Aiding and Altruism: A Mythopsycholegal Analysis

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AIDING AND ALTRUISM: A MYTHOPSYCHOLEGAL ANALYSIS

Thomas C. Galligan, Jr.*

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INTRODUCTION

Confucius' aphorism about the relative values of pictures and words is a testament to the persuasive power of an image. Since the mid-1960s, one image, the image evoked by the Kitty Genovese incident, has shaped the debate about the legal duty to rescue. Ms. Genovese was brutally murdered on a Queens, New York street while thirty-seven neighbors, who watched and listened in safety, did nothing. Not one of those thirty-seven intervened; not one even called the police. Granted, since the Genovese slaying, those neighbors probably have lived with their own private demons or rationalizations, but the impression of humanity left by this tragic image of inaction is rather dim. The Genovese story may leave one feeling isolated, lonely, and, perhaps, even afraid.


Anglo-American law long has held, with a few exceptions, that one has no affirmative duty to help another in peril. The rule's basic thrust is to absolve the non-actor from legal responsibility for the consequences of his inaction. Commentators have long decried the rule as immoral. Some have called for its abandonment, others have shrugged their shoulders and justified it on

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2. A 38th person phoned the police after Genovese was dead. See Gansberg, supra note 1, at 1.
4. Id.
5. See infra notes 26-27 and accompanying text.
6. See infra notes 159, 476 and accompanying text.
7. See infra Part IV.A.
practical grounds. Still others have defended the rule in the name of individual rights.

Some modern studies of tort law have focused on economic efficiency. Alternatively, Professor Epstein has developed a moral theory of strict liability based upon principles of causation. His theory is libertarian, highlighting the individual's general right to do as she pleases, up to the point where that action causes injury to another. Underlying both the economic theories of tort law and Epstein's theory of strict liability is the behavioral notion that people act out of egoistic, enlightened self-interest. Self-interested people will not rescue another unless the personal benefit derived from acting outweighs the anticipated costs of rescue.

A rule that imposes no duty to act is consistent with Epstein's theory. From Epstein's libertarian perspective, as long as a person does not cause injury to another, he should remain free to choose what he will or will not do. To hold otherwise undermines the freedom and value of the individual. If the self-interested actor chooses to help, so be it, but society and the law should not require action.

From the economic perspective, perhaps society could impose a duty to act when the benefits of rescue to the rescuer outweighed the costs of acting. This result could be achieved through some system of penalties or rewards. The economically efficient rule would rely on the underlying assumption that action could be triggered either by threatening the individual with a sanction for failing to act or by promising a reward for rescuing. Either way, the rule would be designed to induce helping behavior by appealing to the self-interest of the potential actor. Both Epstein and the legal economists seem to rely heavily on the psychological model of the self-interested actor.

8. See infra Part IV.D.
9. See infra Part IV.B.
12. See infra notes 468-69 and accompanying text.
13. See infra notes 474-75 and accompanying text.
But is the self-interested actor model really appropriate when talking about helping another? The duty to help, protect, or rescue another involves compassionate behavior, human action that is often not necessarily in the actor's self-interest. It is altruistic behavior. Yet the concepts of compassion and altruism are discussed rarely in judicial opinions.

In contradistinction to the economic theories of tort law and Epstein's model, feminist scholars call for a more empathic view of tort law. But how does empathy relate to the legal duty to act? How does empathy fit with altruism?

The human mind may hold some answers. Why, psychologically, do people help or not help? Are our current laws in this area consistent with scientific and psychological explanations of the way people think and act? Are the generally accepted notions of human behavior upon which we have based our laws accurate? Are they accurate in this context?

The world's mythologies and literatures are full of stories praising compassion and altruistic action. The paradigmatic Christian story of altruistic action is Christ's tale of the good Samaritan. But Christians have no monopoly on stories about altruism. The concept of the Buddhist bodhisattva, who pauses on the brink of the void beyond all knowing before turning back to bring all creatures to enlightenment, connotes compassion. Mystical states whereby a person might experience a wholeness or oneness of being may be viewed, in part, as the breakdown of ego boundaries leading to the sensation of universal compassion. The philosopher Schopenhauer used the metaphor of rescue as the model of compassionate behavior, thereby attempting to explain the mystical feeling of oneness. Thus, both mythology and literature have painted a picture of aiding action that is not limited by the self-interest of the potential actor.

Recent psychological studies have confirmed this mythological model of the human as, at least partially, a compassionate

15. See, e.g., Leslie Bender, Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 DUKE L.J. 848 (challenging the "blame the victim" critique of tort law and calling for a tort system grounded in "care, response, and interdependency").
17. See infra Part II.B.2.
18. See infra Part II.B.3.
19. See infra notes 216–21 and accompanying text.
being. Most notably, studies undertaken by Dr. C. Daniel Batson indicate that one's motivation to aid another is not always self-interest; often it is altruistic. Batson defines a motivation to primarily benefit one's self as egoistic and a motivation to primarily benefit another as altruistic. Not only has Batson shown that people do act to help others out of altruistic motives, but he also has established a connection between feeling empathy for another and subsequent altruistic action. Batson's studies undercut the foundations of the no-duty-to-act rule. They confirm my own notion that the general no-duty-to-act rule merits reconsideration.

Critically, reasonable people in fact may act to help others, not just out of self-interest, but to improve another's condition. People may be, at least in part, altruistic by nature. Therefore, tort law—which has long sanctified the icon of the reasonable person—would do no violence to that concept if it imposed duties to rescue in situations where compassionate, aiding action might be expected. In fact, one may conclude that by not considering all the psychological explanations for behavior, tort law actually is undermining its traditional reliance on the reasonable person standard to define negligence. Of course, the trick is to identify those situations where reasonable people would act altruistically.

To base legal rules—particularly the no-duty-to-act rule—on a psychological model that says people act only out of self-interest is to adopt what turns out to be an unrealistically narrow perspective of human capacity for altruistic action. That perspective and the resulting no-duty-to-act rule minimize our potential for compassionate behavior. They fail to recognize compassion as an integral aspect of our psychological persona, and in this failure, they unrealistically narrow the legal and societal field of vision.

This Article asserts that traditional tort law should be modified to provide for a duty to act in situations in which a reasonable person would act altruistically. Part I examines

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20. In contrast to the recent studies discussed in the text, Freudian models of behavior posit that one's motivation for acting is self-interest. See infra note 355 and accompanying text. Freud's egoistic model is consistent with most biological theories for action, including Darwinian theories of evolution. See infra notes 356–58 and accompanying text.


22. See infra notes 363–68 and accompanying text.

23. See infra notes 388–91 and accompanying text.
traditional and more recent tort doctrine governing the duty to aid. Part II discusses compassion from philosophical, literary, and mythological points of view and explores how these viewpoints inform compassion's possible relationship to a legal duty to help. Part III considers the connections between psychological theories and studies of action, altruism, and empathy. In addition to Batson's work, I reexamine the classic studies of Latané and Darley and the application of their conclusions to the debate about the duty to help. I then analyze legal theorists' discussions of a duty to help in light of the psychological evidence, concluding that while some proposals for modifying the traditional rule are consistent with the psychological evidence, both scholars and courts need to consider more factors than they have so far. Most notably, Latané and Darley's work, showing that a group of bystanders who know each other are more likely to act than an individual bystander, suggests that courts should consider the number of bystanders present and their relationship to one another. Batson's work further suggests that tort law should consider the extent to which an actor under a particular set of circumstances could be expected to feel empathy for another.

Finally, Part IV urges judges and other lawmakers who shape tort rules regarding action to open their eyes to the human capacity for compassionate action. Courts slavishly tied to a model of behavior based on egoistic, self-interested motivations reinforce that model, while Batson's work reveals the limitations of that model given the prevalence of empathically-induced altruistic action. Courts and other policy makers should recognize altruistic action not only as possible and desirable but, in fact, reasonable. In deciding cases and writing laws they must focus on those factors psychologists have determined are most likely to influence a person to help others.

I ultimately conclude that tort law ought to impose a duty to act, but only when action is reasonable under the circumstances. This is standard tort law: there is a duty to act when a reasonable person would act. But in making that decision, courts and juries should look at all relevant factors, including the psychological evidence that humans have the innate ability to act altruistically. To state the duty positively is to recognize our capacity for compassion, whereas the

current rule highlights our egoistic limitations and our isolation from one another. Restatement of the rule and consideration of the psychological evidence are significant shifts both practically and symbolically.

I. THE LEGAL RULES

A. No Duty to Act

Anglo-American tort law generally provides that a person is under no duty to help another avoid injury from a foreseeable risk, even if helping would entail little or no risk or cost. The no-duty-to-act rule has sometimes been restated in terms of the different legal effects of nonfeasance and misfeasance. In these terms, the rule provides that an actor is liable for negligent misfeasance, but not for negligent nonfeasance.

Historically, a rule which imposed no liability for nonfeasance helped maintain the boundary between tort and contract law. If enforceable in tort, a mere promise to act without consideration sufficient to support a contract arguably would have undermined a substantial portion of contract law.

26. Restatement (Second) of Torts § 315 (1965); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56, at 375 (5th ed. 1984) [hereinafter Prosser and Keeton]. Professor Leonard refers to this general no-duty-to-act rule as one of a number of per se no-duty rules. David P. Leonard, The Good Samaritan Rule As a Procedural Control Device: Is It Worth Saving?, 19 U.C. Davis L. Rev. 807, 829 (1986). Per se negligence rules purport to foster predictability and save administrative expense by allowing courts to determine duty “based upon a narrowly prescribed set of circumstances defined in isolation of the facts of particular cases.” Id. at 822. Professor Leonard proposes replacing the per se no-duty rule with a multifactor approach to determining duty. Id. at 853–68. He considers relevant: (1) foreseeability of harm; (2) closeness of the causal link between the failure to rescue and the injury; (3) ease with which the rescue could have been accomplished; (4) identifiability of the defendant as a potential rescuer; (5) moral blameworthiness of the non-rescuer’s conduct; (6) similarity of the case to those invoking a traditionally recognized approach; (7) degree to which imposing a duty will further the social policy of preventing future harm; and (8) consequences for the community of imposing a duty in this case. Id. at 863–64.


28. See Thorne v. Deas, 4 Johns. 84 (N.Y. 1809) (holding that no action in contract would lie for breach of a promise to obtain insurance on cargo subsequently lost at sea because there was no consideration, and no action in tort would lie because the promise was not a sufficient undertaking); see also Mobil Oil Corp. v.
At common law a promise had to be supported by consideration. Recovery for nonfeasance would have eroded this doctrine. With the advent of promissory estoppel as a contract theory of recovery, however, the distinction between misfeasance and nonfeasance has lost some of its historical justification. Now promissory estoppel itself provides at least some legal redress for breach of promises not supported by consideration. Moreover, some recent courts have found a mere promise as the basis for a claim of misfeasance.

The common law no-duty-to-act rule, however, did more than simply reinforce the tort-contract boundary. Courts also applied the no-duty-to-act rule in cases where traditional contract doctrine faced no threat. For instance, in Union Pacific Railway v. Cappier, young Ezelle Cappier was run over by the defendant's railroad car. One of Cappier's arms and one of his legs were cut off. His mother sued and a jury returned a verdict in her favor. No contract values were at stake in Cappier's suit against the railroad—as far as contract law was concerned the parties to the action were strangers. The jury found that the railroad's employees did not go to Ezelle's aid as fast as they could have, although the employees did actually render aid. The Supreme Court of Kansas reversed. Rather than hold that the jury had erred in its fact finding and that the defendant had exercised reasonable care, the court went directly to the general duty question. Its language is a paradigm for future judicial callousness:

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29. See generally John E. Murray, Jr., Murray on Contracts 139–95 (2d rev. ed. 1974).
30. See Restatement (Second) of Contracts § 90 (1981).
32. 72 P. 281 (Kan. 1903).
33. Id. at 281.
34. Id. at 282.
35. Id.
36. The evidence established that the servant in charge of switching operations had yelled a warning to the boy. Id. After the train hit Ezelle the servant stopped it so that Ezelle could be pulled clear of the tracks. Id. Thereafter, the servant moved the car ahead because he feared another train was coming. Id. The servant then informed the general yardmaster of the accident and an ambulance was summoned. Id. Other employees of the railroad actually undertook to stop Ezelle's bleeding before the ambulance arrived. Id. Thus, it would seem that the railroad did take some action on Ezelle's behalf, and that the real question before the court was whether the railroad exercised reasonable care in fulfilling the duty it had assumed.
With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.\textsuperscript{37}

The message is clear. Although the non-actor may find punishment in the next life, his victim has no legal recourse in this one. Whatever fire and brimstone one faces for not acting does not come from tort law.

Another gruesome and oft-cited case is \textit{Buch v. Amory Manufacturing Co.}\textsuperscript{38} Buch’s thirteen-year-old brother was an employee in the mule spinning room of the defendant’s mill.\textsuperscript{39} Without authority, the brother invited eight-year-old Buch, who could neither speak nor understand English, into the room to learn his brother’s work.\textsuperscript{40} Young Buch’s hand became caught in gearing which employees were supposed to avoid—no one had warned Buch of the gear’s danger. After finding that Buch was a trespasser,\textsuperscript{41} the court considered whether, assuming Buch could not be adequately warned about the machinery, the defendant had a duty to eject him forcibly. The court began:

With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved. Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself,

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} 44 A. 809 (N.H. 1898), \textit{overruled in part} by Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976) (premising land owner’s liability on foreseeability of injury rather than solely on plaintiff’s status as trespasser, invitee, or licensee).

\textsuperscript{39} \textit{Buch}, 44 A. at 809.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.}
Aiding and Altruism

and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.\footnote{42} Following this logic, the court predictably concluded that the mill owner owed Buch no duty.\footnote{43}

Since these seminal statements rejecting good Samaritanism were first written, there have been repeated calls to modify the no-duty-to-act rule,\footnote{44} yet it still stands.\footnote{45} Against this backdrop of the ruggedly individualistic\footnote{46} no-duty-to-act rule, several exceptions have developed that require action to help others.

\subsection*{B. Special Relationships Between the Non-Actor and the Victim}

The common law imposes a duty to aid wherever a special relationship exists between the potential actor and the victim.\footnote{47}

\begin{itemize}
  \item \footnote{42} Id. at 810.
  \item \footnote{43} Id. at 811.
  \item \footnote{45} See, e.g., Nally v. Grace Community Church, 763 P.2d 948 (Cal. 1988) (reversing appellate court's exception to the general rule that non-therapist counselors are liable for negligent failure to prevent suicide), \textit{cert. denied}, 490 U.S. 1007 (1989); see also Penton v. Clarkson, 633 So. 2d 918 (La. Ct. App. 1994) (holding that a woman who shared an apartment with a man she had been dating for about two years had no duty to act to prevent his suicide following an argument that had lasted several hours and in which the decedent had threatened the defendant, despite the fact that on prior occasions the decedent had both threatened and attempted suicide).
  \item \footnote{46} The historian Frederick Jackson Turner believed that the principal trait of the American character was a rugged individualism, which had been shaped by the frontier experience and the existence of the frontier itself. \textit{Frederick J. Turner, The Frontier in American History} 30, 37, 271–73 (1920); see also Francis H. Bohlen, \textit{The Moral Duty to Aid Others as a Basis of Tort Liability} (pt. 1), 56 U. Pa. L. Rev. 217, 219–20 (1908) (stating that the "fundamental" distinction between misfeasance and nonfeasance is based on an "attitude of extreme individualism").
  \item \footnote{47} See, e.g., \textit{Prosser and Keeton, supra} note 26, § 56 at 376–77; \textit{Restatement (Second) of Torts} §§ 314A–B (1965). These special relationships "include relationships of intimacy and relationships in which the party upon whom the duty is imposed gains economic benefits from the association." Osbeck, \textit{supra} note 44, at 322.
\end{itemize}
Even in the early days of the common law, those who undertook a public calling were obligated to protect their customers. Accordingly, tort law has long imposed an obligation on common carriers to aid their passengers, and on innkeepers to rescue their guests.

Modern tort law also imposes a duty to act on employers and other “caretakers.” The master of a vessel must rescue a sailor in his charge who falls overboard at sea, and a jailer must aid a prisoner. Similarly, a teacher has an obligation to exercise reasonable care to protect her students.

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48. See Prosser and Keeton, supra note 26, § 56, at 373.
49. See, e.g., Yu v. New York, N.H. & H. R.R., 144 A.2d 56, 58 (Conn. 1958); Gladdish v. Southeastern Greyhound Lines, 169 S.W.2d 297, 299 (Ky. 1943); Frederick v. City of Detroit, 121 N.W.2d 918 (Mich. 1963); Restatement (Second) of Torts § 314A(1) (1965); see also Korn v. Tamiami Trail Tours, Inc., 133 S.E.2d 616 (Ga. Ct. App. 1963) (finding duty breached where bus driver knew of passenger's handicap, failed to warn her about step outside bus terminal, and failed to get medical assistance after passenger was injured); Continental S. Lines, Inc. v. Robertson, 133 So. 2d 543 (Miss. 1961) (finding bus company liable where passenger was injured on bus and notified driver, but driver failed to get medical attention at next stop); sources cited in Fowler V. Harper Etc., 3 The Law of Torts § 18.6, at 722 n.21 (2d ed. 1986); cf. Gilstrap v. Amtrak, 998 F.2d 559, 561 (8th Cir. 1993) (enforcing an 80-year-old Washington state precedent that a common carrier's special relationship to its passengers justifies strict vicarious liability for assaults by an employee).
50. Restatement (Second) of Torts § 314A(2) (1965). This obligation may even include protecting a guest from the criminal conduct of a third person. For instance, in Banks v. Hyatt Corp., 722 F.2d 214, 227 (5th Cir. 1984), the court found a hotel liable for the murder of a man on its doorstep because the hotel had failed to provide adequate security. Id. at 227.
51. Restatement (Second) of Torts § 320 (1965) provides that one who takes control of another, under circumstances that deprive the charge of his “normal power of self-protection,” has an obligation to protect the charge from third persons if the custodian knows or should know that she has the ability to control the third person and knows or should know of the opportunity to exercise that power to control. See id. cmt. b (1965); McLeod v. Grant County Sch. Dist. No. 128, 255 P.2d 360, 362 (Wash. 1953) (citing § 320 of the Restatement in holding that plaintiff stated a cause of action against school district for breach of duty arising out of her forcible rape during recess at school).
54. Board of Educ. v. Chaddock, 398 S.E.2d 120, 123 (W. Va. 1990) (holding that a “teacher has a duty to exercise reasonable care to protect students from those injuries which can be reasonably anticipated,” but finding that duty not breached). But see Beach v. University of Utah, 726 P.2d 413 (Utah 1986) (finding no special relationship between university and student during a university-sponsored field trip).
1. Family Relationships, Owners and Occupiers of Land, and Social Hosts and Guests—Family relationships may also impose an obligation to act. The duties of parents to their children and of spouses to each other are fairly clear. Less clear is whether a child has a similar obligation to his parent.

