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The Morality of Evolutionarily Self-Interested Rescues

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THE MORALITY OF EVOLUTIONARILY SELF-INTERESTED RESCUES

Bailey Kuklin[†]

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INTRODUCTION

Risky rescues occur regularly.¹ Our modern mythology reflects the ideal of the unknown stranger who comes into a community, performs a heroic act such as a rescue, and then departs without more ado. To keep the heroes unknown, the mythologists sometimes place them behind masks, such as for

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1. Awards or recognition for civilian rescues by various entities number “946 non-risky rescues . . . and 243 risky rescues . . . per year in the United States.” David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 668 (2006). “At least 78 Americans lose their lives every year as a result of attempting to rescue someone else [A] substantial percentage of risky rescuers and a significant number of non-risky rescuers were injured—sometimes quite severely.” *Id.* at 668–69.

Batman and Robin, Spider-Man, the Lone Ranger and Tonto,² and even Superman who, stretching credulity, is not recognizable as Clark Kent.³ Now in some sense these stars are not unknown strangers, because they are known by their hero identities. To make them truly unknown, they would have to disappear from town without any recognized identity at all.⁴ Furthermore, other than for the Lone Ranger and Tonto, these particular stars reside in one community where they have become known as heroes. Nevertheless, they approach our ideal heroes because they perform daring, selfless, beneficent acts and do not remain around afterwards for public adoration. Interestingly, they do not use their fame for any advantage, reproductive or otherwise. In fact, even though Superman and Spider-Man are portrayed as particularly inept at romance in their everyday identities, they resist the benefit of divulging their true character to the objects of their affections.⁵ They all do their duties disinterestedly. Kant, champion of the obligation to perform duties not out of self-interest, would be proud of them. Darwin, father of the notion of the “selfish gene,” may be confounded.⁶

2. While Tonto is not masked, as an Amerindian in the Western frontier, he is largely “invisible” to the white community. Cf. Benjamin R. Barber, *Democratic Alternatives to the Mullahs and the Malls: Citizenship in an Age of Global Anarchy*, in 24 THE TANNER LECTURES ON HUMAN VALUES 107, 110 (Grethe B. Peterson ed., 2004) (“[T]he new world was ‘empty’ (the ‘red man’ was invisible in Europe’s eyes, part of the continent’s flora and fauna) . . .”).

3. I leave it to my younger readers to add current “masked” comic book and television heroes.

4. For example, as the Lone Ranger and Tonto leave at the end of an adventure, we would change the standard ending to this: “Who is that masked man?” “I haven’t the slightest idea.” (Notice, it is not, “Who is that masked man and that Indian?”)

5. Ellickson has a somewhat different understanding of these heroic tales. “Popular culture not only reinforces first-party preferences to enforce norms altruistically; it also tells third parties that it is appropriate to reward enforcers after the fact. Superman elicits admiration from Lois Lane; Batman, from Vicki Vail.” ROBERT C. ELLICKSON, ORDER WITHOUT LAW 238 (1991).

6. Truly altruistic and self-sacrificing behavior “represents an evolutionary mistake for the individual showing it.” RICHARD D. ALEXANDER, THE BIOLOGY OF MORAL SYSTEMS 191 (1987). “Even if sainthood takes you into the biologically maladaptive, the Darwinian would think this no more than the occasional price you pay for a first-class social-facilitating mechanism like morality. Most of us admire saints, but feel no great pressure to follow them—nor do we think we should.” MICHAEL RUSE, TAKING DARWIN SERIOUSLY 244 (2d ed. 1998) (citation omitted). “Saintliness is an attractive topic for preaching, but with little practical persuasive force.” John L. Mackie, *The Law of the Jungle: Moral Alternatives and Principles of Evolution*, in PHILOSOPHY OF BIOLOGY 303, 312 (Michael Ruse ed., 1998). On the other hand, perhaps we should knock religious saints down a peg, as people who are “just trying to get on the right side of whatever god they believe in[.] Religious people sometimes claim that only religion can guarantee genuine self-sacrifice; but this is baffling to the secular, since religions nearly always promise that self-sacrifice now will reap enormous rewards later.” JANET RADCLIFFE RICHARDS, HUMAN NATURE AFTER DARWIN 156 (2000).

The duty to rescue is commonly viewed as a moral obligation to be undertaken irrespective of the rescuer's self-interest. If self-interest is evident, the endeavor, even if extremely brave, may be considered less praiseworthy. On the other hand, our visceral reactions may sometimes be at odds with our idealized view of disinterested rescues. While we greatly admire the stranger who heroically rescues a grandmother in dire distress, our marvel is hardly diminished when the rescuer is her granddaughter. The rescuer's strong emotional attachment to the rescuee, rather than grounds for dismissing the rescue as merely self-interested and therefore amoral, is seen as a wonderful manifestation of the love between them worthy of celebration.

In this Article I examine the apparent inconsistency between our visceral approval of risky rescues of those to whom one feels an attachment, and the proposition that true moral conduct must not be done out of self-interest. I begin with a brief look at the legal doctrine of "peril invites rescue," whereby rescuers are granted tort claims for actual damages directly against parties who wrongfully put the rescuees at risk. No distinction is made here between disinterested and self-interested rescues. I then turn to evolutionary principles that, pursuant to the precept of the "selfish" gene, argue that in particular circumstances it is in one's own biological interest to attempt even dangerous rescues despite the personal risk, as where a person runs into a burning building to pull out her children.⁷ This genetic self-interest may well be a primary source of our emotional approval of such conduct. Next, focusing on the predictions of evolutionary psychology regarding rescues, I scrutinize them through the lenses of the most commonly espoused moral systems, utilitarianism and Kantianism. Looking to some of their unsettled principles, I conclude that the evolutionary "selfish" drive to act "altruistically" only in particular, genetically self-interested circumstances fits with surprising comfort within the fuzzy fringes of standard moral theory.

7. In another article I discuss the legal doctrine of "peril invites rescue" and the main evolutionary principles that predict when rescues are likely to be undertaken. See Bailey Kuklin, *Peril Invites Rescue: An Evolutionary Perspective*, 35 HOFSTRA L. REV. 171 (2006). Unfortunately, the reported rescue cases reveal insufficient information to discern whether, in practice, actual rescue cases tend to align with evolutionary predictions.

I. THE RESCUE DOCTRINE AND EVOLUTIONARY PSYCHOLOGY

A. “Peril Invites Rescue”

The rescue doctrine, often stated as “peril invites rescue” or “danger invites rescue,” is well established in the law. If one person wrongfully puts another’s property or person at risk, a rescuer has a direct cause of action against the wrongdoer for actual harm to herself arising from the rescue attempt, whether or not it is successful.⁸ The rescuee’s negligence is not a defense raisable by a third-party tortfeasor and also subjects the rescuee herself to liability to the rescuer. While the rescuer must avoid contributory negligence, the courts are generous to such an actor in ruling on the question.⁹

Although the courts are charitable to rescuers in determining contributory negligence, when granting damages, in accord with the standard tort remedy,¹⁰ they simply return the rescuer to her *ex ante* position.¹¹ The common law provides no bounties for rescues. Perhaps virtue is reckoned to be its own reward,¹² or inducements are thought to be unnecessary.¹³ Nevertheless, some recognition is provided by private

8. See generally RESTATEMENT (SECOND) OF TORTS § 445 cmt. d, illus. 4 (1965); DAN B. DOBBS, *THE LAW OF TORTS* 456 (2000); RICHARD A. EPSTEIN, *TORTS* 266–67 (1999); 4 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* 160 n.41 (2d ed. 1986).

9. See DOBBS, *supra* note 8, at 456; EPSTEIN, *supra* note 8, at 134; JOHN G. FLEMING, *THE LAW OF TORTS* 157 (7th ed. 1987); 4 HARPER ET AL., *supra* note 8, at 209–10, 210 n.36.

10. See FLEMING, *supra* note 9, at 208.

11. *Id.* at 206–08.

12. One court similarly challenged the grant of any relief to the rescuer. It rejected a recovery in restitution for a person who rescued lumber at risk of being carried away by the tides after having been accidentally loosened, reasoning that “it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude.” *Nicholson v. Chapman*, (1793) 126 Eng. Rep. 536, 539 (C.P.D.), quoted in John D. McCamus, *Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution*, 11 OTTAWA L. REV. 297, 302 (1979). Some commentators relatedly question the affirmative duty to rescue:

Another moral argument sometimes made against imposing a duty to rescue is that the imposition of a legal duty to rescue might impoverish the moral quality of rescue, because it would be hard for either the rescuer or third parties to know with certainty whether the rescue was motivated by moral beliefs or by the fear of legal sanctions.

Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 682 (2002).

13. See Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 103 (1985). See generally KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM* (1996) (arguing that altruists simply have a different perspective than rational actors). “Since the enforcement of a legal claim for compensation is costly even if the claim is settled rather than litigated, we predict that a

organizations and governmental authorities.¹⁴ Evolutionary psychology instructs us that nature may provide other positive inducements.

B. Evolutionary Psychology

Evolutionary psychology studies behavior from an evolutionary perspective.¹⁵ Evolution itself is generally understood today from the perspective of the “selfish” gene.¹⁶ Because more organisms are produced than can survive and reproduce in this world of limited resources and conflict, those that have advantageous traits are more likely to leave their genes behind in the gene pool via descendants and other relatives who share their genes.¹⁷ From the gene’s viewpoint, a successful gene is “selfish” in the metaphorical sense that it increases its chances of continued survival if it predisposes its organism to characteristics and behavior that protect the gene. This implies that a gene would incline its organism to altruistic behavior only to the extent that this conduct ultimately acts to the gene’s own benefit. But since evolution works incrementally over very long periods of time, the predisposed behavior of humans today was largely shaped during the period when our ancestors were struggling as hunter-gatherers on the African savanna.¹⁸ To infer current behavioral inclinations,

legal system concerned with maximizing efficiency would refuse to grant compensation in rescue situations where altruism provided a strong inducement to rescue attempts.” William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 95 (1978). For analysis, see *id.* at 95–100.

14. See Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991, 996–99 (2000) (identifying private and government incentives and help for rescuers); Hyman, *supra* note 1, at 666 (“This Article describes approximately 20 different entities that provided data on awards or recognition for civilian rescue.”); Christopher H. White, Comment, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 529–30 (2002) (describing government protections and incentives for rescuers).

15. See generally CHRISTOPHER BADCOCK, *EVOLUTIONARY PSYCHOLOGY* (2000); DAVID M. BUSS, *EVOLUTIONARY PSYCHOLOGY* (1999); JOHN CARTWRIGHT, *EVOLUTION AND HUMAN BEHAVIOR* (2000); *HANDBOOK OF EVOLUTIONARY PSYCHOLOGY* (Charles Crawford & Dennis L. Krebs eds., 1998).

16. The seminal tracts are GEORGE C. WILLIAMS, *ADAPTATION AND NATURAL SELECTION* (1966) and RICHARD DAWKINS, *THE SELFISH GENE* (new ed. 1989).

17. See WILLIAMS, *supra* note 16, at 22–34.

18. The circumstance in which humans evolved is called the environment of evolutionary adaptedness (“EEA”). See, e.g., ROBERT WRIGHT, *THE MORAL ANIMAL* 37–39 (1994); Donald Symons, *On the Use and Misuse of Darwinism in the Study of Human Behavior*, in *THE ADAPTED MIND* 137, 143–44 (Jerome H. Barkow et al. eds., 1992). For questions about the concept of the EEA, see KEVIN N. LALAND & GILLIAN R. BROWN, *SENSE AND NONSENSE: EVOLUTIONARY PERSPECTIVES ON HUMAN BEHAVIOUR* 177–82 (2002).

one must understand human survival and reproductive needs in those distant conditions. Accordingly, three main forms of altruistic behavior relevant to the rescue doctrine have been investigated by evolutionary psychologists: kin selection, reciprocal altruism, and sexual selection. I outline these three in turn, pointing out the behavior of a rescuer that would be expected by the application of each of these notions.

1. Kin Selection

A selfish gene is interested not only in its own organism, but also in those organisms in which identical copies of it reside. These are, quite likely, relatives. It may therefore promote itself by making its own organism fitter to cope with the conditions it confronts as well as by inclining the organism to favor the other organisms with its copies, as where siblings are disposed to advance the interests of one other. The gene's stake in its copies in related organisms is the essence of kin selection.¹⁹

The gene, through its own organism, cannot directly perceive which other organisms contain copies of it. Yet it can make estimates.²⁰ The more closely the other organism is related, the more its genes overlap, and thus, the more likely any particular variation of the gene (i.e., allele) will reside in the other organism's genome. In this regard, identical twins share 100% of their genes, siblings, parents and offspring share 50%, grandparents, grandchildren, aunts, uncles, nieces and nephews share 25%, and, first cousins share 12.5%. Since humans cannot directly perceive kinship, other mechanisms must serve as proxies. Empirically, persons are more likely to be related if they are raised in the same household, or, historically, lived nearby, or even simply knew one another, or looked alike.²¹ Thus kin

19. Kin selection is "[t]he selection of genes due to one or more individuals favoring or disfavoring the survival and reproduction of relatives (other than offspring) who possess the same genes by common descent." EDWARD O. WILSON, *SOCIOBIOLOGY* 587 (1975). See generally BADCOCK, *supra* note 15, at 85–88; DAVID P. BARASH, *SOCIOBIOLOGY AND BEHAVIOR* 79–93 (1977); BUSS, *supra* note 15, at 222–49; CARTWRIGHT, *supra* note 15, at 74–78; HELENA CRONIN, *THE ANT AND THE PEACOCK* 293–310 (1991); ROBERT TRIVERS, *SOCIAL EVOLUTION* 45–47, 169–202 (1985).

20. It is a common convention among evolutionists to anthropomorphize the gene by giving it interests, desires, and other human characteristics. This is metaphoric shorthand.

21. See C. R. BADCOCK, *THE PROBLEM OF ALTRUISM* 75 (1986); CARTWRIGHT, *supra* note 15, at 80–82; DAWKINS, *supra* note 16, at 89–90; W. D. HAMILTON, *Selection of Selfish and Altruistic Behaviour in Some Extreme Models*, in *NARROW ROADS OF GENE LAND* 198, 211 (1996); R. PAUL SHAW & YUWA WONG, *GENETIC SEEDS OF WARFARE* 27, 39 (1989); Charles Crawford, *Psychology*, in *THE SOCIOBIOLOGICAL IMAGINATION* 303, 310–11 (Mary Maxwell ed., 1991). But still, the uncertainty in discerning relatedness may challenge the claim that kin selection supports morality. See ALEXANDER ROSENBERG, *DARWINISM IN PHILOSOPHY, SOCIAL*

selection implies that the choice to encounter risks for another should take into account one's familiarity with, or resemblance to, her.

Copies in other organisms are not all equally valuable to a gene. The value of the copy turns on the extent to which it is able to promote replication of the gene. In the rescue context, it is not beneficial to a gene to put itself at risk for a copy in an organism that is going nowhere reproductively, as where the organism is beyond its breeding years and is incapable of aiding other copies to reproduce. Thus, under kin selection, it is in a gene's interest to take risks for relatives not only in proportion to their relatedness, but also to the extent that the relatives have their reproductive and assisting years ahead. Reproductive factors beyond age also count, which in the modern world relate to such things as the rescuee's attractiveness and wealth, and her educational, vocational, and social accomplishments.

But relatives are not the only persons who may be of help. Even total strangers may perform invaluable services. This possibility takes us to the next way in which the selfish gene may prosper through risk-taking: reciprocal altruism.

2. Reciprocal Altruism

Reciprocal altruism pursues the idea that genetic success can be enhanced by obtaining the future support of others, even if they are

SCIENCE AND POLICY 130–32 (2000). On the other hand, this uncertainty “may be fortunate . . . because it may enlarge the circle of recipients of kin-selected altruism.” Dennis L. Krebs, *The Evolution of Moral Behaviors*, in HANDBOOK OF EVOLUTIONARY PSYCHOLOGY, *supra* note 15, at 337, 354. Perhaps uncertainty is not required for the enlargement. “The actual explanation of the extent of our previous instinctive caring may be the mechanism of kin selection, but (in the absence of evolutionary knowledge) it will not be obvious why biological relationships bear such significance.” ROBERT NOZICK, INVARIANCES 277 (2001). “[R]elatives may be more likely to cooperate with you or come to your aid in situations of need, but shouldn't that then be the basis of caring for others: care for those who are likely to cooperate with you or to come to your aid in need?” *Id.* at 277–78. By understanding this beneficial caring behavior, “the appropriate domain of that behavior may get extended, eventually (by some) to include all of humanity.” *Id.* at 278. In general, “once ethics of some sort exists, once our normative boxes and operators are in place and prepared to receive content, and once our evaluative capacities are functioning, ethics can get extended beyond its originating function.” *Id.* Others have had similar thoughts. See, e.g., ERNST MAYR, TOWARD A NEW PHILOSOPHY OF BIOLOGY 81–85 (1988) (arguing that reason and culture lead humans to extend altruism beyond inclusive fitness); PETER SINGER, THE EXPANDING CIRCLE 139 (1981) (explaining modern altruism towards strangers comes from the human capacity to reason, thereby “bring[ing] with it an appreciation of the reasons for extending to strangers the concern we feel for our kin and our friends”); see also *infra* note 64 and accompanying text.

unrelated, by helping them in their own times of need.²² This reciprocation may occur directly or indirectly, as where one person saves another from drowning, who in turn feeds a starving person, who then pulls the original rescuer's child from a burning building.²³ I examine this principle in greater detail because it squarely involves the morals, norms and related emotions that this Article addresses.

Because reciprocal altruism depends on the expectation of future reciprocation, the possibility of free-riding is worrisome. In the situations under consideration, once a rescue is effectuated, the rescuee and her supporters may simply decline to reciprocate, directly or indirectly. With this as a risk, the establishment of the practice of reciprocal altruism is threatened at square one.

However, the threat of free-riding is reduced by several factors. Norms can overcome the temptation to cheat.²⁴ Social mores induce people to cooperate.²⁵ Religious and moral feelings may engender guilt and shame in shirkers.²⁶ The moral sensibilities of others also produce psychic sticks.

22. Reciprocal altruism is "[t]he trading of altruistic acts by individuals at different times. For example, one person saves a drowning person in exchange for the promise (or at least the expectation) that his altruistic act will be repaid if the circumstances are reversed at some time in the future." WILSON, *supra* note 19, at 593. The elements are: "1. The exchanged acts, while beneficial to the recipient, are costly to the performer. 2. There is a time lag between giving and receiving. 3. Giving is contingent on receiving." FRANS DE WAAL, *GOOD NATURED* 24 (1996). See generally BADCOCK, *supra* note 15, at 102-06; BARASH, *supra* note 19, at 94-96; BUSS, *supra* note 15, at 253-77; CARTWRIGHT, *supra* note 15, at 84-88; CRONIN, *supra* note 19, at 253-65; TRIVERS, *supra* note 19, at 47-49; Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35 (1971).

23. See BADCOCK, *supra* note 15, at 105-06; BOBBI S. LOW, *WHY SEX MATTERS* 152 (2000); Trivers, *supra* note 22, at 39.

24. "[S]election may favor learning from the altruistic and cheating experiences of others, helping others coerce cheaters, forming multiparty exchange systems, and formulating rules for regulated exchanges in such multiparty systems." Trivers, *supra* note 22, at 52. "In short, selection may favor the elaboration of norms of reciprocal conduct." *Id.*; see also JOHN MAYNARD SMITH, *THE THEORY OF EVOLUTION* 184 (3d ed. 1975) (explaining "how a group comes to consist wholly of altruistic individuals in the first place, since in a mixed group altruism will be eliminated by selection," through an answer that, among more intelligent social mammals, "the difference between altruism and selfishness may be a matter of education and not of genetics, so that altruism may be spread by education to all members of a group").

25. In general, social norms are partly "sustained by the emotions that are triggered when they are violated: embarrassment, guilt and shame in the violator; anger and indignation in the observers." JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 113 (1989). For example, altruistic behaviors "save altruists from the future pain and suffering that would have been caused by loss or shame upon *not* behaving altruistically." ANTONIO R. DAMASIO, *DESCARTES' ERROR* 176 (1994).

26. To recapture the benefits of possible future aid when a person has been cut off for cheating, "the cheater should be selected to make up for the misdeed and to show convincing evidence that future cheating is not planned; in short, a reparative gesture is called for."

Ostracism and moralistic aggression against slackers²⁷ or those who decline to punish them²⁸ raise the cost of defection. This moral reaction may stem

TRIVERS, *supra* note 19, at 389. The emotion of guilt may have been selected partly “to motivate the cheater to compensate his misdeed and to behave reciprocally in the future, and thus to prevent the rupture of reciprocal relationships.” Trivers, *supra* note 22, at 50; *see* BADCOCK, *supra* note 15, at 104 (“Guilt can be seen as an internal warning of the likely negative responses of others to your own cheating, and feelings of remorse clearly motivate attempts at reparation where the damage has already been done.”); BADCOCK, *supra* note 21, at 40 (“Even anger directed at oneself in the form of guilt and remorseful feelings” may serve to mollify others for reciprocal failures by inducing “some act of reparation or expiation in one’s own interests.”); VICTOR S. JOHNSTON, *WHY WE FEEL* 84 (1999) (explaining that guilt helps monitor reciprocal altruism); RICHARD JOYCE, *THE EVOLUTION OF MORALITY* 111 (2006) (“The hypothesis . . . is that natural selection opted for a special motivational mechanism for this realm [of cooperative behavior]: moral conscience.”); STEVEN PINKER, *HOW THE MIND WORKS* 404 (1997) (“*Guilt* can rack a cheater who is in danger of being found out. . . . [The cheater] has an interest in preventing the rupture by making up for the misdeed and keeping it from happening again.”); TRIVERS, *supra* note 19; Robert H. Frank, *Economics, in THE SOCIOBIOLOGICAL IMAGINATION*, *supra* note 21, at 91, 96–102 (explaining that “irrational” emotions, such as vengeance, envy, and guilt, when known to others, facilitate cooperation); Nicholas Agar, *Agar’s Review of Katz*, 17 *BIOLOGY & PHIL.* 123, 133 (2002) (book review) (“According to psychologists the primary function of regretting a missed opportunity is to identify conditions that will facilitate taking similar opportunities in future. A bonobo that regrets not helping the victim of violence will be more likely to come to the aid of future victims.”). In general, “a great deal of the time it is our emotions that are driving our moral judgments” JOYCE, *supra*, at 130.

Since studies show that reparative altruistic behavior occurs only when others know of the cheating, *see* TRIVERS, *supra* note 19, in accordance with some commentators, one might more properly refer to the cheater’s emotion as shame, a reaction to public disapprobation or external standards of conduct, rather than guilt, which relates to internal concerns of conscience. *See, e.g.*, CLIFFORD GEERTZ, *Person, Time, and Conduct in Bali*, in *THE INTERPRETATION OF CULTURES* 360, 401 (1973) (“Shame is the feeling of disgrace and humiliation which follows upon a transgression found out; guilt is the feeling of secret badness attendant upon one not, or not yet, found out.”); PINKER, *supra*, at 405 (noting that shame is “the reaction to a transgression after it has been discovered”); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 277 (1981); JOHN RAWLS, *A THEORY OF JUSTICE* 445 (1971); Jon Elster, *Weakness of Will and the Free-Rider Problem*, 1 *ECON. & PHIL.* 231, 246 (1985).

27. “[T]he psychological system underlying human reciprocal altruism . . . might select for friendliness towards altruists, but . . . ‘moralistic aggression’ against cheats,” moralistic aggression being resentful anger. BADCOCK, *supra* note 21, at 39. “*Anger* protects a person whose niceness has left her vulnerable to being cheated.” PINKER, *supra* note 26, at 404. “Many psychologists have remarked that anger has moral overtones; almost all anger is righteous anger.” *Id.*; *see* JOHNSTON, *supra* note 26, at 84 (finding that anger helps monitor reciprocal altruism). *See generally* Robert Boyd & Peter J. Richerson, *Punishment Allows the Evolution of Cooperation (or Anything Else) in Sizable Groups*, 13 *ETHOLOGY & SOCIOBIOLOGY* 171 (1992); Michael E. Price et al., *Punitive Sentiment as an Anti-Free Rider Psychological Device*, 23 *EVOLUTION & HUM. BEHAV.* 203 (2002). “A strong reciprocator has an initial predisposition to cooperate with other cooperators, and retaliates against non-cooperators by punishing them, even when this behaviour cannot be justified in terms of long-run self (or extended kin) interest.” Herbert Gintis, *Group Selection and Human Prosociality*, in *EVOLUTIONARY ORIGINS OF MORALITY* 215, 216 (Leonard D. Katz ed., 2000). Human moralistic aggression and indignation counteract the emotional rewards of unreciprocated altruism, and educate and deter

from an innate sense of fairness or justice.²⁹ While the morality of rescue is taken up below, it has been posited that the quality of virtue or morality has been driven largely by reciprocal altruism.³⁰

Nevertheless, as life in the modern world attests, norms alone are not enough to guarantee cooperative behavior.³¹ Emotions not tied to norms can also facilitate reciprocation.³² Indeed, the very function of emotions in

the nonreciprocator. *See* Trivers, *supra* note 22, at 49. Cooperators may seek retribution against noncooperators. “Such retribution can take many forms including noncooperators being physically attacked, being made the victim of gossip . . . or being denied access to some important resource.” Lee A. Dugatkin, *Cooperation in Animals: An Evolutionary Overview*, 17 *BIOLOGY & PHIL.* 459, 472 (2002). “Punishment may also be linked to cooperation via reputation.” *Id.* (citing evidence that even some animals punish one another for violating “rules”).

28. “In many systems, cheating is further discouraged by the rule: punish not only cheaters but also anyone who fails to punish cheaters.” LOW, *supra* note 23, at 153; *see* ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION* 55 (1997) (“By linking vengefulness against nonpunishers with vengefulness against defectors, the metanorm provides a mechanism by which the norm against defection becomes self-policing.”).

29. *See* TRIVERS, *supra* note 19, at 389. Trivers “believe[s] that a sense of fairness has evolved in human beings as the standard against which to measure the behavior of other people, so as to guard against cheating in reciprocal relationships.” *Id.* at 388. Referring to indirect reciprocation, he contends that a sense of justice is especially needed:

[I]n species such as our own in which a system of multi-party altruism may operate so that an individual does not necessarily receive reciprocal benefits from the individual aided but may receive the return from third parties. This sense of justice involves two components: individuals share a common standard or sense of fairness, and infractions of this standard are associated with strong emotional reactions and aggressive impulses.

Id. at 389. *See generally* THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF THE LAW (Roger D. Masters & Margaret Gruter eds., 1992).

30. *See infra* note 64.

