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# THE DUTY TO RESCUE IN CONTRACT LAW\*

Melvin A. Eisenberg\*\*

## INTRODUCTION

This article concerns the duty to rescue. That term is widely used, but seldom defined. For purposes of this article, by *the duty to rescue* I mean a duty that is imposed by law upon one actor, *A*, to bestir himself to take a low-cost, low-risk, and otherwise reasonable action that will forestall a major loss to another actor, *B*, although *B*'s peril of prospective loss is not created by *A*'s fault.

It is commonly said that there is no duty to rescue in common-law countries.<sup>1</sup> At least insofar as American law is concerned, this statement is unduly broad. It may be true that there is no duty to rescue under American criminal law and tort law (although the exceptions to this rule are so extensive that the basic rule has only a limited ambit). However, I will show in this article that there is a duty to rescue in contract law. Generally speaking, this duty has not been explicitly recognized as such, but it is instantiated in more specific principles and rules that apply in a variety of contract-law settings.

The organization of this article is as follows. In Part I, I briefly develop the no-duty-to-rescue rule, and its exceptions, in tort law and criminal law. In Part II, I much more extensively develop the duty to

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\* It is a great pleasure to contribute an article to the Fordham Law Review tribute to Joe Perillo. I have been recommending Calamari & Perillo's book on Contracts to my classes for almost thirty years, and I frequently consult with and benefit from that book in connection with my own teaching and writing. I have also learned much from Joe's articles. Both the book and the articles, like Joe himself, have the qualities of exceptionally clear and penetrating intelligence, balance (a virtue that is both underestimated and in short supply), lucidity, and a comprehensive grasp of contract law. Joe Perillo has a rare talent for simultaneously clarifying an area and saying new and very important things. He has illuminated contract law.

\*\* I thank Jim Gordley, Andrew Guzman, Muriel Fabre-Magnan, Ariel Porat, Howard Shelanski, and Steve Sugarman for their valuable comments on earlier drafts of this article, and Jon Edlin, Howard Tony Loo, and Debbi Quick for their excellent research assistance.

1. See, e.g., *Salmon v. Chute*, (1994) 4 N.T.L.R. 149, 160 ("[T]he common law countries have not . . . introduced a . . . general offence of 'failing to rescue.'"); Peter M. Agulnick & Heidi V. Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 *Touro Int'l L. Rev.* 93 (1998); John T. Pardun, *Good Samaritan Laws: A Global Perspective*, 20 *Loy. L.A. Int'l & Comp. L.J.* 591, 594-602 (1998); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 *Wm. & Mary L. Rev.* 423, 426-28 (1985).

rescue in contract law. Last, in Part III, I turn to the possible explanations for the difference, in this respect, between tort law and criminal law, on the one hand, and contract law, on the other.<sup>2</sup>

For clarity of exposition, throughout this article I refer to the potential rescuer as *A* and the party who needs rescue as *B*.

### I. THE DUTY TO RESCUE UNDER TORT LAW AND CRIMINAL LAW

The general rule in the United States (and other common-law jurisdictions) is that an actor, *A*, has no duty under tort law or criminal law to take action to save another actor, *B*, from peril—even if the action that is required to save *B* would carry no significant risk to *A*, and failure to take the action would probably or even certainly result in death or substantial injury to *B*. Because tort law and criminal law are largely parallel on this issue,<sup>3</sup> for ease of exposition I will refer to the tort-law and criminal-law rules collectively as the physical-peril rule, and for the most part I will discuss only tort authorities.

The general tort-law rule that governs rescue from physical peril is set forth in Restatement (Second) of Torts section 314: “The fact that [an] actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”

Comment c to section 314 adds:

The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection. . . .

. . . .

The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown.

Or, as put in a leading treatise on torts by Dan Dobbs, “defendants are not liable in tort for a pure failure to act for the plaintiff’s benefit. The fact that the defendant foresees harm to a particular individual from his failure to act does not change the general rule.”<sup>4</sup>

The intensity of the physical-peril rule is exemplified in the cigar-

2. In theory, the law might impose a duty to rescue property. In practice, such a duty is only very seldom imposed under modern Western legal systems, presumably because it is not deemed to be required by moral norms. Accordingly, in this article I do not consider a duty to rescue property. For a brief discussion of this issue, see Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 *Geo. L.J.* 605, 655 & n.214 (2001).

3. See, e.g., Wayne R. LaFare, *Criminal Law* 215-19 (3d ed. 2000).

4. Dan B. Dobbs, *The Law of Torts* 853 (2000).

smoking hypothetical in the Comment to section 314, and in Illustrations 1 and 4 to that section:

1. A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or a touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.

....

4. A, a strong swimmer, sees B, against whom he entertains an unreasonable hatred, floundering in deep water and obviously unable to swim. Knowing B's identity, he turns away. A is not liable to B.

Some of the cases are as dramatic as these Illustrations. For example, in *Yania v. Bigan*,<sup>5</sup> A and B were on A's land, engaged in a business discussion, when B jumped into a pit of water on the land, apparently at A's urging. A did nothing to save B, and B drowned. The court applied the general rule, and held that A was not liable. A criminal-law counterpart is *People v. Beardsley*.<sup>6</sup> A man had left in his home a paramour whom he knew had been drinking heavily and taking morphine tablets and had fallen into a coma. The court overturned the man's conviction for manslaughter, stating, "[t]he fact that this woman was in his house created no duty" to assist her.

Similarly, in *Harper v. Herman*,<sup>7</sup> Jeffrey Harper was one of a party of five at an outing on Lake Minnetonka on Theodor Herman's 26-foot boat. Herman and Harper did not know each other prior to the outing; Harper had been invited on the outing by one of the other guests. Herman was an experienced boat owner and had spent hundreds of hours operating boats on Lake Minnetonka. As owner of the boat, he considered himself to be in charge of the boat and his passengers. After a few hours, the group decided to go swimming, and at Herman's suggestion they went to Big Island. Herman was familiar with Big Island, and he was aware that the water stayed shallow a good distance from its shore. Harper had been to Big Island only once before. Herman positioned his boat 100-200 yards from the island. This area was shallow, but the bottom of the lake was not visible from the boat. Herman set the anchor and lowered the ladder for members of the party to enter the water. While Herman was lowering the ladder, Harper asked Herman if he was going in. When Herman said yes, Harper stepped onto the side of the boat and dove. Because the water was shallow, Harper struck the bottom of the lake, severed his spinal cord, and was rendered a quadriplegic. Harper

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5. 155 A.2d 343 (Pa. 1959).

6. 113 N.W. 1128 (Mich. 1907).

7. 499 N.W.2d 472 (Minn. 1993).

brought suit against Herman, alleging that Herman owed Harper a duty to warn him that the water was too shallow for diving. The trial court granted Herman's motion for summary judgment on the ground that tort law does not impose a duty to rescue, including a duty to warn. The Minnesota Supreme Court affirmed on that ground.<sup>8</sup>

There are a number of exceptions to the general physical-peril rule. Among the most prominent are the following:

*The actor has caused or is about to cause harm to another, even innocently.* An actor who has caused or is about to cause harm to another, even innocently, has a duty to act affirmatively to minimize the other's harm. As stated in Comment d to Restatement (Second) of Torts section 314, the general rule that there is no duty to rescue "applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control." This exception is exemplified by Illustration 3 to section 314:

A, a trespasser in the freight yard of the B Railroad Company, falls in the path of a slowly moving train. The conductor of the train sees A, and by signaling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander would not be liable to A for refusing to give such a signal, the B Railroad is subject to liability for permitting the train to continue in motion with knowledge of A's peril.

Similarly, says Dobbs, "if the defendant's railroad train runs over the plaintiff and severs a limb, the defendant may not refuse to provide assistance even if the railroad was not negligent to begin with and even if the plaintiff himself was . . . negligent."<sup>9</sup>

*Special relationships.* An actor who stands in a certain special relationship to another may be under a duty to rescue the other by virtue of the relationship. The Restatement (Second) of Torts lists five such relationships: carrier-passenger, innkeeper-guest, landowner-invitee, custodian-ward, and employer-employee.<sup>10</sup> For

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8. The facts suggest the possibility that Harper may have dived off the boat too quickly for Herman to warn him. However, the court did not explore that possibility, perhaps because it would have presented a jury question, and the issue before the court was whether summary judgment was proper on the ground that Harper had no duty to rescue.

9. Dobbs, *supra* note 4, at 856. Dobbs adds, "The same principle has been applied when the defendant knows or should know that he has innocently created a risk to others and the defendant has an opportunity to minimize the risk before harm actually eventuates. For instance, if the defendant, without fault, collides with and kills a horse on the highway, reasonable care may oblige him to take steps to warn others or have the animal removed. If he does not do so and a second driver is later injured in striking the carcass or attempting to avoid it, the defendant is . . . subject to liability if he failed to exercise reasonable care."

*Id.* at 856-57.

10. Restatement (Second) of Torts §§ 314A, 314B (1965); Dobbs, *supra* note 4, at

example, under the employer-employee special-relationship exception, if a seaman goes overboard the ship's captain is required to conduct a search, even if there is little hope the seaman will be found alive.<sup>11</sup>

It is unclear what other kinds of relationships will give rise to a duty to rescue under the special-relationship exception. Spouses undoubtedly stand in a special relationship for this purpose, as do parents and their children, although neither of those relationships is enumerated in the Restatement. Some cases have also held that a particular transient relationship imposed such a duty. For example, in *Farwell v. Keaton*<sup>12</sup> two male teenagers, Farwell and Siegrist, tried to engage several young women in conversation. Friends of the young women then beat Farwell severely. Siegrist found Farwell and put ice on his head. Farwell went "to sleep" in the back seat of the boys' car while Siegrist drove him around for two hours. Siegrist then parked the car in the driveway of Farwell's grandparents' house, unsuccessfully tried to rouse Farwell, and left Farwell in the car without notifying anyone of Farwell's condition. Farwell died three days later. The court held that Siegrist was under a duty to rescue Farwell, at least in part because the two boys were "companions on a social venture."<sup>13</sup>

Dobbs points out, however, that not all courts have accepted a social venture as a special relationship that qualifies as an exception to the general rule.<sup>14</sup> For example, where *A* has arranged a date or tryst at her house with *B*, but did not warn *B* that her jealous husband or boyfriend might attack him, the cases have held for *A* on the ground that companions on a social venture owe no duty, not even the duty of warning.<sup>15</sup> Similarly, in *Harper v. Herman* (the boat-outing case), the court gave the special-relationship exception a very stringent interpretation, and refused to apply it to the facts of that case:

We have previously stated that an affirmative duty to act only arises when a special relationship exists between the parties. . . . Accepting, *arguendo*, that Herman should have realized that Harper needed protection, Harper must still prove that a special relationship existed between them that placed an affirmative duty to act on the part of Herman.

Harper argues that a special relationship requiring Herman to act for his protection was created when Herman, as a social host, allowed an inexperienced diver on his boat. Generally, a special relationship giving rise to a duty to warn is only found on the part of

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857.

11. Dobbs, *supra* note 4, at 857.

12. 240 N.W.2d 217 (Mich. 1976).

13. *Id.* at 222.

14. Dobbs, *supra* note 4, at 858-59.

15. *Id.*

common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. Restatement (Second) of Torts § 314A (1965). Under this rule, a special relationship could be found to exist between the parties only if Herman had custody of Harper under circumstances in which Harper was deprived of normal opportunities to protect himself. These elements are not present here.<sup>16</sup>

*Undertaking an activity that would effect rescue if properly performed.* An actor who voluntarily undertakes an activity that would effect rescue if properly performed—for example, an actor who undertakes to serve as a lifeguard—must carry through and perform the undertaking with reasonable care, especially, although not necessarily exclusively, where either the actor's undertaking was relied upon by the victim, or the actor's nonperformance or negligent performance of his undertaking increased the risk to the victim. Dobbs gives the following example of increased risk:

[I]f one of two workers at a day care center assures the other worker that he will take a comatose child to the emergency room, his assurance or undertaking creates the risk that the other will not take needed action. In such a case the child at risk does not rely; she is comatose. Nevertheless, the risk to the child is increased as a result of the undertaking and its nonperformance, and that is enough.<sup>17</sup>

Dobbs also gives an example of reliance: "If a city always provides crossing guards for children walking to school, that action is an undertaking to continue the protection until notice to the contrary."<sup>18</sup>

An undertaking of the kind that gives rise to a duty to rescue may be implicit rather than explicit, as where, in the crossing-guard example, the city does not promise to install crossing guards, but simply institutes a practice of doing so.

*If someone attempts to help a victim, another actor may not interfere with that attempt.* As stated in Restatement (Second) of Torts section 327,

One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.

This exception was pushed to its limit, and perhaps beyond, in

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16. Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993).

17. Dobbs, *supra* note 4, at 862.

18. *Id.*; see also, e.g., Delong v. Erie, 457 N.E.2d 717 (N.Y. 1983) (discussing the negligent failure of government staff).

*Soldano v. O'Daniels*.<sup>19</sup> Darrell Soldano was shot at Happy Jack's Saloon, which was owned by O'Daniels. Across the street from the saloon was a restaurant, The Circle Inn, also owned by O'Daniels. A patron at Happy Jack's came into the Circle Inn, told the bartender that a man had been threatened at Happy Jack's, and asked the bartender to either call the police or allow the patron to use the Circle Inn phone to call the police. The bartender refused both requests. The victim was killed, and his family sued O'Daniels. The court began by pointing out that "there was no special relationship between [O'Daniels] and the deceased."<sup>20</sup> However, the court concluded, "[t]he facts of this case come very nearly within section 327 of the Restatement"<sup>21</sup>—close enough to make O'Daniels liable.

*An actor who is in control of or has custody over a dangerous person, or is in a relationship with a person that gives the actor special knowledge that the person is dangerous to a potential victim, may have a duty to rescue.* In a famous case, *Tarasoff v. Regents of the University of California*,<sup>22</sup> Lawrence Moore, a psychotherapist employed at a University of California hospital, concluded that his patient, Prosenjit Poddar, intended to kill Tatiana Tarasoff. Moore discussed the problem with two psychiatrists at the hospital and with his superior, and informed the police. The police released Poddar after a brief detention. None of the therapists warned Tarasoff or her family of the danger Tarasoff was in, and Poddar killed Tarasoff. In a suit against the therapists and the University based on Tarasoff's wrongful death, the court held that a therapist has a duty of reasonable care to warn a potential victim of danger from the therapist's patient, at least where a specific person is endangered.

