

RELYING ON RESTATEMENTS

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Restatements of the Law occupy a unique place in the American legal system. For nearly a century, they have played a prominent and influential role as legal texts that courts routinely rely on in a wide variety of fields. Despite their ubiquitous and pervasive use by courts, Restatements are not formal sources of law. While they resemble statutes in their form and structure, Restatements are produced entirely by a private organization of experts set up to clarify and simplify the law, and thus lack the force of law on their own. And yet, courts treat them as formal and authoritative sources of law, a reality that has thus far received hardly any systematic scrutiny. As this Article argues, courts' anomalous treatment of Restatements routinely distorts the process of common law development by introducing a plethora of institutional problems into the fray and has in recent years produced needless controversy about the utility of the Restatements themselves.

This Article unravels the complexity and pitfalls of the unique legal authority embodied in Restatements, which elides the traditional categories of authority that courts are familiar with. It argues that the working of this unique legal authority is masked by the manner in which Restatements seek to emulate the language, form, and structure of ordinary statutes, despite crucial differences between the two. Courts have in turn been taken by the Restatements' combination of substantive content and statute-like formulation, and resorted to a variety of different techniques of reliance in their use of Restatements, many of which unwittingly limit their own lawmaking power in the common law over time. The Article then proposes a set of Restatement-specific canons of construction for courts to use in their reliance on the text of Restatements, each of which is tailored to the unique nature of authority invested in them.

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INTRODUCTION

Restatements of the Law are today ubiquitous and influential sources in the American legal system. Produced by the American Law Institute (ALI), a private organization dedicated to the clarification, modernization and improvement of the law since 1923, *Restatements* cover a wide range of legal subjects.¹ While they initially focused on state common law areas, the *Restatements* have since expanded their coverage and today deal with a wide range of federal, state and hybrid subjects.² Every first-year law student is introduced to *Restatements* with the understanding that they are “highly persuasive” sources of law even if not binding as such.³

The influence of the *Restatements*, however, extends well beyond their pedagogical value. Courts in every single U.S. jurisdiction—federal, state, and territorial—routinely rely on or cite to *Restatements* in their decisions. As an

¹ American Law Institute, *Restatements of the Law*, <https://www.ali.org/publications/#publication-type-restatements> (last visited June 1, 2021). The ALI lists a total of 31 *Restatements*, which includes those in progress as well as those approved by the organization’s membership.

² The ALI’s initial *Restatement* subjects were the laws of agency, conflict of laws, contracts, judgments, property, restitution, security, torts and trusts. See Arthur Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19 (1929); Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U.L.J. 145 (2007). More recently, the list has expanded to cover subjects like unfair competition, employment law, foreign relations law, copyright law, and the law of American Indians – many of which cover both federal and state legal rules. See American Law Institute, *supra* note ____.

³ PETER C. SCHANCK, A GUIDE TO LEGAL RESEARCH 32 (1976). The extent to which *Restatements* are “authoritative” has been a matter of some debate. See, e.g., Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 651 (1933) (noting how the ALI purported to have the blackletter of *Restatements* be treated as authoritative); Harlan F. Stone, *The Significance of a Restatement of the Law*, 10 PROCS. ACAD. POL. SCI. N.Y. 3, 6 (1923) (questioning the ability of *Restatements* to be authoritative in the strict sense of the term).

illustration, in the ten-year period between 2011 and 2021, courts around the country cited the *Restatements* more than 10,000 times for various propositions, with a significant number of them quoting *Restatement* language extensively.⁴ Indeed, such is their influence that in a relatively recent U.S. Supreme Court case, Justice Scalia authored a separate opinion with the sole purpose of “caution[ing]” courts against using modern *Restatements* as part of their reasoning without closer examination.⁵

Owing to their enormous influence on the development of judge-made law, much has been written about the substantive content of individual *Restatements* and the process through which they are each produced.⁶ Similarly, the history of the ALI has also been the subject of extensive scholarly commentary and critique.⁷ Despite the voluminous literature on the ALI and the *Restatements*, scholars have devoted surprisingly little attention to examining the manner in which *Restatements* are actually relied on and used by courts as part of their reasoning.⁸ Beyond simple citation numbers, woefully little is known about the techniques and methods employed by courts in their use of

⁴ A Westlaw search of the term “Restatement of” in all U.S. federal, state, and territorial courts from 2011 to 2021 reveals over 10,000 hits, 6,272 at the federal level, 3,604 at the state, and 124 among territorial, tribal, and Puerto Rico courts.

⁵ *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (“I write separately to note that modern Restatements... are of questionable value, and must be used with caution.”) (Scalia, J., concurring).

⁶ See, e.g., THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW (Paul B. Stephan & Sarah H. Cleveland eds. 2020); Edwin W. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397 (1933); Arthur L. Goodhart, *Restatement of the Law of Torts*, 83 U. PA. L. REV. 411 (1935); Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1964); Samuel Estreicher et al., *Foreword: The Restatement of Employment Law Project*, 100 CORNELL L. REV. 1245 (2014); Harvey S. Perlman, *The Restatement of the Law of Unfair Competition: A Work in Progress*, 80 TRADEMARK REP. 461 (1990); Basil H. Pollitt, *Some Comments on the Restatement of Agency*, 17 GEO. L.J. 177 (1928); Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285 (2021); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014).

⁷ See, e.g., N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1 (1997); Hessel E. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 461 (1936); Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212 (1992); Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQ. 625 (1998).

⁸ The only limited prior effort in this regard is: Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004) (focusing on the *Restatements*’ wholesale adoption by statute in the Virgin Islands to draw lessons about their influence on the development of the common law).

Restatements, i.e., the very process through which *Restatements* get incorporated into the law. What makes this oversight particularly consequential is the reality that in relying on *Restatements*, courts are required to engage in the task of *interpretation*, a process that has itself been the subject of rather significant methodological disagreement.⁹

Even though they involve the synthesis of judge-made law, *Restatements* endeavor to function as quasi-statutes, attempting to emulate “the care and precision of a well-drawn statute”.¹⁰ The founders of the ALI saw the drafters of the *Restatements* as “experts” in “legislative drafting” who were better suited to codification than were legislators.¹¹ In an effort to codify judge-made rules and principles, *Restatements* therefore embody very distinct structural similarities to statutes: their primary directives are described as “black-letter” and placed in bold text, their provisions are sequentially numbered and organized logically as a code, and perhaps most importantly their drafters pay acute attention to every single choice of word that is included in the text of a *Restatement*—all in the hope that courts will engage them just as they do ordinary statutes.

Not surprisingly, innumerable courts do just this and treat *Restatements* as statutory directives, i.e., as primary sources of law. As a prime example, consider the celebrated property law case of *Intel v. Hamidi*, decided by the Supreme Court of California.¹² The case involved the applicability of a common law property tort—trespass to chattels—to an internet server. The question before the Court was whether the defendant’s spamming of a private computer server constituted a trespass.¹³ In answering the question in the negative, the Court placed extensive reliance on the *Restatement (Second) of Torts*, and specifically §218 therein, which deals with trespass to chattels.¹⁴ What is particularly noteworthy in the Court’s engagement with the *Restatement* is not just its extensive quotation of the relevant provision or its parsing of the precise

⁹ See Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 Nw. U. L. Rev. 269, 270 (2019) (“[N]o agreement on interpretive methodology has emerged.”); ANTONIN SCALIA, A MATTER OF INTERPRETATION 14 (2014).

¹⁰ AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 37 (2d ed. 2015) (hereinafter “CAPTURING THE VOICE”).

¹¹ *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*, 1 A.L.I. PROC. 1, 69-70 (1923) (hereinafter “*Founding Committee Report*”).

¹² *Intel Corp. v. Hamidi*, 71 P. 3d 296 (Cal. 2003).

¹³ *Id.* at 299-300.

¹⁴ *Id.* at 302.

words contained therein but also the very framing of the *Restatement*'s role as a source of law that would guide its reasoning.

The majority opinion framed its reliance on the *Restatement* as follows: “Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is *actionable*... but other forms of interference require some additional harm to the personal property or the possessor’s interest in it.”¹⁵ At first glance, this observation may appear rather straightforward. Yet on closer scrutiny it perfectly illustrates the tendency of courts to equate *Restatements* with statutes. The Court’s framing treats §218 of the *Restatement* as the primary source of the cause of action; actionability was to be determined by that section since it was seen as arising “[u]nder” it. The obvious flaw in the Court’s formulation lies in its treatment of §218 as a free-standing source of the legal proposition it was considering, when the provision merely synthesizes and restates judge-made law on the point. That framing is however ordinarily reserved for statutes, which as independent sources of law dictate whether something is “actionable under” their terms.¹⁶

Restatements are not independent sources of law despite their superficial resemblance to statutes. The black-letter text of *Restatements* is drawn directly from the language and content of actual judicial opinions, which it synthesizes into succinct directives. While the black-letter text of a *Restatement* may thus resemble statutory text in *form*, in *substance* its source is the judicial opinions that it digests into a directive, a distinction of significance. A longstanding rule—now reiterated multiple times by the Supreme Court—warns against treating the expository language of a judicial opinion as equivalent to the concise text of a statute, since judicial reasoning emerges contextually from the circumstances of the dispute before a court.¹⁷ Consequently, a strong interpretive canon cautions courts against parsing and dissecting the language of judicial opinions in ways that is commonly done for statutes. Courts relying on

¹⁵ *Id.* (emphasis added)

¹⁶ See, e.g., *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108 (2002) (describing behavior that is “actionable under Title VII.”); *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1996 (2016) (“A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government’s payment decision in order to be actionable under the False Claims Act.”); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (“[S]ome conduct actionable under Section 11 may also be actionable under Section 10(b).”).

¹⁷ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (“[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.”); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (“[W]e think it generally undesirable... to dissect the sentences of the United States Reports as though they were the United States Code.”).

Restatements, however, routinely fail to realize that they are in substance interpreting and relying on judicial—as opposed to legislative—language.

Further, unlike statutes *Restatements* contain more than just black-letter text. They contain additional components that are meant to aid judges in their reliance on the document. These components commonly include a “Comments” section that explains the background and rationale for a black-letter provision, and the “Reporter’s Notes”, which are authored by the drafters to convey their own individual views about the provision (and topic) independently.¹⁸ Implicit in their structure and arrangement within a *Restatement* is a presumptive hierarchy of authoritativeness that its drafters advance: the blackletter is meant to embody binding law while the comments and reporter’s notes elaborate on the law and its rationale, with the latter treated as the product of the individual drafter rather than the organization’s membership.¹⁹ Comments and Reporter’s Notes are therefore meant to function as interpretive guides to the blackletter, but from inside the official text of a *Restatement*; like the oddity of interpretive guidance contained within the enacted language of a statute. Owing to their presence as intrinsic guides, courts all too commonly treat them in the way that they do the blackletter of *Restatements* and scrutinize their language very closely.²⁰

Perhaps most importantly, in stark contrast to formal legislation *Restatements* are produced through a decidedly non-transparent process. Early drafts of a *Restatement*—and the debates around its provisions—are never publicly revealed nor recorded. Further, the drafting history of a *Restatement* is never made public. The reasons behind a *Restatement*’s choice of particular language, the inclusions and omissions made to and from its text owing to consultations and suggestions, and the myriad compromises—political, ideological, and otherwise—that such text represents, all remain hidden from courts unless chosen to be revealed by a *Restatement*’s drafters in the Comments or Reporter’s notes, or by a participant in the process. Unlike with statutes, where the legislative history routinely informs the understanding of the text,²¹

¹⁸ CAPTURING THE VOICE, *supra* note __, at 34 (detailing the component parts of a typical *Restatement*).

¹⁹ *Id.* at 45. A prime example is to be seen in the majority and dissenting opinions in *Intel*. See *Intel*, 71 P. 3d at 41, 45 n.6, 69-70 (Mosk, J. dissenting).

²⁰ See, e.g., *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 713 (2021) (citing to a Reporters’ Note in a *Restatement* without distinction); *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 164 (2003) (citing *Restatement* black-letter and reporters’ notes concurrently without distinction).

²¹ See generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Nicholas R. Parrillo, *Leviathan and the Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266 (2013).

courts are meant to rely on the language of *Restatements* without any recourse to its drafting history and intellectual lineage. Courts are thus implicitly directed to accept the text of a *Restatement* on its own: as neutral, apolitical, and thus capable of being understood without looking behind the curtain, except when a drafter thinks it wise to do otherwise.²²

This Article examines the nature and status of *Restatements* as sources of law in the modern American legal landscape by focusing on the manner in which courts interpret and rely on their substantive content. Despite their formal status as secondary sources, *Restatements* are today regularly treated as authoritative sources of law by courts, a transformation that the American Law Institute (ALI) has consciously facilitated and encouraged. Regardless of the wisdom of this transformation, it has unfortunately not been accompanied by a recognition of the rather important ways in which *Restatements* differ from statutes and other codes and regulations, which ought to influence the manner in which they are relied on by courts.

As legal texts that are developed through a collective institutional process involving experts in a field, *Restatements* undoubtedly remain invaluable legal sources for courts and lawyers. All the same, despite being fairly standardized in form and substance today, courts rely on *Restatements* in very different ways. In one of the most common versions of reliance seen today, courts treat *Restatement* language as authoritative statements of law on their own, or as part of their reasoning formally “adopt” *Restatement* sections as the law of their jurisdiction.²³ The anomalous nature of such judicial adoption and the constraining effect that it has on future courts’ discretion under the common law, are factors that are altogether ignored during such reliance. In this form of reliance, courts effectively outsource their lawmaking role under the common law to *Restatement* text, analogous to what they would do with an actual statutory text.

A second (and more benign) form involves courts relying on *Restatements* as secondary sources and thus according them no more than persuasive value. Here, courts use *Restatements* to support their descriptive

²² Indeed, this is an approach that became controversial during the drafting of one of the ALI’s most well-known projects, the Uniform Commercial Code (U.C.C.). Its drafter, Karl Llewellyn, “worried” that prior drafts of the project as well as a project’s drafting history would be “extremely misleading” in the interpretation and reading of the code. See 27 A.L.I. PROCs. 8 (1950). That worry appears to have informed and developed into the current practice.

²³ For a fuller discussion, see *infra* Part III.A.

statements of the law that are independently derived from elsewhere.²⁴ In between the two forms is a third mode of reliance wherein courts look to *Restatements* for their reporters' efforts to choose between conflicting lines of decisional law. In such reliance, courts either unpack a *Restatement's* choice to focus on its rationale, or instead accept the choice as worthy of reliance on its own without any additional scrutiny.²⁵ While the former treats *Restatements* as secondary sources, the latter outsources the normative nature of the choice back to the *Restatement* reporters.

Rarely if ever though do courts specify the form of reliance that they are placing on *Restatements*, often equivocating instead on the issue. Later courts then routinely misconstrue the nature and scope of a prior court's reliance on a *Restatement* in its reasoning, compounding the effect of the initial equivocation. When a court's form of reliance on a source and its accompanying process interpreting that source lack sufficient transparency, it risks undermining the legitimacy and credibility not just of the source at issue but also of the very court engaged in the reliance and interpretation. Indeed, much of the controversy surrounding courts' modern use of *Restatements* stems from their failure to develop a coherent approach for their reliance. At the root of Justice Scalia's observation that modern *Restatements* "are of questionable value, and must be used with caution"²⁶ was the implicit concern that courts were inconsistent and unclear about how and when to interpret and rely on *Restatement* provisions as part of their reasoning.

For *Restatements* to continue serving a meaningful purpose in the American legal system without undermining their own legitimacy, it is critical for courts to develop a methodology of reliance that is tailored to their unique structure, purpose, and status as legal sources. This Article takes the first steps in that direction and offers a set of *Restatement*-specific canons of construction that alleviate the main problems underlying courts' extant use of *Restatements* in their judicial reasoning. These include: the *canon of secondarity*, which would presume that a court's reliance on a *Restatement* is in its use as a secondary legal source, absent an affirmative statement to the contrary; the *canon of faux codification*, which would require courts to look behind the statute-like framing of *Restatements* to actually scrutinize the relationship between the text of the blackletter and that actual law that it purports to restate; the *canon of common law preservation*, which would have courts interpret the *Restatement's*

²⁴ See Part III.B.

²⁵ See Part III.C.

²⁶ *Kansas*, 135 S. Ct. at 1064 (Scalia, J. concurring in part and dissenting in part).

blackletter in a way that preserves—rather than narrows—their own lawmaking function in the common law; and lastly, the *canon of statutory primacy*, which would caution courts against relying on the blackletter of *Restatements* over the language and text of any competing statutory provisions that it seeks to summarize or paraphrase.

The argument of the Article is developed in four parts. Part I unpacks the form of legal authority that *Restatements* embody, focusing on the manner in which they consciously tread a thin line between competing visions of legal authority. This unique positioning has allowed them to play an outsized role in the development of the law and accorded them significant influence among courts. Part II shows how despite superficial similarities in form and structure, *Restatements* remain fundamentally different from statutes. These differences have important consequences for the ways in which *Restatements* are used and relied on by courts. Part III then examines the principal ways in which courts rely on *Restatements* in their judicial reasoning: as actual codified law (analogous to a statute), as a choice among competing lines of case law, and as the opinion of a treatise-writer, albeit an institutional one. Part IV shifts to the normative and argues for the development of a new methodology for courts' reliance on *Restatements*, one that is transparent both about the nature of their authority and the purpose for courts' reliance on them. It then offers a set of four new interpretive canons for courts to use in their reliance on *Restatements* as part of their judicial reasoning. A brief conclusion follows.

Before proceeding too much further, an important methodological caveat is in order. Much of the argument about judicial reliance that follows focuses on courts' use of *Restatements* in their reasoning as articulated in their opinions. A concern might therefore be raised that such reasoning is little more than an ex post rationalization of an outcome that is developed—either consciously or subconsciously—by judges to mask their real motivations for their decisions.²⁷ In other words, an opinion might well state that it is relying on a provision of a *Restatement*, when in reality it is motivated by other considerations, many of

²⁷ The notion of a rationalization draws from the Legal Realist idea that judges give formal reasons for their opinions and outcomes that differ from the real reasons that drove them to that point. See, e.g., JEROME N. FRANK, *LAW AND THE MODERN MIND* 130 (1935); FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 237-38 (1959); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 3 (1977); Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 203 (1984); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268 (1997).

which are for varying reasons incapable of articulation.²⁸ While this concern may well hold true as an evaluation of the psychology of judges (and judging), it fails to account for the independent generativity of legal precedent.²⁹ Even if an opinion at the time does not adequately reflect a judge's real reasons, to later courts it is only ever the professed (i.e., written) reasons and reliance as seen in the opinion that matter, thus according them principal influence as a structural matter.³⁰ The argument that follows is therefore built around this reality.

I. RESTATEMENTS AS LEGAL AUTHORITY

Ever since their emergence on the scene nearly a century ago, *Restatements* have been seen as valuable sources of law that may be relied on by lawyers and courts as part of their legal reasoning. They have been routinely described as “authoritative” owing to the extensive reliance that is placed on them,³¹ a term that masks the precise nature and form of authority that they embody as legal sources. This Part unpacks the nature of legal authority embodied in *Restatements* and shows how it evades the traditional forms and categories of authority attributed to legal sources. This blurring has contributed greatly to the popularity and prominence of the *Restatements*.