31. Among the strategies for promoting cooperation are to “enlarge the shadow of the future,” “teach reciprocity,” “insist on no more than equity,” “respond quickly to provocation,” and “cultivate a personal reputation as a reciprocator.” BUSS, *supra* note 15, at 258 (Box 9-1). “Enlarge the shadow of the future” means indicating, through actions or commitments, that the parties will often interact in the extended future; “respond quickly to provocation” means retaliating quickly when the cooperator defects. *Id.*

32. *See generally* Daniel M. T. Fessler & Kevin J. Haley, *The Strategy of Affect: Emotions in Human Cooperation*, in *GENETIC AND CULTURAL EVOLUTION OF COOPERATION* 7 (Peter Hammerstein ed., 2003). “Emotions appear to be a key determinant of behavior in cooperative relationships. Emotions affect behavior both directly, by motivating action, and indirectly, as actors anticipate others’ emotional responses.” *Id.* “Different emotions affect cooperative behavior in different ways: some emotions lead actors to forego the temptation to defect, some lead them to reciprocate harm suffered or benefits provided, and some lead them to repair damaged relationships.” *Id.* In this chapter the authors “discuss[] thirteen emotions that seem to have the greatest impact on cooperation,” including romantic love, gratitude, anger, envy, guilt, righteousness, contempt, and, shame and pride. *Id.* at 7, 9–21.

general may be to promote one's evolutionary fitness.³³ In the context of reciprocal altruism, emotional inducements to respond to another's need, beyond those mentioned above, spring from gratitude for prior aid,³⁴ as well as sympathy for the plight of the person in distress.³⁵ Liking a person

33. Emotions can be defined "as qualitatively different conscious states that have evolved to represent the nature, magnitude, and direction of *expected* threats or benefits to some aspect of our personal fitness." JOHNSTON, *supra* note 26, at 86 (emphasis added). "[E]motions are adaptations . . ." PINKER, *supra* note 26, at 370. Various studies lead:

[T]o the conclusion that the human mind contains evolved emotional and motivational mechanisms that are specifically targeted to address adaptive problems involved in parenting, emotional communication with infants and adults, kinship, mate choice, sexual attraction, aggression, the avoidance of danger, mate guarding, effort allocation in child care, and so on.

John Tooby & Leda Cosmides, *The Psychological Foundations of Culture*, in THE ADAPTED MIND, *supra* note 18, at 19, 99. "The problem with the emotions is not that they are untamed forces or vestiges of our animal past; it is that they were designed to propagate copies of the genes that built them rather than to promote happiness, wisdom, or moral values." PINKER, *supra* note 26, at 370. Deceit in the form of sham emotions, such as sham generosity, anger, guilt, and shame, may do the work of real emotions by provoking beneficial responses from others. *Id.* at 405; Trivers, *supra* note 22, at 50. Thus, to discriminate between real and sham emotions, trust and distrust evolved, which then escalated the "cognitive arms race," *see* Trivers, *supra* note 22, at 50, even leading to self-deception as a means to better deceive others. *See* PINKER, *supra* note 26, at 405, 421–23; TRIVERS, *supra* note 19, at 415–20. *See generally* Randolph M. Nesse & Alan T. Lloyd, *The Evolution of Psychodynamic Mechanisms*, in THE ADAPTED MIND, *supra* note 18, at 601. On the other hand, Elster contends that some emotions may actually reduce evolutionary fitness, as where they interfere with physical performance or cool reasoning. *See* JON ELSTER, STRONG FEELINGS 46–50 (1999). Regarding the nature of emotions, *see generally id.* and JON ELSTER, ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS (1999).

34. Trivers "think[s] the emotion of gratitude has been selected to regulate human responses to altruistic acts, and that the emotion is sensitive to the cost/benefit ratio of such acts." TRIVERS, *supra* note 19, at 388; *see* Trivers, *supra* note 22, at 49 (similar language). "Psychologists have shown that human beings reciprocate more when the original act was expensive for the benefactor, even though the benefit given is the same." TRIVERS, *supra* note 19, at 389; *see* BADCOCK, *supra* note 15, at 104 ("Sociological findings suggest that the greater the need of the recipient of altruism and the scarcer the resources of the altruist, the greater will be the tendency of the recipient to reciprocate."); PINKER, *supra* note 26, at 404 ("Gratitude calibrates the desire to reciprocate according to the costs and benefits of the original act. We are grateful to people when their favor helps us a lot and has cost them a lot.").

35. Trivers also "believe[s] the emotion of sympathy has been selected to motivate altruistic behavior as a function of the plight of the recipient of the behavior." TRIVERS, *supra* note 19, at 388–89; *see* Trivers, *supra* note 22, at 49 (similar language). Feeling sympathy for a cooperator increases the cost of defecting. *See* Robert H. Frank, *Regulating Sexual Behavior: Richard Posner's Sex and Reason*, in LAW AND EVOLUTIONARY BIOLOGY 149, 156 (Lawrence A. Frolik ed., 1999). "Because of this cost, the person who sympathizes with his trading partners is less likely to defect, and is thus more likely to reap the long-run gains of cooperation." *Id.*; *see* PINKER, *supra* note 26, at 404 ("Sympathy, the desire to help those in need, may be an emotion for earning gratitude. If people are most grateful when they most need the favor, a person in need is an opportunity to make an altruistic act go farthest."). "If the cost/benefit ratio is important in determining the value of co-operation, the emotions of

motivates aiding her.³⁶ In general, feeling good about reciprocating reduces, even outweighs, its costs.³⁷

Yet even norms and emotions together are no guarantee of reciprocation.³⁸ Therefore, rescues driven by reciprocal altruism would also be informed by other factors affecting the likelihood of later reciprocation. Beyond the question of whether the rescuer herself is likely to be in need of a future rescue,³⁹ these factors encompass the probable inclination to

gratitude and sympathy could be seen as having evolved to motivate reciprocity, and to be sensitive to the net cost or benefit in each particular case.” BADCOCK, *supra* note 15, at 104. *But cf.* C. Daniel Batson, *Unto Others: A Service . . . and a Disservice*, in *EVOLUTIONARY ORIGINS OF MORALITY*, *supra* note 27, at 207, 209 (“To the best of my knowledge, there is at present no plausible egoistic explanation of the motivation to help evoked by empathy.”).

36. “Liking is the emotion that initiates and maintains an altruistic partnership. It is, roughly, a willingness to offer someone a favor, and is directed to those who appear willing to offer favors back.” PINKER, *supra* note 26, at 404. “The tendency to like others, not necessarily closely related, to form friendships and to act altruistically toward friends and toward those one likes will be selected for as the immediate emotional rewards motivating altruistic behavior and the formation of altruistic partnerships.” Trivers, *supra* note 22, at 48; *see* TRIVERS, *supra* note 19, at 388 (similar language).

37. One study found that kin selection and reciprocal altruism predict rescue intentions more than do the psychological satisfactions of the rescuer. *See* Daniel J. Kruger, *Evolution and Altruism: Combining Psychological Mediators with Naturally Selected Tendencies*, 24 *EVOLUTION & HUM. BEHAV.* 118, 118–24 (2003). When aid is given primarily to alleviate one’s own distress from knowledge of another’s suffering, Jane Goodall wonders, “Does this mean, then, that we act altruistically only to soothe our own consciences? That our helping, in the final analysis, is but a selfish desire to set our minds at rest?” JANE GOODALL, *THROUGH A WINDOW* 214 (1990). But she demurs to this reductionism. “The very fact that we feel distressed by the plight of individuals we have never met, says it all.” *Id.* at 215. Well, not quite. Perhaps “what matters to society is whether people are likely to be nice to each other, not their motives.” MATT RIDLEY, *THE ORIGINS OF VIRTUE* 21 (1996). Or we could finesse the problem this way: “Typically, *altruistic helping* is defined as voluntary action, intended to benefit another, that is not performed with the expectation of receiving *external* rewards or avoiding *external* aversive reactions or punishments.” Patricia A. Oswald, *The Effects of Cognitive and Affective Perspective Taking on Empathic Concern and Altruistic Helping*, 136 *J. SOC. PSYCHOL.* 613, 615 (1996) (second and third emphases added). Or again: “Psychological altruism, as many philosophers have recognized, is not a matter of going against one’s dominant desires but rather having dominant desires that are directed towards others.” Philip Kitcher, *Psychological Altruism, Evolutionary Origins, and Moral Rules*, 89 *PHIL. STUD.* 283, 291 (1998) (footnote omitted). Still, “[t]he discovery that tendencies to altruism are shaped by benefits to genes is one of the most disturbing in the history of science.” Randolph Nesse, *Why Is Group Selection Such a Problem?*, 17 *BEHAV. & BRAIN SCI.* 633, 633 (1994). Moreover, because we evolved to be sensitive to those who are calculatingly self-interested, “[w]e are programmed to deeply distrust—or even detest—the theory of sociobiology.” ALISON JOLLY, *LUCY’S LEGACY* 110 (1999). In the end, the moral conundrum remains. *See generally* RIDLEY, *supra*.

38. Nevertheless “[a] considerable body of evidence suggests that many people, in many different societies, and under many different social conditions, including complete anonymity, behave like the strong reciprocator.” Gintis, *supra* note 27, at 217 (reviewing some of the evidence); *see, e.g.*, Robert M. Sapolsky, *Cheaters and Chumps*, 111 *NAT. HIST.* 20 (2002).

39. For example, one court reasons:

reciprocate of the rescuee and her supporters, as well as their opportunity to do so.⁴⁰ Among the many relevant details are whether the rescuee is young or old, strong or weak, brave or cowardly, magnanimous or egoistic, trustworthy or oblivious, popular or alienated, and whether she is a stranger, community member, neighbor, friend, or fellow householder. For example, a middle-aged, daring companion who has helped others before is more likely to reciprocate than is an elderly, fearful, antisocial outsider.

Despite the improbability that a particular rescue would be reciprocated, community norms may nevertheless prescribe the attempt.⁴¹ At first glance, norms seem to arise from community interests,⁴² not individual ones, as in the utilitarian mandate to sacrifice the welfare of particular persons for the overall benefit of the community. The adoption of such norms appears to run up against the implications of the selfish gene.⁴³ To explain this, one

Construction work by its very nature is “dangerous.” Manifestly, then, the salutary “danger invites rescue” precept has special significance in the construction field because of the close-knit relationship among workers (akin to that among firemen, policemen, etc.) and the interdependence required of the workers for their mutual safety. There is often no time for outside help; workers have no choice but to aid their fellows.

Rivera v. Sealand Contractors Corp., 630 N.Y.S.2d 899, 903 (N.Y. Sup. Ct. 1995) (citations omitted); see Guarino v. Mine Safety Appliances Co., 297 N.Y.S. 639, 644 (N.Y. App. Div. 1969) (“These men were dependent upon one another and responded in a manner consistent with their relationship as a crew.”).

40. This may give rise to what has been called the banker’s paradox, whereby “when we need help the most, we are often least able to reciprocate.” Joan B. Silk, *Cooperation Without Counting: The Puzzle of Friendship*, in GENETIC AND CULTURAL EVOLUTION OF COOPERATION, *supra* note 32, at 37, 48. Like bankers who prefer to lend money to those who need it least, since they are the lowest credit risks, rescuers may prefer to rescue those least likely to find themselves at risk, for they may be the ones more likely to reciprocate. *Id.*

41. Etzioni found “no widely accepted definition of ‘community,’” but sees it as implying two required attributes: “first, a web of affect-laden relationships among a group of individuals, relationships that often crisscross and reinforce one another . . . , and second, a measure of commitment to a set of shared values, norms and meanings, and a shared history and identity—in short, to a particular culture.” Amitai Etzioni, *Survey Article: On Social and Moral Revival*, 9 J. POL. PHIL. 356, 359 (2001) (footnote omitted). The practice of reciprocal altruism seems almost implicit in this description.

42. “A norm is an organized or institutionalized pattern of social rewards and punishments for doing or not doing *A* in circumstances *C*. A norm, then, corresponds to a normative statement that is generally enforced.” NOZICK, *supra* note 21, at 247. But sociologists and anthropologists “disagree about the precise definition of norms.” *Id.* at 238.

43. See, e.g., Kermyt G. Anderson, *Relatedness and Investment in Children in South Africa*, 16 HUM. NATURE 1, 3 (2005) (“[S]ocial rules can and do override the obligations imposed by genetic relatedness [kin selection].”). But one must not be too quick to conclude that norms may not be in the interest of individuals, or particular individuals. Nozick sees norms as “facilitat[ing] cooperation to mutual benefit.” NOZICK, *supra* note 21, at 251. A particular norm may be adopted because it “can be followed more easily, or because its violations can be detected more easily, or because it is less costly in time, energy, or resources to follow it—these

might turn to the minority view that group selection also operates in natural selection, at least to some extent.⁴⁴ But before retreating to this or another position to understand why a resourceful, self-reliant person would feel the urge to take a risk to rescue a person unlikely to reciprocate, we should consider other potential evolutionary benefits to the rescuer. This takes us to the next topic, sexual selection.

3. Sexual Selection

Evolutionary success is measured by the extent one's genes persist in the gene pool. Reproduction, not merely survival, is the touchstone. While kin selection meets this goal indirectly and reciprocal altruism facilitates it, mating is the more direct route. For this, one needs a mate. The processes of

factors fit with the rubric of facilitating mutual benefit." *Id.* That a norm may benefit some persons to the detriment of others may be because "these people had the greater resources or greater power or greater authority to affect which norm got instituted." *Id.*; see William Irons, *Anthropology*, in *THE SOCIOBIOLOGICAL IMAGINATION*, *supra* note 21, at 71, 77 (prompting study of "the prediction that people will *try to influence the social rules* and other aspects of their culture in such a way as to promote their reproductive interests."). In discussing morality in light of the self-centered aspect of evolution, Alexander writes that individuals would benefit from the completely moral behavior of others. See Richard D. Alexander, *Biology and the Moral Paradoxes*, in *LAW, BIOLOGY AND CULTURE* 101, 107 (Margaret Gruter & Paul Bohannon eds., 1983) [hereinafter Alexander, *Moral Paradoxes*] ("Any ideally moral person would incidentally 'help' every other person in the society, however slightly, to achieve the goals that evolutionists believe have driven evolution by natural selection, because he would hurt himself (a competitor) by dispensing his beneficence indiscriminately."); see R. D. Alexander, *A Biological Interpretation of Moral Systems*, in *ISSUES IN EVOLUTIONARY ETHICS* 179, 190 (Paul Thompson ed., 1995) [hereinafter Alexander, *Moral Systems*]. "One way of [encouraging others to be moral] is to designate as heroes (i.e. as appropriate targets for special rewards) those who most closely approach the ideal moral condition." Alexander, *Moral Paradoxes*, *supra*, at 107.

44. See, e.g., ELLIOTT SOBER & DAVID S. WILSON, *UNTO OTHERS* (1998). But see, e.g., TRIVERS, *supra* note 19, at 67–85 ("The Group Selection Fallacy"); John Alroy et al., *Open Peer Commentary*, 17 *BEHAV. & BRAIN SCI.* 608 (1994). See generally *THE PHILOSOPHY OF BIOLOGY* 147–220 (David L. Hull & Michael Ruse eds., 1998) (Part III: Units of Selection). "For altruism to evolve through group selection, groups composed of individuals inclined to sacrifice themselves for the sake of their groups must prevail over groups containing more selfish individuals . . ." Krebs, *supra* note 21, at 355; see EDWARD O. WILSON, *CONSILIENCE* 258 (1998) (noting that, under mathematical models of population genetics, "[i]f the reduction of survival and reproduction of individuals due to genes for altruism is more than offset by the increased probability of survival of the group due to the altruism, the altruism genes will rise in frequency throughout the entire population of competing groups"). "[M]ost biologists believe that few, if any, species have met [this condition]." Krebs, *supra* note 21, at 355.

competing with others of the same sex for a mate and being chosen by the desired mate is known as sexual selection.⁴⁵

Males and females provide different basic resources to the reproductive endeavor. Among mammals, the female supplies the egg, internally gestates it, and nurses the offspring, perhaps for years. At least in human ancestral times, it seems that nurturing of the offspring was also largely a female task. Of necessity and tradition, a woman invests much in her offspring. The male, on the other hand, can leave descendants simply by supplying a minimal investment: the sperm. As straight economic theory would then suggest, males must compete with other males for the more valuable biological resources provided by females.⁴⁶ But since human males usually supply more than simply sperm to the mating enterprise, for favored females will typically not mate with them otherwise, females also must attract preferred mates. Females compete with one another for the males who can better assure their reproductive success. All this falls within the evolutionary principle of sexual selection.

Because men and women bring different resources and play different roles in the reproductive process, their biological interests do not entirely coincide. For example, because a woman is severely limited in the number of her potential offspring, indiscriminate promiscuity is of limited biological benefit to her.⁴⁷ On the other hand, because a man can sire many offspring, indiscriminate promiscuity may offer him large biological benefits. A female, then, is interested in superior matings in order to assure that her relatively few offspring are more promising breeders themselves,

45. There are two forms of sexual selection: "intersexual selection (often typified by female choice of males) and intrasexual selection (often typified by the male-male competition for access to females)." DONALD E. BROWN, *HUMAN UNIVERSALS* 103 (1991); see DAVID M. BUSS, *THE EVOLUTION OF DESIRE* 3 (1994); BUSS, *supra* note 15, at 385; JAMES L. GOULD & CAROL G. GOULD, *SEXUAL SELECTION* 86 (2d ed. 1997); LOW, *supra* note 23, at 22–23. See generally BADCOCK, *supra* note 15, at 149–88; BARASH, *supra* note 19, at 152–72; CARTWRIGHT, *supra* note 15, at 124–56; CRONIN, *supra* note 19, at 111–249 (Part II: The Peacock).

46. See, e.g., GEOFFREY MILLER, *THE MATING MIND* 86 (2000); David M. Buss, *The Psychology of Human Mate Selection: Exploring the Complexity of the Strategic Repertoire*, in *HANDBOOK OF EVOLUTIONARY PSYCHOLOGY*, *supra* note 15, at 405, 410–11.

47. The modern availability of easy, dependable contraceptives has altered this calculus. This aside, there are times in which matings outside a marriage may be beneficial to women. See JEROME H. BARKOW, *DARWIN, SEX, AND STATUS* 338–39 (1989) (discussing better genes for offspring, genetic diversity, reproduction if mate is infertile, resource accrual, protection, mate replacement if disabled); BUSS, *supra* note 45, at 177–82 (discussing resource accrual, better genes, mate switching, mating skills acquisition, mate manipulation); Buss, *supra* note 46, at 417–18 (same).

while a male is not only interested in high quality offspring, but also gains simply from quantity, even if he fails to support them.⁴⁸

The behavior of men and women reflects their own biological interests as affected by the interests of their mates. As a pair-bonding species, the traits they seek in mates are mostly the same.⁴⁹ But not entirely. Women tend to emphasize the finding of mates who will contribute more to the success of their offspring. For this, the men must be willing and able to aid, protect and nurture their mates and progeny. As relates to the rescue doctrine, these traits preferred in a man include: good financial prospects; social status; ambition and industriousness; size, strength, bravery and athletic ability; dependability and stability, love and commitment; kindness; and, health.⁵⁰ Even for a woman only seeking “good genes” from a mating, not a long-term mate, many of these traits would be preferred insofar as they have a genetic component. Men, on the other hand, differ from women by their disposition to value more greatly their mate’s ability to produce and raise many children, which turns on the woman’s youth and health,⁵¹ as well as her mothering skills.⁵² Indicators of these first two traits include beauty and vivacity.⁵³ For simply a mating, on the other hand, men’s inclined preferences are quite minimal.

Depending on the circumstances, perhaps all the traits listed above that are generally sought by a woman in a mate may be revealed in various rescue efforts. This is partially the case because the honor bestowed on daring rescuers by society may lead to increased status and financial prospects. The traits sought in a wife—youth and health—may indeed be revealed by a rescue effort, but it seems that there are adequate ways for a woman to display these traits without undertaking risky rescues. For a man, on the contrary, it seems that risky rescues offer a more effective opportunity to display, and even increase, the preferred traits to a wide range of potential mates. Thus, under sexual selection, it appears that men,

48. See ROBERT TRIVERS, *Parental Investment and Reproductive Success*, in NATURAL SELECTION AND SOCIAL THEORY 56, 74 (2002).

49. Men and women both prefer “partners who are intelligent, kind, understanding, and healthy . . . [and] who share their values and are similar to them in attitudes, personality, and religious beliefs.” BUSS, *supra* note 15, at 134–35 (citation omitted). The characteristics they seek in a mate are very similar. See GOULD & GOULD, *supra* note 45, at 258; DEL THIESSEN, BITTERSWEET DESTINY 326 tbl.15.3 (1996); Buss, *supra* note 46, at 420 tbl.13.2.

50. See BUSS, *supra* note 15, at 105. Studies confirm these preferences by women. See, e.g., *id.* at 104–30; BUSS, *supra* note 45, at 19–48.

51. See BUSS, *supra* note 15, at 133–45; see also BUSS, *supra* note 45, at 49–58.

52. See, e.g., BUSS, *supra* note 15, at 415–16.

53. See *id.* at 139.

especially during their reproductive years,⁵⁴ have more to gain from rescue attempts than do women.

C. Evolutionary Behavioral Maxims

If a potential rescuer consciously considered only her own genetic success in deciding the circumstances under which she would undertake risky rescues, she would arrive at rescue maxims that seem quite peculiar to the modern moral sensibility. Under kin selection, these types of maxims are suggested: take risks to rescue another in proportion to her degree of relatedness and her potential fecundity, age, wealth, popularity, marriageability (education, attractiveness, vivacity, etc.), familiarity, common resemblance, and family (non-genetic) ties. Under reciprocal altruism, these are among the ones implied: take rescue risks in proportion to the rescuee's familiarity, friendliness, sympathy, morality, wealth, age, and community respect. Finally, under sexual selection, these types of maxims are suggested for men: take risks in proportion to the rescuee's daringness, arduousness, positive community response, or to the degree it reflects the rescuer's commitment, dependability, kindness or concern for children, or inversely proportional to the rescuer's preexisting mating prospects. Sexual selection implies narrower maxims for women, including: take risks to the extent that they reflect the rescuer's youth and vivacity.

These genetically driven rescue maxims sometimes jar our moral sensibilities.⁵⁵ For example, while we honor a person who confronts a high level of risk to save her young children, we seem to honor even more a person who confronts an equal risk to save the young children of a stranger. Similarly, we seem to grant the same honor for an equal risk to save a grandmother beyond her reproductive years and a young person just entering hers. Honor, even reverence, was internationally bestowed on the New York emergency workers who dashed into the World Trade Center as it burned, though most were unacquainted with those inside.⁵⁶

54. Post-reproductive men and women are predicted to be altruistic primarily with respect to kin under kin selection, since they are no longer concerned about sexual selection. See SARAH B. HRDY, *MOTHER NATURE* 94 (1999); WRIGHT, *supra* note 18, at 173.

55. There is strong evidence that children innately develop various stages of moral reasoning. See generally THE EMERGENCE OF MORALITY IN YOUNG CHILDREN (Jerome Kagan & Sharon Lamb eds., 1987); William Damon, *The Moral Development of Children*, *SCI. AM.*, Aug. 1, 1999, at 72.

56. "We stand in awe of risk-takers, because they tread the line between glory, with its happy correlates to reproduction, and abject failure, with death at the ready." THIESSEN, *supra* note 49, at 108.

Perhaps the dissonance between moral sensibilities and the predispositions suggested by basic evolutionary principles arises because the behavioral inclinations actually driven by kin selection, reciprocal altruism, and sexual selection differ from those predicted by general theory. First, cognitive limitations preclude refined behavioral inclinations, as for humans who are unable to directly discern genetic relationships or even genetic self-interest. Even so, the inability to perceive what is in our genetic self-interest need not always be a significant hindrance. For example, the general maxim to rescue anyone at risk may be quite adequate in environments in which nearly everybody around is kin or a reciprocator. Second, and relatedly, irrespective of our cognitive ability to perceive genetic self-interest, a behavioral disposition that was adequate during ancestral times may prove less evolutionarily satisfactory in other environments. For example, if our ancestors on the African savanna lived in isolated family units or clans, the evolved general inclination to rescue anyone at risk would then have been less likely to misfire by inducing the rescue of nonrelatives or nonreciprocators.⁵⁷ Third, genes sometimes have multiple effects (“pleiotropy”),⁵⁸ so that genes that dispose us to rescue relatives or reciprocators may also dispose us to rescue others. Fourth, insofar as there are genes that predispose humans to conform to community norms,⁵⁹ this inclination may overcome other, narrower predispositions for more direct genetic payoffs.⁶⁰ For example, an inclination to take risks only

57. “[E]arly human groups . . . were actually extended families. . . . It was within these early human groups, over millennia, that humans evolved to care and protect not only themselves, but also their genetic relatives.” Yuwa Hedrick-Wong, *The Global Environmental Crisis and State Behavior: An Evolutionary Perspective*, in HANDBOOK OF EVOLUTIONARY PSYCHOLOGY, *supra* note 15, at 573, 578.

58. Wilson defines pleiotropism: “The control of more than one phenotypic characteristic, for example eye color, courtship behavior, or size, by the same gene or set of genes.” WILSON, *supra* note 19, at 591.

59. “The array of evolutionary game theoretic models . . . show conditions under which, bucking the constant headwind of evolution’s myopia, organisms can come to be *designed* by evolution to cooperate, or more precisely designed to behave in such a way as to prefer the long-term welfare of the group to their immediate individual welfare.” DANIEL C. DENNETT, *FREEDOM EVOLVES* 196–97 (2003).

60. Community norms may be specifically designed to counter or restrain certain natural dispositions, as where norms are crafted to limit the extent of moralistic aggression against nonreciprocators, see BADCOCK *supra* note 21, at 39 (explaining Trivers’ concept of “moralistic aggression”), or to encourage behavior that is evolutionarily neutral, such as those relating to dress codes, or even to reinforce natural inclinations, as in the norm against incest. Supposedly, then, the needed strength of the community norm would relate to the degree of resistance from natural inclinations, among other things (such as the onerousness of satisfying the norm and its benefit to the community).

for relatives or reciprocators may be swamped by another disposition to follow a community norm to rescue anyone in danger.

Because a predisposed rescue maxim may be overgeneralized for reasons such as cognitive limitations, changed environments, and pleiotropy, the maxim may appear to be a purely disinterested, moral one under today's understanding of morality.⁶¹ Indeed, some commentators have speculated that kin selection has driven our moral sensibilities.⁶² For example, even though self-interested kin selection on the savanna may be a source of the impulse to rescue, de Waal speculates, "as so often, the impulse became dissociated from the consequences that shaped its evolution, which permitted it to be expressed even when [genetic] payoffs were unlikely. The impulse thus was emancipated to the point where it became genuinely unselfish."⁶³ Others have ventured that reciprocal altruism underlies our moral feelings.⁶⁴ Perhaps sexual selection also plays a role.⁶⁵

61. The relationship between evolution and moral theory is not settled. For example, Lumsden and Wilson "suggest that moral reasoning . . . appears to be ultimately dependent on the genes as well as on culture and self-conscious decision. But the [epigenetic] rules [that channel development of the mind] only bias development; they do not determine ethical precepts or the necessary decisions in a fixed manner." CHARLES J. LUMSDEN & EDWARD O. WILSON, *PROMETHEAN FIRE* 179 (1983). Thiessen sees risk as the main driving force in the evolution of human mentality and concludes "that man did not evolve complicated moral and philosophical systems in response to specific evolutionary demands for ethics and morality. Rather, he evolved strategies to minimize danger and prolong life, some of which can be served by moral imperatives, religious beliefs, and superstitions—bread and survival disguised as philosophy." THIESSEN, *supra* note 49, at 108. See generally *BIOLOGY AND THE FOUNDATION OF ETHICS* (Jane Maienschein & Michael Ruse eds., 1999).

