SWEPT AWAY: SHOULD COURTS RETAIN A RECKLESSNESS STANDARD IN ASSESSING RESCUER INJURY CLAIMS UNDER THE MARITIME RESCUE DOCTRINE?

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INTRODUCTION

The Roman poet Ovid once remarked that "the shipwrecked man shrinks even from calm waters."[1] Indeed, humanity has long respected and feared the expansive reaches and tremendous power of Earth's waters. Ovid's poignant remark alludes to the sea's myriad dangers and its ability to cause injury or death to those who venture out upon it. While powerful hurricanes, extratropical cyclones, and high surf constitute obvious maritime hazards,[2] secondary hazards such as mechanical failure[3] and social hazards such as piracy[4] pose significant danger to life and property. Despite the sea's array of dangers, persons of every level of maritime experience venture out on its waters to work, conduct research, and partake in recreational activity. Naturally, with such a diverse group of individuals engaged in maritime activity, accidents are bound to occur along with a subsequent threat to life and limb. Such imperiled individuals often find themselves in need of rescue to avoid serious injury or even death.

While American tort law has refrained from judicially imposing a universal duty to rescue upon third parties,[5] maritime rescues commonly take place

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1 OVID, EPISTULAE EX PONTO 349 (G.P. Goold ed., Arthur Leslie Wheeler trans., Harvard Univ. Press 1988) (c. 12 A.D.).

2 *See generally Weather*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., www.noaa.gov/wx.html (discussing various meteorological hazards that impact maritime activity).

3 *See, e.g.*, Mariano Castillo, *Company: El Faro Skipper Had Plan to Deal with Storm*, CNN (Oct. 7, 2015), http://www.cnn.com/2015/10/06/us/el-faro-missing-ship/.

4 *See, e.g.*, Ted Kemp, *Crime on the High Seas: The World's Most Pirated Waters*, CNBC (Sept. 15, 2014), http://www.cnbc.com/2014/09/15/worlds-most-pirated-waters.html.

5 Yasamine J. Christopherson, Note, *The Rescue Doctrine Following the Advent of Comparative Negligence in South Carolina*, 58 S.C. L. REV. 641, 641 (2007); *see also* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 675–76 (1994) ("[T]he absence of a duty to rescue remains the general rule in both tort and criminal law."). Note, though,

on a variety of scales in a wide range of circumstances. Large, governmental agencies such as the United States Coast Guard often have statutorily mandated missions, which impel them to engage in numerous, sometimes highly technical rescue operations on a frequent basis.[6] In 2014 alone, the Coast Guard responded to 17,508 cases, saving 3443 lives.[7] While the Coast Guard provides its rescuers with highly specialized training in addition to significant resources,[8] many maritime rescue operations are unofficially and voluntarily initiated by third-party bystanders with little in the way of formal education or training. A simple example of such an unofficial rescue operation might be a nearby individual who renders aid to a family, friend, or stranger in distress.[9] However, just because a rescuer lacks a mandate to engage in rescue operations does not mean he or she will be involved exclusively in small-scale, local rescue operations. For example, in 2013, thirty-one-year-old American entrepreneur and millionaire Christopher Catrambone launched a three-week rescue operation aimed at aiding migrants attempting to flee collapsing dictatorial regimes in Africa and the Middle East.[10] Given the rescuers' varying degrees of education, experience, and skill, it is inevitable that some rescuers will fail to perform their rescues correctly or suffer their own injuries in the process of rescuing those in peril.

Given that a rescuer may suffer a potentially serious or even fatal injury in carrying out a rescue mission, it is necessary to ask what if any recourse is available to provide an injured rescuer or a deceased rescuer's estate with adequate redress. Hoping to incentivize rescue operations by third-party bystanders[11] amidst a backdrop lacking a universal duty to rescue, courts introduced the rescue doctrine to provide a safety net to would-be rescuers. With roots extending back to the nineteenth century, the rescue doctrine

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that this no-duty rule does not apply to agencies or individuals who are statutorily or contractually mandated to carry out rescue operations (e.g., the United States Coast Guard). *See infra* note 6 and accompanying text.

6 *See, e.g.*, 14 U.S.C. § 2(4) (2012) (stating that the Coast Guard shall "develop, establish, maintain, and operate . . . rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States").

7 U.S. COAST GUARD, SEARCH AND RESCUE SUMMARY STATISTICS, 1964 THRU 2013 (2014), http://www.uscg.mil/hq/cg5/cg534/SARfactsInfo/SAR%20Sum%20Stats%2064-14.pdf.

8 *See, e.g.*, U.S. COAST GUARD, ADDENDUM TO THE UNITED STATES NATIONAL SEARCH AND RESCUE SUPPLEMENT (2013), http://www.uscg.mil/hq/cg5/cg534/manuals/COMDTINST%20M16130.2F.pdf.

9 *See, e.g.*, Matt Erspamer & Cassy Arsenault, *Surfer Reunited with Teen He Rescued from Lake Michigan*, FOX17 (Aug. 21, 2015, 10:05 PM), http://fox17online.com/2015/08/21/surfer-reunited-with-teen-he-rescued/.

10 Giles Tremlett, *The Millionaire Who Rescues Migrants at Sea*, GUARDIAN (July 8, 2015), http://www.theguardian.com/news/2015/jul/08/millionaire-who-rescues-migrants-at-sea.

11 *See* Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1089 (4th Cir. 1985) (arguing in support of a "wanton or reckless" standard as the bar for rescuer recovery because it is important to "honor attempts to rescue"); Christopherson, *supra* note 5, at 641 (stating that the rescue doctrine was developed to "encourage third parties to render aid to those in need").

provides access to redress for injured rescuers by refusing to "impute negligence to an effort to preserve [human life], unless made under such circumstances as to constitute rashness."[12] Under the rescue doctrine, a "causal nexus" is established between "the tortfeasor's negligent conduct [and] the rescuer's injuries."[13] Thus, unless a rescuer was rash, as evidenced by "wanton or reckless"[14] conduct, he or she would not be barred from obtaining recovery for his or her injuries from the original tortfeasor owing to a lack of causation.[15] Note, though, the rescue doctrine applies only in cases where peril is created by another's negligent act, and not in cases involving an accident or act of nature.[16] Additionally, the rescue doctrine only applies when there is "a risk of imminent peril to one other than the rescuer."[17] Thus, it is not a failsafe mechanism for rescuer redress.

In the maritime context, the Fourth, Fifth, and Ninth[18] Circuits have repeatedly applied the rescue doctrine along with its "wanton or reckless" standard, reasoning that "of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property."[19] However, in *Barlow v. Liberty Maritime Corp.*, the Second Circuit explicitly declined to adopt the maritime rescue doctrine and its associated "wanton or reckless" standard in assessing whether third-mate George Barlow could recover for injuries he incurred during an attempt to prevent the Liberty Sun vessel from detaching from its moorings.[20] Instead, the *Barlow* court reasoned that George Barlow should be held to the standard of a "reasonable seaman" or "reasonable mariner" under the circumstances, thus declining to apply the maritime rescue doctrine.[21] While the "reasona-

12 *Furka*, 755 F.2d at 1088 (quoting Scott v. John H. Hampshire, Inc., 227 A.2d 751, 753–54 (Md. 1967)).

13 Christopherson, *supra* note 5, at 642 (quoting Estate of Solomon v. Shuell, 457 N.W.2d 669, 683 (Mich. 1990)).

14 *Furka*, 755 F.2d at 1088.

15 *Id.*

16 *See* Christopher H. White, Comment, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 521 (2002) (noting that the rescue doctrine does not provide an avenue for recovery when "the dangerous situation was caused by accident or by an act of nature").

17 25 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, AND DAMAGES § 119.02(1)(a) (Matthew Bender rev. ed. 2015).

18 *Wharf v. Burlington Northern Railroad Co.*, 60 F.3d 631 (9th Cir. 1995), takes place outside the maritime context; however, owing to its express reliance on *Furka*, a maritime rescue doctrine case, in reaching its conclusion that a "wanton or reckless" standard should apply in determining whether an injured rescuer may recover, it is viewed as part of the broader circuit split respecting the doctrine. *See* Barlow v. Liberty Mar. Corp., 746 F.3d 518, 525 (2d Cir. 2014) (pointing out that the Ninth Circuit has explicitly followed *Furka* in the context of a discussion as to whether the Second Circuit should adopt its rule).

19 *Furka*, 755 F.2d at 1089 (quoting Grigsby v. Coastal Marine Serv. of Tex., Inc., 412 F.2d 1011, 1021 (5th Cir. 1969)); *see also Wharf*, 60 F.3d at 635; Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71 (5th Cir. 1980); Asaro v. Parisi, 297 F.2d 859 (1st Cir. 1962).

20 746 F.3d 518, 526–28 (2d Cir. 2014).

21 *Id.* at 527.

ble seaman" standard "recogniz[es] that mariners may have particular skills for responding to emergencies,"[22] it is explicitly and clearly distinguished from the traditional maritime rescue doctrine thus leading to a circuit split between the Second Circuit and the Fourth, Fifth, and Ninth Circuits.[23]

This Note asserts that courts should continue to apply the traditional maritime rescue doctrine along with its "wanton or reckless" standard when assessing whether a rescuer injured during a maritime rescue attempt stemming from a negligent tortfeasor's conduct may recover for his or her injuries. Part I will analyze the arc of rescue doctrine–related case law surrounding the aforementioned circuit split, scrutinizing how the rescue doctrine has been impacted by the larger-scale paradigm shift in apportioning liability from contributory negligence to comparative negligence. Part II will discuss the circuit split directly and argue that in light of admiralty law's historical and statutory commitment to encouraging nearby seafarers to aid those in peril despite no broad, universal tort law duty to rescue, it is consistent and appropriate to preserve the traditional maritime rescue doctrine. Finally, Part III will discuss important policy considerations favoring a "wanton or reckless" standard of care in the maritime rescue context, including both incentivizing life-saving rescue attempts and properly allocating costs under principles of law and economics.

I. JUDICIAL DEVELOPMENT OF THE RESCUE DOCTRINE: A CASE LAW STUDY

In beginning, it is important to delineate the rescue doctrine's precise function amidst the broader tort law landscape. While some jurisdictions have enacted Good Samaritan statutes, which may immunize potential rescuers from civil liability arising from negligent rescue attempts,[24] the traditional rescue doctrine is a creature of common law.[25] Also distinguishing it from Good Samaritan statutes is the rescue doctrine's focus not on immunizing rescuers from civil liability arising from injuries done to rescuees as a result of negligent rescue attempts, but rather on providing a potential remedy for a rescuer's *own* injuries.[26] The doctrine operates on two levels, both of which ensure that an injured rescuer has a legitimate opportunity to recover. Specifically, when a perilous situation results from a tortfeasor's negligent conduct, the rescue doctrine acts to both establish a "causal nexus" between a tortfeasor's negligence and a rescuer's injuries[27] and to allow a

22 *Id.*

23 Circuit Splits, *Standard of Care—Maritime Rescue Doctrine:* Barlow v. Liberty Mar. Corp., 11 SETON HALL. CIR. REV. 150, 151 (2014) [hereinafter *Standard of Care*].

