  
29 See id. at 64, n.26 (discussing the commentary of Thomas Aquinas on the Nicomachean Ethics, explaining the “gain” of the assailant and the murderer as having “more of what is esteemed good inasmuch as they have done their own will and so seem as it were to have gained.”).
everything, about the relationship. He explains: “In the Aristotelian account, gain and loss are a way of representing the occurrence of an injustice that needs to be rectified through liability. Injustice and liability reflect the violation of certain norms, not the existence of certain facts.”

The analysis also allows for a distinction between factual and normative losses. For example, if an injury is innocent, there may be a factual injury without a normative injury. Further, tort law does not insist on correlativity between the plaintiff’s factual injury and the defendant’s factual gain. As Weinrib explains: “In tort law the plaintiff typically complains of the factual loss or injury, but only exceptionally has the defendant realized a corresponding factual gain from the wrong.” In Weinrib’s system, the bridge between the factual and the normative is a Kantian theory of rights and duties: when gains and losses are understood as normative, not factual, “we can therefore identify the correlativity of this normative gain and loss and correlativity of Kantian rights and duties.” According to Weinrib, the correlativity of normative, not factual gain and loss, forms the core of the justificatory structure of corrective justice.

---

30 Id. at 119. \textit{See also} id. 119 at n.8 (“The point of Aristotle’s adducing of quantitative equality is to bring out the categorical distinction between the two forms of justice, not to tell us anything about the subject matter of the equality.”).
31 Id. at 117. \textit{See also} id. at 118 at n.4 (noting Aristotle’s own acknowledgment of the terminological difficulty that the system poses for personal injury cases); id. at 117, n.3 (noting the particular difficulty of intentional wrongs: “one would have to consider the psychic satisfaction of the tortfeasor to be a factual gain that was somehow equal to the factual loss.”).
32 Id. at 115.
33 Id. at 119.
The system has all of the elegance, and all of the limits, of an arithmetic formula. Notwithstanding Weinrib’s suggestions for expanding the imaginative horizon of the system, its quantitative imagery continues to pose serious limits to its flexibility. Consider, for example, how normative correlativity is explained as an imbalance between surplus and shortfall: “the wrongful injury represents both a normative surplus for the defendant (who has too much in view of the wrong) and a normative shortfall for the plaintiff (who has too little).” The core question is “whether the transaction can be regarded as yielding a normative surplus for the defendant and a normative deficit for the plaintiff.” Liability constitutes a “disgorgement” of gain: “The defendant realizes a normative gain through action that violates a duty correlative to the plaintiff’s right; liability causes the disgorgement of this gain.” The “transfer” of the difference is expressed in “a single sum”: “because of the mutual moral reference of the infringement of the right and the breach of the duty, the amount of the gain is necessarily identical to the amount of the loss. Hence the transfer of a single sum annuls both the defendant’s normative gain and the plaintiff’s normative loss.”

Further, as Jules Coleman describes, “the central concern of the principle of corrective justice is the consequences of various sorts of doings, not the character or

---

34 Id. at 117-118.
35 Id. at 119.
36 Id. at 125.
37 Id.
culpability of the doers.”

Here too, using an image from arithmetic, Coleman explains: “Corrective justice specifies certain gains and losses as requiring annulment; it does not specify the conditions under which the individuals who are responsible for creating those gains and losses ought to be blamed or punished. Its concern is consequences, not character.” In addition, he notes, “a loss is wrongful only if it is the result either of a faulty doing or a rights invasion.” Coleman emphasizes how consequences are to be parsed out from character: “The relevant fault is in the doing, not the doer, and the excuses that defeat blame are irrelevant. Thus an objective standard of negligence is perfectly compatible with corrective justice.”

The arithmetic imagery seems to measure well the consequences, and thus also the due repair. Theoretically, claims for dignitary harm such as those discussed above would not be precluded from analysis under this model so long as one locates a distinct injury that connects the defendant as doer and the plaintiff as sufferer. But as Weinrib himself would acknowledge, the model presents something of a rhetorical strain.

A related weakness of corrective justice for analyzing claims for dignitary harm is its rejection of—or at least ambivalence toward—the central role that explanation or apology may have as an integral part of the torts system. For example, while Stephen Perry notes that defendants ought to express regret, it is not clear from

---


39 Id.
his analysis whether this dimension is connected to corrective justice.\textsuperscript{40} Similarly, Scott Hershovitz critiques what he considers to be Coleman’s “cramped” view that the duty to apologize is extraneous to corrective justice.\textsuperscript{41} In contrast, Hershovitz argues, “explanation and apology are at least as central to our practice of making amends as monetary compensation is.”\textsuperscript{42}

Discussing Antony Honoré’s more capacious view of corrective justice, which Goldberg and Zipursky would probably rename “responsibility-based tort theory,” Hershovitz explains:

I see no reason to think that when one person harms another, the only matter of justice at issue between them is the loss. Indeed, as we know from tort, there are many wrongs that involve negligible losses, or even no loss at all. One can harm another by setting back dignitary interests just as well as material ones. It would be odd if justice had nothing to say about such harms simply because they are not connected to a loss. If justice does have something to say about dignitary harms, presumably it would require the actions that would remedy them. Experience suggests that often that will include explanation and apology.\textsuperscript{43}

I submit that the strain is more than rhetorical, and for the analysis of some kinds of tort cases there is something offensive about a framework that attempts to


\textsuperscript{41} Id. (citing Coleman).

\textsuperscript{42} Id. at 96.

\textsuperscript{43} Id. \textit{See also} id. at n.86 (discussing the ideas that damages make whole can be cruelly false); id. at 98 (noting the difficulty of “shoehorning” dignitary harms into the concept of loss; “the metaphor seems more apt for some dignitary harms than others.”).
“annul” the damage—as Arthur Ripstein puts it, “as if it had never happened.”\textsuperscript{44} Returning to Coleman’s emphasis on the relevant fault is “in the doing, not the doer,” there is something about the context of dignitary harms that makes it much harder to parse out the doing from the doer, and the act from a notion of blame. In the case of a dignitary harm, particularly one that is framed against the backdrop of a sexual assault, the point of a cause of action is not only to address the consequence of the harm and the need for repair. The process of calling to account also needs show \textit{how} one came to be harmed. The process itself may provide the victim an opportunity to reclaim the power to shape a narrative which assigns blame to one who has up until that point refused to take responsibility.\textsuperscript{45}

In cases of dignitary harm, the rhetoric of a corrective justice framework fosters an illusion that one might ever return to a point “as if it had never happened.” Analyzing a case arising from the plaintiff being spit on—which could be fairly characterized as an affront to dignity—Hershovitz reflects: “Many kinds of wrongdoing do not involve losses that can be shifted to the wrongdoer.”\textsuperscript{46} For these cases, Hershovitz explains:

\textsuperscript{44} See Arthur Ripstein, \textit{As If It Never Happened}, 48 WM. & MARY L. REV. 1957, 1962 (2007) (discussing “causal annulment”). See also Ripstein, \textit{Three Duties, supra} note 8, at 762 (describing damages as remedial: “their purpose is to undo the effects of one person’s interference with another’s freedom.”).

\textsuperscript{45} Hershovitz, \textit{Harry Potter, supra} note 40, at 98-99 (discussing the example of filing a torts suit in order to “get answers”: “tort litigation has the potential to remedy a defendant’s failure to explain herself, or to do so satisfactorily.”); id. at 100 (“Tort does more to respond to wrongdoing than enforce duties of repair. It empowers victims to demand explanations, and it offers them second-best substitutes for apologies.”).

\textsuperscript{46} Scott Hershovitz, \textit{Tort as a Substitute for Revenge}, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 91 (John Oberdiek, ed., 2014).
The Aristotelian picture holds out a false promise. It makes it seem like we can get back to where we started; we just have to rejigger the line. But we can never get back to where we started. When one person wrongs another, the wrong is part of our history, indelibly, and the challenge is to figure out how to go on, not how to go back. Of course, everyone who writes about corrective justice appreciates this, at least to some degree. So they douse their claims in qualifiers.\footnote{Id. at 92.}

Such might also be an especially apt description of how many victims experience the effects of violent assault.

\textbf{D. The Conceptual Strengths of Civil Recourse Theory}

In contrast to corrective justice, civil recourse emphasizes a number of structural features that tend to fly under the radar of other tort theories, not least of which, Hershovitz observes, is “the fact that tort empowers victims to hold wrongdoers accountable.”\footnote{Hershovitz, \textit{Harry Potter}, supra note 40, at 102, n.105.} As Goldberg and Zipursky explain, at the core of the theory is the argument that “the concept of a tort fits very naturally with the idea of having a court system that is open to hearing complaints that are filed at the discretion of a putative victim of injurious wrongdoing and that seek relief as against a wrongdoer.”\footnote{John C.P. Goldberg & Benjamin C. Zipursky, \textit{Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette}, 88 IND. L. J. 569, 570 (2013).}

If the primary image of corrective justice is Aristotelian repair, civil recourse tends to emphasize the verbal image of a call to account. It parallels in interesting
ways Darwall’s “Second Personal Standpoint,” introduced in Chapter Eight. Reflecting on the contours of civil recourse theory, Darwall highlights how this “relational” framework can help to distinguish the structure of civil recourse, and private law more generally, from that of the criminal law. The “important truth” about torts that civil recourse theory captures can be expressed in relational terms: “namely, that injured victims of violated bipolar obligations owed to them have a distinctive standing to hold their injurers responsible that neither third parties nor the community at large have.”

So what exactly is the particular contribution of civil recourse? As mentioned above, responsibility-based tort theory, and civil recourse in particular, builds on the power of the most basic normative ideas that can be expressed in an easily accessible rhetoric. But how is civil recourse more than just a rhetorical flourish? How is it more substantive than merely the perspective, interpretive spin or narrative that a particular party puts on the meaning that one gives to filing suit—especially one who is very invested in the process of a seeking an explanation, of a calling to account? If the theory’s contribution is is only about interpretive spin, it is not difficult to see why some would relegate the theory to a substantial but quirky footnote under the

---

51 Id. at 18. (explaining: “this legal distinction tracks a moral distinction between, respectively, obligations that are owed to others, so called ‘relational,’ ‘directed,’ or ‘bipolar’ obligations, and moral obligation, pure and simple, or as I sometimes call it, moral obligation period.”).
52 Id. at 19.
53 See discussion *supra* at note 19. See also *Tort Law and Responsibility*, supra note 15, at 36; id. at 22 (“Although moral-philosophical theories of tort law are criticized for being unrealistic, responsibility theories are often more grounded and more helpful than supposedly down-to-earth instrumental theories in making sense of settled law and important modern doctrinal developments.”).
seemingly vast umbrella of corrective justice.

I believe there is more “there there,” but one of the reasons that the dimensions of private law that Goldberg and Zipursky are working to articulate can be hard to appreciate—and even hard to see—is because of the roads not taken in tort law which have left harm, duty and damages severely under-theorized when not viewed through an the lens of instrumental or efficient-deterrence based reasoning. While corrective justice also spurns the deterrence-based or instrumental approach, its focus on “repair” can still be expressed in an image from arithmetic—thus close to economic terms. Through this lens, it seems to be easier to see—and measure—what is happening in a torts suit. Our eyes are drawn to outcomes that are measurable in material and economic terms. This lens also renders dignitary harms almost invisible.

The same history and theoretical trends that make it difficult to theorize dignity-based harms also make it difficult to appreciate the importance and nuance of a private law system that emphasizes the importance of recourse, and the extent to which recourse is not reducible to “correcting” a measurable imbalance. The subsections below explore how claims against an engaged spectator for “exploitative objectification” in the context of sexual assault highlight the distinctive contribution

54 See generally discussion supra, Chapter VIII.A, Under-Theorization of Dignitary Harm: The Roads Not Taken.
55 See Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973) 31 (quoting 1918 declaration of E.L. Thorndike: “Whatever exists at all exists in some amount,” to describe quantification as the hallmark of the new social science); id. at 183 (discussing Charles Ellwood’s 1943 critique of “metaphysical monism, which asserts that only the physical has existential reality.”).
of civil recourse theory to tort law.

1. **Empowering Victims to Bring Suit**

   As noted above, the corrective justice emphasis on repair, in the hope of arriving to the point of “as if it never happened,” presents severe limitations for cases involving sexual assault. Can civil recourse theory do better? I believe that it both illuminates the particular limitations of corrective justice and also gives insights into how to avoid those specific tripping points.

   In a case against an engaged spectator to sexual assault, what is at stake for some victims is one’s need and desire to recover his or her own sense of identity in the wake of having been objectified. It is not only about finding one’s voice and feeling empowered to reclaim one’s own narrative—“I am Jada,”—but also about the call to account to a specific other, to acknowledge the subjectivity and power that had been previously denied.

   Following the internet circulation of the images of her partially nude body captured while she was unconscious, the driving force of Jada’s narrative is an effort to reclaim her identity. The reasons she states for having her first name and unobfuscated face associated with her radio, television and internet interviews about the assault are especially poignant: “There’s no point in hiding. Everybody has already seen my face and my body, but that’s not what I am and who I am.”

---

of #JadaPose speaks volumes: #IAmJada.57 The image that started the hashtag in which Jada is pictured with her arm raised, hand in a fist, captures well her stance: “I’m just angry.”58 Might a civil cause of action not only against those who allegedly raped her, but also against those who took pictures of her face and her body in those circumstances, be a part of the response of a civilized community to this kind of violence—a path that could both validate her anger and help her to reclaim her story and her identity?

For the Vanderbilt gang rape victim, the analogy to Jada’s story might focus on the moment during the initial criminal trial of two of the assailants in which she identified herself in the video—“that’s me”—they did that to me.59 Do you realize that you did that to me? What role might a civil case have in recovering that sense of the “me” who was so dehumanized?

In light of the lurking question of whether civil remedies are needed at all when the criminal law seems sufficient to address community safety concerns, and the further concern that civil remedies might interfere with criminal investigations and process, if the core purpose of the of the system is to “repair,” as it is in corrective justice, it is not clear why we would need to “double up” with both

57 Id.
criminal and civil remedies in order to address the harm. In contrast, with civil recourse theory, the reasons for the distinction are clear. As Goldberg and Zipursky note: “It hardly follows from the fact of having a criminal justice system that a modern and civilized form of government centralizes, or ought to centralize, all power to seek redress of wrongs through the state.”

As Antony Duff explains, a criminal case “is controlled by criminal justice officials; the victim has no formal standing to demand prosecution or influence the sentence.” In contrast, a civil case “is controlled by the plaintiff”—with important consequences for the plaintiff’s agency: “If the victim looks to the civil law, she will find herself as an agent again: it is for her to bring a case, to decide whether and how to pursue it.” The attraction of civil recourse is that it enables the victim “to hold the person who wronged her accountable through a public legal process; she is in charge, decides whether to sue, settle, enforce award.” Or as Darwall puts it, “What civil recourse theory gets right, in opposition to its competitors, is its focus on the victim’s individual authority.”

Goldberg and Zipursky explain this in terms of a conferral of power: “The commission of a tort confers on the victim a particular legal power; namely, a power to demand and (if certain conditions are met) to obtain responsive action from the

60 See, e.g., Murphy, supra note 1, at 663 (from a deterrence perspective, “once criminal liability is in place, there is simply no need for additional civil liability.”).
63 Id.
64 Id. at 221.
65 STEPHEN DARWALL, MORALITY, AUTHORITY AND LAW 178 (2013).
tortfeasor." Like Duff, they emphasize how this process is distinct from criminal procedure: “The victim, not a government official, decides whether to press her claim or not, and the victim, in principle, also decides whether to accept a resolution of the claim short of judgment.” In this feature, “[t]he idea of a relational, injurious wrong goes quite naturally with the idea of the victim being entitled to respond to the wrongdoer.”

What is the meaning of this conferral of power in a case involving sexual assault? It is important—it has the potential for becoming a crucial feature in the process of reclaiming control over the narrative of one’s own identity. As Nora West argues, “rape survivors could be empowered in playing an active role in a system of formal equality—in contrast to being a witness to the state’s action in the criminal justice system with ‘victim’ status—which may reflect a reversal of the gender inequalities expressed and experienced through rape.”

---

66 Civil Recourse Defended, supra note 49, at 572.
67 Id.
68 Id.
69 See Nora West, Rape in the Criminal Law and the Victim’s Tort Alternative: A Feminist Analysis, 50 U. TORONTO FAC. L. REV. 96 (1992); Nikki Godden, Tort Claims for Rape: More Trials, Fewer Tribulations? in FEMINIST PERSPECTIVES ON TORT LAW 163 (ed. Janice Richardson & Erika Rackley 2012). See also Bruce Feldthusen, The Civil Action for Sexual Battery: Therapeutic Jurisprudence, 25 OTTOWA L. REV. 203-34 (1993); Bruce Felthusen, Nathalie Des Rosiers & Oleana Hankivsky, Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Legal System, 4 PSYCHOLOGY, PUBLIC POLICY AND LAW 433-51 (1998). For the role of civil recourse theory in the re-assertion of equality and standing in society, see Jason M. Solomon, Civil Recourse as Social Equality, 39 FLA. ST. U. L. REV. 243, 257 (2011) (“Empowering the victim makes clear that the “public institutions” do not share the view of her “basic standing within . . . society” evidenced by the wrongdoer’s conduct and serves as a counter to the harm and its stark reminder of human vulnerability. And in exercising the right to recourse—in the doing of justice—the one empowered is able to remind the wrongdoer that she is worth respect and attention, and thus her status is that of an equal.”).
2. A Critical Perspective on the Limits of Legal Remedies

A second area that civil recourse theory both critiques and illuminates is the distortions built into the various theoretical depictions of legal remedies. In contrast to theories that define the core of tort law as “making whole” or restoring the *status quo ante*, Goldberg and Zipursky consider this aspect to be “but one remedial rule,” and “not part of the very definition of tort.” While “making whole” might constitute in some circumstances fair and reasonable redress for the victim of a tortious wrong, the concept of redress to which a successful tort plaintiff is entitled is broader, “compatible with judicial provision of remedies ranging from injunctions to nominal damages.” Civil recourse theory highlights that there may be some circumstances in which “nothing will make things ‘right’ between the parties (even in an extended sense of ‘right’) but that tort law nonetheless requires the responsible party to own up to what he has done to the plaintiff.”

Within the grand scheme of responsibility-based tort theory, there seems to be a generous pluralism: “Being a responsibility theorist permits being a corrective justice theorist; it does not require it.” But perhaps in some contexts, including cases regarding sexual assault and other dignitary violations, civil recourse theorists might be less generous, and consider sharpening their critique of the offensive nature of a corrective justice drive for equilibrium, “as if it never happened.”

For example, Antony Duff gives an account of a negligence suit in which

---

70 *Civil Recourse Defended*, supra note 49, at 574.
71 Id. *See also Tort Law and Responsibility*, supra note 15, at 28.
73 Id. at 25.
parents are looking for an explanation of how their child died. He explains:

What the parents properly want is an accounting, and an apologetic recognition not merely of the harm caused, but of the wrong done: an explanation, from the people concerned, of how their child died, of what went wrong; and if what went wrong included negligence, an admission of that. But such an accounting, such apologetic recognition of wrongdoing, cannot fit within a system designed to allocate the costs of harm.74

According to Duff, civil recourse theory can help to fill that gap.75 In contrast to the primary purpose of the cost-allocation model in order to secure damages, civil recourse brings into relief that in some cases the more appropriate primary purpose is “to hold the wrongdoer to account for the wrong and to secure from the court a verdict that he is liable; only after such a finding of liability does the question of a remedy for that wrong arise.”76

When courts declare that a defendant is vulnerable to a claim by the plaintiff for a tort claim in the context of sexual assault, this might be one area where civil recourse can help to clarify the extent to which courts should be especially careful of language that implies that anything that the defendant does or should do will necessarily “repair” or “make whole.” In many of these cases, it could be that the only stance respectful of the victim’s dignity is to acknowledge that the damage is of a nature that nothing can repair.77

---

74 Duff, supra note 62, at 221.
75 Id.
76 Id.
77 See Godden, supra note 69, at 163-64 (United Kingdom background on why civil cases remain rare); id. at 173 (discussing Feldthuelsen’s conclusions that “rape and sexual assault survivors may not be
By framing the duty to repair or the task of “making whole” as “but one remedial rule,” and “not part of the very definition of tort,”78 civil recourse taps into the broader concept of “redress” which include a range of remedies, from injunctions to nominal damages.79 In some cases, some form of an apology need not necessarily be ruled out. As Goldberg and Zipursky explain:

One could, for example, take the position that what is demanded of a tortfeasor, in light of his having wrongfully injured the plaintiff, is to take responsibility by apologizing, and that tort law, by requiring that damages be paid, is requiring something akin to an apology rather than requiring the defendant to correct the wrong or the loss.80

And for cases where apologies are not appropriate, as Hershovitz explains: “tort litigation has the potential to remedy a defendant’s failure to explain herself, or to do so satisfactorily.”81 In sum: “Tort does more to respond to wrongdoing than enforce duties of repair. It empowers victims to demand explanations, and it offers them second-best substitutes for apologies.”82
Civil recourse theory reminds us that the torts apparatus for repair is backed by the compulsive force of the state. Within this framework the common law “offers those who have been wronged a means of responding to those wrongdoings, and both defines and constrains the nature and magnitude of permissible response to wrongdoing.”\(^83\) On one hand this invites a capacious imagination for all of the ways to acknowledge that redress is not only, and not fully, captured in the corrective justice concept of repair. On the other, it also acknowledges the limits of the law. For example, in the profound work of reconciliatory moral repair, it allows for the fact that there are intimate places in the depths of the human heart that the law should not attempt to navigate or control.

\section*{E. Civil Recourse and the Provision of Legal Services}

These two conceptual strengths—a potential for empowering victims and a critical perspective on the nature of tort remedies—come into particular relief in the context of sexual assault cases. This raises a further question about the gauntlet that this theory lays down for the torts system as it operates now. Given the bipolar relational nature of the call to account, Duff highlights: “If our concern is with remedies for wrongs, we should insure that the plaintiff receives not merely appropriate compensation, but that she receives it \textit{from the defendant}.”\(^84\) To put a point on that, if at the heart of tort law is “the idea of having a court system that is open to hearing complaints that are filed at the discretion of a putative victim of

\footnotesize
\begin{itemize}
\item \(^83\) Zipursky, \textit{Philosophy of Tort Law}, \textit{supra} note 14, at 135.
\item \(^84\) Duff, \textit{supra} note 62, at 226.
\end{itemize}
injurious wrongdoing and that seek relief as against a wrongdoer,\textsuperscript{85} how might this ideal fit or interact with the realities of our torts system as it currently operates?

