

Where Morality and the Law Coincide: How Legal Obligations of Bystanders May Be Informed by the Social Teachings of Pope Francis

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INTRODUCTION

Since the beginning of his pontificate, Pope Francis has offered to the world powerful signs of how we should aspire to treat each other as human beings, as brothers and sisters in the one human family.¹ He has communicated his message and his teachings in myriad ways: through symbolic gestures; his presence and words at gatherings in our world’s most troubled places; brief messages, homilies and meditations; and official documents that continue the application of the principles of Catholic social teaching to contemporary social questions.

What might these prophetic signs and statements mean for the dialogue between Catholic social thought and other disciplines? This Article focuses on how the teachings of Pope Francis may illuminate how to theorize the legal obligations of a bystander to a person in need of emergency assistance. In particular, it zeroes in on the so-called “easy rescue” cases in which assistance would seem to pose little or no risk to the bystander, often typified by the trope of a passerby who notices a

1. To note just two examples, see Pope Francis, Photo Gallery *from Homily: Mass of the Lord’s Supper* (Mar. 28, 2013), http://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_20130328_coena-domini.html [<https://perma.cc/WY6B-UXY2>] (Pope Francis washing the feet of young detainees from different ethnic and religious backgrounds); Faith Karmini, *Pope Francis’s Embrace of a Severely Disfigured Man Touches the World*, CNN (Nov. 7, 2013, 6:43 PM), <http://www.cnn.com/2013/11/07/world/europe/pope-francis-embrace/> [<https://perma.cc/M8UY-SHP3>].

toddler drowning in a wading pool.² In the teachings of Pope Francis, reflections on the moral obligations of bystanders—often in the form of meditations on the seminal “rescue” story, the Parable of the Good Samaritan, as well as extended analysis of the perils of a culture of indifference—are no mere footnote, but a central feature.

Shouldn’t it be obvious that a powerful moral obligation to assist other human beings—neighbors in need—has important implications for legal and economic structures? In short, no, it is not obvious. Certainly, reflections on the growing creep of indifference to the needs and the pain of others pull in the direction of a strong moral obligation, but other features of the teachings of Pope Francis may complicate the analysis. For example, reflecting on another central theme of Pope Francis’s pontificate—the meaning and application of mercy in the Church and in society³—leads one to ask, which way does mercy cut? Not everyone is a “do-gooder” or inclined to be heroic.⁴ Might mercy also include a certain comprehension and embrace of the human limitations that people experience in their encounters with pain and violence? Who am I to judge? Further, in settings where Pope Francis is reflecting on the relationship between theological insights and business models, he admits that the Good Samaritan is “not enough.”⁵ Analysis of the systems that lead to both robbers and victims present a more complicated set of questions.

What happens when the teaching of Pope Francis on the duties of bystanders—understood not as a flat and unidimensional assertion, but as a complex and multi-dimensional weave—is placed into dialogue with legal theory? This Article argues that an appreciation for the interior life and decision-making process of bystanders can help us to shed the flat caricatures on either end of the spectrum: on one hand, the unrealistically

2. These “easy rescue” cases are a tiny subset of fact patterns regarding bystander interactions with victims of violence. In other work, I have explored fact patterns in which bystanders become “engaged spectators” by taking pictures or recording, and I have argued for the development of a new “tort of objectification” in order to hold such spectators accountable for the distinct injury that they inflict. See generally Amelia J. Uelmen, *Crime Spectators and the Tort of Objectification*, 12 U. MASS. L. REV. 68 (2017).

3. See, e.g., Pope Francis, Apostolic Letter: *Misericordiae Vultus: Bull of Indiction of the Extraordinary Jubilee of Mercy* (Apr. 11, 2015), https://w2.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_bolla_20150411_misericordiae-vultus.html [<https://perma.cc/J2YA-78LW>]; POPE FRANCIS, THE NAME OF GOD IS MERCY (Oonagh Stransky trans., 2016).

4. This Article travels in a different direction than recent works that focus on the sociology and psychology of “do-gooders.” See, e.g., LARISSA MACFARQUHAR, STRANGERS DROWNING (2015).

5. See Pope Francis, Address to Participants in the “Economy of Communion” Meeting (Feb. 2, 2017) [hereinafter *Economy of Communion*], https://w2.vatican.va/content/francesco/en/speeches/2017/february/documents/papa-francesco_20170204_focolari.html [<https://perma.cc/BY7N-78C3>]; see discussion *infra* note 123.

calm, cool, collected, utterly prepared superhero; and on the other, tort law's villainous "moral monster."

With these caricatures out of the way, the Article then proceeds to explore how this more fleshed out picture of the relationship between law and morality might illuminate some of the more difficult questions at the heart of the dialogue, including the definition of freedom. In particular, it considers how to proceed when a key word or phrase at issue—in this case, freedom—is an "essentially contested concept," defined in radically different ways because of seemingly diametrically opposed worldviews.⁶

Often the social teachings of Pope Francis directly challenge the status quo. Say "no," he advised, to that "spiritual asphyxia" that is "born of the pollution caused by indifference, by thinking that other people's lives are not my concern."⁷ But in the next breath the Pope added that we also need to say no to "the toxic pollution of empty and meaningless words, or harsh and hasty criticism, of simplistic analyses that fail to grasp the complexity of problems, especially the problems of those who suffer the most."⁸ Taking up this double challenge, this Article concludes that while the "easy rescue"⁹ analysis may seem to be grounded in a healthy critique of indifference, it fails to grasp the deeper complexity of the encounter between bystanders and victims. When the legal analysis is informed by this insight, theorists can move forward to address more complex questions.

I. THE GOOD SAMARITAN AND THE GLOBALIZATION OF INDIFFERENCE

It is not surprising that Pope Francis, a communicator who is sensitive to how well-known and well-loved stories and examples resonate with ordinary people, would make frequent and, at times, extended reference to the Parable of the Good Samaritan as recounted in the Gospel of Luke. The text of the Parable follows:

⁵And behold, a lawyer stood up to put him to the test, saying, "Teacher, what shall I do to inherit eternal life?" ²⁶He said to him, "What is written in the law? How do you read?" ²⁷And he answered, "You shall love the Lord your God with all your heart, and with all

6. See W.B. Gallie, *Essentially Contested Concepts*, 56 PROCS. ARISTOTELEAN SOC'Y 167 (1955–1956); see also Amelia J. Uelmen, *Mapping a Method for Dialogue: Exploring the Tensions Between Razian Autonomy and Catholic Solidarity as Applied to Euthanasia*, 2 J. MORAL THEOLOGY 133, 144 (2013) (employing the concept to analyze sharp differences between liberal theory and Catholic social thought).

7. Pope Francis, Homily: *Ash Wednesday* (Mar. 1, 2017), https://w2.vatican.va/content/francesco/en/homilies/2017/documents/papa-francesco_20170301_omelia-ceneri.html [<https://perma.cc/PYG4-LCMP>].

8. *Id.*

9. For a description of the "easy rescue" cases, see discussion *supra* note 2.

your soul, and with all your strength, and with all your mind; and your neighbor as yourself.”²⁸ And he said to him, “You have answered right; do this, and you will live.”²⁹ But he, desiring to justify himself, said to Jesus, “And who is my neighbor?”³⁰ Jesus replied, “A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him, and departed, leaving him half dead.³¹ Now by chance a priest was going down that road; and when he saw him he passed by on the other side.³² So likewise a Levite, when he came to the place and saw him, passed by on the other side.³³ But a Samaritan, as he journeyed, came to where he was; and when he saw him, he had compassion,³⁴ and went to him and bound up his wounds, pouring on oil and wine; then he set him on his own beast and brought him to an inn, and took care of him.³⁵ And the next day he took out two denarii and gave them to the innkeeper, saying, ‘Take care of him; and whatever more you spend, I will repay you when I come back.’³⁶ Which of these three, do you think, proved neighbor to the man who fell among the robbers?”³⁷ He said, “The one who showed mercy on him.” And Jesus said to him, “Go and do likewise.”¹⁰

In a visit to a hospital during his 2013 trip to Brazil, Pope Francis drew his audience into the story with a reflection on the reactions of the various characters in the story.

In the Gospel, we read the parable of the Good Samaritan, that speaks of a man assaulted by robbers and left half dead at the side of the road. People pass by him and look at him. But they do not stop, they just continue on their journey, indifferent to him: it is none of their business! How often we say: it’s not my problem! How often we turn the other way and pretend not to see! Only a Samaritan, a stranger, sees him, stops, lifts him up, takes him by the hand, and cares for him.¹¹

Even more forcefully, during a 2013 homily at Lampedusa, the island in the middle of the Mediterranean Sea that has witnessed the catastrophic drownings of countless migrants attempting to cross in rickety boats from North Africa, Pope Francis challenged his listeners to recognize themselves in those who failed to respond to the victim’s needs:

We have fallen into the hypocrisy of the Priest and the Levite whom Jesus described in the Parable of the Good Samaritan: we see our brother half dead on the side of the road, and perhaps we say to

10. *Luke* 10:25–37.

11. Pope Francis, Address to the St. Francis of Assisi of the Providence of God Hospital, Brazil (July 24, 2013), https://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130724_gmg-ospedale-rio.html [<https://perma.cc/ZZE6-87NE>] (citing *Luke* 10:29–35).

ourselves: “poor soul...!”, and then go on our way. It’s not our responsibility, and with that we feel reassured, assuaged.¹²

On this occasion, the story of the Good Samaritan served as a backdrop for a ringing indictment of the “globalization of indifference,” which then became one of the running themes of his pontificate.¹³

The culture of comfort, which makes us think only of ourselves, makes us insensitive to the cries of other people, makes us live in soap bubbles which, however lovely, are insubstantial; they offer a fleeting and empty illusion which results in indifference to others; indeed, it even leads to the globalization of indifference. We have become used to the suffering of others: it doesn’t affect me; it doesn’t concern me; it’s none of my business.¹⁴

Pope Francis then drew out a further connection to the *Genesis* story of Cain’s murder of Abel and to what might be described as that very first lame excuse for avoidance of responsibility: “Am I my brother’s keeper?” The Pope laments:

Who is responsible for the blood of these brothers and sisters of ours? Nobody! That is our answer: It isn’t me; I don’t have anything to do with it; it must be someone else, but certainly not me. Yet God is asking each of us: “Where is the blood of your brother which cries out to me?”¹⁵

12. Pope Francis, Homily: “*Arena*” *Sports Camp, Salina Quarter* (July 8, 2013) [hereinafter *Lampedusa*], http://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_2013008_omelia-lampedusa.html [<https://perma.cc/TM9R-ZBCB>].

13. See, e.g., Pope Francis, *Apostolic Exhortation, Evangelii gaudium* para. 54 (2013), <http://www.vatican.va/evangelii-gaudium/en/files/assets/basic-html/index.html#1> [<https://perma.cc/4ZWU-23BZ>] [hereinafter Pope Francis, *Evangelii gaudium*] (“To sustain a lifestyle which excludes others, or to sustain enthusiasm for that selfish ideal, a globalization of indifference has developed. Almost without being aware of it, we end up being incapable of feeling compassion at the outcry of the poor, weeping for other people’s pain, and feeling a need to help them, as though all this were someone else’s responsibility and not our own. The culture of prosperity deadens us; we are thrilled if the market offers us something new to purchase. In the meantime, all those lives stunted for lack of opportunity seem a mere spectacle; they fail to move us.”); Pope Francis, Encyclical: *Laudato si’* (On Care for Our Common Home) (2015) [hereinafter *Laudato*], http://w2.vatican.va/content/francesco/en/encyclicals/documents/papafrancesco_20150524_encyclica-laudato-si.html [<https://perma.cc/4ZWU-23BZ>] (noting widespread indifference to refugees due to climate change: “Sadly, there is widespread indifference to such suffering, which is even now taking place throughout our world. Our lack of response to these tragedies involving our brothers and sisters points to the loss of that sense of responsibility for our fellow men and women upon which all civil society is founded.”); see Pope Francis, *Evangelii gaudium* at para. 52 (discussing the need to reduce the “globalization of indifference” regarding the human impact of foreign debt); *id.* at Concluding Prayer (“Enlighten those who possess power and money that they may avoid the sin of indifference...”).

14. *Lampedusa*, *supra* note 12.

15. *Id.*

Throughout his pontificate, Pope Francis has returned frequently to the Parable in his speeches and homilies. For example, in April 2016, he referred to the story to specifically indict those whose focus on *religious* obligations might actually prevent them from seeing their neighbor's needs: "They were in a hurry . . . The priest perhaps looked at his watch and said: 'But I'll be late for Mass . . .' The other one said: 'But, I don't know if the Law allows me, because there is blood there and I will be impure . . .'"¹⁶ From this, the Pope draws out the connection between "true worship" and service to one's neighbor:

Let us never forget it: in the face of the suffering of so many people destroyed by hunger, by violence and by injustices, we cannot remain spectators. What does it mean to ignore man's suffering? It means to ignore God! If I do not approach that man, or that woman, that child, that elderly man or elderly woman that is suffering, I do not come close to God.¹⁷

In a July 2016 Angelus message, Pope Francis reiterated the strong identification between those who, in their suffering, ask for our attention and the presence of God. He exhorted:

The Lord will say to us: 'But you, you remember that time on the road from Jerusalem to Jericho? That man was me half dead. Do you remember? That hungry child was me. Do you remember? The migrant who many want to drive out it was me. Those grandparents alone, abandoned in nursing homes, it was me. That sick person alone in the hospital, that no one goes to see, was me.'¹⁸

Wouldn't this very strong connection between a scriptural point of reference and a clear ethical commitment be enough to draw out straightforward consequences under legal theory?¹⁹ It is tempting to stop here.²⁰ But I believe that other reflections of Pope Francis on the Parable somewhat complicate the question.

16. Pope Francis, *General Audience* (Apr. 27, 2016), https://w2.vatican.va/content/francesco/en/audiences/2016/documents/papa-francesco_20160427_udienza-generale.html [https://perma.cc/HK4X-22D2].

17. *Id.*

18. Pope Francis, *Angelus* (July 10, 2016), https://w2.vatican.va/content/francesco/en/angelus/2016/documents/papa-francesco_angelus_20160710.html [https://perma.cc/862E-25LL].

19. Such would track the almost instinctual reaction that generations of law students have had when they study examples of the common law no duty to rescue. *See, e.g.*, Ingrid Hillinger, *The Duty to Rescue*, 6 COLONIAL L. 8, 9 (1976) (describing the reaction of her torts class to "these unsavory cases": "Our moral sensibilities were deeply offended. Almost instinctively we turned to the legal system. 'There ought to be a law,' we cried."). *See also* discussion *infra* note 120.

20. Some thoughtful theological studies strongly emphasize this dimension of the social teaching. *See, e.g.*, ELISABETH T. VASKO, BEYOND APATHY: A THEOLOGY FOR BYSTANDERS (2015). My work is not a direct critique of this approach but an argument that the implications for *legal* theory require further and more complex layers.

