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THE LEGAL DUTY RULE AND LEARNING ABOUT RULES: A CASE STUDY

JOEL K. GOLDSTEIN*

I. INTRODUCTION

Early in their law school careers, most students find that the notions they brought with them about law clash with the ideas encountered there. As a traditional first semester course, Contracts is one arena in which students experience most acutely that tension between expectation and reality.

Most new law students probably expect law school professors to spend more time teaching basic legal rules.¹ They anticipate the education in black letter law that is the distinctive trait of bar review courses. They are, therefore, surprised by their professors' suggestion, whether explicit or implicit, that being a good lawyer is not a function just of knowing the rules.² Moreover, new law students expect legal rules to operate differently than they often do. Their initial perspective frequently places greater faith on simple rules than the curriculum ultimately suggests is appropriate. They expect law to be more mechanical, to guide with the precision of rules of traffic—when the light turns red, you must stop—or of rules of games—the tie goes to the runner, the line is in (or out as the case may be).

* Professor of Law, Saint Louis University School of Law. I am grateful to Milton I. Goldstein for helpful comments, to Matthew Piant and Christopher Tracy for able research assistance and to Mary Dougherty for superb secretarial help. I have been privileged to know two master teachers of Contracts whose example has inspired me. I studied Contracts in law school under Professor Clark Byse. He was a committed and caring teacher who communicated by his example his enthusiasm for the material and for law. Years later, when I began teaching, he was always generous in responding to my occasional calls for his help. Professor Vincent Immel has been my cherished colleague these past seven years. His commitment to excellence in teaching, to his students, and to this law school have been evident in more than 40 years on our faculty. They are magnificent models as Contracts teachers and colleagues in the profession and I am grateful for having had the opportunity to learn from both. Neither they nor anyone other than myself is responsible for any shortcomings of this article.

1. STEWART MACAULEY ET AL., *CONTRACTS: LAW IN ACTION* 1 (1995).

2. Clark Byse, *Introductory Comments to the First-year Class in Contracts*, 78 B.U. L. REV. 59, 65-66 (1998). See also EDWARD J. MURPHY ET AL., *STUDIES IN CONTRACT LAW* v (5th ed. 1997) (Study of law “involves not only familiarizing oneself with certain data, but reflecting upon that data in a way that helps to form a first-rate professional competence.”).

Clear and simple rules do have their place. They govern more conduct in the real world than in the artificial confines of law school courses which focus on hard cases. Still, students soon find that rules are far less precise and far less predictive than they anticipated. Legal reasoning is more complicated than deciding to press the accelerator (or brake) or signal the runner safe (or out). The student who simply knows what the rules are will not necessarily be a very adept (or happy) lawyer. This helps explain, in part, why teaching basic doctrine is not the primary task law schools have assumed.

This is not to say that rules are unimportant to law or to law schools. On the contrary, they are central to both. Viewing “[t]he rule of law as a law of rules”³ may be controversial, but there is no doubt that law and rules are intertwined and interdependent concepts. Much of legal education involves exploring questions about rules, just not those questions students expect to dominate. If law school does not primarily teach specific rules, it does focus on questions about rules. What are rules? How are they made? By whom? Why? What are the advantages and disadvantages of various types of rules? What characteristics should judge made rules have? Why do rules change? And so on.

A basic course in contracts offers many opportunities to explore these issues. Yet, few topics lend themselves so easily, or so productively, to this enterprise as does the preexisting or legal duty rule. It provides a case study through which students can discover central ideas about law that will reappear in other contexts. Exposing some of these ideas in this context will enable students to identify and assess these phenomena when they arise elsewhere; in Contracts, in other courses or in situations they address during their professional careers.

This essay will suggest some ways in which the legal duty rule can be used to educate students about rules. It will first sketch the basics relating to the preexisting duty rule. This outline will necessarily be incomplete, given the function of this project and the constraints imposed by the space allowed. The purpose of this essay is not to explore fully the legal duty rule and the ramifications of its various circumventions, fictions and alternatives. Others have done so quite well.⁴ Rather, the overview of that concept will service the

3. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

4. See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 182 (4th ed. 1998); ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* 245 (1952); E. ALLAN FARNSWORTH, *CONTRACTS* 287 (2d ed. 1990); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 245 (3d ed. 1990); Daniel A. Graham & Ellen R. Pierce, *Contract Modification: An Economic Analysis of the Hold-Up Game*, 52 LAW & CONTEMP. PROBS. 9 (1989); Robert A. Hillman, *Contract Modification in Iowa — Recker v. Gustafson and the Resurrection of the Preexisting Duty Doctrine*, 65 IOWA L. REV. 343 (1980) (hereinafter Hillman, *Contract Modification in Iowa*); Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680 (1982) (hereinafter Hillman, *Contract Modification Under the*

discussion in section three which will suggest ways in which the basics can be used to explore larger themes about rules and law.

II. THE PREEXISTING DUTY RULE: A SKETCH

A. *The Rule and Its Rationale*

The legal duty rule provides that a promisee's performance of an act she is already obligated to perform is not consideration for the promisor's agreement to pay a different amount than originally agreed. The issue arises in two classic paradigms.⁵

Assume Art and Bart enter into a contract whereby Art will mow Bart's lawn in exchange for \$20. Before performance, Art tells Bart he will not cut the grass unless he receives \$25. Bart agrees to pay the higher fee for the same service. Once Art performs, however, Bart tenders a check for \$20 instead of \$25. Art demands the larger amount. Bart refuses. Under the legal duty rule, Bart's promise to pay \$25 is not enforceable because it is not supported by consideration. Art's performance of something he was duty bound to do—mow Bart's lawn—is not consideration for Bart's second promise.

The issue also arises in a second context, when a promisor obligated to pay a sum agrees to pay a smaller amount to discharge its obligation. Thus, Lorraine and Jane agree that Lorraine will mow Jane's lawn for \$25. When Lorraine finishes, having well-performed the job, Jane agrees to pay Lorraine \$20 if Lorraine accepts that amount as a complete satisfaction of Jane's debt. Lorraine agrees, but after taking the \$20 she decides she wants to recover the extra \$5. Lorraine claims the second agreement (\$20 for a discharge) is unenforceable under the legal duty rule.

Note that in each hypothetical, the legal duty rule makes the modified promise (to pay \$25, to accept \$20) unenforceable for lack of consideration without considering anything else. It is irrelevant to the concept why the parties agreed to the modification, how they reached that agreement, what alternatives the promisor had, what relationship the parties had, or whether the revised price was fair for the work done.

The rule, in both manifestations, is commonly traced to England in earlier times.⁶ For instance, in *Harris v. Watson*,⁷ an occasional casebook performer,⁸

Restatement); Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979) (hereinafter Hillman, *Policing Contract Modifications*); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981); Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61 (1987).

5. See LON L. FULLER & MELVIN A. EISENBERG, *BASIC CONTRACT LAW* 124 (6th ed. 1996).

6. Professor Arthur L. Corbin claimed not to "know the origin of this rule or the reasons that led courts to adopt it in the first place" and his modest disclaimer cautions me against

plaintiff, a seaman, sought to recover additional wages the ship's master promised him while en route to Lisbon after the vessel allegedly encountered peril. Lord Kenyon dismissed the case. Such an action "would materially affect the navigation of this Kingdom."⁹ If seamen could claim additional compensation upon encountering danger, "they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make."¹⁰

Eighteen years later, maritime matters¹¹ provided a second illustration in *Stilk v. Myrick*.¹² Seamen agreed to sail round trip from London to the Baltic for five pounds per month. While en route, two seamen deserted and the master agreed to pay the others the deserters' wages. They worked the vessel home, only to receive the sum originally agreed to without any portion of the promised increment. The court limited the seamen to the original amount. Lord Ellenborough thought *Harris* rightly decided but on different grounds. The crew was duty-bound to exert itself to respond to any emergency. They gave no new consideration for the promised additional wage. Accordingly, the master's promise failed for want of consideration.¹³

The second manifestation—payment of part of a debt cannot discharge the entire amount—also runs its roots deep in history. In *Pinnel's Case*, the court, in dictum, pronounced "that payment of a lesser sum on the [due date] in satisfaction of a greater, cannot be any satisfaction for the whole."¹⁴ Several centuries later, that conclusion emerged as the rule of *Foakes v. Beer*.¹⁵ Plaintiff Julia Beer obtained a judgment of £2090 from Dr. Foakes which, by law, carried interest. Beer agreed to accept installment payments of the principal alone; upon receiving that amount, she demanded the interest. No consideration supported her agreement to forgive the interest, Ms. Beer argued, since Dr. Foakes, in paying the principal, simply did (less than) what he was obligated to do. Dr. Foakes argued through his advocate, W. H. Holl, that the House of Lords should enforce the discharge: A creditor may benefit from

drawing definite conclusions on these points based upon the secondary literature consulted. CORBIN, *supra* note 4, at 246.