In some circumstances, courts have found a special, duty-triggering relationship between owners and occupiers of land and between social hosts and their guests. In this vein, courts have imposed duties on servers of alcohol, both for business and social purposes, to protect minors who are served as well as persons injured by those served.

One older case may go even further in imposing a duty to act on a landowner-host. In Depue v. Flateau, Depue, a cattle buyer, stopped at Flateau’s farm to inspect some cattle. Flateau invited Depue to stay for supper, but denied Depue’s request to let him spend the night. After dinner, Depue was

57. See Marhoefer v. Nacozy, 2 Cal. Rptr. 2d 466 (Cal. Ct. App. 1991) (finding no special relationship between adult son and mother, but holding that adult son owed parent the care of a reasonable son).
58. See, e.g., Doe v. Dominion Bank of Wash., 963 F.2d 1552 (D.C. Cir. 1992) (landlord and commercial tenant); Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (landlord and tenant); Potter v. First Fed. Sav. & Loan Ass'n, 615 So. 2d 318 (La. 1993) (finding the issue of whether a landlord has a duty to maintain adequate exterior lighting that may have prevented plaintiff’s rape by a third person to be a jury question); Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843 (Mich. 1975) (landlord and tenant); cf. L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334 (Ind. 1942) (finding that store owner has a duty to child whose fingers were stuck in escalator to stop the escalator to prevent aggravation of initial injuries). But see Craig v. A.A.R. Realty Corp., 576 A.2d 688 (Del. Super. Ct. 1989) (finding mall owner not liable for rape of sublessee because non-possessory owner did not exercise control equal to actual management of the mall).
59. See, e.g., Rowland v. Christian, 443 P.2d 561 (Cal. 1968). Although Rowland is discussed most frequently as the leading case rejecting the common law emphasis on the plaintiff’s categorization as a trespasser, licensee, or invitee to define the extent of an owner or occupier’s duty, it was essentially a case where the court recognized a social host’s duty to act to avoid harm to a guest.
61. See, e.g., Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984) (holding host liable where guest was visibly intoxicated).
62. 111 N.W. 1 (Minn. 1907).
63. Id.
overcome by an illness which rendered him unable to care for himself. The Flateaus led Depue out to his wagon, put the reins over his shoulders, and wished him bon voyage.64 Depue was found the following morning almost frozen to death in a snow bank.65 Depue later lost several fingers and otherwise suffered ill health due to the misadventure. In contending that they had no duty to provide Depue accommodations on that ill-fated night, or to otherwise exercise due care on his behalf,66 the Flateaus cited Union Pacific Railway v. Cappier.67 The Depue court, noting that Cappier may state the rule as applied to the good Samaritan, did not think it was applicable to the case before it, stating:

The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.68

In Depue, the court reasoned that the invitation to dinner triggered a duty to act. Although no contractual duty required the Flateaus to do anything, "humanity demanded that they do so."69

Two interesting points may be noted about the Depue decision. First, note the court's reference to, and reliance on, "humanity," a concept that the courts in Cappier and Buch were comfortable preaching,70 but which they completely ignored as a basis for rendering their decisions. Second, the Depue court viewed the duty to act arising out of the host-guest relationship not as an exception to the rule that a person has no duty to act, but rather

64. Id. at 2.
65. Id.
66. Id.
67. 72 P. 281 (Kan. 1903). See supra notes 32–37 and accompanying text.
68. Depue, 111 N.W. at 2.
69. Id. at 3.
70. Cappier, 72 P. at 282; see supra note 37 and accompanying text; Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1897); see supra notes 38–42 and accompanying text.
as a part of the more comprehensive rule that one has a duty to exercise due care whenever injury is foreseeable. The general duty to act reasonably in the light of foreseeable risk trumped the more specific no-duty-to-act rule. Imposition of a particular duty to act on an owner or occupier of land in light of the general duty to act reasonably also is apparent in two cases in which neither plaintiff was a social guest.

In the first of those cases, Soldano v. O'Daniels,71 Villanueva threatened Soldano while they were at Happy Jack's Saloon.72 Another patron went across the street to an inn, owned by O'Daniels, and asked the bartender to either call the police, or allow him to call the police.73 The employee refused both requests. Back at Happy Jack's, Villanueva shot and killed Soldano, whose son filed a wrongful death action against O'Daniels.74 O'Daniels contended that he owed no duty to Soldano.75 The appellate court disagreed. Expressly refusing to find a special relationship, the court said that the individualistic attitude prevalent in no-duty-to-act cases merited reexamination.76 The court considered all relevant factors pointing to a duty to act, including the problem with crime in society, the key role of the phone system in preventing crime, the foreseeability of the injury, the bartender's disregard for human life, the deterrent effect of liability, the presence of insurance, and the minimal burden that would have been imposed had the defendant allowed the good Samaritan to use the phone.77 Although the court noted that it would be impractical to require that a person open her home to allow a stranger to use the telephone to report an emergency, the court distinguished a business from a private home and imposed a duty on the business owner to allow emergency telephone access in the public portion of the business.78 The

72. Id. at 312.
73. Id.
74. Id. at 311.
75. Id. at 313.
76. Id. at 315.
77. Id. at 315–16.
78. Id. at 316. The court analogized to RESTATEMENT (SECOND) OF TORTS § 327 (1965), which imposes a duty upon a third person not to prevent assistance to an injured person. 190 Cal. Rptr. at 316. But see Andrews v. Wells, 251 Cal. Rptr. 344 (Cal. Ct. App. 1988) (holding that a bartender and his employer had no duty to act on an inebriated customer's request to arrange transportation home for him, where the customer died after being hit by a car as he crossed a street leaving the defendant's bar).
case thus presented sufficient factual issues to go to a jury.\textsuperscript{79}

In another case, \textit{Ploof v. Putnam},\textsuperscript{80} a sudden storm forced a family to moor their boat to a dock owned by the defendant.\textsuperscript{81} The defendant's servant untied the vessel which, along with its contents, was destroyed by the storm.\textsuperscript{82} The family members suffered personal injury and sued, alleging trespass and violation of a duty to allow the plaintiffs to moor at the dock and remain there until the storm passed.\textsuperscript{83} \textit{Ploof} is often treated as a necessity case.\textsuperscript{84} Underlying the necessity holding, however, is an implicit holding that a land owner may have a duty to act reasonably to aid the victim of an emergency.

The Vermont Supreme Court found that mooring the vessel at the dock was necessary under the circumstances.\textsuperscript{85} Although necessity is a defense to an action for trespass,\textsuperscript{86} in \textit{Ploof} the court used necessity for another purpose: to impose a duty on the defendant to open his land to the plaintiffs. In essence, the necessity of the situation imposed an obligation on the defendant to be a good Samaritan.

2. Joint Adventurers—Another relationship which may trigger a duty to act is that between joint adventurers. In \textit{Farwell v. Keaton},\textsuperscript{87} two teenage boys followed two girls to a drive-in restaurant, only to be chased from the restaurant by the girls' friends.\textsuperscript{88} One of the boys, Siegrist, escaped, but the other, Farwell, was caught and beaten.\textsuperscript{89} Siegrist put ice on Farwell's head and drove him around for a few hours while Farwell slept in the back seat of the car.\textsuperscript{90} Finally, Siegrist

\begin{itemize}
\item \textsuperscript{79} \textit{Soldano}, 190 Cal. Rptr. at 318.
\item \textsuperscript{80} 71 A. 188 (Vt. 1908).
\item \textsuperscript{81} \textit{Id.} at 188.
\item \textsuperscript{82} \textit{Id.} at 188–89.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} The defendant in \textit{Ploof} did not argue that the plaintiff had no right to trespass. Instead he argued first that there was no necessity because there may have been natural objects to which the plaintiff could have moored instead of defendant's dock, and secondly that his servant was acting outside the scope of employment in unmooring the plaintiffs' vessel. \textit{Id.} at 189–90. On necessity in general and on \textit{Ploof} in particular, see John P. Finan & John Ritson, \textit{Tortious Necessity; The Privileged Defense}, 26 \textit{AKRON L. REV.} 1, 3–4 (1992).
\item \textsuperscript{85} \textit{Id.} at 189.
\item \textsuperscript{86} \textit{PROSSER AND KEETON, supra} note 26, § 24, at 147; \textit{see also} cases cited in \textit{Ploof}, 71 A. at 189.
\item \textsuperscript{87} 240 N.W.2d 217 (Mich. 1976).
\item \textsuperscript{88} \textit{Id.} at 219.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\end{itemize}
parked the car at Farwell's grandparents' house and left. Farwell died from his injuries three days later. Farwell's father sued Siegrist, contending that Siegrist should have taken Farwell to the hospital or otherwise notified someone of Farwell's condition. The Michigan Supreme Court affirmed a $15,000 verdict in the father's favor. A plurality found that the two boys were "companions engaged in a common undertaking." As joint adventurers, they had a special relationship to one another that triggered a duty to aid.

A different court reached a similar conclusion in Ocatillo West Joint Venture v. Superior Court. After Easley convinced employees at a golf course to give him the keys to his intoxicated friend's car, and assured them that he would drive his friend home, Easley gave the intoxicated man his keys. The intoxicated driver had an accident and died from his injuries. The appellate court found that sections 323 and 324 of the Restatement (Second) of Torts suggested that Easley might have assumed a duty to his intoxicated friend.

3. Doctor-Patient Relationship: Duty to Disclose—In several cases, courts have held that doctors owe a patient a duty to reveal the results of a medical examination, even if there is no contractual relationship between the doctor and the patient. The typical scenario involves a preemployment physical examination in which the doctor fails to discover or disclose some adverse health condition. Later, when the patient discovers the now advanced condition, he sues the doctor or employer. Courts have recognized the doctor's and employer's duty to disclose what the physical examination reasonably should have revealed.

91. Id.
92. Id.
93. Id.
94. Id. at 225.
95. Id. at 222.
96. Id.
98. Id. at 654.
99. Id.
100. RESTATEMENT (SECOND) OF TORTS §§ 323, 324 (1965) (imposing duty of reasonable care on one who protects or takes charge of one who is helpless or in need of assistance).
103. See supra note 102.
Professor Shapo believes that there ought to be a duty to act whenever one person has power over another so that the first person knows that the other's "physical security is effectively in his hands... [P]ower gives control, which in turn confers duty, the breach of which is conventionally described as negligence."\textsuperscript{104} Shapo's rationale applies to physical exam cases, because the doctor has power over the patient because she possesses information concerning the patient's health.\textsuperscript{105}

The special relationships that I have discussed are by no means exhaustive. The number of special relationships that courts may recognize seems limited only by a lawyer's ingenuity and a court's willingness to reinterpret traditional rules. Some special relationships, like that between an owner or occupier of land and someone on the land,\textsuperscript{106} indicate a general willingness to expand the exceptions to the traditional no-duty-to-act rule.

\section*{C. A Special Relationship Between the Non-Actor and the Perpetrator of the Wrong}

Consistent with the general rule that one has no duty to aid another who is lying helpless, one has no general duty to prevent a person from injuring another.\textsuperscript{107} Where a bystander

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\item \textsuperscript{104} Marshall S. Shapo, The Duty to Act: Tort Law, Power & Public Policy 8 (1977).
\item \textsuperscript{105} This power analysis also applies to a Louisiana case involving the discovery of the identity of a manufacturer. In Devore v. Hobart Mfg. Co., 367 So. 2d 836 (La. 1979), the plaintiff sued the owner of a boiler that had injured her for providing her with the wrong name of the boiler's manufacturer. \textit{Id.} at 837. By the time she had learned the identity of the true manufacturer, her claim was barred by the prescriptive period. \textit{Id.} Nevertheless, the court dismissed the case against the owner, finding that the defendant could not have known that the plaintiff's attorney would rely on the information without conducting further investigation or discovery. \textit{Id.} at 839. The owner had power because of its information and its possession of the boiler, but the court imposed no duty on it. \textit{Id.}; see also Reid v. State Farm Mut. Auto. Ins. Co., 218 Cal. Rptr. 913 (Cal. Ct. App. 1985) (refusing to hold an insurer liable for the destruction of the vehicle that the plaintiff was driving at the time of an accident, even though the insurer had taken possession of the car and destroyed it, because no special relationship existed between insurer and plaintiff). These cases do not refute the viability of Professor Shapo's theory, but they do demonstrate that it has not been universally adopted.
\item \textsuperscript{106} See supra note 58 and accompanying text.
\item \textsuperscript{107} The Restatement (Second) of Torts provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between
has a special relationship with the person posing a risk, however, and the bystander has the ability to control that person, the bystander may be required to prevent injury.\textsuperscript{108} A court applying this rule focuses on the relationship between the non-actor and the actual perpetrator of the wrong, rather than on the relationship between the non-actor and the victim.

The paradigmatic relationship triggering a duty to control another is the parent-child relationship. Accordingly, the Restatement (Second) of Torts provides that a parent must control a minor child to prevent intentional or negligent injury to a third person if the parent knows, or should know, that he can control the child and knows, or should know, of the "necessity and opportunity for exercising such control."\textsuperscript{109}

A similar duty falls upon a master to control the conduct of a servant\textsuperscript{110} and upon a property owner to control the conduct of her licensee.\textsuperscript{111} More generally, the Restatement provides that anyone who has charge of a person known to have dangerous propensities has an obligation to control that person.\textsuperscript{112} Thus, a mental health professional may have a duty to warn those toward whom a patient expresses an intent to harm.\textsuperscript{113}

\textsuperscript{108} Id.


\textsuperscript{110} Restatement (Second) of Torts § 317 (1965).

\textsuperscript{111} Id. § 318.

\textsuperscript{112} Id. § 319. Such persons may include operators of hospitals or mental asylums, \textit{id.} at illus. 1, 2, jailers, PROSSER AND KEETON, supra note 26, at 380–85, and custodians of children, \textit{id.} at 383.

\textsuperscript{113} Perhaps the most publicized case in this genre is Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976), in which an out-patient at the Berkeley Health Center allegedly told his psychologist that he intended to kill a young woman who had spurned his romantic overtures. \textit{Id.} at 339. The patient later killed the woman. \textit{Id.} at 341. The California Supreme Court held that the health care providers owed a duty to the victim because of their relationship with the murderer. \textit{Id.} at 343–51. Some states have defined legislatively the scope of the duty of health care providers regarding a patient's actions. \textit{E.g.}, LA. REV. STAT. ANN. § 9:2800.2 (West 1991 & Supp. 1994).
Under the common law, one historical justification for holding a party liable for misfeasance but not for nonfeasance was the difficulty in thinking of nonfeasance as causing injury.\textsuperscript{114} If the defendant initially caused the underlying risk of injury, however, the defendant's later nonfeasance in failing to aid the victim would not prevent a court from imposing a duty to act. Thus, one who exposes another to an unreasonable risk of harm must exercise ordinary care to protect the other from that risk.\textsuperscript{115} Likewise, one who negligently injures another must exercise ordinary care to aid him after the initial injuries.\textsuperscript{116} Despite some horrific early cases to the contrary,\textsuperscript{117} currently one who innocently injures another must aid the victim.\textsuperscript{118}

Consistent with the innocent injurer's duty to aid, some states have passed hit-and-run statutes making it a crime for a driver involved in a car accident to leave the scene even if she did not cause the accident.\textsuperscript{119} These statutes extend the duty to aid, requiring a driver involved in the accident to "render . . . reasonable assistance"\textsuperscript{120} to any person injured,\textsuperscript{121} presumably even the person at fault.\textsuperscript{122} In the same vein, a

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\item \textsuperscript{114} See Epstein, supra note 11, at 52–53. Causation is an essential element of any tort action. Prosser and Keeton, supra note 26, § 41, at 263.
\item \textsuperscript{115} Restatement (Second) of Torts § 321 (1965).
\item \textsuperscript{116} Prosser and Keeton, supra note 26, § 56, at 377.
\item \textsuperscript{117} E.g., Union Pac. R.R. v. Cappier, 72 P. 281 (Kan. 1903), discussed at supra notes 32–37 and accompanying text; Griswold v. Boston & Me. R.R., 67 N.E. 354 (Mass. 1903) (finding that railroad had no legal duty to help a girl struck by a train, where the railroad was not at fault in injuring her), overruled by Pridgen v. Boston Hous. Auth., 308 N.E.2d 467 (Mass. 1974).
\item \textsuperscript{118} Restatement (Second) of Torts § 322 (1965); Prosser and Keeton, supra note 26, § 56, at 377 & nn.45–46; see, e.g., Tubbs v. Argus, 225 N.E.2d 841 (Ind. Ct. App. 1967) (finding driver of car involved in an auto accident had duty to help injured passenger, despite state guest statute that limited driver's liability for injuries to passenger sustained in initial accident); cases cited in Harper et al., supra note 49, at 721 n.16.
\item Professor Epstein suggests a strict liability approach, under which a person who negligently or innocently harms another is liable for the failure to rescue. Epstein, supra note 11, at 14.
\item \textsuperscript{120} Cal. Veh. Code § 20003 (West 1971 & Supp. 1994).
\item \textsuperscript{121} Id.
\item \textsuperscript{122} See also La. Rev. Stat. Ann. § 14:100 (West Supp. 1994). Of course, leaving the scene of an emergency does not result in civil liability if stopping and helping would have done no good, because leaving the scene is not then the cause-in-fact of plaintiff's injuries. E.g., Shroyer v. Grush, 555 So. 2d 534 (La. Ct. App. 1989).
person may not intentionally or negligently prevent someone else from rendering assistance to another. For example, the Restatement states that a person may not wrongfully obstruct a highway and thereby prevent someone from rendering aid to one in need.

E. Assumption of Duty

Tort law also imposes a duty of reasonable care where the actor has already taken some steps to aid an injured person. Once the actor assumes a duty, he must exercise reasonable care on behalf of the injured person.

1. When Does One Assume a Duty?—What is a sufficient undertaking to trigger a tort duty? It would seem that swimming out to a drowning person would constitute a sufficient undertaking. But what about a promise to aid, such as saying "I'll swim out to save you"? If the promise constituted an undertaking unsupported by consideration, then, as noted previously, tort law would be enforcing indirectly promises unenforceable in contract. A number of modern courts, however, perhaps striving to see that justice is done, have found that promises coupled with some minor reliance constitute an enforceable assumption of a duty to aid another.