If, as civil recourse theorists submit, at the heart of the torts system is neither deterrence, nor locating the cheapest cost-avoider, nor developing the best system for moving money around to compensate for harm—but rather, a victim’s call to a wrongdoer to account for the wrong done—then civil recourse also brings us to a moment of truth: our legal system, and in particular, our structures for the provision of legal services are not yet equipped to operate in this way. Understood in this way, civil recourse is not only a way to re-imagine the purpose of the torts system, it is also a call to restructure the provision of legal services. Much would have to change in our system in order to finance a face-to-face encounter between those who have been injured and those who actually inflicted that injury when the wrongdoer does not have the financial means to cover a judgment.

In the case of sexual assault, what may matter to the victim is that he or she has the opportunity to call a wrongdoer to account. But so long as lawyers are more or less the guides required for navigating the legal system, and in particular, the complexities of a civil trial, money will also make a pivotal difference for whether these cases ever see the light of day.

Consider, for example, why so few cases of intentional infliction of emotional distress wind their way through the torts system. Regardless of how plaintiffs would hope to focus their call to account, the lawyers who represent them, who

\textsuperscript{85} Civil Recourse Defended, supra note 49, at 570.
understandably expect that their work will be reimbursed by a hoped-for recovery, generally keep their eye on the realities of how insurance law intersects with intentional tort claims. Because of how the torts scheme intersects with near-universal clauses in insurance contracts that remove intentional conduct from coverage liability, including tort liability, to state a claim for intentional infliction of emotional distress is often a Pyrrhic victory. As a practical matter, unless the defendant is wealthy, exclusion of a claim from insurance coverage may mean that the plaintiff will be unable to actually recover compensation for injuries, thus making these cases extremely unattractive for lawyers who hope to end up with a fee for their work. This difficulty is outlined below.

General liability policies frequently include clauses covering “accidents” but excluding coverage for casualties resulting from intentional acts, criminal acts, or acts with expected or intended results. Under Texas law, for example, when an insured’s acts are voluntary and intentional, the results or injuries, even if unexpected, are not caused by an “accident” and the event is not an “occurrence” under the

87 17 WILLISTON ON CONTRACTS § 49:115 (4th ed. 1990) (Intentional Acts). See also George A. Locke, Avoiding the “Intentional Injury” Exclusion—Insured Acting with Diminished Mental Capacity, 15 AM. JUR. PROOF OF FACTS 3D 449, § 1 (1992) (“The main objective of an intentional injury exclusion clause is to prevent extension to the insured of what would amount to a license to commit intentional torts.”). See also id. (from an insurer’s perspective, “the central concept of insurance presumes that the insurer will have the ability to supply coverage only for losses that are uncertain from the insured party’s point of view, and intentional acts designed to cause injury or damage do not fall within the actuarial calculations of random occurrence on which insurance companies rely in order to make money.”). See generally Fischer, supra note 86.
policy. These clauses reflect a deep conviction embedded into the law of liability insurance that “a person should not receive indemnity for the civil consequences of his own intentional wrongdoing,” and that a provision to the contrary would be void as against public policy. For example, in a North Carolina case a homeowner intentionally concealed a video camera in his bathroom and filmed its occupants, with sufficient certainty to cause injury as a result of the filming. Given this level of intent, the appellate court found that the arising claims for intentional infliction of emotional distress and invasion of privacy should be excluded from liability under the homeowner’s insurance policy.

Perhaps this is where civil recourse meets its toughest match—not in the theoretical or rhetorical battle lines, but in the on-the-ground difficulty of how legal services interact with insurance coverage. As noted above, at the heart of civil recourse is the idea that “the concept of a tort fits very naturally with the idea of having a court system that is open to hearing complaints that are filed at the discretion of a putative victim of injurious wrongdoing and that seek relief as against a

---

88 See GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1117 (7th Cir. 1995); Metropolitan Prop. & Cas. Co. v. Murphy, 833 S.W.2d 257 (Tex. Ct. App. 1992) (allegation of a spying “peeping Tom” not considered an “occurrence”).
wrongdoer.\textsuperscript{91} If the wrong was intentional, the damages inflicted by this wrongdoer may not be covered under the homeowner’s insurance policy.

While this is not an obstacle \textit{per se} to bringing a case, it will probably be very difficult to find a lawyer to assist with the case when the wrongdoer is judgment proof. Against the backdrop of the incidents discussed above, how likely is it that teenagers and college party-goers who are engaged spectators will not be judgment proof? How can our torts system sustain a call to account against individuals who are judgment proof? Given the current structure of legal services, the putative victim will need to interact not only with the courts, but also with the reality of how legal representation has been financed up until this point.

None of these challenges is insurmountable. Many law school clinics, for example, include among their goals forging new paths for otherwise underserved clients and pushing the envelope on under-developed claims and theories of redress. One could certainly imagine a sexual assault civil recourse clinic designed to help victims voice their call to account through a tort claim, regardless of whether the claim is covered by insurance, and regardless of whether a recoverable judgment would include a hefty enough slice to cover legal fees. In cases in which a monetary judgment for damages was won, one could also imagine such a clinic designing schemes for the garnishment of the wages of engaged spectators—even the meager wages eeked out by teenagers and young adults in typically lower-wage jobs. In fact, there might be something \textit{particularly} appropriate about such schemes as part of a

\textsuperscript{91} \textit{Civil Recourse Defended}, supra note 49, at 570.
real calling to account that touches those who inflict harm where they live, and where they work. But the point is that at this time such schemes are not part of the ordinary run-of-the-mill of the provision of legal services in the United States. I believe the full impact of civil recourse theory will be felt when its structural features are applied not only to how victims see the point of the system, but how lawyers work (and earn their living) within that system as well.

F. Civil Recourse in Dialogue with Feminism

A final consideration of the “why tort” question returns to MacKinnon’s rejection of tort law as pervaded by a “disabling (and cloying) moralism” which works to exclude women from social life, and the question of whether robust tort claims for the dignitary harm inflicted by engaged spectators to an assault is in accord with feminist hopes and goals for the torts system. This section focuses on what strikes me as an odd hiccup in the discussion of what civil recourse theory has to offer, and almost certainly an example of legal theorists talking past each other.

In her assessment of civil recourse theory, Martha Chamallas submits that under its surface lurks a merely updated version of the “familiar masculine subject of liberal theory.” This “very active and very muscular” character is “the empowered tort victim who responds to injury by seeking vindication of his rights . . . Various, this individual is described as exercising a kind of vigorous agency, as someone who

---

92 For the practical insights in this Chapter regarding creative solutions to the provision of legal services and the garnishment of wages, I am indebted to extended conversation with Mike Gottesman.
94 Martha Chamallas, Beneath the Surface of Civil Recourse Theory, 88 INDIANA L. J. 527, 530 (2013).
responds, vindicates, retaliates.” For Chamallas, images of empowerment are simply an overlay onto the classic liberal autonomous rights bearer who remains essentially detached from others. She sees a sharp contrast between this image and the usual portrayal of tort victims as “more often cast as victims of misfortune and misconduct who must contend with the involuntary trauma and disruption that frequently follows tortious events.”

Chamallas takes pains to distinguish this figure and the theory from perspectives of relational or cultural feminism, which “starts from the proposition that human beings are connected and interdependent.” Chamallas instructs:

Relational feminists typically argue that the law places too low a value on “caring for others” and that care-giving and nurturing ought to be given the same importance in the law as self-reliance and autonomy. They stress that individuals need others to survive and flourish, emphasizing that autonomy is not an inborn trait of human beings but a capacity that must be nurtured and supported, often by intimate relationships.

Civil recourse theory, Chamallas surmises, stands in sharp contrast to this relational framework. As she depicts it:

… civil recourse theory is highly individualistic and abstract. It deals with conceptual relationships, for example whether there is a conceptual link between a defendant’s action and plaintiff’s injury (think Palsgraf) and ironically does not readily comprehend

---

95 Id.
96 Id.
97 Id. at 537.
98 Id.
relational injury, meaning the injury that flows from damage to or
destruction of important intimate relationships.99

Granted, Chamallas is not the only scholar to express potential concerns about
“vengeance.”100 As they continue to refine their theory, Goldberg and Zipursky have
acknowledged the extent to which this aspect of the theory could be overwrought.101
But examining their work as a whole, I must confess that I have trouble imagining a
more feminist-friendly foundational space for developing a tort theory that fully
respects the relational nature of human beings. It is enough to spend even just a bit of
time with The Moral of MacPherson to appreciate how the attentive and sensitive the
analysis is to context and relationality, and the extent to which that might inform all
of the core elements of tort theory. As Goldberg and Zipusky themselves explain,
much of their work is actually a strong critique of the sinister side of the atomistic
individualism of liberal theory.102

99 Id.
100 See Darwall and Darwall, Civil Recourse as Mutual Accountability, supra note 50, at 35-36 (noting
occasional references to “vindication” and “revenge,” distinguishing conceptions of recognition in
honor cultures; and discussing the core concept of “mutual accountability of equals”: “To respect
someone as a mutually accountable equal is to hold oneself answerable to him at the same time one
holds him answerable to oneself. It is to be in second-personal relation to someone. Respect for
persons in this sense is what Strawson calls a “participant's” attitude, an attitude of “involvement or
participation with others in inter-personal human relationships”). See also STEPHEN DARWALL,
HONOR, HISTORY AND RELATIONSHIP 68 (2013) (distinguishing accountability from vengeance or
retaliation).
101 See John C.P. Golberg & Bejamin C. Zipursky, Civil Recourse Revisited, 39 FLA. ST. U. L. REV.
341, 357 (2011) (acknowledging Darwall’s work as having “helped us to articulate more clearly the
idea of recourse as a holding-to-account, as opposed to recourse as a wreaking of vengeance.”).
102 See Civil Recourse Defended, supra note 49, at 604 (“The notion of relational duties and the clear
rejection of Holmesian atomism is as fundamental to the work we have done as any-arguably more
fundamental than the notion of civil recourse itself.”); id. at 601 (critiquing as caricature Chamallas’
stock critique of a “liberal” framework, and noting “there is nothing in our writings in tort that
commits us to any of the core tenets of “liberalism” so depicted and indeed plenty demonstrating that
On the constructive side, one might also discern in the contours of civil recourse theory a profound sensitivity to a host of feminist concerns—including the space for victims to call to account those who, to the neglect of their relationally grounded obligations, have caused real injury; and a serious attention to the necessary shift in power such that the legal system might play a constructive role in helping victims to reclaim their own voice and the potential for a healing reconstruction of their own narrative.

In fact, it might be helpful to reconsider Chamallas’ assessment in light of the extent to which civil recourse theory seems to be uniquely equipped not only to respond to relational injuries such as dignitary harm but also to thread out with thorough and thoughtful attention a theory of the bonds of care that legal strangers may owe to each other in certain circumstances. In this context, Goldberg and Zipursky are actually significant allies in the work of pursuing the fascinating questions that Chamallas offers in order to deepen and refine the work of feminist tort theory.

As discussed in Chapter Five, the word “autonomy” need not be ceded to the territory of highly individualistic liberal theory; nor does relationality necessarily imply passivity and readiness to cede rights in order to maintain relational ties. The kind of calling to account for wrongs which seems to be at the heart of civil

103 See discussion supra, Chapter VII.C, Theorizing Stranger-to-Stranger “Relational Duties”
105 See discussion supra, Chapter V.B.2, Nedelsky: “Relational Autonomy” at notes 40 ff.
recourse actually reflects an insight which is deeply compatible with relational theory, in that it is itself an invitation to build more authentic relationships of respect and care.

Similarly, in their dialogue with civil recourse theory, Darwall and Darwall discern in the call to account a profound expression of respect, and yes—reciprocal relationality—because the plaintiff and the defendant are members of the same moral community. They explain:

> When someone in a community of mutually accountable equals violates an obligation, whether an obligation period or a bipolar obligation, she does not thereby become a legitimate object of contempt. To the contrary, she is held accountable for her violation. And this reciprocating response is no form of disrespect that seeks to lower her status or retaliate.106

As Darwall and Darwall demonstrate, a call to account need not be fueled by high-octane aggression or violence. Holding each other accountable for wrongdoing is at the core of what it means to be “relational,” because such practice of accountability is part of what it means to be members of the same moral community. In so doing, Darwall and Darwall explain, “we enter into a relation of reciprocal recognition and mutual respect for one another as mutually accountable equals. Holding someone answerable thus precisely does not return disrespect for disrespect; it embodies a respectful demand for respect.”107

Finally, since when does feminist legal theory entail shaving off from the analysis a vigorous emotional response—which could also include healthy

---

106 See Darwall and Darwall, Civil Recourse as Mutual Accountability, supra note 50, at 37.
107 Id.
expressions of anger, including anger for having experienced a wrong, an injustice? Jada’s very own, “I am just angry,” together with the “#IAmJada” picture depicting her with an arm raised in a fist, could be Exhibit A.

Further dialogue between civil recourse theorists and feminist tort theorists might prove to be an especially fruitful terrain for common exploration of ways to distinguish between relationality and passivity; and to further explore the space within tort theory for expression of the full range of emotions, including legitimate and even constructive expression of anger as part of a process of truth-telling and calling to account.

---

XI. Why A New Tort? “Exploitative Objectification” and Alternative Pleading to Overcome Current Doctrinal Hurdles

Why do we need a new tort? The alleged actions of an engaged spectator in a case like Jada’s or the hypothetical wide-awake voyeur from the upper bunk of the Vanderbilt dorm room—standing by, on the scene, taking pictures or video of someone being sexually assaulted or raped, perhaps also with the clear intention of posting these pictures in order to shame the person who has been assaulted—would seem to satisfy easily the elements for intentional infliction of emotional distress, or to use the term of the third Restatement of Torts, emotional harm. But as discussed more fully in this Chapter, when insights that seem intuitive in theory are poured into the crucible of current practice and pleading in this area, several difficult conundrums emerge. This is especially evident in the area of claims for infliction of emotional distress in the wake of sexual assault. Doctrinal and procedural obstacles would be even more difficult to overcome in claims for emotional distress against engaged spectators.

At the heart of this Chapter are two points. The first is practical and strategic. Within the current doctrinal framework of emotional distress claims, especially when the victim was unconscious at the time of the attack, one may anticipate a number of difficult hurdles. For these circumstances, it might make sense to plead in the alternative the new tort of “exploitative objectification,” which would not encounter
these particular obstacles. Certainly one would hope that the new tort could also point in the direction of shifts in the older doctrine. But even in the absence of that outcome, the new tort offers a potentially successful option to be introduced in pleadings that allow for more than one theory or option.

The second point of this Chapter is substantive: returning to the discussion of the theorization of harm that an engaged spectator may inflict, the more developed torts that may be applicable—infliction of emotional distress and invasion of privacy—tend to rest on a notion of harm, economically measurable damage for “emotional distress,” that does not quite capture the core of the wrong at issue. At the heart of these cases is not so much the damage due to reputational and economic consequences, but the sheer outrage, a la Jennifer Lawrence, at the invasion of personality and dignity. Thus the substantive reason for introducing this new tort is that it articulates in a way that other torts have not the nature of the dignitary harm inflicted by an engaged spectator on a vulnerable person in need of emergency assistance.

As the elements and framework for the tort of “exploitative objectification” have already been discussed in some detail in Chapter Nine, this Chapter Eleven...

---

1 For the classic (and humorous) explanation of pleading in the alternative, see Gary Cartwright, How Cullen Davis Beat the Wrap, TEXAS MONTHLY (May 1979), http://www.texasmonthly.com/articles/how-cullen-davis-beat-the-rap-2/#sthash.VunOSzSH.dpuf (Richard “Racehorse” Haynes’ outline of the classic defense technique as described in a talk at an American Bar Association seminar: “Say you sue me because you claim my dog bit you. Well now, this is my defense: My dog doesn’t bite. And second, in the alternative, my dog was tied up that night. And third, I don’t believe you really got bit. And fourth . . . I don’t have a dog.”). Note, however, that in a civil action, a plaintiff’s inconsistent pleading might create discovery problems, as some responses might ultimately harm the plaintiff’s elected theory of liability. I am grateful to Richard Hibey for raising this further layer of complexity.

2 See generally Anthony J. Sebok, Punitive Damages: From Myth to Theory, 92 IOWA L. REV. 957, 1016-17 (1997) (discussing the dimensions of damage that emotional distress fails to capture).
focuses largely on what could be considered parallel remedies in tort: i.e., whether there would be a legally cognizable claim for emotional distress when the victim was unconscious at the time of the sexual assault; and in somewhat less detail, the nuances of a claim for invasion of privacy in this context. Once the procedural and doctrinal difficulties are explained, this Chapter then explores the extent to which the new tort of “exploitative objectification” could meet these particular obstacles, in addition to highlighting the dignitary nature of the harm inflicted.

A. Stating a Tort Claim for Infliction of Emotional Harm

What allegedly happened to Jada and to the Vanderbilt victim is horrific by any standard of evaluation. But given that both were unconscious at the time of the alleged assault and the initial image capture, it is difficult to pinpoint with precision the exact nature, source, and timing of the emotional distress. In Jada’s case, for example, was it the intense embarrassment and humiliation of having the pictures of her naked body circulated? Was it the trauma, based on her own exposure to the pictures, of conjuring up in her mind the image of what had happened to her at an earlier point in time? Was it the trauma of not knowing exactly what had happened to her other than that it was terrible? Was it the fear associated with the thought of how others could have treated her with such brutality? Perhaps all of these elements were present at one time or another. But when they intersect with the tort scheme for a claim for emotional distress, the problem is that all of these theories of harm present a kind of disassociation with the actual scene of a life-threatening emergency—the typical framework that sets the contours of liability under this tort. Thus to fit the
circumstances of this injury within the contours of the tort would require a number of doctrinal somersaults. While it would not be impossible to imagine a tort claim for emotional distress with some play in the joints to accommodate the circumstances of these kinds of cases, the strains and difficulties with current articulations of the common law are evident. The analysis below opens out these difficulties. It is for the most part anchored in the third *Restatement of Torts*, and given that Jada’s assault occurred in Texas, it also includes relevant aspects of Texas tort law, especially where the Texas scheme differs from the *Restatement*.

*****

The third *Restatement of Torts* defines “Emotional Harm” as impairment or injury to a person’s emotional tranquility. ³ The varying levels of intent are defined as follows:

§ 1 Intent: A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result;

§ 2 Recklessness: A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk;

³ *RESTATEMENT (THIRD) OF TORTS* § 45.
§ 3 Negligence: A person acts negligently if the person does not
exercise reasonable care under all the circumstances. Primary
factors to consider in ascertaining whether the person's conduct
lacks reasonable care are the foreseeable likelihood that the
person's conduct will result in harm, the foreseeable severity of
any harm that may ensue, and the burden of precautions to
eliminate or reduce the risk of harm.\(^4\)

The *Restatement* then distinguishes two distinct causes of action: “Intentional
(or Reckless) Infliction of Emotional Harm;”\(^5\) and “Negligent Conduct Directly
Inflicting Emotional Harm on Another.”\(^6\) Elements for intentional infliction of
emotional harm are described as follows: “An actor who by extreme and outrageous
conduct intentionally or recklessly causes severe emotional harm to another is
subject to liability for that emotional harm and, if the emotional harm causes bodily
harm, also for the bodily harm.”\(^7\)

Generally courts consider the two essential factors to be 1) conduct on the part
of the defendant that is “extreme and outrageous;” and 2) a result of “severe” harm
for the plaintiff. As William Prosser explained in the earliest descriptions of the tort,
actionable conduct should bring the reasonable person to exclaim: “That’s
outrageous!”\(^8\) The intention, according to the *Restatement* reporters, is to provide a
tort remedy only for “a very small slice of human behavior,” as distinguished from

\(^4\) Id.
\(^5\) *Restatement (Third) of Torts* § 46.
\(^6\) *Restatement (Third) of Torts* § 47.
\(^7\) *Restatement (Third) of Torts* § 46.
\(^8\) See William L. Prosser, *Insult and Outrage*, 44 Cal. L. Rev. 40, 44 (1956) (noting that the tort
should apply to a case in which “the recitation of the facts to an average member of the community
would arouse his resentment against the actor and lead him to exclaim ‘Outrageous!’”). See also
(1939); *White*, *supra* note 4 at 102.
the emotional harm which can be “a predictable outcome of otherwise legitimate conduct.”

In Texas, the tort of intentional infliction of emotional distress (“IIED”) was first recognized in Twyman v. Twyman, in which the Texas Supreme Court explained that conduct must have been “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” On the other side of the line, the court explained: “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct.”

Generally, some states have erected formidable procedural barriers to stating a claim for IIED. In Texas, for example, courts are concerned that IIED will be used to circumvent statutory or other limitations on recovery for mental distress. Thus IIED claims have been limited to a “gap filler” function—that is, when the harm could not be addressed with some other tort or statutory remedy. For example, in Hoffman-La Roche v. Zeltwanger, a case arising from a stepfather’s sexual assault of his stepdaughter, the court explained that in the Texas torts scheme, IIED serves “the limited purpose of allowing recovery in those rare instances in which a defendant

---

9 RESTATEMENT (THIRD) OF TORTS §46 cmt. a.
10 Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993).
11 Id. at 630 (quoting RESTATEMENT (SECOND) OF TORTS, §46 cmt. d).
12 See generally MARTHA CHAMALLAS & JENNIFER B. W RIGGINS, THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW 78 (2010) (noting that a majority of courts treat IIED at a “gap filler” to be allowed only when no other remedy is available). See, e.g., Standard Fruit & Vegetable Co. v. Johnson, 985 S.W.2d 62, 67 (Tex. 1998) (cause of action for IIED not recognized where the actor “intends to invade some other legally protected interest, even if emotional distress results. . . . Where emotional distress is solely derivative of or incidental to the intended or most likely consequence of the actor’s conduct, recovery for such distress must be had, if at all, under some other tort doctrine.”).
intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.”

As the court explained, IIED “is only available when the facts are so unique and so egregious that no tort developed under statute or common law addresses that type of claim . . . ‘Where the gravamen of a plaintiff’s complaint is really another tort, intentional infliction of emotional distress should not be available.’”

Restrictions were further clarified and given the broadest possible interpretation in *Creditwatch, Inc. v. Jackson*, a case in which the Texas Supreme Court upheld denial of an IIED claim whenever *any* other recovery would have been available, even if such recovery would have been precluded by the statute of limitations. The court clearly reaffirmed: it is a “gap filler” tort never intended to supplant or duplicate existing statutory or common-law remedies.