62. See, e.g., LIONEL TIGER, *THE MANUFACTURE OF EVIL: ETHICS, EVOLUTION, AND THE INDUSTRIAL SYSTEM* 324 (1987) ("[T]here is reason to think that our broad ethical capacities were formed during a long phase of human evolution when family relations were paramount."). That kin selection drives the moral sense may not be very selfish. See CARL SAGAN & ANN DRUYAN, *SHADOWS OF FORGOTTEN ANCESTORS* 116 (1992) ("Kin selection is also a continuum, and in its arcane calculus *some* sacrifice must be worthwhile to aid the most far-flung and distant members of your family. But since we are all related, some sacrifice must be justified to save anyone on Earth . . ."). "Some authors seem to think that all human ethics is more or less raw inclusive fitness altruism." MAYR, *supra* note 21, at 76. While Mayr does not go this far, he does state that "[t]he shift from an instinctive altruism based on inclusive fitness to an ethics based on decision making was perhaps the most important step in humanization." *Id.* at 77 (emphasis omitted). "The correlated evolution of a larger brain and a larger social group made two new aspects of ethical behavior possible: (1) a selective reward for certain unselfish traits that benefitted the group, and (2) ethical behavior by deliberate choice, rather than purely by the instinct of inclusive fitness." *Id.* at 80. Nonetheless, Mayr, unlike some other biologists, finds that "the evidence indicates that the genetic component in human ethics is over all, of minor importance." *Id.* at 82.

63. FRANS DE WAAL, *THE APE AND THE SUSHI MASTER* 330 (2001) [hereinafter DE WALL, *SUSHI MASTER*]; see FRANS DE WAAL, *PRIMATES AND PHILOSOPHERS* 15 (2006) [hereinafter DE WALL, *PRIMATES*]. In support of this speculation, de Waal discusses the reactions of rescue dogs, who do not undertake rescues "like Skinnerian rats, doing what has been reinforced in the

past, partly out of instinct, partly out of a desire for tidbits.” DE WAAL, *SUSHI MASTER*, *supra*, at 332. Instead, as evidenced at the aftermath of the Oklahoma City bombing, “[w]hen rescue dogs encounter too many dead people, they lose interest in their job regardless of how much praise and goodies they get.” *Id.* Not finding someone alive, “all dogs on the team became depressed. They required longer and longer resting periods, and their eagerness for the job dropped off dramatically.” *Id.* at 332–33. Even rescue dogs, then, “are emotionally invested. They relish the opportunity to find and save a live person.” *Id.* at 333. “Under certain conditions and for certain species, therefore, we can drop the customary quotation marks around ‘altruism.’ At least in some cases, we seem to be dealing with the genuine article: a good deed done *and* intended.” *Id.* For a discussion of chimps and people who are predisposed to provide altruistic help, see B. Bower, *Ape Aid: Chimps Share Altruistic Capacity with People*, *SCI. NEWS*, June 30, 2007, at 406.

64. See, e.g., Michael Shermer, *The Pinker Instinct*, 9 *SKEPTIC*, 2001, at 88, 92 (discussing an interview of Steven Pinker in which he states that a moral sense has an adaptive payoff under the theory of reciprocal altruism). See generally RIDLEY, *supra* note 37, at 188. According to R. D. Alexander, “The essence of moral systems seems to lie in patterns of indirect reciprocity. . . .” Alexander, *Moral Systems*, *supra* note 43, at 188; see ALEXANDER, *supra* note 6, at 77 (“Moral systems are systems of indirect reciprocity.”); HOWARD KAHANE, *CONTRACT ETHICS* 18 (1995) (stating that it is plausible to restrict “the label *moral* to sentiments, desires, and behavior of a reciprocal altruistic nature”). “Morality, or more strictly our belief in morality, is merely an adaptation put in place to further our reproductive ends. . . . In an important sense, ethics as we understand it is an illusion fobbed off on us by our genes to get us to cooperate.” Michael Ruse & Edward O. Wilson, *The Evolution of Ethics*, in *PHILOSOPHY OF BIOLOGY*, *supra* note 6, at 313, 316. Joyce notes that, while various evolutionary processes are consistent with human moral sense, “one glaring datum is that all human moral systems give a leading role to *reciprocal relations*.” JOYCE, *supra* note 26, at 140. “It therefore seems eminently reasonable to assume that reciprocal exchanges were a central evolutionary problem that morality was designed to solve.” *Id.* at 141 (referring to evidence from primatology, experimental economics, neuroscience, developmental psychology, and anthropology). More generally, “[m]oral judgments . . . can function as a kind of social glue, bonding individuals together in a shared justificatory structure and providing a tool for solving many group coordination problems.” *Id.* at 117. For the view that reciprocity cannot sufficiently assure compliance with moral norms, see Chandra S. Sripada, *Punishment and the Strategic Structure of Moral Systems*, 20 *BIOLOGY & PHIL.* 767, 770–77 (2005). On the other hand, congruent with findings that “[f]or over 95% of hominid evolution, humans lived in small social groups organized mainly by kinship and reciprocity relationships,” X. T. Wang, *Risk as Reproductive Variance*, 23 *EVOLUTION & HUM. BEHAV.* 35, 38 (2002), perhaps some moral urges stem from a combination of reciprocal altruism and kin selection. One problem with a sense of morality that springs from adaptation to ancestral environments is that modern circumstances are vastly different. Moral urges that served us well on the savanna may destroy us on city streets. See Janet R. Richards, *The Darwin Wars and the Human Self-Image*, in *A COMPANION TO GENETHICS* 271, 280 (Justine Burley & John Harris eds., 2002). Reason may come to our collective rescue: “I suggest[] that altruistic impulses once limited to one’s kin and one’s own group might be extended to a wider circle by reasoning creatures who can see that they and their kin are one group among others, and from an impartial point of view no more important than others.” SINGER, *supra* note 21, at 134. Emotion, perhaps independent of reason, may suffice. “Does an ape have a robust enough connection with sentience to permit it to expand the circle by recognising the suffering of individuals outside its species?” Agar, *supra* note 26, at 135.

65. Miller, referring to evolutionary psychologists who believe that morality stems from kin selection or reciprocal altruism, posits instead that “human morality is much more likely to be a direct result of sexual selection.” MILLER, *supra* note 46, at 292. “I shall argue that some of

Yet I am not yet willing to concede that genetically self-interested rescue dispositions will align with today's principled moral maxims only when the behavioral inclinations misfire or overgeneralize. While acting on self-interest certainly seems inconsistent with moral principles, appearances may be deceptive. I turn to this question next.

II. MORALITY OF RESCUE

Whether an act is moral is independent of the original source of the actor's moral sensibilities.⁶⁶ This may be fortunate, for the biology of rescue does not seem to conform to the morality of rescue.⁶⁷ But before relying on

our most valued moral virtues had no survival benefits, but they did have strong courtship benefits." *Id.* at 293. "A sexual selection perspective allows us to explain sympathy, agreeableness, moral leadership, sexual fidelity, good parenting, charitable generosity, sportsmanship, and our ambitions to provide for the common good." *Id.* Kinship and reciprocity cannot explain several of these virtues, while sexual selection sheds new light on those virtues explained by these other theories. *See id.* While the emphasis here is on rescue altruism, Miller does not limit morality to altruism. *See id.* "Morality is a system of sexually selected handicaps—costly indicators that advertise our moral character." *Id.* at 294. "In theory, mate choice could be the single most powerful moral filter from one generation to the next. It could favor almost any degree of altruism or heroism, compensating for almost any risk to survival." *Id.* at 307. "Natural selection for selfishness would be impotent against sexual selection for moral behavior." *Id.* at 308. "This does not mean that evolution favors truly selfless altruism, simply that the hidden benefit of generosity is reproductive rather than nepotistic or reciprocal." *Id.* at 318. While Miller sees sexual selection as a powerful hammer, not all moral virtues are nails. *See id.* at 339 (stating that "sexual choice does not account for all of morality"). *See generally id.* at 292–340 (discussing that morality may be a "result of sexual selections").

66. "[T]he theory that explains morality . . . should be neutral with regard to whether our moral attitudes, habits, preferences, and proclivities are a product of genes or culture." DENNETT, *supra* note 59, at 190; *see* NOZICK, *supra* note 21, at 237–38 (questioning whether our shared ethical intuitions should be given any ethical weight).

67. Evolutionary biology has particular difficulty explaining truly selfless acts of altruism that can be expected to result in a loss in reproductive fitness. *See* THIESSEN, *supra* note 49, at 312–15. Perhaps these acts are the result of misplaced altruism, accident, genetic mutation, self-deception, or even the self-interested manipulations by others. *See id.* Or perhaps they are the result of the "heterozygote superiority . . . of alleles that, in homozygotes, code for traits that reduce reproductive success," as in the example of Sickle-cell anemia. Paul Thompson, *Introduction to ISSUES IN EVOLUTIONARY ETHICS*, *supra* note 43, at 1, 35. Ruse addresses what Thiessen suggests by "misplaced altruism":

To make us cooperate for our biological ends, evolution has filled us full of thoughts about right and wrong, the need to help our fellows, and so forth. . . . [Because] it is in our biological interests to cooperate[,] . . . we have evolved innate mental dispositions . . . inclining us to cooperate, in the name of this thing which we call morality.

Michael Ruse, *Evolutionary Ethics: A Phoenix Arisen*, in *ISSUES IN EVOLUTIONARY ETHICS*, *supra* note 43, at 225, 230. "The function of ethics, of ethical norms and ethical beliefs, is to coordinate our actions with those of others to mutual benefit in a way that goes beyond the coordination achieved through evolutionarily instilled desires and patterns of behavior

the inexactitude of behavioral inclinations to support the intuitive morality of rescue, let us examine more closely our moral principles.⁶⁸

In this section I consider the foundations of moral theory and develop basic moral arguments in support of the predicted biological dispositions relating to the rescue doctrine, behavioral misfirings and overgeneralizations aside. I do this by discussing the two main orientations in moral theory, teleology on the one hand, relying on utilitarianism to exemplify it, and deontology on the other, with Kantianism as the model. The discussion will not rely on nuanced normative reasoning;⁶⁹ it seems that whatever moral sense that may have emerged from evolutionary processes is more likely to be manifested in nebulous urges and intuitions than in sophisticated analysis.⁷⁰ Human behavior and feelings largely evolved while our ancestors struggled on the savanna, eons before philosophers articulated refined normative questions, propositions and systems.⁷¹ What apparently

(including self-sacrificing behavior toward biological relatives).” NOZICK, *supra* note 21, at 240. “The coordination that ethics achieves is more extensive and better adapted to new and changing circumstances and opportunities.” *Id.* Posner suggests that insofar as there is a conflict between the biology of rescue and moral principles, it is morals that will suffer. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 7 (1999) (“[T]he analytical tools employed in academic moralism—whether moral casuistry, or reasoning from the canonical texts of moral philosophy, or careful analysis, or reflective equilibrium, or some combination of these tools—are too feeble to override either narrow self-interest or moral intuitions.”).

68. Just as the existence of altruism may be a difficult problem confronting evolutionary psychology, “[t]he ability to accommodate altruistic behavior is widely considered to be the litmus test for ethical theories. Insofar as a theory fails to account for altruism, it is taken to be deficient in a significant respect.” Thompson, *supra* note 67, at 25.

69. “The sociobiologist can admit that particular moral judgments are immediately derivable or supportable from a variety of different sources, culture, religion, even moral theory. Where biology comes in is to explain the nature of those sources.” JEFFRIE G. MURPHY, *EVOLUTION, MORALITY, AND THE MEANING OF LIFE* 100–01 (1982). “The particular judgment may be derivable from the theory; however, the theory itself is supported, not by some wider or more general theory, but by certain facts of human biology.” *Id.* at 101.

70. “Much of our moral sense, or moral knowledge, need not be of an articulable, propositional kind at all.” FLORIAN VON SCHILCHER & NEIL TENNANT, *PHILOSOPHY, EVOLUTION AND HUMAN NATURE* 164 (1984). Posner suggests that because the moral sense developed in ancestral times when humans lived in small bands, “we didn’t need morality in its modern sense of a set of duties toward unknown persons,” and hence “there is no reason to believe that the human brain evolved a capacity for reasoning intelligently about moral questions.” Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1661 (1998). Posner advances a skeptical reason for moral nebulosity: “[M]orality is local. There are no interesting moral universals.” *Id.* at 1640. “A society’s moral code changes when it is shown to be nonadaptive . . .” *Id.* at 1689; see POSNER, *supra* note 67, at 33–35.

71. Ruse finds the Darwinian and the Humean agree that morality is grounded in human nature. “[T]he Darwinian follows Hume in recognizing moral sentiments as being of a type different from mere feelings. They carry a sense of obligation. This is what motivates us to action.” RUSE, *supra* note 6, at 267. Psychopaths are exceptions. This is why they are considered abnormal. See Jeffrie G. Murphy, *Moral Death: A Kantian Essay on Psychopathy*,

evolved is a general moral sense, a facility and perhaps yearning for norms and a feeling of obligation to fulfill them.⁷² While the great philosophers must have tapped into human sensibilities, for otherwise we would have rejected their thoughts out of hand,⁷³ diverse structures can be erected on their fundamental foundations. On utilitarian bedrock, for example, have been built the society-centered principles of Jeremy Bentham and the individual rights-respecting tenets of John Stuart Mill,⁷⁴ while on Kantian fundamentals have been erected the libertarianism of Robert Nozick and the welfare-state liberalism of John Rawls.⁷⁵ Since kin selection, reciprocal altruism and sexual selection do much of their work below the level of self-aware consciousness, as suggested by animal ethology, we should expect the reinforcing moral urges to do much of their work also at a vague, subconscious level. The moral thinking of typical people that drives everyday behavior does not derive from the intricate philosophy of a Rawls

82 ETHICS 284 (1972), reprinted in JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 128, 130 (1979) (“Though psychopaths know, in some sense, what it means to wrong people, to act immorally, this kind of judgment has for them no motivational component at all.”). In the nineteenth century, the condition was called “moral insanity.” See WILLIAM H. CALVIN & GEORGE A. OJEMANN, *CONVERSATIONS WITH NEIL’S BRAIN* 146 (1994). For a brief framework of the connection in moral theory between feelings and behavior on the one side and morality on the other, see Lawrence Blum, *Particularity and Responsiveness*, in *THE EMERGENCE OF MORALITY IN YOUNG CHILDREN*, *supra* note 55, at 306, 307–09.

72. “[P]eople have a predisposition to adopt some set of principles (not any particular set) that will define the moral system of society and that the exact nature of the system depends on early experience, with these principles reflecting the coordinated influence of the evolved genome and early social interactions.” LEWIS PETRINOVICH, *HUMAN EVOLUTION, REPRODUCTION, AND MORALITY* 72 (1995). Kitcher opines that “[a]t some point in our prehistory, our ancestor developed a system of *proto-morality*, a set of rules that reinforced their fragile altruistic tendencies and that enabled them to live in social groups that were subject to less constant rupture and needed less frequent repair.” Kitcher, *supra* note 37, at 305. “[I]t seems to me overwhelmingly plausible that this history [of the emergence of morality from proto-morality] has been guided mainly, if not exclusively, by forces of cultural, rather than natural selection.” *Id.*; see WRIGHT, *supra* note 18, at 324–25 (“We believe the things—about morality, personal worth, even objective truth—that lead to behaviors that get our genes into the next generation.”). See generally STEVEN PINKER, *THE BLANK SLATE* 269–80 (2002) (“The Sanctimonious Animal”).

73. While some philosophers question reliance on moral intuitions, see *supra* note 63, “[o]thers . . . believe that, other things being equal, the more closely a theory accords with our considered moral intuitions the better.” Douglas W. Portmore, *Position-Relative Consequentialism, Agent-Centered Options, and Supererogation*, 113 ETHICS 303, 304 n.2 (2003).

74. Compare JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J. H. Burns & H. L. A. Hart eds., The Athlone Press 1970) (1789), with JOHN STUART MILL, *Utilitarianism*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 51–84 (E. P. Dutton 1950) (1863).

75. Compare RAWLS, *supra* note 26, with ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

or Nozick, but rather is reflected in the lessons of folktales,⁷⁶ religious laws and proverbs,⁷⁷ and the rules of thumb of common aphorisms.⁷⁸ But considered moral theory has a place here. It helps us to understand the intuitively agreeable lessons and the reach of the thumbs.⁷⁹

The basic difference between teleology and deontology hearkens back to the ancient questions of Socrates: “What is the good?” and “What is justice?” In distinguishing the two, the good relates to states of being. Normatively, a person or a society is to *be* good. Justice relates to actions.

76. One group of evolutionary researchers studied the patterns revealed in folktales from forty-eight cultural areas around the world. “[T]he findings are consistent with previous research on patterns of altruism, sex differences in mate preferences, sex differences in reproductive strategy, and differing emphases on male and female physical attractiveness.” Jonathan Gottschall et al., *Patterns of Characterization in Folktales Across Geographic Regions and Levels of Cultural Complexity*, 14 HUM. NATURE 365, 365 (2003). For example, as predictable from kin selection, “[b]oth male and female [folktale] protagonists in the sample expended significant effort of behalf of their kin . . . [while] [a]ntagonists were more self-interested.” *Id.* at 375. Furthermore, “highly disproportionate effort was expended on behalf of mates or 50% genetic relatives (parents, siblings, children) at the expense of more distant relatives.” *Id.*

77. See, e.g., AVISHAI MARGALIT, *THE ETHICS OF MEMORY* 37 (2002) (“[T]he poor of my town . . . according to Jewish law should take precedence in my behavior over the poor in general.”); Janet T. Landa, *Bounded Rationality of Homo Classicus: The Law and Bioeconomics of Social Norms as Classification*, 80 CHI.-KENT L. REV. 1167, 1176 (2005) (“Within the Hokkien-Chinese ethnic group, Confucian ethics further prescribe different degrees of mutual cooperation and reciprocity among the different categories of people based on degree of kinship or ethnic distance.”).

78. For example, Ruse refers to an Arab saying consistent with kin selection: “My brother and I against our cousin. My cousin and I against the stranger.” MICHAEL RUSE, *Evolution and Ethics, in EVOLUTIONARY NATURALISM* 220, 244 (Kindle ed. 2007) (1995). Despite first appearances, this is not in stark contrast to the religious parable of the Good Samaritan, who, by virtue of finding an injured person by the road, became his neighbor. Thus, consistent with robust reciprocal altruism, aid was not extended to a “stranger.” See *id.* at 247. See generally ROBERT MCAFEE BROWN, *UNEXPECTED NEWS: READING THE BIBLE WITH THIRD WORLD EYES* 105–14 (1984) (discussing further the parable of the Good Samaritan). Mackie finds reciprocal altruism “expressed in such formulae as that justice consists in giving everyone his due, interpreted, as Polemarchus interprets it in the first book of Plato’s *Republic*, as doing good to one’s friends and harm to one’s enemies, or repaying good with good and evil with evil.” Mackie, *supra* note 6, at 312. Other aphorisms that seem to align with evolutionary tendencies include: “Blood is thicker than water,” GREGORY TITELMAN, *AMERICA’S POPULAR PROVERBS AND SAYINGS* 29 (2d ed. 2000), “Charity begins at home,” *id.* at 38, “Don’t bite the hand that feeds you,” *id.* at 56, “Fortune favors the brave,” *id.* at 104, and “Love your neighbor as yourself,” *id.* at 218.

79. “Darwinism can help highlight the contrast between the moral codes we have and the sort that a detached philosopher might arrive at.” WRIGHT, *supra* note 18, at 147. “For the Darwinian inclined toward moral philosophy, then, the object of the game is to examine traditional morality under the assumption that it is laden with practical, life-enhancing wisdom, yet is also laced with self-serving and philosophically indefensible pronouncements about the absolute ‘immorality’ of this or that.” *Id.* at 148.

Normatively, a person or a society is to *do* the right thing. Now if doing the right thing always led to a good state of affairs, and vice versa, the distinction between the two would be of little practical import; but, unfortunately, it turns out that they sometimes diverge, as where acting justly toward a convicted criminal disallows a disproportionately severe sentence that would be socially beneficial as a deterrent. In these circumstances a strict teleologist would elevate the good over the just, allowing the severe sentence, while a strict deontologist would elevate justice over the good, refusing to treat the convicted criminal simply as an object to be used for the betterment of society. I first discuss the evolutionary teleology of the rescue doctrine, and then the deontology of it.

A. Utilitarianism

The leading teleological system is utilitarianism which, like all forms of teleology, is consequentialist. The consequences of an action determine its moral value. Its touchstone of consequences aligns with natural selection, which also measures accomplishment by consequences—in particular, reproductive success. The means by which one gets one's genes into the next generation is irrelevant. In the context of the rescue doctrine, I further examine the extent of this consonance between natural selection and teleology. In particular, I focus on three of the complexities of utilitarianism: the nature of the “good” that designates which consequences are morally relevant; whether the relevant consequences are those that affect the agent alone (egoism) or everyone (universalism); and, relatedly, the boundaries of the utilitarian calculus.⁸⁰

80. Evolutionary biology may actuate another complexity, which I do not address—the distinction between act- and rule-utilitarianism:

Act-utilitarianism is the view that the rightness or wrongness of an action is to be judged by the consequences, good or bad, of the action itself. Rule-utilitarianism is the view that the rightness or wrongness of an action is to be judged by the goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances.

J. J. C. SMART, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 3, 9 (1973); see, e.g., J. L. MACKIE, ETHICS 125–29, 136–40 (1977). One commentator contends that certain studies “provide the empirical starting point for an argument that apes are candidate act-utilitarians.” Agar, *supra* note 26, at 124.

1. The Good

The first problem for a teleologist is to identify the “good” that provides the gauge of moral conduct.⁸¹ Jeremy Bentham, the progenitor of the best-known form of utilitarianism,⁸² defined the good as happiness,⁸³ and declared that the goal of a utilitarian is to achieve the most good for the most people.⁸⁴ This is a form of hedonistic utilitarianism, so-called because it identifies the good with qualities such as happiness, pleasure, or avoidance of pain,⁸⁵ each being directed at emotional satisfactions.⁸⁶ Another form is ideal utilitarianism, which declares the good to be something of intrinsic worth, such as knowledge, love, esthetic contemplation, friendship, or a character trait.⁸⁷ A modern form is preference utilitarianism, which sees the good as preference satisfaction.⁸⁸ This is distinguishable from hedonistic utilitarianism since, for example, one may “prefer one thing to another where neither offers pleasure to anyone.”⁸⁹ Because natural selection is driven by a particular desideratum,

81. See RICHARD B. BRANDT, *ETHICAL THEORY* 295–352 (1959); W. D. ROSS, *THE RIGHT AND THE GOOD* 65–133 (1930). For a taxonomy of utilitarianism somewhat different from what follows, see Ken Binmore, *A Utilitarian Theory of Political Legitimacy*, in *ECONOMICS, VALUES, AND ORGANIZATION* 101, 103–08 (Avner Ben-Ner & Louis Putterman eds., 1998).

82. Utilitarian ideas preceding Bentham appear in the works of Epicurus, Locke, Hobbes, and Hume, among others. See BRANDT, *supra* note 81, at 300–01.

83. BENTHAM, *supra* note 74, at 12 (“By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, . . . or . . . to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered.”); see *id.* at 11–13, 40.

84. *Id.* at 12–13.

85. For the benefits of a negative standard (e.g., “avoid pain”) as compared to a positive one (e.g., “maximize happiness”), see S. I. BENN & R. S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 62–63 (1959); SMART, *supra* note 80, at 28–30 (discussing “negative utilitarianism”).

86. See A. C. EWING, *ETHICS* 22 (1953). See generally BRANDT, *supra* note 81, at 295–329; RICHARD B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 132–38 (1979); WILLIAM K. FRANKENA, *ETHICS* 83–92 (2d ed. 1973); G. E. MOORE, *PRINCIPIA ETHICA* 111–60 (Thomas Baldwin ed., Cambridge Univ. Press 1994) (1903).

87. See BRANDT, *supra* note 81, at 332–52 (discussing pluralist theories); FRANKENA, *supra* note 84, at 16 (“[Ideal] utilitarianism is a certain kind of teleological theory of obligation and does not entail any particular theory of value, although a utilitarian must accept some particular theory of value.”); John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in *UTILITARIANISM AND BEYOND* 39, 54 (Amartya Sen & Bernard Williams eds., 1982) (citing MOORE, *supra* note 86).

88. See, e.g., R. M. HARE, *MORAL THINKING* 103 (1981); G. A. COHEN, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 909–10 (1989) (agreeing with Amartya Sen and Ronald Dworkin, distinguishing “hedonic welfare” from “preference satisfaction”); Harsanyi, *supra* note 87, at 54–56.

89. Frederic Schick, *Under Which Descriptions?*, in *UTILITARIANISM AND BEYOND*, *supra* note 87, at 251, 251; see AMARTYA SEN, *ON ETHICS AND ECONOMICS* 41 (1987) (“A person may value the promotion of certain causes and the occurrence of certain things, even though the

that is, the goal of reproductive success, the question arises whether “evolutionary utilitarianism” can be brought within any of the standard utilitarian notions of the good.⁹⁰

The hedonistic form of utilitarianism that aims at emotional satisfaction is suggestive of the evolutionary goal. Many actions that advance reproductive success are usually pleasurable, such as eating, achievement, and sexual intercourse.⁹¹ Moreover, “[o]ne of the fundamental assumptions of evolutionary psychology is that matters closely related to our survival and reproduction have a likelihood of engaging our emotions.”⁹² Still, as suggested by the word “likelihood,” it is difficult to equate happiness wholly with success at increasing one’s genes in the gene pool. There are various reasons for this.

First, natural selection does not always need pleasure and pain as incentives for survival and reproduction, as is evident in the plant kingdom and perhaps in simple animals. We do certainly see these incentives influence human survival and reproduction—influence, but not dominate. As one counterexample, those who must drag themselves out of bed to face the drudgery of another day in the mines in order to feed the mouths at home might well consider it a pain, not a pleasure (“How did I get myself into this?”).⁹³ Some may even doubt the net pleasures stemming directly

importance that is attached to these developments are not reflected by the advancement of his or her well-being, if any, that they respectively cause.”); Harsanyi, *supra* note 87, at 54 (dissociating preference satisfaction from hedonism); cf. Donald Regan, *On Preferences and Promises: A Response to Harsanyi*, 96 ETHICS 56, 58 (1985) (concluding that “the theorist who takes preference satisfaction as the fundamental good has no satisfactory explanation of why”).

90. Of course, without reproduction of the species, no human “good” is possible for very long.

91. See Paul H. Rubin, *Group Selection and the Limits to Altruism*, 2 J. BIOECONOMICS 9, 15 (2000) (“Something approximating utilitarianism might well be consistent with efficient altruism. . . . Utility functions are related to (if not the same as) fitness: we get pleasure from those things that led to increased reproductive success in the EEA and pain from those things that hindered our ancestors’ reproductive success. . . . This may be why utilitarianism has been a long lived and successful moral theory—it is a theory that is consistent with our evolved moral preferences.” (citations omitted)).

92. BROWN, *supra* note 45, at 115. “[T]he pursuit of genetic interest sometimes, though not always, coincides with the pursuit of happiness.” WRIGHT, *supra* note 18, at 148. Alexander rejects utilitarian moral systems for biologically driven contractarian ones in which individuals seek their own interests. See ALEXANDER, *supra* note 6, at 80–81 (“[I]nterests are seen as reproductive, not as individual survival, and, accordingly, pleasure and comfort are postulated to have evolved as vehicles of reproductive success . . .”); *infra* note 117.