One rather general undertaking which has resulted in the imposition of a duty to aid is a hospital's operation of an emergency room. The operation of the emergency room, in

124. Id. § 328.
127. See supra notes 28-29 and accompanying text. But see supra notes 30-31 and accompanying text (noting that promissory estoppel doctrine has eroded unenforceability claims).
128. E.g., Morgan v. Yuba County, 41 Cal. Rptr. 508 (Cal. Dist. Ct. App. 1964) (finding actionable a sheriff's failure to honor his promise to warn the witness to a crime of the criminal's release on bail, resulting in the witness's death); Marsalis v. La Salle, 94 So. 2d 120 (La. Ct. App. 1957) (allowing recovery to cat bite victim who had to undergo unnecessary rabies treatment after owner, who had promised to detain the cat for the purpose of determining whether it was rabid, negligently let the cat escape); Crowley v. Spivey, 329 S.E.2d 774 (S.C. Ct. App. 1985) (finding duty breached where a paranoid schizophrenic woman shot her children after her parents had promised her husband they would supervise her while the couple's children were with her).
and of itself, may impose a duty on the hospital to provide treatment even if the prospective patient cannot pay for the treatment. In one case, a court found that the maintenance of an emergency room, the public’s reliance on a hospital’s provision of the service, and the hospital’s refusal to treat were analogous to the negligent termination of gratuitous services that, under Restatement (Second) of Torts § 323, results in tort liability.

2. When May One Who Has Assumed a Duty Terminate Rescue Efforts?—Once an actor has assumed a duty, she may terminate her efforts short of actual, successful rescue if she does not leave the victim worse off, either by increasing his peril or by inducing the victim to forego other opportunities for help in reliance on the actor’s undertaking. Some courts, however, have imposed liability even though the rescuer has met these criteria.

F. Some Curious Incentives: Rules to Fix Rules

Cumulatively, the rules discussed so far result in a rather odd set of incentives. The lack of a general legal duty to act provides a person with no incentive to help another. But if one assumes a duty by helping, a subsequent failure to exercise ordinary care will result in liability for negligence. The rules actually provide a disincentive to act. In turn, other rules were formulated, in part perhaps to mitigate this disincentive.

One way the common law has tried to encourage people to act is the rescue doctrine. Under the rescue doctrine, a tortfeasor who intentionally or negligently places a person at risk maintains a duty to the original victim and to any rescuer

133. PROSSER AND KEETON, supra note 26, § 56 at 381-82; cf. Bartlett v. Taylor, 174 S.W.2d 844 (Mo. 1943) (affirming landlord’s liability for repairs undertaken voluntarily but negligently).
134. See HARPER ET AL., supra note 49, at 713-15; PROSSER AND KEETON, supra note 26, § 56 at 380; supra Part I.E.
exercising reasonable care under the circumstances of the emergency. European civil law has the doctrine of *negotiorum gestio*, which allows a rescuer to recover from the rescued person certain expenses incurred in rescue. American case law evinces some similar cases. For example, in *Vincent v. Lake Erie Transportation Co.*, a court ordered the defendant to pay the plaintiff for damage to the plaintiff's dock incurred when the defendant moored there out of necessity during a terrible storm. Generally, however, an injured rescuer will not recover in tort unless she can find a tortfeasor responsible for the victim's injury. Therefore, the rescue doctrine, even assuming laypeople are aware of it, is only a band-aid: it applies only if someone else placed the victim at risk, but does not impose liability on anyone for not acting.

The law's incentives not to rescue may conflict with one's moral sense. The tension would be more than psychological for the physician whose professional credo impels him to treat the injured in emergencies, but whose lawyer warns that helping may result in liability for malpractice.

To assuage this tension, doctors have succeeded in having good Samaritan statutes passed in a number of jurisdictions. These statutes provide limited or absolute immunity to a person providing aid to an injured person at the scene of an emergency. The effect of these statutes is that someone aiding at an emergency may not be liable even though negligent. This result is anomalous because the due care standard in an emergency takes account of emergency circumstances and thus would protect the rescuer adequately. Predictably, courts have interpreted these statutes rather narrowly.

137. 124 N.W. 221 (Minn. 1910).
138. Id. at 222.
139. Of course, the victim himself is considered a tortfeasor if he negligently exposed himself to risk and a rescuer is injured trying to rescue him. *Gambino v. Lubel*, 190 So. 2d 152, 157 (La. Ct. App. 1966). On the use of rewards as incentives to rescue, see *Landes & Posner*, supra note 52, at 85–93; *Levmore*, supra note 14.
142. *E.g.*, *Willard v. Mayor of Vicksburg*, 571 So. 2d 972 (Miss. 1990) (holding that the Mississippi good Samaritan statute does not provide absolute immunity to those under a preexisting duty to rescue, such as an ambulance driver); *Frawley v. City of Lake Worth*, 603 So. 2d 1327 (Fla. Dist. Ct. App. 1992) (denying summary judgment where a police officer might have acted unreasonably in rescuing a truck driver).
concluding that such statutes were designed to encourage action by one who otherwise had no duty to act in an emergency.\textsuperscript{143} As a result, the courts have held that a defendant who had a preexisting duty to help the plaintiff could not escape liability under a good Samaritan statute.\textsuperscript{144}

Thus American law has an odd assortment of tort rules. The primary rule is the general rule that one has no duty to help another. Compounding this rule's lack of incentive toward action is the disincentive of the rule holding one who starts to assist liable for negligent actions. The rescue doctrine is only a partial solution in cases where someone's fault has placed the victim at risk. While the no-duty-to-act rule remains, we have seen several jurisprudential exceptions, most notably those based on special relationships between the rescuer and the rescued and those based on the rescuer having caused the initial injury. Some cases have been squeezed into a traditional exception, despite an imperfect fit.\textsuperscript{145}

\textbf{G. Legislative Responses and a Summary of Scholars}

Some civil law countries have had statutes imposing a duty to act, enforceable either criminally or civilly, since at least World War II.\textsuperscript{146} Three states, Vermont,\textsuperscript{147} Minnesota,\textsuperscript{148} and

\begin{thebibliography}{99}
\item \textsuperscript{143} E.g., Willard, 571 So. 2d at 974.
\item \textsuperscript{144} E.g., Sims v. General Tel. & Elec., 815 P.2d 151, 157 (Nev. 1991) (finding a building owner had a preexisting duty to warn a janitor of a dangerous machine); Praet v. Borough of Sayreville, 527 A.2d 486 (N.J. Super. Ct. App. Div. 1987) (finding police had a preexisting duty to provide emergency aid).
\item \textsuperscript{145} For a similar, more extensive discussion of the general rule's erosion see Leonard, supra note 26, at 840–53.
\item \textsuperscript{146} See generally Aleksander W. Rudzinski, The Duty to Rescue: A Comparative Analysis, in THE GOOD SAMARITAN AND THE LAW, supra note 44, at 91 (discussing such a duty in 15 European countries); André Tunc, The Volunteer and the Good Samaritan, in THE GOOD SAMARITAN AND THE LAW, supra note 44, at 43 (discussing good Samaritan laws in France); Kristin A. DeKuiper, Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue, 1976 UTAH L. REV. 529, 537 (discussing the 1964 Czechoslovak Civil Code, "the first broad statutory use of tort law to mandate good Samaritan behavior," as well as the law in the former Soviet Union); Ferdinand J.M. Feldbrugge, Good and Bad Samaritans: A Comparative Study of Criminal Law Provisions Concerning Failure to Rescue, 14 AM. J. COMP. L. 630 (1966) (surveying European, Russian, Ethiopian, and Icelandic criminal codes); Note, The Failure to Rescue: A Comparative Study, 52 COLUM. L. REV. 631 (1952) (discussing Soviet and French law).
\item \textsuperscript{147} VT. STAT. ANN. tit. 12, § 519 (1973). Vermont's duty arises when a person knows that another is exposed to grave physical harm and the person can render
\end{thebibliography}
Rhode Island, have enacted statutes which make the failure to provide reasonable assistance to one in distress a misdemeanor. Seven states, Colorado, Florida, Massachusetts, Ohio, Rhode Island, Washington, and assistance both without danger to herself and without interference with important duties owed to others. Id. § 519(a). A person who complies with the statutory duty is not liable in a civil suit unless she is grossly negligent or she expects to receive remuneration. Id. § 519(b). Violation of the statute exposes one to a fine of up to $100. Id. § 519(c). For a general discussion of the Vermont statute and its potential for tort liability see Marc A. Franklin, Vermont Requires Rescue: A Comment, 25 STAN. L. REV. 51 (1972); see generally Lon T. McClintock, Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach, 7 VT. L. REV. 143 (1982).

148. MINN. STAT. ANN. § 604.05 (West 1988 & Supp. 1994). Minnesota imposes a duty to assist at an emergency on any person who knows that another person is exposed to or has suffered grave physical harm when the person can render assistance without danger to himself or others. Id. Anyone who acts at the scene of an emergency without expecting remuneration is immune from civil liability unless they act willfully, wantonly, or recklessly. Id. § 604.05(2). The rescuer is not immune if he owes a preexisting duty to the plaintiff. Tiedeman ex rel. Tiedeman v. Morgan, 435 N.W.2d 86 (Minn. Ct. App. 1989), (holding that homeowners owed a duty of care to their daughter's 17-year-old boyfriend who became ill at their home and whom they knew had undergone heart surgery). Violation of the statute is a misdemeanor. MINN. STAT. ANN. § 604.05(1) (1988). The same statute imposes a duty on professionals to report the abuse of "vulnerable adults" in their charge. Id. § 626.557.

149. R.I. GEN. LAWS § 11-56-1 (Supp. 1993). The statute imposes a duty to aid on anyone at the scene of an emergency who, without danger to herself, can give reasonable assistance to another in grave physical harm. Id.

150. COLO. REV. STAT. § 18-8-115 (1986). The statute imposes no sanction for a violation but grants immunity from civil liability for disclosure in certain circumstances. Id.

151. FLA. STAT. ANN. ch. 794.027 (Harrison 1991). The statute provides that a person who is not a close relative of the offender or victim and who witnesses a sexual battery must seek assistance for the victim by reporting the offense to a law enforcement officer if the person has reasonable grounds to believe he has observed the commission of the offense and if the person would not be unreasonably exposed to any threat of physical violence for seeking the assistance. Id.

152. MASS. ANN. LAWS ch. 268, § 40 (Law. Co-op. 1992). The statute imposes a duty to report to a law enforcement official a rape, aggravated rape, murder, manslaughter, or armed robbery as soon as is reasonably practicable. Id. The statute applies only to a person at the scene of the crime who knows that another is the victim of one of the enumerated crimes and can make the report "without danger or peril to himself or others." Id.

153. OHIO REV. CODE ANN. § 2921.22(A) (Baldwin 1992). The statute provides that a person who helps in good faith to report a sexual assault is immune from civil liability. Id. § 2921.22(A). (Baldwin 1992). The statute provides that a person who knows a felony has been or is being committed shall report it to law enforcement authorities. Id.

154. R.I. GEN. LAWS §§ 11-37-3.1 to 3.4 (Supp. 1993). A person who helps in good faith to report a sexual assault is immune from liability. Id. § 11-37-3.4. No doubt this would include immunity from liability to an alleged assailter arising out of reporting the assault, as well as immunity from liability to the assaulted victim for not doing more. Note that Rhode Island requires one to report a sexual assault, but not a murder. See Osbeck, supra note 47, at 318 n.13 (questioning the logic of such a distinction).

155. WASH. REV. CODE ANN. § 9.69.100 (West 1988) provides that anyone who witnesses the commission of an array of crimes denominated as violent offenses, id. § 9.69.100(1)(a), a sexual offense or attempted sexual offense against a child, id.
Wisconsin, have adopted laws requiring a person to report certain crimes. Although Professor D'Amato finds it desirable to impose a limited obligation to act under the criminal law but not under the civil law, other legal scholars have called for a tort duty to rescue, at least under some circumstances. Others, like Epstein, defend the no-duty rule. Before turning back to that debate and how recent psychological studies might impact upon it, however, let me take a short detour into the worlds of literature, philosophy, and mythology.

\[\text{§ 9.69.100(1)(b), or an assault against a child that appears likely to cause substantial bodily harm to the child, id. § 9.69.100(1)(c), must notify one of a number of appropriate enforcement authorities. See WASH. REV. CODE ANN. § 9.94A.030(35) (West Supp. 1994) for the definition of violent offense.} \]

156. WIS. STAT. ANN. § 940.34(2) (West Supp. 1993). The statute provides that a person who knows that a crime exposing the victim to bodily harm is being committed shall summon or provide assistance. Id.


159. E.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 292–93 (J.H. Burns & H.L.A. Hart eds., 1970) (arguing for a duty to rescue under certain circumstances); James B. Ames, Law and Morals, 22 HARV. L. REV. 92 (1908), reprinted in THE GOOD SAMARITAN AND THE LAW, supra note 44, at 1, 20 (calling for a duty to engage in easy rescues); Wallace M. Rudolph, The Duty to Act: A Proposed Rule, 44 NEB. L. REV. 499 (1965), reprinted in THE GOOD SAMARITAN AND THE LAW, supra note 44, at 243 (proposing a model law imposing a duty to act); Weinrib, supra note 27, at 251 (arguing in favor of a judicially created general duty of easy rescue); see also SHapo, supra note 104, at 8 (theorizing that existing duties to aid are based on certain relationships of power); Leonard, supra note 26, at 810, 862–68 (arguing that the per se no-duty-to-act rule ought to be replaced by a duty based on a multifactor analysis); Levmore, supra note 14, at 879 (noting that the common law distinction between omissions and commissions is vulnerable to attack); id. at 929–39 (predicting the development of a more general duty to rescue); Robert J. Lipkin, Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue, 31 UCLA L. REV. 252, 287–93 (1983) (justifying a general duty of easy rescue on individualistic grounds); Warren P. Miller & Michael A. Zimmerman, The Good Samaritan Act of 1966: A Proposal, in THE GOOD SAMARITAN AND THE LAW, supra note 44, at 273; Osbeck, supra note 47, at 319, 343–47 (calling for a duty to notify, rather than a duty to rescue).

160. See Epstein, supra note 11, at 51–68 (defending the rule that there is no duty to rescue).

161. I include in my discussion of mythology what some call religion.
II. CAMUS, NICK NOLTE, ST. LUKE, ZORBA, BODHISATTVAS, SCHOPENHAUER AND THE MYSTICS

In this Part, I note generally some of the extra-legal discussions of the duty to act or rescue, before turning in the next Part to some input from the fields of science and psychology. Using the word "myth" in its broadest sense, as a story that informs or shapes a culture, this is the mythological part of my discussion. A prevalent theme in literature and mythology is the call to compassionate, altruistic action. Indeed, the philosopher Schopenhauer saw a direct connection between adopting a compassionate, other-directed perspective and rescue.¹⁶²

A. Art and Action

In *The Fall*, Camus paints a horrific picture of an ex-lawyer, Jean-Baptiste Clamence, who has left his native France and taken up residence in Amsterdam. In France, Clamence was successful in every aspect of life—society, romance, and the practice of law, specializing in what he calls "noble cases."¹⁶³ Clamence, whose voice is the only one heard during the novel, characterizes himself as having been generous when he was practicing law in France.¹⁶⁴ But it became apparent to Clamence that his generosity stemmed not from any real concern for others, but solely from what he gained from it.¹⁶⁵ In his relations with the world he was a play actor. He pretended to be noble because of what being noble did for him. Clamence was a selfish altruist. Clamence recalls a night when he was walking across the Seine:

I was returning to the Left Bank and my home by way of the Pont Royal. It was an hour past midnight, a fine rain was falling, a drizzle rather, that scattered the few people on the streets. I had just left a mistress, who was surely

¹⁶⁴. Id. at 20–22.
¹⁶⁵. Id. at 34–35 (theorizing that people commiserate with the survivor of a tragedy for amusement and self-assurance).
already asleep. I was enjoying that walk, a little numbed, my body calmed and irrigated by a flow of blood gentle as the falling rain. On the bridge I passed behind a figure leaning over the railing and seeming to stare at the river. On closer view, I made out a slim young woman dressed in black. The back of her neck, cool and damp between her dark hair and coat collar, stirred me. But I went on after a moment's hesitation. At the end of the bridge I followed the quays toward Saint-Michel, where I lived. I had already gone some fifty yards when I heard the sound—which, despite the distance, seemed dreadfully loud in the midnight silence—of a body striking the water. I stopped short, but without turning around. Almost at once I heard a cry, repeated several times, which was going downstream; then it suddenly ceased. The silence that followed, as the night suddenly stood still, seemed interminable. I wanted to run and yet didn't stir. I was trembling, I believe from cold and shock. I told myself that I had to be quick and I felt an irresistible weakness steal over me. I have forgotten what I thought then. "Too late. Too far..." or something of the sort. I was still listening as I stood motionless. Then, slowly under the rain, I went away. I informed no one.\textsuperscript{166}

After that episode, Clamence's practice and his relationships with others took a turn for the worse.\textsuperscript{167} Ultimately he found himself in a portside bar in Amsterdam where he acted as a judge penitent—one who first engages in public confession and later judges his listener's confession.\textsuperscript{168} In his confession Clamence would adapt his words to his listener so that his portrait of himself would become a mirror for his listener.\textsuperscript{169} The "I" of the storyteller would become the "we" of the storyteller, the listener,\textsuperscript{170} and the reader. The listener would begin to judge himself, then tell his story to Clamence the penitent, who thus became the judge.\textsuperscript{171} In short, Camus suggests that we are all guilty. We are all also judges—of

\begin{itemize}
\item \textsuperscript{166} Id. at 69–70.
\item \textsuperscript{167} Id. at 73, 78–80.
\item \textsuperscript{168} Id. at 138–42.
\item \textsuperscript{169} Id. at 139–40.
\item \textsuperscript{170} Id. at 140.
\item \textsuperscript{171} Id. at 140–41.
\end{itemize}
ourselves, of others, and of our culture. Clamence’s action, or inaction, is symbolic of our own. 172

Would Clamence’s rescue of the woman, or at least his attempt, have improved his life? Who knows? But the fact that Camus should take Clamence’s failure to rescue as a symbol for a society’s guilt testifies to the power of the image of inaction. It is a sad comment on the effects of the failure to act.

Of course, the rescuer is not always better off for his effort. In the film Bananas, Woody Allen’s character, Fielding Mellish, attempts to defend a woman being attacked on a New York subway by pushing her assailants off the train as the doors close. 173 Unfortunately, the subway doors reopen and the hoodlums refocus their ire on Mellish. Even beneficial action is often an unpleasant experience for the charitable actor. That is the feel, if not the message, of the film Down and Out in Beverly Hills. 174 In that film a family on the edge of its culture saves a homeless man, played by Nick Nolte, who had attempted to drown himself in their swimming pool. Ironically, by the end of the film it is less than clear just who is rescuing whom.

B. Religion and the Rescuer

1. The Good Samaritan—As literature has approached the question of rescue, so has religion. The paradigmatic Christian story of helping behavior appears in the New Testament,


Camus shows us the inside story of how the failure to come to a stranger’s aid turns out to be only the objective symbol of a life which is an inward mockery of itself. The central figure—incidentally, he is a lawyer—is first called to himself by his failure to save another human being from death; this failure soon reveals itself to him as only the outward expression of a constant but covert betrayal of others; and this constant betrayal of others he discovers to be only an aspect of an inward self-betrayal. Camus presents and justifies his narrative in human terms, but he explicitly connects it with traditional religious teaching of damnation and salvation: the lawyer’s living Hell is presented symbolically as Dante’s inner circle of Hell.

