

De barmhartige Samaritaan in het Europees privaatrecht : over de gevaren van beginselen zonder een programma en een programma voor de toekomst = The good samaritan in European private law: on the perils of principles without a programme and a programme for the future

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The Good Samaritan in European Private Law; On the Perils of Principles without a Programme and a Programme for the Future

Inaugural lecture, Maastricht University 19 May 2000

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1. Introduction

He, who is called to a Chair of European Private Law, is in a highly fortunate position. The science of European Private Law is still so much in its infancy that its scholars could

be compared with the cartographers of the old days, who had to cope with vast blank spaces on their maps. Those cartographers were sure of the existence of newly discovered continents and of its coastlines, but they did not yet know what the interiors looked like. Scholars of European Private Law are in a comparable position since they *do* know that there is something like European Private Law, but they often have no clue whatsoever as to its contents or even its contours.¹ This is an enviable position for any scholar, whose primary goal is after all the pursuit of knowledge and the filling-in of *terra incognita*, but it is even more so to any scholar of the civil law who, over the last 200 years, had to be mainly concerned with the interpretation of national Civil Codes and is now able to broaden his scope extensively. That, in doing so, the warning *Hic sunt leones* is just as apt for European Private Law scholars now as it once was for the reader of a map when confronted with vast blank spaces, should however be clear from the outset: the Chair to which I am officially inaugurated today, opens up a wide variety of closely related research themes of a sometimes highly complicated - and thus fascinating - character.

Today, I intend to show you my perception of some of these fascinating research themes - and of European Private Law in general - by discussing one specific case: the case of the Good Samaritan. The method of taking a case as one's starting point for a comparison between different legal systems is becoming more and more popular.² It creates the possibility of comparing the various legal systems on the basis of what is a *tertium comparationis* in itself. The case of the Good Samaritan is particularly apt to serve this purpose: its biblical origin³ has ensured the discussion of the case in nearly every Western legal system. What should be kept in mind however, is that what I bring up today about the Good Samaritan and its consequences, is only an illustration of what I believe in as to the development of European *ius commune* in general. To me, the case of the Good Samaritan is paradigmatic for a pivotal problem of European Private Law: the extent to which in fact uniform principles lead to uniform law. This, in turn, has to do with one's perception of the function of law. In raising these questions, I also hope to make clear what it is that drives me in doing research and lecturing in this field.

Let me begin by giving you a few examples. The Olympic swimming champion happens to walk by a swimming pool and sees a young woman who is apparently in great danger: she is about to drown. All that our champion does, is take a chair and watch the woman drown while sitting on the shore. Is he liable in damages? Or suppose one of the esteemed persons present today is witness to a carcrash. You decide to render first aid to the injured driver, but in doing so you worsen his predicament. Are you liable for the extra injury the cardriver has suffered? Or suppose you have rescued the driver by pulling him out of the exploding car: would you be entitled to a reward or at least to damages if

¹ Cf. for this imagery Michael Stolleis, *Aufgaben der neueren Rechtsgeschichte oder: Hic sunt leones*, 4 *Rechtshistorisches Journal* (1985), 251 and D.P. Visser, *The Legal Historian as Subversive*, in: *id.* (ed.), *Essays on the History of Law*, Cape Town 1989, 31.

² Cf. the *Ius Commune Casebooks for the Common Law of Europe* series, edited by Walter van Gerven and the Trento project, on which M. Bussani/U. Mattei, *The Common Core Approach to European Private Law*, 4 *Columbia Journal of European Law* 1997-1998, 339.

³ Luke 10:33.

you were injured yourself in the rescue operation? These are all classic questions of Good Samaritanship. These could be compared to modern versions: is the seller of a house obliged to give information to the other party as to the condition the house is in? Is an insurance company under any obligation to inform a bank that the securities the bank is going to get from a client are virtually worthless? Today, I am concerned with these questions that all could be summarised under the heading: 'Am I my brother's keeper?'

2. The Good Samaritan in Various European Legal Systems

2.1 Introduction

As to the liability of the Good Samaritan, three different questions can be put forward. First: is there a duty to aid people in distress in penal law or private law? In particular the private law duty is what is of interest to us today, but a small inquiry into the penal law liability is then required as well. Secondly, the question should be put forward if, after the rendering of help, damages or even a fee or reward could be awarded to the Samaritan. In the third place it is apt to investigate whether the Samaritan himself is liable in case he would cause damages himself in aiding the other party. These three questions as a whole determine the legal status of the Good Samaritan.

The three panels of this triptych will be discussed here in accordance with classic comparative law theory. In classic theory of comparative law, the presentation of foreign legal systems should take place as objectively as possible,⁴ paying respect to differences but also stressing similarities. This implies that the black letter rules of various countries are put next to each other and that it is on this black letter level (without much attention for policy issues) that a presentation of the differences and parallels between the various systems is presented.⁵ In this respect, the distinction between the civil law and the common law (in the case of Europe English and Irish law that is) serves as a watershed.⁶

2.2 The Duty to Rescue in Penal Law

⁴ Cf. however B.S. Markesinis/W. Lorenz/G. Dannemann, *The Law of Contracts and Restitution* 1997, 4-5, who seek an 'Anglicization' of German law.

⁵ Cf. for the classic statement the contributions to Zweigert/Puttfarcken (Hrsg.), *Rechtsvergleichung*, Darmstadt 1978, among which Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, 86 ('Die Wertung gehört nicht mehr zur Rechtsvergleichung'). Cf. however Zweigert/Kötz, *An Introduction to Comparative Law*, 3rd. ed., Oxford 1998, 40, 43 (but perhaps too much stressing the need for similarities – cf. *infra*, par. 6).

⁶ Classic presentations are John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 *Harvard LR* (1961), 817 f., 1073 f.; F.J.M. Feldbrugge, *Good and Bad Samaritans: a Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 *AJCL* (1966), 630; Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in: Ratcliffe (ed.), *The Good Samaritan and the Law*, New York 1966, 91. Cf. Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in: Menlowe/McCall Smith (eds.), *The Duty to Rescue; the Jurisprudence of Aid*, Aldershot 1993, 93 and (in Dutch) H.C.F. Schoordijk, *De verbintenis uit en de verplichting tot altruïsme*, Amsterdam 1987. See Walter van Gerven et al (eds.), *Common Law of Europe Casebooks; Torts: Scope of Protection*, Oxford 1998, 56 f.

In order to understand the state of private law concerning the Good Samaritan, it is appropriate to pay attention to the criminal law's stand against general duties to intervene for the sake of another as well. Criminal law is taken as a starting point for a discussion of the private law aspects because it can make us more conscious of what in a society is considered to be a *public wrong*, thus regarded to be a matter of the State to intervene for. Especially in a survey like this, directed towards the unveiling of value judgements in a society, criminal law provisions can not be ignored.

Penal law provisions in which duties to come to the rescue of other people are laid down, exist in a great variety in civil law countries. European penal codes contain such duties *e.g.* in case of *special relationships* as those between parent and child (*e.g.* a duty not to abandon a child⁷) and in case of a traffic accident in which it is forbidden for drivers to leave the place of an accident in which they were involved.⁸ Even more known is the duty to render aid and save lives during disasters such as shipwrecks. Likewise, many codes have a duty to assist others in rescuing people in distress. The prototype of this provision was art. 475-12 of the French Code Pénal of 1810, that was taken over by many countries including Germany (this so-called *Liebessparagraph* was part of the Strafgesetzbuch 1871⁹) and Belgium, in which country the provision still exists (art. 422ter Belgisch Strafwetboek). Specific provisions like these also exist in the common law world, as we shall see in the next paragraph.

A paramount watershed between the civil law and the common law however becomes clear if one looks at the existence of a *general* penal law duty to rescue people in distress. It is well-known that in most of the civil law-countries, such a general duty to come to the rescue of strangers is laid down in the national Penal Codes. This is *inter alia* the case in the Netherlands (art. 450 Wetboek van Strafrecht 1886), Norway (art. 387 Straffeloven 1902¹⁰), Italy (art. 593 Codice Penale 1930 on *Omissione di soccorso*; the Zanardelli Code of 1889 already contained a provision), Denmark (art. 253 Straffeloven 1930), Germany (§ 323c on *unterlassene Hilfeleistung* was introduced in 1953 in the Strafgesetzbuch 1871 although a previous provision was incorporated in 1935 by the Nazis who felt that the old *Liebessparagraph* was an exponent of a far too liberal and individualist mentality; this § 330c was no longer applied after 1945), France (in 1941 a provision was introduced by the Vichy-government that in amended versions existed as art. 63 Code Pénal until 1994; this is now art. 223, 5-7 Nouveau Code Pénal¹¹), Greece (art. 307 of the Penikos Kodikas 1951¹²), Spain (art. 195 of the Código Penal Nuevo of

⁷ Cf. art. 227-1/2 Code Pénal; § 221 StGB; art. 255-260 Wetboek van Strafrecht.

⁸ Cf. the *Verkehrsfucht* of § 142 StGB and art. 7 lid 1 sub b Dutch Wegenverkeerswet 1994.

⁹ Art. 360-10. *e.g.* the Prussian Allgemeines Landrecht of 1794 also knew a penalisation of the refusal to aid.

¹⁰ English Translation in: *The Norwegian Penal Code* (The American Series of Foreign Penal Codes 3), London 1961.

¹¹ For a discussion of some recent French case law see Martin Vranken, *Duty to Rescue in Civil law and Common law: Les extrêmes se touchent?*, 47 *ICLQ* (1998), 934 f.

¹² Reprinted in: *The Greek Penal Code* (The American Series of Foreign Penal Codes 18), London 1973.

1996, the successor of art. 489ter, introduced in 1960 in the Código Penal of 1944, after various previous less extensive provisions¹³), Belgium (art. 422bis was introduced into the Strafwetboek 1867 in 1961¹⁴), Austria (art. 95 Strafgesetzbuch, introduced in 1975 as a revision of the Code of 1804), Portugal (art. 219 of the Código Penal of 1982)¹⁵ and Luxembourg (art. 410-1 Code Pénal 1879, introduced in 1985). The only two civil law-countries within the European Union that do not have a general duty to rescue are Finland - where such a duty was repealed during the revision of the Rikoslaki in the 1980's¹⁶ - and Sweden. Its Brottsbalken of 1965 did not contain a provision from the outset.¹⁷

The above is not to say that there is uniformity within the penal law on the European continent when it comes down to a general duty to rescue.¹⁸ To make this clear, I quote art. 450 Dutch Penal Code, § 323c German Strafgesetzbuch, art. 593 of the Italian Codice Penale and the recently enacted art. 223-6 (second sentence) of the French Code Pénal. They read as follows:

‘Hij die, getuige van het ogenblikkelijk levensgevaar waarin een ander verkeert, nalaat deze die hulp te verlenen of te verschaffen die hij hem, zonder gevaar voor zichzelf of anderen redelijk te kunnen duchten, verlenen of verschaffen kan, wordt, indien de dood van de hulpbehoevende volgt, gestraft met hechtenis van ten hoogste drie maanden of geldboete van de tweede categorie’.¹⁹

‘Wer bei unglücksfallen oder gemeiner Gefahr oder Not nicht Hilfe leistet, obwohl dies erforderlich und ihm den Umständen nach zuzumuten, insbesondere ohne erhebliche eigene Gefahr und ohne Verletzung anderer wichtiger Pflichten möglich ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft’.²⁰

‘Alla stessa pena (con la reclusione fino a tre mesi o con la multa fino a lire seicento mila, JMS) soggiace chi, trovando un corpo umano che sia o sembri inanimato, ovvero una persona ferita o altrimenti in pericolo, omette di prestarre l'assistenza occorrente o di darne immediato avviso all'Autorità (...)’.²¹

¹³ Codes of 1822 and 1848.

¹⁴ On the preceding discussion: Jean Constant, 42 *RDPC* (1961), 199 and Jacques Verhaegen, Belgique, 55 *RIDP* (1984), 559.

¹⁵ Portugal was inspired here by the German example. Cf. Gilbert Geis, Sanctioning the Selfish: The Operation of Portugal's New ‘Bad Samaritan Statute’, 1 *International Review of Victimology* (1991), 297; J. De Figureido Dias, Portugal, 55 *RIDP* (1984), 849.

¹⁶ Finland did have a provision in its Code of 1889 (21:13, reprinted in English in Harri Palmen, Finlande, 55 *RIDP* (1984), 653).

¹⁷ Nils Jareborg, Suede, 55 *RIDP* (1984), 937.

¹⁸ For a survey of differences: Rudzinski, in: Ratcliffe (ed.), *o.c.*, 91; Feldbrugge, *o.c.*; Schoordijk, *o.c.*, 267.

¹⁹ English Translation in: *The Dutch Penal Code* (The American Series of Foreign Penal Codes 30), London 1997.

²⁰ English Translation in: Feldbrugge, *o.c.*, 655.

²¹ Translated in: *The Italian Penal Code* (The American Series of Foreign Penal Codes 23), London 1978: ‘Anyone, finding a human body which is or appears to be lifeless, or a person who

'Sera puni des mêmes peines (cinq ans d'emprisonnement et de 500.000 F amende, JMS) quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter soit par son action personnelle, soit en provoquant un secours'.

Differences exist, *e.g.*, as to the question whether already danger to bodily integrity brings along a duty to rescue (as is the case in Italy, Germany and France) or only danger to life does so (as is the case in the Netherlands, but also in Norway and Denmark). Provisions also differ as to the persons who are bound to render assistance. These could be only witnesses (Netherlands²² and Italy), people to whom the danger is evident (Denmark) or everyone informed of the danger (Belgium). French law does not seem to take a stand on this point, while German law limits itself to the vague concept of *Zumutbarkeit*. And apparently, the risk that is to be taken by the rescuer also differs: in Germany and Belgium, a considerable danger would be enough not to intervene, in the Netherlands and France, the standard is lower because any personal risk would be sufficient reason or even *any* risk at all (France). The Italian provision is silent on this point. The question *what* the rescuer should do, is answered in different ways in different countries as well. Does the rescuer need to intervene personally or obtain help (like in the Netherlands²³ and Belgium) or does he only need to notify the authorities (Italy)? Moreover: liability would only exist in the Netherlands in case the death of the person in need of aid occurs, while other countries do not know such a limitation. Penalties range from a fine or three months detention (the Netherlands and Italy) to a fine or 5 years imprisonment (France).

If we turn now to the duty to rescue in England and Ireland, it is striking to see that a *general* duty to intervene is not part of the penal law of these two systems. Specific duties to aid others do exist however. In English law, this could be so in case of a relationship of dependence (parents should for example feed their children and protect them from abuse²⁴) or in case a person occupies a position that requires him to act (like a policeman) or in case of a contract between the person in peril and the potential rescuer.²⁵

is wounded or otherwise in peril, who fails to provide necessary assistance or to give immediate notice to the authorities, shall be subject to the same punishment (imprisonment for up to three months or a fine of up to 120.000 lire, JMS).'

²² The Dutch Hoge Raad decided that not only the witness of the emergency has a duty to aid, but anyone present who realises that there is a danger (HR 18 January 1926, *NJ* 1926, 242).

²³ According to the *Memorie van Toelichting* (MvT), the warning of the police is as good as personal intervention (MvT, H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht*, III, Haarlem 1882, 259).

²⁴ Children and Young Persons Act 1933, s.1; *cf.* Andrew Ashworth, *Principles of Criminal Law*, 2nd. ed., Oxford 1995, 110. The duty does not extend to adult children: *R. v. Sheppard*, [1981] AC 394 or to spouses (*cf.* McCall, *The Duty to Rescue and the Common Law*, in: Menlowe/McCall Smith (eds.), *o.c.*, 63).