II. MERCY AND THE INTERIOR LIFE OF BYSTANDERS

A. Which Way Does Mercy Cut?

The teachings of Pope Francis also include reflections on the Good Samaritan as an example of another important theme in his pontificate: mercy. For Pope Francis, mercy is tied to getting one's hands dirty, with not being afraid to take on—or be contaminated by—the “smell of the sheep.”²¹ Mercy is “that love which embraces the misery of the human person.”²² Even more graphically, “Mercy gets its hands dirty. It touches, it gets involved, it gets caught up with others, it gets personal.”²³

In a video message to a national gathering of the Argentinian “Open Hands” project, the Pope carefully distinguished the concept of mercy from that of pity or philanthropy. Reflecting on the Parable of the Good Samaritan as well as Jesus's encounter with the widow of Nain (Luke 7:13), he explained:

[Mercy is] when the other's misery, or a situation of grief or misery, enters my heart and I let that situation touch my heart. . . . And this is the way: there is no mercy unless the heart is broken, a heart wounded by another's misery, because of another's painful situation; [it is] a heart that lets itself be wounded.²⁴

Ultimate mercy is a gift from the Lord, grounded in one's own experience of weakness and vulnerability:

One can only be merciful if one has truly felt the Lord's mercy, otherwise one cannot be merciful. If you feel that your sin is assumed, forgiven, forgotten by God, you are *merciful*, and from having experienced mercy you will be able to be *merciful*. If mercy doesn't come from your heart, it isn't mercy.²⁵

What happens to the heart in the process? When one is wounded by another's misery, the heart becomes “like a compass.”²⁶ Pope Francis even suggests that this “compass” might take over other more rational assessments—to the point of not knowing “where it is standing because of

21. Pope Francis, Homily: *Chrism Mass* (Mar. 28, 2013), http://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_20130328_messa-crismale.html [https://perma.cc/D8RA-ZG49].

22. Pope Francis, Homily: *Feast of Our Lady of Guadalupe* (Dec. 12, 2015), https://w2.vatican.va/content/francesco/en/homilies/2015/documents/papa-francesco_20151212_omelia-guadalupe.html [https://perma.cc/DD34-6R87].

23. Pope Francis, First Retreat Meditation, *Jubilee for Priests* (June 2, 2016), https://w2.vatican.va/content/francesco/en/speeches/2016/june/documents/papa-francesco_20160602_giubileo-sacerdoti-prima-meditazione.html [https://perma.cc/ES3E-38MF].

24. *Id.*

25. *Id.*

26. *Id.*

what it is feeling.”²⁷ This, according to the Pope, is where the “return trip” begins.

And thus the path goes from my misery that has received *mercy*, to the misery of the other; from my misery loved by God, to the love of the other’s misery; from my misery loved in my heart, to its expression with my hands, and that is mercy. Mercy is a trip from the heart to the hands.²⁸

But when considering the obligations of bystanders, which way does mercy cut? As will be discussed more fully below, multidirectional traffic may be much more complex than a one-way street. A fuller exploration of the encounter between one person’s need and another person’s response invites one to consider not only the “misery” of the victim on the side of the road but also the “misery” of the bystander, and all that might get in the way of an otherwise heroic response.

One of the contexts in which Pope Francis fleshes out the dimension of mercy for those who may have failed to meet obligations and expectations is in his conversations with prisoners. For example, meeting with those detained at the Curran Fromhold Correctional Facility during his visit to the United States in September 2015, commenting on the phrase from John 13:8, “You will never wash my feet,” the Pope explained:

In those days, it was the custom to wash someone’s feet when they came to your home. That was how they welcomed people. The roads were not paved, they were covered with dust, and little stones would get stuck in your sandals. Everyone walked those roads, which left their feet dusty, bruised or cut from those stones. That is why we see Jesus washing feet, our feet, the feet of his disciples, then and now. We all know that life is a journey, along different roads, different paths, which leave their mark on us.²⁹

Dirty from the “dust-filled roads of life and history,” we all need to be cleansed, the Pope confessed, “All of us. Myself, first and foremost.”³⁰ The profound limitations that mark the human condition touch everyone: “It is painful when we see people who think that only others need to be cleansed, purified, and do not recognize that their weariness, pain and

27. *Id.*

28. *Id.*

29. Pope Francis, Address to Detainees at Curran-Fromhold Correctional Facility (Sept. 27, 2015), https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150927_usa-detenuiti.html [<https://perma.cc/E7SP-LUWB>].

30. *Id.*

wounds are also the weariness, pain and wounds of society.”³¹ To draw a phrase from a different context, when we discern that not everyone may respond in a heroic way to the needs of others, especially in the context of exposure to pain or violence, “Who am I to judge?”³²

So which way does mercy cut? It may be difficult to tell. We must be on guard, Pope Francis exhorted the United States Congress during his September 2015 visit, against the temptation of “the simplistic reductionism which sees only good or evil; or, if you will, the righteous and sinners. The contemporary world, with its open wounds which affect so many of our brothers and sisters, demands that we confront every form of polarization which would divide it into these two camps.”³³

B. Bystanders as “Moved From the Gut”

Considering the role of bystanders to a victim in need of emergency assistance, what happens when we attempt to remove that polarizing filter that divides the world into the righteous and the sinners? This Section explores how two dimensions emerge: first, a heightened attention to the complex interior life not only of victims but also of bystanders; and second, a greater appreciation for the role of emotions in the assessment of bystander responses.

Returning to the Parable of the Good Samaritan in light of Pope Francis’s reflections on mercy, one might query the extent to which the text itself illuminates the Samaritan’s emotional state. What was he thinking? What might have been the steps of his decision-making process? To use the phrase of Pope Francis, how might one describe that “round trip” of an encounter with another’s “misery” to the hands-on actions of service and healing?

It is often hard to get a glimpse of what might reveal something of the Samaritan’s interior life because our attention is often drawn to the action of the rescuer. In artistic portrayals of the Parable of the Good Samaritan, rarely do the depictions draw our eyes to aspects that might reveal something of the Samaritan’s emotional core, such as facial

31. *Id.*; see also First Retreat Meditation, *supra* note 23 (describing the “embarrassed dignity” of the “prodigal yet beloved son” (Luke 15:11–13), and that the place where “dignity and embarrassment exist side by side” is “how our Father’s heart beats”).

32. Pope Francis, Press Conference During Return Flight from Apostolic Journey to Rio de Janeiro (July 28, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-conferenza-stampa.html [<https://perma.cc/H6U9-TX3M>] (answering a question regarding homosexual priests: “If someone is gay and is searching for the Lord and has good will, who am I to judge?”).

33. Pope Francis, Address to Joint Session of the United States Congress (Sept. 24, 2015), https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html [<https://perma.cc/UUB3-N6WV>]. For a critique of “simplistic analyses,” see also Homily: *Ash Wednesday*, *supra* note 7.

expression. For example, in one of the earliest paintings of the parable, a work by Domenico Fetti, we see only the Samaritan's back, as he lifts the victim onto his horse.³⁴ Rembrandt's 1644 pen and brush sketch foregrounds the activity of the caring for the victim, but the Samaritan's lightly detailed face seems focused on the bottle of oil, in concentration on the activity at hand.³⁵ Later works by Delacroix and Van Gogh give a glimpse of the Samaritan's face but without much detail, as the focus of the painting remains on the action of lifting the victim onto a horse.³⁶ For example, in Delacroix's 1852 work, the Samaritan's face is visible as he leans over the man to tend his wounds, but the soft brush strokes do not give much detail of his facial expressions.³⁷ Likewise, Bartholdi's small bronze sculpture depicts the Samaritan as curved over the victim, with his face down and focused on the victim's body as he cleans the victim's wounds.³⁸ One very striking exception to this pattern is Swiss painter Ferdinand Hodler's painting, in which the eye is immediately drawn to the fully depicted front view of the face of the Samaritan: old and wrinkled, but vibrant and expressive as he seems to be trying to communicate with the victim.³⁹

Just as the artistic focus on action makes it difficult to catch a glimpse of the Samaritan's emotional core, so too, the emphasis on action in the interpretation of the text of the Parable often eclipses a more complex assessment of the Samaritan's motives and decision-making process. For example, common translations of the Samaritan's primary motivation for action often seem to connote a kind of reasonable and controlled conferral of a benefit on the victim: he *had* compassion; he *showed* pity or mercy.⁴⁰

34. See Domenico Fetti, *Parable of the Good Samaritan* (ca. 1662), in Boston Museum of Fine Art; see also Rembrandt, *The Good Samaritan at the Inn* (1633) (depicting the Samaritan with his back turned as he negotiated with the innkeeper; eyes are also drawn to the fairly large detail in the foreground of a dog in the process of defecating).

35. Rembrandt, *The Good Samaritan Tends the Wounded Man* (1644).

36. See Eugene Delacroix, *The Good Samaritan* (1849); Vincent van Gogh, *The Good Samaritan* (1890).

37. Eugene Delacroix, *The Good Samaritan* (1852).

38. Frédéric-Auguste Bartholdi, *Le Bon Samaritain* (1853).

39. See Ferdinand Hodler, *Good Samaritan* (1886); see also Ferdinand Hodler, *The Merciful Samaritan* (1875) (Samaritan seems to be in a modern business vest; eyes are lowered and focused on the victim's face as he tries to give him something to drink). For other examples of Hodler's capacity to capture the interior life of his subjects through facial expressions, see Ferdinand Hodler, *A Troubled Soul* (1889) and *Las de la vie* (Tired of Life) (1892).

40. The earliest Latin translation, the Vulgate, and later English translations generally fail to capture the deeper dimensions of the word, often translating it with the potentially cleaner and more rational "mercy" or "compassion." See, e.g., *Luke 10:33* (VULGATE) ("Samaritanus autem quidam iter faciens venit secus eum et videns eum *miser cordia* motus est."); *Luke 10:33* (NEW INTERNATIONAL VERSION) ("when he saw him, he took pity on him"); *Luke 10:33* (KING JAMES VERSION) ("when he saw him, he had compassion on him"); *Luke 10:33* (NEW AMERICAN STANDARD BIBLE) ("when he saw

But as recounted in Luke, the Greek verb which describes the Samaritan's motivation, *σπλαγχνίζεσθαι*, is much stronger, rawer, and potentially boiling over with uncontrolled emotion. Based on the noun "splangchna," which refers to "bowels" or vital organs such as the heart, the liver, and the intestines, the verb *ἐσπλαγχνίσθη* (*esplanchnisthē*) can be literally translated as "feeling a tug from the gut or the bowels."⁴¹ A more in-depth analysis of this word helps to flesh out Pope Francis's insight that the heart—the seat of the emotions—becomes the "compass," and therefore also breaks open the legal analysis to a more complex consideration of how the emotional interior life of bystanders impacts the decision-making process.

In the New Testament, *σπλαγχνίζεσθαι* is an unusual word with a somewhat complex history. A few studies note a distinction between the Hebrew and Greek conceptual streams that inform the metaphorical threads for interpretation.⁴² As Orsolina Montevicchi explains: "In the classical thread, 'bowels' (*viscere*) are conceived as the seat of strong and instinctive passions: anger, fury, anguished anxiety, suffering, passionate love; passions that disturb and consume man. The word corresponds more or less to 'heart.'"⁴³

A brief survey of the use of *σπλαγχνίζεσθαι* in ancient Greek literature also indicates its association with raw emotion—for example, extreme anger⁴⁴ or erotic desire.⁴⁵ Montevicchi argues that this tradition

him, he felt compassion"); *Luke* 10:33 (NEW AMERICAN BIBLE) ("who came upon him was moved with compassion at the sight").

41. See generally Orsolina Montevicchi, *Viscere di misericordia*, 43 RIVISTA BIBLICA 125 (1995) (translation from the original Italian, *infra*, is my own).

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

43. Montevicchi, *supra* note 41, at 126.

44. See AESCHYLUS, *AGAMEMNON* 995 (Loeb Classical Library, 1930), <http://classics.mit.edu/Aeschylus/agamemnon.html> [<https://perma.cc/4D2R-QLHT>] (foreboding chorus predicting a murder: "Not for naught is *my bosom disquieted as my heart throbs* against my justly aboding breast in eddying tides that presage [the coming doom]"); HERODAS, *MIMIAMBOI* (THE MIMES) III:42 (Walter Headlam ed., 1966), <https://babel.hathitrust.org/cgi/pt?id=nnc2.ark:/13960/t4qj8r93j;view=1up;seq=4> [<https://perma.cc/RZK6-4LSW>] (exasperated mother making the case to the school master that her son should be flogged for his misdeeds: "What do you suppose *I feel inside*—poor me—whenever I see him!") (italics are my own, indicating the translation of *σπλαγχνίζεσθαι*).

45. See, e.g., DIONYSIUS OF HALICARNASSUS, *THE ROMAN ANTIQUITIES* XI 35:4 (Loeb Classical Library, 1950), http://penelope.uchicago.edu/Thayer/e/roman/texts/dionysius_of_halicarnassus/home.html [<https://perma.cc/43NQ-N8SF>] (description of a cruel and manipulative tyrant's efforts to possess a young girl betrothed to another: "his soul turgid and *his bowels inflamed* because of his love of the girl, neither paid heed to the pleas of her defenders . . . and furthermore resented the sympathy shown for her by the bystanders, as though he himself deserved greater pity and had suffered greater torments from the comeliness which had enslaved him."); HERODAS, *MIMIAMBOI* (THE MIMES) I:57 (Walter Headlam ed. 1966), <https://babel.hathitrust.org/cgi/pt?id=uc1.b000771539;view=1up;seq=10> [<https://perma.cc/KS8M-F3CQ>] (old nurse goading a

runs parallel to the Semitic thread that is then incorporated into the New Testament.⁴⁶ The meaning is still strong, physical, raw and expressive but nonetheless adequately captured in the Greek word for “pity” or “mercy”—*eleo*.⁴⁷

The Lucan texts, however, raise a further question. Given that Luke’s specific audience was the Gentile world, how should the cultural stream of Luke’s Greek vocabulary be characterized—as Semitic or classical? It seems that in choosing between *σπλαγχνίζεσθαι* and *eleo*, Luke would have been sensitive to how it sounded for the classically trained ear as well.

As Pope Francis also infers in his “Open Hands” message, Luke’s other references to *σπλαγχνίζεσθαι* seem to connote a kind of over-the-top sense of being completely carried away by strong emotions. Wounded, overcome by a sense of connection to others’ misery, the heart seems to lose its grounding, to the point of not knowing “where it is standing because of what it is feeling.”⁴⁸ For example, in the Parable of the Prodigal Son, the word is used to describe the father’s manner of welcoming home the younger son who had just frolicked away the family’s inheritance, living a life of ill repute.⁴⁹ Social and historical studies of the context indicate that the father was behaving in an extraordinary and perhaps even irrational manner. Knowing that upon his return to the village, the son would probably be subject to taunt songs and other verbal and perhaps even physical abuse, the father completely humiliates himself by running towards him.⁵⁰ Generally, as Kenneth Bailey explains, “An Oriental nobleman with flowing robes never runs anywhere. To do so is humiliating.”⁵¹ At this point in the story, rational discourse completely

married woman to turn her interests to a young man: “He saw you at the Descent of Mize, and *his desire was fired with love*, and his heart goaded; he leaves not my house night nor day but weeps over me and coaxes me and is dying of desire.” (emphasis added); see also Oliver Cromwell, Letter to the General Assembly of the Church of Scotland, August 3, 1650, in 2 WRITING AND SPEECHES OF OLIVER CROMWELL 303 (Wilbur C. Abbot, ed. 1939), http://www.olivercromwell.org/Letters_and_speeches/letters/Letter_129.pdf [<https://perma.cc/BJE5-8DNR>] (“Is it therefore infallibly agreeable to the Word of God, all that you say? I beseech you, *in the bowels of Christ*, think it possible you may be mistaken.”).

46. Montevocchi, *supra* note 41, at 126.

47. *Id.*; see also E. MacLaurin & B. Colin, *The Semitic Background Use of “En Splanchnois”* 103 PALESTINIAN EXPLORATION Q. 42 (1971).

48. First Retreat Meditation, *supra* note 23.

49. *Luke* 15:11–32.

