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ARTICLES

RELYING ON RESTATEMENTS

*Shyamkrishna Balganesh**

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.

* Sol Goldman Professor of Law, Columbia Law School; Member, American Law Institute; Project Adviser, Restatement of Copyright Law. Many thanks to Ash Ahmed, Will Baude, Stephanos Bibas, Jane Ginsburg, Andrew Gold, Madhav Khosla, Peter Menell, Tom Merrill, David Pozen, Matt Sag, Bob Scott, Buffie Scott, Henry Smith, and participants at faculty workshops at Boston College Law School, Brooklyn Law School, Columbia Law School, and Washington University School of Law. All errors are mine.

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,[1] Restatements cover a wide range of legal subjects.[2] 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.[3] Every first-

1. See About ALI, ALI, https://www.ali.org/about-ali/ [https://perma.cc/V37N-Z4Q4] [hereinafter ALI, About ALI] (last visited Aug. 29, 2022).

2. Restatements of the Law, ALI, https://www.ali.org/publications/#publication-type-restatements [https://perma.cc/DS2L-TF98] [hereinafter ALI, Restatements of the Law] (last visited Aug. 29, 2022). The ALI lists a total of thirty-four Restatements, including those in progress as well as those approved by the organization's membership. Id.

3. The ALI's initial Restatement subjects were the laws of agency, conflict of laws, contracts, judgments, property, restitution, security, torts, and trusts. See Arthur L. Corbin, The Restatement of the Common Law by the American Law Institute, 15 Iowa L. Rev. 19, 23 (1929) ("Thus far, the committees of the Institute have prepared Restatements of large parts of the fields of Contracts, Conflict of Laws, Agency, and Torts; and much work has been done in Property and Trusts."); Michael Traynor, The First Restatements and the Vision of the American Law Institute, Then and Now, 32 S. Ill. U. L.J. 145, 159 (2007) (describing the

year law student is introduced to Restatements with the understanding that they are "highly persuasive" sources of law even if not binding as such.[4]

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. Ever since their origins, courts around the country have cited to them nearly 10,000 times, with a significant number of those opinions quoting extensively from the language of the Restatements.[5] Indeed, such is their influence that in a relatively recent U.S. Supreme Court case, Justice Antonin 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.[6]

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.[7]

1933 publication of the Restatement of Restitution as a "pioneering work"); ALI, About ALI, supra note 1. 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 ALI, Restatements of the Law, supra note 2.

4. Peter C. Schanck, A Guide to Legal Research: In the University of Michigan Law Library 32 (1976). The extent to which Restatements are "authoritative" has been a matter of some debate. Compare Charles E. Clark, The Restatement of the Law of Contracts, 42 Yale L.J. 643, 651 (1933) (noting how the ALI aimed to have the black letter of Restatements be treated as authoritative), with Harlan F. Stone, The Significance of a Restatement of the Law, 10 Proc. Acad. Pol. Sci. City N.Y. 3, 6 (1923) (questioning the ability of Restatements to be authoritative in the strict sense of the term).

5. A Westlaw search for the term "Restatement of" in all U.S. federal, state, and territorial courts since 1922 yields over 9,880 results (of them 6,755 in state courts). Westlaw, http://westlaw.com/ (filter search by "All States" and "All Federal"; then filter by "All dates after" 01/01/1922; then search in search bar for "Restatement of") (last visited Sept. 19, 2022).

6. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part) ("I write separately to note that modern Restatements . . . are of questionable value, and must be used with caution.").

