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Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law

Gregory E. Maggs
George Washington University Law School, gmaggs@law.gwu.edu

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IPSE DIXIT: THE RESTATEMENT (SECOND) OF CONTRACTS AND THE MODERN DEVELOPMENT OF CONTRACT LAW

Gregory E. Maggs*

I. Introduction

Contracts casebooks often use a three-step approach in teaching legal doctrines like consideration, offer and acceptance, or the statute of frauds. They first reprint a decision that applies the traditional rule that most courts followed until the middle of this century. Then, for contrast, they include another case that rejects the traditional approach in favor of a new and usually more flexible standard. Finally, the casebooks quote a provision from the American Law Institute's Restatement (Second) of Contracts[1] (the "Restatement (Second)") that adopts the more modern view.

Professors E. Allan Farnsworth and William F. Young's Cases and Materials on Contracts,[2] one of the most popular contracts casebooks, contains several examples of this pattern. For instance, in covering the topic of modification, the authors first reprint Arzani v. People.[3] In that case, a subcontractor named Arzani agreed to pave a road for a general contractor for a fixed price.[4] When a labor dispute arose, Arzani told the general contractor he would need more money to complete the work.[5] Although the

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* Associate Professor of Law, George Washington University Law School. I would like to thank Dean Jack Friedenthal and the Law School for their generous financial support. Professors Peter B. Maggs, Mark Movsesian, Richard J. Pierce, and Jonathan Siegel gave me helpful comments. John Nargiso, J.D. 1999, provided invaluable research assistance. I also benefited from an unpublished paper by a former student, Ulrike Patzl, LL.M. 1997, on promissory estoppel and the statute of frauds.

[1] Restatement (Second) of Contracts (1981). The title page of this work identifies it as the "Restatement of the Law of Contracts Second." Id. at 1. By convention and Bluebook form, however, most writers call it the "Restatement (Second) of Contracts." See The Bluebook: A Uniform System of Citation 84-85 (16th ed. 1996).

[2] E. Allan Farnsworth & William F. Young, Cases and Materials on Contracts (5th ed. 1995).

[3] 149 N.Y.S.2d 38 (N.Y. Sup. Ct. 1956), reprinted in Farnsworth & Young, supra note 2, at 355-56.

[4] See id. at 39-40.

[5] See id. at 40.

general contractor promised to pay Arzani an additional sum, the court held this promise unenforceable.[6] The court explained that the general contractor had received nothing in exchange for his promise to pay more money because Arzani had a preexisting duty to complete the work and that the contractor's promise therefore lacked consideration. [7]

***509** Immediately following the Arzani case, Farnsworth and Young reprint a contrary decision called Watkins & Son v. Carrig.[8] In that case, an excavator agreed to dig a cellar for a man named Carrig.[9] The excavator encountered unexpected bedrock and declared that it would need more money to complete the work.[10] Carrig promised to pay the additional amount requested, and the court held the promise enforceable.[11] Refusing to apply the traditional preexisting duty rule relied on in Arzani, the court concluded that fairness required enforcement of the promise in view of the unforeseen difficulty of the work. [12]

In notes printed in connection with Arzani and Watkins, the authors cite section 89(a) of the Restatement (Second).[13] Section 89(a) adopts the holding of Watkins, stating: "A promise modifying a duty under a contract not fully performed on either side is binding. . . if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made."[14] The Reporter's Note following section 89 describes the section as "new" and cites Watkins as authority.[15] Several other leading casebooks cover the topic of modification using this same three-step approach.[16]

Another example from the Farnsworth and Young casebook concerns the ability of past services to serve as consideration. The authors first

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[6] See id.

[7] See id.

[8] 21 A.2d 591 (N.H. 1941), reprinted in Farnsworth & Young, supra note 2, at 357-61.

[9] See id. at 591.

[10] See id.

[11] See id. at 591, 594.

[12] See id. at 594.

[13] See Farnsworth & Young, supra note 2, at 353, 356.

[14] Restatement (Second) of Contracts § 89 (1981).

[15] Id. § 89 reporter's note.

[16] See, e.g., Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law 130-34 (6th ed. 1996); Arthur Rosett, Contract Law and Its Application 240-65 (5th ed. 1994).

reprint Mills v. Wyman.[17] In that famous old case, a sailor fell ill and a man named Mills cared for him.[18] Mills later notified the sailor's father, Wyman, who promised to pay Mills for the services that he had rendered.[19] The court, however, refused to enforce Wyman's promise. [20] It explained that although the father may have had a moral duty to pay for the services, the father had received nothing in exchange for the promise because Mills already had performed.[21] This case illustrates the traditional rule that "past" or "moral" consideration generally cannot serve as a basis for enforcing promises. [22]

Following Mills v. Wyman, Farnsworth and Young include Webb v. McGowin. [23] In that more recent case, Webb saved McGowin's life by diverting ***510** a falling piece of wood.[24] To show his gratitude for this service and to compensate Webb for injuries that he had sustained, McGowin promised to pay Webb a small pension for the rest of his life.[25] The court enforced the promise even though Webb had not exchanged any new consideration.[26] The court concluded that Webb's past action sufficed in the circumstances. [27]

In a note following these two cases, Farnsworth and Young cite section 86 of the Restatement (Second), [28] which adopts the holding of Webb v. McGowin. Section 86 states: "A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice."[29] The Reporter's Note to section 86 describes the section as "new" and cites Webb v. McGowin (among other

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[17] 20 Mass. (3 Pick.) 207 (1825), reprinted in Farnsworth & Young, supra note 2, at 67.

[18] See id. at 207.

[19] See id.

[20] See id. at 212.

[21] See id. at 211.

[22] See id. The court noted that the law traditionally had recognized exceptions for promises reaffirming debts discharged in bankruptcy, barred by the statute of frauds, or incurred as an infant. See id. at 209.

[23] 168 So. 196 (Ala. Ct. App. 1935), reprinted in Farnsworth & Young, supra note 2, at 68-72.

[24] See id. at 196-97.

[25] See id. at 197.

[26] See id. at 198.

[27] See id.

[28] See Farnsworth & Young, supra note 2, at 73.

[29] Restatement (Second) of Contracts § 86 (1981).

decisions) as authority.[30] Numerous other casebooks reprint the same cases, followed by section 86, in discussing the topic of past consideration.[31]

This three-step approach to covering contracts doctrines has several benefits. It demonstrates to first-year students that the law changes over time. It shows them the typical direction of change that has occurred in the twentieth century. It also informs students of the preferred view of the American Law Institute and, therefore, presumably of the academy in general.

Yet, despite achieving these pedagogic objectives, the approach raises a difficult issue. After working through the pattern on one doctrine or another, a student invariably will ask whether the new rule that is included in the Restatement (Second) accurately reflects the current law, or instead whether most courts still apply the traditional rule. This reasonable question usually does not have an easy answer.

The American Law Institute's decision to include a rule in the Restatement (Second) does not mean that a majority of courts have adopted that rule. The Restatement (Second) strives to state the best rules, not necessarily the rules that most courts have followed. As Professor Herbert Wechsler stated in 1969 while serving as the Director of the American Law Institute, "any statement that the law is such and such is more than an empiric finding that decisions have so held. . . .[I]t implies a normative assertion as to what ***511** should now be held, if and when the question is presented."[32] Professor Farnsworth, who served as one of the Reporters to

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[30] Id. § 86 reporter's note.

[31] See, e.g., Randy E. Barnett, Contracts: Cases and Doctrine 688-98 (1995); Steven J. Burton, Principles of Contract Law 191-99 (1995); Thomas D. Crandall & Douglas J. Whaley, Cases, Problems, and Materials on Contracts 204-15 (2d ed. 1993); John P. Dawson et al., Cases and Comment on Contracts 233-47 (6th ed. 1993); Fuller & Eisenberg, supra note 16, at 170-79; Robert W. Hamilton et al., Cases and Materials on Contracts 314-23 (2d ed. 1992); James F. Hogg & Carter G. Bishop, Contracts: Cases, Problems and Materials 180-97 (1997); Charles L. Knapp & Nathan M. Crystal, Problems in Contract Law: Cases and Materials 165-76 (3d ed. 1993); Edward J. Murphy et al., Studies in Contract Law 139-50 (5th ed. 1997); Rosett, supra note 16, at 229-37; Robert E. Scott & Douglas L. Leslie, Contract Law and Theory 193-201 (2d ed. 1993); Robert S. Summers & Robert A. Hillman, Contract and Related Obligation: Theory, Doctrine, and Practice 144-56 (3d ed. 1997).

[32] Herbert Wechsler, The Course of the Restatements, 55 A.B.A. J. 147, 150 (1969).

the Restatement (Second), similarly has explained that "often a paucity of cases or a confusion in the courts' analyses makes it impossible starkly to contrast innovation with tradition."[33]

Most contracts casebooks, for this reason, contain a disclaimer before quoting from the Restatement (Second). They typically caution students that they cannot rely on the work as an accurate statement of the law. For example, Professors Robert W. Hamilton, Alan Scott Rau, and Russell J. Weintraub warn in their textbook: "The Restatement provisions are usually drawn from case precedent, though they do not always reflect the 'majority' view. Sometimes a Restatement provision sets forth what the Reporter and Advisers think the rule should be even though there is little precedent for it."[34] Professor Steven J. Burton likewise explains in his casebook that the law in some jurisdictions may differ from the provisions of the Restatement (Second), but assures his readers that "the Restatement (Second). . . serves as a conventional statement of 'the modern view' of the law, even when it differs from the formal law on the books in a particular jurisdiction."[35]

Disclaimers of this sort seem somewhat inadequate given the prominent role of the Restatement (Second) throughout first-year contracts courses. Students cannot critically think about the legal system unless they have an accurate understanding of what courts actually do. Accordingly, they need clear guidance on when the Restatement (Second) reflects actual contract law and when it merely states a proposal that has not yet gone into practice.

To address this problem, I recently undertook a survey to determine how courts have received some of the modern rules in the Restatement (Second). My survey considered six important and innovative sections:

* Section 15(1)(b), which states a new rule for determining when a mental illness or defect makes a promise voidable;[36]

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[33] E. Allan Farnsworth, Ingredients in the Redaction of the Restatement (Second) of Contracts, 81 Colum. L. Rev. 1, 6 (1981) (internal citations omitted).

[34] Hamilton et al., supra note 31, at 7.

[35] Burton, supra note 31, at 11.

[36] See Restatement (Second) of Contracts § 15(1)(b) (1981) ("A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect...(b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.").

* Section 86, which states a new rule for when past services may serve as a basis for enforcing promises; [37]

* Section 87(2), which states a new rule for when reliance can make an offer irrevocable;[38]

***512** * Section 89, which states a new rule on the enforceability of contract modifications in view of unanticipated circumstances;[39]

* Section 139, which states a new rule on when reliance can make a promise enforceable notwithstanding the statute of frauds;[40] and

* Section 153, which states a new rule on when a unilateral mistake can make a promise voidable.[41]

I analyzed these six sections because they typically arise in contracts casebooks used by students during their first year of law school.[42]

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[37] See id. § 86(1) ("A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.").

[38] See id. § 87(2) ("An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.").

[39] See id. § 89(a) ("A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made....").

[40] See id. § 139(1) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.").

[41] See id. § 153 ("Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.").

[42] Farnsworth and Young cite all of these rules in their casebook. See Farnsworth & Young, supra note 2, at 73, 257-58, 307, 333, 356-57, 801. Other contracts casebooks cite many of them. See, e.g., Fuller & Eisenberg, supra note 16, at 130, 178-79, 409, 699 (citing sections 86, 87(2), 89, and 153); Hamilton et al., supra note 31, at 298, 323, 476, 765, 894 (citing sections 15, 86, 87(2), 89, and 139);

The study had an uncomplicated methodology. Almost thirty-five years have passed since the American Law Institute began work on the Restatement of Contracts in 1963, and more than fifteen years have passed since it published these rules in their final form in 1981.[43] During this time, 241 cases from a wide variety of jurisdictions have cited these six sections.[44] In conducting the survey, I simply read all of these cases. [45]

The survey produced surprising results. Although the six sections contradicted long-standing traditional rules--including black letter rules that appeared in the original Restatement of Contracts[46] (the "Restatement") published in 1932--courts almost universally accepted them. Only eight decisions rejected or criticized the rules.[47] The other cases cited the rules favorably when applying them or discussing them in dicta.

The study does not answer the nagging question about whether the Restatement (Second) accurately states the law in most jurisdictions, but it takes ***513** an important first step. Justice Oliver Wendell Holmes famously defined the law as merely a prediction about what a court will do when presented with particular facts.[48] Under that definition, the new rules in sections 15(1)(b), 86(1), 87(2), 89(a), 139, and 153 certainly come close to the status of law. In view of the overwhelming support for these provisions to date, it is reasonable to predict that most courts will follow them in the future.[49]

Although I initially had sought to determine only how courts had received these new rules in the Restatement (Second), I observed an unexpected phenomenon in reading the cases. In particular, most courts simply deferred to the new rules. In the vast majority of cases, courts gave

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Rosett, supra note 16, at 119-20, 236, 264, 562 (citing sections 15, 86, 87, and 89).

[43] The American Law Institute adopted and promulgated the Restatement (Second) of Contracts at its annual meeting on May 17, 1979. Final publication of the work, however, did not occur until 1981. See Restatement (Second) of Contracts (1981).

[44] See infra Appendix (listing cases).

[45] For a comparable study of how courts have responded to section 90, see Daniel A. Farber & John H. Matheson, Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake," 52 U. Chi. L. Rev. 903, 904, 907 (1985).

[46] Restatement of Contracts (1932).

[47] See infra Part III.B.

[48] See O. W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

[49] See infra Part V.

no reasons for their decisions to embrace the six sections. They simply cited them as they would cite a statute or code and did not question their authority.