²⁵ McCall, *o.c.*, 67.

A passenger allowing a driver to drive dangerously, could also be criminally liable,²⁶ just like the employer who does not control his employee. English law leads the way here for the common law approach of one general principle (namely no duty to intervene) and several exceptions to that principle.²⁷

What can be learnt from this brief survey of the criminal law regarding the liability of the Good Samaritan, is that the failure to act on behalf of a person in peril is regarded to be a crime and thus a *public wrong* on the European continent, while it is only a matter of individuals in English law to decide not to intervene. This is an important point for the matter of unifying law in Europe and I will come back to it later.

2.3 The Duty to Rescue in Private Law

Do the European private law systems also know a duty to rescue? It is obvious that the existence of such a duty should then have its proper foundation in the private law itself and that it could only be enforced through the means of that area of law itself: by awarding damages in case the potential rescuer did *not* act. Let us have a look at German, French and Dutch law on the civil law side and at English and American law on the other side. Our purpose here is to assess the dogmatic vehicles upon which the liability is based.

In German law, a rather strict distinction between the penal law and the civil law does not make it easy to establish a civil law duty to rescue. Of the three possible foundations for tortious liability, § 823 I Bürgerliches Gesetzbuch does not qualify; it relates liability to the *result* of the violation of a duty and not to the duty itself. § 323c Strafgesetzbuch entails only a duty to rescue, not to evade any damage. The absence of any *Erfolgsabwendungspflicht* makes § 823 I thus not a suitable candidate.²⁸ The second possible foundation would be § 823 II BGB: the violation of § 323 StGB would then however lead only to liability in case the norm entailed in that article would be a (statutory) *Schutzgesetz* ex 823 II BGB. Among civil law scholars, it is *communis opinio* that this is not the case.²⁹ The scope of the penal provision is not to ensure that individuals intervene for the sake of others, but a civic duty ('staatsbürgerliche Pflicht') of collaboration in keeping the public order intact.³⁰ The third - and in fact only - possibility would then be to bring an action on § 826 BGB, the 'sittenwidrige vorsätz-

²⁶ *Du Cros v. Lambourne*, [1907] 1 KB 571.

²⁷ *Cf. e.g.* American criminal law, for which the same is true: only in case of a special relationship, statute, contract, voluntary assumption of care or creation of the peril, there is a duty to intervene. *Cf. par. 2.01 (1) Model Penal Code 1962* and Wayne R. LaFare/Austin W. Scott Jr., *Criminal Law*, 2nd. ed., St. Paul, Minn. 1986, 202. *Cf.* for Irish law Charleton/McDermott/Bolger, *Criminal Law*, Dublin 1999, no. 1.39.

²⁸ *Strafgesetzbuch Leipziger Kommentar* (Spendel), 10. Aufl. 1988, Berlin, § 323c, RdN 190.

²⁹ Wilhelm Dütz, Zur privatrechtlichen Bedeutung unterlassene Hilfeleistung, 23 *NJW* 1970, 1825; *Staudinger-Hager*, 13. Aufl. 1999, § 823 RdN G 42; *Cf.*, however, Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, 13. Aufl., München 1994, 441 and *Leipziger Kommentar* (Spendel), *o.c.*, no. 195.

³⁰ *Staudinger-Schäfer*, 12. Aufl. 1986, § 823 RdN 298; *Staudinger-Hager*, 13. Aufl. 1999, § 823 RdN H 9.

liche Schädigung': as long as the potential rescuer is aware of the fact that he is causing damages to the person in peril, he may be liable if special circumstances (a 'gesteigerte sittliche Verantwortung') make it appropriate to intervene. Thus intervention in just an emergency is allowed, but if for example danger to another's life is caused by it or if it would be very easy to intervene without infringing upon the rescuer's interests, liability could exist.³¹

In French and Dutch law, a totally different approach is prevailing. Here, a general clause of liability is incorporated in the respective Civil Codes, having for a consequence that in principle the omission is treated in the same way as an act. In French law, the existence of a *faute d'omission* in case of an *abstention pure et simple* on the grounds of art. 1382-1383 Code Civil is judged by answering the question what a reasonable person would have done in the same circumstances. Liability is then supposed to exist in case of a special pre-existing relationship³² and also - vis-a-vis strangers - in case of the violation of a penal law provision. Thus, the violation of art. 223-6 Code Pénal does without any doubt give rise to liability in damages.³³ What once was problematic here, viz. the existence of a causal connection between the non-intervention and damage, is no longer considered to be a problem. If the facts of the case would not amount to the crime of art. 223-6 Code Pénal, French law is still rather strict: case law shows that then a special relationship (e.g. having to take care of another) is needed in order to create liability. There is disagreement as to the question whether a 'intention de nuire' is always required.³⁴

Dutch law follows the same approach as French law: according to the general provision of art. 6:162 Burgerlijk Wetboek, omissions to act should be treated in the same way as acts. The Dutch Hoge Raad has made clear that it is a prerequisite for liability that the defendant realised that someone was in danger and yet did not intervene. Thus, children would not be liable for the non-removing of a chord, stretched across the street³⁵ because of the mere fact that they cannot be fully accountable for this omission. This, because of the mere fact that they did not realise the possible danger of the situation. Given these not so narrow limits, it is not surprising that Schoordijk was able to state that

³¹ For this topical approach: Dütz, *o.c.*, 1826; *Staudinger-Schäfer*, 12. Aufl. 1986, § 826 RdN 51 (but cf. *Staudinger-Oechsler*, 13. Aufl. 1998, § 826 RdN 91); C.C. van Dam, *Aansprakelijkheid voor nalaten*, Deventer 1995, 30.

³² G. Viney/P. Jourdain, *Traité de Droit Civil; Les Conditions de la Responsabilité*, 2. éd., Paris 1998, nr. 456-1.

³³ François Terré/Philippe Simler/Yves Lequette, *Droit civil; Les obligations*, 7. éd., Paris 1999, no. 689; Mazeaud-Chabas, II-1: *Obligations: théorie générale*, 9. éd., Paris 1998, no. 465; André Tunc, The Volunteer and the Good Samaritan, in: Ratcliffe (ed.), *o.c.*, 49. A recent case (also on civil liability) is Cass. Crim. 19 June 1996, *Bull. crim.* no. 260.

³⁴ Cf. the case law, cited in Mazeaud-Chabas, *o.c.*, no. 465 and Terré/Simler/Lequette, *o.c.*, no. 690. Cf. Van Dam, *o.c.*, 36.

³⁵ See for Dutch penal law Noyon/Langemeijer/Rommelink, *Het Wetboek van Strafrecht*, 7de dr., Arnhem, art. 450 aant. 1a and HR 25 March 1997, *NJ* 1998, 37; for civil law HR 22 November 1974, *NJ* 1975, 149 and Van Dam, *o.c.*, 44 f.

under Dutch law there is an `obligation to act altruistic'³⁶, although case law is nearly absent.

Other civil law systems are more or less adherents of the same approach. In Portugal, there even used to be an explicit provision in the Civil Code of 1867. According to art. 2368³⁷ a bystander present at a violent attack towards a third person was obliged to intervene if that could be done without exposing the rescuer to a risk; failure to assist led to a liability for damages (*perdas e danos*); such a far reaching liability was not laid down in the new Código Civil of 1966. Moreover, it should be clear that because of the embedment of the duty in general civil law - not only in Portugal but in the rest of the civil law countries as well - techniques are available to mitigate the general duty to assist. If for example the victim acted recklessly, contributory negligence comes into play.

The position of English law was recently summarised by Lord Nicholls in *Stovin v. Wise*:³⁸

`The recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional reason why it is fair and reasonable that one person should be regarded as his brother's keeper and have legal obligations in that regard'.

The common law thus does not impose liability for pure omissions. In English Tort Law, an affirmative duty of action can only arise in *specific* situations (as we saw before in English criminal law). In each of these situations, there is some sort of `proximity' between the rescuer and the person in peril, like in case of (again) parent and child,³⁹ host and guest,⁴⁰ carrier and passenger, occupier of land and visitors (both lawful visitor *and* trespasser)⁴¹ and employer and employees while at work.⁴² Despite these special cases, the law is still the same in case of the classic example of a grown person standing by while a blind man crosses the street in front of a speeding car. All that the bystander has to do to save the man's life is shout a warning at him (an `easy rescue'), and yet the bystander does not owe the blind man a duty to save him.⁴³ This is reflected in the terminology of English law to call the rescuer an `officious intermeddler'. Lord Reid's words of 1970 are still accurate:⁴⁴

³⁶ Schoordijk, *o.c.*, 45 f.

³⁷ Translated by Rudzinski, in: Ratcliffe (ed.), *o.c.*, 125.

³⁸ *Stovin v. Wise* (Norfolk County Council, third party), [1996] 3 *All ER* 801, 807. *Cf.* Markesinis/Deakin, *Tort Law*, 4th. ed. 1999, 137; *Clerk and Lindsell on Torts*, 17th ed., London 1995, no. 1-39, 7-28.

³⁹ *Cf.* *Carmarthenshire CC v. Lewis* [1955] *AC* 549.

⁴⁰ *The Ogoogo* [1971] 2 *Lloyd's Rep.* 410 (Canadian case).

⁴¹ Occupier's Liability Act 1957 and 1984.

⁴² Markesinis/Deakin, *o.c.*, 519; *Clerk & Lindsell, o.c.*, no. 7-30.

⁴³ *Cf.* *Restatement of the Law (Second) Torts*, St. Paul, Minn. 1965, Illustrations § 314.

⁴⁴ *Dorset Yacht Company v. Home Office*, [1970] *AC* 100.

`when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty'.

It is worthwhile to pay attention to American law here as well for two reasons. In the first place, American law is the best representative of a *systematised* approach to the common law. In the second place, some groundwork is done here for what I have to say shortly about unification of private law in Europe: the American example may be of use in this context.

2.4 An Intermezzo on American law

The position of American law is very much the same as English law: a `general duty to rescue' is absent - even if the rescue would be easy and non-rescue would lead to the death of the person in peril - but under special circumstances such a duty does exist.⁴⁵ The richness of cases⁴⁶ provide European readers with sometimes hilarious decisions. Apart from the case of the blind man crossing the street I already made mention of, there is the paradigmatic Osterlind-case.⁴⁷ On a 4th of July, defendant rented a canoe to a man who was apparently drunk. The boat capsized and the man manages to cling to the boat for thirty minutes, shouting for help. The defendant however refuses to rescue him and the man drowns. The American judge of 1928 does not hold the defendant liable in damages. That the man was able to hold on to the boat for thirty minutes is even used as an argument that the man `could... exercise care for his own safety'. It is with this lessor as an American court once said about the non-rescuer:⁴⁸ `He may, perhaps, justly be styled a ruthless savage and a moral monster, but he is not liable in damages'.

The amount of exceptions to the *general* principle of American law is large. In case of a `special relationship,' there can be a duty to rescue. As is the case in English law, these are mainly relationships of dependency⁴⁹ as exist between spouses, parent and child,⁵⁰ companions,⁵¹ captain and crew, carrier and passenger, employer and employee,⁵²

⁴⁵ W. Page Keeton (ed.), *Prosser and Keeton on the Law of Torts*, 5th. ed., St. Paul, Minn. 1984, 375; Cf. Joshua Dressler, *Understanding Criminal Law*, 2d ed. 1995, 86.

⁴⁶ Partly described for Dutch readers by Schoordijk, *o.c.*, for the period until 1987.

⁴⁷ Osterlind v. Hill, 263 *Mass.* 73, 160 *N.E.* 301 (1928). The decision was overruled, however, in Pridgen v. Boston Hous. Auth., 364 *Mass.* 696, 308 *N.E.2d* 467 (1974). Cf. Yania v. Bigan, 397 *Pa.* 316, 155 *A.2d* 343 (1959): a businesspartner was invited to dive into a pool, but the invitor abstained from saying the water was 8 feet deep: the refusal to rescue was no violation of a duty of care.

⁴⁸ Buch v. Amory Mfg. Co., 69 *N.H.* 257, 260, 44 *A.* 809, 810 (1897).

⁴⁹ Cf. W. Page Keeton, *o.c.*, 373 f.

⁵⁰ Walker v. Superior Court, 763 *P.2d* 852, 865 (Cal. 1998): parents should aid their badly ill child better than by just praying for it.

⁵¹ Farwell v. Keaton, 396 *Mich.* 281, 290-91, 240 *N.W.2d* 217, 221-22 (1976): a Michigan court held a person liable for not getting a doctor when his companion had been severely maltreated.

⁵² Anderson v. Atchison, T. & S.F. Ry., 333 *US* 821, 823 (1948).

but also between innkeeper and guest and shopowner and client.⁵³ A duty to intervene could also follow from statute or contract (the doctor-patient, lifeguard-swimmer and babysitter-parent relationship).

The Restatement of the Law (Second) Torts⁵⁴ clearly shows this structure of one principle and subsequent exceptions in the articles 314 en 314A.

`Art. 314 Duty to Act for protection of Others

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Art. 314A Special Relations Giving Rise to Duty to Aid or Protect

A common carrier is under a duty to its passengers to take reasonable action to protect them against unreasonable risk of physical harm, and to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

An innkeeper is under a similar duty to its guests.

A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.'

This sketch of the American situation would not be complete without mentioning that in three American states, a general duty to rescue has been laid down in State legislation. Vermont, Minnesota and Rhode Island⁵⁵ do have such a general provision; Washington is on the verge of enacting one.⁵⁶ In Vermont for example, the Duty to Aid the Endangered Act⁵⁷ puts a penalty of maximum \$ 100,00 on the following crime:

'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'.

⁵³ *Southland Corp. v. Griffith*, 633 A.2d 84, 91 (Md. 1993): customer being attacked asks the shopkeeper to call the police; the refusal to do so is a violation of a duty. Cf. *Devlin v. Safeway Stores inc.*, 235 F. Supp. 882, 887 (S.D.N.Y. 1964).

⁵⁴ Restatement, Torts art. 314 (1934) provided as a rule: 'The actor's realization 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'.

⁵⁵ *R.I. Gen. Laws* par. 11-56-1 (1994).

⁵⁶ On this Joey Levick Bill (House Bill 1429) see Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist*, 25 *American Journal of Criminal Law* (1998), 416.

⁵⁷ *Vt. Stat. Ann.* Tit. 12, par. 519 (1973), on which T. McClintock, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 *Vermont Law Review* (1982), 143. Cf. in general Kathleen Payne, *Linking Tort Reform to Fairness and Moral Values*, *Detroit College of Law at Michigan State University Law Review* 1995, 1239.

2.5 The Civil Claim of the Rescuer against the Victim (or his Heirs) for Damages suffered during the Rescue

The second panel of the triptych of the Good Samaritan is a picture of the liability of the person in peril itself: if a rescuer suffers injury in the rescue, can he claim compensation from the person he was trying to rescue? It should be noted that the answer to this question is not in itself related to the question raised in the last paragraph: a legal system could very well be consistent in holding that there is *no* general duty to rescue, but if someone in effect tries to rescue another and suffers damages still make compensation possible. This is so even though there are few cases in which this claim is put forward: officious interveners usually do not intend to charge anyone and if they do, the assisted person will usually be willing to pay.⁵⁸

The cases that do exist, however, appeal to one's imagination. A volunteer may be wounded while trying to stop a bolted horse.⁵⁹ A passing cardriver may be tempted to pull a passenger out of a flaming car.⁶⁰ A motorcyclist may fling himself to the ground in order to avoid hitting a little girl, suddenly crossing the street.⁶¹ Do these rescuers have any claim for damages, remuneration or even a reward?

