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Crime Spectators and the Tort of Objectification

Amelia J. Uelmen

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Crime Spectators and the Tort of Objectification

Amelia J. Uelmen

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ABSTRACT

Reports of how some bystanders interact with victims on the scene of an emergency are shocking. Instead of assisting or calling for help, these individuals take pictures or recordings of the victims on their cell phones. This Article concentrates on the question of whether such an interaction with a victim might in certain circumstances constitute a distinct and legally actionable harm. This Article proposes a new tort: exploitative objectification of a person in need of emergency assistance. It works to articulate the moral and legal foundations for an argument that treating a person in need of emergency assistance as an object of amusement should be considered a legally cognizable harm. Cognizant of concerns about over-breadth and moral overload, it 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 the decision whether to engage, respecting subjective assessments of risks and priorities as grounded in the emotional and interior life of the bystander.

AUTHOR NOTE

Lecturer and Research Fellow, Georgetown University Law Center. This article is drawn from the author’s S.J.D. dissertation, “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,” submitted to the Georgetown University Law Center in December 2015.

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I. INTRODUCTION

For many law students, the discussion of the common law no-duty to rescue is almost a rite of passage. At some point in the first-year torts curriculum, the discussion presents itself as a 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? Consider 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.”¹ 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.² When A does not alert B to the approaching automobile, and B is subsequently run over and hurt, A is not liable to B because A is under no legal duty to prevent B from stepping into the street.³ And the drowning person? As leading torts commentator William Prosser graphically described, even an expert swimmer, rope in hand, “who sees another drowning 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.”⁴

Discussions may also include the case of Kitty Genovese, brutally attacked and stabbed to death in her quiet middle-class Queens, New York neighborhood. As the story goes, at least thirty-eight neighbors heard her screams as she lay bleeding, and the police did not receive their first call until half an hour after the attack.⁵ Debates frequently

¹ Restatement (Second) of Torts § 314 cmt. c, illus. 1 (Am. Law Inst. 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 (Am. Law Inst. 1965).

⁴ William L. Prosser, Handbook of the Law of Torts 340 (4th ed. 1971).

⁵ Martin Gansberg, 37 Who Saw Murder Didn’t Call Police, N.Y. TIMES, March 27, 1964, <http://www.nytimes.com/1964/03/27/37-who-saw-murder-didnt-call-the-police.html> [<https://perma.cc/F6UY-AGNQ>] (the Author notes the inconsistency in the title of this article); see also Charles Mohr, *Apathy is Puzzle*

focus on the action or inaction of one or more bystanders in relation to the primary injury: what should A have done to try to save B from the peril, or at least to mitigate the harm? In the Genovese case of a crowd, how might one determine which A should have done something?

The focus of this Article is different. Considering the reaction of A to the violence, it queries whether A's response to the injury of violence constitutes a *distinct* harm to B. If instead of alerting B to the danger, A takes a cell phone picture of B stepping into the street—might that be a distinct, and legally cognizable harm?

II. *SEINFELD'S* GUIDE TO BYSTANDER OBLIGATIONS

To illustrate this distinction, this Part turns first to a venerable guide to U.S. law and culture: the *Seinfeld* television series, and specifically to the well-known “Finale” of May 1998.⁶ As noted above, the common law has been reluctant to impose legal sanctions on bystanders for failure to assist in an emergency, but some states have experimented with criminal statutes.⁷ The *Seinfeld* “Finale” is perhaps one of the most interesting cultural commentaries on these efforts.

in *Queens Killing*, N.Y. Times, Mar. 28, 1964, <http://www.nytimes.com/1964/03/28/apathy-is-puzzle-in-queen-skilling.html> [<https://perma.cc/D9KN-W7WF>]; Abraham M. Rosenthal, *Thirty-Eight Witnesses* (1964).

⁶ *Seinfeld: Finale* (NBC television broadcast May 14, 1998), <http://seinfeld-episode.blogspot.com/2013/07/the-finale.html> [<https://perma.cc/Z43C-QZTB>]; see also *Seinfeld Scripts, The Finale*, <http://www.seinfeldscripts.com/TheFinale.htm> [<https://perma.cc/4LC2-385G>] (last visited Oct. 11, 2016).

⁷ See, e.g., Minn. Stat. Ann. 640A.01(1) (West 1996) (requiring reasonable assistance at the scene of an emergency); R.I. Gen. Laws 11-56-1 (1994) (same); 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.”). 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

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. While paused on the sidewalk, the group looks across the street and sees an assailant holding up an overweight man at gun point, then taking his wallet and stealing his car.

Kramer, video-camera in hand, says, “I want to capture this,” and films the event, which also records audio of the other three observers making wise-cracks about the incident and about the victim’s weight.⁸ After making a sarcastic comment, Jerry proceeds to place a call on his mobile phone—not to report the robbery, but to check in on the progress of the plane repairs. When a police officer appears on the scene, the crime victim gestures towards 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.”⁹ They are taken to a holding cell at the local jail.

Rev. Stat. § 663-1.6 (1993); Wash. Rev. Code 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. Cal. Penal Code § 152.3 (West 2016). Ohio imposes a general duty to report a felony. Ohio Rev. Code Ann. § 2921.22 (West 1997); *see also* Restatement (Third) of Torts § 38 (Am. Law Inst. 2011) (“When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty.”); *see generally* Eugene Volokh, *Duty to Rescue / Report Statutes* (Nov. 3, 2009), <http://www.volokh.com/2009/11/03/duty-to-rescuereport-statutes> [https://perma.cc/J2M8-ZRSR].

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

When they call to retain an attorney, Jackie Chiles (a parody of Johnnie Cochran), 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.”¹⁰

A. Legal Accountability for “Mocking and Maligning”?

Because this was the first trial of its kind, the extremely zealous *Seinfeld* prosecutor digs up every bit of character evidence to show that the attitude of the four bystanders in this instance was simply a manifestation of a lifetime of “criminal indifference.”¹¹ 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.*¹²

that easy. Now see, the law calls for a maximum fine of \$85,000 and as much as five years in prison.” *Id.*

¹⁰ *Id.*

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.

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." Particularly, when such conduct 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.¹³

Note the large gap between the Seinfeld statute under which the four characters were charged and the driving force of the prosecutor's opening statement. 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." The statute did not delineate a duty to "rescue" in the sense that it required physical intervention, or some other direct interruption of the causal chain of events that led to the initial harm. Remember 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.

The prosecutor's opening statement takes the case in a very different direction. It does not focus on the witnesses' 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: *not* that they had ignored the victim, but the opposite, namely that they inflicted a distinct harm, "they actually mocked the victim as he was being robbed at gunpoint."¹⁴ The conduct that was on trial in the Finale was not so much an attitude of indifference, but that they had inflicted distinct harms, corroborated by character evidence of how they had inflicted similar harms on other vulnerable people. Thus the prosecutor's case consisted in presenting a record of "mocking and maligning" grounded in a "history of

¹³ See *id.* 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 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 *Id.*

selfishness, self-absorption, immaturity, and greed,” with the resulting damage that “everyone who ha[d] come into contact with [the] four individuals ha[d] been abused, wronged, deceived and betrayed.”¹⁵

Focusing on the gap between the *Seinfeld* statute and the prosecutor’s argument, the eye is drawn not to the failure to help *per se*, but the aspect of a bystander’s conduct that may constitute “mocking and maligning.” When a bystander stops to focus on the scene of an accident or assault, notices that the victim is in need of emergency assistance, and engages in conduct that expresses disrespect for the humanity of the victim and this person’s particular need for assistance, this is not doing *nothing*. Thus one might query: might the law recognize that at some point these expressions of “selfishness and self-absorption” do constitute a kind of abuse—a wrong—that should have a civil remedy in law?