93. A Gallup survey in October 2000 found that 26% of workers were “engaged” in their work, 55% were “not engaged,” and 19% were “actively disengaged.” *What Your Disaffected Workers Cost*, THE GALLUP MGMT. J. (Mar. 15, 2001), available at <http://gmj.gallup.com/content/439/What-Your-Disaffected-Workers-Cost.aspx> (“Actively disengaged workers tend to be less productive and report being less loyal to their companies,

from the ultimate goal of raising offspring, especially in an unruly, needy household (“Why did I ever have these rotten kids?”).⁹⁴ But nearly all persevere, happy or not. And, of course, the vast majority of people are happy to bear and raise children, even in modern times when humans have a clear knowledge of the reproductive process and the means to obtain the pleasures of intercourse without significant risks of pregnancy. But still, in sum, equating emotional satisfaction with reproductive success is sometimes a stretch.

Second, emotional satisfaction may not coincide with reproductive success because human behavior and feelings evolved mainly in environments existing long before modern times, going back to a few million years ago when our ancestors were hunters and gatherers on the African savanna. Behavioral dispositions, and the emotional impetus behind them, were largely selected to cope with circumstances present then. They may not be evolutionarily useful today.⁹⁵ As an example, if our distant ancestors lived in small clans of relatives with limited contact with other clans, the satisfaction from the predisposition to take risks to rescue familiar persons would be reinforced by kin selection. Today, because most familiar persons in a modern society are not relatives, the same broad predisposition selected on the savanna may lead to confronting risk with a reduced genetic payoff structure. While reciprocal altruism and sexual selection may support risky rescues in modern environments, once the additional incentive of kin selection is attenuated, a different range of rescues would be beneficial from those adapted for living in clans on the savanna. For another example, it has been supposed that moralistic aggression may be adaptive to

more stressed and less secure in their work. They miss more days and are less satisfied with their personal lives.”). A Harris poll in October 2001 found that 58% of employees were “very satisfied” with their jobs, 36% were “somewhat satisfied,” 5% were “not very satisfied,” and 1% were “not at all satisfied.” Humphrey Taylor, *The Impact of Recent Events and Fears About the Economy on Employee Attitudes*, THE HARRIS POLL #57, Nov. 21, 2001, http://www.harrisinteractive.com/harris_poll/index.asp?PID=268.

94. “Why would any self-interested rational person want [to rear a child]? The costs are enormous, the hours are terrible, the opportunity costs . . . are astronomical, to say nothing of losing the ability to take off on weekends on a whim.” STEVEN R. QUARTZ & TERRENCE J. SEJNOWSKI, *LIARS, LOVERS, AND HEROES* 159 (2002). Raising children seems to diminish happiness. “[S]urveys of parents invariably find a clear dip in happiness after the Blessed Miracle of Childbirth, which continues unabated for twenty years—bottoming out during adolescence—and only returns to pre-birth levels when the child finally leaves home.” Ben Mathis-Lilley, *Happiness: A User’s Manual*, N.Y. MAG., July 10, 2006, at 32, 33. One researcher says, “[E]very bit of data says children are an extreme source of negative affect, a mild source of negative affect, or none at all. It’s hard to find a study where there’s one net positive.” Jennifer Senior, *Some Dark Thoughts on Happiness*, N.Y. MAG., July 10, 2006, at 26, 30 (quoting Daniel Gilbert, author of *STUMBLING ON HAPPINESS* (2006)).

95. See Rubin, *supra* note 91, at 16.

inhibit freeriders in cooperative ventures, such as reciprocal altruism.⁹⁶ That is, if persons partaking in cooperative interactions, and even onlookers, aggress against those who are perceived to be acting unfairly, the costs of shirking or freeriding go up, thereby reducing their occurrence. Presumably, moralistic aggressors generally achieve satisfaction from their reactions.⁹⁷ Road rage seems to be a modern incarnation of moralistic aggression. Whether road rage, even if accompanied by satisfaction, has an evolutionary benefit can be easily doubted. On the other hand, the emotional satisfaction driving some evolutionarily beneficial dispositions may be suboptimal in today's changed circumstances. For an example counter to the one above, insofar as the inclination to rescue strangers resulted from sexual selection on the savanna, it may now be unduly weak in light of the substantial media coverage of rescues that reaches a much larger audience of potential mates and benefactors.

As suggested by the examples above, evolution often works through surrogates, or jerry built, satisficing mechanisms that may have been good enough when they evolved,⁹⁸ but inadequate in changed environments. To refer to one of the examples, the predisposition to take risks for all familiar persons may work satisfactorily in ancestral times as an indirect means to take risks for relatives under kin selection.⁹⁹ More accurate would be the ability to sense kinship directly, as by smell,¹⁰⁰ but once adequate surrogate mechanisms developed, the evolutionary payoff for greater refinement was reduced. But current living conditions give the kinship surrogate a different evolutionary value since in modern communities, familiar persons are usually unrelated. The satisfaction of rescuing familiar persons may then correlate today less strongly with genetic benefit. Similarly, moralistic

96. See *supra* note 27.

97. One study found that “[r]evenge actually is sweet: it stimulates the same types of reward centers in the brain that desserts, desire and drugs do.” Aimee Cunningham, *The Pleasure of Revenge*, 14 SCI. AM. MIND 6, 6 (2004). The economist who undertook the study “says the experiment sheds some light on altruistic punishment—the human tendency to discipline those who violate social norms—so a few bad apples don’t undermine the general cooperative spirit that permeates human existence.” *Id.*

98. See, e.g., STEPHEN JAY GOULD, *THE PANDA’S THUMB* 20, 24–26 (1980); ERNST MAYR, *THE GROWTH OF BIOLOGICAL THOUGHT* 589–91 (1982).

99. Along with familiarity, other evolved mechanisms for indirectly identifying kin are location, phenotype matching, and recognition alleles (“green beards”). CARTWRIGHT, *supra* note 15, at 80; SHAW & WONG, *supra* note 21, at 39 (spatial proximity, early experience, and phenotypic matching); Crawford, *supra* note 21, at 310–11 (spatial distribution, association, phenotype matching, and recognition alleles). For brief explication, see Kuklin, *supra* note 7, at 183–84.

100. “In many species, kin recognition mechanisms involve olfactory cues, and there is clear evidence for similar mechanisms in humans.” DAVID C. GEARY, *THE ORIGIN OF MIND* 137 (2005) (extending to mother and infant, and full siblings).

aggression targeting unfair behavior may be advantageous when triggered by cooperative hunting ventures, but unduly costly when directed at highway driving with its minimal need for extensive cooperation. In sum, the pleasures and pains of jerry built survival and reproduction mechanisms may not be accurate guides today of fit behavior, or, for that matter, accurate guides even in ancestral times under changed circumstances. For example, even back then, for persons whose evolutionary satisfactions were honed by a long line of ancestors living on the savanna, once they move to a seashore, survival and reproductive success could require activities that may have come to be unpleasurable, such as swimming in salt water or seafaring.

Third, successful coping behavior may vary even in a relatively unchanging environment. For instance, as game theory demonstrates,¹⁰¹ it may be individually beneficial to take advantage of another's expected behavior. In particular, in what evolutionists refer to as the "hawk-dove game," if some organisms ("doves") peacefully cooperate for their mutual benefit, it may be advantageous for others ("hawks") to exploit them. A hawk would gain from invading a territory of doves. But if the hawks, unlike doves, are sometimes injured when they interact, too many hawks in the territory would be to their disadvantage and the doves would outperform them. At some point, an equilibrium will be found in which there is an optimal balance of doves and hawks.¹⁰² There will then be two successful coping behaviors, and the pleasures and pains of the organisms with differing strategies would presumably vary accordingly. Hence, where the optimal balance is absent, some organisms' feelings will not be evolutionarily beneficial to them. More generally, whenever there are a variety of behaviors in a species, depending on the circumstances, some will be more successful than others, altruism of diverse sorts included. In sum, personal pains and satisfactions often align with reproductive success. But for the above reasons at least, this is not always the case.

It also seems problematic to identify reproductive success with the good championed by ideal utilitarians. While one could by definitional fiat declare reproduction to be a good, it certainly does not fit comfortably with the usual, oftentimes pluralistic, goals advanced by idealists. These generally fall within the class of mental states said to be of intrinsic worth. Reproductive success is not a mental state, nor does it consistently give rise

101. For a brief introduction to game theory in this context, see Peter Hammerstein, *What Is Evolutionary Game Theory?*, in *GAME THEORY AND ANIMAL BEHAVIOR* 3 (Lee Alan Dugatkin & Hudson Kern Reeve eds., 2000).

102. See, e.g., DAVID P. BARASH, *THE SURVIVAL GAME* 215–24 (2003). See generally JOHN MAYNARD SMITH, *EVOLUTION AND THE THEORY OF GAMES* (1982).

to any preferred mental states. Furthermore, when the good is seen as pluralistic, there is the additional complexity of incorporating reproductive success. When a moral choice has multiple effects, it is hard to imagine how one would commensurate reproductive success with any ensuing mental states said to be of intrinsic worth.¹⁰³

A third form of utilitarianism, which advocates preference satisfaction,¹⁰⁴ also has difficulty encompassing the reproductive goal of natural selection. A common reason for advocating preference utilitarianism is that, under this form, individuals may decide for themselves what is the good and what to seek, whether happiness or anything else.¹⁰⁵ While most people may declare that reproductive success is in their own best interests, perhaps even if it brings them unhappiness, some would not. More so than for a hedonistic or ideal utilitarian, a preference utilitarian must be cautious in responding to this lack of a consensus. While she may attempt to persuade others of her conception of the good, her tenets disallow her from paternalistically imposing her vision on others.¹⁰⁶ If people prefer to avoid reproduction, that

103. Under pluralistic ethics, "there are many candidates with some credentials for the status of intrinsic worth." BRANDT, *supra* note 81, at 340. "[T]he job [of evaluating the candidates] is a large one, and . . . there is no easy way of reducing its proportions. Indeed, the job in practical life is bigger: we have to make judgments of the comparative intrinsic worth of complex sets of events . . ." *Id.*; see PETRINOVICH, *supra* note 72, at 126–27 ("[Problems with pluralistic consequentialism include the fact] that there is little agreement over the way intrinsic value should be estimated" and, once this is accomplished, the way "to arrive at an estimate to decide on the best course of action.").

104. See, e.g., RICHARD B. BRANDT, *MORALITY, UTILITARIANISM, AND RIGHTS* 371 (1992) ("There is also the currently popular *desire or preference* theory [of utilitarianism] which holds that some state of affairs is a good, or a benefit, in itself, just to the extent that someone *wants* it to obtain."); PETER SINGER, *PRACTICAL ETHICS* 94 (2d ed. 1993) ("According to preference utilitarianism, an action contrary to the preference of any being is, unless this preference is outweighed by contrary preferences, wrong."). Preferences may not be hedonistic. For example, "it is by no means a necessary truth that we will enjoy life more if we discover and act on our true preferences." Regan, *supra* note 89, at 58; see BRANDT, *supra*, at 371–72.

105. See Harsanyi, *supra* note 87, at 54; see also FRANK H. KNIGHT, *The Sickness of Liberal Society*, in *FREEDOM AND REFORM* 370, 372 (1947) ("It is also a part of the liberal faith in human nature to believe that normal men prefer freedom to objective well-being, within limits, when the two conflict."); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1129 (1986) ("Some of the most well-established conceptions of public law view the state as a mechanism for aggregating private preferences."). Relatedly, Posner has advanced the ethical concept of wealth maximization, stating that "the wealth of society is the aggregate satisfaction of those preferences (the only ones that have ethical weight in a system of wealth maximization) that are backed up by money, that is, that are registered in a market." RICHARD A. POSNER, *Utilitarianism, Economics, and Social Theory*, in *THE ECONOMICS OF JUSTICE*, *supra* note 26, at 48, 61.

106. Cf. Binmore, *supra* note 81, at 104 (discussing "how . . . we know what people ought to want," referring to the "ipsedixists—those who offer their own moral prejudices in the guise of moral imperatives").

is their own business. Hence, while preference utilitarianism may align with evolutionary ends for some, it may not for everyone.

Overall, then, evolutionary and utilitarian goals correspond to a large, but imperfect, extent. The good of the main forms of utilitarianism must be reworked or refined to fully align with reproductive success.

2. Egoism Versus Universalism

Recall that the usual utilitarian mandate is to achieve the most good for the most persons. Because the total happiness of all people is to be maximized, this is known as universal utilitarianism.¹⁰⁷ But another version of utilitarianism, egoistic utilitarianism, is worthy of consideration because it has affinities with the rescue doctrine in its evolutionary context. Under this version, the satisfaction—utility—of the agent is all that counts, though this may indirectly relate to the satisfaction of others if this is desired by the agent.¹⁰⁸

Notice the kinship of egoistic utilitarianism to the biology of rescue. Right at square one, the selfish gene and the self-interested utility maximizer have an obvious commonality. Both place the individual agent at the center of attention, measuring success only by effects on her. Hence, insofar as one gets satisfaction from having children and the successes of kin, then egoistic utilitarianism aligns with kin selection. And insofar as one gets satisfaction from rescuing another, either from personal gratification alone or from social approbation, then the rescue, whether or not reciprocated, aligns with egoistic utilitarianism. The prospect of possible future reciprocation, direct or indirect, may even add an element of satisfaction.¹⁰⁹ Finally, under sexual selection, the increased attractiveness of the rescuer from the act of daring, especially for males, would often be a boon to the egoistic utilitarian. The commitment to egoistic utilitarianism may even impel the agent to be more evolutionarily successful by engaging in conduct

107. See BRANDT, *supra* note 81, at 355 (“*Universal* theories roughly hold that it is morally obligatory to perform a given act if and only if performing it will (actually or expectably) produce more intrinsic good *in general* than any other act the agent could perform instead.”). Rawls observes that if the persons in the original position behind the veil of ignorance “are conceived as perfect altruists, that is, as persons whose desires conform to the approvals of [an impartial sympathetic] spectator, then the classical principle [of utility] would, of course, be adopted. The greater net balance of happiness with which to sympathize, the more a perfect altruist achieves his desire.” RAWLS, *supra* note 26, at 188–89.

108. The egoistic principle is: “A person is obligated over all to perform an action *A* if and only if *A* is, among all the actions he can perform, the one that will produce states of himself of maximum intrinsic worth.” BRANDT, *supra* note 81, at 369.

109. Alexander posits that patterns of indirect reciprocity ground moral systems, which take on a utilitarian slant. Alexander, *Moral Systems*, *supra* note 43, at 188–95.

that increases attractiveness. But surely there are limits to this correlation. The agent may not actually prefer any of the apparent benefits from performing a rescue. Nor is manifest egoism an attractive feature in either sex, perhaps partially for Darwinian reasons. Such a characteristic seems inconsistent with commitments to others, such as to be a loyal mate, to concentrate one's efforts on raising the children in common, and to aid the mate's kin. It also would leave others doubtful that the egoist would readily reciprocate costly kindnesses.

As a side note, it is interesting that egoistic utilitarianism should have so much in common with biological drives and yet, as discussed immediately below, typically be thought of as immoral. Perhaps this supports Thomas Huxley's observation: "Let us understand, once for all, that the ethical progress of society depends, not on imitating the cosmic process [of evolution by natural selection], still less in running away from it, but in combating it."¹¹⁰ Yet most Darwinians who attend to the relationship of morality to evolution would reject this proposition. Some contend that the sense of morality has its origin in biological drives.¹¹¹

110. Thomas H. Huxley, *Evolution and Ethics*, in *EVOLUTIONARY ETHICS* 29, 68 (Matthew H. Nitecki & Doris V. Nitecki eds., 1993). Even some modern biologists agree. See Francisco J. Ayala, *The Biological Roots of Morality*, 2 *BIOLOGY & PHIL.* 235, 237 (1987); George C. Williams, *Huxley's Evolution and Ethics in Sociobiological Perspective*, in *ISSUES IN EVOLUTIONARY ETHICS*, *supra* note 43, at 337–38; George C. Williams, *Mother Nature Is a Wicked Old Witch*, in *EVOLUTIONARY ETHICS*, *supra*, at 229 (citing Annie Dillard, Richard Dawkins and Joseph Lopreato). *But see* DE WAAL, *SUSHI MASTER*, *supra* note 63, at 344–49 (referring to this view as "Calvinistic sociobiology"); DE WAAL, *PRIMATES*, *supra* note 63, at 7–12 (referring to this as the "Veneer Theory" of human morality); JOYCE, *supra* note 26, at 222 (defining natural selection as "a process that has made us sociable, able to enter into cooperative exchanges, capable of love, empathy, and altruism . . . and has designed us to think of our relations with one another in moral terms").

111. *See supra* notes 24–27, 62–63. Darwin, for example, found it highly probable "that any animal whatever, endowed with well-marked social instincts, the parental and filial affections being here included, would inevitably acquire a moral sense or conscience, as soon as its intellectual powers had become as well, or nearly as well developed, as in man." CHARLES DARWIN, *The Descent of Man and Selection in Relation to Sex*, in *THE ORIGIN OF SPECIES AND THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 387, 471–72 (Modern Library 1970) (1871) (footnote omitted). The first reason is:

[T]he social instincts lead an animal to take pleasure in the society of its fellows, to feel a certain amount of sympathy with them, and to perform various services for them. But these feelings and services are by no means extended to all the individuals of the same species, only to those of the same association.

Id. at 472. Does Darwin here anticipate reciprocal altruism and, perhaps, kin selection? But then Darwin opines, that as human intellectual powers increased, "his sympathies became more tender and widely diffused, extending to men of all races, . . . so would the standard of his morality rise higher and higher." *Id.* at 493. Ruse points to other language in Darwin suggestive of reciprocal altruism: "[A]s the reasoning powers and foresight of the members became

While today most moral and political philosophers identify themselves as Kantians, universal utilitarianism is nevertheless seen as much more defensible than the egoistic version. Simply doing what is best for oneself is seen as an act of prudence, the very antithesis of a moral act.¹¹² But unlike for egoistic utilitarianism, under the universal version, everyone's utility from an attempted rescue is directly part of the calculus: that of the rescuer, the rescuee, their kin, friends, onlookers, and society in general. Everyone's disutility from the attempted rescue, as where the rescuer perishes, is also thrown onto the scales. Because individual utility may be exceedingly difficult to quantify, to say nothing of interpersonal utility measurements, the calculations may become very cloudy.¹¹³ Nevertheless, a universal utilitarian must make them.¹¹⁴

improved, each man would soon learn from experience that if he aided his fellow-men, he would commonly receive aid in return." RUSE, *supra* note 6, at 220 (quoting DARWIN, *supra*, at 499).

112. See John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 556 (1980) ("Rational egoism . . . is really not a moral conception at all, but rather a challenge to all such conceptions . . ."). See generally BRANDT, *supra* note 81, at 369–75; FRANKENA, *supra* note 86, at 17–23.

113. Nearly a century ago, Henry Terry identified the factors relevant to the calculus of reasonable risk. Notice that they are entirely utilitarian:

The reasonableness of a given risk may depend upon the following five factors:

- (1) The magnitude of the risk. A risk is more likely to be unreasonable the greater it is.
- (2) The value or importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principal object. The reasonableness of a risk means its reasonableness with respect to the principal object.
- (3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct,—is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.
- (4) The probability that the collateral object will be attained by the conduct which involves risk to the principal; the utility of the risk.
- (5) The probability that the collateral object would have been attained without taking the risk; the necessity of the risk.

Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42–43 (1915). Terry then turns to an example based on *Eckert v. Long Island Railroad Co.*, 43 N.Y. 502 (1871), a famous rescue doctrine case:

The plaintiff's intestate, seeing a child on a railroad track just in front of a rapidly approaching train, went upon the track to save him. He did save him, but was himself killed by the train. The jury were allowed to find that he had not been guilty of contributory negligence. The question was of course whether he had exposed himself to an unreasonably great risk.

It may appear, at first glance, that considerations of kin selection are irrelevant to the universal utilitarianism supporting rescues, for the satisfaction of the various parties from the rescue may seem independent of whether the rescuer and rescuee are related. But, as suggested above when discussing egoistic utilitarianism, the rescuer and rescuee, and their kin, may gain additional utility if the parties are related, this reaction being partially disposed by the biology of kin selection. In a successful attempt, not only is the kin rescued, but the rescuer is also a kin who gains in reproductively beneficial stature by the daring act via sexual selection, not only for himself but also possibly for his kin. On the other hand, the satisfactions of unrelated onlookers may be somewhat diminished in these circumstances, for they may feel that a daring rescue of a relative is less admirable than that of a stranger. Furthermore, they may be envious that it was not their relative who gained fame from the rescue. As usual in utilitarian calculations, the bottom line is contingent on circumstances, often too complicated to fully anticipate beforehand or even measure afterwards.

While I take up below the reaction of onlookers to rescuing kin versus strangers, let me take a moment to advance the proposition that it is thought to be more admirable, hence satisfaction-generating, to rescue strangers. For this I will rely on your reaction to the World Trade Center disaster. Were not the rescuers there more commendable for their risky efforts on behalf of strangers? Was not the emotional response to the terrorist attacks by the country, even much of the world, partly informed by the heroic rescue efforts toward strangers? Might this explain in part the unprecedented outpouring of support for the victims and their families, privately, institutionally, and governmentally?¹¹⁵ That is, are we honoring the fallen rescuers to some extent by compensating their attempted rescuees? Of course, that a large number of private citizens were the objects of attack for the first time on American soil had much to do with the reactions, but I am still left

Id. at 43 (footnote omitted). In applying the five factors to the hypothetical, he concludes that, “although the magnitude of the risk was very great and the principal object very valuable, yet the value of the collateral object and the great utility and necessity of the risk counterbalanced those considerations, and made the risk reasonable.” *Id.* at 43–44.

114. For an example of the detailed utility considerations that must be weighed in the context of a duty to rescue, see Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247, 284–87 (1980).

115. For a brief description of the remarkable generosity of the September 11 Victim Compensation Fund, Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, § 405(b)(2), 115 Stat. 230, 239–40 (2001), passed within ten days of the calamity, see Robert L. Rabin, *Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts*, in *EXPLORING TORT LAW* 52, 63–65 (M. Stuart Madden ed., 2005).

wondering whether the generosity was not also fueled by the disinterested heroism.

At first blush, the universal utilitarian's reaction to reciprocal altruism also seems to be indifference. The rescue generates satisfaction irrespective of reciprocation. But to the extent that a rescue is known to be undertaken with the thought of possible future reciprocation, overall satisfaction may be reduced. As just discussed in the context of kin selection, the rescue, if done with self-interested motives, is less admirable, less pleasing to the populace at large. While the rescuer and her allies may be more satisfied with the prospect of reciprocation, the rescuee and her allies, and onlookers in general, may discount the rescuer's efforts by an offsetting amount. The reinforcement of the general practice of reciprocal altruism may increase overall satisfaction, but it may be increased even more when the rescuer acts without self-interested motives.

Sexual selection offers a mixed picture to the universal utilitarian. Yes, there is the good of the rescue itself, but, once again, if it is done with self-interested motives, some of the shine is taken off. The rescuer who knowingly acts for the purpose of becoming more attractive loses points. Furthermore, overall sexual attractiveness may be a zero sum game. The more one person becomes attractive, the less relatively attractive, and thus satisfied, are competitors.¹¹⁶ In fact, one can easily imagine that the utility of a large number of competitors is diminished more than the utility of the rescuer is enhanced. In sports terms, losing hurts more than winning feels good.¹¹⁷

116. This is akin to “positional goods”—goods that are sought after less because of any absolute property they possess than because they compare favorably with others in their own class.” ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* 7 (1985) (footnote omitted).

117. See, e.g., Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1620 (1998) (“Negative events tend to have a larger effect on mood and tend to dominate conscious thought relative to positive events, and negative emotions are experienced more intensely than are positive ones.”); Barry Schwartz, *The Tyranny of Choice*, SCI. AM., Apr. 2004, at 70, 73 (“Losses make us hurt more than gains make us feel good.”); Kathy Bissell, *Interview: Bobby Bowden Playing to Win (1998)*, http://www.privateclubs.com/archives/1998-sept-oct/life_jvbobbybowden.htm (referring to other sports figures who share this view). In Charlie Brown's words, “Winning isn't everything, but losing isn't anything.” STEPHEN L. CARTER, *INTEGRITY* 153–54 (1996). This suggests the behavioral economic notion, amply documented, of loss aversion, which “expresses the intuition that a loss of \$X is more aversive than a gain of \$X is attractive.” Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, in *CHOICES, VALUES, AND FRAMES* 1, 3 (Daniel Kahneman & Amos Tversky eds., 2000).

In conclusion, it seems that both egoistic and universal utilitarianism somewhat align with the evolutionary aspects of the rescue doctrine.¹¹⁸ But this estimate turns on the particularities of the rescue and on suppositions as to what provides satisfaction to the various parties and its quantitative measurement. It also turns on exactly whose utility is to count. This needs further discussion.

3. Boundaries

While egoistic utilitarianism is distinguished from the universal version by whether it is the agent's, or everyone's, satisfaction that falls within the utilitarian calculus, there are other possible places to draw the line. Even under Bentham's version of universal utilitarianism, if the aim is to maximize happiness, should not all animals that can experience pleasure and pain, such as complex animals, be taken into account?¹¹⁹ This raises the boundary question confronting utilitarianism.¹²⁰ What are the bounds of the

118. Ruse, speaking in terms of universal utilitarianism, asks, does "the willingness to help and co-operate, which the Darwinian sees as the result of evolution . . . bear any affinities to utilitarian ethics, with its emphasis on happiness as the end and guide to action?" RUSE, *supra* note 6, at 235. "The obvious answer is that it does. Things which give us pleasure and things which give us pain . . . did not just happen by evolutionary chance to be as they are." *Id.* at 235–36. "[N]atural selection has made us in such a way that we enjoy things which are biologically good for us and dislike things which are biologically bad for us." *Id.* at 236. Though we are generally inclined to be self-interested, "(unbeknown to us) our biological fitness is increased if we have urges to expend effort on promoting the ends that others (consciously) want. Since the ends of others are analogous to our ends . . . our urges are directed towards promoting the general happiness of our fellows, as well as ourselves." *Id.* at 237. "In broad outline, therefore, the utilitarian perspective on the nature of morality meshes comfortably with the Darwinian approach to such thought and behaviour." *Id.*

119. "Indeed, as Bentham emphasized, the beneficiaries [of sacrifice] need not be *Homo sapiens*—any sentient being's pains and pleasures are, he claimed, as morally significant as our own." John Troyer, *Human and Other Natures*, in *EVOLUTIONARY ORIGINS OF MORALITY*, *supra* note 27, at 62, 65. Henry Sidgwick, a leading utilitarian, also discussed whether we should "try to produce the greatest amount of happiness for human beings or for all sentient creatures." Peter Singer, *Deciding What Is Right*, in *ETHICS* 243, 245 (Peter Singer ed., 1994) (citing HENRY SIDGWICK, *THE METHODS OF ETHICS* (7th ed. 1907)). "[V]irtually every utilitarian has given the more inclusive answer, as Sidgwick does . . ." *Id.*; see GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 144–45 (1996) ("[T]rue utilitarianism . . . expresses a commitment to improve the well-being of all sentient beings, that is, all living beings, including animals, who experience pleasure and pain.").