7. 170 Eng. Rep. 94 (1791).

8. See, e.g., THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS AND MATERIALS ON CONTRACTS 199 (3rd ed. 1999); JAMES F. HOGG & CARTER G. BISHOP, CONTRACTS: CASES, PROBLEMS AND MATERIALS 198 (1997).

9. 170 Eng. Rep. at 94.

10. *Id.*

11. For a discussion of the role of maritime cases in the law school curriculum, see Joel K. Goldstein, *Reconceptualizing Admiralty: A Pedagogical Approach*, 29 J. MAR. L. & COM. 625 (1998).

12. 170 Eng. Rep. 1168 (1809).

13. For a critique, see GRANT GILMORE, THE DEATH OF CONTRACT 22-28 (1974).

14. 77 Eng. Rep. 237, 237 (1602).

15. 9 App. Cas. 605 (House of Lords 1884).

prompt part payment rather than litigating the claim or forcing the debtor to bankruptcy. The Lords thanked Mr. Holl for his sterling presentation and showered him with compliments, which no doubt would have made his parents proud. To his client's chagrin, it then applied the doctrine from *Pinnel's Case* which, though criticized, "has been accepted as part of the law of England for 280 years."¹⁶

This sketch of these classics reveals three rationales which have supported the legal duty rule. In *Harris*, the court made clear that "public policy" considerations justified the rule against one-sided modifications. Although the court used only the amorphous label, its discussion made clear that it feared extortion would result if the law enforced unreciprocated contractual revisions. Extortion, of course, subverts values intrinsic to contract law. Coerced promises are not, by definition, freely given and are accordingly, at war with the classic model of autonomous, rational parties entering into contract.¹⁷ Moreover, extortion undermines the institution of contracts and threatens to misallocate resources. Judge Richard Posner writes:

It undermines the institution of contract to allow a contract party to use the threat of breach to get the contract modified in his favor not because anything has happened to require modification in the mutual interest of the parties but simply because the other party, unless he knuckles under to the threat, will incur costs for which he will have no adequate legal remedy. If contractual protections are illusory, people will be reluctant to make contracts. Allowing [extorted] contract modifications to be voided . . . assures prospective contract parties that signing a contract is not stepping into a trap, and by thus encouraging people to make contracts promotes the efficient allocation of resources.¹⁸

Lord Kenyon's cryptic justification in *Harris* did not persuade all. When *Stilk* arose, Judge Posner had not yet appeared to illuminate these issues for Lord Ellenborough. *Stilk* accordingly rested on a different premise. Lord Ellenborough found the vessel owner's promise of additional pay failed because the seaman gave no new consideration. The court need not look at public policy arguments for the absence of the formality of consideration made the promise unenforceable.¹⁹

16. *Id.* at 612.

17. *See, e.g.,* Graham & Pierce, *supra* note 4; Hillman, *Contract Modification Under the Restatement*, *supra* note 4, at 680-81.

18. *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983).

19. Professor Eisenberg suggested that consideration has often served as a surrogate for inquiry into fairness issues since courts long believed they lacked power to engage in fairness review. *See* Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 646-47 (1982).

Finally, the preexisting duty rule has rested on earlier precedent.²⁰ *Foakes* invoked not only *Pinnel's Case* but also *Harris* and *Stilk*. By design, precedent has a snowballing effect. Doctrine grows as later decisions surround earlier ones in rolling through history. The rule, accordingly, grew as later cases relied on the older ones.

Subsequent cases that applied the legal duty rule have invoked one or more of those justifications.²¹ Precedent, for instance, became an argument not simply to apply the preexisting duty rule in the familiar context of two party modification cases. It became a basis to extend the rule to other situations involving parties already bound to perform some duty. Thus, public officials and even some private employees whose employment imposed a duty to the public later were deemed ineligible to claim a reward offered to anyone who did what the officials were already bound to do.²²

The rule was also applied in a three-party context. In *McDevitt v. Stokes*,²³ one Shaw hired Mike McDevitt to ride his mare, Grace, in the celebrated Kentucky Futurity race. Stokes, a horse breeder, owned two of Grace's brothers; their value would rise and he would benefit if Grace won. He offered McDevitt \$1000 if McDevitt rode Grace to victory. McDevitt, and especially Grace, performed. Grace crossed the finish line first but Stokes paid only \$200 of the promised amount. McDevitt sued for the balance. Stokes claimed that his promise was unsupported by consideration since McDevitt was already bound (to Shaw) to ride the horse to victory. Of course, if Shaw, not Stokes, had made the second promise, the modification would clearly run afoul of the rule. Seeing no difference in the three-party context, the court sustained Stokes' position and held his promise to McDevitt unenforceable.²⁴

The other two bases, consideration and extortion prevention, are central concepts in contracts law. Consideration responds largely to the perceived need for formalities to achieve important evidentiary, cautionary and channeling functions of contract law.²⁵

Extortion prevention helps assure that contracts are entered into freely. Contracts encourage long-term commitments. Knowing the law will enforce certain promises enables entrepreneurs and consumers to plan their futures with greater certainty, thereby enhancing their utility. But, as Judge Posner

20. See, e.g., *Lingenfelder v. Wainwright Brewery Co.*, 15 S.W. 844 (Mo. 1890).

21. See, e.g., *Recker v. Gustafson*, 279 N.W.2d 744, 795 (Iowa 1979) (price increase invalid for want of consideration).

22. See, e.g., *Denney v. Rappert*, 432 S.W.2d 647, 649 (1968) (policemen and bank guards ineligible for reward since acting in course of public/private duties); *Gray v. Martino*, 103 A. 24, 24 (N.J. 1918) (police officer ineligible for reward); RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. b (1981).

23. 192 S.W. 681 (Ky. 1917).

24. See *id.* at 683.

25. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799-800 (1941).

points out, “[t]here is often an interval in the life of a contract during which one party is at the mercy of the other.”²⁶ An unscrupulous or greedy contractor may exploit this dependence by demanding a higher price or offering a reduced performance. The imperfection of legal remedies—they are costly and do not reach all damages—may leave the demandee without effective recourse. The legal duty rule protected prospective victims by holding one-sided modifications unenforceable, theoretically removing the incentive to exploit dependency.

The competing rationales are reflected in the different way many casebooks present the legal duty concept. Many casebook authors, following from *Stilk*, present the doctrine as part of a chapter on consideration.²⁷ Others, taking their lead from *Harris*, present the doctrine as one designed to police contractual behavior. For instance, Summers and Hillman regard the rule as “principally a policing doctrine” and present it in their chapter, *Policing Agreements and Promises*.²⁸ Knapp, Crystal and Prince confine their discussion of the rule to their materials on modification in the *Justification for Nonperformance* chapter.²⁹ Some introduce the concept with consideration and return to it in discussing policing techniques.³⁰ Dawson, Harvey and Henderson offer some small taste of the rule in their material on exchange through bargain and reliance on a promise but offer their full sampling of it in their chapter, *Policing the Bargain*.³¹ Kasteley, Post and Hom provide a “first look” at the preexisting duty rule in their unit on consideration but provide a

26. *United States v. Stump Home Specialties Mfg., Inc.*, 905 F.2d 1117, 1121 (7th Cir. 1990).