*State statutes.* Two states, Vermont and Minnesota, have adopted wide-ranging duty-to-rescue statutes. The Vermont statute provides,

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others. . . .

....

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.<sup>23</sup>

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19. 190 Cal. Rptr. 310 (Cal. Ct. App. 1983).

20. *Id.* at 314.

21. *Id.* at 317.

22. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). Some jurisdictions have rejected *Tarasoff*. See, e.g., *Nasser v. Parker*, 455 S.E.2d 502 (Va. 1995).

23. Vt. Ann. Stat. tit. 12, § 519 (1973).



The Minnesota statute is similar.<sup>24</sup> In addition, six other states have adopted more limited statutes, which require an actor to provide assistance or summon law enforcement when the actor knows that a crime, or a certain kind of crime, is being committed that would expose a victim to bodily harm.<sup>25</sup>

## II. THE DUTY TO RESCUE IN CONTRACT LAW

The major theses of this article are as follows: (1) If, in a contractual context, *B* is at risk of incurring a significant loss, and *A* could prevent that loss by an action that would not require *A* to forgo an existing or potential significant bargaining advantage, undertake a significant risk, or incur some other cost that is either significant or unreasonable under the circumstances, then as a matter of fairness *A* should be under a duty to take that action. By a *contractual context*, I mean a context in which the parties have entered into a contract or in which one or both parties have taken steps toward forming a contractual relationship. (2) American contract law does impose such a duty—a duty to rescue. By and large, the general principle that there is a duty to rescue in contract law has not been explicitly recognized as such, but it is instantiated in more specific principles and rules that apply in a variety of contract-law settings, including mitigation, offer and acceptance, and performance.

### A. Mitigation of Losses

It is a well-established rule of American law that a party who is injured by a breach of contract must take reasonable actions to mitigate—that is, forestall or limit—the other party's losses. The most familiar instantiation of this principle is the duty to mitigate damages.<sup>26</sup> That duty is captured in Restatement (Second) of Contracts section 350(1): “[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.”

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24. Minn. Stat. Ann. §§ 604A.01, 609.02 (West 2000):

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to himself or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this section is guilty of a petty misdemeanor [and subject to a fine of not more than \$300].

25. Haw. Rev. Stat. § 663-1.6 (1993); Mass. Gen. Laws Ann. ch. 268, § 40 (West 2002); Ohio Rev. Code Ann. § 2921.22(A) (Anderson 2002); R.I. Gen. Laws §§ 11-37-3.1 to -3.4. (2000); Wash. Rev. Code Ann. § 9.69.100 (West 1998); Wis. Stat. Ann. § 940.34 (West 1996 & Supp. 2001); see Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 Wash. U. L.Q. 1, 5-8, 20-38 (1993).

26. See E. Allan Farnsworth, *Contracts* 806 (3d ed. 1999).

One example of this duty is the rule that where a party to a contract, *B*, makes clear to the other party, *A*, that she does not intend to perform her side of the contract, and thereby explicitly or implicitly countermands further performance by *A*, *A* normally must stop performing even though *B*'s countermand is wrongful. So, for example, in *Rockingham County v. Luten Bridge Co.*,<sup>27</sup> Rockingham County and Luten had entered into a contract under which Luten would construct a bridge for the County. After Luten had begun to construct the bridge, the County changed its mind and instructed Luten to stop work. Luten disregarded the instructions and completed the bridge. The court held that Luten was not entitled to damages attributable to work performed after the countermand.

Cases like *Rockingham County* seem very easy, because as a result of the way in which expectation damages are calculated, if *A* continues to perform despite a countermand, *A* will increase *B*'s losses without augmenting its own net gain.<sup>28</sup> The standard formula for measuring a service-provider's damages for breach by a service-purchaser is based on the contract price minus out-of-pocket costs remaining to be incurred by the service-provider at the time of breach.<sup>29</sup> Assume that in *Rockingham County* the contract price is \$100,000; Luten's total out-of-pocket cost to build the bridge would be \$80,000; and the County breached when Luten had incurred \$40,000 in out-of-pocket costs. In that case, if Luten stops work when it is told to do so, under the standard formula its damages will be \$60,000—the contract price, \$100,000, minus the costs remaining to be incurred, \$40,000. Luten's net, however, will be only \$20,000, because \$40,000 would merely reimburse Luten for costs incurred. Now assume that instead of stopping, Luten drives the project through to completion. If Luten was allowed to do that, its damages under the standard formula would be \$100,000, the contract price. (There would be no deduction for out-of-pocket costs remaining to be incurred, because no costs would remain.) However, Luten's net would still be only \$20,000, because \$80,000 would merely reimburse Luten for costs incurred. Accordingly, Luten's continuation of work after the countermand would increase the County's losses from \$60,000 to

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27. 35 F.2d 301 (4th Cir. 1929).

28. Accordingly, there is an exception where the breaching party will be made better off if the innocent party completes performance. "For example, if a buyer breaks a contract to buy manufactured goods after manufacture has begun, the seller may be better able to avoid loss [to the buyer] by continuing manufacture and selling the finished goods than by ceasing manufacture and attempting to salvage the work in progress." Farnsworth, *supra* note 26, at 809.

29. An alternative, algebraically equivalent, formula is based on the service-provider's gross profit (contract price minus total out-of-pocket costs) plus the out-of-pocket costs already incurred by the service-provider at the time of breach. Both measures need to be adjusted if the service-purchaser has made payments prior to the breach.

\$100,000, but would not increase Luten's net.

Viewed this way, it might seem too plain for argument that when *B* issues a countermand, even if wrongful, *A* must cease performance. However, nothing in life, and therefore nothing in law, is too plain for argument. Indeed, English law does not always require the innocent party to stop performing on the basis of a wrongful countermand. Instead, as stated by Treitel, "The English view is that the aggrieved party is, as a general rule, entitled to perform in spite of the repudiation and claim the agreed [price]."<sup>30</sup>

The leading case is *White & Carter (Councils) Ltd. v. McGregor*.<sup>31</sup> White & Carter furnished public litter bins to municipalities, including the City of Clydesdale; it made its profits from payments by third parties for advertisements on plates that White & Carter attached to the bins. McGregor ran a garage in Clydesdale. In June 1957, McGregor's sales manager made a contract with White & Carter under which advertisements for the garage would be displayed on twelve of the bins for three years for a total price of £196, of which £187 represented payment for the space, at two shillings a week per plate, and £9 represented payment for the plates, at five shillings a year per plate. The day the contract was made, McGregor repudiated it on the ground that its sales manager had not been instructed to make the contract. However, White & Carter ignored the repudiation, carried the advertising on the bins for three years, and then sued for the entire contract price.

The House of Lords held, three to two, in favor of White & Carter. A majority of the Law Lords concluded that a repudiation does not in itself bring a contract to an end. Instead, the nonrepudiating party has an option to terminate. If that option is not exercised, the contract remains in full effect. Accordingly, the House of Lords held, a party who received a repudiation could choose to complete performance and sue for the contract price, provided the performance could be completed without the cooperation of the repudiating party. Lord Morton, dissenting, pointed out, to no avail, that,

If the appellants [White & Carter] are right, strange consequences follow . . . . One . . . is the engagement of an expert to go abroad and write a report on some subject for a substantial fee plus his expenses. If the appellants succeed in the present case, it must follow that the expert is entitled to incur the expense of going abroad, to write his unwanted report, and then to recover the fee and expenses, even if the other party has plainly repudiated the contract before any expense has been incurred.<sup>32</sup>

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30. G.H. Treitel, *Remedies for the Breach of Contract—A Comparative Account* 183-84 (1988); see also G.H. Treitel, *The Law of Contracts* (10th ed. 1999) [hereinafter Treitel, *Contracts*].

31. [1962] A.C. 413.

32. *Id.* at 432. In response, Lord Reid stated, somewhat cryptically,

The English position underlines that American law on this issue is not foreordained, but rather reflects a policy choice; the choice that the aggrieved party has a duty to mitigate the breaching party's loss.<sup>33</sup>

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It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. . . . If I may revert to the example . . . of a company engaging an expert to prepare an elaborate report and then repudiating before anything was done, it might be that the company could show that the expert had no substantial or legitimate interest in carrying out the work rather than accepting damages. . . . But that is not this case. Here the respondent [MacGregor] did not set out to prove that the appellants [White & Carter] had no legitimate interest in completing the contract and claiming the contract price rather than claiming damages; there is nothing in the findings of fact to support such a case, and it seems improbable that any such case could have been proved. It is, in my judgment, impossible to say that the appellants should be deprived of their right to claim the contract price merely because the benefit to them, as against claiming damages and re-letting their advertising space, might be small in comparison with the loss to the respondent: that is the most that can be said in favour of the respondent.

*Id.* at 431.

33. In *The Law of Contracts*, Treitel puts forward as a possible justification of the doctrine of *White & Carter* that

[T]here are . . . situations in which the injured party would be prejudiced by discontinuing performance and claiming damages: e.g., where this leads to injury to his reputation, for which damages (if recoverable at all) could not be accurately assessed; where the injured party has entered into commitments with third parties which he must honour as a matter of business; or where part of the loss which the injured party would actually suffer is legally irrecoverable because it is too remote.

Treitel, *Contracts*, *supra* note 30, at 946-47. This view is certainly sensible, but it is not easy to see what interest *White & Carter* itself had in performing rather than simply collecting damages.

The exact status of the doctrine of *White & Carter* is uncertain. The doctrine is subject to exceptions where either performance requires cooperation by the innocent party or the breaching party has no legitimate interest in performing, and the scope of these exceptions is unclear. Furthermore, a few opinions have overlaid the doctrine with a requirement that the injured party act reasonably in deciding whether to continue performance. *See Clea Shipping Corp. v. Bulk Oil Int'l Ltd. (The Alaskan Trader)*, [1984] 1 All E.R. 129; *Attica Sea Carriers Corp. v. Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)*, [1976] 1 Lloyd's Rep. 250. Nevertheless, the doctrine seems to represent current English law. *See also Telephone Rentals plc v. Burges Salmon & Co.*, [1987] Independent, April 22, 1987, 1987 WL 492639; *Gator Shipping Corp. v. Trans-Asiatic Oil Ltd. SA & Occidental Shipping Establishment (The Odenfeld)*, [1978] 2 Lloyd's Rep. 357; *Hounslow London Borough Council v. Twickenham Garden Developments, Ltd.*, [1971] Ch. 233. Indeed in 1999, the Scottish Law Commission published a Report on Remedies for Breach of Contract, which said that legislation was needed to limit the holding in *White & Carter*:

There should be legislation, designed to solve the problem revealed by *White & Carter (Councils) Ltd. v. McGregor*, to the effect that a party to a contract who has been told that performance under the contract is no longer wanted but who, being in a position to give performance without the co-operation of the other party, has proceeded to perform, is not entitled to recover payment for performance occurring after intimation that further

Strictly speaking, cases like *Rockingham* do not involve a duty to rescue, because the obligation of the innocent party in such cases is to be inactive, rather than active. However, the duty to mitigate damages under American contract law goes well beyond the rule that when *B* countermands, *A* normally must stop performing. For example, under American contract law *A* must not merely stop performing, but normally must also take affirmative action to reduce his damages from *B*'s breach and thereby reduce *B*'s losses. Thus, where *B*'s breach would result in consequential damages to *A* that would otherwise be recoverable under the principle of *Hadley v. Baxendale*<sup>34</sup> because they were foreseeable at the time of breach, *A* cannot recover those losses if he could have prevented them by covering.<sup>35</sup> This rule is exemplified by Illustration 6 to Restatement (Second) of Contracts section 350:

A contracts to supervise the production of B's crop for \$10,000, but breaks his contract and leaves at the beginning of the season. By appropriate efforts, B could obtain an equally good supervisor for \$11,000, but he does not do so and the crop is lost. B's damages for breach of contract do not include the loss of his crop . . . .

An even more onerous obligation is imposed on an employee in the event of the employer's breach of a contract of employment. In such cases, the duty to mitigate damages requires the employee to actively seek other employment of like kind, even though such a search will frequently require the innocent employee to engage in significant activity (in terms of both the employee's time and the emotionally difficult nature of job-seeking) for the sole purpose of reducing the loss of an employer who has treated the employee wrongfully.

Again, these rules are not foreordained. For example, in the case of leases the traditional rule was (and in some states still is) that if a tenant breaks the lease, the landlord is under no obligation to mitigate damages by seeking out a new tenant, or even renting to a new tenant who comes along.<sup>36</sup> This position underlines that, as stated by Ariel Porat, the duty-to-mitigate cases in contract law are "radical outcome[s] . . . [because] although both parties contributed to a loss that could have been mitigated, the aggrieved party is made to bear the entire burden of this part of the loss."<sup>37</sup>

performance is unwanted if (a) that party could have entered into a reasonable substitute transaction without unreasonable effort or expense or (b) it was unreasonable for that party to proceed with the performance.

Scottish Law Commission, Report on Remedies for Breach of Contract, No. 174, § 2.10, at 5 (1999), available at <http://www.scotlawcom.gov.uk>.

34. 156 Eng. Rep. 145 (Ex. Ch. 1854).

35. See U.C.C. § 2-715 (1989).

36. John E. Cribbet, *Principles of the Law of Property* 190 (1975); M. Friedman, *Friedman on Leases* § 16.3 (4th ed. 1997).

37. Ariel Porat, *Contributory Negligence in Contract Law: Toward A Principled Approach*, 28 U. B.C. L. Rev. 141, 159 (1994).

It is often said that mitigation of damages is not really a duty, because an actor's failure to mitigate damages does not make him liable, but instead simply reduces the amount of damages that he can collect. If that were the case, it might be argued as a corollary that the duty to mitigate damages is not a duty to rescue. Such an argument would be misconceived.

