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THE DO-NOTHING OFFEREE: SOME COMPARATIVE REFLECTIONS

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Quare Clausum Fregit?

It must be admitted, or indeed asserted, that considerations of equity and morality play a large part in the process of finding a promise by inference of fact as well as in constructing a quasi contract without any such inference at all.[1]

I. INTRODUCTION

THE problem of the do-nothing offeree, generally referred to in Contracts literature as the problem of whether and when silence may constitute a legally binding acceptance of an offer, goes to the heart of what Contracts, classically understood, is all about: the effectuation of the will, or rather of the agreement of the wills, of more than one autonomously acting party.[2]

Classical contract doctrine, following a schema first adumbrated by Grotius,[3] conceptualizes contract liability as generally arising from an

1. 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 19, at 46 (1952).

2. That "agreement" is at the heart of Contract is perfectly clear despite the definitional emphasis placed on the more unilateral-sounding concept of "promise" employed in American law's standard definition of contract: "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). The RESTATEMENT's definitional strategy of employing "promise," rather than "agreement," as its organizing principle permits the remedially convenient incorporation of situations involving a promisee's unbargained-for reliance on a promise, so-called promissory estoppel, under the umbrella term "contract." *See id.* at § 90 (making binding those promises the promisor reasonably ought to have expected to result in action or forbearance). That this strategy was adopted in no way diminishes a recognition of the fact that the paradigm situation of promissory liability involves promises exchanged as part of a bilateral agreement. "Except . . . [for a limited number of special situations,] the formation of a contract requires a bargain in which there is *a manifestation of mutual assent to the exchange* and a consideration." *Id.* at § 17(1) (emphasis added). *See also* CORBIN, *supra* note 1, § 107, at 106 (opining that "although there are many 'unilateral' contracts that can be made without any expression of assent by the promisee, the great majority of contracts are bargaining contracts, the purpose of which is to effect an exchange of promises or of other performances").

3. II H. GROTIUS, DE JURE BELLI AC PACIS ch. 11 §§ 11, 14 (F. Kelsey trans., 1925).

exchange of manifestations of the wills of at least two parties, the familiar sequence of offer and acceptance:

> An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.[4]
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> . . .
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> Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.[5]
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> . . .
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> An agreement is a manifestation of mutual assent on the part of two or more persons.[6]
>
> . . .
>
> The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party or followed by an acceptance by the other party or parties.[7]

When A makes an offer to B, standard theory leads us to expect a clear indication of an affirmative response on B's part before we regard either party as bound to one another:

> It is true that there is much room for interpretation once the parties are inside the framework of a contract, but it seems there is less in the field of offer and acceptance. Greater precision of expression may be required, and less help from the court given, when the parties are merely at the threshold of a contract.[8]

What happens when the offeree says or does[9] nothing to indicate his response to an offer? Inasmuch as the interpretation of words themselves is so fraught with peril, how much greater the danger, one should think, in interpreting silence: a failure even to lay before the fact-finder the conventional linguistic symbols used to convey meaning, however imperfectly. The peril, of course, is the imposition of unwilled and unmerited liability, in an area of law whose watchword

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4. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).
5. *Id.* § 50(1).
6. *Id.* § 3.
7. *Id.* § 22(1).
8. United States v. Braunstein, 75 F. Supp. 137, 139 (S.D.N.Y. 1947).
9. From the category of do-nothing offerees I exclude those who overtly behave in a way that conveys the meaning acceptance as clearly, or nearly as clearly, as language itself. "Throwing up one's hat is usually an expression of joy; but it may be made to express assent to an agreement to sell land for ten thousand dollars." CORBIN, *supra* note 1, at § 18. For Corbin, such contracts represent a species of express contracts called contracts implied-in-fact. *Id.* at § 19.

is "the intent of the parties." This is contract law's sin against the Holy Ghost, the one unforgivable offense.

Silence as a basis for contract formation has been accorded at best a mixed reception in American contract law. The primary reaction might be summed up as one of generic theoretical hostility towards the suitability of silence for concluding contracts, a reaction hardly surprising given the law's embrace of the voluntaristic principle that an offer to contract must evoke a "manifestation of assent to the terms thereof made by the offeree"[10] before a contract is formed. This hostility, however, is coupled with a willingness to consider certain defined situations in which silence just might pass muster.

America's unofficial codification of contract principles, the *Restatement of Contracts*, identifies such situations in section sixty-nine:

> Acceptance by Silence or Exercise of Dominion
> (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
> (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
> (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
> (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
> (2) An offeree who does any act inconsistent with the offeror's property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.[11]

This articulation of the circumstances in which silence may conclude a contract has always provoked in me a feeling of profound unease. It has always appeared terribly out of keeping with those first principles of contract law that the *Restatement* itself embraces, overbroad and offensive to liberty and privacy interests. Nonetheless, it did seem correctly to capture the sense of a number of decided American cases, some of which I discuss in Part II of this essay, and so to that extent fulfilled the *Restatement*'s recapitulative function. In search for a way to deal with my unease, I turned my sights abroad,

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10. RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981).
11. *Id.* at § 69.

wondering how foreign legal systems with which I was familiar handled the same problem of the do-nothing offeree. Part III details the results of my research. I believe the differences I encountered are not insignificant, and they provoked the commentary and reflections found in part IV.

II. On Native Grounds: Some American Background

A. Paradigm Shifts

In her essay "The History of Mainstream Legal Thought,"[12] legal historian Elizabeth Mensch provides a lucid synopsis of key developments in nineteenth-century American law, tracing its movement from a period of what she calls "pre-classical" (1776-1865) to one of "classical legal consciousness" (1885-1935).[13] Characteristic of the earlier period in contract law, she notes, was the frequent use made of the concept of "implied intent":

> The emphasis on implied intent did not . . . necessarily evidence concern with the actual, subjective intent of individual parties; instead, it represented a fusion of subjective intent with socially imposed duty. Legal thinkers self-confidently assumed that they could find the "law" within the *obligations inherent in particular social and commercial relations*, obligations which, it could be claimed, parties intended to assume when they entered the relationship.
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> . . . [I]n his important treatise on contract law, [Theophilus] Parsons devoted over ninety percent of his pages to a description of various types of parties (*e.g.*, agents, guardians, servants) and relational contexts (*e.g.*, marriage, bailment, service contracts, sale of goods). Each category represented *a social entity with its own implicit duties and reasonable expectations.* A party entering into a particular relationship would be said to have intended to conform to the standards of the reasonable behavior that inhered in such a relationship. . . . Subjectivity and free will were thus combined with the potentially conflicting imposition of objective, judicially created obligations[.][14]

In essence, objectively defined status-based duties were routinely being imposed on parties through the imputation to them of an intent to assume those duties they were presumed actually to have had. Sub-

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12. Elizabeth Mensch, *The History of Mainstream Legal Thought, in* The Politics of Law: a Progressive Critique 18 (D. Kairys ed., 1982).

13. *Id.* at 19-26.

14. *Id.* at 22.

jective will was effectively made co-extensive with typecast, generally recognized patterns of regular dealing.

But by the later "classical" period, this whole approach had undergone a radical transformation:

> The nineteenth century's process of legal rationalization resulted in the abstraction of law from both particularized social relations and substantive moral standards. By the "rule of law" classical jurists meant quite specifically a structure of positivised, objective, formally defined rights. They viewed the legal world not as a multitude of discrete, traditional relations but as a structure of protected spheres of rights and powers. Logically derivable vacuum boundaries defined for each individual her own sphere of pure private autonomy[.]
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> . . . [In Williston's treatise on contracts], because every rule was based upon the principle of free contract, the logical coherence of a contract doctrine, correctly applied, ensured that private contracting was always an expression of pure autonomy. With no small amount of self-congratulation, classical jurists contrasted their conceptualization of private autonomy to Parsons' description of contract law as something to be found *within* numberless particular social relations. In retrospect, Parsons could be viewed as naive and unscientific.[15]

If the "pre-classical" period, then, had submerged the actual subjective intent of the parties into prescribed, objectively defined relationships, classical Contract theory restored subjective intent to pride of place through a recognition of autonomy, a right of the subjective wills of individuals to fashion and assume the obligation they saw fit.

But the same period also witnessed the occurrence of a second, potentially conflicting shift in Contract law, a shift that moved, in fact, in the opposite direction to the one noted by Mensch. Even as the legal treatment of a contract's substantive *terms* was transformed from an ascription to parties of a stereotyped intent into an inquiry into the particularized contents of their actual intent, the analytically prior question of contract *formation* now underwent a reverse shift from a subjective "meeting of the minds" standard to an objective "coincidence of expression" standard. The pithiest exponent of the latter was, as usual, Holmes:

> The whole doctrine of contract is formal and external.[16]

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15. *Id.* at 23, 25.

16. This is a handwritten annotation in Holmes' own copy of OLIVER W. HOLMES, JR., THE COMMON LAW (1881), to the passage on pp. 293-94 beginning "[i]t is said that consideration must not be confounded with motive," *quoted in* GRANT GILMORE, THE DEATH OF CONTRACT 21 (1974).

> . . . The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct . . . . The true ground of the decision [in *Raffles v. Wichelhaus*, 2 Hurl. & C. 906 (1864)] was not that each party meant a different thing from the other . . . but that each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another.[17]

Similarly the "post-Holmesian objectivist"[18] Williston:

> Doubtless the law is generally expressed in terms of subjective assent, rather than of objective expressions, the latter being said to be the "evidence" of the former . . . but when it is established that this is no rule of evidence but rather a rule of substantive law, the whole subjective theory which is sometimes rather ludicrously epitomized by the quaintly archaic expression "meeting of the minds," falls to the ground.
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> Under the guise of conclusive presumptions of mental assent from external acts, the law has been so built up that it can be expressed accurately only by saying that the elements requisite for the formation of a contract are exclusively external . . . .
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> Thus . . . it is clear that the great majority of courts have discarded the impractical and unrealistic subjective standard (using the cliche "meeting of the minds") which seemed so appropriate and fitting a century or more ago in favor of an objective approach based on the external manifestation of mutual assent.[19]

Now consider the combined effect of these two paradigm shifts: the self-same verbal expressions of intent that were to be interpreted subjectively for one purpose would be treated objectively for another. While the *substance* of contractual obligation was assertedly shifting during this classical period from the social matrix in which the parties operated to the autonomous and coincident acts of their wills, the embrace of an "objective" standard of contract *formation* in some ways undermined the full force of that shift. The linguistic community in which the parties operated, merely one facet of the overall social matrix, would determine, typically in the person of the judge, what the outward expressions of the parties' autonomous wills "objectively meant." The court's determinations of "what they must have meant," reached by an implicitly majoritarian appeal to the commun-

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17. HOLMES, *supra* note 16, at 309.

18. GILMORE, *supra* note 16, at 43.

19. III S. WILLISTON, CONTRACTS § 153(b), at 32-34, 36 (1970), *quoted in* GILMORE, *supra* note 16, at 43.

ity's shared experience of language usage, were dispositive, despite a party's protestations to the contrary. This is a socially tolerable state of the law because most often "objective meaning" and "subjective intent" were the same. Nine times out of ten, the effectuation of the objective significance of the parties' expressions would also be an effectuation of their actual subjective intent. But not always.

The shift to an explicitly objective standard of contract formation was in one sense clearly an advance in clarity of thought, inasmuch as it recognized that finders of fact, lacking clairvoyance, could never be privy to the actual subjective states of mind of the parties to a lawsuit at some earlier moment in time. Hence it had indeed always been imprecise for courts to speak of a "meeting of the minds" as the goal of their factfinding in litigation over contract formation. But in their zeal to objectify the criteria for contract formation, the proponents of the "coincidence of expression" test sometimes appeared to stray into a form of mechanism or automatism when they expressed legal indifference to the actual states of mind of the litigants. Thus Learned Hand, with elegant hyperbole:

> It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation.[20]

And in a similar vein:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.[21]

This sentiment is in some ways almost as wrong as the woolly standard it replaced. An objective test should always acknowledge its status as merely a proxy for subjective intent; given the inaccessibility of the mental acts of others, it is a necessary *pis aller*. It may provide a generally reliable stand-in for actual intent, but in itself "objectivity" scarcely rates this defiant triumphalism of Learned Hand's. With apologies to the shade of this great jurist for my temerity, his priori-

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20. Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 984 (S.D.N.Y. 1917).