24 *See generally* Danny R. Veilleux, Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4th 294 (1989).

25 *See* Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985) (describing the rescue doctrine as "[t]he common law doctrine of rescue").

26 *See* Christopherson, *supra* note 5, at 641–43 (introducing the rescue doctrine and accentuating its focus on the rescuer's injuries).

27 *Id.* at 642; *see also* Walker Hauling Co. v. Johnson, 139 S.E.2d 496, 499 (Ga. Ct. App. 1964) ("[T]he chain of causation remains intact, since it is reasonably to be anticipated

rescuer an opportunity to recover in full unless his or her rescue attempt was undertaken "recklessly or rashly."[28]

Before delving into relevant case law, it is important to note that the common law rescue doctrine arose during a time at which contributory negligence was the prevailing regime under which courts apportioned liability.[29] Under contributory negligence, "[a]n injured plaintiff was unable to recover—and the defendant went unpunished—even if the plaintiff's actions were much less blameworthy than those of the defendant."[30] Thus, as an examination of the case law will reveal, *one* original impetus underlying judicial development of a rescue doctrine was to provide a sort of escape hatch through which injured rescuers could recover despite bearing a degree of fault for their injuries, wholly barring them from redress under traditional doctrinal principles of contributory negligence.[31] One pivotal question, however, is whether case law suggests that contributory negligence's seminal role in the rescue doctrine's origination renders it redundant in an era marked by a comparative negligence approach to the apportionment of liability. This Part argues that while concerns over contributory negligence undoubtedly catalyzed judicial development of a rescue doctrine, early case law and its progeny evince a more fundamental commitment to developing a distinct tort law carve-out aimed at providing injured rescuers with a liberal opportunity to be made whole in addition to incentivizing bystanders to aid those who are imperiled. As such, this Part claims that a shift from contributory to comparative negligence does not necessarily render a traditional application of the rescue doctrine superfluous because comparative negligence fails to address these fundamental concerns sufficiently.

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that, once such peril to life or property is initiated and brought into being by the negligence of a defendant, reasonable attempts will be undertaken to alleviate and nullify the consequences of such peril.").

28 Jennifer A. Noya, Note, *The Application of the Rescue Doctrine Under Comparative Negligence Principles:* Govich v. North American Systems, Inc., 23 N.M. L. Rev. 349, 353 (1993).

29 *See* Barlow v. Liberty Mar. Corp., 746 F.3d 518, 524 (2d Cir. 2014) (discussing the rescue doctrine's roots in concerns over a plaintiff's potential inability to recover if faced with contributory negligence).

30 *Id.*

31 *See, e.g.*, *id.* ("Although courts applying the doctrine of contributory negligence may have been willing to deny recovery to a person whose negligence precipitated an emergency, they hesitated before applying it to someone who voluntarily exposed himself to danger in order to rescue others from it. To protect would-be rescuers, courts created the rescue doctrine."); *see also* Jeffrey F. Ghent, Annotation, *Rescue Doctrine: Applicability and Application of Comparative Negligence Principles*, 75 A.L.R. 4th 875, § 1 (1989) ("The purpose of the rescue doctrine when it was first created was to avoid having a plaintiff be found contributorily negligent as a matter of law when he voluntarily placed himself in a perilous position to prevent another person from suffering serious injury or death . . . .").

A. Rescue Doctrine Case Law in the Era of Contributory Negligence

One of the earliest formulations of the rescue doctrine is found in *Eckert v. Long Island Railroad Co.*,[32] decided in 1871. In the case, the plaintiff's husband was killed when he ran out onto a set of train tracks to save a small child who was likely to be struck by an incoming, negligently speeding train.[33] In the New York Supreme Court, counsel for the Long Island Railroad contended that the plaintiff's husband negligently and "voluntarily placed himself in peril from which he received the injury," thus precluding his estate from recovering.[34] On appeal, the New York Court of Appeals affirmed the trial court's decision, in which the jury determined that Mr. Eckert's actions did not constitute negligence and thus did not bar his estate from recovering.[35] The court held that "[t]he law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute *rashness* in the judgment of prudent persons."[36] The *Eckert* court never explicitly mentioned avoiding contributory negligence's potentially harsh consequences as a justification for implementing the rescue doctrine; however, it did point out that "[f]or a person engaged in his ordinary affairs," it traditionally constituted negligence and thus barred recovery if one "knowingly and voluntarily [placed] himself in a position where he [was] liable to receive a serious injury."[37] Certainly, avoiding such a finding of contributory negligence was essential if Mr. Eckert's estate was to potentially recover; however, some scholars have accentuated the court's broader, more fundamental aim that Mr. Eckert's "heroic effort" be recognized even if it "trumped application of the law."[38] In subsequent decades, courts continued to follow *Eckert*'s approach, routinely applying the rescue doctrine to allow plaintiffs to recover in cases where contributory negligence would ordinarily forbid recovery, while simultaneously exhibiting a broader commitment to affirming communal mores tilted towards recognizing and honoring efforts to save human life.[39]

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32 43 N.Y. 502 (N.Y. 1871).

33 *Id.* at 503–04.

34 *Id.* at 504.

35 *Id.* at 506.

36 *Id.* (emphasis added).

37 *Id.* With this language, the *Eckert* court differentiates instances of ordinary negligence as well as "the mere protection of property" from special cases in which human life is at stake. *Id.* It is this latter subset of cases where a rescuer's voluntary, potentially negligent (according to traditional principles of tort law) "exposure" to danger is not a prohibitive bar to recovery unless the "exposure" is deemed "rash or reckless." *Id.*

38 Amelia H. Ashton, Note, *Rescuing the Hero: The Ramifications of Expanding the Duty to Rescue on Society and the Law*, 59 DUKE L.J. 69, 94 (2009); *see also* Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1383 & n.247 (1994) ("The jury [in *Eckert*] refused to find that the decedent was contributorily negligent, and the New York Court of Appeals refused to overturn that finding. Such a heroic effort was clearly worthy of community approbation in spite of the foreseeability of death.").

39 *See, e.g.*, Gibney v. State, 33 N.E. 142 (N.Y. 1893); Pennsylvania Co. v. Langendorff, 28 N.E. 172 (Ohio 1891).

In *Maryland Steel Co. v. Marney*,[40] the Maryland Court of Appeals issued a particularly strong opinion affirming the rescue doctrine. In the case, plaintiff John Marney was seriously injured when he attempted to plug a tap hole that was oozing molten metal due to the negligence of a substitute employee.[41] Applying the rescue doctrine, the court declared that Mr. Marney could not be held contributorily negligent unless his rescue attempt was conducted in a rash or reckless manner.[42] However, it was the court's language in reaching this conclusion that was particularly telling. It concluded: "The plaintiff in this case, though moving in a humble sphere, has given an example of genuine and heroic manhood, and has demonstrated that in his estimation 'the duties of life are more than life.'"[43] Here, the court's moralistic, almost transcendental language speaks not simply to an unwillingness to apply principles of contributory negligence in the province of rescue; but more precisely, the court's reasoning resonates with a fundamental desire to preserve every possible avenue for recovery when a bystander risks his or her life for the safety of others. Nevertheless, this language is both dicta and subject to interpretation, and thus a question remains as to whether in a modern day comparative negligence regime, Mr. Marney would have faced a reduced recovery or whether the court would have refused to reduce his recovery under a strict application of the rescue doctrine.

Still firmly anchored in an era of contributory negligence, *Wagner v. International Railway Co.*, decided in 1921, offers further insight into this important question.[44] This paradigmatic, seminal case centered on Herbert Wagner, who, while voluntarily attempting to rescue his cousin after he fell out of a railway car left open, lost his footing and subsequently injured himself.[45] Stating that "[d]anger invites rescue," Justice Cardozo noted that "wrong to [an] imperiled victim . . . is a wrong also to his rescuer."[46] He clarified this relationship by noting that "[t]he risk of rescue, *if only it be not wanton*, is born of the occasion. The emergency *begets* the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."[47] Determining that the lower court improperly instructed the jury on the role of a rescuer in an emergency situation and the subsequent standard for rescuer recovery, the court remanded the case for further proceedings consistent with his opinion.[48]

Justice Cardozo's opinion is instructive in a couple of respects. First, by asserting that the risk of rescue is "if only it be not wanton . . . born of the

40 42 A. 60 (Md. 1898).

41 *Id.* at 61–62.

42 *Id.* at 66.

43 *Id.*

44 133 N.E. 437 (N.Y. 1921).

45 *Id.* at 437.

46 *Id.*

47 *Id.* at 438 (emphasis added).

48 *Id.*

occasion,"[49] Justice Cardozo arguably reaffirms the "rash and reckless" standard employed in assessing rescuer fault under the rescue doctrine as it was articulated by *Eckert* and other early cases.[50] More importantly, however, Justice Cardozo's opinion offers some hints as to how *Wagner* may have been decided had comparative negligence been in place at the time. Specifically, Justice Cardozo's statement that "the emergency *begets* the man," coupled with his description of the rescuer as a "deliverer," offers further insight into whether a standard of comparative negligence should in fact subsume the traditional rescue doctrine.[51] Justice Cardozo's language seems to suggest more than a mere desire to avoid a finding of contributory negligence; rather, his wording assumes a transformative character, hinting at a deeper, more moralistic intention to "beget" and establish a fuller, more complete carve-out aimed at offering rescuers maximal opportunity to recover despite tort law's broader restrictions on duty and liability. In fact, some scholars have suggested that at its core, *Wagner* is not focused microscopically on issues of apportioning fault but rather centers on ensuring that rescuers are made *completely* whole, owing to their heroic actions despite the nuances of tort law.[52] Such interpretations would seem to militate against arguments that Justice Cardozo would rule differently amidst a regime of comparative negligence. These arguments are particularly persuasive in light of Justice Cardozo's collective, welfarist view of common law.[53] Such an approach suggests that Cardozo would hesitate to impinge on rescuers' ability to recover fully for their injuries, given that doing so would not fully honor their selfless commitment to community. Cardozo's ethos is also consistent with both *Eckert* and *Marney*, cases that utilized similarly ethical language in reaching pro-rescuer results.

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49 *Id.*

50 *See* Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985) (characterizing *Wagner* as one example in a long line of cases requiring "wanton or reckless" behavior on a rescuer's part before any fault may be assigned); *see also* Christopher M. Hohn, Note, *The Missouri Firefighter's Rule:* Gray v. Russell, 59 MO. L. REV. 479, 483 n.31 (1994) (citing *Wagner*, 133 N.E. at 437–38, for the proposition that so long as a rescue is not "wanton," a rescuer is deemed a foreseeable plaintiff for proximate cause purposes). *But see* Barlow v. Liberty Mar. Corp., 746 F.3d 518, 527 (2d Cir. 2014) (stating that Justice Cardozo was actually applying a reasonableness standard because he makes the "'wanton' reference when discussing the 'normal' and 'probable' urge to rescue," and "[t]hese words [are] associated with a reasonableness standard").