In the civil law, two techniques are generally accepted to make compensation possible. First, there is a claim in tort if the person to be rescued caused the emergency himself.⁶² Of course, the existence of a causal link between the creation of the dangerous situation and the damages of the rescuer should be established, but in general that does present a problem: the rescuer's action is not regarded as a *novus actus interveniens*, but rather as a consequence of the imperilled person's conduct. More problematic is the tort law requirement of fault: in a case of self-sacrifice in road-traffic, as of the motorcyclist just cited, the rescuer would not be able to claim damages if the imperilled person was too young to be capable of fault.⁶³ Moreover, the intervention of the rescuer should be reasonable: a needlessly reckless attempt to save someone, *e.g.* by jumping out of a window in order to rescue a child on the road, would lead to contributory negligence of the rescuer, not only in civil law but also in common law jurisdictions.

The second technique is characteristic of continental Europe: in civil law systems, the rescuer may have a claim for *negotiorum gestio* against the person that he tried to rescue. Virtually all civil law jurisdictions accept *negotiorum gestio* as a separate source of obligations;⁶⁴ its justification for Civilians would lie in *Menschenhilfe* or

⁵⁸Goff/Jones, *The Law of Restitution*, 5th ed., London 1998, 473.

⁵⁹For this classic example *e.g.* RG 20 Febr. 1902, *RGZ* 50, 219.

⁶⁰*Cf.* Cass. 1 December 1969, *D.* 1970, 422.

⁶¹Christian Von Bar, *The Common European Law of Torts*, Vol. 1, Oxford 1998, no. 514.

⁶²*Cf.* Von Bar, *o.c.*, no. 512-513; Tunc, in: Ratcliffe (ed.), *o.c.*, 51;

⁶³For this Danish case Von Bar, *o.c.*, no. 514.

⁶⁴*e.g.* § 677 BGB (Geschäftsführung ohne Auftrag); art. 1372 CC (gestion d'affaires); art. 6:198 BW (zaakwaarneming); art. 2028 lid 1 Codice Civile (gestione di affari); art. 1888 Código Civil (negocios ajenos); art. 464 Código Civil Português (Gestão de negócios); art. 730 Greek Civil Code; *cf.* however § 1035 ABGB.

Devoir moral d'entraide, 'the great legal paradigm of human help' as Stoljar has put it.⁶⁵ Thus, e.g. French law,⁶⁶ German law⁶⁷ and Dutch law⁶⁸ have widely accepted *negotiorum gestio* as a source of financial compensation for rescuers. In case of the self-sacrificing motorcyclist, e.g. German law would recognise a claim.⁶⁹ If this is also true in legal systems that have a far-reaching system of protection of victims of road traffic, like French or Dutch law,⁷⁰ remains to be seen. The altruistic character of *negotiorum gestio* is usually not regarded to be incompatible with the rule that someone, who by contract or statute is *obliged* to act, is not managing another's affairs in the civil law sense.⁷¹

It is not so much in the requirements of *negotiorum gestio* itself that the various civil law systems differ today. There is, however, important diversity as to the *actio contraria*, the claim of the gestor (rescuer) against the principal (person in peril). As a rule, a gestor can recover the expenses he incurred in both French, German and Dutch law.⁷² However, what these expenses amount to differs within the various legal systems. In French law, the lower courts sometimes used to grant a 'salaire' (rémunération) to the gestor, but recently, the Cour de Cassation has - in line with the text of art. 1375 Code Civil - affirmed that no such right exists.⁷³ This is contrary to Dutch law, where art. 6:200 s. 2 BW makes clear that if the gestor has acted professionally, he retains the right to be paid for his activities to the extent that this is reasonable.⁷⁴ In the more subtle German law, a remuneration for services of the gestor is not recognised either, unless he has acted professionally. But this is not a unanimous view: it is also asserted that the presumed intention of the parties should prevail: would gestor and principal have agreed upon a remuneration if the closing of a contract would have been possible? In the case of a professional, the answer would definitely be yes, but in the case of non-professionals that might sometimes also be the case.⁷⁵

⁶⁵ S.J. Stoljar, *Negotiorum Gestio*, *IECL* vol. X, Ch. 17 (1984), no. 18, although criticised in no. 19-20. For a nice illustration in French law: Cass. 1 Civ. 26 janv. 1988, *D.* 1989, 405, 87 *RTDCiv* (1988), 539. The rather late acceptance of *negotiorum gestio* as the basis for this claim by the German Reichsgericht took place on 7 May 1941, 167 *RGZ* 83.

⁶⁶ Terré/Simler/Lequette, *o.c.*, no. 954; cf. e.g. Cass. Civ. 16 nov. 1955, *JCP* 1956 II 9087.

⁶⁷ Staudinger-Wittmann, 13. Aufl. 1995, Vor § 677, RdN 24 and MünchKomm - Seiler, 3. Aufl. 1997, Vor § 677, RdN 27.

⁶⁸ Asser-Hartkamp III, *De verbintenissen uit de wet*, 10th. ed. 1998, no. 291 f.

⁶⁹ Cf. Von Bar, *o.c.*, no. 514.

⁷⁰ Cf. Loi no. 85-677 (1985) and Asser-Hartkamp III, *o.c.*, no. 214 f.

⁷¹ Cf. Terré/Simler/Lequette, *o.c.*, no. 954; MünchKomm - Seiler, 3. Aufl. 1997, § 677, RdN 36 and the very existence of § 680 BGB (but cf. John P. Dawson, Rewards for the Rescue of Human Life?, in: Ratcliffe, *o.c.*, 77); *PG Boek* 6, 792 (TM) and Asser-Hartkamp III, *o.c.*, no. 297.

⁷² Resp. § 683 BGB (*Aufwendungen*, which does not in itself involve damages); art. 1375 CC (*dépenses utiles ou nécessaires*); art. 6:200 BW (*schade*). Cf. Stoljar, *o.c.*, no. 69.

⁷³ Cass. Com. 15 déc. 1992, *Bull. Civ.* IV, no. 415; 92 *RTDCiv* (1993), 579.

⁷⁴ *PG Boek* 6, 796 (MvA). Here, it is reasoned that the gestor is entitled to a fee since he was not able to act professionally during the period of rescue himself. No such limitation is incorporated in the article, nor present in the other systems.

⁷⁵ MünchKomm-Seiler, 3. Aufl. 1997, § 683, RdN 24 and Helmut Köhler, Arbeitsleistungen als 'Aufwendungen', *JZ* (1985), 362.

Could the above two techniques be regarded as common to all civil law countries, some civil law systems have additional mechanisms of compensating the rescuer.⁷⁶ In French law, sometimes an implied contract of assistance is said to exist between the person in peril and the rescuer. What would be impossible in the common law because of the lacking of any consideration for the contract, is thus possible in France: a contract for gratuitous services (*convention d'assistance*) that is implied essentially because of the result it brings with it (namely compensation for damages).⁷⁷ Of course, the problem here is that in an emergency situation the rescued person is usually unable to express his views; to say of a drowning person that he has wanted to contract for a rescue remains highly fictitious.⁷⁸

Apart from the law on State of necessity (developed in the law of admiralty on general average and having resulted in *e.g.* § 1043 of the Austrian ABGB⁷⁹), several public law devices exist because of the idea that it is sometimes better to have a socialisation of the risk of rescue. The costs involved with only individuals trying to be recompensed may be too high. Therefore, in French administrative law, a *responsabilité sans faute au profit des collaborateurs occasionnels des services publics* exists. The community should compensate damages of an individual who on one occasion serves as a collaborator of the public service. Thus, a doctor who drowned while trying to rescue a child in a specific *commune* was an occasional extension of the community, of which the doctor's wife and nine children could obtain damages.⁸⁰ In *e.g.* German law, the rescuer is sometimes protected by social insurance: he may have a claim for damages against his *Land* or social insurance company to the amount he is protected for in case of an industrial accident.⁸¹ Some legal systems recognise rewards from public funds to those who save others.⁸²

When we turn to the common law, the picture is different: no *embarras du choix* of possible techniques to give the rescuer compensation. A doctrine of *negotiorum gestio* is missing and to imply a (in this case wholly gratuitous) contract would be contrary to the requirement of consideration.⁸³ Or, as the American Restatement of the Law of Restitution of 1937 puts it in article 2: 'A person who officiously confers a benefit upon

⁷⁶ Cf. in general Stoljar, *o.c.*, no. 252 f.

⁷⁷ Tunc, *o.c.*, 52; Cass. Civ., 27 May 1959, *D.* 1959, 524 and Cass. Civ. 1 Dec. 1969, *D.* 1970, 422; S. Hocquet-Berg, Remarques sur la prétendue convention d'assistance, *Gaz.Pal.* 1996, 32 f.

⁷⁸ Cf. Stoljar, *o.c.*, no. 249.

⁷⁹ In case of this *Haverei*, one sacrifices his property in order to prevent a greater damage to himself or to others. All who have benefit of this should compensate him proportionally.

⁸⁰ Conseil d'Etat 25 sept. 1970, Comm. de Batz-sur-Mer, *AJ* 1971, 37, *D.* 1971, 55. Cf. René Chapus, *Droit administratif général*, t. 1, 11. éd. 1997, Paris, no. 1495 (also citing other cases) and Stoljar, *o.c.*, no. 256.

⁸¹ Reichsversicherungsordnung § 539 Abs. 1 Nr. 9a u. c jo. 655 v.; *MünchKomm*, Vor § 677, RdN 27 and Von Bar, *o.c.*, no. 514.

⁸² As in Austria. See Rudzinski, in: Ratcliffe (ed.), *o.c.*, 117.

⁸³ Although a promise to recompense the rescuer, made after the rescue is enforceable under American law; Stoljar, *o.c.*, no. 251.

another is not entitled to restitution therefor'. However, the vigour of this principle is sometimes mitigated, as we shall see below.

In English law, a sharp distinction should be made between the claim of the rescuer for damages in tort for injuries he sustained during the rescue on the one hand, and his claim for remuneration or reimbursement of his expenses on the other. The first claim could be enforced against the assisted person in case he intentionally or negligently created the situation of danger and regardless whether the rescuer acted professionally or not. Thus, even in the somewhat atypical situation of a professional fireman being wounded in trying to tackle a fire, English law makes the one who caused the fire pay damages.⁸⁴ In case of non-professional rescuers, the same is true for other common law-jurisdictions, although this may have been different in the past: courts used to deny the existence of a causal link between the dangerous situation and the damages, primarily caused by the 'heroic and laudable' act.⁸⁵ Cardozo settled the matter in a New York case that was influential in England as well:⁸⁶

'Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind (...) The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.'

An entirely different answer is the other question provided with. Apart from cases in which there is already a pre-existing relationship between the intervener and the person in peril (*i.e.* agency of necessity),⁸⁷ English law - very much in line with the absence of a general duty to rescue - in principle denies a stranger, intervening for the benefit of another, any remuneration or reimbursement of his expenses. Usually quoted is the statement of Bowen L.J., so typical of 19th century will theory:⁸⁸

'The general principle is, beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will'.

⁸⁴ *Ogwo v. Taylor*, [1987] 3 *All ER* 961 (CA); see Dawson, *Harvard LR*, *o.c.*, 1119 for a different American view (the 'fireman's rule'). *Cf.* *McCall, o.c.*, 74 and *Haynes v. Harwood*, [1935] 1 *KB* 146; *Corrothers v. Strobadian*, [1975] 51 *DLR* (3d) 1.

⁸⁵ *Cutler v. United Dairies*, [1933] 2 *KB* 297; *cf.* Allen M. Linden, *Rescuers and Good Samaritans*, 34 *MLR* (1971), 253.

⁸⁶ *Wagner v. International Railway Company* 133 *N.E.* 437 (New York, 1921); *cf.* *Baker v. Hopkins*, [1959] 1 *WLR* 966.

⁸⁷ *Cf.* Goff/Jones, *The Law of Restitution, o.c.*, 461 f.

⁸⁸ *Falcke v. Scottish Imperial Ins. Co.*, (1886), 34 *Ch.D.* 234, 248-249.

Apart from this case of preservation of property - of which Goff and Jones hold that a restitutionary claim should be possible after all, but within carefully defined limits⁸⁹ - English law makes restitution possible in a few cases. However, these are only disperse cases as the fulfilment of another's duty to bury the dead and the supply of necessities to legally incapacitated persons. Goff and Jones⁹⁰ defend that in case of preservation of life and health in case of emergency, in which it is not practicable to communicate with the assisted person, interveners should also be able to get restitution. Professionals (like a doctor) should then get the normal remuneration for their services; non-professionals should be able to get their expenses reimbursed. Despite these and other⁹¹ scholarly efforts to ground restitutionary relief in cases like these, English case law does not seem to give much support for this sweeping principle.

2.6 The Liability of the Rescuer for Damages Caused by his Action

The third panel I would like to show you today, is the issue of liability of the rescuer himself. Could he be liable for damage caused by his action to the person he tried to rescue? The mere fact that the rescuer has exposed himself to danger, yet has acted morally correct, calls for a mild evaluation of the would-be helper's conduct: only if he has acted very foolishly, liability should exist. This general idea is present in the various techniques to hold the rescuer liable and its effect is even reinforced in case of a *duty* to rescue.⁹²

If the intervention of the rescuer could be qualified as *negotiorum gestio*,⁹³ the question is one of how far the *actio directa* extends. The rights of the principal against the gestor are laid down in general provisions of the various civil codes (art. 1372 Code Civil, § 276 BGB, art. 6:199 jo. 6:74 jo. 6:95 f. BW). Specific provisions on the liability of the gestor do however exist for the situation in which he acts out of concern for the principal. Thus, in art. 1374 s. 2 Code Civil⁹⁴, it is said that the circumstances that induced the gestor to intervene, may authorise the judge to moderate the measure of damages. In German law, § 680 BGB provides that in case the gestor intervenes to avoid 'einer dem Geschäftsherrn drohenden dringenden Gefahr', he is only liable if he has caused a loss intentionally or grossly recklessly.⁹⁵ In Dutch law, the fact that 'belangeloze dienstverlening' was the reason for the intervention, makes a mitigation of the damages (art. 6:109 BW) probable.⁹⁶

⁸⁹ Goff/Jones, *o.c.*, 467 f.

⁹⁰ Goff/Jones, *o.c.*, 473 f.

⁹¹ P.B.H. Birks, *Negotiorum Gestio and the Common Law*, 24 *Current Legal Problems* (1971), 131; F.D. Rose, *Restitution for the Rescuer*, 9 *Oxford Journal of Legal Studies* (1989), 167. Cf. for Canadian law Mitchell McInnes, *Restitution and the Rescue of Life*, 32 *Alberta LR* (1994), 37.

⁹² Honoré, *Causation and Remoteness of Damage*, *IECL XI Torts* (1983) ch. 7, no. 154.

⁹³ Cf. for a general survey: Stoljar, *o.c.*, no. 270.

⁹⁴ Cf. art. 2030 s. 2 *Codice Civile* and art. 1889 s. 2 *Código Civil*.

⁹⁵ This diminished liability also applies to professional interveners; cf. *MünchKomm-Seiler*, § 680, RdN 5.