This practice raises an important normative question: Should courts follow the Restatement (Second) as readily as they currently do? This Article seeks to address that policy issue in addition to describing the survey. It concludes that, although some arguments counsel against deference to an academic work such as the Restatement (Second), on balance, the practice does more good than harm. By deferring to the Restatement (Second), courts have tended to promote uniformity and certainty in the law of contracts and to conserve judicial resources. Although deference to the Restatement (Second) may alter the substance of the law in some jurisdictions, such changes generally do not have deleterious consequences.

The remainder of this Article consists of four parts. Part II describes the development of the Restatement and its successor, the Restatement (Second). Part III describes the survey and shows the extent to which courts have followed the six new rules. Part IV evaluates the propriety of judicial deference to the Restatement (Second). Part V concludes by predicting that even more decisions will support the new rules in the future.

II. The Restatement of Contracts

In the early 1920s, at the invitation of the American Association of Law Schools, a group of prominent judges, legal scholars, and practicing attorneys formed the "Committee on the Establishment of a Permanent Organization for the Improvement of the Law."[50] This committee prepared an influential report faulting the American legal system for its uncertainty and complexity.[51] The report proposed creating an institute that would undertake projects to address these problems.[52]

***514** In 1923, in response to the report's recommendation, Chief Justice William Howard Taft, former Secretary of State Elihu Root, and others formed a nonprofit organization called the American Law Institute

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[50] See Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute, reprinted in American Law Institute, The American Law Institute--50th Anniversary 5, 12 (1973) [hereinafter Report].

[51] See id. at 15-19.

[52] See id. at 20-25 (discussing, specifically, the need for a restatement of the law).

("ALI").[53] Over the past seventy years, the ALI has enjoyed a membership of some of the most prominent lawyers, judges, and law professors in the nation.[54] In accordance with its founding objective, the ALI has undertaken numerous projects designed to improve the law, including the creation of the Restatement and the Restatement (Second).

A. The Restatement of Contracts

In its first year of existence, the ALI decided that expert authorities should examine the common law precedents in several areas of the law and reduce them to a clear set of rules that lawyers and judges could follow.[55] With funding from the Carnegie Corporation and the leadership of Professor Samuel Williston, it undertook work on the subject of contracts.[56] In 1932, after nine years of collaborative effort, the ALI completed and published the two-volume Restatement.[57]

The Restatement contains a total of 609 sections addressing different contract law doctrines.[58] Each section contains a concisely stated rule of law followed by an explanatory comment, which often includes illustrations.[59] The sections do not provide citations justifying the rules; instead, the ALI simply asserted that "[t]he accuracy of the statements of law made rests on the authority of the Institute."[60]

In compiling the Restatement, the ALI sought to state existing common law rules in clear and simple terms. It did not desire to create new rules. [61] Although the authors of the Restatement occasionally had to choose

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[53] See Restatement of Contracts at vii (1932); American Law Institute, About the American Law Institute (visited Sept. 1, 1997) <http:// www.ali.org/ali/thisali.htm>.

[54] The ALI has two kinds of members. The "official members" include Supreme Court Justices, Chief Justices of state courts of last resort, and various bar association figures. The "elected members" include respected attorneys, judges, and law professors. See Restatement of Contracts at vii-viii; American Law Institute, supra note 53.

[55] See Restatement of Contracts at xi-xii.

[56] See id. at ix.

[57] See id. at ix, xi. For additional history on the creation of the Restatement, see Note, What Price Certainty? Corbin, Williston, and the Restatement of Contracts, 70 B.U. L. Rev. 511, 516-22 (1990).

[58] See Restatement of Contracts at xvii-xli (listing the sections).

[59] See, e.g., id. § 492 & cmt. (defining duress, explaining the definition, and providing illustrations).

[60] Id. at xi-xii.

[61] See G. Edward White, The American Law Institute and the Triumph of Modernist Jurisprudence, 15 Law & Hist. Rev. 1, 23 (1997).

among "very numerous and sometimes conflicting" cases,[62] they believed that their work reflected mainstream views. ALI Director William Draper Lewis accordingly proclaimed that "there is reason to expect that the Restatement of this and other subjects will be accepted by the courts and legal profession ***515** generally as prima facie a correct statement of what may be termed the general common law of the United States."[63]

The effort to state rules sometimes required creativity. For instance, in the often-cited section 90, the Restatement declared that a court may enforce a promise upon which the promisee has relied, even in the absence of consideration.[64] This provision contradicted judicial opinions holding that reliance on a promise alone could not justify its enforcement.[65] The ALI, however, decided to include section 90 because courts often had found ways to protect parties who relied on promises even if courts did not explicitly acknowledge reliance as a basis for enforcement.[66] Professor Arthur L. Corbin, who participated in drafting the Restatement, explained: "It is the belief of the present writer that the court decisions compel the inclusion of some such rule as that adopted by the Institute, and that the generally prevailing law never was inconsistent with it."[67] The Restatement produced a mixed reaction upon its publication.[68] Most scholars praised

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[62] Restatement of Contracts at xi.

[63] Id. at xiv.

[64] See id. § 90 ("A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."). The Restatement gives the following example: "A promises B not to foreclose for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding." Id. § 90 illus. 1.

[65] See, e.g., Commonwealth v. Scituate Sav. Bank, 137 Mass. 301, 302 (1884) (Holmes, J.) ("It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting on reliance on it.").

[66] See James Gordley, Enforcing Promises, 83 Cal. L. Rev. 547, 566-68 (1995) (discussing the history of the decision to include section 90).

[67] Arthur Linton Corbin, Corbin on Contracts 281 (1952).

[68] For early commentary on the Restatement, see, for example, Charles E. Clark, The Restatement of the Law of Contracts, 42 Yale L.J. 643 (1933); George W. Goble, The Restatement of the Law of Contracts, 21 Cal. L. Rev. 421 (1933); Harold C. Havighurst, The Restatement of the Law of Contracts, 27 Ill. L. Rev. 910 (1933); Charles E. Hughes, Restatement of Contracts Is Published by the American Law Institute, 18 A.B.A. J. 775 (1932); Edwin W. Patterson, The Restatement of the Law of Contracts, 33 Colum. L. Rev. 397 (1933); and Clarke B. Whittier, The

the work for its impressive scope and careful construction.[69] Yet, many writers also faulted it because they did not believe that common law doctrines lent themselves to summary in simple black letter rules.[70] Law professors also criticized the failure of the ALI to offer citations to support the rules.[71] Despite these academic objections, the Restatement took the judiciary by storm. Courts relied on the work heavily and ultimately cited its rules in over twelve thousand cases.[72] The ALI had sought to influence judges and probably could not have hoped for more success.

***516** B. The Restatement (Second) of Contracts

In 1962, with funding from the A.W. Mellon Educational and Charitable Trust, the ALI began work on a revised version of the Restatement called the Restatement (Second).[73] Professor Robert Braucher served as the Reporter until 1971;[74] Professor E. Allan Farnsworth succeeded him and served as Reporter until completion of the project in 1981.[75] The Restatement (Second) contains 385 sections, considerably fewer than its predecessor.[76] This reduction reflects an effort to condense and combine related sections. As in the Restatement, the sections in the Restatement (Second) each state a black letter rule and then have comments explaining the rule and giving illustrations.[77] Unlike the first Restatement, every section of the Restatement (Second) contains a "Reporter's Note."[78] These notes

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Restatement of Contracts and Consideration, 18 Cal. L. Rev. 611 (1930).

[69] See Farnsworth, supra note 33, at 1 (summarizing early reaction to the Restatement).

[70] See White, supra note 61, at 36 ("In review after review of the early Restatements critics demonstrated their disaffinity with the jurisprudential assumptions guiding the project.").

[71] See id.

[72] See 1979 Annual Report, 56 A.L.I. Proc. 560 (1980) (noting that 12,580 cases had cited the Restatement by 1979, the year in which the ALI adopted and promulgated its successor, the Restatement (Second)).

[73] See Restatement (Second) of Contracts at vii (1981).

[74] See id.

[75] See id.; see also supra note 43 (discussing the completion date of the Restatement (Second)).

[76] See Restatement (Second) of Contracts at ix-xxii (listing the sections).

[77] See, e.g., id. § 175 & cmt. & illus. (stating when duress by threat makes a contract voidable); see also supra note 59 and accompanying text (providing an example of this organization in the Restatement).

[78] See, e.g., Restatement (Second) of Contracts § 175 reporter's note.

typically list cases that support or, in some instances, contradict the section's rules, comments, and illustrations.[79]

The ALI officially explained its motivation for revising the original Restatement by saying that changes in the law mandated "periodic reexamination and revision."[80] Professor White, however, argues that the ALI had a more specific reason for wanting a new version of the work. In particular, he contends that the ALI found the original Restatement intellectually inadequate in view of the scholarly criticism described above.[81] Whatever the impetus for the revision, most writers would agree that the Restatement (Second) rests on a different philosophy from the Restatement. In the first publication, the ALI sought only to clarify the law and not to change it.[82] The ALI, for this reason, generally avoided including new or controversial rules. The Restatement (Second) differs considerably in this regard.

The drafters of the Restatement (Second) did not seek merely to state rules that courts in a majority of jurisdictions had adopted. They sought instead to express a "normative" view about what rules courts should apply.[83] In many instances, they chose rules that had little support at the time, but that further policies the ALI considers important.[84] Sections 15(1)(b), 86, 87(2), 89, 139, and 153 all would appear to fall into this category.[85] The Reporter's Notes describe these sections as "new" because they state rules that ***517** did not appear in the Restatement.[86] These notes generally contain few citations to cases, but instead rely heavily on academic commentary as authority.[87]

This shift in philosophy apparently has not lessened the ALI's influence on the judiciary. A total of over twenty-four thousand cases now have cited

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[79] See Farnsworth, supra note 33, at 4 (discussing the creation of the "reporter's notes").

[80] Restatement (Second) of Contracts at vii.

[81] See White, supra note 61, at 46; supra notes 70-71 and accompanying text.

[82] See supra note 61 and accompanying text.

[83] Wechsler, supra note 32, at 150.

[84] See Farnsworth, supra note 33, at 5-7.

[85] See infra Part III.B. (discussing each of these provisions in depth).

[86] See Restatement (Second) of Contracts § 15 reporter's note (1981); id. § 87 reporter's note; id. § 89 reporter's note; id. § 139 reporter's note; id. § 153 reporter's note.

[87] See, e.g., id. § 15 reporter's note (relying on numerous law review articles and other legal publications).

the Restatement and the Restatement (Second).[88] Moreover, courts generally have followed the new rules in the Restatement (Second) even though they differ from traditional rules.[89]

III. Judicial Reception of New Rules in the Restatement (Second) of Contracts

To determine how courts received the new rules in sections 15(1)(b), 86, 87(2), 89, and 139, I examined all of the cases that have cited them. The following discussion first explains the methodology of the survey. It then reports the number of cases that have cited each of the sections favorably and unfavorably. Finally, it describes the reasons for courts' general acceptance of the new rules.

A. Survey Methodology

I obtained lists of cases citing the six new rules from two sources. First, I gathered all of the citations included in the 1982, 1986, 1990, 1993, and 1997 appendices to the Restatement (Second).[90] These appendices strive to list all judicial decisions that have cited the Restatement (Second) in its final published form or in earlier circulated drafts. Second, I collected all of the citations of the six sections included in the 1994 main volume and the March 1997 appendix of Shepard's Restatement of the Law Citations.[91]

Several factors required researching both sources. Unlike the appendices to the Restatement (Second), Shepard's does not include cases that cited preliminary versions of the six sections that appeared in published drafts before 1979. The Shepard's appendix, however, contains some recent citations that have not yet been published in a Restatement (Second) appendix. In addition, each source lists a few cases that the other should include but, for some unknown reason, does not; some citations in the appendices do not appear in Shepard's, [92] and some citations in Shepard's

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[88] See 74 A.L.I. Ann. Rep. 25 (1997).

[89] See infra Part III.B.

[90] See Restatement (Second) of Contracts at app. 6 (1982), app. 7 (1986), app. 8 (1990), app. 9 (1993), & app. 10 (1997).

[91] Shepard's Restatement of the Law Citations (3d ed. 1994 & app. Mar. 1997).

[92] See, e.g., Quigley v. Wilson, 474 N.W.2d 277, 281 (Iowa Ct. App. 1991) (citing section 89); Bragdon v. Drew, 658 A.2d 666, 668-69 (Me. 1995) (citing section 15).

do not appear in the appendices.[93] Looking at both sources thus provided a method of double-checking my research.

***518** B. The New Rules and Their Reception

A total of 241 cases cited the six new rules contained in sections 15(1)(b), 86, 87, 89, 139, and 153.[94] Of these cases, only eight rejected the rules or otherwise referred to them negatively. The other 233 adopted and applied the rules or at least cited them favorably in dicta. The following paragraphs discuss each of these sections and the results of the survey in more detail.

1. Section 15(1)(b)

Contract law allows a person to void a promise that he or she made while lacking mental capacity. Courts traditionally have judged a person's mental capacity by examining the person's ability to understand the promise.[95] Section 15(1)(a) of the Restatement (Second) retains this standard, permitting a party to void a promise if "he [wa]s unable to understand in a reasonable manner the nature and consequences of the

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[93] See, e.g., Strata Prod. Co. v. Mercury Exploration Co., 916 P.2d 822, 829 (N.M. 1996) (citing section 87); Blatt v. Manhattan Med. Group, P.C., 519 N.Y.S.2d 973, 978 (N.Y. App. Div. 1987) (Sandler, J., concurring) (citing section 15).