Id. at 219.

173. BANANAS (United Artists 1971).

174. DOWN AND OUT IN BEVERLY HILLS (Touchstone Films 1986).
where Jesus tells the parable of the good Samaritan.\textsuperscript{175} Interestingly enough, as in Camus's \textit{The Fall}, a lawyer plays a prominent role in this parable. As St. Luke tells the story, the lawyer asked Jesus: "Teacher, what shall I do to inherit eternal life?"\textsuperscript{176} Dealing with the lawyer as the law student is accustomed to being dealt with, Jesus answered with a question: "What is written in the law? How do you read?"\textsuperscript{177} The lawyer, obviously prepared for this line of inquiry, adroitly answered: "You shall love the Lord your God with all your heart, with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself."\textsuperscript{178} Jesus praised the lawyer's answer.\textsuperscript{179} Nevertheless, this lawyer, like any lawyer, saw another issue lurking in this most difficult question, an issue that has continued to plague us. He asked Jesus, "And who is my neighbor?"\textsuperscript{180} Jesus' answer was the parable of the good Samaritan.

"A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him, and departed, leaving him half dead. Now by chance a priest was going down that road; and when he saw him he passed by on the other side."\textsuperscript{181} Next, along came a Levite, who, like the priest, passed by.\textsuperscript{182}

But a Samaritan, as he journeyed, came to where he was; and when he saw him, he had compassion, and went to him and bound up his wounds, pouring on oil and wine; then he set him on his own beast and brought him to an inn, and took care of him.\textsuperscript{183}

\textsuperscript{175} \textit{Luke} 10:25-37. Indeed, as noted earlier, the title of the paradigm has invaded the legal scheme, lending its name to various statutes exculpating actors at emergency scenes from liability for negligence.

\textsuperscript{176} \textit{Id.} 10:25.

\textsuperscript{177} \textit{Id.} 10:26.

\textsuperscript{178} \textit{Id.} 10:28. Indeed, the lawyer's answer in Luke is the same answer Jesus himself provided when others asked him the same question in two of the other three Gospels. \textit{See} \textit{Mark} 12:28-34; \textit{Matthew} 22:34-40 (answering inquiry of a lawyer as to what is the greatest commandment). The fact a lawyer is involved in two of the teachings of this message is rather ironic in light of Anglo-American law's failure to impose a duty to aid.

\textsuperscript{179} \textit{Luke} 10:28.

\textsuperscript{180} \textit{Id.} 10:29.

\textsuperscript{181} \textit{Id.} 10:30-31.

\textsuperscript{182} \textit{Id.} 10:32.

\textsuperscript{183} \textit{Id.} 10:33-34.
The next day when the Samaritan left the inn he gave additional funds to the innkeeper to care for the injured man, promising to pay even more, if necessary, upon his return.\(^{184}\)

After telling this story, Jesus then asked, "Which of these three, do you think, proved neighbor to the man who fell among the robbers?\(^{185}\) The lawyer answered: "The one who showed mercy on him,"\(^{186}\) to which Jesus responded: "Go and do likewise."\(^{187}\) Our neighbors thus include people we do not even know, people who are not from our tribe, people who, from all appearances, we might even take to be our enemies.

Before moving on, however, the story presents one dilemma that deserves attention. Recall that the lawyer had initially asked: "Teacher, what shall I do to inherit eternal life?\(^{188}\) The problem with which I am concerned is this: if I love and help my neighbors, using that term most broadly, as I love myself, but I do it to secure eternal "life" for myself, am I loving and helping for the right reason? Put differently, do I really love my neighbor if I act to benefit myself? In loving others to assure my eternal salvation, am I ultimately being selfish? Are my neighbors to me like Clamence's noble cases were to him—food for my own insatiable self-interest? Put in Batson's terms, if I love my neighbor for my own reward, my motivations are egoistic, but if I help my neighbor out of a primary desire to improve her condition, I am acting altruistically.\(^{189}\)

The key to understanding altruism may be compassion. Unlike Clamence, the Samaritan had compassion, true concern for himself.\(^{190}\)

2. Zorba and the Boddhisattva—The concept of compassion is by no means unique to Western religion. According to Buddhism, "All life is suffering."\(^{191}\) Zorba the Greek expressed the same sympathy more concretely:

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184. Id. 10:35.
185. Id. 10:36.
186. Id. 10:37.
187. Id.
188. Id. 10:25.
189. See infra Parts III.C. and III.D.
190. Of course, perhaps the hope of eternal salvation is the carrot Christianity holds out to induce altruistic action. Thus conceived, Christianity's hope is not unlike the hortatory effect of law: it is designed to induce certain behavior.
191. This is from the Buddha's sermon on the Eightfold Path cited in JOSEPH CAMPBELL, THE MASKS OF THE GODS: OCCIDENTAL MYTHOLOGY 247 (1964) [hereinafter MASKS].
Whether a man's good or bad, I'm sorry for him, for all of 'em. The sight of a man just rends my insides, even if I act as though I don't care a damn! There he is, poor devil, I think; he also eats and drinks and makes love, and is frightened, whoever he is; he has his God and his devil just the same, and he'll peg out and lie as stiff as a board beneath the ground and be food for worms, just the same. Poor devil! We're all brothers! All worm meat!192

What hope is there? The key for Buddhists is to treat all beings with compassion.193 The story of the Boddhisattva, Avalokiteshvara, is particularly enlightening on this point.

According to Mahayana Buddhism, a Boddhisattva is a world savior "whose being is illumination."194 The name Avalokiteshvara means "The Lord Looking Down in Pity."195 Avalokiteshvara is so called "because he regards with compassion all sentient creatures suffering the evils of existence."196 Avalokiteshvara, in contrast to the lawyer listening to the parable of the good Samaritan, has already attained what is, for him, the penultimate condition. He has reached the boundary of the void beyond all knowing, but, while poised on the edge of Buddhahood, he turns back and vows that he will instead bring all creatures to enlightenment.197 Thus, he makes what may be thought of as the ultimate sacrifice out of compassion. The boddhisattva turns; and in turning, or returning, he "dwells within (without exception) every sentient being."198

Thus, we are all one with this boddhisattva: the boddhisattva, the "embodiment" of compassion, is immanent. This is a

193. See MASKS, supra note 191, at 247 (stating that the result of accomplishing Buddha's goals is compassion for others who had not); WALPOLA RAHULA, WHAT THE BUDDHA TAUGHT 46 (2d ed. 1974) (stating that Buddhism fundamentally requires the individual to develop compassion and wisdom together).
194. JOSEPH CAMPBELL, THIS BUSINESS OF THE GODS . . . 92 (1989); JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES, 150 n.83 (1949) [hereinafter HERO] ("The word boddhisattva (Sanskrit) means: "whose being or essence is enlightenment.").
195. HERO, supra note 194, at 149. Avalokiteshvara is "folne of the most powerful and beloved of the Boddhisattvas of the Mahayana Buddhism." Id.
196. Id. at 149–50.
197. See id. at 149–71; see also JOSEPH CAMPBELL, THE MYTHIC IMAGE, 221–24 (1974) (recounting the story of original boddhisattva's refusal to accept Buddhahood until all others had attained their goals).
198. HERO, supra note 194, at 160.
difficult idea for the Western mind to accept. Aristotelian logic tells us that what is A cannot at the same time be not-A. 199 If we are all one with the bodhisattva, however, we are all one with everyone else. But our perceptions show us that we are not totally one with others. Thus we are both different from, and the same as, everyone and everything we see outside ourselves. These are most troublesome concepts.

The story of the bodhisattva also presents us with the alleged identity not only between humans or creatures, but also the identity between time and eternity, the goal of the lawyer speaking with Jesus. 200

The pause on the threshold of Nirvana, the resolution to forego until the end of time (which never ends) immersion in the untroubled pool of eternity, represents a realization that the distinction between eternity and time is only apparent—made, perforce, by the rational mind, but dissolved in the perfect knowledge of the mind that has transcended the pairs of opposites. 201

Thus, all things are one on some other plane of existence. There is no reason to be good now, only seeking reward later. Later is now, now is then, and then is later. The reason to act compassionately now is that compassion is its own reward. Perhaps compassion brings an understanding of the immanence of unity while even a glimpse of that unity triggers compassion.

3. Mysticism: All Things Are One, Thou Art That—The belief in unity, that all things are one, including time and eternity, represents what Westerners sometimes call mysticism. 202 William James wrote that mysticism has four traits: ineffability, a noetic quality, transiency, and passivity. 203 Mysticism is ineffable because it "defies expression." 204 It is noetic because normally it is accompanied or followed by states of knowledge. It is transient because mystical "states

200. See supra Part II.B.1.
201. HERO, supra note 194, at 152.
204. Id. at 380.
cannot be sustained." Finally, it is passive because the mystic feels as if he is being held in the power of some greater force.

While this discussion may conjure up an image of a yogi sitting motionless on a bed of nails, Professor Stace identifies two types of mystic states: introvertive mysticism and extrovertive mysticism. The introvertive mystic experiences extra-sensual mystical states inside herself. Some faculty other than one of the five senses is the receiving device for the signals that bring on and constitute the mystical state. Here, the image of the yogi is apt, as is the picture of the traditional Christian mystic: a monk or nun, such as St. Theresa or St. John of the Cross, starving in a cell attempting to induce a mystical state. The extrovertive mystic, on the other hand, experiences the oneness of all things through his senses.

Not all mystics are religious mystics and many non-religious mystics are extrovertive mystics. Aldous Huxley, William Blake, Lord Tennyson, and Walt Whitman all had mystical experiences in which their senses were paramount. Indeed, while many religious mystics deny themselves food and drink in order to trigger their mystical states, Huxley ingested peyote in order to bring on his experience of oneness.

4. Mysticism, Schopenhauer, and Aiding Action—What does mysticism have to do with the duty to act? Consider the following quote from the German philosopher Schopenhauer, who was influenced by Eastern philosophy:

How is it possible that suffering that is neither my own nor of my concern should immediately affect me as though it were my own, and with such force that it moves me to
This is something really mysterious, something for which Reason can provide no explanation, and for which no basis can be found in practical experience. It is nevertheless of common occurrence, and everyone has had the experience. It is not unknown even to the most hard-hearted and self-interested. Examples appear every day before our eyes of instant responses of the kind, without reflection, one person helping another, coming to his aid, even setting his own life in clear danger for someone whom he has seen for the first time, having nothing more in mind than that the other is in need and in peril of his life....

Significantly, Schopenhauer chose rescue as the model of how one's condition may affect another's feelings, just as Camus selected the failure to act as a symbol of society's fall. Schopenhauer said that neither reason nor self-interest can explain the act of rescuing. Recall how Clamence devalued his generosity when it was self-serving. Yet also recall the parable of the good Samaritan with its message of compassion alongside its self-serving payoff of eternal salvation.

According to Campbell, "Schopenhauer's answer to his question is that this immediate reaction and response [to provide help] represents the breakthrough of a metaphysical realization—namely ... 'tat tvam asi, thou art that,' a belief at the core of Hindu mysticism. To Schopenhauer, the metaphysical realization that 'thou art that' takes the physical form of a compassionate act—rescue. Thus, the rescuer is a mystic, or at least one who is experiencing an extroverted mystical state when, through a sensual impression, the rescuer has realized the similarity, if not identity, of himself and the person he rescues." It is this realization that prompts the act.

216. JOSEPH CAMPBELL, THE INNER REACHES OF OUTER SPACE 112 (1986) (quoting ARTHUR SCHOPENHAUER, ON THE FOUNDATION OF MORALITY 253 (1840)).
217. See supra Part II.A.
218. See supra note 165 and accompanying text.
219. CAMPBELL, supra note 216, at 112.
220. See generally STACE, supra note 207, at 30–33 (1960) (recounting the use of the phrase in the Chandogya Upanishad and other Upanishads, the primary texts of Hindu worship).
221. In one account of a rescue, an African-American man tells how white co-workers saved his life after a vat of hot tar exploded and severely burned him: "The guys on the job, who were white, helped me. I was on the ground, on fire. They put the fire out." Sara Rimer, Jobs Illuminate What Riots Hid: Young Ideals, N.Y. TIMES, June 18, 1992, at A20.
The discussion in this section, however, must give us pause. It is not sufficient to say that the law ought to require rescue because various religions, or writers, seem to encourage it. Indeed, in this area the law has adopted the attitude that since religion counsels rescue, the courts need not or should not do so. Rescue is a spiritual matter, not a secular one.

It is contrary to commonly accepted modern notions of persuasive legal or philosophical discourse to ground a duty to rescue in religious doctrine. However, our view of our relation with the gods, eternity, and our fellow humans may serve as a jumping off point, not to jump out, but to jump in—to the human mind, to an examination of what psychology can tell us about some of these concepts, as well as what it can tell us about rescuing in general.

III. ACTION, ALTRUISM, AND PSYCHOLOGY

In this Part, I hope to do several different things. First, and most broadly, I examine why people help others. Do they help to further their own self-interest or do they help altruistically, out of a desire to help another? To answer these questions, I examine Freud’s explanation for action, as well as Batson’s hypothesis that feelings of empathy trigger altruistic action. Additionally, I briefly set forth some biological explanations for altruistic action. Second, this Part considers the scientific evidence describing when people help. On this point I focus on Batson’s work and the groundbreaking studies of Latané and Darley.

As an overriding theme, this Part examines the implications of the scientific evidence on the current tort duty not to act. If people do act altruistically, and people are likely to do so in certain predictable circumstances, what rule would best accord with those psychological conclusions? Alternatively, if people act out of self-interest, at least sometimes, what legal rule best accords with that evidence? Different rules might be appropriate under different factual and relational circumstances. It ultimately may make the most sense to say simply that there is a duty to act when reasonable people would act under the relevant circumstances and to use psychological evidence to identify some of the relevant factors. My analysis is both descriptive and prescriptive because some current rules,
particularly those imposing a duty to act when there is a "special relationship" between the bystander and the victim, are consistent with scientific evidence.

Of course, to understand the implications of the scientific evidence on tort laws I must make some basic assumptions about tort law. Tort law depends, in part, on why people do what they do. To the degree that people act out of self-interest, tort rules premised on deterrence can be very effective. A rule threatening liability may trigger beneficent, or at least efficient, behavior.

If people act out of altruism, however, what is the need for legal rules? Rules still might express some truth about our society. I believe we outlaw certain types of discrimination not simply to deter the proscribed behavior, but also to express our outrage at it. Therefore, recognizing a duty to act when people might be expected to act, albeit altruistically, is to state something about human nature, to expressly recognize our capacity for compassion, something the law has not typically done.

Alternatively, if the evidence indicates that human motivations differ under certain circumstances, then either different legal rules or a multifactor approach are appropriate. In this subsection, I take seriously both of the above stated characteristics of tort law: deterrence and the reflection of societal traits or values. Of course, saying that any of the psychological evidence has any meaning to the law assumes that legal or societal norms are meaningful at all in the helping–rescuing context. I begin my journey through some psychological evidence on the relevance of norms.

A. Do Norms Count at All When Rescue Is Involved?

What can psychology tell us about the relationship between norms and rescue? If there is no salient relationship then one

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223. Stating that one of the purposes of tort law is to compensate recognizes a factfinder's ability to be swayed, at least in part, by compassion.
would have to search for some other, non-normative justification for a legal duty to act. Alternatively, one might conclude that the law should not impose a duty to act.

1. Latané and Darley: Norms Do Not Matter—The most well-known, pre-Batson psychological studies of bystander action or inaction are those of Latané and Darley. Latané and Darley concluded that decisions whether to act rarely were dictated by societal norms. Other factors concerning one's interpretation of the relevant situation and the potential rewards and costs associated with various courses of action were predominant. In circumstances where "certain norms are made salient, they inhibit action." In most circumstances, however, norms are "vague, unspecific, and conflicting," and, therefore, may be "relatively unimportant determinants of behavior." Latané and Darley concluded that "norms exist as a sort of nominal theory of behavior. They are an easy and socially acceptable after-the-fact explanation for one's actions even though [they are] never considered in deciding what to do."

Tentatively, Latané and Darley drew the same conclusions regarding feelings of compassion or empathy. Their general conclusion in this regard was that a person was more influenced by the costs and benefits to himself of various courses of behavior than by norms or other generalized feelings such as compassion.

Latané and Darley's conclusions regarding the indeterminate effect of norms on behavior imply that the law as a normative tool might not encourage voluntary action by imposing a duty to act. Neither a general duty to act, nor any legal norm created to influence human behavior would be effective. If, however, as Latané and Darley concluded, the evaluation of the personal costs and benefits of alternative

225. Id. at 27–28.
226. Id. at 26 (basing this finding on a study of bystander participation in playing frisbee in Grand Central Station).
227. Id. at 21.
228. Id.
229. Id. at 27.
230. Id. ("As with norms, [feelings of compassion or empathy] may provide an overall predisposition to help or they may provide post hoc explanations for why we have acted in a certain way.").
231. Id. at 7–28.
courses of action is a better predictor of action than are norms, then the law may induce action by imposing costs for noncompliance or rewards for compliance. A law imposing some meaningful sanction for the failure to act might be more successful in inducing action. Thus Latané and Darley's work suggests that the deterrent goal of tort law has some psychological base. The idea that legal norms play some other, more general role, finds less support.

2. Norms May Matter: An Experiment From The 1960s—Somewhat inconsistent with Latané and Darley's conclusions regarding norms is an experiment conducted among non-law university students in the 1960s in Germany, Austria, and the United States. The students were presented with four different case histories and asked a series of questions. Each case history described a person who had failed to help someone in distress. At the time, Germany had a good Samaritan statute requiring action, whereas Austria and the United States did not. When asked whether they would have failed to act, as had the character in the case history, 37% of the Germans answered that they would have acted, compared with 39% of the Austrians and 44% of the Americans. More significantly, 75% of the Americans thought that the law should not interfere in such cases, but should leave the decision of whether to rescue to the conscience of the individual. Sixty-two percent of the Austrians agreed, while only 42% of the Germans agreed. Twenty-two percent of the Germans and only 2% of the Americans thought that a person refusing to assist should be incarcerated. Most revealingly, 86% of the Germans thought that it was their legal duty to render legal assistance, compared with 26% of the Austrians and 19% of the Americans. As a lawyer, I interpret the results as providing evidence for the proposition that norms do affect what people believe: in this case, Germany

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233. Id.
234. Id.
235. Id.
236. Id. at 210.
237. Id.
238. Id.
239. Id.
240. Id.
has a legal duty to aid another in distress, while America does not.\footnote{241}

3. Kohlberg's Principled Morality—Dr. Lawrence Kohlberg's model of principled morality also bears on the issue of norms and helping behavior.\footnote{242} Kohlberg believes that cognitive development is affected by a psychological tendency to conform to a given set of moral principles or values. To some theorists, Kohlberg's principled morality is an important component of an altruistic personality. If one of the reasons people help others is to uphold moral principles,\footnote{243} then imposing a duty to act, based upon some shared moral principle, might induce further action because of the actor's belief that it was important to conform to societal norms and the imposed legal duties based upon those norms. This conclusion is in marked distinction to Latané and Darley's general skepticism about the relationship between norms and behavior.\footnote{244}

4. Simon's Docile Altruist—Dr. Herbert Simon, a Nobel Prize Winner in economics, has developed an algebraic model indicating, from a biological perspective, why organisms in a culture might act altruistically.\footnote{245} Simon's theory is consistent with Kohlberg's hypothesis.\footnote{246} Simon hypothesizes that, even in a world where a selfish gene drives the species, altruistic behavior\footnote{247} can still be successful from an evolutionary standpoint.\footnote{248}

Dr. Simon considers a population consisting of altruistic and selfish individuals.\footnote{249} The altruistic individuals randomly
contribute additional offspring to members of the society through their altruistic action. Their altruism has its cost, however, as each altruist has fewer children than each selfish actor. Simon then accounts for the possible effect of social learning on altruism, theorizing that social learning contributes in two ways to each individual's fitness:

First, it provides knowledge and skills that are useful in all of life's activities, in particular, in transactions with the environment. Second, goals, values, and attitudes transmitted through social learning, and exhibited in the speech or behavior of the learner, often secure supportive responses from others...