But perhaps the greatest obstacle, as mentioned in Chapter Ten, is how litigation of an intentional tort intersects with insurance schemes, which generally will not cover damages that emerge from intentional conduct. The Texas case of *Boyles v. Kerr* is an excellent example. In that case, in response to the prodding of

---

13 *Hoffman-La Roche v. Zeltwanger*, 144 S.W.3d 438, 442 (Tex. 2004) (when gravamen of complaint is for sexual harassment, plaintiff must proceed solely under a statutory claim unless there are additional facts, unrelated to sexual harassment, to support an independent tort claim for intentional infliction of emotional distress). *See* id. at 448 (explaining the parameters for pleading “facts independent of the alternative tort, affirming appellate court’s upholding of a jury verdict on both intentional infliction of emotional distress and assault because stepdaughter had proven facts “which were separate and apart from his assaultive behavior,” including stepfather’s videotaping the sexual encounters then threatening to show them to others, blaming the stepdaughter for ruining his life, and threatening to ruin hers).

14 Id. at 447.


his friends, the defendant had set up a secret video camera that recorded him and his girlfriend having sexual intercourse. He subsequently showed the tape to ten of his friends and gossip about the tape spread around the girlfriend’s college campus, causing her severe emotional distress.\textsuperscript{17} If the plaintiff had sued for intentional infliction of emotional distress, she probably would have had a slam-dunk case.

Why didn’t the plaintiff sue for intentional infliction of emotional distress? This is not mentioned in the opinion, but I surmise it was because the insurance scheme which would have blocked an actual financial recovery if the tort were intentional. Thus the plaintiff forwent all theories other than \textit{negligent} infliction of emotional distress.\textsuperscript{18} Because the facts did not fit neatly within the doctrinal restraints for that cause of action, recovery was denied, and the court took this unfortunate occasion to reject an independent cause of action for negligent infliction of emotional distress.\textsuperscript{19}

Note that the court did \textit{not} find that the defendant’s conduct was trivial or trifling. As the court explained, recovery was denied “not because Boyles breached no duty toward Kerr, but because the only theory which she chose to assert negligent infliction of emotional distress was overly broad and would encompass other cases involving merely rude or insensitive behavior.”\textsuperscript{20} The court explained:

\begin{quote}
The tort system can and does provide a remedy against those who engage in such conduct. But an independent cause of action for negligent infliction of emotional distress would encompass
\end{quote}

\textsuperscript{17} Id. at 594.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 597.
\textsuperscript{20} Id. at 602.
conduct far less outrageous than that involved here, and such a broad tort is not necessary to allow compensation in a truly egregious case such as this.21

What the court did not acknowledge, as least not explicitly, was the ephemeral nature of the remedy that the torts system seems to provide for truly egregious conduct. When the defendant is judgment proof, few plaintiffs manage to work their way out of the financial Catch-22 of an intentional tort claim—for most ordinary people it would be difficult to pay for legal fees and costs without that portion of insurance that covers the judgment.

Note also how efforts to salvage a potentially viable negligence cause of action can also lead to incredibly contorted reflections on the nature of intent. As noted above, in the Texas Supreme Court first recognized a cause of action for IIED in Twyman, which followed closely on the heels of Boyles v. Kerr. In Twyman, a wife’s divorce action included a claim for negligent infliction of emotional distress on the grounds that the husband tried to emotionally coerce her into engaging in sadomasochistic bondage activities, even after she told him she was uncomfortable with such activities because she had been raped at knifepoint before their marriage.22 The court applied the recent holding in Boyles to reject the plaintiff’s claim for negligent infliction of emotional distress and remanded for consideration of a claim for intentional infliction of emotional distress. Justice Spector wrote in dissent:

. . . in many cases, severe emotional distress is caused by an actor who does not actually desire to inflict severe emotional distress,

21 Id.
22 Twyman, 855 S.W.2d at 636.
and who is even oblivious to the fact that such distress is certain, or substantially certain, to result from his conduct; e.g., in *Boyles v. Kerr*, the boyfriend may have videotaped the sexual intercourse with the plaintiff “not for the purpose of injuring her, but rather for the purpose of amusing himself and his friends”; nonetheless, “brutish behavior that causes severe injury, even though unintentionally, should not be trivialized.”

What? Because the driver for brutish behavior was to amuse one’s friends, and because one was oblivious to the injury that brutish conduct would inflict on another human being—the conduct is not intentional? Because of a reason extraneous to the legal categories—the fact that the financial premium for both plaintiffs and plaintiffs’ lawyers lies with the claim for negligence rather than with the intentional tort—the analysis of harm in this area of law contends with contortions such as this.

*****

As noted in the introduction to Part Three of this Thesis, the proposed tort of “exploitative objectification of a vulnerable person in need of emergency assistance” sits uncomfortably within the realm of intentional torts. Reasons for the discomfort have been sprinkled throughout the analysis; I summarize them here, in light of the procedural and doctrinal hurdles of the new tort’s closest cousin, IIED.

First, as discussed in Chapter Eight, the interactions between engaged spectators and vulnerable persons that may ground a claim for “exploitative objectification” may involve what seem to be blurry lines regarding the formulation

---

23 Id. at 644 (Spector, J., dissenting).
of an actual intent to harm. For example, when image capture in a public forum was relatively mindless or habitual, analogous to rubber-necking a highway accident, the intentional quality of the conduct may not be fully evident.\(^{24}\) Similarly, blurry lines regarding intent may also be introduced when engaged spectators are intoxicated or suffer from other forms of diminished capacity, not an uncommon condition at a party scene.\(^{25}\) Given the track record in the IIED context of how rarely courts find behavior to be “extreme and outrageous,” and “utterly atrocious,” it would not be surprising to meet resistance to a tort that some may consider more like mindless highway rubbernecking than an “utter atrocity.”

The proposed tort of “exploitative objectification” sits uncomfortably in the realm of intentional torts not because the categories would not match the conduct; nor because it would be so difficult to theorize how the circumstances present the intentional infliction of a distinct harm. The primary challenge is the distortions that plague this entire area of recourse for dignitary harm—currently litigated under the form of emotional distress—because it has been both disfavored with procedural obstacles and financially hobbled by its intersection with insurance schemes. None of these obstacles are insurmountable, but they are formidable.

\(^{24}\) See discussion supra, VIII.B.2, Insights on Objectification from Social Psychology.

As will be evident in the section below, the analysis of negligent infliction of emotional harm is just as ridden with inconsistencies and difficulties. Nonetheless, it may be mined both for concepts and patterns from which to draw analogies that may help to flesh out the development of the new tort.

B. Negligent Infliction of Emotional Harm: Doctrinal Hurdles

As discussed in Chapter Ten, because insurance policies generally do not cover intentional torts, claims which would seem to fit the “outrageous” framework of intentional infliction of emotional distress are often framed as negligent infliction of emotional distress (“NIED”). The third Restatement of Torts divides the universe of “negligent conduct directly inflicting emotional harm on another” into two types: (a) harms that occur when the emotional harm results from being placed in danger of immediate bodily harm (also analyzed under the rubric of “zone of danger”);26 and (b) harms that occur in the course of “specified categories, activities, undertakings or relationships in which negligent conduct is especially likely to cause serious emotional harm.”27

As a general matter, NIED presents a terrain on which courts tread carefully.28

At the heart of much NIED analysis is an effort to respond to two distinct concerns:

26 Restatement (Third) of Torts § 47(a) (negligent conduct that causes serious emotional harm is subject to liability if the conduct “(a) places the other in danger of immediate bodily harm and the emotional harm results from the danger).
27 Restatement (Third) of Torts § 47(b).
28 See, e.g., Robert L. Rabin, Emotional Distress in Tort Law: Themes of Constraint, 44 Wake Forest L. Rev. 1197, 1198-1208 (2009) (recounting the theories of constraint that limit NIED, including concerns about opening the floodgates of litigation; imposing crushing liability; imposing disproportionate liability; and chilling effect on speech or conduct; and contrasting these theoretical
first, concerns regarding “excessive liability” focus on the sheer number of people who could claim having suffered emotional harm, for example, as a consequence, of witnessing a traumatic event, and aim to keep liability within reasonable limits. Second, concerns regarding “extent-of-liability” focus on the “sticks and stones” problem, and aim to keep within limits the gravity of the emotional harm that is actionable.

As with IIED, the threshold of proving legally cognizable harm is high. As articulated by the Restatement, both categories of NIED are imbedded within the contours of limited circumstances. One challenge in sorting through these circumstances is NIED’s connection to the victim’s subjective mental state and the extent to which aspects of emotional harm are under the control of the victim. Thus within the NIED scheme, there are two limits regarding the nature of the harm: first, the source of the harm must be objective and externally generated; and second, the nature of the harm must be severe. Emphasizing the concept of a plaintiff as “one who is acted upon,” Goldberg and Zipursky explain: “what is crucial—at least historically under the common law—is that the injury be inflicted from without, rather than self-inflicted. The plaintiff’s injury cannot be her responsibility, for she is using the legal system to obtain recourse for something done to her by someone grounds with theories grounding IIED, which articulates a social norm that defines the boundary between tolerably and socially unacceptable behavior).

29 See generally Restatement (Third) of Torts § 47 cmt. I (“The threshold reduces the universe of potential claims by eliminating claims for routine, everyday distress that is part of life in modern society. At the same time, the seriousness threshold assists in ensuring that claims are genuine, as the circumstances can better assessed by a court and jury as to whether emotional harm would genuinely be suffered.”).

else.” The “zone of danger” test aims to distill only those cases in which the trauma arrived from an external source, such as a car accident or whizzing bullet; and not only as a reaction to someone else’s pain. Similarly, claims in the second category also aim to distill only the kinds of relationships in which an extreme level of vulnerability builds in a risk that negligence could be experienced, in Gregory Keating’s turn of the phrase, as a “visceral and devastating assault on the self.”

Considering the fact patterns of engaged spectators who photograph a sexual assault, it would not be a stretch to define the emotional harm as both externally generated and severe; and it would not be an overstatement to characterize what happened to these victims as an objectively generated “visceral and devastating assault on the self”—not only because of the assault, but also because exacerbated by the cruel and brutal indifference of those who stood by taking pictures, as if it were a form of entertainment. It would be extremely inappropriate to characterize the bystanders’ infliction of harm as something to simply “get over,” a “transitory upset,” or cases in which the victim is making a mountain out of a molehill. These concerns are simply not present in a case of this type.

The primary obstacle for an NIED claim in these circumstances would not be meeting the threshold for conduct or harm, but the shape of the doctrine as articulated

---

31 Id. at 1684.
32 Id. at 1685-86 (describing circumstances in which the victim’s “visceral, immediate, and unthinking” response is not under his or her control, thus the victim “exercised little or no agency.”).
33 Gregory C. Keating, Is Negligent Infliction of Emotional Distress a Freestanding Tort? 44 WAKE FOREST L. REV. 1131, 1174 (2009). See id. (noting that the canonical cases of recovery for NIED all have “the exceptional characteristic of not being something people should be expected to master or to suffer uncomplainingly.”).
in the *Restatement*. A claim *against* bystanders who are *spectators* of a sexual assault or rape would seem to be something of a hybrid between the “zone of danger” analysis (type a) and the pre-existing relationships analysis (type b), incorporating various aspects of the two provisions, but not completely in line with the analytical flow of either provision.

This mismatch presents two difficulties: first, for a “zone of danger” analysis, when the victim was unconscious at the time that the alleged injury was inflicted, and thus the emotional harm could not have been contemporaneous with the danger, ironically it seems difficult to show a direct connection between the emotional harm and having been placed in danger of immediate bodily harm.

Second, regarding the harms inflicted in the context of “specified categories, activities, undertakings or relationships,” in these cases the posited engaged spectator who was recording may have had no prior relationship that would be recognized in law as triggering a pre-existing duty. Generally cases analyzed under the rubric of pre-existing relationships have no need to grapple with the problem of excessive liability, because the relational contours of the alleged injurious action are already defined. Instead, the focal point of these cases will be on the extent of liability—in particular, whether emotional harm should be included as part of the foreseeable consequences of one’s actions within a given relationship or agreement.\(^{34}\) If NIED is to be extended to harm inflicted by legal strangers, the question arises whether the *only* entry point for an analysis under type (b) is to show a pre-existing relationship;

\(^{34}\) Keating, *supra* note 33, at 1146.
and whether, as a corollary, pre-existing relationships or agreements are the only paradigm that will assure that this type of claim does not open out litigation floodgates into excessive liability to an unlimited number of people.\(^{35}\)

Note that this query runs parallel to the argument in Chapter Seven of this Thesis, which critiques the limits of “special relationship” analysis as applied to stranger-to-stranger obligations, and especially the sense that quasi-contractual arrangements, and no other, are what keep the seal on the floodgates of unlimited liability.\(^ {36}\) Considering the theoretical resources of responsibility-based tort theory discussed above, and in particular its constructive alternatives to the opacity of “special relationships” in this context, how might those resources be brought to bear in theorizing a duty in this context?

The first subsection below addresses the nature of the injury, and works through the analytical puzzles that emerge when the infliction of an injury is not contemporaneous with emotional harm. The second subsection parses problem of whether a pre-existing relationship should be the *sine qua non* of type (b) NIED claim.

1. Non-Contemporaneous Emotional Harm

Amidst all the distress in the world which could be traceable to the negligent

\(^{35}\) Id. at 1147 (“Liability turns solely on relationships accepted by the defendant, usually under a contractual arrangement.”)

\(^{36}\) See discussion *supra*, Duty to a Stranger Grounded in Circumstances, Not Status, Chapter VII. For an NIED argument that affirmative obligations should be extended by increasing the numerical number of “special relationships” see Colin E. Flora, *Special Relationship Bystander Test: A Rational Alternative the Closely Related Requirement of Negligent Infliction of Emotional Distress for Bystanders*, 39 *RUTGERS L. REC.* 28 (2011-2012).
acts of others, tort doctrine has developed some bright-line rules for liability. For example, in *Thing v. La Chusa*, the California Supreme Court held tight to the “zone of danger” rule, even in the face of denying recovery to a mother who arrived just moments after the accident that had killed her child. Although her emotional distress at seeing her child in this condition was evident, the court held that because she herself had not been in the “zone of danger,” she did not meet the threshold for stating an NIED claim: apprehension and fear for her own safety. Thus the “zone of danger” test functions to limit liability to situations in which the emotional distress experienced by the bystander-victim was contemporaneous to the threat of physical injury experienced by the primary victim. As the third *Restatement of Torts* explains:

> Modern courts have continued to limit liability to cases in which the person seeking recovery contemporaneously perceived the event, as distinguished from those who discovered what has occurred later. This limitation may be justified by the practical necessity of drawing a line, since the number of persons who suffer emotional harm at the news of a homicide of other outrageous attack may be virtually unlimited.

Turning to Jada’s case, it is tempting to try to connect the fact pattern to the “zone of danger” analysis. She was obviously in a zone of physical danger, and the extreme nature of the physical threat also constitutes both an objective source of the harm as well as an objective sense of the severe emotional harm that she may have suffered as a result of the spectator’s conduct. But these specific facts also present a

---


38 *Restatement (Third) of Torts* § 46 cmt. m (discussing contemporaneous perception). *See also* *Restatement (Third) of Torts* § 47a.
difficult quandary: she was unconscious at the time of the attack. For this reason, it is
difficult to directly connect the emotional harm with the physical threat, because the
harm was not “realized” until she understood what had happened—in this case two
weeks after the assault. The actual injury may have been inflicted while she was
unconscious, but she did not experience the consequent emotional harm until she was
both temporally and spatially beyond the “zone of danger” and the immediate threat
to her physical safety.

Although there is, in a certain sense, a strong connection between the physical
injury and the emotional harm, the relationship between the assault and NIED by the
bystanders would be symbiotic rather than parasitic. Unlike the first NIED type in
which the bystander-victim did not actually experience the physical harm, in a case
like Jada’s the physical injury and the emotional harm are concentrated on the same
victim. As discussed in Parts One and Two, the engaged spectator’s connection
would not be based on the impact of the primary injury, but for having directly
inflicted a distinct harm. In these circumstances, the emotional harm inflicted was
direct, but not contemporaneous, in the sense that the emotional harm was not
experienced at the same time as the physical harm. For these reasons the fact pattern
seems to fall less within a “zone of danger” analysis, and more within type (b)
scenario—harm that occur in the course of “specified categories, activities,
undertakings or relationships in which negligent conduct is especially likely to cause
serious emotional harm.”

2. “Pre-existing Relationships” as the Sine Qua Non for NIED?

a) Theoretical Perspectives on the Contours of the Debate

On its face, the text of the third Restatement Section 47(b), which vaguely refers to conduct occurring “in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm,” seems capacious enough to embrace the situation of engaged spectators to Jada’s assault. It does not seem to be a stretch to deem the activity of those gawking and taking pictures during a rape as a “category” of activity especially likely to cause serious emotional harm.

Historically, however, cases within this category have been limited to what would be analogous to “special relationships” under the law of affirmative obligations: categories of activities or services in which a specific contractual undertaking or profession deals with recognized areas of particular emotional vulnerability, such as the doctor-patient relationship, or an agreement to prepare the body of a loved-one for burial. As courts and commentators parse the elements of a negligence case which is distinct from the “zone of danger” interaction between strangers as a result of an accident, they tend to emphasize the extent to which a “pre-existing” or “independent” duty fully addressed concerns regarding what could otherwise be boundless responsibility for emotional harm.

39 Restatement (Third) of Torts § 47(b).
In his assessment, Dan Dobbs emphasizes how sub-section (b) provides a distinct tool for analyzing NIED claims, and that courts should be careful not to mash in the features or requirements of sub-section (a), such as requiring the claimant to have been in the “zone of danger.” In order to explain the difference, he notes the implications of an “undertaking” or “special relationship” for the analysis: “When the defendant owes an independent duty of care to the plaintiff, there is no risk of unlimited liability to an unlimited number of people. Liability turns solely on relationships accepted by the defendant, usually under a contractual arrangement.”

Note that Dobbs does not state that an “undertaking” or a “special relationship” is the exclusive ground for stating a claim, but neither does he explore the possibility of alternative foundations.

Similarly, in Hedgepeth v. Whitman Walker Clinic, a case in which a patient misdiagnosed as HIV-positive suffered from an extended period of depression, the District of Columbia Court of Appeals focused its analysis on the distinct nature of the two types of NIED claims. In this case the patient did not need to prove that he was in the “zone of danger,” because the doctor-patient relationship presented a context in which the negligent performance of a legal obligation to the plaintiff was

---


41 Dobbs, The Law of Torts, supra note 40, at 611. See also Dobbs, Undertakings, supra note 40, at 54.
very likely to cause serious emotional harm. As Dobbs further explains, relationships such as between doctor and patient “implicate” the plaintiff’s emotional well-being, and care for emotional well-being is a part of the very nature of the relationship.

As the final version of the third Restatement is fairly recent, to date no case has yet addressed the question whether proving an “independent duty”—or as some other commentators describe it, a “pre-existing duty”—is the only way to show that the conduct occurred in “the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.” Is the phrase in Restatement Section 47(b)—“specified categories of activities, undertakings, or relationships”—so broad that any conduct may be brought within its parameters? Might it be enough to show merely a direct link between any conduct that might be considered an “activity,” the probability that this particular activity would cause serious emotional harm, and that the harm was actually suffered?

If the latter were the case, it would seem it would seem to be sufficient to show mere foreseeability of emotional harm—an unlikely interpretation, given the

---

43 Id. at 812-813 (based on Dobb’s analysis, finding that in order to satisfy the exception to the general rule “a relationship or undertaking must ‘implicate’ the plaintiff’s emotional well-being: ‘There are some relationships, such as that of psychiatrist/therapist and patient, where care for the emotional well-being of the patient is the very subject and purpose of the engagement, and it can be said that the psychiatrist or therapist has undertaken to care for the patient’s emotional well-being, making it especially likely that the therapist’s negligence will cause the patient to suffer emotional distress.’”). See also Undertakings, supra note 40, at 68.
44 Restatement (Third) of Torts § 47(b)
tendencies of courts to carefully cabin NIED claims. The specter of unlimited liability could include, for example, how the misdiagnosis of a film star would have a foreseeable—and extreme—emotional impact on fans.

Thus the interpretation of this provision is the topic of a live debate among tort theorists. For example, Keating seems to have elevated this aspect of the analysis—the inclusion of an “independent duty”—to one of the defining characteristics and distinguishing marks of a type (b) claim. As he explains contrasting features: first, claims under (a) involve accidents among strangers and claims under (b) involve “pre-existing relationships”; and second, claims under (a) are parasitic on physical injury, while claims under (b) are not: “In pre-existing relationship cases, breach of duty does not endanger anyone physically.”

Like the function of “special relationships” in the analysis of affirmative obligations, an NIED tort claim grounded in a pre-existing relationship seems to free the analysis from the tightly bound elements of tort, inviting a quasi-contractual dimension. Keating explains that in pre-existing-relationship cases, “duty exists independent of the law of torts. It arises out of the antecedent interactions of the parties.” Thus in both kinds of NIED cases—those for bystanders within the zone of danger, and those based on a pre-existing relationship—“liability for emotional injury arises as a question about the extent of the defendant’s liability for the

\[45\] See, e.g., NEW RESTATEMENT (THIRD) OF TORTS § 47 cmt. i (“Courts often state that the test for determining whether negligently caused emotional harm is recoverable is whether the actor reasonably should have foreseen the emotional harm. But foreseeability cannot appropriately be employed as the standard to limit liability for emotional harm.”).

\[46\] Keating, supra note 33, at 1144-45.

\[47\] Id. at 1157.
consequences of a breach of an independently established duty of care.”48 In neither instance is NIED a freestanding tort.

As a Texas appellate court explained in *Freeman v. Harris County*:

Texas courts generally do not recognize a legal duty to avoid negligently inflicting mental anguish. However, the Supreme Court of Texas has noted that mental anguish damages may be compensable when they are the foreseeable result of a breach of a duty arising out of certain “special relationships,” including “a very limited number of contracts dealing with intensely emotional noncommercial subjects such as preparing a corpse for burial.”49

Within this framework, Keating explains, a “relationship marked by special obligations” is what triggers responsibility for emotional harm, and this duty “arises from the nature of the parties’ undertaking, not from an independent tort principle holding that reasonable foreseeability of emotional harm triggers a duty to use due care to avoid such harm.”50 Because the shape of the duty “arises out of the reasons the pre-existing relationship provides for recognizing such responsibility, reasons generally recognized and accepted by the parties themselves,”51 it seems that it would be difficult to articulate a duty to use due care to avoid emotional harm in the absence of a pre-existing relationship.

The comments in this provision of the *Restatement* indicate that the historical examples are also grounded in pre-existing or special relationships, often of a

---

48 Id. at 1146.
50 Keating, supra note 33, at 1162.
51 Id.
professional or contractual quality. In the analysis of some courts, “special relationships” function as short-hand to describe the categories of activities, undertakings and relationships that fit within the description of an extremely sensitive area of interaction with vulnerable parties such that extra attention to the emotional dimension of care is merited. These categories of activity merit extra protection notwithstanding general concerns about overload in the care and concern for the emotional needs of other people.