50. KENNETH E. BAILEY, POET AND PEASANT 181 (1976) [hereinafter POET].

51. *Id.* at 181–82 (quoting Ben Sirach: “A man’s manner of walking tells you what he is.”; Weatherhead: “It is so very undignified in Eastern eyes for an elderly man to run. Aristotle says, ‘Great men never run in public.’”).

breaks down; the son forgets his prepared speech, overwhelmed by the father's physical demonstration of love.⁵²

The word's location at the center of the Good Samaritan parable indicates that it was chosen carefully.⁵³ In the two other places where Luke used this word in his Gospel he followed a similar textual pattern. In both the Parable of the Prodigal Son (Luke 15:20), and in his description of Jesus' healing of the widow's son at Nain (Luke 7:13), the verb is placed at the center of the text, and in both instances the word marks a turning point in the account.⁵⁴

The raw, emotional depth of the word—the sense of being taken by an overwhelming reaction to the situation—also matches well the extreme risk that the Samaritan was taking in approaching the victim. As a general matter, Bailey notes, Samaritans were classified as heretics and schismatic, in bitter strife with the Jews: “The Samaritans were publicly cursed in the synagogues; and a petition was daily offered up praying God that the Samaritans might not be partakers of eternal life.”⁵⁵

Specifically, what did the Samaritan risk? Risks included contact with what could have been a corpse, which could have led to contamination extending to his animal and his goods.⁵⁶ It also included further attack by robbers, who may have stayed their hands upon meeting a more respected priest or Levite.⁵⁷ In the process of administering the first aid, if the man came to consciousness the Samaritan risked the possibility of insult for his kindness, because “oil and wine are forbidden objects if they emanate from a Samaritan,” and because by accepting such objects, the wounded man would be required to pay tithes for them.⁵⁸ In bringing the victim to the inn, the Samaritan also risked retaliation from the families and friends of the very person whom he had aided.⁵⁹ As Bailey explained:

52. See also Luke 7:13 (using *σπλαγγνίζεσθαι* to describe Jesus's response to a widow in the city of Nain whose son had just died).

53. See, e.g., Maarten J.J. Menken, *The Position of σπλαγγνίζεσθαι and σπλάγγνα in the Gospel of Luke*, 30 NOVUM TESTAMENTUM 107, 111–12 (1988) (numeric analysis locates the word at the center of the 136 words spoken by Jesus); POET, *supra* note 50, at 72–73 (categorizing the parable as a “Parabolic Ballad” employing a series of three-lined stanzas in which each stanza introduces a new scene or significant shift of action and featuring a structure of “inverted parallelism,” in which the Samaritan reverses the actions of the three previous actors—the robbers, the priest, and the Levite; the word *σπλαγγνίζεσθαι* is at the center of this “reversal,” representing the center of the text and the turning point in the story).

54. Menken, *supra* note 53, at 108–09.

55. KENNETH E. BAILEY, *THROUGH PEASANT EYES* 48 (1980) (citing Osterley) [hereinafter PEASANT EYES].

56. See generally JACOB MILGROM, *LEVITICUS: A BOOK OF RITUAL AND ETHICS* 150–53 (2004) (outline of purification procedures and effects, including corpse-contamination).

57. PEASANT EYES, *supra* note 55, at 48.

58. *Id.* at 50.

59. *Id.* at 49.

The Samaritan, by allowing himself to be identified, runs a grave risk of having the family of the wounded man seek him out, to take vengeance on him The stranger who involves himself in an accident is often considered partially, if not totally, responsible for the accident. After all, why did he stop? Irrational minds seeking a focus for their retaliation do not make rational judgments, especially when the person involved is from a hated minority community. . . . Caution would lead him to leave the wounded man at the door of the inn and disappear.⁶⁰

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

In this light, the difference between *σπλαγχνίζεσθαι* and *eleo* does have an impact on the interpretation of the Parable. The discrepancy between the two words can be read to highlight the uniquely astounding dimensions of the kind of love to which Jesus was calling both the lawyer and his listeners, and that if one remains only on a “rational” level of engagement, it can be difficult even to perceive this dimension of love. The use of the word *σπλαγχνίζεσθαι* conjures up not an elegant kindness that bestows gifts of charity on others, but a gut-level, almost physiological connection to other human beings in which one can do nothing other than to run the irrational risk of getting involved, not so much because of a well-laid plan, but because of the raw tug of an emotional connection.

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

C. *“From Jerusalem to Jericho”: Another Look at the Darley & Batson Experiment*

In the light of this exegesis, it is interesting to consider how the famous social psychology experiment by John Darley and Daniel Batson informed reflection on legal obligations.⁶¹ The two researchers explored

60. *Id.* at 52.

61. John M. Darley & C. Daniel Batson, “From Jerusalem to Jericho”: A Study in Dispositional and Situational Variables in Helping Behavior, 27 *J. PERSONALITY & SOC. PSYCH.* 100 (1973). The subjects were forty students at Princeton Theological Seminary. *Id.*

the correlation between helping behavior and personality variables. Personality variables focused on the subjects' perceptions of how religiosity related to perception and action in the world.⁶² Some subjects were instructed to give a short talk on the Parable of the Good Samaritan, while others were instructed to focus their talk on job-related prospects for seminary students.⁶³ For another variable, the experiment infused three different levels of "hurry" infused in the instructions. When instructed to go to the next building, some of the subjects were averted to the "high-hurry" condition in which the assistant looked at his watch, and then said: "Oh, you're late. They were expecting you a few minutes ago. We'd better get moving. The assistant should be waiting for you so you'd better hurry. It shouldn't take but just a minute."⁶⁴ For the "intermediate-hurry" condition, the text was: "The assistant is ready for you, so please go right over."⁶⁵ Finally, the "low-hurry" condition text was: "It'll be a few minutes before they're ready for you, but you might as well head on over. If you have to wait over there, it shouldn't be long."⁶⁶ The experiment then tested who of the subjects would stop along the path from one building to another to help a slumped "victim" planted in the alleyway, who would cough twice, groan, and if the subject stopped to ask if something was wrong, offer an explanation.⁶⁷

The study found that the variable on the assignment—to prepare a job-related talk as compared with a commentary on the Good Samaritan parable—made no significant difference in the decision to stop to offer help. Nor did the religious personality type. Instead, the most significant variable was the level of "hurry." For the low-hurry group, 63% offered help; for the intermediate group, 45%; for the high-hurry group, 10%.⁶⁸ Darley and Batson query whether the subjects consciously noted the victim's distress and consciously chose to leave him in distress. They muse whether another explanation is more apt: that the state of being in a hurry can generate a "narrowing of the cognitive map."⁶⁹

Based on the subjects' own reflections during the debriefing, Darley and Batson concluded that it may not be accurate to interpret the subjects' responses as having seen the victim's distress and having chosen to ignore it. Instead, they submit: "[B]ecause of the time pressures, they did not

62. *Id.* at 102–03.

63. *Id.* at 103.

64. *Id.* at 103–04.

65. *Id.* at 104.

66. *Id.*

67. *Id.* at 102.

68. *Id.* at 105.

69. *Id.* at 107 (citing E.C. Tolman, *Cognitive Maps in Rats and Men*, 55 *PSYCHOL. REV.* 189, 189–208 (1948)).

perceive the scene in the alley as an occasion for an ethical decision.”⁷⁰ Further, for the group of subjects that decided not to stop, Darley and Batson perceptively note that the hurrying was also related to the subjects’ desire *to help* the experimenter, who was “depending on him to get to a particular place quickly.”⁷¹ Thus the decision not to stop may not have been a matter of indifference, but instead because the subject “was in conflict between stopping to help the victim and continuing on his way to help the experimenter.”⁷² The study notes: “And this is often true of people in a hurry; they hurry because someone depends on their being somewhere. Conflict, rather than callousness, can explain their failure to stop.”⁷³

At first glance, the Darley–Batson experiment seems to be a gentle dig at religious folks: isn’t it interesting and ironic that it makes no difference that the subjects were instructed to give a talk—a process that presumably includes some reflection on content—on the story of the Good Samaritan? But on further reflection, the experiment, like the Parable itself, indicates openness and even a kind of gentleness, before the messy and conflicted reality of bystander decision-making.

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

III. STRANGERS DROWNING:

ILLUMINATING THE CANONICAL “EASY RESCUE” CASES

Previous Parts have explored two dimensions of the teachings of Pope Francis—on one hand, a strong critique of the globalization of

70. *Id.* at 108.

71. *Id.*

72. *Id.*

73. *Id.* at 108; *see also id.* at 101 (“One can imagine the priest and the Levite, prominent public figures, hurrying along with little black books full of meetings and appointments, glancing furtively at their sundials. In contrast, the Samaritan would likely have far fewer and less important people counting on him to be at a particular place at a particular time, and therefore might be expected to be less in a hurry than the prominent priest or Levite.”).

indifference, and on the other, a deep appreciation for the interior life in which most people encounter their own limitations and weakness, notwithstanding a visceral sense of connection to others' needs. This Part aims to illustrate what these tensions might reveal when brought into the analysis of the so-called "easy rescue" cases.

The teachings of Pope Francis seem to compliment the critique of a bystander's failure to perform an "easy rescue" in an extraordinary way. The shocking hypothetical is well known to torts students: a passerby who, with no danger to herself, could easily pull a drowning toddler from a wading pool, instead "pulls up a chair and looks on as [the toddler] perishes."⁷⁴ Does the passerby have any legal duty to help? In almost all jurisdictions in the United States, the answer is no.⁷⁵ As leading torts commentator, William Prosser, graphically described, even an expert swimmer "who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette and watch the man drown."⁷⁶

Isn't Pope Francis's scathing Lampedusa indictment of how the world has stood by, watching countless strangers drown in the Mediterranean Sea, directly aligned with Prosser's critique? The following lament seems to indicate the shared horror:

74. MARY ANN GLENDON, RIGHTS TALK 78 (1991). For the essay often credited for getting the discussion rolling in philosophy circles, see Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972) ("[I]f I am walking past a shallow pond and see a child drowning in it, I ought to wade in and pull the child out. This will mean getting my clothes muddy, but this is insignificant, while the death of the child would presumably be a very bad thing.").

75. A few states have amended their penal codes to include a statutory duty to rescue. *See, e.g.*, MINN. STAT. ANN. § 640A.01(1) (1996) (requiring reasonable assistance at the scene of an emergency); 11 R.I. GEN. LAWS § 11-56-1 (1994) (same). In Massachusetts, bystanders are not required to provide assistance, but are required to report violent or sexual crimes to which they are a witness. MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1990) ("Whoever knows that another person is a victim of aggravated rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable."); *see also* VT. STAT. ANN. tit. 12, § 519(a) (West 1973) ("A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others."). Similar statutes have been enacted in Florida, Hawaii, Washington, and Wisconsin. *See* FLA. STAT. ANN. § 794.027 (West 1992); HAW. REV. STAT. § 663-1.6 (1993); WASH. REV. CODE ANN. § 9.69.100. (West 1998); WIS. STAT. ANN. § 940.34 (West 1996). California imposes a duty to report when the victim is a child. CAL. PENAL CODE § 152.3. Ohio imposes a general duty to report a felony. OHIO REV. CODE ANN. § 2921.22 (West 1997); *see also* RESTATEMENT (THIRD) OF TORTS § 38 (AM. LAW INST. 2011) ("When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty."). *See generally* Eugene Volokh, *Duty to Rescue/Report Statutes*, VOLOKH CONSPIRACY (Nov. 3, 2009, 12:24 AM), <http://www.volokh.com/2009/11/03/duty-to-rescuereport-statutes/> [<https://perma.cc/WU47-CUFC>].

76. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 340 (4th ed. 1971) [hereinafter PROSSER 1971].

Has any one of us grieved for the death of these brothers and sisters? Has any one of us wept for these persons who were on the boat? For the young mothers carrying their babies? For these men who were looking for a means of supporting their families? We are a society which has forgotten how to weep, how to experience compassion—"suffering with" others: the globalization of indifference has taken from us the ability to weep! . . . [L]et us ask the Lord for the grace to weep over our indifference, to weep over the cruelty of our world, of our own hearts, and of all those who in anonymity make social and economic decisions which open the door to tragic situations like this.⁷⁷

Mary Ann Glendon's account of the canonical of no duty to rescue cases adds to the sense of outrage.⁷⁸ She notes *Buch v. Amory* as the source of a particularly shocking explanation. The court wrote:

I see my neighbor's two-year-old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries . . . because the child and I are strangers, and I am under no legal duty to protect him.⁷⁹

This gloss of a particularly extreme level of individualistic obliviousness to humanity and human need has helped to generate outrage and bewilderment in generations of commentators and citizens alike. For many law students, the discussion of these cases is an important moment in which they intuit what seems to be a vast and unbridgeable chasm between the law they are learning and the moral considerations of ordinary human beings. And here it would be tempting to add to the pile Pope Francis's cutting critique of the globalization of indifference.

But what happens when we bring into the discussion theological insights on the complexity of the interior life of bystanders? A first application might be astounding for its sheer simplicity. In these cases, the first result of a more full-bodied analysis of the interior life of bystanders is to note when *bystanders were not even present*. Attention to the humanity and decision-making process of bystanders helps to highlight the extent to which much of the legal analysis in this setting is grounded in a caricature of bystander action or inaction, and in a polarizing tendency to draw tidy lines between the righteous and the sinners.

77. *Lampedusa*, *supra* note 12.

78. GLENDON, *supra* note 74, at 78. In hers and many other accounts, *Osterlind v. Hill* (1928), *Handiboe v. McCarthy* (1966), and *Yania v. Bigan* (1959), discussed below, are all cited as authority for the lack of a duty to rescue a drowning "stranger."

79. *Id.* at 79 (citing *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1897)).

A further result of this inquiry is to bring down, like a house of cards, the purportedly extreme tension between law and morality that the canonical no duty to rescue cases seem to pose. As it turns out, the common law of torts would leave much more room than expected for an analysis grounded in an ordinary person's assessment of their moral obligations and, as explicated by Pope Francis, for the reasons of the heart.

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

As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown. Or, again, I see a child on the railroad track too young to appreciate the danger of the approaching train. I might easily save the child, but do nothing, and the child, though it lives, loses both legs. Am I guilty of a crime and must I make compensation to the widow and children of the man drowned and to the wounded child?⁸⁰

Both of these examples are included in Prosser's influential treatise on torts, as well as in the parallel explanations in the second *Restatement of Torts*. Both Prosser and the *Restatement* include in the notes cases that purport to stand as authority for the applicability of the no duty to rescue rule in such scenarios. But, when these narratives are compared with the actual facts of the cases, it is striking to see which details are not evident from the cases themselves.

It is even more striking to note that it is precisely these details that tend to caricature the bystanders, in some cases turning them into what one court termed "moral monsters."⁸¹ Precisely the aspects of the narratives that do so much work to depict the bystanders as coolly or cruelly indifferent emerge less from the facts of how people bungled their way through the tragic events that led to the victim's injury, and more from judicial dicta and the imaginative minds of treatise writers. The sections below trace three examples of how Prosser's sleight of hand has

80. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908); see JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 292-93 (J. Burns & H.L.A. Hart eds., 1970); see also THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE 264 (2004) (discussing a text from Maimonides' *Mishnah Torah* interpreting the *Leviticus* 19:16 injunctive not to "stand idly by the blood of thy neighbor").

81. For an early articulation of the "moral monster" image, see *Buch*, 44 A. at 810 (One who fails to aid "may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages . . .").

embellished the narrative—the drowning stranger; the child in the jaws of a machine; and the child in the pool.