7. See, e.g., Sarah H. Cleveland & Paul B. Stephan, Introduction: The Roles of the Restatement in U.S. Foreign Relations Law, *in* The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law 1, 1 (Paul B. Stephan & Sarah H. Cleveland eds., 2020) (describing the Restatements' impact on foreign relations law); Thurman Arnold, The Restatement of the Law of Trusts, 31 Colum. L. Rev. 800, 800 (1931) (discussing the tentative draft of the Restatement of the Law of Trusts); Shyamkrishna Balganesh & Peter S. Menell, Restatements of Statutory Law: The Curious Case of the Restatement of Copyright, 44 Colum. J.L. & Arts 285, 291 (2021) (reflecting on the "mismatch between the traditional approach to Restatements and statutory law" within the Restatement of Copyright); Albert A. Ehrenzweig, The Second Conflicts Restatement: A Last Appeal for Its Withdrawal, 113 U. Pa. L. Rev. 1230, 1230 (1954) (expressing "serious misgivings" about the publication of the Second Restatement of the Conflict of Laws); Samuel Estreicher, Matthew T. Bodie, Michael C. Harper & Stewart J. Schwab, Foreword: The Restatement of Employment Law Project, 100 Cornell L. Rev. 1245, 1245 (2015) (discussing the process of producing the Restatement of Employment Law); Arthur L. Goodhart, Restatement of the Law of Torts, 83 U. Pa. L. Rev. 411, 411 (1935) (describing the

Similarly, the history of the ALI has also been the subject of extensive scholarly commentary and critique.[8] 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.[9] Beyond simple citation numbers, woefully little is known about the techniques and methods employed by courts in their use of Restatements, that is, 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.[10]

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."[11] The founders of the

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Restatement of the Law of Torts as a "storehouse in which the expert can find material for his arguments or judgments"); Thomas W. Merrill & Henry E. Smith, Why Restate the Bundle? The Disintegration of the Restatement of Property, 79 Brook. L. Rev. 681, 681 (2014) (expressing disappointment in the transparent law-reform efforts found in some volumes of the Restatement of Property); Edwin W. Patterson, The Restatement of the Law of Contracts, 33 Colum. L. Rev. 397, 397 (1933) (describing the publication of the Restatement of the Law of Contracts as "highly significant"); Harvey S. Perlman, The Restatement of the Law of Unfair Competition: A Work in Progress, 80 Trademark Rep. 461, 461 (1990) (discussing the process by which Restatements are formulated and issues animating the Restatement of the Law of Unfair Competition); Basil H. Pollitt, Some Comments on the Restatement of Agency, 17 Geo. L.J. 177, 177–78 (1929) (describing three "essential elements of an agency relationship," which appear in the Restatement of Agency).

8. See, e.g., Alex Elson, The Case for an In-Depth Study of the American Law Institute, 23 Law & Soc. Inquiry 625, 625 (1998) (describing the substantial contributions of the ALI throughout its history); N.E.H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, 8 Law & Hist. Rev. 55, 56 (1990) (examining the origins of the ALI based on new manuscript sources and interpretations); Jonathan R. Macey, The Transformation of the American Law Institute, 61 Geo. Wash. L. Rev. 1212, 1212 (1993) (exploring the ALI's struggle to approve new corporate governance principles); G. Edward White, The American Law Institute and the Triumph of Modernist Jurisprudence, 15 Law & Hist. Rev. 1, 2 (1997) (examining the early history of the ALI and its significance); Hessel E. Yntema, What Should the American Law Institute Do?, 34 Mich. L. Rev. 461, 461 (1936) (exploring the origins and plan for the ALI).

9. For the only limited prior effort in this regard, see Kristen David Adams, The Folly of Uniformity? Lessons From the Restatement Movement, 33 Hofstra L. Rev. 423, 424 (2004) [hereinafter Adams, The Folly of Uniformity] (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).

10. See Antonin Scalia, A Matter of Interpretation 14 (2014) (explaining that there is no agreement on a statutory interpretation theory); Richard H. Fallon, Jr., The Statutory Interpretation Muddle, 114 Nw. U. L. Rev. 269, 271 (2019) ("[N]o agreement on interpretive methodology has yet emerged.").

11. ALI, Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 36 (2d ed. 2015) [hereinafter ALI, Capturing the Voice 2015].