To begin with, actions taken to mitigate damages may actually *increase* damages. Specifically, an actor who incurs costs in a reasonable effort to mitigate is entitled to recover those costs against the breaching party even if the effort to mitigate is unsuccessful, so that mitigation actually increases rather than reduces the damages the actor can collect. For example, in *West Haven Sound Development Corp. v. West Haven*,<sup>38</sup> the City of West Haven sold part of a large parcel of land to A, who planned to use the land to open a restaurant. The City promised A that the rest of the parcel would be developed with residential and commercial buildings, which would provide a clientele for the restaurant. The City broke its promise, because a subsequent referendum required the City to develop the rest of the parcel as a park. A sued the City for breach of contract, and recovered, among other elements of damages, \$200,000 for the expenses it incurred after the City's breach in an unsuccessful attempt to mitigate the City's damages by keeping the restaurant afloat.

Similarly, in *Mr. Eddie v. Ginsberg*,<sup>39</sup> Ginsberg was wrongfully dismissed by his employer early in the term of a three-year employment contract. Immediately after the dismissal, Ginsberg took another job, which he held for thirty-four weeks, earning \$13,760. After Ginsberg left that job, he spent \$1340 unsuccessfully seeking further employment. The court held that Ginsberg was entitled to recover the remaining salary under his contract, minus the \$13,760 earned on the other job, but plus the \$1340 expended unsuccessfully looking for further employment. As to that expense, the court said that

the rule in such cases is . . . as follows: "the expenses for which a recovery may be had include necessary and reasonable disbursements made in an effort to avoid or mitigate the injurious consequences of the defendant's wrong. . . . If such expenses are the result of a prudent attempt to minimize damages they are recoverable even though the result is an aggravation of the damages rather than a mitigation."<sup>40</sup>

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38. 514 A.2d 734 (Conn. 1986).

39. 430 S.W.2d 5 (Tex. Civ. App. 1968).

40. *Id.* at 12 (citation omitted); see also *Automated Donut Sys. v. Consol. Rail Corp.*, 424 N.E.2d 265 (Mass. App. Ct. 1981); Restatement (Second) of Contracts § 347 cmt. c and illus. 3, and § 350 cmt. h. In *Automated Donut*, the court said,

There was evidence that Donut attempted to make the equipment function and as a result incurred expenses exceeding \$22,000. Despite Donut's

Although the rule allowing affirmative recovery for unsuccessful costs of mitigation expenses can be explained in more than one way, the best explanation is that because the injured party has a duty to mitigate, it is only fair that he be compensated for his costs in carrying out that duty. In any event, from the perspective of an economically rational actor, *A*, there is no substantive difference between (1) the sanction of being required to pay *B* \$1000 in damages to *B*, unless *A* takes a given action, and (2) the sanction of being required to accept \$1000 less in damages from *B* than *A* would otherwise be entitled to, unless *A* takes a given action. For purposes of this article, therefore, whether or not mitigation of damages is a "duty" is irrelevant, because even if mitigation is not a "duty" the basic point remains that normally where *B* is in breach, and *A* could take an action that would reduce the damages that *B* would otherwise incur, *A* must bestir himself to take that action or face a legal sanction.

More fundamentally, the principle of mitigation of contract law is not confined to requiring the innocent party to take reasonable actions to mitigate the breaching party's *damages*. Instead, the principle requires the innocent party to take reasonable actions to mitigate the breaching party's *losses*. Thus, in *Shiffer v. Board of Education*,<sup>41</sup> the court stated that "[t]he principle of mitigation is a thread permeating the entire jurisprudence." Similarly, in *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, Goetz and Scott conceptualize mitigation as a principle that each party to a contract is required to act "so as to minimize the joint costs of providing performance or its equivalent,"<sup>42</sup> and go on to show the application of that principle to a number of areas of contract law other than damages.

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endeavors, the machine never became operable. The defendant claims that repairs are an alternative form of recovery and that recovery may not be had both for repairs and the difference between the value of the property before and after the harm.

When there is a partial loss and the plaintiff successfully repairs the property, recovery may not be had both for repairs and the difference in value of the property. Such recovery would be duplicative. . . .

However, in cases where such repair efforts are reasonable at the time made, and it is only through hindsight that it becomes evident that the efforts were unsuccessful and enhanced the cost, there is no rule barring recovery for both attempted repairs and the difference in value of the property before and after loss. Permitting recovery for such attempts "reflects the policy . . . of encouraging the injured party to make reasonable efforts to avoid loss by protecting him even when his efforts fail . . . ." Restatement (Second) of Contracts § 350(2) & Comment h (1981). Thus the rule of the Restatement (Second) is that "costs incurred in a reasonable but unsuccessful effort to avoid loss are recoverable."

*Id.* at 270-71 (footnote omitted).

41. 224 N.W.2d 255, 258 (Mich. 1974).

42. Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va. L. Rev. 967, 969 (1983).

For example, where *B* sells goods to *A* that are defective and will continue to lose value because of the defect unless *A* takes some easy action to prevent the further loss, *A* must take the action. This rule is exemplified by Illustration 3 to Restatement (Second) of Contracts section 350:

A sells oil to B in barrels. B discovers that some of the barrels are leaky, in breach of warranty, but does not transfer the oil to good barrels that he has available. B's damages for breach of contract do not include the loss of the oil that could have been saved by transferring the oil to the available barrels.

Similarly, Uniform Commercial Code § 2-203(1) provides that if a merchant buyer rightfully rejects goods that are in his control, and the seller has no place of business or agent at the place of rejection, the buyer is under a duty to follow any reasonable instructions received from the seller with respect to the goods, and in the absence of instructions is under a duty to make reasonable efforts to sell the goods for the seller's account if the goods are perishable or threaten to speedily decline in value. If a merchant buyer fails to satisfy this duty, he will be liable to the seller for any loss in the value of the seller's goods that would have been prevented if the buyer had made reasonable efforts to resell the goods, although that loss would not increase the buyer's damages.

### B. Offer and Acceptance

A duty to rescue—to bestir oneself to prevent loss to another—is also imposed in various settings in the area of offer and acceptance; in particular, in the settings of silence as acceptance, late acceptance, and unilateral contracts.

#### 1. Silence as Acceptance

It is often said that there is a general rule of contract law that silence is not acceptance. The rule as so stated is much too broad in two respects.

First, there are many exceptions to the rule, and the number of cases that have held that, on the facts, silence did constitute acceptance is probably greater than the number of cases that have held that, on the facts, silence did not constitute acceptance. Second, one of the exceptions to the nominal rule is that silence does constitute acceptance where the offeror has so stated and the offeree, in remaining silent, intended to accept. Accordingly, a better statement of the nominal rule would be that in general an offeror cannot require an offeree to bestir himself to reject the offer, at the risk of being bound to a contract if he does not.

This formulation of the rule can be explained in terms of the following paradigm case: *A* and *B* are strangers. *B* writes to *A*, "I offer



to buy your car for \$13,000. If I don't hear from you otherwise, we have a contract." *A* throws *B*'s letter away without intending to accept. *A*'s silence should not, and does not, constitute acceptance. In the paradigm case, *B*'s only potential loss is a defeated and unreasonable expectation to which *A* did not contribute, and *A*, on his part, gains no benefit from his silence. Given the lack of either prior interchange on the subject-matter of the offer, a significant loss to *B*, or a benefit to *A*, it would be unreasonable to impose upon *A* the costs of communicating a rejection to *B* at the risk of becoming liable under a contract if he does not, however low those costs might be.<sup>43</sup>

When, however, *A*'s silence occurs in the context of a prior interchange, or when the stakes get higher—either because *B* may suffer a more significant loss or because *A* may be enriched at *B*'s expense—then at least where the costs to *A*, the offeree, would be very low, fairness may require *A* to bestir himself to take action to inform *B*, the offeror, that the offer is not accepted.

For example, in one recurring scenario *B* begins to render services that will benefit *A*. *B* expects to be paid for the services, as *A* knows or should know. The rule is that in such a case if it is easy for *A* to notify *B* that he does not intend to pay, *A* must do so, and if he does not he will be liable for the value of the services.

*Day v. Caton*<sup>44</sup> is a well-known case of this kind. *A* and *B* owned adjoining lots. *B* built a brick party wall (presumably a load-bearing wall, not just a fence) that straddled the boundary between the lots, and benefited *A*. The court held that if *A* knew or should have known that *B* expected *A* to pay for half the wall, and said nothing while *B* continued to build, *A* would be liable for half the value of *B*'s services:

If a party . . . voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. . . . [W]hen one stands by in silence, and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefore, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.<sup>45</sup>

In reaching its conclusion, the court employed a hypothetical that made clear that whether *A* has a duty to bestir himself to take action in such a case depends on the costs that the action would entail:

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43. For a cost-based analysis of the problem of silence as acceptance, see Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 Mich. L. Rev. 215, 249-72 (1990).

44. 119 Mass. 513 (1876).

45. *Id.* at 515.

If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit and with the expectation of payment indicated that consent which would give rise to the inference of a contract.<sup>46</sup>

In other words, *A* has a duty to warn *B* that no payment will be made if, but only if, the cost of warning is relatively low.<sup>47</sup>

In another recurring scenario, Seller's salesperson solicits from Buyer an order for goods, subject to Seller's acceptance. Although the order is on Seller's form, legally it is an offer by Buyer. Seller does not communicate with Buyer, and when Buyer requests delivery, Seller informs Buyer that it never accepted Buyer's order. Here, unlike the paradigm case, the offer occurs in the context of a prior interchange: the offeree (Seller) has both invited the offer and structured its terms. Furthermore, Seller knows or should know that Buyer will not be in a position to purchase the kind of goods in question from a third party while she awaits word from Seller, because if she does so and then Seller accepts the order, Buyer will end up with an oversupply of goods. Under these circumstances, Buyer will have a reasonable expectation that Seller will notify her within a reasonable time if it decides not to accept, so that Buyer will be free to make a purchase elsewhere. As a matter of fairness, therefore, Seller should be under a duty to give Buyer such notice, on penalty of being held liable on a contract based on the terms of the offer if it does not. That is indeed the legal rule.<sup>48</sup>

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46. *Id.* at 516; *see also, e.g.,* Laurel Race Course, Inc. v. Regal Const. Co., 333 A.2d 319 (Md. 1975); Farnsworth, *supra* note 26, at 150 (if the offeree has a reasonable opportunity to reject services, he "is expected not only to refrain from taking affirmative action that would appropriate services to the [offeree's] use, but also to speak up in protest"); John Edward Murray, Jr., *Murray on Contracts* 181 (3d ed. 1990).

47. There is an analogous rule in property law: if *A* observes that *B* is continually trespassing on *A*'s land to mine a mineral or other commodity, but stands by in silence, *B* will be liable in trespass, but only for the value of the commodity in its natural state under the ground, not for the significantly higher value of the commodity when extracted from the ground and ready to sell. *See, e.g.,* Minerals & Chem. Phillip Corp. v. Millwhite Co., 414 F.2d 428, 431 (5th Cir. 1969) (remarking that the landowner's silence "was tantamount to the creation of an implied contract").

48. *See, e.g.,* Ammons v. Wilson & Co., 170 So. 227 (Miss. 1936); T.C. May Co. v.

In a closely related kind of case, Applicant submits an application for insurance on Insurer's form. The application is an offer. Insurer delays notifying Applicant one way or the other. Meanwhile, the casualty that was to be covered by the insurance occurs. Here again, the offeree (Insurer) has both invited the offer and structured its terms. Insurer also knows or should know that the offeror (Applicant) will not be in a position to purchase insurance from another insurer while she awaits word, either because she was required to enclose payment for the insurance with her application to Insurer, or because if she gets other insurance and Insurer then accepts her application she will end up overinsured, or both. As a matter of fairness, therefore, Insurer should be under a duty to notify Applicant within a reasonable time if it decides not to issue the policy, on penalty of being held liable on the policy if the casualty occurs during the interim period. Although the cases are divided, the better view, supported by a number of cases, is that Insurer is under such a duty. As stated by Appleman,

A claim . . . [in such cases] is not based on a contract of insurance; rather, it is based upon the damages produced by the failure of the insurer promptly to perform the duty which the facts imposed upon it. The better rule is to the effect that an insurer has a duty either to accept or to reject an application within a reasonable time, and is liable if it delays unreasonably in acting thereon. And if its action is adverse, if it delays unduly in notifying the applicant thereof, it may be held liable just as if it had accepted the risk. . . .

. . . [H]ealth is a fragile thing. Over a period of unreasonable delay, one's health may change adversely; death may occur, either from accident or from some theretofore undiscovered cause. It is important to an applicant that the insurer act with diligence and either accept him or reject him, in which latter event he can seek coverage elsewhere. Delay of any duration is prejudicial to him; unwarranted delay may inspire judicial intervention. And . . . while the older pronouncements look with greater regard upon the insurer's need, more recent decisions, as a rule, cherish more highly those of the potential insured.<sup>49</sup>

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Menzies Shoe Co., 113 S.E. 593 (N.C. 1922); *Sioux Falls Adjustment Co. v. Penn Soo Oil Co.*, 220 N.W. 146 (S.D. 1928); *Cole-McIntyre-Norfleet Co. v. Holloway*, 214 S.W. 817 (Tenn. 1919); *Hendrickson v. Int'l Harvester*, 135 A. 702 (Vt. 1927).

49. 12A John Appleman & Jean Appleman, *Insurance Law and Practice* § 7216, at 107-08, § 7217, at 116 (1981) (footnotes omitted); *see also* Couch on Insurance §§ 11.8-11.10 (3d ed. Lee R. Russ & Thomas F. Segalla eds., 1996) (discussing the effect of delay in responding to an insurance application). *Compare* *Bellak v. United Home Life Ins. Co.*, 211 F.2d 280 (6th Cir. 1954) (finding liability for unreasonable delay); *Gorham v. Peerless Life Ins. Co.*, 118 N.W.2d 306 (Mich. 1962) (same); *Kukuska v. Home Mut. Hail-Tornado Ins. Co.*, 235 N.W. 403 (Wis. 1931) (same), *with* *Killpack v. Nat'l Old Line Life Ins. Co.*, 229 F.2d 851 (10th Cir. 1956) (finding no liability for unreasonable delay); *Schliep v. Commercial Cas. Ins. Co.*, 254 N.W. 618 (Minn. 1934) (same), *and* *Hayes v. Durham Life Ins. Co.*, 96 S.E.2d 109 (Va. 1957) (same).