21. Hotchkiss v. National City Bank of New York, 200 F. 287, 293 (S.D.N.Y. 1911), *quoted in* GILMORE, *supra* note 16, at 43. Gilmore notes that Williston's treatise approvingly quotes from the *Hotchkiss* case, which it describes as a "classic." *Id.*

ties are simply skewed. The will, actual, subjective and inaccessible, should be *central* to our thinking about contract; outer manifestations are only the will's epiphenomena. It is only *because* we believe that outward expression is generally a reliable index of actual intent that we are content to employ it in the latter's stead. Claims of divergence between actual intent and the apparent meaning of outward expressions should trouble us profoundly, not be loftily dismissed. It may be that from time to time the courts will have no choice but to prefer the apparent meaning of a statement or a significant action over a doubtless self-serving claim of intent otherwise, but this is no cause for self-assurance and smug contentment, rather for a judicial sleepless night or two. If contract law abjures its connection with volition in the interests of the efficiency of the adjudicatory process, it loses its moral underpinnings, and becomes merely another form of state control, deceptively named.[22]

This breezy carelessness of objectivist Contract theory about actual intent to form contracts, coupled with some inarticulate and highly questionable assumptions about "unjust enrichment," led to the problem to be discussed in what follows: a proneness in some cases to construe at best highly ambiguous facts as clear objective indicia of actual intent to contract. What the mixture in fact led to, I shall argue below,[23] was the implementation of erroneous intuitions about what

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22. Arthur Corbin came closer to striking the right balance:

> Agreement consists of mutual expressions; it does not consist of harmonious intentions or states of mind. It may well be that intentions and states of mind are themselves nothing but chemical reactions or electrical discharges in some part of the nervous system. It may be that some day we may be able to observe a state of mind in the same way that we observe chemical processes and electrical discharges. At present, however, what we observe for judicial purposes is the conduct of the two parties. We observe this conduct and we describe it as the expression of a state of mind. It is by the conduct of parties, by their bodily manifestations, that we must determine the existence of what is called agreement. This is what is meant by the anciently-honored term "meeting of the minds." This is what is meant by mutual assent.
>
> . . . .
>
> By the foregoing it is not meant that the courts are indifferent to the actual intentions and expectations of men or to the legal effects that one or both contracting parties thought they were producing.

CORBIN, *supra* note 1, at § 9, at 14-15; *see also id.* § 107, at 157:

> It has already been shown, and it will appear at many places in this treatise, that a 'meeting of the minds' is not an unvarying prerequisite to an enforceable contract. But if it is made clear that there has in fact been no such 'meeting of the minds,' the court will not hold a party bound by a contract varying from his own understanding unless his words and conduct were such that he had reason to know that the other party would be and was in fact misled.

Id. For further discussion of the argument in the text, see Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733, 771-81 (1990).

23. *See infra* text accompanying notes 115-25.

constituted situational fairness, disguised in the decorous garb of Contract with its positive volitional associations.[24]

B. *Twice-told Tales*

Being a Common Lawyer by training (and because of the enormous chic legal scholarship nowadays finds in anything even vaguely suggestive of story-telling), I wish to start out by briefly discussing some cases. (By all means, dear reader, regard them as "narratives" if that makes me any trendier in your eyes.) The cases I propose to discuss are a number of American decisions, along with a student's report of a business problem, that illustrate the sorts of situations that pose a dilemma for the "classical" offer-acceptance model and its reliance on outward manifestations of intent as the touchstone of contractual liability.

1. Easy Cases

a. *Pure quasi-contract, or contract implied in law*[25]

In 1955, a quite elderly Romanian woman, an immigrant to the American midwest and by all appearances a postwar "Displaced Person," collapses and loses consciousness in a Detroit grocery store. The police are summoned, and rush her to the hospital in an ambulance. She stays for two weeks, unconscious the whole time. She is then transferred to a different hospital—ominously described as an "overflow" facility—where she remains for eleven months of uninterrupted coma.

At some point, the hospitals naturally evince a wish to be paid. Surely her grateful children, auto workers or millhands or their wives, will be only too happy to pay, in those golden days of affordable medical care? But alas, she has no family; her relatives, in Detroit or Romania, cannot be located. How about the "social service agencies" (if I may use the anachronistic modern term)? Sorry: it turns out she owns, free and clear, a $ 7000 house (with an upstairs lodger who pays her $33 a month) and $50 cash. By the standards of the local welfare department, this qualifies as opulence, and hence it declines to underwrite her months of vegetation.

At the end of the eleven months, the woman dies at last, never regaining consciousness. Fortunately she never gets to see the

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24. *See infra* part IV.

25. These are the retold (but not distorted, I think) facts of *In re* Crisan Estate, 107 N.W.2d 907 (Mich. 1961).

depressing[26] surroundings in which she expires. Perhaps the local Romanian Orthodox church holds a funeral with keening women in shawls, burying her in consecrated ground at the parish's expense. Or perhaps not.

In the ordinary course of things her meager assets, reduced by the costs of probate and estate administration, would descend to the beneficiaries she had named in her will. But naturally, this result may follow only after an important preliminary has been taken care of, *viz.*, payment of "all her just debts," as the hallowed formula goes. And who, pray tell, are her creditors? The hospitals with their unpaid bills, of course.

By what color of right do they lay claim to her assets? The major classes of claim, as we know, are tort and contract. But the Romanian woman has done no reported wrong, so any claim is hardly tortious. Contract? Contract requires a "meeting of the minds," as even laymen know, offer and acceptance visibly manifested. This woman's comatose mind, however, met with nothing and no one from the world of appearances for eleven whole months; then she died. How could anyone say she had manifested agreement to accept and pay for medical services when she couldn't say her own name (which happened to be Sosa Crisan)?

But her executor was made to pay the bill ($3218.30), as instinct tells you of course he should, even though "the law" leaves you feeling uneasy about quite why. Just think of what would happen if her estate didn't have to pay up: Why, doctors and hospitals would leave the unconscious for dead, those avaricious, blood-sucking bastards, and we can't have that, can we?! So now we'll just have to wink, won't we, and all make believe that Sosa really had agreed to pay for the medical services. Which being interpreted, reworded in the sonorous cadences of legalese, is: the law will "imply" a contract between Sosa and the hospitals, indulging in a "legal fiction" to the same effect. Put that way, it certainly sounds a lot more proper than "wink" and "make believe."[27] That the estate should have to pay is obviously the right answer, isn't it, even though there is also something obviously not quite right about it.

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26. The first hospital, where she spent the first two weeks after collapsing, charged $29.20 a day; the second, where she died, charged $8.90 a day. That's how I know she would have been depressed had she ever awakened. "One of us has got to go," said Oscar Wilde when he saw the wallpaper of the room where he was brought to die.

27. Even though lawyers always screw up the difference between "imply" and "infer," known to every moderately educated layman. Why does an English teacher snicker when a lawyer dies?

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Since the legal academic's professional malady is the confection of hypotheticals, the ringing of changes on fact patterns, when I read *Crisan's Estate* I sometimes have the following fantasy: suppose, towards the end of her eleven-month confinement, Sosa is lying unconscious in her bed in the dingy hospital room, surrounded by a faithful circle of lady friends keeping watch, octogenarian Romanians all, who knit and gossip and pray and keep Sosa company after their fashion. Then, softly, one of the women, really almost unaware of what she is doing, begins to intone a melody of their girlhood, a Transylvanian folksong perhaps, one they had all sung as lasses together in the Old Country in days of yore, as they walked off arm in arm across the fields to milk the cows or churn the butter or dig the rhubarbs—my fantasy varies—in those bygone times long before Hitler and the depredations of Ceaucescu, an era bathed by their memories in a counterfactual golden light. One by one the other ladies join in, adding their quaking sopranos and contraltos to the hymn-like tune. It is quite pretty and very touching really, and some of the nurses begin to gather in the doorway, just listening. When the women come to the twenty-ninth verse, one that has to do with imploring God's protection against vampire attacks or something, one of the nurses thinks she has noticed something remarkable: on the patient's face, mixing with the usual drool issuing from her mouth, the nurse sees what appears to be a copious flow of tears from Mrs. Crisan's eyes. And good God, her lips are moving too, mouthing the words in DP, not that the nurse has a clue what they mean. Then, one of the Romanian women looks over and sees what the nurse saw. She makes a sharp intake of breath, which the others hear, and then they see it too. On the thirtieth verse, Sosa opens her eyes.

When all the whooping and shrieks of elation at Sosa's return to the living die down, the head nurse, with an unerring instinct for the worst possible moment, marches up to the patient's bed, brandishing a copy of the hospital's bill. One of the Romanian ladies, with a better grasp than Sosa of English, translates the head nurse's tactless dunning. Sosa takes hold of the bill, sees the amount, and says, at first sadly, then with mounting vehemence: "All my life, all I ever want is: go back to Bucharest! I old woman, 86, what?, 87 year old. This one in white here, she say they keep me in hospital for almost eleven month, I sleep whole time, I lie here like dead. Now they wake me up: for what? So I should live what, one, most two year more? In Detroit? For this I should pay? Why they not let me die? Why they not let me die?"

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Earlier on I indicated that I consider this an "easy" case, but it only becomes such on non-contractual principles. My hypothetical variation on the facts of the real case, however, tried to suggest that there is a not implausible argument to be made that someone in the position of Sosa Crisan might well have regarded the implication of a contract with the hospitals on her behalf as a violation of her autonomy, a violation without even the excuse of ambiguous behavior on her part that a factfinder could construe as assent. Even so, this is an easy case because the relative priorities of the values involved are absolutely clear (or about as clear as things ever get): because of the parade of horribles that would ensue if a contrary decision were reached, and because of the unarguably paramount value society places on human life, and because of the extreme likelihood that persons in a position like Sosa Crisan's would in fact consent to pay for such treatment were they able to manifest assent, the law is absolutely justified in ignoring the possibility that their *de facto* wishes might be otherwise. Quoting from the *Restatement of Restitution*, the court explains its reasoning as follows:

> A person who has supplied things or services to another, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if
> (a) he acted unofficiously and with intent to charge therefor, and
> (b) the things or services were necessary to prevent the other from suffering serious bodily harm or pain, and
> (c) the person supplying them had no reason to know that the other would not consent to receiving them, if mentally competent; and
> (d) it was impossible for the other to give consent or, because of extreme youth or mental impairment, the other's consent would have been immaterial.[28]

Intent to contract has no place in this analysis. This is lawmaker's fiat, based on the *lawmaker's* assessment of what is right and proper, just as much as the law that says we must pay income tax to the government, like it or not. Volition has nothing to do with it. The treatment of this problem in contract law, through the fiction of "quasi-contract" or "contract implied in law," is pure antiquarianism. The will here is irrelevant, and necessarily must be.

b. *Elected silence and pregnant silence*

Also relatively unproblematic are those cases in which the parties have jointly agreed to let silence signify what it ordinarily would not, acceptance of an offer. The agreement can be explicit, as with the so-

28. 107 N.W.2d 907, 910 (Mich. 1961) (citing RESTATEMENT OF RESTITUTION § 116 (1937)).

called "negative option" plans[29] under which, *e.g.*, the "Book of the Month Club," by postcard, makes its members an offer of its featured selection for that month, with a member's nonresponse, *i.e.*, silence, agreed in advance to constitute an acceptance of such offers. Alternatively, a virtual agreement to let silence, *i.e.*, lack of overt rejection, constitute acceptance can arise by clear implication from past dealings between the parties in which that had been their practice. For example, in *Hobbs v. Massasoit Whip Co.*,[30] the plaintiff had shipped eelskins to the defendant on a number of occasions without having been requested to do so, but the defendant had regularly paid for them. The defendant now tried to deny liability to pay for a new shipment that was subsequently destroyed after arrival. Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, found that the plaintiff-offeror was warranted in assuming an acceptance from the existence of the usual pattern of silence and retention of the eelskins:

> The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for . . . . [S]ending them [imposed] on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance.[31]

However, the most plausible interpretation of the silence here is as evidence of *actual* intent to accept the offer to sell. But it was an acceptance the offeree understandably now wished to retract, inasmuch as the risk of loss would have been deemed to have passed to it before the destruction of the goods, and hence it would have had an obligation to pay the price of the goods despite their destruction.