120. There are other aspects of this problem of scope. For example, Mackie questions whether the utilitarian mandate reaches "all human beings' or 'all sentient beings'? . . . Does it include only those who are now alive, or also future generations; and if so, only those who will exist or also those who might exist?" MACKIE, *supra* note 80, at 126–27. Similarly, Posner observes that welfare economics "cannot answer the question of what the boundaries of the society are. Should fetuses be included or not? What about the unborn generally? And therefore

utilitarian calculus? For some modern philosophers, such as Peter Singer, the bounds do indeed reach all sentient creatures, including animals, driving him to vegetarianism in most circumstances.¹²¹ But even keeping the boundary at all humans has implications that most people balk at.¹²² At the limit, it suggests that people in prosperous nations should donate their money to those in third-world poverty to the point where their next dollar would give more utility to the giver than to the receiver.¹²³ The result would

what about a person's future selves? I know of no other body of thought that offers a satisfactory answer to the question either." RICHARD A. POSNER, *AGING AND OLD AGE* 89 (1995). "These paradoxes of utilitarianism reflect one of the fundamental and seemingly insoluble problems of that philosophy, which is its inability to specify the community whose utility is to be maximized." Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, in *COST-BENEFIT ANALYSIS* 317, 335 (Matthew D. Adler & Eric A. Posner eds., 2001); *see, e.g.*, D. D. RAPHAEL, *MORAL PHILOSOPHY* 37–38 (1981) (discussing "whose pleasure is to count"); Barbara Herman, *The Scope of Moral Requirement*, 30 *PHIL. & PUB. AFF.* 227, 227 (2001) ("In moral theories that take the promotion of well-being as their core value, beneficence comes naturally. . . . Once the claim of need is acknowledged, it is not easy to see what, morally, can constrain its demand."); Singer, *supra* note 119, at 245 ("And is it only good to increase happiness by making existing beings happier, or is it also good to bring into existence beings who will be happy?"). As the following sources further indicate, it is not just utilitarians who are fretting over boundaries. In general, "[t]here has been growing debate over the claim that we have 'associative duties' to people with whom we have special relationships, such as our relatives, friends, and countrymen." Niko Kolodny, *Do Associative Duties Matter?*, 10 *J. POL. PHIL.* 250, 250 (2002). "The debate has tended to focus on the differential treatment that associative duties would entail . . ." *Id.*; *see, e.g.*, Neera K. Badhwar, *International Aid: When Giving Becomes a Vice*, 23 *SOC. PHIL. & POL'Y* 69 (2006); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 *PHIL. & PUB. AFF.* 257 (2001); Herman, *supra*; Charles Jones, *Patriotism, Morality, and Global Justice*, in *GLOBAL JUSTICE* 125 (Ian Shapiro & Lea Brilmayer eds., 1999); Richard W. Miller, *Beneficence, Duty and Distance*, 32 *PHIL. & PUB. AFF.* 357 (2004); Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 *PHIL. & PUB. AFF.* 3 (2007).

121. *See* SINGER, *supra* note 104, at 55, 62–65 (naming, among possible exceptions, when animals are "produced without suffering").

122. "In practice, utilitarians have been remarkably unforthcoming about the international implications of the doctrine, with the exception of Peter Singer." Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in *GLOBAL JUSTICE*, *supra* note 120, at 12, 36. "Darwinism seems to fit more with our moral intuitions than does utilitarianism. We have a moral obligation to promote happiness, but this obligation weakens as the circle widens." RUSE, *supra* note 6, at 242. This is reflected in our courts. "The true utilitarian would be concerned about all of humankind, but national courts are interested exclusively in the welfare of the nation." FLETCHER, *supra* note 119, at 146.

123. "Many moralists argue that we have an equal obligation to all human beings, indifferently as to relationship acquaintance, nationality, or whatever." Ruse, *supra* note 67, at 239; *see* Weinrib, *supra* note 114, at 264 ("[William] Godwin's comprehensive view of [utilitarian] morality required everyone to devote all of their resources, energies, and opportunities to the assistance of others in order to maximize the utility of all."). Singer points in this direction: "[I]t is difficult to see any sound moral justification for the view that distance, or community membership, makes a crucial difference to our obligations." SINGER, *supra* note 104, at 232. But Ruse suspects "that, sincerely meant, this doctrine makes the evolutionist decidedly queasy,"

be a worldwide leveling of wealth, insofar as wealth is associated with utility. A counterargument to required generosity this extensive is that it would produce negative utility effects, including those that stem from undermining incentives for the wealth generation needed for economic development.¹²⁴ But long before this point is reached, most people would already object to sending their dollars abroad.

One way to respond to the impulse that “charity begins at home” is to adjust the boundaries of the utilitarian calculus.¹²⁵ One could draw the boundary short of all humans. Falling between the reaches of egoistic and universal utilitarianism, one could declare, say, that the satisfaction of distant humans has less value than the equal satisfaction of nearer ones.¹²⁶

since, biologically, our concerns are with kin, those we have a relationship with, “and only finally to complete strangers.” Ruse, *supra* note 67, at 239. “And, feelings of moral obligation have to mirror biology.” *Id.* Singer acknowledges the biases from human nature, but still rejects their moral significance. See Badhwar, *supra* note 120, at 93. Hume largely agrees with Ruse, though he overlooks the tug of reciprocal altruism: “A man naturally loves his children better than his nephews, his nephews better than his cousins, his cousins better than strangers, where every thing else is equal.” DAVID HUME, *A TREATISE OF HUMAN NATURE* 483–84 (L.A. Selby-Bigge ed., London, Oxford 1888). “Our sense of duty always follows the common and natural course of our passions.” *Id.* at 484. To speculate on the origins of our passions towards strangers: “For our ancestors, encounters with strangers were probably rare, owing to low population densities and territorial defense against outsiders, and they were possibly accompanied by strong emotions (e.g., anxiety, hostility, sexual interest).” Adrian Treves & Diego Pizzagalli, *Vigilance and Perception of Social Stimuli: Views from Ethology and Social Neuroscience*, in *THE COGNITIVE ANIMAL* 463, 464 (Marc Bekoff et al. eds., 2002). Indeed, “[a]ny modern parents who gave no more care and affection to their own children than they did to all others would be seen as monsters.” MARY MIDGLEY, *THE ETHICAL PRIMATE* 146 (1994). Ruse invokes Rawls: “Explicitly, Rawls treats close kin as a case meriting special attention, and as he himself admits it is far from obvious that his theory readily embraces relations with the Third World.” Ruse, *supra* note 67, at 240 (citing Rawls, *supra* note 112).

124. See Badhwar, *supra* note 120, at 75; Kolodny, *supra* note 120, at 262. Furthermore, “[t]he element of truth in the view that we should first take care of our own, lies in the advantage of a recognised system of responsibilities.” SINGER, *supra* note 104, at 233. Singer considers, and rejects, various objections to expecting extensive generosity to strangers. See *id.* at 232–46. But even Singer, finding “that the standard set by [his] argument is so high as to be counterproductive,” settles “for a round percentage of one’s income like, say, 10 per cent,” unless the donor has special needs. *Id.* at 246. For utilitarian problems with the requirement of “perfect and general altruism,” see Weinrib, *supra* note 114, at 281–83.

125. “‘Charity begins at home’ is the motto of the evolutionary ethicist.” RUSE, *supra* note 78, at 248.

126. Samuel Scheffler observes that “the importance of special obligations in common-sense moral thought seems undeniable.” SAMUEL SCHEFFLER, *Individual Responsibility in a Global Age*, in *BOUNDARIES AND ALLEGIANCES* 32, 36 (2001).

The willingness to make sacrifices for one’s family, one’s community, one’s friends, and one’s comrades is seen as one of the marks of a good or virtuous person, and the demands of morality, as ordinarily interpreted, have less to do with abstractions like the overall good than with the specific web of roles and relationships that serve to situate a person in social space.

Though not a typical utilitarian standard, one might say that the utility of persons in foreign countries is to be weighted as half that of fellow citizens, so that one is to donate money to foreigners in poverty to the point where the next dollar would give more than half the utility to the giver than to the receiver. Or a sliding scale could be embraced depending on which foreign country is in question, distinguishing, say, nearby Mexico from distant Nepal. Or one might simply exclude foreigners altogether from the calculus. For example, Rawls considers, but rejects, “the strict classical doctrine” of utilitarianism “that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals *belonging to it*.”¹²⁷ For that matter, one might exclude altogether, or at least discount, residents of

Id. at 36–37. Many of the essays in Scheffler’s collection discuss this and related issues. See SCHEFFLER, *supra*; see also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1067–68 (1976) (discussing the utilitarian position of Mill and Sidgwick “that our propensity to prefer the interests of those who are close to us is in fact perfectly reasonable because we are more likely to be able to benefit those people”). In considering this issue, Margalit distinguishes ethics from morality. “Morality, in my usage, ought to guide our behavior toward those to whom we are related just by virtue of their being fellow human beings, and by virtue of no other attribute.” MARGALIT, *supra* note 77, at 37 (explaining “thin relations”). “Ethics, in contrast, guides our thick relations,” *id.*, which “are grounded in attributes such as parent, friend, lover, fellow-countryman,” *id.* at 7. “Ethical relations involve partiality—that is, favoring a person or a group over others with equal moral claim.” *Id.* at 87. For similar distinctions, see generally KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005). See also T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* 171–77 (1998); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 6, 174–96 (1985). As an example, Christopher Heath Wellman advocates on moral grounds a redistributive policy favoring compatriots over foreigners, contending that the domestic poor should receive more than the foreign poor. See Christopher Wellman, *Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun “My”?*, 110 ETHICS 537 (2000). For criticism of his reasoning, see Christian Coons, *Wellman’s “Reductive” Justifications for Redistributive Policies that Favor Compatriots: Metaphysical and Geographical*, 111 ETHICS 782 (2001). Singer, to the contrary, argues that “taking care of our own” is not a persuasive reason to reduce foreign aid. See SINGER, *supra* note 104, at 232–34. Similarly, “[t]o many Christians, allowing believers to develop a hierarchy of responsibilities accedes too much to everyday custom, thereby dulling the edge of Christianity’s capacity for social criticism, its radical message of selfless, indiscriminate love.” Richard B. Miller, *Christian Attitudes Toward Boundaries*, in BOUNDARIES AND JUSTICE 15, 17–18 (David Miller & Sohail H. Hashmi eds., 2001). “Territorial boundaries are a source of embarrassment for liberals of all stripes, and particularly for liberal egalitarians.” Will Kymlicka, *Territorial Boundaries: A Liberal Egalitarian Perspective*, in BOUNDARIES AND JUSTICE, *supra*, at 249, 249. That, by declining to aid the distant needy, we may be ogres or irrational, see Caspar Hare, *Rationality and the Distant Needy*, 35 PHIL. & PUB. AFF. 161 (2007).

127. RAWLS, *supra* note 26, at 22 (emphasis added).

distant parts of the same country or society. Or members of different communities,¹²⁸ or neighborhoods.¹²⁹

Once one is willing to draw boundaries, it becomes easier to mesh utilitarianism with evolutionary dispositions. If drawn at family members, then kin selection is approached.¹³⁰ Approached, but not reached, since utilitarianism ordinarily weighs equally the satisfaction of all within the boundary, while kin selection preferentially weighs the reproductive advantages, whether or not measurable in terms of satisfaction, to kin in proportion to their genetic closeness. In other words, for the universal utilitarian, all human satisfactions count the same, but for the kin selector, some relative's reproductive success is more valuable than other's. But since we are now

128. One form of communitarianism suggests this line drawing. Communitarianism is a political philosophy that rejects the priority of the individual over the community. Observing that persons are not self-made, but are largely formed by their environment, the communitarian argues that therefore the community has claims against its members beyond those recognized by individualists, such as libertarians. See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). The communitarian must then identify the community to which each person has obligations. In fact, each person is a member of many communities, including the neighborhood, city, state, nation, religious group, school, company, civic organizations, etc. If they all have claims against the individual, conflicting demands are likely. Arguably, in cases of conflict, obligations to each of a person's communities must be prioritized and weighted. "The theory of justice is alert to differences, sensitive to boundaries." MICHAEL WALZER, *SPHERES OF JUSTICE* 315 (1983). "[B]oundary conflict is endemic. The principles appropriate to the different spheres are not harmonious with one another . . ." *Id.* at 318. To cope with any disharmony, an adjustment is needed. "But this adjustment must itself be worked out politically, and its precise character will depend upon understandings shared among the citizens about the value of cultural diversity, local autonomy, and so on." *Id.* at 29. In the context of the rescue doctrine, for example, while Walzer recognizes duties to strangers in distress, he curtails them beyond those owed to fellow community members. See *id.* at 33–34; see also RUSE, *supra* note 78, at 247 (referring to those who "have argued for a more restricted morality, arguing that there is a falling away of the moral imperatives as one moves farther from oneself, one's family, one's friends, one's society and one's country").

129. One "should acknowledge the ethical salience of not just the state but the county, the town, the street, the business, the craft, the profession, the family as communities, as circles among the many circles narrower than the human horizon that are appropriate spheres of moral concern." APPIAH, *supra* note 126, at 246. "The morality most people practice . . . [reveals that] the strongest obligations are those to family and kin, then to friends who have benefited oneself, then, in diminishing order of urgency, to one's group, tribe, neighborhood, nation—and only lastly to humans in general." John Chandler, *Ethical Philosophy, in THE SOCIOBIOLOGICAL IMAGINATION*, *supra* note 21, at 157, 159. This "cohere[s] well with sociobiological theory." *Id.*; cf. HOWARD RACHLIN, *THE SCIENCE OF SELF-CONTROL* 185–86 (2000) (arguing that, in light of unselfish behavior towards friends, "[i]t seems that people's concepts of their selves may include other people with whom they function together").

130. "In 1997, . . . over four thousand living Americans donated kidneys. One of these donors actually gave a kidney to a non-relative. Her act was so rare that she received a flood of media attention." TERRY BURNHAM & JAY PHELAN, *MEAN GENES* 204 (2000). Did this media attention improve her mate or mating opportunities, via sexual selection, or her future prospects, via reciprocal altruism?

departing from standard utilitarianism, let us not hesitate to further subdivide boundaries. We could weigh the utility of kin in incremental proportion to their closeness. Then the only remaining gap between this utilitarianism and kin selection is that utilitarianism aims for satisfaction or utility, while kin selection aims for genetic success, the chances of which may vary among equally close kin because of, say, their relative ages, attractiveness, or prospective supportiveness. But once we begin to freely adjust the utilitarian calculus, we could take into account these last factors as well.

By adjusting boundaries, the gap between utilitarianism and reciprocal altruism can also be narrowed. If the utilitarian calculus extends only to members of the community, acquaintances, friends, or neighbors, then the principle of reciprocal altruism may be brought closer to utilitarianism, the distinction between utility and reproduction remaining.¹³¹ As one example, “Sidgwick notes, a utilitarian never regards himself as acting merely for the sake of an impersonal law, but always for the welfare of some being or beings for whom he has some degree of fellow feeling.”¹³² As another example, Donald Reagan champions “co-operative utilitarianism,” the first step of which is that each agent “should identify the other agents who are willing and able to co-operate in the production of best possible consequences,”¹³³ and then she should cooperate with them.¹³⁴ But again the

131. On the other hand, Pinker, using reciprocal altruism ideas in discussing Singer’s utilitarian expanding circle, contends that “[t]he expansion of the moral circle does not have to be powered by some mysterious drive toward goodness. It may come from the interaction between the selfish process of evolution and a law of complex systems.” PINKER, *supra* note 72, at 167. “Human societies, like living things, have become more complicated and cooperative over time. Again, it is because agents do better when they team up and specialize in pursuit of their shared interests, as long as they solve the problems of exchanging information and punishing cheaters.” *Id.* at 167–68.

132. RAWLS, *supra* note 26, at 477 (citing SIDGWICK, *supra* note 119, at 501). Sidgwick, wishing to expand the boundaries, goes on to “maintain that, on empirical grounds alone, enlightened self-interest would direct most men to foster and develop their sympathetic susceptibilities to a greater extent than is now commonly attained.” SIDGWICK, *supra* note 119, at 501. Yet Sidgwick doubts that human affection can be expanded to a universal scope, see *id.* at 434–35, but takes comfort in the observation that “each person is for the most part, from limitation either of power or knowledge, not in a position to do much good to more than a very small number of persons,” *id.* at 434. Mill was also restrictive about the moral claims to altruistic concern. “No one has a moral right to our generosity or beneficence, because we are not morally bound to practise those virtues towards any given individual.” MILL, *supra* note 74, at 61–62. For a modern view that one should be partial to one’s friends, see, for example, Sarah Stroud, *Epistemic Partiality in Friendship*, 116 ETHICS 498 (2006).

133. DONALD REAGAN, *UTILITARIANISM AND CO-OPERATION*, at x (1980).

134. Specifically, “[t]hen he should do his part in the best plan of behaviour for the group consisting of himself and the others so identified, in view of the behaviour of non-members of that group.” *Id.* Evolution may be brought into this utilitarian conception. In discussing

boundary may not circumscribe an all-or-nothing calculus, but instead consist of innumerable delineations generating a sliding scale that weighs the utility of others according to the likelihood that they will interact, and hence be in a position to reciprocate in the future. Even finer lines can be drawn that turn not only on the likelihood of interacting, but also on the likelihood of reciprocating, as where the age, status, and wherewithal of the rescuee, her kin, and supporters are considered.¹³⁵ Why not slide all the way down the slope to coincide with full-fledged reciprocal altruism under the cover of demarcating utilitarian boundaries?

While the utilitarianization of kin selection and reciprocal altruism does not seem to require general distinctions between the conduct of men and women, when it comes to exploring the utilitarian boundaries of the rescue doctrine suggested by sexual selection, the substantial differences in the mating strategies of men and women call for explicit consideration of the sex of the prospective rescuer. The possible mating benefits for men from rescues appear so much greater than those for women, such that their reinforcing moral impulses would seem to differ substantially. For women desiring men, it was postulated that daring or arduous rescues may provide opportunities to demonstrate their youth, health and even commitment,¹³⁶ but it would seem that women simply seeking matings need not demonstrate very much of these qualities, if any, and women seeking better mates, along with those simply seeking matings, usually have other, less costly means to amply demonstrate these qualities. In other words, because of the risks of undertaking rescues, a woman's good, insofar as it relates to mate or mating opportunities, typically would be increased more efficiently by displaying the qualities that make her desirable in other, safer manners. Yet this may not always be the case. The quality of commitment sought by men may be uniquely demonstrated by a woman's risky rescue attempt of a person to whom she is committed. But "commitment" in these circumstances implies a preexisting relationship. The rescue of a stranger is not the product of a commitment in this sense. The rescue of a fellow householder, relative, or friend, on the other hand, does reflect the relevant commitment. This implies that for women, moral urges regarding rescues stemming from sexual selection would be skewed toward extant, warm relationships. This

evaluative capacities, Nozick opines that "evolutionarily selected desires and patterns of behavior might get incorporated into norms: 'Care for your offspring'; 'Help members of your family'; 'Cooperate with those who evidence a willingness to cooperate with you for mutual benefit.'" NOZICK, *supra* note 21, at 276.

135. Sam Murumba noted to me the daunting computational requirements of this suggestion along with its prisoner's dilemma and collective action problems.

136. See *supra* Part I.B.3.

is consistent with Gilligan's findings that women generally share an ethic of attachment and care-giving for loved ones beyond that of men, who tend to develop a moral sensibility that does not give as high priority to such relationships.¹³⁷

For men, on the other hand, sexual selection would favor a substantial enlargement of the utilitarian boundaries of the rescue doctrine beyond those of kin selection and reciprocal altruism. It was noted that a man by a daring rescue might display several qualities desired by a woman, such as strength, athleticism, bravery, health, kindness, dependability, love and commitment, along with the possible enhancement of social status and financial prospects. Most of these qualities are demonstrated or furthered irrespectively of the character of the rescuee. While the rescue of a social pariah may decrease social status and financial prospects, it would still usually demonstrate the physical and emotional qualities preferred by women in a man. Therefore, it seems that the moral urges of men springing from sexual selection would encompass wide boundaries for rescuees, extending toward, if not quite reaching, universal ethical utilitarianism.¹³⁸

To summarize, the utilitarian boundaries of the rescue doctrine consistent with the considered evolutionary factors substantially differ from one to the next, and even depend on the sex of the agent. The urges from kin selection would approach egoistic utilitarianism in their narrowness, and the urges for men from sexual selection would approach universal utilitarianism. Those from reciprocal altruism would fall in between. Perhaps this lack of coherence helps to explain why humans are ambivalent about the aptness of various moral mandates for rescue attempts, and, more immediately, vary so much in their willingness to undertake risky rescues.

Though I have been able in principle to drag utilitarianism closer to biological dispositions, I will be the first to admit that I have stretched principle beyond that of any standard utilitarian system, partially because the three considered evolutionary factors suggest different versions of utilitarianism. But my stretches are not over. See what I next do to Kant.

137. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* 151-74 (1982).

138. Despite my argument that sexual selection may induce men to rescue more people than it would women, this may not dominate actual overall dispositions. To refer to an example used before, the inclination of both women and men to rescue anyone at risk may have become established on the savanna where nearly everyone in the vicinity was kin or a potential reciprocator. See *supra* text accompanying note 18. In this case, any narrower tendencies from sexual selection may have been swamped by those from kin selection and reciprocal altruism. For this and other reasons, it remains an empirical question whether men and women diverge in their tendencies to rescue strangers. For suggestive evidence, see Kuklin, *supra* note 7, at 206 n.136.

B. Kantianism: The Categorical Imperative

Immanuel Kant developed the best-known deontological theory. Kant's deontology is grounded on pure reason and not on any natural moral feelings such as an innate sense of justice.¹³⁹ Reason alone drove Kant to the categorical imperative.

Three key forms of Kant's categorical imperative suffice to identify his basic moral framework.¹⁴⁰ First, moral maxims are to be universalized.¹⁴¹ For example, it is improper for a person to embrace a maxim that declares, "Everyone is to attempt reasonable rescues of those in peril, except me." Second, people, as moral beings by virtue of their rational nature, are to be treated with respect, as ends in themselves and not as a means only to another's end.¹⁴² In other words, as autonomous, ethical beings, people are not simply to be used by others. Third, adopted moral maxims are to be performed disinterestedly.¹⁴³ One is to perform them out of a sense of duty, and

139. Arnhart challenges Kant's proposition that morality must stem from a disinterested rationality. "Psychopaths show that [this] cannot be true. . . . Their immorality comes not from any defect of abstract reason, but from their emotional poverty. They cannot be moral, because they lack the social emotions—such as sympathy, guilt, and shame—that sustain moral conduct." LARRY ARNHART, *DARWINIAN NATURAL RIGHT* 229 (1998). Even chimpanzees may have a sense of justice. See FRANS DE WAAL, *CHIMPANZEE POLITICS* 207 (1982) ("[T]his [conduct by two chimpanzees] would suggest that reciprocity among chimpanzees is governed by the same sense of moral rightness and justice as it is among humans."); Frans B.M. de Waal, *The Chimpanzee's Sense of Social Regularity and Its Relation to the Human Sense of Justice*, in *THE SENSE OF JUSTICE*, *supra* note 29, at 241, 241–54. Even capuchin monkeys object to perceived unfairness. See Nicholas Wade, *Genetic Basis To Fairness, Study Hints*, *N.Y. TIMES*, Sept. 18, 2003, at A27. "Based on recent research on chimpanzee cognition, it seems likely that some of the cognitive capacities that underlie the expression of ethics in humans were also present in the common ancestor of humans and chimpanzees." Daniel J. Povinelli & Laurie R. Godfrey, *The Chimpanzee's Mind: How Noble in Reason? How Absent of Ethics?*, in *EVOLUTIONARY ETHICS*, *supra* note 110, at 277, 277. Since biological traits evolve gradually, one would expect other higher primates to have some sense of morality, as do humans. See RUSE, *supra* note 6, at 227–29.

140. See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H. J. Paton trans., 3d ed. 1956) (1785).

141. See generally CHRISTINE M. KORSGAARD, *Kant's Formula of Universal Law*, in *CREATING THE KINGDOM OF ENDS* 77, 77–102 (1996). Many moralists other than Kantians, including religious leaders, utilitarians, stoics, and existentialists, have embraced a universalization principle. See SINGER, *supra* note 104, at 10–11. "The criterion of generality [universality] is so widely accepted that it is often identified with the moral point of view." AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 13 (1996). See generally MACKIE, *supra* note 80, at 83–102.

142. Note that Kant would reject the utilitarian position that animals fall within the sphere of beings considered part of the moral calculus. See IMMANUEL KANT, *LECTURES ON ETHICS* 239–41 (Louis Infield trans., Harper & Row 1963) (1930).

143. For a brief summary of these three forms of the categorical imperative, see FLETCHER, *supra* note 119, at 147–49.

not because it is in one's self interest to do so or because one gets pleasure from it. A prime example of a Kantian maxim is that all promises are to be kept, such as those central to contractual obligations. Because both parties agree to the contract, their autonomy is respected and they are not simply using one another. Both contracting parties, presumably, benefit from the arrangement, but even if this is not the case, they must dutifully perform because they have promised.

Kant's moral system is said to be merely formal.¹⁴⁴ It establishes only a framework for moral maxims. While, as a matter of logic, adopted maxims must cohere with one another, Kant's system does not necessitate any particular maxim or set of maxims.¹⁴⁵ Thus, in theory, there are an infinite number of Kantian moral orders. Every member of a society could rationally adopt a different set of maxims.

Emphasizing the formal structure of Kant's moral system, I will examine the three main forms of the categorical imperative to see the extent to which they may be consistent with the principles of kin selection, reciprocal altruism, and sexual selection in the context of the rescue doctrine. First, I analyze the universalization principle, then the mandate to respect persons, and finally the duty to act disinterestedly.

1. Universalized Maxims

Kant's universalization principle has been likened to the Golden Rule. More closely, but still inexactly, it boils down to: "A person's maxim is universalizable if, and only if, he can agree, as a matter of reflective policy, to everyone else also acting in accordance with it."¹⁴⁶

144. See, e.g., F. H. BRADLEY, *ETHICAL STUDIES* 142–59 (photo. reprint 1959) (2d ed. 1927); C. D. BROAD, *FIVE TYPES OF ETHICAL THEORY* 123 (7th ed. 1956) (1930); ONORA NELL, *ACTING ON PRINCIPLE* 132–37 (1975). Hegel first asserted this understanding. See G. W. F. HEGEL, *THE PHILOSOPHY OF RIGHT* 89–90, 253–54 (T. M. Knox trans., 1953) (1821). Some challenge the interpretation of Kant as a pure formalist. See, e.g., CHRISTINE M. KORSGAARD, *Kant's Analysis of Obligation: The Argument of Groundwork I*, in *CREATING THE KINGDOM OF ENDS*, *supra* note 141, at 43, 64–65; MARCUS GEORGE SINGER, *GENERALIZATION IN ETHICS* 251–52 (1961). Ruse sees in Kant the argument that "the basis for ethics [is] the interrelation of rational beings as they attempt to live and work together. Without ethics, in the normative sense, we run into 'contradictions', where these are to be understood as failures of social living rather than anything in a formal sort of way." RUSE, *supra* note 78, at 255.