ALI saw the drafters of the Restatements as "experts" in "legislative drafting" who were better suited to codification than were legislators.[12] 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 unstated hope that courts will engage them just as they do ordinary statutes, even if through the common law process.[13]

Not surprisingly, innumerable courts do just this and treat Restatements as statutory directives, that is, as primary sources of law. As a prime example, consider the celebrated property law case of *Intel Corp. v. Hamidi*, decided by the Supreme Court of California.[14] 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.[15] In answering the question in the negative, the court placed extensive reliance on the Restatement (Second) of Torts, and specifically section 218 therein, which deals with trespass to chattels.[16] 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 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."[17] 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 section 218 of the Restatement as the primary source of the cause of action; actionability was to be determined by that section since it was

12. 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].

13. See ALI, Capturing the Voice 2015, supra note 11, at 36 (noting how the language should be in the nature of a "codification"). For a comprehensive history of the ALI's efforts to engage statutory law and its rejection of an internal report that exhorted it to reproduce the language of the statute rather than paraphrase such language or suggest alternatives, see Balganesh & Menell, supra note 7, at 285–312.

14. 71 P.3d 296 (Cal. 2003).

15. Id. at 299–300.

16. Id. at 302.

17. Id. (emphasis added).

seen as arising "[u]nder" it.[18] The flaw in the court's formulation lies in its treatment of section 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.[19]

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.[20] Consequently, a strong interpretive canon cautions courts against parsing and dissecting the language of judicial opinions in ways commonly done for statutes. Courts relying on 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, which 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.[21] Implicit in their structure and arrangement within a Restatement is a presumptive hierarchy of authoritativeness that the Restatements' drafters advance: The black letter 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

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18. Id.

19. See, e.g., 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]."); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 108 (2002) (describing behavior that is "actionable under Title VII"); Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) ("[S]ome conduct actionable under § 11 may also be actionable under § 10(b).").

20. 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."); 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.").

21. See ALI, Capturing the Voice 2015, supra note 11, at 34 (detailing the component parts of a typical Restatement).

of the individual drafter rather than the organization's membership.[22] Comments and Reporter's Notes are therefore meant to function as interpretive guides to the black letter, 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 Comments and Reporter's Notes in the way that they do the black letter of Restatements and scrutinize their language very closely.[23]

Perhaps most importantly, in stark contrast to formal legislation, Restatements are produced through a decidedly nontransparent process. Early drafts of a Restatement—and the debates around its provisions—are never publicly revealed nor recorded.[24] Further, the full drafting history of a Restatement is never made public.[25] 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.[26] Unlike with statutes, for which the legislative history routinely informs the understanding of the text,[27] courts are meant

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22. See ALI, Capturing the Voice 2015, supra note 11, at 45. A prime example is found in the majority and dissenting opinions in *Intel*. See *Intel*, 71 P.3d at 304, 307 n.6; id. at 327–28 (Mosk, J., dissenting).

23. See, e.g., Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 713 (2021) (citing to a Reporter's Note in a Restatement without distinction); Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 164 (2003) (citing Restatement black letter and reporter's notes concurrently without distinction).

24. As an example, consider the recent controversy around a draft of the Restatement of Consumer Contracts, in which one ALI member attempted to make the draft publicly accessible. The ALI's opposition to the attempt confirmed that drafts were accessible only to ALI members and that nonmembers could be provided drafts only for "an appropriate, limited use." Letter from Stephanie A. Middleton, Deputy Dir., ALI, to Paul Alan Levy, Pub. Citizen Litig. Grp. (May 15, 2019), https://static.reuters.com/resources/media/editorial/20190201/alioncopyright.pdf [https://perma.cc/P3W3-TYX7]. None of the organization's unapproved drafts are therefore publicly available. See Alison Frankel, State AGs Protest ALI Consumer Contract Restatement Ahead of May 21 Vote, Reuters (May 21, 2019), https://www.reuters.com/article/us-otc-ali/state-ags-protest-ali-consumer-contract-restatement-ahead-of-may-21-vote-idUSKCN1SL2VB [https://perma.cc/E7WB-YZ23] (describing the episode and linking to the ALI's public access policy description).

25. 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) (noting how the practice of transcribing adviser and council meetings where the drafts are modified and debated has long been discontinued).

26. See id. at 78 (noting that though individual authors may have some persuasive say through their writings, the final product is "envelop[ed] in a carapace of institutional authorship").