A. Not Sitting on the Dock, Not Close, and No Cigar

The first edition of Prosser's *Handbook of the Law of Torts* includes the following principle in its summary of the law of "Acts and Omissions": "For an omission to act, there is no liability unless there is some definite relation between the parties which is regarded as imposing a duty to act."⁸² Further, "[t]he law has not recognized any general duty to aid a person who is in peril."⁸³ After explaining the early and still "deeply rooted" distinction between "active misconduct, working positive injury to others" (misfeasance) and "passive inaction, or a failure to take steps to protect them from harm" (nonfeasance),⁸⁴ the discussion of "Duty to Aid One in Peril" provides a number of examples of the law's reluctance to recognize "the moral obligation of common decency, to assist another human being who is in danger."⁸⁵

The first example in the treatise is as follows: "The expert swimmer, with a boat [and a rope] at hand, who sees another drowning before his eyes, may sit on the dock, smoke his cigarette, and watch him drown."⁸⁶ The authority cited for this example is a 1928 Massachusetts Supreme Court case, *Osterlind v. Hill*.⁸⁷ The example and cited authority are repeated in all five versions of the treatise.⁸⁸

As Prosser was the Reporter for the 1965 *Restatement (Second) of Torts*, it is no surprise that the example also appears in § 314, "Duty to Act for Protection of Others:" "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."⁸⁹ The explanation's language and tone closely track Prosser's, with the preference for a cigar over a cigarette:

82. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, ch. 5, § 32b, at 190 (1941) [hereinafter PROSSER 1941].

83. *Id.*

84. *Id.* at 191 (citing Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908)).

85. *Id.* at 192.

86. *Id.* (citing *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928)).

87. *Hill*, 160 N.E. 301.

88. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, ch. 6, § 38, at 184 (2d ed. 1955) [hereinafter PROSSER 1955]; WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, ch. 10, § 54, at 336 (3d ed. 1964) [hereinafter PROSSER 1964]; PROSSER 1971, *supra* note 76, at 340; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, ch. 9, § 56, at 375 (5th ed. 1984) [hereinafter PROSSER & KEETON 1984]. The "rope at hand" detail is included beginning with the third edition.

89. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule.⁹⁰

However, without severe distortion of the case, neither the holding nor the facts of *Osterlind* can be read as support for Prosser's point. According to the declaration, in the early morning of July 4, 1925, Osterlind and Ryan, both intoxicated, visited a business that rented pleasure boats and canoes to be used on Lake Quannapowitt in Wakefield, Massachusetts. The pair rented a canoe and went out on the lake. Shortly thereafter, the canoe capsized and Osterlind hung on to the overturned canoe "making loud calls for assistance, which calls the defendant [boat owner] heard and utterly ignored."⁹¹ After about half an hour, Osterlind released his grip and drowned. The declaration does not indicate what happened to Ryan. Osterlind's estate sued the owner of the boat, and the issue before the court was not a purported duty to rescue but a statutory obligation to have "a reasonable regard for the safety of the persons to whom he let boats and canoes."⁹²

When *Osterlind* is read through the lens of the duty to rescue—an issue that was not before the court—it might seem that the case stands for a kind of glorification of rugged individualism. The court's discussion of *Black v. New York Railroad*, a case describing the duty owed to a local train passenger who was so intoxicated "as to be incapable of standing or walking or caring for himself in any way,"⁹³ could be interpreted as asking, "how drunk do you have to be before someone is required to help you?" Further, one might also extrapolate that a legal duty to rescue was not required based on an assumption that an able-bodied man can care for himself: anyone who was in a good enough condition to hang on to the

90. *Id.* § 314 cmt. c. The details of the Restatement illustration for comment c further capture the sense of moral outrage. *See id.* cmt. c, illus. 1 ("A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B."). For a careful analysis of the extent to which case law supports this section of the *Restatement (Second) of Torts*, see two articles by Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315 (1997) and *Bad Boys, Bad Men, and Bad Case Law: Re-Examining the Historical Foundations of No-Duty-to-Rescue Rules*, 43 N.Y. L. SCH. REV. 385 (1999).

91. *Osterlind*, 160 N.E. at 302.

92. *Id.*

93. *Id.* (citing *Black v. New York R.R.*, 79 N.E. 797 (Mass. 1907)).

canoe for half an hour and shout for help did not really require assistance.⁹⁴ And it seems brutally callous for the court to conclude that the failure of the defendant to respond to the plaintiff's cries for help was "immaterial."⁹⁵

In contrast, when the opinion is read through the lens of the issue that actually was before the court, what would now be termed negligent entrustment—whether the boat owner had reasonable regard for the safety of the person to whom he rented the canoe, given the manifest conditions of impairment at the time of the rental transaction—then the court's focus and language make sense. As distinguished from the condition of the plaintiff in *Black*, the *Osterlind* court found that the plaintiff was not helpless—as it turned out, he was in good enough condition to hang on to a canoe for half an hour and had the wherewithal to shout for help. The case turned not on the defendant's failure to act once Osterlind was out on the lake but on the initial judgment of whether to rent a canoe to a person in light of how he presented himself at the time of the rental transaction.

Second, the facts hardly support Prosser's point. Recall that *Osterlind* is cited as authority for the principle that "the expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown."⁹⁶ Because rescue was not precisely at issue in the case, there was no discussion of the physical position of the boat owner or boathouse employee relative to the plaintiff in distress. For example, in the declaration the plaintiff alleged that the defendant could hear Osterlind's shouts, but there is no indication that the owner or employee was on a dock, was watching the incident, or was close enough to throw him a rope. Nor was there any indication that in those undoubtedly dark early morning hours⁹⁷ the defendant was able to see Osterlind at all.⁹⁸ And there was certainly no indication of anyone calmly smoking a cigar (or cigarette, or pipe) while a fellow human being was drowning. Neither does the case indicate how far out the canoe had drifted, what happened to Osterlind's friend, Ryan, and why Ryan did not help.

94. See Philip W. Romohr, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty to Rescue Rule*, 55 DUKE L.J. 1025, 1029 n.23 (distinguishing the facts as follows: "After renting the canoe, the defendant apparently listened to the deceased's screams for help for half an hour and did nothing. In fact, the court found the deceased's ability to hang on to the canoe for that long indicated that he was not truly helpless.").

95. *Osterlind*, 160 N.E. at 302.

96. PROSSER 1971, *supra* note 76, at 340.

97. Sunrise in Massachusetts for early July is about 5:13 AM. See *Sunrise and Sunset in Boston*, TIMEANDDATE.COM, <http://www.timeanddate.com/worldclock/astronomy.html?n=43&month=7&year=2014&obj=sun&afl=-11&day=>

98. See *generally Osterlind*, 160 N.E. 301.

The 1925 report for the town of Wakefield indicates only one death on July 4, 1925, that of Osterlind.⁹⁹

Probing the question of whether the owner would have been able to hear Osterlind's shouts from a distance, a picture taken in the 1930s of Hill's Boathouse in Wakefield, Massachusetts, depicts a fairly large structure that includes not only boat rental facilities but also a dance hall on the upper floor.¹⁰⁰ Historical accounts indicate that the Boathouse was the center of town life from 1887 through 1963.¹⁰¹ One inventory indicates that in the mid-1920s, Hill's boat rental business was not a small operation—more than 120 boats were available for rent.¹⁰² The wee hours of Saturday, July 4, 1925, would have been the beginning of a holiday weekend. This may give some indication that even very late that evening the owner or employees may have been too busy to keep track of individual customers who ventured out onto the lake. Further, given that the most popular central dance hall in town was located on the floor above the boat rental space, it is not inconceivable that employees would have been unable to hear or distinguish Osterlind's shouts, regardless of how close he was to the shore.

In sum, on the facts, *Osterlind* includes no details indicating that the boat owner or the owner's agent was in a physical position to perform an "easy" rescue. Nor does the case include any indication of the details that have been so effective for turning the canoe renter into a callous and indifferent moral monster. Prosser's lampoon of a callous and gawking bystander obfuscates not only more thoughtful and nuanced discussions of the contours of affirmative obligations but also the broader and more structural considerations of the factors that were relevant to the canoe-renter's decision-making process in this case, including the extent to which one person should be responsible for the decisions or safety of another adult who is intoxicated and how to determine legal responsibility

99. See *Annual Report of the Town Officers of Wakefield Massachusetts* (1925), http://archive.org/stream/annualreportofto1925wake/annualreportofto1925wake_djvu.txt [<https://perma.cc/KWC4-TYXP>].

100. The cover of a Lake Quannapowitt picture book features Hill's Boat House and Dance Hall with a large sign that reads "Dancing Every Saturday Night." From the picture one might also intuit the extent to which the lower boat rental part of the structure may have been impacted by the noise level of the upper level dance hall. See ALISON C. SIMCOX & DOUGLAS L. HEATH, LAKE QUANNAPOWITT (2011); see also Jayne M. D'Onofrio, *Hill's Boathouse, circa 1930's*, NOBLE Digital Heritage, Item #12056 (1933), <http://heritage.noblenet.org/items/show/12056> [<https://perma.cc/5PGV-5R6J>].

101. Records indicate that the dance hall was added to the structure in 1912 and was in operation as a dance hall through the 1960s. See Nancy Bertrand, *History: The Boathouse, Early Center of Life in Wakefield*, WAKEFIELD PATCH (Sept. 6, 2011), <http://wakefield.patch.com/groups/opinion/p/history-the-boathouse-early-center-of-life-in-wakefield> [<https://perma.cc/82Z5-BKPJ>].

102. See D'Onofrio, *supra* note 100 (describing the inventory of the boat rental operation, including more than 100 canoes and more than twenty public rowboats).

for the point of intervention when intoxication levels are not always immediately evident.

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

In a second example, Prosser notes that one is under no duty “to cry warning to one who is walking into the jaws of a dangerous machine,”¹⁰³ citing, among other cases, *Buch v. Amory*.¹⁰⁴ The opinion by the Chief Justice of the New Hampshire Supreme Court is thick with dicta that have become the stuff of moral monster legends in the no-duty-to-rescue literature. The court made an explicit link to the Good Samaritan story, drawing a sharp distinction between law and morality:

Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved.¹⁰⁵

The court used an example of a baby on the railroad track as a particularly dramatic illustration:

Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury, or indictable under the statute for its death.¹⁰⁶

In explaining the “wide difference” between causing and preventing an injury, the court returns to the two-year-old babe, this time, the child of his neighbor “in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries . . . because the child and I are strangers, and I am under no legal duty to protect him.”¹⁰⁷ The court continues:

103. PROSSER 1941, *supra* note 82, at 192; PROSSER 1955, *supra* note 88; PROSSER 1964, *supra* note 88; PROSSER 1971, *supra* note 76, at 341; PROSSER & KEETON 1984, *supra* note 88.

104. See generally *Buch v. Amory Mfg. Co.*, 44 A. 809 (N.H. Sup. Ct. 1897).

105. *Id.* at 810. See generally *Luke* 10:30–37, for the Good Samaritan Parable, with references to the passing priest and Levite.

106. *Buch*, 44 A. at 810.

107. *Id.* at 811.

Now, suppose I see the same child trespassing in my own yard, and meddling in like manner with dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child's trespass? The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant, by coming unlawfully upon my premises, impose upon me the legal duty of a guardian? None has been suggested, and we know of none.¹⁰⁸

Standing alone, these illustrations do have an extreme quality. But the actual facts of the case are hardly an example of indifference. The child in question was not two but eight, the brother of a thirteen-year-old employee in the mule-spinning room of a mill. While there was evidence that other boys had brought their younger brothers to the factory, there was no evidence in the record that the employer knew this. The court noted that about two hours before the accident, the overseer in charge of the other boys became aware that the eight-year-old boy was not an employee and directed him to leave. "[T]hinking he might not understand English, [he] took him to an operative who spoke the plaintiff's language, whom he told to send the plaintiff out."¹⁰⁹ It seems that the boy either did not understand or did not follow the directive. Subsequently, his hand became caught in a gearing that the other boys had been instructed to avoid.¹¹⁰

When the dicta are compared with the facts, the actual case includes neither a baby nor a direct awareness on the part of the employer that a child was "walking into the jaws of a dangerous machine."¹¹¹ The facts do indicate some effort to remove the boy from danger and that the tragic bungle was at least in part a failure to communicate effectively due to a language barrier. As the court summarized, the negligence charged to the employer was that "inasmuch as they could not make the plaintiff understand a command to leave the premises, and ought to have known that they could not, they did not forcibly eject him."¹¹²

The image of *Buch* that remains fixed in our legal-cultural imagination is that of a law that remains callous and indifferent to a bystander watching a baby crawl into a machine. In reality, like in *Osterlind*, the facts of *Buch* include no reference to a bystander-witness coolly watching the accident unfold before his eyes.

108. *Id.*

109. *Id.* at 809.

110. *Id.*

111. *See supra* note 103.

112. *Buch*, 44 A. at 810.

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

In the 1971 fourth edition of Prosser's treatise, *Handiboe v. McCarthy*¹¹³ is included in the footnote with *Osterlind* as further authority for the idea that the expert swimmer is not required to do anything as a man drowns before his eyes. The summary notes that in *Handiboe* "it was held that there was no duty whatever to rescue a child licensee drowning in a swimming pool."¹¹⁴ *Handiboe* does involve a small child and a swimming pool, but it is not a failure to rescue case, at least not in the sense of fitting into this line of hypotheticals. In *Handiboe*, the plaintiff's four-year-old son had been a frequent visitor to the defendant's home to play with the defendant's son of the same age. The housekeeper was the only adult at home at the time of the accident. On the day of the accident, a door had been left unlocked, giving the children access to an enclosed yard with a swimming pool. The deep end of the pool contained about three feet of water, together with a slippery and slimy "accumulation of leaves, moss, and other trash and scum."¹¹⁵ When the little boy fell into the pool, he was unable to pull himself up because of the slippery condition.¹¹⁶

The case is very sad, but not an example of cruel indifference. The tragic consequences were the result of a careless person leaving a door unlocked. One might sustain a strong critique of the court's reasoning and the extent to which adult supervision should have informed the neighbor's duty of care to the child. But this is hardly a case in which a bystander stood by doing nothing, watching a child drown. In fact, based on the facts as recounted in the case, there were no witnesses at all.

D. *Healing the Perceived Tension Between Law and Morality*

Why fuss over these seemingly tiny factual disputes regarding the depiction of bystanders? There are two reasons to correct the record. First, the framework depicting bystanders as "moral monsters" has caused enormous damage, convincing legions of law students and lawyers that it is difficult to reconcile their ordinary moral instincts and their study of the law. Second, the hyperbolic tendencies to create moral monsters distract from the harder work required to identify and resolve the more complex sources of injustice.

Regarding the first, of course if the image of a baby drowning in a wading pool did not catch our attention, something would be awry. As a

113. *Handiboe v. McCarthy*, 151 S.E.2d 905 (Ga. Ct. App. 1966).

114. PROSSER 1971, *supra* note 76, ch. 9, § 56 at 340 n.60; PROSSER & KEETON 1984, *supra* note 88, ch. 9, § 56 at 375 n.22.

115. *Handiboe*, 151 S.E.2d at 907.

116. *Id.*

teaching tool, this hypothetical is precisely designed to attract students' attention and to help them learn to think with their heads, even when the example pulls on their heartstrings. But a certain habit of referring to hypotheticals located at the extreme edges of reality may also be grounded in a sense that becoming a lawyer entails entry into a mindset and way of being that is different from that of people who are not lawyers.