Restatements quite deliberately straddle the divide between primary and secondary authority. While they do not derive their authority from any identifiable law-making power, they at the same time do not rely exclusively on reason and persuasion for their acceptance, along the lines of the common law. Similarly, *Restatements* also do not ever position themselves as principally

²⁸ There is a strong parallel here to the distinction between stated and revealed preferences that is today made in economics. See Amartya Sen, *Behaviour and the Concept of Preference*, 40 *ECONOMICA* 241 (1973); Amartya K. Sen, *Choice Functions and Revealed Preference*, 38 *REV. ECON. STUD.* 307 (1973); Elizabeth Anderson, *Unstrapping the Straightjacket of “Preference”: A Comment on Amartya Sen’s Contributions to Philosophy and Economics*, 17 *ECON. & PHIL.* 21 (2001).

²⁹ See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 *IOWA L. REV.* 601 (2001); Charles L. Barzun, *Impeaching Precedent*, 80 *U. CHI. L. REV.* 1625 (2013).

³⁰ See Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 *U. CHI. L. REV.* 1421, 1429-31 (1995); Shyamkrishna Balganesh, *The Constraint of Legal Doctrine*, 163 *U. PA. L. REV.* 1843, 1848-49 (2015); Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 *U. PA. L. REV.* 1241, 1266 (2015).

³¹ See, e.g., *Eckard Brandes, Inc. v. Riley*, 338 F. 3d 1082, 1085 (9th Cir. 2003) (noting the “authoritative nature of the Restatement [of Agency]”); *Murray v. Fairbanks Morse*, 610 F. 2d 149, 154 (3d Cir. 1979) (noting that “Restatement law is authoritative... in the absence of local law to the contrary”); *Mounkes for Mounkes v. Mounkes*, 469 P.3d 109 (Kan. Ct. App. 2020) (“The Kansas Supreme Court has looked to previous editions of the Restatement for authoritative guidance on trust principles.”); *Fisher v. Townsends, Inc.*, 695 A. 2d 53, 59 (Del. 1997) (describing the *Restatement (Second) of Agency* as “an authoritative source for guidance”).

normative texts, despite eschewing the idea that they are exclusively descriptive in orientation and design. Instead, they follow the model of the common law, which adheres to the view that the law is merely found and declared rather than made afresh.³² Each of these paradoxes of authority underlying *Restatements* is examined in turn.

A. Neither Primary nor Secondary

The difference between primary and secondary authority (or sources) is one that every first-year law student learns about.³³ Primary authority, or “real” authority as some put it, refers to sources of law that are “officially imposed or accepted by” the decisionmaker as the applicable rule in the decision-making process.³⁴ Secondary authority, by contrast, are sources that are neither imposed as binding nor accepted as such but instead derive their relevance to the decisionmaker from their content and persuasiveness.³⁵ Prominent within the former are formal sources of law such as constitutions, statutes, regulations, ordinances and judicial decisions. Secondary authorities on the other hand cover treatises, articles, monographs, digests and other sources of “opinion” by experts in the field.

One important way of understanding the difference between primary and secondary authority lies in the modality through which they exercise their influence. Primary authorities are always produced by institutions (or individuals) recognized by a legal system as vested with lawmaking power.³⁶ In a democratic setting, this typically includes sources produced by the legislature, executive, and judiciary or their delegates. Secondary authority on the other hand is produced by entities lacking such formal lawmaking power. Consequently, secondary authority relies on the power of its persuasiveness in order to function as a source of law to a decisionmaker.³⁷

³² Its roots trace back to Blackstone. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69 (1766). See generally Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421 (2013) (defending its applicability in the modern context).

³³ See ROBERT C BERRING & ELIZABETH A. EDINGER, FINDING THE LAW 16-17 (1999).

³⁴ *Id.* at 16 (“Primary authority is authority which is a statement of the law itself.”); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1952 (2008); W.M. Lile, *The Uses and Abuses of Secondary Authority*, 1 VA. L. REV. 604, 604 (1914).

³⁵ Schauer, *supra* note __, at 1940.

³⁶ BERRING & EDINGER, *supra* note __, at 16.

³⁷ Schauer, *supra* note __, at 1940-43.

The distinction between these modalities of influence is often described as the difference between the power of *fiat* and that of *reason*.³⁸ Situations of influence by fiat focus on the legitimacy of the entity producing the authority. Once such legitimacy is established, the substantive correctness or wisdom of the actual content of the directive becomes irrelevant and the authority is rendered obligatory. Legislative directives are a prime example of authority by fiat. Once validly enacted into law, courts (and other participants in a legal system) must accept the content of legislation as binding even when they disagree with it.³⁹

Authority by fiat is sometimes referred to as “decisionist” authority and seen to derive from content-independent reasons that the decisionmaker has to treat the directive at issue as binding.⁴⁰ In this sense, authority by fiat need not be devoid of reason altogether: yet the reasons for such authority are content-independent. Returning to the example of the legislature, such reasons can arise from issues such as institutional norms, adherence to the principle of separation of powers, or on occasion the belief in the superior wisdom (individual or collective) of the entity generating the directive. Despite all of this, the reality remains that such fiat-based authority is rarely, if ever, openly second-guessed by the decisionmaker who is obligated to apply it.

As the name suggests, influence by reason is entirely content-dependent. A directive within this category (secondary authority) derives its authoritativeness not from the position of the entity producing it, but instead from its substantive persuasiveness.⁴¹ The decision-maker renders it authoritative as such only when convinced by its underlying substance. In a strict sense therefore, such secondary authority is hardly authoritative on its own; it instead becomes authoritative only upon being sufficiently persuasive. As some have pointed out, persuasion and authoritativeness point in opposite directions such that the idea of “persuasive authority” is itself an oxymoron of sorts.⁴²

While persuasion is predominantly content-dependent, in practice it is tied to the identity of the *persuader*. In other words, the persuasiveness of a directive is commonly a product of both its substantive content and the trust that

³⁸ See Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 377-80 (1946); Arie Rosen, *Two Logics of Authority in Modern Law*, 64 U. TORONTO L.J. 669, 670 (2014).

³⁹ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 222 (“The wisdom of Congress’ action, however, is not within our province to second-guess.”).

⁴⁰ Rosen, *supra* note __, at 673.

⁴¹ Schauer, *supra* note __, at 1941.

⁴² *Id.* at 1943 (describing persuasive authority as “self-contradictory”).

is placed in the judgement and expertise of the individual/entity that is the source of such content.⁴³ Such trust is of course content-independent, thus imbuing secondary (or persuasive) authority with both content-dependent and content-independent reasons for acceptance. Conversely, authority by fiat is equally capable of persuading as well such that individuals may (and routinely do) have content-specific reasons in addition to content-independent ones, to follow such authority. All the same, the two forms of authority remain fundamentally different.⁴⁴

Restatements sit somewhat uncomfortably between the categories of primary and secondary authority. The American Law Institute (ALI), which produces them, is an entirely private organization that is vested with no formal lawmaking power.⁴⁵ In this respect, the ALI differs even from the Uniform Law Commission (UCL), another private organization that has its members appointed by state governments as their representatives in the drafting process.⁴⁶ Formed as a “membership organization”, the ALI’s membership “consists of eminent judges, lawyers, and law professors...reflect[ing] the excellence and diversity of today’s legal profession”.⁴⁷ Produced therefore by a private entity, the *Restatements* are formally mere “secondary sources” or “persuasive authorities”, a reality that the ALI readily acknowledges.⁴⁸ All the same, this formal classification does not tell the full story.

Owing in large part to the prominence of its membership, which comprises innumerable members of the state and federal judiciaries who actively participate in the working of the organization, *Restatements* are treated by courts as much more than just persuasive. Their influence (or authoritativeness, so to speak) emerges not merely (or even) from the substantive content of their directives but instead from a significant amount of trust and faith that is placed in the institutional process through which they are produced. That process includes the composition of the organization’s membership, which is seen to be representative of the legal profession. In an important sense, therefore,

⁴³ *Id.* at 1944-45.

⁴⁴ Rosen, *supra* note __, at 675; Schauer, *supra* note __, at 1941.

⁴⁵ See GEOFFREY C. HAZARD, THE AMERICAN LAW INSTITUTE: WHAT IT IS AND WHAT IT DOES 7 (1994).

⁴⁶ See Uniform Law Commission: About Us, <https://www.uniformlaws.org/aboutulc/overview> (June 3, 2021).

⁴⁷ American Law Institute, Membership, <https://www.ali.org/members/> (June 3, 2021).

⁴⁸ American Law Institute, Frequently Asked Questions, <https://www.ali.org/about-ali/faq/> (June 5, 2021) (“ALI’s publications are persuasive authorities, not controlling law...[and] serve as useful secondary sources to aid interpretation, advance understanding more generally, or provide a basis for legislation.”)

Restatements are functionally imbued with decisionist authority, where the legitimacy of the organization and the production processes drive the authoritativeness of the content. This renders their authority closer to that of a primary source functionally even if not formally.

It bears emphasizing that the *Restatements*' treatment as a quasi-primary source is hardly just an unintended consequence. It was instead a core objective behind the very formation of the ALI and its commitment to restating the law. Describing the goal of the *Restatements*, the ALI's founding committee conceptualized the authoritativeness of the enterprise as follows:

To fulfill its objects the restatement must have authority greater than that now accorded to any legal treatise, an authority more nearly on a par with that accorded the decisions of the courts. To develop among judges and lawyers the feeling that the restatement has this high degree of authority the work of making the restatement must from its inception be generally recognized as a work carried on by the legal profession in fulfillment of an obligation to the American people.⁴⁹

From their very origins the *Restatements* sought recognition as primary authorities, akin to judicial decisions, which were seen as declaring the law. And yet, the ALI's founders recognized that as a formal matter, *Restatements* were analogous to "legal treatise[s]", a secondary legal source.⁵⁰ This in turn required distinguishing *Restatements* from such ordinary treatises, which was in turn seen to lie in making the process of *Restatement* production seem participatory, representative and thus embodying a distinctively democratic character.

"Representative[ness]" thus formed an important consideration during the formation of the ALI.⁵¹ The organization's founders were insistent that the body's membership be drawn from all segments of the legal profession as well as existing legal organizations. The stated rationale for this was to imbue the process of *Restatement* production with the notion of a "professional responsibility" and thus a public character, despite the organization being a private institution.⁵² In producing the *Restatements*, the ALI was meant to be seen as exercising a professional responsibility entrusted to the legal profession as a whole, in discharge of a "public duty" to the general citizenship.⁵³

⁴⁹ *Founding Committee Report*, *supra* note ___, at 29.

⁵⁰ *Id.* at 29.

⁵¹ *Id.* at 34, 37.

⁵² *Id.* at 29.

⁵³ *Id.*

Once brought into existence under these conditions, it was not long before the *Restatements* achieved the ALI's stated goal of being received as quasi-primary sources of legal authority. Writing a mere quarter century after the founding of the ALI and its production of the first *Restatement of Torts*, Herbert Goodrich, then Director of the ALI had the following to say (and report to Congress) about the influence of the *Restatements*:

A study was recently made of the effect of the Restatement of Torts in Pennsylvania from 1939 to 1949. ... Three out of four cases of first impression rely on the authority of the Restatement. One section has been cited with approval in changing the common law. In only one instance in the years between 1938 and 1949 has the Supreme Court of Pennsylvania cited a section of the Restatement without following it. *The Restatement, the author concludes, has become "primary authority" in Pennsylvania.*

The results of this investigation are borne out by the experience of a lawyer who recently had occasion to spend an entire day in one of the Pennsylvania courts while waiting for his particular case to be argued. He reported that in the many cases which were argued before the court, lawyer after lawyer relied in the main upon sections from the Restatement of the law to support the contentions advanced. When a lawyer failed to indicate what the view of the Restatement was on a particular question, he was asked for it by the Judge. The lawyer concluded that for any advocate who appeared before this court it was as important to find support in the Restatement as it was in the decisions of the highest courts of the State and he felt all the more confident of his case because the research on his brief had started with the Restatement.⁵⁴

This observation is telling. Referring back to the founders' vision of authoritativeness for the *Restatements*, Goodrich proudly concluded that the goal had been realized: "[t]he Restatement has become authoritative, to a far greater extent, than those who organized the Institute had ever anticipated."⁵⁵

All the same, what was noticeably missing from Goodrich's account was any discussion of precisely *why* it was that courts had come to accept *Restatement* provisions as authoritative. Treating such authoritativeness as an unadorned good, his analysis failed to examine the reasons why courts found the

⁵⁴ Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. U.L.Q. 283, 290-91 (emphasis supplied).

⁵⁵ *Id.* at 292.

Restatement of Torts to be a better authority to rely on than precedent. One answer that he alluded to in passing was the ease with which *Restatement* provisions synthesize existing law, thus obviating the need to track down individual cases for a proposition. Yet, this explanation fails to account for *Restatement* provisions that overtly change the law, which as he admitted, received just as much deference from courts.⁵⁶ For such provisions, the ease of citation is hardly an adequate explanation.

The answer, explicit in the ALI founders' vision and implicit in Goodrich's account, was to be found in courts' acceptance of the ALI as a quasi-lawmaking entity, one whose legitimacy derived from both the prominence of its membership as well as its representativeness (national and otherwise). One court during the very period identified by Goodrich explained its reason for adopting a provision of the *Restatement* into law as driven by its "faith in the object and character of the *Restatement*."⁵⁷ This vision of the *Restatements'* authority has continued over the years, of course varying with different subject matter. *Restatements* thus sit uncomfortably between primary and secondary sources, at least vis-à-vis the courts that rely on them. A recent example of the phenomenon is to be seen in the state legislative outcry over the *Restatement of Liability Insurance*. Once adopted by the ALI over the objections of numerous state governors and legislators, some states concerned about the substantive content of the *Restatement* took the unprecedented step of enacting legislation expressly forbidding courts from placing any reliance on its provisions.⁵⁸ Implicit in the very need for such disavowal was the recognition that there was some portion of state courts who would not be persuaded by the substance of the objections to the *Restatement*, and who might rely on it as authority simply because it was adopted by the ALI.

B. Neither Descriptive nor Normative

A second ambiguity surrounding the authoritativeness of *Restatements* is also one that has received a significant amount of attention in recent times,

⁵⁶ *Id.* at 290 ("One section has been cited with approval in changing the common law.").

⁵⁷ *Dept. of Pub. Assistance v. Hurlbutt*, 39 Pa. D. & C. 466, 469 (Com. Pl. 1941).

⁵⁸ 39 OHIO REV. CODE. §3901.82 (2021) ("The 'Restatement of the Law, Liability Insurance' that was approved at the 2018 annual meeting of the American law institute does not constitute the public policy of this state and is not an appropriate subject of notice."); ARK. CODE §23-60-112 (2021); TENN. CODE ANN. §56-7-102 (2021); MICH. COMP. LAWS ANN. §500.3032 (2021).

albeit based on a misunderstanding.⁵⁹ This is the question of whether *Restatements* are merely descriptive of the existing law as stated and developed by courts or are instead overtly normative in offering not just an account of existing law but also a statement of how the law *should* be understood. Indeed, this formed the core of Justice Scalia's critique of the *Restatements*, when he noted that "[o]ver time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be" such that "it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law."⁶⁰

The descriptive/normative dichotomy that Justice Scalia invokes is a rather poor fit for the way in which *Restatements* have always operated. From their very inception, *Restatements* have endeavored to synthesize, clarify and simplify the law. That process necessarily involves explicating and elaborating on the law where it involves issues and questions that have not been addressed by courts directly, or on which there are conflicting strands of reasoning that require harmonization or selection. *Restatements*, as originally designed, were therefore never meant to limit themselves to statements of existing law. Instead, they were conceived of as "complete" codes that were to anticipate situations that courts had yet to address.⁶¹ And in such situations, it was fully expected that they would improve on and possibly change the law:

[T]he restatement should deal with situations that have not as yet been passed on by the court or made the subject of statutory enactment. Again, a group of persons primarily absorbed in setting forth a complete body of principles are perhaps more apt to perceive possible improvements. Each change, however, before being suggested, must pass through the test of precise statement. This necessity for precise statement will tend to make the writers give careful examination to the effect of the proposed change in view of the law as set forth in other related parts of the restatement.⁶²

⁵⁹ See, e.g., Orin Kerr, *Scalia Questions the Value of "Modern" Restatements*, WASHINGTON POST, Feb. 25, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/25/scalia-questions-the-value-of-modern-restatements/>.

⁶⁰ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J. concurring in part and dissenting in part).

⁶¹ *Founding Committee Report*, *supra* note ___, at 20.

⁶² *Id.*

Change was therefore always an integral component of the *Restatement* enterprise. This is not to suggest that *Restatements* altogether eschewed stating the law as it currently existed. To the contrary, it is clear that they saw their primary task as stating the law with such descriptive fidelity, but with the unambiguous remit to deviate from such description when required by the situation at hand.⁶³ The ALI's founders went to some length to justify the need for such deviation and improvement, which they viewed as the core—and foundational—contribution of the *Restatements*:

We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life. The character of the restatement which we have in mind can be best described by saying that it should be at once analytical, critical and constructive.

...

The restatement should be constructive...it should not be confined to examining and setting forth the law applicable to those situations which have been the subject of court action or statutory regulation, but should also take account of situations not yet discussed by courts or dealt with by legislatures but which are likely to cause litigation in the future.⁶⁴

“Constructive” was the term that the ALI's founders chose for the reform that *Restatements* were directed at suggesting. It is worth emphasizing that the ALI was neither coy nor embarrassed by this overt commitment to reform and change. To the contrary, its founders went to some lengths to recognize the limitations of the normative (i.e., constructive) agenda, given the private, non-governmental nature of the organization. And it is here that the *Restatements* developed a conceit that has come to confound the traditional descriptive/normative dichotomy.

In advancing the idea that *Restatements* were to improve the law to meet the “needs of life”, the ALI's founders nevertheless recognized a “limitation on the character of any reformation of the law” that was “reasonably definite.”⁶⁵ The limitation was that “[c]hanges in the law, which are, or which would, if proposed, become a matter of general public concern and discussion should not

⁶³ *Id.* at 12-13.

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 15.

be considered, much less set forth, in any restatement of the law.”⁶⁶ On the other hand, changes designed to “carry out more efficiently ends generally accepted as desirable” were outside the limitation. Caught within this limit most obviously were issues of “policy”, “novel social legislation”, or institutional reform.⁶⁷ Conversely, “settled policy” that was no longer a matter of “public controversy” could form the basis for the *Restatements*’ engagement.⁶⁸ Within this limitation, *Restatements* were therefore meant to suggest improvements and the ALI’s founders were optimistic that such improvements would “do more to improve the law than any other thing the legal profession can undertake.”⁶⁹

Viewed from today’s standpoint, the distinction between matters of “general public concern” and those merely operationalizing established accepted ends may seem abstruse. Yet in the early twentieth century where Legal Formalist thinking remained prominent, that distinction meant something: the boundary between law and politics.⁷⁰ In as much as the ALI was an “organization of lawyers” representing the “legal profession”, the *Restatements* were to limit themselves to questions within the expertise of the ALI’s membership, questions of law.⁷¹ All the same, this did not entail avoiding any engagement with the external non-legal ends and purposes of the law, reflecting the ALI’s partial embrace of Legal Realist thinking. To the contrary, it meant doing so (a) when such ends had been “settled” and (b) entirely through the mechanisms of the law. In this respect, the *Restatements* therefore both accepted and deviated from a core feature of Legal Formalism.