Somewhat similar to cases of elected silence are those cases in which, while the parties did not mutually agree on the use of silence as a means of expressing acceptance, the offeree has failed to respond under circumstances which suggest that only a *rejection* of the offer

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29. *See* 16 C.F.R. § 425.1(c)(2) (1991) (indicating that a "subscriber" to a negative option plan has "*agreed* to receive the benefits of, and assume the obligations entailed in membership in any negative option plan") (emphasis added).

30. 33 N.E. 495 (Mass. 1893).

31. *Id.* This position is adopted by the RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(c) (1982) (giving as one of the circumstances in which an offeree's silence and inaction operate as an acceptance "[w]here because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept").

would need to be communicated, and promptly (if at all).[32] Hence there arises a strong negative inference from silence that the offeree has in fact accepted. The offeree has unilaterally elected to remain silent when he might have given an explicit response, under circumstances that endow the non-response with a specific semantic content. One of the typical background circumstances is that there have been prior contacts between offeror and offeree before the transaction complained of, which cumulatively endow the silence with significance. In effect silence has become pregnant with only one possible objective meaning: acceptance. This meaning attaches objectively, whether it was actually intended by the offeree or not, because that is how a reasonable person in the position of the offeror would interpret it. The offeror has an expectation, legitimated by the circumstances, that the offeree will overtly manifest only rejection. This expectation, which the offeree has in some way himself joined in creating, becomes legally privileged and deserving of protection.

Massasoit Whip,[33] was read by Holmes as an instance of this sort of "pregnant" silence: situations where an accepting offeree does not outwardly manifest his actual acceptance, because circumstances indicate he does not need to, will often, not surprisingly, be indistinguishable from those where an offeree not intending to accept is merely slothful or dilatory against the backdrop of the same circumstances.

In *Cole-McIntyre-Norfleet Co. v. Holloway*,[34] a traveling salesman for a grain wholesaler solicits the owner of a country general store to place an order with his company for barrels of meal. The store owner, formally, is required to make an offer to buy from the wholesaler. When the store owner first requests delivery of that meal two months after he places the order, he is told that the wholesaler has rejected his offer, and hence that no contract of sale exists. The wholesaler wants out of the deal, it appears, because the price at which it can sell the meal has risen since the date the order was placed.

In *Kukuska v. Home Mutual Hail-Tornado Insurance Co.*,[35] a farmer applies for coverage, during the height of the summertime hail season, to an insurance company writing crop insurance against hail. In the formal way the deal is structured, the farmer is required to apply to, *i.e.*, to make an offer to purchase coverage from, the insurer, on forms supplied by the latter and accompanied by pre-pay-

32. *See, e.g.*, Ammons v. Wilson & Co., 170 So. 227 (Miss. 1936) (holding that a seller who customarily shipped his product within a week after receiving an order might be found by the jury to have accepted an offer to which he had not replied within twelve days).

33. 33 N.E. at 495.

34. 214 S.W. 817 (Tenn. 1919).

35. 235 N.W. 403 (Wisc. 1931).

ment of the first premium, with coverage (if extended) to be retroactive to the application date. He receives no response from the company for about a month, but then finally receives a notification that his application has been denied. In the afternoon of that same day, a hailstorm severely damages his crops.

In *Cole-McIntyre-Norfleet Co.*, the grain meal case, the court displays a willingness to treat an offeree's silence and inaction as actual acceptance of an offer "where the circumstances surrounding the parties afford a basis from which an inference may be drawn from silence."[36] That is certainly a plausible but not a necessary interpretation. In *Kukuska*, the hail insurance case, the court seems frankly indifferent to the need for analytical precision, offering up instead a grab-bag of competing legal rubrics, among which it declines to choose:

> Does not the very nature of the transaction impose upon the insurer a duty to act? It is considered that there is a duty. If the insurer is under such a duty and fails to perform the duty within a reasonable time and, as a consequence, the applicant sustains damage, it is not vastly important that the legal relationship be placed in a particular category. If we say it is contractual, that is, there is an implied agreement under the circumstances on the part of the insurer to act within a reasonable time, or, having a duty to act, the insurer negligently fails in the performance of that duty, or that the duty springs out of a consensual relationship, and is therefore in the nature of a quasi contractual liability, is not vitally important. Each view finds some support in the cases.[37]

Perhaps the best way of viewing these decisions is that both *Cole-McIntyre-Norfleet Co.* and *Kukuska* are about compensating offerors for injuries sustained in justifiable reliance on the *apparent* objective significance of the offerees' non-response: the store owner might have procured meal and the farmer hail insurance elsewhere, but, because of what they legitimately thought silence meant, they failed to do so and sustained injuries by their inaction. Like Holmes' reading of *Massasoit Whip*, both these cases are thus really about protection of the legitimate expectations of one of the parties about the meaning of silence, derived from the totality of the circumstances in which the si-

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36. 214 S.W. at 818.

37. 235 N.W. at 405 (omitting citations). Many states now, either by statute or decisional law, impose on insurance companies a duty to act without unreasonable delay on applications which its agents have solicited; if they do not fulfill this duty, the applicants may have reason to consider themselves covered, particularly where they have already paid a premium. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. d (1981).

lence occurred. To that extent, these cases are also like *Crisan*, in that some social policy of overarching importance—here: protection of legitimate expectations or justifiable reliance—displaces *actual* intent from the center of the contract-formation analysis, and justifies treatment of the offeree *as if* (but only as if) he had objectively displayed an actual intent to contract.

2. *Trouble Cases*

a. *Passive acceptance of benefits thrust upon one*

A father-in-law gives his son-in-law a two-year subscription to a newspaper.[38] When the initial subscription period lapses, the newspaper continues to be sent without the subscription's ever being renewed. Two bills are sent to the son-in-law, who dutifully pays, but directs the newspaper to stop being sent. The directions to stop are ignored. The son-in-law does not refuse delivery of the newspaper at the post office, but takes it home and presumably reads it. He finally has to move out of state to escape the flood of unordered newspapers. But the newspaper, claiming it is owed money, sues upon the account.

A newly begun office-supply company needs to build up its clientele.[39] It alights upon the unethical technique of having its deliverymen deliver, unordered, quantities of photocopy-machine toner to local businesses, in the belief that the unordered status of the toner will at least sometimes escape detection, hoping that a busy company will just pay. The toner comes with pro-forma invoices, charging a reasonable price. In some cases, the office-supply company's hopes are in fact realized: the toner is received and used without demur. The final invoice is submitted from the office supply company. A bookkeeper at the recipient's offices then discovers that his company never issued a purchase order for the toner.

What does American common law do with these situations? In the case of the unordered newspaper, a Missouri appellate court early in this century made the son-in-law pay. It reasoned:

> [O]ne may not have ordered supplies for his table, or other household necessities, yet if he continue to receive and use them, under circumstances where he had no right to suppose they were a gratuity, he will be held to have agreed, by implication, to pay their value. . . . This was an acceptance and use of the property, and there

38. The facts are those of Austin v. Burge, 137 S.W. 618 (Mo. App. 1911).

39. The outlines of this story were reported to me by a first-year law student in my Contracts course. I do not recall whether the merchandise in question was in fact photocopy-machine toner, but frankly it does not matter.

> being no pretense that a gratuity was intended, an obligation arose to pay for it.[40]

In the case of the unordered photocopy toner, there is good reason to think American law would do likewise if the matter ever came to litigation, given the language of the *Restatement (Second) of Contracts*, section sixty-nine: "An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable."[41]

b. *Elected silence, bis*

In Boston in 1871, two neighbors have a disagreement over their adjoining properties in the then newly-developing neighborhood of the South End.[42] One neighbor, wishing to improve his property, wants to have a party wall built, to sit on the boundary line with his neighbor's plot. Half the wall would be on his property, half on his neighbor's, the costs of erecting the wall to be evenly shared by the two of them. He claims his neighbor expressly agreed to this deal, but his neighbor denies any conversation with him on that subject. The wall-building neighbor, the plaintiff, sues his recalcitrant neighbor, the defendant, for one-half the cost of the wall's erection.

The trial court, sitting with a jury, found for the plaintiff, and was affirmed on appeal by the Supreme Judicial Court of Massachusetts. The Supreme Judicial Court reasoned as follows:

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40. Austin v. Burge, 137 S.W. at 618.

41. RESTATEMENT (SECOND) OF CONTRACTS § 69(2) (1981). This hypothetical purposely has the merchandise delivered in person, rather than through the mails, so as not to bring into play 39 U.S.C.A. § 3009. *See infra* text accompanying note 132. *See also* RESTATEMENT (SECOND) OF CONTRACTS, § 69 cmt. e, illus. 7, 8 (1981):

> 7. A sends B a one-volume edition of Shakespeare with a letter, saying, "If you wish to buy this book send me $6.50 within one week after receipt hereof, otherwise notify me and I will forward postage for return." B examines the book and without replying makes a gift of it to his wife. B owes A $6.50.
>
> 8. The facts being otherwise as stated in Illustration 7, B examines the book and without replying carefully lays it on a shelf to await A's messenger. There is no contract. *Id.* The Reporter's Note to this section says: "Modern consumer protection statutes have greatly restricted the power of an offeror of unsolicited merchandise to create an obligation in the recipient. Under such statutes the merchandise may be deemed a gift and the practice may be forbidden and enjoinable." *Id.* at § 69 reporter's note cmt. e (1981) (citations omitted). The inference to be drawn from this is that, absent such statutes, it is still good common law that contracts can be formed in the manner described in Illustration 7. *See id.* illus. 7. The text of some of the statutes referred to in the Reporter's Note can be found in Part IV of this Article. *See infra* text accompanying notes 131-33.

42. The facts are those of Day v. Caton, 119 Mass. 513 (1876).

> [W]hen one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.[43]

The court indicates that it could not give a universally valid answer to the question of whether silence could indicate consent, suggesting that only "[t]he circumstances of each case" could make that clear. Examples of such circumstances would be the extent of the defendant's knowledge of what was going on, and the ease with which he could have broken his silence:

> If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made.[44]

As another example, the *Restatement* hypothesizes the following case:

> A gives several lessons on the violin to B's child, intending to give the child a course of twenty lessons, and to charge B the price. B never requested A to give this instruction but silently allows the lessons to be continued to their end, having reason to know A's intention. B is bound to pay the price of the course.[45]

The comment immediately preceding this illustration is as follows:

> [W]hen the recipient knows or has reason to know that the services are being rendered with an expectation of compensation, and by a

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43. *Id.* at 515.

44. *Id.* at 516.

45. RESTATEMENT (SECOND) OF CONTRACTS § 69, illus. 1 (1981). This was also the first illustration of the predecessor section to section 69 in the first Restatement. I was unable to determine whether this illustration was based on a decided case.

> word could prevent the mistake, his privilege of inaction gives way; under Subsection 1 (a) [of section 69] he is held to an acceptance if he fails to speak. The resulting duty is not merely a duty to pay fair value, but a duty to pay or perform according to the terms of the offer.[46]

The trouble cases and their treatment in American law are discussed in part IV *infra*.

III. In Another Country

O wad some power the giftie gie us,
To see oursels as others see us!
It wad frae monie a blunder free us,
An' foolish notion.[47]

Among its virtues, comparative law is the best specific for legal provincialism. Oddly enough, this is most especially true when the legal systems to which one looks for comparison are those of countries with which we share much in the way of history, culture and general level of economic development. Our differences from Uighurs and Uzbeks make for arresting stories; our differences with congeners give us real pause. One obvious way of gaining some perspective on the problem of the do-nothing offeree should be to look at its treatment elsewhere. I propose now to do that, using as my sample countries three European Civil-Law nations: France, Germany and Spain.[48]

A. France

1. General Rejection of Silence as a Basis for Contract

One French scholar who in recent years has made a careful study of the problem of the do-nothing offeree under French law is Joanna Schmidt-Szalewski, in her two books *Négociation et Conclusion des Contrats*[49] (1982) and *Droit des Contrats*[50] (1989). In the earlier book, Schmidt-Szalewski sums up the findings of her research as follows:[51]

> May the fact of not responding to an offer count as acceptance? Although the Civil Code does not give a direct answer to this question, positive law [*le droit positif*] does not, in principle, accord any effect to silence.