27. See generally Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992) (defending the use of legislative history in interpreting statutes); Nicholas R. Parrillo, Leviathan and Interpretive Revolution: The Administrative

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.[28]

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 ALI has consciously facilitated and encouraged.[29] 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 should 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 the Restatements' fairly standardized 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 formally "adopt" Restatement sections as the law of their jurisdiction in their reasoning.[30] 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 statements of the law that are independently derived from elsewhere.[31] In between the two forms is a third mode of reliance wherein courts look to Restatements for their reporters' efforts to choose between conflicting

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State, the Judiciary, and the Rise of Legislative History, 1890–1950, 123 Yale L.J. 266 (2013) (providing an institutional account of the rise of legislative history in statutory interpretation).

28. 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 the project's drafting history would be "extremely misleading" in the interpretation and reading of the code. Consideration of the Proposed Final Draft of the Uniform Commercial Code, 27 A.L.I. Proc. 1, 8–9 (1950). That worry appears to have informed and developed into the current practice.

29. See infra section I.A for a fuller discussion of this point.

30. For a fuller discussion, see infra section III.A.

31. See infra section III.B.

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.[32] 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"[33] 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 Restatements' 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 black letter and the actual law that it purports to restate; the *canon of common law preservation*, which would have courts interpret Restatements' black letter in a way that preserves—rather than narrows—their own law-making function in the common law; and lastly, the *canon of statutory primacy*, which would caution courts against relying on the black letter 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

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32. See infra section III.C.

33. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

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 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.[34] 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 which are for varying reasons incapable of articulation.[35] While this concern may well hold true as an evaluation of

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34. 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., Felix S. Cohen, Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism 237–38 (1959) (discussing "realistic jurisprudence" as emerging from "discrepancies . . . between what courts are saying and what courts are doing"); Ronald Dworkin, Taking Rights Seriously 3 (1977) (describing legal realists' arguments that "judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization"); Jerome N. Frank, Law and the Modern Mind 130 (1935) (arguing that one of the chief uses of legal rules and principles is "to enable the judges to give formal justification—rationalizations—of the conclusions at which they otherwise arrive"); Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Tex. L. Rev. 267, 268 (1997) (describing that from the realist perspective, judges "rationalize [decisions based on their personal values] after-the-fact with appropriate legal rules and reasons"); Jon O. Newman, Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values, 72 Calif. L. Rev. 200, 203 (1984) (discussing that "[f]or the legal realist, the expression of preferences predominates" over rational processes in a judge's reasoning over a decision).

35. There is a strong parallel here to the distinction between stated and revealed preferences that is made in economics. See generally Elizabeth Anderson, Unstrapping the Straitjacket of "Preference": A Comment on Amartya Sen's Contributions to Philosophy and Economics, 17 Econ. & Phil. 21 (2001) (arguing that a full understanding of rationality requires "a non-preference-based conception of *reasons for action*" and "robust conceptions of *collective agency* and *individual identity*"); Amartya Sen, Behaviour and the Concept of

the psychology of judges (and judging), it fails to account for the independent generativity of legal precedent.[36] 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.[37] 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,[38] 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

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Preference, 40 Economica 241 (1973) (discussing the normative implications of the economic theory of revealed preference); Amartya K. Sen, Choice Functions and Revealed Preference, 38 Rev. Econ. Stud. 307 (1971) (providing "a systematic treatment of the axiomatic structure of the theory of revealed preference").

36. See generally Charles L. Barzun, Impeaching Precedent, 80 U. Chi. L. Rev. 1625 (2013) (arguing for the evaluation of a decision's underlying motivations as a valid means of assessing the decision's precedential value); 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) (describing a theoretical model to examine how decisions are affected by the historical path leading to them).