The Freeman court referred explicitly to the “special relationship” framework: “mental anguish damages may be compensable when they are a foreseeable result of a breach of duty arising out of certain ‘special relationships,’ including a very limited number of contracts dealing with intensely emotional noncommercial subjects such as preparing a corpse for burial.”

On the other hand, in the discussion of this relatively new articulation of the rule, nothing explicitly precludes a more expansive reading which could consider that

---

52 See, e.g., RESTATEMENT (THIRD) OF TORTS § 47 cmt. b (examples include “liability on hospitals and funeral homes for negligently mishandling a corpse and on telegraph companies for negligently transcribing or misdirecting a telegram that informs the recipient, erroneously, about the death of a loved one.”); id. cmt. f (examples include delivery of a telegram or other erroneous communication of a death or illness; mishandling a corpse; delivery of food contaminated with a foreign object; a physician’s negligent diagnosis of a serious disease; a hospital’s loss of a newborn infant; an employer’s mistreatment of an employee; and a spouse’s mental abuse of the other spouse). See also id. (“Typically, the undertaking or relationship is one in which serious emotional harm is likely or where one person is in a position of power or authority over the other and therefore has greater potential to inflict emotional harm. Courts appropriately identify such categories of activities, undertakings, or relationships as giving rise to liability for emotional harm.”).

53 Freeman, 183 S.W.3d at 890. See also Hedgepeth, 22 A.3d at 811 (includes dicta interpreting Restatement type (b) claims to exclude a “freestanding duty” between strangers: “In the absence of such an undertaking or relationship between plaintiff and defendant, the general rule continues to be that there is no freestanding duty to avoid the negligent infliction of emotional distress to a ‘stranger’ unless the actor’s negligent conduct has put the plaintiff in danger of bodily harm.”).
space in between a predetermined, usually contractual, pre-existing duty or relationship and liability hinging on mere foreseeability.\footnote{See \textit{Restatement (Third) of Torts}, § 47 (b) cmt. f (the “mere fact that serious emotional harm was foreseeable under the facts of the specific case” may not be enough to prove the cause of action.)} The question could be further refined: if a stranger, \textit{i.e.}, a person with no pre-existing relationship to the victim, inflicted direct emotional harm on the victim, and the circumstances are such that the case presents no risk of unlimited liability to an unlimited number of people, should the lack of a pre-existing relationship preclude recovery? I argue no.

Martha Chamallas proposes just such a contextual analysis. As she explains, the provision “does not express an opinion as to which specific activities, undertakings, or relationships give rise to liability, providing only that they be of a kind likely to produce serious emotional injury.”\footnote{Martha Chamallas, \textit{Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights}, 44 \textit{Wake Forest L. Rev.} 1109, 1113 (2009). \textit{See also Chamallas & Wriggins, supra note 12, at 89-97 (discussing standards for negligence claims under the Restatement).} As Chamallas sees it, this context could provide an opening toward an analysis based on “the concrete relational context in which the tort is committed,” stepping away from recovery based solely on the categorization of the injury.\footnote{Chamallas, \textit{Unpacking Emotional Distress, supra note 55, at 1113.}} In contrast to Keating’s analysis, Chamallas reads the provision as a rejection of “the highly abstract and confusing ‘independent duty’ requirement that some courts have used as they scrambled for a doctrinal peg from which to hang recovery.”\footnote{\textit{Id.}}

Acknowledging that contractual limitations do capture the essence of many of the cases, Chamallas nevertheless resists the tendency to treat this strand of
negligence law as an “appendage to contract law,” bolstering and enforcing voluntary agreements and “the general interest in private ordering protected by contract.”

Arguing for a broader interpretation, Chamallas explains: “this conceptualization of the tort misses a key dimension of so many of the cases—their clear link to intimate human relationships and interests unrelated to contract.”

In NIED analysis, as in analysis of affirmative obligations, an instrumental framework focused on identifying pre-existing or “special” relationships tends to lock our gaze onto categorical policy limits. The result is both opaque and incoherent. Why does there need to be relationship that falls into a checklist of those considered “special” or “pre-existing” when the elements of the tort can do the work necessary to keep liability within the bounds of reason—and serve justice between the parties? In this form of the NIED tort, the “stranger-to-stranger” relationship is not one that opens out toward the specter of an indefinitely large number of potential plaintiffs which threaten to batter down the “floodgates” of litigation. Instead, at the heart of these type (b) cases is a specific plaintiff connected to a specific defendant whose specific conduct inflicted emotional harm which must be deemed serious enough to meet a threshold qualification.

58 Id. at 1114.
59 Id. See id. (drawing further connections to the gendered nature of the harm: “A critical feature of this strand of negligent-infliction cases is that the defendant’s conduct often damages a plaintiff’s well-being in noncommercial contexts central to her identity as a woman, mother, or family member.”).
b) Resuscitating the “Direct Victim” Category

“Direct victim” cases have been defined by Chamallas and Wriggins as the “most chaotic pocket of law” governing recovery for emotional distress. Early in the history of the California Supreme Court’s analysis of NIED claims, the concept of “direct victim” had surfaced with the potential to help clarify criteria for stating a claim when the victim was not in a pre-existing or special relationship with the person who inflicted harm. However, the concept was quickly subsumed into the tangle of pre-existing relationships to the point that notwithstanding the linguistic oddities, the two ideas came to be interpreted as synonymous.

In a 1980 case, *Molien v. Kaiser Foundation Hospitals,* the California Supreme Court grappled with the concepts that helped to form the foundations of the third Restatement type (b) claim. In particular, it parsed how to evaluate NIED claims arising not from having witnessed an accident from within the “zone of danger,” but from other circumstances no less tragic or egregious, but requiring a different set of analytical tools. In this case, a wife had been mistakenly diagnosed with syphilis, and her doctor instructed her to tell her husband that he should also be tested. The consequent mistrust led to the disintegration of their marriage. Analyzing the husband’s emotional distress claim, the California Supreme Court struggled with how to categorize a fact pattern that fit neither the “zone of danger” paradigm nor that of a pre-existing relationship between doctor and patient. In contrast to the “zone of danger” cases in which the plaintiff was a “percipient witness to the injury of a third

---

60 Chamallas & Wriggins supra note 12, at 94.
person,” the court explained that the husband was “himself a direct victim of the
assertedly negligent act.”62 This distinction was coupled with an explanation of the
reasonable foreseeability of the harm: because of how the disease is normally
transmitted, “it is rational to anticipate that both husband and wife would experience
anxiety, suspicion, and hostility when confronted with what they had every reason to
believe was reliable medical evidence of a particularly noxious infidelity.”63 Thus the
Court agreed with the plaintiff “that the alleged tortious conduct of defendant was
directed to him as well as to his wife.”64

Did Molien stand for the proposition that one could state a claim for NIED in
the absence of a pre-existing relationship? To what extent would the extension be
limited to these specific facts, perhaps even as narrow as NIED cases regarding the
misdiagnosis of venereal disease? Unfortunately, the concept of “direct victim” was
not further developed in Molien, and in subsequent cases it was strangely (from a
linguistic perspective) subsumed into the “pre-existing duty” analysis.

For example, in Burgess v. Superior Court, the California Supreme Court
considered a claim for NIED suffered when the plaintiff learned of injuries to her
child during the child’s delivery, which took place when she was under anesthesia.65
Because she had been unconscious, she had not contemporaneously witnessed the
injuries to her child, and thus her claim did not fit within the parameters of the “zone

62 Molien, 616 P.2d at 834.
63 Id. at 845.
64 Id.
of danger” test. The Burgess Court noted the distinguishing mark of these cases as all arising “in the context of physical injury or emotional distress caused by the negligent conduct of a defendant with whom the plaintiff had no pre-existing relationship, and to whom the defendant had not previously assumed a duty of care beyond that owed to the public in general.”

The court reasoned that if the NIED claim were to be opened out to a mother under anesthesia, it presented the specter of liability that was both limitless and out of proportion to the defendant’s culpability. Thus in Burgess the bright-line rule articulated in Thing was affirmed:

In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.

Applying the rule to the contrasting facts in Burgess, the Court noted that “direct victim” cases “arose to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is ‘assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.”

Discussing Molien, the Burgess court took pains to address the confusion that

67 Burgess, 831 P.2d at 1200.
68 Id. (emphasis added).
69 Id. at 1201.
had arisen from the broad language of *Molien*, in particular the extent to which its “direct victim” language had been interpreted to introduce a “new method” for determining the existence of a duty, limited only by the concept of foreseeability.

The *Burgess* Court stated:

> To the extent that *Molien* stands for this proposition, it should not be relied upon and its discussion of duty is limited to its facts. As recognized in *Thing*: “[I]t is clear that foreseeability of the injury alone is not a useful ‘guideline’ or a meaningful restriction on the scope of [an action for damages for negligently inflicted emotional distress].”

Driving a nail in the coffin of the potential within the “direct victim” category, the Burgess court explained that a claim for NIED may lie where duty arising from a pre-existing relationship is negligently breached: “In fact, it is this later principle which defines the phrase ‘direct victim.’ That label signifies nothing more.” Thus *Burgess* memorialized a double oddity: first, it cites *Molien* for the principle that a cause of action will lie for a duty arising from a pre-existing relationship when, on its facts, *Molien* upheld a “direct victim” claim from a plaintiff who did not have a pre-existing relationship with his wife’s doctor. Second, linguistically and conceptually the category of a “pre-existing relationship” does not fully capture the aforementioned categories for analyzing the existence of a duty as “1) assumed by the defendant; 2) imposed on the defendant as a matter of law, or 3) arising out of a relationship between the two.”

---

70 Id. (brackets in original).
71 Id.
72 Id.
more nuanced understanding of “direct victim” slips below the radar, and becomes simply the equivalent of a “pre-existing duty”—nothing more.\textsuperscript{73}

Cases indicate that most causes of action for emotional harm fall into three categories: 1) emotional shock due to a sudden trauma, as in the bystander “zone of danger” cases; 2) emotional harm or distress when dealing with a delicate or traumatic context, such as death, illness or other aspects of medical care; and 3) emotional harm precisely due to distortions in close relationships of intimacy or power. Regarding this last category, although in a world of casual hook-ups and one-night stands it is not difficult to imagine how an otherwise “stranger” might enter into a space of intimacy or power, it is also clear that common law cases have not yet fully theorized how a stranger could inflict emotional harm in a sexual context. Further, especially when the harm is categorized and pleaded as “negligent,” it is even more difficult to imagine how the response would not be that it should be up to the plaintiff to prevent strangers from entering this space by applying that important life lesson, “sticks and stones…”

\textsuperscript{73} See Restatement (Third) of Torts § 47 cmt. f (noting that the approach in 47(b) “addresses the same issue” as “direct victim” analysis—that is, the context “when plaintiff has not been placed at risk of physical harm (and thus Subsection (a) is unavailable) and is unable to make out a claim for emotional harm as a bystander under § 48.” It offers that the analysis in 47(b) may be “more helpful than the ‘direct victim’ approach.”). For articles discussing the “direct victim” feature, see Julie A. Davies, Direct Actions for Emotional Harm: Is Compromise Possible? 67 Wash. L. Rev. 1 (1992); Julie Greenberg, Negligent Infliction of Emotional Distress: A Proposal for a Consent Theory of Theory Recovery for Bystanders and Direct Victims, 19 Pepp. L. Rev. 1283, 1310 (1992). See also J. Mark Appleberry, Negligent Infliction of Emotional Distress: A Focus on Relationships, 21 Am. J. L. & Med. 301, 319 (1995) (completely collapsing analysis of “direct victim” into the question of a pre-existing relationship: “The first question courts should ask is whether there was a pre-existing relationship between the defendant and the injured victim.”).
As Robert Rhee explains: in contrast to the *collateral* victims excluded by the “zone of danger” test,

[t]he direct victim class is a close approximation of the plaintiff class if mental injuries behaved more like physical ones and did not have their transient, unpredictable quality. The direct victim class includes the physical impact and zone of danger tests because defendant’s negligence can be said to be “directed” at the victim. It recognizes the special circumstances where the common law has long permitted recovery though they do not fairly fit into any of the standard tests, those situations including mishandling of corpses and fear of diseases cases.\(^\text{74}\)

Jada’s case, and other examples of engaged spectators to violence, including sexual assault, illustrate how strangers can and do inflict emotional harm—and not just in a generalized way, but directed toward a specific victim. An imaginative exercise that drives home this point is to compare the elements of *intentional* infliction of emotional distress to a physical punch, and then take the intentionality down a notch. In the tort of IIED, the emotional harm is directed and aimed at a specific victim, and it makes contact with that victim, causing a discernible injury. Rhee draws out how this characteristic frames the policy arguments:

Courts are less concerned with the scope of exposure since intentional infliction of emotional distress is almost always directed at a particular individual or finite group of individuals and few in our society engage in such outrageous conduct necessary to impose liability, and so there is no issue of wider exposure liability to the general populace.\(^\text{75}\)

\(^{74}\) Rhee, *supra* note [Error! Bookmark not defined.], at 854.  
\(^{75}\) Id. at 864.
Further, Rhee explains: “because the class of direct victims is limited to a small group and their interests are of a higher order, claims can be evaluated under generally accepted tort principles of duty, proximate cause, and damage. The mental injury claims are treated no differently than physical injury claims.”

Drawing out the analogy, consider a scenario in which specific harm is directed at a specific victim, but intentionality is slightly blurred by alcohol or drugs, as discussed above, or by a serious lack of reflection on the consequences of one’s actions. Does that necessarily dissipate the metaphorical “punch” or open up a risk that a cause of action for this type of harm might suddenly open the floodgates of litigation? The harm would be no less directed and no less contained. At this juncture, Rhee’s analysis supports retrieving the category of “direct victim” as a way to distinguish a separate analysis for these kinds of harms. He notes: “By definition, intentional infliction of emotional distress involves conduct directed at a particular person (i.e., a direct victim).” It seems that a “direct victim” claim for negligent infliction of emotional harm could follow the same analytical flow—the only difference being that the defendant’s conduct may not reach the threshold of “extreme and outrageous.”

76 Id. at 866.
77 See, e.g., discussion of Judge Spector’s dissent in Twyman, supra note 23 (noting potential distinction between conduct for the purpose of injuring another and conduct “for the purpose of amusing himself and his friends”). See generally Chamallas, Unpacking Emotional Distress, supra note 55, at 1116 (discussing the Spector dissent).
78 Rhee, supra note Error! Bookmark not defined., at 881.
79 See id. Further clarity on the analytical space for “direct victims” as distinct from “pre-existing relationships” to establish claims could further ground a critique of exactly where the New York Court of Appeals went wrong in Lauer. The case involved an emotional distress claim against a municipality
Chamallas and Rhee theorize a way forward, over the difficult doctrinal hurdles. As Chamallas suggests, a technical reading of the Restatement language describing type (b) claims may leave room for a more contextual interpretation of what constitutes a relationship. And Rhee suggests that a more common-sense interpretation of the concept of “direct victim” could also help to theorize harm and the possibilities for containing liability when it is clear that there was an identifiable victim. In light of the egregious nature of the new harms that are emerging from our interactions with new technologies, courts may be open to these interpretations and applications of NIED.

However, where courts are influenced by tort law’s ongoing affair with contract through the “special relationship” category, and have trouble seeing through the disjointed nature of a harm not experienced contemporaneously with the injury, NIED for engaged spectators may be a harder sell. For these cases, pleading in the alternative the new tort of “exploitative objectification of a vulnerable person in need of emergency assistance” as developed in this Thesis may offer a viable option for failure to correct a report finding that a child’s cause of death was abuse by blunt trauma, resulting in an accusation and investigation of the father. A subsequent examination three weeks later determined that the boy had died of natural causes, but the examiner failed to alter the death certificate, correct the findings, or communicate the correction to the police or the parents. Seventeen months later a newspaper investigation reveals the discrepancy, but by then the parent’s marriage had disintegrated and the father had to move due to hostility from neighbors. Rather than appreciating the specific and bounded nature of the claim, the New York Court of Appeals could not escape the framework of pre-existing “special relationship” categories as the only way to keep the floodgates of liability from bursting. See Lauer v. City of New York, 258 A.D.2d 92, 94-96 (N.Y. App. Div. 1999), rev’d, 733 N.E.2d 184 (N.Y. 2000). See also John C.P. Goldberg & Benjamin C. Zipursky, Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette, 88 Ind. L. J. 569, 594-95 (discussing Lauer).

80 See discussion supra, Chapter VII.A, The Tight Grip of “Special Relationships” in the Law of Torts.
for stating a tort claim in these circumstances. Because the tort hinges not on the emotional response of the victim, but on the bystander’s act of “exploitative objectification,” it will not run aground in circumstances where the victim was unconscious at the time of the assault and further humiliation by engaged spectators. The acts of these engaged spectators in and of themselves—whether expressed by taking pictures or other means—form the basis of the tort, regardless of the victim’s emotional response, immediate or otherwise.

A second reason to plead in the alternative the new tort of “exploitative objectification” is that it helps to highlight the need for and the possibility of articulating the core of the harm in a more objective and more accurate way. For example, in Jada’s case, in line with the analysis in Chapter Eight, the harm inflicted would not hinge on her immediate emotional response, nor even on her subsequent emotional response. The distinct and objectively verifiable harm in this case was in the brutal act of dehumanization, which was an affront to her dignity as a person and an offense to her personality. Regardless of the victim’s subjective emotional reaction, engaged spectators who inflict this distinct harm should be called to account for their actions. The tort of “exploitative objectification” helps to bring into relief and articulate this dimension of the harm. The fact that Jada, like Jennifer Lawrence, at least in public did not present herself as having fallen apart due to the “emotional distress” of the incident, but rather reacted with dignified outrage and anger, strengthens and affirms the nature of the harm rather than detracting from it.
C. Invasion of Privacy for Publicized Pictures

In contrast to the manifold doctrinal and procedural hurdles involved with stating claims for IIED or NIED, for a case such as Jada’s where pictures of her nude body were taken without her consent and posted on the internet, it would not be difficult to state a claim for invasion of privacy. In order to draw out the contrast, this section offers a brief note on the contours of these potential claims against engaged spectators who post or publish the pictures taken.

There seems to be wide and longstanding agreement that the non-consensual publication of a nude or partially nude photograph reaches the threshold of publication of private facts that would be “highly offensive” to a reasonable person. John Stuart Mill delineated the principle with elegance:

. . there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call into question.81

As David Elder catalogues, the “highly offensive” requirement has been met by the disclosure of “‘shocking, revolting or indecent’ picture of human anatomy or plaintiff in a state of déshabillé.” Publication of a nude or partially nude photograph would fulfill this element.82

81 2 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS 560 (1893).
82 See David A. Elder, Public Disclosure of Private Facts, in PRIVACY TORTS § 3:6 (discussing the
Even Richard Posner, infamous for articulating a bizarre economic cost-benefit analysis in favor of a “rape license” and a “right to rape,”83 agrees that this realm of privacy should be protected by law. As he explains:

Even people who have nothing rationally to be ashamed of can be mortified by the publication of intimate details of their lives. Most people in no way deformed and disfigured would nevertheless be deeply upset if nude photographs of themselves were published in a newspaper or book. . . . The desire for privacy illustrated by these examples is a mysterious but deep fact about human personality. It deserves and in our society receives, legal protection.84

Arguably the focus is on the effect of disclosure. From a doctrinal perspective, nothing is difficult about this application. As with the intersection between insurance law and IIED, difficulties may arise in the realm of practical concerns—for example, in cases where people have been cyber-bullied by anonymous parties, the effect of a lawsuit might be to further increase the bullying.85

But note that analogous to the framework for IED, here too there is a tension in the description of the core interest that this tort protects. On one hand, within

---

83 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 216 (8th ed. 2011). See also SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:5 (2009) (“truly intimate or private matters,” including “private sexual affairs or intimate details about the health of one’s self or one’s family,” would be quite legitimately regarded as “no one else’s concern, and therefore subject to the common law’s protection.”).
Prosser’s privacy scheme, the claim at issue fit squarely within the tort for “public disclosure of embarrassing private facts.” 86 “Embarrassing” highlights the emotional reaction that the disclosure provoked in the victim, for example, a sense of shame.

Note also that in contrast to NIED, the Restatement point of reference for this tort is Section 652D of the second Restatement of Torts, a part that has not yet been re-formulated. This section provides: “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” 87 This language zeros in not on embarrassment or reputational harm, but on a broader and perhaps more objective harm: whether the disclosure would be “highly offensive.”

In any case, there is little doubt that disclosure of nude images taken of a person who was unconscious following the consumption of a date-rape drug would be highly offensive to a reasonable person. 88 Although some commentators have


87 As a recent Texas appellate court states the elements, in order to recover damages for invasion of privacy claim based on public disclosure of private facts, plaintiff must prove that: (1) publicity was given to matters concerning the plaintiff’s private life; (2) the matter publicized is not of legitimate public concern; and (3) the publication of those matters would be highly offensive to a reasonable person of ordinary sensibilities. See Freedom Commc’ns, Inc. v. Coronado, 296 S.W.3d 790 (Tex. Ct. App. 2009). Some Texas courts require that the invasion be intentional, and refuse to recognize claims for negligent invasion of privacy. See Doe v. Mobile Video Tapes, Inc., 43 S.W.3d 40, 54 (Tex. Ct. App. 2001) (“Although some courts in Texas recognize negligent invasion of privacy, we decline to adopt a negligent invasion of privacy cause of action.”).

advised caution against an overly broad expansion of common law liability for spontaneous “image capture” in public venues, there seems to be widespread agreement that allowing a cause of action for dissemination of the images of a sexual assault are, as Seth Kriemer puts it, a “far cry” from these kinds of concerns.89

At this point in the development of internet technology, there is widespread agreement that the “publicity” component of the tort is satisfied by publication on the internet.90 In fact, several commentators have noted the particular damage that internet publication can cause, due not only to rapid and widespread dissemination, but also to the enduring nature of the publicity.91

Generally there are three common defenses to the invasion of privacy tort: 1) consent; 2) that the material was a matter of legitimate public concern, at times referred to as “newsworthy;” and 3) the constitutional privilege for freedom of

assaults on unconscious victim had been sealed by a protective order; defendant’s mother obtained possession and provided them to CBS and its series 48 Hours for viewing and copying; court upheld claim of invasion of privacy against defendant’s mother). See also Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 Ariz. L. Rev. 131, 208-209 (2002) (discussing the additional harms that accrue from videotaping or photographing victims of sexual assault—“a radical invasion of privacy under any circumstance”—and cataloging the state statutes that criminalize the photographing or videotaping of a person who has an expectation of privacy).