Concerns about a particular form of “mocking and maligning” have crystallized with the pervasive presence of recording devices such as cell phones. Like Kramer with his video-camera in the Finale scene, those who take cell phone pictures are hardly ignoring the victim or doing nothing. Rather, they are engaging the attack by focusing on it, and filming or photographing it. Such conduct objectifies and exploits another human being precisely at a moment in which this person is vulnerable. In many situations, this objectification and exploitation is exacerbated by subsequently posting the photograph or video recording on social media.

B. The Prevalence of “Mocking and Maligning” Today

Consider a recent incident of a man beaten up outside of New York City’s Port Authority Bus Terminal. In the early morning hours of March 31, 2014, Jose Robles (“Robles”) took a bus from New Jersey to the main bus depot in Manhattan, 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 tried 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.”¹⁶ 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. Robles recounted, “He wouldn’t stop. I tried to get up again, but he grabbed

¹⁵ *Id.*

¹⁶ *Id.*

my jacket and spun me around and he grabbed my shoes and threw them in the street and started kicking me again.”¹⁷

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.”¹⁸ Dismayed that no one tried to assist or shout for help, he managed to pull out his own cell phone and call the police. As he dialed 9-1-1, the assailant yelled, “That’s my phone”—which Robles surmised was an effort to trick onlookers into believing the assailant was the victim.¹⁹ “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.”²⁰ The assailant followed Robles inside the terminal and hid when he saw the police. Robles identified the assailant, who was subsequently arrested.²¹

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.”²² As one headline mused, “Deli Manager Mercilessly Beaten as NYC Onlookers Just Stare”—a “Modern Day Kitty Genovese?”²³

¹⁷ Kerry Burke, Tina Moore & Bill Hutchinson, *Port Authority Attack Victim Says Bystanders Snapped Photos Instead of Calling for Help*, N.Y. Daily News (Apr. 1, 2014), <http://www.nydailynews.com/new-york/nyc-crime/port-authority-attack-victim-angry-do-nothing-witnesses-article-1.1742519> [<https://perma.cc/YUB6-DSA>]. Other coverage insures that this was not an April Fool Day story. See, e.g., Aaron Feis, *Carnegie Deli Manager Attacked by a Homeless Man*, N.Y. Post (Apr. 2, 2014), <http://nypost.com/2014/04/02/carnegie-deli-manager-attacked-by-homeless-man> [<https://perma.cc/DAR8-FNKC>].

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See Modern Day Kitty Genovese? Deli Manager Mercilessly Beaten in NYC as Onlookers Just Stare*, Fox News Latino (Apr. 2, 2014), <http://latino.foxnews.com/latino/news/2014/04/02/deli-manager-mercilessly-man-beaten-in-middle-nyc-as-onlookers-just-stare> [<https://perma.cc/ZCV3-PL33>].

Robles was certainly not alone in registering his dismay for how bystanders respond to violence.²⁴ One might, 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, appeared oblivious to his trauma. Instead, they turned his urgent need for assistance into a spectacle, as if it were simply a scene in a movie.

Sadly, the behavior of bystanders in the Robles attack is not an isolated incident. The daily papers carry frequent accounts of bystanders gathering to snap cell phone pictures of assaults, rapes, and even murders, as well as more run-of-the-mill accidents.²⁵

²⁴ A comment to the *New York Daily News* web article about the Robles attack from a writer who identifies as "Pissed about 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 et al., *supra* note 17 (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.

²⁵ See, e.g., Associated Press, *No One Made an Effort: Arrest Made After Bystanders Watch Subway Death*, Sydney Morning Herald News (Dec. 6, 2012), <http://www.smh.com.au/world/no-one-made-an-effort-arrest-made-after-bystanders-watch-subway-death-20121205-2awka.html> [<https://perma.cc/S6VB-N3FJ>]; Max Fisher, *China's Bystander Problem: Another Death After Crowd Ignores Woman in Peril*, Wash. Post (Oct. 24, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/10/24/chinas-bystander-problem-another-death-after-crowd-ignores-woman-in-peril> [<https://perma.cc/RWT8-BE9B>] (security cameras showed over a dozen people gawking and taking pictures of a woman whose head was caught between traffic rails; 30 minutes passed before someone thought to help); Madison Gray, *The Subway Shove Homicide: How Two New Yorkers' Lives Became Tragically Linked*, Time (Dec. 6, 2012), <http://newsfeed.time.com/2012/12/06/the-subway-shove-homicide-how-two-new-yorkers-lives-became-tragically-linked> [<https://perma.cc/3EAE-Q7ZP>] (accounts of how bystanders took pictures and filmed as man pushed onto tracks stared down an oncoming subway train); Joe Kemp, *'I became really afraid': New Jersey mom pummeled in front of her 2-year-old son feared for child during brutal attack*, N.Y. Daily News (June 27, 2014), <http://www.nydailynews.com/news/national/new-jersey-mom-pummeled-front-2-year-old-son-feared-child-brutal-attack-article-1.1846214> [<https://perma.cc/LZ88-CL5T>] (during fight in a parking lot between two McDonald's co-workers during which several bystanders recorded the confrontation instead of calling for help); Edgar Sandoval & Bill Hutchinson, *Widow, daughter of man pushed to his death on subway tracks outraged by New*

Recently, an Internet subculture has also developed in which those who witness violent assaults stand by to record the incidents without intervening, and then they post the videos on social media. For some, aspects of this phenomenon have coalesced around a website named “WorldStar HipHop.”²⁶ According to one estimate this site garners 3.4 million visitors and 17 million page views per day.²⁷

Some of the assaults are staged,²⁸ but many are not, and witnesses often encounter the scenes through happenstance. In several of these situations, authorities learned that wrongdoing had occurred only once the videos had reached viral status.²⁹ For example, in one November 2011 incident on the New York City subway, a witness recorded a man leaning against the doors of the car telling another man to stop spitting on the train; almost immediately, three men attacked the man near the door and savagely beat him.³⁰ Throughout the video, witnesses visibly laughed as the victim was repeatedly punched and

York Post front page photo, N.Y. Daily News (Dec. 5, 2012), <http://www.nydailynews.com/new-york/relatives-man-pushed-death-outraged-photo-article-1.1213683> [<https://perma.cc/6KJD-H9B2>].

²⁶ World Star Hip Hop, <http://worldstarhiphop.com> (last accessed Oct. 18, 2016).

²⁷ See Craig D. Lindsey, *On Culture: WorldStar is portal to what's wrong with mankind*, The News & Observer (Apr. 18, 2015), <http://www.newsobserver.com/entertainment/ent-columns-blogs/article18750474.html> [<https://perma.cc/5TKG-QDYH>]. Many thanks to James Simmons for alerting me to this phenomenon and for research assistance on this section.

²⁸ See Lacey Lett, *Disturbing Fight Video in Oklahoma City Brings Awareness to Alarming Trend*, KFOR (Dec. 7, 2015), <http://kfor.com/2015/12/07/disturbing-fight-video-in-oklahoma-city-brings-awareness-to-alarming-trend> [<https://perma.cc/C6FV-BV2U>] (quoting a social media expert who described how “there’s a whole popular sub-culture on the internet of people staging fights and then recording it, and then putting it on the internet because, in their world, that’s how you gain popularity.”).

²⁹ See, e.g., Amanda Milkovits, *Two Arrested After Providence Fight Video Featuring Samurai Sword Goes Viral*, Providence Journal (Sept. 24, 2015), <http://www.providencejournal.com/article/20150924/NEWS/150929613> [<https://perma.cc/ZPW8-FKCY>] (in which a couple fights with a neighbor as children are heard screaming “Mommy!” in the background. Police only began investigating once they were tipped off six days later after the video had reached 781,000 views.).