51 *Wagner*, 133 N.E. at 438 (emphasis added).

52 *See* Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CALIF. L. REV. 85, 92–93 (1986) ("*Wagner* and its progeny represent a transformation in the doctrine of contributory negligence through expansion of traditional notions of foreseeability and causation in order to reach a fair result on the ultimate question of recovery for rescuers.").

53 *See* John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1335 (1990) ("[Cardozo] not only thought that the common law reflects and enforces community standards of obligation; he felt that it *ought* to.").

Ex post, Justice Cardozo was concerned with ensuring that injured rescuers have a fair opportunity to be made whole for injuries suffered during a rescue attempt. However, his language also suggests he held a broader ex ante concern, namely, incentivizing bystanders and third parties to engage in rescue operations. Cardozo's opinion begins with what is now a famous maxim: "Danger invites rescue. The cry of distress is the summons to relief."[54] Courts and scholars alike have long interpreted Cardozo's words to be aimed at encouraging bystanders to aid injured and imperiled victims.[55]

The significance of any impact wrought by a shift to comparative negligence is thus best viewed against this clearly articulated policy goal of paving a wide path designed to invite bystanders to engage in rescue. Considering *Wagner* from this angle, any attempt to place an obstacle in front of a would-be rescuer could be said to frustrate its broader policy goals. Specifically, applying principles of comparative negligence to a rescue attempt could allow for a rescuer's recovery to be docked according to his or her degree of responsibility for any injuries sustained.[56] This in turn might lead a would-be rescuer to conclude that it is better to refrain from offering assistance lest he or she not be fully compensated for any potential injuries. Admittedly, it is unlikely that a bystander faced with an emergent and imminent crisis decides to react or not to react based upon an ex ante consideration of the relevant legal standard.[57] Theoretically, however, for reasons mentioned above, a comparative negligence standard (as opposed to a recklessness standard) would seem to exert a greater chilling effect on an individual's willingness to intervene in a situation in which his or her own physical or emotional wellbeing may be threatened. Empirical support for this proposition is limited; however, some modern courts have voiced a similar concern in the context of the rescue doctrine.[58] At the least, it is certainly possible that a greater number of would-be rescuers may be deterred from rendering aid to an individual in need amidst a regime of comparative negligence. It is difficult to

54 *Wagner*, 133 N.E. at 437.

55 *See* Spencer v. Liberty Mut. Ins. Corp., 381 F. Supp. 2d 811, 820 (S.D. Ind. 2005) (discussing *Wagner* and noting that Justice Cardozo's language reflects an expectation and even a "hope" that one would aid an injured victim and that Indiana public policy should take that into account); *see also* Albert, *supra* note 52, at 92 ("*Wagner* and its associated cases reflect the assumption that rescue is a commendable human urge to be encouraged, not penalized.").

56 *See* Barlow v. Liberty Mar. Corp., 746 F.3d 518, 528 (2d Cir. 2014) ("[E]ven if the rescuer acts unreasonably, he can still recover *in proportion* to his caution . . . ." (emphasis added)).

57 *See* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1536 (2005) ("[I]t is commonly accepted that very few people know much about what the laws say . . . .").

58 *See* Bridges v. Bentley, 769 P.2d 635, 640 (Kan. 1989) ("An abrogation of the rescue doctrine would tend to operate as a deterrent to potential rescuers and penalize acts which would constitute ordinary negligence, but would not rise to the level of rash conduct. Such a holding would be one more weapon in the arsenal of the 'don't-get-involved' creed of citizenship which is already too prevalent.").

harmonize such a consequence with *Wagner*'s policy goal of freely incentivizing rescues.

B. The Turning Tide: The Impact of Comparative Negligence on Rescue Doctrine Case Law

While Justice Cardozo's opinion in *Wagner* is suggestive of a broader desire to develop a distinct carve-out aimed at protecting rescuers and incentivizing bystanders to render aid, it remains unclear whether Cardozo would in fact have reached a similar result under a comparative negligence regime. As comparative negligence began to predominate, many courts directly questioned whether a traditional understanding of the rescue doctrine remained appropriate. Thus far, two camps have emerged with respect to how comparative negligence affects traditional common law formulations of the rescue doctrine. One argues that comparative negligence has subsumed the rescue doctrine because under comparative negligence principles, an injured but negligent rescuer may still recover in proportion to his or her responsibility for any injuries suffered. Contrarily, others argue comparative negligence impermissibly impinges upon a rescuer's access to redress—thus claiming that a traditional, common law understanding of the rescue doctrine should be maintained.[59]

In *Sweetman v. State Highway Department*,[60] the Michigan Court of Appeals considered whether traditional rescue doctrine principles still applied to an accident on an icy overpass. In *Sweetman*, plaintiff Rosalyce Sweetman was severely injured when a car lost control and struck her while she was rendering aid to another motorist.[61] Sweetman argued that she was engaged in a rescue and that her injuries resulted from the defective design of the overpass, which was not properly suited to icy conditions.[62] Because she was engaged in a rescue, Ms. Sweetman contended that principles of comparative negligence should not apply to her.[63] The court concluded that rescue doctrine principles still applied with respect to establishing proximate cause.[64] However, in addressing the allocation of responsibility, the court stated that "since allocation of negligence to the plaintiff under a system of comparative negligence is not a bar to the plaintiff's recovery, the second attribute of the rescue doctrine is no longer compelling."[65] Elaborating, the court explained that it perceived no "harsh result" in applying comparative negligence.[66] It

59 *See* Christopherson, *supra* note 5, at 650 ("The rescue doctrine could interact with comparative negligence in two distinct ways. A . . . court could rule that the *Wagner* standard should continue as an independent standard of care . . . . Or, a court may rule that comparative negligence has subsumed the rescue doctrine.").

60 357 N.W.2d 783 (Mich. Ct. App. 1984).

61 *Id.* at 786.

62 *Id.* at 786–88.

63 *Id.* at 788.

64 *Id.* at 789.

65 *Id.*

66 *Id.*

ultimately remanded Ms. Sweetman's case, with instructions to follow principles of comparative negligence in assessing Ms. Sweetman's potential recovery.[67]

Cords v. Anderson[68] is another case in which comparative negligence was found to subsume traditional rescue doctrine principles. In *Cords*, plaintiffs Jane Cords and Sue Henry fell down a jagged rock formation while trying to rescue a friend, Norina Boyle.[69] Plaintiffs contended that Ms. Boyle fell due to negligence on behalf of park manager Floyd K. Anderson, specifically pointing to his failure to notify superiors about a hazardous drop-off along their hiking trail.[70] Ms. Cords was permanently paralyzed as a result of her fall, and Ms. Henry also sustained serious injuries.[71] Here, the court again applied the first aspect of the rescue doctrine; however, with respect to the second, the court held that "a rescuer is not negligent where the rescue, although dangerous, is *not unreasonable* or unreasonably carried out."[72] Further elaborating, the court explained:

> In a comparative negligence jurisdiction such as Wisconsin, if the trier of fact finds that the rescue is unreasonable or unreasonably carried out the fact finder should then make a comparison of negligence between the rescuer and the one whose negligence created the situation to which the rescue was a response.[73]

Thus, like in *Sweetman*, the court effectively abrogated the "wanton or reckless" standard traditionally associated with application of the rescue doctrine.

Under *Sweetman*, *Cords*, and other similar cases,[74] a plaintiff faced with life-altering and extremely expensive injuries emanating from a rescue attempt may find himself or herself financially responsible for a portion of those injuries if a jury finds unreasonability under the circumstances. Such a result is disconcerting when it is viewed against earlier decisions such as *Maryland Steel* and *Wagner*. In both cases, a core aim was to ensure rescuers a genuine opportunity to be made whole.[75] For example, it seems hard to imagine that Justice Cardozo, characterizing rescuers as "deliverer[s],"[76] would modify his holding in *Wagner* to allow for allocation of responsibility based upon principles of comparative negligence if it would leave a freely acting rescuer like Jane Cords with potentially significant and crippling finan-

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67 *Id.* at 790.

68 259 N.W.2d 672 (Wis. 1977).

69 *Id.* at 676–77.

70 *Id.* at 678.

71 *Id.* at 677.

72 *Id.* at 683 (emphasis added).

73 *Id.*

74 *See, e.g.*, Ryder Truck Rental, Inc. v. Korte, 357 So. 2d 228 (Fla. Dist. Ct. App. 1978); Estate of Solomon v. Shuell, 420 N.W.2d 160 (Mich. Ct. App. 1988); Dehn v. Otter Tail Power Co., 251 N.W.2d 404 (N.D. 1977).

75 *See supra* note 52 and accompanying text.

76 Wagner v. Int'l Ry. Co., 133 N.E. 437, 438 (N.Y. 1921).

cial responsibility for her paralyzing injuries. Again, such an assertion is particularly compelling in light of Cardozo's characterization of the common law as a tool for judges to encourage moral development in society.[77]

In light of comparative negligence, many courts have in fact repudiated the "wanton or reckless" standard traditionally associated with the rescue doctrine; however, some courts have affirmatively refused to do so, instead adhering to a more traditional interpretation. In *Bridges v. Bentley*,[78] the Kansas Supreme Court refused to abrogate the rescue doctrine's "rash and reckless" standard, arguing it was not subsumed by principles of comparative negligence.[79] In *Bridges*, Mr. Mark Bridges was struck by a pickup truck while aiding victims of a previous auto accident.[80] He suffered severe injuries including a head injury as a result of this impact.[81] Appellant, Icy Bentley, claimed that a recently enacted statute espousing principles of comparative negligence eliminated any need for a traditional rescue doctrine in Kansas.[82] The court vigorously disagreed, finding "no reason to believe the legislature intended to abrogate the rescue doctrine in enacting the comparative negligence statute."[83] In explaining its decision, the court noted that it "remains sound policy to encourage rescue efforts," and that "[a]n abrogation of the rescue doctrine would tend to operate as a deterrent to potential rescuers and penalize acts which would constitute ordinary negligence, but would not rise to the level of rash conduct."[84]

The Rhode Island Supreme Court reached a similar result in *Ouellette v. Carde*.[85] In *Ouellette*, plaintiff Ms. Beverly Ouellette suffered severe burns when she attempted to aid her neighbor, Mr. Oren Carde, who, due to his

77 In describing his view of common law, Judge Benjamin Cardozo remarked that judges should "follow, or strive to follow, the principle and practice of the men and women of the community whom the *social* mind would rank as intelligent and *virtuous*." BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 273 (1928) (emphasis added). Cardozo's statement once again reflects his moralistic, welfarist view of the common law. As John C.P. Goldberg notes, "[t]he moralistic strain in some of Cardozo's decisions can then be explained by his belief that moralistic rules would assist litigants and the general populace in attaining a higher level of personal moral development." Goldberg, *supra* note 53, at 1339 (discussing Cardozo scholar Stanley Brubaker's analysis of the moralistic strain in some of Cardozo's judicial opinions). Certainly, neither Cardozo's own words nor Goldberg's analysis speak directly to Cardozo's ruling in *Wagner*. However, assuming a bystander who willingly risks his or her own safety to aid another in peril is someone to be characterized as moral and virtuous, Cardozo's broader common law views seem difficult to square with a legal approach that may leave an injured rescuer with a devastating financial burden on top of his or her physical injuries. Additionally, such a law is likely to disincentivize moral rescue operations going forward.