[94] This count requires four qualifications. First, this figure includes a few cases in which only a concurring or dissenting opinion cited one of the sections. See, e.g., In re Estate of Obermeier, 540 N.Y.S.2d 613, 615 (N.Y. App. Div. 1989) (Weiss, J., dissenting) (citing section 15). The following discussion singles out most of these cases for special treatment. Second, in the rare instance that a case discussed more than one of the six sections, the case was counted once for each section cited. For example, Wachovia Bank & Trust Co. v. Rubish, 293 S.E.2d 749, 755-56, 759 (N.C. 1982), was counted as two cases because it cited both sections 89 and 139. Third, superior and inferior court decisions were counted as separate cases. For instance, the Pennsylvania Supreme Court's decision in Estate of McGovern v. Commonwealth, 517 A.2d 523, 526-27 (Pa. 1986), and the Pennsylvania Commonwealth Court's decision in Estate of McGovern v. Commonwealth, 481 A.2d 981, 984-86 (Pa. Commw. Ct. 1984), were counted as two cases. Fourth, this figure does not include cases that erroneously cited one of the six sections when the court apparently intended to refer to some other provision. See, e.g., Altevogt v. Brinkoetter, 421 N.E.2d 182, 187 (Ill. 1981) (citing section 139, but apparently referring to some other provision).

[95] See E. Allan Farnsworth, Contracts § 4.6, at 240 (2d ed. 1990); 1 Samuel Williston, The Law of Contracts § 256, at 500 (1929).

transaction."[96] Section 15(1)(b), however, now includes an alternative test that allows a person to void a promise if "he [wa]s unable to act in a reasonable manner in relation to the transaction and the other party ha[d] reason to know of his condition."[97] Under the alternative rule, the person's ability to understand the promise does not matter.

Many casebooks teach the new alternative using Ortelere v. Teachers' Retirement Board.[98] In that case, a woman named Ortelere exercised an option under her retirement plan while suffering from cerebral arteriosclerosis.[99] The New York Court of Appeals acknowledged that New York cases previously had relied on a cognitive test of understanding to determine mental capacity, but decided to update the law based on what it considered ***519** advances in "psychiatric knowledge."[100] At the time of the decision, the ALI had not yet published the Restatement (Second), but it had circulated preliminary drafts. The Court of Appeals cited and followed a draft version of what is now section 15(1)(b),[101] explaining that even if Ortelere could understand the transaction, she might not have been able to act in a reasonable manner.[102]

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[96] Restatement (Second) of Contracts § 15(1)(a) (1981).

[97] Id. § 15(1)(b).

[98] 250 N.E.2d 460 (N.Y. 1969).

[99] See id. at 461-62.

[100] Id. at 464.

[101] See id. at 465 (citing Restatement (Second) of Contracts § 18C (Tentative Draft No. 1, 1964)). In a somewhat circular manner, the reporter's note to the final version of section 15(1)(b) cites Ortelere for support. See Restatement (Second) of Contracts § 15 reporter's note.

[102] See Ortelere, 250 N.E.2d at 464 ("Once it is understood that, accepting plaintiff's proof, Mrs. Ortelere was psychotic and because of that psychosis could have been incapable of making a voluntary selection of her retirement system benefits, there is an issue that a modern jurisprudence should not exclude, merely because her mind could pass a 'cognition' test based on nineteenth century psychology.").

The survey found twenty-two cases citing section 15.[103] Only one of these cases cited the provision in a negative manner. In Estate of McGovern v. Commonwealth State Employees' Retirement Board,[104] the trial court followed the new rule in section 15(1)(b), but the Pennsylvania Supreme Court reversed and simply stated that the rule did not reflect Pennsylvania law.[105] A vigorous dissent, however, urged adoption of section 15(1)(b).[106]

2. Section 86

Traditional statements of contract law reject the concept of "past" or "moral" consideration. They say that a promisor does not have to keep a promise merely because the promisor, prior to making the promise, received something from the promisee.[107] Unless the promisor bargained for the benefit***520** from the promisee, a court cannot find consideration

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[103] See infra Appendix. The citations came from federal courts within the First, Sixth, and Eighth Circuits, and from local courts in Alaska, the District of Columbia, Massachusetts, New York, Oregon, Pennsylvania, Tennessee, Texas, and Wisconsin. Some of these cases cited section 15 generally, without singling out subsection(1)(b). Two cases, both from New York, cited section 15 only in dissent. See In re Estate of Obermeier, 540 N.Y.S.2d 613, 615 (N.Y. App. Div. 1989) (Weiss, J., dissenting); Tomasino v. New York State Emp. Ret. Sys., 448 N.Y.S.2d 819, 822 (N.Y. App. Div. 1982) (Weiss, J., dissenting), aff'd, 440 N.E.2d 1300 (N.Y. 1982). The majority opinions in these two cases, however, did not reject the rule in section 15(1)(b), which the New York courts have followed since Ortelere. See, e.g., Blatt v. Manhattan Med. Group, P.C., 519 N.Y.S.2d 973, 976 (N.Y. App. Div. 1987) (implicitly adopting section 15(1)(b) by holding that contracts are voidable if one party suffers from psychosis about which the other party knew or should have known).

[104] 481 A.2d 981, 984-86 (Pa. Commw. Ct. 1984), rev'd, 517 A.2d 523 (Pa. 1986).

[105] 517 A.2d 523, 526 (Pa. 1986) ("This Court has never adopted Section 15 of the Restatement, which requires a post--hoc determination of reasonableness, and we decline to do so now.").

[106] See id. at 530 (Larsen, J., dissenting) ("I would adopt the principles set forth in the Restatement of the Law of Contract Second, § 15, apply those principles to this case, and affirm the Commonwealth Court.").

[107] See Corbin, supra note 67, § 230, at 321; Farnsworth, supra note 95, § 2.8, at 54, 57-58; 1 Williston, supra note 95, §§ 142, 148, at 317-19, 329-31. For categories that traditionally were excluded from this rule, see supra note 22.

and cannot enforce the promise.[108] The Mills v. Wyman case illustrates this traditional view.[109]

The Restatement (Second) creates an exception to the traditional rule. Adopting the approach used in Webb v. McGowin,[110] section 86 states: "A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice."[111] The survey found four cases citing section 86.[112] All of these cases treated the rule favorably.

3. Section 87(2)

A person who makes an offer generally can revoke it at any time prior to acceptance unless he or she has entered into a binding contract (called an "option contract") to keep the offer open.[113] Traditional statements of contract law say that an offeror can form a binding option contract only by promising to keep the offer open and receiving consideration for the promise.[114] The requirements of a promise and consideration, however, may produce hardship because sometimes an offeree relies on an offer even if the offeror has not bargained to keep it open.

Many casebooks illustrate this potential hardship with Drennan v. Star Paving Co.[115] In that case, a subcontractor made an offer to a general contractor to do some paving work for a fixed price.[116] The general

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[108] See Restatement of Contracts § 75 cmt. b (1932) (stating the traditional rule that "[c]onsideration must actually be bargained for as the exchange for the promise").

[109] See supra notes 17-22 and accompanying text.

[110] See supra notes 23-27 and accompanying text.

[111] Restatement (Second) of Contracts § 86(1) (1981). For further discussion of section 86, see Steve Thel & Edward Yorio, The Promissory Basis of Past Consideration, 78 Va. L. Rev. 1045, 1058-67 (1992) (describing the development of section 86). See also Gordley, supra note 66, at 597-98 (presenting an interesting theory of the nature of the injustice suffered in a case covered by section 86).

[112] See infra Appendix. These cases came from a federal district court in Kansas, and from state courts in Arizona, California, and Missouri. See infra Appendix; see also Graves v. Sawyer, 588 S.W.2d 542, 544 (Tenn. 1979) (citing section 86 but apparently intending to refer to some other provision).

[113] See Restatement (Second) of Contracts § 47 (stating the rule for "Revocation of Divisible Offer").

[114] See Corbin, supra note 67, § 31, at 50; Farnsworth, supra note 95, § 3.25, at 199; 1 Williston, supra note 95, § 55, at 94.

[115] 333 P.2d 757 (Cal. 1958) (in banc).

[116] See id. at 758.

contractor relied on this offer in preparing a bid.[117] After the general contractor submitted the bid and obtained the contract, the subcontractor attempted to withdraw its offer, and the general contractor could not find anyone else to do the work for the same price.[118] Under traditionally stated principles of contract law, the subcontractor could have revoked the offer.[119] Because the subcontractor***521** had not promised to keep the offer open, no option contract existed.[120] In an opinion by Justice Roger Traynor, however, the California Supreme Court rejected this position and held that an offeror cannot revoke an offer if the offeror knew that the offeree would rely on it.[121]

The Restatement (Second) adopts the rule in Drennan as an exception to the traditional view that an offeror remains free to revoke an offer absent a bargain to keep the offer open.[122] Section 87(2) states: "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."[123] Under this section, reliance on an offer may create an option contract that precludes revocation even if the offeror has not promised to keep the offer open.

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[117] See id.

[118] See id. at 758-59.

[119] See Farnsworth, supra note 95, § 3.25, at 199 (noting that, under "traditional contract doctrine," a subcontractor could revoke an offer "in spite of reliance by the general contractor," and explaining that the California Supreme Court "made a dramatic departure from this traditional analysis" in Drennan).

[120] See id. § 4.21, at 287 (explaining but questioning this logic).

[121] See Drennan, 333 P.2d at 760.

[122] See Restatement (Second) of Contracts § 87 reporter's note (1981) (citing Drennan). For further discussion of section 87(2), see Avery Katz, When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations, 105 Yale L.J. 1249, 1261-66 (1996) (discussing the development of section 87(2)), and Charles L. Knapp, Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel, 81 Colum. L. Rev. 52, 62-67 (1981) (same).

[123] Restatement (Second) of Contracts § 87(2).

The survey found twenty-one cases citing section 87(2).[124] None of the cases rejected section 87(2) or otherwise referred to it in a negative manner. Two cases, although not unfavorable, stood out as somewhat unusual. In Pearl v. Merchants-Warren National Bank,[125] the Appeals Court of Massachusetts cited a draft version of section 87(2) to support the proposition that "[a]n option given without consideration is revocable at any time by the offeror."[126] This citation seems a little odd because section 87(2) creates an exception to that rule. In Pavel Enterprises, Inc. v. A.S. Johnson Co.,[127] the Court of Appeals of Maryland cited section 87(2) and accepted the idea that reliance can make an offer binding.[128] Yet, the court analyzed the issue primarily under the general promissory estoppel rule in section 90 rather than the specific rule for offers in section 87(2).[129] This decision also seems peculiar because offers are not promises.

***522** 4. Section 89

As described above in the discussion of Arzani and Watkins, one party to a contract sometimes encounters unforeseen circumstances when the time for performance arrives.[130] For example, a contractor may face increased labor costs, or an excavator may discover hidden bedrock. In these cases, the other party might promise to pay more money or consent to change the specifications in order to obtain the previously agreed upon performance.

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[124] See infra Appendix. The citations came from federal courts within the D.C., Second, Third, Sixth, and Eleventh Circuits, and from the U.S. Court of Claims, and from state courts in Colorado, Idaho, Iowa, Maryland, Missouri, New Mexico, New York, Pennsylvania, and Washington. Some of these cases cited section 87 generally, without singling out subsection (2). Cases that cited only section 87(1) or its predecessors were not counted. See, e.g., Lewis v. Fletcher, 617 P.2d 834, 836 (Idaho 1980) (citing the tentative draft of section 87); Johnson v. Norton Hous. Auth., 375 N.E.2d 1209, 1211 (Mass. 1978) (same). One New York case cited section 87(2) in dissent, see Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1251 (N.Y. 1983) (Jasen, J., dissenting), but the majority opinion did not reject the rule. See id. at 1246-48. The New York Court of Appeals has cited the rule favorably. See De Kovessey v. Coronet Properties Co., 508 N.E.2d 652, 655 (N.Y. 1987).

[125] 400 N.E.2d 1314 (Mass. App. Ct. 1980).

[126] Id. at 1315.

[127] 674 A.2d 521 (Md. 1996).

[128] See id. at 529-30.

[129] See id. at 531-32.

[130] See supra notes 3-12 and accompanying text.

Traditional statements of contract doctrine say that these subsequent promises lack consideration.[131] The party making the promise, the logic runs, is not receiving anything in exchange because the other party has a preexisting duty to perform.[132] The Restatement (Second) retains this rule in section 73, which states: "Performance of a legal duty to a promisor which is neither doubtful nor the subject of honest dispute is not consideration."[133]

The Restatement (Second), however, contains a new section based on Watkins that sometimes makes this kind of subsequent promise enforceable even if it lacks consideration. Section 89 provides:

> A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or (b) to the extent provided by statute; or (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.[134] Under section 89, if a party encounters unexpected difficulties, the other party does not have to promise to pay more money or to change the specifications. Yet, if the other party does make such a promise, courts will enforce it if enforcement would be "fair and equitable" in view of the circumstances or, in some instances, if the aggrieved party relied on the promise.[135] The aggrieved party's preexisting duty to perform would not matter.

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[131] See Corbin, supra note 67, § 184, at 265-66; Farnsworth, supra note 95, § 4.21, at 287; 3 Williston, supra note 95, § 130, at 275-76.

[132] See Corbin, supra note 67, § 184, at 265-66; Farnsworth, supra note 95, § 4.21 at 287; 3 Williston, supra note 95, § 130, at 276.

[133] Restatement (Second) of Contracts § 73 (1981).

[134] Id. § 89. For further discussion of the development of section 89, see Knapp, supra note 122, at 71-76 (discussing the history of the inclusion of the provision), and Subha Narasimhan, Of Expectations, Incomplete Contracting, and the Bargain Principle, 74 Cal. L. Rev. 1123, 1184-87 (1986) (same). See also Robert A. Hillman, Contract Modification Under the Restatement (Second) of Contracts, 67 Cornell L. Rev. 680, 692-702 (1982) (criticizing section 89 for lack of clarity and underinclusiveness).

[135] See Restatement (Second) of Contracts § 89.