37. See Shyamkrishna Balganesh, The Constraint of Legal Doctrine, 163 U. Pa. L. Rev. 1843, 1848–49 (2015) (discussing how legal doctrine may "constrain the decision by framing the inquiry and analysis, in situations where it applies"); Shyamkrishna Balganesh & Gideon Parchomovsky, Structure and Value in the Common Law, 163 U. Pa. L. Rev. 1241, 1266 (2015) (describing how "the interaction between [jural and normative meanings that legal concepts embody] is responsible for maintaining an adequate level of stability necessary for the successful operation of the common law, while at the same time allowing for change at the normative level"); Richard A. Posner, Judges' Writing Styles (and Do They Matter?), 62 U. Chi. L. Rev. 1421, 1429–31 (1995) (discussing how judges' writing styles in their decisions reflect the audience they intend to target).

38. See, e.g., Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1085 (9th Cir. 2003) (noting that "courts have recognized the authoritative nature of the Restatement [of Agency]"); Murray v. Fairbanks Morse, 610 F.2d 149, 154 n.8 (3d Cir. 1979) (noting that "Restatement law is authoritative in the Virgin Islands in the absence of local law to the contrary"); Fisher v. Townsends, Inc., 695 A.2d 53, 59 (Del. 1997) (describing the Restatement (Second) of Agency as "an authoritative source for guidance"); Mounkes ex rel. Mounkes v. Mounkes, 469 P.3d 109, 2020 WL 4913012, at *1 (Kan. Ct. App. Aug. 21, 2020) (unpublished table decision) ("The Kansas Supreme Court has looked to previous editions of the Restatement for authoritative guidance on trust principles.").

identifiable lawmaking 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 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.[39] 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.[40] 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 decisionmaking process.[41] 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.[42] 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.[43] In a democratic setting, this typically includes sources produced by the legislature, executive, 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.[44]

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39. Its roots trace back to Blackstone. See 1 William Blackstone, Commentaries *69. See generally Allan Beever, The Declaratory Theory of Law, 33 Oxford J. Legal Stud. 421 (2013) (defending its applicability in the modern context).

40. See Robert C. Berring & Elizabeth A. Edinger, Finding the Law 16–17 (11th ed. 1999).

41. W.M. Lile, The Uses and Abuses of Secondary Authority, 1 Va. L. Rev. 604, 604 (1914); see also Berring & Edinger, supra note 40, 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) [hereinafter Schauer, Authority and Authorities] (discussing the binding nature of primary authority).

42. Schauer, Authority and Authorities, supra note 41, at 1940.

43. See Berring & Edinger, supra note 40, at 16.

44. Schauer, Authority and Authorities, supra note 41, 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*.[45] 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.[46]

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.[47] In this sense, authority by fiat need not be devoid of reason altogether, yet the reasons for such authority are content independent.[48] 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.[49]

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.[50] The decisionmaker 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.[51]

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 is placed in the judgement and expertise of the individual or entity that is the source of such content.[52] Such trust is of course content

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45. 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).

46. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) ("The wisdom of Congress' action, however, is not within our province to second-guess.").

47. Rosen, supra note 45, at 674.

48. Id. (noting how directives from decisionist authority "have no necessary claim to correctness, but they still have a claim to our respect").

49. See, e.g., *Eldred*, 537 U.S. at 222.

50. Schauer, Authority and Authorities, supra note 41, at 1940.

51. Id. at 1943 (describing persuasive authority as "self-contradictory").

52. Id. at 1944–45.

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 persuasion 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.[53]

Restatements sit somewhat uncomfortably between the categories of primary and secondary authority. The ALI, which produces them, is an entirely private organization that is vested with no formal lawmaking power.[54] In this respect, the ALI differs even from the Uniform Law Commission (ULC), another private organization that has its members appointed by state governments as their representatives in the drafting process.[55] 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."[56] Produced therefore by a private entity, the Restatements are formally mere "secondary sources" or "persuasive authorities," a reality that the ALI readily acknowledges.[57] All the same, this formal classification does not tell the full story.

Owing in large part to the prominence of the ALI's 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, Restatements are functionally imbued with decisionist authority, in which 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.

The Restatements' treatment as a quasi-primary source is hardly just an unintended consequence. It was instead a core objective behind the

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53. Rosen, supra note 45, at 675; Schauer, Authority and Authorities, supra note 41, at 1941.