145. For a Kantian argument for a duty to rescue, see Weinrib, *supra* note 114, at 287–92.

146. BRANDT, *supra* note 81, at 29. One of Kant's versions is, "I ought never to act except in such a way that *I can also will that my maxim should become a universal law.*" KANT, *supra* note 140, at 70.

Kant himself championed at least two moral maxims as basic: truth-telling and, as in the contract example above, promise-keeping.¹⁴⁷ These maxims, circumscribed by the categorical imperative, led him to some conclusions that most would find untenable. For example, assume that a person has promised to meet another for lunch sharply at noon. While racing to the appointed restaurant to get there on time, the promisor, an excellent swimmer, sees a person in distress flailing in a nearby lake while crying for help. If the rescue would delay the promisor beyond the noon appointment, Kant would have her pass on by. Promises must be kept!¹⁴⁸ For another example, assume a host asks a guest how she enjoyed the dinner party. If the guest actually found the evening excruciatingly boring and the food barely edible, she must report this to the host.¹⁴⁹ No white lies, the truth must be told!

Few moralists, even Kantians, would agree with the extreme strictures implied by Kant's universalized framework as seen in the examples above. Various ways have been found to soften them. For example, regarding the truth-telling example, one might define "lie" in such a way as to exclude white lies. A lie may be defined as an assertion of fact on which the listener

147. See KANT, *supra* note 140, at 70–71 (discussing truth-telling and promise-keeping); KANT, *supra* note 142, at 224–29 (discussing truth-telling).

148. See IMMANUEL KANT, *On a Supposed Right to Lie from Altruistic Motives*, in THE CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346, 346–50 (Lewis White Beck trans., Univ. of Chicago Press 1949) (1797). For criticism, see, for example, SISSELA BOK, LYING 37–39 (1978) (calling Kant "obsessive" but concluding he is correct); Brian Barry, *And Who Is My Neighbor?*, 88 YALE L. J. 629, 644–45 (1979). For analyses by distinguished Kantians that avoid the "rigorism" of Kant's passages endorsing an absolute duty of truth-telling, see generally CHRISTINE M. KORSGAARD, *The Right to Lie: Kant on Dealing with Evil*, in CREATING THE KINGDOM OF ENDS, *supra* note 141, at 133 [hereinafter KORSGAARD, *Right to Lie*]; CHRISTINE M. KORSGAARD, *Two Arguments Against Lying*, in *id.* at 335 [hereinafter KORSGAARD, *Two Arguments*]; H. J. Paton, *An Alleged Right to Lie: A Problem in Kantian Ethics*, 45 KANT-STUDIEN 190 (1953–54); Tamar Schapiro, *Kantian Rigorism and Mitigating Circumstances*, 117 ETHICS 32 (2006).

149. Perhaps the guest need not be so forthright. For example, in the movie *Amadeus*, Mozart attends an opera by Salieri and afterwards is asked by him, "Did my work please you?" AMADEUS (Warner Bros. 1984). Mozart, obviously unimpressed, answers, "How could it not, Excellency?" "Yes?" Salieri responds. "I never knew that music like that was possible," says Mozart. "You flatter me." Mozart finally concludes, "Oh no! One hears such sounds and what can one say, but—Salieri!" *Id.* Upon that, Salieri smiles, as does the knowing viewer. *Id.* Apparently, Mozart kept abreast of the writings of his contemporary, Kant. On the other hand, Bok, who defines a lie as "any intentionally deceptive message which is stated," may not approve. BOK, *supra* note 148, at 13 (emphasis omitted). Yet even she "would not wish to argue that all white lies should be ruled out." *Id.* at 71. Carter opines that the commitment never to lie is "psychologically impossible." STEPHEN L. CARTER, INTEGRITY 33 (1996).

may be reasonably expected to rely to her detriment.¹⁵⁰ Since a host is unlikely to detrimentally rely on a guest's etiquette-driven compliment of her dinner party, the assertion is not a lie, properly speaking.¹⁵¹ Or, as in the promise-keeping example of the foregone rescue, one might qualify each express promise with implied exceptions, the provisos to be filled according to legal rules, customs, social mores, and other normative understandings.¹⁵² In this example, the implied proviso might be, "except if I am delayed by attempting a rescue," or, more generally, "except if I find myself in a dire emergency."¹⁵³ As a matter of reflective policy, moral persons normally would agree to these qualifications. But a qualification may be unacceptable if, say, the meeting exactly at noon was known to be crucial to the wellbeing of the promisee, as where the promisor was to pay off a debt that the promisee must turn over to a gangster at 12:01, "or else . . ."

At first glance it may seem that the exceptions run afoul of Kant's universalization principle. But this would be a mistaken confusion of generality for universality.¹⁵⁴ Though the unqualified maxims are more general than those with provisos, all of them may be equally universal when, qualified or not, they apply to everyone without exclusion whenever the specified circumstances arise.¹⁵⁵ For example, one universalized maxim

150. This version of "lie" verges into fraud or misrepresentation. See generally E. ALLAN FARNSWORTH, *CONTRACTS* 236–52 (4th ed. 2004). For an insightful taxonomy of "lie," see STEVEN L. WINTER, *A CLEARING IN THE FOREST* 297–300 (2001).

151. Baier suggests other plausible universalized maxims regarding truth-telling: "'Lie when it is the only way to avoid harming someone,' or 'Lie when it is helpful to you and harmful to no one else,' or 'Lie when it is entertaining and harmless.'" KURT BAIER, *THE MORAL POINT OF VIEW* 200 (1958). *But cf.* SINGER, *supra* note 144, at 100–01 (noting the problem that a lie may benefit one person while injuring another). Proper and improper lies may be distinguished "by fine-grained, context-sensitive descriptions, rather than general descriptions like 'deception.'" Schapiro, *supra* note 148, at 37.

152. If the "other normative understandings" include Kantian maxims, then one is at risk of circular reasoning.

153. "Possibly Kant could argue . . . [that] one can will the maxim, 'When breaking a promise is required in order to help someone I will break it,' to be universally acted on in the situations specified, especially if it is also specified in the maxim that the promise is not crucially important and that the help is." FRANKENA, *supra* note 86, at 26–27; *cf.* CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 26 (1996) ("Many rules have explicit or implicit exceptions for cases of necessity or emergency."); W. D. ROSS, *The Personal Character of Duty*, in *ETHICS*, *supra* note 119, at 332, 334 ("If I have promised to meet a friend at a particular time for some trivial purpose, I should certainly think myself justified in breaking my engagement if by doing so I could prevent a serious accident or bring relief to the victims of one.").

154. "A famous flaw with the categorical-imperative test is that it fails to establish at what *generality* the maxims that we test ought to be pitched." WILLIAM D. CASEBEER, *NATURAL ETHICAL FACTS* 134 (2003).

155. "Briefly, generality is the opposite of specificity, whereas universality is compatible with specificity, and means merely the logical property of being governed by a universal

with broad generality is, "One is to attempt reasonable rescues of those in peril." We could expand the generality, that is, enlarge the number of cases to which rescue is morally required by eliminating the "reasonable" limitation and declaring, "One is to attempt rescues of those in peril." To put the less general maxim in the form of an explicit exception, it might read, "One is to attempt rescues of those in peril, except when such a rescue attempt would be unreasonably demanding."¹⁵⁶ While this gambit of narrowing the generality of a maxim may facilitate self-serving rationalizations,¹⁵⁷ it appears that we have no choice but to face this risk in developing a reasonable, principled moral system.¹⁵⁸

Qualified moral maxims, then, do not necessarily violate Kant's universalization principle, though they still must satisfy the coherence

quantifier and not containing individual constants." HARE, *supra* note 88, at 41 (using the distinguishing examples, "'Never kill people' and 'Never kill people except in self-defence . . .'""); see SINGER, *supra* note 144, at 67 (using the label "restricted universality" for a "restriction to 'every similar person in similar circumstances'"). Brandt refers to the general Kantian maxim: "In circumstances of the kind *FGH*, let me do *A!*" BRANDT, *supra* note 81, at 28. A completely general, universal maxim would be, "always do *A*."

156. "To help others *where one can* is a duty . . ." KANT, *supra* note 140, at 66 (emphasis added). Kant found the duty of mutual aid to be "an imperfect duty of virtue, since the law does not say exactly what or how much we must do along these lines." KORSGAARD, *Right to Lie*, *supra* note 148, at 145. But there is some question whether Kant adequately defends his view that one logically does have a duty render aid. See George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 547-49 (1987). In Weinrib's Kantian analysis of a proposed duty to rescue, he finds room for "emergency" and "convenience" limitations to the duty. See Weinrib, *supra* note 114, at 289-92; George Klosko, *Samaritanism and Political Obligation: A Response to Christopher Wellman's "Liberal Theory of Political Obligation,"* 113 ETHICS 835, 837 (2003) ("As ordinarily construed, [a person's] duty to rescue other people is limited by the proviso that this must not be unduly costly to herself.").

157. See SINGER, *supra* note 144, at 101-03 (criticizing the ad hocery of avoiding conflicts among maxims by qualifications and questioning the possibility of specifying all governing qualifications).

158. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 118 (1979). "Most Kantians try to avoid fanaticism by carving exceptions to the categorical duties they impose [as where one person must be tortured to save the human race]. . . . Once this much is conceded, however, there is no logical stopping point." *Id.* (footnote omitted). "Depending on where he does draw the line, the Kantian either shades into the utilitarian (if he gives a lot of weight to costs) or remains a fanatic (if he doesn't)." *Id.* Korsgaard, a thorough Kantian, discusses the consideration of utilitarian and other values when adjusting the reach of universalized maxims. See KORSGAARD, *Two Arguments*, *supra* note 148, at 357. She writes:

A natural objection is that if we work this way there is a danger that we will simply adjust our ethical categories and principles reciprocally until we get whatever result we want. . . . Of course there are dangers of this kind, but it is not clear that we have any option but to face them, and to try to be intellectually honest.

Id. at 357-58.

requirement.¹⁵⁹ That is, the set of adopted moral maxims must be consistent with one another, so that a person is able to satisfy them all simultaneously. This can be seen as an aspect of Kant's famous mandate that "'ought' implies 'can.'"¹⁶⁰ In legal terms, society cannot properly require compliance with a particular law if one cannot do so without violating another law.¹⁶¹ Interestingly, "'ought' implies 'can'" also restricts maxims to those that are physically possible, precluding maxims such as, "if necessary, one must leap over tall buildings to rescue those in distress." General psychological impediments also suggest the impossibility limitation to maxims,¹⁶² as where, when considering utilitarianism, the leveling principle of voluntary equal-wealth distribution throughout the world was discussed. Would most people find it psychologically "impossible" to be so generous to distant strangers?¹⁶³

159. See IMMANUEL KANT, CRITIQUE OF PURE REASON 308 (J. M. D. Meiklejohn trans., P. F. Collier & Son 1900) (1781).

160. See, e.g., William K. Frankena, *Obligation and Ability*, in PHILOSOPHICAL ANALYSIS 157, 157 (Max Black ed., 1950) ("[M]any moral philosophers . . . say, in one way or another, that 'ought' implies 'can.' Indeed, if there is anything on which philosophers are agreed with plain men and with each other, and goodness knows there is very little, it is Kant's dictum, '*Du kannst, denn du sollst!*'"); MICHAEL S. MOORE, LAW AND PSYCHIATRY 341 (1984) (stating that both John Rawls and H. L. A. Hart regard "ought" implies "can" "as the principle of responsibility from which more particular principles, such as those requiring actions, intentions, or reasons, may be derived").

161. Lon Fuller insists that among the eight ways "that the attempt to create and maintain a system of legal rules may miscarry [are] . . . (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party." LON L. FULLER, THE MORALITY OF LAW 38-39 (rev. ed. 1969).

162. See CASEBEER, *supra* note 154, at 65. "'Ought implies can': If a moral system produces obligations upon us that are so severe that we are psychologically incapable of implementing them, then this speaks against the viability of the moral system." *Id.* "[T]here are a number of different ways in which it is possible to interpret the principle [that "'ought' implies 'can'"], depending on what is meant by 'can.' [One commentator] suggests that we should understand 'can' as 'can learn to.'" Carolyn Price, *Rationality, Biology and Optimality*, 17 BIOLOGY & PHIL. 613, 616 (2002) (citing STEPHEN STICH, THE FRAGMENTATION OF REASON 156 (1990)). "If people ought to do something, then it must be possible for them to do it. Human nature circumscribes what is possible." Elliott Sober & David Sloan Wilson, *Summary of Unto Others: The Evolution and Psychology of Unselfish Behavior*, in EVOLUTIONARY ORIGINS OF MORALITY, *supra* note 27, at 185, 205. Mackie, in discussing why "moralities of universal concern [are] impracticable," declares that "a large element of selfishness—or, in an older terminology, self-love—is a quite ineradicable part of human nature." MACKIE, *supra* note 80, at 132. "[W]hat we recognize as unselfishness or benevolence is . . . incompatible with *universal* concern. It takes the form of what Broad called self-referential altruism—concerns for others, but for others who have some special connection with oneself; children, parents, friends, workmates, neighbours in the literal, not the metaphorically extended, sense." *Id.*

163. Ruse and Wilson suggest a route to disinterested moral rules. While behavior advancing kin selection and reciprocal altruism is self-interested in a strong biological sense, it may run afoul of our immediately perceived self-interest, as where one considers whether to aid

Let us turn to possible qualifications of moral maxims in the context of the rescue doctrine. Suppose one qualifies the maxim, "One is to attempt reasonable rescues of those in peril," with the proviso, "except when the person in peril is not a member of the community," or, "except when the person in peril is a stranger," or, ". . . is not a neighbor," or, ". . . is not a relative."¹⁶⁴ (These maxims are more likely to be expressed in a way that obscures the qualification, such as: "One is to attempt reasonable rescues of fellow community members in peril," or, ". . . reasonable rescues of acquaintances . . .," "neighbors," or, "relatives.") While these qualifications reduce the generality of the maxim, they still maintain its universality. Everyone is to undertake a rescue of anyone who falls within the specified categories. The maxim, though still universal in some weak sense, fails to be general at all when the qualification reaches this point: "except when the person in peril is not me."¹⁶⁵ Conversely, an example of a maxim that is exceedingly general but hardly universal is: "Everyone but me is to attempt reasonable rescues of those in peril."¹⁶⁶ While the maxim applies to the

a neighbor. Ruse & Wilson, *supra* note 64, at 315. The authors wonder how the dispositions for the adaptive behavior are "expressed in our conscious awareness[.] We need something to spur us against our usual selfish dispositions. Nature, therefore, has made us . . . believe in a disinterested moral code, according to which we *ought* to help our fellows." *Id.* "In short, to make us altruistic in the adaptive, biological sense, our biology makes us altruistic in the more conventionally understood sense of acting on deeply held beliefs about right and wrong." *Id.*; see Michael Ruse & Edward O. Wilson, *Moral Philosophy as Applied Science*, in CONCEPTUAL ISSUES IN EVOLUTIONARY BIOLOGY 421, 425 (Elliott Sober ed., 1994) ("[H]uman beings function better if they are deceived by their genes into thinking that there is a disinterested objective morality binding upon them, which all should obey.").

164. "Virtually all known ethical systems contain some version of the categorical imperative (although, regrettably, the fine print reveals that such rules have almost always been intended to apply only to within group, not out of group members)." ALEXANDER J. FIELD, ALTRUISTICALLY INCLINED? 91–92 (2001). "Sociologists have a convenient epigram: 'in-group amity, out-group enmity.'" DAVID P. BARASH, REVOLUTIONARY BIOLOGY 94 (2001). Barash points out that the fundamental biblical mandate to "'love your neighbor as yourself' . . . almost certainly means literally *neighbor*; that is, someone who is nearby, not just anybody and everybody, but an in-group member." *Id.* at 96. "Rather than a blanket prohibition against bad behavior across the board, the Ten Commandments can be interpreted equally—and probably more accurately—as a warning that such behavior is prohibited, *but only toward a fellow group member.*" *Id.* at 97.

165. This may be too far down the slippery slope to make much sense. From the agent's perspective, it amounts to, "I am to attempt reasonable rescues of myself when I am in peril."

166. A way to get to the "except me" proviso that smacks of universalization, though it is not, is by this type of qualification: "except for graying, six foot tall males living at 543 West 21st Street, N.Y.C." For a similar example, see CASEBEER, *supra* note 154, at 137.

entire world except for one person, it is the type of maxim that fails Kant's test of universality.¹⁶⁷

It has not escaped the reader's notice that, given the posed, proper qualifications above, the rescue maxim can conform to the evolutionary principles of kin selection or reciprocal altruism.¹⁶⁸ Indeed, a universalized maxim may satisfy both principles at once, as where the proviso is, to choose one of the possible classes supported by reciprocal altruism, "except when the person in peril is neither a relative nor a fellow community member."

Perhaps the reader has also noticed the similarity in the gambits of reducing the generality of moral maxims by means of implied or explicit exceptions and the boundary drawing in utilitarian reasoning used to narrow the reach of the utilitarian calculus. Both can lead to moral justifications of maxims that conform to the principles of kin selection and reciprocal altruism.

Of greater difficulty for the Kantian, as it is for the utilitarian, is to identify maxims that support the evolutionary principle of sexual selection. As discussed in the context of utilitarianism, a complexity arises because sexual selection posits different mating preferences for men and women. This would imply that women would adopt moral maxims reflecting their purposes, while men would adopt others.¹⁶⁹ Although this may appear to violate the universalization principle, again, we must be careful to distinguish generality from universality. A universalized maxim at the highest level of generality, such as, "do the right thing," applies equally to men and women, but less general, though universalized maxims may turn on sexual differences, as where, say, a maxim implicitly distinguishes women by declaring, "one is not to expose one's private parts in public except when nursing a child."¹⁷⁰ Certainly moral double standards relating to sexual and gender matters have been around for a very long time.¹⁷¹

167. For illustrations discussed by Kant, see KANT, *supra* note 140, at 89–91. Furthermore, "[i]t is almost as immoral to make exceptions in favor of one's wife, son, or nephew as in favor of oneself." BAIER, *supra* note 151, at 193. A fervent kin selectionist may disagree.

168. While "it is of the utmost importance to take warning that we should not dream for a moment of trying to derive the reality of this principle [of duty] from *the special characteristics of human nature*," KANT, *supra* note 140, at 92, once the principle of duty is derived, there would then be no need to ignore human nature in deciding which maxims to universalize.

169. For the role of the agent's "purpose" in the adoption of a universalized maxim, see *infra* note 173 and accompanying text.

170. Is this a moral maxim or simply etiquette? Certainly it would not be bizarre to hear from an on-looking prig that such behavior was "immoral." Of course, we might also hear from this person, "That's tacky!" Some moral philosophers "exclude etiquette from the 'institution' of morality." Carolyn Pope Edwards, *Culture and the Construction of Moral Values: A Comparative Ethnography of Moral Encounters in Two Cultural Settings*, in THE EMERGENCE

Even if one may defensibly circumscribe a moral maxim to reach one gender only, it is a long stretch to articulate a reasonable or rational maxim that would coincide with the interests of women in attracting a mate under the sway of sexual selection. Recall that men are disposed to prefer women who are young, healthy and committed.¹⁷² But maxims that would advertise these qualities seem not to ring true. Might a woman properly endorse these maxims to promote her interest in demonstrating her desired youthfulness: “When seeking a mate, one is to attempt reasonable rescues of those in peril,” or, “When one is young . . . ?” Turning to the woman’s interest in revealing fitness, is this a proper maxim: “When seeking a mate, one is to attempt arduous rescues of those in peril?” These maxims seem peculiar, as not very moral-like. First, these maxims alone imply that women not of an age or situation to be in the market for mates would have no moral duty to rescue. Second, the self-interested reason for adoption is on the surface, making the maxim seem to be a transparent dictate of prudence rather than morality.¹⁷³ Or, to avoid these appearances, perhaps the original moral

OF MORALITY IN YOUNG CHILDREN, *supra* note 55, at 123, 137 (citing JOHN LADD, *THE STRUCTURE OF A MORAL CODE* (1957) and FRANKENA, *supra* note 86); *cf.* Katherine J. Strandburg, *Privacy, Rationality, and Temptation: A Theory of Willpower Norms*, 57 *RUTGERS L. REV.* 1235, 1258–59 (2005) (discussing the social norm against nursing in public). This weak example reflects the difficulty I had in coming up with a common moral maxim that overtly distinguishes women from men. The application of particular maxims may sometimes lead to differences between the sexes, as where the performance of a rescue maxim in specific circumstances requires physical strength less common among women than men, but this difference can be buried in the expression of the maxim. For example, the maxim may mandate “reasonable” rescues, physical strength being a factor in what is reasonable.

171. For example, “polygyny . . . is allowed or encouraged in most cultures in the anthropological record (708 of 849, or 83 percent), while the converse arrangement, polyandry, is rare (4 of 849); and a double standard of sexual restriction is found in the majority of societies.” MELVIN KONNER, *WHY THE RECKLESS SURVIVE* 7–8 (1990). Of course, a long history of double standards says nothing about their moral value. On the existence and problematics of sexual double standards, see WRIGHT, *supra* note 18, at 147–48.

172. See *supra* text accompanying notes 51–53.

173. But under Kant’s contradiction test, “the contradiction that is involved in the universalization of an immoral maxim is that the agent would be unable to act on the maxim in a world in which it were universalized so as to achieve his own purpose – that is, the purpose that is specified in the maxim.” KORSGAARD, *supra* note 141, at 92. “If this interpretation is correct, then it is essential that in testing maxims of actions the purpose always be included in the formulation of the maxim.” *Id.*; see SINGER, *supra* note 144, at 237 (“[A] reference to the circumstances and purpose of an action is necessarily involved in the ‘maxim’ of the action.”). Because circumstances and purpose are included in maxims, “Kant’s ethical rigorism is neither a consequence of nor compatible with the principle of universality.” SINGER, *supra* note 144, at 238. Mill takes the implicit purposes for universalized maxims down a utilitarian path: “When Kant . . . propounds as the fundamental principle of morals . . . he virtually acknowledges that the interest of mankind collectively, or at least of mankind indiscriminately, must be in the mind

maxim, “one is to attempt reasonable rescues of those in peril,” will suffice to do the work, with the balancing implications of the word “reasonable” incorporating the interest of the mate-seeking woman in displaying her attractive qualities. Under this approach, sexual selection does not affect the chosen maxim, but only whether the maxim is applicable in particular situations.

But women not only have an interest in attracting mates, but also in attracting matings. These are not the same thing. Nirvana for a woman in the Darwinian world is to obtain the best possible, permanent, unsuspecting, cuckold-ready mate, and the genes of a male 10.¹⁷⁴ While a highly-rated mate may be hard to obtain, outside matings are not, as is evidenced by the statistics.¹⁷⁵ For the woman seeking a clandestine, genetic upgrade, it is not obvious what maxim she would adopt in the context of the rescue doctrine. Because when it comes to mating, men are disposed to seek quantity while women seek quality, a man’s roving eye focuses less on youth and health than does his devoted heart. For a male higher on the scale of desirability than a woman’s actual or probable mate, physical allurements (and discretion?) may do for a brief affair, a quality that does not seem to be relevant to a rescue attempt.¹⁷⁶

Moral maxims advancing the interests of men in attracting potential mates under the influence of sexual selection also are a stretch. Women, it was noted, generally prefer mates who are strong, daring, wealthy, powerful, generous, loving, and committed.¹⁷⁷ Some of these qualities are better exemplified than others in the likely circumstances of the rescue

of the agent when conscientiously deciding on the morality of the act.” MILL, *supra* note 74, at 64–65.

174. See, e.g., BUSS, *supra* note 44, at 90–91.

175. See, e.g., NANCY L. SEGAL, ENTWINED LIVES 39 (1999) (“Nonpaternity rates are estimated to be between 5 and 30%, so a substantial minority of children are not related to presumed fathers.” (footnote omitted)); THIESSEN, *supra* note 49, at 323 (“The estimates for female cuckoldry range from 5 to over 40 percent in America and Britain, escalating even higher, depending upon the society.”); Serge Brédart & Robert M. French, *Do Babies Resemble Their Fathers More Than Their Mothers? A Failure to Replicate Christenfeld and Hill (1995)*, 20 EVOLUTION & HUM. BEHAV. 129, 130 (1999) (“[R]ates of human misassigned paternity (based on blood typing tests) of 6% to 30% have been reported in studies done in southern England, 9% among Venezuelan Yanomanö, and 10% in rural Michigan.” (references omitted)); Steven M. Platak et al., *Reactions to Children’s Faces: Males Are More Affected by Resemblance than Females Are, and So Are Their Brains*, 25 EVOLUTION & HUM. BEHAV. 394, 395 (2004) (“Current estimates of extra-pair paternity in humans vary between 1% and 20%, with most around 10% . . .”). Genetically for men, nothing could be worse than cuckoldry.

176. The man, of course, is not indifferent to considerations of health, for he wants to avoid transmitted diseases. Furthermore, any fame that comes from a rescue by a woman may be an attractive feature to a man for even a simple mating.

177. See *supra* note 50 and accompanying text.

doctrine. Strength and daring would seem to come often into play. Wealth, power and generosity may be important if resources must be mustered for a rescue, but the rescue doctrine usually relates to situations in which fast action is needed, thereby precluding the deliberate behavior that seems necessary to demonstrate these attributes. On the other hand, the social approbation that usually ensues from heroics may bring some wealth and power in its train. Lovingness and commitment may be reflected in rescues of family members and friends. Therefore, to weave moral maxims tightly around the relevant qualities being sought by women may lead to the same types of nonmoral-like precepts discussed above in considering a woman's adoption of maxims driven by sexual selection. At a higher level of generality, such a maxim might be, "One is to attempt reasonable rescues of those in peril, [especially(?)] when they demonstrate attractive qualities." But again, the proviso does not ring true to a Kantian moralist. This maxim seems more prudential than moral. Or, also again, the word "reasonable" in the otherwise unqualified maxim may do the work to allow the potential male rescuer to take into account the tugs of sexual selection when judging the applicability of the maxim.

For the male seeking matings rather than a mate, most of the qualities preferred by women in a mate recede, and hence the man's self-interested moral maxims would change accordingly. Rather, this should be put the other way around. For women seeking matings, that is, "good" genes, the only preferred qualities in men that are relevant would be those that have a genetic component. Strength would generally fall into this category. Beyond this one, we move into controversial territory. Daring, or at least lack of inhibition, is an aspect of temperament¹⁷⁸ that has genetic ingredients,¹⁷⁹ and

178. From extensive studies of children, Kagan found "two easily observed behavioral profiles, which we call *inhibited* and *uninhibited*." Jerome Kagan, *Born to Be Shy?*, in STATES OF MIND 29, 33 (Roberta Conlan ed., 1999) ("[T]hese terms reflect only two of the many possible temperaments.").