³⁰ *NYPD Seek Three Men in Brutal L Train Beating (VIDEO)*, Huffington Post (Nov. 16, 2011), http://www.huffingtonpost.com/2011/11/16/nypd-see-three-men-in-br_n_1097472.html [<https://perma.cc/A9Z4-ABEA>].

kicked after falling to the ground.³¹ At the 50-second mark, one woman yelled “WorldStar baby!”³² In the video, the witnesses can be seen moving to another car, where they continue to record the fight through the window and laugh while the victim, left alone and bleeding profusely, tried to regain his balance.³³ Only days later, once the video had reached nearly 50,000 views, did police learn of any wrongdoing and begin their investigation.³⁴ Similar assaults have been recorded with alarming regularity on countless street corners, onboard public transportation, and in schools throughout the country.³⁵

In the aftermath of the New York City subway assault, a columnist for *Gothamist* tried to make sense of the phenomenon. He wrote:

The site’s popularity has created a sort of voyeuristic feedback loop, in which disassociated bystanders immediately videotape violent incidents and act as if they’re already watching a video on the Internet. This particular video serves as a perfect example of how violence becomes instant entertainment these days: as the young man is getting brutally beaten, the woman recording the fight is heard gloating “World Star, baby!”³⁶

A correspondent for the *Boston Globe* similarly observed that since “the drawn-out drama of narrative is edited out for efficiency,” these types of videos “satisfy our craving for conflict with a quick,

³¹ *See id.*

³² *Id.*

³³ *See id.*

³⁴ ‘L’ Train Attack Caught on Video; Cops Looking for Suspects: Nervous Straphangers Say Crime Appears to Be Escalating Underground, CBS New York (Nov. 16, 2011), <http://newyork.cbslocal.com/2011/11/16/l-train-attack-caught-on-video-cops-looking-for-suspects> [<https://perma.cc/AZ2P-ZPW4>].

³⁵ *See* Steven Kurutz, *The Creator of WorldStarHipHop Plots His Second Act*, N.Y. Times (Nov. 2, 2015), <http://www.nytimes.com/2015/11/06/fashion/mens-style/lee-odenat-creator-of-worldstarhiphop-plots-his-second-act.html> [<https://perma.cc/N33V-PV6Q>].

³⁶ John Del Signore, *Police Seek 3 Men for Beating L Train Rider Who Scolded Them for Spitting*, *Gothamist* (Nov. 16, 2011), http://gothamist.com/2011/11/16/police_search_for_men_in_beating_of.php [<https://perma.cc/HS9A-XP9Q>].

concentrated dose.”³⁷ For viewers, “there’s a thrill built into spontaneously caught footage capturing the rare collision of happenstance and comeuppance.”³⁸ Similarly, sociologist Jeff Ferrell observed that the phenomenon reflects a culture that has become so desensitized to violence that observers barely flinch when taking out their cameras and hitting record: “Violence is normalized as a part of sitcoms and news coverage and video games. In one fight, a kid really did go to the hospital with a fractured skull. It’s not fake in that sense, but it’s immediately perceived as an image.”³⁹

Further, bystanders have much to gain in satisfying this captive online audience. As one journalist observed, witnesses who upload these videos are rewarded with “the possibility of being instantaneously famous” or becoming an “automatic celebrity.”⁴⁰ Posting a particularly violent video can boost one’s “street cred” because it demonstrates that the witness risked danger while recording the scene.⁴¹

The creator of WorldStar, Lee O’Denat, places the phenomenon within a journalistic frame, explaining that it “provides coverage of communities that larger news organizations like CNN or MSNBC might ignore. It can be ugly at times, but so is reality.”⁴² But the fact remains that bystanders are extracting voyeuristic pleasure from

³⁷ Michael Andor Brodeur, *Fight Videos Are Everywhere Online, but Why Do We Watch Them?* Boston Globe (Aug. 25, 2015), <https://www.bostonglobe.com/arts/2015/08/24/fight-videos-are-everywhere-online-but-why-watch-them/Zo3otPlzWN23ZK5a7aTNgP/story.html> [https://perma.cc/RLH4-QM9Y].

³⁸ *Id.*

³⁹ Colleen Curry, *World Star Hip Hop Provides Home for Fights, Sex and Violence*, ABC News (Feb. 8, 2012), <http://abcnews.go.com/US/world-star-hip-hop-home-fights-sex-violence/story?id=15493007> [https://perma.cc/K83Q-JKPN].

⁴⁰ Abby Phillip, *Worldstar and the Lure of Internet Fame that Drives Teens to Film Brutal Assaults*, Wash. Post (Mar. 17, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/16/worldstar-and-the-lure-of-internet-fame-that-drives-teens-to-film-brutal-assaults> [https://perma.cc/9W5D-EFFZ].

⁴¹ *Id.*

⁴² Jason Parham, *The Man Behind the Web’s Most Controversial Video Site*, Gawker (June 19, 2014), <http://gawker.com/the-man-behind-the-webs-most-controversial-video-site-1592857533> [https://perma.cc/EN7C-R8C4].

another person's pain and need for emergency assistance—oblivious to their need for immediate medical attention.

Might bystanders in these circumstances, as the *Seinfeld* prosecutor argued, be held responsible—not only morally, but also legally—for this kind of “mocking and maligning?”

C. Concerns about Moral Overload and Over-Breadth

Shifting to the defense perspective, the opening statement for the *Seinfeld* defendants taps into another kind of gut moral instinct—the unfairness of holding some people responsible for the consequences of another person's bad actions. Their attorney argues that the categorization of the four witnesses as bystanders should determine their innocence:

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.⁴³

The defense argument hones in on the category of bystanders as uninvolved, and therefore, not responsible. Are there circumstances in which this assessment is exactly right—bystanders are in some sense, by definition, innocent? If so, how might one sort through the difference? How might this distinction help to articulate a tort claim for “mocking and maligning,” or as I frame it, “exploitative

⁴³ Finale Script, *supra* note 6.

objectification,” that steers clear of legitimate concerns about moral overload?

III. THE INTERIOR LIFE OF BYSTANDERS

A. Making Space in the Law for the Interior Life of Bystanders

One reason why it may be difficult to articulate when it would be appropriate to hold the *Seinfeld* characters responsible for the harm that they caused is because the harm seems to be grounded less in the performance of a physically observable action (or failure to act), and more in an interior attitude. The action-oriented focus of the legal and cultural commentary on cases involving bystanders' obligations is a reflection of a broader quest for distilling objective rules and standards over subjective states of mind.⁴⁴ This trend has in various ways obfuscated the potential focus on more subjective elements of the interior life of bystanders.

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

In its practical and technical simplicity, the hypothetical ignores any reference to two factors that often come into play in a bystander's response to an emergency. First, it elides 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. Second, it obscures the *relational* complexity that may permeate the various interactions on the scene, not only between bystanders, victims and perpetrators,

⁴⁴ See Morton J. Horwitz, *The Transformation of American Law 1870-1960* (1992) (“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.”).

but also all of their interactions with structures of authority, such as the police or emergency responders.⁴⁵

In the common law of torts, when the decision-making process of bystanders is not invisible or caricatured as some form of moral monstrosity, it is often depicted as relatively flat. How might we 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? Examining the journalistic accounts of the bystander villains who failed to help in the well-known case of the murders of Kitty Genovese, the analysis below highlights the importance of a multi-faceted analysis that leaves room for the subjective emotions, fears and psychological limitations of those who find themselves face-to-face with brutal violence.