54. See Geoffrey C. Hazard, The American Law Institute: What It Is and What It Does 7 (1994).

55. See About Us, Unif. L. Comm'n, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/GP4W-SYKA] (last visited Aug. 8, 2022) (describing the structure and state appointments of the ULC).

56. Membership, ALI, https://www.ali.org/members/ [https://perma.cc/QHT4-8LF3] (last visited Aug. 8, 2022).

57. Frequently Asked Questions, ALI, https://www.ali.org/about-ali/faq/ [https://perma.cc/KS3H-MGFJ] (last visited Aug. 8, 2022) ("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.").

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 . . . .[58]

From their very origins the Restatements sought recognition as primary authorities, akin to judicial decisions, which were seen as declaring the law. At one early meeting of the ALI, its Director sought to describe the form and style chosen for Restatements, which aimed to separate out direct statements of legal principle (today's black letter) from comments in the following terms:

> [T]he person for whom primarily we are writing the Restatement is the judge engaged in the actual decision of a case . . . . The form presupposes that the judges . . . will want the conclusions reached by the Institute as to principles and rules of law, and also that the Institute, because of its personnel, organization, and the care used in the creation of the Restatement has a right to speak with authority.[59]

The early Restatements came to be criticized for advancing this ideal.[60] Criticizing the Restatement of Contracts, noted scholar and judge Charles Clark observed that "[t]he Institute seems constantly to be seeking the force of a statute without statutory enactment."[61] The Restatement of Contracts, as its reporter acknowledged, chose to avoid providing citations for its black-letter propositions in an effort to "achieve an authority of its own" through "exact rules."[62] The ALI's founders recognized that the Restatements risked appearing similar to "legal treatise[s]," a secondary legal source.[63] 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.

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58. Founding Committee Report, supra note 12, at 29.

59. William Draper Lewis, Dir., ALI, The Work of the American Law Institute, Address Before the Ohio State Bar Association (Jan. 25, 1924), *in* 22 Ohio L. Rep. 14, 23, 25 (1924).

60. See, e.g., Clark, supra note 4, at 654 (arguing that the difficulties of interpreting statutes become even more unreasonable when interpreting Restatements).

61. Id.

62. Restatement of Contracts Is Published by the American Law Institute, 18 ABA J. 775, 777 (1932) (quoting Samuel Williston).

63. Founding Committee Report, supra note 12, at 29.

"Representative[ness]" thus formed an important consideration during the formation of the ALI.[64] 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.[65] 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.[66] In producing the Restatements, the ALI purported to exercise a professional responsibility entrusted to the legal profession as a whole, in discharge of a "public duty" to the general citizenship.[67]

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.*
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> 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.[68]

This observation is telling. Referring back to the founders' vision of authoritativeness for the Restatements, Goodrich proudly concluded that

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64. See id. at 37–38 (discussing the desire to have the body of the ALI represent the legal profession).

65. Id.

66. Id. at 29.

67. Id.

68. Herbert F. Goodrich, The Story of the American Law Institute, 1951 Wash. U. L.Q. 283, 290–91 (1951) (emphasis added).

the goal had been realized: "The Restatement has become authoritative, to a far greater extent, than those who organized the Institute had ever anticipated . . . ."[69]

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 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.[70] 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.[71] 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."[72] 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. The state legislative outcry over the Restatement of Liability Insurance provides a recent example. Once the ALI adopted the Restatement 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.[73] Implicit in the very need for such disavowal was the recognition that there was some portion of state courts which would not be persuaded by the substance of the objections to the Restatement and which might rely on it as authority simply because it was adopted by the ALI.

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69. Id. at 292.

70. See id. at 290 (discussing the "overwhelming mass of law cases and legal literature" facing the courts before the Restatements).

71. Id. ("One section has been cited with approval in changing the common law.").

72. Dep't of Pub. Assistance v. Hurlbutt, 39 Pa. D. & C. 466, 469 (Ct. Com. Pl. 1940).

73. Ark. Code Ann. § 23-60-112 (2019); Mich. Comp. Laws Ann. § 500.3032 (West 2020); Ohio Rev. Code Ann. § 3901.82 (2018) ("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."); Tenn. Code Ann. § 56-7-102 (2021).