89 Seth Kriemer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, 159 U. Pa. L. Rev. 335, 398 (2011) (cautioning against an overly broad expansion of common law liability for pervasive image capture in public spaces: “allowing criminal or tort actions in the case of dissemination of a videotape of sexual assaults or intimate sexual interactions is a far cry from banning spontaneous image capture by the holders of cell phones in public venues or granting the subjects of such image capture broad authority to censor the memorialization of their images.”).

90 See, e.g., McCarthy, supra note 84, at § 5:82 (“The Internet has become the model method to disclose something “to the public,” even though the person posting private or embarrassing material may intend it to be restricted to just a few.”)

91 See Danielle Keats Citron, Mainstreaming Privacy Torts, 98 Cal. L. Rev. 1805, 1808 (2010) (noting that the “searchable, permanent nature of the internet extends the life and audience of privacy disclosures, and exacerbates individuals’ emotional and reputational injuries,” including the potential that employers “may not want to get involved” with people who have “publicized baggage.”)
expression. While more difficult questions permeate the analysis of liability for forwarding, re-posting or re-Tweeting nude pictures taken without consent, in a case like Jada’s lack of consent not only to publication, but also to the process of gathering the images, would generally be clear on the facts of photographing an unconscious victim. In sum, where the pictures were published on the internet, it would be relatively easy for her to prevail in an invasion of privacy action.

What would pleading in the alternative the tort of “exploitative objectification” add to this discussion? As with the limits of the IED framework, note here as well the tendency to slide into an analysis of the harm based only on the emotional reaction of the victim or on the economic consequences of the harm, by emphasizing, for example, harm to reputation or employment. Note how other than the broad question of consent, the focus of this tort is generally on the image and the disclosure as they relate to the status of the person in society, not how the image was captured. While the tort may give shape to conversations about what engaged spectators do with a captured image, it does not speak directly to the question of bystander conduct in the face of sexual assault.

---


94 See Falk, *supra* note 88 at 133-138. *See also* id. at 209 (harm from the transmission or circulation of the recorded images of sexual assaults is due both to the rapid transmission to a wide audience; and the fact that the recording may remain a constant source of enduring harm).

95 In contrast, claims for invasion of privacy by intrusion do not hinge on the disclosure. *See, e.g.*, Lewis v. LeGrow, 670 N.W.2d 675, 689 (Mich. Ct. App. 2003) (even where defendant did not
Of course questions of reputation and economic damage are important, but to emphasize only this dimension is reductive, and in some cases this focus misses the point entirely. To illustrate, it is enough to recognize how deeply offensive it would be to argue that the dissemination of the intimate pictures hacked from Jennifer Lawrence’s computer constituted a missed economic opportunity—to what, sell the pictures herself? The point is that the core of the offense is not damage to one’s reputation or economic opportunity, but the deep incursion into respect for dignity, personality and humanity—regardless of the economic consequences. All of these points are intuitively accessible; the tort of “exploitative objectification” helps us to hit the refresh key on these dimensions, and in this way perhaps also to keep the focus in privacy cases more on the harm as “highly offensive” to human dignity and personality and less on the feature that the disclosure was “embarrassing.”

****

Why do we need a new tort? Fortunately, given the possibility of alternative pleading, the argument need not be framed as a stark choice, or nor as a claim that this new tort bests all the others. Instead, from a practical perspective, especially in contexts where the victim was unconscious at the time of the assault, the doctrinal contribution that the new tort of “exploitative objectification of a vulnerable person in need of emergency assistance” may bring to the landscape is to show one way out of the tangle that claims for IED may encounter.

---

publicize tapes, a jury could have found “that the surreptitious, nonconsensual videotaping of intimate acts is objectionable to a reasonable person.”).
Namely, when emotional harm is not contemporaneous with the assault, and when there was no “pre-existing relationship” to define more clearly the contours of the duty between the engaged spectator and the victim, claims need not be stymied by this thicket. The new tort provides an alternative path to state a claim for a distinct harm. The second, and deeper reason for the new tort is that the current conceptual framework for assessing harm in these kinds of cases is inadequate, and in some cases, even deeply offensive. The reason that the distinct harm inflicted by engaged spectators on an unconscious victim of sexual assault requires a call to account is not only because it may have provoked emotional harm, distress, shame or embarrassment for the victim. Nor is it only because disclosure of what happened while he or she was unconscious may result in harm to his or her reputation, educational or job prospects. The reason for a call to account in the form of a tort action is that to treat a vulnerable person in need of emergency assistance, conscious or not, as an object; to engage the scene of the violation of their human person as an entertaining show, is not only brutal and dehumanizing, but also simply and objectively a “wrong.” It is a wrong that that cries out for redress.96

---

96 The new tort may also help to articulate the precise nature of harm in a slightly different context: medical patients who are subjected to “mocking and maligning” while under anesthesia. See e.g., Editorial, On Being a Doctor: Shining a Light on the Dark Side 163 ANNALS INTERNAL MEDICINE 320 (2015) (introducing and discussing essay describing instances of in which women under anesthesia for gynecological surgery were subjected to comments and treatment with “heavy overtones of sexual assault”); Anonymous, Our Family Secrets, 163 ANNALS INTERNAL MEDICINE 321 (2015). See also Tom Jackman, Anesthesiologist Trashes Sedated Patient—And it Ends Up Costing Her, WASH. POST (June 23, 2015), https://www.washingtonpost.com/local/anesthesiologist-trashes-sedated-patient-jury-orders-her-to-pay-500000/2015/06/23/cae05e00-18f3-11e5-ab92-c75ae6ab94b5_story.html (describing defamation case in which a jury awarded $100,000 against anesthesiologist who made vicious comments to and about her patient while sedated for a colonoscopy; the doctor had not realized the recording function of the patient’s cell phone was in order to capture post-op instructions).
XII. **What about the Constitution? “Exploitative Objectification” and Freedom of Expression**

A final concern to address in this Thesis is the question of how a new tort for “exploitative objectification of a vulnerable person in need of emergency assistance” would interact with Constitutional protections, specifically those enumerated in the First Amendment.¹ Would a tort cause of action for conduct which consists in having taken a picture of a person on a public street run afoul of First Amendment protections for freedom of speech or freedom of the press? In the 1964 case of *New York Times v. Sullivan*, the United States Supreme Court clarified that private law rules restricting speech must pass constitutional muster,² thus most probably embracing a state tort scheme such as that proposed for this the tort of “exploitative objectification.”

---

¹ See U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”).
² *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) (“What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.”). Note also the concerns that the vast scope of constitutional privilege could swallow the tort law in this area in its entirety. *See, e.g.*, Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326, 336 (1966) (analyzing the intersection of the privacy tort with journalistic privileges, and querying “whether the claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after claims of privilege have been confronted?”); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law of Tort*, 77 CAL. L. REV. 957, 996 (1989) (noting long-standing policy concerns regarding the diffusion of information in which the public has a “legitimate interest: “Warren and Brandeis, for example, flatly asserted that: “[t]he right of privacy does not prohibit any publication of matter which is of public of general interest.””). For a very creative argument that dignitary torts could be construed as a Ninth Amendment right “retained by the people,” thus rescuing them from the tendency to vault speech rights over the right to sue for dignitary injuries, *see* Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*. 78 BROOK. L. REV. 65 (2012).
The focal cases of the previous two chapters have been located inside—in a private dwelling, or in the room of a dormitory. Generally in a case like Jada’s, First Amendment protections would not extend to engaged spectators taking pictures at a gathering in a private home. But the rules are different for engaged spectators who roam what would be defined as a “traditional public forum,” which generally includes streets, sidewalks and public parks. Thus for much of the inquiry in this Chapter, we will move back outside. To explore the First Amendment questions that permeate these circumstances, the discussion below returns to the focal case of engaged spectators photographing the assault of Jose Robles on a public sidewalk outside of the New York City Port Authority bus station.

---

3 See Perry Education Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which ‘have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’ In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”). Note also that freedom of expression in a public forum is also subject to reasonable time, place and manner restrictions. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”). For example, when the general public is excluded from an area due to an accident or a crime scene investigation, neither would journalists have a constitutional right of access. See Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.”); Chavez v. City of Oakland 2009 WL 1537875 (N.D. Calif. 2009) (explaining that the public, including the press, “does not have a First Amendment right to take photographs while standing in the middle of the freeway.”), aff’d, 414 Fed. Appx. 939 (9th Cir. 2011).
A. “Non-Communicative” Photography

A threshold question is: what counts as “speech” so as to come under the purview of First Amendment protection? While the U.S. Supreme Court has not directly addressed the question of a photographer’s First Amendment rights, guidelines have emerged from cases regarding expressive speech and conduct. For example, in Texas v. Johnson, the Court considered whether the First Amendment protect the act of burning an American flag in order to protest the policies of the president, an act that would otherwise falls within the purview of a criminal statute prohibiting the desecration of a venerated object if such were likely to incite anger in others.\(^4\) Probing the question of whether the action constituted a form of “symbolic speech” protected by the First Amendment, the Court held that it did. The Court explained: “The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word … we have acknowledged that conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’”\(^5\) The Court then articulated the threshold: “In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”\(^6\)

\(^{5}\) Id. at 404.
\(^{6}\) Id.
Applying this test to people taking pictures, courts have noted that the mere fact that bystanders are using a camera, an instrument typically associated with a means of expression, does not necessarily implicate the First Amendment. As the court explained in *Larsen v. Fort Wayne Police Department*, “The First Amendment is not implicated because a person uses a camera, but rather, when that camera is used as a means of engaging in protected expressive conduct, or less commonly, to gather information about what public officials do on public property.”

Following further discussion of a 1995 U.S. Supreme Court that considered the “communicative” aspect of a parade, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, a series of district court opinions began pushing the envelope on when photographs might be defined as “non-communicative,” thus deeming the photographic activity as not within the purview of First Amendment protections. For example, in *Montefusco v. Nassau County* a teacher brought an action under § 1983 following a school board’s investigation of charges that he had surreptitiously taken photographs of young girls and used the photographs in a sexually gratifying manner. Among other claims he alleged that the board’s actions had violated his First Amendment rights. While the court did not find it necessary to reach the substance of the First Amendment claim, it nonetheless offered ample dicta on the

---

7 Larsen v. Fort Wayne Police Dept., 825 F. Supp. 2d 965, 979 (N.D. Ind. 2010).
8 515 U.S. 567, 568 (1996) (holding that a private citizens organizing a parade could be compelled to include a group expressing a message that the organizers did not wish to convey).
10 Id. at 242 (finding no evidence of the board’s interference with taking the photos; nor that it sought to stifle any message).
“communicative” nature of the photographs at issue. Its reasoning has since been incorporated into the holdings of other cases.

In an admittedly “broad interpretation” of the Hurley standard, the court noted that First Amendment protections require: (1) a message to be communicated and (2) an audience to receive that message, regardless of the medium in which the message is sought to be expressed.\(^1\) In a footnote, the court offered an interesting set of criteria for determining whether photographs of this nature would be entitled to First Amendment protection. It noted, for example, the plaintiff’s answer to a deposition question “what, if any, intentions he had with respect to the photographs at issue,” to which he responded, “most of them would be thrown out.” It also noted that he had stated in an affidavit that “photography is simply a hobby,” and that “he takes many photographs in the hope of capturing something of historical or topical value so that he can bring it into his classroom for discussion purposes.” For this court, the test was not to protect a pool of photographs from which such shots would be chosen, but the specific intention regarding the photographs at issue in the case. Under these circumstances, “there is no identifiable message sought to be communicated, nor is there an identified audience to whom a message was being broadcast. Without any element of expression at all, the photos would not receive the protection of the First Amendment.”\(^12\)

\(^1\) Id. at 242. See also Bery v. City of New York, 97 F.3d 689, 694-95 (2d Cir.1996) (pointing out that while the First Amendment protects various types of expression, the “images nevertheless must communicate some idea in order to be protected under the First Amendment”).
\(^12\) Montefusco, 39 F. Supp. 2d at 242, n.7.
A Southern District of New York case took this analysis and ran with it. In *Porat v. Lincoln Towers Community Association,* the plaintiff had been walking along a public street in New York City, and stopped to take pictures of a group of residential buildings. Informed by a building security guard that non-residents were not permitted to take pictures on the premises, the plaintiff proceeded to enter a public courtyard on the premises to take pictures. When the guard asked why he was taking the pictures, the plaintiff explained: “for aesthetic and recreational reasons.” After he proceeded to take pictures, another guard placed him under civilian arrest, and police issued him a ticket for trespassing. His complaint alleged that the guards and police officers violated his First Amendment rights because the trespass ticket was issued in retaliation for the exercise of conduct protected under the First Amendment.

The court noted that because the plaintiff’s complaint denied “any communicative or other interest protected by the First Amendment,” and stated that he was taking the pictures “for his own personal use,” the question would be “whether the First Amendment protects purely private recreational, non-communicative photography.” Following the test under *Hurley,* the court determined that because the plaintiff himself had “effectively disclaim[ed] any communicative property of his photography as well as any intended audience by

---

13 *Porat v. Lincoln Towers Community Association,* 2005 WL 646093 (2005), denial of leave to amend aff’d, 464 F.3d 274 (2nd Cir. 2006).
14 Id. at *1.
15 Id. at *2.
16 Id. at *4.
describing himself as a ‘photo hobbyist,’ and alleged that the photographs were only intended for ‘aesthetic and recreational’ purposes,” the conduct would not be protected by the First Amendment.\textsuperscript{17}

Similarly, in another case, notwithstanding the school’s no-videography rule for a particular event, a parent whose daughter was performing in the choral concert asserted a First Amendment right to videotape. The court found that he had no redress for the First Amendment claim because his stated reason for recording was “simply for his personal archival purposes.” Following \textit{Porat}, the court held that the First Amendment “does not protect purely private recreational, non-communicative photography.”\textsuperscript{18}

In two circumstances courts seem especially reluctant to draw the kinds of distinctions offered in \textit{Montefusco} and \textit{Porat}. First, in cases that implicate persons working for media outlets and covering events of obvious public interest, courts are understandably more reluctant to propose the exercise of scrutinizing the photographer’s frame-by-frame intention to communicate a particular message to a determined audience.\textsuperscript{19} Similarly, given currently red-hot political concerns about

\begin{itemize}
\item \textsuperscript{17} Id. at *5.
\end{itemize}
excessive use of force by the police, some courts seem especially reluctant to interfere with a citizen’s rights to film examples of the use of excessive force by the police.\textsuperscript{20}

Although the question is far from settled, there is plausible, and possibly even strong, support in the case law for an argument that the kinds of photographs that engaged spectators were taking during the Robles assault—random, mindless image capture, not part of a large public event, and as far as we know, not turned over to authorities to assist in an investigation—might be more analogous to the “hobbyist” with no intention to communicate a particular message than to other circumstances which merited First Amendment protection.\textsuperscript{21}

Shifting the facts to consider incidents of image capture of sexual assault in a public setting, it is interesting to consider how this “hobbyist” standard creates a kind of window of opportunity for tort law. In other words, if an engaged spectator admits that pictures were taken with intent to communicate some message to others (e.g., with an intention to distribute)—rather than turning them over to the police—such might lead to liability under criminal laws, as well as opening the door to claims for

\textsuperscript{20} See, \textit{e.g.}, Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (First Amendment protection “encompasses a range of conduct relating to the gathering and dissemination of information” and this protection covers all individuals not just members of the press’); id. at 82 (“Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.”). \textit{Compare} federal cases from the Third, Fourth and Tenth Circuits discussed in Carol M. Bast, \textit{Tipping the Scales in Favor of Civilian Taping of Encounters with Police Officers}, 5 \textit{U. Denver Crim. L. Rev.} 61, 90 (2015) (courts held that “a First Amendment right to tape a government official was not clearly established under the circumstances,” but leaving open the question of whether a First Amendment right to gather information exists).

invasion of privacy. If there was no such intent, if the pictures were taken only for personal use, then the photographer is simply a hobbyist, and First Amendment protections should pose no obstacles to a tort claim for exploitative objectification.

**B. An Appeal to “Common Decency”**

Under the tort rubric of “public disclosure of private facts,” a few sporadic cases have analyzed a certain kind of vulnerability that at first glance could seem to be analogous to the proposed tort of “exploitative objectification,” minus the emergency—cases which involve the publication of accidental exposure or nudity. For example, in a 1964 Alabama case, the plaintiff sued the newspaper that had published a picture showing the plaintiff with her dress blown up as she was leaving a fun house at a county fair. Acknowledging that “one who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status,” when the status changes to one embarrassing “to an ordinary person of reasonable sensitivity,” the court noted that the person “should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place.”

In contrast, a Texas high school soccer player sued the newspaper that published a photograph in which his genitalia happened to be accidentally exposed while playing soccer. The court held that the newspaper was entitled to First Amendment immunity, explaining that the photograph was taken for media purposes: “The picture accurately depicted a public event and was published as part of a

---

newspaper article describing the game. At the time the photograph was taken, McNamara was voluntarily participating in a spectator sport at a public place.”

Perhaps most importantly, it seems that there was no clear intent on the part of the newspaper to exploit the accidental exposure: “None of the persons involved in the publishing procedure actually noticed that McNamara’s genitals were exposed.”

From an analytical perspective, there seems to be a clear analogy between “exploitative objectification” of a victim of an accident or assault and the “common decency” not to exploit the misfortune of accidental nudity. But according to the Restatement courts have for the most part taken the law of “involuntary public figures” in a different direction. As the Restatement comment explains, those who without consent or approval become involved with public events like crimes, disasters or accidents are:

. . . properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public . . . As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.

Are there any limits? The second Restatement locates the reference point in community mores and would draw the line according to “common decency”:

---

24 Id.
25 RESTATEMENT (SECOND) OF TORTS § 652D cmt. f. See Post, supra note 2, at 1003 (discussing the difficulty of containing this exception when information with a “discernible relationship” to public matters “will likely be deemed ‘of legitimate concern to the public,’ and hence dissemination to the public will not be actionable.”); id. (example of an event that was not public until disclosure by the press made it so).
The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.26

But the truth is that it is exceedingly difficult to distinguish news from entertainment, and courts usually err on the side of publication.27 And to make matters even more complex, recent U.S. Supreme Court cases such as Snyder v. Phelps demonstrate just how wide is the space granted to freedom of expression even in a face-to-face encounter, even when the expression is deeply offensive to the target victim.28

26 RESTATMENT (SECOND) OF TORTS, § 652D cmt. h.
27 See e.g., Shulman v. Group W. Productions, Inc., 18 Cal.4th 200 (Cal. 1998) (nurse assisting accident victim on medivac helicopter wore a wireless microphone supplied by a video-camera operator recording the wreckage of an automobile accident and the rescue; victim’s statement, “I just want to die. I don’t want to go through this,” was broadcast without her consent; plurality of the court rejected a claim of publication of private facts, holding that the material was “newsworthy,” a complete bar to recovery; other aspects of an intrusion tort were remanded). See also Post, supra note 2, at 1005-1006 (discussing coverage of accidents, courts are concerned that restraints will be overbroad and any limitation would effectively put the brakes on publication regarding any accident in which the victims are discernible).
28 Snyder v. Phelps, 562 U.S. 443 (2011) (including within protected speech messages of members of the Westboro Baptist Church, who picketed on public land the funeral of a soldier; signs displayed 30 minutes before the funeral included these messages: “Thank God for Dean Soldiers,” “God Hates Fags,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.”). For an explanation of extent to which the “open-textured” nature of tort rules does not clash with Constitutional due process values, see Benjamin C. Zipursky, Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law, 60 DEPAUL L. REV. 473, 496 (2010-2011) (explaining that in a tort case, “[t]he reason a defendant is vulnerable to the plaintiff’s claim as facilitated by the court lies in the defendant’s having wrongfully injured the plaintiff, not the defendant’s having broken a rule.”); id. at 518-19 (tort inquiry does not focus on “whether the right to express certain views may be curtailed when the speech has a
Where the pictures are deemed to be “communicative,” how might courts sort through what seem to be directly clashing interests? How might we simultaneously ensure vigorous support for freedom of expression and freedom of the press, both important dimensions of a healthy society, and at the same time, foster some limits of “common decency” in how citizens engage each other in a public forum—especially when the person being photographed is vulnerable and in need of emergency assistance?

The proposed tort of “exploitative objectification” can help us to both theorize those limits and draw some of those lines. By regulating only areas that cross the threshold of “exploitative objectification,” the framework for this tort can still protect and even celebrate the contributions that ethical journalism brings to our culture and our world. By staying its hand regarding incidents that do not involve vulnerable persons needing emergency assistance, it recognizes the ambiguity that permeates situations in which photojournalists often find themselves, and does not purport to dispense easy answers to those conundrums. By focusing on and bringing into relief the distinct harm inflicted through the tort of “exploitative objectification,” the analysis can also help to further theorize remedies for other areas of profound social
certain potentiality for causing offense or distress” but submits that “there are certain ways that each of us is entitled not to be mistreated. It allows individuals to come to court and demand redress on the ground that they have been mistreated by the defendant in a manner that courts have regarded as substantial. It tells courts that if the plaintiff can establish that he was so mistreated, then he shall be entitled to hold the mistreater accountable for having wrongfully injured him.”).
concern, such as child pornography. It is to these questions that the next sections now turn.

C. Criteria to Discern When Photography of a Vulnerable Person is Not “Exploitative Objectification”

Consider this dilemma, taken from a 1976 account of Alf Khumalo, a Black reporter for the Johannesburg Sunday Times, describing the outbreak of riots in Soweto, South Africa:

. . . Suddenly a small boy dropped to the ground next to me. I realized then that the police were not firing warning shots. They were shooting into the crowd. More children fell. . . . I began taking pictures of the little boy who was dying next to me. Blood poured from his mouth and some children knelt next to him and tried to stop the flow of blood. Then some children shouted that they were going to kill me. . . . I begged them to leave me alone. I said I was a reporter and I was there to record what happened. A young girl hit me on the head with a rock. I was dazed, but still on my feet. Then they saw reason and some led me away. All the time helicopters circles overhead and there was the sound of shooting. It was like a dream. A dream I will never forget.29

What is a journalist supposed to do when someone is gravely injured before his or her eyes? How much does that question depend on who else is around to help? One of the elements that makes this story especially difficult is the visceral and violent reaction of the children. Were they reacting specifically to the reporter’s picture-taking? Or was it a more generalized response to the violence of the situation

29 SUSAN SONTAG, ON PHOTOGRAPHY 168 (1978) (excerpt from THE OBSERVER (LONDON), June 20, 1976).
and the fear that they may have felt at that moment? What to make of the personal
risks that the reporter was taking with his own safety, and possibly his own life?