The survey found twenty-one cases citing section 89.[136] Only one case cited section 89 in a negative or, at least, potentially negative way. In Wachovia***523** Bank & Trust Co. v. Rubish,[137] the North Carolina Supreme Court stated the traditional preexisting duty rule as follows: "[A]n agreement to waive a substantial right or privilege, thus altering the terms of the original contract, must be supported by additional consideration, or an estoppel must be shown."[138] After this statement, the court included the following citation: "But see Restatement (Second) of Contracts § 89 (1981) (modification of executory contract needs no consideration if fair and equitable in light of unanticipated circumstances or if allowed by statute or if detrimental reliance)."[139] The "but see" signal makes the court's position on section 89 difficult to determine. The signal may imply that the court does not agree with the rule in section 89, but wants to acknowledge the existence of contrary authority. Alternatively, the signal may indicate that the court recognizes an exception to the general rule that it has stated.

5. Section 139

Section 90, as described above, adopts promissory estoppel as a basis for enforcing contracts.[140] When courts first began to use the rule stated in section 90, they saw reliance as a substitute for consideration. [141] Some litigants, however, sought to use promissory estoppel to enforce unwritten promises falling within the statute of frauds.[142] In the leading case of Monarco v. Lo Greco,[143] however, Justice Roger Traynor writing for the

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[136] See infra Appendix. These cases came from federal courts within the D.C., First, Third, Fifth, Seventh, and Tenth Circuits, and state courts in Connecticut, Illinois, Iowa, Massachusetts, Michigan, North Carolina, New Hampshire, New York, Ohio, Rhode Island, and Wyoming. Two cases cited section 89 only in dissent, but the majority opinions in these cases did not reject the rule. See Scholz v. Montgomery Ward & Co., 468 N.W.2d 845, 854 (Mich. 1991) (Levin, J., concurring in part and dissenting in part); Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1251 (N.Y. 1983) (Jasen, J., dissenting).

[137] 293 S.E.2d 749 (N.C. 1982).

[138] Id. at 755 (emphasis omitted).

[139] Id.

[140] See Restatement (Second) of Contracts § 90.

[141] See Farnsworth, supra note 95, § 2.19, at 92, 95-96.

[142] Courts previously had allowed parties to use equitable (as opposed to promissory) estoppel to preclude defendants from denying that they had signed a sufficient writing. See id. § 6.12, at 454-55 (contrasting equitable and promissory estoppel); 1 Williston, supra note 95, § 98, at 187 (discussing estoppel in general).

[143] 220 P.2d 737 (Cal. 1950) (in banc).

California Supreme Court accepted this argument, enforcing an unwritten promise on grounds that the promisee had relied.[144]

In drafting the Restatement (Second), the ALI adopted the approach of cases like Monarco and concluded that courts should have the power to use promissory estoppel to overcome the statute of frauds.[145] Section 139(1) states:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided ***524** only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.[146]

The survey found eighty-four cases citing section 139.[147] Six of these cases cited section 139 negatively. Of these six cases, four categorically rejected the provision; a federal district court applying Pennsylvania law, the Washington Supreme Court (in a pair of cases), and the Indiana Court of Appeals all concluded that reliance could not overcome the statute of frauds in any circumstance.[148] The Maine Supreme Court also rejected

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[144] See id. at 740-41.

[145] See John D. Calamari & Joseph M. Perillo, The Law of Contracts §§ 19-48, at 842 & n.61 (3d ed. 1987); see also Knapp, supra note 122, at 67-71 (describing the development of section 139 and the change that it made in the law).

[146] Restatement (Second) of Contracts § 139(1) (1981).

[147] See infra Appendix. The cases came from federal courts within the First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth circuits, and from state courts in Arkansas, California, Colorado, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Missouri, New York, North Carolina, Ohio, Oregon, Texas, Washington, West Virginia, Wisconsin, and Wyoming. The count does not include one case that cited section 139, but apparently meant to refer to another section. See Altevogt v. Brinkoetter, 421 N.E.2d 182, 187 (Ill. 1981). One case from Michigan cited section 139 only in dissent. See Powers v. Peoples Community Hosp. Auth., 465 N.W.2d 566, 567 (Mich. 1991) (Levin, J., dissenting). The following discussion describes the Michigan case in detail. See infra notes 154-156 and accompanying text.

[148] See Josephs v. Pizza Hut of Am., Inc., 733 F. Supp. 222, 226 (W.D. Pa. 1989) (rejecting section 139 on the basis of Polka v. May, 118 A.2d 154, 156 (Pa. 1955)), aff'd mem., 899 F.2d 1217 (3d Cir. 1990); Whiteco Indus., Inc. v. Kopani, 514 N.E.2d 840, 844-45 (Ind. Ct. App. 1987) (generally rejecting section 139); Greaves v. Medical Imaging Sys., Inc., 879 P.2d 276, 283 (Wash. 1994) (generally rejecting section 139); Lige Dickson Co. v. Union Oil Co., 635 P.2d 103, 103, 107 (Wash. 1981) (rejecting section 139 in a case involving section 2-201 of the UCC).

section 139 in the employment context without deciding its applicability in other contexts. [149] The Missouri Court of Appeals similarly suggested that section 139 should not apply in employment cases.[150] As explained more fully below, these courts mostly reasoned that judges could not make exceptions to a statute (i.e., the statute of frauds) in a common law manner.[151]

A number of other decisions also deserve mention, although they did not cite section 139 negatively. Five federal and state cases applying New York law cited section 139 in a generally favorable manner, but held that a plaintiff seeking to overcome the statute of frauds also must show that failure to enforce a promise would produce an "unconscionable" injury.[152] In a sense, these courts have added an element to section 139. Six other decisions (five applying Washington law and one applying Maine law) expressly declined***525** to adopt or reject section 139.[153] One dissenting opinion cited section 139 favorably in circumstances suggesting that the

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[149] See Stearns v. Emery-Waterhouse Co., 596 A.2d 72, 74-75 (Me. 1991) ("[W]e decline [plaintiff's] invitation to accept promissory estoppel as permitting avoidance of the statute in employment contracts that require longer than one year to perform. Although section 139 of the Restatement may promote justice in other situations, in the employment context it contravenes the policy of the Statute to prevent fraud. It is too easy for a disgruntled former employee to allege reliance on a promise, but difficult factually to distinguish such reliance from the ordinary preparations that attend any new employment." (emphasis omitted)).

[150] See McCoy v. Spelman Mem'l Hosp., 845 S.W.2d 727, 730 (Mo. Ct. App. 1993) (distinguishing the employment relationship from other contractual relationships).

[151] See infra Part IV.A.1.

[152] See Kubin v. Miller, 801 F. Supp. 1101, 1122 (S.D.N.Y. 1992); Rosenthal v. Kingsley, 674 F. Supp. 1113, 1125 (S.D.N.Y. 1987); Klein v. Jamor Purveyors, Inc., 489 N.Y.S.2d 556, 560 (N.Y. App. Div. 1985); D & N Boening, Inc. v. Kirsch Beverages, Inc., 471 N.Y.S.2d 299, 302 (Sup. Ct.), aff'd, 472 N.E.2d 992, 996 (N.Y. 1984); Swerdloff v. Mobil Oil Corp., 427 N.Y.S.2d 266, 269 (N.Y. App. Div. 1980).

[153] See Chapman v. Bomann, 381 A.2d 1123, 1130 n.6 (Me. 1978); Berg v. Ting, 886 P.2d 564, 573-74 (Wash. 1995) (en banc); Family Med. Bldg., Inc. v. Department of Soc. & Health Servs., 702 P.2d 459, 462-63 (Wash. 1985) (en banc); Lectus, Inc. v. Rainier Nat'l Bank, 647 P.2d 1001, 1001-02 (Wash. 1982) (en banc); Klinke v. Famous Recipe Fried Chicken, Inc., 616 P.2d 644, 648 (Wash. 1980) (en banc); see also Tiegs v. Boise Cascade Corp., 922 P.2d 115, 122-23 (Wash. Ct. App. 1996) (noting that the Washington Supreme Court rejected section 139 in Lige and Greaves, but distinguishing those decisions in a case involving part performance), rev. granted, 936 P.2d 416 (Wash. 1997).

majority did not accept the rule. In that case, the Michigan Court of Appeals held that the statute of frauds barred enforcement of an oral promise without considering section 139.[154] The Michigan Supreme Court denied leave to appeal.[155] A dissent from the denial, however, asserted that the Court of Appeals should have considered the section.[156]

6. Section 153

Occasionally, after two parties form a contract, one of them will realize that he or she made a mistake and will not want to perform. For example, a subcontractor might offer to do work for fifty thousand dollars, but later discover that, because of a mathematical error, it should not have offered less than seventy-five thousand dollars. Traditional statements of contract doctrine generally do not recognize a unilateral mistake as a defense to nonperformance or ground for rescission.[157] Section 503 of the first Restatement, for instance, said that "[a] mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable."[158]

The traditional rule that unilateral mistakes do not make a contract voidable has an exception for mistakes caused by the other party's failure to disclose the facts. Section 472(1)(b) of the first Restatement said: "There is no privilege of non-disclosure, by a party who. . . knows that the other party is acting under a mistake as to undisclosed material facts."[159] Section 472(2) then made clear that "[w]here non-disclosure is not privileged it has the effect of a material misrepresentation"[160] and accordingly may justify rescission of the contract.

The drafters of the Restatement (Second) decided to "liberalize][" the exception to the traditional rule that a unilateral mistake does not make a contract voidable.[161] Section 153 now provides:

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[154] See Powers v. Peoples Community Hosp. Auth., 455 N.W.2d 371, 373-74 (Mich. Ct. App. 1990).

[155] Powers v. Peoples Community Hosp. Auth., 465 N.W.2d 566, 566 (Mich. 1991).

[156] See id. at 566 (Levin, J., dissenting from denial of leave to appeal).

[157] See Farnsworth, supra note 95, § 9.4, at 693; 3 Williston, supra note 95, § 1578, at 2792.

[158] Restatement of Contracts § 503 (1932).

[159] Id. § 472(1)(b).

[160] Id. § 472(2).

[161] Restatement (Second) of Contracts § 153 reporter's note (1981).

***526** Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(b) the other party had reason to know of the mistake or his fault caused the mistake.[162]

Section 153 changes the traditional doctrine stated in the original Restatement in two ways. First, a unilateral mistake can render a contract voidable if "enforcement of [such] contract would be unconscionable" whether or not the nonmistaken party had a duty of disclosure.[163] Second, a unilateral mistake can render a contract voidable if the nonmistaken party had "reason to know of the mistake," even if he or she did not have actual knowledge of the mistake.[164]

The survey found eighty-nine cases citing section 153.[165] None of these cases rejected section 153 or cited it in a negative manner. Three cases, however, found the elements of the section unsatisfied without deciding

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[162] Id. § 153.

[163] Id.

[164] Id.

[165] See infra Appendix. The cases came from the United States Supreme Court, the United States Claims Court and Court of Federal Claims, and from other federal courts within every circuit but the First Circuit and Federal Circuit. They also came from local courts in Alabama, Alaska, Arizona, California, Colorado, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Utah, Washington, West Virginia, and Wisconsin. Five of these cases cited section 153 only in dissenting opinions, but the majority opinions in these cases did not reject the rule stated by the section. See Middle E. Banking Co. v. State St. Bank Int'l, 821 F.2d 897, 910 (2d Cir. 1987) (Mahoney, C.J., concurring in part & dissenting in part); Village of Kaktovik v. Watt, 689 F.2d 222, 235 n.14 (D.C. Cir. 1982) (Greene, J., concurring in part & dissenting in part); Waggoner v. Waggoner, 383 N.E.2d 795, 799 (Ill. App. Ct. 1978) (Karns, J., dissenting), aff'd, 398 N.E.2d 5, 9 (Ill. 1979) (citing tentative draft); Alperin v. Eastern Smelting & Ref. Corp., 591 N.E.2d 1122, 1131 (Mass. App. Ct. 1992) (Fine, J., dissenting); Cortesi v. R & D Constr. Corp., 524 N.Y.S.2d 874, 876-77 (N.Y. App. Div.), aff'd, 534 N.E.2d 313 (N.Y. 1988).

whether to adopt the section as the governing law.[166] One case oddly cited section 153 in support of the proposition that unilateral mistakes cannot void a contract.[167]

***527** C. Why Courts Have Favored the New Rules

Why did so many courts decide to follow these six sections even though they state new rules of contract law? Although some of the cases surveyed offered explanations for their acceptance, the vast majority did not. Most courts simply cited the new rules and applied them without comment. The precise reasons that the rules have caught on, as a result, necessarily remain a matter of some speculation.

Careful consideration of the cases, however, suggests four explanations for the favorable reception of the new rules in sections 15(1)(b), 86, 87(2), 89, 139, and 153. First, a few courts appear to have followed the rules on grounds of precedent. Second, a few other courts appear to have followed the new rules for policy reasons. Third, several other courts adopted the rules because statutes or case law require them to follow the Restatement (Second) absent contrary authority. Fourth, the remaining courts appear to have accepted the rules on grounds of convenience; rather than examine precedent or policy arguments, courts voluntarily deferred to the ALI's view of what the law should be. The following discussion describes each of these four reasons for the success of the new rules.

1. Precedent

The foregoing portion of this Article describes the six rules in sections 15(1)(b), 86, 87(2), 89, 139, and 153 as new because the rules contradict traditional statements of contract doctrine. The adjective "new," however, requires some qualification. In two types of situations the rules may not

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[166] See In re Conservatorship of Estate of O'Connor, 56 Cal. Rptr. 2d 386, 398-99 (Cal. Ct. App. 1996); Da Silva v. Musso, 428 N.E.2d 382, 386-87 (N.Y. 1981); Erickson by Wightman v. Gundersen, 515 N.W.2d 293, 299-300 (Wis. Ct. App. 1994) (noting that no Wisconsin case had adopted the rule but finding elements unsatisfied).