Most relevant however, is the manner in which the *Restatements* chose to internalize that law/politics boundary. In attempting to steer clear of controversies of “general public concern” (an obvious euphemism for political issues) while nevertheless embracing the ideas of change and improvement within the law, the *Restatements* embraced the notion of *finding* and *declaring*

⁶⁶ *Id.*

⁶⁷ *Id.* at 15-16.

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 18.

⁷⁰ For more on the Legal Formalist commitment to the law/politics divide, see: BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009); Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464 (2014); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383 (2014).

⁷¹ *Founding Committee Report*, *supra* note ___, at 18.

the law, the accepted model of common law evolution.⁷² This framework, once commonly adopted by English common law courts, overtly denies the reality of judge-made law. Instead, it operates on the understanding that incremental changes in the law are situationally emergent and therefore merely declared by courts as their decision rule when needed. In embracing this model of legal change, the *Restatements* purported to speak in the “voice” of common law courts, thus declaring emergent changes without expressly acknowledging their departure from existing decisions. And in so doing, they purposely blended the descriptive/normative distinction.

Indeed, this was readily apparent in the very first round of *Restatements*. One of the earliest volumes in this series was the *Restatement of Torts*, adopted by the ALI in 1934.⁷³ §339 therein dealt with the liability of a landholder for trespassing children, and expanded the scope of liability rather significantly by recognizing that landowners owed children a heightened duty of care when the risk of harm far exceeded the utility to the landowner from the dangerous condition.⁷⁴ Recognizing that §339 represented the “most successful single achievement” of the whole *Restatement*, prominent scholars nevertheless acknowledged that it was “a new point of departure for the modern law,” intended to effect a change in the doctrine.⁷⁵ Courts too recognized this, even while accepting its formulation.⁷⁶ Yet, what is most striking in all of this was the actual text of §339, which merely stated its *new* formulation in matter-of-fact descriptive terms, much like the rest of the *Restatement* did with areas of law that it left unchanged. Neither the language of the provision, nor its accompanying comments and notes gave any suggestion of its novelty—a methodology that one critic of the *Restatement of Torts* aptly described as “reform by descriptive theory” in so far as it adopted the common law’s technique of synthesizing prior precedents around a general principle that it then

⁷² See 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (1766) (noting that the judge is “not delegated to pronounce a new law, but to maintain and expound the old one”); Beever, *supra* note __, at 421-23. While the declaratory theory as such has come under criticism for quite some time now, its core precept—that the is/ought distinction is meaningless—survives. It was given new vigor in the work of Lon Fuller, and later in the Legal Process school of jurisprudence. See, e.g., LON L. FULLER, THE LAW IN QUEST OF ITSELF 7-9 (1940); Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 18 (2013).

⁷³ RESTATEMENT OF THE LAW OF TORTS (Am. L. Inst. 1934).

⁷⁴ *Id.* §339.

⁷⁵ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 440 (1955). See also Leon Green, *Lawdowners’ Responsibility to Children*, 27 TEX. L. REV. 1, 10 n.33 (1948).

⁷⁶ See, e.g., *Bartleson v. Glen Alden Coal Co.*, 361 Pa. 519, 529 (1949); *Gimmestad v. Rose Brothers Co.*, 194 Minn. 531, 537 (1935). See also Green, *supra* note __, at 10 n.33.

found in some selection of prior cases.⁷⁷ Even if everyone knew that the law was changing in the *Restatement*, such change was never acknowledged as a “departure” from existing law.

Justice Scalia was therefore grossly incorrect to suggest that only “modern” *Restatements* contain “novel extensions” that were absent in the “original” ones.⁷⁸ To the contrary, such extensions were an intrinsic part of the *Restatement* enterprise from its very inception. It is certainly true that soon after their adoption, the early *Restatements* came under heavy criticism from the Legal Realists who saw them as hewing too close to existing law and abandoning any progressive reform.⁷⁹ The substantive merits of this criticism remain unclear in so far as it failed to account for improvements (often significant ones) that were passed off as descriptive accounts, such as was seen in §339 discussed above. Stylistically of course, the criticism had merit since the *Restatements* never expressly embraced reform even when carrying it out.⁸⁰

The *Restatements* therefore readily adopted the conceit of speaking in the voice of the common law, which allowed them to blend description with reform. Yet it was not until much later that the ALI openly acknowledged this reality. Addressing the question of the descriptive/normative dichotomy in *Restatements*, Herbert Wechsler, then director of the ALI advanced what he described as a “working formula” for *Restatements*: “we should feel obliged in our deliberations to give weight to all of the considerations that courts, under a proper view of the judicial function, deem it right to weigh in theirs.”⁸¹ Drawing a direct analogy to prominent common law decisions that had created new law—such as *Palsgraf*, *MacPherson*, and *Ultramares*—Wechsler argued that the *Restatements* had “embraced” a similar position, to keep up with such

⁷⁷ Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U.L.J. 93, 93 (2007).

⁷⁸ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J. concurring in part and dissenting in part).

⁷⁹ See, e.g., EDWARD S. ROBINSON, *LAW AND THE LAWYERS* 36 (1937) (criticizing the *Restatements* as formalist); Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 656 (1933) (“It is caught between stating the law which should be and the law which is and often ends by stating only the law that was.”); Thurman W. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811 (1936).

⁸⁰ See ROBINSON, *supra* note __, at 36 (“If a batch of cases should seem to point in two or more directions it was planned that the experts should themselves decide *what the law really is*....[but] were not to publish argumentative support for their conclusions since that might again resurrect the very uncertainty which the Institute was seeking to squelch.”).

⁸¹ Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U.L.J. 185, 190 (1968).

decisions.⁸² In other words, since the *Restatements* dealt with the common law, they were seen as empowered to adopt not just the content of the common law but also its mechanism of evolution and growth.⁸³

Despite its entrenchment within the content of the *Restatements*, this “voice” wasn’t formalized by the ALI until it published its *Style Manual* in 2005.⁸⁴ In describing the task of the *Restatements*, the *Style Manual* categorically observed that *Restatement* provisions “reflect the law as it presently stands or might plausibly be stated by a court.”⁸⁵ The latter part of the statement, reflecting the common law method was modified a few years later to “might appropriately be stated by a court”.⁸⁶ An early version of the *Style Manual* further observed that blackletter provisions of the *Restatements* (such as §339) “assume the stance of describing the law as it is”,⁸⁷ a noticeably misleading observation that came to be omitted in subsequent editions.⁸⁸

Restatements are therefore neither purely descriptive, nor entirely normative. And therein lies an additional challenge to the nature of their authority for courts. Since *Restatements* speak the language of the common law’s declaratory theory, courts have little ability to readily discern the extent to which the position being advanced in a provision is driven by existing law, or instead an extension of it. It was in this respect that Justice Scalia was undoubtedly correct in warning courts against assuming that *Restatements* were always descriptive.

* * *

These two features—the quasi-primary nature and declaratory voice—of the *Restatements* contribute in no small measure to their authoritativeness. Indeed, it is the interaction of the two features that further buttresses their status as legal authority. Innumerable courts have read their declaratory tone as

⁸² *Id.*

⁸³ For a similar argument, defending the *Restatements* against the charge of blending the is and the ought, see: Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 207 (2007) (concluding that the *Restatements* merely reflect problems “endemic to common-law courts” and ought not to be criticized for internalizing those problems into their methodology).

⁸⁴ ALI, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2005) (hereinafter CAPTURING THE VOICE 2005).

⁸⁵ *Id.*

⁸⁶ ALI, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2D ED. 2015) (hereinafter CAPTURING THE VOICE 2015).

⁸⁷ CAPTURING THE VOICE 2005, *supra* note __, at 4.

⁸⁸ CAPTURING THE VOICE 2015, *supra* note __, at 4.

representing something more than just the considered opinion of an expert body, and instead as *the law* itself. Identifying *Restatements* as “authoritative” enables courts to avoid having to differentiate between its descriptive and normative provisions since the distinction breaks down for a primary source.⁸⁹ This is especially true when a *Restatement* deals with an issue for which the court lacks directly applicable precedent.⁹⁰

To be sure, a few courts have recognized the paradoxes underlying the *Restatements*’ authoritativeness and cautioned against treating them as such without further inquiry.⁹¹ One court elaborated on the *Restatements*’ ambiguous authoritativeness to note:

Because the *Restatements* are carefully studied and precisely stated summaries of basic principles of law, they are particularly useful for study and reference. They are entitled to respect as authoritative and reasoned outlines of the law “as it has developed in the courts.” ... Although we have often relied upon and cited the *Restatements* as relevant authority, we believe it is inappropriate for a judicial body to “adopt” principles of law as summarized in the *Restatements*. While at times the difference may appear semantical, there are important differences between “adopting” a reference and relying upon it as relevant authority in a particular case. We are not a legislative body and we therefore cannot “adopt” any part of the *Restatements*. Of course, we shall continue to use and cite Restatement references as authoritative and convenient expressions of principles of law where they are appropriate.⁹²

⁸⁹ See, e.g., *Alfaro-Huitron v. Cervantes Agribusiness*, 982 F.3d 1242, 1250 (10th Cir. 2020); *Dep’t of Pub. Assistance v. Hurlbutt*, 39 Pa. D. & C. 466, 469 (Com. Pl. 1941); *Ackerman v. Sobol Fam. P’ship, LLP*, 298 Conn. 495 (2010); *Nationwide Mut. Ins. Co. v. Hassinger*, 325 Pa. Super. 484, 493 (1984); *Venaglia v. Kropinak*, 125 N.M. 25, 30 (1998); *Sahgal v. DMA Elec., Inc.*, 270 P.3d 1230 (Kan. Ct. App. 2012); *Gianetti v. Norwalk Hosp.*, 64 Conn. App. 218, 228 (2001), *aff’d in part, rev’d in part*, 266 Conn. 544 (2003).

⁹⁰ See, e.g., *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1312 (D.C. Cir. 1985) (“It will often be tempting for federal courts in diversity cases simply to follow the Restatement rules where local law is silent [since t]he Restatement, after all, seems authoritative and claims the support of numerous cases”) (Bork, J. concurring); *DeLoach v. Alfred*, 952 P.2d 320, 322 (Ariz. Ct. App. 1997) (“[W]e follow the Restatement in the absence of prior Arizona decisions.”).

⁹¹ See *Anderson v. Fisher Broadcasting Co.*, 300 Or. 452, 460 (1986) (“The exact formulations of the Restatements are not necessarily authoritative statements of the law of this state.”); *Coulter Prop. Mgmt., Inc. v. James*, 328 Or. 164, 173 n.4 (1998) (requiring caution in treating *Restatements* as authoritative); *Barsness v. Gen. Diesel & Equip. Co.*, 383 N.W.2d 840, 842 (N.D. 1986) (noting the fallacy of “adopt[ing]” a *Restatement* provision).

⁹² *Barsness*, 383 N.W.2d at 842.

Such statements of caution and precision are exceptionally rare, with a vast majority of courts doing just the opposite and accepting (or “adopting”⁹³) *Restatements* as law.

Contributing to the ambiguity surrounding the authoritativeness of *Restatements* is an additional phenomenon that has received little attention thus far and is best described as the “circularity of authoritativeness”. Ever since 1934, the year that the first installment of the *Restatement of Torts* was adopted, the ALI has kept close track of judicial citations to the *Restatements* and actively publicized them in print.⁹⁴ Between 1934 and 1976, the ALI produced an annual report titled *The Restatement in the Courts*, which sought to show “the use of the... *Restatement* by courts in their opinions.”⁹⁵ While the ALI stopped publishing this information as a stand-alone publication in 1976, it thereafter began incorporating such citations into the actual *Restatement* volumes, much like annotated statutes.

The annotations generally list cases that have cited to or quoted specific *Restatement* provisions. All the same they do not specify the form of reliance placed by such courts on the *Restatement* in citing to or quoting them. For instance, they do not note whether the *Restatement* was one of several sources relied on by the court, or more importantly whether the citation was to the *Restatement* as a source of law or as merely documenting the law developed by courts. All the same, this accretion of citations creates the perception of a steadily growing authoritativeness when a “growing number of courts” cite to a provision, which in turn encourages more courts to cite to that provision as authority.⁹⁶ This, in turn, produces a circularity where a court’s reliance on the authority of a *Restatement* provision itself contributes to the provision’s perceived authoritativeness.

The legal authority of *Restatements* is therefore a complex mix of several factors, most of which were built into their design and continue to operate in their curation. And yet, very few courts pause to reflect on this reality before

⁹³ See, e.g., *Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 910 (Iowa 2017); *Kessler v. Mortenson*, P.3d 1225, 1228 (Utah 2000); *Jaiguay v. Vasquez*, 287 Conn. 323, 351 n.21 (2008); *Dyer v. Maine Drilling & Blasting, Inc.*, 984 A.2d 210, 212 (2009); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 571 (2000); *Distad v. Cubin*, 633 P.2d 167, 176 (Wyo. 1981); *Reitmeyer v. Sprecher*, 431 Pa. 284, 291 (1968); *Fox v. Pretasky*, 501 N.W.2d 471 (Ct. App. 1993).

⁹⁴ See AMERICAN LAW INSTITUTE, *THE RESTATEMENT IN THE COURTS* (1934).

⁹⁵ *Id.* at 1.

⁹⁶ See, e.g., *Rampone v. Wanskuck Buildings, Inc.*, 102 R.I. 30, 33 (1967); *Johnson v. Yousoofian*, 930 P.2d 921, 925 (Wash. App. 1996); *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 512 (S.C. 1998).

relying on them to support their conclusions. This *authority* is further embellished and augmented by their structural similarity to statutes, a similarity that hides more than it reveals.

II. RESTATEMENTS AS FAUX STATUTES

The statutory form was not just a stylistic model for the *Restatements*. It was instead an analytical frame to be used by drafters in conceptualizing the enterprise, its coverage and eventual reception by audiences. The ALI's founders were clear that the operative part of the *Restatements* was to "be made with the care and precision of a well-drawn statute."⁹⁷ Such statutory precision was to be a state of mind: "It is essential that the attitude of mind of those doing the work should not be that of those who are writing a treatise...[but] more like that of those who desire to express the law in statutory form."⁹⁸ *Codification* of the common law was therefore at the heart of the *Restatement* enterprise from its very origins. Indeed, this object went hand-in-hand with the ALI founders' desire that *Restatements* gain acceptance as primary—rather than secondary—sources of law.

A hallmark of all *Restatements* today is therefore their use of tersely worded and sequentially numbered statements of law, referred to as the "blackletter" since it is placed in boldface.⁹⁹ Every *Restatement's* blackletter is designed to resemble the text of a statute. Yet, the similarity, which is of form rather than substance, ends there. Both in the process of their production and in their final form, *Restatements* embody features that differentiate them from ordinary statutes, and indeed make them ill-suited to being treated as such. This Part examines three such features that courts all too readily overlook in their focus on the formal similarity between *Restatements* and statutes.

A. Opacity of Process and Record

The public nature of both laws and law-making is something that is taken for granted today. While initially associated with the actual content of laws, this

⁹⁷ *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*, 1 A.L.I. PROCS. 1, 69-70 (1923) (hereafter *Founding Committee Report*).

⁹⁸ *Id.* at 20.

⁹⁹ CAPTURING THE VOICE, *supra* note ___, at 36 ("It is called black letter because it is highlighted in boldface type.").

commitment to publicity and openness has over the years come to be extended to the very process of law-making.¹⁰⁰ Transparency in lawmaking has come to be seen as particularly crucial to the public legitimacy of laws.¹⁰¹ Even within this understanding, legislatures pride themselves in being the “most transparent” of any “government institution” with the recognition that “[i]f the work of legislation can be done shrouded in secrecy and hidden from the public...[it would] erod[e] the confidence of the public”.¹⁰² It is with this understanding that for the last half century, legislatures at both the federal and state levels have developed practices aimed at promoting greater transparency.¹⁰³ This is not to suggest that transparency in lawmaking is an unfettered good. As recent literature has pointed out, transparency in lawmaking has routinely skewed the process by interjecting special interest group capture and other extraneous considerations into it, all of which have clouded—rather than furthered—the legitimacy of the process.¹⁰⁴

Transparency and openness that is contemporaneous with the process is however different from transparency of record, that can come about *after* the process has ended. Such *ex post* (or non-contemporaneous) transparency is less susceptible to special interest capture, but significantly buttresses the utility of the laws that emerge from the process by publicizing *how* and *why* the law came into existence. Courts (and others) relying on a law are then able to better understand and grapple with a law’s substantive content when they know the reasons and motivations that prompted its enactment in the first place. This is the basic logic behind the use of legislative history as an interpretive tool by courts.¹⁰⁵ Often times such history reveals the true meaning behind a statutory provision as well as the myriad compromises that went into its creation and eventual enactment.

¹⁰⁰ WALTER J. OLESZEK, CONGRESSIONAL LAWMAKING: A PERSPECTIVE ON SECRECY AND TRANSPARENCY 1 (2011).

¹⁰¹ *Id.*

¹⁰² *Id.* See also ELIZABETH GOITEIN, THE NEW ERA OF SECRET LAW 28-29 (2016).

¹⁰³ *Id.* 1 n.3.

¹⁰⁴ See David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 101, 154-59 (2018) (documenting the concerns with transparency that have moved it away from being understood as an unencumbered good).

¹⁰⁵ See Nicholas R. Parillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 280-81 (2013) (“[L]egislative history could be of great value in guiding and deepening a judge’s policy reasoning, particularly if the judge used the history to reason at a high level of generality—discerning the legislature’s overall objective and then reasoning ‘downward’ to find a disposition of the specific case that best implemented that objective.”)

As a private legislation with its membership chosen from the “elite” of the legal profession, the ALI’s method of producing the *Restatements* is anything but transparent.¹⁰⁶ The process of restating an area of law begins with the selection of one or more reporters for the project by the ALI Council. The reporters are chosen for their expertise in a field and remain responsible for drafting the text of the *Restatement*.¹⁰⁷ The ALI also appoints a committee of experts for each *Restatement*, known as the project advisers.¹⁰⁸ The advisers play an entirely advisory role and can make suggestions for the improvement of a *Restatement*’s text. However, the reporters are free to disregard these suggestions altogether.¹⁰⁹ Self-selected groups of ALI members are also free to offer suggestions to the reporters in a similar vein. The reporters then present their draft to the ALI Council, which has actual oversight over the reporters’ work product.¹¹⁰ The Council must then approve (or disapprove) a project draft, for it to move forward. Once the Council approves of a draft, it is then placed before the entire membership of the ALI for a vote. If a majority of the membership votes to adopt a draft (or portions of it), the adopted draft becomes final—and usable by courts.¹¹¹

While the process just outlined may seem orderly, it is easy to miss the one overarching feature that characterizes it from beginning to end: the lack of any public transparency, both during the process and after it has ended. None of the several drafts that a *Restatement* goes through before adoption by its membership is ever made public.¹¹² They are instead accessible only to the ALI’s membership and the project’s advisers. Additionally, and perhaps more

¹⁰⁶ For a general overview of the ALI’s elitist orientation at its founding, see: White, *supra* note __, at 15.