Silence may also constitute acceptance under the Uniform Commercial Code. Section 2-207 of the Code provides that a definite and seasonable expression of acceptance that is sent within a reasonable time operates as an acceptance even though it states terms additional to those in the offer. If the offer is made by a merchant to a merchant, and if certain other conditions are satisfied, then unless the offeror notifies the offeree that he objects to the additional terms, they become part of the contract.

## 2. Late Acceptance

Another offer-and-acceptance context in which the law imposes a duty to rescue concerns late acceptance. Assume that *A* makes an offer to *B*, and the offer does not state the time within which it must be accepted. In such a case, the offer must be accepted within a reasonable time. Suppose *B* accepts the offer after the expiration of a reasonable time, but within a time that *B* could plausibly have believed, and did believe, was reasonable. The rule in such a case is that although the acceptance does not form a contract, *A*, the offeror, is under a duty, imposed as a matter of fairness, to inform *B*, the offeree, that the acceptance was too late. If *A* fails to so notify *B*, *A* will be liable on a contract. As stated in *Phillips v. Moor*,<sup>50</sup>

It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time. . . . but if the party to whom it is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late.<sup>51</sup>

## 3. Unilateral Contracts

Where an offer calls for acceptance by an act, a contract is completed as soon as the act is performed. In some cases, the fact that the act has been performed will naturally come to the offeror's attention within a reasonable time after performance occurs. In other cases—for example, where the act is performed at a distant location—it will not. In the latter type of case, the offeror may be prejudiced by the fact that a contract has been formed without his knowledge, because he may plan his affairs with the belief that he is not contractually bound to the offeree. Accordingly, even though a

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50. 71 Me. 78 (1880).

51. *Id.* at 80; see also *Kurio v. United States*, 429 F. Supp. 42, 64 (S.D. Tex. 1970); *Forbes v. Bd. of Missions of Methodist Episcopal Church, S.*, 110 P.2d 3 (Cal. 1941); *Sabo v. Fasano*, 201 Cal. Rptr. 270 (Cal. Ct. App. 1984); *Davies v. Langin*, 21 Cal. Rptr. 682 (Cal. Ct. App. 1962); Restatement (Second) of Contracts § 70 (1981).

contract has been formed, and the contract does not by its terms require any further action by the offeree, where the performance would not naturally come to the offeror's attention within a reasonable time, as a matter of fairness the offeree should be required to bestir himself to give the offeror notice of the performance so as to prevent prejudice to the offeror. That is just the law. In such cases, although a contract is formed when the act is completed, the offeror's duty to render performance under the contract is discharged if the offeree fails to notify the offeror within a reasonable time that a contract has been formed.<sup>52</sup>

### C. Performance

A duty to rescue may also arise in various contexts in the area of performance. These contexts include the duty to warn a party that it may be about to breach, the duty to warn a party of a potential loss, and the duty to cooperate.

#### 1. The Duty to Warn a Party That It May Be About to Breach

Often it is not entirely clear exactly what performance is required under a contract. For example, the terms of a contract may be insufficiently specified, or performance may look different on the ground than it does on paper, or performance may extend for a long time and one of the parties may fail to recollect some subsidiary contractual obligation or condition. In such cases, where *A* realizes that *B* may be about to breach without intending to do so, *A* should be obliged to warn *B* that *B* may be about to breach. As stated by Ariel Porat,

[Q]uestions arise whenever the [potentially] aggrieved party chooses not to help the party [who may be] in breach to understand his obligations, although he could easily have done so. For instance, one party may simply forget to perform her duties on the date required by the contract and the other, although aware of it, stands idle; or one party may inadvertently render a defective performance on a matter that is a precondition for the performance of the other, who then fails to deliver counter-performance without offering explanations. It is assumed that, had the first party drawn the second party's attention to the defect, the latter could have corrected it or changed it in time.

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The potentially aggrieved party should not be required to go to unreasonable lengths to clarify misunderstandings, nor is she the other party's guardian. [However, one party should not refuse] to

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52. See, e.g., *Bishop v. Eaton*, 37 N.E. 665 (Mass. 1894); Restatement (Second) of Contracts § 54 (1979).

meet with or speak to the other without a reasonable justification, . . . when the other party appears to be acting in good faith, and knowing that clarification might prevent a breach. . . .

[Imposing such a duty] would promote suitable behaviour in contract performance, and lead to more contracts being fulfilled. In fact, increasing the chances of fulfillment regarding a contract where performance has been riddled with misunderstandings will strengthen the parties' reliance and planning ability. They will be less fearful of drifting into ambiguous situations, and will trust each other's help and support if and when such situations do emerge.<sup>53</sup>

The duty to warn a party that it may be about to breach is exemplified by the opinion of Judge Posner in *Market Street Associates Ltd. Partnership v. Frey*.<sup>54</sup> In 1968, J.C. Penney Company, the retail chain, entered into a sale and leaseback arrangement with General Electric Pension Trust for the purpose of financing Penney's growth. Under the arrangement, the Lessee [Penney] sold various properties to the Pension Trust, which the Trust then leased back to Penney for a term of twenty-five years.

Paragraph 34 of the lease gave the Lessee the right to "request Lessor [the Pension Trust] to finance the costs and expenses of construction of additional Improvements upon the Premises," provided the amount of the costs and expenses was at least \$250,000.<sup>55</sup> The Pension Trust agreed that upon receiving such a request it would give reasonable consideration to finance the improvements, "and Lessor and Lessee shall negotiate in good faith concerning the construction of such Improvements and the financing by Lessor of such costs and expenses."<sup>56</sup> Paragraph 34 went on to provide that if the negotiations failed, the Lessee would be entitled to repurchase the relevant property at a price roughly equal to the price at which Penney sold the property to the Pension Trust in the first place, plus six percent a year for each year since the original purchase. Accordingly, if Penney had sold the property to the Pension Trust at the property's then-market value, then if the average annual appreciation in the property exceeded six percent, and there was a breakdown in negotiations over the financing of improvements, Penney would be entitled to buy back the property for less than its

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53. Porat, *supra* note 37, at 149-50. Porat's analysis in this article is couched in terms of what kinds of inaction might be deemed contributory negligence under contract law, which would justify an adjustment of damages. However, his analysis is also relevant to the duty to rescue, because a party's inaction can be deemed contributory negligence only if the party had a duty to act. Accordingly, while I approach performance issues in this article from a slightly different perspective, the underlying inquiry is basically the same, and I draw here heavily on Porat's analysis.

54. 941 F.2d 588 (7th Cir. 1991). My statement of the facts in this case is in substantial part taken verbatim from Judge Posner's opinion.

55. *Id.* at 591.

56. *Id.*

market value.<sup>57</sup>

One of the properties that Penney had sold to and leased back from the Pension Trust was a shopping center in Milwaukee. In 1987, Penney assigned the lease on this shopping center to Market Street, which succeeded to Penney's rights and duties under the lease. In 1998, Market Street received an inquiry from a drugstore chain that wanted to open a store in the shopping center, provided that Market Street built the store for it. Market Street initially sought financing for the project from sources other than the Pension Trust. These sources were unwilling to lend the necessary funds unless they were given a mortgage on the shopping center. However, Market Street could not give such a mortgage because it was only the lessee of the shopping center, not the owner.<sup>58</sup>

Market Street therefore decided to try to buy the property back from the Pension Trust. In June 1998, Market Street's general partner, Orenstein, tried to call David Erb of the Pension Trust, who was responsible for the Milwaukee property. Erb did not return his calls, so Orenstein wrote to Erb, expressing an interest in buying the property, and asking Erb to "review your file on this matter and call me so that we can discuss it further."<sup>59</sup> At first, Erb did not reply. Eventually Orenstein reached Erb, who promised to review the file and get back to him. A few days later, an associate of Erb called Orenstein and indicated that the Pension Trust would be interested in selling the property to Market Street for \$3 million, a price that Orenstein considered much too high.<sup>60</sup>

On July 28, Market Street wrote a letter to the Pension Trust, formally requesting funding for \$2 million in improvements to the shopping center. The letter made no reference to paragraph 34 of the lease. Indeed, the letter did not mention the lease. The letter asked Erb to call Orenstein to discuss the matter. Erb did not call. On August 16, Orenstein sent a second letter, again requesting financing and this time referring to the lease, although not expressly to paragraph 34. The heart of the letter was the following two sentences: "The purpose of this letter is to ask again that you advise us immediately if you are willing to provide the financing pursuant to the lease. If you are willing, we propose to enter into negotiation to amend the ground lease appropriately."<sup>61</sup>

The next day, August 17, Market Street received a letter from Erb dated August 10, turning down the original request for financing on the ground that the request did not "meet our current investment criteria" because the Pension Trust was not interested in making loans

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

for less than \$7 million.<sup>62</sup> On August 22, Orenstein replied to Erb by letter, noting that his letter of August 10 and Erb's letter of August 16 had evidently crossed in the mails, expressing disappointment at the turn-down, and stating that Market Street would seek financing elsewhere. That was the last contact between the parties until September 27, when Orenstein sent Erb a letter stating that Market Street was exercising the option granted under paragraph 34 to purchase the property at the original price plus six percent per year if negotiations over financing broke down, as they had.<sup>63</sup>

The Pension Trust refused to sell the property at that price, and Market Street sued to compel specific performance. The price computed by the formula in paragraph 34 was \$1 million. The market value of the property presumably was higher, or Market Street would not have tried to force the Pension Trust to convey the property at the paragraph 34 price. Whether the value was as high as the \$3 million sale price originally offered by the Pension Trust was not clear.<sup>64</sup>

The district judge granted summary judgment for the Pension Trust. The judge inferred that Market Street didn't really want financing from the Pension Trust. Instead, it just wanted an opportunity to buy the property at a bargain price, and hoped that the Pension Trust wouldn't realize the implications, under paragraph 34, of turning down Market Street's request for financing. In the district judge's view, Market Street should have warned the Pension Trust that it was requesting financing pursuant to paragraph 34, so that the Trust would understand the penalty for refusing to negotiate.<sup>65</sup>

On appeal, the Seventh Circuit, in an opinion by Judge Posner, agreed that there is a duty on a contracting party not to take deliberate advantage of an oversight by its contract partner concerning rights and duties under the contract:

[I]t is one thing to say that you can exploit your superior knowledge of the market—for if you cannot, you will not be able to recoup the investment you made in obtaining that knowledge—or that you are not required to spend money bailing out a contract partner who has gotten into trouble. It is another thing to say that you can take deliberate advantage of an oversight by your contract partner concerning his rights under the contract. Such taking advantage is not the exploitation of superior knowledge or the avoidance of unbargained-for expense; it is sharp dealing. Like theft, it has no social product, and also like theft it induces costly defensive expenditures, in the form of overelaborate disclaimers or investigations into the trustworthiness of a prospective contract partner, just as the prospect of theft induces expenditures on

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62. *Id.*

63. *Id.* at 592.

64. *Id.*

65. *Id.*



locks. . . .

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. . . [I]mmensely sophisticated . . . enterprises make mistakes just like the rest of us, and deliberately to take advantage of your contracting partner's mistake during the performance stage (for we are not talking about taking advantage of superior knowledge at the formation stage) is a breach of good faith. To be able to correct your contract partner's mistake at zero cost to yourself, and decide not to do so, is a species of opportunistic behavior that the parties would have expressly forbidden in the contract had they foreseen it. The immensely long term of the lease amplified the possibility of errors but did not license either party to take advantage of them.<sup>66</sup>

A comparable kind of case is presented where one party knows that the other party is about to inadvertently fail to fulfill a condition. This kind of case is exemplified by Illustration 7 to Restatement (Second) of Contracts section 205:

A suffers a loss of property covered by an insurance policy issued by B, and submits to B notice and proof of loss. The notice and proof fail to comply with requirements of the policy as to form and detail. B does not point out the defects, but remains silent and evasive, telling A broadly to perfect his claim. The defects do not bar recovery on the policy.<sup>67</sup>

This Illustration, like Judge Posner's analysis in *Market Street*, is based on the principle of good faith in performance. Given both the generality of that principle, and the continuing controversy over the manner in which the principle should be articulated, it is preferable to base the analysis in such cases on the duty to rescue, which is more specific, easier to apply, and reaches pre-contractual as well as post-contractual activity.

## 2. The Duty to Warn of a Potential Loss

Under the principle of *Hadley v. Baxendale*, a party who is injured by a breach of contract can recover only those damages that (1) arise

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66. *Id.* at 594, 597. Having set out the applicable law, the Seventh Circuit reversed and remanded, because on the Pension Trust's motion for summary judgment the district judge had construed the facts as favorably to the Pension Trust as the record would permit, while the correct standard for summary judgment is to construe the facts as favorably to the nonmoving party (*Market Street*) as the record would permit. Under such a construction, the Seventh Circuit said, it was at least conceivable that Orenstein believed that Erb knew about paragraph 34 but simply had no interest in financing the improvements, regardless of the purchase option. If Orenstein believed that Erb knew, or would surely find out, about paragraph 34, it was permissible for Orenstein not to warn Erb about that paragraph. To decide what Orenstein believed, a trial was necessary.

67. The Reporter's Note states that this Illustration is based on *Johnson v. Scottish Union Ins. Co.*, 22 S.W.2d 362 (Tenn. 1929).