⁹⁶ *PG Boek* 6, 449 (MvA). In art. 6.4.1.2 s. 2 OM, it was suggested to maintain a provision like art. 1374 s. 2 (art. 1392 s. 2 BW 1838), but for systematic reasons there is no need for such a

Mitigation would in Dutch law also be the most probable technique in case the imperilled person holds the rescuer liable in tort. But French and German law choose for another solution. As we saw before, in French law the behaviour of the rescuer is judged by the criterion of the ordinary man, who may be in panic and who may be emotional.⁹⁷ His behaviour would not even lead to fault on his part. If the rescuer inflicts a loss under German law, he could be protected from civil liability on the same ground. In English law, the reproach to the rescuer could very well be more successful: since there is no duty to rescue, already the interference with life and good of someone else is likely to be qualified as unlawful interference, let alone the worsening of the predicament of the imperilled person. However: the standard of care to be exercised by the rescuer in the cases we have under review here is normally not high and sometimes there is - again - contributory negligence on the part of the imperilled person.⁹⁸

The common law principle however led to the highly unfortunate consequence that the one who does not lift a finger while seeing somebody drown, is many times better-off than someone who is so heroic to try to rescue a person in peril but causes some damage in doing so. The common law thus does not particularly encourage Good Samaritanship; even doctors have been reluctant to intervene out of fear for potential liability. Precisely in order to evade this consequence of the common law, between 1959 and 1987 all American states have introduced the well-known 'Good Samaritan statutes'. In these statutes, a doctor who renders aid in an emergency (in most of the states, the statute also applies to other rescuers) is granted immunity for liability in tort.⁹⁹ I take for an example the statute of Georgia:¹⁰⁰

'Any person, including any person licensed to practice medicine and surgery (...) and including any person licensed to render services ancillary thereto, who in good faith renders emergency care at the scene of an accident or emergency to the victim or victims thereof without making any charge therefor shall not be liable for any civil damages as a result of any act or omission by such person in rendering emergency care or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person'.

2.7 What is Next?

provision: the *actio directa* is governed by the general principles on damages, including art. 6:109 BW.

⁹⁷ Cf. A. Tunc, *Jurisprudence*, 61 *RTDCiv* (1963), 329: 'ce n'est pas sentimentalisme, mais droit rigoureux, que reconnaître souvent dans l'urgence ou le désir d'aider (...) une excuse à une attitude qui, en d'autres circonstances, serait jugée imprudence ou maladresse'.

⁹⁸ Cf. *Markesinis/Deakin, o.c.*, 141; *Barrett v. Ministry of Defence* [1995] 3 *All ER* 87.

⁹⁹ Reprinted in: David W. Louisell/Harold Williams, *Medical Malpractice*, Vol. 2, New York 1989, no. 21.01-21.60. Cf. on the Good Samaritan laws Wallace M. Rudolph, *The Duty to Act: a Proposed Rule*, 44 *Nebraska Law Review* (1965), 499 f.

¹⁰⁰ US federal law has several other immunities for people acting for the good cause: par. 84-930 (1975) of the Oil Pollution Act (*Publ. no. 101-380*, 33 U.S.C.A. par. 2701-2761), granting immunity to people cleaning up oil, and most recently the 'Y2K Good Samaritan Law' (Year 2000 Information and Readiness Disclosure Act 1999; *Publ. no. 037-106*).

In the above, a classic comparative law survey was given of the liability of the Good Samaritan. It brought to the surface many differences between the various legal systems, not only between the civil law and the common law, but also between the various systems within the civil law itself. These differences stand alongside with similarities, not only as to the vehicles of thought (the aforementioned legal techniques), but also as to the underlying principles. Classic comparative law would be quite happy with this result and could - perhaps after a short recapitulation of the findings - very well abstain from any further investigation.

However, a characteristic feature of European Private Law is that it does *not* stop at this point. It goes further than the study of comparative law by adding a *future oriented* dimension: the science of European Private Law is concerned in a *critical* way with the possibility of establishing uniform private law in Europe. Thus, European Private Law presupposes the material (although that material often is never there, which accounts for the fact that European Private Law scholars often have to be comparatists at the same time) and tries to *do* something with it. In the following, I intend to show you what the possible methods of this future oriented approach are. Whether only comparative law material is sufficient for doing this, yet remains to be seen: if anything should become clear of this exercise, it is that a coherent European Private Law cannot be developed without a well-defined direction of where the law should go to.

3. The Principles Approach and its Perils

3.1 The Principles Approach in General

One of the most popular methods of those, seeking to find a common private law for Europe, has been the drafting of principles. Until now, Principles of European Contract Law and of European Trust Law have been published, while European Principles of Tort Law are still in the making.¹⁰¹ Suggestions have been made as to the drafting of Principles of European Family Law and of European Property Law.¹⁰² What these projects have in common, is that they are all devoted to finding common principles, leaving out as many differences between the national legal systems as reasonably possible. In this lecture, I will not go into any detail as to the precise function and ambit of the existing Principles projects; I did so in a recently published book.¹⁰³

What I would like to stress today, however, is that these principles can never be just a *restatement* of the existing law. Starting from a *praesumptio similitudinis*, the drafters are destined to leave out many subtleties of national legal systems. Even more, many times their goal is partly political in the sense that they see their Principles as a

¹⁰¹ Cf. Lando/Beale (eds.), *Principles of European Contract Law*, Parts 1 and 2, The Hague 2000; Hayton/Kortmann/Verhagen (eds.), *Principles of European Trust Law*, The Hague 1999; Jaap Spier/Olav A. Haazen, The European Group on Tort Law and the European Principles of Tort Law, 7 *ZeutP* (1999), 469.

¹⁰² Cf. G.J.W. Steenhoff et al, *Een zoektocht naar Europees familierecht*, Deventer 1999, 21 and the discussion at the 4th Maastricht-Utrecht-Leuven Ius Commune Conference in November 1999.

¹⁰³ J.M. Smits, *Europees privaatrecht in wording*, Antwerpen 1999, 52 f.

precursor of a European Civil Code.¹⁰⁴ As long as the goal of the drafting of uniform principles is to help uncover the common roots of the different legal systems, there is no true danger as to diversity being strangled. But that may be different if these principles are drafted with an eye to unification - as is more and more the case.¹⁰⁵ This makes it all the more important to critically assess the Principles approach from the inside: what does it exactly mean to make a principle in the field of European Private Law? This, I will try to show you by actually drafting some principles on the liability of the Good Samaritan.

3.2 Towards Principles of Liability of the Good Samaritan?

What is it to make Principles out of various national legal systems? As I already mentioned, the usual approach would be to take comparative law materials as a starting point. On that basis, similarities and differences are assessed first, principles being made later on the basis of that assessment. In doing so with the Good Samaritan, it is apt to distinguish once more between the three aforementioned questions.

A private law duty to rescue may exist in both the civil law and the common law through the awarding of damages to the victim in tort in case the potential rescuer did not intervene, although he had a duty to do so. In civil law, this duty is normally derived from the penal law provision, although this is different in Germany. There, only in case of special circumstances that amount to 'sittenwidrige vorsätzliche Schädigung', the non-rescuer could be held liable. Although in French and Dutch law the liability of the non-rescuer is judged by the general standard of care, the non-rescue other than in case of violation of the penal law provision, could probably only lead to liability in damages if there was a pre-existing relationship between the imperilled person and the non-rescuer. The black letter English law is comparable to this position. Here, the principle is one of *non*-liability in instance of abstaining from rescue, but with an exception for the special relationship that amounts to the fulfilment of the requirement of 'proximity'. For one who seeks similarities between legal systems, it could then be stated that in many respects the exceptional position of English law is comparable to the principal position of the civil law.

The second question that was raised, is whether the rescuer is entitled to any remuneration or reimbursement of his expenses. Neither in civil law nor in common law that would be a problem if the person to be rescued caused the emergency himself: it would amount to tortious conduct and thus lead to liability in damages. If this is not the case, there is divergency, not only within the civil law itself but also between the civil law and the common law. In the civil law, the rescuer in most cases has an action on the basis of *negotiorum gestio*, although what this *actio contrario* amounts to, differs by system. Some countries have techniques of their own to give compensation to the rescuer (in particular the *convention d'assistance* of French law or even public law devices).

¹⁰⁴ Cf. O. Lando, *European Contract Law*, 31 *AJCL* (1983), 653; *Principles of European Contract Law; an Alternative or a Precursor of European Legislation*, 56 *RabelsZ* (1992), 262.

¹⁰⁵ Cf. Van Gerven et al (eds.), *Torts; Scope of Protection*, Oxford 1998, v.; J.M. Smits, *A European Private Law as a Mixed Legal System*, 5 *MJ* (1998), 328 and D. Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 *ELJ* (1997), 3.

English case law on the other hand in principal denies any remuneration or reimbursement to the rescuer in other cases than those that may be qualified as agency of necessity. It is thus not so easy to establish any common principles, unless one is willing to adhere to the view of some influential English authors.¹⁰⁶

In the third place, there is at least dogmatic divergence as to the liability of the rescuer himself for damages caused by his action. If he has worsened the condition of the imperilled person, many techniques are available to assess the rescuer's conduct mildly: from a separate provision in German law for *negotiorum gestio* through mitigation of damages in Dutch law to the presumption of a low standard of care in French and English law. Although details may very well still differ by country, the underlying ideology of a mild appreciation is apparently the same and fills up the dogmatic categories.

The following principles could be derived from this comparative assessment of the law with regard to the Good Samaritan. Each section corresponds with one of the previously mentioned questions concerning his liability.

1. The fact that someone (the rescuer) realises or should realise that action on his part is necessary for another's aid or protection imposes upon him a duty to take such action in case of special circumstances. Those circumstances exist in particular in case of the violation of a penal law provision which obliges the rescuer to act or in case of a pre-existing special relationship between the person to be helped or protected and the potential rescuer. There is no liability of the rescuer if he is not able to aid or protect the victim without endangering himself.
2. The rescuer is entitled to reimbursement of his expenses if he on good grounds helped someone in peril, provided the latter intentionally or negligently created the situation of danger or a special relationship as meant in section 1 could be established.
3. If the rescuer worsened the position of the person in peril, he is not liable in damages unless he caused these intentionally or grossly recklessly.

From this representative attempt to state 'European' principles, it becomes apparent that the drafting of principles inherently forces the drafter to leave out as many differences between the national legal systems as is reasonably possible. Section 1 for example states as a common denominator that the non-rescuer is liable in case of special circumstances; it is beyond any doubt that this is true, but it probably does neither grasp the civil law nor the common law mentality. There is probably much more to these systems than just the commonality as stated in section 1. A presumably unjustified simplification is also present in section 2 in the sense that it is - again - true, but also much too *thin*¹⁰⁷ to characterise the typical characteristics of the legal systems involved: to speak of a special

¹⁰⁶ See *supra*, par. 2.5.

¹⁰⁷ Cf. for the idea of a *thick* and a *thin* description Gilbert Ryle, as quoted in C. Geertz, Thick Description: Toward an Interpretive Theory of Culture, in: *id.*, *The Interpretation of Cultures*, New York 1973, 3 f. Cf. Pierre Legrand, European Legal Systems are not Converging, 45 *ICLQ* (1996), 56.

relationship is not particularly informative. Moreover, there is no mention of the legal position in case the person in peril did not cause the emergency himself and no special relationship exists. Some legal systems then still would allow compensation. Section 3 probably is a true statement as well, but it does not take into account any of the dogmatic techniques through which the general principle is channelled and which undoubtedly contain a whole code of practical wisdom that is left out in a principles approach. Let us therefore have a closer look at the perils of this approach.

Before we do so, I should however make mention of one possible objection against my argument. It seems to be somewhat artificial first to state Principles in a defective way and then to challenge these for their awkwardness. This line of arguing does not convince me. Even if the above Principles had been more strongly worded, the same problems would emerge (apart from the fact that it is still extremely difficult to come up with well-phrased uniform principles). The trick is that any putting into some 'objective' transnational text of the common core of national legal systems does not grasp the details of these systems. I will come back to this in the next paragraph, where I also pay attention to another example of failure in coming up with a uniform principle.

3.3 The Perils of the Principles Approach; the Legacy of Rabel

What are the perils of the Principles approach? As far as I can see, there are two. In the first place,¹⁰⁸ presenting law through principles is what Clifford Geertz has called a 'skeletonization of fact': moral dilemmas are reduced to abstractions. Pierre Legrand rightly quotes Friedman when he says that to reduce the law in this way is very much like the work of the old system builders that 'took fields of living law, scalded off their flesh, drained off their blood, and reduced them to bones'.¹⁰⁹ Many details (that actually amount to *practical wisdom*) are thus left out in an exercise that is primarily concerned with a looking for *consensus*: making common principles is inherently a quest for the common denominator. This seems even to have become the prevailing view of some leading comparatists. The well-known manual of Zweigert and Kötz departs from a 'praesumptio similitudinis': in their functional approach, the comparatist can only be content if his research leads to the conclusion that the systems he has compared reach the same or similar practical results. If these principles or similar results are subsequently used in a political way and prescribed to national communities, the warning of Paul Feyerabend becomes of paramount importance:¹¹⁰

'A society that is based on a set of well-defined and restrictive rules, so that being human becomes synonymous with obeying these rules, forces the dissenter into a no-man's-land of no rules at all and thus robs him of his reason and his humanity (...). Remove the principles, admit the possibility of many different forms of life'.

¹⁰⁸ I have used this argument before in J.M. Smits, *Eenheid en verscheidenheid in het contractenrecht*, 27 *R&R* (1998), 36 f.

¹⁰⁹ Friedman, cited in Pierre Legrand, *Against a European Civil Code*, 60 *MLR* (1997), 59.

¹¹⁰ Paul Feyerabend, *Against Method*, 3rd. ed., London 1993, 162-163.

The principles approach is thus directed towards the finding of an intermediate position. It is not the *best possible rule* that prevails, but the rule on which consensus can be reached, indeed leaving out the flesh and blood of national legal systems.¹¹¹

The second peril of the principles approach in my view is that in this method, principles are derived from the rules as they stand in national legal systems *in present time* and not from the underlying value judgements that they should be distilled from. This may be termed the legacy of Ernst Rabel, in many ways the founder of the functionalist approach, who defended that if the particular legal qualification of national legal systems were ignored and attention directed to the consequences of the cases, a common solution would emerge from the comparison; from any normative discussion could then be abstained.¹¹² To presuppose that the existing legal rules can be the source of new uniform principles, should however be questioned. Such an exercise would be possible if the present rules represented one well-defined philosophy; that philosophy then could be easily transferred to a higher European level and laid down in a then truly uniform applicable European principle. There are however two reasons why this may be impossible.

In the first place, many rules on a *national level* have stopped to be a representative of any clear-cut philosophy at all. Of course, that used to be different in the 19th century, when on the European continent most private law rules were shaped on the basis of the Savignyan ideal of structured concepts and the *Laissez Faire* ideology. In present time however, any *explicit*, all of the law pertaining, ideology for the respective national private law systems is lacking, thus leaving place for many different interpretations of national rules. The national private law systems in Europe all contain rules which to a great extent do not determine the outcome in specific cases, thus leaving space for many differing interpretations. Or, as the adherents of Critical Legal Studies have put it: private law now is essentially indeterminate.¹¹³ And Richard Epstein, a scholar of an entirely different theoretical framework, has noted about (American) contract law:¹¹⁴

‘The logic of exchange is not role specific. It does not speak about one set of rules for people who are rich and powerful and another set for those who are frail or meek. (...) These people are colorless, odorless, and timeless, of no known nationality, age, race or sex. These people are self-conscious abstractions known to be false as representations of people in the world, and useful precisely because they are so detached from any grubby set of particulars (...). There is a cold, practical logic behind this remorseless search for

¹¹¹ Richard Hyland, Comparative Law, in: Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Cambridge Mass. 1996, 190 calls this ‘reductionism’.

¹¹² See Hyland, *o.c.*, 187 for this insightful description. The best example of the approach is Ernst Rabel, *Das Recht des Warenkaufs*, Berlin 1936-1958, but see also R.B. Schlesinger (ed.), *Formation of Contracts: a study on the common core of legal systems*, Dobbs Ferry 1968.