78 769 P.2d 635 (Kan. 1989).

79 *Id.* at 640.

80 *Id.* at 637.

81 *Id.*

82 *Id.* at 638.

83 *Id.* at 639.

84 *Id.* at 640.

85 612 A.2d 687 (R.I. 1992).

own negligence, had become trapped under a car.[86] Ms. Ouellette suffered these burns when gasoline on the floor of defendant Carde's garage ignited as she electronically opened his garage door.[87] While Ms. Ouellette was clearly engaged in a rescue operation, Carde nevertheless claimed that Ms. Ouellette's damages should have been reduced in proportion to her level of fault in accord with principles of comparative negligence.[88] Notwithstanding comparative negligence's potential benefits to would-be rescuers,[89] the *Ouellette* court concluded that despite a "split in authority," the "comparative-negligence doctrine does not fully protect the rescue doctrine's underlying policy of promoting rescue."[90] As the court noted, there is nothing other than a bystander's "moral conscience" to incentivize rescue amidst a no-duty rule; and "one who voluntarily attempts to save a life of another should not be barred from *complete* recovery."[91] The court concluded that this is true unless a rescuer is "rash or reckless."[92] Finally, in adopting its reasoning, the *Ouellette* court channeled Judge Cardozo, referencing that his "oft quoted words . . . apply now as they did in 1921."[93]

Collectively, an examination of rescue doctrine case law leaves a significant degree of ambiguity as to whether principles of comparative negligence have abrogated a traditional understanding of the doctrine. However, a close reading of *Eckert*, *Wagner*, and their progeny reveals that while contributory negligence's prohibitive effects on rescuer recovery undoubtedly catalyzed judicial development of a rescue doctrine, a much broader carve-out ultimately emerged. Concerned both with providing rescuers a genuine opportunity to be made whole and incentivizing private rescue, courts broadly and deliberately exempted rescuers from traditional tort law principles of causation, foreseeability, and reasonableness.[94] Given this, it seems highly likely that rescue doctrine principles are "more than a vestige of contributory negligence."[95] The rescue doctrine's twin aims argue against its clear abrogation in light of comparative negligence; and, as Part II argues, abrogating its protection for rescuers would be particularly problematic in a maritime context.

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86 *Id.* at 688–89.

87 *Id.* at 689.

88 *Id.*

89 *Id.* ("Comparative fault removes the harsh consequences of contributory negligence because a rescuer is not barred completely from recovery for negligently performing a rescue.").

90 *Id.* at 690.

91 *Id.* (emphasis added).

92 *Id.*

93 *Id.* (citing Wagner v. Int'l Ry. Co. 133 N.E. 437, 437–38 (N.Y. 1932)).

94 *See supra* note 50.

95 Anita Bernstein, *The Communities that Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 767 n.143 (2002) ("The rescue rule has been reaffirmed in the comparative fault era, suggesting (once again) that lenient treatment of a class of plaintiffs is more than a vestige of contributory negligence.").

II. INCENTIVIZING MARITIME RESCUES: A HIGH STAKES DECISION

Part I traced some 120 years of rescue doctrine–related case law to analyze its relationship to shifting principles of apportionment. As Part I argued, while ambiguity exists as to whether comparative negligence has subsumed the rescue doctrine, an integrated study of relevant case law militates against such an argument. This Part contends that an abrogation of the rescue doctrine and its associated "wanton or reckless" standard for rescuer recovery would be particularly inappropriate and ill-advised in an admiralty and maritime context and that a "wanton or reckless" standard should be maintained.

While land-based rescues are most common and many rescue doctrine–related cases feature land-based scenarios, the classic tort law rescue doctrine applies across a wide range of environments, including both sky and sea. At sea, classic rescue doctrine principles are embodied in what is termed the maritime rescue doctrine.[96] Traditionally, like its parent, this maritime permutation of the rescue doctrine both establishes a causal nexus between a tortfeasor's negligence and a rescuer's injuries and allows a rescuer to recover unless his actions were "wanton or reckless."[97] However, just as within broader rescue doctrine case law, this traditional "wanton or reckless" standard has come under fire in light of a shift from contributory to comparative negligence.[98] Today, this barrage has culminated in a split between the Fourth, Fifth, and Ninth Circuits, which have retained a "wanton and reckless" standard, and the Second Circuit, which in *Barlow v. Liberty Maritime Corp.*[99] adopted a "reasonable mariner" standard.[100] In adopting a "reasonable mariner" standard, the Second Circuit effectively abrogated traditional maritime rescue doctrine principles by asserting that a recklessness standard was inappropriate in light of a shift to comparative negligence in apportioning liability.[101] In light of this divergence, it becomes crucial to analyze which standard more appropriately reflects maritime rescue doctrine aims. Before addressing unique attributes of admiralty and maritime law supportive of a "wanton or reckless" standard for rescuer recovery, it is essential to examine the contours of the circuit split itself in order to lay out relevant battle lines.

A. Application of the Maritime Rescue Doctrine: The Circuit Split

In *Grigsby v. Coastal Marine Service of Texas, Inc.*,[102] the Fifth Circuit considered whether a maritime rescuer's own negligence should bar his estate from recovering for his death. Despite being decided against a backdrop of

96 Barlow v. Liberty Mar. Corp., 746 F.3d 518, 524 (2d Cir. 2014).

97 Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088–89 (4th Cir. 1985).

98 *See id.* at 1088 (discussing the contention that the rise of comparative negligence has diminished the force of the traditional rescue doctrine).

99 *Barlow*, 746 F.3d at 527.

100 *See Standard of Care*, *supra* note 23, at 150.

101 *See Barlow*, 746 F.3d at 527–28.

102 412 F.2d 1011 (5th Cir. 1969).

contributory as opposed to comparative negligence, *Grigsby* laid down an approach strongly supportive of a "wanton or reckless" standard. In the case, John D. Grigsby, a plant guard for Olin Matheson, perished when he attempted to rescue a ship repairer who had fallen and seriously injured himself in a barge's wing tank.[103] Substantively, Grigsby's estate asserted his death was proximately and vicariously caused by both Coastal Marine Service, Inc., and Welders Supply Co., owing to actions taken on their behalf by ill-trained and inexperienced employees, one of whom was seriously injured, precipitating Grigsby's rescue attempt.[104] Specifically, Grigsby died because he slipped and fell, became unconscious, and subsequently inhaled a lethal quantity of carbon monoxide from within the tank.[105] Grigsby's estate contended his death was a direct and proximate result of both: (a) Coastal's employees' failure to warn him of dangerous conditions including potentially lethal levels of gas within the tank; and (b) Welders's failure to inform its own employee, Sonnier, who was injured in the tank, of potential dangers associated with tank entry.[106] Appellants, Coastal and Welders, rebutted that Grigsby's estate should bear responsibility for his own passing due to his failure to act prudently in attempting to rescue Sonnier.[107]

In addressing Appellants' claims, Judge John Robert Brown, a former eminent admiralty lawyer, ultimately concluded that Grigsby could not be held liable for his injuries and that his culpability for them failed to rise to an actionable level under applicable standards.[108] Judge Brown began by focusing on admiralty law's unique nature and its particular preference for incentivizing rescues. He asserted that "[f]or of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property."[109] Characterizing Grigsby as a "maritime life salvor," Judge Brown noted that "[m]aritime law in *every way* and in *every context* encourages the salvor to salve—to save."[110] Judge Brown noted that many arguments raised by Coastal and Welders, which may have possessed a degree of force in a land-based context, lost considerable strength because they were made in a maritime arena.[111] Specifically turning to Grigsby's purported negligence, Judge Brown noted that "the law accords a considerable latitude in the standard of performance of the salvage service."[112] He then stated that "[t]he salvor is seldom held liable for just a failure to save and liability for negligent salvage is limited to situations in which the salvor,

103 *Id.* at 1015.

104 *Id.* at 1016–20.

105 *Id.* at 1019–20.

106 *See id.* at 1033–37.

107 *Id.* at 1021–23.

108 *Id.*

109 *Id.* at 1021.

110 *Id.* at 1021–22 (emphases added).

111 *Id.* at 1022.

112 *Id.* at 1021.

through *want* of due care, has *worsened the position of the victim*," before dismissing appellants' claims that Grigsby was contributorily negligent.[113]

In so holding, *Grigsby* repudiates an ordinary negligence standard for rescuer liability. While its precise focus is on salvage law and the Good Samaritan doctrine, *Grigsby* nevertheless sets a high bar for rescuer fault in applicable situations, including application of the maritime rescue doctrine. In *Berg v. Chevron U.S.A., Inc.*,[114] the Ninth Circuit, commenting on *Grigsby*, noted that the case rejected a negligence standard[115] and proceeded to link *Grigsby* and *Furka*, noting that it agrees with them and holds that "a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue."[116] *Barlow* itself, which ultimately split from *Grigsby* and *Furka*, noted when discussing the maritime rescue doctrine and its "wanton or reckless" standard that "the Fifth Circuit has adopted a similar rule," and then proceeded to cite *Grigsby*.[117] Thus, while Judge Brown never explicitly references a "wanton or reckless" standard for rescuer recovery, many courts have read *Grigsby* as a seminal case affirming such an approach in light of maritime law's unique orientation with respect to incentivizing third-party rescue operations.

Moving to 1985, the Fourth Circuit had occasion to consider a claim parallel to that in *Grigsby*. In the oft-referenced and paradigmatic case of *Furka v. Great Lakes Dredge & Dock Co.*,[118] the Fourth Circuit directly addressed the maritime rescue doctrine and what relevance its "wanton or reckless" standard retained in light of principles of comparative negligence. In *Furka*, Paul Furka died when his sixteen-foot Boston Whaler sank in frigid January seas as he attempted to rescue a scowman from a stranded tugboat.[119] Deborah Furka, suing on behalf of Paul Furka's estate, claimed his death resulted from Great Lakes Dredge & Dock Co.'s negligence in ordering him and his small Boston Whaler to assist the stranded tug and scow despite knowledge of perilous weather conditions.[120]

In addressing appellant Great Lakes' claim that Furka's estate should be barred from complete recovery under principles of comparative negligence, Judge Wilkinson began by reaffirming bedrock rescue doctrine principles. Quoting a long line of cases, Judge Wilkinson wrote, "The law has so high a regard for human life that it will not impute negligence to an effort to pre-

113 *Id.* at 1021–24 (emphases added).

114 759 F.2d 1425 (9th Cir. 1985).

115 *Id.* at 1429 (citing *Grigsby*, 412 F.2d at 1021–22).

116 *Id.* at 1430.