“naturally, i.e., according to the usual course of things” from the breach, or (2) might “reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of . . . [a] breach.”<sup>68</sup>

Assume a contract between Seller and Buyer in which Seller is the potential breaching party. (As a practical matter, the principle of *Hadley v. Baxendale* normally operates only to cut off damages against breaching Sellers.) Under the first branch of the principle, Buyer can recover all damages that flow from Seller’s breach and do not depend on Buyer’s particular circumstances—for example, the difference between the contract price and the market price in a breach of contract for the sale of goods. Under the second branch of the principle, Buyer can also recover any damages that result because of Buyer’s particular circumstances—for example, a loss of profits that it suffers because of Seller’s delay in delivering a machine that Buyer needs in his factory—if, but only if, Seller is on notice of those circumstances at the time the contract is made.<sup>69</sup>

By the nature of the principle of *Hadley v. Baxendale*, the cases under this principle usually do not address circumstances that arise after the contract is made. However, Ariel Porat has persuasively argued that in at least two types of cases an injured party who is the potential victim of a breach (“Buyer”) has a duty to warn the other party (“Seller”) of circumstances that arise after the contract is made. In the first type of case, Buyer becomes highly certain that a given loss is impending if Seller breaches, and knows that although Seller is on notice of the possible loss, she views it as merely a distant possibility. In the second type of case, at the time the contract was made a reasonable person would have foreseen Buyer’s specific loss if the contract was breached, but Seller did not foresee the loss. Buyer now realizes that the loss is impending and that Seller does not know this. In either type of case, fairness requires Buyer to warn Seller of the impending loss.<sup>70</sup>

Similarly, Goetz and Scott argue that in some cases the potentially breaching party (Seller) has a duty to warn the other party (Buyer) that the latter will incur a certain kind of loss on Seller’s breach. Goetz and Scott exemplify this point with a hypothetical in which Seller agrees to install a compressor for Buyer at a fixed price:

Assume . . . that [after the contract was made,] while making the calibrations necessary to design the compressor, Seller observed but did not react to the fact that Buyer was constructing a laboratory in which sensitive research experiments were to be thermostatically controlled. Assume further that, once the system was operational,

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68. *Hadley v. Baxendale*, 156 Eng. Rep. 145, 145 (Ex. Ch. 1854).

69. See generally Melvin Eisenberg, *The Principle of Hadley v. Baxendale*, 80 Cal. L. Rev. 563 (1992).

70. Porat, *supra* note 37, at 151.

malfunctions in the laboratory's automated control processes caused \$100,000 worth of experiments to be ruined. Upon examination, Seller discovered that the compressor's thermostat was not calibrated with sufficient precision to control experiments of such sensitivity and thus the control processes malfunctioned. Accurate calibration is sometimes difficult, but imprecise settings of that magnitude are usually harmless. Buyer, unaware that thermostatic calibrations were so crucial, had not indicated the sensitive nature of his research projects at the time of contract. Seller therefore argues that he will be responsible for any ordinary damages, but not for the \$100,000 worth of ruined experiments which he claims were unforeseeable consequential damages.

Seller's argument under conventional contract rules seems powerful. *Hadley v. Baxendale* limits an obligor's responsibility for the consequences of breach to those needs and circumstances he had reason to know at the time of contracting. . . .

Formulating the appropriate disclosure rule presents problems, however. Any attempt to particularize the obligation in advance fails because of its inapplicability to most contractors. A more promising approach is to extend *Hadley v. Baxendale* to all those particular needs of which an obligee is unaware, if the obligor has reason to know of them at any time before performance is tendered. Thus, Seller's failure to warn Buyer would be a breach of an implied duty to "rescue" a contracting partner.<sup>71</sup>

In short, depending on the circumstances, *A*, a party to a contract, should and may well be under a duty to warn the other party, *B*, of impending losses that *A* knows *B* does not expect, where a warning is likely to prevent or reduce the loss.

### 3. The Duty to Cooperate

Cases like *Market Street Associates, Ltd. Partnership v. Frey*<sup>72</sup> involve a duty to warn. In other cases, a party to a contract will be under a duty to actively cooperate. Cases involving a duty to cooperate can be divided into two categories. In some cases, a duty to cooperate may be derived through interpretation of the contract on the ground that the parties must have contemplated that the cooperation of one was necessary to the performance of the other and would therefore be forthcoming.<sup>73</sup> As Porat points out,

[I]n some cases, it may become clear when the contract is created that performance is either impossible or extremely difficult without some measure of cooperation from the recipient. In such circumstances, it is a matter of interpretation whether a duty of

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71. Goetz & Scott, *supra* note 42, at 1012-14 (footnotes omitted).

72. 941 F.2d 588 (7th Cir. 1991).

73. See, e.g., U.C.C. § 2-311(3) (1989).

cooperation is implied. If the contract is interpreted to mean that the recipient was required to cooperate, and that his failure to do so prevented the other party's performance it is the recipient who will be considered the party in breach. . . .<sup>74</sup>

At least in theory, cases of this kind do not present an issue of the duty to rescue; instead, they simply present an issue of contract interpretation. A leading case that falls into this category is *Vanadium Corp. v. Fidelity & Deposit Co.*<sup>75</sup> In 1939 and 1940, two mining leases of Navajo lands that held vanadium-bearing ore had been made to Horace Redington, John Wade, and Thomas Curran. Because the lands belonged to the Navajos, any transfer of the leases required approval by the Secretary of the Interior.<sup>76</sup>

The mineral vanadium was a critical war material. After World War II had begun, Vanadium Corporation made a contract with Redington under which Redington assigned his interest in the two leases to Vanadium for \$13,000, subject to approval by the Secretary of the Interior.<sup>77</sup> The contract provided that if the assignments were not so approved, Redington would repay the \$13,000 purchase price and the agreement would be cancelled.

Vanadium requested the Interior Department to approve the assignments. Subsequently, however, Curran (one of the three lessees) notified Vanadium that Wade, acting for all the lessees, had made a contract to sell the entire output of ore from the properties to Metals Reserve Corporation for the duration of the war. This information cooled Vanadium's desire for Redington's interest in the leases. When the Interior Department asked Vanadium to provide assurance of its intent to cooperate with the other two lessees, Vanadium refused to give assurances. Subsequently, Vanadium withdrew its request for approval of the assignments.<sup>78</sup>

The Department then disapproved the assignments. Redington appealed. The Department responded that it was prepared to reconsider if Vanadium would go along, and wired Vanadium that the disapproval was "being reconsidered with view to approving assignments. Wire your position." Vanadium answered, "Our position . . . must be to respectfully request no reconsideration of your position." The Department then notified the parties that without "a joint request for reconsideration by both parties to the assignment, no further consideration could be given to approving the assignments."<sup>79</sup>

Vanadium then sued Redington to recover the \$13,000 payment. Redington defended on the ground that Vanadium's lack of

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74. Porat, *supra* note 37, at 147.

75. 159 F.2d 105 (2d Cir. 1947).

76. *Id.* at 106.

77. *Id.*

78. *Id.* at 106-07.

79. *Id.* at 107.

cooperation prevented the assignments from being approved and therefore justified Redington in retaining the \$13,000. The court held that Vanadium could not recover the \$13,000 because it was under a duty to cooperate and had failed to do so:

Here an obligation to attempt in good faith to secure the prerequisite of the Secretary's approval would appear to rest upon both parties. Indeed plaintiff [Vanadium] may well have the heavier burden, for . . . it seems that the assignee must file the assignment for approval and apparently no one else can legally do so. It was surely not the intent of the parties when they made an apparently binding assignment that [Vanadium] should have the power to invalidate the assignment by not filing it for approval. On the contrary, it must have been assumed that plaintiff would reasonably file it and in good faith seek its approval.<sup>80</sup>

As the court in *Vanadium* saw that case, at the time the parties made the contract it must have been their intent that Vanadium would cooperate in obtaining the Secretary's approval, because Vanadium's cooperation was necessary for performance of the contract. In contrast, in the second category of duty-to-cooperate cases the cooperation of a party is not necessary to performance of the contract. Rather, because of unanticipated circumstances that arise only as performance of the contract unfolds, it turns out that a slight amount of cooperation by one party can save the other party from incurring very high costs. In this kind of case the duty to cooperate is imposed not on the ground of interpretation, but on the ground of fairness.

Judge Posner has forcefully set out this principle at least twice. In *AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc.*,<sup>81</sup> he stated that "[t]he parties to a contract are embarked on a cooperative venture, and a minimum of cooperativeness in the event unforeseen problems arise at the performance stage is required even if not an explicit duty of the contract."<sup>82</sup> He reiterated this information in the *Market Street* case:

[C]ontracts do not just allocate risk. They also (or some of them) set in motion a cooperative enterprise, which may to some extent place one party at the other's mercy. . . .

. . . At the formation of the contract the parties are dealing in present realities; performance still lies in the future. As performance unfolds, circumstances change, often unforeseeably; the explicit terms of the contract become progressively less apt to the governance of the parties' relationship . . . and with it the scope and bite of the good faith doctrine . . . grows.<sup>83</sup>

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80. *Id.* at 108 (citations omitted).

81. 896 F.2d 1035, 1041 (7th Cir. 1990).

82. *Id.*

83. *Market St. Assocs., Ltd. P'ship v. Frey*, 941 F.2d 588, 595-96 (7th Cir. 1991).

Hugh Collins gives a good example of the sort of a case in which the duty of cooperation requires a party to bestir himself to action based on fairness rather than on interpretive considerations:

Consider a case of a contract of carriage of goods by road, where the owner of the goods hears on the radio that the main road is blocked due to an accident. Should the owner give this information to the carrier so that the delivery is not delayed, or can the owner simply leave the carrier to fend for itself, with the result that the carrier breaks the contract by delivering the goods late? Here, the economic analysis points towards a duty to disclose the information. The failure to disclose the information would simply increase the costs of performance to the carrier to the extent of the damages payable for delay and the opportunity costs caused by having a lorry stuck in a traffic jam, with no benefit to the owner of the goods. Since these costs could be avoided at the price of a telephone call, the criterion of wealth maximization suggests that an implied duty of disclosure of this information should be imposed.

A similar conclusion emerges from an alternative analysis of this example in terms of the value of co-operation. If we assume that the common law recognizes a basic value that the legal rules should be structured to promote the proper performance of contracts by requiring, where necessary, an implied duty of co-operation, then again we should expect the law to impose an implied duty to disclose information in these circumstances. The duty to disclose information would assist the successful completion of contracts by requiring a minimal and inexpensive mutual duty to safeguard the other contracting party's interests.<sup>84</sup>

#### D. Summary

A duty to rescue—that is, a duty that is imposed by law upon one actor, *A*, to bestir himself to take a low-cost, low-risk, and otherwise reasonable action that will forestall a major loss to another actor, *B*, although *B*'s peril of prospective loss is not caused by *A*'s fault—is an important, albeit implicit, principle of American contract law. A number of the rules that instantiate this duty have been considered in this Part. These rules are illustrative rather than exhaustive. For example, suppose *A* and *B* make a contract that includes Expression *E*. *A* attaches the meaning Alpha to Expression *E*, while *B* attaches the meaning Beta. Alpha is a more reasonable meaning than Beta, but *A* knows that *B* attaches the meaning Beta, and *B* does not know that *A* attaches the meaning Alpha. In such a case Expression *E* will be interpreted to mean Beta, although that meaning is less reasonable than Alpha. Similarly, if *B* makes a mechanical error in formulating

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84. Hugh Collins, *Implied Duty to Give Information During Performance of Contracts*, 55 Mod. L. Rev. 556, 556-57 (1992).

an offer, such as a mistake in computing a bid, and *A* is aware of the error, *A* cannot take advantage of the error by accepting the offer and completing a contract. In both cases, in effect *A* has a duty to warn *B* of his error.

### III. WHY DOES CONTRACT LAW IMPOSE A DUTY TO RESCUE WHILE TORT LAW AND CRIMINAL LAW DO NOT?

The apparent inconsistency in the treatment of the duty to rescue under contract law on the one hand, and tort law and criminal law on the other, is unsettling, because under two ideals for the law, the whole body of law should be coherent.

The first of these ideals is that the body of rules that constitute the law should be congruent with the body of legal rules that one would arrive at by giving appropriate weight to all applicable propositions of morality, policy, and experience ("social propositions"), and making the best choices where such propositions collide. Attainment of this ideal helps assure that disputes will be resolved under, and that law will be based upon, social standards; harmonizes legal outcomes with the reasonable expectations of private actors; and furthers the legitimacy of the law by demonstrating its substantive rationality. Call this the ideal of social congruence.

The second ideal is that all the rules that make up the body of the law should be consistent with one another. Attainment of this ideal promotes predictability and evenhandedness, and furthers the legitimacy of the law by demonstrating its rationality. Call this the ideal of systemic consistency.

It might appear that systemic consistency is based on formal logic rather than on social propositions. That is not so. Social propositions normally determine not only whether the body of the law is socially congruent, but also whether it is systemically consistent. To illustrate, take the rule that bargains are enforceable. There are a number of exceptions to this rule. Generally speaking, the rule and its exceptions are consistent only if the exceptions reflect applicable social propositions. For example, one standard exception to the rule is that a bargain made by a minor is not enforceable against the minor. This exception is consistent with the rule because, and only because, applicable social propositions suggest that for purposes of liability a distinction should be drawn between the consent of a minor and the consent of an adult. In contrast, suppose a court were to hold that a bargain made by a clergyman is not enforceable against the clergyman, even if the bargain is not religious in nature. This exception would undoubtedly be criticized as inconsistent with the rule. That criticism, however, would not be based on formal logic, but on the ground that applicable social propositions would not support a rule giving special status to clergymen for this purpose. It is easy to

imagine social propositions that would support exceptions for other purposes or in another society or time. In the Middle Ages, for example, clergymen could be prosecuted for felonies only in ecclesiastical courts, and therefore were not subject to capital punishment. Even today, religious bargains made by clergymen might well be unenforceable. But applicable social propositions in contemporary society would not support a clergyman exception for secular bargains. That is the reason, and the only reason, why such an exception would be inconsistent with the bargain rule.

At any moment in time, the whole body of law is unlikely to be socially congruent and systemically consistent, partly because there is also a third ideal in the law: stability of doctrine over time. As a result, some rules may persist even if they are not the very best rules, at least if they are not substantially socially incongruent. Furthermore, a distinction must be drawn between a strong and a weak meaning of systemic consistency. A legal rule is systemically consistent in a strong sense if it is consistent with other legal rules on the basis of applicable social propositions. Even if that condition is not satisfied, however, two legal rules may be said to be systemically consistent in a weak sense, although they lead to different results in socially comparable cases, on the ground that the two rules are parts of different legal subsystems. Examples include conflicting rules in property law and contract law, and in maritime law and nonmaritime law. This weak kind of systemic consistency, however, tends to dissolve over time, because it provides only an impoverished justification for the different treatment of socially comparable cases.