Journalists covering situations of war, violence, and other manifestations of
social instability are immersed in the dilemma of how to cover their subject in a way
that fosters respect not only for the human beings that they encounter, but also for
their audience—a wider humanity that absorbs the news and images of otherwise
largely inaccessible landscapes and dilemmas. This section explores circumstances in
which I argue that a photographer’s conduct has *not* crossed the line of “exploitative
objectification,” because of the simultaneous concern expressed for the vulnerable
person, and recognition not only of this person’s humanity, but also their of urgent
need.

A trip to the Pulitzer Prize Photographs Gallery at the *Newseum* in
Washington, D.C., reveals just how many of the most highly valued works in the field
of photojournalism would fall within the category of “vulnerable persons in need of
emergency assistance.”\(^30\) For this limited set of photographs, the stories of how the
photographers engaged their human subjects—at least as conveyed in how they
framed their encounter in narrative terms—seems to quell many concerns about
exploitation in these contexts. From a Kantian perspective, their attention to the
human needs of the persons they encountered, their own emotional response to
another person’s suffering, and their concern for the larger social and political

---

\(^30\) The photographs from the exhibit are also collected together with brief commentary in *The Pulitzer Prize Photographs: Capture the Moment* (Cyma Rubin & Eric Newton eds., 2014 edition).
pressures and structures at stake all seem to point away from what might constitute “exploitative objectification.”

1. Attention to Physical Needs

The Pulitzer Prize collection includes striking accounts of how photo-journalists kept the human needs of the victims at the center of their concern. Many are familiar with the 1973 prize-winner, Huynh Cong “Nick” Ut’s photograph in Vietnam of the “Terror of War.” A South Vietnamese plane had missed its Viet Cong target, dropping burning napalm onto South Vietnamese soldiers and civilians. Women and children ran toward the photographer, screaming, and a mother with a badly burned child died right in front of his camera. Then he heard other children screaming, “Please help! Please help!” The narrative accompanying the famous photograph recounts:

As Ut furiously snaps photographs, a young girl runs toward him—arms outstretched, eyes clenched in pain, clothes burned off by napalm. “She said, ‘Too hot, please help me.’ I say ‘yes,’ and take her to the hospital.” The girl, Phan Thi Kim Phuc, survives. She grows up, gets married. Through the years, she and Ut stay in touch, brought together by a moment of tragedy.31

Similarly, the winner of the 1988 Feature, Michel du Cille, described his work of telling through pictures the story of how a public housing project that had become

31 Id. at 76. The picture is available at http://www.perdana4peace.org/2013/do-you-know-what-happened-to-the-girl-in-this-iconic-pulitzer-prize-winning-photo-from-the-vietnam-war/. See also Associated Press, Relief for Napalm girl after 43 years, N.Y. Post (Oct. 24, 2015) http://nypost.newspaperdirect.com/epaper/viewer.aspx (noting Ut’s presence for Phuc’s laser surgery procedure to soften scar tissue; Phuc recounts: “He’s the beginning and the end . . . He took my picture and now he’ll be here with me with this new journey, new chapter.”) Thanks to Kenneth Handal for signaling this article.
a magnet for crack cocaine addicts was not just a “black inner-city problem,” but that “people in all walks of life were involved.”\textsuperscript{32} In response to seeing small children roaming an apartment unsupervised while their mother slept off a high, he explained: “Her baby would run around all day in one dirty diaper, without a bath. We brought her diapers and soap. There is a certain line of humanity that you have to draw and you say ‘I have to step over this line and be human.’”\textsuperscript{33}

Although not precisely in the context of an emergency, respect for the humanity of one’s subject is also communicated in recognizing when one has captured an intimate and personal moment that would require permission to share it with others. As Anthony Suau described his interaction with the subject of the 1984 Feature winner, “Memorial Day”:

I was just walking around. And I saw this woman. It looked like she had been holding the tombstone and then she let go. So I positioned myself with a longer lens. And sure enough, within a few minutes, she embraced the tombstone again. I made about six frames. And I realized immediately that it was a very intimate moment.

At that point he decided to put down his camera and wait for the woman outside. As she was leaving the cemetery, he approached her:

I said, “I just took your picture embracing this tombstone. And I want to make sure it’s OK with you to publish it.” She was delighted. “I got a lot of phone calls from people around the world saying, ‘I’ve done that. I’ve hugged my husband’s or father’s

\textsuperscript{32} Id. at 146.
\textsuperscript{33} Id. \textit{See also} Howard Cohen, Pulitzer-Prize Winning Journalist Michel du Cille Dies at 58, Local Obituaries, \textsc{Miami Herald} (Dec. 12, 2014) available at: http://www.miamiherald.com/news/local/obituaries/article4456502.html.
2. Emotional Attention and Response to Human Suffering

The depth of these photographers’ humanity is also conveyed by the range of emotions that they experience as they engage their subjects and the reality of human suffering. As Stan Grossfield described the overwhelming experience behind “Ethiopian Famine,” the 1985 Feature winner: “I’ll never forget the sound of kids dying of starvation. They sound like cats wailing... You try to be a technician and look through the viewfinder; sometimes the viewfinder fills up with tears.” Just hours after Grossfield shot the picture of the starving mother caressing her child as they wait in line for food in Wad Sharafin Camp, the child was dead.

William Snyder, winner of the 1991 Feature “Forgotten Children,” recounts a similar sense of shock at seeing the state of the children at a Romanian orphanage: “I had always been a run-and-gun photographer. Going to Romania changed everything for me. This wasn’t about the pictures, this was about people, defenseless, helpless people. It was no longer just pictures to be taken, it was stories to be told.”

Four-time Pulitzer Prize-winning photographer Carol Guzy described what it was like to cover a mudslide in Colombia that had just killed more than 20,000...
people. “Sometimes I would just rage inside, seeing the helplessness. . . . Just to be able to deal with this, I would seek out those moments of humanity and courage.”38

One tragic account of the direct emotional impact of contact with suffering on a photojournalist is the story behind Kevin Carter’s 1994 Feature, “Waiting Game for Sudanese Child.” The narrative recounts:

At a feeding station at Ayod, he finds people so weakened by hunger that they are dying at the rate of 20 an hour. As he photographs their hollow eyes and bloated bellies, Carter hears a soft whimpering in the bush. Investigating, he find a tiny girl, trying to make her way to the feeding center. Carter crouches, readying his camera. Suddenly a vulture lands nearby. Carter waits. The vulture waits. Carter take his photographs, then chases the bird away. Afterward he sits under a tree and cries.

Instructed not to touch the famine victims because of the risk of spreading disease, Carter did not pick the child up.39 Nonetheless, Carter remained deeply affected by outraged letters asking why he did not pick her up. Overwhelmed by the controversy and other problems, Carter died that same year, at 33 years of age, an apparent suicide.40

---

38 Id. at 2.
39 See Peter Martin, “I’m Really, Sorry I Didn’t Pick the Child Up,” SUNDAY MAIL (London) (Oct. 16, 1994) at 40 (quoting Clark’s colleague Chris Marais: “all the journalists in that area had been instructed by the UN not to touch the local people because of the risk of disease.”).
40 CAPTURE THE MOMENT, supra note 30, at 170. See also Scott Macleod, The Life and Death of Kevin Carter, TIME (June 24, 2001) http://content.time.com/time/magazine/article/0,9171,165071,00.html (more background and insight into Carter’s emotional state); Influential Photographs: Struggling Girl, 1993, by Kevin Carter, http://www.lomography.com/magazine/257626-influential-photographs-struggling-girl-1993-by-kevin-carter (noting account of Carter’s colleague, Joao Silva, that the girl had not been abandoned; parents were just a few feet away collecting food supplies at a plane).
3. A “Witness” to Suffering in View of a Social or Political Response

The work of these photojournalists can also be considered in light of the public role that images play in our common life. As the introduction to the collection of Pulitzer Prize winning photographs explains: “These classics of photojournalism capture the tragedy and triumph of our times. They bear stark witness to war and brutality. They also honor heroism, compassion and the strivings of ordinary people for better lives.”

Photojournalism as photography often leads people to contemplate the heights and depths of the human spirit and of nature; and as journalism it often contributes to the communication of a message that provokes social change. The introduction continues: “Photographers spark wonder, generate action and can ignite change in the world. Most of all, they give us a glimpse of our own humanity.”

As James B. Dickman described the work behind his 1983 Feature, “El Salvador: The Killing Ground,” in the midst of a battle between anti-government guerrillas and the ruling military junta:

I photographed soldiers dragging away bodies. Nobody tried to stop us... One of the difficult parts is to keep your focus, literally and figuratively, on what you are there for. Hopefully you are human enough to be affected emotionally, but you realize that you are documenting it so people back home can see it and it will have an impact.

His series on El Salvador remains as “vivid proof of the brutality of the war.”

---

41 CAPTURE THE MOMENT, supra note 30, at 1.
42 Id. at 2.
43 Id. at 120.
44 Id.
In the 1989 Spot News winner, “Giving Life,” Ron Olshwanger captured the image of a firefighter with a naked two-year old girl in his arms, both dirty with smoke, his helmet back, giving the child mouth-to-mouth resuscitation. He explained: “I’ve been at other fires where I didn’t get the pictures because I was helping the victims . . . but in this situation, there was nothing I could do. . . . The little girl did not survive . . . It was her 2-year-old birthday. It was very sad.” But because homeowners, schools and fire houses still display the photograph as a graphic reminder of the importance of smoke detectors and fire-prevention programs, Olshwanger reflects on the impact of the little girl’s picture: “she saved a lot of lives.”

The 2012 Breaking News prize-winner, “Attack in Kabul,” which ran on the front page of numerous papers, is horrific by any standard. Twelve-year old Tarana Akbari, dressed in a bright green party dress stands screaming, splattered with blood, in total shock and terror, amidst a pile of bloody bodies—women, children and infants—knocked to the ground by a suicide bomber in a blast that killed more than seventy people, including her seven-year-old brother Shoaib. As the photographer Massoud Hossaini remembered: “I knew I had to record the action of that girl . . . I knew that whatever this green girl was doing would be something that people would

---

45 Id. at 148. See also id. at 146 (discussing the impact of Michel du Cille’s photography of a public housing project: “The publication of du Cille’s photographs moves people and stimulates change. The government sweeps in, cleaning up the complex and driving out the crackheads. “When I went through there a year or so ago, it had been painted pastel peach and white.”).  
46 Id. at 148.
remember forever.”\textsuperscript{47} He wept for days. He had been born in Afghanistan, but left as a boy. He explained: “This is the reality of Afghan life . . . This is a real war, a war without reason, and it’s really painful and it’s really violent. Everybody who sees that picture sees our situation. Who are the victims? Children, women and civilians.”\textsuperscript{48}

Narratives such as these, evincing the depths of human sensitivity and respect on the scene of an emergency, bespeak of anything but “exploitative objectification of a vulnerable person in need of emergency assistance.” But this raises a very difficult question: how might one distinguish the “good”—photography aimed at the service of humanity, with respect not only for one’s immediate human subjects, but also for the subject of humanity as a whole—from the “bad” and the “ugly”? Even within this limited collection of pictures, it is also important to pay attention to the sliding nature of mixed emotions and attitudes. Perhaps when Kevin Carter took the initial shot of the little girl at the feeding center in Sudan, he realized that in his heart of hearts he was insensitive to her humanity because as the vultures landed a few feet away from her body he was more interested in the set-up for a perfect Pulitzer Prize-winning shot. Later he cried. It could be that discernment of those sliding motives within himself—and not just his overwhelming encounters with human suffering—were the source of his despair. We will never know.

*****

\textsuperscript{47} Id. at 240.
\textsuperscript{48} Id.
Like many other professionals, journalists work simultaneously against the backdrop of (at least) two horizons. The first is the immediate circumstances, in which they are working where they often directly encounter other human beings. The second is their professional horizon—the media outlets for which they work, the particular audience for that outlet, and the professional service that they provide to bring news and images of that first horizon to these contexts.\footnote{When considering the conflicts between these two horizons, one could draw extensive analogies to other professional quandaries. For example, it would be interesting to compare the dilemmas of journalists in these circumstances to the quandaries of lawyers who focus only on the interests of their clients, in some circumstances to the direct harm of third parties, or to the detriment of the common good. Further exploration of this topic is beyond the scope of this Thesis.}

For journalists who are covering war, violence, and other situations of social instability, the first horizon may include the encounter with immense human need, and at times vulnerable persons in immediate need of emergency assistance. For their role in this context, it is tempting to fall into stock narratives analogous to the “easy rescue” Olympic swimmer, on the scene, rope in hand, perfectly equipped and prepared to pull the drowning toddler out of the wading pool. But in many circumstances the reality is much more complex. For example, working against the backdrop of larger and often extremely complex military and/or humanitarian operations, journalists may have been specifically instructed by authorities of different kinds to stay or get out of the way. Interfering, even with the intention to help, may actually create more risk, confusion, and further danger for others. As with the temptation to flatten out the subjective life of bystanders, from a distance it is easy to accuse Carter of not picking up the tiny and vulnerable subject of his picture. But
both the instructions to the photographers not to touch the children and the watchful
eye of the child’s mother who was a short distance away retrieving food for her family, were beyond the borders of the photograph.

Considering the professional horizon of journalists, how is one to judge the action or inaction of a particular photographer? For example, how might one compare the good of immediate assistance in an emergency with the good of communicating to the larger world through images the reality of the famine perpetuated by poor policies or politics; or the horrors that a suicide bombing inflicts on the ordinary lives of Afghan citizens? From a utilitarian perspective, who is to say which contribution might actually save more lives? Who is to say which is more “valuable” or important in a given moment—the immediate assistance that a Doctors Without Borders physician provides to an Ebola patient, or the photographer who helps to insure that the concern—and so also global funding for such projects such as emergency medical assistance—remains in the public eye?

The circumstances of journalists covering war and other situations of violence or extreme social instability are perhaps one area where a neat distinction between “pure bystanders” and “engaged spectators” is less than helpful. Notwithstanding the fact that their professional engagement places photojournalists in direct contact with vulnerable persons in need of emergency assistance, these are contexts in which it is especially difficult to judge the point at which engagement become “exploitative objectification.” Like “pure bystanders,” professional photojournalists working in these contexts should be allotted full discretion to dig deep and follow their instincts
to determine whether to engage a vulnerable person—or not—according to the risks as they read them in the specific circumstance. Recalling the example at the beginning of this section, in situations of a sudden outbreak of violence, one journalist may be “moved from the gut” to try to stop the bleeding of the little boy who has fallen down next to him. Another may be “moved from the gut” to concentrate on the professional task at hand—capturing the shot—so as to tell a story that might help to open eyes and hearts in other parts of the world to the reality of the suffering and violence that portions of humanity are experiencing in that moment.\textsuperscript{50} Either can be a contribution to the good, or at least the better or best possibility for a positive contribution in a bad situation.

\textbf{D. Criteria to Discern When Photography of a Vulnerable Person Constitutes “Exploitative Objectification”}

As discussed above, attention on one hand, to the physical and emotional needs of vulnerable persons, and on the other hand, to the broader service that journalism may contribute to the social good are sometimes in tension, and cannot always be carried comfortably together. But when \textit{neither} aspect is present, and when the consequence is also inattention or disregard for the physical and/or emotional needs of a vulnerable person in need of emergency assistance, such might be a sign that it might be appropriate to draw some limits—or at least design a scheme so that those who benefit financially from this inattention to “common decency” compensate those who suffer dignitary harm as a result.

\textsuperscript{50} \textit{See} discussion \textit{supra}, Chapter III.A, The Good Samaritan as “Moved from the Gut”
Scripted reflections mounted on the walls of a museum or gathered in prize-winning picture books might in some cases present an overly romanticized and sanitized angle on the reality of “exploitative objectification” that can lurk behind the financial interest in pictures that tend to generate more sales. The following subsections move from the softly illuminated halls of the Newseum to the grittier floors of the offices of the New York Post, and then to wherever the paparazzi lie in wait.

1. **When Shock is the Only Value**

On the afternoon of December 4, 2012, Ki-Suk Han, who was probably intoxicated, got into an altercation with a mentally unstable homeless man on a busy midtown New York City subway platform. Han was pushed onto the tracks, and struggled for about sixty seconds to hoist himself up onto the platform as a subway train approached. Several bystanders were present, and none attempted to help him. He was crushed by the oncoming train. As his limp body was pulled up onto the platform, the assembled crowd began to take videos and snapped photographs on their cell phones until they were pushed away by another bystander, who attempted to resuscitate him.  

As the train was approaching, from some distance away, a freelance photographer was recording the incident, and the photograph later appeared on the front page of the New York Post. The publication prompted horror and outrage, but

---

also interest and sales. The photographer later claimed that he was too far away to help, and so was attempting to use his flash to alert the train conductor.\textsuperscript{52} As the competing \textit{New York Daily News} recounted, Han’s loved ones were outraged.\textsuperscript{53}

What was the point of that picture—other than shock value? To what broader message did it “bear witness?” What was the broader social message that it may have served? And what to make of the harm and disrespect to Han’s mourning family? These are not rhetorical questions and answers are not obvious. For example, one might argue that the point was to illustrate the dangers of the subway system and the need for further safety measures.

And even if the only “value” was shock, one response is that as a society we are so far down that road that at this point it would be impossible to dial back the fascination with—and consequent market for—shocking and gruesome images of suffering or impending doom. Or perhaps this fascination is simply part of the human condition, evident in much earlier reflections as well. As Plato recounts in \textit{The Republic}, we are torn between the “forbidding principle” derived from reason, and “that which bids and attracts,” proceeding from “passion and disease.”\textsuperscript{54} Perhaps at some point we have all found ourselves in Leontius, son of Aglaion, who coming up


\textsuperscript{53} \textit{See} Sandoval & Hutchinson, \textit{supra} note 52.

one day from Piraeus to the place of execution observed some dead bodies lying on
the ground:

He felt a desire to see them, and also a dread and abhorrence of
them; for a time he struggled and covered his eyes, but at length
the desire got the better of him; and forcing them open, he ran up
to the dead bodies, saying, “Look, ye wretches, take your fill of the
fair sight.”

For an especially horrifying example of a popular culture depiction of this
interest or need to “take your fill,” consider an episode of what” the British television
anthology series Black Mirror. “White Bear”—spoiler alert—concocts a
nightmarish scenario in which eerily indifferent “engaged spectators” who take cell
phone pictures of the victim-protagonist play a crucial role in state-sponsored torture.
The genius of the episode is that it is difficult to tell what for the victim is the source
of greater pain—the direct infliction of shock and terror, or the bewildering and
disorienting crowd of picture-takers.

---

55 Id. Many thanks to David Luban for signaling the connection with this text. See SONTAG, ON
PHOTOGRAPHY, supra note 29, at 96-97 (discussing this Plato text).
56 Emily Nussbaum, Button Pusher: the Seductive Dystopic of Black Mirror, NEW YORKER (January 5,
2015) http://www.newyorker.com/magazine/2015/01/05/button-pusher. The series, which often
focuses on the unintended effects of our interactions with new technologies, has been described as “an
update on ‘The Twilight Zone’ for the digital age.”
57 White Bear, Season 2, Episode 2, BLACK MIRROR (first aired February 18, 2013), available at:
http://www.channel4.com/programmes/black-mirror/on-demand/54663-003. From a theological
perspective, one of the most interesting and disturbing scenes is when the victim is taken to a wooded
area where it appears that people have been crucified, and the spectators remain indifferent not only to
her fate but to the fate of those who seem to be hanging on the crosses as well. Many thanks to Alvaro
Bedoya for alerting me to how this episode connects with thesis in this Thesis.
To add a further layer of complexity, noting how lines circled around the block for entrance to the film version of *Fifty Shades of Grey*, one might also wonder whether it may be simply naïve to think that our society could come to any sense of consensus on either “common decency,” or what might constitute, the opposite: “exploitative objectification”—whether in a photograph, or in the process of taking a photograph. For many, definitions of what is good, what is bad, and what is ugly, not only in photography, but in all aspects of human encounter, seem too hopelessly subjective to ground a tort claim based on “exploitative objectification.”

The truth seems to be that our encounters with human suffering and vulnerability are often a reflection of a mixed and jumbled range of emotions—from noble empathy (that could be me), to fearful distinction (I’m glad that’s not me), to morbid or banal curiosity (what exactly does he or she look like?)… and beyond.

For these situations, perhaps the torts scheme could somehow hold together both realities. In other words, while we should recognize that an outright ban on these forms of speech may not pass constitutional muster, that concern should not block the design of a scheme to insure that those who gain financially from the production and distribution of these images should also pay—they should be subject to tort liability—for the damage caused. Such claims could be analogous to a products liability suit: when a manufacturer places in the stream of commerce a

---

particular product that serves some purpose, but also carries simultaneous risks, the manufacturer who gains from the marketing of the product should also pay for the damage inflicted. In the Han case, for example, where the publication of a front page picture generated both lots of money for the obliging newspaper, and harm and distress for the family of mourners, the newspaper should be liable for those damages. The new tort of “exploitative objectification of a vulnerable person in need of emergency assistance” would be a good framework for assessing that harm.

2. When Conduct Provokes or Exacerbates the Need for Emergency Assistance

Running parallel to the accidents of otherwise ordinary citizens are the concerns and complexities that pervade the image capture of those who are already in the public eye, who perhaps may have a lowered expectation that their mishaps or accidents may be tempered by a modicum of discretion. In one of the most famous of these cases, aggressive “paparazzi” photographers were initially blamed for the tragic death of Princess Diana and Dodi Fayed as a result of injuries sustained due to a car crash in a tunnel in Paris on August 31, 1997. Subsequent investigations concluded that the deaths were due to the negligence of their chauffeur, Henri Paul, driving at up to 120 miles per hour while under the influence of alcohol and drugs. Manslaughter

59 See, e.g., Elizabeth Blanks Hindeman, The Princess and the Paparazzi: Blame, Responsibility, and the Media’s Role in the Death of Princess Diana, 80 JOURNALISM & MASS COMM. Q. 666 (Aug. 2002) Id. at 666.
charges against the nine photographers and a press motorcyclist who were following the car were dropped.\textsuperscript{61}

Nonetheless, the tragedy provoked extensive reflection on the possibility of imposing some legal limits on photographers in order to protect the privacy and safety of celebrities.\textsuperscript{62} While the investigation placed the blame on the driver, one may of course still query whether he would have been driving so fast if the car was not being pursued by aggressive paparazzi. The high speed chase is an excellent example of how “exploitative objectification” actually \textit{provoked} the ultimate need for emergency assistance. Thus another contribution that the new tort of “exploitative objectification” could bring to the analysis of these cases is to train our eyes to the actual harm—even physical harm—that the pursuit of a picture may have caused; an argument that legal responsibility for the damages caused by this actual harm should follow.