One student's reflections on the varying responses of first year law students and their visiting family members during a "Family Day" mock torts class discussion of *Osterlind* draws out the contrast:

My father came to visit and we sat in on a first year torts class. The *Osterlind* case was discussed and I remember distinctly that this case more than any other drew perplexed questions from visiting family members. The visitors just could not understand how the defendant was not culpable in some way. The professor teaching the class had several students planted in the room upon whom he called to discuss the case and they rattled off the legal theory without missing a beat. The rest of the law students present, myself included, nodded in agreement and felt proud that we could follow this logic. We had learned a lot during that first year. We were thinking like lawyers—something that our families could not do.¹¹⁷

Some students do not nod in agreement or feel proud. Instead, they feel confused and maybe even horrified or sickened. For some, discussion of the no-duty-to-rescue cases is a moment they realize, to quote Carole King, that "something inside has died."¹¹⁸ They detect within themselves a kind of fissure between what they perceive as the technical, partisan, even "hired gun" mentality of the legal profession, and their sense of duty and respect for other human beings grounded in ordinary morality and common sense. The student goes on to engage these concerns:

We hear that expression a lot—think like a lawyer. That's our goal in law school. However, cases like *Osterlind* demonstrate that thinking like a lawyer means thinking the polar opposite of what we were raised to think and what the rest of society thinks. It means disregarding the moral compass that guides all of society. If that's the case—then why should we want to think like lawyers?¹¹⁹

Some students fight back. The no-duty-to-rescue examples provoke a kind of rebellion against the normative rule—the law must be wrong, it should be changed. As one student from an earlier generation described

117. Corina Bogaciu, *Thinking Like a Lawyer*, FORDHAM FORUM ON L., CULTURE, & SOC'Y BLOG (Dec. 20, 2008, 7:17 PM), <http://www.forumonlawcultureandsociety.org/2008/12/20/thinking-like-a-lawyer/> [<http://perma.cc/KD3B-5R3C>].

118. See CAROLE KING, *IT'S TOO LATE* (Tapestry 1971).

119. Bogaciu, *supra* note 117.

her torts class discussion of *Osterlind* and *Handiboe*: “there was a visible reaction of horror to these unsavory cases. Our moral sensibilities were deeply offended. Almost instinctively we turned to the legal system. ‘There ought to be a law,’ we cried.”¹²⁰

How might attention to the interior life of bystanders, as illuminated by Pope Francis’s complex reflection on the moving parts of this problem, help to heal the perceived tension between responses grounded in ordinary morality and this common law tort rule? Pope Francis’s account of mercy manages to hold together two points in seeming contrast: on one hand, a strong critique of a culture of indifference, and on the other, a capacity to understand and even embrace the limitations that people may experience when they encounter pain and violence. Perhaps it is precisely the capacity to hold together these contrasts that may shed light on a more humane and more realistic assessment of bystander obligations.

It may also illuminate the process of learning how to “think like a lawyer.” For example, holding these elements together might also help foster students’ appreciation for the complexities of such situations that inform the real-life questions about bystander response to emergencies. “Thinking like a lawyer” should include developing the complex categories needed to understand and work with the facts of real-life situations and actual cases, not just streamlined hypotheticals.

Further, the exercise of learning to “think like a lawyer” should also include attention to the *interior life of real people* that one encounters in the process of learning about the legal system—whether through a case account, a newspaper story, or a client in a clinic. In some of the cases in the classic torts canon, actual human beings have suffered a loss, been subjected to violence, or witnessed something traumatic. Some of the bystanders were distracted, tongue-tied, or extremely fearful, and for good reason. Others were paralyzed by pressure or loyalty. “Thinking like a lawyer” includes the capacity to perceive all of the ways in which circumstances and subjective perspectives inform how people act and react and the decisions that they make.

If the extreme “moral monster” hypotheticals are not grounded in the facts of the cases and if they actually obfuscate many important tort law questions, then there is no need to wield them in a way that only serves to confuse law students. Instead of accentuating a fissure between a student’s understanding of the law and ordinary morality, these hypotheticals should call for ordinary morality to kick in as a support to the exercise of critical analytical skills.

120. Hillinger, *supra* note 19, at 9.

Regarding the second reason, the extent to which “moral monster” hypotheticals distract from the more difficult analysis of sources of injustice, “thinking like a lawyer” should also include the invitation to think structurally about the extent to which the law, or which aspects of the law, may or may not be the right instrument to address difficult moral problems. A host of structural and institutional questions pervade the seemingly “easy” rescue cases. Especially when violence is involved, complex social, personal, and psychological factors necessarily inform how bystanders engage the scene, making it very difficult to articulate a clear pattern of obligatory conduct. Some encounters between bystanders and victims may indicate something like moral monstrosity on the part of a witness—but these are hardly “easy” cases.¹²¹

Once the mythical moral monsters are dismissed from the classroom, the passionate anger that can rise in the face of injustice can be channeled toward the investigation of these subtler subjective, relational, and structural problems. It is to this dimension that Part IV now turns.

IV. THE GOOD SAMARITAN IS NOT ENOUGH: ATTENTION TO STRUCTURES

A. Battling the Frameworks that Produce Robbers and Victims

A further layer of Pope Francis’s reflections to consider is his assessment of when the Good Samaritan is “not enough.” Particularly when engaging interdisciplinary projects at the nexus between theological reflection and business models, the Pope has exhorted participants to pay close attention to the deeper and more structural questions that may permeate the incidents and contexts that lead to accidents, violence, or other forms of injury. Drawing on a pervasive theme in Catholic social thought across the decades,¹²² the Pope explains that the problem with a myopic focus on individual action is that it may obfuscate the occasions when the root of our most difficult problems should also be attributed to structures and systems that foster injustice.

121. See generally Uelmen, *Crime Spectators*, *supra* note 2 (discussing the mythical aspects of how bystanders to the Kitty Genovese murder were depicted and suggesting elements to distinguish fearful or distracted bystanders from “engaged spectators” who are, in a certain sense, participants in the violence).

122. See, e.g., John Paul II, *Sollicitudo rei socialis* (On Social Concerns) paras. 36–39 (1987), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html [<http://perma.cc/MMV3-42Q9>] (discussing the theological concept of “structures of sin”).

For example, in an address to participants in the “Economy of Communion” project,¹²³ Pope Francis explored how a business project dedicated to combatting poverty must pay attention to how this work is embedded in *social and legal systems* that tend to “produce” marginalized and “discarded” people:

But—and this can never be said enough—capitalism *continues to produce discarded people* whom it would then like to care for. The principal ethical dilemma of this capitalism is the creation of discarded people, then trying to hide them or make sure they are no longer seen. A serious form of poverty in a civilization is when *it is no longer able to see its poor*, who are first discarded and then hidden.¹²⁴

Note the Pope’s deep skepticism regarding efforts to repair human and environmental damage with “credits” or other kinds of financial contributions.

Aircraft pollute the atmosphere, but, with a small part of the cost of the ticket, they will plant trees to compensate for part of the damage created. Gambling companies finance campaigns to care for the pathological gamblers that they create. And the day that the weapons industry finances hospitals to care for the children mutilated by their bombs, the system will have reached its pinnacle. This is hypocrisy!¹²⁵

What might it mean to explore a vision of justice that pushes beyond *individual* attention to those who are “discarded”? Here too, the Pope is deeply skeptical about some forms of utilitarian cost–benefit analysis, and he challenges the Project to keep its horizons broad:

[The project] must not only care for the victims, but build a system where there are ever fewer victims, where, possibly, there may no longer be any. As long as the economy still produces one victim and

123. Economy of Communion, *supra* note 5. Pope Francis began the address by probing the potentially oxymoronic quality of the project’s name, and in so doing he also gave a synopsis of its work: *Economy and communion*. These are two words that contemporary culture keeps separate and often considers opposites. Two words that you have instead joined, accepting the invitation that Chiara Lubich offered you 25 years ago in Brazil, when, in the face of the scandal of inequality in the city of São Paulo, she asked entrepreneurs to become *agents of communion*. . . . With your life you demonstrate that economy and communion become more beautiful when they are beside each other.” See generally Luigino Bruni & Amelia J. Uelmen, *Religious Values and Corporate Decision Making: The Economy of Communion Project*, 11 FORDHAM J. CORP. & FIN. L. 645, 662–65 (2006) (describing the project and providing a sketch of insights applicable to economic and legal theory).

124. Economy of Communion, *supra* note 5.

125. *Id.*

there is still a single discarded person, communion has not yet been realized; the celebration of universal fraternity is not full.¹²⁶

The bar is high: lack of attention to “a single discarded person” indicates that we have work to do. He then refers to the Parable of the Good Samaritan, but notes the need to go beyond this story:

[W]e must work toward changing the rules of the game of the socio-economic system. Imitating the Good Samaritan of the Gospel is not enough. Of course, when an entrepreneur or any person happens upon a victim, he or she is called to take care of the victim and, perhaps like the Good Samaritan, also to enlist the fraternal action of the market (the innkeeper). . . . But it is important to act above all *before* the man comes across the robbers, by battling the frameworks of sin that produce robbers and victims. An entrepreneur who is only a Good Samaritan does half of his duty: he takes care of today’s victims, but does not curtail those of tomorrow.¹²⁷

By analogy, one might argue that in the interdisciplinary conversation about the obligations of bystanders, a legal theorist who pays attention only to the moral exhortations for individuals to pierce the “soap bubbles”¹²⁸ that isolate them from attention to their neighbor’s needs also only does half of her duty. It is with this critical eye that this Part now turns to an analysis of two additional canonical no-duty-to-rescue cases.

B. The Railroad Cases: The Duties of Landowners, Not Bystanders

The cases discussed in Part III reveal a gap between the facts of the cases and the explanatory narratives drawn out by courts or treatise authors. In contrast, the “easy rescue” railroad cases present a different framework.¹²⁹ railroad owners and employees are not mere bystanders, they are landowners or agents of landowners who are dealing with trespassers. In the leading case, *Union Pacific Railway v. Cappier*, a trespasser on a railroad track was struck and injured by a moving train, through no fault of the railroad.¹³⁰ Suit was brought for failure to assist the injured, bleeding trespasser.

If the injured person had been a passenger, such would have constituted the kind of “special relationship” between passenger and carrier, triggering a duty of care. The usual course of action in these

126. *Id.*

127. *Id.*

128. See *Lampedusa*, *supra* note 12.

129. See generally Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1279–80 (1949); Sam B. Warner, *Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless*, 7 CALIF. L. REV. 312 (1919).

130. *Union Pac. Ry. v. Cappier*, 72 P. 281, 282 (Kan. 1903).

situations would have been for the crew to take charge of the hurt person, render first aid, and get the injured passenger to a hospital or under a doctor's care.¹³¹ This duty did not extend to trespassers. The court explained:

[T]he duty [to aid] must be owing from the defendant to the plaintiff, otherwise there can be no negligence And the duty must be owing to plaintiff *in an individual capacity*, and not merely as one of the general public. This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues.¹³²

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

With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief 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.¹³³

This language—not the holding, and not even the principle that landowners should not be legally responsible for assisting trespassers who have been injured through no fault of the railroad—has been the source of harsh criticism in the literature. As John Scheid lamented: “The court’s attitude is one of consummate individualism, and the case is a perfect example of its excesses.”¹³⁴

As noted above, in all of these cases, railroad owners and employees are not mere bystanders, they are landowners or agents of landowners who are dealing with trespassers. And in all likelihood the reason that the railroad employees did not assist trespassers injured on the tracks was

131. Charles O. Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DEPAUL L. REV. 30, 43 (1951).

132. *Cappier*, 72 P. at 283 (emphasis added); see also *Adams v. Southern Ry. Co.*, 34 S.E. 642 (N.C. 1899) (holding that a railroad employee had no authority to employ at the company’s expense a physician to care for three homeless people who were injured while stealing a ride on the train). *Contra Whitesides v. S. Ry. Co.*, 38 S.E. 878 (N.C. 1901). Some states impose a statutory obligation to alert medical personnel in case of such accident. *Adkins v. Atlanta & C. Airline Ry. Co.*, 2 S.E. 849 (S.C. 1887) (discussing statute requiring railroad companies to notify the physician most accessible in the event of an accident causing injury).

133. *Cappier*, 72 P. at 282.

134. John H. Scheid, *Affirmative Duty to Act in Emergency Situations: The Return of the Good Samaritan*, 3 J. MARSHALL J. PRAC. & PROC. 1, 2 (1969).

because of a company policy regarding injured trespassers. Certainly railroad employees could be critiqued for their failure to challenge the inhumane consequences of company policy.¹³⁵ But, as Harper and James note, the railway cases are not exactly analogous to the relationship between a bystander and a baby in a pool, “where there is no antecedent relationship between the parties and defendant has done nothing to create the risk.”¹³⁶

In contrast, they submit that these cases seem to call for a more structural, institutional response: “As we have seen, there is growing belief that the beneficiaries of an enterprise which creates risks should pay for the casualties it inflicts without regard to fault.”¹³⁷ Either way, like the other canonical rescue cases discussed above, the railroad cases shed little light on the decision-making process of bystanders.

C. When the “Bystander” Is a Bully

Similarly, and as noted above, seemingly “easy” rescue cases that involve the bystander as a witness—and perhaps also as a participant—in some form of violence also beg deeper social, psychological, and structural questions.¹³⁸ Of all of the canonical “easy rescue” cases, *Yania v. Bigan*¹³⁹ seems to most closely track the cool indifference of the expert swimmer watching someone drown. According to the complaint, John Bigan and Joseph Yania were both operators of coal strip-mining operations in Pennsylvania. Together with another man, Boyd Ross, Yania came onto Bigan’s property in order to discuss a business matter. While they were there, Bigan asked them to help him get a pump started. The pump was submerged in a large trench that had been cut for the purpose of removing the coal underneath. The water was about eight to ten feet deep. The complaint alleges that while Yania was standing at the edge of the trench, Bigan and Ross were “urging, enticing, taunting and inveigling” him to jump into the water.¹⁴⁰ Yania jumped and subsequently drowned. The complaint alleged that Bigan failed to take reasonable steps to assist him.¹⁴¹

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

135. Note that the harsh impact of these policies would be mitigated over time also due to changes in tort doctrine. See Gregory, *supra* note 131, at 43. See generally Warner, *supra* note 129.

136. FOWLER V. HARPER & FLEMING JAMES, JR., 2 THE LAW OF TORTS 1047 (1956).

137. *Id.*

138. See generally Uelmen, *Crime Spectators*, *supra* note 2.

139. *Yania v. Bigan*, 155 A.2d 343, 343–46 (Pa. 1959).

140. *Id.* at 345.

141. *Id.*

constitute actionable negligence if it resulted in harm.”¹⁴² But when he “undertook to perform an act which he knew or should have known was attended with more or less peril,”¹⁴³ he was an adult in full possession of all his mental faculties. His own action, not Bigan’s conduct, was held to be the cause of his “unfortunate death.”¹⁴⁴ Bigan is one of the few actual onlookers in the canonical cases, and the descriptions of his conduct, at least as described in the complaint, may actually provide the most insight into his intentions and his decision-making process.

But this is precisely why this case is also a misnomer—not only for the duty-to-rescue discussion but also for a discussion regarding the moral and legal obligations of bystanders. Bigan was hardly a bystander. On the contrary, the facts indicate that Bigan was very involved and perhaps best characterized as a bully, actively contributing to the risk that ultimately led to Yania’s demise.¹⁴⁵ Thus, this does not answer the question of whether Yania’s choices, made as a competent adult, would have eviscerated that contributing factor. But regardless, neither the case nor the commentary provides a good model for a discussion of the legal and moral obligations of bystanders.