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46. *Id.* at § 69 cmt. b.

47. R. Burns, *To a Louse*, stanza 8 (1786).

48. More detailed comparative information on this topic can be found in Formation of Contracts—A Study of the Common Core of Legal Systems (Rudolf B. Schlesinger ed., 1968).

49. Translation: "Negotiation and Formation of Contracts." The French scholar's surname at the time was simply Schmidt.

50. Translation: "Contract Law."

51. All translations in this portion of the article are the author's own.

> To admit that acceptance might result from an absence of a manifestation of the will would risk leading to the creation of an obligation against the will of the party obligated, since silence has an equivocal significance. The principle under which silence does not count as an acceptance is unanimously recognized by legal scholarship [*la doctrine*].[52]

The best-known case in which the Court of Cassation, France's highest court for ordinary civil and criminal matters, enunciated the basic principle that silence may generally not equal consent is *Guilloux c. Société des raffineries nantaises et faillite Robin et Comp.* (characterized by Schmidt-Szaleweski as an *arrêt de principe*, an important upper-court decision on a matter of principle).[53] In this case arising in the mid-1860's, M. Guilloux had apparently been engaged in negotiations with a view towards acquiring shares of a refining company based in the French industrial city of Nantes. This stock offering was being underwritten by the banking house Robin & Co., which subsequently itself went bankrupt. At some point Guilloux received a letter from Robin & Co. stating that it had debited his account for the amount of 2500 francs, representing the first installment payment for twenty shares of the Nantes refinery to which it said he had subscribed. Guilloux had never expressly committed himself to subscribing to any shares, and he did not reply to the letter. Subsequently, the refinery sued Guilloux for overdue installment payments, totalling 7500 francs, towards the subscription price of his twenty shares. The commercial court of first instance held for Guilloux, finding that it had not been established that he had ever subscribed to any shares. On appeal, however, the intermediate appellate court held that Guilloux's failure to respond to the letter had to be regarded as an acceptance of the transaction. But finally the Court of Cassation, in its turn, announced, in the characteristically terse manner of French appellate decisions, that "whereas, in law, the silence of him whom one asserts [to be] obligated cannot, in the absence of any other circumstances, suffice to constitute proof against him of the obligation alleged," it would therefore quash the judgment of the appellate court.[54]

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52. JOANNA SCHMIDT, NÉGOCIATION ET CONCLUSION DES CONTRATS 84 (1982) (omitting citations).

53. Judgment of May 25, 1870, Cass. civ. 1re, 1870 Recueil Periodique et Critique [D.P.] I 257, *reprinted in* HENRI CAPITANT, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE 323 (A. Weil et al. eds., 8th ed. 1984). In the text, I shall refer to the case in the common-law style as *Guilloux*. Subsequent citation will be made to the Capitant reprint.

54. *Id.* at 324. For an explanation of the Court of Cassation's power at that time only to "quash" lower-court judgments rather than reverse them, see RUDOLPH B. SCHLESINGER ET AL., COMPARATIVE LAW 464-65 (5th ed. 1988).

Following the principle expressed in *Guilloux*, courts have held that an offeror may not unilaterally impose on the offeree an obligation to respond, by indicating that silence will be regarded as an acceptance of the offer.[55] Indeed, on facts substantially similar to the American case of *Austin v. Burge*,[56] the "newspaper subscription" case, a number of French courts have reached exactly the opposite conclusion, holding that the silence of a newspaper recipient who continues to receive copies of the newspaper after the subscription has run out does not constitute acceptance, even though the wrapping on the newspaper bore a legend which said that the subscription would be continued absent contrary instructions from the addressee.[57] The sending of unordered merchandise can constitute the criminal offense of "forced sale."[58]

2. *Silence as Acceptance: the Exception Cases*

a. *Statutorily significant silence*

As might have been predicted, much attention has been devoted, since the *Guilloux* decision, to an examination of those "other circumstances" which would lead to silence's being treated as an acceptance. The clearest cases are, of course, those where statute expressly deems silence to be an acceptance: for example, the failure by an insurer (other than a life insurance company) to respond within ten days to an insured's letter proposing an extension or amendment of his coverage is deemed to be an acceptance of that proposal.[59] Similarly, the lessor of commercial premises who fails to respond within three months to an existing lessee's proposal to renew the lease is deemed to have accepted the renewal.[60] Finally, if a new owner of real property proposes to existing mortgagees and lienholders a satisfaction of the outstanding encumbrances thereon and they do not reject it within forty days, the creditors are, once again, deemed to have accepted the proposal.[61]

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55. SCHMIDT, *supra* note 52, at 85 & n.53.

56. *See supra* note 38.

57. SCHMIDT, *supra* note 52, at 87 & n.61.

58. *Id.* at 85.

59. *Id.* (quoting French CODE DES ASSURANCES art. L. 112-2, al. 2). Compare this statutory duty of prompt reply to existing policyholders with the even broader case law duty imposed by Kukuska v. Home Mutual Hail Insurance Co., 235 N.W. 403 (Wisc. 1931), where the plaintiff would apparently have been a new policyholder. *See supra* text accompanying notes 35-37.

60. SCHMIDT, *supra* note 52, at 85 (citing D. 30 Sept. 1953, art. 6).

61. *Id.* (citing Code Civil [C. CIV.] art. 2186 (Fr.)). Sometimes, however, a statute takes the opposite tack, and treats silence for a defined period of time as a rejection of an offer, as in the legislation dealing with rights of pre-emption for rural property. *Id.* (citing Code Rural art. 796 (Fr.)).

b. *Pregnant silence: known custom and prior dealings*

Apart from statutes, scholarship and case law [*jurisprudence*] have evolved a number of principles for identifying when silence may equal acceptance. One such principle is that silence is an acceptance where commercial custom invests it with that meaning. Put another way, a prevailing commercial custom that silence may be treated as acceptance of an offer creates a legitimate expectation that meaning will attach in any individual dealing with a merchant.

Following this principle, the Court of Cassation found a broker on the Paris *bourse* to have accepted a client's order because the broker failed to respond within twenty-four hours of receiving the client's order confirmation advice, given the prevailing custom to that effect which the broker, as a professional, knew or ought to have known.[62] Similarly, some professionals (particularly those exercising a state-protected monopoly function) will be held to have accepted offers from those seeking to employ their services if they fail to respond to such offers.[63] The commercial tribunals have thus far apparently been unwilling, however, to make this a general rule applicable to all businessmen and professionals.[64]

Another type of situation in which silence has been found to constitute acceptance is one where prior dealings exist between offeror and offeree which justify the former in presuming acceptance, absent express rejection. This is especially true where earlier contracts have been entered into without any express acceptance by the offeree,[65] as had happened in the American case of *Hobbs v. Massasoit Whip Co.*, discussed earlier.[66]

Both the "prior dealings" and "known custom" rationalia can be considered particular instances of the social policy of protecting legitimate expectations that arise from past behavior, either of a defendant-offeree himself or of the identifiable community within which he operates. This policy naturally must override the contract-law policy of effectuating the coincident actual intentions of autonomous individuals.

c. *Elected silence or social policy?*

A recent decision by the Court of Cassation explicitly endorsed a holding of contractual liability against a do-nothing offeree in what it

62. *Id.* at 86 (citing Judgment of Jan. 9, 1956, Cass. civ. comm., 1956 BULL. CIV. III, No. 11).

63. *Id.* (citing decisions of the Court of Cassation).

64. *Id.*

65. *Id.*

66. *See supra* text accompanying notes 30-31.

read as another obvious exception situation, *viz.*, where the parties to negotiations expressly indicate that the offeree's silence or inaction should be treated as an acceptance, the situation I have called "elected silence." In that 1988 case, *Maillard c. Czernik*,[67] the Court of Cassation found an offeree's non-response to constitute acceptance of an offer, on facts it interpreted as showing that the parties had assigned the meaning "acceptance" to the offeree's silence. The facts, however, can also plausibly be read as presenting a situation in which an offeror's reliance on the *apparent* significance of the offeree's silence was both justified and deserving of protection, irrespective of whether there was a *de facto* agreement to let silence signify acceptance or not.[68] As I will argue below,[69] this may be a case where the court is again effectuating overriding social policy considerations, while embracing the centrality of, and appearing to respect, the intent of the parties.

In *Maillard c. Czernik*, the Czerniks offered the Maillards an option to buy a fairground attraction. The deal proposed was that if both sides could not agree on a price within eighteen months, the price was to be set by an arbitrator. If the Maillards made a price offer at some point during the next eighteen months—which would signify their acceptance of the option deal proposed[70]—the Czerniks reserved the right to accept or reject the bid within two weeks of its receipt. Upon notification of rejection of the price bid, it was the Maillards' responsibility to lay the matter before an arbitrator within a further two-week period. If they failed to do so, the Czerniks would be discharged from their obligations to sell the property. Thus, although the Czerniks were offerors of the overall deal, they were to be the offerees of any price bid by the Maillards.

On January 5, 1982, the Maillards informed the Czerniks that they were exercising their purchase option, proposing an amount of

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67. Judgment of Jan. 12, 1988, Cass. civ. 1re, 1988 BULL. CIV. I 6 [hereinafter *Maillard*].

68. *See infra* text accompanying notes 115-22.

69. *See infra* text accompanying notes 73, 124.

70. E. Allan Farnsworth describes this sort of agreement in American law as "an agreement with open terms," in which the parties agree to continue negotiating in good faith on the open terms, but failing agreement, the deal is still to go forward, with a court (or other third party) to fill in the contractual blanks. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 253 (1987). He distinguishes this from the "agreement to negotiate," where, if the open terms are not subsequently agreed upon between the parties, the deal falls apart. *Id.* at 263. Hence, in Farnsworth's terminology, the Czerniks were making an offer to enter into an agreement with open terms. The French court conceptualizes the Czerniks' action rather as the giving of an option, and speaks of the price bid by the Maillards as "the exercise of an option by naming a specific figure" (*levée d'option chiffrée*). *Maillard*, 1988 BULL. CIV. I at 7. This conceptual difference, however, is irrelevant for present purposes.

100,000 francs as the price. On February 11, *more* than two weeks after receipt of the Maillards' price proposal, the Czerniks notified the Maillards of their purported rejection of the offered price, and of their (the Czerniks') intention to lay the matter before an arbitrator. The Maillards then brought suit, claiming that a sale had been consummated.

The Court of Cassation affirmed a judgment of the Court of Appeals, the intermediate appellate court, for the Maillards. The latter court had indeed given due regard to the principle enunciated in the *Guilloux* case, wrote Cassation, but its "assessment, in the exercise of its sound discretion (appréciation souveraine), of the facts of the case and the intention of the parties" led the Court of Appeals to conclude that the Czerniks, "by imposing on themselves a time period within which to accept or reject the price offered by M. and Mme Maillard, had obligated themselves to give an express manifestation of their rejection (*désaccord*) if the price did not suit them, and that the silence they maintained during that period counted as an acceptance of the price."[71]

The phraseology employed by the Court of Cassation to describe the intermediate appellate court's treatment of the facts, *appréciation souveraine*, indicates that the Court of Appeals engaged in a full *de novo* reconsideration of the facts of the case, which may also have included the taking of new evidence not presented to the court of first instance.[72] Hence, it may well be that there is additional evidence, not reflected in the cursory recapitulation by the Court of Cassation, which more clearly reveals the parties to have explicitly assigned the meaning "acceptance" to the Czerniks' non-response to a price bid. However, given the facts reported, it is not absolutely clear that such was the explicitly manifested intention of the parties: the language employed in the opinion to describe the Czerniks' argument on appeal, which is likely to echo the language used in the option document itself, is that M. Czernik "was reserving to himself whether to *accept* or refuse [the attempted exercise of the option] within two weeks of [receipt of] same."[73] This phrasing, on its face and without more, suggests nothing about the meaning of silence. If the language, standing alone, were to mean what the Court thought (*viz.*, that silence equalled acceptance), one would have expected the document to read instead "reserving to himself whether to refuse . . . ."

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71. *Maillard*, 1988 BULL. CIV. I at 7.

72. On the powers of intermediate appellate courts to review the factual record *de novo* and to take new evidence itself without remand, see SCHLESINGER, *supra* note 54, at 457.