B. Bystanders to the Kitty 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,⁴⁶ in the early morning hours of March 13, 1964, twenty-nine-year-old Kitty Genovese was returning from work to her middle-class Queens neighborhood. 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, only to return two more times, continuing the attack, which resulted in her death. According to the *Times*, “[f]or more than half an hour 38

⁴⁵ Compare these questions with Antony Honoré’s “easy enough” list of line-drawing factors for imposing a legal duty to rescue. This list, it could be argued, is also missing the thickness of the bystanders’ subjective perspective and consideration of various forms of relational complexity: “The relevant factors are easy enough to list: the gravity of the peril, the chances of successful intervention, the attitude of the victim, and the likelihood that another better-qualified rescuer will act.” Antony M. Honoré, *Law, Morals and Rescue*, in *The Good Samaritan and the Law* 234 (James M. Ratcliffe ed., 1966, reprinted 1981) [hereinafter *The Good Samaritan*].

⁴⁶ 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.”).

respectable, law-abiding citizens in Queens watched a killer stalk and stab a woman in three separate attacks in Kew Gardens.”⁴⁷ The article indicated that she lay bleeding for half an hour before the first call arrived to the police, who came immediately.⁴⁸ The neighbor who finally made the belated call to the police sheepishly explained, “I didn’t want to get involved.”⁴⁹

The incident generated a wave of deep angst and soul searching: how could so many witnesses have failed to respond, even with something as easy as a call to the police?⁵⁰ The year following the attack, the University of Chicago hosted an interdisciplinary conference that brought together legal theorists, philosophers, sociologists and journalists to discuss the case and address proposals for a change in the no-duty-to-rescue rule.⁵¹ The passive indifference and cold-hearted inhumanity of these “thirty-eight witnesses” became something of a mantra that generated intense public concern.⁵²

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. Decisions to intervene are hindered not only by the isolation and anonymity that tend to emerge amidst crowds of any large urban environment, but also by deliberate efforts to seek and preserve a high degree of privacy.⁵³

⁴⁷ Gansberg, *supra* note 5; *see also* Cook, *supra* note 46, at 78.

⁴⁸ *See* Gansberg, *supra* note 5, at 1; *see also* Cook, *supra* note 46, at 80.

⁴⁹ Gansberg, *supra* note 5.

⁵⁰ 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 On-Line, <http://www.911dispatch.com/911/history/> [https://perma.cc/U2V4-WJER] (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 Good Samaritan, *supra* note 45, at 24, 34 (noting that shortly after Genovese’s death New York instituted an easy-to-remember centralized number to contact the police).

⁵¹ *See generally* Good Samaritan, *supra* note 45 (volume collecting the conference papers and presentations).

⁵² *See generally* Aleksander Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in Good Samaritan, *supra* note 45, at 91.

⁵³ Alan Barth, *The Vanishing Samaritan*, in Good Samaritan, *supra* note 45, at 159, 165; *see also id.*, at 165.

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.⁵⁴ While sources for the revisionary account could be multiple, this discussion refers 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 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.⁵⁵

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 *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 seemed that there was a lack of response.

⁵⁴ See Cook, *supra* note 46, at 99 (noting one reporter's perspective that under Rosenthal, the new policy was to "'fake' stories and overdramatize events."), 204-11 (discussing recent sources for a revision of the factual account of the Genovese murder); see also generally Marcia M. Gallo, "No One Helped": Kitty Genovese, New York City, and the Myth of Urban Apathy (2015); Catherine Pelonero, *Kitty Genovese: A True Account of a Public Murder and Its Private Consequences* (2014); CHARLES E. SKOLLER, *Twisted Confessions: The True Story Behind The Kitty Genovese and Barbara Kralik Murder Trials* (2008) (account by the prosecutor in the Genovese case); Rachel Manning, Mark Levine, Alan Collins, *The Kitty Genovese Murder and the Social Psychology of Helping: The Parable of the 38 Witnesses*, 62 *Am. Psychol.* 555 (2007); Joseph De May, *Kitty Genovese: A critical review of the March 27, 1964*

New York Times article that first broke the story, *A Picture History of Kew Gardens*, NY, <https://archive.is/39ZWT> [<https://perma.cc/SDC6-9GMU>]; see also Harold Takooshian, *The 1964 Kitty Genovese Tragedy: Still a Valuable Parable*, *PsychCritiques*, *Contemporary Psychology: APA Review of Books* 54 (March 11, 2009) (reviewing Skoller, *supra* note 51 and Rosenthal, *supra* note 5). Many thanks to Greg Klass for initial insights into the difference this history makes for this analysis.

⁵⁵ See Cook, *supra* note 46, 214-20.

1. 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.”⁵⁶ Abraham Rosenthal, editor of the *New York Times* and the likely author of this first line, later admitted that he knew this was impossible.⁵⁷ Thirty-eight was the number of entries in the police log of the people who were interviewed in the days following the crime.⁵⁸ Reporters never identified the witnesses, but accepted the detective reports at face value.⁵⁹ Instead, by the prosecutor’s count, no more than five or six could have seen or heard enough to know that Genovese was in mortal danger.⁶⁰ 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.⁶¹

What is made extremely opaque by the *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.⁶² Spatially and aurally it would have been impossible for the same group of people to see or hear both.⁶³ After the first attack, Moseley feared that he might be identified by association with his car, which was parked nearby.⁶⁴ He left the scene to move the car.⁶⁵ Genovese got up and staggered around the corner, out of the sight and earshot of those who may have seen the first attack from their windows.⁶⁶ Because she

⁵⁶ Gansberg, *supra* note 5.

⁵⁷ See Cook, *supra* note 46, at 98 (quoting Rosenthal later admitting: “Thirty-eight was impossible, I knew”).

⁵⁸ *Id.* at 107.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *id.* at 107-09.

⁶² See *id.* at 127.

⁶³ 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. See *id.*

⁶⁴ *Id.* at 215.

⁶⁵ *Id.*

⁶⁶ *Id.* 215-16.

had been stabbed in the lung, by the time she reached the second location, an indoor entrance to an apartment, she did not have enough lung capacity to emit an audible scream when Moseley returned.⁶⁷

Of the seeming large number of witnesses, only two were likely to have understood that she was in mortal danger and in need of immediate help.⁶⁸ Joseph Fink worked nights as an assistant superintendent at the Mowbray apartment building.⁶⁹ From an office on the ground floor, he had a clear view of the scene of the first attack.⁷⁰ 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.”⁷¹ 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.⁷²

The other witness, Karl Ross, knew Genovese and was a frequent guest in her home.⁷³ He had been drinking most of the night, but at 3:30 a.m. he heard the cries from the initial Austin Street attack.⁷⁴ He did nothing, and the cries died down.⁷⁵ A few minutes later he was startled by a noise coming from the back of his building. He heard scuffling and a muffled cry.⁷⁶ After a few minutes, he finally opened the door a crack, and saw a man with a knife on top of Genovese.⁷⁷ 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.”⁷⁸

⁶⁷ 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).

⁶⁸ *Id.* at 107-08.

⁶⁹ *Id.* at 107.

⁷⁰ *Id.*

⁷¹ *Id.* at 107-08.

⁷² *Id.* at 108.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 108-09.

⁷⁸ *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.”⁷⁹ The Inspector lamented, “If we had been called when he first attacked, [she] might not be dead.”⁸⁰

But according to Kew Gardens historian Joseph De May, a key witness was overlooked by reporters, police, and everyone else involved in the investigation, one who did call immediately after the first attack.⁸¹ Another neighbor, Andrée Picq, lived in the fourth floor of the Mowbray.⁸² After she heard the initial screaming, she stayed at her window, and saw the man come back, this time with a feathered hat.⁸³ She watched him check the doors of the train station, and then lost sight of him.⁸⁴ As Cook recounts, “Unsure of her English, unsure of what she had just seen, afraid to identify herself to the authorities, she put down the phone.”⁸⁵ Finally, Sam Koshkin, from the sixth floor of the Mowbray, wanted to phone the police, but his wife discouraged him. “I told him there must have been thirty calls already.”⁸⁶

⁷⁹ See Gansberg, *supra* note 5; see also Cook, *supra* note 46, at 80.