179. "The concept of temperament refers to any moderately stable, differentiating emotional or behavioral quality whose appearance in childhood is influenced by an inherited biology, including differences in brain neurochemistry." JEROME KAGAN, GALEN'S PROPHECY, at xvii (1994). Relevant to rescue attempts, "there are genes for the development of a fearless, risk-taking profile." Kagan, *supra* note 178, at 49. "Psychologists have discovered that our personalities differ in five major ways: we are to varying degrees introverted or extroverted, neurotic or stable, incurious or open to experience, agreeable or antagonistic, and conscientious or undirected." PINKER, *supra* note 72, at 50. "All five of the major personality dimensions are heritable, with perhaps 40 to 50 percent of the variation in a typical population tied to differences in their genes." *Id.*; see MATT RIDLEY, NATURE VIA NURTURE 83 (2003) ("Psychologists nowadays define personality in five dimensions – the so-called 'big five' factors: Openness, Conscientiousness, Extroversion, Agreeableness and Neuroticism In each case a little over 40 percent of the variation in personality is due to direct genetic factors . . ."). Research has shown that "long alleles (e.g., 7-repeats) of the DRD4 gene have been linked

temperament generally may have adaptive value.¹⁸⁰ Generosity and commitment may also overlap with heritable temperaments. The remaining qualities of wealth and power seem not to have a significant genetic component, at least insofar as they do not correlate with intelligence.¹⁸¹ We will await further enlightenment from scientists. Other genetic qualities, however, would be important to a woman seeking only “good” genes. For example, she would like her children to be intelligent, attractive and healthy in order to increase their reproductive opportunities.¹⁸² Since she may need to trade off these qualities, and others, in order to find a committed, supportive mate, they should move higher onto her wish list for outside matings.¹⁸³ The male with a roving eye considering which rescue maxim to embrace

to novelty-seeking personality, hyperactivity, and risk-taking behaviors.” Chuansheng Chen et al., *Population Migration and the Variation of Dopamine D4 Receptor (DRD4) Allele Frequencies Around the Globe*, 20 EVOLUTION & HUM. BEHAV. 309, 320 (1999). The authors ascribe differences among populations in the frequency of this gene to whether the society is migratory, where the exploratory aspect of human nature is beneficial, or sedentary, where novelty-seeking would have social costs and be selected against. *See id.*; *see also* PINKER, *supra* note 72, at 48 (noting that particular genes are associated with general intelligence, thrill seeking, and anxiety).

180. *See* Randolph M. Nesse, *Psychiatry, in THE SOCIOBIOLOGICAL IMAGINATION, supra* note 21, at 23, 33 (“We know that many personality attributes are strongly heritable, and it is thus tempting to interpret personality types as alternative strategies for getting along in the social world.”). But “the precise origins of the many human temperaments—the processes that make for gregarious risktakers or for shy souls who prefer the safety of the known—remain something of a puzzle.” Kagan, *supra* note 178, at 30.

181. Intelligence does have a substantial genetic component. *See, e.g.*, DEAN HAMER & PETER COPELAND, *LIVING WITH OUR GENES* 218–19 (1998) (stating that IQ is 48–75% heritable); SEGAL, *supra* note 175, at 49–60, 135–36 (“30–70%”); ULLICA SEGERSTRÅLE, *DEFENDERS OF THE TRUTH* 236, 283 (2000) (stating that IQ is up to 80% heritable); Tim Beardsley, *For Whom Did the Bell Curve Toll?*, 9 SCI. AM. PRESENTS, Winter 1998, at 30, 30 (“[A]bout 48 percent.”).

182. But, at least today, studies show that intelligence decreases the number of offspring and frequency of sex for both men and women. Rosemary L. Hopcroft, *Sex, Status, and Reproductive Success in the Contemporary United States*, 27 EVOLUTION & HUM. BEHAV. 104, 110, 112 (2006). Even though attractiveness is not high on the list of qualities sought by women in a mate, there are reproductive benefits to having a sexy son: “If female tastes were also heritable, as they probably would be, a female choosing a mate who appealed to her would effectively be choosing genes for her sons, which would make them appealing to the next generation of females.” Christopher R. Badcock, *PsychoDarwinism: The New Synthesis of Darwin and Freud*, in *HANDBOOK OF EVOLUTIONARY PSYCHOLOGY, supra* note 15, at 457, 472; *see* BARKOW, *supra* note 47, at 58–59; CRONIN, *supra* note 19, at 201–04; RICHARD DAWKINS, *THE BLIND WATCHMAKER* 195–220 (1987). This is known as the “sexy son[.]” theory. BUSS, *supra* note 45, at 91; MATT RIDLEY, *THE RED QUEEN* 142–43 (1993); Daniel J. Kruger et al., *Proper and Dark Heroes as Dads and Cads*, 14 HUM. NATURE 305, 307 (2003). All else equal, an attractive daughter would also have better marriage prospects.

183. *See* Michele K. Surbey & Collette D. Conohan, *Willingness to Engage in Casual Sex*, 11 HUM. NATURE 367, 379 (2000) (“Where little else is to be gained from a relationship, a focus on attractiveness, insofar as it signifies ‘good genes,’ may be the best strategy for women.”).

would then be eager to demonstrate his intelligence, strength, and health, and perhaps his daring and lovingness. I have pondered above the types of maxims that these might produce. Perhaps here, more than when accommodating the other reaches of sexual selection, the simple maxim, "One is to attempt reasonable rescues of those in peril," will suffice as an articulated guideline, though again the word "reasonable" hides the complications of application. But those ancestral men who acted on a more refined impulse that corresponded to the nuances of sexual selection were more likely to leave additional descendants.

To reconnoiter, because the genetically self-interested adoption of maxims may seem inconsistent with Kantian rational morality, let me summarize my argument to the contrary. I have contended that the universalization form of the categorical imperative is not necessarily abridged simply by reducing the generality of a moral maxim to coincide with genetic self-interest. Though related, generality is different from universality. The agent's purpose for adopting the maxim also may legitimately be on the surface. Evident self-interest does not disqualify a maxim. It only must be one that the agent would agree to everyone else embracing as well. Yet still, at some point we may wonder at self-interested moral maxims that appear to be simply dictates of prudence for advancing the interests of only "number one." Among other things, they may seem to exploit the rescuee and others, contrary to the second form of the categorical imperative, to which I now turn.

2. Respect for Persons

The adoption of maxims based on genetic self-interest may appear to run afoul of the second form of Kant's categorical imperative that people are to be treated as an end in themselves and not used as a means only to another's end.¹⁸⁴ The maxims seem to use the rescuee as a means to the rescuer's reproductive advantage. Indeed, this is supposed to be the case. Nevertheless, the maxims do not use the rescuee as a means *only* to the rescuer's advantage. The rescuee is not simply being exploited.¹⁸⁵ The rescuee gets much from adherence to the maxims. She gets rescued. We could hardly

184. "[M]an, and in general every rational being, *exists* as an end in himself, *not merely as a means* for arbitrary use by this or that will: he must in all his actions, whether they are directed to himself or to other rational beings, always be viewed *at the same time as an end.*" KANT, *supra* note 140, at 95–98.

185. "At the most general level, A exploits B when A takes unfair advantage of B." ALAN WERTHEIMER, EXPLOITATION 10 (1996). At worst, the rescue may be a "mutually advantageous exploitation" in which "A gains *unfairly* or *excessively* by an action or transaction that is *beneficial* to B." *Id.* at 207.

imagine a potential rescuee objecting to the attempt to rescue her because she knows that the rescuer was motivated, even entirely, by the opportunity to display his daring to potential mates.¹⁸⁶ The rescuee will not cut off her nose in spite. As in a contractual arrangement, there is a quid pro quo. The rescuee gets rescued, and the rescuer gets evolutionary benefits. In this sense, both parties are using one another, but this is done with mutual respect for the other's autonomy, even though there is no explicit prior agreement.

While an actual rescuee will gladly agree to the rescue even though the rescuer is self-interested, those potential rescuees who fall outside the evolutionarily driven, universalized maxims may object to being left out of the classes of persons to be aided. They are being neglected. Does this mean that they are not being respected as ends in themselves?

At first glance, it appears that those persons who fall outside the evolutionary-centered maxims have no grounds to object. Unlike for an actual rescuee, they are not being used as any kind of means at all. Therefore, what do they have to complain about? To answer this, we must recall why this form of the categorical imperative emerges. It is because humans, as rational beings, are thereby ethical beings, and hence are to be respected as ends in themselves. Each person is to be respected as much as any other person. In our context, by declaring some people subject to rescue, but not others, the respect granted appears to be unequal.

One way to avoid the thrust of this second form demanding respect for others is to deny its factual underpinnings for particular persons. As history has demonstrated all too often, people can easily dismiss the humanity of outsiders.¹⁸⁷ They might say that the outsiders are neither rational nor ethical

186. "[O]n at least one plausible reading of the Kantian maxim, one treats another as a mere means only when one treats 'him in a way to which he could not possibly consent,' as in cases of coercion and fraud." *Id.* at 23.

187. Petrinovich observes that people who understand moral principles can avoid their force by distorting the relevant facts. "Thus, the idea of humanity is redefined so that it does not include an outgroup . . . and this definition is used to justify decisions to disregard moral obligations to those of the outgroup on the grounds that they are not equal humans of our kin, kind, or community." PETRINOVICH, *supra* note 72, at 31; see HRDY, *supra* note 54, at 529 ("In many cultures the word for one's own group is the word for 'humans.' Humans are, by definition, those people like oneself, and also likely to be those people one is most closely related to."). Jane Goodall refers to cultural "pseudospeciation" whereby:

[M]embers of one group may not only see themselves as different from members of another, but also behave in different ways to group and nongroup individuals. In its extreme form pseudospeciation leads to the 'dehumanizing' of other groups, so that they may be regarded almost as members of a different species.

Jane Goodall, *Gombe Chimpanzee Politics*, in PRIMATE POLITICS 105, 135–36 (Glendon Schubert & Roger D. Masters eds., 1991). "Virtually all people tend to denigrate those they

and therefore, under Kantian suppositions, they are not entitled to respect. Even Nazi Germany, a highly educated society familiar, if not imbued, with Kantian morality, was able to adopt this gambit in partial justification of the Final Solution.¹⁸⁸ While cognitive dissonance may have played a role in the Nazis' perception of facts, all humans are subject to the distortions of this and other psychological defense mechanisms. As Hume instructed, reason is

define as other, regarding them as inferior, less than human." Elaine Pagels, *The Origin of Satan in Christian Traditions*, in 20 THE TANNER LECTURES ON HUMAN VALUES 1, 16–17 (Grethe B. Peterson ed., 1999). Conversely, "altruists simply have a different way of seeing things. Where the rest of us see a stranger, altruists see a fellow human being." MONROE, *supra* note 13, at 3. One observer finds three interrelated processes behind "sanctioned massacres": the processes of authorization and routinization, which deflect the perceived need and opportunities for moral challenges, "and (c) processes of dehumanization which deprive both victim and victimizer of identity and community." Herbert C. Kelman, *Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizer*, 29 J. SOC. ISSUES 25, 25 (1973). A psychologist who studies the psychology of moral reasoning, Albert Bandura, "has identified eight mechanisms that people use to rationalize immoral behavior." Benedict Carey, *In the Execution Chamber, The Moral Compass Wavers*, N.Y. TIMES, Feb. 7, 2006, at F6. One of them is dehumanization, that is, "[a]ssailing others as degenerates, devils, savages or infidels." *Id.* (listing the others as moral justification, euphemistic labeling, advantageous comparison, displacement of responsibility, diffusion of responsibility, disregard or distortion of consequences and blaming the victim).

188. See SAMUEL P. OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI GERMANY 6 (1988) (explaining that the differences between Jews and others "were highlighted and exaggerated by a constant barrage of Nazi propaganda that defined Jews as outside the pale of humanity"). For example, one rescuer of concentration-camp Jews reported that a guard at a concentration camp rationalized his shooting of six Jews with the afterthought, "You know, they were not human anymore." MONROE, *supra* note 13, at 205. One commentator particularly condemns the Nazis because they should have known better than, say, "primitive tribe[s]," to dehumanize those outside their group. See Robert J. Richards, *Birth, Death, and Resurrection of Evolutionary Ethics*, in EVOLUTIONARY ETHICS, *supra* note 110, at 113, 122. Some Americans used this rationalization to justify atrocious behavior towards Amerindians. "For example, Oliver Wendel[1] Holmes claimed that Indians were nothing more than a 'half-filled outline of humanity' whose 'extermination' was the necessary 'solution to the problem of [their] relation to the white race.'" James P. Sterba, *Understanding Evil: American Slavery, the Holocaust, and the Conquest of the American Indians*, 106 ETHICS 424, 430 (1996) (quoting DAVID E. STANNARD, AMERICAN HOLOCAUST 245 (1992)). Slavery has been similarly justified. "Ignorance and depravity, and the inability to rise from degradation to civilization and respectability, are the most usual allegations against the oppressed. . . . By making the enslaved a character fit only for slavery, [slaveholders] excuse themselves for refusing to make the slave a freeman." David A. J. Richards, *Tolerance and the Struggle Against Prejudice*, in TOLERATION 127, 137 (David Heyd ed., 1996) (quoting Frederick Douglass, *The Claims of the Negro Ethnologically Considered*, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 295 (Philip S. Foner ed., 1975)). "[I]f there is a universal in genocide, it surely is the practice of dehumanizing the victims, just as dehumanizing the enemy is a frequent feature of warfare." PAUL R. EHRLICH, HUMAN NATURES 263 (2000) (footnote omitted); see PINKER, *supra* note 72, at 273–74, 320–21.

the slave of the passions.¹⁸⁹ Though today we are quick to distinguish between ratiocination and rationalization, at least in principle, it is easy to imagine this distortional process at work when our ancestors, perhaps with lesser cognitive abilities, struggled against other clans or groups on the savanna.¹⁹⁰

One would hope that the modern, developed world has grown beyond these rationalizations for dismissing the humanity of outsiders. But we have little reason to believe this is true, and much evidence to the contrary. As seen in the former Yugoslavia, it is easy enough to deny the humanity of one's life-long neighbors, let alone outsiders. This may have biological roots. Humans appear to have inclinations toward ethnocentricity, xenophobia, and territoriality, among other tendencies to look askance at outsiders.¹⁹¹ For example, some anthropologists have found evidence of global ethnocentrism: "People universally see the ingroups to which they belong as 'virtuous and superior' . . . and 'strong'. . . . Moreover, people tend to 'see [an] out group as contemptible, immoral and inferior'" ¹⁹² It

189. See HUME, *supra* note 123, at 413. "The heart of man is made so as to reconcile contradictions." ALEXANDER, *supra* note 6, at 107 (quoting 2 DAVID HUME, *ESSAYS AND TREATISES ON SEVERAL SUBJECTS* 203 (1772)). In Darwinian terms, "[b]elonging as we do to a species (*the species*) whose members justify their actions morally, we are designed to think of ourselves as good and our behavior as defensible, even when these propositions are objectively dubious." WRIGHT, *supra* note 18, at 338–39.

190. In band societies that periodically face times of need, "[t]here would be advantages to being able to define people in other groups as a different species—as 'them,' not 'us.' They could thus be placed outside the universe of obligation, and it would then be psychologically easier to remove them indiscriminately as competitors." EHRlich, *supra* note 188, at 261 (footnote omitted).

191. See W. D. HAMILTON, *Innate Social Aptitudes of Man: An Approach from Evolutionary Genetics*, in *NARROW ROADS OF GENE LAND*, *supra* note 21, at 315, 330 (xenophobia); Edward O. Wilson, *Comparative Social Theory*, in 1 *THE TANNER LECTURES ON HUMAN VALUES* 49, 68 (Sterling M. McMurrin ed., 1980) (ethnocentricity, xenophobia, territoriality). "The common evolutionary adaptations of strong kinship ties were nepotism, ethnocentrism, tribalism, social bonding, obedience to authority, nationalism, patriotism, [territoriality], enemy thinking, xenophobia, jingoism, and reciprocal social exchange. We carry these traits with us to the market every day." THIESSEN, *supra* note 49, at 296. "The dark side to the inborn propensity to moral behavior is xenophobia." WILSON, *supra* note 44, at 253. "People give trust to strangers with effort, and true compassion is a commodity in chronically short supply." *Id.* Even among animals, xenophobic aggression is pervasive. See JOSEPH LOPREATO & TIMOTHY CRIPPEN, *CRISIS IN SOCIOLOGY* 263 (1999); Josiah Ober & Stephen Macedo, *Introduction to DE WAAL, PRIMATES* *supra* note 63, at ix, xv ("The tendency towards partiality for insiders is a constant among nonhuman social animals.").

192. Ian Jobling, *The Psychological Foundations of the Hero-Ogre Story*, 12 *HUM. NATURE* 247, 252 (2001) (quoting R.A. LEVINE & D.T. CAMPBELL, *ETHNOCENTRISM* 13, 14 (1972)). "The theory of ethnocentrism known as 'realistic group conflict theory' . . . argues that these biases in the perception of ingroup and outgroup are exacerbated by conflict between the groups." *Id.* at 253 (citations omitted). "In viewing our enemies as dissimilar to us, we move

is not difficult to conjure up reasons why this may have had survival value on the savanna where, presumably, competition for resources was intense, and reasons why this may bring us to disaster today. Acceptance of the demeaning of out-groups as the supposed facts could lead even a strong Kantian to exclude them from a rescue maxim.

A second plausible means of rejecting the extension of a rescue maxim to others is, rather than to deny their humanity, to declare that they have forfeited their claim to kind treatment.¹⁹³ One of the responses to criminal conduct provides a good example of this line of reasoning: By virtue of the illegal conduct, the criminal forfeits her right to be free of public chastisement. Indeed, Kant argues, a society shows respect for the criminal's ethical personhood by holding her responsible for her illicit conduct.¹⁹⁴ Otherwise, the criminal is not respected as a rational person, but rather is treated as a child or mental incompetent. The retributive aspect of

them outside our domain of empathy. Indeed, when out-group members are perceived as a threat, it is not unusual to dehumanize them completely, viewing them as rats, pigs, weasels, snakes, and dogs” *Id.* (quoting D. L. Krebs & K. Denton, *Social Illusions and Self-Deception: The Evolution of Biases in Person Perception*, in *EVOLUTIONARY SOCIAL PSYCHOLOGY* 21, 28 (J. A. Simpson & D. T. Kenrick eds., 1997)); see BROWN, *supra* note 45, at 139 (noting that among people in general, “[a]n ethical dualism distinguishes the in-group from the out-group, so that, for example, cooperation is more expectable in the former than with the latter”); DE WAAL, *PRIMATES*, *supra* note 63, at 53 (“Universally, humans treat outsiders far worse than members of their own community: in fact, moral rules hardly seem to apply to the outside.”); GEARY, *supra* note 100, at 136–39 (discussing the universal tendency of a wide range of species, including humans, to identify in-groups and out-groups, which, at times among humans, leads to devaluing or even dehumanizing out-groups); WRIGHT, *supra* note 18, at 340 (“We tend to find our rivals morally deficient, [and] to find our allies worthy of compassion”). There may be a silver lining to this: “In the course of human evolution, out-group hostility enhanced in-group solidarity to the point that morality emerged,” though “[m]oral systems are inherently biased towards the in-group.” DE WAAL, *PRIMATES*, *supra* note 63, at 54, 163.

193. This relates to “blaming the victim” whereby “[t]he people being cheated or attacked are ‘asking for it.’” Carey, *supra* note 187, at F6 (discussing the findings of the psychologist Dr. Albert Bandura).

194. See M. Margaret Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 *LAW & PHIL.* 25, 25 (1987) (noting that Kant’s standards for punishment are “his renowned principle of respect for persons and his insistence that only the ‘Law of retribution’ (*ius talionis*) could determine the morally appropriate kind and degree of punishment”). In a remarkable passage, Kant goes so far as to write that if a society is about to dissolve forever, it has the duty to carry out the executions of its convicted murderers, “for if [the people] fail to do so, they may be regarded as accomplices in this public violation of legal justice.” IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (John Ladd trans., 1965) (1797); see also CHRISTINE M. KORSGAARD, *Creating the Kingdom of Ends: Reciprocity and Responsibility in Personal Relations*, in *CREATING THE KINGDOM OF ENDS*, *supra* note 141, at 188, 189 (“To hold someone responsible is to regard her as a *person*—that is to say, as a free and equal person, capable of acting both rationally and morally.”). See generally JEFFRIE G. MURPHY, *Kant’s Theory of Criminal Punishment*, in *RETRIBUTION, JUSTICE, AND THERAPY*, *supra* note 71, at 82.

Kant's morality is well known. As applied to an evolutionary rescue maxim, a person could be denied equal consideration if she has committed a relevant grievance.¹⁹⁵ On the ancestral savanna, simple trespass on clan or tribal territory may have been a sufficient grievance to justify hostility, to say nothing of the denial of beneficence.¹⁹⁶ Beyond this, if, by means of her conduct, a person has denied the humanity of the agent or her cohorts, has not treated them with due respect, a like response may be warranted.¹⁹⁷ Again, we may imagine how these justifications may have been prominent during evolutionary times. A neighboring group may have once invaded a campsite, or intruded into the ancestral hunting grounds, or even simply abused, refused to aid, or declined to reciprocate the kindness of the agent's fellow clan member. Then, all members of this out-group are guilty of unacceptable conduct or disrespect, either as perpetrators, conspirators, sympathizers, or by virtue of their membership status under a notion of collective guilt.¹⁹⁸ Unfortunately, this reasoning would not sound unduly anachronistic in today's world.

195. "[G]enocidalists frequently see themselves as the victimized parties honestly acting to redress a grievance. What to an objective observer is a barbaric act of murder, genocidalists perceive as a preemptive strike necessary to ward off their own destruction." MONROE, *supra* note 13, at 220; see Kelman, *supra* note 187, at 33–34 ("The most widely accepted justification for violence is that it occurred for reasons of self-defense against attack or the threat of attack."). It is easy enough to perceive others as wanting, even when they are not a threat. One investigator "found that research participants were likely to derogate a person whom they perceived to be an innocent victim of suffering. This derogation presumably served to maintain participants' belief that people get what they deserve and deserve what they get." C. DANIEL BATSON, THE ALTRUISM QUESTION 221 (1991) (citation omitted).

196. We can only wonder how tolerant ancient peoples were to outsiders seeking resources. In modern times, one researcher finds that "[h]uman foragers are overwhelmingly permissive in allowing neighbouring groups to forage on their land." Bruce M. Knauft, *Symbols, Sex, and Sociality in the Evolution of Human Morality*, in EVOLUTIONARY ORIGINS OF MORALITY, *supra* note 27, at 130, 133. "Revealingly, warfare between bands of simple human foragers is rare to nonexistent . . ." *Id.* at 134. Other researchers find less tolerance. "Extant bands fight a lot, and they seem more likely to fight if they have a history of having to deal with some environmental unpredictability. They also seem more prone to fighting if hunting is predominantly their subsistence strategy." Christopher Boehm, *The Origin of Morality as Social Control*, in EVOLUTIONARY ORIGINS OF MORALITY, *supra* note 27, at 149, 154 (citation omitted). "There is a lot of anthropological and archeological evidence that warfare was and is common among past and present hunter-gatherer societies." Christoph Kuzmics & Carlos Rodriguez-Sickert, *The Evolution of Moral Codes of Behavior* 34 (Aug. 11, 2007) (unpublished manuscript, on file with author).

197. "[C]an a person's conduct be so contemptuous of others that it defeats and cancels our (presumed) obligation to respect him or her as a human being? Many seem to think so; Kant did not . . ." Thomas E. Hill, Jr., *Respect for Humanity*, in 18 THE TANNER LECTURES ON HUMAN VALUES 1, 65 (Grethe B. Peterson ed., 1997) (1996).

198. "[Emotions] can be experienced in a *corporate fashion*. By this we mean that anger, shame, pride, gratitude, and so on can be elicited by actions that affect some part of a group in

Beyond reliance on (problematic) facts to circumscribe the reach of a Kantian, evolutionary rescue maxim, there is a contractual approach to the imperative to respect potential rescuees. As suggested above, a contract is quite consistent with Kantian mandates, indeed, it is an archetype of a just relationship. Each party, in seeking the consent of the other, demonstrates respect for her as an end in herself. A contractual analysis of rescue maxims may therefore provide a way to satisfy the Kantian. Since individual contracts are unrealistic, the contract in question will be a type of social contract, a hypothetical one in the fashion of Rawls, who professes his own theory of justice to be Kantian.¹⁹⁹ Suppose, then, that the founders, not simply of a particular society but rather of all societies in order to encompass outsiders, sit down behind a veil of ignorance to draft a rational rescue doctrine or set of maxims. What would it look like?

Well, the rescue doctrine emerging from behind a veil of ignorance could be highly variable. I doubt that it would coincide with kin selection alone. While each of the contractors behind the veil may well prefer their own kin to others because of biological urges, they would realize that the beneficial interdependency of the modern world depends on more extensive cooperation. Therefore, the rescue doctrine would cover, at least, the enlarged range of reciprocal altruism. Modern commercial societies may favor an international reach to the doctrine to reflect the current marketplace, while traditional, exploited societies may prefer to stay within their visible horizons.²⁰⁰ But even the expansive societies would reject a doctrine

which the actor is a member, even though the actor was not directly involved in the interaction." Fessler & Haley, *supra* note 32, at 27. "For example, intervillage violence occurs not infrequently in Bengkulu, most commonly when a young man from one village insults someone from another village—the action is experienced as a transgression by all members of the second village, leading to widespread anger and calls for retribution." *Id.* at 28. By way of brief explanation, "corporate emotions not only function to promote the individual's interests by leading actors to act in the group's interests, they also function to promote the individual's interests by shaping relationships with fellow group members." *Id.*

199. See RAWLS, *supra* note 26, at 140–41, 251–57. Eisenberg, under a deontological, Rawlsian perspective that considers consequences, finds the existence of a moral duty to rescue. "People imagining that they might be in a position of needing rescue or might be able to make a rescue certainly would choose to have such legal duty (since the adverse consequence of not being rescued is far greater than the inconvenience of rescuing)." Eisenberg, *supra* note 12, at 681. Ruse, discussing the Rawlsian contract, suggests a third way to reduce obligations to outsiders: "[A] Rawlsian might well argue that relations with people from other countries, particularly very deprived countries, call for somewhat different levels of moral obligation. Were the members of such countries really, even hypothetically, in an original position with us?" RUSE, *supra* note 6, at 247. Rawls himself puts aside "questions of justice between societies." Rawls, *supra* note 112, at 524.

200. But the veil of ignorance may keep the founders from knowing what type of society they are members of.

derived from reciprocal altruism that would accord equal rescue effort to neighbors and distant strangers. In economic terms, this would be inefficient, oftentimes simply because of the information and transportation costs relating to distant dangers, to say nothing of unavoidable delays. The required effort would take into account the likelihood of reciprocation, direct or indirect, and this depends partially on prospective interactions, including geographical considerations. The breadth, then, of the adopted rescue maxim would not turn on community, race, religion, or ethnicity per se, but may somewhat have this consequence because co-members of particular groups may interact with one another more often in, say, their houses of worship or concentrated neighborhoods.