73. *Maillard*, 1988 BULL. CIV. I at 7 (emphasis added).

A more plausible reading of the reported facts is that silence was given the meaning "acceptance" not at the conscious election of the parties, but rather as the result of a retroactive and tacit policy decision by the court that the surrounding facts and circumstances justified the treatment of the language as if it had borne that meaning *ab initio*. What is implicated on these facts is not so much the social policy underlying classical contract thinking, the effectuation of express agreements of autonomous parties as, rather, the social policy of protecting the justified[74] *reliance* of a contract negotiator on the *apparent objective implications* of the behavior of his opposite number, in light of the setting in which that behavior occurred, even if the party now being held liable *intended* no such meaning to attach. For one obvious way the deal in *Maillard* might be construed was that the buyers were supposed to invoke the services of an arbitrator, *if at all*, within thirty days of their submission of a bid, apparently on pain of losing all rights in the property. Hence, when the first two weeks elapsed without the owners' communication of their rejection—the event which alone would trigger the Maillards' recourse to arbitration that needed to occur, if at all, within the short additional time span permitted—the contractually contemplated timing and sequence of events would have made it practically or literally impossible for the Maillards to exercise their contractual right to invoke the services of an arbitrator if the Czerniks were to be permitted to say they were rejecting the bid once the first two-week period was over. Even if he really was planning to reject the bid, M. Czernik's silence throughout the two-week period in turn brought about the Maillards' inaction, their failure to invoke the arbitrator within the prescribed period, arguably the one requisite for preserving their rights to have the ownership of the property ultimately transferred to them. The assumption that there could be a rejection by the Czerniks after the first two weeks had elapsed was simply inconsistent with a real recognition of the contractual rights the Maillards were supposed to have. The Maillards' forbearance, their failure to go to arbitration in reliance on the apparent practical significance of the Czerniks' silence, might well be deemed to constitute a relinquishment of their contractual rights over the future disposition of the property, rights they had acquired by making the initial bid in the first place.

While leading to the same outcome, this reading of the facts of *Maillard* identifies, perhaps with greater precision, the appropriate basis on which to rest the decision: reasons of overriding social policy

74. The key question in such cases is always whether the reliance was justified. *See* discussion *infra* part IV.

rather than contract. It is worth emphasizing that the policy of protecting legitimate expectations, although at times an appropriate basis for finding contractual liability to exist, is conceptually quite distinct from the core voluntaristic idea behind classical "Contract." Whether or not it is taught in the course called Contracts, the protection of action or forbearance in justified reliance on a legitimate expectation is rather more like a species of tort liability, in that the offeree had a duty to behave in accordance with a particular expectation of the offeror, but did not. But even if the rationale for the decision in the *Maillard* case might better have been articulated as a protection of the plaintiffs' reliance, the rationale that was actually employed shows that the will of the parties is clearly central to French thinking about the problem of the do-nothing offeree. Before foisting contractual liability on a silent and inactive party, French jurisprudence appears to want a clear indication that the parties' intent was to let silence and inaction signify acceptance. In the absence of some other policy of a higher order (*e.g.*, those embodied in statutes, protection of legitimate expectations), this is obviously sound. Indeed the temptation, yielded to by the Court of Cassation in *Maillard*, to misidentify the basis for non-contractual decisions as contractual, is in itself highly significant.[75]

B. Germany

1. General Rejection of Silence as a Basis for Contract

The treatment of the problem of the do-nothing offeree is not substantially different under German law from that under French, even if there are naturally differences in the details:

> In transactions governed by the civil [*i.e.*, non-commercial] law, silence does not in principle have any declarative significance; with regard to offers to contract or other legal dealings, silence therefore signifies rejection. On an exceptional basis, silence may provide grounds for liability in damages if a justified reliance on the expected conclusion of a contract (which is, in general, not deserving of protection) is disappointed[.][76]
>
> In commerce, there is a particularly strong need for prompt clarification of the factual and legal status [of matters]. Every uncertainty in business transactions acts as a hindrance. An

75. *See infra* text accompanying notes 120-24.

76. VOLKER EMMERICH ET AL., HEYMANNS HANDELSGESETZBUCH [hereinafter HEYMANN] 50 (1990).

> uncertain state of affairs is particularly likely to result when a party who gets an offer *remains silent*. Even in commercial transactions one proceeds from the assumption that silence is not in principle to be regarded as *assent*. There also exists no general commercial custom whereby mere silence is to be interpreted as assent. It is only correct [to say] that mere silence may be ascribed the legal significance of an assent more often in mercantile life than elsewhere. Here, however, one must distinguish [situations where] a genuine *manifestation of [the offeree's] intent* [*eine echte Willenserklärung*] is present from situations where a manifestation of intent is lacking, yet the party who has kept silent must have his silence count against him as assent by virtue of a legal fiction or with a view towards protecting reliance by third parties.[77]

Following this fundamental principle, scholarship indicates that there is no general duty to make an explicit rejection of a contractual offer.[78] The Reichsgericht, the pre-war German Supreme Court, found that no one had a duty to respond to the offer to sell which accompanies unordered merchandise.[79] Similarly, silence after receipt of an invoice does not signify acceptance when no contract as yet exists.[80]

2. *Silence as Acceptance: the Exception Cases*

a. *Statutorily significant silence*

As in France, German statutory law at times expressly deems silence, in certain narrowly defined circumstances, to have the meaning of an acceptance. Under the Civil Code, for example, if a mortgagor sells mortgaged real property to a buyer who contractually agrees to assume the mortgage debt and the mortgagor communicates this fact to the mortgagee, the latter's non-response to the communication within six months is deemed to be an approval of the debt assumption.[81] Silence by buyers of items bought "on approval" is deemed to be an approval.[82] Under the Commercial Code, if a commercial clerk

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77. ERNEST GESSLER ET AL., SCHLEGELBERGERS HANDELSGESETZBUCH 345 (5th ed. 1976) (emphasis in original and omitting citations) [hereinafter SCHLEGELBERGER]; *see also* HEYMANN, *supra* note 76, at 248 ("Commercial Code sec. 362 constitutes an exception to the principle that even in commercial dealings a contract fundamentally comes into being only through offer and acceptance . . . and the silence of the offeree prevents a contract [from coming into existence] for lack of acceptance, since even in commercial dealings silence in reply to any offer fundamentally signifies its rejection.") (omitting cross-references and citations).

78. HEYMANN, *supra* note 76, at 52.

79. Judgment of May 11, 1901, Reichsgericht, 48 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 175.

80. HEYMANN, *supra* note 76, at 53.

81. BÜRGERLICHES GESETZBUCH [BGB] 416(1).

82. *Id.* at 496.

or a business agent enters into a transaction on behalf of his principal for which he lacks actual authority, the principal is deemed to have ratified the transaction if he does not disavow it immediately upon learning of its existence and substance.[83] If a broker sells below or buys above the price set by his client, the latter, if he wishes to reject the transaction for his account, must do so immediately upon receiving notification of the execution of the transaction.[84]

Perhaps the most telling exception to the general principle that silence cannot constitute acceptance of an offer is found in section 362 of the Commercial Code:

> If a merchant the practice of whose business entails the handling of matters [*die Besorgung von Geschäften*] for others receives an offer for the handling of such matters from one with whom he has a business connection, he is obligated to reply without delay; his silence is deemed an acceptance of the offer. The same is true when a merchant receives an offer concerning the handling of matters from one to whom he has proposed himself for handling such matters.[85]

The exceptional nature of this instance of do-nothing contractual formation[86] is underlined by contrasting this provision of the Commercial Code, the specialized body of law (*lex specialis*) applicable to those having merchant status, with the parallel provision of the general Civil Code (*lex generalis*):

> One who holds a public appointment, or has publicly offered, to [act as agent] for handling matters of a particular kind is obligated, should he not accept an order concerning such matters, to give immediate notice of his rejection to the party placing the order. The

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83. HANDELSGESETZBUCH [HGB] 75h, 91a.

84. HGB 386(1). Again as in France, statute too sometimes assigns silence the explicit meaning of rejection. For example, if a debtor and a third party contract for the latter to assume the former's debt and either one communicates this to the creditor (whose approval is a prerequisite to the legal effectiveness of the contract), the creditor's failure to respond within the period set in the communication is deemed to be a refusal to approve the assumption of the debt. BGB 415(2). The contract of a minor has legal effect only upon approval of parent or guardian; if the latter fails to give approval within two weeks of being asked to do so, approval is deemed to have been refused. BGB 108(2). If the party on behalf of whom an unauthorized agent entered into a transaction is requested to ratify it but fails to do so within two weeks of the request, he is deemed to have refused ratification. BGB 177(2).

85. HGB 362(1).

86. HEYMANN, *supra* note 76, at 249 ("The expansion of the rule to non-merchants who participate in commerce like merchants is to be rejected on fundamental considerations and on account of the exceptional character of the rule."); SCHLEGELBERGER, *supra* note 77, at 347 (characterizing HGB 362 as a "exceptional rule" [*Sondervorschrift*] and criticizing legal writer who proposed an analogical extension of HGB 362 to non-merchants).

> same is true if one has proposed himself for the handling of particular matters to the party placing the order.[87]

The key difference between the two provisions is the respective consequences of silence. Merchants are held to have contracted, and are accordingly liable for expectation damages in the event of non-performance.[88] The silence of non-merchants, to whom the Civil Code provision applies, is not without its actionable aftermath; but significantly, it leads not to contract but only to liability for reliance damages.[89]

This conceptual and remedial dichotomy highlights the usual policy of protecting ordinary "civilians" from the imposition of unwanted contractual liability, requiring an objectively clear expression of intent to be bound, a so-called "declaration of will" [*Willenserklärung*], to use the German term of art. It also reveals a willingness, though only a partial willingness, to relax this protective policy in the interests of expediting commercial transactions and protecting the legitimate expectations raised by the status and past behavior of merchants. This relaxation of the normally protective policy is especially well warranted inasmuch as professional businessmen, who are deemed better able *ex officio* to protect their own interests, may appropriately be held, by virtue of their status, to a more onerous duty of expressly manifesting rejection rather than acceptance. Yet, even then, this duty only exists in fairly narrow circumstances: the duty to reject, on pain of contract formation, does not apply, for example, to offers merely to buy or sell goods, or to situations where there is neither a continuing business relationship between the parties nor a past solicitation of an offer by the merchant-offeree.[90]

But it is perhaps the clearest indication of the analytic maturity of German legal thinking in this area that it does not contort itself trying to force the facts to fit into a voluntarist pattern; instead, it frankly recognizes that the obligation raised has nothing to do with the actual will of the offeree, being instead an *Erklärungsfiktion*,[91] a *fictitious* manifestation of intent at the service of policies rooted in non-contractual concerns. Nonetheless, almost equally revealing is that German scholarship still feels compelled to label it a fictitious declaration

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87. BGB 663.

88. HEYMANN, *supra* note 76, at 251.

89. *Id.* at 248; *see also* 3 KURT REBMANN & FRANZ-JÜERGEN SÄCKER, MÜENCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH pt. 2, at 47 (P. Ulmer 1980) (indicating that consequence of non-merchant's silence is liability for reliance damages).

90. HEYMANN, *supra* note 76, at 249-50.

91. *Id.* at 248.

of will, highlighting the ordinary centrality of actual subjective intent in contract formation under German law.

b. *Pregnant silence: known custom and prior dealings*

Again like French law, German law accepts the principle that commercial custom can invest silence with the meaning "acceptance," an objective semantic content it would not otherwise have. Because of the particular circumstances involved, silence in such cases either is indeed a genuine "declaration of will," or, given the notoriety of the custom, provides a compelling justification for protecting the legitimate expectations of one of the parties. The overarching principle which legitimates such an interpretation is expressed in section 346 of the Commercial Code:

> Between merchants, regard is to be had to the customs and usages prevailing in commercial dealings when considering the meaning and effect of actions and omissions.