3. *A Relational Critique of Arguments for Unlimited Access and Exposure*

Returning to themes initially discussed in Chapter Five, running through much of the discussion of the First Amendment rights of photographers is an assumption that at the heart of freedom is unlimited access to the subject (or object) to photograph, and the resulting unlimited exposure to the public of whatever the market will buy—no matter how sorrowful, how shocking, or how embarrassing it may be.63 The philosophical and theological frames of relational autonomy would query whether this rings true. From this perspective, tort limitations on “exploitative objectification” could actually foster greater freedom, because on the flip side, photographic practices that constitute “exploitative objectification” harm not only the vulnerable person and his or her loved ones, but the photographer as well.64

In a thoughtful commentary probing the seeming zero sum game in gaining “access” to the private lives of others, Anita Allen pushes the envelope on the assessment of “winners and losers” in privacy law.65 She queries whether those who “win” access to the lives of others have in some way “lost” track of the moral value of “restraint in attention to others’ intimate lives.”66 She submits that we should also consider the costs of simply bowing to market demands: “Feeding raw desires and fan

---

63 Compare discussion *supra*, Chapter V, Freedom as Autonomy—In What Sense?
66 Id.
obsessions at the expense of nontrivial activities has moral implications.”67 Within this framework, “inattention to others’ personal lives”—understood as the deliberate choice not to feed these obsessions—can actually be “a qualitative benefit to civil society.”68

Perhaps the most direct evidence of the relational nature of the harm of unlimited exposure, and of the need for a more complex assessment of the impact of “exploitative objectification” can be found in recent discussions of the severe levels of trauma and stress that journalists and photographers suffer—and not just those covering the stories on the ground, but also those in the newsrooms, sorting through pictures and footage.69 The problem seems to be compounded by a professional culture which discourages the expression of emotions, a sense of vulnerability or the need for help in dealing with traumatic experiences.70

In a recent interview, seasoned journalist Mac McClelland recounted how while still on assignment after the after effects of the 2010 Haiti earthquake, she

67 Id.
68 Id. (emphasis added).
69 Gabriel Arana, A Mental Health Epidemic in the Newsroom, HUFFINGTON POST MEDIA (May 18, 2015, updated May 26, 2015) http://www.huffingtonpost.com/2015/05/18/mental-health-journalism-trauma_n_7305460.html?utm_hp_ref=media (recounting the prevalence of traumatic stress not only among those covering natural disasters and war, but also among those who edit footage and sort through pictures); Catherine Taibi, It’s Not Just War Reporters: How Viewing Graphic Content Secondhand Can Lead To Mental Health Issues In Journalists, HUFFINGTON POST MEDIA (May 19, 2015, updated May 28, 2015) http://www.huffingtonpost.com/2015/05/19/secondhand-trauma-journalists_n_7305992.html?1432035656 (“While full-blown PTSD is rare among journalists, other mental health problems—such as anxiety, stress, alcohol and drug abuse, depression, trouble sleeping and social dysfunction—are more common.”). For an artistic rendition of the depth and scope of the harm to a war photo-journalist, see PÉREZ-REVERTE, supra note 64.
70 Arana, Mental Health Epidemic, supra note 69. For description of an antidote, see Taibi, supra note 69 (describing recent programs, including a trauma-education initiative, implemented by the Associated Press to help journalists deal with exposure to graphic material).
began to experience the symptoms of Post Traumatic Stress Disorder (PTSD), including disassociation, uncontrollable sobbing, horrific nightmares, and then excessive drinking.\footnote{Gabriel Arana, Mac McClelland Says Journalists Need To Talk About Trauma, HUFFINGTON POST MEDIA (May 26, 2015) http://www.huffingtonpost.com/2015/05/26/mac-mcclelland-journalism_n_7444214.html?1432670099. See generally MAC McCLELLAND, IRRITABLE HEARTS: A PTSD LOVE STORY (2015); Sonia Faliero, “Irritable Hearts,” MacMcClelland, SUNDAY REVIEW OF BOOKS, NEW YORK TIMES (Feb. 20, 2015) http://www.nytimes.com/2015/02/22/books/review/irritable-hearts-by-mac-mcclelland.html} Reflecting on her efforts to discuss her illness with journalism colleagues, she noted a number of obstacles, including the extent to which journalism and the entertainment industry lift up “invincibility, emotional invincibility, and toughness, and invulnerability.”\footnote{Arana, Talk About Trauma, supra note 71.} For women it can be even more difficult: “there’s more pressure because you don’t want people to think that you’re hysterical.”\footnote{Id.}

McClelland found little support from her colleagues in journalism. After she wrote an essay about her experience with PTSD, some reporters indicated that they too had had similar experiences, but for the most part, she recounts, “everybody felt embarrassed and awkward about the fact that I wasn’t handling myself and that I was weak and vulnerable. And it’s not just journalists who respond that way; it’s hard for people to face other people’s trauma because it makes you think about how vulnerable you are, and it’s terrifying.”\footnote{Id.} According to McClelland, more conversation and openness to the reality of PTSD in journalism—to stop pretending
“like we’re all super tough, reporting robots who don’t have any feelings”—could be a trailblazer for the culture as a whole.\textsuperscript{75}

Ironically, then, one of the most powerful arguments for articulating the elements of a tort of “exploitative objectification of a vulnerable person in need of emergency assistance” could be sustained by journalists themselves. The focus would be concern not only for the dignity of the people they encounter in their work, but also for their own emotional and physical health. Further, articulation of a new tort might also help to define some boundaries for journalists to acknowledge the depths of their own humanity and their human experience of pain in contact with the pain of others. More open discussion of the contours of what might constitute “exploitative objectification” could help to jump start that conversation, and splice through the complex layers of these ethical quandaries. Appreciation of the relational nature of the harms that permeate the field of journalism can help not only to draw healthy ethical boundaries around the practice of, in Allen’s phrase, “feeding raw desires,” but also help journalists themselves be attentive to the care they need to have for others and for themselves\textsuperscript{76}.

\begin{flushright}
\textsuperscript{75} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{76} Further development of how the new tort may mesh with the ethics of journalism could include exploration of the extent to which the argument is paternalistic and condescending, especially when articulated as an effort to protect journalists from themselves. Thanks to Judith Lichtenberg for this insight.
\end{flushright}
E. A Comparison between the Tort of “Exploitative Objectification” and Other Schemes to Regulate or Criminalize Photography

To conclude the analysis in this Chapter, it is helpful to draw analogies between the proposed new tort of “exploitative objectification of a vulnerable person in need of emergency assistance” and other areas of law that regulate photography when it is clear that the act of photographing a vulnerable person causes real harm. The sections below compare the structure of the tort of “exploitative objectification of a vulnerable person in need of emergency assistance” to three aspects of other legal schemes to regulate or criminalize photography: first, the definition of harm that informs the regulation of child pornography; second, the extent to which the harm implicit in the act of taking a picture may be distinguished from the harm of objectification in the interaction with an image; and finally, how the harm of “explicit objectification” may be distinguished from constitutional concerns about thought-patrol that have arisen in the context of litigation over criminal statutes that prohibit “improper” or “unlawful” photography. In each of these areas, the analysis explores not only analogies and distinctions, but also the extent to which the new tort may help to illuminate current debates regarding the precise harms that these areas of law aim to deter or punish.

1. The Harm of “Exploitative Objectification of a Vulnerable Person” as Analogous to the Harm of Child Pornography

First, it is helpful to see the parallels between the tort of “exploitative objectification” and the precise nature of the harm in child pornography. How the
harm has been articulated in the latter area can help to delineate the path that the new tort forges through the doctrinal obstacles in tort law discussed in Chapter Eleven.

What exactly is the harm of child pornography? The foundational case for this field is *New York v. Ferber*, in which a bookstore owner was convicted under a New York statute prohibiting the knowing promotion of a sexual performance by a child under the age of sixteen. Even though the jury had found that the two films at issue did not fall within the definition of “obscene,” the Court concluded that child pornography fell outside the protection of the First Amendment, regardless of whether it was obscene.77 Because the standards for obscenity did not necessarily address the state’s compelling interest in prosecuting “those who promote the sexual exploitation of children,” regardless of whether the material met the standard for obscenity, states could justifiably pursue activities in which “a child has been physically or psychologically harmed in the production of the work;” and those producing images that “required the sexual exploitation of a child for its production.”78

Regarding circulation, the Court noted that the child may be further harmed by the fact that the material constitutes “a permanent record of children’s participation [in sexual activity] and the harm is exacerbated by their circulation.”79 Identifying an intrinsic relationship between distribution of the image and sexual exploitation and abuse of the child, the Court also concluded that the only way to end

78 Id. at 761.
79 Id. at 759.
the harm of creation was to shut down distribution. It is important to note that the law focuses on the objective harm to the child—both through creation and distribution—not on the nature of the material.

The Child Pornography Prevention Act of 1996 worked to expand prohibitions beyond material that employed actual children to images that appear to be those of a minor engaging in sexually explicit conduct, but are in fact merely virtual. In Ashcroft v. Free Speech Coalition the United States Supreme Court struck down the statute, ruling that it pushed too far—potential harms to future victims of child sex abuse were too vague to pass constitutional muster. The touchstone for the harm should have been grounded in how the image was made, not a broad argument about what the image communicated. With virtual child pornography, the Court found that there was “no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.”

Courts remain divided in their assessment of “morphing”—when the face of a child who was fully clothed in an innocent picture is pasted onto a sexually explicit picture of the body of an adult. Technically, no child may have been abused in the production of the initial picture, but harm to a real child could be evident based on the

---

80 Id. at 759 (“the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”). See Amy Adler, Inverting the First Amendment, 149 U. Pa. L. Rev. 921, 941 (2001) (“As the crisis of child sexual abuse has escalated, the definition of what constitutes ‘child pornography’ also has expanded dramatically, in the direction that makes it increasingly unrelated to the harm that the law was designed to combat.”).

association of his or her face with the morphed picture. Touchstones for assessing the harm vary. For example, in United States v. Hotaling the Second Circuit focused on the question of “whether an image of child pornography implicates the interests of an actual minor.” Two state cases illustrate the paradoxical cross-current: In State v. Zidel, the Supreme Court of New Hampshire overturned a conviction, reasoning that: “when no part of the image is ‘the product of sexual abuse’ and a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image.” The Zidel court left open the question of a distinct analysis of harm had the image been circulated. In contrast, in McFadden v. State, an Alabama court affirmed a conviction for possession of a morphed image, even where, as the court noted, there was “no indication that the children depicted in the collages were aware of the existence of the material or any indication that the defendant ever showed his collages to anyone.”

In some cases, the theorization of the harm seems to track that of infliction of emotional distress, or reputational damage. For example, in Hotaling the essence of the damage seems to be the “psychological harm of knowing that their images were exploited . . . by a trusted adult.” In a Seventh Circuit case, United States v. Klug,
the defendant had used a camera hidden in a backpack to surreptitiously film boys he supervised on camping trips as they showered or changed clothes. The court found that the harm should not be limited to depictions of sexual abuse, but should also include the fact that the filming gave “their images a permanent existence and the potential for endless replication, all of which is beyond the control of the victims.”

Some of the morphing cases consider the difficult puzzle of actual harm to a child who was unaware of the morphed image. In United States v. Stewart, the district court’s reasoning is explicitly based on the harm of objectification: “there is also harm to the child in his or her objectification by a single viewer of his or her images of unintended intimacy.” Similarly, in Lora v. Boland, the district court found that minors in computer-morphed images were harmed by the existence of the pictures even though they had never seen or learned about the images. For this court, it was sufficient that the images had been displayed:

[T]here is nothing in the statute to suggest that the minors need to know about the images in order to suffer a personal injury. … These images have been displayed in courtrooms in Ohio and Oklahoma. Once images have been shown in public, it is impossible to know that they will never surface again.

What is to be drawn from this assessment? As might be expected, much of the analysis of harm is to be found within the well-worn grooves of damage to

86 United States v. Klug, 670 F.3d 797 (7th Cir. 2012).
87 Id. at 800.
90 Id.
reputation and emotional distress. But assessments of harm based on objectification—extended even beyond actual knowledge—are not unheard of. This glimmer of recognition might be a sign that some courts would be open to more robust theorization along these lines. Work to theorize the tort of “exploitative objectification of a vulnerable person in need of emergency assistance” could help to sustain theorization of the distinct dignitary harm in this context as well.

2. The Harm of “Exploitative Objectification” Distinguished from Objectification when Interacting with an Image

To what extent would a tort of “exploitative objectification” run aground on the shoals of precisely that area the tort aims to recognize and respect—the interior life, which includes the domain of one’s intimate thoughts? As the U.S. Supreme Court opined in Ashcroft, when material is produced without “actual harm to actual children,” the First Amendment does not allow the state to punish speakers for their thoughts as opposed to their actions. Analogously, would a tort for “exploitative objectification of a vulnerable person in need of emergency assistance” risk a foray into unconstitutional thought patrol? This subsection argues that it would not.

In a tour de force on child pornography law which predates the Ashcroft decision, Amy Adler carefully parses the extent to which the trend at the time risked moving toward the overreach of state-regulation of thought. Important for the analogy to “exploitative objectification,” Adler offers a hypothetical of a man on a beach with a camera that is equipped with a telephoto lens. Unbeknownst to a little

91 Ashcroft, 535 U.S. at 253-55.
girl in a bikini playing on the beach with her mother, the man uses the camera to zoom in on her genitals, which are covered only by her bathing suit. As Adler elaborates: “The girl and her mother never see the man; they never know the photo has been taken. The photographer, who finds the resulting picture sexually stimulating, keeps the photograph to himself, in his secret stash of ‘child pornography.’ He never shows it to anyone else.” Setting aside the question discussed above, whether such photography would be “non-communicative,” and thus beyond the purview of First Amendment protection, this subsection works to distinguish this scenario from the harmful conduct that the tort of “exploitative objectification” aims to reach.

Note the facts in Adler’s example: unlike the child pornography cases discussed above, the production of the picture of the child at the beach involved no underlying harmful act of abuse in the sense in which Farber defined abuse. Neither could the little girl or her mother claim an invasion of privacy, as the picture was taken in a public place. We may be troubled by the “creepiness” that pervades these kinds of examples, but as Adler notes, such concerns are generally not sufficient to bring to bear the full force of child pornography law:

We may not like that this picture has been taken of the girl. And we may not like the way the photographer thinks of the photo, nor the way he thinks of the little girl. These are troubling concerns. But would it be correct to say that the picture is “child

---

92 Adler, supra note 80, at 941.
93 Id. at 941-42.
94 Id. at 942 (noting pictures taken in public places do not require consent or “release” by the subject). See generally Phillip E. Hansssman, Taking Unauthorized Photographs as Invasion of Privacy, 86 A.L.R.3d 374 § 4 (1978).
pornography” and to bring all the attendant severity of child pornography law to bear on its possessor.95

The challenge of these kinds of cases is precisely the potential for slippage in how intent seems to operate. Adler clarifies: “The problem we confront in child pornography law is therefore not the familiar free speech puzzle: that it is difficult to draw the line between bad speech and good, that they exist on a hazy continuum.”96 Instead, the problem is that whether the speech is bad or good seems to turn only on an interior motive or perspective. More precisely, Adler notes: “. . . the problem is that bad speech and good may often be one and the same thing: the cute pictures of our children playing on playgrounds or riding their bikes may be precisely the same pictures that most appeal to the pedophile.”97

In light of this concern, does the proposed new tort of “exploitative objectification of a vulnerable person in need of emergency assistance” turn only on intent? No. In Adler’s example of the photographer at the beach, note that the focus is not on the conduct of the photographer in the context of the circumstances in which the subjects of his photography find themselves, but on the connection between the resulting image and this photographer’s interior state of mind—the effect that the photograph has on the photographer. In contrast, the tort of “exploitative objectification of a vulnerable person in need of emergency assistance,” is focused on a more objective harm: conduct that reflects disregard for the humanity of another

95 Adler, supra note 80, at 943.
96 Id. at 946.
97 See also id. at 961 (“if the subjective viewpoint of the pedophile can turn any depictions of children into erotic pictures, then it really doesn’t matter whether we focus on the four corners of the photograph—its objective contents—or the use of the photograph.”).
human being in a specific circumstance of vulnerability generated by the need for urgent help. The conduct of taking a picture in this circumstance is evidence of this disregard, but the picture itself, and the effect of the picture on the mind of the photographer, is irrelevant. The focus is on the act of taking the picture in this particular circumstance; with the photograph itself being evidence of the act, the circumstances, and the perspective.

Here too, Adler’s analysis is helpful. Critiquing Catharine MacKinnon’s framework for analyzing pornography, Adler explains how MacKinnon tends to fuse three distinct components that, according to the constitutional law theory respecting a distinction between speech and action, should be analyzed separately: 1) the action that went into making the picture; 2) the picture itself; 3) the effect on the viewers that the picture produces. Adler submits that much of the confusion in child pornography law is due to a similar conflation of these components, namely: 1) the molestation of the child that occurs in the production of a picture; 2) the picture itself; 3) the effect of the picture on its viewers.98

The tort of “exploitative objectification of a vulnerable person in need of emergency assistance” focuses only on the first element: the action that went into making the picture, and the distinct harm that this conduct generated—and analogous

98 Id. at 981. According to Adler, the Ferber opinion, is a particularly egregious example of the tendency to conflate the photographs with the underlying action that produced them, collapsing the distinction “between representation and reality.” See id. (“Ferber eroded one aspect of the speech/action distinction when it introduced the idea that a representation can be banned because of the underlying illegal act that produced it . . . Ferber departed from a fundamental assumption underlying the speech/action distinction: the simple idea that speech is separate from what it depicts, describes, or represents.”).
to the molestation of a child—the fact that the object of the photography in the specific circumstances was vulnerable. Like a careful analysis of the harm in child pornography, the tort would also be able to distinguish between what in the act of taking the picture constitutes a distinct and objective harm, and aspects of unacceptable thought-patrol. Further, as discussed in Chapter Nine, evidence of having taken a photograph in these circumstances would generate a rebuttable presumption of exploitative objectification. It would be a complete defense to show that the photograph or recording was taken for a benign reason, such as to further a police investigation of the incident.

A further reason to develop a tort of “exploitative objectification of a vulnerable person in need of emergency assistance,” grounded as discussed in Chapter Eight in exploration of the roads not taken in recourse for dignitary harms, is that such work might also help to theorize the precise nature of the harm to children in the creation and circulation of child pornography. Perhaps one reason that the emphasis has been so heavy on the impact on reputation rather than on the objective nature of the harm is because resources in legal theory to describe the dignitary harms to children have been relatively thin. If this is the case, perhaps the further development of this new tort law can help to remedy that lacuna.

3. The Harm of “Exploitative Objectification” Distinguished from Objectification Targeted in “Improper” or “Unlawful Photography” Statutes

Disturbed by the potential for rampant “creepiness” in pervasive image capture, some state legislatures have adopted criminal statutes that prohibit “improper
photography” or “unlawful photography.” In fact, the new trial against Brandon Vandenburg, the defendant in the Vanderbilt rape case who took cell phone pictures of the unconscious victim during the assault, at present includes a charge under the Tennessee “unlawful photography” statute. Some commentators have critiqued these statutes as unconstitutionally vague and overbroad, and recently a Texas criminal court of appeals agreed with this assessment of the Texas “improper photography” statute. This subsection notes these constitutional concerns and explains why they would not apply to the new tort of “exploitative objectification.”

In a Texas criminal case involving a scenario remarkably similar to the beach photographer example discussed above, Ex parte Thompson, the defendant had taken pictures of “unknown females” in their bathing suits at a water park. He had been charged with 26 counts of “improper photography or visual recording” under the Texas Penal Code which made it a crime to photograph another person if the

---

99 See David Boclair, Date Set for New Trial of Former Vanderbilt Players Accused of Rape, NASHVILLE POST (July 8, 2015) https://www.nashvillepost.com/blogs/postsports/2015/7/8/ date_set_for_new_trial_of_former_vanderbilt_players_accused_of_rape (noting that Vandenburg has been charged with one count of unlawful photography). Tennessee’s unlawful photography criminal statute (Tenn. Code Ann. §39-13-605 (2010)) reads as follows: Unlawful photographing in violation of privacy. (a) It is an offense for a person to knowingly photograph, or cause to be photographed an individual, when the individual has a reasonable expectation of privacy, without the prior effective consent of the individual, or in the case of a minor, without the prior effective consent of the minor's parent or guardian, if the photograph:

(1) Would offend or embarrass an ordinary person if such person appeared in the photograph; and
(2) Was taken for the purpose of sexual arousal or gratification of the defendant.
(d)(1) A violation of this section is a Class A misdemeanor.
(2) A violation of this section is a Class E felony if:
(A) The defendant disseminates or permits the dissemination of the photograph to any other person; or
(B) The victim of the offense is under thirteen (13) years of age at the time of the offense.
(3) A violation of this section is a Class D felony if:
(A) The defendant disseminates or permits the dissemination of the photograph to any other person; and
(B) The victim of the offense is under thirteen (13) years of age at the time of the offense.
photograph is made without that person’s consent, and the photograph is “made with the intent to arouse or gratify the sexual desire of any person.”100

The Texas Court of Criminal Appeals did not adopt the “non-communicative” photo-hobbyist line of analysis discussed above,101 but instead defined photographs and visual records as “inherently expressive.” The court then went on to assess the level of protection for the act that creates the end product. The court reasoned:

The camera is essentially the photographer’s pen or paintbrush. Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting. In all of these situations, the process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes. This is a situation where the ‘regulation of a medium inevitably affects communication itself.’ We conclude that a person’s purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves.102

But there are, of course, limits to how a camera can be used. Neither a camera nor the First Amendment is a shield for conduct that would otherwise be unlawful. The court explained: “When the intent is to do something that, if

---

100 Ex parte Thompson, 442 S.W.3d 325 (Tex. Ct. Crim. App. 2014). See TEXAS PENAL CODE § 21.15(b)(1) (crime to photograph or record by electronic means a visual image of another person if: (1) the person being photographed or recorded is not in a bathroom or private dressing room, (2) the photograph or recording of the person is made without that person’s consent, and (3) the photograph or recording is made with the intent to arouse or gratify the sexual desire of any person). See also Eugene Volokh and Samantha Booth, Brief of Amicus Curiae, The Reporters Committee for Freedom of the Press (March 18, 2014), available at http://www2.law.ucla.edu/volokh/amicusclinic/thompson/AmicusBrief.pdf. See also Eugene Volokh, Texas’ Highest Criminal Court Strikes Down “Improper Photography Statute,”” (Sept. 18, 2014) http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/18/texas-highest-criminal-court-strikes-down-improper-photography-statute/

101 See discussion supra, “Non-Communicative” Photography, Chapter XII.A.

102 442 S.W.3d at 337.
accomplished, would be unlawful and outside First Amendment protection, such as the intent to threaten or intimidate, such an intent might help to eliminate First Amendment concerns."103 For example, as discussed above, harm to actual children in the production of child pornography would be both unlawful and outside of First Amendment protection. On the other hand, the court explained,

when the intent is something that, if accomplished, would constitute protected expression, such an intent cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression. . . . Banning otherwise protected expression on the basis that it produces sexual arousal or gratification is the regulation of protected thought, and such a regulation is outside the government’s power.104

Because taking pictures in the public context of a water park was not unlawful, the court found that the improper photography statute had crossed the line into a constitutionally impermissible effort to engage in governmentally enforced thought control. The court explained:

The government cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts. First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.105

Privacy was already deemed to be adequately protected, with bans on non-consensual photography in private locations such as a home, and of otherwise

103 Id. at 338.
104 Id. at 339.
105 Id.
concealed parts of the body. In contrast, the photography at issue in Thompson was of what was already voluntarily in public view at a public water park. As the court explained: “A person who walks down a public street cannot prevent others from looking at him or her with sexual thoughts in their heads.”\textsuperscript{106} According to the court, the paternalistic overreach of trying to protect a person who appears in public “from being the object of sexual thoughts” was exactly what the First Amendment “was designed to guard against.”\textsuperscript{107}

Would the tort of “exploitative objectification of a vulnerable person in need of emergency assistance” constitute analogously impermissible thought-patrol? No. As discussed above, the focus of the tort is neither the thoughts associated with the picture, nor the impact of the picture on any viewer, nor any expressive or communicative aspect of the picture or recording taken. The focus is on the circumstances that situate the engaged spectator’s conduct, and the distinct dignitary harm that this conduct inflicted on the vulnerable person in need of assistance in these specific circumstances.