27. *See, e.g.*, MACAULAY ET AL., *supra* note 1, at 250-53; JOHN D. CALAMARI ET AL., *CASES AND PROBLEMS ON CONTRACTS* 186-229 (3d ed. 2000) (containing a section on duress followed by a section on statutory changes regarding the modification of contracts.); ROBERT W. HAMILTON ET AL., *CONTRACTS CASES AND MATERIALS* 278-313 (2d ed. 1992); FULLER & EISENBERG, *supra* note 5, at 114-37; RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 703-16 (1995); ARTHUR ROSETT & DAVID J. BUSSEL, *CONTRACT LAW AND ITS APPLICATIONS* 471-512 (6th ed. 1999).

28. ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE AND PRACTICE* (3rd ed. 1997). Summers and Hillman do include a short note in their materials on consideration of teaching the doctrine as an exception to the bargain theory. *Id.* at 80.

29. CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 798-809 (2d ed. 1999). *See also* E. ALLEN FARNSWORTH & WILLIAM F. YOUNG, *CONTRACTS: CASES AND MATERIALS* 287 (5th ed. 1995) (policing the bargain).

30. *See, e.g.*, JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENTS* 221-25, 289-91, 560-97 (7th ed. 1998).

31. *Id.*

more thorough discussion in a later unit, *Agreed Modifications and the Pre-existing Duty Rule*.³²

B. *The Rule and Its Demise*

By design, the preexisting duty rule operated in a relatively simple, straightforward fashion. Any one-sided or unreciprocated modification was unenforceable. A court faced with such a modification need not ask any questions or consider many facts. The parties' conduct, motives, or alternatives were irrelevant as was the fairness of the modification. One fate fit all.

The simplicity of the rule came at a price. Over time, the rule proved vulnerable to criticism by courts and commentators alike. Professor Patterson thought of the legal duty rule as an "adjunct of the doctrine of consideration which has done most to give [consideration] a bad reputation."³³ One court called it "one of the relics of antique law which should have been discarded long ago."³⁴ The literature overflows with caustic comments denigrating the doctrine. Its underlying rationale (enforce consideration, prevent extortion) seemed too feeble to support it. Take consideration as a justification. It was not clear that one-sided modifications really offended either the benefit-detriment or bargain theory of consideration. Some cases did argue that the promisor received no benefit and the promisee incurred no detriment when the promisee agreed simply to fulfill a duty.³⁵ Yet these arguments tended to rely on rather wooden definitions of benefit and detriment. As Professor Farnsworth observes, "it requires no great stretch of the imagination to view performance by a promisee that is reluctant to perform both as a benefit to the promisor, which has reason to want a bird in the hand, and as a detriment to the promisee, which might prefer to take its chances on being sued for damages."³⁶

Although some view the preexisting duty rule as "a logical extension of the bargain theory,"³⁷ that conclusion is certainly contestable.³⁸ "To one schooled

32. AMY H. KASTELEY ET AL., *CONTRACTING LAW* 323-29, 923-40 (1996). See also MURPHY ET AL., *supra* note 2, at 103-17, 792-802 (introducing topic in chapter on consideration, returning to it in chapter on good faith).

33. Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 936 (1958). But see Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27, 36 (1894) (praising rule as logical and just).

34. *Rye v. Phillips*, 282 N.W. 459, 460 (1938).

35. See, e.g., *Lingenfelder v. Wainwright Brewery Co.*, 15 S.W. 844, 848 (Mo. 1891) ("What benefit was to accrue to Wainwright? . . . What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed?").

36. FARNSWORTH, *supra* note 4, at 287. Professor Farnsworth points out that the argument that any detriment is not a "legal" detriment is circular and question begging. See also CORBIN, *supra* note 4, at 247-48.

37. BARNETT, *supra* note 27, at 703.

38. See, e.g., FARNSWORTH, *supra* note 4, at 287.

in the contemporary bargain theory of consideration, it might seem just as logical to conclude that performance, even by one who is already under a duty to perform, is consideration for a promise if the performance is bargained for.³⁹ Professor Farnsworth points out. The Restatement (Second) of Contracts recognizes this point in section 72 which provides in part that “any performance which is bargained for is consideration” except for performance subject to the legal duty rule.⁴⁰ The logic of the bargain theory of consideration does not therefore compel the preexisting duty rule. On the contrary, only by defining the bargain theory to exclude promises to perform enforceable duties is the preexisting duty rule preserved.

The weakness of the consideration rationale was revealed by the tendency of those invoking it to slide quickly, and often without transition, into the extortion argument. In *Lingenfelder v. Wainwright Brewery Co.*,⁴¹ a casebook favorite,⁴² the Supreme Court of Missouri strenuously, but conclusorily, argued absence of consideration and then, without changing course asserted the “plain fact that Jungenfeld took advantage of Wainwright’s necessities, and extorted the promise”⁴³ To permit recovery would “offer a premium upon bad faith.”⁴⁴ This argument might present a convincing reason not to enforce the modification, but extortion prevention, not the sanctity of consideration, propelled the discussion.

But extortion prevention itself increasingly came to be seen as an imperfect rationale for the preexisting duty rule. The fit between the rule and that objective was far from perfect. To be sure, some one-sided modifications might reflect extortion. In *Alaska Packers’ Ass’n v. Domenico*,⁴⁵ the owner of a salmon fishing boat agreed to double the crew’s pay to induce it not to jump ship at a time when it was too late to engage replacements. Based on the court’s findings that showed no motive other than opportunism to explain the sailors’ conduct, the court found the owner’s promise of double wages unenforceable under the preexisting duty rule.⁴⁶ The sailors effectively said, “Stick ‘em up!” and the owner did. Of course, when the owner obtained the voyage’s catch, it promptly put down its hands and cut the checks for the

39. *Id.*

40. RESTATEMENT (SECOND) OF CONTRACTS § 72 (1981). *See also* CORBIN, *supra* note 4, § 171.

41. 15 S.W. 844 (Mo. 1891).

42. *See, e.g.*, CRANDALL & WHALEY, *supra* note 8, at 200; FULLER & EISENBERG, *supra* note 5, at 117; HOGG & BISHOP, *supra* note 8, at 199-201; FREDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS 652-55 (3d ed. 1986); DAVID H. VERNON, CONTRACTS: THEORY AND PRACTICE 160-62 (2d ed. 1991).

43. *Lingenfelder*, 15 S.W. at 848.

44. *Id.*

45. 117 F. 99 (9th Cir. 1902).

46. *Id.* at 102.

original amount,⁴⁷ an action which resulted in the case coming to court and ultimately to generations of law students.

But all one-sided modifications do not evidence such opportunistic behavior. In some respects, the rule proved overinclusive; in addition to combatting holdups it also arrested some innocent, even beneficial behavior. Although it is easy to appreciate that one-sided modifications might reflect extortion and produce unconscionable results, empirical evidence does not necessarily support this intuition.⁴⁸ Some one-sided modifications might be good faith adjustments by rational entrepreneurs fully possessed of their senses and their free will. The parties might agree that one would pay more owing to some changed circumstance that complicated performance.⁴⁹ For instance, a homeowner or buyer might agree to pay the contractor more than the contract requires when the latter encounters unanticipated rubble or soil conditions,⁵⁰ or when the number of customers a contractor is to serve increases exponentially.⁵¹ Enforcing the promise may actually increase the promisor's utility. Assume a home buyer promises to pay the builder more than the contract price after the builder hits hard rock or soggy soil that makes the contract price unfeasible for it. "If the purchaser merely declares his intention of paying the builder a higher price, but is free to renege, [because of the preexisting duty rule] the builder may decide not to complete performance but instead to take his chances in bankruptcy court,"⁵² Judge Posner explains. The buyer may prefer to promise, rather than to pay up front, for fear that if the contractor goes belly up the buyer may have trouble recovering his cash. "This is a clear case where the enforcement of a promise not supported by fresh consideration enhances the welfare of the promisor,"⁵³ Judge Posner argues.

A businessperson might agree to accept less (or pay more) for the same performance in order to preserve a needed supplier, help a loyal customer, develop a reputation for fairness, or avert an interruption of performance. For instance, in *Goebel v. Linn* defendant beer brewers agreed to pay an ice company \$3.50/ton although their contract called for a price of \$2/ton. A very

47. See, e.g., MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 65 (3d ed. 1998) (discussing the case).

48. Eisenberg, *supra* note 19, at 645; Hillman, *Contract Modification Under the Restatement*, *supra* note 4, at 682-84, 689.