Hence, in an important decision in 1980, the *Bundesgerichthof*, the West German Supreme Court having jurisdiction over ordinary civil matters, found that the purchaser of an automobile "silently accepts" the "offer" of a warranty against defects in material or workmanship that the manufacturer makes through its dealer, "since an express answer was obviously not expected."[92] On the other hand, the high court found no such customary understanding of silence when a bank receives for discounting a draft drawn upon one of its clients' debtors:

> On the appellate court's interpretation, since the draft was handed over the counter at branch P of plaintiff[-bank], the plaintiff's teller entered into a discounting contract by a silent acceptance of [the drawer-payee's] offer to contract. . . . The appellate court ignored the respective interests of bank and client in a discounting transaction as well as the bank practice that results therefrom. A bank which discounts a draft thereby assumes the risk that the amounts demanded therein will prove unrecoverable. Thus it will generally check the validity of the draft and the solvency of the debtor prior to accepting the offer to enter into a discounting agreement.[93]

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92. Judgment of Nov. 12, 1980, BGH Ver. Gr. Sen., 3 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 369, 372-73 (F.R.G.).

93. Judgment of Sept. 19, 1984, Bundesgerichtshof, 2nd Senat, 1985, *Neue Juristische Wochenschrift* [NJW] 196.

Neither does the mere cashing of a life insurance applicant's check, remitted without request in payment of the first month's premium, indicate the life insurance company's acceptance of a contractual obligation to insure that risk, in light of the established custom whereby life insurers have virtually always provided an express (and generally written) indication of their acceptance of the proposed coverage.[94]

Similarly, if the parties in their past dealings with one another have previously contracted without overtly manifesting acceptances of offers, silence or inaction may be deemed an acceptance.[95]

c. *Elected silence*

Finally, German law also accepts the relatively noncontroversial idea that the parties, by explicit agreement to this effect, may have accorded to silence the meaning of acceptance.[96]

C. Spain

1. General Rejection of Silence as a Basis of Contract

In Spanish law, one finds the same basic mixture of generic rejection of silence as a basis for contractual liability coupled with a willingness to find such liability when it comes accompanied by particular circumstances:

> If we have seen that not only must a personal and inward intention of contracting be present but also that it must manifest itself and be able to be recognized, a negative answer will apparently have to be given to the problem of whether silence may serve to make such manifestation. It is true that silence, considered in the abstract, conveys nothing; but without a doubt it will suffice for it to be present on particular facts, where the normal thing would be not to keep silent, for us to realize that no clear-cut answer can be given one way or the other.
>
> When they treat the same problem under our law, Pérez and Alguer state that no categorical assertion can be made about the effect of silence apart from the few cases in which statute law expressly sanctions it . . . and they add that "we have no hesitation about denying any effect to silence in those cases where the offeror hastens to assign it a value and gives himself his own reply by

94. Judgment of Oct. 1, 1976, Bundesgerichtshof, 4th Senat, 1976 NJW 289.
95. HEYMANN, *supra* note 76, at 52.
96. *Id.* at 51-52.

establishing in advance that he will consider silence an acceptance . . . since no one can unilaterally impose on another the duty of responding."[97]

One commentator writes in a similar vein about the same question in a treatise on Commercial Law:

Declarations of will can be express or tacit and direct or indirect. The former are given external expression [*se exteriorizan*] by words or actions suitable for manifesting a determinate intent. The latter are externalized by words or actions from which a determinate intent may be deduced, even though those actions or words are not suitable for manifesting it directly. When one speaks of the value of silence in Commercial Law, what is disputed is not the possibility that in business dealings an intent to contract [*la voluntad contractual*] may be expressed in either of these ways: either by suitable words (express consent) or by conclusive actions (tacit consent). What is disputed is whether pure silence, that is to say, the merely passive attitude of him who employs neither words, nor a writing, nor signs, nor conclusive actions, may count in some cases as contractual consent.

May one who receives an offer become obligated though he says nothing (in words written or oral) and does nothing (through deeds which conclusively evince a determinate intent)? The answer presents no doubt; if in order for there to be a contract there must be intent, manifested or recognizable through positive acts, silence, which neither manifests nor permits any [intent] to be recognized, may not equal consent.[98]

2. *Silence as Acceptance: the Exception Cases*

a. *Statutorily significant silence*

As in France and Germany, statute occasionally assigns silence a specific meaning. For example, the silence of the spouse of a merchant may be treated as an implied authorization of the latter's business activity, which has the effect of subjecting the couple's community property to the claims of creditors of the business.[99] A broker who receives a client's order and neither accepts nor rejects it is liable to the client for damages.[100] On the other hand, if a dissident shareholder who has voted against a corporate reorganization or merger does not indicate his willingness to acquiesce in the agreement

97. JOSE PUIG-BRUTAU, FUNDAMENTOS DE DERECHO CIVIL pt. 1, at 61-62 (1978).

98. JOAQUIN GARRIGUES, CURSO DE DERECHO MERCANTIL 18-19 (F. Sánchez Calero 8th ed. 1983).

99. C. COM. arts. 7, 8.

100. *Id.* at art. 248.

within a period of one month, he is effectively frozen out of the corporation; those who did not participate in the vote have three months to respond or be frozen out.[101]

b. *Pregnant silence: known custom and prior dealings*

The most detailed authoritative statement on this subject was given in a much-cited 1943 decision of the Tribunal Supremo, the Spanish Supreme Court:

> The delicate and much discussed problem of the legal value of abstentions has to be examined with great care, since in principle silence, by its very nature the absence of an act [*hecho negativo*], cannot be considered as expressive of any intent; and if modern scientific legal theory [*doctrina*] indeed generally admits that in some cases silence is susceptible of being interpreted as assent and, therefore, a manifestation of the will, proceeding in this regard from the simple idea that silence may serve as a proof or a presumption of intent, or basing that conclusion on the thesis that silence can be a source of liability which substitutes for intent, whenever the practical necessities hallowed by usage impose [the obligation] of responding to certain persons (especially if one has had relations with them followed by transactions), and if one does not do so, prolonged silence equals a fault which may be regarded as needing to be rectified by treating him who kept silent as if he had accepted, it is in any event necessary that we keep in mind: 1. that legal theory in this area has not yet come to lay down any generally accepted formulas, sufficiently certain and precise, that have their due counterpart in positive law; and 2. that if we accept, given the widespread diffusion it has had and continues to have, the former view that silence counts as a declaration when, given a determinate relation between two persons, the usual manner of proceeding implies the duty to speak, since if one who can and ought to speak does not do so he must be deemed as consenting on principles of good faith *(qui siluit quum loqui et debuit et potuit, consentire videtur)*, it will be necessary for the following two conditions both to be present in order to regard silence as an expression of consent: one, that he who is silent "is able to contradict," which presupposes above all that he has knowledge of the facts which would underlie the possibility of protest (*subjective* element); and the other, that he who is silent "had an obligation to answer," or at least it would have been natural and

101. LEY SOBRE LAS SOCIEDADES ANÓNIMAS arts. 135, 144.

> normal for him to manifest his dissent if he did not wish to approve the actions or proposals of the other party (objective element).[102]

The recognition of an occasional duty to speak, of course, is but another way of saying that the law will protect one party's legitimate expectations, which in this case were viewed as arising from "a determinate relation between two persons," "the usual manner of proceeding" and the "natural and normal," all of which imply a mutually understood social matrix which gives rise to those expectations. Such expectations can naturally arise, as in French and German law, from the past dealings of the parties with one another, alluded to in the Spanish passage quoted, as well as from a more generalized commercial custom.

A more recent decision by the Tribunal Supremo[103] found a duty to speak on facts which bear a certain surface similarity to the facts of *Day v. Caton*, the "party wall" case, discussed earlier.[104] A certain Don José María, the defendant, had contracted to have repair work done on his boat. That work was performed in accordance with the terms of the contract. But the company which performed the contractually agreed work also performed certain other items of work not included in the contract, for which the defendant now refused to pay. In affirming a holding that he was obligated to pay the amount assessed by the lower court, the Tribunal Supremo noted that the lower court had based its holding on a finding that:

> since the defendant every day personally observed the performance of the boat repairs throughout the whole time they lasted, without raising any objection to the carrying out of such work and modifications, this implies a tacit acceptance as to the performance of those [items] not within the plans, corroborated by his accepting without demur the work performed, which presupposes an obvious knowledge of the carrying out of all the work done.[105]

In what follows,[106] I shall discuss the key distinctions between this "Boat Repair" case and *Day v. Caton* that lead to a conclusion that the Spanish case is more likely to have been rightly decided than the Massachusetts one.

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102. Judgment of Nov. 24, 1943, Tribunal Supremo, Repertorio Aranzadi de Jurisprudencia [R.A.J.] 1292 (Spain); *see also* 1 J. CASTAN TOBEÑAS, DERECHO CIVIL ESPAÑOL, COMUN Y FORAL pt.2, 753-54 (J.L. de los Mozos. 14th ed. 1984).

103. Judgment of Nov. 25, 1966, 4966 R.A.J. at 3183.

104. *See supra* text accompanying notes 42-44.

105. *See* Judgment of Nov. 25, 1966, 4966 R.A.J. at 3183.

106. *See infra* text accompanying notes 138-40.

c. *Elected silence*

Like its European neighbors, Spain accepts the idea that parties can explicitly assign silence the meaning of acceptance.[107]

IV. Fairness and Autonomy
Europa, du hast es besser . . .

A. Comments

The cases in which do-nothing offerees are held to contractual liability oscillate between two poles of dispositive principle. One is classical contract law's foundational principle of volition, or autonomy; the other is what might loosely be called social policy, manifesting itself in a variety of specifics but centering around the key idea of fairness. This is true of all four of the legal systems under discussion.

Contract is the regime of "private" law in its most literal sense: the law that the parties make for themselves. But in the real world, of course, no parties ever contract in a vacuum. Rather, they do so in the context of a wider society on whose enforcement mechanisms they rely and to whose assessments of propriety and policy they have no choice but to submit. Consequently, autonomy can only ever be a default principle: acts of private will are suffered to govern personal dealings only insofar as the public will, expressed through some organ of government, has not deemed otherwise. The public will otherwise typically grounds itself in intuitions of situational fairness.

To say this, of course, need not be to say that society attaches no affirmative social value to private ordering. While a Marxist society and its legal system might well embrace such a devaluation, the whole ideology of advanced capitalism, expressed through its legal superstructure, is very much to the contrary. Yet even capitalist societies have a hierarchy of values in which private ordering is not always at the pinnacle. However dimly intuited its sources and imprecise its articulation, the major thrust of this ranking is quite clear: liability arising from a publicly imposed duty readily trumps the baseline principle that contractual liability can arise only from coincident, overtly manifested acts of private will.

Ideally, fairness and autonomy should overlap without need for distinction; the latter, in fact, should generally act as guarantor of the former. Thus the theory, and thus often the reality. Whether the contractual bargain yields an objective equality of exchange values, as in Aristotle's model,[108] or leaves each party convinced he has gotten the

107. Puig-Brutau, *supra* note 97, at 62.

108. Aristotle, 5 Nichomachean Ethics 117-20, 123-28 (M. Oswald trans., 1962).

better of a deal, as in Adam Smith's,[109] there will be no occasion to consider whether the demands of fairness and autonomy conflict, as the parties will never seek to upset such a transaction. Indeed, the more real-world transactions are perceived to approach outcomes such as these, the more a legal system may abjure a more active policing for fairness, considering its monitoring duties more than discharged by the incentives for achieving fairness already present in autonomously expressed self-interest.

Nonetheless, the principles do come into conflict, and not infrequently. One line of reported cases—often assumed by freedom-of-contract hardliners to be a small, unrepresentative sample of the universe of contract dealings, ignoring structural impediments to dispute resolution that keep serious problems from surfacing in greater numbers—show parties in essence forced to contract on unfair terms because of the misbehavior or overwhelming tactical advantage of the other side. When such transactions are retroactively challenged, courts police them for fairness using such non-transgressable boundary-line concepts as fraud, duress, gross inequality of bargaining power, unconscionability, and, for that matter, the *contra bonos mores* provision of the German Civil Code[110] and the French "abuse of rights" doctrine.[111] In extreme cases, these legal systems have seen through the argument that the formal autonomy of a contracting party was in itself a sufficient guarantee of a transaction's minimal fairness, *i.e.*, the standard cant that parties should be presumed to know and be capable of looking out for their own self-interest, they possessed freedom of contract, courts should not rewrite the bargain of the parties, etc.[112] Courts instead use their variously denominated "fairness" doctrines to release parties from contracts they unquestionably entered into.