When the inquiry focused only on the mental state of the photographer, the distinction is subtle. But when the inquiry expands to include the wider context and the interaction with a vulnerable person in need of emergency assistance, and is further grounded in the theoretical foundations of dignitary harm, it becomes clear that the proposed tort does not present the same kinds of Constitutional concerns as the scenario in Ex parte Thompson. “Exploitative objectification” is not merely an

\textsuperscript{106} Id. at 343.
\textsuperscript{107} Id. at 344.
interior state of mind of the one who objectifies, but can be demonstrated or rebutted with proof according to the surrounding circumstances. It is this contextual assessment that would distinguish the tort of “exploitative objectification of a vulnerable person in need of emergency assistance” from efforts to regulate photography—improper or otherwise—as such.
Conclusion

Discerning the motivations for feminist work in law, Robin West locates its heart in two powerful emotions: “Love and rage not only move us to action, but they also inform a feminist sense of justice and morality.”1 As I look back on the development of this Thesis, and actually on all of my previous legal scholarship, I can say without hesitation that this is true of all of my work. For some of my scholarship, I can even pinpoint with precision the moment when I felt a spark of rage, grounded in personal or empathetic participation in a particular lack of respect for some aspect of human dignity or identity.2

For this Thesis, that initial spark of rage was lit by the seeming fact that people could be so self-absorbed that they would not bother to pull a toddler out of a wading pool. That rage, however, was both tempered and re-directed by research. Realizing that most of these “moral monster” fact patterns were grounded not in actual cases, but in the sleight of hand of treatise writers shook to the foundations my conviction that there should be a broad legal duty to rescue, and also led me to re-evaluate the source of my rage.

2 See, e.g., Amelia J. Uelmen, The Evils of “Elasticity”: Reflections on the Rhetoric of Professionalism and the Part-Time Paradox in Law Firm Practice, 33 FORDHAM URB. L.J. 81 (2005) (a not dispassionate comparison between efforts to buck the cultural tide on large firm work schedules and scenes from a C.S. Lewis science fiction novel, That Hideous Strength, recounting the misadventures of a young professional’s efforts to navigate a cosmically evil research institution); Amelia J. Uelmen, Toward a Trinitarian Theory of Products Liability, 1 J. CATHOLIC SOCIAL THOUGHT 603 (2004) (aligning with the anger ignited in jurors when they hear that cost-benefit analysis led automobile manufacturers to serious slippage in concern for the safety of automobile drivers).
What was it *exactly* that made these “moral monster” cases so upsetting? One day I fixed my gaze on that cold, steely stare of Prosser’s guy sitting on the dock smoking a cigarette watching someone drown. And Bentham’s man, with mocking laughter before the woman her headscarf on fire. And yes, the *Seinfeld* episode depicting the four protagonists “mocking and maligning” the overweight robbery victim. In each of these illustrations, what crystalized was a distinct, and distinctly cruel kind of harm. Now why shouldn’t *that* be recognized as a legally cognizable harm?

Redirected rage then poured out in response to numerous real-life stories of people who have been “mocked and maligned” in circumstances of extreme vulnerability and need. In the twenty-first century, that steely cold stare was found behind a camera—now in the form of a cell phone, iPhone or iPad—held up to capture that shot, indifferent to the trauma provoked by a bloody assault or a violent rape, oblivious to the human need for urgent help.

Research has also tempered rage. A re-reading and radical re-framing of the Kitty Genovese story led to the recognition that much as we would all like to think of ourselves as potential heroes, in situations of violence, shock, or trauma, many of us would be bumbling bundles of nerves and emotions, conditioned by fears and perhaps also paralyzed by uncertainty about what exactly might be the right or best response. At this point another conviction crystallized in my mind: that human hearts need discretionary space to work through exactly how to respond to an emergency situation, especially when violence or trauma is involved. In an unexpected about-
face from where I began this project, I now submit that we should go easy on that leap toward “there ought to be a law” that dictates how any particular bystander should have responded to an emergency.

The proposed tort of “exploitative objectification of a vulnerable person in need of emergency assistance” brings these two convictions together. It provides ample discretionary space to those who decide, for whatever reason, to pass by; and submits that “engaged spectators”—those who decide to stop and engage the scene and a vulnerable person in need of emergency assistance—owe a legal duty to treat the person in need with the respect due to a fellow human being. The tort of “exploitative objectification” would define objectifying conduct such as taking a cell phone picture instead of calling for help as a distinct and legally cognizable harm.

This Thesis recognizes that the common law of tort in the United States, in its history and its doctrinal developments, has favored neither the theoretical foundations to sustain stranger-to-stranger obligations, nor the theorization of a dignitary harm that is difficult to monetize. But instrumental and efficient-deterrence frameworks are not the only options for viewing the law of torts. Nor are the edgier aspects of libertarian notions the only way to conceptualize law, freedom, and human experience. We can draw on a “richer conception of humanity” through which we can “address each other as moral agents”—not simply “entities to be managed, handled, or ‘incentivized.’”

---

Convinced that a “richer conception of humanity” has much to offer tort law, this Thesis has drawn on a range of interdisciplinary sources reflecting on both ancient and popular wisdom—from philosophy to theology and religious ethics; from history and literature to the social sciences; from the classics, to painting, television, and other forms of popular culture. These have helped to reveal not only useful tools for analysis, but also sensitivity to the complexity of the emotional life and the values that ground human experience and meaning. Drawing on insights from these sources regarding duties to self and others, the definition of harm, as well as paths for reconciling freedom and personal fulfillment with obligations to others, the Thesis reaches toward that “richer conception of humanity” which can help us to discern that which is “vital” in tort law—specifically regarding the questions about what it means to treat each other as moral agents.

On this basis, philosophical and theological attention to the relational dimensions of freedom, autonomy and the limits of speech and expression have helped to theorize deeper foundations for a tort duty and a legally cognizable harm. The Thesis has also considered the ways in which civil recourse holds together the resources of responsibility-based tort theory that are particularly adept for the harms explored; and how a morally-based frame for tort law can respond specifically to the need for a call to account in circumstances of exploitative objectification, especially to assess the conduct of engaged spectators to a sexual assault.

The introduction of the tort of “exploitative objectification of a vulnerable person in need of emergency assistance” would undoubtedly push the envelope on
several aspects of the current torts system. For example, it would throw down the gauntlet on the problem of re-imagining how to finance legal services for a path to recourse for intentional tort damages not covered by insurance. It would suggest a creative work-around for aspects of emotional distress claims that are currently blocked by doctrinal obstacles and that render opaque crucial aspects of the reality of the harms of sexual assault as a scourge in today’s culture. The analysis presented here may also serve as a creative driver for further articulating how awareness of the severe risks and harms of photographing vulnerable subjects should also inform our reflections on what is at the heart of the freedom that the First Amendment protects.

If rage was the initial spark, throughout the journey of this Thesis, I can also discern three stable points, or better “drivers” for my research, which could also be expressed as three great “loves” in my life. The first is law students, and a desire to help them maintain or recover their sense of humanity as they move through law school. The second is young people—teenagers and young adults—as they navigate social pressures and choices which seem to be increasingly difficult and confusing in world in which many of their relationships and interactions are mediated by technology. And the third is humanity—including how we interact with each other in otherwise anonymous and seemingly banal social circumstances such as a morning commute. In conclusion, a word of love for each.

Placing ourselves into the seats of a first year torts class, if images of a baby drowning in a wading pool or a blind person walking into traffic did not catch our attention, something would be awry. As teaching tools, these hypotheticals are
designed precisely to attract students’ attention, and to help them learn to think with their heads, even when the examples pull on their heartstrings. A certain habit of referring to hypotheticals located at the extreme edges of reality may also be grounded in a sense that becoming a lawyer entails entry into a mindset and way of being which is different from that of people who are not lawyers.

One student’s reflections on the varying responses of first year law students and their family members during a “Family Day” mock torts class discussion of *Osterlind* draws out the contrast:

My father came to visit and we sat in on a first year torts class. The *Osterlind* case was discussed and I remember distinctly that this case more than any other drew perplexed questions from visiting family members. The visitors just could not understand how the defendant was not culpable in some way. The professor teaching the class had several students planted in the room upon whom he called to discuss the case and they rattled off the legal theory without missing a beat. The rest of the law students present, myself included, nodded in agreement and felt proud that we could follow this logic. We had learned a lot during that first year. We were thinking like lawyers—something that our families could not do.⁴

But some students do not nod in agreement or feel proud. Instead, they feel confused, and maybe evening horrified or sickened. For some, discussion of the no-duty-to-rescue cases is a moment in which they realize, to quote Carole King, that “something inside has died.”⁵ They detect within themselves a kind of fissure

---


⁵ Carole King, *It’s Too Late* (Tapestry, 1971) (lyrics by Toni Stern).
between what they perceive as the technical, partisan, even “hired gun” mentality of
the legal profession, and their sense of duty and respect for other human beings
grounded in ordinary morality and common sense. The student goes on to engage
these concerns:

We hear that expression a lot—think like a lawyer. That’s our goal
in law school. However, cases like Osterlind demonstrate that
testing like a lawyer means thinking the polar opposite of what
we were raised to think and what the rest of society thinks. It
means disregarding the moral compass that guides all of society. If
that’s the case—then why should we want to think like lawyers?⁶

Some students fight back. The no-duty-to-rescue examples provoke a kind of
rebellion against the normative rule—the law must be wrong, it should be changed.
As one student from an earlier generation described her torts class discussion of
Osterlind and Handiboe: “there was a visible reaction of horror to these unsavory
cases. Our moral sensibilities were deeply offended. Almost instinctively we turned
to the legal system. ‘There ought to be a law,’ we cried.”⁷

The word of love this Thesis offers for law students is an invitation to
radically re-frame the first year discussions of “easy” rescue by either eliminating or
subjecting to extensive critique the hypotheticals which cast bystanders as seeming
moral monsters. This would help the process of “thinking like a lawyer” in three
ways. First, it can help to foster in students appreciation for the complexity that
informs the real-life questions about bystander response to emergencies. “Thinking
like a lawyer” should include developing the complex categories needed to

⁶ Bogaciu, supra note 4.
⁷ Ingrid Hillinger, The Duty to Rescue, 6 COLONIAL L. 8, 9 (1976).
understand and work with the facts of real-life situations and actual cases, and not just streamlined hypotheticals.

Second, the exercise of learning to “think like a lawyer” should also include attention to the *interior life of real people* that one encounters in the process of learning about the legal system—whether through a case account, a newspaper story, or a client in a clinic. In some of the cases in the classic torts canon, actual human beings have suffered a loss, have been subject to violence, or have witnessed something traumatic. Some of the bystanders were distracted, tongue-tied, or extremely fearful, and for good reason. Others were paralyzed by pressure or loyalty. “Thinking like a lawyer” includes the capacity to enter into all of the ways in which circumstances and subjective perspectives inform how people act and react, and the decisions that they make.

Finally, “thinking like a lawyer” should also include the invitation to think structurally about the extent to which the law, or which aspects of the law, may or may not be the right instrument to address difficult moral problems. A host of structural and institutional questions pervade the seemingly “easy” rescue cases. Especially when violence is involved, complex social, personal and psychological factors necessarily inform how bystanders engage the scene, making it very difficult to articulate a clear pattern of obligatory conduct. Some encounters between bystanders and victims may indicate something like moral monstrosity on the part of a witness—but these are hardly “easy” cases.
If the extreme moral monster hypotheticals are not grounded in the facts of the cases, and if they actually obfuscate many important tort law questions, then there is no need to wield them in a way that accentuates in students a fissure between their understanding of the law and ordinary morality. Or better, ordinary morality can and should kick in as a support to the exercise of critical analytical skills. Ordinary morality can also sustain the new tort of “exploitative objectification of a vulnerable person in need of emergency assistance.” Once the mythical moral monsters are dismissed from the classroom, the passionate anger that can rise in the face of injustice can be channeled toward the investigation of these more subtle subjective, relational and structural problems.

Turning to the second great love—young people, and conversations with them about their moral responsibilities as bystanders—another spark for this Thesis was an exchange with a nineteen-year-old friend who had just taken a “gap year” before heading off to a large public university for her college experience. As we caught up over lunch, she recounted her shock by what she found upon returning to school. After the first year of college many of her high school friends had changed dramatically, and were feeling burned by what they had experienced of the party scene. She recounted with fear how attentive she felt she needed to be in guarding her drink at any event; and how in these environments, her guy-friends from high school had become so much more sexually aggressive. That was the moment in which a spark of love and rage flamed up in me—deep concern not only for the safety
of young women, but also for how young men are navigating intense peer pressure in
the midst of out-of-control party scenes.

Coincidentally, research for this Thesis also coincided with what seemed to be
an avalanche of news stories recounting the problems of sexual assault occurring at
under-age and college drinking parties. More frequent reports may be due in part to
the pictures and recordings that were surfacing more frequently as evidence of these
attacks, and perhaps also the increasingly pervasive use of date-rape drugs. The
combined motor of love and rage also led me to reflect on rhetorical frames for
effective communication and reflection on what to do: how might we imagine
conversations with young people that could give them some interior and conceptual
tools for discerning how to engage these multiple pressures and dangers?

One way in which a tort for “exploitative objectification of a vulnerable
person in need of emergency assistance” might “cash out” could be in its impact on
shaping a rhetorical strategy for helping teenagers and young adults understand their
moral obligations to each other in these circumstances. Talking with teenagers and
young adults about what might happen if they decide to stand back and seem to enjoy
the show by taking pictures, doing nothing else to care for a person who needs
emergency assistance, I believe it would be helpful to be able to say the following: if
you do decide to take this stance, keep in mind that consequences could include a
lawsuit, in which you will be held legally and publicly accountable for the extent to
which that action—standing by and seeming to enjoy the show—inflicted harm on the
human being in front of you. And the criteria for discerning your legal responsibility
in this instance will be based on a fairly simple assessment—that it is a serious moral and legal *wrong* to treat another person that way.

Finally, a word of love for humanity. Lee Budesheim queried whether we ever give a second thought to the “dark matter” of those largely instrumental and anonymous exchanges among people who fall into the “low warmth” and “low competence” quadrants of our lives. I have to confess that often I do wonder about the interior life of grocery clerks and fast-food workers, and I do try to make eye contact with the bus drivers that I meet as I greet them or thank them for their service. Even while living in crowded and anonymous New York City, I can recall many occasions in which I witnessed the kindness of strangers interacting and engaging with each other on the subway or the street, and marveled at the instances of attention to each other’s humanity, even in this context.

At the same time, I recognize that these encounters can also be complex and filled with uncertainty. I remember a particularly painful New York subway commute in which a middle-aged lady who had probably not taken her medication banged her head against the window—not so hard as to be alarmed for her immediate safety, but hard enough to make her bleat, expressing what I interpreted as a profound sense of disorientation. I wanted to help, to alleviate her pain in some way, but I did not intervene. With zero “expertise” in how to deal with what I perceived to be mental illness, I was unsure of what I could do, and afraid that intervention from a stranger might in some way further her pain or disorientation. But the lady’s face and presence haunted me for several days, and sometimes I still wonder if she is okay.
As we walk through our city streets, what meaning do we give to our
counters with the pain of others? When and under what circumstances do we sense
that it would be good to intervene? What do these encounters look like from the
inside of both those who are in pain, and those who would otherwise pass by? By
naming and defining the shape of a tort duty, and so clarifying that under certain
circumstances strangers can and do inflict emotional and dignitary harm on each
other; and by delineating the nature of the distinct harm that “exploitative
objectification” may cause in certain circumstances, this Thesis stands as an invitation
to further explore the nature of these encounters, and the scope of what we owe to
each other simply by virtue of the nature of our common humanity. I am cognizant of
the fact that I have suggested some clear boundaries around the circumstances in
which this particular tort would apply. These boundaries are in no way intended to
impede further exploration of other circumstances in which moral and legal
obligations would be appropriate.

As I conclude, I realize that the new tort of “exploitative objectification of a
vulnerable person in need of emergency assistance” may be greeted with myriad
questions. But I am convinced that love itself—and the great loves in our life—can
help to light the path for the ways in which our torts system and our legal system as a
whole might be informed by a richer conception of humanity. We have much to
learn, and much to gain in the process.
References

Constitutional Provisions and Statutes

U.S. Constitution Amendment I.


Calif. Penal Code § 152.3 (West 1999).


Cases


Alcorn v. Mitchell, 63 Ill. 553 (1882).


Bery v. City of New York, 97 F.3d 689 (2d Cir.1996).


Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).


DeMay v. Roberts, 9 N.W. 146 (Mich. 1881).


Fanean v. Rite Aid Corp., 984 A.2d 812 (De. Super. Ct. 2009)


GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112 (7th Cir. 1995).

Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011).


Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993).

Heaven v. Pender, 11 Q.B.D. 503 (1883).


Olmstead v. United States, 277 U.S. 483 (1928).


Perry Education Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983).


Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993).

Union Pac. Ry. v. Cappier, 72 P. 281 (Kan. 1903).

United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011).

United States v. Johnson, 546 F.2d 1225 (5th Cir. 1977).

United States v. Klug, 670 F.3d 797 (7th Cir. 2012).


**Treatises and Restatements**


*Restatement (Second) of Torts* (1965).


Rigelhaupt, Jr., James. “Liability Insurance: Intoxication or Other Mental Incapacity Avoiding Application of Clause in Liability Policy Specifically Exempting
Coverage of Injury or Damage Caused Intentionally by or at Direction of


Books and Book Chapters

___ Through Peasant Eyes (1980).
___ Poet and Peasant (1976).


Barth, Alan. “The Vanishing Samaritan.” In The Good Samaritan and the Law,

Benovitz, Moshe. “Your Neighbor is Like Yourself: A Broad Generalization with
Regard to the Torah.” In A Holy People: Jewish and Perspectives on Religious

Bentham, Jeremy. “Specimen of a Penal Code.” In Works of Jeremy Bentham,
volume 1, edited by J. Bowring (1943).

Bentham, Jeremy. Introduction to the Principles of Morals and Legislation, edited by


Budesheim, Thomas Lee. “Exploring the Dark Matter of Objectification.” In Justice,
Conflict and Wellbeing: Multidisciplinary Perspectives, edited by Brian H.

Chamallas, Martha & Jennifer B. Wriggins. The Measure of Injury: Race, Gender
and Tort Law (2010).


Coleman, Jules. “Tort Law and the Demands of Corrective Justice.” In Foundations
of Tort Law, edited by Saul Levmore & Catherine Sharkey (2d ed. 2009).

Cook, Kevin. Kitty Genovese: The Murder, the Bystanders, the Crime that Changed
America (2014).

Cromwell, Oliver. Writing and Speeches of Oliver Cromwell, volume 2, edited by Wilbur C. Abbot (1939).


____. Morality, Authority and Law (2013).


**Journal Articles**


__. “Masculinity and Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State.” 73 Md. L. Rev. 887 (2014).


___, “The Vulnerable Subject and the Responsive State.” 60 Emory L.J. 251 (2010).


Hale, Robert L. “Prima Facie Torts, Combination, and Non-Feasance.” 46 Colum. L. Rev. 196 (1946).


Kelley, Matthew E. and Stephen D. Zansberg. “‘A Little Birdie Told Me: You’re a Crook’: Libel in the Twittersphere and Beyond.” Communications Lawyer 1 (March 2014).


Papadaki, Lina. “What is Objectification?” 7 J. Moral Phil. 16 (2010).


Warner, Sam B. “Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless.” 7 Cal. L. Rev. 312 (1919).


**Newspaper and Magazine Articles**


Sandoval, Edgar and Bill Hutchinson. “Widow, Daughter of Man pushed to his Death on Subway Tracks Outraged by New York Post Front Page Photo.” *New York*


Ancient Classics and Texts

The Hebrew Bible

Genesis

Leviticus

Ruth

Job

Psalms

Isaiah

The New Testament


John

Other Classic Texts

Aeschylus. Agamemnon, Loeb Classical Library (1930).
Bereshit Rabbah.


Maimonides, *Laws Pertaining to the Sabbatical Year* (YEAR)

Moschus, *Idyl*.


Sifra, Kedishim.


**Roman Catholic Church Sources and Documents**


___. *Dives in misericordia* (1980).


___. *Gaudium et spes* (1965).

**Painting and Photography**

Bartholdi, Frédéric-Auguste. *Le Bon Samaritain* (1853).


___. *The Good Samaritan* (1852).


___, *Good Samaritan* (1886).

___, *Las de la vie* (Tired of Life) (1892).

___, *The Merciful Samaritan* (1875).


___, *The Good Samaritan Tends the Wounded Man* (1644).


**Film, Television, Other Media**


**Music**

King, Carol and Toni Stern (lyrics). “It’s Too Late.” *Tapestry* (1971).