[167] See Warren v. Greenfield, 595 A.2d 1308, 1312-13 (Pa. Super. Ct. 1991). The court said that "unilateral mistakes will not void a contract." Id. at 1313. It then cited comment (a) to section 153, which explains that "[courts are] reluctant to allow a party to avoid a contract on the ground of mistake, even as to a basic assumption, if the mistake was not shared by the other party." Id. at 1313 n.4 (quoting Restatement (Second) of Contracts § 153 cmt. a) (internal quotation marks omitted).

have appeared novel to courts that applied them. On the contrary, courts may have felt bound by applicable precedent to follow them.

First, in a few instances courts may have felt compelled to follow the rules because their jurisdictions already had adopted essentially the same rules prior to the publication of the Restatement (Second). Despite the general novelty of the six rules considered, the ALI actually did not invent them; indeed the Reporter's Notes for each of the six sections cite at least a few cases supporting the rules.[168] As a result, some courts that followed the sections may have felt that precedent compelled their decisions.

Consider, for example, section 139. This section states what I have characterized as a "new" rule on using promissory estoppel to overcome the statute of frauds.[169] The rule, however, is not entirely novel. The California Supreme Court in fact adopted essentially the same rule in 1950 in Monarco v. Lo Greco.[170] Accordingly, when courts in California cite section 139, they ***528** are not really adopting a new rule. Instead, they simply are citing a secondary source that restates preexisting California law. The Monarco precedent requires them to follow the rule.

In conducting the survey, I found it difficult to determine exactly how many of the 241 cases that cited the new rules could have relied instead on precedent. Most decisions, as noted, simply did not give reasons. Yet, probably only a few cases followed the rules because they reflected preexisting precedents; the Reporter's Notes themselves confirm that only

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[168] See Restatement (Second) of Contracts § 15 reporter's note (citing Ortelere v. Teachers' Retirement Bd., 250 N.E.2d 460 (N.Y. 1969) and other cases); id. § 86 reporter's note (citing Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825) and other cases); id. § 87 reporter's note (citing Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) and other cases); id. § 89 reporter's note (citing Watkins & Son v. Carrig, 21 A.2d 591 (N.H. 1941) and other cases); id. § 139 reporter's note (citing McIntosh v. Murphy, 469 P.2d 177 (Haw. 1970) and other cases); id. § 153 reporter's note (citing Elsinore Union Elementary Sch. Dist. v. Kastorff, 353 P.2d 713 (Cal. 1960) and other cases).

[169] See id. § 139.

[170] 220 P.2d 737, 740-41 (Cal. 1950) (in banc). See Paul T. Wagerin, Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants, 72 Iowa L. Rev. 47, 77 n.220 (1986) ("The substantive principle of Monarco is now enshrined in § 139....").

a handful of jurisdictions actually had adopted the rules prior to publication of the Restatement (Second).[171]

Second, in other instances courts may have felt compelled to follow the new rules because of precedent arising after the ALI formulated the rules. For example, in Ortelere described above,[172] the New York Court of Appeals cited and adopted the rule in section 15(1)(b).[173] At the time of that decision, the rule had little or no support in the cases and could be considered a new rule. Subsequent New York cases, however, must treat the Ortelere decision as precedent. As a result, when lower courts in New York now cite section 15(1)(b), they no longer really are adopting a new rule. For this reason, the number of jurisdictions that have adopted the rules in some respects provides a better gauge of the ALI's influence than the number of cases that have cited them favorably.[174]

2. Policy

Although some courts may have approved the new rules on grounds of precedent, others based their decisions on policy grounds. For example, the Colorado Supreme Court in Kiely v. St. Germain[175] carefully considered the policies behind both the statute of frauds and the doctrine of promissory estoppel. [176] It concluded that the legislature would want courts to "utilize a balancing test to prevent use of the statute [of frauds] to effect inequitable results."[177] It thus decided to follow section 139.[178]

The survey, however, found few decisions even remotely similar to Kiely. [179] Several courts described a new rule with a favorable adjective, such as "appropriate" or, ironically, "mainstream."[180] Most courts, however,

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[171] See Restatement (Second) of Contracts § 15 reporter's note; id. § 86 reporter's note; id. § 87 reporter's note; id. § 89 reporter's note; id. § 139 reporter's note; id. § 153 reporter's note.

[172] See supra notes 98-102 and accompanying text.

[173] See Ortelere, 250 N.E.2d at 465.

[174] See infra Appendix (organizing cases by jurisdiction).

[175] 670 P.2d 764 (Colo. 1983) (en banc).

[176] See id. at 767-70.

[177] Id. at 770.

[178] See id. at 769.

[179] The New York Court of Appeals carefully considered the policy arguments for the new rule in section 15(1)(b) in Ortelere. See 250 N.E.2d at 465.

[180] See, e.g., McCallum Highlands, Ltd. v. Washington Capital Dus, Inc., 66 F.3d 89, 94 (5th Cir.) (describing section 89 as an "appropriate exception to the preexisting duty rule"), opinion corrected on denial of reh'g, 70 F.3d 26 (5th Cir. 1995); Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112, 116 (4th Cir.

simply***529** cited the new rules from the Restatement (Second) without comment. The opinions in these cases did not indicate that the courts had any views about the substance of the rules.

True, some courts may have decided to follow the rules for policy reasons even if they did not discuss those reasons. Yet, this practice probably did not occur often. The notes and illustrations in the Restatement (Second) strive to explain the rules, but usually say little about their rationale.[181] Working through all of the policy arguments for the rules would require some effort, and courts undertaking that effort in a serious fashion in most instances probably would say something about it in their opinions.

3. Mandated Deference

A couple of courts involved in the survey followed the new rules in the Restatement (Second) for reasons unrelated to precedent or the policy arguments in favor of the rules. Instead they adopted the rules because statutes or case law in their jurisdictions require courts to defer to the ALI's various Restatements. In these rare instances, the Restatement (Second) acts something like a code of contract law.

Legislation in the Virgin Islands, for example, makes all of the ALI's Restatements binding unless contradicted by other law. The Virgin Islands Code provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.[182]

Pursuant to this statute, courts generally must defer to the Restatement (Second). In the survey, one court applying Virgin Islands law felt

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1983) (identifying section 153 as the "mainstream of judicial decisions").

[181] The comments to sections 15, 86, 89, and 153 briefly state the rationales behind the rules in a single paragraph. See Restatement (Second) of Contracts § 15 cmt. a (1981); id. § 86 cmt. b; id. § 89 cmt. a; id. § 153 cmt. a. The comments to sections 87 and 139 explain the elements of the rules, but do not state their rationale. See id. § 87 cmts. a-e; id. § 139 cmts. b-d.

[182] V.I. Code Ann. tit. 1, § 4 (1996).

compelled by this statute to adopt the new rule on the modification of contracts stated in section 89.[183]

In other jurisdictions, judicial decisions sometimes require courts to defer to the ALI. For instance, the Arizona Supreme Court has decreed that Arizona courts will follow the Restatements absent contrary authority. [184] Lower Arizona courts and federal courts sitting in diversity accordingly must defer to rules in the Restatement (Second) when no statute or precedent requires***530** otherwise.[185] Five cases involved in the survey fall within this category.[186]

Even if no decision expressly requires courts to defer to the Restatement (Second), a widespread practice may create such a policy. For instance, in Acme Investment, Inc. v. Southwest Tracor, Inc.,[187] a federal district court in a diversity case decided to follow section 238 (a provision not considered in the survey) because it observed that Nebraska courts often had followed other provisions of the Restatement (Second).[188] Courts have used similar reasoning in other jurisdictions.[189]

4. Convenience

In a few of the cases involved in the survey, courts indicated that they were accepting the new rules because of precedent, policy considerations, or laws requiring them to follow the Restatements. In most of the cases,

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[183] See Billman v. V. I. Equities Corp., 743 F.2d 1021, 1024 & n.3 (3d Cir. 1984) (following section 89).

[184] See Bank of Am. v. J. & S. Auto Repairs, 694 P.2d 246, 248 (Ariz. 1985) ("In the absence of contrary authority Arizona courts follow the Restatement of the Law.").

[185] See, e.g., L.K. Comstock & Co. v. United Eng'rs & Constructors, Inc., 880 F.2d 219, 223 & n.2 (9th Cir. 1989) (following Restatement (Second) based on Arizona precedent requiring courts to defer to it).

[186] See United States v. Brown, 763 F. Supp. 1518, 1526 (D. Ariz. 1991) (citing section 153 with approval), aff'd, 979 F.2d 1380, 1380 (9th Cir. 1992); AMERCO v. Shoen, 907 P.2d 536, 541 (Ariz. Ct. App. 1995) (same); Hill--Shafer Partnership v. Chilson Family Trust, 784 P.2d 691, 698 (Ariz. Ct. App. 1989) (same), vacated, 799 P.2d 810 (Ariz. 1990) (en banc); Realty Assocs. v. Valley Nat'l Bank, 738 P.2d 1121, 1124 (Ariz. Ct. App. 1986) (citing section 86 with approval); Hill v. Jones, 725 P.2d 1115, 1118-19 (Ariz. Ct. App. 1986) (citing secTion 153 with approval).

[187] 911 F. Supp. 1261 (D. Neb. 1995), aff'd, 105 F.3d 412, 414 (8th Cir. 1997).

[188] See id. at 1268.

[189] See, e.g., Livingstone v. North Belle Vernon Borough, 12 F.3d 1205, 1209-10 n.6 (3d Cir. 1993) (in banc) (noting that Pennsylvania courts frequently follow the Restatement).

however, courts did not say anything about why they were adopting the new rules. They simply cited the new rules and applied them much as they would cite and apply a governing statute. Courts did not explain why they were relying on the Restatement (Second), or critically analyze the rules that they were applying.

Courts in these cases undoubtedly knew that the ALI has no authority to make law and that courts may disagree with the Restatement (Second). Most courts also probably knew that not all jurisdictions agree with every rule in the Restatement (Second). So why did courts simply look up the rules and apply them? My hypothesis is convenience. By deferring to the Restatement (Second), courts avoided the difficulty of analyzing precedent or weighing policy arguments.

Consider, for example, how the Massachusetts courts have received section 153 on unilateral mistakes. In 1942, in Swinton v. Whitinsville Savings Bank,[190] the Supreme Judicial Court of Massachusetts rejected the idea that a unilateral mistake could make a contract voidable.[191] In that case, a bank sold a house to a purchaser without disclosing that the house had termite damage.[192] The court refused to rescind the transaction despite the purchaser's***531** mistaken belief that the house contained no damage.[193] The court explained that the bank had no duty to disclose, stating:

> The law has not yet, we believe, reached the point of imposing upon the frailties of human nature a standard so idealistic as this. That the particular case here stated by the plaintiff possesses a certain appeal to the moral sense is scarcely to be denied. . . . But the law cannot provide special rules for termites and can hardly attempt to determine liability according to the varying probabilities of the existence and discovery of different possible defects in the subjects of trade. The rule of nonliability for bare nondisclosure has been stated and followed by this court in [numerous cases cited].[194]

Section 153 rejects the result of Swinton. If a court applied section 153 to the facts of the Swinton case, the court would rescind the sale of the house. The court would conclude that, under the circumstances, the unilateral mistake of the purchaser would make the contract voidable.[195] A

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[190] 42 N.E.2d 808 (Mass. 1942).
[191] See id. at 809.
[192] See id. at 808.
[193] See id. at 809.
[194] Id. at 808-09.
[195] See Restatement (Second) of Contracts § 153 (1981).

Reporter's Note in the Restatement (Second) confirms this analysis by citing Swinton as contrary authority.[196]

In light of this background, litigants might have expected the Supreme Judicial Court of Massachusetts to reject section 153 as contrary to its precedent. In First Safety Fund National Bank v. Friel,[197] however, the court simply cited and applied section 153 without recognizing that it conflicts with Swinton.[198] The Appeals Court of Massachusetts has acted similarly in two other cases.[199] The courts in these three cases appear to have deferred to the Restatement (Second) simply on grounds of convenience. Researching the black letter rules requires less effort than sifting through fifty years of precedent.

Deference based on convenience has become so common that the practice now attracts little attention. Courts apparently do not see a need to explain the reason for what they are doing. As a consequence, the Restatement (Second) now has extraordinary influence on the law.

IV. Propriety of Judicial Deference

The survey revealed that a large number of courts have followed the new rules stated in sections 15(1)(b), 86, 87(2), 89, 139, and 153 of the Restatement (Second). Most of these courts appear to have accepted the new rules on grounds of convenience and not because either precedent or careful considerations of policy mandated their acceptance. These observations raise an important policy question: Should courts defer so readily to a nonbinding ***532** secondary source like the Restatement (Second) in formulating common law rules?

The following discussion considers this question, addressing potential legal and policy objections. It concludes that on balance the practice appears not only lawful, but also more beneficial than harmful. Deference to the Restatement (Second) generally adds clarity and uniformity to the law and conserves judicial resources. A contrary conclusion would cast doubt on both the competence of the hundreds of courts that have deferred to the ALI's rules and the concept of a restatement of contract law.

A. Possible Legal Objections

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[196] See id. § 161 reporter's note cmt. d.

[197] 504 N.E.2d 664 (Mass. App. Ct. 1987).

[198] See id. at 667.

[199] See Torrao v. Cox, 525 N.E.2d 1349, 1352 (Mass. App. Ct. 1988); Covich v. Chambers, 397 N.E.2d 1115, 1121 (Mass. App. Ct. 1979).

It is not easy to find a legal objection to the way that courts have adopted the new rules in the Restatement (Second). Most states have given courts the power to develop the rules of contract law in a common law manner. Pursuant to this power, courts at one time developed the traditional rules that existed prior to the middle of this century. Also pursuant to this power, it stands to reason, courts should be able to modify the rules as they deem appropriate. In some cases, that power to modify may mean adopting the new rules included in sections 15(1)(b), 86, 87(2), 89, 139, and 153 of the Restatement (Second).