Certain people are more adept at social learning than others. These people are docile, i.e., "disposed to be taught." Docile people learn what they think others in the society want them to learn and believe. Docile people are likely to learn that compliance with norms is "good."

Docility fits in with the idea of bounded rationality, the inability to evaluate independently everything in which one believes. A docile individual will believe many facts that she has not been able to evaluate personally. Importantly, the docile individual may believe that it is proper to engage in certain behaviors that will not make a positive contribution to personal fitness, i.e., altruistic behaviors. If docility's overall contribution to personal fitness outweighs the loss experienced from "docile" altruism, there will be a net positive effect from docility, including the docile acceptance of altruistic values in

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250. Id.
251. Simon's hypothetical population consists of A, altruistic individuals, and S, selfish individuals. If A and S were the same in all respects, each would have X number of offspring. There are p individuals who are altruistic and 1-p individuals who are selfish. Each A randomly contributes b offspring to members of the population as a result of his altruistic behavior. The cost of altruistic behavior to each A is that each A has c fewer children than each selfish individual. Thus, the average number of offspring of each A is: x-c+b(p). The average number of children that each S will have is x+b(p). Id.
252. Id.
253. Id.
254. Id.
255. Id. at 1666–67.
256. Id.
257. Id.
certain situations. Note the egoistic bent of the proposition—there must be a positive net benefit to the individual. Assuming that altruistic action is one side effect of docility, docility will contribute to the overall fitness of the population so long as the gain from docility outweighs the loss from altruism.

Simon's work is relevant to the law because docile people may be more likely to obey the law, even laws not enforced by sanctions or reinforced by rewards, because they are likely to learn that they should obey the law. The guilt and shame associated with failing to adhere to societal norms are some of the chief ways in which docility may operate to assure compliance with societal norms. If one societal norm with which docile people complied was a tort law requiring action in an emergency, such a law might have an overall positive effect on society, assuming that the positive effect of docility-induced rescue outweighed its cost.

One will note the importance Simon ascribes to norms, in contrast with Latané and Darley. Compared to Batson, Simon does not concern himself with people's motives. The docile individual may act to protect himself from the guilt and shame arising from breaking the law, an egoistic motive. The important point is that docility, if it contemplates obedience to the law, may explain partially the efficacy of a legal duty to act.

5. Summary of the Importance of Norms—Although the evidence is inconsistent, norms may affect behavior. Latané and Darley downplay the relevance of norms in this context, but Kohlberg's and Zeisel's experiments point to a different conclusion. Moreover, Simon's theoretical model relies on the docile individual's compliance with norms as a limited basis for explaining altruism in the genetic context.

258. Id.
259. If altruistic action is one of the side effects of docility the average, docile individual, A, will have $X + d - c + b(c)p$ offspring; see supra note 251. The selfish actor will have $X + b(c)p$ offspring. Here, $b(c)$ replaces the $b$ used earlier; $b(c)$ is the number of offspring A's altruism adds to the population. See Simon, supra note 245, at 1667. As long as $d$, the gain from docility, is greater than $c$, the loss from altruism, docility contributes positively to the overall population. Id.
260. Id.
261. See supra Part III.A.1.
262. See supra Part III.A.3.
263. See supra Part III.A.2.
Additionally, even if norms do not play a key role in inducing helping behavior, Latané and Darley's work does not account for the possibility that the law may induce action if costs or benefits are attached to non-compliance or compliance. Their conclusions concerning the non-predictive value of norms to provide aid seem to be limited to naked norms, that is, norms with no consequences attached to compliance or violation. But their conclusion, that the costs and benefits of action are more important than are norms in determining behavior, indicates that rules with penalties or rewards attached may affect behavior.\textsuperscript{265} Their conclusions support tort law's claim of deterrence.

Therefore, assuming the analysis and development of norms is not psychologically irrelevant, let me consider when people might be expected to help. Thereafter let me consider why they so act. As to when people might be expected to act, I focus again on Latané and Darley's work.

\textbf{B. Under What Circumstances Might People Be Expected to Act?}

1. \textit{Latané and Darley: Bystanders and Action}—Latané and Darley developed a psychological model of bystander behavior in emergencies, a model which might prove quite useful to a society shaping legal rules governing the same situation. They noted that the issue of bystander action or inaction boiled down to two questions: (1) "What is the underlying force in mankind towards altruism?" and (2) "What determines in a particular situation whether one person will help another?"\textsuperscript{266} They believed that their first question was semi-philosophical and probably never could be answered completely by empirical data.\textsuperscript{267} Thus, they concentrated on the second question, noting that it was "more specific, more mundane, [and] more amenable to research analysis."\textsuperscript{268}

\textsuperscript{265} Latané & Darley, \textit{supra} note 224, at 28.
\textsuperscript{266} \textit{Id.} at 6.
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.} In comparison, Batson is less disposed to abandon the study of the first question. \textit{See infra} notes 371–73 and accompanying text.
The bulk of Latané and Darley's research focuses on bystanders in emergencies.\(^2^6\) Latané and Darley characterize as emergencies situations those which "involve[] [a] threat of harm or actual harm"\(^2^7\) with "few positive rewards for successful action."\(^2^7\) Emergencies are "unusual and rare event[s],"\(^2^7\) which vary widely from one to another both in their causes and in the kinds of intervention required to cope with them.\(^2^7\) Emergencies are unforeseen; one cannot consult beforehand with others about what to do.\(^2^7\) Finally, emergencies require "immediate, urgent action" under conditions of great stress.\(^2^7\)

Latané and Darley theorized that before intervening in an emergency, a bystander must make a series of decisions.\(^2^7\) First, the bystander must notice that something wrong is occurring;\(^2^7\) the emergency event must intrude upon the bystander's consciousness. Individuals pay only selective attention to their environment.\(^2^7\) People may block out certain stimuli, including those events signaling an emergency. For instance, the more noise present, the less likely a person is to perceive an emergency. Likewise, the more potential danger confronting a person, the less likely she will be to perceive someone else as being in an emergency. Finally, and most

\(^2^6\) In the initial field studies reported, Latané and Darley found that people who requested minor assistance were quite successful in obtaining it. \textit{Latané & Darley, supra} note 224, at 9. This assistance included providing the time, directions, or, frequently, exact change. Requests for the subject's name, however, were much less successful. \textit{Id.} Interestingly, the request for a name was more likely to yield success when the experimenter preceded her request by providing some information about herself, such as her name. \textit{Id.} at 10–11. Latané and Darley posited that perhaps people were more successful in getting help after providing information because the subjects had greater justification either to help or to provide their name. \textit{Id.} at 11–12. Perhaps an introduction reduced the strangeness or suspiciousness of the request. Alternatively, the information may have created a closer bond between the subject and the requester. \textit{Id.} Note that these early experiments did not involve emergencies. These basic experiments support the current imposition of a duty to act when a special relationship exists between the actor and the victim, as even a small degree of familiarity seems to breed action. Perhaps then the law's special relationship requirement requires too much affinity before imposing a duty to act, at least in a non-emergency situation where only minor aid is needed.

\(^2^7\) \textit{Id.} at 29.

\(^2^7\) \textit{Id.}

\(^2^7\) \textit{Id.} at 30.

\(^2^7\) \textit{Id.} at 29.

\(^2^7\) \textit{Id.}

\(^2^7\) \textit{Id.} at 31.

\(^2^7\) \textit{Id.}

\(^2^7\) \textit{Id.}

\(^2^7\) \textit{Id.}
importantly for their experimental work, Latané and Darley posited that being in a group, especially a group of strangers, may place constraints on action.279 For example, society considers it impolite to pay too much attention to a stranger, including noticing the stranger's plight. This norm may inhibit action, because it inhibits noticing another's condition.280

Second, the bystander must perceive the event as an emergency rather than as something less urgent.281 It is often difficult to determine whether a noticed event is perceived as an emergency since many events can be interpreted in a number of different ways. History, personality, present mood, "the extent to which the individual is motivated to avoid belief that [a situation] is an emergency, and the way he is influenced by the reactions of other bystanders"282 all influence the interpretation of an event as an emergency. Thus, if an actor convinces herself that nothing is wrong, then she avoids internal conflict over whether to intervene. In such situations, an observer is influenced considerably by the actions or inactions of others. If others apparently see a situation as not being an emergency, great pressure is placed on the observer to conform his impressions to theirs and to decide also that there is no emergency.283

Third, the bystander must "decide that it is his personal responsibility to act."284 Whether an individual witnessing an emergency will feel personally responsible and take action depends on several variables. The first is whether the bystander thinks the victim deserves help, which is greatly influenced by the bystander's social characteristics.285 The second is whether the bystander is competent.286 The third is the relationship between the bystander and the victim.287 Finally, the number of bystanders who share the responsibility influences whether the bystander will act.288 Feelings of personal responsibility may be diffused if a number of others are also watching an accident, because each person feels that others could or should
help. A lone observer of an emergency may feel more personally responsible because she is the only one able to help.

Fourth, the bystander "must ... consider what form of assistance [s]he can give." Generally, there are two alternatives: the actor may intervene directly or indirectly. For example, the actor may save the victim or merely call the police to report the incident.

Finally, the bystander "must decide how to implement his action." Once a person decides to take action, success will depend on how complicated the required actions are or how much skill they require. Success also may be affected by stress, because the more stress an individual is under, the more clumsy he will be.

2. Experimental Confirmation of the Model—In a series of experiments involving controlled emergencies, such as smoke-filled rooms, falling ladies, villains, fighting children, and others, Latané and Darley confirmed their hypotheses, particularly the notion that the presence of others adversely affected action.

Latané and Darley concluded that the presence of others "turns out to be a major determinant of bystander intervention in emergencies—even though bystanders may not be aware that they are being influenced." In each of the experiments, bystanders were less likely to intervene if others were present. Yet people persistently claimed not to be influenced

289. Id.
290. Id.
291. Id. at 32 (emphasis omitted).
292. Id. at 34–35.
293. Id. at 34–35.
294. Id. at 32 (emphasis omitted).
295. Id.
296. Id. at 36.
297. Id. at 43–54.
298. Id. at 55–67.
299. Id. at 69–77.
300. Id. at 79–85.
301. Id. at 89. Latané and Darley's theory that the presence of others inhibited an individual's actions and reactions because it was embarrassing to be too attentive in public to the condition of another was only partially supported. They concluded that the relationship between the proprieties of public behavior and attentiveness to an emergency is probably more complex than they had originally suggested. Id. at 88–89.
302. Id. at 123.
by others. Most subjects thought that the average person probably was less likely than them to help, but still did not think that the presence of others would affect the average person's likelihood of acting. Thus, people systematically underestimated the degree to which they were influenced by others. Although people think of themselves as "sturdy independents," they are, in effect, "moderate conformers."

The presence of others had a great effect on notions of personal responsibility. Latané and Darley posited that this was due to the diffusion of responsibility. A sole bystander feels all the guilt for her inaction. If there is more than one bystander, guilt is diffused and one becomes more likely not to act. Like responsibility, blame also may be diffused. Thus, when a group observes an emergency together, perceptions of future punishment or blame may be slight compared to when an individual observes an emergency alone.

This notion of the diffusion of responsibility strikes me as particularly persuasive when considering the Genovese case. In the Genovese incident, the presence of other bystanders may have diffused the personal responsibility felt by the neighbors. Even if a person cannot see that others are present, but nevertheless knows that there are other bystanders, she may assume that someone else is already taking action. This may lead to a rationalization of inaction and a reduction in the psychological costs of nonintervention.

How many lawyers were members of the bar does not appear; but, in the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

Id. at 56.

303. Id. at 124.
304. Id. at 124–25.
305. Id. at 125.
306. Id. at 121.
307. Id. at 90–91.
308. The notion of diffusion of responsibility is evident in Powell v. Alabama, 287 U.S. 45 (1932), in which the United States Supreme Court reversed the conviction of seven accused rapists because the trial court had appointed "all members of the bar," id. at 53, to represent the defendants. Id. at 56. Finding that appointment inadequate, the Court stated:

Id. at 56.

309. LATANÉ & DARLEY, supra note 224, at 90.
310. Id.
311. See supra notes 1–2 and accompanying text.
312. LATANÉ & DARLEY, supra note 224, at 101.
313. Id. at 91.
The presence of others also may limit intervention for two other reasons. First, others may inhibit one from doing seemingly foolish things.\(^{314}\) Second, the presence of others serves as a guide to behavior. If others are inactive this will lead a subject to inaction as well.\(^{315}\) Each of these phenomena involves different channels of communication between bystanders. While some require that the bystanders see each other, others do not.\(^{316}\)

Critically, when the bystanders in an emergency were friends, intervention was more likely and occurred faster.\(^{317}\) Perhaps there was less fear of embarrassment among friends and less likelihood that one friend would misinterpret another friend's inaction. Perhaps friends are better at nonverbally communicating concern, or perhaps friends are more likely to discuss a situation and come up with a mutual plan for action.\(^{318}\) These same trends were witnessed in an experiment in which subjects brought a friend to the experiment with them.\(^{319}\) In this experiment, although the friends were in different rooms listening to the same victim, they were still more likely to report an actor's feigned epileptic seizure than those subjects who thought that a stranger was listening,\(^{320}\) even though the bystander-subject could not see or communicate with his friend.\(^{321}\) Latané and Darley suggest that this result occurred because the bystander who had brought a friend along knew that she would see the friend and discuss the situation with the friend afterward.\(^{322}\) Maybe friends acted more quickly and reported the feigned epileptic seizure to maintain or earn their friend's good opinion or perhaps there was no responsibility diffusion at all because the friends viewed each other as "we" and not as "me" and a stranger.\(^{323}\)

In a similar epileptic seizure experiment, mere acquaintance with the victim seemed to have a significant effect on action.

\(^{314}\) Id. at 100-01.
\(^{315}\) Id. at 40-41.
\(^{316}\) Id. at 125-26.
\(^{317}\) Id. at 63. Both friends and strangers were slower to intervene than one person alone. Id.
\(^{318}\) Id. at 64. This counteracts the effect of pluralistic ignorance. See supra notes 278-80 and accompanying text.
\(^{319}\) LATANÉ & DARLEY, supra note 224, at 93-112.
\(^{320}\) Id. at 105. Where a friend was listening, 100% responded; where a stranger was listening, only 85% responded. Id.
\(^{321}\) Id. at 106.
\(^{322}\) Id.
\(^{323}\) Id. at 107.
In fact, merely meeting a victim beforehand had a great effect on the likelihood and speed with which a bystander went to the victim's assistance. Latané and Darley concluded that the subject may have thought that he was the only one who had met the victim and thus could not diffuse responsibility. "Subjects in this condition, and only in this condition, reported that when the victim began to have the fit, they could visualize him doing so. They could picture an actual individual in distress." Thus, the subject perhaps felt more empathy for a victim he had met. A final explanation is that because the victim and the bystander had seen each other, the bystander might have felt more accountable, and anticipated that it would be more painful later if he did not intervene. Acting to avoid later pain would be an egoistic, rather than altruistic, motive.

Latané and Darley also considered the effect of personality traits on action, but concluded that the perceived number of bystanders was a more important factor. They concluded that "[i]f people underst[oold the situational forces that can make them hesitate to intervene, they may better overcome them." As to biographical variables such as background, Latané and Darley found that "only two reached an acceptable level of significance": the size of the community in which the subject grew up, and the occupation of the subject's father. Those who grew up in smaller communities seemed more likely to help than those who grew up in larger communities. Those who came from lower-middle-class backgrounds were generally faster helpers than those who came from upper-middle-class backgrounds.

Latané and Darley also found that the more familiar one was with her environment, the more likely she would be to help. This conclusion grew out of the results of an experiment originally designed to shed light on whether social class

324. Id. at 108. Response after meeting was 100%, in an average of 69 seconds. Response without meeting was 62%, in an average of 166 seconds. Id.
325. Id.
326. Id. at 109.
327. Id.
328. Id. at 116.
329. Id.
330. Id. at 117. Recall that these studies were reported in 1970.
331. Id.
332. Id.
333. Id. at 119.
correlated with helping behavior. A passenger falling in a subway received help more often than one who fell at an airport. When Latané and Darley reconsidered the experiment, however, they concluded that familiarity with the environment, not social class, was the significant factor. The importance of familiarity appears to be rooted in the fact that one in a familiar environment is not overloaded with stimuli or fear of embarrassment. Fear of harm also may be somewhat reduced by familiarity with the environment. One in a familiar environment may feel a greater stake in helping to keep it safe. He also may feel more in control and thus more likely to take some action to help another. These facts combine to make one more likely to act in a familiar environment.

Latané and Darley also concluded that the longer one waited to intervene, the harder it became. One reason for this inertia may be that the longer one waits to act, the more inconsistent later action is with earlier inaction. This is an example of how self-observation may moderate behavior.

3. Latané and Darley and a Legal Duty to Act—What can the law learn from Latané and Darley? First, one important factor in considering whether to impose a duty to act in a given case is the presence or absence of bystanders. Latané and Darley's studies indicate that people in the presence of others are much less likely to act in an emergency. Also, in those situations in which people do act in the presence of others, they act more slowly. Thus, there is strong support for the proposition that while a reasonable person may act when alone,
that same reasonable person may not act when in a group. The law might therefore impose a duty to act on a person who is alone with the victim of an emergency, but not on a person who is observing in a crowd. At the least, the presence of others should be a relevant factor in shaping any duty to act.