49. Indeed, in *Alaska Packers*, the fishermen argued unsuccessfully that the nets provided to them were deficient. 117 F. at 101. Since their pay was based in part on the size of the catch, they argued they should receive more to compensate for the bad equipment. *Id.*

50. See also Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977); see, e.g., *Watkins & Son, Inc. v. Carrig*, 21 A.2d 591 (N.H. 1941).

51. See, e.g., *Angel v. Murray*, 322 A.2d 630 (R.I. 1974) (enforcing price increase after units to be serviced by refuge collection increase twenty times faster than anticipated).

52. Posner, *supra* note 50, at 421.

53. *Id.*

mild winter had produced an inadequate crop of ice.⁵⁴ The brewers, not wishing their product to go bad, agreed to the higher charge.⁵⁵ But once the ice was delivered and preserved the brew, defendant's commitment to the increase chilled and it stood on the original contract.⁵⁶ The court upheld the modification and ruled for plaintiff.⁵⁷ Defendant had thought the price increase preferable to jeopardizing their supplier's business and their own under the extraordinary circumstances they faced.⁵⁸ They were bound by the modification.

The preexisting duty rule would render each such modification unenforceable. The doctrine did not discriminate between coerced and voluntary modifications. Uncoerced modifications were rendered unenforceable even when they seemed intuitively appropriate. The courts' refusal to enforce them frustrated the expectation of contractors who had arranged modifications.⁵⁹

The rule also proved underinclusive in that it failed to address some coerced contractual behavior. An extortionist who demanded a greatly increased compensation could shield his misconduct by conferring some token concession on his victim. Thus, the rule would not prevent the fishermen in *Alaska Packers* from extorting their double wage, provided they threw some (fish) bone their employer's way. Similarly, the preexisting duty rule only addressed a certain type of coerced contractual behavior, unperformed unilateral promised modifications. Once the promise was performed, the rule no longer provided any remedy. The rule, after all, served simply to rule certain conduct unenforceable since not supported by consideration. Yet performance rendered the presence or absence of consideration a moot point. Thus, the rule made the *Alaska Packers*' promise to pay double wages unenforceable but would not apply if the owner had already distributed the raises.

Dissatisfaction with harsh applications of the rule led courts to search for ways to avoid applying it. Courts have viewed facts imaginatively to avoid the rule.⁶⁰ In addition, they searched for fictions to circumvent the rule.⁶¹ First, contract law recognized as enforceable mutual modifications. Although a one-

54. *Goebel v. Linn*, 11 N.W. 284, 284 (Mich. 1882).

55. *Id.*

56. *Id.*

57. *Id.* at 285.

58. *Id.* at 286.

59. FARNSWORTH, *supra* note 4, at 290.

60. *See, e.g., De Cicco v. Schweizer*, 117 N.E. 807, 808 (1917).

61. MURRAY, *supra* note 4, at 247-48; Hillman, *Contract Modification Under the Restatement*, *supra* note 4, at 685-86. Other techniques include finding consideration in the promise not to breach or in unanticipated circumstances. *See, e.g., King v. Duluth, Missabe & Northern Ry. Co.*, 63 N.W. 1105 (Minn. 1895); *Linz v. Schuck*, 67 A. 286, 289 (Md. 1907).

sided modification, i.e., Bart's promise to pay \$25 instead of \$20, is unenforceable for want of consideration, a bilateral modification may bind both. This circumvention hardly reflects novel thinking. On the contrary, it follows from Lord Coke's dictum nearly four centuries ago to the effect that some corresponding change such as a "horse, hawk or robe" would suffice to make the modification enforceable.⁶² The Restatement (Second) of Contracts specifically provides that "a similar performance [to that previously owed] is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain."⁶³ Courts have sometimes winked at the "more than a pretense" concept and accepted something less. "Yet any consideration for the new undertaking, however insignificant, satisfies this rule," observed the Supreme Court of New Jersey in *Levine v. Blumenthal*⁶⁴ (noting that payment at a different time or place or "in property, regardless of its value" could suffice).⁶⁵ Thus, if Art agrees to render the service a day (or hour) earlier or to run the sprinkler after he cuts Bart's lawn, Bart's previously unenforceable new promise blossoms (hopefully like Bart's lawn) into a commitment the law will enforce. This new consideration renders the legal duty rule irrelevant even though Bart's new promise may be coerced.

In addition to the mutual modification technique, the legal duty rule can be avoided by mutual rescission. Under this technique, the parties do not simply modify their original agreement in a single step. Instead, they accomplish the same effect but in two steps. First, each surrenders their rights against the other under the original contract in a contract to rescind. Having eliminated their respective rights against, and duties to, each other, they proceed, in step two, to fashion a new contract. As Professor Murray points out, such an arrangement involves three contracts—the initial executory contract, the contract of rescission, and the new contract.⁶⁶

Schwartzreich v. Bauman-Basch, Inc.,⁶⁷ a casebook favorite,⁶⁸ illustrates the rescission two-step. Schwartzreich was contractually obligated to design clothes for Bauman-Basch for \$90 per week for one year beginning in November 1917. The prior month, Schwartzreich advised his employer of an

62. Pinnel's Case, 77 Eng. Rep. 237, 237 (1602).

63. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

64. 186 A. 457, 459 (N.J. 1936).

65. *Id.*

66. MURRAY, *supra* note 4, at 255.

67. 131 N.E. 887 (N.Y. 1921).

68. See, e.g., CALAMARI ET AL., *supra* note 27, at 186-90; MICHAEL L. CLOSEN ET AL. CONTRACTS: CONTEMPORARY CASES, COMMENTS AND PROBLEMS 185-86 (1992); DAWSON ET AL., *supra* note 30, at 564; FULLER & EISENBERG, *supra* note 5, at 129; KESSLER ET AL., *supra* note 42, at 79-83; MATTHEW MCKINNON, CASES AND MATERIALS ON CONTRACTS 7-26 - 7-30 (1993); ROSETT & BUSSEL, *supra* note 27, at 472-78; SUMMERS & HILLMAN, *supra* note 28, at 632-36; VERNON, *supra* note 42, at 163-67.

offer from another firm at \$110 (or \$115 depending on whom you believe) per week. Bauman-Basch agreed to pay, and Schwartzreich to accept, \$100 per week and the parties executed a new agreement to that effect. The arrangement lasted a month at which point Schwartzreich was fired. In his action to recover for damages based upon the \$100/week price, the legal duty rule would jump out at many compulsive classroom volunteers as an obstacle to recovery. Not a problem, reasoned the great New York Court of Appeals of the Cardozo period, in an opinion written by Justice Crane. At the same time the parties executed the new \$100/week contract, Schwartzreich left with his employer the old \$90/week deal with the signatures torn off. “There is no reason that we can see why the parties to a contract may not come together and agree to cancel and rescind an existing contract, making a new one in its place,”⁶⁹ wrote Justice Crane, a conclusion which not only “[a]ll concede” but which, better yet, was supported by Professor Williston on Contracts.⁷⁰ It was immaterial whether the two steps, rescission and recontracting, took place sequentially or simultaneously, a position which has vigorous modern critics.⁷¹

To be sure, the two circumventions rested on a certain logic of their own. Contract law would derive little benefit from holding parties to a contract neither wanted. Clearly the law had to allow parties an escape from such a deal. If both parties wanted to cash in their chips before the game played to completion why not let them? Of course, once they had eliminated any contractual commitments to each other under Contract I by Contract II, the legal duty rule would not inhibit them from creating new relations between themselves (Contract III). Nor would contract law have any apparent interest in preventing a subsequent transaction between the parties that they freely decided would advance their respective interests.

Mutual modification rested on similar logic. If instead of terminating their agreement, both parties simply wanted to change it, why not let them do so? If two parties wanted to modify their original agreement by each undertaking an additional burden or disadvantage to receive some perceived gain, why should they not be able to do so? Bart’s delighted to pay the extra \$5 to have his yard watered as well as mowed; Art’s thrilled to become \$5 richer simply for turning on the sprinkler. Contract law generally assumes that each party knows her own interests. It refuses to assign values to items to be exchanged so long as consideration seems to exist. It would be anomalous for contract law to impose a more stringent test for modifications.