Against this background I explore, in this Part, two approaches to explaining the apparent difference between the treatment of the duty to rescue in contract law on the one hand, and tort law and criminal law on the other. In Section A, I explore the explanation that the physical-peril rule is unsound and that contract law differs because the courts have been unwilling to extend an unsound rule beyond what precedent requires. In Section B, I explore the possibility of reconciling the treatment of the duty to rescue in the three bodies of law.

#### *A. Is the Physical-Peril Rule Sound?*

One possible explanation of the difference between the contract-law rule and the physical-peril rule is that the physical-peril rule is unsound and the courts are unwilling to extend an unsound rule beyond what precedent requires.

Here is the argument in favor of a duty to rescue from physical peril:

It is generally recognized that an actor is under a strong moral obligation to take action to save a victim from physical peril if there is no significant risk or other cost to the actor and failure to take the



action would probably result in death or substantial injury to the victim. Given this strong moral obligation, most people will perform such rescues even if they are under no legal obligation to do so. However, many will not. This is shown by the many cases in which an actor did not attempt an easy rescue—cases like *Yania v. Bigan*,<sup>85</sup> where the defendant did nothing to save a person who was drowning in a pit of water on the defendant's land; *Harper v. Herman*,<sup>86</sup> where the defendant did not warn the plaintiff that the water was too shallow for diving; and *People v. Beardsley*,<sup>87</sup> where the defendant did nothing to save a woman who was in a coma and dying in his home. In those cases, the actor was held not liable. Actors also failed to perform easy rescues in the scores of cases in which an actor was held liable under an exception to the physical-peril rule—cases like *Soldano v. O'Daniels*,<sup>88</sup> where a bartender would not allow a would-be rescuer to use his phone. And beyond the litigated cases are tragic unlitigated events, like the Kitty Genovese case, in which people looked out the windows of their apartments, saw a young woman being murdered, and did not even lift a finger to call 911.<sup>89</sup>

Accordingly, experience shows that the imposition of a legal duty to rescue is a necessary incentive—and probably would often be a sufficient incentive—to lead into action those many potential rescuers who have either failed to internalize the moral norm, or have internalized it so weakly that it is overborne by slight considerations of personal convenience. The imposition of such a duty therefore would increase the amount of rescue, and would lead to more lives being saved, and more personal injuries being averted or ameliorated, at little cost. A legal duty to rescue is especially important in a mobile, somewhat anonymous society, where the moral duty cannot easily be enforced by the sanctions of shame and scorn.

Furthermore, a major function of legal rules is to mark out those social norms that the community regards as especially important. The inclusion in the law of a duty to rescue a victim from physical peril sends the message that members of a society owe one another an important obligation of due concern. The omission of such a duty to rescue sends the message that due concern is not an important obligation. The former message is highly desirable. The latter message is highly undesirable.

That is the argument in favor of a duty to rescue from physical peril. It is extremely strong. Several kinds of arguments have been made against such a duty. They are not very strong—certainly, not strong

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85. See text accompanying *supra* note 5.

86. See *supra* notes 7-8, 16 and accompanying text.

87. See text accompanying *supra* note 6.

88. See text accompanying *supra* notes 19-21.

89. Martin Gansberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. Times, Mar. 27, 1964, at 1.

enough to trump the argument in favor of such a duty.

Some of the arguments against a duty to rescue from physical peril are based on morality. In a well-known article, Richard Epstein makes two such arguments.<sup>90</sup> Epstein's first argument is that there is no duty to rescue under conventional or social morality.<sup>91</sup> This argument is empirical, and is empirically incorrect. "[A]ll agree," says Liam Murphy—all, that is, but Epstein—"that the person who fails to effect an easy rescue is a moral monster . . ."<sup>92</sup> Where an actor could prevent a serious injury to a blind man about to cross a street merely by saying a word, would anyone seriously think that the actor has acted morally if he does not say the word? The Restatement (Second) of Torts itself, after stating in the Comment to section 314 that under the law an actor "may sit on the dock, smoke his cigar, and watch [a victim] drown," adds that "decisions [that take this position] have been condemned . . . as revolting to any moral sense."<sup>93</sup> As the court observed in *Soldano v. O'Daniels*,<sup>94</sup>

The refusal of the law to recognize the moral obligation of one to aid another when he is in peril and when such aid may be given without danger and at little cost in effort has been roundly criticized. Prosser describes the case law sanctioning such inaction as a "refus[al] to recognize the moral obligation of common decency and common humanity" and characterizes some of these decisions as . . . "revolting to any moral sense."<sup>95</sup>

As suggested by *Soldano*, a distinction needs to be drawn between heroic rescues and easy rescues. There is no moral obligation to make heroic rescues, that is, rescues that would involve significant risk to the rescuer. If an actor does perform a heroic rescue he will have acted in a way that is morally commendable, but not in a way that was morally required. In contrast, there *is* a moral obligation to make easy rescues, that is, to make rescues that do not involve significant physical risks or significant out-of-pocket costs. Of the two, physical risks are much more important. In the physical-peril context, rescue seldom involves out-of-pocket costs. Where it does, the results are paradoxical. If there is no legal duty to rescue from physical peril, then presumably an actor who chooses to engage in rescue acts officiously, for purposes of the law of restitution, and therefore cannot recover any costs. This result provides a *disincentive* to rescue. In contrast, if there was a legal duty to rescue from physical peril, then

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90. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Leg. Stud. 151, 189-203 (1973).

91. *Id.* at 200-01.

92. Murphy, *supra* note 2, at 625.

93. Restatement (Second) of Torts § 314, cmt. c (1965).

94. 190 Cal. Rptr. 310 (Cal. Ct. App. 1983).

95. *Id.* at 313 (quoting W. Page Keeton, et al., Prosser & Keeton on the Law of Torts § 56, at 340-41 (4th ed. 1971)).

the rescuer should not be deemed to have acted officiously, and should be allowed to recover his costs under the law of restitution, at least to the extent that those costs do not exceed the benefit to the victim.<sup>96</sup> Under a rule requiring rescue, therefore, rescue might entail minimal physical risks but would normally not entail out-of-pocket costs, either because most rescues from physical peril do not involve such costs, or because in the case of those that do, the costs should be recoverable to the extent that a benefit is conferred.

Epstein's second moral argument against the imposition of a legal duty to rescue is that such a duty would impinge on the moral value of autonomy or individual liberty.<sup>97</sup> However, the liberty interest is a thin and unsatisfactory moral value unless it is coupled with and limited by the moral obligation to have due concern for others. Many legal rules impinge on individual liberty. The issue is never whether a legal rule impinges on individual liberty, but whether it impinges unduly or improperly. As Liam Murphy points out, concern with individual liberty in the duty-to-rescue context is therefore "disingenuous, or at any rate mistaken."<sup>98</sup> Although under the Millian harm principle the only purpose for which power can be rightfully exercised over a member of a civilized community against his will is to prevent harm to others,<sup>99</sup>

a duty to rescue can legitimately be enforced precisely for the reason that, though it does diminish the negative liberty of the person coerced, it promotes the interests of others. Of course, if the promotion of the interests of others actually achieved by such a provision were outweighed by the loss in autonomy caused by the interference with negative liberty, such a provision would make no sense for a Millian liberal. But as a legal duty of easy rescue would interfere with liberty only minimally, it is not surprising that Mill [himself supported such a duty].<sup>100</sup>

Or as Kent Greenawalt puts it,

From a consequentialist perspective . . . [a] legal duty requiring people to prevent death or severe injury to another when they are fortuitously in the position to do so at no risk and at slight cost to themselves is a minimal infringement on individuals' pursuit of their

96. See Murphy, *supra* note 2, at 658.

97. Epstein, *supra* note 90, at 203-04.

98. Murphy, *supra* note 2, at 606-07.

99. John Stuart Mill, *On Liberty* 9 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859).

100. Murphy, *supra* note 2, at 631. Mill himself took this position:

There are also many positive acts for the benefit of others which [a person] may rightfully be compelled to perform, such as . . . saving a fellow creature's life . . . —[acts] which whenever it is obviously a man's duty to do he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.

Mill, *supra* note 99, at 10-11.

own projects. . . .

Does an examination from a deontological perspective (based on moral rights and justice) yield a different conclusion? I assume that a moral duty to rescue exists . . . . 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). A duty to rescue is a reasonable responsibility of citizens. People may believe that, on balance, imposing the duty is unwise, but the duty involves no breach of any defensible deontological principle that law should not enforce morality.<sup>101</sup>

The autonomy argument against a duty to rescue is often coupled with a distinction, said to be basic, between commissions and omissions. The idea here is that it is proper to regulate commissions, but not omissions. That idea, however, adds nothing to the autonomy argument, and is both flimsy and unwarranted except to the extent that it simply restates the autonomy argument. Certainly there is no obstacle in the law to holding a person liable for omissions, and such liability is not uncommon. The Model Penal Code provides that “[a] person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act *or* the omission to perform an act of which he is physically capable,”<sup>102</sup> and modern codifications of the criminal law typically provide that crimes may be committed by omission.<sup>103</sup> Many statutory crimes are specifically defined in terms of failure to act,<sup>104</sup> and liability for failure to rescue is already imposed in both tort law and criminal law under the exceptions to the physical-peril rule.

It is true that most American legal rules do not unconditionally require persons to take affirmative action, but instead are in an implicit conditional form, such as: if a person drives, he must drive carefully; or, if a person earns income, she must pay income taxes; or, if a person has children, he must support and educate them. In contrast, the duty to rescue from physical peril imposes an affirmative

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101. Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. Crim. L. & Criminology 710, 714-15 (1995); see also Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 Phil. & Pub. Aff. 157, 182 (1994):

[A] duty to give emergency assistance constitutes a reasonable and not excessively burdensome interference with individual liberty because it applies only to cases in which a fairly small effort is able to avert a very great harm and the threat arises out of exceptional circumstances. From the perspective of the citizen affected by [a statute that requires easy rescue], the chances that one will be inconvenienced by this duty are small, while the nature of the hazard—death or injury—that assistance would avert is very great.

102. Model Penal Code § 2.01(1) (1962) (emphasis added).

103. LaFave, *supra* note 3, at 214 & n.1.

104. *Id.* at 214 n.1.

obligation on persons who may not have engaged in any activity connected to the victim's peril. But so what? This general characterization of American law is subject to many exceptions, and is positive, not normative. In any event, there is only a razor-thin difference between saying that if you spend your whole life in a cave you will have no legal duties to speak of, and saying that if you engage in life you will have legal duties. Indeed, as made clear in the *Tentative Draft of the Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*, even negligence can often be conceived as based on either commissions or omissions:

A person's negligence often consists of an act as such: for example, making an imprudent left turn while driving. Or it consists of a course of conduct: for example, driving a car at an unreasonable rate of speed. However, . . . negligence frequently involves a failure to take a reasonable precaution. Thus, for example, a driver can be negligent for failing to step on the brakes when the driver's car approaches other traffic on the road. Such a failure can be described as an omission, and it hence can be said that the omission is itself negligent. Alternatively and preferably, it can be stated that the driver is negligent for the dangerous action of driving the car without taking the precaution of braking it appropriately. Likewise, a company that transmits electric power can be negligent for omitting to have the power lines adequately inspected, or omitting to warn persons of unexpected dangers. Alternatively, it can be stated that the company is negligent for transmitting electricity without taking appropriate precautions.<sup>105</sup>

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. However, a legal duty to rescue would require only easy rescues, and therefore would leave ample space for moral action just where moral action is needed, that is, for heroic rescues.<sup>106</sup> Furthermore, as stated by A.D. Wozzley, "A Good Samaritan law . . . would do nothing to prevent a genuine Good Samaritan from acting as one; the demand that we act according to the law is not the demand that we act out of respect for it."<sup>107</sup> Wozzley also points out that if "the introduction of a Good Samaritan law would make it impossible for us to be Good Samaritans, then by analogy it must be the case *now* that none of us can display honesty in our handling of each others' goods—owing to

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105. Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 3 (Tentative Draft No. 1, 2001).

106. See Silver, *supra* note 1, at 434.

107. A.D. Wozzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273, 1292-93 (1983), quoted in Jeremy Waldron, *On the Road: Good Samaritans and Duties*, 40 Santa Clara L. Rev. 1053, 1064 n.26 (2000).

the unfortunate existence of the larceny laws.”<sup>108</sup>

Still another kind of argument sometimes made against imposing a duty to rescue from physical peril is based on administrative considerations. The major argument is that a duty to rescue could not be practicably administered because of the difficulty of determining such elements as whether a given peril requires a response and how much risk a rescuer should be required to accept.

This argument treats the problem as if we were writing on a blank slate. We are not. Most civil-law jurisdictions impose a duty to rescue persons in physical peril.<sup>109</sup> For example, Article 323c of the German Penal Code provides, “Whoever does not render assistance during accidents or common danger or need, although it is required and can

108. *Id.*; see also Alon Harel & Assaf Jacob, *An Economic Rationale for the Legal Treatment of Omissions in Tort Law: The Principle of Salience*, 3 *Theoretical Inquiries in Law* 413 (2002), <http://www.lexisnexis.com/universe>:

Landes and Posner . . . [claim] that imposing a legal duty to rescue may diminish the incentives to rescue in that a person who rescues will not be recognized as a hero, but, rather, will be regarded as merely having fulfilled his or her duty. This argument is grounded in a dubious psychological conjecture. It is difficult to know what effect imposing a duty of rescue has on people’s attitudes toward rescuing another . . .

Jewish sources seem to disagree with Posner and Landes’ psychological conjecture. . . . Rabbi Hanina [said]: “he who is commanded and fulfils [the command] is greater than he who fulfils it though not commanded.” The *Tosfoth*, one of the important Talmudic commentaries, explains the rationale underlying this surprising claim. It argues that one who is commanded is anxious to obey the commandment. Someone who is not commanded obeys because of his own will to do so and, consequently, should not be rewarded in the same way. . . . Rabbi Elbo . . . [says that]

he who is commanded and fulfills [the command] is greater than he who fulfills though not commanded since the man who is commanded and fulfills . . . performs two things. The one that he does the good deed or the honest deed, and the second that it is meant to do the will of his father in Heaven, and he who is not commanded and fulfills merely because it is the right deed and nothing else.