⁸⁰ See Gansberg, *supra* note 5; see also Cook, *supra* note 46, at 78.

⁸¹ See Cook, *supra* note 46, at 206-08 (noting that Michael Hoffman, who had seen the attack from his window, and his father Sam were interviewed by the police the day after the attack, and Michael recalled: “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.”); De May, *supra* note 54.

⁸² See Cook, *supra* note 46, at 127.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *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. John Darley & Bibb Latané, *Bystander “Apathy,”* 57 *Am. Scientist* 244-268 (1969); see also Cook *supra* note 43, 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.”); see also, e.g., John Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility,* 8 *J. Personality & Soc. Psych.* 377-383 (1968).

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.”⁸⁷ 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.⁸⁸ When the police arrived, they found Genovese cradled in Farrar’s arms; Farrar was saying, “It’s okay, they’re coming. It won’t be long.”⁸⁹

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.⁹⁰ As Gregory urged, “we must get people to believe that the police will take them seriously and respect their anonymity when they telephone.”⁹¹ 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.⁹² 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.”⁹³ 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.⁹⁴ But perhaps most important for this case is how a key

⁸⁷ Cook, *supra* note 46, at 80.

⁸⁸ *Id.* at 219.

⁸⁹ *Id.* at 220.

⁹⁰ See also Gregory, *supra* note 50, 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.”).

⁹¹ Gregory, *supra* note 50, at 35.

⁹² Cook, *supra* note 46, at 96-97.

⁹³ *Id.* at 126.

⁹⁴ See *id.* at 126 (excerpting from letters to the *New York Times*: “Have you ever reported anything to the police? If you did, you would know that you are

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.⁹⁵

Cook reports Ross was gay, and was friends with Kitty Genovese and Mary Ann Zielonko, who were living together and in a lesbian relationship. According to Cook, the negative treatment of homosexuals by the police gave Ross good reason to fear calling them.⁹⁶ 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."⁹⁷ Already before the exposure to the trauma of the murder, Ross was, according to Zielonko, a "very nervous, frightened person."⁹⁸ 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.⁹⁹

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 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

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.").

⁹⁵ 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).

⁹⁶ *Id.* at 86.

⁹⁷ *Id.*

⁹⁸ *Id.* at 56.

⁹⁹ 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." See *id.* at 83-84.

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, who was an eye-witness from the first floor of the apartment building in front of the crime scene fifty feet away, had 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.

This is *not* to say that Ross did the right thing. Nor is it to say that he should not have experienced pangs of conscience for having done the wrong thing. Acknowledging the complexity of the subjective interior life of bystanders—for example, how they perceive 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.

From the outside, a witness such as Ross seems to have been perfectly positioned to help. From the outside, nothing seems 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 the mind of Ross his emotionally-charged decision-making process was probably much more fraught.

Many hope that they could respond with heroic generosity to the needs of others, but most people would admit that in the face of danger, pressure, or other kinds of fear, they are just as likely to experience paralysis, an instinct to flee, or at least to pull back from engagement. Appreciation for the range of emotions and the reactive nature of decisions to help (or not) also highlights that most people fall somewhere in the middle of that vast range between devious villains and super-heroes. 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 our discussions of morality and law in a set of more realistic expectations about human psychology and behavior.

IV. PHILOSOPHICAL FOUNDATIONS FOR A DISTINCTION BETWEEN "PURE BYSTANDERS" AND "ENGAGED SPECTATORS"

Holding steady these observations about the interior life of bystanders, the analysis now moves to the project of delineating a framework in which the decision-making process of a bystander is accorded full respect, including respect for decisions made against the backdrop of fears, emotional reactions, and psychological limitations.

In considering which philosophical framework might help to articulate these distinctions, this analysis considers both utilitarian and deontological accounts of bystander obligations. Section A highlights a few of the conceptual limitations of some utilitarian accounts of bystander obligations. Section B explores 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. On this basis, Section C 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 (“engaged spectators”).¹⁰⁰

¹⁰⁰ In the legal literature I have not found the term “engaged spectators” to be used in precisely this way. For examples of an incidental use of the term, but not referring to bystanders, see Louis D. Bilonis, *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 Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. Int’l L.J. 249, 264 (2009) (referring to spectators to a sports event); David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 Va. L. Rev. 127, 162 n.105 (1997) (discussing Posner’s analogy between judges and spectators at a theatrical performance). In political theory the term has been used to describe a stance of moral and political critique. See, e.g., Aurelian Craiutu, *Faces of Moderation: Raymond Aron as Committed Observer*, in *Political Reason in the Age of Ideology* (Essays in Honor of Raymond Aron) 261, 273-75 (Bryan-Paul Forst and Daniel J. Mahoney, eds., 2007) (examining Raymond Aron’s conception of political moderation and use of the metaphor *spectateur engagé*, translated also as “committed observer”). In art history and critique the term has been used to describe the physical stance or cultural context of the viewer. See, e.g., John Shearman, *A More Engaged Spectator*, in *Only Connect . . . : Art and the Spectator in the Italian Renaissance*, at 10 (1992) (discussing the work of Donatello, Tomb of Giovanni Pecci, Bishop of Grosseto, in the Duomo of Siena, noting the perspective of an “engaged spectator”—one who is “placed in the moment and position of witness at the bishop’s funeral.”); Nell Bouton Taylor, *The Engaged Spectator: Fifteenth-Century Venetian Textiles, their Function and Acquired Meaning in Sacred Images* (Master of Arts Thesis, George Washington University) (2003) (discussing the use of space and the inclusion of commercial commodities were meaningful to a Venetian audience).

A. Conceptual Limits in Some Utilitarian Accounts of Bystander Obligations

When considering a bystander's encounter with a 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 toward the circumstances dictating to the bystander exactly what he or she should do or should have done. Why resist that route?

It is interesting to note the parallels between the *Seinfeld* prosecutor's case discussed above¹⁰¹ and Jeremy Bentham's classic argument for the appropriateness of punishing a bystander's failure to help a person in need of assistance. Like the *Seinfeld* prosecutor, Bentham queries: "[I]n 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?"¹⁰² In these circumstances, given the goal that legislation and policy should produce the greatest good for the greatest number of people, the gain in utility through saving a life would certainly outweigh the slight cost to individual autonomy that follows from legal compulsion to act.¹⁰³ Given the presumption that the risk and imposition would be minimal, 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:

¹⁰¹ See discussion *supra* at note 12.

¹⁰² Jeremy Bentham, Introduction to the Principles of Morals and Legislation 292-93 (J. Burns & H.L.A. Hart, eds., 1970) (1789); 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.").

¹⁰³ See Ernest Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247, 265-66 (1980) (describing but not adopting a utilitarian line; deontological support subsequently retracted by further scholarship).

*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.*¹⁰⁴

Bentham concludes with a rhetorical question: “Who is there that in any of these cases would think punishment misapplied?”¹⁰⁵

There is another parallel between Bentham’s example and the *Seinfeld* Finale. Considering Bentham’s illustration of the woman with the headdress on fire, what drives this intuition that punishment would be appropriate? Not only does the man look on, but he also laughs at her predicament. Other interactions are more ambiguous. For example, all we know about the bystander to the drunken man with his face in the puddle is that he “sees” him; we have no further information about the surrounding circumstances, and 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.