Yet recognition of these circumventions also made the legal duty rule less compelling. Schwartzreich’s new deal became enforceable simply because of

69. *See Schwartzreich*, 131 N.E. at 890.

70. *Id.*

71. MURRAY, *supra* note 4, at 255.

the simultaneous rescission of the old deal.⁷² Absent that step, presumably the court would have invoked the legal duty rule and disallowed the unilateral change. Yet whether Schwartzreich and his boss simply insert and initial “\$100/week” over “\$90/week” in Contract I or shred the first contract and execute a new one, the substance of the deal is the same. It would seem to exalt form over substance, to turn enforceability on whether the parties insert and initial or shred and reexecute.

Mutual modification posed other problems. Consistent with the general approach to consideration, the law does not scrutinize deeply the relative values of the modifications so long as at least one favors each party. As Judge Posner put it, “The law does not require that consideration be adequate—that it be commensurate with what the party accepting it is giving up. Slight consideration, therefore, will suffice to make a contract or a contract modification enforceable.”⁷³ Thus Bart’s willing, yet unreciprocated, promise to pay an extra \$5 is unenforceable yet it becomes binding once Art makes some trivial concession like working in the morning instead of the afternoon, accepting a check instead of cash, or running the sprinkler while he packs up to leave. “To surrender one’s contractual rights in exchange for a peppercorn is not functionally different from surrendering them for nothing,”⁷⁴ Judge Posner concludes. The shrewd extortionist would come within the mutual modification exception and accordingly not offend the rule.

The willingness of courts to enforce these circumventions reflected misgivings regarding the rule. Courts could accept a simultaneous rescission because it allowed them to dance around the preexisting duty rule and enforce the agreed upon modification.⁷⁵

The law compromised the legal duty rule to accommodate other values. Assume George asserts an invalid claim against Abraham for \$1,000. Abraham wishes to settle the matter by paying \$250 in exchange for a release. Can George enforce Abe’s promise to pay \$250? A strict application of the legal duty rule might frustrate the settlement. Since George’s claim is invalid, he is relinquishing nothing in exchange for the money. But such a resolution would impede settlement of disputes, an activity society prefers to encourage. Determining whether a discharge would support a return promise would require the parties to litigate the underlying claim to test its validity. But that would defeat the parties’ desire to avoid the risks and expenses of litigation. Moreover, parties wish to settle invalid as well as meritorious claims to provide certainty and security. The law has limited the legal duty rule by

72. *Schwartzreich*, 131 N.E. at 890.

73. *United States v. Stump Home Specialties Mfg., Inc.*, 905 F.2d 1117, 1122 (7th Cir. 1990).

74. *Id.*

75. *See, e.g., CORBIN, supra* note 4, at 269.

allowing some surrender of invalid claims or defenses to be consideration for a return promise. Although the formulations vary,⁷⁶ Restatement § 74 requires only that the surrendered claim or defense have some foundation or rest on a good faith belief. Restatement § 74 provides:

Settlement of Claims

- (1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless
 - (a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
 - (b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.⁷⁷

The good faith requirement makes enforceability turn on the subjective belief of the party asserting the claim or defense. This test blows a wide hole through the preexisting duty rule in the context of settlements since it may shield a “negligent or foolish” belief.⁷⁸

The preexisting duty rule did not operate alone in the field. The doctrine of duress as it had evolved by the dawn of the twentieth century might also provide relief. The excuse of duress allowed a victim to void a contract if his manifestation of assent was induced by an “improper threat” that left the victim with “no reasonable alternative.”⁷⁹ Duress was not, of course, a doctrine of recent vintage. For centuries, the common law doctrine addressed property transfers compelled by some criminal or tortious threat of physical violence. The relatively novel feature was, however, the expansion of the doctrine to address economic pressure.⁸⁰ Thus, the realm of improper threats was expanded to include those that breached “the duty of good faith and fair dealing under a contract with the recipient” of the threat.⁸¹ This category included within its possible reach some contract modifications.⁸²

The doctrine of economic duress offered an alternative weapon against extorted modifications. This development did not calm misgivings about the

76. See, e.g., *Duncan v. Black*, 324 S.W.2d 483, 486 (Mo. Ct. App. 1959) (surrendered claim or defense must have some foundation and rest on good faith).

77. RESTATEMENT (SECOND) OF CONTRACTS § 74(1) (1981).

78. Hillman, *Contract Modification Under the Restatement*, *supra* note 4, at 691.

79. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

80. See also RESTATEMENT (SECOND) OF CONTRACTS § 176, cmt. a (1981) (“Modern decisions have recognized as improper a much broader range of threats, notably those to cause economic harm.”); CALAMARI & PERILLO, *supra* note 4, at 187 (duress doctrine evolving to address modifications). See generally John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947). See, e.g., *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 536 (N.Y. 1971).

81. RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(d) (1981).

82. *Id.*

preexisting duty rule; if anything it may have had the opposite effect by presenting an alternative weapon against extorted modifications. The preexisting duty rule came under heavy assault from a range of courts, learned commentators and legislatures. “There has been a growing doubt as to the soundness of this doctrine as a matter of social policy,”⁸³ reported Professor Corbin at the middle of the twentieth century.

The criticisms of the preexisting duty rule took their toll. Over time, contract law softened the preexisting duty rule in several noticeable ways. The Restatement (Second) of Contracts specifically endorsed some one-sided contract modifications. Restatement § 89 provides in pertinent part:

A promise modifying a duty under a contract not fully performed on either side is binding

- (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
- (b) to the extent provided by statute; or
- (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.⁸⁴

Restatement § 89 did not, of course, bury the preexisting duty rule. That doctrine remained in Restatement § 73. By its terms, Restatement § 89 addressed only a subset of those situations the old rule covered. In effect, Professor Robert A. Hillman has argued, Restatement § 73 viewed unilateral modifications as presumptively coerced subject to rebuttal under the terms of Restatement § 89.⁸⁵ But Restatement § 89 did turn more than a few shovels in the emerging hole. It did not mention consideration⁸⁶ nor did it require that modifications be reciprocal. The doctrine was presented in a section entitled “Contracts Without Consideration.” It specifically rejected the mutual rescission two-step, which was firmly lodged in consideration theory as often “fictitious” and unproductive.⁸⁷

The primary criteria it substituted required simply that the modification (a) be “fair and equitable” and (b) rest on circumstances the parties did not anticipate at the time of contracting.⁸⁸ These characteristics were seen as

83. CORBIN, *supra* note 4, at 246. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 89, cmt. b (1981) (reporting much criticism of certain applications of the rule).

84. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

85. Hillman, *Contract Modification Under the Restatement*, *supra* note 4, at 686-87.

86. Some cases purporting to follow it did, however, find consideration in the changed circumstances. *See, e.g.*, *Brian Constr. & Dev. Co. v. Brighenti*, 405 A.2d 72, 76 (Conn. 1978).

87. RESTATEMENT (SECOND) OF CONTRACTS § 89, cmt. b (1981).

88. Hillman, *Contract Modification Under the Restatement*, *supra* note 4, at 687-88. Professor Hillman has cogently spotlighted shortcomings of the provision in an article well worth review.

rebutting any inference that a modification was procured through unfair pressure. But the mere absence of coercion was not sufficient to render a modification enforceable. The promisee also had to defend the modification as “fair and equitable,” a standard that suggested, in part at least, that the new terms should not reflect avarice or overreaching. Indeed, the “fair and equitable” criteria may operate as something of a surrogate for voluntariness. Presumably, extortionists will drive a hard “bargain” and will not let their victims off with a fair and equitable result. In addition, the promisee was required to demonstrate some “objectively demonstrable reason for seeking a modification.” But the Restatement left some play in this limitation since an event may be unanticipated if not adequately covered even though foreseen as a remote possibility.⁸⁹

Cases have applied Restatement § 89 to enforce modifications in price in situations where substantial rubble which the parties had not anticipated vastly inflated the price of excavation⁹⁰ or where some additional compensation was authorized to a refuse collector after the number of dwellings covered increased by twenty times the amount predicted⁹¹ or even when terms of the sale of a farm were adjusted in favor of the buyer after land values plummeted.⁹² An advocate might, with a straight face, classify these events as surprises. But the justifying event apparently need not present such a shock. The Restatement also includes an illustration based on the precise facts of *Schwartzreich*. If an employee receiving a better offer is an unanticipated circumstance, many events might qualify. Restatement § 89(a) sanctions modifications in situations where the “unanticipated circumstance would not excuse performance”⁹³ or even catch the parties off guard. The potential of Restatement § 89 to subvert the rule of *Harris*, *Stilk* and *Foakes* is considerable.