*Id.* at 418 n.11; see also Waldron, *supra* note 107, at 1064-65:

[P]eople’s main motivations for refraining from rape, murder, robbery, etc. is that they know it is wrong; and the imposition of sanctions, like death or imprisonment, is intended to cover the cases—alarming cases, not ordinary cases, in the eyes of the law—in which moral requirements per se have not been effective. And this remains true in cases where the law requires action, rather than merely forbidding it. . . . It is nonsense to suppose that the law discounts such motivations or seeks to supplant them with a fear of penalties. The penalties are there to ensure that, in the unlikely event the moral motivation fails, there will be something else with which to deter flight or the evasion of responsibility.

109. See, e.g., Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law, in The Duty to Rescue—The Jurisprudence of Aid* 93 (Michael A. Menlowe & Alexander Smith eds., 1993); John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 *Harv. L. Rev.* 1073, 1105 (1961); David N. Kelley, *A Psychological Approach to Understanding the Legal Basis of the No Duty to Rescue Rule*, 14 *BYU J. Pub. L.* 271, 277-78 (1999-2000). In addition to the West European codes, almost all East European and Latin American criminal codes impose a duty to rescue. Cadoppi, *supra*.

be expected of him under the circumstances and, especially, is possible without substantial danger to himself and without violation of other important duties, shall be punished with imprisonment for not more than one year or a fine."<sup>110</sup> Similarly, Article 223-6 of the French Penal Code provides, "Any person who willfully abstains from rendering assistance to a person in peril when he or she could have rendered that assistance without risk to himself, herself, or others, either by acting personally or calling for aid, is liable to [imprisonment for five years and a fine of 500,000 francs]."<sup>111</sup>

The French courts have interpreted Article 223-6 and its predecessors in a very forceful way.<sup>112</sup> For example:

(i) The term "peril" includes perils created by third parties, by natural events, by the victim's own fault, and even by the victim's threat to commit suicide.<sup>113</sup>

(ii) An actor, *A*, is not excused from the duty to rescue a victim in peril, *B*, on the ground that *A* did not believe that *B* was in peril, if *A* knew that he was not fully informed, and could have informed himself of *B*'s peril by due inquiry.<sup>114</sup>

(iii) Although Article 223-6 on its face only applies when the potential rescue would be "without risk," a risk will constitute an excuse only where it would deter the intervention of a reasonable and well-intentioned person in the same circumstances.<sup>115</sup>

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110. Strafgesetzbuch [StGB] [German Penal Code], translated by Bundesministerium der Justiz [the Federal Ministry of Justice], available at <http://www.bmj.bund.de/images/10927.pdf>.

111. French Penal Code of 1994, reprinted in 31 American Series of Foreign Penal Codes: The French Penal Code of 1994 (1999); Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. Sch. J. Int'l & Comp. L. 451, 460-61 (2000).

112. The following passages on French law rely heavily on Tomlinson, *supra* note 111, and on research into French law by my research assistant, Debbi Quick.

113. Tomlinson, *supra* note 111, at 477-81.

114. See TC Charleville, Feb. 6, 1952, J.C.P. 1953, II, 6987, note P.A. Pageaud; Tomlinson, *supra* note 111, at 480.

115. See CA Aix, Dec. 23, 1952, J.C.P. 1953, II, 7429, note P.A. Pageaud (involving failure of farmer to summon aid for dying girl near his farm); Tomlinson, *supra* note 111, at 485-87; cf. Murphy, *supra* note 2, at 656.

[The Rhode Island statute imposing a duty to rescue] requires only "reasonable" assistance, and specifies that this will never involve danger or peril to the rescuer. As a matter of statutory interpretation, it is not plausible to read this latter limitation such that a rescue attempt is required only if it would involve no risk whatever of physical harm. Even walking to the edge of the dock to toss the life preserver entails *some* risk to my life (I could slip and fall off, hitting my head on the rocks). In any event, a sensible legal duty to rescue will require rescue attempts so long as only a minimal risk of serious harm is involved. This means that the risk that a good swimmer will get a cramp and drown if she swims out into the calm lake to rescue a floundering child would not be sufficient to justify inaction. But an average swimmer (as opposed to an off-duty, professional surf lifeguard) should not be required to head off into rough surf to attempt to rescue someone caught in a rip tide

(iv) If an actor fails to fulfill the duty to rescue, it is not a defense that the victim nevertheless ultimately escaped the peril.<sup>116</sup>

(v) Despite the language of the Article 223-6, which seems to require a potential rescuer to either act personally or call for aid, an actor has a duty to make a reasonable response to a victim's peril, which will not always be satisfied by a mere call for aid.<sup>117</sup>

(vi) Although Article 223-6 imposes only criminal liability, a violation of that Article will also give rise to an action in tort.<sup>118</sup>

It is hard to believe that civil-law countries would have persisted in maintaining a duty to rescue if the rule was unadministrable. Indeed, even present law shows that a duty to rescue from physical peril is administrable. Recall that there *is* a duty to rescue from physical peril whenever one of the exceptions to the general rule is applicable. Under almost all of the exceptions, the courts must determine virtually all the elements that would need to be determined under a general duty to rescue: whether the victim, *B*, was in peril; whether the potential rescuer, *A*, had reason to believe that *B* was in peril, and that he could easily save *B* from the peril; and whether the rescue would pose a significant risk to *A*. If the courts can administer those elements under the exceptions, so too could the courts administer those elements under a general duty-to-rescue rule. It is true that under most of the exceptions a court does not have to decide to whom a duty to rescue runs, but once the other elements of the duty are satisfied, the answer to that question will normally be obvious: If *A* knows that *B* is in peril and that *A* could easily save him from that peril, then *A* owes a duty of rescue to *B*.

A different kind of administrability argument is that a duty to rescue from physical peril could not be practicably applied in cases where there is more than one potential rescuer, each of whom might justifiably refrain from acting because he expects one or more of the others to act.<sup>119</sup> This argument is also not persuasive.

To begin with, even under current law one or more of the exceptions can be applicable even in cases where there is more than one potential rescuer. For example, several different psychologists

*Id.* (footnote omitted).

116. See Cass. crim., Jan. 21, 1954, J.C.P. 1954, II, 8050, note P.A. Pageaud (involving failure of doctor to attend an injured man); CA Pau, Dec. 2, 1943, J.C.P. 1944, II, 2724, note J. Seignolle; TC Charleville, Feb. 6, 1952, J.C.P. 1953, II, 6987, note P.A. Pageaud; TC Douai, Dec. 20, 1951, D. 1952, somm. 53.

117. See Cass. crim., July 26, 1954, D. Jur. 1954, 666; TC Bayeux, June 22, 1954, J.C.P. 1954, II, 8290, note P.A. Pageaud, *upheld*, Cass. crim., Oct. 9, 1956, J.C.P. 1956, II, 9598 (involving failure of passing driver to take badly injured man to hospital); Tomlinson, *supra* note 111, at 482-83.

118. See TC Le Mans, Oct. 22, 1951, J.C.P. 1951, II, 6557 (involving failure of nearby farmers to help rescue injured bicyclist); Dawson, *supra* note 109, at 1107-08. *But see* OLG Frankfurt, NJW-RR (1988), 794.

119. See, e.g., Keeton et al., *supra* note 95.



could have saved the victim in *Tarasoff v. Board of Regents*, and as Murphy points out, "If twenty school teachers all failed to throw a rope to a drowning elementary school pupil at the school rowing regatta, would our courts be unable to find a way to impose liability?"<sup>120</sup>

Moreover, although there have been a few spectacular and horrible instances in which there were a number of potential rescuers who might have reasonably assumed that another would act, the reported cases in both common-law and civil-law jurisdictions suggest that such instances are not the norm. In most duty-to-rescue cases, either there is only one potential rescuer or each potential rescuer can observe that the others are not acting. And even in those relatively few cases in which there are a number of potential rescuers who cannot observe the others, whether a given actor, *A*, has a duty to rescue can usually be resolved by asking whether *A* would have acted if his own self-interest was at stake. For example, if *A* saw his child in trouble in the surf off a crowded beach, would he be likely to refrain from making an easy rescue because he believed that if he didn't act, someone else would? If not, then *A* should be under a duty to rescue even if the child in trouble is not his own. Of course, this may mean that in an occasional case many actors are under a duty to rescue, but there is nothing wrong with that, and indeed the same result can follow even now under some of the exceptions to the physical-peril rule.

Law-and-economics has also weighed in on the desirability of the physical-peril rule. On its face, that rule seems inefficient, at least under the Hand (or *Carroll Towing*) formula, under which liability in tort depends on whether (i) the burden of taking precaution against injury to another is less than (ii) the cost of the injury that may result multiplied by the probability that the injury will result.<sup>121</sup> A duty to rescue from physical peril would be applicable only when there was little or no risk or other cost to the rescuer. Accordingly, the burden imposed on potential rescuers under a duty-to-rescue rule would almost invariably be far less than the victim's probable loss (often, death) multiplied by the probability of the loss in the absence of rescue (normally, close to 100 percent).<sup>122</sup> As stated by Richard Epstein,

if one considers the low costs of prevention to *B* of rescuing *A*, and the serious, if not deadly, harm that *A* will suffer if *B* chooses not to

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120. Murphy, *supra* note 2, at 621.

121. *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947); Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 3 (Tentative Draft No. 1, 2001); Dobbs, *supra* note 4, at 341.

122. See Epstein, *supra* note 90, at 190; Eric H. Grush, *The Inefficiency of the No-Duty-to-Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U. Pa. L. Rev. 881 (1998); Richard Hasen, *The Efficient Duty to Rescue*, 15 Int'l Rev. L. & Econ. 141, 141 (1995).

rescue him, there is no reason why the *Carroll Towing* formula or the general rules of negligence should not require, under pain of liability, the defendant to come to the aid of the plaintiff.<sup>123</sup>

In a well-known article, Landes and Posner nevertheless argued that a duty to rescue from physical peril would result in a decrease in total utility because of activity-level effects.<sup>124</sup> The argument is as follows: If there was a duty to rescue, then when actors who are potential rescuers had a choice between two activities that are equally gratifying, and “one activity is ‘hazardous’ thus creating rescue opportunities . . . [while no victims] are present in the alternative activity and therefore no rescue opportunities exist,” actors would choose the nonhazardous activity, so as to avoid potential liability for failure to rescue.<sup>125</sup> As a result, the number of potential rescuers who engage in the hazardous activity will be undesirably reduced.<sup>126</sup>

Landes and Posner do not define what constitutes a “hazardous” activity, but by implication, for purposes of their analysis a hazardous activity is an activity that provides opportunity for rescue. But if “hazardous activity” is defined so broadly, it is unlikely that there are many nonhazardous activities, and even more unlikely that these nonhazardous activities would be good substitutes for hazardous activities. And even if there are a few non-hazardous activities, it is still more unlikely that actors will prefer a nonhazardous activity solely because it does not implicate a possible duty to rescue. As Saul Levmore has said, “the only appealing example of identifiable rescue spots and, therefore, of a counterproductive activity-level effect concerns beaches, but one can barely imagine evening strolls on the beach decreasing if potential strollers feared that in the event of a drowning they would be identified as having passed within earshot of the victim.”<sup>127</sup>

Finally, Landes and Posner fail to recognize that potential rescuers may be *more* willing, rather than less willing, to engage in hazardous activities under a duty-to-rescue rule. Potential rescuers are also potential victims.<sup>128</sup> In their capacity as potential victims, actors will feel safer engaging in a hazardous activity if there is a duty to rescue from physical peril, because they will know that if they fall into peril they will be more likely to be rescued. Landes and Posner avoid this issue only by making the exceptionally improbable assumption that actors are either potential victims or potential rescuers, but not

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123. Epstein, *supra* note 90, at 190.

124. 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, 119-28 (1978).

125. *Id.* at 120-21.

126. See Kelley, *supra* note 109, at 278-79.

127. Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 Va. L. Rev. 879, 890 (1986).

128. Hasen, *supra* note 122, at 142.

both.<sup>129</sup>

In the end, even Landes and Posner do not claim that a duty to rescue would be inefficient. "We have not . . . *proved*," they say, "that the imposition of liability for failure to rescue would be inefficient. We have merely *suggested* that the results under the common law, occasionally imposing liability but mostly denying it, *may* be consistent with efficiency."<sup>130</sup> Well, yes, the results under the common law *may* be consistent with efficiency, but they probably are not. And if the efficiency calculus is unknown, the principles of morality should control.

To summarize, the argument in favor of a legal duty to rescue from physical peril is extremely strong, while the arguments against such a duty are weak and unpersuasive.<sup>131</sup> Accordingly, one explanation of

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129. Landes & Posner, *supra* note 124, at 120. Landes and Posner also argue that imposing a legal duty to rescue would diminish the amount of rescue that is made for reputational effects. This argument is also dubious. Hasen comments,

I doubt altruism is motivated solely (or even primarily) by the desire for rewards or recognition; the altruists I know appear to derive utility from doing good for others, whether or not they are doing so under compulsion of a legal duty, and whether or not they receive public recognition.

The presence of altruism does not affect the utility of a liability rule for non-altruists. Altruists act regardless of a liability rule . . . .

Hasen, *supra* note 122, at 146. Recall, too, that a duty to rescue from physical peril would not require heroic rescue, so that heroic rescue would remain purely altruistic.

130. Landes & Posner, *supra* note 124, at 126 (second and third emphasis added).

131. Some commentators take the view that (i) the rule that there is no legal duty to rescue from physical peril is unsound, but (ii) the duty should be imposed only by criminal law, not by tort law. *See, e.g.*, Mark 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 (2000); Murphy, *supra* note 2, at 662-63. Because this view is consistent with the position that the physical-peril rule is unsound I will address it only briefly. The basic rationale for this view is that tort damages for failure to rescue would often be dramatically out of scale with the fault involved. This rationale is unconvincing within the framework of existing tort law.

To begin with, liability for failure to rescue is already imposed in a great number of cases under one of the many exceptions to the rule, and these exceptions come close to swallowing the rule.