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?¹⁰⁶

¹⁰⁴ See Bentham, Introduction, *supra* note 102, at 292-93 (note also that in subsequent rescue discussions Bentham’s examples are occasionally confused with actual cases).

¹⁰⁵ *Id.*

¹⁰⁶ 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.

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

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 *particular* fear of an invasive police investigation? How might one account for impairment of judgment due to alcohol? The large number of variables required for a strict utilitarian analysis leaves much to purportedly objective but ultimately arbitrary assessments.

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.¹⁰⁷

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.”¹⁰⁸ As Murphy surmises:

Personality & Soc. Psych. 100, 108 (1973) (noting how the elements of “hurry” and conflicting commitments may influence a decision to help or not).

¹⁰⁷ See Liam Murphy, *Benevolence, Law, and Liberty: The Case of Required Rescue*, 89 *Geo. L. J.* 605, 644, 646 (2001); see also Judith Lichtenberg, *Negative Duties, Positive Duties, and the “New Harms,”* 120 *Ethics* 557, 557 (2010) (in light of the “over-demandingness” objection to positive duties, offering a theory of responsibility in light of the subtle nature of “New Harms”).

¹⁰⁸ *Id.* at 647.

*If commitment to a duty to rescue brings with it a commitment to a general moral requirement of beneficence, and if the most 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.*¹⁰⁹

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.¹¹⁰ Lord Macaulay remarked:

*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?*¹¹¹

When slightly more complex elements enter the scene such as violence, fear and anxiety, some lines of utilitarian reasoning run up against serious limitations. Not only do they risk vague and unbounded

¹⁰⁹ Murphy, *supra* note 107, at 650.

¹¹⁰ Thomas B. Macaulay, *Notes on the Indian Penal Code*, in 4 Miscellaneous Works of Lord Macaulay 252-53 (H. Trevelyn ed., 1880); see also Michael Menlowe, *The Philosophical Foundations of a Duty to Rescue*, in *The Duty to Rescue: Jurisprudence of Aid 18* (Michael Menlowe & Alexander McCall Smith eds. 1993).

¹¹¹ Macaulay, *supra* note 110, at 254-55; see also Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 Santa Clara L. Rev. 1053, 1079 n.45 (2000).

application, they also risk missing the deeper story of what *exactly* hangs in the balance, in large part, because they lack more fine-tuned instruments that might help to account for more subjective factors.

B. Conceptual Strengths in Some Elements of Kantian Thought

In contrast to the limits discussed above, certain elements 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 person in need of emergency assistance. In particular, this section explores the extent to which selected concepts from Kant can form a framework that is simultaneously able to hold together affirmation of the principle of respect for the humanity of the victim, psychic space for the bystander to exercise discretion based on the specific circumstances, and an appreciation for just how emotionally charged these encounters may be.

Applying Kant's distinction between perfect and imperfect obligations, as well as further explanation of wide and narrow duties, to an analysis of bystander response to a person in need of emergency assistance, an important distinction may be drawn. This distinction separates the *maxims* that a subject is required to hold from the process of *discernment* to decide what to do in a given situation.¹¹² 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.

In the *Groundwork for the Metaphysics of Morals*, Kant depicts the man for whom things are going well who refuses to help others whom he could help:

¹¹² See Immanuel Kant, *Metaphysics of Morals*, Ak. 6:411 (Mary Gregor trans., 1991) [hereinafter Kant, *Metaphysics*] ("... 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.").

“[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.”¹¹³

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.”¹¹⁴

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.”¹¹⁵ Neglecting the predisposition to greater perfection might “admittedly be consistent with the *preservation* of humanity, as an end in itself, but not with the *furtherance* of this end.”¹¹⁶ 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 a positive agreement with *humanity, as an end in itself*” unless everyone also

¹¹³ Immanuel Kant, *Groundwork for the Metaphysics of Morals* [hereinafter Kant, *Groundwork*] (Mary Gregor trans., revised ed. 2012) at Ak. 4:423. *See also* Kant, *Metaphysics of Morals*, *supra* note 109 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.”).

¹¹⁴ Kant, *Groundwork*, *supra* note 112, at Ak. 4:421.

¹¹⁵ *Id.* at Ak. 4:430.

¹¹⁶ *Id.*

tries, as far as he can, “to further the ends of others.”¹¹⁷ As Kant summarizes: “For the ends of a subject who is an end in itself must, as far as possible, be also *my* ends, if that representation is to have its *full* effect in me.”¹¹⁸

That sounds pretty demanding. But in the *Metaphysics of Morals*, Kant clearly explains that setting maxims is only half of the project. His analysis also 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 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.¹¹⁹

In the *Metaphysics of Morals*, this explanation is followed by a number of examples that flesh out 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 discretion: “No rational principle prescribes specifically *how* far one should go in cultivating one’s capacities.”¹²⁰ Similarly, for the cultivation of morality, the duty prescribes “only the *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 *action itself*.”¹²¹

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

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Kant, *Metaphysics*, *supra* note 110, at Ak. 6:390.

¹²⁰ *Id.* at Ak. 6:392.

¹²¹ *Id.*

doubts about the legality of his action.”¹²² Also for this reason it is especially difficult to prescribe particular actions for particular circumstances.

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.¹²³

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.¹²⁴

In the exercise of determining exactly what to do, as Nancy Sherman notes, emotions can actually *help* in the process: “in a fallible

¹²² *Id.*; see also *id.* at Ak. 6:446-47 (discussing how duties are narrow and perfect in terms of quality; “but it is wide and imperfect in terms of its degree, because of 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 one’s advantage (or to avoiding what is detrimental) and that, in other circumstances, could just as well serve vice?”).

¹²³ *Id.* at Ak. 6:393.

¹²⁴ See *id.* at Ak. 6:411 (“[E]thics, 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).

way, they may give some access to values and concerns that might otherwise remain veiled from one's reports about what motivates one's action."¹²⁵ Further, much of the work of deliberation is not projecting out toward the abstract dimension of a universalizable maxim, but "reflecting on what respect for rational agency requires of us in the circumstances before us."¹²⁶ 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 nondeception or beneficence. The norms are supple in that they stand ready to be transformed and thickened by the circumstances themselves.*¹²⁷

A final element of Kant's analysis to consider is the interaction with what he describes as "*subjective* conditions of the receptiveness to the concept of duty, not as objective conditions of morality."¹²⁸ 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."¹²⁹ The same applies to "sympathetic joy and sadness"—"sensible feelings of pleasure or pain at another's state of joy or sorrow."¹³⁰

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, 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

¹²⁵ Nancy Sherman, *Making a Necessity of Virtue* 304 (1997).

¹²⁶ *Id.* at 310.

¹²⁷ *Id.* at 312.

¹²⁸ Kant, *Metaphysics*, *supra* note 112, at Ak. 6:399.

¹²⁹ *Id.*

¹³⁰ *Id.* at Ak. 6:456.

people out.”¹³¹ 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 cultivation of an attitude of callous indifference to 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.”¹³² 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.”¹³³ 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.”¹³⁴ Helping actions, therefore, would be obligatory in circumstances in which “helping is the *only* way to acknowledge the other person’s status as a positive end,”¹³⁵ “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.”¹³⁶

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 make it his principle not to comply with such

¹³¹ *Id.* at Ak. 6:457.

¹³² Karen Stohr, *Kantian Beneficence and the Problem of Obligatory Aid*, 8 J. Moral Phil. 45, 61 (2011).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 62-63.