Still, Restatement § 89(a) may not bless all modifications. The *Schwartzreich* illustration aside, its language appears to require that some “unanticipated circumstance” trigger the change. But regardless of how broadly that ambiguous term is reasonably defined, it will not embrace all voluntary modifications. As Professor Hillman points out, a range of considerations might induce contractors to agree happily to one-sided changes independent of any unforeseen circumstance.⁹⁴

Restatement § 89 also extended to situations in which a promisee’s reliance on a modification might make enforcement appropriate and to the

89. RESTATEMENT (SECOND) OF CONTRACTS § 89, cmt. b (1981).

90. See *Brighenti*, 405 A.2d at 76.

91. *Angel v. Murray*, 322 A.2d 630, 637 (R.I. 1974).

92. *Quigley v. Wilson*, 474 N.W.2d 277, 281 (Iowa Ct. App. 1991), *aff’d per curiam*, 474 N.W.2d 277 (Iowa 1991).

93. See Hillman, *Contract Modification Under the Restatement*, *supra* note 4, at 697-98.

94. See *id.* at 700-01.

extent statutes so provide. The latter idea, that a statute might abrogate this common law doctrine, was hardly novel. Presumably, its main significance was to incorporate in the sale of goods context the more sweeping innovation of the Uniform Commercial Code. U.C.C. § 2-209 specifically provides that with respect to sales of goods an “agreement modifying a contract . . . needs no consideration to be binding.”⁹⁵ In case anyone reading the statutory text missed its import, the Official Comment states its purpose to “protect . . . all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments,”⁹⁶ and that “an agreement modifying a sales contract needs no consideration to be binding.”⁹⁷ If anything, U.C.C. § 2-209 is even more explicit than Restatement § 89 in its rejection of consideration doctrine and goes further in interring the preexisting duty rule. The only limitation it recognizes is the requirement that a modification be made in good faith which “may in some situations require an objectively demonstrable reason.”⁹⁸

The U.C.C. is not oblivious to the policies behind the legal duty rule but seeks to achieve them in other ways. The requirement that modifications within the Statute of Frauds must satisfy its terms serves the evidentiary and cautionary purposes of consideration.⁹⁹ Modifications must also satisfy the U.C.C.’s good faith standard. The U.C.C. so provides in Comment 2 to section 2-209 and in section 1-203 which imposes a good faith obligation in the performance or enforcement of contracts for the sale of goods. This approach has proved controversial. Professor Hillman, for instance, argues that the absence of language in section 2-209 itself has led courts to overlook the good faith requirement and/or to develop the doctrine inadequately.¹⁰⁰ Moreover, “[f]ew standards exist to tell us how hard one may twist the arm of the other before crossing the line into the zone of bad faith.”¹⁰¹

III. LESSONS ABOUT RULES

The contracts curriculum develops these various doctrinal strands in part to acquaint students with an area of law they may encounter down the road. But providing this snapshot of the messy state of this corner of contract law provides only a part of the justification. The path of the preexisting duty rule also provides an interesting case study from which we can uncover lessons about rules which can lead to a deeper understanding of law. What follows are

95. U.C.C. § 2-209(1).

96. *Id.* at cmt. 1.

97. *Id.* at cmt. 2.

98. *Id.* Some have criticized U.C.C. § 2-209 for not including the good faith requirement in its text, relegating it to the comment. *See, e.g.,* MURRAY, *supra* note 4, at 259-60.

99. Fuller, *supra* note 25, at 800, 804.

100. Hillman, *Policing Contract Modifications*, *supra* note 4, at 850-51.

101. MACAULEY ET AL., *supra* note 1, at 253.

suggestions regarding some of the points about rules we can extract from digging into this area.

A. *The Purpose of Rules*

First, rules are designed to serve purposes. Hopefully my more charitable readers will suppress the sarcastic chorus of “duh” this rather obvious point may elicit. Justice Holmes reminded us of the importance of “education in the obvious”¹⁰² and I think this somewhat transparent point qualifies. Rules rarely reflect simply some arbitrary choice. They rather are fashioned with some goal(s) in mind. In order to assess the merit of a rule of law, we must begin by trying to understand its animating purpose.

At times, a rule may owe its creation to some substantive or instrumental end the law-maker seeks. For instance, Lord Kenyon thought the preexisting duty rule necessary to prevent seamen on the *Alexander* from insisting on additional compensation in time of danger as their price for not suffering the vessel to sink. The rule has often been justified as a way to prevent extortion, to remove the incentive a contracting party would otherwise have to use the other’s dependence to squeeze further concessions. Rules also may have formal or procedural purposes. Thus the preexisting duty rule might be justified as a way to give meaning to the doctrine of consideration when parties seek to modify a contract. This was, of course, Lord Ellenborough’s point in explaining the outcome of *Stilk*.

This discussion suggests a second basic attribute of rules—they may have multiple purposes or rationales. This point, too, is hardly shocking; at some level we understand that behavior often has multiple explanations. Nonetheless as we identify one rationale that seems to have explanative power we often overlook other purposes that appeal to others.

Sometimes the diverse justifications will each resonate with a particular audience. Each point reinforces the other, leaving advocates of a rule doubly convinced of its merit. On other occasions, however, the existence of multiple arguments may allow some who are skeptical regarding one rationale to support the rule based on the second. If we believe the commercials, some appreciate Miller Lite because it “tastes great,” others because it is “less filling.” No matter how loudly they insist on their rationale during their barroom exchanges, the two camps may never convince each other. Still both apparently have a reason to appreciate and consume the product. Similarly, Lords Kenyon and Ellenborough can find merit in the rule because it satisfies the rationale important to them (“Prevents extortion!” “Protects consideration!”). Both articulate the rule although they reach no consensus on its basis.

102. Oliver Wendell Holmes, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292, 295 (1920).

But just as multiple rationales may enhance the support a rule or product enjoys, it also may subvert its appeal. Whatever makes beer taste good may also make it more filling and whatever makes it less filling may make it taste worse. To the extent the preexisting duty rule makes concessions to consideration doctrine it may erode its ability to police extortion. For instance, mutual modification and the mutual rescission two-step are rooted in consideration doctrine. They may, however, undermine the rule's ability to police extortion since they may camouflage coerced modifications. The focus on whether modifications are reciprocal which consideration mandates diverts attention from whether they are voluntary.

The legal duty rule demonstrates the effort of the law to craft rules which accommodate different objectives society values. "Finding the proper balance between protecting flexibility and ensuring stability in contractual arrangements is the challenge of contractual modification law,"¹⁰³ writes Professor Hillman. For instance, the legal duty rule emphasized the formal requirement of consideration and sought to prevent extortion while paying little attention to the virtue of facilitating modifications. The various alternatives and qualifications of that rule—Restatement §§ 74 and 89 and U.C.C. § 2-209—reflect different accommodations. Restatement § 74, for instance, goes far to promote dispute settlement. It subordinates consideration to that objective since it allows a party to trade an invalid claim for value provided it honestly believes in that claim. Restatement § 89 tilts the balance in favor of flexibility and away from stability, at least where its conditions are met. Section 2-209 goes further, allowing modifications subject to the requirement of good faith. Based on the lessons experience offers, the law changes the mix of ingredients to produce a rule which reflects contemporary dispositions.

B. The Death of the Legal Duty Rule

1. How Rules Erode

The experience of the legal duty rule offers lessons regarding the demise of particular rules of law. Several issues afford fruitful grounds for inquiry. First, what signs are there that a rule of law is undergoing stress, that society is less committed to a rule that once commanded obedience? The experience of the legal duty rule suggests some tell tale signs that a rule is on a downward spiral.