Alternatively, Latané and Darley's conclusions concerning the frequency and speed of action when bystanders were friends rather than strangers,\textsuperscript{345} indicate that courts might also consider the relationship between bystanders. Bystanders who know each other are more likely to act. Therefore, the stronger the bond between the bystanders, the more reasonable it would be to impose a duty to act upon them. Currently, tort law considers the relationships between victims and onlookers and between actual tortfeasors and onlookers,\textsuperscript{346} but not the relationships between onlookers. Yet Latané and Darley suggest that "the failure to intervene may be better understood by knowing the relationship among bystanders rather than that between a bystander and the victim."\textsuperscript{347}

The relationship between bystander and victim, however, may also be important, given Latané and Darley's own evidence that even a slight relationship between the actor and the victim increased the likelihood that an actor would help in an emergency.\textsuperscript{348} Current law thus makes sense by imposing a duty to act on people who have a special relationship with the victim.

But by limiting duty-triggering relationships to those relationships between family members or other close personal relations such as master and servant, current law may be underinclusive. Again, recall Latané and Darley's evidence that a bystander who had become only vaguely acquainted with a victim before encountering the emergency was more likely to act, and to act faster, than a stranger.\textsuperscript{349} Latané and Darley's data thus suggest that our current rules are much too narrow: courts could consider whether the bystander had any relationship at all with the victim, not just whether a special relationship existed. In this regard, the imposition of a duty on

\textsuperscript{345} See supra notes 317–27 and accompanying text.
\textsuperscript{346} See supra Parts I.B, I.C.
\textsuperscript{347} LATANÉ \& DARLEY, supra note 224, at 128.
\textsuperscript{348} See supra notes 324–27 and accompanying text.
\textsuperscript{349} Id.
one friend to help another, as in *Farwell v. Keaton*\(^{350}\) and *Ocatillo West Joint Venture v. Superior Court*\(^{351}\) may be psychologically appropriate. Likewise, the result in *Depue v. Flateau*\(^{352}\) may be supported by the psychological evidence, because the Flateaus had contact with Depue sufficient to lead a reasonable person in their position not to drive him out into the cold Minnesota night.

Finally, Latané and Darley's interpretation of their experiments suggest that the more familiar one is with the environment, the more likely one is to act, even if surrounded by others.\(^{353}\) Thus, when deciding whether to impose a duty to act, courts should consider the actor's familiarity with the environment. Currently, they do not.

In conclusion, the strongest case for a duty to act may be made when a person alone in a familiar environment observes a relative or friend suffering an emergency. The case for a duty becomes weaker the less familiar the environment and the larger the number of people surrounding the bystander. A duty still might be imposed, however, on groups of bystanders who are relatives or friends. Latané and Darley's work supports the case for a multifactor approach, similar to that suggested by Professor Leonard.\(^{354}\) Now, let me address why people act—what motivates one person to help another.

**C. What Motivates People to Help?**

1. *Freud and Selfish Genes*—Considering why people do what they do from a psychological standpoint may shed some light on how the law should treat inaction in a dangerous situation. Traditional Western psychological models of behavior have assumed that people act out of self-interest. For instance, Freud's psychological model of the id, ego, and the superego, with his pleasure principle playing a key role in

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352. 111 N.W. 1 (Minn. 1907); see supra Part I.B.1.
353. See supra notes 333–36 and accompanying text.
354. See supra note 26.
human development, contemplated that people act in their self-interest.355

Similarly, geneticists have maintained, consistent with neo-Darwinism,356 that a selfish gene ultimately is responsible for the success or fitness of individuals and species.357 It is this gene which promotes the "survival of the fittest." Selfishness—acting in one's self-interest—leads to survival. According to this theory, those who acted for themselves most successfully survived.

2. Genetics and Altruism—Some studies, however, have now established that altruistic actions may contribute to overall fitness.358 Geneticists have found that altruism towards close relatives can contribute to the fitness of the family.359 One hypothesis to explain action in these family relationships is that the shared genes of the actor and the victim lead to the actor's identification with the victim. This then leads to action through a type of vicarious egoism.360

From a legal standpoint, the notion that altruism among close family members is consistent with survival of the fittest establishes at least some basis for a duty to act when a familial relationship exists between the actor and the victim. That is, if science sees and even expects altruistic actions among close family members, it is reasonable for tort law to require


357. See generally RICHARD DAWKINS, THE SELFISH GENE (1976). Dawkins discusses natural selection as occurring at the genetic level, but concludes that "[w]e have at least the mental equipment to foster our long-term selfish interests rather than merely our short-term selfish interests." Id. at 215.


359. See generally DAWKINS, supra note 357.

360. See Hamilton, supra note 358, at 1, 17 (describing a mathematical model relating the likelihood of altruism to the degree of kinship).
one to help close relatives. If genetics tell us that reasonable people in certain relationships would act altruistically to help another, tort law might require such people to act in those situations. The closer the relationship between the actor and the person at risk, the more likely would, and should, a court impose a duty to aid. This genetic theory may provide some scientific basis for requiring parents to aid their children.

But just as geneticists have looked beyond selfish genes to explain behavior, psychologists have looked past self-interest to discover instances where people act altruistically. If the mind may at times trigger other-directed altruistic action, then perhaps there is a psychological basis for a legal duty to act. That is, the reasonable person may, in fact, act to help another under certain circumstances.

3. Batson's Studies on Action and Altruism—While studying why people do what they do, psychologists have considered whether there are situations in which peoples' motives are truly altruistic. The most important recent psychological work on action and the motivation for helping is Professor C. Daniel Batson's work. Over the past ten to fifteen years, Professor Batson has conducted a number of experiments on action and motivation, and in 1991 Batson collected and stated his conclusions in *The Altruism Question . . . Toward a Social-Psychological Answer*. He concludes that, under certain circumstances, feeling empathy for another triggers altruistically motivated action to help that other person. Thus to the extent reasonable people experience empathy for others, people may be expected to act.

Batson defines altruism as "a motivational state with the ultimate goal of increasing another's welfare." An altruistic

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362. Id. at 6 (emphasis omitted). Batson's earlier works on the subject include: C. Daniel Batson et al., *Empathic Joy and the Empathy-Altruism Hypothesis*, 61 J. PERSONALITY & SOC. PSYCHOL. 413 (1991) (rejecting the hypothesis that empathically induced helping was egoistically motivated by a desire to share vicariously through empathic joy at the victim's improvement); C. Daniel Batson, *How Social an Animal?—The Human Capacity for Caring*, 45 AM. PSYCHOLOGIST 336, 344 (1990) (concluding from empirical evidence that "we are capable of caring for others for their sake and not just our own," with some qualifications); C. Daniel Batson et al., *Five Studies Testing Two New Egoistic Alternatives to the Empathy-Altruism Hypothesis*, 55 J. PERSONALITY & SOC. PSYCHOL. 52 (1988) (defending the hypothesis that the empathic motivation to help is at least partially altruistic); C. Daniel Batson, *Prosocial Motivation: Is It Ever Truly Altruistic?*, 20 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 65 (1987); C. Daniel Batson et al., *Where is the Altruism in the Altruistic Personality?*, 50 J. PERSONALITY & SOC. PSYCHOL. 212, 220 (1986) (presenting an experiment and concluding that researchers' conclusions about whether there is an
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act is, therefore, one in which the actor is motivated by a desire to further another's interests rather than his own. Of course, in the process of ultimately benefiting another, one may experience pleasure or may benefit himself. If the actor's ultimate goal is to benefit another then his motivation is altruistic.

On the other hand, "egoism is a motivational state with the ultimate goal of increasing one's own welfare." One may act egoistically not only to further one's own self-interest by receiving a material reward, but also to receive the psychological reward of avoiding unpleasant feelings, including those caused by seeing another person suffer. An egoistically motivated action may benefit another. What determines whether an action is egoistic or altruistic is not the result of the action, but rather the person's goal or motivation in pursuing that action.

While Batson uses the word "altruistic" to describe an act done with altruistic motives, many legal scholars use the word to refer to acts having altruistic effect, not necessarily altruistic motive. For example, Landes and Posner refer to what they describe as "reciprocal altruism," a situation in which one person acts to help another in the hope that sometime in the future the person helped or another member of society will subsequently act to benefit the actor. Batson's altruistic personality depends on their definitions of altruism); C. Daniel Batson et al., Influence of Self-Reported Distress and Empathy on Egoistic Versus Altruistic Motivation to Help, 45 J. PERSONALITY & SOC. PSYCHOL. 706 (1983) (concluding from empirical evidence that distress and empathy are distinct reactions to witnessing another's pain, and that the two reactions lead to, respectively, egoistic and altruistic motivations to help); see also Jay S. Coke et al., Empathic Mediation of Helping: A Two-Stage Model, 36 J. PERSONALITY & SOC. PSYCHOL. 752, 765 (1978) (finding support from empirical evidence for the hypothesis that taking another's perspective increases one's empathy for the other, which in turn increases helping behavior).

363. BATSON, supra note 243, at 6-9.
364. Id. at 6-7.
365. Id. at 7.
366. Id. (emphasis omitted).
367. Id. at 8.
368. Id. A few side issues must be examined. First, the terms egoism and altruism do not apply to mere reflex action, where actions are not tied to motivation. Id. at 9. Second, a single motive cannot ultimately be both egoistic and altruistic, although egoistic and altruistic motives may coexist. Id. at 8-9. Third, a person may be unaware of his or her true motivations. Id. at 9. Fourth, a motive will not necessarily induce action. Id.
369. See supra note 368 and accompanying text.
370. Landes & Posner, supra note 52, at 93. But note that Landes and Posner concern themselves only with altruists unmotivated by the expectation of compensation. Id.
definitional scheme would classify reciprocal altruism as egoistically motivated since it is done for a later personal benefit.

Batson hypothesizes that "feeling empathy for a person in need evokes altruistic motivation to help that person." Batson states:

[e]mpathy . . . refers to . . . emotions . . . that are more other-focused than self-focused, including feelings of sympathy, compassion, tenderness, and the like. Defined in this way, empathy is distinct from feelings of personal distress . . . , but it is indistinguishable from what many philosophers and early psychologists call pity, compassion, or tenderness.

Thus, according to Batson, empathy involves a feeling which is focused on others, rather than on one's self.

It must be noted, however, that Batson's definition of empathy does not entail a breakdown of ego boundaries such as the mystic sense of oneness described in Part II.B. Batson states that the terms "altruistic" and "egoistic" "assume a distinction between self and other: At issue in defining motives as egoistic or altruistic is whether the goal is the self's welfare or the other's welfare." In contrast, a breakdown of the self-other distinction would mean that "we are psychologically indistinguishable from the other." Batson

371. BATSON, supra note 243, at 74.
372. Id. at 86 (citations omitted).
373. For a similar definition of "empathy" based upon the psychological literature, see Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987), wherein the author states:

Although the literature of empathy manifests disagreement about what is or is not "empathy," rather than projection, sympathy, or what have you, there are three basic phenomena captured by the word: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). The first two forms are ways of knowing, the third form a catalyst for action.

Id. at 1579.
374. BATSON, supra note 243, at 55. See supra notes 362–370 and accompanying text for Batson's definitions of egoism and altruism.
375. See BATSON, supra note 243, at 55 (citation omitted).
believes that this breakdown occurs fully only "in some mystical states," if at all.376

4. Pseudoaltruistic Motives—Freud viewed helping actions as egoistically motivated. He believed that people learn to love and help others, in large part, to benefit themselves.377 Freud wrote about a struggle between the life force, Eros, and the death force, Thanatos, which manifests itself in the development of the superego, or conscience.378

[A]ggressiveness is introjected, "internalized"; in fact, it is sent back where it came from, i.e., directed against the ego. It is there taken over by a part of the ego that distinguishes itself from the rest as a super-ego, and now, in the form of "conscience," exercises the same propensity to harsh aggressiveness against the ego that the ego would have liked to enjoy against others. The tension between the strict super-ego and the subordinate ego we call the sense of guilt; it manifests itself as the need for punishment.379

376. Id.; see also Henderson, supra note 373, at 1581 (characterizing an early psychotherapeutic form of empathy "as not a dissolution of 'ego boundaries' or absorption of self by other—[but as] a means of relating to another or making another intelligible"). One of Batson’s reviewers appropriately notes the relevance of mystical, or what she calls "transcendental," experiences to the action/inaction debate.

From the spiritual perspective, one can easily note that for millennia, people have testified to transcendent experiences in which they learned that all humanity is one. A ramification of such a lesson is that what happens to one person happens to all people. Thus, helping a neighbor, stranger, friend, relative, or oneself are all in essence the same thing. . . .

. . . The healthy person, however, clearly understands self-other boundaries. He or she can choose to be of egoistic help to others, seeking to ease empathic discomfort or to invest in reciprocal help-giving relationships. However, he or she can also proceed further developmentally and deliberately choose the blurred ego boundaries of the transcendent state. Help rendered then becomes altruistic . . . . When driven by transcendent awareness . . . [s]acrifice is an irrelevant concept.

Penelope Thrasher, On Altruism: Comment on Batson, 46 AM. PSYCHOLOGIST 163 (citations omitted).

377. See, e.g., SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 171 (G. Stanley Hall trans., 1920) (“Even those persons whom the child seems to love from the very beginning, it loves at the outset because it has need of them, cannot do without them, in other words, out of egoistical motives.”). This notion is somewhat consistent with the biological models of helping behavior. See supra notes 358–60 and accompanying text.


379. Id. at 105.
Freud contended that a civilized person endures this psychological conflict because of his need to live with others. The superego is the force within the individual which inhibits her aggression against others. The superego allows us to coexist in a society. Thus, the superego impels us to love our neighbors as ourselves, or at least to say that we should, and to prevent us from doing what human nature, the id and ego, would naturally lead us to do. Freud believed that:

[I]ndividual development seems to us a product of the interplay of two trends, the striving for happiness, generally called "egoistic," and the impulse towards merging with others in the community, which we call "altruistic." . . . In individual development, as we have said, the main accent falls on the egoistic trend, the striving for happiness; while the other tendency, which may be called the "cultural" one, usually contents itself with instituting restrictions.381

Batson characterized Freud as believing that "[c]oncern for the welfare of others is something that civilization can extract from the individual only with the sharp whip of guilt . . . ." Thus, Freud believed that even "altruistic" actions are selfishly, or even egoistically, motivated. Actions which appear altruistic are actually motivated by a need to curb truly self-serving, natural action, rather than a desire to help another. Curbing that action is still egoistically motivated, because unhindered, self-interested action would lead to the destruction of civilized society. Thus, in Freud's view the preservation of society through apparently altruistic action is really motivated by self-interest.383

Freud's view of the super-ego, altruism, and instituting restrictions is somewhat consistent with the traditional legal view that there is no duty to act. Many laws forbid certain actions, while few require action. The law, therefore, is consistent with the notion that human nature is basically egoistic. It would be unreasonable to require people to help when people only become concerned with others when such

380.  Id. at 134–35.
381.  Id. at 134.
382.  BATSON, supra note 243, at 36.
383.  The idea of reciprocal altruism is similar: people help another now to help themselves later. See supra text accompanying note 370.
Aiding and Altruism

concern is self-benefiting. Requiring action would not comport with Freudian notions of psychological reality. It would ask too much. A duty to act based on Freudian concepts clearly would not be grounded in Batsonian altruism. Rather, it would be supported by the notion that a limited duty to act is, in some way, good for most individuals. It would be justified not solely by the good done for the rescued victim, but more by the good received by the rescuer or the public. This point moves us to consider the basic relationship between egoism and helping.

As Freud noted, when a person acts to rescue or help another, a number of egoistic motivations may be implicated. For instance, the helper may anticipate feeling good about himself if he helps. Alternatively, he may anticipate reward either from society or the individual aided. If people act in hope of gaining rewards, the law could encourage rescue by providing a reward for those who do rescue. Arguably, this is what the maritime law of salvage does when it awards a "bonus" to the salvor of maritime property.

Alternatively, people may act not simply to obtain rewards or to feel good about themselves, but also to avoid punishment or to avoid feelings of guilt or shame, all egoistic motives. If a person's motivation is to avoid punishment, one way to encourage action would be to create a rule that punishes a person if he fails to act. If people act to avoid guilt, the law could provide a rule which increases the guilt experienced from failing to act. If detection is unlikely, punishment or threatened liability for failing to act still deter to some extent: one would feel guilty for breaking the law; that guilt, or the desire to avoid guilt, might encourage one to act. Docile individuals would be most likely to act to avoid this guilt.

If people act selfishly to maximize their wealth, a reward for rescuing, or a penalty for not rescuing would be most likely to encourage socially desirable action. Egoism would dictate action as long as the ex ante net costs of acting, assuming there may be other benefits than simply avoiding liability, were lower than the potential liability for failing to act, discounted to pre-rescue value.

384. See supra notes 377–82 and accompanying text.
385. See Levmore, supra note 14, at 882–85.
387. See supra Part III.A.4.
5. Pure Altruism—Alternatively, one may act out of a truly altruistic motivation. While helping another, one also may incidentally satisfy some egoistic desire such as avoiding guilt, receiving a reward, or avoiding unpleasant feelings. However, if an actor's primary motive is to benefit another, then the motivation for action is altruistic.

Studies have indicated that feeling empathy for another increases helping behavior. 388 Importantly, studies have also indicated that feelings of empathy may be manipulated. 389 If one is told to attempt to imagine what the victim in an experiment is feeling, one's empathy for that individual will increase. 390 If one is told that she should simply observe the victim, however, less empathy will be evoked. 391

D. Batson's Model of Helping Behavior

To test the motivations of people who helped when feeling empathy, Batson created a model with three "paths" toward helping behavior. 392 On the first path, people act to receive rewards or avoid punishment. On the second path, based on aversive arousal reduction, people help another in distress to avoid their own unpleasant feelings generated by the victim's plight. Paths one and two are egoistically motivated, and may be expressed simultaneously. 393 The third path is Batson's empathy-altruism hypothesis, which states that people feel empathy and act on it out of an altruistic motivation. 394


389. See studies discussed in BATSON, supra, note 243, at 93–96.

390. Id. at 94.

391. Id.

392. Id. at 74–105.

393. Id. at 78.

394. Id. at 83–90. Each path of action requires that the actor perceive another as being in need. Id. at 75. Perception of need is the "recognition of a negative discrepancy between the other's current and potential states in one or more dimensions of well-being." Id. These dimensions include freedom from unpleasant states, such as
1. Path One: Expectancy of Reward or Punishment—On path one, where people act to garner rewards or avoid punishment, the potential rescuer must expect a reward for helping, a punishment for not helping, or some combination of the two. The egoistic motive to gain rewards or avoid punishment is the motivational state. The magnitude of the motivation depends upon two factors: the magnitude of the anticipated reward or punishment, and the potential rescuer's need for the anticipated reward or punishment. This need may include a need for enhanced self-esteem, a need for relief from bad feelings, or a need for the continuation of good feelings.