Many of the cases in which do-nothing offerees are held to contractual liability also present situations where autonomy and fairness are at odds. Again autonomy must yield, and ineluctably so. But here, by contrast to the cases immediately foregoing, fairness demands that parties be *held* to contracts they never provably intended to enter into. Many of the European statutes discussed above,[113] for example, that

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109. *See, e.g.*, ADAM SMITH, THE WEALTH OF NATIONS (Modern Library, E. Cannan ed., 1937) (discussing self-love and self-interest).

110. "A legal transaction that offends against good morals [*gegen die guten Sitten verstoesst*] is null and void." BGB 138.

111. SCHLESINGER, *supra* note 54, at 740-51.

112. For "contracts" between John Doe and Giant Corporation, this is rather like the argument that the United States and Liechtenstein are both sovereign nations: technically correct, but irrelevant to *Realpolitik*.

113. *See supra* text accompanying notes 59-61, 81-84, 99-101.

assign silence the meaning "acceptance of an offer," represent clear legislative policy decisions to tip the scales in favor of the presumptively weaker of the parties to highly standardized deals (insurer-insured, lessor-lessee, mortgagee-mortgagor, etc.). By interpreting the stronger party's silence as legally equivalent to acceptance of an arrangement that would greatly benefit the weaker, the legislature is implementing "fairness" by its own lights, bringing the weaker party a bit closer to parity with his opposite number by giving him a compensating legal advantage not available to the other. But it should nonetheless be quite clear that, as a result of such statutes, the stronger party will sometimes be held to contractual liability without having freely chosen to assume it. Naturally, one may quarrel with the merits of the underlying policy decisions,[114] but it is no fatal objection to the legality of what is happening to note that a party is being compelled to do something against his will, for this situation is no different from a legislative decision to implement a graduated income tax, in part because it is "fairer." This is legislative *fiat*, and so outside the realm of contract, even if its effect is imposition of contractual liability.

Vindication of legitimate expectations is certainly another important aspect of fairness. Hence, a second class of cases in which fairness requires do-nothing offerees to be held to contracts they did not provably manifest an intent to enter into are those in which the offeror has a legitimate expectation about the significance of the offeree's future action or inaction. The expectation could arise from commercial custom, as recognized in section 346 of the German Civil Code[115] and French decisions;[116] or it could arise from prior dealings, as explicitly recognized in all the legal systems studied;[117] or it could arise because the offeror knew the offeree had actual or constructive knowledge that the offeror needed quickly to accept or forego other opportunities, as was true in the *Kukuska*[118] ("hail insurance") case and the *Cole-McIntyre-Norfleet Co.*[119] ("grain meal") case, or needed quickly to act or forbear from acting, as was true on the alternative reading of the *Maillard*[120] ("fairground attraction") case. These are

114. Naturally, "fairness" is not the only policy statutes of this sort may embody. Both HGB 362, the section of the German Commercial Code imposing contractual liability on do-nothing merchant offerees under certain circumstances, and the Spanish corporate freeze-out statutes, for example, embody more a recognition of the need for speed in certain types of business transactions. *See supra* text accompanying notes 77-86.

115. *See supra* text accompanying note 91.

116. *See supra* text accompanying notes 62-63.

117. *See supra* text accompanying notes 30, 65, 95, 102.

118. Kukuska v. Home Mutual Insurance Co., 235 N.W. 403 (Wisc. 1931).

119. Cole-McIntyre-Norfleet Co., 214 S.W. 817 (Tenn. 1919).

120. *Maillard*, Cass. civ. 1re, 1988 BULL. CIV. I 6.

all, in fact, cases of "pregnant silence." What the silence has become pregnant with is the legitimate semantic expectations of the offeror. If they are indeed legitimate, these expectations are deserving of legal protection. Hence courts properly enforce the claimed contracts without regard to the supersession of the principle of autonomy. Yet it must be frankly avowed that such cases of contractual liability imposed because of the legitimate expectations of one party, like the statutory cases discussed above,[121] turn out, on closer inspection, to be just as much cases of quasi-contract, or contract-implied-in-law, as the *Crisan*[122] case discussed earlier, whether or not they are typically labelled as such. For they too are rooted not in "the will of the parties," but rather in social policy, in externally imposed duty. What often happens, however, is that such cases are not recognized for the contracts implied-in-law that they are; rather, there is a tendency for courts to strain to see them through voluntarist spectacles as contracts implied-in-fact, interpreting the silence as probative evidence of actual acceptance. Courts succumbed to this tendency, for example, in the *Cole-McIntyre-Norfleet*[123] ("grain meal") case as well as in the French *Maillard*[124] ("fairground attraction") case, both nonetheless rightly decided. What explains this lapse?[125]

One key to understanding them may lie in Elizabeth Mensch's historical account of the development of American contract law,[126] along with the simultaneous and reverse shift in the criteria for contract formation. For both cases, in their way, are microcosms of contract law's only partly accomplished paradigm shift from the eighteenth to the nineteenth centuries, from a model of duties grounded in a shared, commonly understood and essentially static social matrix to one grounded in individuality, autonomy, and flux. The "implied intent" and "inherent social obligations" that characterized the pre-classical era in American contract law embodied the values of a socially-based and hence objectively understood fairness, while classical contract

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121. See the statutes referred to in the preceding paragraph.

122. *See supra* text accompanying note 25.

123. 214 S.W. 817 (Tenn. 1919).

124. Maillard, 1988 BULL. CIV. I 6.

125. Possibly because of the presence in its legal vocabulary of the concept *Erklärungsfiktion*—a "fictitious manifestation of intent," *see, e.g., supra* text accompanying note 91—German law appears to have avoided the analytic pitfall discussed in the text; at any rate, my research did not uncover instances of its falling prey to the confusion that is particularly obvious in American caselaw. I also encountered no instances of it in Spanish law, but again, I may simply have failed to uncover them.

126. *See supra* text accompanying notes 12-15. Mensch's periodization, of course, has no direct relevance to the history of French contract law, although the tensions between fairness and autonomy that it points up are just as clearly felt across the Atlantic as in domestic law.

law's "formal rights" and "bounded private spheres" upheld the autonomy of individuated subjectivity. But while the theory propounded by contract law's classicists seemingly exalted the autonomy of the individual will and the value of subjectivity, the practical tests they embraced for discovering the will of the parties on the matter of contract formation remained rooted in the objectivist past of the field, effectively blending the two concepts together.[127] Thus the nominal implementation of the will of private parties would inevitably devolve, at times, into a pursuit of society's fairness concerns. The ideology of the day, however, only permitted the latter to appear in public in the costume of the former.

Thus, for reasons more of legal history than of logic, Contract continued to be the doctrinal and remedial category through which certain social obligations were imposed; courts instinctively intuited the need to do so. However, such was the mesmerizing allure of the ideal of autonomy, the levelling power of the idea of free contract, that contract courts at times could scarcely any more recognize competing social-policy principles, such as protection of legitimate expectations, for what they were; they looked everywhere for intent of the parties, and often saw it where it was not. Hence, a seller of grain meal was inferred from his silence to have actually accepted the offer to buy, and M. Czernik was interpreted as having expressly adopted the equation of silence to acceptance in the original design of his offer, both conclusions resting on somewhat flimsy factual bases. That the real grounds for those decisions had everything to do with mandatory social policies and little or nothing to do with the rhetorically privileged "intent of the parties" remained below the threshold of consciousness.

Admittedly, the misidentification of the proper bases for the decisions in *Cole-McIntyre-Norfleet Co.* and *Maillard* is seemingly inconsequential, since ultimately they were "rightly" decided. Yet this sort of muddling is not without its baleful effects elsewhere, at least in American law. For this analytic goulash, the confounding of fairness and autonomy, is also served up, far more disturbingly, in the American "trouble" cases, the wrongly decided *Austin v. Burge*[128] ("newspaper subscription") case and the *Day v. Caton*[129] ("party wall") case. These cases, again, were treated by the courts as instances of contracts implied-in-fact: they found in the offeree's silence evidence

127. The attitude of jurists like Learned Hand suggested they planned to remain rooted there, and with a vengeance. *See supra* text accompanying notes 20-21.

128. 137 S.W. 618 (Mo. App. 1911).

129. 119 Mass. 513 (1876).

of actual intent to contract, only this time without the saving grace of a subliminal but compelling "fairness" rationale to support the outcome.

Take first the "newspaper subscription" case. Initially, it should be worthy of some note, and perhaps concern, that French courts reacted to facts very much like (and if anything even stronger than) those in *Austin v. Burge* in exactly the opposite way, holding that the continued silent receipt of a newspaper after the subscription period expired was not a binding acceptance of a contract offer for a new subscription, even where the wrapping bore a legend stating that the recipient had to take affirmative action to stop the newspaper from coming.[130] (Recall that the defendant in *Austin* actually gave instructions to stop the deliveries, but these were ignored.) On the other hand, however, from an economic perspective there is obviously a sort of windfall present, since the defendant obtained the benefit of actually receiving (and presumably reading) the newspaper without having to pay for it. Hence, even if the deciding court did not rest the decision on these grounds, would not some policy disfavoring unjust enrichment, a "fairness" rationale of yet another kind, mandate the result actually reached, *viz.*, holding the recipient to pay?

In the first place, it does not seem at all clear that all cases of voluntary self-impoverishment—the outcome that befell the French newspapers—necessarily translate, without more, into cases of unjust enrichment of the recipient of the benefit. But be that as it may, consider, second, the ferocity of a number of American *legislative* reactions against decisions such as *Austin v. Burge*, as well as their response to the general problem of unordered merchandise:

> 1958:
> No person in this state shall be compelled to pay for any newspaper, magazine or other publication which shall be mailed to him or sent to him without his having subscribed for or ordered it, or which shall be mailed or sent to him after the time of his subscription or order therefor has expired, notwithstanding that he may have received it.[131]
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> 1971:
> (a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of [bills or dunning communications] constitutes an unfair method of competition and an unfair trade practice [under section 5 of the Federal Trade Commission Act].

130. *See supra* text accompanying note 40.
131. NEB. REV. STAT. § 63-101 (1958).

> (b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.
> (d) For the purposes of this section "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.[132]

> 1982:
> No person, firm, partnership, association, or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares, merchandise, or services, where the offer includes the voluntary and unsolicited sending or providing of goods, wares, merchandise, or services not actually ordered or requested by the recipient, either orally or in writing. The receipt of any goods, wares, merchandise, or services shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the goods, wares, merchandise, or services in any manner he or she sees fit without any obligation on his or her part to the sender or provider.
>
> If, after any receipt deemed to be an unconditional gift under this section, the sender or provider continues to send bill statements or requests for payment with respect to the gift, an action may be brought by the recipient to enjoin the conduct, in which action there may also be awarded reasonable attorney's fees and costs to the prevailing party.[133]

It would be hard to imagine a more stinging rebuke, a more thoroughgoing repudiation of the line taken by the courts and the *Restatement*. At a minimum, these statutes (along with the French decisions) suggest that the result in *Austin v. Burge* was not self-evidently right; evidently Congress and state legislatures did not accept the unjust enrichment/fairness arguments that could be raised in support of the result in that case.

Now take *Day v. Caton*, the "party wall" case. One neighbor watched another erect a party wall on the boundary line between their two properties, and said nothing. The Massachusetts court therein

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132. 39 U.S.C. § 3009 (West 1980).

133. CAL. CIV. CODE § 1584.5 (West Supp. 1992). California added the provisions of the statute relative to unsolicited services in 1985, suggesting that the problem dealt with by the statute continues to be a live one.

found evidence of actual intent to accept the fifty-fifty deal that the offeror alleged he had proposed (but which the "offeree" denied ever hearing about):

> [W]hen one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure, (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.[134]

This reading is by no means obvious; in fact, it seems almost wilfully perverse. If the court believed (or, rather, held that a jury could believe) the plaintiff's account of events, why not rest the decision squarely on the basis that there had been an oral contract, instead of confecting an implied contract *ex nihilo*? The problem was that the record below revealed a swearing contest: the court may have been troubled by the directly opposing testimony about whether the neighbors had ever had any conversation about the party wall at all. But if so, unless it was absolutely crystal clear that the defendant was an out-and-out liar, the evidentiary dispute ought to have been resolved in his favor, not against him. As I argue elsewhere:

> Given that failing to enforce a contract where one was intended and enforcing one where none was intended are each violations of [human] autonomy, is not the latter by far more offensive? Using the state's coercive power to force a party to perform when there is the slightest chance that such performance would be against his will is a far more serious intrusion into the protected realm of human autonomy than any failure by the state to lend its coercive power to enforce a performance the party may have willed. Confronted with an ineluctable choice between these two courses of action, is it not morally incumbent on the legal system to opt for the lesser evil?[135]

Instead, the Massachusetts court adopted the thoroughly unpersuasive approach of finding an actual contract implied in fact on the basis of the defendant's silence.