First, when courts frequently invoke fictions to avoid applying a rule it is reasonable to infer that the rule is losing its hold. Judges tend to respect precedent and are understandably reluctant to announce that they have

103. See Hillman, *Contract Modifications in Iowa*, *supra* note 4, at 343.

disregarded a rule of long-standing in order to reach a result it will not allow. Yet at times precedent may lead in directions judges believe are unreasonable or unjust. Faced with such a predicament, some courts employ some fiction to reach a palatable outcome without demonstrating overt disrespect for a rule. Courts have often performed intellectual gymnastics to escape the consequence of the legal duty rule. For instance, courts have allowed the mutual rescission two-step in cases where the two steps occur simultaneously.¹⁰⁴ They have found consideration for a modification in dubious circumstances.¹⁰⁵ Cases that use such ingenuity to avoid a rule suggest courts are not enamored with the rule.¹⁰⁶

Second, frequent criticism of a rule may suggest an erosion of its following. Academic studies may reveal problems but ultimately judicial criticism is particularly significant. Unlike academics, judges are not professional critics of rules. Their job is to apply law to disputes, not to trash the rules they are supposed to apply. When they include passages in their opinions explaining a rule's shortcomings they often are campaigning for some change in it. The judiciary has not been mute regarding its misgivings regarding the legal duty rule.

Third, when exceptions to a rule proliferate it generally suggests some instability in the rule itself. The mutual rescission two-step and mutual modification exceptions have been discussed above. Restatement § 89 is even more subversive of the rule. It rejects any pretense that consideration or some semblance of it is necessary to circumvent the rule. Moreover, it adopts other criteria to exempt from the rule certain modifications.

Finally, the development of alternative rules generally suggests a rule is on the skids. The adoption of U.C.C. § 2-209 endorsing modification without consideration suggests not only substantial dissatisfaction with the rule but offers a robust competitor in some contexts.

Professor Corbin recognized a number of these factors. Writing in 1952, he advised against according the legal duty rule much deference. "When general rules have never been applied with uniformity and appear to be breaking down into a number of other rules that take new factors into consideration, it behooves both writers and courts to weigh the matter anew and to be ready to reach new results."¹⁰⁷

104. See *Schwartzreich v. Bauman-Basch*, 131 N.E. 887, 889-90 (N.Y. Ct. App. 1921).

105. See *Swartz v. Lieberman*, 80 N.E.2d 5, 6 (Mass. 1948) (finding consideration where party, who has breached contract, agreed to perform for more money).

106. CALAMARI & PERILLO, *supra* note 4, at 184 ("[T]here are many decisions in which ingenuity has been employed in circumventing the rule, often on tenuous grounds. These decisions show that the courts are not impressed with the fairness of the rule.").

107. CORBIN, *supra* note 4, at 246.

2. Why Rules Erode

In addition to the descriptive issue of how rules erode, a second question relates to why they erode. First, rules may erode because their underlying rationales become less convincing. We have seen that consideration provides an important part of the foundation for the legal duty rule. Yet consideration itself has experienced some loss of support. Contract law recognizes other bases for enforcing promises such as promissory estoppel (Restatement § 90) and promises for benefit received (Restatement § 86). It also identifies situations in which consideration is not a sufficient basis. As this foundation for the preexisting duty rule weakens a bit, so, too, must the rule.

Second, rules crumble because the fit between rationale and result seems less perfect than society wants. We have seen that one instrumental purpose of the legal duty rule was to prevent extortion. That rationale is intuitively compelling and lies at the core of the concept of freedom of contract. One party to a contract should not be able to extract more simply because the other has no adequate legal remedy which might embolden him to resist. If the legal duty rule well-served that purpose it would be unassailable. Over time, however, many have concluded that the rule is a poor instrument to ferret out extortion. It results in some voluntary modifications becoming unenforceable yet does not censure some extorted modifications that have been completed or seem supported by a peppercorn in exchange. In order to avoid discordant results, courts develop exceptions and escapes from the rule. These may make the remaining core of the rule more palatable but ultimately the circumventions may subvert the rule. If they proliferate, they suggest the rule may have less merit than thought. They also deprive the rule of the certainty that was one of its virtues. As Professor Macauley and his colleagues observe, “the pre-existing duty rule is shot through with exceptions and qualifications. It is difficult to say when it will and will not apply.”¹⁰⁸

Third, rules erode because over time the law develops other instruments to achieve their underlying rationale. Contract law has certainly not abandoned the idea that law should not enforce extorted promises. Far from it. Yet the preexisting duty rule has become less important as a mechanism to address extortion due in part to the expansion of duress as an alternative policing doctrine. As duress has grown to incorporate economic duress, it reached many, if not all, of the situations of extorted contract modifications which the legal duty rule traditionally combatted. Yet duress has clear advantages over the legal duty rule as a defense against extorted modifications. It has a built-in filter which separates the extorted modifications from those freely given. Unlike the legal duty rule, it is not overinclusive. Moreover, it can combat some extorted modifications which flew below the radar of the legal duty rule.

108. MACAULEY ET AL., *supra* note 1, at 252.

Unlike the legal duty rule, it does not give an automatic pass to the mutual modification, the mutual rescission two-step, or the completed exchange. Rules, like equipment, become obsolete not only because they no longer function well but also because a better model is available. Even some who might conclude that the legal duty rule does a pretty good job, might consider it expendable given the new, improved duress model.

C. Advantages of Different Types of Rules

The subject of the legal duty rule also provides an opportunity to consider the relative merits of the different types of rules law students and lawyers encounter. Some rules are relatively precise and turn on behavior easily measured against some yardstick. When these rules turn on a single factor, they yield what might be called precise or bright-line rules. Other rules may employ multi-factored tests and/or may utilize criteria that do not lend themselves to easy measurement.¹⁰⁹ Bright-line and multi-factored rules have different advantages and disadvantages which can be explored in a discussion of the legal duty rule.

With respect to the enforceability of contract modifications, the Contracts curriculum offers three contemporary alternatives—the preexisting duty rule which renders modifications unenforceable unless balanced by consideration, Restatement § 89 which makes modifications enforceable if fair and equitable and precipitated by unanticipated circumstances, and U.C.C. § 2-209 which makes modifications enforceable.¹¹⁰ In one sense the legal duty rule and section 2-209 seem polar opposites; one (section 2-209) makes enforceable what the other renders unenforceable. They actually share an important feature. Both are relatively bright-line rules which dictate the fate of modifications unsupported by consideration in simple, straightforward fashion. The legal duty rule requires decision-makers to address only one question of fact—whether consideration exists for the modification. Section 2-209 eliminates even that inquiry. Thus both rules, to the extent applied, impose relatively simple tasks on the court and provide contractors with a relatively clear guide.

109. The “precise” and “multi-factor” terminology comes from Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974). At times, rules are juxtaposed with balancing tests but this dichotomy does not really capture the different nuances. A balancing test is really a type of rule. It identifies criteria which contractors must/may consider and courts must/may follow. It involves two or more factors that courts must weigh. At times, of course, the things the court is to balance will not be subject to measurement on the same scale. At other times, they may conflict. Ultimately, a balancing test gives the court more apparent discretion to resolve a case. They point less directly to the answer and are more malleable. Still, a court, which is supposed to weigh multiple considerations but decides based on only one factor, may be deemed to have misapplied the law.

110. I am putting aside, for now, the good faith inquiry the U.C.C. requires.

By contrast, Restatement § 89 requires the court to engage in much more fact intensive inquiries laden with subjective and malleable criteria. The modification is enforceable only if fair and equitable, surely criteria that turn on numerous facts and circumstances and may differ to each beholder. Moreover, the fair and equitable modification must come from unanticipated circumstances, an inquiry that requires assessments of causation and foreseeability. Under this standard, courts possess far more leeway to reach a result than they do under either of the other two rules.

On its face, Restatement § 89 does a better job at separating extorted (and therefore unenforceable) promises from voluntary (enforceable) ones. Whereas section 2-209 would enforce all one-sided modifications and the legal duty rule would enforce none, Restatement § 89 would enforce only those that satisfied its two-factored test. Restatement § 89 has considerable appeal if we believe that test does a good job at ferreting out coerced modifications. A multi-factor rule will often seem more capable of achieving a particular purpose because it is designed more precisely to address the targeted evil.