117 Barlow v. Liberty Mar. Corp., 746 F.3d 518, 525 (2d Cir. 2014).

118 755 F.2d 1085 (4th Cir. 1985).

119 *Id.* at 1087. A scowman is an individual who works on a flat-bottomed boat. *Scowman*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2004), http://www.merriam-webster.com/dictionary/scowman.

120 *Furka*, 755 F.2d at 1087–88.

serve it, unless made under such circumstances as to constitute rashness."[121] Then Judge Wilkinson addressed what if any role comparative negligence has played in abrogating a "rashness" or "wanton or reckless" standard. Judge Wilkinson acknowledged that a degree of ambiguity existed as to whether comparative negligence had subsumed the rescue doctrine in land-based contexts. Observing comparative negligence's ameliorative effects on a rescuer's ability to recover despite some potential degree of culpability, he noted that "[i]n some comparative negligence jurisdictions . . . the wanton and reckless standard has thus been diluted."[122] However, he quickly noted that such is not an "appropriate" course in admiralty because "[the court] agree[s] with the Fifth Circuit [*Grigsby*] that 'of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property.'"[123] The *Furka* court's agreement rested on a belief that "[t]he best traditions of seafaring men demand that we honor attempts to rescue, unless the rescuer acts beyond the bounds that even the exigencies of the moment would allow."[124] Doing so is crucial, Judge Wilkinson reasoned, because "[l]aw must encourage an environment where human instinct is not insular but responds to the plight of another in peril."[125]

Furka's holding that a "wanton or reckless" standard is most appropriate because it honors admiralty law's historical commitment to rescue and salvage coupled with its role in incentivizing rescue operations and aligns with earlier, land-based rescue doctrine cases including both *Maryland Steel* and *Wagner*. In both *Maryland Steel* and *Wagner*, an ex post concern was that an injured rescuer be given a full opportunity to be made whole just as one concern in *Furka* was "avoid[ing] a total defeat of recovery under common law."[126] Yet, an equally important, ex ante concern in all three cases was setting a precedent likely to encourage and promote rescue attempts by third parties.[127] Channeling this tradition, *Furka* firmly reaffirms the "wanton or

121 *Id.* at 1088 (quoting Scott v. John H. Hampshire, Inc., 227 A.2d 751, 753–54 (Md. 1967)). The *Scott* case itself quotes *Maryland Steel Co. v. Marney*, 42 A. 60, 66 (Md. 1898), which was discussed in Part I. The *Furka* court's citation to *Maryland Steel* lends further support to the proposition that its holding was more than a mere repudiation of contributory negligence in the rescuer recovery context.

122 *Furka*, 755 F.2d at 1088–89 (citing Ryder Truck Rental, Inc. v. Korte, 357 So. 2d 228 (Fla. Dist. Ct. App. 1978); Cords v. Anderson, 259 N.W.2d 672, 683 (Wis. 1977)).

123 *Id.* at 1089 (quoting Grigsby v. Coastal Marine Serv. of Tex., Inc., 412 F.2d 1011, 1021 (5th Cir. 1969)).

124 *Id.*

125 *Id.*

126 *Id.*; *see supra* Part I (discussing *Maryland Steel* and *Wagner*).

127 *See* Christopherson, *supra* note 5, at 651 ("[T]he [*Furka*] court expressed that the law should *encourage* rescue by not imputing negligence on efforts to preserve life unless those effects are rash or reckless." (emphasis added) (citing *Furka*, 755 F.2d at 1089)).

reckless" standard attached to the maritime rescue doctrine and the rescue doctrine more broadly.[128]

Finally, in *Wharf v. Burlington Northern Railroad Co.*,[129] the Ninth Circuit issued a short and straightforward opinion affirming *Furka*'s traditional approach to the rescue doctrine. While not a maritime case, its express reliance upon *Furka* establishes it as a pro-"wanton and reckless" member of the aforementioned circuit split.[130] In the case, Lonnie L. Wharf sued his employer, Burlington Northern Railroad, on a Federal Employers' Liability Act (FELA) claim.[131] Mr. Wharf's left hand was injured when he attempted to free a co-worker, Mr. Puhek, from frozen ballast in a railroad car.[132] Mr. Wharf argued his injury occurred during an active rescue operation instigated by Burlington Northern's negligence.[133] Affirming the district court's findings that Mr. Wharf could not be held liable for his own injuries, Judge Charles E. Wiggins of the Ninth Circuit summarily concluded that "[t]he rescue doctrine applies as a matter of law."[134] Citing *Furka*, Judge Wiggins continued by stating that "no comparative fault may be assessed against the rescuer unless his or her conduct in performing the rescue was *wanton* or *reckless*."[135]

Viewed collectively, *Grigsby*, *Furka*, and *Wharf* strongly militate against an abrogation of a "wanton or reckless" standard within admiralty law's maritime rescue doctrine, and, to varying extents, rescue doctrine law more broadly. In *Barlow v. Liberty Maritime Corp.*,[136] however, the Second Circuit declined to apply *Furka*, thus leading to a split between itself and the Fourth, Fifth, and Ninth Circuits. In *Barlow*, third-mate George Barlow was injured when he attempted to prevent his employer's ship, the Liberty Sun, from detaching from its mooring lines.[137] Specifically, as Mr. Barlow was attempting to "bump[ ] the brake" in hopes of slackening the line, the line "paid out uncontrollably," striking Mr. Barlow and wounding him.[138] Mr. Barlow argued that because his injuries resulted from an attempt to rescue the Liberty Sun, a rescue attempt necessary because of his employer's negligence, he was entitled to a jury instruction on the maritime rescue doctrine along with its "wanton and reckless" standard.[139] Thus, Mr. Barlow claimed that the

128 *See id.* at 661 ("If given the occasion, the Fourth Circuit likely would not limit the *Furka* holding, as rescue should be encouraged on all terrain.").

129 60 F.3d 631 (9th Cir. 1995).

130 *See Standard of Care*, *supra* note 23, at 150.

131 *Wharf*, 60 F.3d at 633.

132 *Id.* at 634.

133 *Id.* at 633.

134 *Id.* at 635.

135 *Id.* (emphases added) (citing Berg v. Chevron U.S.A., Inc., 759 F.2d 1425, 1430 (9th Cir. 1985); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985)).

136 746 F.3d 518 (2d Cir. 2014).

137 *Id.* at 521–22.

138 *Id.* at 522.

139 *Id.* at 522–23.

district court erred by instructing the jury that if it found he acted unreasonably under emergency circumstances, his recovery could be docked.[140]

Writing for a unanimous panel, Judge Wesley began by discussing judicial development of rescue doctrine as a mechanism aimed at shielding injured rescuers from contributory negligence's harsh effects.[141] Noting Barlow's request that the Second Circuit follow *Furka* and adopt its application of a "wanton and reckless" standard, Judge Wesley pointed out that this case "squarely presented . . . the question of whether to follow *Furka*."[142] Beginning to answer this pivotal question, Judge Wesley turned to admiralty and maritime law's traditional application of principles of comparative fault "in resolving competing claims of negligence," in order to argue that application of such principles was historically appropriate in cases such as Mr. Barlow's.[143] Then, addressing both ex post and ex ante concerns, he stated, "Under comparative negligence, of course, even a negligent rescuer can recover, as Barlow did here. Consequently, the principal justification for the rescue doctrine—encouraging rescue—has largely disappeared."[144] Lastly, after examining precedent (including *Wagner*) that he believed had also applied a reasonableness standard to questions of rescuer recovery,[145] Judge Wesley addressed Mr. Barlow's final claim that "unique perils of life at sea favor the *Furka* standard."[146] In dismissing this assertion, Judge Wesley wrote that while "[i]t is true that life at sea is generally more dangerous than life on land . . . that is no reason to adopt Barlow's rule."[147] Thus, the court explicitly declined to follow *Furka*, instead adopting a "reasonable mariner standard."[148]

B. Rough Waters: Why a Recklessness Standard for Rescuer Recovery Is Particularly Important in a Maritime Context

Grigsby, *Furka*, and *Wharf* contrast starkly with *Barlow* regarding the appropriate governing standard for analyzing whether a rescuer may recover in full for his injuries, setting up an unresolved split in authority. In light of Part I's argument that an examination of relevant case law militates against abrogation of the rescue doctrine's "wanton or reckless" standard, this Note argues that doing so in a maritime context would be undesirable as well.

140 *Id.* at 523.

141 *Id.* at 524 ("Under the [rescue] doctrine, defendants asserting the defense of contributory fault were required to show that a rescuer acted not just negligently, but recklessly, thus providing additional leeway to claims of rescuers." (citing COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N.Y., NEW YORK PATTERN JURY INSTRUCTIONS: CIVIL 2:41 (3d ed. 2009))).

142 *Id.* at 525.

143 *Id.* at 525–26.

144 *Id.* at 526.

145 *Id.* at 526–27; *see also supra* note 52.

146 *Id.* at 527.

147 *Id.*

148 *Id.* at 527–28.

This Part will now address a few aspects of admiralty and maritime law rendering such an abrogation particularly problematic: (a) admiralty law's historical commitment to mandating or at least strongly incentivizing third-party rescue operations against a background no-duty rule; (b) some of its relevant statutory schemes requiring rescue operations; and (c) the remote locations in which many maritime rescues take place. These reasons collectively favor a traditional "wanton or reckless" standard for rescuer recovery.

From its earliest inception, admiralty law has exhibited a customary and distinctive preference for encouraging and honoring rescue and salvage attempts.[149] For "[t]he universal custom of the sea demands as much wherever human life is in danger."[150] This "universal custom" animating its jurisprudence, maritime law has entrenched its preference for incentivizing rescue in a variety of statutory and common law legal frameworks in an effort to ensure those in peril have a maximal opportunity to receive aid and assistance.

In 1897, the Comite Maritime International was founded; and by 1902, the Comite had organized two conferences, one in Paris and another in Hamburg.[151] Between 1905 and 1910, four sessions were held in Brussels in which members of each conference came together to draft an international salvage convention based upon findings from Paris and Hamburg.[152] The result was the 1910 Brussels Salvage Convention, which in relevant part states:

> Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost.
>
> The owner of the vessel incurs no liability by reason of contravention of the foregoing provision.[153]

The Salvage Convention entered into force in the United States on March 1, 1913, approximately two and a half years after its signing in Brussels.[154] The Convention's original text, particularly that of Article 11 above, evinces a strong commitment to maritime rescue, requiring a ship's captain to render aid to "everybody," even "an enemy" that is in danger at sea.[155]

149 *See* Robert D. Peltz, *Adrift at Sea: The Duty of Passing Ships to Rescue Stranded Seafarers*, 38 TUL. MAR. L.J. 363, 367 (2014) ("[T]he moral obligation to rescue a distressed vessel has been long recognized in international maritime sources . . . ."); Andrew A. Braun, Note, *The Maritime Duty of Rescue: Beyond Contract and Privity*—Walsh v. Zuisei Kaiun K.K., 5 MAR. L. 81, 87 (1980) (discussing the "universal custom of the sea" and "special solicitude" afforded by the maritime law in the context of rescue operations); *supra* text accompanying note 109.