¹⁰⁷ *Founding Committee Report*, *supra* note __, at 54 (“The reporters will be selected because they already know a great deal concerning their topics.”).

¹⁰⁸ CAPTURING THE VOICE, *supra* note __, at 15.

¹⁰⁹ *Id.* at 16 (noting how the advisers have “no authority” over the reporters or the direction of the project).

¹¹⁰ *Id.* at 17

¹¹¹ *Id.* at 18.

¹¹² It is worth noting that in so far as one of the concerns with transparency in lawmaking is its potential for special interest capture, this has been shown to be true of the ALI’s drafting process for *Restatements*, quite independent of such transparency. It therefore remains an open question whether the addition of transparency will serve to mitigate such capture. For an examination of the influence of special interest groups on *Restatements*, see: Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 649-51 (1995) (finding that the ALI process is equally susceptible to such influence); Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1212 (1993).

importantly, most of the deliberations underlying the process—the advisers’ suggestions, the Council’s amendments, and reporters’ responses to these proposals—take place behind closed doors and are never recorded or publicized even to the ALI’s full membership.¹¹³ When the draft is eventually placed before the full membership for their vote, the ensuing discussion is recorded in an official publication, but proves to shed surprisingly little light on the final draft that is published since the vote routinely authorizes reporters to make any necessary amendments and thus operates as little more than an in-principal approval.¹¹⁴ The drafting “history” of a project, so to speak, remains secret.

Such opacity has substantive implications. Courts looking to a *Restatement* are as a result forced to rely exclusively on the text of the document to understand its content. The story behind the evolution of the text is altogether hidden from them, except as filtered through the reporters themselves. This proves to be especially problematic when the blackletter changes the law using its declaratory tone, and a court is then forced to both identify the change and then understand the reasons for it. An example will help illustrate the substantive interpretive implications of the opacity in drafting history. As was previously noted, the Supreme Court’s decision in *Kansas v. Nebraska*¹¹⁵ generated a dissenting/concurring opinion by Justice Scalia, which called into question the nature and value of *Restatements* as sources of law. Central to his pointed critique was §39 of the *Restatement (Third) of Restitution and Unjust Enrichment*.¹¹⁶

§39 deals with the availability of a disgorgement remedy for an opportunistic breach of contract. These are basically situations where the breaching party earns a profit from the breach, while the non-breaching party is unable to be made whole using traditional contract damages. Crucial however is that the breach be “deliberate”, a term that is left undefined in the text.¹¹⁷ In such situations, §39 contemplates awarding the non-breaching party the profits

¹¹³ One scholar has noted how in its “early days” the exchanges at Advisers’ meetings was transcribed by a stenographer and recorded for the future, but that this practice has since been discontinued. See Deborah A. DeMott, *Restatements and Non-State Codifications of Private Law*, in CODIFICATION IN INTERNATIONAL PERSPECTIVE 75, 79 & n.17 (Wen-Yeu Wang ed., 2014).

¹¹⁴ The ALI’s standard practice of approving a draft at its membership meetings involves a motion known as a “Boskey motion”, wherein “members are asked to approve the draft, subject to any requested changes to which the Reporters agreed or any motions that passed during the course of the meeting, as well as general, nonsubstantive edits that may be required before publishing.” ALI, *Frequently Asked Questions*, <https://www.ali.org/about-ali/faq/>, June 25, 2021.

¹¹⁵ 135 S. Ct. 1042, 1064 (2015) (Scalia, J. concurring).

¹¹⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §39 (Am. L. Inst. 2010).

¹¹⁷ *Id.* §39(1).

earned by the breaching party.¹¹⁸ Even a cursory glance at the final (adopted) text of the provision reveals it to be fundamentally different from the version that was originally suggested by the reporter in the earliest draft, and indeed from the version that was voted on (and approved) by the ALI's membership.¹¹⁹ One such crucial difference was the element of "opportunistic breach". Whereas earlier versions of §39 required a showing that the breach was opportunistic—i.e., in conscious disregard of the other party's contractual entitlement, knowing that it would result in under-compensation when applying traditional contract remedies—the final version altogether eliminated any need for such showing.¹²⁰ A comment accompanying the final published version confirms this omission, noting how "the motivation of the breaching party" does not need to be proven.¹²¹ Another change that occurred during the drafting was the replacement of the term "intentional" with "deliberate", to describe the breach required.

While these changes may be discerned from a study of the project's early draft, nothing at all is known about the *reasons* for these changes. In her opinion for a majority of the Court, Justice Kagan relied on the language of §39 and the accompanying comments to make sense of the state of mind contemplated by the provision, specifically whether reckless behavior could be treated as deliberate for the purposes of the remedy.¹²² Despite concluding that the breaching party in the case had not acted "purposefully" but had instead merely "knowingly" exposed the other party to a risk of breach, the majority concluded that such behavior was deliberate and therefore covered by §39.¹²³ Crucial to that analysis would have been the reasons for the *Restatement's* elimination of a motive requirement, and its replacement of "intentional breach" with the term "deliberate breach." The majority's interpretation, in turn, prompted a strong dissent from Justice Thomas, who characterized the entire provision as a "novel extension" that was unsupported in the case law, itself a questionable assertion.¹²⁴ In the dissent's view, a reckless (i.e., knowing) breach was not "deliberate" since it lacked an opportunistic motive, the obvious purpose behind

¹¹⁸ *Id.*

¹¹⁹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 4, 2005).

¹²⁰ *Id.* §39(2) (expressly defining an "opportunistic" breach).

¹²¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §39 cmt. b (Am. L. Inst. 2010) ("[T]here is no requirement under this section that the claimant prove the motivation of the breaching party").

¹²² *Kansas*, 135 S. Ct. at 1056-57.

¹²³ *Id.* at 1057 ("In some areas of the law and for certain purposes, the distinction between purposefully invading and recklessly disregarding another's rights makes no difference.").

¹²⁴ *Id.* at 1068 (Thomas, J. dissenting).

§39.¹²⁵ Implicitly therefore, the dissent read the idea of an “opportunistic breach” into the meaning of “deliberate.”

Leaving aside the merits of the disagreement between the two opinions, what is obvious is that the Court’s reliance on §39 would have undoubtedly benefited from a clear record shedding light on the manner in which §39 had evolved during the drafting process, the reasons for these changes, and the history behind the *Restatement*’s choice of unique terminology therein. In the absence of such a legislative history, both opinions instead relied exclusively on the text of the *Restatement* (§39, and its accompanying comments) to interpret its meaning, which barely spoke to the issue.

Even if the Court had pulled up the record of the meeting where the ALI membership voted on §39—the only legislative history of the provision that exists—it would have been of little use.¹²⁶ That record reveals queries from multiple members about the provision’s use of “deliberate” to describe the breach, none of which were addressed by the reporter.¹²⁷ Further, the membership’s final vote allowed the reporter to make additional changes to the provision, which produced a different structure altogether, rendering any discussion or commentary non-probative of the membership’s *intent* in adopting it.¹²⁸

To be sure, the absence of a usable drafting history for *Restatements*—their legislative history, or *travaux préparatoires*, so to speak—is entirely by design. A large part of its omission is driven by the belief that such history is best summarized by the reporters themselves, in parts of a *Restatement* that do not constitute its “statut[ory]” component.¹²⁹ This presents its own set of problems.

B. Merging Interpretation and Exposition

Statutes do not ordinarily tell their readers or courts how ambiguities in their substantive directives are to be interpreted or understood. Interpretation has instead long been understood as within the domain of courts; such that they are free to consult any number of sources regardless of legislative direction to the

¹²⁵ *Id.* at 1069.

¹²⁶ See 82 A.L.I. PROCS. 249 (2005)

¹²⁷ *Id.* at 253-54, 261-62, 267, 268.

¹²⁸ *Id.* at 296.

¹²⁹ See, e.g., 5 A.L.I. PROCS. 304 (1927).

contrary.¹³⁰ Any interpretive direction and guidance that statutes offer is instead embodied within the substance of their directives. On occasion, some state statutes contain annotations and notes that are aimed at aiding the interpretation of various statutory provisions.¹³¹ Even when such annotations are merged with the official text (and published as a unified document), the statute ordinarily goes to some length to differentiate between the official text and the annotations/notes by denying the latter any legal effect.¹³² Relying on a strong norm of separation of powers, legislatures leave it to courts to adopt an appropriate interpretation of a statute's provisions. When they disagree with the judicial interpretation and application of a statute, they have the option to amend the provision to override such interpretation and better reflect their intention.

Despite attempting to emulate statutes, *Restatements* have never been content with limiting themselves to textual directives. They therefore contain more than just blackletter provisions. In addition to tersely worded blackletter text, they also contain two other parts: Comments and Reporter's Notes, each of which plays an important role in embellishing the statute-like status of the black letter.

1. Comments

Immediately following the blackletter in a *Restatement* are "Comments". Comments seek to explain the meaning of the blackletter and are intended to function as a guide to "understand[ing] the background and rationale of the black letter and the details of its application."¹³³ They are therefore meant to "clarify the meaning and scope" of the blackletter by "mak[ing] explicit what is only implicit or suggested" by the statute-like text.¹³⁴

Being expository in nature, Comments function as the principal interpretive guide to the blackletter text. All the same, they are produced, approved, adopted, and published through the exact same process as the blackletter, and are thus considered "the official product" of the ALI.¹³⁵ In so

¹³⁰ See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674 (1990); Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 11 n.47 (1993); Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. LEGIS. 211, 225 (1994).

¹³¹ See, e.g., GA. CODE ANN. §1-1-1 (2021); ARK. CODE ANN. §1-2-102 (2019).

¹³² GA. CODE ANN. §1-1-1(c) (2021); ARK. CODE ANN. §1-20115(c) (2019).

¹³³ CAPTURING THE VOICE 2015, *supra* note __, at 42.

¹³⁴ *Id.*

¹³⁵ *Id.* at 42, 15-18.

being approved and adopted in identical fashion as the blackletter, Comments occupy a somewhat peculiar position in the *Restatements*. On the one hand, they embellish the blackletter with context and commentary. Since they are not written without an eye towards statutory “precision”, they are often fairly elaborate and descriptive in nature. Yet on the other, they function as independent authority within the *Restatement* since as a formal matter their “authority” is no less than that of the blackletter, and their content is often of greater utility to courts owing to their level of detail. In this respect, they remain in direct competition with the blackletter on authoritativeness. In as much as the blackletter is representative of the law on any given point, so too are the Comments in a *Restatement*.

From the very inception of the *Restatements*, the Comments section was intended to serve as a guide to interpreting the blackletter.¹³⁶ Nevertheless, in being adopted into the body of a *Restatement* courts have come to treat Comments as an independent source of authority within the document. Indeed, courts have even extended their techniques of statutory interpretation to Comments. A prime example is the case of *Pollard v. Ashby*, which involved a claim of products liability brought by a patient against a drug manufacturer.¹³⁷ The court was called upon to apply §402A of the *Restatement (Second) of Torts*, which deals with the special liability for the sale/manufacture of an unreasonably dangerous product sold in a defective condition.¹³⁸ *Comment k* accompanying §402A addresses the application of the provision to drugs and provides that dangerous drugs should not be treated as “unreasonably dangerous” when accompanied by proper directions and warnings.¹³⁹

In adopting *Comment k* as its rule of decision, the court in *Pollard* decided to parse the Comment’s language just as it would for a statutory provision. First, it examined the policy behind the Comment, which it found to be sound.¹⁴⁰ Then, it looked to the drafting history of the Comment, to note how during its adoption at an ALI meeting, one member had proposed an amendment seeking to exempt all prescription drugs from §402A. The amendment was rejected, and *Comment k* was adopted the following year, which the court took to suggest a partial acceptance of the rejected amendment.¹⁴¹ Finally, it

¹³⁶ For an early recognition of this, see: 5 A.L.I. PROCs. 304 (1927) (“[T]he Section is the Statute, the Restatement of the law, and the comments are mere advice.”).

¹³⁷ 793 S.W. 2d 394 (Mo. App. 1990) (en banc).

¹³⁸ RESTATEMENT (SECOND) OF TORTS §402A (Am. Law Inst. 1965).

¹³⁹ *Id.* cmt. k.

¹⁴⁰ *Pollard*, 793 S.W. 2d at 400.

¹⁴¹ *Id.*

embarked on a close plain meaning reading of the language in *Comment k*, focusing on its use of “some” and “common”, which it took to suggest that not all prescription drugs would meet its criteria.¹⁴²

Leaving aside the substantive merits of the court’s approach, what is most revealing is the manner in which the court treated the language of the Comment as worthy of *statutory* interpretation. This approach prompted a dissent from several judges, who observed that “[t]he comments to the Restatement are obviously not statutes and there is considerable doubt that their interpretation should follow the more rigid requirements of statutory interpretation.”¹⁴³ In their view, they were “simply explanations and expressions of policy of the purpose and intent of the Restatement sections”, in other words an interpretive aid rather than a substantive source of authority.¹⁴⁴

While few courts have overtly applied the techniques of statutory interpretation to Comments in the manner that *Pollard* did, most courts nevertheless draw no distinction in their treatment of Comments when looking to *Restatements*. In other words, they accord Comments just as much weight and authority as they do the blackletter, an approach that is defensible given the manner in which Comments are produced and included in the text of *Restatements*.¹⁴⁵ What was thus meant to be an extrinsic aid to interpreting the blackletter has since become an intrinsic (and independent) source of law within the *Restatement*.

Restatements have readily embraced this reality over their existence. The ALI’s drafting manual (first published in 2005 and revised in 2015) categorically notes that “[b]lack letter without Comment is incomplete” even though nothing new is to be contained therein “that is not at least foreshadowed by or closely related to the black letter”, a statement that allows Comments to directly embrace the task of “improving” the law.¹⁴⁶ All the same, it notes that some

¹⁴² *Id.*

¹⁴³ *Id.* at 406 (Smith, J. dissenting).

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., *Bifolck v. Philip Morris, Inc.*, 152 A.3d 1183, 1187 (Conn. 2016) (adopting comment as law); *Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan. 2000) (rejecting the adoption of a comment); *Grundberg v. Upjohn Co.*, 813 P.2d 89, 92 (Utah 1991) (adopting comment as law); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 337 (Tex. 1998) (refusing to adopt comment); *Priv. Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 314 (4th Cir. 2002) (discussing the adoptions of a comment into law); *Ellis v. Coleman Co.*, 232 F.3d 894 (9th Cir. 2000) (discussing the potential adoption of a comment by the Alaska Supreme Court); *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758, 770 (Ky. 2004) (adopting comment into law).

¹⁴⁶ CAPTURING THE VOICE 2015, *supra* note ___, at 42.

courts have been unwilling to treat Comments as “germane to the interpretation” of the blackletter, and cautions against using Comments to “fill in gaps or alter or modify the meaning or scope of proposed [blackletter] language.”¹⁴⁷ This last observation appears to be an allusion to the controversy surrounding the use of Comments in uniform acts jointly produced by the ALI and the Uniform Law Commission, where the utility of similarly framed comments has remained a topic of debate among scholars and courts.¹⁴⁸

In thus seeking to facilitate the interpretation of the blackletter, Comments routinely introduce new content into a *Restatement* by extending or limiting the application of the blackletter. The Comment at issue in *Pollard* is an apt illustration of this phenomenon. The supposed precision of the blackletter is therefore never a real constraint on *Restatement* reporters as it is on statute drafters, since the former are able to elaborate on their views in the Comments, which are in turn accorded equal significance. The equivalent in a statute would be a situation where the legislative history and/or relevant committee reports are themselves enacted into law and rendered authoritative interpretive sources, an idea that many have regarded as controversial owing to constitutional concerns.¹⁴⁹

2. Reporters’ Notes

Quite independent of Comments, *Restatements* contain an additional level of commentary that is also meant to aid courts in their interpretation of the blackletter: Reporters’ Notes. These Notes typically contain a discussion of the sources that the reporters relied on in drafting the blackletter and Comments, and any other details that they were unable to include in the preceding sections

¹⁴⁷ *Id.*

¹⁴⁸ The use of comments as interpretive devices in legislation produced by the Uniform Law Commission proved to be controversial. For a useful overview of the controversy in relation to the U.C.C., see: Sean Michael Hannaway, Note, *Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962 (1990). The principal drafter of the U.C.C., Karl Llewellyn, emphasized the importance of comments as a way of ensuring that the open-ended language of the statute was interpreted and applied consistently by courts. *Id.* 967. To this end, he sought to introduce language within the U.C.C. that would render the comments obligatory interpretive materials for courts to use. See U.C.C. §1-102(2) (May 1949 Draft) (noting that the “Official Comments” “may be consulted by courts... as a guide in its construction and application”). This provision ultimately proved to be quite controversial. See 27 A.L.I. PROCS. 7-22 (1950) (documenting some of the controversy during the discussion and debate over the provision).

¹⁴⁹ See, e.g., Jonathan R. Siegel *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000) (arguing for such enactment but recognizing its problems); John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000) (arguing that such enactment would be unconstitutional).

for being “too peripheral” to their substance.¹⁵⁰ What sets Reporters’ Notes apart from other parts of the *Restatement* is the fact they are considered the work of the individual reporters and not the ALI as a whole. In other words, their content is never formally reviewed, approved, or adopted by the membership, even though they are written in the same voice as the blackletter and Comments.¹⁵¹ They are therefore designed to have *less* authority than the rest of the *Restatement* even though they serve an important interpretive purpose.

Despite this hierarchy in avowed authoritativeness, courts looking to *Restatements* routinely treat Comments and Reporter’s Notes as interchangeable for the purposes of their reliance.¹⁵² The idea that the latter is merely the work of the *Restatement*’s reporters—and not the ALI as a whole—is for the most part ignored. Even when they disagree about the meaning and implication of a Reporter’s Note, courts do not appear to care much about the distinction and its resulting hierarchy.¹⁵³ While this is likely a mere reflection of courts’ general unwillingness to engage the nature of a *Restatement*’s authoritativeness when citing to it, it is also driven by the very presence of the Reporter’s Notes within the body of the *Restatement*. Unlike with privately produced annotations (and notes) that are merged into the official texts of some state codes, where they are then expressly delineated as non-binding and of no authoritative significance,¹⁵⁴ *Restatements* do not attempt to demarcate the Reporter’s Notes as less important within their text. Here too then, the *Restatements*’ blending of interpretive guidance with substantive exposition sets them apart from ordinary statutes.

* * *

Despite attempting to emulate the *precision* of statutory language in the blackletter, the *Restatements* utilize imprecise, expository descriptions to augment the blackletter in the rest of the document. Indeed, these non-blackletter parts constitute an overwhelmingly large portion of the *Restatement* as a whole. And since they have the same “authoritativeness” as the blackletter, they function as an unstated safety-valve for *Restatements*, enabling them to enter

¹⁵⁰ CAPTURING THE VOICE 2015, *supra* note ___, at 45.