D. Proceeding to the More Difficult Questions

As discussed above, when these canonical no-duty to rescue classics are examined carefully, it turns out that *none* of the facts turn on the failure of bystanders to assist a victim in need of emergency assistance. Instead, they are more about—forgive the pun—run-of-the-mill questions regarding the care owed to those who do not seem to fit well within the neat categories of duties derived from clear and specific relational ties: a neighbor’s child when there is no clear arrangement for supervision; a younger sibling of a teenage employee who was not supposed to be on the factory premises; a trespasser on the train tracks; and a person with whom one had just engaged in a business transaction. The more shocking details about the moral and legal obligations of bystanders emerge not from the cases themselves, but from judicial dicta and the embellishing imagination—and at times the sleight of hand—of journal and treatise authors.

What follows from these observations? This is *not* to say that the dicta in these cases are unimportant or should be disregarded. The language in the cases and the various versions of Prosser’s treatise are significant texts that have exerted powerful influence on legal and cultural

142. *Id.*

143. *Id.* at 346.

144. *Id.*

145. *Id.* at 345.

narratives over the course of the twentieth century, and they should be analyzed as such. At the same time, it is also helpful to acknowledge the extent to which these mischaracterizations and caricatures of the actions and decision-making process of seeming “bystanders” in these cases have exerted a broad and powerful influence over our common law discussion of bystanders. When perceptions of bystander behavior are disassociated from these distortions, we may be able to grapple with the more difficult questions regarding bystander decision-making that lurk just beneath the surface.

For example, some of the previously discussed cases involve serious tensions between the principle of beneficence and the principle that competent adults should take responsibility for their own actions. To make matters more complex, these tensions arise when one considers the responsibilities of third parties who were not in a clearly defined relationship of legal responsibility with the injured party. To illustrate, the harder question at the heart of *Osterlind* was the extent to which renters should be held responsible for assessing the “manifest impairment” of their customers before renting out the vehicle or boat. The harder question at the heart of *Handiboe* was how to allot responsibility for accidents that emerge when arrangements for the supervision of children are only tacit. The harder question at the heart of *Yania* was how the law should analyze the relational complexity of bullying between otherwise competent adults. All of these questions are difficult, and to reduce to caricature the decision-making process of the actors who were actually present yields nothing for a serious effort to solve these problems.¹⁴⁶

Of course, as Pope Francis also emphasizes, callous indifference to the suffering of another human being is bad—bad for victims, bad for witnesses, and bad for society. But we must also be on the lookout for the danger of, as Pope Francis describes, “simplistic analyses that fail to grasp the complexity of problems.”¹⁴⁷ Here too, refraining from drawing tidy lines between the righteous and the sinners can help to open the space we need to explore more complex and more difficult questions within legal theory that pervade both individual and structural decision-making.

V. FREEDOM AND OTHER-REGARDING OBLIGATIONS

One way to engage the complexity of the duty-to-rescue discourse is to acknowledge how it might be difficult to find a common language to

146. David Hyman has amassed significant empirical data proving that the scenario on which much of the anxious rescue discussion is based—purported failure to execute a seemingly “easy rescue”—is extremely rare. See David Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 656 (2006).

147. Homily: *Ash Wednesday*, *supra* note 7.

bridge the differences between libertarian legal discourse and discourse grounded in Catholic moral theology.¹⁴⁸ After setting out how this tension in diverse accounts of whether conscription of the assistance of an otherwise uninvolved bystander would be an incursion on the bystander's freedom, this Part proceeds to consider how the work of two legal theorists might step in to fill the gap.

A. Libertarian Concerns About Other-Regarding Obligations

The *Restatement (Third) of Torts* Section 37 sets out some of the philosophical foundations for the arguments for a general rule against affirmative obligations. These rules also ground concerns regarding bystander obligations more generally. One comment to this Restatement section surmises that the requirement of affirmative conduct “in turn relies on the liberal tradition of individual freedom and autonomy. Classical liberalism is wary of laws that regulate conduct that does not infringe on the freedom of others.”¹⁴⁹

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

[G]iven the Kantian requirement of treating others as ends rather than merely as means, it is impermissible to use someone as a mere means to your ends by exposing him (or his resources) to significant foreseeable unaccepted risks, regardless of how greatly the benefit to you might outweigh the risk to him.¹⁵⁰

It follows, then, from the principle of protecting “negative freedom”—the principle which guards against “unjustified interference with one's use of one's existing resources to pursue one's project or life plan”—that such freedom would be “completely undermined if one must always weigh the interests of all others equally with one's own when deciding how to deploy one's existing resources.”¹⁵¹

148. See generally Uelmen, *Mapping a Method*, *supra* note 6 (discussing the challenge that, in W.B. Gallie's turn of the phrase, “essentially contested concepts” pose for the work of bridging Catholic social thought and liberal theory).

149. RESTATEMENT (THIRD) OF TORTS, § 37 cmt. e.

150. Richard W. Wright, *The Standards of Care in Negligence Law*, in THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 256 (David G. Owen ed., 1995).

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

Arthur Ripstein's "equal freedom" argument against a civil duty to rescue is similar. Within a realm in which all persons bear a "special responsibility for their own lives" in order to pursue their own ends as they see fit, "equal freedom" also includes the notion that "one person's liberty will not be limited unilaterally by another's vulnerability, nor one person's security limited unilaterally by another person's choices."¹⁵²

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

No person can be used solely as a means for the benefit of others, which means that no one can be legally required to go beyond the requirements of Right (corrective justice and distributive justice) if such obligation would require a significant sacrifice of one's autonomy or freedom for the alleged greater good of others.¹⁵³

Any extension of the obligation would fall under the realm of ethics, namely beneficence, rather than law, "because it is only specifiable as an indeterminate 'broad' duty, which varies depending on each would-be benefactor's own resources and needs, rather than as a determinate (and hence legally enforceable) 'strict' duty."¹⁵⁴

Some of the libertarian claims come to a rather sharp point. As philosopher Michael Menlowe summarized, the Kantian concept of treating persons as ends and not means is considered by some as support for a "right of self-ownership"—the right to use one's energy and one's possessions as one likes—and a prohibition against using persons as resources for others.¹⁵⁵ As a general principle, the law ought not require a person to act in a way that restricts one's liberty for the sake of the needs of another except by voluntary agreement.¹⁵⁶ On the contrary, if I am

152. Arthur Ripstein, *Three Duties to Rescue: Moral, Civil and Criminal*, 19 LAW & PHIL. 751, 759 (2000).

153. Wright, *supra* note 150, at 272–73.

154. *Id.* at 273.

155. Michael Menlowe, *The Philosophical Foundations of a Duty to Rescue*, in THE DUTY TO RESCUE: JURISPRUDENCE OF AID 10 (Michael Menlowe & Alexander McCall Smith eds. 1993) [hereinafter JURISPRUDENCE OF AID]; see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198 (1973); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA ix, 33 (1974); Robert L. Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946) (discussing objection to affirmative duties: "when a government requires a person to act, it is necessarily interfering more seriously with his liberty than when it places limits on his freedom to act—to make a man serve another is to make him a slave, while to forbid him to commit affirmative wrongs is to leave him still essentially a free man"); Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980).

156. See, e.g., JURISPRUDENCE OF AID, *supra* note 155, at 26; Epstein, *supra* note 155, at 199; Hale, *supra* note 155, at 214 (assumption behind the no-duty-to-rescue rule is that "a rugged,

required to promote the good, I may be prohibited from regarding my own interests as special, and then my integrity is threatened.¹⁵⁷ Summarizing how concerns in this genre have been expressed as a kind of zero-sum game, he quips: “The more I have to do for other people, the less I can do for myself.”¹⁵⁸ Similarly, in *A Theory of Strict Liability*, Richard Epstein reasoned: “Once one decides that . . . an individual is required under some circumstance to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty.”¹⁵⁹

But if the situation poses only a minimal inconvenience to the bystander’s freedom, isn’t it an incredible mismatch to compare this relatively trivial interest with the pressing needs of a vulnerable person whose life or health is in serious danger? For libertarians, though, the inquiry turns not on weighing, measuring, comparing, or matching interests but on protecting the principle that the individual holds the right to decide what to do or not to do in a circumstance like this without state coercion.¹⁶⁰

B. Pope Francis’s Different Point of Reference for Defining Freedom

Now for something completely different. Not surprisingly, Pope Francis’s theological framework leads him to articulate a very different notion of freedom. For example, speaking with teenagers, he directly addressed aspects of some libertarian notions of freedom:

At this point in life you feel also a great longing for freedom. Many people will say to you that freedom means doing whatever you want. But here you have to be able to say no. Freedom is not the ability simply to do what I want. This makes us self-centered and aloof, and

independent individual needs no help from others, save such as they may be disposed to render him out of kindness, or such as he can induce them to render by the ordinary process of bargaining, without having the government step in to make them help.”); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (Part I), 56 U. PA. L. REV. 217, 218–20 (1908) (the distinction between misfeasance and nonfeasance “is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.”). *But see* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 682 (1994) (arguing it is myopic to generalize common law trends only from the law of trespass and tracing ancient public law duty to prevent criminal violence).

157. See JURISPRUDENCE OF AID, *supra* note 155, at 38; Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 115–17 (1973).

158. JURISPRUDENCE OF AID, *supra* note 155, at 38.

159. Epstein, *supra* note 155, at 198.

160. It would be interesting to draw further connections between these rights-based concerns and Pope Francis’s rejection of some utilitarian forms of cost-benefit analysis. See discussion *supra* note 126 (“As long as the economy still produces one victim and there is still a single discarded person, communion has not yet been realized.”).

it prevents us from being open and sincere friends. Instead, freedom is the gift of being able to choose the good. The free person is the one who chooses what is good, what is pleasing to God, even if it requires effort.¹⁶¹

On another occasion, Pope Francis warned that it is precisely in opting for “ease and convenience, for confusing happiness with consumption” that we end up losing our freedom.¹⁶² In contrast, it is precisely the path of encountering the needs of others, in “making of your own lives a gift to him and to others,” that one discovers what it means to be free.¹⁶³

Explaining this concept in light of a reflection on attention to the needs of others, Pope Francis gave the following example:

True freedom is always given to [the Church] by the Lord. Freedom, first of all from sin, from selfishness in all its forms: freedom to give of oneself and to do it with joy, like the Virgin of Nazareth, who is free of herself, does not close in on herself in her condition—and she would indeed have had cause!—but thinks of those who in that moment are in greater need. She is free in the freedom of God, which is manifest in love. And this is the freedom that God has given to us, and we must not lose it: the freedom to adore God, to serve God and to serve him also in our brothers.¹⁶⁴

Using a colorful image, the Pope also noted that this kind of freedom can transform even the “existential grayness” of sadness, fear, internal emptiness, isolation, regret, and complaints. It can also bring us beyond

161. Pope Francis, Homily: *Jubilee for Boys and Girls* (Apr. 24, 2016), https://w2.vatican.va/content/francesco/en/homilies/2016/documents/papa-francesco_20160424_omelia-giubileo-ragazzi.html [<https://perma.cc/5C74-3UZK>].

162. Pope Francis, *Homily for the Prayer Vigil with Young People, Cracow, Poland* (July 30, 2016), https://w2.vatican.va/content/francesco/en/speeches/2016/july/documents/papa-francesco_20160730_polonia-veglia-giovani.html; see also Pope Francis, Jubilee Audience (Sept. 10, 2016), https://w2.vatican.va/content/francesco/en/audiences/2016/documents/papa-francesco_20160910_udienza-giubilare.html [<https://perma.cc/H3B6-7ZYS>] (“How many illusions are sold on the pretext of freedom, and how many new forms of slavery are created in our time in the name of a false freedom! . . . We need God to free us from every form of indifference, selfishness and self-sufficiency.”).

163. *Id.*; see also Pope Francis, Jubilee Audience (Sept. 10, 2016), https://w2.vatican.va/content/francesco/en/audiences/2016/documents/papa-francesco_20160910_udienza-giubilare.html [<https://perma.cc/H3B6-7ZYS>] (“How many illusions are sold on the pretext of freedom, and how many new forms of slavery are created in our time in the name of a false freedom! . . . We need God to free us from every form of indifference, selfishness and self-sufficiency.”).

164. Pope Francis, Homily: *Pastoral Visit to the Dioceses of Campobasso-Boiano and Isernia-Venafro* (July 5, 2014), https://w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco_20140705_molise-omelia.pdf [<https://perma.cc/4LLE-5AGC>].

the “negative attitudes” that make people more self-referential and “more concerned with defending themselves than with giving of themselves.”¹⁶⁵

While the concepts are attractive and profound, the form of the discourse, its biblical and doctrinal points of reference, and its underlying foundations seem distant from the discourse of legal theory. What interdisciplinary resources might help to bridge the divide? The next Section explores how the work of two legal theorists might help with this task.

C. A Legal-Philosophical Bridge: Three Senses of Autonomy

1. Richard Fallon: Descriptive and Ascriptive Autonomy

A 1994 analysis by Richard Fallon, “Two Senses of Autonomy,” can help to illuminate many of the difficult questions previously discussed.¹⁶⁶ Recognizing autonomy as a “protean concept” that means “different things to different people” and at times appears “to change its meaning in the course of a single argument,”¹⁶⁷ Fallon parses the different “senses” in which autonomy is used and how these interpretations interact with concepts of negative and positive liberty.¹⁶⁸

In a “descriptive” sense, autonomy refers to the actual conditions that enable people to be meaningfully self-governed—for example, freedom from coercion, manipulation, and temporary distortion of judgment. Fallon notes, “Someone who is drugged or hallucinating or who acts in panic has reduced autonomy and may not be autonomous at all.”¹⁶⁹ The presence or absence of these factors is a matter of degree that can be mapped along a continuum.¹⁷⁰

In an “ascriptive” sense, “autonomy represents the purported metaphysical foundation of people’s capacity and also their right to make and act on their own decisions, even if those decisions are ill-considered or substantively unwise.”¹⁷¹ In this sense, Fallon explains, “Ascriptive autonomy—the autonomy that we ascribe to ourselves and others as the foundation of a right to make self-regarding decisions—is a moral entailment of personhood.”¹⁷² The image that best captures this notion of

165. *Id.*

166. *See generally* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994).

167. *Id.* at 876.

168. *See id.* (“In rough terms, negative liberty is freedom from external interference in doing or determining what one wants. By contrast, positive liberty signifies rational authorship of one’s ends in action and, in some broader views, may entail empowerment to pursue those ends effectively under laws that reflect a consensus of rational wills.”).

169. *Id.* at 877.

170. *Id.*

171. *Id.* at 878.

172. *Id.*

autonomy is one of a sphere of “personal sovereignty” bounded by respect for the rights of others.¹⁷³ This quality is not a matter of degree, but inheres in one’s person.¹⁷⁴

Fallon then analyzes how varying emphases on either negative or positive freedom make a difference in discussions about autonomy in the law of freedom of expression. For example, for those who emphasize “negative” liberty, descriptive autonomy was often assumed to be a baseline feature of interactions in a market economy.¹⁷⁵ For that reason, the bar for prohibition of certain aspects of freedom of expression was placed at “freedom from interferences such as coercion, manipulation, or temporary distortion of judgment.”¹⁷⁶ As Fallon notes, “positive” libertarians would critique this notion as somewhat thin: “To be an ethically attractive concept, autonomy must imply some degree of critical awareness and self-control. A person who acts entirely voluntarily, but without self-awareness or self-control, is not self-governing in any ethically attractive or descriptively useful sense.”¹⁷⁷

But, a remaining weakness of the arguments for autonomy as viewed through a positive libertarian lens is the difficulty in articulating how competing claims on contested questions should be compared or weighed: “A merely quantitative comparison seems inadequate; positive freedom connotes not just power, but moral reasonableness under shared standards.”¹⁷⁸

Addressing the weaknesses and weaving in the strengths of each perspective, Fallon attempts to synthesize the criteria for descriptive autonomy as depending on these four conditions: 1) critical and self-critical ability; 2) competence to act; 3) sufficient options; and 4) independence of coercion and manipulation.¹⁷⁹ For example, the development of critical and self-critical ability brings the subject beyond slavish reactions to an impulse of the moment: “Autonomy requires the capacity to reflect upon, order, and self-critically revise the tastes, passions, and desire that present themselves as reasons for action. It is this human capacity that enables persons to experience a sense of rational authorship of their ‘higher-order plans of action.’”¹⁸⁰ Freedom from

173. *Id.* at 878, 890.