150 Harris v. Pa. R.R., 50 F.2d 866, 869 (4th Cir. 1931).

151 Patrick J. Long, Comment, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, 48 BUFF. L. REV. 591, 594 (2000).

152 *Id.*

153 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, art. 11, Sept. 23, 1910, 37 Stat. 1658, T. S. 576.

154 Assistance and Salvage at Sea, Library of Congress, http://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0780.pdf.

155 *Id.*

The version ratified by the United States exhibits a similarly forceful commitment, with language requiring a ship's master to "render assistance to any individual found at sea in danger of being lost," or face up to a $1000 fine or a term of imprisonment not exceeding two years.[156] Similar language can be found in the 1982 United Nations Convention on the Law of the Sea. Article 98 of the Convention provides that "[e]very State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: to render assistance to *any* person found at sea in danger of being lost."[157]

The aforementioned international conventions reveal admiralty law's longstanding commitment to incentivizing, and in some cases mandating, bystander rescue operations. Specifically, recognizing how perilous life at sea can be, nations of many stripes came together to draft conventions aimed at cultivating legal frameworks amenable to rescue operations. Admittedly, these conventions specifically concern salvage operations, which are a narrower, more distinct form of maritime rescue operation when compared with a broader range of scenarios likely to implicate traditional, tort law maritime rescue doctrine principles.[158] Nevertheless, they speak to a broader, original concern ubiquitous in admiralty law, namely that legal frameworks should not effectively deter would-be rescuers from aiding those in peril as longstanding maritime traditions demand. In a 1976 opinion, Judge Gerard Goettel of the Southern District of New York captured this fundamental orientation towards rescue:

> The sea is a hard master and those who sail her are united in a common struggle. It is their tradition to answer calls of distress regardless of cost or peril. So firmly accepted is this tradition that our laws make it a criminal offense to ignore those "at sea in danger of being lost."[159]

This intrinsic aspect of admiralty jurisprudence has asserted itself time and time again in a variety of scenarios. Courts have repeatedly recognized "[t]he strong policy inherent in maritime law to encourage rescue by rewarding those who rise to the call and punishing those who do not."[160] For example, in *Hunley v. ACE Maritime Corp.*, Judge Nelson of the Ninth

156 46 U.S.C. § 2304 (2012).

157 United Nations Convention on the Law of the Sea, art. 98, Dec. 10, 1982, 1833 U.N.T.S. 397 (emphasis added).

158 Within admiralty law, salvage operations constitute a narrow species of maritime rescue operation. Specifically, "[s]alvage is defined as the rescue of any ship, cargo or other recognized subject of salvage (e.g. property, life, and treasure) from danger at sea." Jason Parent, Note, *No Duty to Save Lives, No Reward for Rescue: Is That Truly the Current State of International Salvage Law?*, 12 ANN. SURV. INT'L & COMP. L. 87, 89 (2006). Thus, certain operations falling under the ambit of the maritime rescue doctrine would not be implicated by the salvage conventions discussed in this Note. However, the larger concerns surrounding incentivizing maritime rescue operations are quite relevant.

159 Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc., 418 F. Supp. 656, 656–57 (S.D.N.Y. 1976) (quoting 46 U.S.C. § 728 (1926) (current version at 46 U.S.C. § 2304 (2012))).

160 Peltz, *supra* note 149, at 378.

Circuit noted that "the law of admiralty has always sought to 'encourage and induce men of the sea to go to the aid of life and property in distress.'"[161] Similarly, in *Caminiti v. Tomlinson Fleet Corp.*, Judge Thomas D. Lambros wrote:

> [T]he law of the sea has always demanded a higher degree of care, vigilance and diligence. Accordingly, while it is true that the law of the land may not generally recognize a "Good Samaritan" rule which requires a person to come to the aid of a stranger in peril, such a duty is easily found in the context of admiralty.[162]

The moralistic, transformative language utilized in *Hunley* and *Caminiti* corresponds well with language used in early rescue doctrine cases such as *Eckert*, *Maryland Steel*, and *Wagner*. As in *Wagner*, where Justice Cardozo's concern was transcending static tort law rules to ensure would-be rescuers would have a legitimate opportunity to be made whole,[163] *Hunley* and *Caminiti* accentuate admiralty law's unique proclivity for encouraging (or even mandating) rescue operations as support for why its rules, which might run afoul of certain land-based principles, are appropriate in a maritime realm.[164] Thus, just as Justice Cardozo's language in *Wagner* characterized the rescue doctrine as a broader, tort law carve-out aimed at protecting would-be rescuers, *Hunley* and *Caminiti* seem to hint at a maritime "carve-out," which deliberately rejects particular intricacies of tort law that would thwart its broader commitment to incentivizing rescue. Thus, like Cardozo in *Wagner*,[165] *Hunley* and *Caminiti* appear to assume a welfarist approach to common law, intending that its judicially created structures take root in fundamental, time-honored communal (here, maritime) mores and traditions. Indeed, an elemental "axiom of tort law tacitly recognizes that the continued vitality of the common law, including the law of torts, depends upon its ability to reflect contemporary community values and ethics."[166]

Far from relegating bedrock rescue principles of maritime law to common law, Congress has codified such mores in a couple of iterations. Following the Titanic's sinking in 1912, Congress enacted 46 U.S.C. § 728, which assumes a substantial portion of its language from the 1910 Brussels Salvage Convention, though differing in some other material respects.[167] Essentially, it provides for liability if a vessel fails to render aid that it could reasonably give, without endangering itself, to any person at sea in danger of being lost.[168] Today, 46 U.S.C. § 728 has been incorporated into 46 U.S.C. § 2304,

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161 927 F.2d 493, 498 (9th Cir. 1991) (quoting Berg v. Chevron U.S.A., Inc., 759 F.2d 1425, 1429 (9th Cir. 1985)).

162 1981 A.M.C. 201, 205 (N.D. Ohio 1979).

163 *See supra* text accompanying note 52.

164 *See supra* text accompanying notes 161–62.

165 *See supra* text accompanying note 53.

166 Whetzel v. Jess Fisher Mgmt. Co., 282 F.2d 943, 946 (D.C. Cir. 1960) (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 24–25, 108 (1921)).

167 Peltz, *supra* note 149, at 371.

168 46 U.S.C. § 728 (1926). The full text of the statute provides:

which was enacted in 1983.[169] Viewed collectively, these statutes are indicative of Congress's historical and longstanding affirmation of international maritime law's widely recognized preference for incentivizing and even mandating rescue operations. Specifically, 46 U.S.C. § 728 and eventually 46 U.S.C. § 2304 gave congressional "bite to the Convention's bark," by "offer[ing] a concrete criminal sanction for a shipmaster's nonfeasance."[170] In fact, by some measures, said statutes went even further than the Convention, for example, by not including a disclaimer of liability for the vessel owner.[171]

Consistent with its statutory text, purpose, and context, many district courts have assessed liability under 46 U.S.C. § 2304 when a vessel has failed to rescue stranded seafarers when it could reasonably have done so.[172] *Caminiti*,[173] mentioned earlier in a common law context, found 46 U.S.C. § 728 to be an equally plausible basis for liability. Finding that "[t]he universal custom of the sea demands as much wherever human life is in danger," the *Caminiti* court concluded that "implicit and inherent in general maritime law [is] a duty to rescue strangers in peril."[174] It then went on to conclude that "Section 728 . . . says as much in *clear* words."[175] *Martinez v. Puerto Rico Marine Management, Inc.*,[176] is another leading case in which statutory law was applied to assess liability for a failure to rescue. In *Martinez*, Hoyt Dixon and Denny Jones perished at sea during an attempt by the crew of the SS Ponce to rescue them from their shrimp boat, the Joan J. II.[177] The court found that Dixon and Jones died as a result of a poorly conducted rescue attempt

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> The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding $1,000 or imprisonment for a term not exceeding two years, or both.

Id.

169 46 U.S.C. § 2304 (2012). The statute begins:

> A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board." It then goes on to provide that "[a] master or individual violating this section shall be fined not more than $1,000, imprisoned for not more than 2 years, or both.

Id. § 2304(b).

170 Parent, *supra* note 158, at 106.

171 Peltz, *supra* note 149, at 371 ("Because Congress is deemed to have been aware of the Convention's language when it enacted its subsequent statute, the omission of the disclaimer of liability for the owner must be considered intentional.").

172 *Id.* at 373.

173 Caminiti v. Tomlinson Fleet Corp., 1981 A.M.C. 201 (N.D. Ohio 1979).

174 *Id.* at 206 (quoting Harris v. Pa. R.R. Co., 50 F.2d 866, 869 (4th Cir. 1931)).

175 *Id.* (emphasis added).

176 Martinez v. Puerto Rico Marine Mgmt. Inc., 755 F. Supp. 1001 (S.D. Ala. 1990).

177 *Id.* at 1002.

on the SS Ponce.[178] Turning to the Ponce's liability, the court concluded that "[w]here a maritime rescue is involved, section 2304 of Title 46 of the United States Code imposes a duty to provide assistance at sea."[179] Concluding that Puerto Rico Marine Management owed a duty to the Joan J. II to provide rescue assistance, the court summarily concluded that the SS Ponce breached that duty and thus could be held liable under 46 U.S.C. § 2304.[180] These decisions, among others,[181] reveal district courts' willingness to impose liability—both as a matter of statutory and common law—when a vessel fails to carry out its duty to rescue in accord with maritime law's most honorable traditions.

While both international maritime law and American statutory law evince a clear preference for incentivizing and even mandating maritime rescue operations, some important objections exist. First, it cannot be ignored that such a framework seems inapposite next to American tort law's autonomy-focused, no-duty-to-rescue rule.[182] Specifically, common law imposes no affirmative duty upon a willing Good Samaritan,[183] so why should admiralty law exceed tort law's libertarian bounds? Despite its considerable weight, such an argument fails to account for admiralty law's historic preference for rescuers and rescue operations. The court in *Caminiti* said as much when it stated that "the law of the sea has *always* demanded a higher degree of care, vigilance and diligence."[184] Likewise, the Fourth Circuit stated in *Furka* that "[t]he best *traditions* of seafaring men demand that we honor attempts to rescue."[185] Indeed, admiralty law jurisprudence is rich with such affirmations.

However, some scholars would debate whether admiralty law itself has always exhibited such a clear preference. Salvage law, for example, was traditionally concerned only with property and not human life as is evidenced by an 1840 American decision, *The Emblem*, in which the majority held that "a court of admiralty has no authority to allow a reward merely for the saving of life."[186] As such, some argue that results emanating from Brussels' 1910 Salvage Convention, as well as 46 U.S.C. §§ 728 and 2304, are simply inconsistent with traditional principles of salvage as articulated by early case law.[187]

178 *Id.* at 1006.

179 *Id.*

180 *Id.*

181 *See, e.g.*, Langston v. Zapata Gulf Marine Corp., No. 85-2696, 1987 WL 25097 (E.D. La. Nov. 20, 1987).