On path one, the potential actor will calculate the costs and benefits of each potential response. Four behavioral responses are possible: helping, letting another help, escaping, or doing nothing. The actor will engage in whichever response has the greatest perceived relative net benefit to himself. If seeking rewards is the reason one acts, helping need not be successful to satisfy the actor's motivational needs, because rewards may be bestowed even if one's help is not successful. Similarly, if one fears self-punishment for not acting, a third person's help may sufficiently abate any uncomfortable feelings. Finally, escaping without acting may effectively avoid societal or even self-punishment.

"physical pain, negative affect, anxiety, and stress," and the experience of pleasant feelings, such as "physical pleasure, positive affect, satisfaction, and security." See supra Part III.B.2. Rewards and punishment may include "being paid, gaining social approval, or avoiding censure . . . [or] may also be more subtle, such as receiving esteem in exchange for helping, complying with social norms, complying with internalized personal norms, seeing oneself as a good person, or avoiding guilt." BATSON, supra note 243, at 77 (citations omitted).

395. Rewards and punishment may include "being paid, gaining social approval, or avoiding censure . . . [or] may also be more subtle, such as receiving esteem in exchange for helping, complying with social norms, complying with internalized personal norms, seeing oneself as a good person, or avoiding guilt." BATSON, supra note 243, at 77 (citations omitted).

396. Id. at 78.

397. Id.

398. Id. at 81. This cost/benefit calculus may take only a matter of seconds. Id.
If personal guilt arises from inaction and a person feels obligated to comply with societal rules, then a rule requiring action may indeed encourage action as long as the motivation to act is to avoid punishment. Liability for failure to act would have a similar effect on people motivated by wealth maximization concerns. Path one is consistent with law’s deterrence function. Alternatively, if one helps in hope of gaining a reward, a legal scheme providing rewards for helping might trigger action. If path one motivation is the primary motive for helping, a legal duty to act, at least in certain situations, might play a key role in inducing helping behavior.

2. Path Two: Aversive Arousal Reduction—Path two is an aversive arousal reduction path. Once again, the actor must perceive another in need, but on path two the internal response is an experience of personal distress caused by seeing another in need or distress. The magnitude of this aversive vicarious emotion appears to be a function of three factors: the magnitude of the perceived need, its salience, and its personal relevance to oneself. Salience and personal relevance to one’s self increase with a feeling of “we-ness.” The more one identifies with the person in need, the more she will not only be aware of the situation but will see the situation as personally relevant. The actor’s motivational state in the aversive arousal model is to reduce personal distress, an egoistic motive. As in path one, the actor engages in a cost/benefit analysis. His behavioral response will be either helping, allowing another to help, or escaping. Here, the actor escapes not to avoid punishment but to avoid the stimulus which creates the unpleasant feelings. Physical escape is probably the only effective escape here. Short of escape, helping is the only way to avoid or abate the unpleasant feelings caused by witnessing another in distress.

A rule requiring action would seem most relevant when path one and two motivations overlapped. That is, if the negative feelings experienced when one sees another in distress coexist with a fear of punishment or liability, or hope of reward,
perhaps a legal duty to act, imposing punishment or liability for failing to act might heighten the negative feelings experienced when one witnesses another in distress.

3. Path Three: The Empathy-Altruism Hypothesis—The third path also requires that the actor perceive another in need, but on path three that perception leads to a unique internal response: empathy. The actor imagines how the person in need is affected by the situation, either by recalling a similar situation or by imagining how the situation must feel to the victim. Limits on adopting the perspective of another depend partially upon the extent to which one becomes engrossed in reminiscences. In the laboratory, perspective adoption often is induced by instructing the subject to imagine how the other person, the victim, is feeling. Another way to induce perspective-taking in the laboratory is to use subjects who have had prior experience in similar situations or who are attached somehow to the victim.

Attachment refers to "love, caring, feeling close, we-feeling, or bonding." The greater the attachment, the greater the likelihood of adopting that person's perspective. The strength of the felt attachment can affect the magnitude of empathy.

Path three motivation is altruistic. The magnitude of the altruistic motivation evoked by empathy is a direct function of the magnitude of the empathic emotion experienced. Even though the motivation on path three is altruistic, the actor still engages in a hedonic cost-benefit calculus. Here again, as in path two, helping must be effective. Unlike path two, however, there is no consideration of escape, because escaping will not help the victim. The only ways to deal with the altruistic motivation are to help or to get help.

406. Id. at 83.
407. Id.
408. Id. Two factors are relevant to the adoption of a perspective: (1) the ability to adopt another's perspective, and (2) "a perspective-taking set, that is, a set to imagine how the person in need is affected by his or her situation." Id. at 84.
409. See supra notes 388-91 and accompanying text.
410. BATSON, supra note 243, at 84-85.
411. Id. at 85.
412. Id.
413. Id. at 87.
414. Id. at 88-89.
415. Id.
If the empathy-altruism hypothesis holds weight, the effectiveness of a legal duty to act may vary with the level of empathy experienced or with the level of attachment. In this light, the law's imposition of a duty to act where there is a special relationship between an actor and the person at risk makes some sense.\(^4\) Similarly, current law regarding special relationships is consistent with the "reasonable person" standard of negligence law. The model implies that the reasonable person who is psychologically attached to someone in distress will act. Thus, a legal duty to act in circumstances in which the model predicts action would merely dictate what the psychologically reasonable person would do under the same circumstances anyway.

In summary, the motivation to help on Batson's paths one and two is egoistic while the motivation to help on path three is altruistic. Feeling empathy for another and responding to that empathy with action, however, do not necessarily establish that the motivation to act in such a circumstance is altruistic rather than egoistic. For instance, if one experiences empathy for another in distress, one may act to relieve the feeling of empathy not because of an altruistic motivation to help the other but because of an egoistic motivation. Empathy may trigger an egoistic motivation to help, such as avoiding punishment, receiving a reward, or avoiding some aversive arousal triggered by the empathy.\(^4\) One feeling empathy on path three may end up on paths one or two.\(^4\) To determine whether empathically aroused individuals act out of altruistic or egoistic motivation, Batson conducted a broad array of experiments.

4. Experimental Confirmation—(a) Disproving the Aversive Arousal Reduction Model—In his most recent book, Batson first recounts experiments dealing with the aversive arousal reduction model,\(^4\) noting that it is the most popular explanation for helping behavior when one experiences empathy.\(^4\) Using Batson's paths, the aversive arousal reduction model posits that when a person on path three feels empathy, she shoots up to path two, where her subsequent acts are motivated by a selfish desire to reduce unpleasant personal feelings.

416. See supra notes 411–12 and accompanying text.
417. BATSON, supra note 243, at 96–99.
418. Id. at 97, 99.
419. See id. at 109–27.
420. Id. at 98–99.
triggered by the feelings of empathy.\textsuperscript{421} This explanation of the empathy helping relationship is akin to the path two model described above,\textsuperscript{422} although here, seeing another in distress causes empathy, which in turn causes the need to reduce the negative feelings caused by the empathy. In contrast, on path two, seeing another in distress triggers negative feelings directly and causes one to act to reduce those negative feelings.\textsuperscript{423}

Batson's experiments confirmed the empathy-altruism hypothesis, not the aversive arousal reduction hypothesis.\textsuperscript{424} Thus, one who feels empathy acts to relieve the suffering of another, not to avoid empathically induced aversive arousal. In one context where the cost of helping was high, however, the experiment seemed to confirm the aversive arousal reduction model, rather than the empathy-altruism model.\textsuperscript{425} That is, when the cost of helping became too high, the motivational patterns tended to be egoistic rather than altruistic.\textsuperscript{426} Batson concluded that the "[r]esults of this study . . . suggest that any altruistic motivation that blossoms from feeling empathy may be a fragile flower, easily crushed by overriding egoistic concerns."\textsuperscript{427}

From a legal perspective, there are two ways to view the conclusions of this "fragile flower" experiment. Under the first view, law should not impose a duty to act when the costs of acting are high, because empathically motivated individuals tend to act egoistically rather than altruistically under such circumstances. When the costs of acting are high, it would be inconsistent with psychological models of human behavior to impose a duty. In situations where psychologically reasonable people would not act, the law should not require action. This view is consistent with the Minnesota, Vermont, and Rhode Island statutes that impose only a duty of easy rescue,\textsuperscript{428} and is also consistent with those legal scholars who have called for only a duty of easy rescue.\textsuperscript{429}

\begin{footnotes}
\item[421] Id.
\item[422] See supra notes 399–405 and accompanying text.
\item[423] See supra notes 399–405 and accompanying text.
\item[424] BATSON, supra note 243, at 126–27.
\item[425] Id. at 125–26.
\item[426] Id. at 126.
\item[427] Id. at 125–26. The "overriding egoistic concerns" were the higher costs of helping—in the experiment, pain from a shock. Id. at 124.
\item[428] See supra notes 147–49.
\item[429] See supra notes 158–59 and accompanying text.
\end{footnotes}
Alternatively, under a deterrence-oriented view of law, it is arguable that legal rules might be most effective when the costs of helping are high and the motivation to help is egoistic. If the applicable legal rule imposes punishment or liability, and if punishment-avoidance or guilt-avoidance is a partial motivation for behavior, then laws may be most necessary, or effective, when motivations are egoistic.\(^{430}\) Indeed, violating a rule that imposes a duty to act would distress docile individuals more than any others.\(^{431}\) Under this view, a duty to act may be unnecessary when the costs of helping are low, as empathy may trigger action without a legal duty. However, when empathy may not be expected to trigger action, such as when the costs of rescue are high, a legal duty to act may be the most effective way to encourage action.\(^{432}\) My own view is that law works best when it follows indicated psychological tendencies, not when it tries to counteract them. Thus, where the costs of rescue are high, I would contend that the "fragile flower" experiment indicates that not acting would be reasonable and therefore that the non-actor should not be subject to tort liability.

(b) Punishment Avoidance—Batson also studied the contention that acting when one feels empathy is governed by an empathy-specific punishment avoidance model.\(^{433}\) Proponents of this model contend that the tendency to help is greater when a person feels empathy because the helper knows that additional punishments in the form of guilt, shame, and censure follow inaction.\(^{434}\) There are two versions of the theory. The first postulates that one feeling empathy acts because of the concern or fear of additional socially administered punishments.\(^{435}\) The second suggests that one feeling empathy helps because of the fear of additional self-inflicted, though socially learned, punishments.\(^{436}\) Under either scenario, the desire to help is motivated by egoistic concerns because the motivation is primarily to avoid punishment.\(^{437}\) Here, one notes the

\(^{430}\) The same statement could be made concerning rewards if people act in the hope of receiving a reward.

\(^{431}\) See supra Part III.A.4.

\(^{432}\) At some point, presumably, one could argue that the risk to the actor would be so great that action should not be required.

\(^{433}\) BATSON, supra note 243, at 128–48.

\(^{434}\) Id. at 128–29.

\(^{435}\) Id.

\(^{436}\) Id. at 134.

\(^{437}\) See id. at 97–98.
relationship to path one. This theory of the relationship between empathy, punishment, and action shoots the empathically aroused individual from path three up to path one. Batson found little or no justification for an empathy-specific punishment model. Instead, his experiments once again confirmed the empathy-altruism model. High empathy individuals acted altruistically, not egoistically. The experiments did reveal, however, that low empathy individuals often helped out of a desire to avoid punishment.

The results of the experiments testing the empathy-specific punishment model also present some interesting ramifications for the law. Currently, tort law requires action when there is a special relationship between the bystander and the victim. Thus, the law imposes a duty to act in situations where a reasonable person experiences high levels of empathy and is motivated to help by altruistic reasons. Where there is low empathy, the experiments indicate that helping may be coerced, in part, by an egoistic concern or a desire to avoid punishment. In such a case, psychologists might contend that a law which imposes punishment or liability on a low-empathy individual for failing to act would have a positive effect on rescue.

Certainly, a law imposing liability on a high-empathy individual as well would do no harm. It would, as noted, be consistent with what psychologists expect the high-empathy actor to do anyway. The psychologically reasonable person experiencing high empathy would and should act; the failure to do so would be unreasonable, and therefore negligent, conduct. Interestingly, when the costs of helping were high, the experiments indicated that even the high-empathy actors' motivation to help were egoistic. Accordingly, a legal duty to act might even be appropriate for high-empathy individuals when the costs of action are high. In this regard, current special relationship rules between rescuer and victim may be psychologically appropriate because they provide an incentive for egoistically motivated action.

438. Id. at 96–97.
439. Id. at 134.
440. Id. at 147–48.
441. See supra Part I.B.
442. See supra note 440 and accompanying text.
443. See supra note 439 and accompanying text.
(c) Empathy-Specific Rewards Model—Finally, Batson considered psychological models that contend that the relationship between empathy and helping is related to empathy-specific rewards. Proponents of these models explain the empathy-helping relationship by claiming that when the helper empathizes with the person in need, the anticipation of social or self-rewards egoistically triggers aiding action.

There are two different versions of the empathy-specific rewards model of helping behavior. The first provides that we learn through our society that additional rewards, such as social praise or pride, follow helping one for whom we feel empathy. The second version states that the "need for the reward of helping, not the reward itself, is empathy specific." That is, we need to alleviate the "negative affective state" that empathy brings on. In such a case, empathy would lead to an egoistic desire to help. Based on a series of studies, Batson concluded that the empathy-specific rewards model was probably wrong, but that the evidence was "not as overwhelming or clear as evidence against the aversive-arousal reduction and empathy-specific punishment hypotheses." Nevertheless, if a relationship exists between empathy and specific rewards, laws might be crafted so that individuals who rescue could be specifically rewarded.

5. Batson's General Conclusions, Altruistic Personalities, and Mysticism—Professor Batson concludes that the motivation behind empathically induced helping is altruistic. Although an individual whose motivation to help is altruistic might also experience some incidental benefit from helping, the motivation to help another truly is altruistic. While some theorists have argued that there exists an altruistic personality type, Batson has concluded that there is not sufficient evidence to justify the belief that people who help

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445. Id. at 149–74.
446. Id. at 149.
447. Id.
448. Id. at 163 (emphasis omitted).
449. Id.
450. Id. at 173.
451. Id. at 174.
452. Id.
others are altruistic by virtue of their personality type; further research is needed.\textsuperscript{454}

While Batson does note that several of the identified altruistic personality variables are associated with increased helping, he also notes that the motivation behind helping associated with most of those variables is egoistic, not altruistic.\textsuperscript{455} Batson apparently believes that high-empathy individuals help others not because of their personality type and not because they are afraid of punishment, seeking reward, or seeking to abate unpleasant feelings. Rather, they help out of an altruistic motive triggered by their empathy for another in need.

Professor Thrasher, one critic of Batson’s work, has stated that to understand altruistic actions one might consider the east and the various mystical experiences in which ego breaks down and actor and rescued become, in essence, one.\textsuperscript{456} This is a psychological analogue of Schopenhauer’s philosophical explanation of rescue.\textsuperscript{457} As noted, Batson rejects the ego breakdown explanation. However, even if there is a mystical explanation for rescue, one wonders how the law could help induce this mystical response, other than by expressly recognizing the role compassion plays in human experience.

6. \textit{Batson and Legal Rules}—If people act because they fear punishment or liability, the law has a rather traditional role to play. A law threatening punishment or liability would induce action. Alternatively, if people act because they seek specific rewards, society might set up a legal regime that rewards rescue.\textsuperscript{458}

Even under Batson’s empathy-altruism model, there are situations in which, although people are partially motivated by altruism, egoistic motives predominate. In these situations, a law providing a duty to act with an accompanying sanction, liability, or reward could play a key role to the extent society

\textsuperscript{454} \textit{Batson}, \textit{supra} note 243, at 199.
\textsuperscript{455} \textit{Id.} at 200–01. Interestingly, docility was not included among Batson’s variables.
\textsuperscript{456} Thrasher, \textit{supra} note 376.
\textsuperscript{457} \textit{See supra} Part II.B.4.
\textsuperscript{458} For example, in admiralty, salvors are entitled to a reward, or bonus, when they rescue maritime property. \textit{See} \textit{Jo D. Lucas, Cases and Materials on Admiralty} 703–61 (3d ed. 1987). Interestingly, pure life salvors go uncompensated, \textit{id.} at 749–51. Thus there is no reward for saving mere life as opposed to saving solely property. An additional allowance, however, can be made for saving life in addition to property.
takes deterrence seriously. If, as Batson suggests, people act egoistically when the costs of rescue are high, a rule imposing a duty to act may be most important under those very circumstances.

More broadly, perhaps the most important thing about Batson's empathy-altruism hypothesis which concerns the legal duty to act is its recognition that people at least occasionally act to benefit others. This realization requires us to reexamine many of our current laws. It forces us to consider that laws based solely upon the psychological model that people act only to help themselves are not universally appropriate. Batson's work encourages us to recognize that we can expect more from people, that under certain circumstances a reasonable person may act to benefit another, despite hazards or costs.

Batson's hypothesis increases greatly the potential scope of legal action. At the least, it shows that the general rule imposing no duty to act is inconsistent with all of the psychological evidence, and paves the way for the imposition of a partial duty to act. Psychology tells us that we can expect more from people than the law currently requires. We must wonder whether there is some good reason for the law to ignore what psychology tells us about when, how, and why people act.

Throughout this Part, I have relied on psychological evidence to inform the reasonable person standard of negligence law. It is appropriate to consider relevant psychological data when deciding whether conduct is reasonable. We have long considered the common sense of the community by defining the standard of care for negligence in reference to the reasonable person.\(^{459}\) More recently, courts have expressly defined reasonable conduct in light of the costs and benefits associated with various actions.\(^{460}\) We must also consider our psychological capabilities.

Courts, when deciding whether to impose a duty to act, should consider the extent to which a bystander felt empathy for the victim. The higher the empathy, the more reasonable to require rescue and attach liability for not rescuing, especially if the costs of rescue are low. Therefore, Batson's psychological evidence counsels that among the relevant

\(^{459}\) PROSSER ET AL., supra note 55, at 151-52.

\(^{460}\) See generally United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (setting forth Judge Learned Hand's negligence formula B<PL, where B=burden, P=probability, and L=injury).
factors in asserting a duty to act are the amount of empathy experienced and the costs of rescue. In a low-risk case, a high-empathy actor is psychologically expected to act altruistically. In such a case, compassionate action is the norm, and tort law should institutionalize that norm.

Considering the psychological evidence broadens our traditional conception of reasonable conduct. American law generally has followed a Freudian bent in duty to act cases by holding that because people act primarily out of self-interest it is unreasonable to require them to act for another. In a cost-benefit, self-interested world, the rule imposing no general duty to act is consistent with the reasonable person standard. Incorporating Batson's evidence into the formula, however, may encourage society to reconsider. If reasonable people do act altruistically in certain circumstances, we must broaden our view of when tort law should require action.

The results of Batson's experiments on empathy and altruism are not inconsistent with feminist scholarship on tort law. Batson's data suggests that many of the characteristics that feminist scholars urge courts to consider when rendering their decisions, like empathy, do determine significant helping behavior by both men and women.