174. *Id.* at 891.

175. *Id.* at 880.

176. *Id.* at 881; *see also* Kyla Ebels-Duggan, *Moral Community: Escaping the Ethical State of Nature*, 9 PHILOSOPHERS’ IMPRINT 10 (2009) (discussing Kant’s analysis of primary threats to internal freedom emerging from inclinations or passions).

177. *See* Fallon, *supra* note 166, at 885.

178. *Id.*

179. *Id.* at 886.

180. *Id.* at 887.

“coercion” zeroes in on “the deliberate and wrongful subjecting of one human being to the will of another or domination that disrespects the other’s equal moral worth.”¹⁸¹

He then queries: which sense of autonomy ought to receive priority and in which contexts?¹⁸² It would seem, he argues, that the distinctions between self-regarding and other-regarding action would offer a promising method for distinguishing the domains. “Descriptive autonomy matters exclusively in cases of other-regarding action, where the boundaries of private rights must be defined; ascriptive autonomy matters most, and possibly exclusively, in cases of self-regarding action and contemplated paternalistic responses.”¹⁸³ However, given the fluidity of some aspects of these boundaries and the unsurprising difficulties in defining “harm,” Fallon admits that neat categories prove to be elusive.¹⁸⁴ He concludes: “Descriptive and ascriptive autonomy are both fundamental to our understanding of ourselves and of personhood. When their claims pull in different directions, there is no reliable formula for assigning priority.”¹⁸⁵

Notwithstanding this tension, this framework sheds much light on the central questions of this Article. First, respect for *ascriptive* autonomy might actually run parallel to the complex implications of mercy, including respect for the reasons why bystanders may choose not to intervene—regardless of whether this decision is grounded in other priorities, how those priorities are weighed, and the power of emotional obstacles or other kinds of affective input.

Second, what is especially helpful about Fallon’s synthesis of *descriptive* autonomy is how it highlights certain features of a person’s

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

182. *Id.* at 893. Kant, who defines autonomy as free self-legislation, would recognize only the positive version of autonomy, not the libertarian version. See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 4:431 (Mary Gregor, ed. & trans., Jens Timmermann ed., Cambridge Univ. Press rev. ed., 2012) (1785) [hereinafter *GROUNDWORK*] (“[A]ll maxims are rejected that are not consistent with the will’s own universal legislation. Thus the will is not just subject to the law, but subject in such a way that it must also be viewed *as self-legislating*, and just on account of this as subject to the law (of which it can consider itself the author) in the first place.”).

183. See Fallon, *supra* note 166, at 894.

184. See *id.* at 898 (“In sum, the suggestion that ascriptive autonomy should yield to descriptive autonomy in cases of other-regarding action, even if it were formally accepted, turns out to have rather limited bite, due to the need of ascriptive theories to define the ‘harms’ on which the line between self- and other-regarding action depends.”). Similarly, neither can ascriptive autonomy be deemed absolute: “even John Stuart Mill favored interference with someone about to step onto an unsafe bridge.” *Id.* In sum: “the line between self- and other-regarding action is often vague and contestable. Once this is acknowledged, a categorical preclusion of descriptive autonomy from the self-regarding sphere could only seem arbitrary.” *Id.*

185. *Id.* at 899.

encounter with a victim in need of emergency assistance. By definition, the victim exemplifies the far end of the spectrum of the lack of descriptive autonomy—unable to act and foreclosed from the usual range of options—and for this reason, also highly vulnerable to coercion or manipulation by others.

It is interesting to note that the bystander may also be deficient in some aspects of descriptive autonomy. For example, some bystanders may be in need of self-critical reflection regarding the definition of freedom, perhaps even along the lines of what Pope Francis suggests. Here, reflection grounded in his critique of the globalization of indifference may actually *increase* the descriptive autonomy of the bystander because it may open the person to a deeper sense of “rational authorship” over one’s own conduct and one’s interaction with another human being. To the extent that there may be a crowd or gang-type coercive effect on those who interact with victims, an obligation to treat the victim as an end may help to *free* the individuals in the crowd from this kind of coercion and manipulation.

2. Jennifer Nedelsky: Relational Autonomy

Can we push the envelope even further to support an argument that in certain circumstances a legal obligation would not only *not* hinder ascriptive or descriptive autonomy, but could also actually foster freedom? Or on the flip side, to argue that acts that deliberately demonstrate indifference to the humanity of the victim may actually detract from freedom—and cause harm—not only to the victim but also to the bystander?

Note how this possibility is easily obfuscated by starker versions of the libertarian claim: If I am required to promote good, I may be prohibited from regarding my own interests as special, and then my integrity is threatened.¹⁸⁶ Tight analysis can distinguish the varying elements—for example, the problem is not in promoting the interests of others, but in being *required* and perhaps *legally* obliged to do so. Interests are not necessarily always in tension. Notwithstanding these distinctions, the analysis still creates a certain tension between “the good” (including the good of others) and “my special interests,” which easily lends itself to distortion. Framed in this way, it is easy to slide into a kind of zero-sum game balancing act: at the heart of my integrity is the promotion of my own interests as special, and in particular, the promotion of my own interests over those of others.

186. See JURISPRUDENCE OF AID, *supra* note 155, at 38.

What alternative philosophical foundation might help to avoid this zero-sum game?¹⁸⁷ In a thoughtful survey of the feminist critique of liberalism, Linda McClain notices the tendency of feminists and liberals to talk past each other when it comes to defining and understanding the role of autonomy.¹⁸⁸ She recounts: “Negative valuation of autonomy is crucial in assessing feminist critiques of liberalism. . . . Feminist critics have associated autonomy with indifference, isolation, separation, and lack of connection.”¹⁸⁹ But autonomy, McClain submits, need not be atomistic. In fact, as it turns out, responsibility to others “resembles autonomy in the sense of freedom to make choices about one’s life.”¹⁹⁰ Let us see why.

One eloquent and in-depth exploration of autonomy understood in these constructive terms is Jennifer Nedelsky’s opus, *Law’s Relations*.¹⁹¹ Like McClain, Nedelsky critiques the superficial and snarky tendency to utter the catchphrase “autonomous individuals” with a derisive sneer.¹⁹² Rather than giving up on the concept of autonomy, Nedelsky’s strategy is to re-theorize it within the rubric of “relational autonomy.”¹⁹³ Aware of quips that “relational autonomy” is an oxymoron,¹⁹⁴ she recognizes the challenge of the project. “Why choose a value that is practically synonymous with the liberal, individualistic approach I want to supplant or at least shift?”¹⁹⁵ Nedelsky argues that much is at stake:

I think that feminism, and indeed all other emancipatory projects I know of, cannot do without an adequate conception of autonomy. It is too central to our aspirations not to let others define our lives, constrain our opportunities, or exclude us from the power to shape collective norms I argue that we cannot afford to cede the meaning of autonomy to the liberal tradition and that we should redefine rather than resist the term.¹⁹⁶

187. I am on the lookout for models that discern an *ontological* connection and harmony between the interests of the self and those of others. I will proceed with caution to avoid what I consider to be the excesses of some communitarian theorists who seem more comfortable than I am in harnessing state power for the purpose of regulating such harms. See generally Heyman, *supra* note 156 (articulating a communitarian theory of duty to rescue, grounded in a Hegelian philosophical framework).

188. See generally Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992).

189. *Id.* at 1190.

190. *Id.* at 1190.

191. See generally JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW* (2011).

192. *Id.* at 123.

193. *Id.* at 38.

194. *Id.* at 42.

195. *Id.*

196. *Id.* at 43–44.

Noting the reality of our pervasive dependence on others for the possibility of autonomy, she surmises that the concept of autonomy can be reduced neither to independence nor to control.¹⁹⁷

In contrast to a “separative self,” who “clinging to the rights that affirm its separateness”¹⁹⁸ establishes boundaries according to the harm principle,¹⁹⁹ and in contrast to a “simple plurality of independent beings whose inherent rights and obligations mediate their encounters with each other,”²⁰⁰ Nedelsky articulates a “relational” view of persons based on an ontological claim that persons are constituted in their identity—which includes the development of autonomous self-governance—in and by their relationships. She explains: “On a relational view, the persons whose rights and well-being are at stake are constituted by their relationships such that it is only in the context of those relationships that one can understand how to foster their capacities, define and protect their rights, or promote their well-being.”²⁰¹

According to Nedelsky, Hannah Arendt’s theory of judgment, which builds on Kant’s, is a promising resource for this project.²⁰² For Arendt, she explains:

Judgment requires taking into account the perspectives of others in forming one’s own judgment. It is a cognitive ability that is only possible in a social context.

...

One cannot be autonomous without doing the work of exercising judgment about how one engages with the inevitable conditions, desires, interests, or aspirations one has.²⁰³

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

One can learn to exercise judgment well, to use the perspectives of others to become conscious of one’s presuppositions and biases. For

197. *Id.* at 46. *But see* Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255 (2010) (describing vulnerability as “the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual”).

198. NEDELSKY, *supra* note 191, at 116.

199. *Id.* at 121.

200. *Id.*

201. *Id.*; *see* Susan Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 344–45 (2005) (arguing for a revival of the “classical pragmatist interactionist theory of the self,” which includes a conception of the self as “thoroughly constituted by its social context”).

202. NEDELSKY, *supra* note 191, at 58.

203. *Id.*

Arendt, to exercise judgment *is* to exercise it autonomously. As we use the perspectives of others to liberate ourselves from our private idiosyncracies, we become free to make value judgments. Indeed, I see a reciprocal relation between judgment and autonomy. Each requires the other, and experience with one enhances the other: as we exercise judgment about the values we want to embrace, we become more fully autonomous; as we become more autonomous, our capacity for judgment increases.²⁰⁴

Assessing theories that describe autonomy as the “internal” dimension of freedom, which is a combination of self-creation and of what happens to a person,²⁰⁵ Nedelsky critiques that “not everything that is internal is either arrived at autonomously or conducive to autonomy. Indeed, some of what is internal, such as fears, anxieties, and even a sense of duty, can interfere with the exercise of judgment.”²⁰⁶ Instead, distinguished from the core of “agency”—making a choice—the concept of autonomy includes self-governance.²⁰⁷

The process of developing autonomy, or finding “one’s law,” is inherently relational. The law becomes one’s own, but it is not self-made: “the individual develops it but in connection with others; it is not simply chosen, as if from an unlimited market place of options, but recognized, developed and affirmed.”²⁰⁸ Nedelsky opens out the relational dynamic of this process:

The idea that there are commands that one recognizes as one’s own, requirements that constrain one’s life but come from the meaning or purpose of that life, captures the basic connection between law and freedom—which is perhaps the essence of the concept of autonomy. The necessary social dimension of the vision that I am sketching has two components. The first is the claim that the capacity to find one’s own law can develop only if the context of relations that nurture this capacity. The second is that the “content” of one’s own law is

204. *Id.* at 59.

205. *Id.* at 60–61.

206. *Id.* at 62; *see also id.* at 60 (“Many things that people may experience as ‘their own,’ such as consumeristic desires or concern with professional status, may come to be seen by them as limitations to their autonomy.”). Conversely, spiritually structured obedience may be a path to freedom from illusion, obsession, false values, other inferences with true freedom. *Id.*

207. *Id.* at 63. Kant would agree. *See, e.g.,* GROUNDWORK, *supra* note 182, at Ak. 4:431 (“[A]ll maxims are rejected that are not consistent with the will’s own universal legislation. Thus the will is not just subject to the law, but subject in such a way that it must also be viewed as *self-legislating*, and just on account of this as subject to the law (of which it can consider itself the author) in the first place.”).

208. NEDELSKY, *supra* note 191, at 123.

comprehensible only with reference to shared social norms, values and concepts.²⁰⁹

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

When autonomy is understood within a relational framework, it is easier to see that reasons to refrain from imposing rescue obligations on pure bystanders need not be grounded in an ontological claim about autonomy and certainly need not be framed as an affirmation of unfettered liberty to disregard the urgent needs of vulnerable others. Instead, what becomes clearer is that one reason the coercive power of the law should stay its hand is because of the limits of the *law*—and more precisely, because of the law’s incapacity to clearly define how in an emergency a given subject should discern the contours of his or her own response to the needs of another human being. The reason to be cautious about imposing legal obligations is grounded *not* in a generic hands-off claim about the bystander’s *freedom*. Rather, it is grounded in an awareness that in certain circumstances, for example, in the face of violence, it may be difficult for *the law* to probe the thoughts and emotions that would have informed the risks as the bystander perceived them. Because respect for autonomy in making decisions is just one aspect of freedom, to claim that the law should leave room for a bystander’s discernment—especially in the face of violence—is not to equate “freedom” with the “right” not to be bothered by the urgent needs of others.

As Nedelsky summarizes, “A relational approach always directs attention to context and consequences. In asking how a law structures relationships it directs attention to the difference context makes, to how the law affects different people in different circumstances.”²¹⁰ With what I find to be a lovely touch of personal and institutional modesty, Nedelsky explains the potential impact of relational habits of mind:

I think habits of relational thinking, in the realm of rights as in others, would foster both compassion and intelligent responsibility. Seeing

209. *Id.* at 123–24.

210. *Id.* at 221.

ourselves in relation to others would not generate inflated and overwhelming ideas about the scope of our responsibilities to cure all evils. It could be the basis for a more reasonable judgment about the limits of our power as individuals as well as the desirable forms of power we exercise collectively.²¹¹

I agree, and suggest that a relational conception of autonomy can hold together the complex layers of the interior life and decision-making process of bystanders. It can also meld appreciation from a subjective point of view for the limitations that might inform bystanders' engagement with the needs of others, with a concept of the human person as finding both freedom and meaning in attention to the needs and realities of others.

D. Full Circle: A Theological Model in Dialogue with Legal Theory

Is it possible to bridge Pope Francis's theological reflections on freedom, grounded as they are in Christian insights and doctrine, with these knotty problems in legal theory? I think so, especially when his teachings are placed into the context of and understood as an expression of the wide and deep currents of the tradition of Catholic social thought. Because of Pope Francis's largely successful style of communication that some see as uniquely capable of reaching the contemporary world, some are tempted to interpret his teaching as deviating from previous pontificates, and from the sweep of the tradition as a whole. This interpretation is a mistake—not only because this view fails to appreciate the profound continuity between his teachings and those of other Popes but also because it truncates access to a deep reservoir of resources for reflection on social themes.

For example, it is interesting to place Pope Francis's reflections on freedom into the context of a recent body of work in Christian theological scholarship and commentary that offers a further resource for reflection on relationality as constitutive of identity and, therefore, also in harmony with human freedom. The reflection begins with the premise that to understand the attribute of God as *love* implies that God is a community of Persons—Father, Son, and Holy Spirit—a Trinity, bound together as One in relationships of love. Thus, the interior life of God is constituted by relationships of love. Because God's own identity is love, it is at its core a relational reality.