¹¹³ Mark Kelman, *A Guide to Critical Legal Studies*, Cambridge Mass. 1987; Roberto M. Unger, *The Critical Legal Studies Movement*, Cambridge Mass. 1986; Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 *Harvard LR* (1976), 1685; De Lange & Raes (eds.), *Plural Legalities*, Nijmegen 1991.

¹¹⁴ Richard A. Epstein, *Simple Rules for a Complex World*, Cambridge Mass. 1995, 73-74.

abstractions. (...) This massive oversimplification of the social universe treats all persons as though they are as fungible as the letters of the alphabet, and thus ignores or rejects every effort to force the common law to take into account the difference between an individual worker of limited means and a huge industrial corporation'.

This is in many respects also true for the European situation and this observation leads to many consequences I tackled in some of my earlier - critical - work on European Private Law.¹¹⁵ Here, it is important to note that the present indeterminacy of private law enables the courts to do justice without worrying too much about the value judgements that underpin the national private law systems. These judgements should - in the end - be decisive for the outcomes that the courts reach. And in national legal systems, they probably *are* decisive, because of the simple fact that the courts are aware of the national culture (if you like: morality or *mentality*) in which the rules are embedded. That these judgements often do not come to the surface, does in this respect not pose a danger for the parties' interests (although it *is* a danger from a viewpoint of a transparent and consistent national private law).¹¹⁶

This is different however if the private law rules are cut off from their national cultural embedment and presented as European principles. Such a venture can only be undertaken if the distilling of common denominators goes hand in hand with the development of some general idea of what to do with these principles. If this is not done, they are nothing but weak extracts of national rules without any possibility of filling them up with a uniform mentality (if this is at all possible). In other words: uniform principles are in need of a *programme*. In order to create one, the contradictory values as to the specific legal question (in our case the liabilities related to the Good Samaritan) should be balanced again and different from the previously found balance that is now - at least in many cases it is - hidden behind abstract national rules. In other words: we are in need of a vision of how it *should* be, not of how it *is*.

A good example of the realisation of this peril of just satisfying oneself with distilling principles from present day national rules, is provided by the Principles of European Contract Law.¹¹⁷ Here, the abstention from any inquiry into the 21st century foundations of contract law, led the drafters to come up with values that are essentially those of the 19th century. The famous Italian comparatist Rodolpho Sacco would say that not enough legal formants have been taken into account.¹¹⁸

A second reason why it may be futile to use existing legal rules as a source of new uniform principles, also has to do with a lack of theoretical reflection as to the pur-

¹¹⁵ Notably Smits, *o.c.*, 10 f.

¹¹⁶ On this *infra*, par. 6.

¹¹⁷ Lando/Beale (eds.), *o.c.* I have used this argument before in Smits, Het vraagstuk van de 'initial impossibility' en de contractsvisie van de Unidroit Principles, in: *Europees contractenrecht*, Arnhem 1995, 127 f.

¹¹⁸ Sacco suggests that what is usually perceived as a unitary rule is in fact the emergence of competing and conflicting values. These legal formants may be unformulated (in which case they are referred to as *cryptotypes*) and describing legal mentality. Cf. R. Sacco, Legal Formants: A Dynamic Approach to Comparative Law, 39 *AJCL* (1991), 1 f., 343 f.

port of these rules. The argument now is not so much that there is a need for a programme behind the principles approach, but that *even* if such a programme is made, uniform principles will never lead to uniform law because of the intrinsic differences between the common law and the civil law idea of what law essentially is. Notably Pierre Legrand has been the one who put forward this argument.¹¹⁹ According to him, a uniform morality or *mentalité* is absent in Europe because of irreconcilable differences in reasoning and in legal culture between England and the European continent. To use national rules of present day time to base uniform principles on, would draw too heavily on the expansibility of the former. This argument may sound convincing, but I suggest that a more precise analysis of what this different mentality actually is, should be undertaken first. Legrand largely abstains from such a mission.¹²⁰

The extent to which Legrand is right that alleged differences between the civil law and the common law prevent a uniform law from developing, will be investigated in paragraph 5. In paragraph 4 however, I will first deal with the development of a programme for the liability of the Good Samaritan. I propose to do this in accordance with what I just suggested, by unveiling the underlying policy issues of the present Good Samaritan rules.

4. The Possibility of Uniformity: Policy Issues Evaluated

4.1 Introduction

In the above, three perils of the Principles approach were identified. First: drafting Principles may very well lead to the finding of a common denominator, instead of the best possible rule. Secondly: distilling principles from national rules should always be accompanied by a survey of the values to be weighed. Thirdly: in creating uniform principles, possibly fundamental differences between the civil law and the common law mentality should be taken into account. In this paragraph, the second argument is elaborated: what are the values behind the legal position of the Good Samaritan? Although from now on emphasis is laid upon the policy issues of the general duty to rescue, I will also pay some attention to the compensation schemes of the various legal systems.

In doing so, I will make use of some American material. In my mind, there is no legal system in the world that allows so much place for policy issues in the private law debate as the American legal system. The insertion of an intermezzo on American law in paragraph 2.4 had as an explicit goal to do some groundwork in order to make the American discussion accessible to European readers. Although American law does not know a general duty to rescue, many authors defended such a duty; others who are

¹¹⁹ P. Legrand, *Sur l'analyse différentielle des juriscultures*, 50 *RIDC* (1999), 1053; *Against a European Civil Code*, 60 *MLR* (1997), 44 f.; *European Legal Systems are not Converging*, 45 *ICLQ* (1996), 52.

¹²⁰ See, however, his recent book *Le droit comparé*, Paris 1999, 88 where he follows Oakeshott in distinguishing between two different moralities.

against a general duty to intervene, partly negated their arguments.¹²¹ In the following, I partly build upon this insightful discussion.

4.2 The Case for a General Duty to Rescue

At least since the 1960's, many American authors defended a general duty to intervene for the sake of others.¹²² They mostly put forward two interrelated arguments in favour of such a duty.

One of the most used arguments in favour of a general duty to rescue lies in the incentive to save lives that such a duty is asserted to bring along. If the requirements of the specific statutory duty are fulfilled, there is after all no choice but to intervene and thus save the life (or health) of the person in peril. The incentive to do so is even reinforced if financial relief for the rescuer is available.¹²³ This argument is usually related to the economic idea that thus the welfare of society as a whole would increase: if a person can be rescued at low cost, it is efficient to do so.¹²⁴ This argument from the Law & Economics movement however has been attacked by others. According to Landes and Posner, non-liability for not rescuing is possibly more efficient, assuming that rescuers are also motivated by a desire to be recognised as altruists and by future rewards that result from that recognition. If there is liability for failure to rescue, it is impossible for the rescuer to prove that he was motivated by altruism.¹²⁵ Moreover, in case of liability for non-rescue, the amount of potential rescuers would diminish, or - in the ornate language of Richard Posner - 'the strong swimmer would avoid the crowded beach'.¹²⁶ Although these counterarguments have been attacked as well,¹²⁷ it remains problematic to distill from economic analysis of law a true argument in favour of a duty to rescue.

The second argument in favour of a general duty to rescue is of paramount importance for what I have to say today: it is that the law should reflect moral norms.¹²⁸

¹²¹ For a recent overview John T. Pardun, Good Samaritan Laws: a Global Perspective, 20 *Loyola of Los Angeles International and Comparative LJ* (1998), 591 f.

¹²² Hanoch Dagan, In Defence of the Good Samaritan, 97 *Michigan LR* (1999), 1152; Steven J. Heyman, Foundations of the Duty to Rescue, 47 *Vanderbilt LR* (1994), 673; John M. Adler, Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others, 72 *Wisconsin LR* (1991), 867; Jay Silver, The Duty to Rescue: A Reexamination and Proposal, 26 *William and Mary LR* (1985), 423; Robert J. Lipkin, Beyond Good Samaritans and Moral Monsters: an Individualistic Justification of the General Legal Duty to Rescue, 31 *UCLA* (1983), 252; Ernest J. Weinrib, The Case for a Duty to Rescue, 90 *Yale LJ* (1980), 247.

¹²³ Cf. McInnes, *o.c.*, 44.

¹²⁴ Heyman, *o.c.*, 673; cf. Donald Wittman, Good Samaritan rule, in: Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, Vol. I, London 1998, 202.

¹²⁵ William M. Landes/Richard A. Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: an Economic Study of Law and Altruism, 7 *Journal of Legal Studies* (1978), 94, 124.

¹²⁶ Richard Posner, *Economic Analysis of Law*, 5th. ed., Boston 1998, par. 6.9.

¹²⁷ Lipkin, *o.c.*, 258; cf. Wittman, *o.c.*, 202.

¹²⁸ Heyman, *o.c.*, 741; Weinrib, *o.c.*, 263;

Prosser states that the no duty-rule is 'revolting to any moral sense';¹²⁹ that calls for the law to make it its duty to enforce intervention by strangers in case of people in peril who can be rescued easily. Heyman puts this into the following words:¹³⁰

'Every citizen has a fundamental right to protection by the community. In return, the individual has an obligation to assist in performing this function by acting when necessary to rescue a fellow citizen in danger. This duty is owed not only to the community at large but also to the other members of the community, especially the endangered person. An individual who breaches this obligation can properly be held responsible both to the community through its criminal law and to the injured party in a tort action'.

Heyman thus offers a political-philosophical theory that underpins a legal duty to rescue. Looked at more precisely, this argument falls apart into two different steps: the first is that a general duty to rescue is part of the shared morality of the community; the second is that this morality should be enforced by the law. Apparently, Heyman goes all the way where American law usually stops after having taken the first step.

As a third argument in favour of the general duty is sometimes put forward that the rescuer who has suffered injuries during the rescue should get compensation. This line of arguing however seems to overlook the possibility within one legal system to abstain from any legal duty to rescue, yet to obtain compensation if one rescues and suffers injuries. Looked at from this angle, there is no need to defend a general duty, just to be able to compensate the rescuer.

4.3 The Case against a General Duty to Rescue

The most important argument *against* a general duty to rescue has come to the surface in American law as well.¹³¹ It has - again - to do with the relationship between law and morality and may be formulated as was done in an American case of 1903:¹³²

'With the humane side of the question the courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, the failure to respond to the cause of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in the higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant is swift and sure'.

¹²⁹ W. Page Keeton, *o.c.*, 376.

¹³⁰ Heyman, *o.c.*, 738-739.

¹³¹ Among its adversaries are Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 *Washington University Law Quarterly* (1993), 1 f.; Don M. Reckseen, The Duty to Rescue, 47 *Indiana Law Journal* (1972), 321 f.

¹³² *Union Pac. Ry v. Cappier*, 72 P. 281, 282 (Kan. 1903).

In American law (as in the common law in general), people who do not intervene to save others, may still be regarded as 'ruthless savages and moral monsters'. However, what is morally reprehensible, does not have to be enforced through means of the law. Morality and law thus are separate entities. This argument is the opposite of the one just discussed as the second argument in favour of a general duty to rescue: here, only the first step is taken.

Closely related to this first argument is another one: it asserts that to impose a legal duty to rescue, is incompatible with the individualist values underpinning the law. Self-determination and autonomy are the keywords here and any other point of view would mean that 'Big Brother comes in'. This Libertarian ideology is adhered to by, *e.g.*, Richard Epstein who adopted the Kantian idea that 'the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others'.¹³³ Again, that person may act in a morally reprehensible way, but the law should not intervene. I add that this idea has been questioned by some American authors as well,¹³⁴ yet it still seems to be the prevailing view in American law that to impose a general duty to rescue would be an undue burden on individual liberty.

The pendant of this argument in case of the question whether benefactors should be entitled to restitution of the costs they incurred, is the idea that altruism should be its own reward;¹³⁵ to make compensation possible, would obliterate the moral satisfaction the rescuer already experienced. The gift of life (or his helping anyway) is already sufficient enrichment of the rescuer. It reminds us of the argument of Richard Posner against the economic efficiency of a general duty to rescue.¹³⁶ An English court held in 1793:¹³⁷

'Perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude'.

Two more policy reasons for not imposing any legal duty to rescue were put forward by Landes and Posner. In their economic analysis of law and altruism,¹³⁸ they suggest that if generous awards would be given to rescuers, a moral hazard results: people may create the need for emergency services by luring good-intentioned rescuers and capitalise on that. This would, however, not be true if rescuers would only be recompensed for their actual expenses.¹³⁹ Another argument of Landes and Posner is that 'horrendous'

¹³³ Richard A. Epstein, A Theory of Strict Liability, 2 *Journal of Legal Studies* (1973), 203-204.

¹³⁴ Lipkin, *o.c.*, 275 f. and Dagan, *o.c.*, 1152 f. both defend that the duty to rescue could be based upon individualist grounds.

¹³⁵ Cf. *Restatement (Second) of Restitution*, par. 3 cmt. c (Tentative Draft no. 1, 1983); McInnes, *o.c.*, 42.

¹³⁶ See *supra*, par. 4.2.

¹³⁷ *Nicholson v. Chapman*, 126 *Eng. Rep.* 536, 539 (1793).

¹³⁸ Landes/Posner, *o.c.*, 93.

¹³⁹ And a remuneration for those who normally charge for their services. Cf. McInnes, *o.c.*, 43.

administrative costs would arise: the altruistic impulses of the rescuer would diminish once the rescue is over. He then would revert to self-interest and seek relief¹⁴⁰ and if so, the capital needed to adjudicate these cases - leave alone to punish the violators of the Samaritan laws¹⁴¹ - would be exorbitant.

Apart from this theoretical scepticism, some more practical objections against the duty to rescue have been put forward as well. It is, for instance, difficult to find the boundaries of the duty and therefore it is difficult for potential rescuers to know whether they have to intervene and if so, when their duty to assist ends.¹⁴² The boundary between necessitous intervention and interference with somebody else's freedom is faint. This, however, is a problem that is apparent in the drafting of any rule on liability; moreover, in continental Europe, private law systems seem to have succeeded in drawing the line.

Another objection is that it is often very difficult to identify the tortfeasor: if a woman is being raped and murdered outside her apartment building with 38 bystanders watching, should they all be considered joint tortfeasors?¹⁴³ The answer is probably yes: the mere fact that there were others who could have intervened, does not make the defendant less culpable.¹⁴⁴ Sometimes, it is even asserted that the presumed rescuer normally does not know that he is under a legal duty to act and that therefore it would not make any sense to hold him liable.¹⁴⁵ But this argument is not to the point as it is also true for many other duties that people are under and that they do not know of; in general that is no reason not to hold them liable. Thus these practical arguments are not very convincing.

4.4 Evaluation

The clash of arguments in favour of and against a general legal duty to rescue people in distress - as described above - provides us with insights into the question why such a duty should exist or should be abandoned anyway. This time - as was set out in paragraph 3.3 - these arguments were not derived from the national legal systems, but viewed from the angle of policy considerations. Apparently, no reasons of a practical legal nature stand in the way of the acceptance of a general duty to rescue. Looking meticulously, only one

¹⁴⁰ Landes/Posner, *o.c.*, 95. Cf. Posner, *Economic Analysis of Law, o.c.*, par. 6.9. For criticism of this 'specious' argument: McInnes, *o.c.*, 43.

¹⁴¹ Cf. Landes/Posner, *o.c.*, 124: 'Legal-error costs (...) might be high because of the difficulty, in many settings (e.g., on a crowded beach), of identifying potential rescuers.'

¹⁴² Stewart, *o.c.*, 406; Pardun, *o.c.*, 604. A similar argument was used by opponents of the introduction of art. 422bis in the Belgian Penal Code: see Constant, *o.c.*, 207. Michael A. Menlowe, *The Philosophical Foundations of a Duty to Rescue*, in: McCall, *o.c.*, 5 f. even asserts that a general duty did not develop in the common law because of the trouble it had in limiting its boundaries.