From a policy perspective, Batson's empathy-altruism hypothesis has even broader implications. People who experience high empathy do, in fact, help more often than others. Thus, the law might generally attempt to increase feelings of empathy. If feelings of attachment increase empathy, and empathy increases helping, laws could be designed to increase the amount of empathy we feel for others. The greater the empathy, the more altruistically motivated helping one could expect. Thus, if helping is desirable, perhaps legal rules should focus not on the moment help is needed, but instead on the more general pre-emergency setting, in order to

461. See supra notes 355-57, and accompanying text.
463. BATSON, supra note 243, at 192-98.
464. See supra note 388 and studies cited therein.
foster the empathy that would trigger action at the later time of the emergency. \(^{465}\)

In the next section I turn to several frequently cited theorists on the no-duty-to-act rule. I analyze them primarily in light of the empathy-altruism hypothesis, although I also note some relevant points raised by Latané and Darley's work.

IV. COMMENTATORS, PSYCHOLOGY, LAW, AND A MODEST PROPOSAL

A. Ames

In 1908 Dean Ames proposed the following rule:

One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death. \(^{466}\)

As we have seen, Ames's rule is consistent with the psychological evidence. Its duty of easy rescue conforms with Batson's "fragile flower" experiment, which showed that altruistically motivated helping is unlikely when the costs of action are high. \(^{467}\) Thus, if laws are designed merely to recognize truths, including psychological truths, Ames's rule would be consistent with the empathy-altruism hypothesis. Arguably, a legal rule would be most unnecessary in the easy rescue context, and most effective at deterrence, when the actor's primary motivation is of an egoistic nature. In that case, Ames's limited rule would be backwards.

\(^{465}\) Moreover, if people act altruistically to help, one must consider the extent to which people might, in fact, over-rescue. In that light, rescue actually may be, as Batson notes, "harmful to your health." Batson, supra note 243, at 212.


\(^{467}\) See supra Part III.D.4.
In his theory of strict liability based on principles of causation, Professor Epstein defends the no-duty-to-act rule in the good Samaritan case.\textsuperscript{468} To oversimplify Epstein's theory of strict liability, one is liable, irrespective of traditional notions of fault, when he \textit{causes} another to suffer injury. To cause an injury, some volitional act is required. Epstein explains and defends the current no-duty-to-act rule on the principle that the defendant non-actor has not caused the plaintiff any injury.\textsuperscript{469}

Professor Epstein criticizes those legal moral philosophers like Ames who have called for a duty of easy rescue, arguing that it is difficult, if not impossible, to place principled limits on such easy rescue rules.\textsuperscript{470} Accordingly, Epstein argues that if law requires forced exchanges via required rescues, it "will no longer be possible to delineate the sphere of activities in which contracts (or charity) will be required in order to procure desired benefits and the sphere of activity in which those benefits can be procured as of right."\textsuperscript{471} Further, he argues that the traditional rule tends to find the middle line between moral theories emphasizing the importance of free will and those concerning the external effects of individual behavior, rather than motivation.\textsuperscript{472} Although the "common law position on the good Samaritan question does not appeal to our highest sense of benevolence and charity,"\textsuperscript{473} Epstein thinks our current general rule is sensible.

At the conclusion of his defense of the traditional good Samaritan rule, Professor Epstein states his conception of the general purposes of tort law:

[I]t is better to see the law of torts in terms of what might be called its political function. The arguments made here suggest that the first task of the law of torts is to define the boundaries of individual liberty. To this question the rules of strict liability, based upon the twin notions of

\begin{footnotesize}
\begin{enumerate}
\item[468.] Epstein, \textit{supra} note 11, at 51–68.
\item[469.] \textit{Id.} at 51–52. Epstein excludes from his discussion cases in which the plaintiff and defendant share some special relationship. \textit{Id.} at 51 n.1.
\item[470.] \textit{Id.} at 60–63.
\item[471.] \textit{Id.} at 63.
\item[472.] \textit{Id.} at 64–65.
\item[473.] \textit{Id.} at 60.
\end{enumerate}
\end{footnotesize}
causation and volition, provide a better answer than the alternative theories based upon the notion of negligence, whether explicated in moral or economic terms. In effect, the principles of strict liability say that the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others.\textsuperscript{474}

Epstein prizes individual liberty, the freedom of an individual to act as she wishes, for oneself or another. Indeed, “[e]ven those who argue . . . that the law is utilitarian must in the end find some special place for the claims of egoism which are an inseparable byproduct of the belief that individual autonomy—individual liberty—is a good in itself not explainable in terms of its purported social worth.”\textsuperscript{475}

Certainly this may be true, but it assumes that people act out of self-interest. Although one might argue that individual liberty and altruism are consistent because an individual has the liberty to act altruistically, I associate the word “liberty” not with altruism, but with the right to act as one chooses for one’s self within certain broad limits. Thus, Epstein’s libertarian defense of the no-duty-to-act rule is somewhat inconsistent with Batson’s confirmation of the empathy-altruism hypothesis. Batson recognizes the psychological relationship between our highest senses of benevolence and charity, and our willingness to act on behalf of others.

Justification of a legal rule by largely egoistic concerns may contradict the psychological evidence Batson has disclosed. Put differently, liberty may or may not be considered a sufficient justification for a legal rule that contradicts the psychological evidence concerning human tendencies and motivations. If liberty is based, in part, on selfishness, it is somewhat odd to say that people are expected to act altruistically under certain circumstances but that the law says they need not because people have a right to act selfishly.

Epstein’s theories recognize the value of individual, egoistically motivated action. But liberty is not an absolute. Other values swirl in the mix. The major thrust of Part II, which discussed myth and literature, was to point out the cross-cultural recognition and praise of compassionate behavior. A

\textsuperscript{474} Id. at 68.
\textsuperscript{475} Id. at 61.
legal rule defended for its reinforcement of individual liberty fails to recognize that we exist in a world where interdependence is as real a condition as individual isolation.

C. Weinrib

Although he has since recanted,\textsuperscript{476} Professor Weinrib initially found support in moral philosophy for a tort law duty of easy rescue similar to Ames’ duty.\textsuperscript{477} Weinrib accepts “the intuition that failure to effect an easy rescue [is] morally reprehensible.”\textsuperscript{478} He therefore argues that Epstein’s defense of the no-duty-to-rescue rule contradicts Epstein’s claim that he is going to develop a “normative theory corresponding to common-sense morality.”\textsuperscript{479} After dealing with several of Epstein’s other arguments, Weinrib turns to Epstein’s argument that “confining the duty to rescue to situations of emergency and lack of inconvenience would not be feasible.”\textsuperscript{480} While noting Epstein’s underlying concerns for individual liberty, Weinrib feels that Epstein’s most challenging argument relates to the feasibility of a duty of easy rescue.\textsuperscript{481}

For Epstein, as for Kant and Godwin, freedom is a central value; indeed, he [Epstein] believes that “the first task of the law of torts is to define the boundaries of individual liberty.” If the proposed duty is admitted, he argues, no principled basis could be found to prevent unacceptable infringements of individual liberty. Charitable contributions in amounts dependent on the donor’s wealth would be compulsory if it were substantially certain that without them someone would die. Moreover, because the inconvenience to the reluctant rescuer could be eliminated by the victim’s offer of objectively suitable reimbursement, the rescuer would find himself coerced to exchange the means


\textsuperscript{477} See Weinrib, \textit{supra} note 27, at 279–92.

\textsuperscript{478} \textit{Id.} at 279.

\textsuperscript{479} \textit{Id.} at 259–60.

\textsuperscript{480} \textit{Id.} at 267.

\textsuperscript{481} \textit{Id.} at 268.
of salvation for compensation. Once such forced exchanges are required, says Epstein, there will be no way to distinguish liberty from obligation or contract from tort.\textsuperscript{482}

Weinrib responds to Epstein's argument by noting that in emergency situations, contract values are usually not at stake.\textsuperscript{483} Thus, he postulates that a duty of easy rescue in emergency situations would be imposed only when "values of contractual liberty are absent."\textsuperscript{484} Weinrib points out that such a legal rule of easy rescue would "correspond to existing restrictions on the power to contract,"\textsuperscript{485} and consequently would not consume contract law.

Importantly, Batson's empathy-altruism hypothesis does not distinguish between situations in which one acts altruistically in an emergency and in which one acts altruistically by engaging in beneficence, such as donating to charity. To the extent that one looks at the legal implications of Batson's empathy-altruism hypothesis, one might respect Epstein's objection that it is difficult to distinguish between beneficence and rescue. In this regard, Weinrib's limitation of the duty of easy rescue to emergency situations—where contract values are not implicated—makes some sense. One may go further, however, and question why beneficence might not be required if reasonable people would act beneficently under the circumstances.\textsuperscript{486}

Another objection to a tort duty to act has been that the sheer number of potential defendants would make the rule unworkable. Imagine a child drowning while a crowd looked on from a crowded beach without acting. How can the law single out one bystander to hold liable? The empathy-altruism hypothesis provides no response to this objection. Where there are several bystanders, Latané and Darley's evidence on limited action in the company of others handles the feasibility objections of Epstein concerning inaction. Psychologists would not expect action in the company of strangers, so it arguably would be inappropriate to impose a legal duty to act on any one among many bystanders. A duty could be imposed,

\textsuperscript{482} Id. at 267.
\textsuperscript{483} Id. at 268–72.
\textsuperscript{484} Id. at 270.
\textsuperscript{485} Id. at 279.
\textsuperscript{486} I presently make no such claim, although I note that taxation to fund various social programs is a form of universally imposed, forced beneficence.
however, if the bystanders or the victim had some relationship to the rescuer, or if the bystanders themselves were somehow related.

Weinrib also examined the philosophical foundations for a duty of easy rescue. He first focused on Jeremy Bentham's utilitarian justifications, pointing out that limiting the duty to rescue to emergency situations in which rescue was convenient would limit the duty of rescue along utilitarian lines and would keep the duty out of the field of beneficence. To Weinrib, if each and every individual acted or was required to act altruistically, we would all be "embrac[ing] a phantom." He thus imposes a convenience limitation that plays an important role in restricting the duty to rescue.

Of course, Batson's work, which finds that the empathy-altruism hypothesis is a "fragile flower," implies that the altruistic bases for rescue will not result in chasing phantoms. People faced with high rescue costs will not act, at least not out of altruistic motives. The costs of rescue will place practical limits both on the duty to rescue and the number of attempted rescues.

D. Landes, Posner, and Levmore

Professors Landes and Posner and Professor Levmore have examined the duty to rescue from an economic perspective and have made general recommendations regarding the inducement of rescue through punishment or reward. If Batson's empathy-altruism hypothesis holds true, rewards or punishments would be most relevant in those situations in which people were acting out of egoistic, rather than altruistic, motivations.

All three authors have written that imposing a duty to act might keep people away from certain recreational sites, such

487. Weinrib, supra note 27, at 279–92.
488. Id. at 280–81.
489. Id. at 282.
490. See supra notes 424–27 and accompanying text.
491. Weinrib's phantom objection is more persuasive as an objection to Schopenhauer's view of "mystical" rescue, but even then the objection is limited. Mystical states are transient. I know of no societies paralyzed by mystical activity.
492. Landes & Posner, supra note 52.
as crowded beaches. If people in crowds usually do not act, however, Latané and Darley's work would support a legal duty to act only if the victim was a relative or friend, the bystander was surrounded by relatives or friends, or the beach was a familiar environment. If courts adopted a duty to rescue with these limitations, I doubt that beaches would be empty. Further, a concern for empty beaches somewhat trivializes the capacity of one person to help another.

E. Heyman

In Foundations of the Duty to Rescue, Professor Heyman analyzed the legal duty to rescue in light of natural right and social contract theories. Heyman concluded that one's responsibility to the community and her relationship to individual members of the community can serve as the basis for a duty to rescue. That duty would extend to a stranger; however, only where action did not involve a "substantial risk of death or serious bodily harm to the rescuer or to others." Breach of the duty would be both a crime and a tort. Any resources expended in the rescue effort would be "recoverable from the community, through a mechanism established for that purpose." Heyman persuasively defends his proposal against both formalist objections like those of Weinrib and libertarian objections like those of Epstein. Although Heyman and I approach the issue from different perspectives, our general conclusions are similar.

494. See supra notes 343-54 and accompanying text.
495. Heyman, supra note 157.
496. Id. at 738-39.
497. Id. at 747-48. If a state intends to establish the duty with criminal sanctions, and to set up a public fund to compensate rescuers for expenses, legislation is of course required. Id. at 749. Moreover, because of several difficult situation-specific issues, Heyman believes that legislation would be preferable. Id. In the absence of positive legislation, courts could impose a tort duty of easy rescue. Id. at 750.
498. Id. at 748.
Professor Bender has argued for the imposition of a duty to act grounded in "a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation." \(^4\) Bender emphasizes that a person in need of rescue is "a human being, a part of us." \(^5\) The drowning person "is not detached from everyone else . . . He is interconnected with others." \(^6\) Bender's language is reminiscent of Schopenhauer's mystical accounts of rescue. \(^7\) Bender states that if "we impose a duty of acting responsibly with the same self-conscious care for the safety of others that we would give our neighbors or people we know, we require the actor to consider the human consequences of her failure to rescue." \(^8\) We would, in Batson's terms, encourage empathy, which the empathy-altruism hypothesis says leads to altruistic action. Bender calls for a duty arising out of our interconnectedness with a "strong legal value placed on care and concern for others rather than on economic efficiency or individual liberty." \(^9\) Bender's arguments for a duty to rescue are based on the human ability to behave compassionately. Her views generally are consistent with Batson's conclusions and with the proposal I make in the next subsection.

G. A Modest Proposal

Professor Leonard would base a duty of easy rescue upon a multifactor analysis of foreseeability, ease of rescue, moral blameworthiness, and other relevant factors. \(^10\) Like Professor Leonard, I too would impose a duty to act using multiple relevant factors for courts and juries to consider in particular cases. In addition to the factors Leonard identifies and those

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500. Id.
501. Id. at 34–35.
502. See supra notes 216–21 and accompanying text.
503. Bender, supra note 499, at 35.
504. Id. at 36.
505. See Leonard, supra note 26, at 863–64.
courts traditionally consider in such cases, I would implore them to consider the factors found relevant by the psychological studies described above.

First, as a general matter, I would restate the rule. Current law provides that there is no duty to act unless an exception to the rule is triggered. I would reject this statement of the rule in favor of a tort duty to help in an emergency when reasonable people would do so under similar circumstances. This positive statement of the rule has several benefits. First, it is consistent with the reasonable person standard traditionally applied in negligence cases. Reasonable care is what tort law normally requires of an actor; the law should require reasonable aid as well. A requirement of reasonable aid is consistent with the psychological evidence that people do act to help others out of a concern for others. Second, a positive statement of the duty recognizes the value of helping acts and our capacity to act compassionately. It recognizes a virtue rather than a limit. Moreover, it reflects conflicting values, individual liberty, and community action, rather than merely individualism.

More specifically, what I propose is a multifactor tort duty that would be flexibly applied in light of the relevant factors. Any flexible standard raises concerns of uncertainty and overdeterrence. I am willing to accept some of those risks in light of the psychological evidence and the fact that my proposal is consistent with the reasonable person standard traditionally employed in negligence cases. I am sensitive, however, to the concern that my flexible rule is not sufficiently well-defined to justify the imposition of a criminal sanction.

Before setting the relevant factors, however, let me make a procedural point about the allocation of decision-making power. I would leave it to the court in the first instance, not the jury, to decide if a reasonable person should have acted under the circumstances. Only if reasonable minds could conclude that a reasonable person would have acted, and that the call to action otherwise would not affect adversely any
relevant social policies would I counsel a court to submit the case to the jury. A court, when deciding whether to impose a duty of reasonable action in a particular case, should consider: (1) the number of bystanders present; (2) the degree of attachment, connection, or relationship between all the parties, including the bystanders; (3) the costs of rescue, including potential risk to the rescuer; (4) the degree of empathy that the defendant nonrescuer felt or could reasonably be expected to feel for the person who was not rescued; (5) the extent to which contract values were implicated, or adversely affected, by imposing a duty to rescue; and (6) the defendant's interest in doing what he chooses. The first two factors are based in Latané and Darley's work. The third, cost of rescue, is derived from Latané and Darley's model, Batson's experiments, and the legal commentators described in this section. The empathy factor is obviously based on Batson's work. The concern for contract values is one I share with Professor Weinrib, while the inclusion of the last factor, liberty, is an acknowledgment that liberty is a good, but only one good among many. It should be a factor, not an absolute. Along with liberty, we value compassion, and the law must recognize that fact, lest concern for individual autonomy and empty beaches isolates us not just from one another but from a part of ourselves as well.

CONCLUSION

The law traditionally has provided that there is no duty to aid or rescue. This rule is consistent with a psychological model of egoistic motivations, and a model of individual behavior under which each person is free to act as she chooses and under which individual decisions made out of self-interest supposedly lead to the greatest good for the greatest number. This no-duty-to-act rule has been criticized, however, not only

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508. For my view of the allocation of decision-making authority in tort cases generally, see Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 La. L. Rev. 1509 (1993).
511. *See supra* Part III.D.3.
by legal scholars but also by the world’s religions and artists. Philosophers like Schopenhauer have called for action under certain circumstances.

In light of this conflict between law and values, and in light of the psychological evidence, one justifiably may conclude that the current rule is inappropriate. By considering what psychology has to say about the way in which the mind actually works, we may develop new insight into developing appropriate legal rules. It is in this vein that I have undertaken extensive discussions of the work of Latané and Darley, and Batson. Their work has ramifications for our legal conceptions of when and how courts ought to impose a duty to act. In some regards, the psychological literature is consistent with current legal rules. In other instances, however, the psychological evidence tends to support the conclusion that the law should be more demanding.

Based on that evidence I have argued that the law should impose a tort duty, in an emergency, to act to help when reasonable people would do so. The impetus for my proposal comes, in part, from a personal commitment to our capacity, as well as our need, for compassion. Batson’s confirmation of the empathy-altruism hypothesis provides support for the notion that reasonable people do act to help others.

In the end, however, I must confess some uncertainty. I have been educated in a world where egoism was assumed to be the basic motivating force in human behavior. Batson’s work raises doubt; however, I cannot abandon the traditional behavioral model so easily. Ultimately, I am left thinking of egoism and altruism as one of the world’s many “mutually supplementary antagonisms [like]: male-and-female, age-and-youth, life-and-death, love-and-hate; these, by their attraction, conflicts, and repulsions, supply polar energies that spin the universe.” Adding egoism and altruism to the list, it does not seem unreasonable that law, in shaping its rules, at least ought to consider both. It is the express consideration of altruism, as a prevalent motivation for action, that requires an adjustment of our traditional image of tort law.

512. JOSEPH CAMPBELL & HENRY M. ROBINSON, A SKELETON KEY TO FINNEGAN’S WAKE 14 (1944) (emphasis omitted).