¹³⁶ *Id.* at 63.

duties.”¹³⁷ 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.¹³⁸ The elements of Kantian ethics noted above would have 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? As discussed above, this Article proposes an analytical distinction between an “engaged spectator” and a “pure bystander”—a person who may notice something about the incident, but who does not stop to focus on it. When considering the moral obligations of persons in these categories, the first issue to address is whether bystanders who, for various reasons, do not stop or 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. It is simply to acknowledge that, for example, it is very difficult to tell whether the decision not to directly intervene in that moment was the best that Karl Ross could manage under the circumstances.

For this reason, I believe it would be difficult for the law to draw any hard lines regarding civil legal responsibility dependent on a risk and injury that the bystander did not cause and/or did not exacerbate. Notwithstanding his proximity to the violence, Karl Ross was a “pure bystander.” The concepts from Kantian ethical analysis discussed above can help to hold together respect for the needs of victims, and

¹³⁷ Kant, *Metaphysics*, *supra* note 112, at Ak. 6:390.

¹³⁸ *Id.*

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, would a narrow duty that prohibits "contempt, arrogance, defamation, and mockery" be triggered for a bystander?¹³⁹ In what circumstances might an interaction between a bystander and a vulnerable person become a failure to treat that 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, therefore, 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 moral analysis 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.

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?*¹⁴⁰

¹³⁹ See Karen Stohr's discussion of this narrow duty, *supra* note 129.

¹⁴⁰ Jeremy Waldron, *Who is My Neighbor?: Humanity and Proximity*, 86 *Monist* 333, 333 (2003).

No one needs to answer all of these questions 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 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.”¹⁴¹ 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.*¹⁴²

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.*¹⁴³

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 broad and

¹⁴¹ *Id.* at 338.

¹⁴² *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 intentional and deliberate choice, “going out of their way not to help, or going out of their way to avoid a decision about whether to help.” See *id.* at 343. My distinction between “pure bystanders” and “engaged spectators” would not foreclose moral responsibility or blame; but I would be more cautious about the capacity to discern an intentional moral harm from the mere action of crossing the road. See also Waldron, *supra* note 111, at 1081.

¹⁴³ *Id.* at 344; see also Waldron, *supra* note 111, at 1081.

universal general obligations.¹⁴⁴ 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? The blurred line that this fact pattern indicates illustrates that the moral evaluation of a bystander's interaction with the victim in an emergency context does not hinge on the use of the technology in and of itself. Rather it hinges on what that use signifies about both the complex circumstances and 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 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.¹⁴⁵ Perhaps it was filmed as a record of what happened, or perhaps there were many motives behind the recording.

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. 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 had already called

¹⁴⁴ Waldron, *supra* note 140, at 346; *cf.* 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 workers are “on the scene”; surmising that these claims do not necessarily require courts to probe larger questions of resource allocation).

¹⁴⁵ See Burke et al., *supra* note 17.

for help, and the greatest service that one could provide for the victim and for the safety of the community was to record the event in order to assist with the 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, mindless act, one more sight or sound to take in on the way to work, together with 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 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,¹⁴⁶ 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 prevents one from doing so. With the realization of having done nothing to help, one may also feel ashamed, as to 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 rather it was received as a fairly banal and

¹⁴⁶ See Finale Script, *supra* note 6.

trivial incident that blends into other weird sights 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, an “engaged spectator”—directly engaging not only the scene of an accident or an assault, but also in some way the vulnerable person.

However they engage, those who do stop are then morally obliged to treat the victim as an 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: calling for help and recording the attack 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, humiliate and exploit a victim at his or her most vulnerable moment. Those who decide to stop, focus and engage an emergency scene, and to use their cell phones to record images of a victim at the site of an assault or an accident, have a moral obligation to treat the victim with dignity, which includes neither objectifying nor exploiting their vulnerability.¹⁴⁷

V. THE TORT OBLIGATIONS OF “ENGAGED SPECTATORS”

In the 1960s, the Kitty Genovese story sparked a national debate on the “bystander effect,” and whether there should be a legal duty to assist or at least call for help in an emergency situation when there are supposedly numerous witnesses.¹⁴⁸ Should the whole neighborhood

¹⁴⁷ Because of limited space, this Article will fully delineate neither the nature of the duty between otherwise-strangers, nor the nature of the harm, nor the extent to which the category of “engaged spectators” may overlap with photojournalists. Each of these topics has been the subject of my doctoral research, and will be the subject of future publications.

¹⁴⁸ See Cook, *supra* note 46 (discussing studies by Latané and Darley 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.”); see also, e.g., John Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J.

have been held responsible? How can 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 technologically, 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.

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.

The act of taking a cell phone picture can function as a kind of sorting mechanism, to separate “pure bystanders”—those who do not engage the scene of an accident or assault—from “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. This Part focuses on the *legal*

Personality & Soc. Psych. 377 (1968); John Darley & Bibb Latané, *Bystander “Apathy,”* 57 Am. Scientist 244 (1969).

obligations of bystanders who 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, to both objectify and exploit a person in need of emergency assistance.¹⁴⁹

Daily life in our society presents a number of scenarios in which people objectify and exploit each other in some way. An attempt to impose tort liability on many of these various harms would be unrealistic and undesirable for many reasons. For this reason, the proposed tort of “exploitative objectification of a 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.¹⁵⁰

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 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 assault or accident. In a way that the beachgoer is not, the victim of an assault or accident is vulnerable—understood as “open to physical or emotional harm”—

¹⁴⁹ See John Adler, *Relying Upon the Reasonableness of Strangers: Some Observations about the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 Wisc. L. Rev. 867, 916 (1991) (“One may always confine one’s activities completely so as to try to avoid the risk of accidental occurrences. When individuals venture forth and encounter accidents, however, liability rules require that they behave reasonably.”).

¹⁵⁰ I would like to express gratitude to the Georgetown Law faculty members who participated in the April 2015 workshop discussion of this aspect of the analysis, and also to Deborah Cantrell and Sheila Foster who took the time for extended conversations on this topic. The questions raised and suggestions offered in these contexts were an important source of insight and clarity for this portion of the analysis.

and generally has no control over the circumstances that brought him or her to be splayed out for public visual consumption.¹⁵¹

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. 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 would argue, only the latter crosses the line into the kind of harm that should be legally cognizable under the rubric of this proposed new tort.

B. The Objective Need for Emergency Assistance

Although we live in a world filled with immense need, very few people would actually sign up for a life program of unbounded duties of self-sacrifice.¹⁵² There is, however, something extremely problematic about venturing forth to encounter a particular person in urgent need of assistance, and then doing nothing to help this person.

¹⁵¹ See, e.g., Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 Ala. L. Rev. 609, 614 (2015). Martha Fineman's work indicates how legal theory might be informed by an understanding of vulnerability deeper and broader than this working definition. See *id.* ("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 other contexts as well. See *also id.* at 618-19 (distinguishing between the vulnerability that arises because we are *embodied* beings and that which arises *embedded* in social relationships); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 Emory L.J. 251, 267 (2010) (describing the pervasive nature of vulnerability, and variety of forms in which it arises from embodiment).

¹⁵² See discussion and sources cited *supra* note 107.

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. 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 John Goldberg and Benjamin Zipursky explain, courts hold plaintiffs “to an external standard that, to some extent, ignores their particular vulnerabilities.”¹⁵³ To state a “wrong” that was inflicted by the defendant, it is important that the injury not be the plaintiff’s own responsibility—“for she is using the legal system to obtain recourse for something done to her by someone else.”¹⁵⁴

The backdrop of a need for emergency assistance helps to distinguish contexts in which one could describe the victim’s harm as “self-inflicted.”¹⁵⁵ Goldberg and Zipursky explain the distinction:

*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.*¹⁵⁶

¹⁵³ John C.P. Goldberg & Benjamin Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1683 (2002).