¹⁵¹ *See id.*

¹⁵² For courts relying on Reporters Notes, see: Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 713 (2021); Grable & Sons Metal Prod., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 318 (2005); Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 260 (Ill. 2007); Wells Fargo Bank, NA v. SBC IV REO, N.W.2d 821, 838 (Mich. App. Ct. 2016); Bongaards v. Millen, 793 N.E.2d 335, 351 (2003); Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295, 1298 (Fed. Cir. 1986).

¹⁵³ *See, e.g.*, Estate of McFarlin v. State, 881 N.W. 2d 51, 59-60, 69 n.9 (Iowa 2016).

¹⁵⁴ *See, e.g.*, GA. CODE ANN. §1-1-1(c) (2021); ARK. CODE ANN. §1-20115(c) (2019).

new domains and direct the law in ways that statute-like terseness does not permit. Even if formally designed to aid the interpretation of the blackletter *qua* statutory text, these additional parts nevertheless introduce an altogether new complexity into the ways in which courts rely on *Restatements* that is in stark contrast to statutory texts.

C. Parsing Judge Made Law

Unlike statutes that operate as independent sources of law once brought into existence, any legal authority that the *Restatements* possess derives entirely from their *re-stating* law produced and declared in other sources. As originally conceived, the principal source of such law—which required restating—was judge-made law, i.e., the common law.¹⁵⁵ While this is often taken to represent little more than a question of formal source, it hides an important (and potentially problematic) feature of *Restatement* blackletter.

In essence, *Restatements* attempt to informally *codify* judge-made law into precise rules. This was widely recognized to be true from their very inception.¹⁵⁶ Despite being opposed to formal enactment into law, the ALI's founders nevertheless conceptualized the *Restatements* as bringing the techniques of legislation to bear on the common law, while allowing it to retain its judicial origins.¹⁵⁷ This inevitably involved digesting case law into “precise statements” that captured the rule/principle at issue in general terms, while leaving a good amount of discretion to judges in apply it.¹⁵⁸ The vision was thus to have principles of law “set forth with a fullness made possible by the care with which rules pertaining to the application of more general principles have been considered” by judicial decisions.¹⁵⁹

The process of restating judge made law into a rule-like formulation necessarily entails closely reading common law decisions, parsing the reasoning therein, and then synthesizing the reasoning into a tersely worded principle of

¹⁵⁵ See *Founding Committee Report*, *supra* note, at 13 (discussing the “great volume of case law” and the need to analyze the “thousands of decisions” as the basis for *Restatements*).

¹⁵⁶ See, e.g., Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1373 (1934); Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39, 41 (1931); Warren Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A. J. 317, 318 (1962); Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 265 (1979); Hessel Yntema, *The Restatement of the Law of Conflict of Law*, 36 COLUM. L. REV. 183, 198 (1936).

¹⁵⁷ *Founding Committee Report*, *supra* note, at 19-20.

¹⁵⁸ *Id.* at 20-21.

¹⁵⁹ *Id.* at 21.

some precision and certainty. While that may seem relatively straightforward as such, the problem is that judicial opinions (especially common law ones) are rarely ever written with an eye towards such clear distillation. Their strength lies instead in their analytical exposition of a rule, followed by an application of that rule to the facts of a case. Justice Holmes's observation that "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards" is routinely quoted.¹⁶⁰ What is often missed is what Holmes offered as an explanation for that statement:

A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step. These are advantages the want of which cannot be supplied by any faculty of generalization, however brilliant, and it is noticeable that those books on which an ideal code might best be modelled avowedly when possible lay down the law in the very words of the court.¹⁶¹

The expositional language of a judicial opinion is therefore hardly redundant or extraneous to its development of the rule involved. The founders of the ALI were acutely aware of this reality, when they noted that common law courts that relied on precedent for their rule of decision were often more constrained than courts in civil law countries that relied on codes, because of the strong connection between the rule involved and the dispute from which it was generated.¹⁶² Distilling a common law decision into a rule is therefore no easy task, and instead one that compromises on much of the nuance underlying expository judicial reasoning. Indeed, early critics of the *Restatements* made this point rather emphatically. Charles Clark, for instance, belittled them for "attempt[ing] to force a black letter [to] do what it can never do—state pages of history and policy and honest study and deliberation."¹⁶³

It is with this concern in mind that courts have also developed a canon of interpretation for judicial opinions that cautions against parsing the language

¹⁶⁰ Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

¹⁶¹ *Id.* at 1-2.

¹⁶² See *Founding Committee Report*, *supra* note, at 21.

¹⁶³ Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 646 (1933). See also James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140, 156 ("[I]t is hard to make the rules any clearer than the thought behind them.").

of a judicial opinion as though it was a statute.¹⁶⁴ The origins of this canon can be traced back to Chief Justice Marshall's opinion in *Cohens v. Virginia*, where he observed that "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used".¹⁶⁵ Courts' use of "general language" in their opinions—the Supreme Court has since reiterated on multiple occasions—should not be seen as "referring to quite different circumstances" not before a court.¹⁶⁶

Despite these concerns, the *Restatements* have always found it altogether unproblematic to parse the language of legal opinions and synthesize them into rules. Such synthesis presents both a substantive and a structural concern. The substantive concern is as just described above, driven by the belief that the fecundity of common law reasoning is difficult to accurately capture in rule-based generalizations. The substantive concern may seem exaggerated since innumerable statutes routinely codify judge-made law into rules.¹⁶⁷ This is where a structural concern unique to *Restatements* renders the substantive concern more significant. Even if the synthesis and distillation offered by *Restatements* is no better or worse than that offered by codifying statutes that incorporate the prior law into them, what sets them apart from statutes is the reality that their legal authority—if any—derives entirely from the jurisprudence and case-law that they are synthesizing. When a legislature codifies common law decisions into a statutory rule, even though the content of that rule is meant to be identical to the common law, the rule itself derives its formal authority quite independent of the common law, i.e., from the lawmaking power of the legislature. By contrast, since *Restatements* lack any such independent legal authority (notwithstanding their desire to be quasi-primary sources), any authority that their formulations contain is parasitic on the underlying case law itself. In other words, a citation to a *Restatement* provision is a replacement for citing to the caselaw that it synthesizes whereas a citation to a codifying statutory rule is meaningful on its own as independent authority. Owing to this reality, the substantive concern with accuracy in distilling common law jurisprudence into a terse rule gets exacerbated for *Restatements*.

¹⁶⁴ See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341-42 (1979); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993); *Arkansas Game and Fish Com'n v. U.S.*, 568 U.S. 23, 35 (2012).

¹⁶⁵ 6 U.S. (Wheat.) 264, 399-400 (1821).

¹⁶⁶ *Illinois v. Lidster*, 540 U.S. 419, 424 (2004).

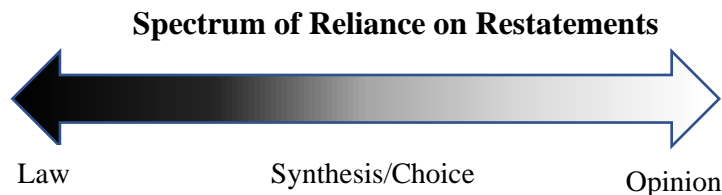
¹⁶⁷ A prominent example here is the Lanham Act, which codified much of the prior common law of trademark and unfair competition. Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946). See also *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 861 n.2 (1982) (White, J., concurring) (describing how the Lanham Act managed to "codify and unify the common law of unfair competition and trademark protection.").

While the substantive concern with accuracy is undoubtedly alleviated to some extent by the Comments and Notes accompanying *Restatement* blackletter, it nevertheless cautions courts against treating the blackletter as equivalent to statutory text. Perhaps more importantly, in so far as courts remain willing to rely on such blackletter as a substitute for the underlying common law jurisprudence, the cautionary rule suggests that they pay closer attention to the actual judicial reasoning underlying a blackletter rather than taking the synthetic blackletter provision as an accurate distillation and representation of such jurisprudence. Further, in so far as the blackletter—along with the Comments and Reporter’s Notes—is itself representative of judicial reasoning and opinions, that same canon perhaps implies that it too ought not to be “parsed...[like] the language of a statute.”¹⁶⁸

III. COURTS AND RESTATEMENTS

In spite of all of their ambiguities and inadequacies, *Restatements* today command significant respect and reliance from courts at all levels. Much of this reliance involves citation to, and on occasion quotation from, *Restatement* blackletter and Comments. Such reliance, however, plays varying roles in courts’ reasoning, a reality that is seldom addressed.

Judicial reliance on *Restatements* is best understood as lying along a continuum, which in a rough-sense maps onto the primary/secondary source distinction at either extreme. At one end of the spectrum is courts’ reliance on *Restatements* as an independent source of law, the equivalent of their reliance on statutes/regulations. At the other end is their reliance on *Restatements* as expert opinion on the subject at issue, equivalent to their reliance on scholarship, treatises, and other secondary guidance. In between the two extremes is a form of reliance that is the murkiest, wherein they rely on *Restatements* not as independent sources of law but instead as a synthesized choice among competing formulations of the law. This Part considers each of these forms of reliance.



¹⁶⁸ *Reiter*, 442 U.S. at 341-42.

A. Law

The most extreme form of reliance entails courts' use of *Restatements* as actual sources of law. Characteristic of this use is their acceptance of a *Restatement* provision as the starting point of the analysis, without a close examination of the extent to which prior precedent has accepted the provision into law. This form of reliance manifests itself most commonly in a few different ways.

In the first, courts simply assume that a particular provision of the *Restatement* is the law within their jurisdiction on a given topic, without any additional scrutiny or analysis. Assertions of this nature take the form of judicial declarations that a section is “authoritative”¹⁶⁹ within the relevant jurisdiction, or that it “is the law”¹⁷⁰ that is binding on the court. A related manifestation is where a court declares that it is following a rule from a *Restatement* in the absence of local precedent or a rule to the contrary.¹⁷¹ Once such assertions are made, the court at issue—and indeed later courts which treat the prior opinion as precedent—make direct recourse to the *Restatement* provision as applicable law.

A second form treats a *Restatement* provision as giving rise to a cause of action or basis of liability on its own, in the exact same way that a statute would. The legal requirement in question is therefore seen as arising or emerging

¹⁶⁹ See, e.g., *Alfaro-Huitron v. Cervantes Agribusiness*, 982 F.3d 1242, 1250 (10th Cir. 2020); *Ackerman v. Sobol Fam. P'ship, LLP*, 4 A.3d 288, 300 (Conn. 2010); *Nationwide Mut. Ins. Co. v. Hassinger*, 473 A.2d 171, 175 (Pa. 1984); *Foley v. Lacasse*, No. CV010086449S, 2002 WL 31686680, at *2 (Conn. Super. Ct. Nov. 14, 2002); *Bd. of Comm'rs of Decatur Cty. v. Greensburg Times*, 20 N.E.2d 647, 647 (Ind. 1939); *Carr v. Vannoster*, 281 P.3d 1136, 1138 (Ct. App. Kan. 2012); *DeCoursey v. Am. Gen. Life Ins. Co.*, 822 F.3d 469, 477 (8th Cir. 2016); *CRM Collateral II, Inc. v. TriCounty Metro. Transp. Dist. of Oregon*, 669 F.3d 963, 970 (9th Cir. 2012); *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 351 (Tex. 1995); *Coward v. Wellmont Health Sys.*, 295 812 S.E.2d 766 (Va. 2018); *Venaglia v. Kropinak*, 956 P.2d 824, 829 (N.M. 1998); *Randazzo v. Cochran*, No. CV K16C-07-024 JJC, 2018 WL 1037455, at *2 (Del. Super. Ct. Feb. 22, 2018); *Monsanto Co. v. Reed*, 950 S.W.2d 811, 812 (Ky. 1997).

¹⁷⁰ See, e.g., *Alcombrack v. Ciccarelli*, 363 P.3d 698, 702 (Ct. App. Ariz. 2015); *Addie v. Kjaer*, 51 V.I. 836, 844 (D.V.I. Apr. 28, 2009); *Van Ingen v. Wentz*, 70 Pa. D. & C.2d 555, 558 (Pa. Com. Pl. 1975); *Smartt v. Lamar Oil Co.*, 623 P.2d 73, 75 (Colo. App. 1980); *Meyers v. Pittsburgh S. S. Co.*, 165 F.2d 642, 644 (6th Cir. 1948); *Scott v. Kay*, 227 A.2d 572, 574 (Del. 1967).

¹⁷¹ See 1 V.I.C. §4 (2020) (“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”); *Est. of Ogumoro v. Ko Han Yoon*, No. 2016-SCC-0022-CIV, 2019 WL 2564119, at *5 (N. Mar. I. June 21, 2019), on reh'g in part, No. 2016-SCC-0022-CIV, 2020 WL 1699022 (N. Mar. I. Apr. 8, 2020); *Bank of Am. v. J. & S. Auto Repairs*, 694 P.2d 246, 248 (Ariz. 1985).

“under” a blackletter provision of a *Restatement*, even when that provision itself is merely synthesizing prior caselaw.¹⁷² With it being commonplace to speak of a cause of action or requirement “under” the terms of a statutory provision, courts frequently transpose that framing to their reliance on *Restatement* blackletter with little additional scrutiny. In this framing, the relevant *Restatement* provision is treated in identical manner as an ordinary statute.¹⁷³

A final way in which courts come to treat *Restatement* rules as law involves their open adoption of the rule into the common law of the jurisdiction. Commonly seen in state courts of final appeal—that are endowed with final say over state common law—the opinion at issue usually canvases competing rules and principles, and when satisfied with the *Restatement* formulation decides not just to rely on it as a relevant common law rule for the case at hand, but to “adopt” it as such for the jurisdiction.¹⁷⁴

Such “adoption” of course remains something of an anomalous process. Since the court is hardly vested with any legislative power to enact law for the state, its ability to formulate the law is tied to its common law decision-making, which is in theory limited to its formal holding and disposition. Consequently, despite such adoption into the law—and not just into its own rule of decision—any formal legal authority that such adoption invests in the *Restatement* provision is closely tied to the court’s own application of it in the case being decided. Yet in practice, such symbolic “adoption” imbues the *Restatement* provision with a legal authority of its own, such that subsequent courts look

¹⁷² See, e.g., *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1349 (D. Md. 1982); *Harvey v. Fresno Cty. Econ. Opportunities Comm’n*, No. F045399, 2005 WL 2108135, at *8 (Cal. Ct. App. Sept. 1, 2005); *Olney v. Beaman Bottling Co.*, 418 S.W.2d 430, 432 (Tenn. 1967); *Cahalin v. Rebert*, 10 Pa. D. & C.3d 142, 147 (Pa. Com. Pl. 1979); *Smith by Smith v. George*, 534 N.E.2d 224, 226 (Ill. 1989); *Est. of Massad ex rel. Wilson v. Granzow*, 886 So. 2d 1050, 1051 (Fla. Dist. Ct. App. 2004); *Donahue v. Polaris Indus., Inc.*, No. 02-11-00279-CV, 2012 WL 1034908, at *2 (Tex. App. Mar. 29, 2012); *Larsen v. Philadelphia Newspapers, Inc.*, 543 A.2d 1181, 1183 (Pa. 1988); *Smith v. Allendale Mut. Ins. Co.*, 303 N.W.2d 702, 729 (Mich. 1981).

¹⁷³ See *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 747 (2017) (“[B]ringing the suit under a statute.”); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120 (2014) (“Under the Lanham Act.”).

¹⁷⁴ See, e.g., *Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 910 (Iowa 2017); *Kessler v. Mortenson*, 16 P.3d 1225, 1228 (Utah 2000); *Jaguay v. Vasquez*, 948 A.2d 955, 973 n.21 (Conn. 2008); *St. James Vill., Inc. v. Cunningham*, 210 P.3d 190, 194 (Nev. 2009); *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1004 (Mont. 2000); *Dyer v. Maine Drilling & Blasting, Inc.*, 984 A.2d 210, 215 (Me. 2009); *Distad v. Cubin*, 633 P.2d 167, 175 n.7 (Wyo. 1981); *N. Country Villas Homeowners Ass’n v. Kokenge*, 163 P.3d 1247, 1249 (Kan. App. Ct. 2007); *Lydia v. Horton*, 583 S.E.2d 750 (S.C. Ct. App. 2003); *Birchwood Land Co. v. Krizan*, 115 A.3d 1009, 1015 (Vt. 2015); *Bank of Am., N.A. v. Prestance Corp.*, 160 P.3d 17, 29 (Wash. 2007); *Matter of Est. of Campbell*, 876 P.2d 212, 216 (Kan. App. Ct. 1994).

directly (and sometimes exclusively) to the blackletter of the *Restatement* for a statement of the law, abjuring any analysis of the adopting court's actual application of the provision in its case.¹⁷⁵

This last point bears some elaboration, since it highlights the manner in which *Restatements* come to be relied on directly by courts as law, a reliance that is distinguishable from the accretive process of common law development and stymies the characteristic generativity of that very process. A common feature seen in each of the three forms of reliance outlined above is the manner in which the *Restatement* blackletter at issue assumes normative (i.e., authoritative) significance on its own, altogether independent of its use and application by the court. In the ordinary process of common law growth, a court's adoption of a rule of decision serves as precedent for a subsequent court, which then examines not just the abstract rule but also its application to the facts of the prior dispute. This examination allows the subsequent court (or courts) to examine the scope and contours of the rule, and meld it accordingly as new situations demand.¹⁷⁶ This process goes on incrementally and generatively over time in the common law, in turn both constraining and liberating subsequent courts.¹⁷⁷

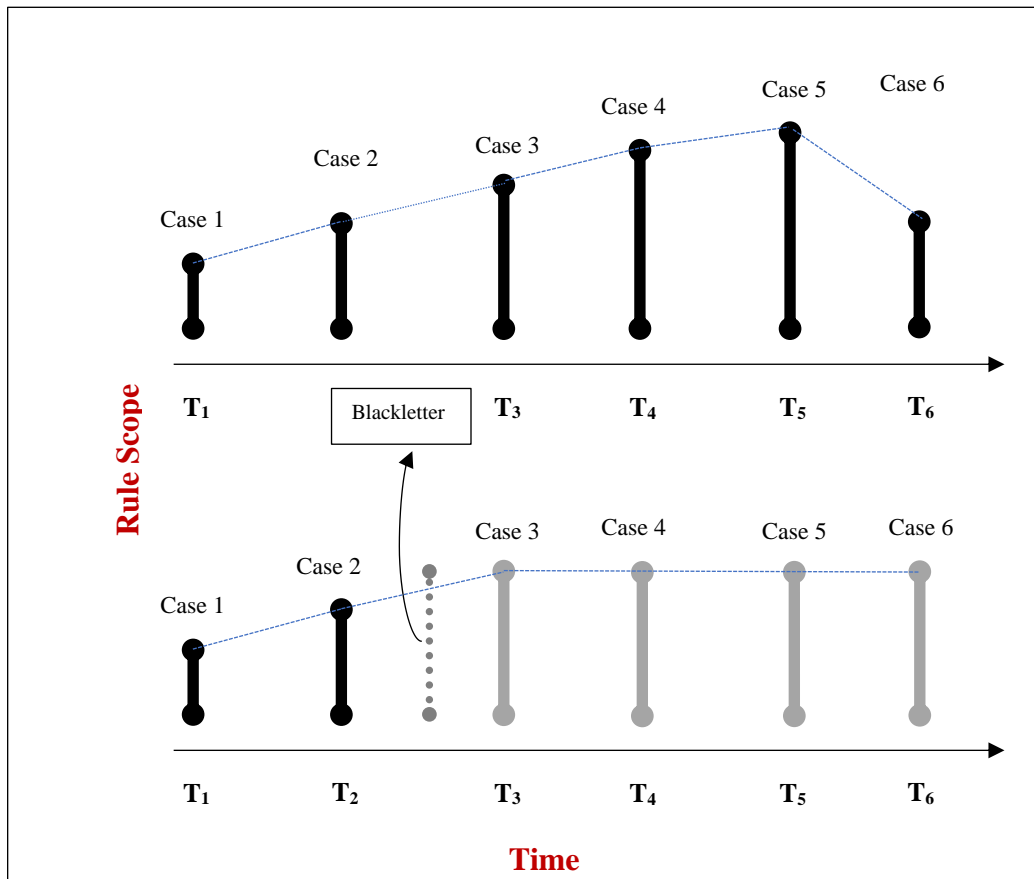
When a court instead treats a blackletter provision of a *Restatement* as law and cites to it as such, subsequent courts routinely eschew any scrutiny of how the blackletter is actually applied in an individual case, and instead treat the abstract (statute-like) language of the blackletter as their decision rule. In so disentangling the scope of the rule from its actual application, subsequent courts' engagement with the rule leaves scarcely little (if any) room for its modification when new circumstances arise. Treatment of *Restatement* blackletter as law, in short, stymies traditional common law accretion in a fundamental way.¹⁷⁸

¹⁷⁵ For an early identification of this phenomenon in the context of the adoption of a provision of the *Restatement of Torts* by the Pennsylvania Supreme Court, see: Henry A. Gladstone, Note, *The Supreme Court of Pennsylvania and Section 339 of the Restatement of Torts: A Case Study of Opinion-Writing*, 113 U. PA. L. REV. 563, 567 (1965).