¹⁴³ Lipkin, *o.c.*, 252. This example is taken from the famous American Kitty Genovese case (cf. James M. Ratcliffe, Introduction, in: *id.* (ed.), *The Good Samaritan and the Law, o.c.*, ix), the true starting point of the American discussion as to a general duty to intervene.

¹⁴⁴ Cf. Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 5th. ed., London 1993, 66.

¹⁴⁵ This argument is rejected by Lipkin, *o.c.*, 252.

policy argument seems to be decisive for the question whether such a duty should be part of a European private law (or of a national legal system, for that matter).

This is the famous philosophical question whether the law should reflect moral norms or not. Of course, whether law and morality should be separated, is very much related to a society's perspective on values as individualism and altruism and the role of the State. The contents of a private law system are in this way dependent of the socio-political environment to which the system belongs. It goes without saying that these environments may differ by country; it could even very well be that precisely this difference is a characteristic trait of the great divide between the civil law and the common law. Hence this conclusion and the one, drawn in paragraph 3, both lead the way to an inquiry into the present mentality of the civil law and the common law *and* to the question what road to take on this point in Europe. As we have been looking for a direction the European Private Law principles should take, here you will find such a direction: in a well-defined choice for some relationship between law and morality, directly leading to a decision as to the introduction of a general duty to rescue or not.

5. Law and Morality: A Closer Look at the Civil Law and the Common Law

5.1 Introduction

Two lines of reasoning brought us to the theme of this paragraph. Firstly, there is the general idea that there may be an irreconcilable cleavage between the civil law and the common law mentality (see paragraph 3). Secondly, there is the finding of the last paragraph that to give the law concerning the Good Samaritan a well-defined direction, some choice as to the relationship between law and morality is needed. The two are interrelated because of the presumption that it is precisely the extent of interaction between law and morality that is typical of both the civil law and the common law approach. I should add that - as far as the Good Samaritan is concerned - if the first question is answered in the affirmative, the second wouldn't need an answer anymore. But our findings in this paragraph could of course be extended to other subjects as well (see paragraph 5.6).

5.2 Civil Law and Common Law Separated?

Two approaches towards the interaction of law and morality within the American discussion have already been sketched. These are also present in a European context. In many civil law jurisdictions that have a general duty to rescue, there has been discussion about the extent to which moral duties should be laid down in legislation. In the Netherlands for example, there has been a fierce discussion during the legislative process that led to the enactment of the Dutch Penal Code of 1886. It is striking to see how this 'battle of the Good Samaritan' was fought over exactly the same question and with many of the same arguments, as is still the case in the United States.

As a reason for the introduction of art. 450 Dutch Penal Code 1886 is given the 'volksbewustzijn' that would be irritated by the immunity of punishment for those who would not give help. The fundamental discussion in Parliament (1880) was exactly about the

point if the State had to intervene or moral disapproval would suffice. Minister Modderman and a majority of the Drafting Commission (46 to 21) defended the former: if the police as a representative of the State would not be present in case of an emergency, the duty of the State is taken over by the person who happens to be present at the scene. To quote Modderman: 'In den individu of de individuen die toevallig tegenwoordig zijn en de eenige zijn die hulp verleen kunnen, is, tegenover de ongelukkige, de maatschappij, de Staat als 't ware vertegenwoordigd. Maar dan rust ook op dezen de pligt om die hulp te verleen die *zij* alleen verleen kunnen'.

Member of Parliament Donner led the opposition: to him, the non-rescuer did represent a brute, yet a brute ('onmens') who could better be left to the 'straf van het greintje menselijkheid dat in hem was overgebleven, en aan de verontwaardiging van het publiek over zulk eene daad'. According to Donner, any ground for the State to intervene was lacking: 'Mij wordt de daad als mensch geboden (...) Het geldt hier eene daad van zuivere liefde! Ligt het nu in het wezen van den Staat om liefde te gebieden? Kan de Staat mij gebieden dat ik liefde heb?'¹⁴⁶

This was also true for Belgium, where the belief that¹⁴⁷

'les devoirs de charité doivent rester dans le domaine de la conscience et que la répression de l'omission de porter secours procède d'une regrettable confusion entre le droit et la morale'

was contrasted with the idea that

'la morale circule dans l'intérieur du droit comme le sang dans le corps'.

In continental Europe, it is apparently the latter point of view that has gained the upper hand. In the civil law, duties to rescue are not seen as mere moral duties, but as *civic duties*.¹⁴⁸ This is precisely the reason why it is a *crime* in the penal law of the continental European countries not to intervene for the sake of others; through penalising this conduct, it is made a *public wrong*. The moral duty is thus used by the State as an instrument of moral guidance. This is reflected in the civil law systems, where the non-intervention of potential rescuers amounts to a tortious conduct for the same reason. In other words: both penal law and private law are brought into action by the State to affect people's behaviour.¹⁴⁹ People should act as responsible members of society and the State in this respect serves as an *educator*. This corresponds with looking at the law's function as promoting the good; laws essentially provide a moral compass that points society in its proper direction.¹⁵⁰

¹⁴⁶ Smidt III, *o.c.*, 262.

¹⁴⁷ Cited in: Constant, *o.c.*, 206.

¹⁴⁸ Cf. Mary Ann Glendon, *Rights Talk*, New York 1991, 84.

¹⁴⁹ Glendon, *o.c.*, 84; Tunc, *o.c.*, 63.

¹⁵⁰ Cf. Pardun, *o.c.*, 606.

This is totally different in the common law. 'It is not the purpose of the law to maintain the entire fabric of morality', Lipkin says.¹⁵¹ This implies that in the case of the Good Samaritan, it is not regarded a public wrong not to intervene, but a *private right*. A moral duty is after all not enough to impose a legal duty. This idea is present in both American and English law. In the United States, the influence of Oliver Wendell Holmes has been profound at this point. In *The Path of the Law*,¹⁵² he sustains that a separation of law and morals is 'of the first importance for the (...) right study and mastery of the law'. And then Holmes introduces that famous person that all legal scholars know of:

'If you want to know the law and nothing else, you must look at it as a *bad man*, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience' (italic is mine, JMS).

In English law, there are many signs of the same approach. The very denial of a doctrine like *negotiorum gestio* is significant, as is the dictum in, e.g., *Malone v. Metropolitan Police Commissioner*¹⁵³ that 'there are many moral precepts which are not legally enforceable'. Both common law jurisdictions thus seem to be exponents of one and the same mentality, described by Mary Ann Glendon as an 'extreme individualism typical of Anglo-Saxon legal thought'.¹⁵⁴ I like to emphasise that this does *not* mean that individualism is also lacking in morality: it is definitely not.¹⁵⁵ The function of the law just is not to promote the good, but to guarantee each and everyone a private moral sphere that is free from unnecessary human interference.¹⁵⁶ Morality is only enforced if that is absolutely necessary. I will substantiate this thesis of a separation of the civil law and the common law on the basis of morality somewhat further by looking at the mixed legal systems of Quebec and Louisiana (paragraph 5.3) and by reference to some philosophical ideas (paragraph 5.4).

5.3 Mixed Legal Systems and the Morality Preservation Index

Looking at mixed legal systems can substantiate that the acceptance of a general duty to rescue is part of the civil law morality. It is my profound belief that the experience mixed legal systems already have with the mixing of the civil law and the common law can be

¹⁵¹ Lipkin, *o.c.*, 257.

¹⁵² 10 *Harvard LR* (1897), 459.

¹⁵³ [1979] 1 *Ch.* 344.

¹⁵⁴ Glendon, *o.c.*, 82.

¹⁵⁵ For this reason, I have my doubt as to the accuracy of the judgment that the absence of *negotiorum gestio* as a doctrine in English law 'reflects the traditional individualism and the reserved mentality of the English people' (Reinhard Zimmermann, *The Law of Obligations*, Cape Town 1990, 435. In my view, it only reflects an individualism *in the law*, not in the English people.

¹⁵⁶ Cf. Dagan, *o.c.*, 1161. The separation is related to another one, namely that between rules that *precede* and *prescribe* future behaviour and rules that *describe* behaviour as it has been up till now. Cf. Legrand, *Le droit comparé*, *o.c.*, 8.

of great significance for the venture of establishing a European Private Law.¹⁵⁷ Many times, the *Rechtshonoratioren*¹⁵⁸ of these systems were able to pick from both the civil law and the common law what they considered to be the best solution for a specific problem. The complete mixing of the two traditions was however mitigated by the prevailing morality of the country involved. Thus, in South-Africa, the idea of the post-war legal elite that the country's legal system had to be part of the civil law tradition, led to the elimination of some common law concepts and the preservation of the civil law ones.¹⁵⁹ The mixed legal systems are thus able to provide us with what I term a 'morality preservation index': this index shows us what legal rules (or institutions) have survived the competition on the market of legal rules¹⁶⁰ as part of some morality and thus may be looked at as specifically part of the civil law or the common law. The more 'pure' a rule today is, the more it is apparently considered to be essential by the people of a specific country for its national legal system. Thus, the prevailing civil law morality in Scotland and South Africa may very well have led to the survival of *negotiorum gestio* as a legal institution.¹⁶¹ Likewise, the survival of a common law rule in a civil law environment or of a civil law rule in a common law environment would indicate that that rule is highly unaffected by morality considerations and is thus much more *transplantable*.

A somewhat different, yet extremely insightful, path was followed in Quebec. Until 1975, Quebec, under the influence of the common law, did not recognise a duty to assist others in case of emergency. In that year, however, such a duty was introduced in article 2 of the Constitution of the Province (the *Charte des droits et libertés de la personne*¹⁶²). It says:

'Tout être humain dont la vie est en péril a droit au secours.
Toute personne doit porter secours à celui dont la vie est en péril, personnellement ou obtenant du secours, en lui apportant l'aide physique nécessaire et immédiate, à moins d'un risque pour elle ou pour les tiers ou d'un autre motif raisonnable'.

This provision is now regarded as the basis of the private law duty to come to the rescue of others.¹⁶³ Although spectacular applications of the provision are lacking, the very existence of the provision is important for the argument of this speech. Art. 2 was

¹⁵⁷ For ample elaboration of this thesis see Smits, *Europees Privaatrecht in wording, passim*.

¹⁵⁸ To use Max Weber's famous expression; see Max Rheinstein, *Die Rechtshonoratioren und ihr Einfluss auf Charakter und Function der Rechtsordnungen*, 34 *RechtsZ* (1970), 1 f.

¹⁵⁹ Cf. Smits, *o.c.*, 157 f.

¹⁶⁰ Cf. *supra*, par. 5.5.

¹⁶¹ Cf. for Scots law Stair, I, 8, 3, David M. Walker, *Principles of Scottish Private Law, Vol. II: Obligations*, Oxford 1988, 513 f. and R.D. Leslie, *Negotiorum Gestio in Scots Law: the Claim of the privileged gestor*, *The Juridical Review* 1983, 12 f.; for South-African law: D.J. Joubert/D.H. van Zyl, in: W.A. Joubert (ed.), *LAWSA* 17, Durban 1983, no. 17 f.

¹⁶² *L.R.Q.* c. C-12, reprinted in Paul-A. Crépeau (ed.), *Les Codes Civils*, Montréal 1992, 685 f.

¹⁶³ Jean-Louis Baudouin, *La Responsabilité Civile*, 4. éd., Cowansville 1994, no. 123; A. Klotz, *Le droit au secours dans la province de Québec*, 21 *Revue de Droit Université de Sherbrooke* (1991), 479 f.

explicitly introduced as a reinforcement of the civil law morality of Quebec. The Good Samaritan rule was used here as an *icon* of civil law morality,¹⁶⁴ just as the 1994 *Code Civil* was a 'code culturel et politique'.¹⁶⁵

The law of Louisiana is a good representative of the reverse situation. In this mixed legal system, courts had all legal techniques available to create a general duty to rescue. The law of Louisiana is after all based upon a civil law codification, dating back to 1808. Yet, such a duty is no part of Louisiana's private law system, apparently having chosen the common law *morality*. As far as the Good Samaritan is concerned, Louisianian law is very much in line with the rest of American law: no general duty to rescue, yet recognising such duties in case of a special relationship.¹⁶⁶ Also with regard to *negotiorum gestio* (now codified in art. 2292 Louisiana Civil Code), there has been much confusion, partly because of the common law difficulty with legislating morality.¹⁶⁷

These are all indications that the legal duty to rescue¹⁶⁸ scores high on the morality preservation index. Apparently the theme is to a great extent *harmonisation resistant*. The question why this is the case, still has to be addressed. I will try to give a beginning of an answer by paying some attention to the philosophical underpinnings of the difference between the civil law and the common law.

5.4 Some Philosophical Backgrounds: a Reminder

The differing civil law and common law mentality is related to differing political and philosophical ideas in continental Europe on the one hand and the Anglo-American world on the other. In the following, I will give some clues as to these ideas, without describing them in any detail. There is no need to do so for the sake of my - in this speech rather rough - argument. To most of you, it is a reminder of what you already know.

In Anglo-American political thought, the idea of a minimal state and of law as command, proposed by *inter alia* Hobbes, Locke and Mill¹⁶⁹ and more recently by Friedrich Hayek and the Libertarian Nozick,¹⁷⁰ has been highly influential. As long as there is no interference with individual liberty, one can act as one likes and the State should not interfere for the enforcement of moral precincts. This rigid separation of law and morals is also present in the work of Jeremy Bentham's disciple John Austin, another author whose work has been of influence particularly in the common law world. He also maintains the idea of law as a command, set by political superiors, as opposed to positive

¹⁶⁴ Cf. in general on the civil law mentality in Quebec Pierre Legrand, *Civil Law Codification in Quebec: A Case of Decivilianization*, 1 *Zeup* (1993), 574 f. and Smits, *o.c.*, 124 f.

¹⁶⁵ Legrand, *o.c.*, 51.

¹⁶⁶ Ferdinand F. Stone, *Louisiana Civil Law Treatise, Vol. 12: Tort Doctrine*, St. Paul 1977, 413 f. (as supplemented in Stone/Crawford, *Pocket Part* 1999); Frank L. Maraist/Thomas C. Galligan, *Louisiana Tort Law*, Charlottesville 1996, 110 f.

¹⁶⁷ See Cheryl Martin, *Comments*, 69 *Tulane LR* (1994), 186.

¹⁶⁸ As does *negotiorum gestio*; see for its acceptance in Quebec art. 1482 *Code Civil de Québec*.

¹⁶⁹ Thomas Hobbes, *Leviathan* (1651); John Locke, *Two Treatises of Government* (1690); John Stuart Mill, *On Liberty* (1859). Cf. also Glendon, *o.c.*, 86.

¹⁷⁰ F.A. Hayek, *Law, Legislation and Liberty*, Chicago 1973-1979; Robert Nozick, *Anarchy, State and Utopia*, Oxford 1974.

morality not clothed with legal sanctions.¹⁷¹ And so one could go on with dropping names from English and American political philosophers who defended a separation of law and morals.

Of course, it would be foolish to suggest that the Anglo-American debate be entirely centered around the idea that law and morals should be separated. To mention the important work of Lon Fuller,¹⁷² who claims that the law has an internal moral structure to which it must conform in order to be law, should suffice. Fuller - as a representative of the natural law tradition - has however been severely criticised;¹⁷³ his views do not seem to match with the political 'programme' of the Anglo-Saxon world that gives the individual pride of place¹⁷⁴ and leaves moral duties to the individual conscience.