Courts and commentators, nonetheless, have expressed two potential objections to judicial deference to the ALI. First, although courts have the power to develop new common law rules, they do not have the power to contradict legislation. Second, even if courts have the power to make new rules of contract law, they cannot delegate this power to the ALI. The following discussion addresses these arguments but ultimately concludes that neither has much force in the present context.

1. Supremacy of Legislation over the Common Law

Legislation generally takes precedence over common law rules,[200] including the common law rules that govern contracts. For example, if the state legislature passes a law that says eighteen year-olds have the capacity to form nonvoidable contracts, a court could not retain a common law rule setting the age of majority at twenty-one.[201] On the contrary, the court would have to follow the legislation. Any other result would place courts ahead of state legislatures in the formation of the law.

In most states, the supremacy of legislation would not affect adoption of the rules contained in sections 15(1)(b), 86, 87(2), or 153 of the Restatement (Second). These sections address subjects usually left to the common law. ***533** Few states have statutes defining the test for mental

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[200] See Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 283-94 (1989) (discussing the topic of legislative supremacy in depth). The general principle that statutes take precedence over the common law has exceptions. For example, prior common law decisions may continue to influence the interpretation of statutes in a variety of ways. See Earl Maltz, The Nature of Precedent, 66 N.C. L. Rev. 367, 386-87 (1988); Honorable Roger J. Traynor, Statutes Revolving in Common-Law Orbits, 17 Cath. U. L. Rev. 401, 402 (1968).

[201] See Restatement (Second) of Contracts § 14 cmt. a (noting that the common law age of majority was 21, but that nearly all states have lowered the age to 18 by legislation).

incapacity, the validity of moral consideration, the consequences of reliance on offers, or the rules regarding unilateral mistakes. Instead, states generally have allowed courts to make rules in these areas, as they have done for most of contracts law.

Section 89 differs somewhat. Almost all states have passed statutes governing the modification of contracts. Section 2-209(1) of the Uniform Commercial Code (the "U.C.C."), in particular, provides: "An agreement modifying a contract within this Article [i.e., Article 2 governing sales of goods] needs no consideration to be binding."[202] A court could not adopt a common law rule contradicting this provision. Two factors, however, limit the extent to which section 2-209(1) of the U.C.C. conflicts with section 89 of the Restatement (Second). First, section 2-209(1) applies only to transactions in goods.[203] Courts therefore still can adopt section 89 as a common law governing other types of contracts. Second, sections 89 and 2-209(1) resemble each other very closely. Both sections weaken the traditional preexisting duty rule, permitting courts to enforce modifications even if no new consideration supports them. Section 2-209(1) merely exceeds section 89 by not requiring (or at least not explicitly requiring) a change of circumstances to justify the modification.[204]

Section 139 presents a greater challenge to the principle of legislative supremacy. When courts adopt section 139, they arguably are contradicting legislation. Section 139, as described above, creates an exception to a statute--the statute of frauds. This section allows courts to enforce unwritten promises that the statute indicates they should not enforce. For this reason, several courts specifically have refused to adopt section 139. For example, in Lige Dickson Co. v. Union Oil Co.,[205] a litigant sought to use section 139 to overcome the statute of frauds in section 2-201 of the U.C.C.[206] The Supreme Court of Washington rejected the argument, concluding that enforcing an unwritten promise based on promissory estoppel would contradict the statute.[207] This position, although not

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[202] U.C.C. § 2-209(1) (1995); see also id. § 2A-208(1) (implementing the same rule for leases of goods).

[203] See id. § 2-102 (defining the scope of the Article).

[204] An official comment suggests that courts should not enforce modifications made in bad faith. See id. § 2-209 cmt. 2. A person who requests a modification when circumstances have not changed may be acting in bad faith. See id. In such a case, section 89 and section 2-209 might provide the same result.

[205] 635 P.2d 103 (Wash. 1981) (en banc).

[206] See id. at 103.

[207] See id. at 107.

universally accepted, has much to say for it. Courts certainly have no duty to adopt the positions taken by the ALI and may decline to adopt them when they think that they would run afoul of legislation.

Despite this reasoning, however, courts still might find adoption of section 139--or other provisions touching upon subjects covered by a statute-- permissible for two reasons. First, state legislatures may have delegated to courts the power to balance competing interests in interpreting statutes. The Supreme Court of Colorado, for instance, found that the state legislature had ***534** taken this approach in the U.C.C.[208] Indeed, in many cases, courts reasonably can assume that legislatures expect them to create common law exceptions to the statute of frauds because courts have been tinkering with statutes of frauds for many years.[209]

Second, the principles of legislative supremacy may vary from state to state.[210] Although the law in some jurisdictions may not permit judges to create exceptions to statutes, it may allow the practice in others. Indeed, some courts' adoption of section 139 demonstrates this possibility. These courts have the power to determine what is legal and what is not, and they evidently have not seen a problem with creating an exception to the statute of frauds.

2. Improper Delegation

Even if courts generally have the power to make common law rules, they still face some limits on how they exercise that power. Judges, for example, cannot allow bribes to influence their decisions. They also cannot render decisions when they have a conflict of interest. A question thus arises whether judges legitimately are exercising their lawmaking authority if they simply defer to the Restatement (Second).

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[208] See Kiely v. St. Germain, 670 P.2d 764, 770 (Colo. 1983) (en banc). In adopting section 139, the court relied on section 1-103 of the U.C.C., which provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." U.C.C. § 1-103.

[209] See Farnsworth, supra note 95, § 6.1, at 395 (explaining how the statute of frauds "has been the subject of constant erosion" by the courts).

[210] See Guido Calabresi, A Common Law for the Age of Statutes 101 (1982).

Judge Paul A. Simmons forcefully has asserted that courts have gone too far in their solicitude to the Restatements.[211] He contends that "the courts of this nation have surrendered to the ALI their inherent common law judicial power to state, restate, and reformulate the legal principles that must be used and applied by courts in the course of litigating various cases and controversies in this nation's judicial system."[212] Judge Simmons maintains that this delegation of lawmaking authority from courts to the ALI violates the separation of powers doctrine.[213] In his view, courts must exercise the power to develop the common law more independently.[214]

This argument, although forcefully made, fails for two reasons. First, although courts may have followed the Restatement (Second) in many cases, they actually have not delegated their authority to the ALI. No court has committed itself to following whatever rules the Restatement (Second) may contain.[215] Instead, courts consider the rules one at a time. Adopting one ***535** section does not bind them to follow another. The Pennsylvania courts may adopt section 87(2),[216] but still reject section 15(1)(b).[217]

Second, Judge Simmons's argument, if taken to its logical extreme, suggests that courts cannot follow any secondary sources when formulating legal rules. Yet, judges traditionally have consulted a wide variety of secondary sources when deciding cases. They often cite law review articles, legal encyclopedias, treatises, dictionaries, and so forth. These sources can further their understanding of existing law. They also enable judges to see criticisms of the law that precedents alone might not supply. For these reasons, a ban on consulting secondary sources has never existed and would have deleterious consequences.

B. Policy

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[211] See Paul A. Simmons, Government by an Unaccountable Private Non Profit Corporation, 10 N.Y.L. Sch. J. Hum. Rts. 67, 71-72 (1992).

[212] Id. at 89.

[213] See id. at 71.

[214] See id. at 89-90.

[215] The Arizona Supreme Court, as noted, has directed lower courts to follow the rule in the Restatement (Second) absent contrary authority. See supra Part II.C.2. The court, however, did not commit itself always to follow the rules. See supra Part II.C.2.

[216] See Bethlehem Steel Corp. v. Litton Indus., Inc., 488 A.2d 581, 593 (Pa. 1985) (Hutchinson, J., concurring) (citing section 87).

[217] See Estate of McGovern v. Commonwealth, 517 A.2d 523, 526-27 (Pa. 1986) (rejecting section 15(1)(b)).

Even if deferring to the Restatement (Second) does not violate any law, the question remains whether courts should engage in the practice as a matter of policy. A simple utilitarian analysis suggests that the kind of deference seen in the survey has both advantages and disadvantages. The following discussion considers the potential costs and benefits of the practice and concludes that the benefits generally outweigh the costs.

1. Potential Costs of Deference

When a court makes a new rule by simply deferring to the Restatement (Second), it risks incurring two important costs. First, the court might adopt a rule that does not achieve all of the goals that the court thinks desirable. Second, to the extent that deferring to the Restatement (Second) changes the law, the court risks upsetting settled expectations.

a. Adopting Inappropriate Rules

The substance of contract law makes a difference. Some rules may promote economic efficiency better than others. Some rules may balance the need for certainty with the need for flexibility better than others. Still other rules may conform more closely to customary business practices. In creating common law rules, courts generally are free to decide what goals the rules should achieve. When a court defers to the Restatement (Second), however, the rule it selects may not accomplish the ends that the court considers important.

A court, for instance, may believe that the law should strive almost exclusively to promote economic efficiency. The court also may believe that efficiency requires enforcement of any contracts not induced by fraud, incapacity, or duress.[218] Accordingly, if the court were creating its own rules, it ***536** would not permit a party to void a contract based on unilateral mistake. Yet, if the court simply defers to section 153, it would adopt a contrary rule.[219] Deference to the Restatement (Second), accordingly, would come at a cost. A court would adopt a rule that it considers inappropriate.

Several factors, however, mitigate this cost. First, the ALI has a fairly mainstream orientation. Its members consist of lawyers, law professors, and judges who mostly have the same vision of contract law as the judges

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[218] See Richard A. Posner, Economic Analysis of Law, § 4.7, at 104 (3d ed. 1986) ("Economic analysis reveals no grounds other than fraud, incapacity, and duress...for allowing a party to repudiate the bargain that he made in entering into the contract.").

[219] See Restatement (Second) of Contracts § 153 (1981).

who occupy courts of last resort throughout the states. Indeed, many of these judges belong to the ALI and participate in the formulation of the Restatements.[220] As a result, in most instances, the ALI designs its rules to achieve nearly the same objectives that courts would want to achieve if they were drafting the rules from scratch.[221]

Second, the ALI's rules may accomplish courts' goals even better than any rules that courts might devise themselves. The ALI publishes its Restatements only after years of diligent work by academics and lawyers widely acknowledged as experts in their fields. It requires every comment in every section to contain illustrations and thus insures that any rules stated actually will produce clear results. Courts simply do not have the time or resources to devote a comparable effort to creating or revising rules.[222]

Third, any errors that courts make by deferring to the Restatement (Second) probably will have only minor consequences. Some contractual rules may be better than others, but the difference often does not matter much. Unlike tort liability, which often governs the rights of involuntary participants, contractual liability generally is voluntary. Parties usually can choose whether to enter into contracts, and if so, on what terms they wish the contract to proceed. Accordingly, parties usually can work around contracts rules that do not fit their needs. In many cases, therefore,

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[220] See supra note 54 and accompanying text.

[221] See Simmons, supra note 211, at 86-88. Judge Simmons objects to deference to the ALI partly because he believes that the ALI has biases that will prevent it from choosing appropriate rules. He notes that most of its members have affiliations with elite Ivy League law schools, and thus may not see issues in the same light as the general public. See id. at 86-87. He also notes that "[t]here are no sociologists, economists, accountants, political scientists, bankers, stockbrokers, insurance executives, corporate chief executive officers, engineers, or penologists represented on the ALI Council." Id. at 88 (citation omitted). Judge Simmons, however, fails to recognize the possibility of making the same observations about many state supreme court justices. These justices might choose the same rules as those in the Restatement (Second) even if the ALI did not exist.

[222] But see James Gordley, European Codes and American Restatements: Some Difficulties, 81 Colum. L. Rev. 140, 156 (1981) (arguing that "[i]t would be better to allow courts to settle on rules as they feel it necessary in the interests of certainty"). Professor Gordley contends that developing a coherent set of rules all at once involves greater difficulty than creating an individual rule in a single case. See id. The ALI, however, has put in the effort to create a comprehensive set of rules to govern contracts.

adopting inappropriate contracts rules will impose only minor burdens on the parties or society.[223]

***537** Consider, for example, the new rule in section 89 that, in some instances, makes promises to modify contracts binding even in the absence of additional consideration.[224] Suppose that a court defers to this rule because it appears in the Restatement (Second). This rule need not affect parties who do not like it. A party who does not want to make a binding promise to modify a contract has a simple option. He or she simply can refuse to make such a promise. The rule, accordingly, applies only to the small number of people who make promises without receiving consideration and then later decide not to keep them.

Fourth, even if courts generally defer to the Restatement (Second), they remain free to disregard any provisions with which they disagree. The Pennsylvania courts, as noted, have cited sections 87(2) and 153 favorably,[225] but they have refused to adopt section 15(1)(b).[226] Even jurisdictions like Arizona and the Virgin Islands, which by case law and statute follow the Restatement (Second) in the absence of contrary law, have the freedom to reject its provisions when necessary. Thus, although deference may cause courts to pick some inappropriate rules, this cost seems likely to remain rather small.

b. Unsettling Expectations

Courts risk imposing another cost when they defer to new rules in the Restatement (Second). To the extent that they change existing doctrines significantly, courts may upset settled expectations. For example, relying on the traditional doctrine that courts will not disturb bargains based solely

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[223] This statement requires some qualification. Although parties may contract around rules that they do not like in most instances, they may incur additional transaction costs. In addition, the choice of the default rule may have distributional consequences; it may favor one party, and thus affect what the other party has to pay to get around it. See Russell J. Weintraub, A Survey of Contract Practice and Policy, 1992 Wis. L. Rev. 1, 9-10 (1992); see also Katz, supra note 122, at 1265 (questioning whether parties actually will have the knowledge and skill to contract around legal rules such as section 87(2)).

[224] See Restatement (Second) of Contracts § 89.