If one could have called the *Day v. Caton* court on the case's weak credentials as a genuine contract implied-in-fact, one suspects the court's fallback position would have been that the outcome of the

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134. 119 Mass. 513, 515 (1876).

135. Ansaldi, *supra* note 22, at 779-80.

case was nonetheless objectively "fair." Could it be, then, that *Day v. Caton* is but another instance of the phenomenon encountered in *Cole-McIntyre-Norfleet Co.* and *Maillard, viz.*, a contract implied-in-law masquerading as one implied-in-fact? If so, the problem with the decision would again not be a very serious one: a correct result wrongly accounted for. For that to be true, however, there would have to be a compelling "fairness" justification for the decision. Prima facie, two interrelated rationalia present themselves: one is again the concept of unjust enrichment; the other is what might be called something like "good-neighborly behavior," both arguably outgrowths of the hydra-headed concept of fairness.

Certainly the defendant in the "Party Wall" case was in all probability "enriched" in some sense by having a valuable addition made *gratis* to his property. But is the enrichment necessarily "unjust" because it was acquired without his expending time, money or effort to obtain it? In the calculus of the justice *vel non* of the defendant's enrichment other factors besides must figure.

Suppose the defendant's past dealings with the plaintiff had revealed to him that the plaintiff was a thoroughly disagreeable, noisome fellow, with whom he wanted nothing further to do. Or that the plaintiff was constantly coming up with property-improvement schemes that he never followed up on, all talk and no action. Now he leaves a note detailing his umpteenth "fifty-fifty" deal for his neighbor, the defendant. The latter, because his blood pressure goes off the charts whenever he sets eyes on the plaintiff, tosses it away angrily, insisting to his wife that he will never speak to the blighter again.

Why should the law so privilege any person in the position of the plaintiff that he can effectively compel his neighbor to have truck with him? Both the Massachusetts court[136] and the *Restatement*[137] suggest that if the quantum of objective difficulty required for the defendant to communicate his rejection to the plaintiff is slight, he must so communicate, on pain of being held liable under the terms of the plaintiff's offer. For most good neighbors, of course, their relations are such that such communication is only to be expected. But, if the discussion proceeds, as it should, on the level of what behavior the law should *require*, when push comes to shove: doesn't the defendant have the right not to have his privacy invaded, a right to avoid his neighbors if he chooses? What about the vaunted "right to be left alone," the privilege of inaction, the defendant's right not to be com-

136. *See supra* text accompanying note 134 (quoting Day v. Caton, 119 Mass. 513 (1876)).

137. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. b. *See also supra* text accompanying note 34 (quoting section 69).

pelled to emerge from his close, his right not to have another man set his agenda? Why must he respond? Why not take the policy underlying the federal and state statutes as a font of general principle whereby *all* goods delivered or services rendered by anyone who has not previously secured an agreement, either verbal or clearly implied-*in-fact*, from the recipient to pay for them may be treated as a gift? Any possible "injustice" of the defendant's enrichment pales in comparison to the unjust consequences of the Massachusetts court's decision in this case.

What explains the sharp disagreement between courts and legislatures? Between the judicial outcomes of trouble cases and the legislatures' rejection of them lies a clash of the two fundamental values, fairness and autonomy, reflecting the schizoid past of contract law itself. The trouble cases and the statutes display both sides of the mixed lineage. But what an analysis of the "newspaper subscription" and the "party wall" case should make absolutely clear is that, in the absence of a truly compelling fairness rationale, the "default" principle of autonomy should control, which means that parties should generally not be held to contracts absent a clear, unambiguous manifestation of their will. It is never a compelling fairness rationale that a purveyor of goods or provider of services has forced himself onto someone's agenda or sought to profit from the latter's inattention or choice to remain private.

The Civil Law case that comes closest to *Day v. Caton*, but with a key difference, is the Spanish "Boat Repair" case.[138] In the Spanish case, the defendant was having certain itemized repair work performed on his boat by the plaintiff company. Before the owner's eyes and under his continuous monitoring, the company's workmen also did other work not on the agreed list, without objection from the owner. For this work the boat owner subsequently refused to pay, pleading no contract. The Spanish Supreme Court, finding in his silence a "tacit acceptance" of the performance of the unagreed work, held the boatowner to an obligation to pay therefor the amount it deemed adequate.

The key fact that distinguishes the "Boat Repair" case from *Day v. Caton* is that in the former a liability-creating interpretation is placed on the silence of one of two parties who were already in contractual relations with each other, whereas in the "Party Wall" case the very question at issue is whether silence may serve to bring two parties into contractual dealings with one another in the first place. Though per-

138. *See supra* text accompanying note 103.

haps not entirely free from doubt on policy grounds,[139] the Spanish decision imposing liability can probably be justified on the basis that parties who are already in contract owe each other a heightened duty, what American law would probably denominate a duty of good faith,[140] as contrasted to the duty (if any) owed to mere offerors of a contract deal, as was the plaintiff in *Day v. Caton*.

Summary

While one of the European countries under review, France, may have joined with a number of American courts in the more pardonable error of confusing a genuine fairness rationale with a contract rationale for a decision (*Maillard*), no European cases were discovered in which the more serious American error was made: fobbing off a bogus fairness rationale as a contract rationale. The Spanish "Boat Repair" case, which comes the closest of the materials surveyed, can probably be successfully distinguished from its American counterpart.

B. Reflections

Quare Clausum Fregit?

On the one hand, it is not surprising that so much in the treatment of the problem of the do-nothing offeree is common to United States contract law and to that of its Civil Law cousins. One would hardly expect it otherwise, given how much else the societies share. And where they differ? It is of course possible that the failure to discover any Civil Law cases which truly parallel the deeply problematic *Austin v. Burge* and *Day v. Caton* is just a fluke of research. Perhaps they are really out there, waiting for someone else to find them.

On the other hand.

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139. It occurs to me to wonder why the drydock company went ahead and performed additional unscheduled, unbudgeted work without securing the owner's approval. He was right there all the time. Were they slying trying to increase their billings in a slow season, hoping they could just get the owner to pay without kicking up a fuss? *Cf.* California's Automotive Repair Act, CAL. BUS. & PROF. CODE § 9884.9 (West 1973) ("No work shall be done and no charges shall accrue before authorization to proceed is obtained from the customer. No charge shall be made for work done or parts supplied in excess of the estimated price without the oral or written consent of the customer which shall be obtained at some time after it is determined that the estimated price is insufficient and before the work not estimated is done or the parts not estimated are supplied."). The facts here savor a bit of the problem in "photocopy toner" hypothetical described above. *See supra* text following note 39. The drydock, I suspect, may have unclean hands in this matter. Hence I am hesitant to endorse the result.

140. *See, e.g.*, U.C.C. 1-203 (1990) (imposing a duty of good faith in the performance or enforcement of a contract subject to the code).

Might cases like *Austin v. Burge* and *Day v. Caton*, along with the apparent absence of European counterparts, not reveal something of significance about these legal systems, or about their societies? A data base for the drawing of broad, sweeping conclusions is obviously not present. But that is why this section is entitled "Reflections." Perhaps "Speculations" would be even more accurate.

One obvious point that needs to be made is that legal systems whose core principle of contract formation is a subjective act of will, as in the European countries studied, may be less likely to stray into the error of foisting unintended contractual liability onto a litigant than a system whose stated principle of contract formation is largely objective and external.

But there is more beyond this mere technical point. What horrifies me—yes, really horrifies me—about *Day v. Caton* and *Austin v. Burge*, every time I read them, is the matter-of-fact brutality of their vision of social relations, and the part law plays in ratifying the brutalization. These are strong words. I know. Over and over I think about the cynical newspaper circulation department that ignored the repeated pleas to stop delivery and kept the floodtide of unwanted papers coming, badgering the defendant for payment and cowing him into doing so twice, before he finally stood his ground. And then to have the "justice" system act the part of willing enforcer for extortioners. Or the despised neighbor irrupting into another's world with its private concerns and private designs, holding him hostage to his schemes and exacting tribute from his coffers. And the law commanded its payment, on the truly outrageous pretext of contract!

Of course fairness and autonomy will perpetually be at odds in contract law. In some sense it should not be so shocking to find courts reaching a decision they believe effectuates their sense of fairness, however misguided. But the problem is that generally, fairness acts as a boundary-principle, putting limits on the extent of autonomy, as, for example, in the cases of unconscionability. In the do-nothing offeree cases, by contrast, there is a radical departure from the usual relationship between the two. Apart from cases of elected silence, when do-nothing offerees are held to contractual liability, fairness concerns effectively obliterate autonomy. It is state power at its most nakedly invasive. Indeed, under the guise of contract, both the "trouble cases" legitimate invasions of privacy. The *Restatement* is in accord. That they may really be doing so at the prompting of inarticulate but finally unpersuasive fairness concerns does not do much, to my mind, to mitigate the gravity of the offense.

Why here and not abroad? If it is not a fluke of research, I can only offer speculations, based on my acquaintance with the cultures of my

own country as well as of its European cousins. Yes, I'll be grossly overgeneralizing. Yes, I can't back any of this up with hard data. But for what they are worth, these are my observations. They help me to make sense of my research.

Apart from the different attitudes imparted by varying standards of contract formation, I think the difference at root has to do with a greater European respect for privacy, an observance of the distance that naturally separates strangers. Continental European languages have an array of forms for "you," and conventions about titles and the use of given names, which calibrate the precise degree of distance. Americans instantly move to first names, nay often assume the privilege of using hypocorisms, on first introduction. Europeans entertain less frequently at home than Americans; to be invited there is a signal distinction. Americans hold cocktail parties in their living rooms for sixty of their closest friends.

A Spanish attorney who practised with me in Chicago remarked on the disappointing shallowness of the "friendships" he had made at the law firm: effusive gladhanding and unexpected warmth at the beginning of the relationship, followed by indifference and nodding as he passed people in the corridors. The follow-up did not live up to the promise implied at the start of things, he thought. He would have expected less at the beginning, rather more as time went by. I told him Americans are often put off by the initial European aloofness and reserve, reading it for unfriendliness.

Official American ideology praises the virtues of individualism, but there is far less tolerance here than almost anywhere else I've been towards people who don't fit the mold, who aren't "regular guys," who do not subscribe to the conventional cannons of taste and values. Football and Chevrolet, in the ol' U.S.A. . . . The pressures for conformity are enormous. Doubtless there are good historical reasons for this: the melting pot had to make all the ingredients in the stew blend compatibly. It was ancient Europeans, was it not, who first noted the way democracies loathe distinction?

The surface geniality and bonhomie, along with the conformity, of American life bespeak a certain presumptuousness, an abruptness and directness about personal interactions that I think are reflected in the two cases I am so exercised about. Since 'we are all the same,' no special fuss need be taken, no particular forms observed, about initiating contacts, or claiming to have formed contracts, for that matter. Just as our society does not have a sufficiently developed sense of the sacredness of privacy to respond with collective outrage to the phenomenon of "telemarketers"—who think nothing of calling strangers in their homes, using first names in the manner of an old friend, and

trying to peddle some worthless service or product—so too, when the newspaper tries to sell us a subscription or the neighbor to rope us into his schemes, somehow we are at fault if we simply decline to answer, if we decline to be drawn at all into the pseudo-friendly relations offered. We are at fault for not responding in ways the offeror should have had no right to expect of us in the first place. If we fail to live up to the "good buddy" mores of behavior, our silence gets treated as a kind of violation of the rules of fair play, a pouting that is punishable by the imposition of liability.

That the legal system should act as accomplice and abettor of all this reflects the contamination of contract thinking with one of the most disagreeable aspects of American life. It grieves me profoundly. I blush for my country.