This common law mentality became the subject of a famous, yet still insightful, debate in England after the publication of the report of the Wolfenden Committee in 1957. In this report, it was recommended that homosexual practices in private between consenting adults should no longer be a crime. There was a well-defined ideology underpinning this recommendation: according to the Committee, the function of criminal law is particularly to preserve the public order and to protect the citizen from what is offensive or injurious. And then follows a famous passage:¹⁷⁵

'It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour (...). (T)here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.

In a reaction, Lord Patrick Devlin¹⁷⁶ rejected this position. To him, morals (according to Devlin originating from Christianity) and law were interwoven. As these Christian values (not only the prohibition of homosexuality, but for example also the very idea of marriage) were now part of the law, they could, according to Devlin, not be separated from it by using the simple argument that a majority of the people is not Christian anymore: 'It has got there because it is Christian, but it remains there because it is built into the house in which we live and could not be removed without bringing it down'.¹⁷⁷

¹⁷¹ John Austin, *The Province of Jurisprudence Determined* (1832), ed. Hart, London 1954, 134 f.

¹⁷² Lon Fuller, *The Morality of Law*, New Haven 1964. One could also refer to the important work of Ronald Dworkin (for example *Taking Rights Seriously*, Cambridge Mass. 1977).

¹⁷³ Cf. e.g. M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 6th. ed., London 1994, 116, 222: 'the approach remains essentially an idealist search for absolute truth in the realm of values'.

¹⁷⁴ Cf. for this 'Idéologie Libérale-Individualiste' and its influence on the law: Eduardo Novoa Monreal, *Les délits d'omission*, 55 *RIDP* (1984), 479.

¹⁷⁵ *Report of the Committee on Homosexual Offences and Prostitution*, par. 62.

¹⁷⁶ Patrick Devlin, *Morals and the Criminal Law*, in: *id.*, *The Enforcement of Morals*, Oxford 1965, 1 f.

¹⁷⁷ Devlin, *o.c.*, 9.

However, general opinion did not follow Devlin; as is well-known, in particular H.L.A. Hart's defence of the original English position¹⁷⁸ was convincing to many.

On the European continent, a different philosophical journey from the one in common law was embarked upon.¹⁷⁹ Here, in particular the ideas of Jean-Jacques Rousseau and René Descartes were highly influential. Although Rousseau¹⁸⁰ too is as much a believer in the social contract theory (or perhaps even more) as Hobbes and Locke and thus also refrains from any State intervention without the will of the people, he refuses to draw a distinction between law and morality. The individual becomes part of the 'volonté générale' which is at the same time the moral will of every citizen. Thus law is the 'register' of that 'volonté générale' and therefore also a register of morality: the laws express the prevailing moral conviction as they originate from the will of the people.¹⁸¹ The corresponding function of the law is that of a moral compass, guiding society and educating its citizens. It is well-known that Rousseau puts much emphasis on this issue of education, of making a 'new moral man'. For my non-legally skilled listeners, I refer to his *Émile où de l'éducation* of 1762, in which it is defended that the education of the heart should be preferred to an education of reason.

As to the contents of natural law, that is surrendered by the individuals to the collectivity in the social contract in order to get them back in the form of positive law, Rousseau regards this not as following from *reason* (as Hobbes and Locke did), but from sentiment and the heart.¹⁸² It then is only a small step to contending that sentiment and morality are part of the law as well. Thus, Rousseau indeed is the great promoter of human sentiment and morality against reason.¹⁸³

The prevailing ideology that is apparent here, is that social life demands participation of all members of society. Citizens have legal duties against the community in which they live. Monreal rightly stresses this point and contrasts it with Anglo-American individualism:¹⁸⁴

'la vie sociale demande une collaboration, une participation et une solidarité de tous ses membres; chaque être humain, en conséquence, doit contribuer activement au développement social'.

¹⁷⁸ H.L.A. Hart, Immorality and Treason, in: R.M. Dworkin (ed.), *The Philosophy of Law*, Oxford 1977, 83 f.

¹⁷⁹ Kant too thought of morals as prescribing only internal conduct and not external conduct (duties as to the latter being law and thus a perfect obligation). According to him, the duty to help others in distress was only of a moral character (and therefore an imperfect obligation, not to be enforced through the law). See Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (1785). Critically of this standard approach is Richard W. Wright, *The Standards of Care in Negligence Law*, in: David G. Owen (ed.), *Philosophical Foundations of Tort Law*, Oxford 1995, 273.

¹⁸⁰ Jean-Jacques Rousseau, *Du Contrat Social* (1762).

¹⁸¹ Cf. Freeman, *o.c.*, 108.

¹⁸² Cf. J.M. Kelly, *A Short History of Western Legal Theory*, Oxford 1992, 269.

¹⁸³ Here, I should refer to his *Julie ou La Nouvelle Héloïse* (1761).

¹⁸⁴ Monréal, *o.c.*, 480.

I can be more concise about the influence of Descartes, who with his *Discours de la Méthode* of 1637 strived towards a systematisation of the entire universe. All 'irrelevant' details had to be eliminated in order to formulate principles, free from contingent time and place. These principles could then be given a universal character.¹⁸⁵ This search for the universal meant for the law that it had to operate through general rules. Or, as Van der Walt put it:¹⁸⁶

'Many theorists wanted to ensure that choices among competing rights are constrained by clear and unambiguous principles, so that judicial judgment could be separated from the uncertainties of political rhetoric and metaphysical theory. The lawyers of the Enlightenment were, in a word, looking for a legal science in which certainty was guaranteed through method' .

The law was thus reduced to general rules and over time, Rousseau's morality was put into these general rules as an eternal truth. This is a whole different idea of rules than is immanent in the common law that indeed 'écarte (...) les attrait de la certitude dogmatique et de la vérité'.¹⁸⁷

Now, I do not say that *because* of the influence of philosophers like Rousseau and Descartes, the socio-political structure is different on the continent than it is in England. It could very well be the other way around: the work of some philosophers may, for one reason or another, have found a better breeding ground on the continent. My contention just is that the extent to which morality should be enforced by law differs in civil law and common law because of a different socio-political structure in which the two legal systems are embedded (although I recognise that also *within* the civil law and the common law differences may exist). Such a structure is partly the result of philosophical influences, but also of other, *e.g.* economic, cultural and historical circumstances that cannot be elaborated here. Thus, I resist the temptation of quoting from the work of Geert Hofstede, whose idea of culture as 'software of the mind' is insightful for comparative lawyers as well.¹⁸⁸

What I do hope to have made clear however, is that the extent of interaction between morality and the law indeed differs substantially in the two great legal systems of the world and that this is related to differing views regarding the function of the law. The assignment of this paragraph was to find out if there really is an irreconcilable

¹⁸⁵ Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity*, New York 1990, 22 f.

¹⁸⁶ A.J. van der Walt, Marginal notes on powerful(l) legends: critical perspectives on property theory, 58 *THRHR* (1995), 402.

¹⁸⁷ Legrand, *o.c.*, 94.

¹⁸⁸ In particular his 'uncertainty avoidance index' is insightful: in countries with strong uncertainty avoidance (like Germany) there tend to be more precise laws in order to prevent uncertainties in the behaviour of people. This may have to do with the inheritance of the Roman Empire, that established an effective system of formal control of its territories and a unified legal system, thus creating an uncertainty-avoiding pattern. See Geert Hofstede, *Cultures and Organisations; Software of the Mind*, London 1991, 126 and *id.*, *Culture's Consequences*, London 1980, 179. Cf. Eve Darian-Smith, *Bridging Divides*, Berkeley 1999.

cleavage between the civil law and the common law on the issue of the Good Samaritan; there apparently is on the level of the function (*mentality*, if you like) of the law. What remains to be seen is if a well-defined choice for one of the two conceptions results in uniformity. This is the question referring to a common approach for Europe.

5.5 A Common Approach for Europe? A Plea against Minimum Standards

Do the differing functions of the law in England and on the European continent stand in the way of a uniform law for the whole of Europe? To look at the law as essentially there to promote the good, is definitely not the same as to look at it as guaranteeing each and everyone a private moral sphere. The principles of liability of the Good Samaritan, as proposed in paragraph 3.2, would thus have a different meaning for English courts and for a court in, say, France or Germany.

If this view is sound, it means that in those areas of the law where a common European morality is lacking, the drafting of 'uniform' principles is not of much help without simultaneously changing that morality. The latter, however, is not a task of jurists or lawyers or even of the legislature. To make morality, or what Glendon¹⁸⁹ calls the 'missing language of responsibility', part of the common law, requires a shift in mentality of the English people as a whole, which involves much more than a change of the law only.

Where does this leave us with our second question? Which conception of how law and morality are related is best for Europe? It is a question that every court that has to judge about a case at the intersection of civil law and common law, has to ask itself. More important today, it is also a fascinating academic question. Two views, to my idea incompatible with each other, can be held.

Firstly, one could be committed to establishing uniformity from the outset. Then, there is no choice but to remove the national moralities from the uniform law as much as possible, leaving these moralities to the private sphere of the European citizen. This entails a choice for the common law approach, thus sacrificing the civil law mentality on the altar of uniformity. The idea is that in case mentalities differ, the law should not intervene and sovereignly impose one of these mentalities upon others. With differing mentalities, common values do not exist and the law should content itself with imposing minimum standards.¹⁹⁰ Any other view would be destructive for those legal systems that do not share the morality that would be imposed upon them. And what is more: it would not work for those systems because of the fact that 'legal irritants' would evolve.¹⁹¹ Thus, with regard to the Good Samaritan, the revised weighing of the values involved leads to the conclusion that no liability of the one who refuses to rescue a total stranger, should exist in Europe. Of course, there still would be a duty to rescue in case of a special relationship, but for a different reason than mere morality: in that case, there are good

¹⁸⁹ Glendon, *o.c.*, 82 f.

¹⁹⁰ For a suggestion as to the introduction of a minimum number of mandatory contract rules see Ugo Mattei, Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules, 39 *Virginia Journal of International Law* (1999), 537 f.

¹⁹¹ Günther Teubner, Legal Irritants, 61 *MLR* (1998), 11 f.

legal reasons for the existence of a duty to assist and for reimbursement of expenses in the civil law.

Secondly, there is the idea that the development of a uniform private law in Europe should be an evolutionary evolution through the competition of legal rules. In particular national courts should choose between rules in Europe; in the end, a uniform law will evolve only if this is not contrary to the morality of a national system. The latter is ensured because of the place given to the courts, being best equipped to take care of the preservation of national morality. Thus, as in the first view, it is recognised that if common values do not exist, the law should not impose any as such. This is the view I set out in some of my earlier writings¹⁹² and that I still firmly believe in. Among its many advantages¹⁹³ is that in this method an optimal mix of morality and uniformity can be reached. Courts are only willing to give up their own national rules as long as that would not be contrary to the prevailing mentality in that country. As to the problem of the Good Samaritan, this would probably lead to a preservation of both the 'moral' approach on the continent and of the other one in England. It goes without saying that courts should still consider policy issues in order to find out which rule may be the best;¹⁹⁴ in case of the Good Samaritan, however, that may very well not lead to any uniformity, the civil law keeping its pedagogical character and the common law still guaranteeing people a private moral sphere.

The other approach, viz. of accepting minimum standards for the law, could never lead to the same results. The law, as separated from morals, would then be *economised*: the mentality of the civil law, also having an educational function, would be destroyed. In this respect, minimum standards are just like principles: their flesh in the form of morality is scalded off. In this sense, it may even be questioned whether it is possible at all to make minimum standards by scraping off that morality. As we saw, Lord Devlin denied this because of the innate moral character of English law. Left aside whether that is true for English law, it *is* true for the civil law. With many rules, it would be like taking out their heart in case their inherent morality would be eliminated. In other words: in the weighing of the different values - in order to make a new programme for European Private Law rules regarding different subjects - it should be admitted that sometimes morality is *a value in itself* that outweighs all other values for the simple reason that letting other values prevail would not lead to uniformity at all. In that case, the law is resistant to harmonisation, not because it would be inherited with one's genes, but because it is part of - to quote Hofstede¹⁹⁵ - the mental software. For that reason I defend that there *is* a place for Rousseau's sentiment in a future Europe.

Another important disadvantage of the idea of minimum standards is that - perhaps different from what one expects - it leaves no space for moral and cultural

¹⁹² Jan Smits, A European Private Law as a Mixed Legal System, 5 *MJ* (1998), 328 f.; *id.*, *Europees Privaatrecht in wording, o.c.*, 74 f., where literature is referred to, and recently Meinrad Dreher, Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa?, 54 *JZ* (1999), 105 f.

¹⁹³ See for a more general account Smits, *Europees privaatrecht in wording, o.c.*, 78 f.

¹⁹⁴ And that may still have important consequences for the consistency of the *national* laws.

¹⁹⁵ Hofstede, *Cultures and Organisations, o.c.*

pluralism. It is a myth to think that minimum standards can be neutral,¹⁹⁶ unless they grant a court so much discretion that they actually say nothing. Lord Devlin's plea is to the point here. Thus, in the pluralist society that Europe essentially is, I choose for having different moral standards next to each other, not for bringing them to one common denominator.

So, what I am saying, is that even if we desire to have uniformity as to the general duty to rescue and relief for the rescuer, it would be quite impossible to realise it. Is this bad? In my opinion, it is not. Why should someone who sees a person drown in the fountain at the Piazza Navona be treated in exactly the same way as someone who witnesses a drowning of another person in the fountain at Trafalgar Square? I cannot see why that should be the case.¹⁹⁷ To most of you, this may sound not so surprising: the differing laws regarding the Good Samaritan do not constitute an obstacle for the functioning of the internal market. There is no economic reason for harmonisation. But the way we have reached this result is insightful: morality is made a *factor* in answering the question when uniformity is possible, not a penetrating principle, underlying all legal rules.

Thus, the status of the Good Samaritan in European Private Law is, to my idea, illustrative for a pervasive problem of my discipline: what is, given the distinct functions of the civil law and the common law, the impact of 'European' Principles in case of differing moralities? That question has a more general ambit: there are more instances in which moralities differ. But there are also parts of the law where a European morality does exist. The way I address these problems means that a European Private Law has to be essentially diverse. This brings me to the following more general statements about the future of my discipline.

5.6 A Praise of Diversity

We have seen that with morality as a value in itself, uniform law can never be created as long as moralities in Europe differ. I have deliberately chosen the theme of the Good Samaritan to make that clear to you. There are, however, many other subjects where the anew weighing of the contrasting values underlying the legal rules *will* lead to uniformity. Again, I repeat that the mere formulating of Principles out of comparative law material is not sufficient and that this material should be rationalised by turning it into a clear direction. Now, I intend to give you some clues as to how I look at this process.

First, I should make mention of other areas of the law where morality is a value in itself. Apart from the liability of the Good Samaritan, I think for example of the law of

¹⁹⁶ Cf. for a different evaluation Mattei, *o.c.*, 570.