Multi-factor, imprecise rules impose some costs which study of Restatement § 89 reveals. In particular, they require additional work from courts who must engage in more extensive fact finding to reach a conclusion. Parties presumably will often present conflicting accounts of what transpired. The testimony of the promisor will suggest the promise was coerced; the promisee will present the pledge as freely given. Courts are not perfect and they will sometimes make mistakes. The more factors that are relevant, the more occasion to find fact erroneously. Finally, the imprecision of the rule may encourage those with marginal claims to litigate. Multi-factor rules, like Restatement § 89, provide less predictability. As bright-line rules section 2-209 and the legal duty rule impose a lesser burden on courts and allow surer predictions than does Restatement § 89.

The legal duty rule and duress lend themselves to a similar comparative analysis. Both address extortion, the former by resort to a bright-line rule, the latter through a multi-factor approach. The legal duty rule is a blunt instrument which addresses extortion by striking down all one-sided modifications. It is easy to apply and should deter those aware of it from one-sided modifications (though not necessarily from extortion). On the other hand, duress requires proof that (a) an improper threat, (b) induced a manifestation of assent and (c) the victim lacked a reasonable alternative. The defense only upsets a modification if all three conditions exist—the threat was improper, it caused the modification, and the victim lacked reasonable alternatives. This test addresses extortion precisely but imposes greater transaction costs and offers less predictable outcomes since it is a multi-factor approach which requires subjective and objective assessments of fact.

The story of the preexisting duty rule cautions, however, that bright-line rules may not produce the level of certainty anticipated. If such precise rules

detect their intended object, here extortion, with twenty-twenty vision, they may operate well. But their aim is not perfect. Like the preexisting duty rule, they overinclude and underinclude. As a rule's poor marksmanship becomes apparent, courts try to compensate. They craft exceptions or fictions or engage in creative factfinding. These expedients may help decide particular cases in more palatable fashion but they render the bright-line rule less bright than advertised. Instead of having just the precise rule to guide them, courts and contracting parties now have a rule blurred by assorted exceptions and circumventions, a confusing chart of precedents pointing in different directions, a culture of judicial decisions somersaulting to avoid harsh or unpleasing applications.

Moreover, defective rules typically impose an additional cost which the judicial conduct just described illustrates. These ingenious solutions may produce the "right" result in a particular case but they tend to spawn incoherent doctrine.¹¹¹ To the extent results seem manipulated, judicial integrity becomes subject to question. Respect for the law and the judicial system suffer. Candor has its advantages. "It would have been preferable if these courts had simply found the modifying promise enforceable without consideration," argues Professor Murray.¹¹²

Multiple rules may apply to the same situation. Under the U.C.C., for instance, section 2-209 purports to make a modification enforceable without regard to consideration. Yet this bright-line rule does not really operate alone. It is subject to the ambiguous¹¹³ good faith requirements of the Code. Thus, the modification is enforceable provided it is made in good faith. Similarly, the Restatement (Second) of Contracts makes an otherwise enforceable modification subject to duress analysis. Thus, even simple bright-line rules often are reinforced by other rules. The certainty a precise rule may seem to provide may be impaired once some issue like good faith or duress enters the calculus.

Finally, study of the legal duty rule and its surrounding exceptions reveals another problem with rules that emphasize legal formalities. Whether a modification is enforceable may turn on whether the parties are aware of the mutual modification or mutual rescission techniques. In essence, those who are sophisticated regarding the formal requisites or who have access to legal advice may construct their modifications in a manner that renders them enforceable. Those less informed or less affluent may run afoul of these

111. See, e.g., Hillman, *Policing Contract Modifications*, *supra* note 4, at 853-54.

112. MURRAY, *supra* note 4, at 254.

113. Hillman, *Policing Contract Modifications*, *supra* note 4, at 858-59.

rules.¹¹⁴ In this respect, the legal duty rule may impact a person's ability to achieve their reasonable expectations based on knowledge of formalities. No doubt this form of discrimination occurs routinely and is, to some extent, inevitable. But if the formalities are of dubious value or are esoteric, the price may be too high. Why should two episodes of similar behavior which is equally voluntary (or involuntary) fare differently because one actor knew the formalities while the other did not?

D. Precedent as a Guide

The legal duty rule provides an opportunity to consider stare decisis as a basis for applying a common law rule. To be sure, precedent has its claims and law students learn of the judicial tendency to apply rules of earlier cases to decide later controversies. To some extent, the legal duty rule continues to be applied because of its status as precedent. *Foakes* relied on that rationale. "The rule has been so long embedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it," wrote the Missouri Supreme Court in *Lingenfelder*.¹¹⁵ The claims of precedent are stronger where an old rule brings certainty or has engendered reliance.

Yet to what extent ought precedent to furnish a guide? *Lingenfelder* recognized that "cogent reasons" could override common law precedent. Precedent might be disregarded, Professor Llewellyn suggests, where the underlying rationale of a rule fails to apply to a situation. He wrote:

They should come to recognize the court's steady quest for rules which satisfy the needs of the Grand Tradition—each rule with a singing reason apparent on its face, each rule a rule whose reason guides and often even controls application according to the double maxim: *the rule follows where its reason leads; where the reason stops, there stops the rule*.¹¹⁶

Thus, some courts abandoned the preexisting duty rule in the three-party context¹¹⁷ where the prevent extortion purpose of the rule was less compelling.

Professor Corbin suggests a different reason for ignoring the rule. "Like other legal rules, this rule is in process of growth and change, the process being

114. See, e.g., MACAULEY ET AL., *supra* note 1, at 251 ("[M]ost non-lawyers would not know about the consideration rule and think themselves bound to the settlement."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1699 (1976).

115. *Lingenfelder v. Wainwright Brewery*, 15 S.W. 844, 848 (Mo. 1891).

116. K. N. LLEWELLYN, *THE BRAMBLE BUSH ON OUR LAW AND ITS STUDY* 189 (Oceana Publications, Inc. 1996) (1960).

117. See, e.g., *Patterson v. Katt*, 791 S.W.2d 466, 469 (Mo. Ct. App. 1990).

more active here than in most instances.”¹¹⁸ Why follow a common rule that is collapsing or is out of step with modern principles?¹¹⁹

E. Statutory Sources of Common Law Development

The case of the legal duty rule also provides an example of the extent to which statutory developments can shape the common law. U.C.C. § 2-209 has not only abandoned the legal duty rule in the sale of goods context; it has also provided an analogy which has no doubt contributed to the erosion of the common law rule. The common law grows not only as judges reason from and analyze other cases; it also borrows principles from statutes to evolve.¹²⁰

F. The Diverse Influences on Rules

The legal duty rule also provides an opportunity to demonstrate the diverse intellectual currents which shape law and rules. Professor Clark Byse observes that various approaches to the law each offer some insight.¹²¹ Thus, the positivist might appreciate the way the legal duty rule utters a simple command. The legal realist might nod knowingly at the way judges manipulated the rule and its exceptions, in cases like *Schwartzreich* or *DeCicco*, to avoid harsh results. The product of the legal process school might applaud the emphasis on identifying purposes behind rules. The law and economics scholars might point to the way enforcement of a one-sided modification can maximize utility in circumstances where the party seeking the modification is responding to some changed circumstances, not exploiting a monopoly.¹²² The critical theorist might point out the extent to which the preexisting duty rule impacts differently the legally sophisticated and the legally illiterate. These points are not exhaustive. They illustrate the extent to which different perspectives may shine light in evaluating the rule.

IV. CONCLUSION

The preexisting duty rule offers an opportunity to use one body of contracts doctrine to suggest more general ideas about law. The avenues suggested above are by no means exclusive. Others no doubt will effectively exploit the topic to other ends. In any event, the enterprise is worth pursuing.

118. CORBIN, *supra* note 4, at 246.

119. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150-52 (Yale Univ. Press 1932) (1921).

120. See, e.g., Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908); James Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533, 538-39 (1947).

121. Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1091 (1986).

122. See generally Posner, *supra* note 50, at 421-24.

For ultimately the fascination in any subject of law is not simply in learning its doctrine but in probing what lies behind it, in exploring its connections to other areas of law, and in asking what lessons it teaches about law in general.