182 *See* Long, *supra* note 151, at 596 ("By imposing an affirmative obligation on sailors to rescue those in peril, this statute runs counter to the resilient tort distinction between misfeasance and nonfeasance.").

183 *Id.*

184 1981 A.M.C. 201, 205 (N.D. Ohio 1979) (emphasis added).

185 Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1089 (4th Cir. 1985) (emphasis added).

186 The Emblem, 8 F. Cas. 611, 612 (D. Me. 1840) (No. 4434).

187 *See* Long, *supra* note 151, at 600 ("[I]n truth, American admiralty never imposed a duty to rescue.").

Such an argument presents a strong counterweight against claims asserting admiralty law has always exhibited a clear preference for incentivizing *life* rescue.

It is largely uncontroverted that early (pre-Brussels) American admiralty law imposed no affirmative duty upon salvors to save; however, this does not wholly undermine admiralty law's high degree of regard for would-be rescuers. While traditional precepts of American salvage law suggest admiralty's preference for rescuers is not absolute, such claims must be viewed against salvage law's own inherently self-limiting framework. Specifically, as salvage law's compensatory benefits are at least in part tethered to a saved piece of property's economic value,[188] it would be a difficult, quasi-arbitrary enterprise to attempt to fix an appropriate level of compensation for life salvage. As an 1859 case, *The Mulhouse*, points out, "[i]ndeed, if no property is saved, no means are supplied by which the court can reward the salvor."[189] Thus, salvage law's more limited focus on property "rescue," at least in part, seems to have arisen from its own compensation-based system's effective limits. Recognizing said gap in salvage law's framework, Congress passed the Salvage Act, 46 U.S.C. § 728 (now 46 U.S.C. § 2304), and in doing so affirmed life rescue as a vital requirement in admiralty law.[190] While courts have not always enforced § 2304 in a uniform manner,[191] its text and purpose provide a clear pathway for liability when would-be salvors fail to aid imperiled seafarers. Finally, while not binding on American courts, international salvage law does recognize life salvage and provides appropriate compensation for it.[192] This further underscores admiralty law's preference for encouraging life rescue and rescue in general.

Ultimately, this Note's focus is on neither salvage law's historical development nor its structural intricacies. However, salvage law's dynamic evolution—from its historical-constructural limitation to property salvage, to the 1910 Brussels Salvage Convention, to Congress's responsive, remedial enactment of 46 U.S.C. §§ 728 and 2304—readily evinces admiralty law's characteristic commendation of maritime rescue operations. Such fundamental principles of admiralty law are freely transferable from salvage law to maritime rescue doctrine scenarios. In both cases, admiralty law should, in accord with "the best traditions of seafaring men," strive to incentivize and compensate life rescue. Admittedly, district courts have inconsistently applied 46 U.S.C. § 2304 and its criminal penalties for failure to engage in

188 *See id.* at 601 n.83.

189 17 F. Cas. 962, 967 (S.D. Fla. 1859) (No. 9910).

190 *See* Parent, *supra* note 158, at 105–08 (discussing The Salvage Act and other congressional responses to salvage law's failure to appropriately encourage life salvage or rescue in accord with broader principles of admiralty law).

191 *See, e.g.*, Korpi v. United States, 961 F. Supp. 1335, 1346 (N.D. Cal. 1997) (concluding that "[a] private party has no affirmative duty to rescue a vessel or person in distress"). As some have pointed out, the sporadic enforcement of 46 U.S.C. § 2304 is in part due to the remoteness and unreported nature of many maritime rescues. *See* Parent, *supra* note 158, at 111–12.

192 Parent, *supra* note 158, at 132–33.

life rescue; however, this lack of uniform enforcement only underscores why, in a maritime rescue doctrine context, it is pivotal to retain a framework amenable to private rescue. Specifically, in light of 46 U.S.C. § 2304's scattershot enforcement, would-be rescuers may not feel legally compelled to engage in life rescue operations, particularly if they may face significant personal liability for a negligent (though not wanton or reckless) rescue attempt. Thus, allowing a would-be rescuer to recover for his or her potentially serious injuries incurred during a rescue attempt—unless he or she acts in a wanton or reckless manner—acts as an additional impetus to encourage private rescues. Additionally, a "wanton or reckless" standard of care better comports with admiralty law's holistic structure; for if 46 U.S.C. § 2304 is appropriately enforced, thus subjecting individuals to potential criminal liability for failure to engage in life rescue, it makes little sense to simultaneously increase such individuals' exposure to potentially significant personal liability under the maritime rescue doctrine.

One additional aspect of admiralty strongly militating in favor of a lower threshold for full rescuer recovery under traditional maritime rescue doctrine principles stems from admiralty's nature. Specifically, by its nature, a seafarer's life is solitary, and many maritime rescues unfold in remote, untraveled locations. Thus, a third party's nearby vessel may be an imperiled victim's only means of rescue and thus his or her only opportunity for survival.[193] For example, in *Hutchinson v. Dickie*, a social guest fell off a pleasure boat and drowned in Lake Erie.[194] Issues of premises liability and invitee status notwithstanding, the Sixth Circuit focused on remoteness as a primary basis for liability.[195] The court noted that rescuing Dickie "was certainly a moral duty, *universally* recognized and acted upon. Dickie was drowning and appellant's cruiser was the only instrumentality by which he might be rescued."[196] Interpreting *Hutchinson*, Professor Peter Lake has noted that "*Hutchinson* is compatible with a rule requiring rescue at sea whenever one knows of danger and of another's imminent peril and controls the only means of rescue."[197]

Considerations of remoteness lend pragmatic force to admiralty law's historical preference for incentivizing and honoring private rescue. If an imperiled mariner is lucky, a fellow vessel will be near enough to render aid; and admiralty law, taking account of such potential isolation, has encouraged and in some cases even impelled private rescue. Such considerations align well with Justice Cardozo's description of rescuers as "deliverer[s]" in *Wag-*

193 *See* Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DEPAUL L. REV. 315, 345 (1997) ("It is powerful ammunition for the argument that a duty to use at least minimal, if not reasonable, care arises whenever one who can act at minimal or no risk to himself controls the only instrument of rescue for another who is helpless and in dire and immediate peril in a remote location." (footnote omitted)).

194 162 F.2d 103 (6th Cir. 1947).

195 Lake, *supra* note 193, at 344 (quoting *Hutchinson*, 162 F.2d at 106).

196 *Hutchinson*, 162 F.2d at 106 (emphasis added).

197 Lake, *supra* note 193, at 344.

ner.[198] Merriam-Webster's Dictionary defines savior, a synonym of deliverer, as "one that saves from danger or destruction."[199] This definition, coupled with its context in *Wagner*, evokes a strongly moralistic response, and one that is echoed by Judge Hicks in *Hutchinson*. As Professor Lake writes, "[t]his feature of the boat-rescue cases is instructive to other, non-boat cases. It suggests that a more humanitarian system encourages rescue with duty and forgives many failed rescues attempts through immunity."[200] Thus, remoteness considerations provide a boost to humanitarian arguments made in favor of cultivating legal frameworks amenable to incentivizing rescue operations in a maritime context. From such a perspective, abrogating the maritime rescue doctrine's traditional "wanton or reckless" standard becomes even more problematic, and doing so should be discouraged in light of admiralty law's writ large policy aims.

III. Paving the Path to Rescue

Parts I and II of this Note focused on precedential, historical, and structural reasons why abrogating the "wanton or reckless" standard traditionally associated with the rescue doctrine would be problematic, particularly in a maritime rescue context. Additionally, Parts I and II highlighted important policy forces militating against such an abrogation. Part III will briefly discuss two particular policy considerations in greater detail in order to shed further light on negative consequences likely to result from making it more difficult for voluntary, private rescuers to recover fully for injuries sustained during rescue attempts. First, this Note has made frequent reference to the rescue doctrine as a tool for incentivizing private rescues. Thus, it is necessary to analyze precisely how rescue doctrine principles act to catalyze and encourage private rescue attempts as well as evaluate their efficacy in doing so. Second, an economic and political concern ubiquitous throughout tort law asks how legal frameworks do and should affect allocation of costs stemming from accidents and other emergency scenarios. Thus, this Part will also briefly examine how costs emanating from private rescues might be allocated efficiently and fairly.

A simple example helps to delineate what perils and risks a potential rescuer may face should he or she decide to render aid to an imperiled victim amidst a regime of comparative negligence. Take *Cords v. Anderson*, a case in which the Wisconsin Supreme Court applied principles of comparative negligence in lieu of a "wanton or reckless" standard when assessing Ms. Jane Cords' ability to recover for injuries she sustained while attempting to rescue her friend, Norina Boyle.[201] A formerly athletic University of Wisconsin sophomore, Ms. Cords' crippling injuries left her a paraplegic with little

198 Wagner v. Int'l Ry. Co., 133 N.E. 437, 438 (N.Y. 1921).

199 *Savior*, Merriam-Webster Dictionary (11th ed. 2004), http://www.merriam-webster.com/dictionary/savior.

200 Lake, *supra* note 193, at 346–47 (footnote omitted).

201 259 N.W.2d 672 (Wis. 1977).

to no bowel and bladder control.[202] In determining appropriate damages, the *Cords* jury concluded that Ms. Cords was partially responsible for her injuries and her damages.[203] Thus, in line with principles of comparative negligence, her damages were docked accordingly.[204] While Ms. Cords did receive a $300,000 general damages award, she was still unable to recover fully for her life-altering injuries.[205]

Cords draws attention to a troubling quandary facing any would-be rescuer who must make a snap decision as to whether to aid an imperiled victim. Specifically, if mere unreasonableness as it is defined by traditional tort law principles is enough to reduce a would-be rescuer's recovery in accord with comparative negligence, it becomes a significantly riskier enterprise to render aid to one in need. Turning to a simplified example, if would-be rescuer A engages in a rescue operation and incurs serious and crippling injuries with a "value" of $1,000,000; and, subsequently, a court finds he or she was two percent responsible for his or her injuries, rescuer A may still be out some $20,000. It is very difficult to envision such a result being satisfactory to said rescuer A. Thus, the *Sweetman* court's observation that it "perceive[d] *no* harsh result from the application of comparative negligence principles to rescue cases" seems tenuous at best,[206] for it is hard to characterize $20,000 in expenses, lasting functional impairment, and significant emotional and psychological distress as not "harsh" in any manner.

Given this, numerous scholars have cited incentivizing rescue as a key impetus behind judicial development of a rescue doctrine along with implementation of its associated "wanton or reckless" standard governing claims for rescuer injuries. Delving deeper, application of a "wanton or reckless" standard acts to encourage rescue by "adopt[ing] a bright-line rule to provide more rigid and certain legal protection for the rescuer."[207] Specifically, unless an injured rescuer's conduct has crossed a certain threshold—namely, a recklessness threshold—he or she will not be barred from complete recovery. Thus, less ambiguity exists as to whether a rescuer will be able to recover. Also, a greater likelihood exists that a would-be rescuer will, in fact, recover more fully. Theoretically, at least, such added protections make it more likely that a would-be rescuer will engage in a rescue operation when compared with a regime lacking such buffers.[208]

Interestingly, some have criticized the rescue doctrine on grounds that it fails to go far enough. Such scholars argue it fails to incentivize private res-

202 *Id.* at 685.