But again, distinguishing neighbors from strangers, and indirectly, coreligionists, et cetera, seems troublesome for a Kantian. These rescue distinctions smack of discrimination, as valuing some persons more than others. This is a problem with hypothetical contracts. As long as everyone “agrees,” such a contract could justify a vast array of legal and political regimes. While the Kantian may balk at allowing people to consent to self-enslavement or self-destruction, because these reflect disrespect for oneself, most other regimes could, arguably, claim justification through a supposed hypothetical contract. Rawls found his rational persons behind the veil of ignorance to agree to a regime of welfare state liberalism.²⁰¹ Nozick’s Kantian political state turned out to be libertarian.²⁰² Posner declared consent as the grounding for the social goal of wealth maximization, “in the Kantian philosophical tradition.”²⁰³ In light of the range of these well-regarded Kantian systems, what kind of distinction in a rescue doctrine would be supported by committed Kantians? Without pursuing this much

201. See generally RAWLS, *supra* note 26. In setting out his case for “justice as fairness,” Rawls’s guiding light is that society’s basic structure must satisfy “the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality.” *Id.* at 11. These principles “regulate all further agreements” and “specify the kinds of social cooperation that can be entered into.” *Id.* Ruse finds that “[t]his all sounds like reciprocal altruism in action.” RUSE, *supra* note 6, at 245. The Rawlsian social contract “is simulated by natural selection—burned into our souls—because that is the way to maximize an individual’s interests, in a group where everyone is trying to do the same.” *Id.* at 246; see Michael Ruse, *The New Evolutionary Ethics*, in EVOLUTIONARY ETHICS, *supra* note 110, at 133, 149–50. As Ruse points out, Rawls himself suggests this. See RAWLS, *supra* note 26, at 503 (“The theory of evolution would suggest that . . . the capacity for a sense of justice and the moral feelings is an adaption of mankind to its place in nature.”).

202. Nozick advocates a minimal state that recognizes strong side constraints on what can be done in pursuit of goals. See NOZICK, *supra* note 75, at 28–30. “Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent.” *Id.* at 30–31.

203. See POSNER, *supra* note 26, at 89.

further, my intuition is that the spirit of Kantian morality, seeing all humans as ends in themselves, would disfavor narrow categories of mandated rescues. Those aligning with kin selection alone are too exclusive, placing the vast bulk of humanity outside one's substantial moral concerns. Even enlarging the circle to encompass reciprocal altruism may not suffice to satisfy the spirit of Kantianism, for this also draws peculiar, morally jarring boundaries. Recall that when discussing the purely evolutionary implications of reciprocal altruism, I observed that distinctions would be made among persons who are more or less likely to be in a position, or to have the inclination, to reciprocate, directly or indirectly, and hence one would distinguish among fellow householders, friends, distant acquaintances and strangers, the rich and the poor, the young and the elderly, the demonstrated altruists and loners, prominent leaders and social pariahs, et al. Like Rawls,²⁰⁴ and even Posner,²⁰⁵ I believe a dedicated Kantian would find at least some of these distinctions problematic. Notwithstanding support from a supposed hypothetical contract, some persons are being treated disrespectfully.

The hypothetical contract aligning the rescue maxims with the urges of sexual selection is indifferent to most, if not all, of these questionable distinctions among potential rescuees. The rescuer here is not particularly concerned with the identity of the rescuee, that is, whether she is a relative or someone with whom future reciprocation is in the offing. Instead, the rescuer is primarily concerned with demonstrating and improving her, or,

204. Rawls finds among the "natural duties:" "[T]he duty of help[ing] another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself." RAWLS, *supra* note 26, at 114, 117. "[I]t is characteristic of natural duties that they apply to us without regard to our voluntary acts." *Id.* at 114. Natural duties also "hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally." *Id.* at 115. Notice that Rawls's natural duties exist irrespective of a Kantian social contract. Notice also that the natural duty to help does not extend to "excessive risk or loss to oneself," thereby often falling short of the risks assumed in rescue doctrine cases. Rawls asks whether, under his social contract, one has special duties to immediate descendants. *See id.* at 128. He finds that, motivationally, "representatives from periods adjacent in time have overlapping interests," and that everyone would have concern for some persons in the next generation, "it being presumed that their concern is for different individuals in each case." *Id.* at 128–29. "Thus the interests of all are looked after and, given the veil of ignorance, the whole strand is tied together." *Id.* at 129.

205. "Suppose that if all the members of society could somehow be assembled they would agree unanimously that, as a reasonable measure of mutual protection, anyone who can warn or rescue someone in distress at negligible cost to himself (in time, danger, or whatever) should be required to do so." Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 460 (1979). Because insurmountable technical obstacles prevent the formation of such a contract, "tort duties can sometimes (perhaps, as we shall see, generally) be viewed as devices for vindicating the principles that underlie freedom of contract." *Id.*

more insistently, his own qualities by means of the rescue effort for purposes of attracting a mate or mating. But there are limits to the rescuer's indifference to the identity of the rescuee. For example, the rescue of a social pariah, as a Jew in Nazi Germany, particularly if this identity is known when undertaking the rescue, is not likely to endear the rescuer to most available mates, to say nothing of the detriment to the rescuer's family. A highly risky rescue that is perceived to cross the line into foolhardiness might also give pause to prospective mates. Even Kant would not count foolish rescues among his maxims. What if everyone tried them? Still, in the end, the hypothetical contract coinciding with sexual selection comes closer to satisfying the expansiveness of Kant's targets of moral concern than do the contractual maxims aligning with kin selection or reciprocal altruism.

To summarize, even though I may have had a modicum of success in squeezing the evolutionary principles of kin selection, reciprocal altruism, and sexual selection into a Kantian framework for moral maxims, something about my tactics may seem grossly unsatisfactory. Evolutionary principles are grounded largely on the "selfish gene," while Kantian principles are famous for their foundation on purely rational, detached reasoning.²⁰⁶ Despite any such uneasiness, one must be wary of falling into the genetic fallacy.²⁰⁷ Just because qualified moral maxims have their genesis in selfish, evolutionary principles, it does not follow that they therefore violate the Kantian framework, for this is purely a formal one. That a person adopts a set of maxims that are consistent with evolutionary principles, and embraced for that very reason, is not, for this reason alone, improper, so long as the categorical imperative is met.²⁰⁸ A maxim does not fail the test of pure rationality simply because it is beneficial to the maxim-

206. For example, Rawls refers to the Kantian view "of trying to derive the content of justice within a framework that uses an idea of the rational as the sole normative idea." John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 237 n.20 (1985).

207. The genetic fallacy is "the fallacy of believing that the causal origin of a belief affects the truth or reasonableness of that belief." MURPHY, *supra* note 69, at 24; *see* CARTWRIGHT, *supra* note 15, at 331 ("[T]he belief that the origin of ideas impacts on their truth-value."). "In the case of this, as of our other moral sentiments, there is no necessary connection between the question of its origin, and that of its binding force. That a feeling is bestowed on us by Nature, does not necessarily legitimate all its promptings." MILL, *supra* note 74, at 51; *see* Tamler Sommers & Alex Rosenberg, *Darwin's Nihilistic Idea: Evolution and the Meaningless of Life*, 18 BIOLOGY & PHIL. 653, 662 (2003) ("Thus, it is fallacious to infer directly from the fact that selection for reproductive fitness is the cause of our dispositions to advance and honor moral claims, to the claim that ethical propositions are either false or unjustified.").

208. "We have the Categorical Imperative, or something very much like it, embedded in an epigenetic rule. We feel we ought to treat others as ends. They feel the same way about us. Hence, Darwinism and Kantianism are each satisfied." RUSE, *supra* note 6, at 244.

maker. For example, Kant's defenses of both truth-telling and promise-keeping, while put in terms of contradiction, specifically invoke the long-term interest of the agent.²⁰⁹ But even so, Kant's categorical call for performing duties disinterestedly seems to be in jeopardy under my analysis. This requires a sharper focus.

3. Disinterested Duty

Though a self-interested rescue effort will satisfy the rescuee, if not those outside the scope of the rescue maxims, we must see if it will also satisfy Kant. He is more demanding. While his framework may accommodate self-interested moral maxims, Kant specifies under the third form of the categorical imperative that, once adopted, the maxims are to be performed disinterestedly. One is not to perform a duty because it is in one's self-interest, as where the agent might otherwise be punished, or because she would earn praise from the community, or even because she would simply get self-satisfaction,²¹⁰ but rather one is to perform one's duty purely out of a sense of duty.²¹¹ In the context of the rescue maxim qualified to coincide with evolutionary dispositions, an agent is not to attempt a particular rescue for the conscious purpose of promoting her genes, though this may have driven her rationale for adopting the maxim originally.²¹² Instead, she is to

209. Under a universal law of lying, "there could properly be no promises at all, since it would be futile to profess a will for future action to others who would not believe my profession or who, if they did so over-hastily, would pay me back in like coin." KANT, *supra* note 140, at 71; *see id.* at 90 (proposing a similar argument). For a brief explication of Kant's standard of contradiction, see CHRISTINE M. KORSGAARD, *An Introduction to the Ethical, Political, and Religious Thought of Kant*, in *CREATING THE KINGDOM OF ENDS*, *supra* note 141, at 3, 14–16. *See also* KORSGAARD, *supra* note 141, at 77–102.

210. *See* KANT, *supra* note 140, at 65. He states:

To help others where one can is a duty, and besides this there are many spirits of so sympathetic a temper that, without any further motive of vanity or self-interest, they find an inner pleasure in spreading happiness around them and can take delight in the contentment of others as their own work.

Id. at 66. But however "right" and "amiable" such an action may be, "[it] still has no genuinely moral worth," unless it is done from a sense of duty. *Id.* One commentator demurs, "[q]uite the opposite of Kant's moral principles, altruistic motivation prompts us to care for another not from duty but from inclination. Rather than a source of obligation, it seems a cause for—admittedly guarded—hope and celebration." BATSON, *supra* note 195, at 230.

211. "A human action is morally good, not because it is done from immediate inclination—still less because it is done from self-interest—but because it is done for the sake of duty." H. J. Paton, *Analysis of the Argument*, in KANT, *supra* note 140, at 17, 18–19 (emphasis omitted); *see* KANT, *supra* note 140, at 64–69. "This is Kant's first proposition about duty, though he does not state it in this general form." Paton, *supra*, at 21; *see, e.g.*, EWING, *supra* note 86, at 51; KORSGAARD, *supra* note 209, at 12–13; KORSGAARD, *supra* note 144, at 55–64.

212. Recall that selfish genes need not be aware of their selfishness. "[N]either sociobiology nor evolutionary psychology requires that humans be any more self-consciously

engage in the rescue disinterestedly simply because she had previously committed herself to the maxim. Duty for duty's sake.²¹³

For example, in accord with sexual selection, a rescuer, motivated to perform his duty in order to show off to prospective mates, will not earn Kant's approval.²¹⁴ But the mental state ascribed to this rescuer seems implausible. We could imagine the rescuer, while considering the rescue or while swimming out to the drowning rescuee, thinking to himself, "I must get there as fast as I can," or, "I hope I can pull this off," or even, less plausibly, "I hope I can succeed at doing my duty here," but hardly, "this will really impress the gals."²¹⁵ On the other hand, in cooler circumstances,

desirous of achieving personal genetic success than are red-winged blackbirds." JOHN ALCOCK, *THE TRIUMPH OF SOCIOBIOLOGY* 26 (2001).

To say that an act of altruism arises from our proximate capacity for intentional morality in no way eliminates the complementary ultimate explanation that our morally motivated behavior, or the psychological mechanism that underlies the behavior, tends to advance the genetic success of individuals, or did so in environments in the past.

Id. at 181.

213. Nozick considers "a Kantian disposition to act from respect for the moral law." NOZICK, *supra* note 21, at 273. "Couldn't this itself (not the Kantian *theory* but its psychological basis or underpinnings) be a psychological disposition that was selected for because of the firm reliability it gives one in the eyes of others as a participant in cooperative activities?" *Id.*

Perversely, Adolph Eichmann partially defended himself with a muddled version of Kantian morality during his trial for war crimes for expediting the transportation of Jews to concentration camps during the Third Reich. He said, in effect, "I was just doing my duty, not only following orders, but also obeying the law." See HANNAH ARENDT, *EICHMANN IN JERUSALEM* 135–38 (rev. ed. 1965).

214. Under Kant, "[a]n action—even if it accords with duty and is in that sense right—is not commonly regarded as morally good if it is done solely out of self-interest." Paton, *supra* note 211, at 19. But, "Kant's doctrine would be absurd if it meant that the presence of a natural inclination to good actions (or even of a feeling of satisfaction in doing them) detracted from their moral worth. The ambiguity of his language lends some colour to this interpretation, which is almost universally accepted." *Id.* Kant's position "is that if an action is to be morally good, the motive of duty, while it may be present *at the same time* as other motives, must by itself be sufficient to determine the action." *Id.*; see KORSGAARD, *supra* note 209, at 12–13; KORSGAARD, *supra* note 144, at 58–61.

Trivers, on the other hand, makes the disinterested rescuer suspect. "Selection may favor distrusting those who perform altruistic acts without the emotional bas[e]s . . . because the altruistic tendencies of such individuals may be less reliable in the future." Trivers, *supra* note 22, at 50–51. "[H]umans respond to altruistic acts according to their perception of the motives of the altruist." *Id.*; cf. KANT, *supra* note 140, at 62 ("[T]he very coolness of a scoundrel makes him, not merely more dangerous, but also immediately more abominable in our eyes than we should have taken him to be without it."). For the emotional bases of reciprocal altruism, see *supra* notes 32–37 and accompanying text.

215. In emergencies, "[t]he decision to help is instantaneous and impulsive, without much time to think. When fugitives knock on the door, one determines there and then whether to take them in." DE WAAL, SUSHI MASTER, *supra* note 63, at 329. "Realistically, the rescuer in such [emergency] situations will likely have no time to calculate more than what actions are required

say, where a person is contemplating whether to offer food to a neighbor who lost her crops, self-interested thoughts do seem more plausible, though these types of calmer situations generally fall outside the rescue doctrine. Yet plausible or not, if self-interested motives drive the decision to help, to perform one's duty, Kant would give it no moral worth.²¹⁶

The proper performance of a duty, then, depends on the agent's mental state. While the agent may be able to perceive whether she is performing her duty disinterestedly—though even here, despite her privileged position, cognitive distortions may be at work—the determination of the agent's mental state is quite problematic for onlookers. This weak ability to judge another's mental state harkens back to the prior observation that it seems more praiseworthy to rescue a stranger than to rescue one's close relative. While we may admire a risky rescue of one's mother, we admire even more a similarly risky rescue of a complete stranger.²¹⁷ Now in principle there is no reason why the rescue of one's mother cannot be performed entirely out of a disinterested sense of duty, but we tend to doubt that such a rescue was in fact so driven. Indeed, when the reporters stick their microphones in the face of the rescuer to ask what motivated her to undertake such a risky venture, we would be appalled if she said, "I was just doing my duty." We expect her to reply, "She's my mother!"²¹⁸ That says it all. Why even bother

to effect the rescue." Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CAL. L. REV. 85, 103 (1986) (determining that a rescuer is not thinking of compensation). For additional examples, see *supra* text accompanying note 115.

216. Others disagree. Under Kant, the complete egoist "acts wrongly, not only when he steals, breaks promises, and harms other people, but also when, for self-interested reasons, he acts honestly, keeps his promises, and helps other people. These are unacceptable conclusions." Derek Parfit, *What We Could Rationally Will*, in 24 THE TANNER LECTURES ON HUMAN VALUES 285, 326 (Grethe B. Peterson ed., 2004). Furthermore, if you rescue me purely from a sense of duty, "then I may be glad of being rescued, but I shall hardly regard your motives as purer or nobler or more virtuous than the motives of one who rushes to my rescue from immediate affection and heartfelt concern for my welfare, with no dutiful deliberations entering into it." BRUCE N. WALLER, *THE NATURAL SELECTION OF AUTONOMY* 105 (1998).

217. De Waal, asserting that kin selection drives altruism, as suggested by the expression, "Blood is thicker than water," then observes: "No wonder awards for heroism are rarely bestowed on those who have saved members of their own family." DE WAAL, SUSHI MASTER, *supra* note 63, at 317–18. Consistent with de Waal's point, "[t]he Carnegie Hero Fund Commission awards medals to individuals who performed some heroic and altruistic act." Clarry Lay et al., *The Responsive Bystander in Emergencies: Some Preliminary Data*, 15 CAN. PSYCHOL. 220, 221 (1974). Among the criteria for the awards is that "the rescuer was not related to the rescued person." *Id.*

218. "A difficulty that strikes most readers of Kant is that men seem often to perform the most noble and self-sacrificing actions under the influence of love rather than out of a conscious sense of duty, and it seems unfair to deny all intrinsic value to such actions." EWING, *supra* note 86, at 51. Indeed, one philosopher "endorse[s] the view that on occasions a person whose motivations derive from explicit moral calculation rather than direct sympathy is manifesting a

to ask? Rescuing a stranger, on the other hand, is more likely to elicit the response, which Kantians would approve, “I was just doing my duty,” or “What else could I do?” This was the reply most commonly heard from those who rescued Jewish strangers from the Nazis.²¹⁹ This answer seems nobler than the response, aligning with reciprocal altruism, “Well, who knows, maybe someday I will need to be rescued myself,” or the response, aligning with sexual selection, “I just wanted all the ladies to know what a daring guy I am.” Certainly the rescuers of Jews were not driven by self-interest. Quite to the contrary, because they often faced the disapprobation of their anti-Semitic family or neighbors, and potential penalties for violating German laws, including death for their entire families,²²⁰ they were extraordinarily heroic despite garnering unexpected public approval after the passing of the Third Reich.²²¹ Perhaps, short of knowingly sacrificing one’s life for a stranger, the most heroic rescue we can imagine is one done for a stranger with the knowledge that it would make the rescuer an outcast from her family and community. But we cannot push this line of thought too far. If, say, the stranger is already terminally ill, or, to speak indelicately, is one who has been a substantial drain on society, such as a known hardened criminal, the rescuer’s heroic effort may strike us as simply foolish, even when the rescuer says quite justifiably, “I was just doing my duty.” Yet now, based on this consequentialist, cost-benefit analysis, our intuitive reaction seems to have become infected with explicit utilitarian reasoning when we were holding ourselves out, in this section, as Kantians. Or perhaps our intuitive reaction stems from evolutionary thinking, since the rescuer who risks much to save, say, a social pariah stranger, is doing nothing to promote kin selection, perhaps nothing to reinforce reciprocal altruism, and even nothing to increase his attractiveness under sexual

kind of moral vice.” JOYCE, *supra* note 26, at 50. While commentators disagree as to whether Kant actually goes this far, Ewing reads him as finding moral value in the action “if it was motivated both by some desire and by respect for the moral law in such a way that either motive by itself would have been sufficient to bring about the act.” EWING, *supra* note 86, at 51; *see supra* note 211.

219. *See* FIELD, *supra* note 164, at 78–79 (noting that the rescuers of Jews “did, in their view only what others would have done in their place This is a common sentiment expressed by those honored for heroism”); MONROE, *supra* note 13, at 11 (describing that when pressed, the rescuers often said, “Everybody does it,” “That’s what you’re supposed to do,” or, “But what else could I do?”). That moral and religious education may have had little or no impact on the rescuers of Jews, *see* POSNER, *supra* note 67, at 69–72.

220. *See* MONROE, *supra* note 13, at 18, 140, 153, 165. Because families were put at risk, Monroe challenges the kin selection theory of altruism. *See id.* at 165.

221. But even after the war, some rescuers refused to identify themselves for fear of being labeled a “Jew lover” or exposing themselves to the threats of neo-Nazi groups. *See* OLINER & OLINER, *supra* note 188, at 1–2.

selection, for women are likely to say, “Who would want this crazy guy who risks so much for so little?”²²²

Perhaps I have pushed Kant’s demand for the disinterested performance of duties too far. The problem with some of the hypotheticals considered above may be that I lose sight of the rescue maxim that I had previously emphasized: “One is to attempt *reasonable* rescues of those in peril.” The word “reasonable” implies a cost-benefit analysis of sorts, smacking of utilitarian consequentialism. It seems unlikely that even a die-hard Kantian would omit the word “reasonable.”²²³ Even such a Kantian would see as foolish an extremely risky, unpromising rescue attempt. A maxim demanding this would not be one a rational person would adopt. Furthermore, the substantial likelihood of “throwing away one’s life” does not give due consideration to one’s own life which, like all other human lives, is owed respect as an end in itself, as seen in Kant’s rejection of suicide.²²⁴ In his own (translated) words, “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”²²⁵ The Kantian does not calculate the “worth” of the rescuee, or, for that matter, the rescuer, because, as ethical beings, they are entitled to respect equal to that of anyone else.²²⁶ Nevertheless, the Kantian would consider the likelihood of effectuating a successful rescue and the degree of risk to the rescuer. Disinterest need not be entirely cold.

III. CONCLUSION

Rescues are encouraged by the law, honored by society, but seemingly difficult to explain in evolutionary terms. There is no question that the rescue doctrine is well established in the law. Injured rescuers of those placed in peril through tortious behavior have an independent, direct cause

222. Perhaps people often question the sanity of those who coolly perform extremely altruistic acts without apparent payoffs to the actor. For example, as reported by one person who volunteered to donate one of his kidneys to a complete stranger, “[t]he first thing they do is send you to see a psychiatrist.” Stephanie Strom, *Giving of Yourself, Literally, To People You’ve Never Met*, N.Y. TIMES, July 27, 2003, § 4 (Week in Review), at 3. “I thought that was hilarious, but it made sense. I mean, what kind of nut puts up his hand and says ‘I want to give away body parts?’” *Id.*

223. See *supra* note 158.

224. See KANT, *supra* note 140, at 96–97; KANT, *supra* note 148, at 148–54. Kant also rejects suicide as a reflection of a maxim based on self-love that violates the universalization principle. See KANT, *supra* note 140, at 89. “Self-respect, [Kant] argued, requires that we avoid servility and other forms of self-degradation.” Hill, Jr., *supra* note 197, at 9.

225. KANT, *supra* note 140, at 96 (emphasis and footnotes omitted).

226. If the object in peril is an animal or property, then the Kantian would consider worth.

of action against the tortfeasors, or even against the rescues who endangered themselves through negligent behavior. Beyond the courtroom, society often treats rescuers as altruistic heroes. That rescuers are altruists, however, is a position that would appear to run afoul of the notion of the “selfish” gene that largely grounds evolutionary thinking. Under this precept, fitness is measured by reproductive success, that is, by the extent to which one leaves one’s genes in the gene pool. Altruism, on the other hand, turns on the willingness to sacrifice personal interests for those of another person. It would seem that such genetically disposed behavior would be driven out of the gene pool. Nevertheless, evolutionary psychologists have developed various theories to explain this apparently unselfish behavior. I have considered the three main theories: kin selection, reciprocal altruism, and sexual selection.

The three evolutionary theories of altruism imply that rescues will be skewed along differing predictable lines. Under kin selection, rescuers of relatives serve their own genetic self-interest since they share genes in common with their rescues, the more so as they are more closely related. All else equal, then, saving one’s child is more evolutionarily beneficial than saving a first cousin. But under evolutionary considerations, the rescue of an offspring without reproductive prospects is less beneficial than the rescue of a cousin with high prospects. Indeed, insofar as kin selection drives decisions about whom to rescue, how much effort to expend, and the degree of risk to confront, finely nuanced behavior may lead to choices that seem peculiar, as in the preference above for the cousin over the progeny. Under reciprocal altruism, a risky rescue may be genetically beneficial once one takes into account the likelihood that the rescuee will later return the favor, not necessarily in kind, or once the rescue induces others to do so. Again, as under kin selection, this may lead to particular choices that seem arbitrary or unsettling, as where the rescue of a wealthy person is preferred to that of a poor one. Finally, under sexual selection, the prospective genetic payoff of a rescue is measured by the likelihood that it will increase the rescuer’s success in obtaining a better mate or matings. Here the interests of females and males differ. Because females, as mammals and through historical contingency, have been more burdened with childbearing and nurturance than have males, their mating opportunities are more limited. In principle, men can mate indiscriminately without any significant burden on themselves, while women must invest much in each child. As a consequence, when it comes to matings, men are genetically disposed to seek quantity while women seek quality. On the other hand, when it comes to mates, to put it simply, it is genetically beneficial for women to seek men who will be better protectors and providers, while men seek women who

will be more fecund and maternal. In the context of the rescue doctrine, women would be impressed by men who display such qualities as strength, daring and kindness, while men would be impressed by women who reveal the qualities associated with fertility and motherliness, which usually seem less evident in these circumstances. Because of these differences, it is expected that men are more likely to undertake risky rescues than are women, and the attempted rescues are more likely to be ones that display the desired traits. Thus, the rescuer would be less concerned about the identity and character of the rescuee than under kin selection or reciprocal altruism, so long as the rescue provides a means to “show off” to the opposite sex or to gain additional resources.

The predictions from evolutionary psychology about the features of likely rescues are somewhat curious and morally disquieting. To pursue this further, I examined fundamental moral theory to see the extent to which the predicted behavior may be aligned with moral tenets. The two grand schools were considered: teleology as represented by utilitarianism and deontology in its Kantian version.

In discussing utilitarianism, I delved into three abiding questions: the nature of the Good that is to be sought by moral choices, whether the moral calculus is to encompass the effects on the chooser alone (egoism) or all persons (universalism), and, relatedly, the boundaries of the utilitarian concern. First, the most prominent versions of the Good of utilitarianism are hedonism, which values “happiness” or some other emotional satisfaction, idealism, which values mental states said to be of intrinsic worth, and preference satisfaction, which values the individual choice of personal moral goals. None of these versions aligns strongly with the evolutionary touchstone of reproductive success, for reproduction itself may not be pleasurable overall or promote any of the other standard notions of the Good. Second, I found that evolutionary reasoning fits somewhat with both egoism and universalism, but this conclusion depends, as always for consequentialism, on the particular circumstances and conjectures about the satisfactions ensuing from the rescue of the various parties and onlookers. Third, by carefully drawing the boundaries of the utilitarian calculus and differentially weighting the classes of persons within moral concern, utilitarianism can be roughly fitted with either kin selection or reciprocal altruism, but usually not both at the same time. Sexual selection, on the other hand, implies that women and men have different reproductive interests, and few of women’s interests would be advanced by risky rescues, thus suggesting a narrower boundary of concern for them, while men’s interests would usually be furthered by daring rescues of nearly any human being, thus suggesting an expansive boundary.

In incorporating Kantianism, I examined the requirements of three forms of the categorical imperative: to universalize moral maxims, to respect all persons equally, and to perform duties disinterestedly. First, the universalization of a moral maxim is distinguishable from its generalization, and hence, as in the utilitarian boundary question, one may reduce the generality of moral maxims to coincide with kin selection and reciprocal altruism without necessarily abridging the universalization demanded by the formality of the categorical imperative. Once again, however, supposed moral maxims supporting sexual selection, which differentiates the interests of women and men in obtaining mates or matings, would not ring true to the everyday moralist. Second, the equal respect due to every person does not imply that each one has the same claim to be rescued. When the rescue doctrine is put through the filter of a Kantian social contract, distinctions among persons may well emerge that tend to align with kin selection and reciprocal altruism. Sexual selection, on the other hand, implies a rescue doctrine that encompasses a wider range of potential rescuees, but only indirectly, since in these cases the rescuer is more concerned with displaying personal qualities than preserving particular persons or engaging the rescuee or her affiliates in future interactions. Third, performing duties disinterestedly does not mean that the underlying moral maxims must be adopted dispassionately. It only means that a disinterested motive for performing the chosen maxim must be sufficient itself to spark the required conduct. While we may often doubt that a particular rescue is performed with sufficient disinterest, as when the rescuee is closely related, in principle every such rescue could satisfy this form of Kant's categorical imperative.

Overall, at least some rescues, or refusals to rescue, consistent with the evolutionary forces of kin selection, reciprocal altruism and sexual selection may run afoul of utilitarian or Kantian guidelines. However, despite their genesis in selfish genes, many of these choices can be justified on basic, though perhaps unrefined, moral terms, especially when they invoke agreeable positions on some of the controversial, fundamental questions that still dog moral thought.