Next, the most common form of tort liability is negligence, which often entails the imposition of enormous liability for a small degree of fault. Indeed, negligence may entail no fault whatsoever, as where an automobile driver does her best in a given situation, but her best is not as good as a reasonable person would have done. And although negligent conduct might be characterized as immoral in the sense that it displays a lack of due regard for others, that characterization would often be strained and is seldom employed. In contrast, a failure to effect an easy rescue is a deliberate rather than an inadvertent act, and typically involves a high degree of fault and immorality. Accordingly, to the extent that the criminalization-only view is based on a disproportion between fault and damages, it is inconsistent with the operation of the principle of negligence in tort law.

Finally, if there would indeed be a unique problem of disproportionality between fault and damages for a duty to rescue under tort law, the solution would not be to refrain from imposing an otherwise-appropriate duty for fear of excessive damages, but to cap the damages by legislation. To provide a further incentive for rescue, the legislature might also exempt an actor who attempts a rescue from liability

the different treatment of the duty to rescue in contract law on the one hand, and tort law and criminal law on the other, is that the courts have chosen not to extend an unsound rule any further than precedent requires.

There is good evidence for this explanation in tort law itself. The exceptions to the physical-peril rule cover so much ground that, as Dobbs concludes, "it may be that properly understood the exceptions have the effect of creating a duty to act in most instances where a reasonable person would feel compelled to act."<sup>132</sup> To put this differently, the exceptions are so pervasive that a stranger who didn't know the law and merely observed the results of the cases might well conclude that normally there *is* a duty to rescue from physical peril.

Furthermore, some of the exceptions are inconsistent with the rule. How can it be consistent to conclude that an actor can watch a baby drown in ten inches of water, but has a duty to let a bystander use his phone to summon help, or to rescue a social guest who is drowning in a pool on his property? In common-law reasoning, when a doctrine is not supported by morality, policy, and experience, the courts often retain the doctrine but emasculate it with inconsistent exceptions. Conversely, the presence of inconsistent exceptions to a rule provides a strong signal that courts consider the rule unsound. Even Richard Epstein, a vigorous opponent of the duty to rescue, candidly recognizes that many of the exceptions to the physical-peril rule are founded in a judicial belief that the rule is unsound. "There is a . . . class of exceptions to the [physical-peril] rule, motivated by . . . judicial distaste for the doctrine. . . . These variations on the . . . rule illustrate the evasive responses that courts are prepared to make in order to restrict a rule that they accept but do not like."<sup>133</sup> Because the physical-peril rule is unsound, and is so regarded even by many of the courts that purport to accept the rule, it is not surprising that the courts would choose not to extend the rule beyond tort law and criminal law.

### B. *Can the Duty to Rescue in Contract Law Be Reconciled with Tort Law?*

I now consider the radically different question whether the duty to rescue in contract law can be *reconciled* with tort law. (For simplicity I will focus here only on tort law, on the assumption that criminal law largely follows in its train.)

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for negligence in making the attempt, although a court could probably reach the same result by creating a partial immunity for reasons of policy, just as courts have done in other areas, such as the business judgment rule in corporation law, and the principle of judicial immunity against claims based on negligence.

132. Dobbs, *supra* note 4, at 854.

133. Epstein, *supra* note 90, at 193-94.

Some corners of the duty to rescue in contract law might be reconciled with some corners of tort law. For example, there is a duty to mitigate damages not only in contract law but also in tort law,<sup>134</sup> although tort law probably has no counterpart to the contract-law mitigation rules that require the innocent party not only to reduce the breaching party's damages, but to take action to prevent that party from incurring additional losses, as where an innocent buyer is required to patch the seller's leaky oil barrels, or to re-sell perishable commodities on the seller's behalf. In any event, the real issue is not whether a corner of the contract-law principle can be reconciled with a corner of the tort-law rule, but whether a larger reconciliation is possible, based on differences between the enterprise of tort law and the enterprise of contract law.

For example, there is an important difference in the nature of the interest normally at stake in tort law and the interest normally at stake in contract law: Tort law typically concerns the prospect of bodily injury or death, while contract law typically concerns only financial gains and losses. An attempt at reconciliation on this basis, however, seems unproductive. Because our society values bodily integrity more than profits, the duty to rescue should be stronger in tort law than in contract law, not weaker. Furthermore, in tort cases the party in need of rescue is typically not himself at fault. In contrast, in contract cases the party in need of rescue is often at fault. On this basis too, the duty to rescue should be stronger in tort law than in contract law, not weaker.

Another, more promising difference between the enterprise of tort law and the enterprise of contract law concerns the characteristic relationship between parties in tort and contract cases. Tort law tends to concern random interactions between strangers. In contrast, contract law tends to concern actors who have associated voluntarily. This difference suggests two possible lines of reconciliation with regard to the duty to rescue.

First, the duty to rescue in contract law might be conceived as congruent with the implied-understanding exception to the physical-peril rule, on the theory that the instantiations of the duty to rescue in contract law are based on implication from the parties' contract. However, although this approach might account for some of the contract-law instantiations it would fail to account for others. For example, this approach could not account for the contract-law rules that apply where the parties have not yet entered into a contract, such as the rule that where an acceptance is late but the offeree might fairly have believed that the acceptance was timely, the offeror is under a duty to tell the offeree that her acceptance is late; or the rule that

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134. See, e.g., *Colton v. Benes*, 126 N.W.2d 652, (Neb. 1964); *Cannon v. N.J. Bell Tel.*, 530 A.2d 345, 350 (N.J. Super. Ct. App. Div. 1987).

where *B* begins rendering services for *A* in the expectation of payment, and *A* knows *B*'s expectation, *A* will be bound if it would be easy for him to speak but he does not do so. This approach would also not account for duties that are imposed, not on the ground of implication from the contract, but on the ground of fairness—such as the duty of a party to a contract, *A*, to render low-cost cooperation to save the other party, *B*, from incurring a significant loss, even when *A*'s cooperation is not required for *B*'s performance.

Furthermore, even where the parties have entered into a contract, often it is not clear that if, at the time of contract formation, the parties had addressed the issue of rescue in a context in which the duty to rescue may arise, they would have agreed that rescue would be required. For example, it is not clear that an employee would agree *ex ante* that if he is discharged in breach of contract he must pound the pavement looking for a new job to reduce his employer's damages. Similarly, it is not clear that contracting parties would agree *ex ante* to remind each other of provisions in the agreement that the other might have forgotten. I do not claim that in these and other cases the parties would not so agree. I do claim that we cannot be sure what the parties would agree to, and therefore the implied-understanding approach provides a less secure foundation for the outcomes in these cases than a straightforward duty-to-rescue principle based on fairness.

A potentially more fruitful approach to reconciling tort law and contract law, based on the contract characteristic of voluntary association, is to conceive the duty to rescue in contract law as congruent with the special-relationship exception to the physical-peril rule. The power of this approach depends on which of three competing views of tort law should be taken.

Under one view of tort law, the special-relationship exception is highly circumscribed. This is the view taken in Restatement (Second) of Torts, which specifies only five such relationships: carrier-passenger, innkeeper-guest, landowner-invitee, custodian-ward, and employer-employee. It is true that the courts have sometimes extended the exception beyond those root relationships, as in *Farwell v. Keaton*,<sup>135</sup> where a young man on a social outing with a friend was held to have a special relationship with the friend. However, the courts have been extremely parsimonious about extending the exception, as reflected in cases like *Yania v. Bigan*,<sup>136</sup> where the court held that *A* had no duty to rescue *B* although *B* jumped into a pit of water on *A*'s land, apparently at *A*'s urging; *People v. Beardsley*,<sup>137</sup> where the court held that the defendant had no obligation to help a woman dying in a coma in his home; and the tryst cases, in which the

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135. 240 N.W.2d 217 (Mich. 1976).

136. 155 A.2d 343 (Pa. 1959).

137. 113 N.W. 1128 (Mich. 1907).

courts have held that an actor has no duty to warn a date about a jealous spouse or boyfriend. Similarly, even in the relatively recent case *Harper v. Herman*,<sup>138</sup> the court held that the defendant boat owner had no duty to warn the victim of shallow water despite the fact that the victim was on the defendant's boat as a member of a party of five.<sup>139</sup> Accordingly, this circumscribed view of tort law does not provide a basis for reconciling tort law and contract law in regard to the duty to rescue.

Under a second view of tort law, the special-relationship exception in tort law would be reconceived in a very catholic way to mean not just a series of specified relationships, but an *appropriate* relationship—appropriate, that is, to require rescue. On this view, contract law and tort law could be reconciled on the theory that contractual contexts typically involve such a relationship. This view, although attractive, finds only limited support in the tort authorities, and therefore could be achieved only by treating the older authorities, like Restatement (Second) of Torts, *Yania v. Bigan*, and the trust cases as past their sell-by dates, and treating the modern case of *Harper v. Herman* as a bad decision that should not be followed.

Under a third view of tort law, contract law and tort law could be reconciled, not by reconceiving the physical-peril rule and its exceptions, but by reconceiving tort law itself. Stephen Sugarman has proposed just such a reconception. Under Sugarman's conception, the core principle of fault-based liability in torts is "that one is (provisionally) liable if one unreasonably fails to act in a way that would have prevented the injury suffered by the victim."<sup>140</sup> "Provisionally," because in determining whether one has acted unreasonably, "it is . . . crucial . . . to take the injurer's social role into account."<sup>141</sup> Accordingly, "whether or not the burden on the defendant of avoiding the harm to the victim is too great is very much a social judgment," and not simply a matter of applying the Hand formula.<sup>142</sup> (This conception would help to explain why as a normative matter only easy rescue should be required, even where the Hand formula would require heroic rescue. As a matter of social judgment, an actor is not required to perform a heroic rescue regardless of the potential benefit to the victim.) Under this

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138. 499 N.W.2d 472 (Minn. 1993).

139. Although the victim, Harper, was originally a guest of a guest, folks who come to parties as guests of guests are socially viewed as themselves guests. In any event, when Herman let Harper remain on the boat after boarding, he was essentially accepting Harper as his guest, just as when you give a ride to a friend in your car and your friend brings a date, the date becomes your guest if you do not demur.

140. Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of A Restatement (Fourth) of Torts*, 50 UCLA L. Rev. (forthcoming 2002) (manuscript on file with the Fordham Law Review).

141. *Id.*

142. *Id.*

conception of tort law, the duty to rescue in contract law and tort law could be easily reconciled, because there would be no physical-peril rule. On the contrary, there would be a duty to rescue in tort law whenever rescue was reasonably required by an actor's social role, potentially including his role as a member of the community who by virtue of physical proximity or for other reasons is in a unique position to effect a rescue, and the social judgment concerning the appropriate burden of rescue. Similarly, there would be a duty to rescue in contract law where the social role of an actor in a given contractual context reasonably so required.

#### CONCLUSION

Under contract law, there is a duty to rescue—a duty imposed on an actor in a contractual context to bestir himself to take a low-cost, low-risk, and otherwise reasonable action that will forestall a major loss to another. Contract law differs in this regard from the physical-peril rule of tort law and criminal law, as presently conceived. However, that does not cast doubt on the duty to rescue in contract law. Because the physical-peril rule is unsound, there is no good social reason to extend it to contract law. Moreover, there are ways of reconceptualizing either the special-relationship exception to the physical-peril rule, or tort law itself, to reconcile the physical-peril rule and the duty to rescue in contract law.

Moreover, if we look at law as a whole, the picture is not simply one of competing rules in contract law on the one hand, and tort law and criminal law on the other. To begin with, the physical-peril rule is riddled with so many exceptions that, as Dobbs concludes, the result is to impose liability in most cases where a reasonable person should act. Next, if the duty to rescue in contract law is incongruent with the general rule in tort law and criminal law, it is congruent with the many, sometimes inconsistent, exceptions to that rule. Finally, a duty to rescue is congruent with other areas of law—in particular, admiralty and restitution. Under admiralty law, there is a duty to rescue life in peril on the sea.<sup>143</sup> Under the law of restitution, an actor is under a duty to act to return a mistaken payment, although he has no relationship to the payor, has not undertaken to make a repayment, and was not at fault in receiving the payment.<sup>144</sup>

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143. 46 U.S.C. § 2304; United Nations Convention on the Law of the Sea, Art. 98, U.N. Sales No. E.83.V.5; Brussels Salvage Convention of 1910, art.11, *reprinted in* Ina H. Wildeboer, *The Brussels Salvage Convention* 266 (1965); Thomas Schoenbaum, *Admiralty and Maritime Law* 382 (3d ed. 2001).

144. The affirmative nature of that duty is underscored by the position, taken by Stephen Smith, that because an actor who receives a mistaken payment has not undertaken to return the payment, and was not at fault in receiving it, as a matter of principle the actor should not be under a duty to return it. Therefore, Smith concludes, the only way to explain the duty to return mistaken payments is that in the absence of such a duty it would be mechanically difficult for the payor to recover the



Viewed globally, therefore, what is both socially and systematically incongruent in the law is not the duty to rescue in contract law, but the tort-law and criminal-law cases that uphold the physical-peril rule and conclude that no exception to the rule is applicable.

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payment.

The best interpretation of the law on mistaken transfer . . . is that the law has . . . adopted a kind of reverse *de minimis* rule. Strictly speaking, the duty to return property in such cases is inconsistent with the harm principle. On its face, such a duty is a problem for both consequentialist and nonconsequentialist accounts of the law, but because the duty is trivial [and the benefit is great] an exception is made. The exception is parasitic on the more basic obligation of noninterference. The core *reason* for the duty is not to uphold a duty to reverse an unjust enrichment but rather to ensure that individuals are able to retrieve their property or its equivalent value.

Stephen A. Smith, *Justifying the Law of Unjust Enrichment*, 79 *Tex. L. Rev.* 2177, 2194-95 (2001).

A much better (and much cleaner) way to explain the duty to return a mistaken payment is the position taken in the text above: that duty is simply an instantiation of a more general duty to rescue. As Smith says, the cost of a duty to return a mistaken payment is trivial and the harm to be avoided is great. When action is not too risky or costly, and great harm would be suffered if the action is not taken, the Millian harm principle does not prevent the imposition of a duty to take the action, as Mills himself concluded in the case of rescue from physical peril. *See supra* text accompanying notes 97-99.