Building on an interpretation of Genesis 1:26–27, which describes humankind as made in the divine image (*imago Dei*), Christian theology extends the analogy between the life of God and human relationships.²¹²

211. *Id.* at 223.

212. *Genesis* 1:26–27.

Humanity is made in the image of a God who loves, and it finds its own identity, and therefore its freedom, in building and living within relationships of love with other human beings. Because relationality is constitutive of identity for human beings made in the image of God, so also autonomy—discovery of one’s own law—would be in accord with this ontological ground. As a recent Catholic Church summary of the social teaching explains:

The revelation in Christ of the mystery of God as Trinitarian love is at the same time the revelation of the vocation of the human person to love. This revelation sheds light on every aspect of the personal dignity and freedom of men and women, and on the depths of their social nature.²¹³

This summary reflects how the analogy was also an important feature of the Second Vatican Council’s principal reflection on the Church’s dialogue with the modern world, *Gaudium et spes*. Referring to the text from the Gospel of John in which Jesus prays to the Father “that they may all be one,”²¹⁴ the Council Fathers explained that this horizon implies “that there is a certain parallel between the union existing among the divine Persons and the union of the children of God in truth and love.”²¹⁵ This document also draws out the anthropological and ethical implications: “This likeness reveals that man, who is the only creature on earth which God willed for itself, cannot fully find himself except through a sincere gift of himself.”²¹⁶

Within this vision, the ultimate identity, vocation, and destiny of the human person is to fulfill oneself by “creating a network of multiple relationships of love, justice, and solidarity with other persons,” as one goes about one’s various activities in the world.²¹⁷ In a later reflection on the application of this model, under the rubric of a “spirituality of communion,” Pope Saint John Paul II explained how the connection between “contemplation of the mystery of the Trinity dwelling in us” should bring Christians to discern that same light “shining on the face of brothers and sisters around us.”²¹⁸ Specifically, “a spirituality of

213. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH, para. 34 (2004) [hereinafter COMPENDIUM].

214. *John* 17:21–22.

215. Second Vatican Council, *Gaudium et spes*, para. 24 (Pastoral Constitution on the Church in the Modern World) (1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [<https://perma.cc/7P52-H529>].

216. *Id.* para. 24 (cf. *Luke* 17:33).

217. COMPENDIUM, *supra* note 213, para. 35.

218. Pope John Paul II, Apostolic Letter: *Novo millennio ineunte* (At the Beginning of the New Millennium), para. 43 (2001), https://w2.vatican.va/content/john-paul-ii/en/apost_letters/2001/documents/hf_jp-ii_apl_20010106_novo-millennio-ineunte.html [<https://perma.cc/EV69-K3EL>].

communion also means an ability to think of our brothers and sister in faith within the profound unity of the Mystical Body, and therefore as ‘those who are a part of me.’”²¹⁹ In contrast, when the human person does not recognize in oneself and in others the value and grandeur of the human person, one effectively deprives *oneself* of the possibility of benefiting from his humanity and of entering into that relationship of solidarity and communion with others for which one was created by God.²²⁰

Recalling the libertarian references to Kant’s moral theory, it is evident that the Kantian framework is generally understood to be more individualistic than these Catholic teachings. But, it is interesting to note that their conception of freedom and dignity are surprisingly similar to Kant’s conception. As *Gaudium* noted, autonomous discernment is an important aspect of human dignity: “[M]an’s dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within, not under blind internal impulse nor by mere external pressure.”²²¹ Like a Kantian understanding of autonomy previously discussed, dignity is grounded in emancipation from “all captivity to passion” in order to pursue one’s goals “in a spontaneous choice of what is good.”²²²

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

[H]uman freedom is often crippled when a man encounters extreme poverty just as it withers when he indulges in too many of life’s comforts and imprisons himself in a kind of splendid isolation. Freedom acquires new strength, by contrast, when a man consents to the unavoidable requirements of social life, takes on the manifold demands of human partnership, and commits himself to the service of the human community.²²³

In one of his most developed teaching documents, the encyclical letter *Laudato si’*, Pope Francis beautifully summarizes this doctrine and also draws out its implications for the entire cosmos:

The divine Persons are subsistent relations, and the world, created according to the divine model, is a web of relationships. Creatures tend towards God, and in turn it is proper to every living being to tend

219. *Id.*

220. Pope John Paul II, *Centesimus annus* (On the Hundredth Anniversary of *Rerum Novarum*), para. 41 (1991).

221. *Gaudium*, *supra* note 215, para. 59; *see also* Second Vatican Council, *Dignitatis Humanae* (Declaration on Religious Freedom) (1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html [<https://perma.cc/42FJ-22F3>].

222. *Gaudium*, *supra* note 215, para. 60.

223. *Id.* para. 61.

towards other things, so that throughout the universe we can find any number of constant and secretly interwoven relationships. This leads us not only to marvel at the manifold connections existing among creatures, but also to discover a key to our own fulfilment. The human person grows more, matures more and is sanctified more to the extent that he or she enters into relationships, going out from themselves to live in communion with God, with others and with all creatures. In this way, they make their own that trinitarian dynamism which God imprinted in them when they were created. Everything is interconnected, and this invites us to develop a spirituality of that global solidarity which flows from the mystery of the Trinity.²²⁴

What are some of the philosophical implications of this framework as it addresses libertarian arguments about the obligations of bystanders? To paraphrase Pope Saint John Paul II, if I do not recognize in others the value and grandeur of the human person, I effectively deprive *myself* of the possibility of entering into a relationship of solidarity and communion with others—which is my destiny and identity as a human being.²²⁵ Deliberate indifference to the needs of others harms not only the victim but also the person who so denies another’s humanity—for to do so is to deny a core aspect of what it means to be human—that is, to recognize the humanity of others.²²⁶

Looking at relationships through a Trinitarian lens strengthens the “rationality” of respecting the dignity of others not only because I owe them the same freedom that I claim, but because the other is “a part of me,” and my own fulfillment and happiness hinges on the possibility of “creating a network of multiple relationships of love, justice, and solidarity” with others.²²⁷ If it is through the free gift of self that one finds oneself, then to respect another person’s dignity and integrity is to express the depths of one’s own humanity.

The analogy to Trinitarian theology also provides a lens to “re-envision” the seeming tautology undergirding structures for analyzing altruism. To recognize the humanity of a vulnerable person in need of assistance is not so much a matter of reaching beyond the boundaries of myself and my own identity in order to determine how aware or how generous to be. Rather, such recognition is a logical consequence of an

224. *Laudato*, *supra* note 13, para. 240.

225. *Centesimus*, *supra* note 220, para. 41. For further exploration of this paradigm, see Chiara Lubich, *The Charism of Unity and Philosophy*, in *ESSENTIAL WRITINGS: SPIRITUALITY, DIALOGUE, CULTURE* 211 (2007) (“I am myself not when I close myself off from the other, but rather when I give myself . . .”).

226. *Cf. Gaudium*, *supra* note 215, para. 27 (acts inimical to life and human dignity “defile those who are actively responsible more than those who are the victims”).

227. *COMPENDIUM*, *supra* note 213, para. 35.

ontological claim about the nature of my own being, and what it means to act in accord with my own identity as a human being fundamentally connected to other human beings.²²⁸

The Trinitarian analogy can help to articulate a critique not only of atomistic individualism but also of the seemingly positive alternate: altruism, understood as “true” only if it cuts *against* my own selfish interests.²²⁹ I realize that neither line of argument must *necessarily* be attributed to a libertarian philosophical stance, but the creep from a stance in political theory to a larger cultural claim is nonetheless frequent. Pushing the envelope on how to articulate the content of a bystander’s freedom, one might query the extent to which these kinds of claims regarding altruism actually exacerbate a tautological tension between the self and others.

Through the lens of the Trinitarian analogy, the reciprocal quality of human interactions comes into focus. Coming full circle in another way, it is interesting to note the continuity between the teachings of Pope Francis on mercy and how Pope Saint John Paul II explained the dynamic in his encyclical letter on mercy, *Dives in misericordia*:

In reciprocal relationships between persons merciful love is never a unilateral act or process. Even in the cases in which everything would seem to indicate that only one party is giving and offering, and the other only receiving and taking (for example, in the case of a physician giving treatment, a teacher teaching, parents supporting and bringing up their children, a benefactor helping the needy), in reality the one who gives is always also a beneficiary. In any case, he too can easily find himself in the position of the one who receives, who obtains a benefit, who experiences merciful love; he too can find himself the object of mercy.²³⁰

228. See generally THOMAS J. NORRIS, *THE TRINITY: LIFE OF GOD, HOPE FOR HUMANITY: TOWARDS A THEOLOGY OF COMMUNION* 131–70 (2009) (delineating elements and potential effects of a Trinitarian ontology). See also Amelia J. Uelmen, *Toward a Trinitarian Theory of Products Liability*, 1 J. CATHOLIC SOC. THOUGHT 603, 630–32 (2004) (describing the criteria of a “reasonable person” through the lens of a Trinitarian theological model).

229. See LUIGINO BRUNI, *THE WOUND AND THE BLESSING* 64–68 (2012) (building on the work of Antonio Genovesi and the civil economy tradition, critiquing as incomplete models of altruism which do not fully account for human sociality); *id.* at 46–62 (reconciling *eros*, *philia*, *agape*, and the common good); Bruni & Uelmen, *supra* note 123, at 662–65 (2006) (distinguishing civil economy concepts from some theories of corporate social responsibility and altruism); Amelia J. Uelmen, *Caritas in veritate and Chiara Lubich: Human Development from the Vantage Point of Unity*, 71 THEOLOGICAL STUD. 29, 38 (2010) (“Through the lens of the spirituality of unity, many theories of altruism would be merely the tautological flip side of individualism, for they are grounded in an assumption that the other’s interests are in fundamental tension with one’s own.”).

230. Pope John Paul II, Encyclical: *Dives in misericordia* (Rich in Mercy), para. 14 (1980), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30111980_dives-in-misericordia.html [<https://perma.cc/BD7A-3JLT>].

Further, it is interesting to return to the Parable of the Good Samaritan in light of this framework. The Parable is frequently read as a model of altruism, as the quintessential example of what it means to go out of one's way in order to serve another's needs. For example, Martin Luther King, Jr., in the sermon he delivered on the eve of his assassination, referred to the Good Samaritan story as part of a powerful plea for the support of the striking sanitation workers in Memphis, Tennessee. Dr. King endorsed the Good Samaritan as a model of one who, on that "dangerous curve" from Jerusalem to Jericho, was able to move beyond fear in order to "project the 'I' into the 'thou' and to be concerned about his brother."²³¹ Dr. King pointed out the contrast with the Levite who asked: "If I stop to help this man, what will happen to me?" But the Good Samaritan was able to "reverse the question" and asked, "If I do not stop to help this man, what will happen to him?"²³²

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

Through this lens, one can discern how the seminal rescue story, the Parable of the Good Samaritan, seems especially set on driving home this point. Recall that Jesus shifts the question from an inquiry into the categorical definitions of "who is my neighbor" to what it means to *be* a neighbor. As previously discussed, in the text of the parable itself, the word *σπλαγγνίζεσθαι*, often translated as "moved with compassion," is better translated to be rawer, more reactive, and "moved from the gut."²³³ Instead, in discussing the Parable with Jesus, the lawyer persisted in expressing himself with the elegant *eleo*—to show mercy.²³⁴

The Trinitarian analogy helps to highlight an important dimension of the text and the meaning of *σπλαγγνίζεσθαι*—to be moved from the gut. Shocked, the lawyer was able to move a few steps in Jesus' direction by

231. TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 284 (James M. Washington ed., 1986) (from "I See the Promised Land," delivered on April 3, 1968).

232. *Id.*

233. See discussion *supra* at note 40 and forward.

234. For this reason, some scholars have argued that the parable is best understood as extracted from its frame, attributing the different choice of words to a seam in the redaction of the text. See, e.g., JAN LAMBRECHT, S.J., ONCE MORE ASTONISHED: THE PARABLES OF JESUS 79 (1981) (arguing that a seam in the redaction could also explain the potentially unintended tension in the text between *defining* one's neighbor (part of the frame) and what it means to *be* neighbor (part of the parable)).

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

In this light, it would also be helpful to revisit Jesus’ invitation to shift one’s perception of an encounter with a neighbor’s needs—to move away from seeing others as simply a passive object of merciful attention toward an appreciation of a deeper “gut level” connection. This can help to explain the meaning of Jesus shifting the question from “who is my neighbor?” to “[what does it mean to be a neighbor?” The verb *σπλαγχνίζεσθαι* indicates that the work of the disciple is no longer to define passive objects of mercy but to completely shift one’s orientation toward the world, and therefore, to every human being. If “mercy” is not the punch line, then perhaps neither is the core question how to determine the boundaries for who should be the passive object of one’s assistance, “who is my neighbor?”²³⁵

The verb *σπλαγχνίζεσθαι* suggests that the stance Jesus describes implies the recognition of one’s fundamental—physiological, emotional, and intellectual—bond to every human being and then on this basis, the work of understanding what it means to *be* a neighbor in various circumstances as they present themselves. In this Parable, it seems that the one who exemplified the fulfillment of the law is a person who let himself be seized by an overwhelming emotional and perhaps even irrational response to the sight of another human being in need, to the point of taking some extraordinary risks to meet the other’s needs.

So would not this model of human freedom and fulfillment point in the direction of a clear moral obligation to help in any and all circumstances? Christian scriptures and tradition are certainly not void of

235. See Howard Lesnick, *The Consciousness of Religion and the Consciousness of Law: Some Implications for Dialogue*, 8 U. PA. J. CONSTIT. L. 335, 343 (2006) (noting Jesus’ capacity to “reach under the argument, and under the lawyer’s motivation, to a quality that the lawyer had not exhibited,” and describing how Jesus “shifts the question” in such a way that a universal definition of neighbor is assumed).

exhortations, examples, and encouragement to find meaning and personal fulfillment in self-sacrifice—with the model *par excellence* being that of the sacrificial love of Christ who risked contact with a hostile humanity to the point of being sentenced to die on a cross: “Greater love has no man than this, that a man lay down his life for his friends.”²³⁶ And perhaps that is the point: the models are offered to people and communities who have had a long track record of severe limitations in the extent to which they recognize each other’s humanity and treat each other according to that grandeur. The image of the Good Samaritan as “moved from the gut” is compelling because it illustrates Jesus’ appreciation for the extent to which human beings act on impulse and also shows that he was not a moralist. Numerous other stories in the Christian scriptures recount God’s mercy when human beings fail to live up to the relational nature of their own identity. All of this can inform a searching “examination of conscience” on the extent to which one may or may not have exercised one’s discretion in order to meet one’s moral obligations to respond to the needs of others.

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

CONCLUSION

So would Pope Francis support a common law rule that bystanders should be legally required to come to the emergency assistance of a victim in need, when to do so would impose no significant risk on the bystander? Notwithstanding his strong moral condemnation of increasing indifference to the various ways in which strangers are drowning before our eyes, I believe he would appreciate how difficult it may be to probe the factors that inform a bystander’s interior state of mind and decision-making process.

It would be important to note, however, that such caution would *not* be framed as concern for a threat to the freedom or integrity of the bystander, in the sense that coming to another’s aid requires a zero-sum

236. *John* 15:13.

balance of interests. Instead, the focus may be more on the limits of the *law*—and the *law's* difficulty in probing the lines between cruel indifference and understandable fear, paralysis, distraction, or the like. Most of us are not heroes. This is why we need to work together to address, beyond the confines of a direct response to an emergency, the complex social and economic problems that make life—and survival—so difficult, especially for those who suffer the most.