¹⁷⁶ For a well-known account, see: BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 23 (1921).

¹⁷⁷ See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2-3 (1949).

¹⁷⁸ See generally Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004). Adams argues that a similar ossification has occurred in relation to the common law of the Virgin Islands, where the *Restatements* are accorded the status of primary authority by the language of a statutory directive which requires that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute... 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." 1 V.I. §4 (2020). Adams argues that such adoption has interfered with local courts' ability to

Table: Alteration in Common Law Rule Development

The figure above identifies this effect graphically. The top graph in the figure shows the generally linear process through which a common law rule

create judge-made law and “interrupted... the natural development of Virgin Islands law.” Adams, *supra* note __, at 8. Adams limits her argument to the rather unique (and extreme) case of the Virgin Islands; yet, a similar phenomenon applies beyond situations of wholesale adoption and is especially troublesome in situations of sporadic adoption and treatment as primary authority, where it is hardly noticed. The mechanism of interruption in situations of sporadic adoption is of course fundamentally different from that of a wholesale adoption, since the constraint in sporadic situations is internal to the common law process unlike in wholesale contexts where it is exogenous (i.e., legislative). This internal dimension gives the adoption a patent ambiguity that is only ever understood to be an impediment to the common law process over the long term, unlike with wholesale adoptions where the interruption is unmistakable from its occurrence.

grows incrementally over time. In each successive case, a court has the ability to modify (however slightly) the scope of the decision rule that it draws from the precedent so as to adapt it to the relevant facts of the dispute before it. The lower graph reveals how this comes to be altered when a blackletter rule is formally adopted by a common law court (Case 3), or treated as the authoritative rule of decision. Courts subsequent to such adoption/treatment (Cases 4-6) find their ability to adapt the decision rule to be significantly curtailed, with the effect that the abstract (and precise) formulation of the blackletter substitutes for the case-by-case adaptation with a uniform rule.

An example of this phenomenon is to be seen in the working of §339 of the *Restatement of Torts*, discussed earlier.¹⁷⁹ As noted, §339 was considered a landmark shift in the law relating to the liability of landlords for trespassing children.¹⁸⁰ Following its adoption by the membership of the ALI, the Supreme Court of Pennsylvania (among other courts) came to rely on its formulation, which it soon “adopted”.¹⁸¹ Then, in a much-cited subsequent decision, the court boldly announced: “To the extent that past cases are in conflict with the view of section 339 of the *Restatement of the Law of Torts*, which we have adopted, they are no longer authority.”¹⁸² This “adoption” of §339 gave it an altogether independent authoritativeness.

Even though §339 was not a significant departure from prior case law (in Pennsylvania), its formal adoption gave it the façade of an altogether new rule.¹⁸³ Consequently, later opinions confronting the issue eschewed any reliance on prior caselaw addressing the point and focused entirely on the wording of §339 to apply it to their facts.¹⁸⁴ To the extent that they looked to precedent, it was principally to buttress their reading and interpretation of §339, an approach that has continued for multiple decades since.¹⁸⁵ §339 therefore became the law of Pennsylvania—through the common law—even though its mechanism of

¹⁷⁹ See *supra* text accompanying notes __ - __.

¹⁸⁰ WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 440 (1955). See also Leon Green, *Landowners' Responsibility to Children*, 27 *TEX. L. REV.* 1 (1948).

¹⁸¹ *Allen v. Silverman*, 50 A.2d 275, 277 (Pa. 1947) (noting how §339 had been “adopted” in earlier precedents from 1942 and 1944).

¹⁸² *Bartleson v. Glen Alden Coal Co.*, 64 A.2d 846, 851 (Pa. 1949).

¹⁸³ Gladstone, *supra* note __, at 565-66.

¹⁸⁴ See *Rush v. Plains Twp.*, 120, 89 A.2d 200, 201 (Pa. 1952); *Verrichia v. Soc'y Di M. S. Del Lazio*, 79 A.2d 237, 238-39 (Pa. 1951); *McGuire v. Carey*, 79 A.2d 236, 236 (Pa. 1951); *Gallagher v. Frederick*, 77 A.2d 427, 429 (Pa. 1951); *Bruce v. Hous. Auth. of City of Pittsburgh*, 76 A.2d 400, 402 (Pa. 1950).

¹⁸⁵ See *Jennings v. Glen Alden Coal Co.*, 87 A.2d 206, 208 (Pa. 1952); *G.W.E. v. R.E.Z., Jr.*, 77 A.3d 43, 46-49 (Pa. Super. Ct. 2013).

authority operates independent of the common law method, effectively stripping courts of the power to modulate the scope of the rule as circumstances demand.

A more recent example from the same jurisdiction highlights the ossificatory consequences of courts' reliance on *Restatement* blackletter as law, and its deleterious effect on the generativity of the common law. An issue that emerged within the law of residential leases was the liability of a landlord to the tenant for harm that resulted from a defective condition on the premises, which the landlord had *orally* promised to remedy at the time that the written lease was entered into by parties.¹⁸⁶ In the first quarter of the twentieth century, landlords routinely relied on such promises to entice tenants into signing the lease and thereafter reneged on the commitment, which in many instances resulted in physical harm to the tenant. Early on, courts adopted the logic of English common law and sided with landlords.¹⁸⁷ Since an owner's liability to non-owners for any harm from the premises was to be based on "occupation and control", when the owner relinquished such control by handing over the premises to the tenant, the very basis for liability was taken to have disappeared.¹⁸⁸ While undoubtedly formalist, this reasoning nevertheless formed the dominant position in the first quarter of the twentieth century.¹⁸⁹ In its early cases, the Supreme Court of Pennsylvania endorsed this position, following the logic of the early common law.¹⁹⁰

By the 1960s, the common law's general approach to residential leases had begun to change. Described by many as the "revolution" in residential landlord-tenant law, the residential tenant came to be seen as the "ward and darling" of the common law, rather than its "stepchild."¹⁹¹ Much of this change

¹⁸⁶ See, e.g., *Jacobson v. Leaventhal*, 128 Me. 424 (1930); *Dustin v. Curtis*, 67 A. 220 (N.H. 1907); *Miles v. Janvrin*, 82 N.E. 708 (Mass. 1907); *Cullings v. Goetz*, 176 N.E. 397 (N.Y. 1931); *Harris v. Lewistown Trust Co.*, 191 A. 34 (Pa. 1937).

¹⁸⁷ Courts usually traced this logic back to the case of *Cavalier v. Pope*, [1906] A.C. 433 (Eng.), where the court held that "[t]he power of control necessary to raise the duty . . . implies something more than the right or liability to repair the premises. . . [i]t implies the power and the right to admit people to the premises and to exclude people from them."

¹⁸⁸ *Harris*, 191 A. at 35.

¹⁸⁹ *Id.* (describing it as the "general rule in this country").

¹⁹⁰ *Id.* at 36; *Hayden v. Second Nat'l Bank of Allentown*, 331 Pa. 29, 31 (1938); *Kolojeski v. John Deisher, Inc.*, 239 A. 2d 329 (Pa. 1968).

¹⁹¹ Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 519 (1984). See also Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503 (1982); Charles J. Goetz, *Wherefore the Landlord-Tenant Law "Revolution"?*—Some Comments, 69 CORNELL L. REV. 592 (1984); Samuel B. Abbott, *Housing Policy*,

in attitude was produced by changing socio-economic conditions in the market, including the extreme housing shortage that had been documented at the time, which was shown to have produced an asymmetry in bargaining power between landlords and tenants in the marketplace. In 1965, the *Restatement (Second) of Torts*—in §357—recognized this changed landscape and proposed a modification, one that would impose liability on the landlord.¹⁹² Such liability was recognized to still be a minority position, though significantly less so than a few decades earlier.¹⁹³

In a 1968 case, the Supreme Court of Pennsylvania was called upon to revisit its earlier jurisprudence on the basis of the new §357. The court scrutinized the language of the new provision and its accompanying reasons closely, to conclude:¹⁹⁴

We must recognize the fact that... critical changes have taken place economically and socially. Aware of such changes, we must realize further that most frequently today the average prospective tenant vis-a-vis the prospective landlord occupies a disadvantageous position. Stark necessity very often forces a tenant into occupancy of premises far from desirable and in a defective state of repair. The acute housing shortage mandates that the average prospective tenant accede to the demands of the prospective landlord as to conditions of rental, which, under ordinary conditions with housing available, the average tenant would not and should not accept.

...

If our law is to keep in tune with our times we must recognize the present day inferior position of the average tenant vis-a-vis the landlord when it comes to negotiating a lease.

Until this point, the court's reasoning followed the usual pattern of common law change, namely, recognizing the need for the law to keep up with changing conditions. Yet, it went one step further: instead of simply accepting a change in the rule (of liability), it instead "adopted" the language of §357 into the law,

Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. REV. 1 (1976); Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974); Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?*, 77 NEB. L. REV. 703 (1998).

¹⁹² RESTATEMENT (SECOND) OF TORTS §357 (Am. Law Inst. 1965).

¹⁹³ *Id.* cmt. b (describing its position as the "minority position").

¹⁹⁴ *Reitmeyer v. Sprecher*, 243 A. 2d 395, 398 (Pa. 1968).

noting that “[w]e adopt Section 357 of [the *Restatement*] as the sound and sensible approach to the instant problem.”¹⁹⁵

The text of §357—and not the court’s opinion—thus became *the law* of the jurisdiction. §357 was undoubtedly motivated by the landlord-tenant law revolution, and the court was prescient to allow the common law to adapt to the changed circumstances. Yet, by tying the law to the blackletter of the *Restatement*, the court implicitly ignored the possibility of *further* evolution and change that might be needed, independent of the blackletter. In other words, it denied later courts the opportunity to move beyond §357 without having to reject or un-adopt its text as the law of the jurisdiction. Indeed, in the many years since the court’s “adoption” of §357, the revolution in landlord-tenant law has developed even further, and attained a level of analytical and normative sophistication that did not previously exist.¹⁹⁶ This sophistication is borne out in doctrines such as the “implied warranty of habitability”.¹⁹⁷ All the same, §357 continued (and continues) to dominate the discussion of a landlord’s obligation to repair the premises independent of the lease, such that courts have read a tenant’s claim to damages on the ground as arising “under” the text of §357.¹⁹⁸ For over half a century now, §357—as the “adopted” law of Pennsylvania on the issue—remains unchanged, which is somewhat ironic for a provision triggered by a revolution.

It is crucial to appreciate the precise sense in which the treatment of *Restatement* blackletter as the law of the jurisdiction impedes further common law development. One might of course point to the reality that most blackletter language—especially those seen in the early *Restatements*—represented “vague rules” (i.e., standards) rather than precise rules, which in theory would have allowed courts to shape and further develop the law in an incremental manner.¹⁹⁹ In no sense does a court’s treatment of blackletter text as the law convert such a standard into a rule; this is hardly the sense in which the ossification described

¹⁹⁵ *Id.* Interestingly, the majority opinion prompted a vigorous dissent from the Chief Justice of the court, who saw it as abandoning *stare decisis* with no reasoned basis other than an unsupported factual assertion about the existence of a housing shortage. See *Reitmeyer*, 243 A. 2d at 399 (Bell, C.J. dissenting).

¹⁹⁶ For a useful summary, see: Korngold, *supra* note ___, at 708.

¹⁹⁷ See *Javins v. First National Realty Corp.*, 428 F. 2d 1071 (D.C. Cir. 1970).

¹⁹⁸ See, e.g., *Reed v. Dupuis*, 920 A. 2d 861, 866 (Pa. Sup. Ct. 2007) (describing the claim as arising “under” §357); *Kelly by Kelly v. Ickes*, 629 A. 2d 1002, 1007 (Pa. Sup. Ct. 1993); *Bonacci v. Pal*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 11155, at 10-11 (Pa. Comm. Pleas Ct. 2017).

¹⁹⁹ For the seminal account, predicting that this is likely to occur when interest group pressure is diffuse and spread out in the process of developing the *Restatement*, see: Schwartz & Scott, *supra* note ___, at 609.

herein occurs. Instead, as seen in the examples discussed, the ossification occurs through a subtle yet powerful change in the *source* of the common law, which is all too easy to overlook.

When a court treats a *Restatement* provision “as law” and applies it in a manner that mimics its reliance on statutes, the court is in effect sourcing the logic of the common law rule from something other than its own reasoning. Indeed, this remains so even though it is the court that is incorporating the blackletter provision into its reasoning, something that is adequately borne out in the practice of later courts to avoid relying primarily on the opinion that adopts/applies the provision in favor of the provision itself. Even if the formal source of the rule remains the judicial opinion, its substantive source is now expressly identified as lying elsewhere. This, in turn, makes subsequent change—through judicial reasoning alone—more difficult, since later courts will now have to find a way to distance themselves from both (i) the formal source being differentiated/overruled, and (ii) the substantive source identified as the real source for it. The process thus adds an additional layer to the extant path dependency in the common law’s evolution, which is the mechanism through which the law ossifies.²⁰⁰

To be sure, the problems inherent in courts’ treatment of *Restatement* provisions as law have not gone altogether unnoticed by courts. In one instance, the Supreme Court of Oregon criticized treating *Restatement* provisions as “authoritative”,²⁰¹ with one justice noting that “it is misleading to speak of pleading or proving a cause of action ‘under’” a section of the *Restatement* since it could never “substitute for an independent analysis and presentation of the elements.”²⁰² In a more recent opinion, the Supreme Court of Pennsylvania—which has long “adopted” individual provisions into the common law of the state—sought to clarify the limitations of such adoption:

²⁰⁰ The process is in some ways analogous to statutory provisions that purport to do no more than “restate” the common law and thereby attempt to allow courts to continue to develop the law further. The very act of (statutory) codification forces courts to treat the source of the law as now more diffuse, i.e., as having a statutory component as well, in the process impeding their ability to further develop the law, despite the best intentions of the statute. Congress’s codification of the fair use doctrine in copyright law is a prime example here, where despite the legislative history exhorting courts to develop the doctrine further in incremental fashion, courts have unfortunately found themselves wedded to the text of the four statutory factors. The diffusion all too easily anchors their reasoning and thus ossifies further development. See Christopher S. Yoo, *The Impact of Codification on the Judicial Development of Copyright*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 177 (Shyamkrishna Balganesh ed. 2013).

²⁰¹ *Coulter Prop. Mgmt., Inc. v. James*, 970 P.2d 209, 214 n.4 (Or. 1998).

²⁰² *U. S. Nat. Bank of Oregon v. Fought*, 630 P.2d 337, 352 (Or. 1981) (Linde, J. concurring).

Consistent with its adjudicative rather than policy-making role, the Court has “adopted” or deemed sections of a restatement a proper statement of Pennsylvania law if the cause of action and its contours are consistent with the nature of the tort and Pennsylvania’s traditional common law formulation. ... In this sense, the adoption of a restatement formulation intended to advance the law cannot be so unmoored from existing common law and produce such a policy shift that it amounts in actuality or public perception to a derogation of legislative authority, and the concomitant suggestion that such authority is reposed in the Judiciary or in the American Law Institute. ...

Moreover, because the language of a provision of the restatement, even to the extent it was adopted by the Court verbatim, has not been vetted through the crucible of the legislative process, a court applying the restatement formulation should betray awareness that the language of an “adopted” restatement provision is not “considered controlling in the manner of a statute.”²⁰³

The court’s observations above echo almost precisely the concern with ossification and outsourcing of legal change just described. And yet, despite caveats such as these, the practice of treating *Restatement* provisions as law continues unabated.

B. Opinion

A second form of judicial reliance on *Restatements* involves their use as true secondary sources. Recognizing that in the end *Restatements* are little more than the views of experts in a given field, numerous courts treat them as analogous to other secondary sources such as scholarly articles, treatises, and encyclopedias. The ultimate authoritativeness of such secondary sources hinges on their ability to persuade the reader of their position; and thus courts relying on *Restatements* in this capacity do so when convinced of the bases for their positions.

Such reliance on *Restatements* as secondary sources, i.e., as the opinion of experts, is usually characterized by the court finding an independent basis for

²⁰³ *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 354-55 (Pa. 2014).

its rule of decision, which it then finds support for in a *Restatement*.²⁰⁴ Such independent basis is usually the relevant applicable precedents, or decisions from other jurisdictions (which have but a persuasive value).²⁰⁵ Central to this approach is therefore the court's arrival at its rule or principle of choice through sources *other than* the *Restatement*, with its use then of the *Restatement* as support for the proposition.