¹⁵⁴ *Id.* at 1683; *see generally* Erica Goldberg, *Emotional Duties*, 47 Conn. L. Rev. 809 (2015).

¹⁵⁵ 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.

¹⁵⁶ Goldberg & Zipursky, *supra* note 153, 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

By limiting the tort to 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.¹⁵⁷ 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.

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.¹⁵⁸

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 progress) 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 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 Ernest Weinrib’s early proposal for an affirmative obligation: it is the emergency itself that distinguishes who would be required to respond. In the words of Cardozo, “the emergency begets the man.”¹⁵⁹ For Weinrib, it is the unusual circumstances of an

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.”)

¹⁵⁷ See Schauer, *supra* note 156, at 650.

¹⁵⁸ See Goldberg & Zipursky, *supra* note 153, 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.”).

¹⁵⁹ *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

emergency that draw 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 of 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.¹⁶⁰

I share all of these concerns, but stop short of the conclusion that the emergency circumstance necessarily defines the contours of the bystander's obligation. Respect for both the decision-making process of the bystander, as well as their 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 those who decide to engage.

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.”).

¹⁶⁰ Ernest Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247, 292 (1980). Similarly, Goldberg and Zipursky have employed the circumstantial concept of emergency to limit a potential affirmative duty to assist. In their analysis, the circumstantial category of “emergency” works to limit legally cognizable harm to a context which would present neither legal nor moral overload. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733, 1837 (1998).

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 particularly acute when the attack or accident is in course 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 have, and the harm that she 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* a specific response.

In contrast to an analysis of circumstances in which “the emergency begets the man,” in this analysis, 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,¹⁶¹ 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 one's 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” his

¹⁶¹ Weinrib, *supra* note 160, at 292.

or her 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. This is true especially in those areas of social interaction 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.

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 furthering 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 trivializing the harm, 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. 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."¹⁶² 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."¹⁶³

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

¹⁶² Stohr, *supra* note 132, at 61.

¹⁶³ *Id.* at 63.

narrow duty not to be indifferent to the ends of others—one which is always required—and a *perfect* legally enforceable duty not to exploit others. 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 that as conveying morally objectionable indifference. Subjectively, however, Ross may have been doing his best to manage an impending panic attack. Because this Article aims to preserve an ample 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 spectators’ failure to call for assistance in response to his medical needs, but also the failure of his co-citizens to care for the safety of the community as a whole. They could have helped to arrest and contain further violence on the part of an assailant who had proved himself to be dangerously unstable.¹⁶⁴ At the same time, in several cases 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 systemic improvement in the criminal justice system.¹⁶⁵

¹⁶⁴ See Arthur Ripstein, *Three Duties to Rescue: Moral, Civil and Criminal*, 19 *Law & Philosophy* 751, 773-79 (2000) (explaining criminal duty to rescue as owed to the community, grounded in a citizen’s obligation to contribute to social institutions of coordination).

¹⁶⁵ Arguably the most poignant example, the shooting of Walter Scott, more particularly the video shot by Feidin Santana, served as a catalyst for broad and intense discussions of reforming police organizations across the United States. See Alan Binder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, *N.Y. Times*, June 8, 2015, <http://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html> [<https://perma.cc/GFF3-GWTR>].

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 another kind of attack, is there something unique about the type of harm that 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 the attack itself, as participants and not merely bystanders.¹⁶⁶

D. Face-to-Face Encounters, but Not Contingent on Victim's Immediate or Emotional Response

The tort hinges on *presence* on the scene, the *encounter* between a person in need of emergency assistance, and the spectator's exploitative objectification of the victim in this context. One might query whether limiting the tort to these circumstances draws a line that 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 a 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

¹⁶⁶ For a thoughtful analysis of this problem, see Kimberley K. Allen, Note, *Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes*, 99 *Geo. L.J.* 837 (2011). 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 that actually affirms and perpetuates the violence itself. 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.

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 latter 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.¹⁶⁷

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 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

¹⁶⁷ Judith Lichtenberg, *Distant Strangers: Ethics, Psychology and Global Poverty* 41 (2014); *see also* Stohr, *supra* note 132, at 30 (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).

the context in which we experience them.”¹⁶⁸ 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.”¹⁶⁹

But that said, the tort would not hinge on the immediate response or reaction of the victim to exploitative objectification and humiliation. In contrast to the varying versions of the tort of infliction of emotional distress, this tort defines “exploitative objectification” of a 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 wisecracks 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.*¹⁷⁰

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.”¹⁷¹ Along similar lines, I would argue that

¹⁶⁸ David Luban, *Torture, Power and Law* 150 (2014) (contrasting torture with natural childbirth).

¹⁶⁹ *Id.* at 151; see also Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law of Tort*, 77 Cal. L. Rev. 957, 967 (1989) (“Violations of civility rules are intrinsically 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.”).

¹⁷⁰ Luban, *supra* not 168, at 145.

¹⁷¹ *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

the harm of exploitative objectification of a 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. In other words, 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.

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 the earlier discussions regarding the extent to which cruel objectification was the driver for moral outrage expressed in response to Bentham's example of the man with water at hand laughing at the lady with the headdress on fire,¹⁷² Prosser's image of the man on the dock coolly smoking a cigarette while another person drowns before his eyes,¹⁷³ and, of course, the *Seinfeld* characters "mocking and maligning" the robbery victim.¹⁷⁴ 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 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.

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.'").

¹⁷² See discussion of Bentham's example, *supra* note 104.

¹⁷³ See Prosser, *supra* note 4, at 340.

¹⁷⁴ See discussion of *Seinfeld* Finale, *supra* note 12.

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*. 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.
2. It is a complete defense for the spectator to show a) that the photograph or recording 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 or recording was not used in an objectifying way (e.g., posted on social media accompanied by sarcastic comments).

VI. CONCLUSION

Like many people, I have been disturbed by reports of what seems to be indifference on the part of bystanders to the needs of persons in need of emergency assistance whom they physically encounter. 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. This Article proposes 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 an act of violence that this person has not caused nor exacerbated. On this basis, I propose a distinction between "pure bystanders" and "engaged spectators."

Much as we would all like to think of ourselves as potential heroes, in situations of violence, shock, and trauma, many of us would be bumbling bundles of nerves and emotions, conditioned by fears and perhaps also blocked by a sense of paralysis and uncertainty that impedes a helpful response. Because people often need discretionary space to work through their response to violence or trauma, we should

also go easy on that leap toward “there ought to be a law” that dictates exactly what should be done and by whom in an emergency situation.

For a host of reasons, some of which have been explored above, the people whom I describe as “pure bystanders” may choose not to engage the scene. I make no claim about the *morality* of their choice. Or better, my argument also allows space for strong moral condemnation. Nonetheless, I also argue that this category of bystanders should not be *legally* coerced to intervene because I believe the law lacks the fine-tuned instruments needed to probe the interior life of bystanders which shapes the contours of their choices.

However, when an onlooker directly engages the scene and the victim, this person crosses an objective line. Once that line has been crossed, I argue that the person has entered into a territory in which *legal* obligations should attach. The line consists of 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, including shock, fear, indifference, hurry, or simply because one was not paying attention. But those who stop to engage the scene in order to watch and observe may 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.

Until recently, 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—a cell phone camera—through which they can take pictures that document their presence, thus serving as evidence of engagement, focus, and in some circumstances, intentions.

The proposed tort of “exploitative objectification of a person in need of emergency assistance” reflects an effort to define the obligation that an engaged spectator—one who has in the context of an emergency made a decision to engage a vulnerable person—owes to this fellow human being. The tort also crystallizes the distinct harm that this person inflicts with objectifying conduct, such as taking a cell phone picture instead of calling for help or helping.

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 Article stands as an invitation to explore further 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.