203 *Id.* at 682–83.

204 *Id.*

205 *Id.* at 685–86.

206 Sweetman v. State Highway Dep't, 357 N.W.2d 783, 789 (Mich. Ct. App. 1984) (emphasis added).

207 William E. Westerbeke & Stephen R. McAllister, *Survey of Kansas Tort Law: Part I*, 49 U. KAN. L. REV. 1037, 1127 (2001).

208 *See supra* note 57 and accompanying text (discussing empirical concerns surrounding this proposition).

cue sufficiently because it forces a rescuer to make a determination as to whether it will apply in any given case—i.e., it forces a rescuer to determine whether a victim's injuries resulted from negligence (rescue doctrine applies) or merely from an act of nature (rescue doctrine does not apply).[209] Another potential criticism would be that application of rescue doctrine principles merely restores an injured rescuer to his or her ex ante financial position without providing any meritorious reward. This is a difficult pill to swallow in light of potentially crippling functional and emotional injuries. However, such criticisms only underscore why—at the least—it is so important to retain a "wanton or reckless" standard when applying rescue doctrine principles. To be sure, legislatures should strive to implement other, more efficient means of compensating rescuers for injuries suffered;[210] however, such efforts will undoubtedly take time and resources. It would be unwise to take a step backwards in the interim.

At this point, it is important to address a couple of key objections. First, it might be argued that a goal of incentivizing private rescue is not without significant policy concerns in its own right. Specifically, what consequences might arise from incentivizing poorly performed or suboptimal rescues? Would an imperiled victim be better off if such a rescue were not attempted on his or her behalf? Might such an imperfect rescue lead an imperiled victim to suffer additional injuries or fail to prevent significant injuries altogether? In his work, Christopher H. White offers a concrete example to help shed light on precisely what "choice" an individual in need of rescue actually faces. White notes:

> If Person 2 is the only person capable of rescuing Person 1, then the alternative to an imperfect rescue is not a perfect rescue, but *no rescue at all*. Thus, Person 1 does not face a choice between costs of zero or $(n)(X)$, but rather a choice between costs of $(n)(X)$ or X. In this case, Person 1 prefers the imperfect rescue that reduces his injuries, but does not eliminate them.[211]

White's observations hold particular force in a maritime context, where the issues of remoteness discussed in Part II are especially likely to arise. In essence, an imperiled mariner may truly have only one—if he or she is lucky—avenue of rescue available. Such a "deliverer," to borrow Justice Cardozo's terminology, should not be deterred from engaging in a rescue operation as a result of a heightened risk for personal liability emanating from abrogation of the maritime rescue doctrine's "wanton or reckless" standard for rescuer recovery.

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209 *See* White, *supra* note 16, at 524–25 ("Under both *Pifer* and *Williams* [two fire rescue cases], a potential rescuer must make a determination at the scene as to whether a fire has been negligently started or not. This is impossible.").

210 Christopher H. White examines an excellent body of suggestions in his work. In it, he analyzes three potential avenues that individual states could implement to provide redress to injured rescuers. He looks at "(1) allowing the rescuer to sue the rescued victim in tort, (2) creating a public compensation fund, or (3) creating an insurance regime." *See id.* at 530–45.

211 *Id.* at 519.

One additional objection has to do not with any theoretical issues but rather with a lack of empirical evidence. Specifically, it is difficult to find empirical support for the maritime rescue doctrine's efficacy in incentivizing rescue.[212] The precise contours of this quandary are beyond this Note's scope; however, it raises important pragmatic questions implicating issues of legal literacy and quick, pressured decisionmaking that are ripe for further investigation.

The nature of rescue operations as being comprised of reactive, often gut-level and emotionally driven actions also raises vexing issues surrounding proper allocation of costs. Ubiquitous throughout tort law, concerns over proper allocation of costs emanating from accidents are a focal point of a law-and-economics approach to tort policy. While it is far beyond this Note's scope to consider cost allocation issues deeply, it is necessary to consider how rescue-focused laws impact upon such considerations. At its core, an economic approach to tort law demands that policymakers conceptualize and implement tort law as a tool for both reducing the cost of accidents in the aggregate and for keeping avoidance costs low.[213] In the rescuer-rescued context, such a framework poses complex questions in light of a rescue's reactive nature.

As Christopher H. White accentuates in his work, an individual jumping to rescue another imperiled individual does not engage in a robust rational calculus before acting.[214] Instead, such decisions are driven by emotional, psychological, and outright altruistic motivations, motivations quite distinct from a traditional economic focus on maximization of material self-interest.[215] This deviation from traditional approaches to decision-making places rescuers in an unusual position relative to an economic-focused tort law framework. For traditionally, an economic conception of tort law asks whether a precaution, which could prevent negligent activity and any resultant injuries, is both rational and cost-justified.[216] Stating it quite simply, economists accept a precaution as rational only if it is cost-justified, and a precaution is cost-justified only if its expected cost is less than that of an expected injury.[217] Examining White's paradigmatic rescue scenario in which Person 1 needs rescue and Person 2 is a potential rescuer, one can see how rescue operations uniquely impinge upon traditional tools for allocating

212 *See* Stevenson, *supra* note 57, at 1536.

213 *See* Jules Coleman et al., *Theories of the Common Law of Torts*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2 (Edward N. Zalta ed., 2015), http://plato.stanford.edu/entries/tort-theories/#TheTorLawEcoAna.

214 *See* White, *supra* note 16, at 515 ("Given the current legal regime's economic disincentives for rescues, it is surprising that Americans ever act to help others. Yet ordinary people continue to come to the assistance of others in danger. This suggests strongly that people do not act as strictly rational actors in the traditional economic sense of maximizing their own material self-interests when confronted with a rescue situation." (footnotes omitted)).

215 *See id.*

216 *See* Coleman et al., *supra* note 213, § 2.1.

217 *Id.*

accident costs.[218] As White articulates, in a socially optimal world, Person 2 will intervene to aid Person 1 when and if his cost of intervening, Y, is less than Person 1's cost of remaining in need of rescue, X.[219] The disparity, however, is that Person 2 does not directly suffer Person 1's costs and thus will act when Y is less than Z, a variable representative of Person 2's intrinsic benefit.[220] As noted earlier, Person 2's intrinsic benefit may very well be difficult to quantify in a pecuniary manner; instead, it often assumes an emotional or psychological character. Thus, an overall disconnect exists, in which Person 2 does not account for X in his or her decision, and society fails to account for Z in determining its optimal outcome.[221]

For this Note's purpose, it suffices to articulate a crucial result from such a discrepancy. Specifically, if legislatures, policymakers, or even courts allocate costs in a manner likely to increase Y, a rescuer's cost of intervening, would-be rescuers will be less likely to intervene owing to an unfavorable risk-reward calculus. Thus, from an angle geared toward incentivizing maritime rescue and rescue more broadly, lawmakers should strive to lower Y and raise or honor Z, a would-be rescuer's intrinsic benefit.[222] Here, abrogating a "wanton or reckless" standard in favor of a reasonable mariner standard in assessing a rescuer's ability to recover for injuries sustained during a voluntarily entered into rescue attempt raises Y by making it more likely a rescuer will not recover in full for injuries suffered. It also fails to honor Z in that it does not adequately recognize a rescuer's altruistic motives for acting. Thus, put simply, a would-be rescuer is less likely to attempt to rescue. Therefore, a "wanton or reckless" standard more appropriately facilitates attainment of both of Justice Cardozo's considerations in *Wagner*—that ex post, a rescuer has a legitimate opportunity to recover in full, and that ex ante, individuals are incentivized to engage in rescue operations for society's broader benefit.[223] Such considerations only grow more forceful in a maritime context owing to its unique historical, statutory, and policy-based aspects.[224] Given that allocating costs in a manner that places prohibitive barriers in a rescuer's path makes it less likely that third-party rescue operations will take place, doing so is inconsistent with original principles underlying judicial development of a rescue doctrine.

Conclusion

This Note has examined what standard of care a rescuer must exhibit while carrying out a rescue operation in order to recover for injuries he or she sustains while rendering aid to an imperiled victim. This Note has specifically focused on analyzing this question with respect to maritime rescue

218 *See* White, *supra* note 16, at 543.
219 *Id.*
220 *Id.*
221 *Id.*
222 *Id.*
223 *See supra* Part I.
224 *See supra* Part II.

operations. Currently, the Fourth, Fifth, and Ninth Circuits have retained a "wanton or reckless" standard for rescuer recovery, while the Second Circuit has abrogated this "wanton or reckless" standard, instead adopting a "reasonable seaman" standard based on principles of comparative negligence.

This Note argues that it would be advisable to retain a "wanton or reckless" standard in assessing claims for rescuer recovery under the maritime rescue doctrine. Part I traced over a century of rescue doctrine–related case law in order to analyze its relationship to shifting principles of apportionment. It found that while uncertainty exists as to whether comparative negligence has subsumed the rescue doctrine, an integrated study of relevant case law militates against such an argument. Part II then argued that an abrogation of the rescue doctrine and its associated "wanton or reckless" standard would be particularly ill-advised in an admiralty law context. Finally, Part III delved more deeply into how traditional rescue doctrine principles act to incentivize private rescue in addition to examining how such an application properly allocates costs under core principles of law and economics. Retaining traditional maritime rescue doctrine principles—notwithstanding a framework of comparative negligence—fairly offers injured rescuers a legitimate opportunity to be made whole while simultaneously encouraging would-be rescuers to aid those in peril, twin benefits potentially applicable to us all.

This being said, questions about how courts and policymakers might assess rescuer recovery claims going forward remain unanswered. This Note has argued for a "wanton or reckless" standard in assessing rescuer recovery claims; however, precisely what conduct constitutes a wanton or reckless rescue attempt? Certainly, recklessness requires a higher level of culpability than a mere negligence standard; but it is equally true that a "wanton or reckless" standard is not equivalent to absolute immunity for rescuers. In essence, at some threshold level, a rescuer will be acting recklessly and face significantly diminished prospects for recovery. No bright-line test likely exists; however, it is worth considering rescue situations in which the negligence-recklessness border is likely to be crossed. Another question involves societal costs associated with improperly carried out rescues. While this Note's focus has been on concrete parties and smaller-scale questions of law and economics relevant to rescue operations, it is also crucial to examine how incentivizing rescue operations may shift larger-scale, aggregate costs when rescues are carried out improperly. Finally, as this Note has pointed out, rescues are often emotionally driven and reactive in nature. Meanwhile, law tends to be very analytical and rational in its character. Thus, a broader scale, structural tension is likely to exist between classic legal concepts and psychological forces motivating an individual to render aid to another in need. Ultimately, this friction is unlikely to have a concrete remedy; however, it is instructive to courts and policymakers in that it reminds them to be attentive to areas of law ripe for departure from traditional principles.