A related but nonetheless distinct way that such secondary reliance on *Restatements* can emerge involves cases of first impression, where a court is required to develop a new rule in the absence of guiding precedent. In such situations, courts sometimes look to the rationale or policy underlying a particular *Restatement* proposition and when persuaded by its soundness, choose to frame their rule of decision around the *Restatement* proposition.²⁰⁶ What distinguishes these situations from those where a court simply "adopts" the *Restatement* rule is that here the court frames its rule, and finds validation for it in the *Restatement* just as it would in other secondary sources. The distinction is subtle yet important, in that it does not accord the *Restatement* provision independent normative significance in the way in which it would if merely adopted as such. Consequently, the court does not curtail (or eliminate) its own—or indeed future courts'—discretion in modifying or expanding the rule,

²⁰⁴ See, e.g., *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 658 (Iowa 2000) (Lavorato, J. concurring); *Langley v. Nat'l Lead Co.*, 666 S.W.2d 343, 345 (Tex. App. 1984); *Plant v. Kelly & Picerne, Inc.*, No. CIV.A. 75-1706, 1981 WL 391025, at *3 (R.I. Super. July 24, 1981); *Elizabeth Arden, Inc. v. Brown*, 107 F.2d 938, 939 n.1 (3d Cir. 1939); *Flanagan v. Baker*, 621 N.E.2d 1190, 1193 (Mass. App. Ct. 1993); *Nygren v. Potocek*, 14 Conn. Supp. 405, 407 (Super. Ct. 1946), *aff'd*, 133 Conn. 649, 54 A.2d 258 (Conn. 1947); *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1388 (Ind. 1995); *Baer v. Bd. of Cty. Comm'rs of Washington Cty.*, 257 A.2d 201, 204 (Ct. App. Md. 1969); *Hardin v. Harris*, 507 S.W.2d 172, 176 (Ky. 1974); *McKenna v. McKenna*, 422 A.2d 668, 669 (Pa. Super. 1980); *Bank of Am. Nat. Tr. & Sav. Ass'n v. Cryer*, 58 P.2d 643, 646 (Cal. 1936); *Parrish v. De Remer*, 187 P.2d 597, 604 (Colo. 1947); *DBT Yuma, L.L.C. v. Yuma Cty. Airport Auth.*, 361 P.3d 379, 382 (Ariz. 2015); *Wilkes v. Wilkes*, 488 S.W.2d 398, 406 (Tex. 1972); *Dep't of Hum. Servs. v. Richardson*, 621 A.2d 855, 857 n.6 (Me. 1993); *Miller v. Celebration Mining Co.*, 29 P.3d 1231, 1235 (Utah 2001); *Wright v. Haskins*, 260 N.W.2d 536, 541 (Iowa 1977).

²⁰⁵ See, e.g., *Abington Ltd. P'ship v. Heublein*, 717 A.2d 1232, 1240 (Conn. 1998) ("Our reaffirmation of *Carbone* finds support in the recently approved provisions of the Restatement (Third) of the Law of Property."); *Shyface v. Sec'y, Health & Hum. Servs.*, 165 F.3d 1344, 1349 (Fed. Cir. 1999) ("[T]he 'but for' test [adopted by Michigan courts] finds support in the Restatement (Second) of Torts.").

²⁰⁶ As an example, consider the Supreme Court of Connecticut's decision in *Garthwait v. Burgio*, 216 A.2d 189 (Conn. 1965), which involved the abandonment of privity as a basis of liability for defective products. Canvassing prior case law, the court could find no directly applicable precedent since each of the prior cases had involved contractual liability. *Id.* at 192. Nevertheless the court went on to observe that it could find "no sound reason why the manufacturer should escape liability simply because the injured user...was not in contractual privity with it by purchase and sale" and for this, it found itself "in accord with the rule" adopted by the *Restatement*. *Id.*

as circumstances demand; the legal authority for the rule remains the holding of the case rather than the *Restatement* provision.

The subtlety of this distinction is best captured in the early opinions of the Supreme Court of Illinois in its dealings with §402A of the *Restatement (Second) of Torts*. §402A, which dealt with liability for defective products, was one of the most influential provisions of any *Restatement* adopted by the ALI.²⁰⁷ §402A proposed a rule of strict liability for sellers of defective products that were in an unreasonably dangerous condition.²⁰⁸ As scholars have noted, it was a major achievement at the time, heralding the onset of strict products liability and the idea of consumer expectation as a basis for liability.²⁰⁹ Once adopted by the ALI, it soon came to be adopted by courts in rapid succession, which some described as a “prairie fire”.²¹⁰ One set of scholars remarked that §402A soon came to achieve the status of a “holy writ” and “sacred scripture”, and it is likely the most cited *Restatement* provision in history.²¹¹

As §402A grew in popularity, several state courts around the country all too readily “adopted” the provision into their law.²¹² The Supreme Court of Pennsylvania, for instance, expressly adopted the provision’s “language as the law of Pennsylvania.”²¹³ This produced the effect previously described.²¹⁴ By contrast, the Illinois court refrained from so adopting the provision. Instead, when presented with a products liability claim and an argument that the state should develop a strict liability framework for the area, the court in *Suvada v. White Motor Co.* undertook an elaborate analysis of the policy rationale underlying the move to strict liability.²¹⁵ Canvassing the history of the field,

²⁰⁷ RESTATEMENT (SECOND) OF TORTS §402A (Am. Law Inst. 1965). See generally George W. Conk, *Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished*, 26 REV. LIT. 799 (2007) (reviewing the influence of §402A and its reasons).

²⁰⁸ RESTATEMENT (SECOND) OF TORTS §402A (Am. Law Inst. 1965).

²⁰⁹ See, e.g., William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Jay M. Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

²¹⁰ Conk, *supra* note ___, at 800.

²¹¹ James A. Henderson, Jr., & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1512-13 (1992).

²¹² See, e.g., *Dippel v. Sciano*, 155 N.W.2d 55, 63 (Wisc. 1967); *Brooks v. Dietz*, 545 P.2d 1104, 1108 (Kan. 1976); *Johnson v. Am. Motors Corp.*, 225 N.W.2d 57, 58 (N.D. 1974); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 118 (Miss. 1966).

²¹³ *Webb v. Zern*, 422 220 A.2d 853, 854 (Pa. 1966).

²¹⁴ See *supra* text accompanying notes __-__.

²¹⁵ *Suvada v. White Motor Co.*, 210 N.E.2d 182, 186 (Ill. 1965).

scholarly writing in the domain, and the landmark pre-*Restatement* cases (some of which had motivated the drafting of §402A), the court in *Suvada* then concluded that “public policy” justified the move towards a strict liability standard in Illinois.²¹⁶ Further, instead of simply adopting §402A as such, it treated the provision as but one reason for the move, noting merely that “the views herein expressed coincide with the position taken in section 402A.”²¹⁷

The move was more than symbolic and had a discernible effect on the approach taken by later courts. Instead of merely relying on §402A when presented with new situations and circumstances, later opinions felt at liberty to modify and supplement the *Suvada* court’s original formulation, sometimes without even acknowledging the *Restatement*.²¹⁸ §402A undoubtedly played an important role in the direction and framing of the law. All the same, its use as an identifiably secondary source placed few unnecessary constraints on the courts’ common law development of the area. Indeed, in *Suvada* the court was presented with the argument that any change in law needed to come from the legislature rather than the courts.²¹⁹ The court’s response was simple. Reiterating the primacy of the common law method, it observed: “[w]e closed our courtroom doors without legislative help, and we can likewise open them.”²²⁰

C. Choice of Position

A third form of reliance derives from *Restatements*’ avowed efforts to resolve divergences in decisional law by rationalizing competing positions and choosing the position that represents a majority rule/trend in the law. In contrast to courts’ reliance on propositions of *Restatement* as either law or as opinion, such reliance on a *Restatement*’s choice amounts to a reliance on its *process* of restating the law, rather than just its final product.

Ever since their origins, the *Restatements* were meant to digest case law from different jurisdictions, and as part of that process choose between competing formulations. The ALI’s founders envisioned that such synthesis (and choice) be supported by an exhaustive and “complete” review and citation of the relevant authorities and that a *Restatement* highlight “any differences”

²¹⁶ *Id.* at 186-87.

²¹⁷ *Id.* at 187.

²¹⁸ See, e.g., *Palmer v. Avco Distrib. Corp.*, 412 N.E.2d 959, 962 (Ill. 1980); *Hunt v. Blasius*, 384 N.E.2d 368, 372 (Ill. 1978); *Lamkin v. Towner*, 563 N.E.2d 449, 457 (Ill. 1990); *Anderson v. Hyster Co.*, 385 N.E.2d 690, 693 (Ill. 1979).

²¹⁹ *Suvada*, 210 N.E. 2d at 188.

²²⁰ *Id.* at 188.

between its chosen position and the underlying caselaw.²²¹ Even today, the drafting manual for *Restatements* reiterates both the centrality of choice underlying a *Restatement's* synthesis and formulation of its black letter:

The first [step] is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. ... If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.²²²

The ALI's founders were therefore quite clear that *Restatement* drafting would involve hard choices, given the very nature of the common law. They were also clear that rather than shying away from those choices—and presenting multiple positions—*Restatements* would only ever realize their purpose when they made and defended their preference for one competing position over another.²²³ In the decades since their emergence, *Restatements* have therefore routinely had to choose among competing rules.²²⁴ And while for the most part, they tend to adopt what they see as the position taken by a “majority” of jurisdictions, that choice is by no means driven by its status as the majority position.²²⁵ A *Restatement* is to scrutinize the rationale and basis for the majority position before adopting it, giving it therefore the flexibility to reject a majority position in favor of a minority view when needed.²²⁶

²²¹ Founding Committee Report, *supra* note __, at 20, 22.

²²² CAPTURING THE VOICE 2015, *supra* note __, at 5.

²²³ Founding Committee Report, *supra* note __, at 22

²²⁴ CAPTURING THE VOICE 2015, *supra* note __, at 7 (“When decisions among state courts conflict, a Reporter should report the conflict but is not bound to adhere to the majority view.”).

²²⁵ See, e.g., RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §10 cmt. b (Am. L. Inst. 2010); RESTATEMENT OF THE LAW OF LIABILITY INSURANCE §27 cmt. d (Am. L. Inst. 2019); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §36 (Am. L. Inst. 2000); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §23 (Am. L. Inst. 2011); RESTATEMENT (SECOND) OF PROPERTY, DON. TRANS. §6.1 (Am. L. Inst. 1983); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) §4.1 (Am. L. Inst. 1997); RESTATEMENT OF EMPLOYMENT LAW §8.06 cmt. e (Am. L. Inst. 2015).

²²⁶ See, e.g., RESTATEMENT (SECOND) OF PROPERTY, DON. TRANS. §6.1 (Am. L. Inst. 1983) (adopting the minority position).

Not surprisingly, when confronted with an issue involving competing positions for the first time, i.e., as a matter of first impression within the relevant jurisdiction, courts rely on the groundwork done by a *Restatement* in exercising this choice. Courts relying on a *Restatement*'s choice however adopt one of two different approaches. In the first—the cautionary approach—they readily recognize the normative nature of the exercise, i.e., its presumptive connection to an underlying rationale. As a result, even when they accept and follow the *Restatement*'s choice, they nevertheless separately identify the majority and minority positions so as to showcase the actual positions involved and the underlying normative considerations influencing each of them, before themselves embracing that choice in conformity with the *Restatement*.²²⁷ This approach is more than just rhetorical. It instead has the salutary effect of allowing the court to preserve its own common law decision-making for future by making clear that it is exercising its own discretion and normative judgment in choosing between competing options, rather than outsourcing that determination to the *Restatement*. A natural corollary to this approach is situations where the court identifies the conflicting positions and their rationales, but then chooses to follow the position rejected by the *Restatement* based on its own normative assessment.²²⁸

In many respects, this form of reliance on *Restatement* choice tracks courts' use of *Restatements* as secondary sources, i.e., as opinions. It is nevertheless distinct in one important respect, which deserves explication. The cautionary reliance on a *Restatement* choice is not just a reliance (however strong/minimal) on the normative basis of the choice involved; it is also a tempered acceptance of the *Restatement*'s very identification, characterization and classification of the competing positions themselves. In other words, even though the choice made by a *Restatement* is in some sense discretionary, it is nonetheless predicated on an underlying epistemic reality: competing/divergent positions. A reliance on the choice is therefore a reliance not just on the basis for the choice, but also on the very need for such a choice. The cautionary

²²⁷ See *Correa v. Curbey*, 605 P.2d 458, 460 (Ct. App. Ariz. 1979); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 474 (Ok. 1987); *Kirk v. Stineway Drug Store Co.*, 187 N.E.2d 307, 313 (Ill. App. Ct. 1963); *Zutz v. Nelson*, 788 N.W.2d 58, 73 (Minn. 2010) (Anderson, J. dissenting); *Ferrero Const. Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1140 (Ct. App. Md. 1988); *McGoey v. Brace*, 918 N.E.2d 559, 567 (App. Ct. Ill. 2009).

²²⁸ See, e.g., *Foley v. Bishop Clarkson Mem'l Hosp.*, 173 N.W.2d 881, 885 (Neb. 1970) (adopting the "minority rule" on the negligence of hospitals even when the *Restatement (Second) of Torts* in §299A had rejected it for the majority rule).

reliance looks to the *Restatement* not just as opinion, but also as “evidence of the law”.²²⁹

A particularly good example of this cautionary approach is to be found in the decision of the New York Court of Appeals in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, which involved the question of a client’s access to his/her lawyer’s representation-related files after the attorney-client relationship had ended.²³⁰ Even though the relevant *Restatement* provision had canvassed competing jurisdictions, identified both majority and minority positions, and then adopted a clear position allowing unfettered access, the court in *Sage Realty* nevertheless decided to conduct its own review and synthesis.²³¹ Upon identifying the majority and minority positions fo

r itself and explicating the rationale for both, it chose “the majority position, as adopted in the ... *Restatement*...[as] the sounder view.”²³² In so doing, it offered up its own reasons for the choice—which included conformity to other parts of local law and considerations of fairness, which in its discretion had to play an important role.²³³ Other courts have adopted the same modality of reliance in their reasoning.²³⁴

In contrast to the cautionary approach is a form of reliance that outsources the assessment of majority/minority position, the synthesis of majority positions to formulate a single rule, and the normative rationale for the choice of position, without much additional scrutiny. In this (incautious) approach, the court does not acknowledge the normative exercise involved in classifying competing positions and thereupon choosing among them. It instead takes the *Restatement*’s identification of a rule as the majority position, to be dispositive.²³⁵ While this form of reliance is less common than the cautionary approach, when it does occur it effectively treats the choice as *both* evidence of

²²⁹ For analytical articulations of the distinction, see: Charles E. Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593 (1917); Ezra Thayer, *Judicial Legislation*, 5 HARV. L. REV. 172 (1891); J.W. Bingham, *What is the Law?*, 11 MICH. L. REV. 1 (1912).

²³⁰ 689 N.E.2d 879 (N.Y. 1997).

²³¹ *Id.* at 881-82.

²³² *Id.* at 882.

²³³ *Id.* at 882-83.

²³⁴ See *supra* sources cited in note ____.

²³⁵ See, e.g., *Ferguson v. Ferguson*, 473 P.3d 363, 373 (Idaho 2020) (following the “majority position” taken in the *Restatement (Third) of Trusts* in §96(2)).

the law, and as the law itself. This is especially true when coupled with the court's formal "adopt[ion]" of the synthesized choice as its rule.²³⁶

The contrast between the two approaches to relying on a *Restatement's* choice of rule is exemplified in courts' use of the *Restatement (Third) of Tort: Products Liability*, which sought to put forth an emerging standard of liability for defective products.²³⁷ Adopted by the ALI in 1998, the *Restatement* sought to modify the strict liability approach to defective product designs by replacing it with a requirement of a "reasonable alternative design."²³⁸ The *Restatement* recognized that the position it was advancing on this point had not been followed uniformly by all courts. All the same, it pressed forward with the understanding that its position "reflect[ed] the strong majority of cases."²³⁹ Additionally, the new position that it was advancing sought to replace a position taken by the prior *Restatement* on the subject (§402A, discussed previously), which innumerable courts had come to adopt and follow.²⁴⁰

A relatively early adopter of the *Restatement's* position was the Supreme Court of the Virgin Islands. The law of the Virgin Islands contains a statutory provision expressly mandating that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute... 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."²⁴¹ When called upon to apply this statutory section and thus adopt the *Restatement (Third) of Tort: Products Liability* into local law, the court first went to some length to note that despite the wording of the statute it was not bound to "mechanically apply" *Restatements* in its decisions as though they were statutory texts.²⁴² Despite reaffirming its discretion on the matter, the court nevertheless chose to follow the *Restatement* principally because it was the "majority rule" around the country.²⁴³ Not only did the court not engage the underlying reasons for the *Restatement's* shift in position, but it also somewhat mechanistically accepted the "majority" status of the rule *following* its adoption by the ALI without any

²³⁶ *Id.*

²³⁷ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§1-3 (Am. L. Inst. 1998).

²³⁸ *Id.* §2(b).

²³⁹ *Id.* §2 cmt. b ("When read in its totality the Restatement reflects the strong majority of cases.").

²⁴⁰ See discussion at *supra* note ____-____.

²⁴¹ 1 V.I.C. §4 (2020).

²⁴² *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 976 (2011).

²⁴³ *Id.* at 982-83.

additional scrutiny.²⁴⁴ In effect, the court outsourced both the choice of rule and its underlying basis to the *Restatement*.

This incautious outsourcing placed fetters on later courts' ability to move away from the *Restatement* formulation when presented with alternative rules. As recently as 2021, when the Supreme Court was presented with the question again—it simply chose to follow the *Restatement* formulation because “the Court ha[d] already adopted” portions of that *Restatement*, despite perceptions of the law having changed in the interim.²⁴⁵

By contrast, other courts approached the very same *Restatement*'s choice with greater caution. The Supreme Court of Pennsylvania, long known to hew closely to *Restatement* formulations, adopted the cautionary approach to relying on the *Restatement*'s choice in the area of products liability.²⁴⁶ When presented with the option of “moving” to the new formulation, it chose to undertake a detailed examination of the competing positions and their rationales.²⁴⁷ Instead of merely accepting the *Restatement*'s version of the conflict and majority positions, it chose to examine the methodology adopted by the *Restatement* for its classification, which it then found to be deeply problematic.²⁴⁸ While refusing to get into the question of whether the *Restatement* position did in fact represent the majority, the court had one overarching message, which informed its cautionary approach: “the imperative of judicial modesty” in relying on a *Restatement*.²⁴⁹

IV. STREAMLINING RESTATEMENT RELIANCE

Courts rely on *Restatements* in different ways and for varying purposes. While the nature of reliance is often times clear from the context and nuanced choice of words that a court uses in its reasoning, such clarity is hardly uniform or dominant. To the contrary, as we have seen, judicial opinions routinely rely on the ambiguity and equivocation inherent in their engagement with *Restatements*, which allows them to place greater reliance on *Restatement* provisions as sources of law. While it is rare for a court to expressly endorse

²⁴⁴ *Id.*

²⁴⁵ *Davis v. UHP Projects, Inc.*, 2021 V.I. 5, 8 (2021).

²⁴⁶ *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 395-400 (Pa. 2014).

²⁴⁷ *Id.* at 395.

²⁴⁸ *Id.* at 398-99 (“The Third Restatement approach presumes too much certainty about the range of circumstances, factual or otherwise, to which the ‘general rule’ articulated should apply.”).