[225] See Bethlehem Steel Corp. v. Litton Indus., Inc., 488 A.2d 581, 593 (Pa. 1985) (citing section 87); Lanci v. Metropolitan Ins. Co., 564 A.2d 972, 974-75 (Pa. Super. Ct. 1989) (citing section 153).

[226] See Estate of McGovern v. Commonwealth, 517 A.2d 523, 526-27 (Pa. 1986) (rejecting section 15).

on unilateral mistakes, a party may withhold facts from another party during negotiations. If a court later adopts the new rule on unilateral mistakes in section 153 of the Restatement (Second) and rescinds the contract, its action will surprise the party that did not make the disclosure.

Although unsettling expectations does impose a cost on the parties (and perhaps society as a whole), several factors may lessen the blow. First, many parties to whom the new rules apply do not have a clear understanding of the law anyway. As a result, they do not have expectations that a court can upset. For example, few business people know exactly which kinds of contracts fall within the statute of frauds and which do not. Accordingly, in many instances, in applying section 139 to enforce an unwritten promise, a court will not upset their expectations. Second, in many instances, parties' expectations may accord more closely with the new rules than traditional contract doctrine. The new rule in section 89 provides a good example. Nonlawyers well ***538** might expect that contract modifications will bind them even absent new consideration. In such instances, a court would upset expectations less by adopting the new rule in section 89 than by applying the traditional preexisting duty doctrine.

2. Benefits

Deference to the Restatement (Second) in theory may impose some limited costs. Yet, at the same time, it also has a number of benefits. A policy or practice of following the Restatement (Second) rules may promote clarity and uniformity in the law, and conserve judicial resources. Although courts have not mentioned these benefits in their opinions, they may have influenced their decisions to defer to the new rules considered in the survey.

a. Clarity

The ALI, as described above, undertook the project of producing the Restatements specifically to address the difficulty that courts were having in discerning common law rules from large numbers of precedents.[227] They sought to create an authoritative source that plainly and concretely would express rules of contracts and other common law subjects. Few would contest that the Restatement (Second) has achieved this goal. It has stunningly well-drafted rules accompanied by careful explanations and illustrations. When courts adopt these rules, they almost inevitably bring clarity to contract doctrines.

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[227] See supra Part I.A.

Improving clarity in the law benefits society because uncertainty about the governing legal rule imposes a number of social costs. Uncertainty increases the amount of time that individuals must devote to legal research and litigation.[228] It also causes people to misgauge legal boundaries.[229] Without clear contract rules, parties may think contracts are binding when they are not, or vice versa. Merely stating the rules in a clear manner can alleviate these problems.

True, sometimes the law favors vagueness. Legal doctrines often rely on standards such as reasonableness or injustice rather than black-and-white tests. The Restatement (Second) includes many such standards; indeed, all of the six sections considered in the survey employ one or more of them. [230] Naturally, a court sometimes will disagree about how the standards apply to the facts of a particular case. Yet, even when a section of the Restatement (Second) contains a standard, courts still can promote legal clarity by adopting the section. Although parties and judges may not know exactly how the standard applies, they at least will know which standard governs. In this way, ***539** even if the new rules considered in the survey will not eliminate uncertainty, they will reduce the costs associated with it.

b. Uniformity

The United States has more than fifty jurisdictions that have the power to create common law rules of contracts. Because courts in each jurisdiction act independently when exercising this authority, they often have produced different rules. As a result, the law of contracts in many instances lacks uniformity from one jurisdiction to another. The rules in one state, put simply, may differ from those in another.

Nonuniformity in contract law may cause problems. As one commentator famously put it, commerce relies heavily on contracts, but "knows

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[228] See Gregory E. Maggs, Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee, 29 Harv. J. on Legis. 123, 126-30 (1992) (discussing the costs of ambiguity in legal rules).

[229] See id. at 127-28.

[230] See Restatement (Second) of Contracts § 15(1)(b) (1981) ("reasonable"); id. § 86 ("injustice"); id. § 87(2) ("reasonably" and "injustice"); id. § 89 ("fair and equitable"); id. § 139 ("reasonably" and "injustice"); id. § 153 ("unconscionable").

nothing of [[[s]tate boundaries."[231] A party in one jurisdiction frequently will make a contract with a party in another jurisdiction. If the contract law differs between the two jurisdictions, the parties may have difficulty determining which rule will govern their conduct, and the result may surprise one party or the other.

The desire for uniformity in the law of contracts led to the enactment in nearly every jurisdiction of the Uniform Sales Act in the first half of this century and its successor, Article 2 of the U.C.C., in the second half. [232] Article 2, however, has a limited scope; it applies only to "transactions in goods" and not to contracts involving services or other subject matters.[233] As a result, much of the law of contracts remains nonuniform throughout the different states.

Deference to the Restatement (Second) tends to make the law more uniform. When a court follows a Restatement (Second) provision, it usually is adopting a rule that other jurisdictions already have followed and more will accept in the future. For example, if a court follows the rule laid out in section 153, its rules on unilateral mistakes will match those in effect in at least twenty-two other jurisdictions.

Uniformity, despite its benefits, does have a disadvantage. Sometimes standardization can become the enemy of progress because it discourages innovation. If courts value having the same rule as other jurisdictions more than having the best rule possible, they will not experiment in an effort to improve the law of contracts. For example, if the California Supreme Court had not adopted a new rule in Drennan v. Star Paving Co. section 87(2) might not have come to exist. To the extent that these rules reflect better policies than their predecessors, society might have suffered.

This concern does not appear especially grave. No courts have bound themselves to follow the Restatement (Second). Courts defer when they have no particular objections to the Restatement (Second)'s rules. If a court ever ***540** did think another rule preferable, it could refuse to follow the ALI's recommendation. Eight of the cases considered in the survey, after

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[231] M. D. Chalmers, Codification of Mercantile Law, 19 Law Q. Rev. 10, 17-18 (1903) (expressing the need for codification, and hence, unification of commercial law in the United States).

[232] See James J. White & Robert S. Summers, Uniform Commercial Code § 1, at 1-5 (3d ed. 1988) (discussing adoption of the U.C.C. and the Uniform Sales Act).

[233] U.C.C. § 2-102 (1996).

all, took exactly that course of action. Thus, even though widespread deference to the Restatement (Second) generally will promote uniformity, it certainly does not make experimentation impossible.

c. Conservation of Judicial Resources

Many observers have remarked in recent years that both state and federal courts, especially at the appellate level, have too much work.[234] Time saving measures that do not adversely affect the quality of a judge's work may free up judicial resources for other tasks. For example, if courts spend less time on contracts cases, they may have more time for criminal cases and so forth. The Restatement (Second) may help in this regard.

By deferring to the Restatement (Second) when determining the applicable law, courts have saved time and effort in deciding contracts cases. Indeed, this benefit probably explains better than anything else why most courts in the survey actually cited and applied the new rules in sections 15(1)(b), 86, 87(2), 89, 139, and 153. Courts in most cases appeared to want a quick answer to the question before them. Because the Restatement (Second) supplied a convenient statement of the rule of contract law, most of the opinions required only a paragraph to decide the issues that they confronted. In the aggregate, with more than twenty-four thousand cases citing the Restatement (Second)'s formulation of the rules,[235] this benefit gradually adds up to a considerable savings of judicial resources.

Simplifying the task of judicial decisionmaking does have limits. Judges could rule easily if they merely had to flip a coin to determine whether the plaintiff or the defendant should win. Deference to the Restatement (Second), however, not only lessens the burden on courts, but in most instances also improves the quality of the contracts doctrine.

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[234] See, e.g., Richard A. Posner, The Federal Courts: Crisis and Reform chs. 3-5 (1985) (explaining the extent and consequences of the case load expansion and suggesting "institutional proposals" to deal with the problem); Thomas E. Baker, A View to the Future of Judicial Federalism: "Neither out Far Nor in Deep," 45 Case W. Res. L. Rev. 705, 715-18, 741 (1995) (discussing the prominent role state courts, in comparison to federal courts, will play in preparing for the influx in cases and appeals filed); Edith H. Jones, Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction, 73 Tex. L. Rev. 1485, 1487-91 (1995) (describing the problem of an increased case load at the appellate level).

[235] See supra note 88 and accompanying text.

The improvement takes two forms. First, from a technical standpoint, the Restatement (Second) contains carefully worded and superbly drafted rules. For the most part, the rules also fit together in a coherent manner. [236] For instance, the sections on offer and acceptance mesh with those addressing mistake, misrepresentation, and so forth. As long as a court agrees with the outcome of the rule, the court generally will do better to adopt it than to try to rephrase it. The ALI, after all, studied the rules for years before finally ***541** promulgating them. Courts should not seek to duplicate this effort when they simply can follow the pertinent sections.

Second, from a substantive standpoint, the rules generally promote mainstream goals in contracts law. Although judges may disagree with some of the rules on substantive grounds, they should keep in mind the limitations of their judgment. A large number of legal experts have devoted decades to formulating the rules in the Restatement (Second). As a result, they probably have chosen better substantive rules than anyone could expect to devise without expending comparable effort to weighing competing policy objectives.

C. Deference in Perspective

The foregoing discussion strongly supports judicial deference to the Restatement (Second). It argues that deference generally violates no legal principles, and that it has limited social costs and substantial benefits. This conclusion may strike some readers as controversial because it does not fit closely with the traditional model of common law development. Courts are not slowly developing and refining the rules of contracts law in an incremental manner. Instead, they simply are choosing a rule from a book and then applying it. Two observations, however, may help to put my conclusion in perspective.

First, the practice of deferring to the Restatement (Second) has become extraordinarily widespread. Several hundred courts have deferred to the six new rules considered in the survey alone. Thousands of decisions have cited and followed other rules. Any assertion that courts should not or legally cannot defer, as so many already have done, would imply that almost all of the judiciary, acting independently or in concert, are doing something fundamentally wrong.

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[236] Some commentators have argued, however, that some rules or doctrines cannot fit comfortably with others. See, e.g., Grant Gilmore, The Death of Contract 61-65, 72 (1973) (arguing that the promissory estoppel doctrine fundamentally conflicts with the consideration doctrine).

Second, any objection to courts' actions would cast in doubt the basic plan of the Restatement (Second). The ALI created this work not as an academic exercise, but instead because they wanted to devise clear rules that courts could understand and follow. The ALI did not expect courts to trouble themselves very much with policy considerations in adopting the rules. Instead, the ALI wanted deference, and they achieved it.

These two observations, needless to say, do not demonstrate that courts have acted properly. The foregoing discussion attempts to do that. Instead, these observations merely serve to show that what at first might seem surprising, if not shocking, in fact should be less controversial than the alternative. The status quo in the common law development of contracts doctrine--deference to the ALI--although different from the historical model, should not seem so peculiar.[237]

***542** A. Concluding Prediction

The survey found that the vast majority of courts that have cited the new rules in sections 15, 86, 87, 89, 139, and 153 have followed them.[238] Out of 241 cases, only eight decisions cited the new rules in a negative manner. Besides showing that courts generally defer to the Restatement (Second), what does this observation suggest about the status of these particular sections?

The survey does not prove that courts in every jurisdiction or even a majority of jurisdictions have adopted the new rules. Most states simply have not yet had the opportunity to consider the six sections surveyed. For example, although over eighty cases have cited section 153 on the subject of unilateral mistake, there were only forty-six state cases from only twenty-four different states (including the District of Columbia).[239] Even fewer jurisdictions have produced decisions citing the other five sections.[240]

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[237] Whether courts should exercise comparable deference to other ALI publications, such as the Restatement (Second) of Torts, remains an open question because the answer involves different considerations. Tort law differs from contracts law in many ways. For example, although contracts law often merely establishes procedures and default rules for people who want to make contracts, tort law governs the conduct of everyone, whether or not they want to be tortfeasors or tort victims. As a result, the substance of tort law may matter more than the substance of contracts law, and courts may not wish to turn over their authority so easily.

[238] See infra Appendix.

[239] See infra Appendix.

[240] See infra Appendix.

The methodology of the survey also may have exaggerated to some extent the popularity of the new rules. Many of the decisions citing the rules mentioned them only in dicta. In addition, courts that have disagreed with the sections may have decided not to cite them. For example, courts that do not believe that past consideration can suffice as a basis for enforcement simply may state that rule without bothering to say anything about section 86.

Despite these limitations, the observation that 233 out of 241 cases cited the new rules favorably leads me to predict that most courts will adopt these rules if presented with issues to which they apply. Making predictions of this sort, of course, involves some hazards. Professor Grant Gilmore, for example, famously predicted that promissory estoppel would swallow up the consideration doctrine,[241] and that forecast has not proved accurate.[242] Yet, the results of the survey make continued acceptance of sections 15(1)(b), 86, 87(2), 89, 139, and 153 seem quite likely.

When these six sections first appeared in the Restatement (Second), they all stated new rules that had little support in the cases and that contradicted traditional statements of contracts doctrine. The survey shows that large numbers of courts nonetheless have been adopting the rules.[243] Nothing has happened that might bring that trend to an end; courts, on the whole, have not established substantial precedent for rejecting the rules. On the contrary, a large body of cases--233 and counting--now supports these six rules. These precedents create additional momentum, making the movement toward adopting the sections all the more difficult to stop.

I undertook the survey to help answer the question whether the new rules stated in sections 15(1)(b), 86, 87(2), 89, 139, and 153 accurately state the law. The survey shows that most of the rules already have gained a strong foothold in the precedent. The number of favorable decisions almost ***543** certainly will grow as time proceeds. To the extent that a statement of the law represents a prediction about what rule a court will

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[241] See Gilmore, supra note 236, at 87.

[242] See E. Allan Farnsworth, Developments in Contract Law During the 1980's: The Top Ten, 41 Case W. Res. L. Rev. 203, 221-22 (1990); Amy H. Kastely, Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories, 90 Nw. U. L. Rev. 132, 135-42 (1995).