¹⁹⁷ Cf. Cadoppi, *o.c.*, 93; H.C.F. Schoordijk, Enkele opmerkingen over de bronnen van verbintenis en 'European law in the making', in: *Europees contractenrecht*, Arnhem 1995, 106 f., emphasising the difference in 'rechtscultuur'. I admit that Heyman, *o.c.*, 738 f. defends an intermediate position, namely a 'liberal-communitarian theory' or social duty theory, which says that moral duties are enforceable only to the extent that they can be transformed into duties of right or community' (742). Within that theory, he accepts a general duty to rescue.

negotiorum gestio as such. In a French manual of private law, the very existence of this institution is explained by a reference to affirm the need of a 'solidarité sociale'.¹⁹⁸ Another well-known example is good faith in contract law. In art. 1.201 of the Principles of European Contract Law, it is held that 'each party must act in accordance with good faith and fair dealing'. But, to my idea, it is a typical misunderstanding of the English morality to state that English law and continental European law share an identical concept of good faith. Even if good faith would be a general principle of English law,¹⁹⁹ it would have a totally different meaning than it has on the continent. On the continent, it is first and foremost a duty of behaviour for the contracting parties; the law *prescribes* this good faith in order to make good citizens. That concept is alien to English law; there the freedom to contract and the principle of party autonomy remain vigorous.²⁰⁰

Related to both the good faith issue *and* the Good Samaritan is the question whether there should be liability of those who failed to warn others of some danger, physical or financial or in the process of making a contract.²⁰¹ Here, too, a different morality seems to prevail in the common law than in the civil law. It is significant that in *e.g.* German contract law, the non-disclosing of essential information to the other party before the closing of the contract, could be *sittenwidrig* (§ 826 BGB).²⁰² In French law, a *faute d'abstention* could also lie in the non-disclosure of information to the other party.²⁰³ English law does in principle not recognise any of these duties outside of special relationships.²⁰⁴ The failure of an insurance company to warn a third party (a bank) that he may become the victim of deceit, did not trigger a liability either.²⁰⁵ I do not see any chance of these moralities growing any closer in the near future. According to Viney, a decline of individualism is not at hand,²⁰⁶ as English authors emphasise that an increase of social solidarity does not exist in their country.²⁰⁷

But I should not overestimate. The cases where morality differs so much that uniformity may never prevail as long as that morality does not change, are exceptional.

¹⁹⁸ Terré/Simler/Lequette, *o.c.*, no. 53.

¹⁹⁹ It is denied for the precontractual phase in *White v. Jones*, [1995] 2 *WLR* 187.

²⁰⁰ *Cf.* Teubner, *o.c.* For an insightful discussion between French and English lawyers during the negotiations about the Eurochunnel see P. Nouel, 24 *International Business Lawyer* (1996), 22 f.

²⁰¹ *Cf.* in general McCall, *o.c.*, 83 f.; critical of this is S.M. Waddams, Pre-contractual Duties of Disclosure, in: Cane/Stapleton (eds.), *Essays for Patrick Atiyah*, Oxford 1991, 237 f.

²⁰² *Staudinger-Schäfer* § 826 RdN 52: namely if 'nach Treu und Glauben mit Rücksicht auf die Verkehrssitte der Vertragsgegner eine Mitteilung erwarten dürfte' (BGH 12 November 1969, *NJW* 1970, 653).

²⁰³ *Cf.* Civ. III, 2 October 1974, *Bull. Civ. III*, nr. 230.

²⁰⁴ *Cf.* G.H. Treitel, *The Law of Contract*, 9th ed., London 1995, 361.

²⁰⁵ *Banque Financiere v. Westgate Insurance*, [1990] 2 *All ER* 947. This may be different in American law in, *e.g.*, the relationship psychiatrist-victim of one of his patients (*cf.* *Tarasoff v. Regents of the University of California* 131 *Cal. Rpt.* 14 (1976)).

²⁰⁶ Viney, *o.c.*, no. 456-1: 'que le déclin constant de l'individualisme qui caractérise les sociétés contemporaines conduit à restreindre chaque jour davantage la place de la liberté au profit de la sécurité'.

²⁰⁷ Darian-Smith, *o.c.*, *passim*.

Mostly, moralities do not differ that much for the simple reason that much of the civil law does *not* have an educational function and much of the common law does *not* have the function of guaranteeing freedom to the citizens. Large parts of the law of contract, of tort law and of property law better be understood in other terms than morality.²⁰⁸ The underlying policy issues here are much more concerned with such divergent values as efficiency, consumer protection, protection of victims and a proper distribution and protection of property. It is in the weighing of these values on the basis of some well-defined direction, and - again - not just on the basis of the black letter rules, that a new programme for these areas of law can emerge in Europe.

To me, it is obvious that for instance the law of contract of a united Europe should have two major functions: promoting efficiency in a merchant law and protecting the interests of consumers in a consumer law in the broad sense of the word (regarding all contracts to obtain the first necessities of life). This dichotomy of autonomy and intervention was put forward by Kessler²⁰⁹; one of its parts is already coming to the surface through the many directives on consumer protection,²¹⁰ the other one is in need of formulating new foundations. I am a firm believer in the fruitfulness of such a new dichotomy within the law of contract; to think otherwise makes a 'general' contract law meaningless because of the much too general norms that it would contain.²¹¹ Still, much work is to be done to lay the foundations for this dichotomy; again, it requires thinking about the road we want to travel, viz. the *programme* we want to make. I defended previously that it should be the way of efficiency, through economic analysis of the law, for the merchant contract law and the way of Human Rights for the protection of weaker parties.²¹² Both disciplines show the way towards a more consistent dual private law, not only in Europe but also in the Netherlands itself, for that matter. It is inevitable that in the re-evaluation of values, traditional categories may have to make place for others.

Today, I will not elaborate this thesis any further. Nor will I make suggestions as to the direction tort law or property law should take. It is clear, however, that legal diversity will remain part of a future Europe. In this respect, my speech can be

²⁰⁸ I leave out family law here; it has its specific problems. It is a justified question to ask how it should be decided which part of the law is so invaded with morality that it is impossible to reach uniformity. In my view, this is a matter essentially to be judged in legal practice, *e.g.* in the aforementioned national courts that play the primordial role in making European Private Law through the free movement of legal rules. The morality preservation index indicates what is probable in this context.

²⁰⁹ Friedrich Kessler, *Freiheit und Zwang im Nordamerikanischen Vertragsrecht*, in: *Festschrift für Martin Wolff*, Tübingen 1952, 67 f. *Cf.* for the relationship with the parallel concepts of efficiency and distributive justice Christian Joerges, *The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines*, EUI Working Paper Law No. 94/5, 15.

²¹⁰ For a list of these directives *cf.* Müller-Graff, in: Hartkamp et al (eds.), *Towards a European Civil Code*, 2nd. ed., Nijmegen 1998, 83 f.

²¹¹ I have elaborated this thesis in Smits, 27 *R&R* (1998), 10 f. Critical of this view are Mattei, *o.c.*, 537 f. and T. Hartlief, *De vrijheid beschermd*, Deventer 1999, 45.

²¹² H.C.F. Schoordijk/J.M. Smits, *Verleden, heden en toekomst van het privaatrecht*, 48 *Ars Aequi* (1999), 800 f.

qualified as a praise of diversity. It could also be termed as essentially postmodern: since the main ideas of present-day private law are largely contradictory, it is wasted effort to try to make a coherent system. In this sense, a modern private law cannot be but postmodern, thus rendering account of these tendencies.²¹³ To reduce these to one common denominator, is doomed to failure.

6. A Programme for the Future

This speech is a programmatic one. Starting from the case of the Good Samaritan, I defended several viewpoints as to how in my view European Private Law should be practised. I still have something to say about these viewpoints in a more systematic way. I thus submit to you my articles of faith. These are threefold. They are concerned respectively with the need for a programme for European Private Law itself, with the need to emphasise similarities as well as differences within Europe, and with the significance of mixed legal systems for the enterprise of unification of law.

The need for a programme follows from the peril of searching for a common denominator of the national legal systems in Europe without at the same time involving issues of policy, morality or legal culture. All legal principles or rules still need interpretation; and contrary to what is the case in national legal systems, the directive policy for this interpretation is not implicit part of the European legal system as immanent practical wisdom.²¹⁴ It should therefore be made explicit from the outset what the *programme* is of each and every subject for which a uniform principle is made. The present tendency of not doing so, is reminiscent of the pure comparative law method, only looking for differences and similarities between legal systems with no other goal but the pursuit of knowledge. The programmatic character of European Private Law however adds a goal to this method, thus avoiding a much too *indeterminate* uniform law. It has for a consequence that not just the comparison of national private law systems as they stand today is a source of knowledge for European Private Law. Economic analysis of law, legal history, legal theory, European institutional law and perhaps even non-legal disciplines such as cultural studies and sociology can be of use as well for the defining of programmes for contract law, tort law, family law, etc.²¹⁵

Do I think this interdisciplinary approach surprising? No: it is impossible to do otherwise in a discipline that has not yet found its foundations and that is still to be built up from various other disciplines. Do I then think it threatening that it is impossible to develop a uniform European private law without at the same time taking a stand towards theoretical questions of the law? Definitely not. Even more: I have always been convinced of the fact that this should also be the way to address a *national* legal system.

²¹³ For a different interpretation of present comparative practice see J.H.M. van Erp, *Europees privaatrecht: Postmoderne dilemma's en keuzen*, Deventer 1999, 14.

²¹⁴ For the foundations of the concept of practical wisdom cf. Martha Nussbaum, *The Fragility of Goodness*, Cambridge 1986.

²¹⁵ In general about the interrelationship of law with other disciplines see William Twining, *Law in Context: Enlarging a Discipline*, Oxford 1997.

In my writings on Dutch law, I always tried to uncover the hidden policy issues and the contrasting values covered underneath the national rules.²¹⁶ There was - with most of the time only one prevailing morality within the Netherlands - no need to do so from a practical perspective, only from a scholarly one. But in European Private Law, there is a need to do so from *both* perspectives: the making of European principles without setting a programme at the same time is doomed to failure. In this sense, I feel that my work on European Private Law is a continuation of my previous work on Dutch law, be it of more practical interest.

Apart from its significance for Europe, the critical perspective that the discipline of European Private Law brings along will also have practical consequences for the national legal systems. These will be looked at more and more from a European perspective, using the acid test of 'Europe-resistance'. The contest of national and European private law will definitely lead to a demystification of national private law: the underpinning of European private law through economic or other interdisciplinary analysis may lead to private law rules no longer being considered as in themselves decisive for the outcome of the case.²¹⁷ In this respect, I approve of Richard Posner quoting Cardozo²¹⁸ that 'few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end'.

My standing point may then be summarised as that I am a firm believer in the need for a common law for Europe, not only because it is good for Europe, but also because it is good for our own national laws. These have to be thought through from the standpoint of a more coherent programme than is the case now. We as jurists have to look *forward* to what we wish the legal system to be, and not backward to the mass of national legal materials. There is a need to *do* something with that material, eliminating some parts of it, extending other parts, rethinking it all.

My second article of faith is concerned with the issue of uniformity and diversity in Europe. The big advantage of including economic or other non-legal analysis of law in private law scholarship, is that it contrasts the particularity of law with the universality of these other disciplines.²¹⁹ It shows us the intellectual unity of the law on a European, if not a global scale. In the above however, I used the Good Samaritan as an illustration of the idea that this should not be pushed to extremes. Some part of European Private Law is resistant to the universalistic tendency and thus to harmonisation. Looked at it from the

²¹⁶ Starting with my doctoral thesis *Het vertrouwensbeginsel en de contractuele gebondenheid*, Leiden 1995, taking up the theme again in 27 *R&R* (1998), 10 f. and *id.*, Bronnen van verbintenis: over pragmatisme en de Anglicisering van het Nederlands verbintenissenrecht, 26 *R&R* (1997); 213 f.; *id.*, Het failliet van de Savignyaanse systematiek: dwaling en wanprestatie, 26 *R&R* (1997), 137 f.

²¹⁷ I do not regard this as negative in itself: I do not believe that Europeanisation may *spoil* (in the negative sense of the word) some delicate equilibrium of national law; *cf.* C. Bollen/G.R. de Groot, Verknoeit het Europese recht ons Burgerlijk Wetboek?, 12 *NTBR* (1995), 1 f.

²¹⁸ Richard Posner, *Overcoming Law*, Cambridge Mass. 1995, 391. *Cf.* 4 f. on the pragmatist approach of Posner.

²¹⁹ *Cf.* Ugo Mattei/Fabrizio Cafaggi, Comparative Law and Economics, in: Newman (ed.), *New Palgrave, o.c.*, Vol. I, 347.

angle of comparative law: there is an end to emphasising similarities and rejecting differences. Thus, in my idea of European Private Law, the assumption that uniformity is always superior to difference should be challenged. I believe in as much uniformity as is possible without sacrificing national moralities in Europe or different moralities within one national legal system.

This is in line with a most recent tendency in comparative law to emphasise differences instead of similarities. Although classic comparative law states that both similarities and differences should be uncovered in the comparative enterprise, there have always been influential authors who stressed universalism in the law, regarding diversity as caused by historical accident. This idea seems to have gained ever-greater importance over the last few years,²²⁰ but the adherents of difference theory challenge it.²²¹ They suggest that legal systems may very well actually differ in the sense that 'no level may be discoverable at which, in any meaningful sense, the differences disappear'.²²² I do believe there are parts of private law where this is the case, but also that there are other parts where the 'extinction' of legal 'species' is at hand and that this is to be valued positively. Large parts of the law of obligations and property law can be newly founded on the basis of a universal programme.

The question that remains is *when* uniformity can be superior to diversity, or - in other words - when the making of uniform principles does lead to uniform law. I see it as one of the big challenges of my discipline to find out which legal rules or legal institutions are suitable candidates for perishing or survival on the market of legal culture. The idea of a morality preservation index can be of use here: as we saw, this index measures the sensitivity of a legal rule or institution for specific national morality considerations. The so-called mixed legal systems already put many rules and institutions to this test of morality-sensitivity; their experience may be of great use for the European venture as well. This brings me to my third tenet.

The last thing I would like to stress today is that I have a profound belief in the usefulness of looking at mixed legal systems for the process of European private law integration. It would be highly unproductive not to make use of the experience these systems already have with the mixing of the civil law and the common law. I must admit that this idea is connected to my view on how European private law should come about, namely by competition of legal rules, but also for those who do not believe in this model, the mixed legal systems have much to offer. The law of in particular South-Africa, Scotland, Quebec and Louisiana tells us a lot about the legal rules or institutions that are either independent of civil law or common law morality or, conversely, looked at as an inherent part of it. Moreover, the mixed legal systems many times provide us with practical insight into the mixing of both legal traditions on the level of positive law. Often, the approach of general principles of the civil law is supplemented by the

²²⁰ Cf. *supra*, par. 3.1.

²²¹ Among them are Legrand, *Le droit comparé, o.c., passim*, Hyland, *o.c.* and Sacco, *o.c.*; the various contributions to 46 *AJCL* (1998), 595 f.

²²² Hyland, *o.c.*, 193. 'The differences relate to features of a legal system that endure over time - and that generally survive even legislative revision'.

emphasis on particular cases of the common law. In that case, the mixed legal systems offer the best of both worlds to interested comparatists.²²³ I intend to keep making use of the experience of the mixed legal systems, as I have done in the past.

Many different claims have been made in the previous lines. They may not all have been worked out as good as legal scholarship demands, but that has been done deliberately. I wished to show you the richness of this new discipline of European Private Law and to give you a clue as to how I stand towards many of its fascinating questions. In the years to come, I hope to be able to elaborate many of the claims I made today. What it is that drives me in practising European Private Law should have become clear in the process: to me, private law scholarship is at its best when there still is *terra incognita* to discover. Then the road to be travelled does not only depend on personal views regarding the desired methods and results, but also on one's opinions regarding legal theory, economic analysis of law and many other disciplines. Thus, one is able to extend private law scholarship beyond its traditional boundaries with a view to practical and scholarly results in a future Europe. That is a highly fulfilling mission for anyone committed to the study of law.²²⁴

²²³ See, also for other benefits of looking at the mixed legal systems Smits, *Europees privaatrecht in wording, o.c., passim*.

²²⁴ I would like to thank Gerrit van Maanen for commenting on a draft of this lecture and Nienke Krijff for editing a previous English version. Acknowledgments are also due to the Tulane Law School (New Orleans, La.), where I was able to do some research for this lecture as a Visiting Professor in December 1999.