²⁴⁹ *Id.* at 353 n.6.

Restatement “language as the law”²⁵⁰ of the jurisdiction, it is just as rare for courts to recognize the anomaly inherent in the very idea of a judicial “adoption” of the provision.²⁵¹ Caught between the two extremes are therefore situations where courts—legitimately focused on the substance of the adjudication—neglect the nature and form of their written reliance on *Restatements*.

Such unreflective reliance on *Restatements* has significant long-term effects in the development of the common law. Since the accretive process of common law growth through precedent occurs entirely through courts’ engagement with the language and reasoning of prior opinions, an early court’s failure to inject sufficient nuance into its use of a *Restatement* risks enabling that reliance to be understood in different (i.e., usually, stronger) terms than originally intended. Courts’ use of the term “adopt” in relation to *Restatement* blackletter is a good example here in as much as it conceals the nature of a court’s reliance. A court may “adopt” the provision as its decision rule in the case,²⁵² “adopt” the rationale underlying the provision into its reasoning,²⁵³ or alternatively it may “adopt” the provision as the law of the jurisdiction.²⁵⁴ Complicating matters is the ALI’s own use of the term “adopt” to refer to any use of the term by a court in relation to a *Restatement* provision.²⁵⁵ Each of these *adoptions* represents a different form of reliance along the primary/secondary spectrum.

As we have seen, judicial engagement with *Restatement* text also pays insufficient attention to the institutional effects of such reliance. Even though the treatment (and “adoption”) of blackletter law as “the law” curtails future courts’ ability to modify the rule contextually, the lure of simplicity, clarity, and precision underlying blackletter text is often too attractive for courts to ignore. Consequently, they rather simplistically transpose their methods and assumptions underlying statutory text to the blackletter, without fully appreciating the effect of such equivalence on their own future discretion underlying the common law method.

²⁵⁰ *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966).

²⁵¹ See, e.g., *Barsness v. Gen. Diesel & Equip. Co.*, 383 N.W.2d 840, 842 (N.D. 1986); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 354-55 (Pa. 2014).

²⁵² See *Dexter v. Town of Norway*, 715 A.2d 169, 172 (Me. 1998).

²⁵³ *Great Atl. & Pac. Tea Co. v. Yanofsky*, 403 N.E.2d 370, 374 (Mass. 1980); *Dunning v. Buending*, 247 P.3d 1145, 1149 (N.M. Ct. App. 2011); *Peragallo v. Sklat*, 466 A.2d 1200, 1202 (Conn. Super. Ct. 1983).

²⁵⁴ *Webb*, 220 A.2d at 854.

²⁵⁵ See, e.g., RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §1 Case Citations – By Jurisdiction (Am. L. Inst. 1998).

This Part takes the first steps towards addressing these concerns by suggesting that courts develop a set of *Restatement*-specific canons of construction for their use in relying on *Restatements*. Canons of construction are well known as rules of thumb (or norms) that courts deploy in interpreting statutes.²⁵⁶ And while they are far from being a panacea for solving courts' inconsistency in the interpretive process, they nevertheless play something of an anchoring and framing role in both judicial decision-making and opinion-writing.²⁵⁷

To be sure, canons of constructions are capable of manipulation and use by courts to simply rationalize their results.²⁵⁸ All the same, evidence suggests that judges use canons as tools of persuasion (even if not decision-making) in their actual opinions, which obviously plays an important role in directing the shape of future common law decisions.²⁵⁹ Further, knowledge and awareness of the canons play an unstated—often subconscious—role in judges' approach to legal questions, and thus serve a constraining role, even if judges do not consciously think and reason in terms of individual canons.²⁶⁰ If the four *Restatement* related canons proposed here rise to the level of playing an equivalent role in judicial reasoning, it will indeed go a long way in streamlining judicial reliance on *Restatements*.

A. The Canon of Secundarity

All Restatement text is presumed to carry no more than secondary legal authority in the absence of rules requiring otherwise.

As shown earlier, the most significant problems surrounding courts' reliance on *Restatements* in their reasoning derive from their inability and

²⁵⁶ See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxix (2012); WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 33 (2016); Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 181 (2018).

²⁵⁷ See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1330-31 (2018).

²⁵⁸ For a critique of the canons and their utility, see: Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950). But see Jonathan R. Macey & Geoffrey R. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992); William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994).

²⁵⁹ Gluck & Posner, *supra* note ___, at 1330.

²⁶⁰ *Id.* at 1331.

unwillingness to candidly specify the nature and purpose of their reliance in their opinions. With this being unlikely to change, the best that can be expected is a default rule that generates a rebuttable presumption of purpose. The canon of secondarity would posit that a court's use of (i.e., citation to and reliance on) a *Restatement* is exclusively as a secondary legal source. In other words, a court is presumed to treat *Restatement* language and blackletter as being of no more than persuasive value.

The canon of secondarity is likely to produce a few salutary effects. First, it would compel courts to locate the authority for the proposition contained in the *Restatement* in an independent and formal (i.e., primary) legal source, such as precedent. By forcing the recognition of the blackletter as "secondary" to another primary source, the canon in effect signals the incompleteness inherent in a court's bare reliance on it. Second, in the absence of such an independent primary source, the court's reasoning would itself come to be treated as the primary authority for the proposition rather than the *Restatement* language. In matters of first impression or situations requiring novel extensions of existing rules, courts unable to find a primary authority would now be forced to embrace the reality of their own lawmaking. Finally, being in the nature of a rebuttable presumption, the canon would allow for situations where a *Restatement* provision is indeed to be treated as primary legal authority as a result of a procedural rule or legislative directive giving it such status. A good example here is the law of the Virgin Islands, which directs according *Restatement* blackletter status as "the law" of the jurisdiction in the absence of local authority.²⁶¹

The canon of secondarity is likely to have a direct impact on the anomalous practice of courts "adopting" *Restatement* blackletter and language as the law of the state.²⁶² By now presuming the secondary status of such *Restatement* text, the "adoption" is denied any independent normative significance akin to legislative enactment. Instead, in as much as the court "adopts" a *Restatement* directive as its rule of decision in a case, that court's holding and application will become the relevant primary source for subsequent courts, which will then be obligated to rely on that holding and application rather than the *Restatement* in isolation. While the canon is of course unlikely to change the judicial practice of adopting *Restatement* provisions immediately, it will

²⁶¹ 1 V.I.C. §4 (2020) ("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").

²⁶² See *supra* text accompanying notes __-__.

nevertheless cast new light on the meaning and significance of such adoption for later courts (and lawyers).

B. The Canon of Faux Codification

Non-governmental, i.e., privately produced, codifications of judge-made law ought to be closely scrutinized for their fidelity to the underlying rule that they are based on.

The related canon of faux codification would directly target courts' reliance on *Restatement* blackletter simply for its statute-like precision by giving direct recognition to the reality that the similarity between the blackletter and actual legislative codification is purely stylistic. Even when the simplicity and precision of the blackletter is alluring enough for courts to gravitate towards it, the canon would emphasize the artificiality of the codification and require courts to examine the extent to which the blackletter is an accurate representation of the caselaw that it purports to synthesize.

Over time, this canon would work to eliminate the perfunctory manner in which courts apply the language, logic and methods of their engagement with statutes to *Restatements*. This would include their attempts to (i) parse the language of the blackletter using the actual techniques of statutory interpretation, (ii) locate a legislative "intent" behind the blackletter, and (iii) presume the existence of a transparent and democratic legal process behind the production of the blackletter.

Restatements entail a synthesis of judge made law into precise rules. As described previously, such synthesis involves normative judgments that the precision routinely masks. Indeed, the *Restatements* themselves recognized the inadequacy of their own precise rules over time, as they began generating more and more detailed commentary about their own blackletter rules within each *Restatement*. The canon of faux codification acknowledges—but does not eliminate—the normative nature of the blackletter's distillation. And through such acknowledgement, it places the burden on a court to either accept its outsourcing of that judgment to the *Restatement* by perfunctorily relying on its blackletter or instead make that judgment on its own, using the blackletter as a helpful anchor.

Most notably, the canon of faux codification does not have to be limited in its application to *Restatements*, but would in principle extend to just about any privately-produced effort to distill judge-made law into rules. It would thus

apply with equal measure to other legal encyclopedias such as the *Corpus Juris Secundum* and the *American Jurisprudence*, and to treatises that attempt succinct code-like formulations of the common law.²⁶³

C. The Canon of Common Law Preservation

In reading Restatement text, courts ought to prefer a meaning that preserves their common law role over any reading that would narrow that role.

In purporting to speak in the “voice” of a common law court,²⁶⁴ *Restatements*—especially in their blackletter—routinely make choices among competing alternatives of concepts, principles and languages, in their synthesis of judge-made law into a precise statement of rule. Yet, unlike with ordinary statutes, those choices are not binding on courts, a reality that they routinely fail to acknowledge or recognize. The canon of common law preservation would remedy this, by requiring courts to adopt a reading of the *Restatement*-synthesized common law rule that preserves their common law discretion for the future, rather than one that cabins it.²⁶⁵

In some ways, the canon of common law preservation might be seen as a corollary to the canon of statutory interpretation that presumes against change in the common law, sometimes referred to as the rule that “statutes in derogation of the common law are to be strictly construed.”²⁶⁶ The logic behind this longstanding canon of statutory interpretation is the belief that if a legislature chose to limit the judiciary’s lawmaking, i.e., common law, power in an area, it was obligated to do so clearly and unequivocally in order to allow the fecundity of the common law to flourish unabated.²⁶⁷ Since legislatures could not have anticipated a myriad of unforeseen situations, they were never presumed to have readily eliminated the ability of courts to adapt the law to those situations. Limits

²⁶³ See generally Robert C. Berring & Valerie Wedin, *Corpus Juris Secundum*, 1 LEG. REF. SERV. Q. 67, 67-8 (1981) (describing the nature of the encyclopedia); Jeanne Benoff & Kathleen Vanden Heuvel, *American Jurisprudence 2d*, 3 LEGAL REF. SERV. Q. 59, 59-61 (1983).

²⁶⁴ See ALI, CAPTURING THE VOICE 2015, *supra* note ___, at 6 (observing how *Restatements* attempt to emulate the inquiry of an “excellent common-law judge”).

²⁶⁵ For a general account of common law discretion and its working, see: BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 18-19 (1921); Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961).

²⁶⁶ Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304 (1959); Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950).

²⁶⁷ SCALIA & GARNER, *supra* note ___, at 318-19.

on the common law were therefore generally disfavored, unless clear and express.

The canon of common law preservation would do something similar for *Restatements*. However, instead of the concern being with change in the common law as it is in the statutory context, it is with the introduction of bright-line certainty in the common law that steers courts in an irreversible direction. An example of this effect is seen in courts' adoption of §339 of the *Restatement (First) of Torts*.²⁶⁸ As noted previously, courts in Pennsylvania "adopted" §339 and emphatically declared that all prior caselaw in derogation of the provision was to be disregarded after such adoption.²⁶⁹ As has been pointed out, §339 did not effect a major change in the law. Instead, it made rules and concepts that existed in the prior law more obvious and easily discernible—such that even after its adoption, the pre-adoption jurisprudence remained relevant.²⁷⁰ All the same, the courts' attempt to read §339 as a major change, in order to signal a break with the past, had the deleterious effect of forcing later courts to focus more narrowly on the choices made in §339, such that some of the nuances of the prior position came to be disregarded altogether, despite being perfectly compatible with the new position as such.²⁷¹ If the Pennsylvania courts had, on the other hand, read §339 as merely continuing in their line of existing cases, later courts would have had the ability to incorporate these nuances into their application of the §339 rule.

D. The Canon of Statutory Primacy

When Restatement blackletter covers an area that is already codified in actual legislation, courts ought to begin by interpreting the text of the relevant legislation for themselves.

While *Restatements* originally began in fields dominated by the common law and therefore operated principally at the state level, they have since moved into areas of federal law statutes dominate the landscape.²⁷² Federal courts interpreting these statutes have, in turn, generated a good deal of jurisprudence around the meaning and scope of their provisions. The *Restatements* then

²⁶⁸ RESTATEMENT (FIRST) OF TORTS §339 (Am. L. Inst. 1934).

²⁶⁹ See discussion at *supra* text accompanying notes __-__.

²⁷⁰ Even though it was not cited or quoted, owing to the supposed break in continuity. See generally Gladstone, *supra* note __, at 567-68.

²⁷¹ Gladstone, *supra* note __, at 566-86.

²⁷² See Richard L. Revesz, *Restatements and Federal Statutes*, 38 A.L.I. REP. 3 (Spring 2016).

purport to synthesize this body of interpretive jurisprudence into an additional set of precise blackletter rules.²⁷³ Courts adjudicating questions in the area then effectively have two different “codifications” before them to consider: one, the actual statutory language enacted by the legislature, and two, the interpretive reformulation of the blackletter that is presented in codified form. In such situations, the canon would caution courts to do the obvious: “begin, as [is] usual, with the statutory text” and then move to additional sources.²⁷⁴ In other words, it would have them prioritize the legislative codification over the *Restatement’s* competing effort.

Restatement codifications of case law interpreting statutes have received surprisingly little attention in the literature.²⁷⁵ Ironically, the founders of the ALI were prescient enough to recognize that this might be an area that the *Restatements* eventually entered, and therefore cautioned against developing new blackletter language for a *Restatement* that did not reproduce the exact language of the relevant legislative provision in its entirety.²⁷⁶ Despite this early caution, recent *Restatement* efforts have been significantly less cautious in advancing seemingly competing codificatory language to courts for their reliance.

The canon of statutory primacy would certainly not preclude courts from looking to the *Restatement* synthesis. All the same, it would have them recognize that the interpretive process is one that they ought to be undertaking afresh, deploying sources and methodologies of their choosing rather than outsourcing those normative choices to the *Restatement*. In this respect, the canon would operate to highlight the reality that even though statutory interpretation and common law rulemaking—both by courts—have many similarities, they each involve different institutional choices that an unthinking reliance on the *Restatement* blackletter text could readily miss.²⁷⁷

* * *

It bears emphasizing that these canons are unlikely to eliminate all of the concerns and problems attending courts’ reliance on *Restatements*. All the same, what they can be expected to do is introduce a degree of predictability and

²⁷³ *Id.* at 3 (discussing how blackletter for statutory *Restatements* would mimic the working of blackletter for common law subjects).

²⁷⁴ *Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017).

²⁷⁵ See Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285 (2021).

²⁷⁶ William Draper Lewis, *Report on Business Associations*, 2 A.L.I. PROC. 281, 358 (1924)

²⁷⁷ For an early articulation of the difference, see: CARDOZO, *supra* note ___, at 18-19.

coherence into courts' reliance on *Restatements* and thereby insulate the process from the arbitrariness of that process.²⁷⁸ In as much as canons are meant to be "grounded in experience [and] developed by reason," over time they will likely come to streamline the judicial engagement with *Restatements*.²⁷⁹

CONCLUSION

The relationship between courts, *Restatements*, and the common law has always been anything but straightforward. Writing a century ago of the *Restatements* and their effect on the growth of the law, Justice Benjamin Cardozo was rather emphatic in observing that they were "to stimulate and free" judge-made law rather than "repress".²⁸⁰ Yet, he presciently cautioned that "[i]n breaking one set of shackles, we are not to substitute another."²⁸¹ The goal was to "set the judges free" rather than limit them to the language of the blackletter.²⁸² Cardozo was also confident that *Restatements* would come to "be invested with *unique authority*, not to command, but to persuade."²⁸³ Despite these predictions, a century later the nature of this "unique authority" continues to confound the judicial engagement with *Restatements*.

Restatements remain deeply influential in the development of judge-made law in the U.S., especially in the traditional common law fields. And for the most part, this influence has been substantively valuable. By bringing together experts in a field, and canvassing the growing morass of case law from around the country, their process of production undoubtedly serves to simplify and clarify the law. This salutary role has in turn contributed to a constantly growing number of courts relying on them for substantive expertise in a given field. By any measure then, *Restatements* have been immensely successful as substantive legal sources in the U.S.

All the same, their substantive appeal has come at a rather significant cost, one embodying both analytical and structural dimensions. In focusing almost exclusively on their substantive merit, as representing the consensus of

²⁷⁸ Eskridge & Frickey, *supra* note ___, at 66.

²⁷⁹ 3 ROSCOE POUND, JURISPRUDENCE 506 (1959).

²⁸⁰ BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 10 (1924); Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 117 (1921).

²⁸¹ CARDOZO, GROWTH OF THE LAW, *supra* note ___, at 10.

²⁸² *Id.*

²⁸³ *Id.* at 9.

experts in the field, courts have all too commonly treated *Restatements* as actual sources of law, in the process overlooking the “unique authority” that they possess. *Restatements* have in the process seen their modality of influence move from the domain of persuasion to that of command, and almost always without any justification by courts. Perhaps more importantly, this move has inflected the way in which common law courts operate when under the influence of *Restatement* blackletter. Instead of undertaking a synthesis of precedent and an independent formulation of their own rules of decision, courts routinely outsource much of that work to the language of a *Restatement* provision. The facial similarity between *Restatement* and statutory language has contributed in no small measure to this tendency.

This tendency—of courts to treat *Restatements* as actual sources of law—has in recent years generated a good amount of controversy. Some states have gone so far as to enact legislation restricting judicial reliance on *Restatements* or declaring that they “are not controlling” within the jurisdiction.²⁸⁴ Justice Scalia’s previously noted well-documented criticism of *Restatements* was driven almost entirely by the concern that lower courts would mechanistically rely on *Restatement* blackletter without further scrutiny.²⁸⁵ And yet, the controversy appears to have provoked surprisingly little reflection and assessment from courts themselves, or indeed the American Law Institute.

Returning *Restatements* to their appropriate role in the hierarchy of legal authority—as strongly persuasive secondary sources—will undoubtedly require courts to focus on the modality and language of engagement with *Restatements* in their actual reasoning. To this end, a set of basic norms (or rules of thumb) that they keep at the back of their minds during this engagement, is likely to go far in developing some systematicity into that process over time.

Even though Cardozo optimistically predicted that *Restatements* would set “the judicial process... in motion again, but with a new point of departure, a new impetus and direction,” he was quick to caution that the certainty afforded by *Restatement* language could be “illusory” and impede the growth of the law if judges were to abandon reason and fixate on the precision of a rule.²⁸⁶ In his view, an “[o]veremphasis of certainty may carry us to the worship of an intolerable rigidity”, one that compromised on the common law’s core “principle of growth” through the judicial process.²⁸⁷ Cardozo believed that this balance

²⁸⁴ See, e.g., TEX. CIV. PRAC. & REM. CODE 5.001 (2020).

²⁸⁵ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J. concurring and dissenting).

²⁸⁶ CARDOZO, *GROWTH OF THE LAW*, *supra* note ___, at 17.

²⁸⁷ *Id.* at 20.

would be realized by judges through the sheer wisdom of the common law process. And yet, close to a century of *Restatement* usage and reliance by courts has shown that something more is needed for judge-made law to preserve its vitality and legitimacy in a legal system that is today dominated by statutes and regulations. Put another way, Cardozo grossly underestimated the overbearing allure of certainty and precision that the *Restatements* embody.