[243] See infra Appendix.

follow when confronted with a set of facts,[244] then the rules appear to express the law of contracts with admirable accuracy.

Appendix

This Appendix lists the cases citing sections 15(1)(b), 86, 87(2), 89, 139, and 153. Citations to federal decisions follow the citations to state decisions (including those from the District of Columbia).

Section 15(1)(b)

Alaska

Pappert v. Sargent, 847 P.2d 66, 70 (Alaska 1993).

District of Columbia

Butler v. Harrison, 578 A.2d 1098, 1100-01 (D.C. 1990).

Massachusetts

Krasner v. Berk, 319 N.E.2d 897, 898, 900 (Mass. 1974).

Farnum v. Silvano, 540 N.E.2d 202, 204-05 (Mass. App. Ct. 1989).

New York

Ortelere v. Teachers' Retirement Bd., 250 N.E.2d 460, 465 (N.Y. 1969).

In re Estate of Obermeier, 540 N.Y.S.2d 613, 615 (N.Y. App. Div. 1989) (Weiss, J., dissenting).

Blatt v. Manhattan Med. Group, 519 N.Y.S.2d 973, 978 (N.Y. App. Div. 1987).

Tomasino v. New York State Employees' Retirement Sys., 448 N.Y.S.2d 819, 822 (N.Y. App. Div.) (Weiss, J., dissenting), aff'd, 440 N.E.2d 1330 (N.Y. 1982).

Pentinen v. New York State Employees' Retirement Sys., 401 N.Y.S.2d 587, 588 (N.Y. App. Div. 1978).

Keith v. New York State Teachers' Retirement Sys., 362 N.Y.S.2d 231, 236 (N.Y. App. Div. 1974).

In re Estate of ACN, 509 N.Y.S.2d 966, 970 (Sur. Ct. 1986).

In re Estate of Gebauer, 361 N.Y.S.2d 539, 544-45 (Sur. Ct. 1974).

Oregon

Gore v. Gadd, 522 P.2d 212, 213 n.1 (Or. 1974) (in banc).

***544** Pennsylvania

Estate of McGovern v. Commonwealth, 517 A.2d 523, 526, 530 (Pa. 1986).

Estate of McGovern v. Commonwealth, 481 A.2d 981, 984-86 (Pa. Commw. Ct. 1984).

Tennessee

In re Ellis, 822 S.W.2d 602, 607 (Tenn. Ct. App. 1991).

Texas

Smith v. Christley, 755 S.W.2d 525, 532-33 (Tex. App. 1988).

Nohra v. Evans, 509 S.W.2d 648, 654-55 (Tex. App. 1974).

Wisconsin

Hauer v. Union State Bank, 532 N.W.2d 456, 461 (Wis. Ct. App. 1995).

Federal

FDIC v. Ohlson, 659 F. Supp. 490, 492 n.3 (N.D. Iowa 1987).

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[244] Cf. Holmes, supra note 48, at 457 (describing law as the study of "the prediction of the public force through the instrumentality of the courts").

In re Hall, 188 B.R. 476, 485 n.12 (Bankr. D. Mass. 1995).
In re Britton, 66 B.R. 572, 577 n.7 (Bankr. E.D. Mich. 1986).

Section 86

Arizona

Realty Assocs. v. Valley Nat'l Bank, 738 P.2d 1121, 1124 (Ariz. Ct. App. 1986).

California

Knight v. Board of Admin. of Pub. Employees' Retirement Sys., 273 Cal. Rptr. 120, 145 n.10 (Cal. Ct. App. 1990).

Missouri

McMurry v. Magnusson, 849 S.W.2d 619, 623 n.1 (Mo. Ct. App. 1993).

Federal

First Nat'l Bankshares, Inc. v. Geisel, 853 F. Supp. 1344, 1357 (D. Kan. 1994).

Section 87(2)

Colorado

Centric-Jones Co. v. Hufnagel, 848 P.2d 942, 956 n.4 (Colo. 1993) (en banc) (Vollack, J., dissenting in part).

***545** Idaho

Mitchell v. Siqueiros, 582 P.2d 1074, 1081 n.2 (Idaho 1978) (Bistline, J., concurring).

Iowa

Levien Leasing Co. v. Dickey Co., 380 N.W.2d 748, 754 n.3 (Iowa Ct. App. 1985).

Maryland

Pavel Enters., Inc. v. A. S. Johnson Co., 674 A.2d 521, 529 & n.17 (Md. 1996).

Massachusetts

Rhode Island Hosp. Trust Nat'l Bank v. Varadian, 647 N.E.2d 1174, 1178 (Mass. 1995).
Loranger Constr. Corp. v. E. F. Hauserman Co., 384 N.E.2d 176, 179 (Mass. 1978).
Cannavino & Shea, Inc. v. Water Works Supply Corp., 280 N.E.2d 147, 149 (Mass. 1972).
Loranger Constr. Corp. v. E. F. Hauserman Co., 374 N.E.2d 306, 311 n.3 (Mass. App. Ct.), aff'd, 384 N.E.2d 176 (Mass. 1978).

Missouri

Cleveland v. High Country Fashions, Inc., 831 S.W.2d 784, 787 (Mo. Ct. App. 1992).

New Mexico

Strata Prod. Co. v. Mercury Exploration Co., 916 P.2d 822, 829 (N.M. 1996).

New York

De Kovessey v. Coronet Properties Co., 508 N.E.2d 652, 655 (N.Y. 1987).
Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1251 (N.Y. 1983) (Jasen, J., dissenting).

Pennsylvania

Bethlehem Steel Corp. v. Litton Indus., Inc., 488 A.2d 581, 593 (Pa. 1985) (Hutchinson, J., concurring).

Washington

Arango Constr. Co. v. Success Roofing, Inc., 730 P.2d 720, 725 (Wash. Ct. App. 1986).
Ferrer v. Taft Structurals, Inc., 587 P.2d 177, 179 (Wash. Ct. App. 1978).

***546** Federal

Dugan & Meyers Constr. Co v. Worthington Pump Corp., 746 F.2d 1166, 1174 (6th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

Dankrag, Ltd. v. International Terminal Operating Co., 729 F. Supp. 360, 364 n.3 (S.D.N.Y. 1990).

Koro Co. v. Bristol-Myers Co., 568 F. Supp. 280, 285 (D.D.C. 1983).

Cayuga Constr. Corp. v. Vanco Eng'g Co., 423 F. Supp. 1182, 1185 (W.D. Pa. 1976).

In re Waldron, 36 B.R. 633, 636 (Bankr. S.D. Fla. 1984).

Hoel-Steffen Constr. Co. v. United States, 684 F.2d 843, 848 (Ct. Cl. 1982).

Section 89

Connecticut

General Elec. Supply Co. v. Southern New England Tel. Co., 441 A.2d 581, 592 (Conn. 1981).

Illinois

Greenberg v. Mallick Management, Inc., 527 N.E.2d 943, 949 (Ill. App. Ct. 1988).

Iowa

F. S. Credit Corp. v. Shear Elevator, Inc., 377 N.W.2d 227, 231 (Iowa 1985).

In re Guardianship of Collins, 327 N.W.2d 230, 233 (Iowa 1982).

Quigley v. Wilson, 474 N.W.2d 277, 280 (Iowa Ct. App.), aff'd, 474 N.W.2d 277 (Iowa 1991).

Massachusetts

Telecon, Inc. v. Emerson-Swan, Inc., 461 N.E.2d 1227, 1228 (Mass. App. Ct. 1984).

Michigan

Scholz v. Montgomery Ward & Co., 468 N.W.2d 845, 854 (Mich. 1991) (Levin, J., concurring in part and dissenting in part).

New Hampshire

Gintzler v. Melnick, 364 A.2d 637, 640 (N.H. 1976).

New York

Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1251 (N.Y. 1983) (Jasen, J., dissenting).

***547** North Carolina

Wachovia Bank & Trust Co. v. Rubish, 293 S.E.2d 749, 756 (N.C. 1982).

Ohio

Smaldino v. Larsick, 630 N.E.2d 408, 413 (Ohio Ct. App. 1993).

Rhode Island

Salo Landscape & Constr. Co. v. Liberty Elec. Co., 376 A.2d 1379, 1381 n.1 (R.I. 1977).

Angel v. Murray, 322 A.2d 630, 636-37 & n.3 (R.I. 1974).

Wyoming

Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211, 219 (Wyo. 1994).

Federal

McCallum Highlands, Ltd. v. Washington Capital Dus, Inc., 66 F.3d 89, 94 (5th Cir.), opinion corrected on denial of reh'g, 70 F.3d 26 (5th Cir. 1995).

Autotrol Corp. v. Continental Water Sys. Corp., 918 F.2d 689, 692 (7th Cir. 1990).

Union Mut. Life Ins. Co. v. Chrysler Corp., 793 F.2d 1, 13 (1st Cir. 1986).

United States v. Sears, Roebuck & Co., 778 F.2d 810, 816-18 (D.C. Cir. 1985).

Billman v. V. I. Equities Corp., 743 F.2d 1021, 1024 & n.3 (3d Cir. 1984).

Coyer v. Watt, 720 F.2d 626, 629 (10th Cir. 1983).

Lowey v. Watt, 684 F.2d 957, 968-70 & n.17 (D.C. Cir. 1982).

Section 139

Arkansas
Hoffius v. Maestri, 786 S.W.2d 846, 850 (Ark. Ct. App. 1990).
California
Tenzer v. Superscope, Inc., 702 P.2d 212, 221 (Cal. 1985) (in banc).
Munoz v. Kaiser Steel Corp., 203 Cal. Rptr. 345, 350-51 (Cal. Ct. App. 1984).
Colorado
Kiely v. St. Germain, 670 P.2d 764, 768-770 (Colo. 1983) (en banc).
Chidester v. Eastern Gas & Fuel Assocs., 859 P.2d 222, 225 (Colo. Ct. App. 1992).
Nicol v. Nelson, 776 P.2d 1144, 1147 (Colo. Ct. App. 1989).
Tripp v. Shelter Research, Inc., 729 P.2d 1024, 1025-26 (Colo. Ct. App. 1986).
***548** St. Germain v. Boshouwers, 646 P.2d 952, 954 (Colo. Ct. App. 1982), rev'd in part, 670 P.2d 764 (1983).
Hawaii
McIntosh v. Murphy, 469 P.2d 177, 181 (Haw. 1970).
Hawaiian Trust Co. v. Cowan, 663 P.2d 634, 637 (Haw. Ct. App. 1983).
Lee v. Kimura, 634 P.2d 1043, 1048 (Haw. Ct. App. 1981).
Indiana
Whiteco Indus., Inc. v. Kopani, 514 N.E.2d 840, 844-45 (Ind. Ct. App. 1987).
Iowa
Peterson v. Petersen, 355 N.W.2d 26, 27 (Iowa 1984).
Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342-44 (Iowa 1979).
Kansas
Progress Enters., Inc. v. Litwin Corp., 589 P.2d 583, 588 (Kan. 1979).
Walker v. Ireton, 559 P.2d 340, 345-46 (Kan. 1977).
Maine
Stearns v. Emery-Waterhouse Co., 596 A.2d 72, 74-75 (Me. 1991).
Chapman v. Bomann, 381 A.2d 1123, 1130 n.6 (Me. 1978).
Maryland
Pavel Enters., Inc. v. A. S. Johnson Co., 674 A.2d 521, 532 n.28 (Md. 1996).
Snyder v. Snyder, 558 A.2d 412, 417 (Md. Ct. Spec. App. 1989).
Michigan
Powers v. Peoples Community Hosp. Auth., 465 N.W.2d 566, 567 (Mich. 1991) (Levin, J., dissenting).
Missouri
Davis v. Nelson, 880 S.W.2d 658, 667 (Mo. Ct. App. 1994).
McCoy v. Spelman Mem'l Hosp., 845 S.W.2d 727, 730 (Mo. Ct. App. 1993).
Geisinger v. A & B Farms, Inc., 820 S.W.2d 96, 99-100 (Mo. Ct. App. 1991).
New York
Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1247, 1251 (N.Y. 1983) (Jasen, J., dissenting).
***549** Klein v. Jamor Purveyors, Inc., 489 N.Y.S.2d 556, 560 (N.Y. App. Div. 1985).
D & N Boening, Inc. v. Kirsch Beverages, Inc., 471 N.Y.S.2d 299, 302 (N.Y. App. Div.), aff'd, 472 N.E.2d 992, 996 (1984).
Swerdloff v. Mobil Oil Corp., 427 N.Y.S.2d 266, 269 (N.Y. App. Div. 1980).
Healy v. Brotman, 409 N.Y.S.2d 72, 75 (N.Y. Sup. Ct. 1978).
North Carolina
Wachovia Bank & Trust Co. v. Rubish, 293 S.E.2d 749, 759 (N.C. 1982).

Ohio

Gathagan v. Firestone Tire & Rubber Co., 490 N.E.2d 923, 925 (Ohio Ct. App. 1985).

State ex rel. Celebrezze v. Tele-Communications, Inc., 601 N.E.2d 234, 255 (Ohio Ct. Cl. 1990).

Oregon

Meader v. Orbit Inn Corp., 556 P.2d 1365, 1366 (Or. 1976).

Texas

"Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 940 (Tex. 1972).

Boddy v. Gray, 497 S.W.2d 600, 604 (Tex. App. 1973).

Washington

Berg v. Ting, 886 P.2d 564, 573-74 (Wash. 1995) (en banc).

Greaves v. Medical Imaging Sys., Inc., 879 P.2d 276, 281-83 (Wash. 1994) (en banc).

Family Med. Bldg., Inc. v. Department of Soc. & Health Servs., 702 P.2d 459, 462-63 (Wash. 1985) (en banc).

Lectus, Inc. v. Ranier Nat'l Bank, 647 P.2d 1001, 1001-02 (Wash. 1982) (en banc).

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