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, albeit based on a misunderstanding.[74] 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.[75] 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."[76]

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.[77] 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.[78]

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

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74. See, e.g., Orin Kerr, Scalia Questions the Value of "Modern" Restatements, Wash. Post (Feb. 25, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/25/scalia-questions-the-value-of-modern-restatements/ (on file with the *Columbia Law Review*).

75. Id.

76. Kansas v. Nebraska, 574 U.S. 445, 475–76 (2015) (Scalia, J., concurring in part and dissenting in part).

77. Founding Committee Report, supra note 12, at 20.

78. Id.

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.[79] The ALI's founders went to some length to justify the need for such deviation and improvement, which they viewed as the core 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.
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> . . . .
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> The restatement should be constructive. . . . [I]t 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.[80]

"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, nongovernmental 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."[81] 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 be considered, much less set forth, in any restatement of the law."[82] On the other hand, changes designed to "carry out more efficiently ends generally accepted as desirable" were outside the limitation.[83] Caught within this limit most obviously were issues of "policy," "novel social legislation," or institutional reform.[84] Conversely, "settled policy" that was no longer a matter of "public controversy" could form the

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79. See id. at 12–14 (differentiating Restatements from treatises because Restatements can seek to improve the law on issues not previously decided by the courts).

80. Id. at 14–15.

81. Id. at 15.

82. Id.

83. Id.

84. Id. at 15–16.

basis for the Restatements' engagement.[85] 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."[86]

Viewed from today's standpoint, the distinction between matters of "general public concern" and those merely operationalizing established accepted ends may seem abstruse.[87] Yet in the early twentieth century where legal formalist thinking remained prominent, that distinction meant something: the boundary between law and politics.[88] Inasmuch 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.[89] 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* the law, the accepted model of common law evolution.[90] This framework, once commonly adopted by English common law

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85. Id. at 16.

86. Id. at 18.

87. Id. at 15.

88. For more on the legal formalist commitment to the law/politics divide, see generally Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging 13 (2010) ("The story about legal formalism consists of . . . a theory of the nature of law . . . and a theory of how judges mechanically apply law . . . . "); Alfred L. Brophy, Did Formalism Never Exist?, 92 Tex. L. Rev. 383, 388 (2013) ("[A] cluster of articles from important legal historians and legal theorists discussing the 'legal formalists' and 'legal formalism' arrived in the mid- 1970s."); Frederick Schauer, Formalism, 97 Yale L.J. 509, 509 (1988) ("With accelerating frequency, legal decisions and theories are condemned as 'formalist' or 'formalistic.'"); Lawrence B. Solum, The Positive Foundations of Formalism: False Necessity and American Legal Realism, 127 Harv. L. Rev. 2464, 2464 (2014) ("The great debate over formalism and realism . . . was the jurisprudential debate of twentieth-century American legal theory . . . .").

89. Founding Committee Report, supra note 12, at 18.

90. See 1 Commentaries, supra note 39, at *69 (noting that the judge is "not delegated to pronounce a new law, but to maintain and expound the old one"); Beever, supra note 39, at 421–23 (describing the history of the controversy over whether judges make law or simply declare law and arguing that the former prevails in modern law). While the declaratory theory as such has come under criticism for quite some time now, its core precent—that the is/ought distinction is meaningless—survives. It was given new vigor in the work of Lon

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.[91] 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.[92]

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.[93] Section 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.[94] Recognizing that section 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.[95] Courts, too recognized this, even while accepting its formulation.[96] Yet, what is most striking in all of this was the actual text of section 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" insofar as it adopted the common law's technique of synthesizing prior precedents around a general principle that it then *found* in some selection of prior cases.[97] Even if everyone knew that the law was changing in the

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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).

91. See John W. Salmond, Theory of Judicial Precedents, 16 L.Q. Rev. 376, 377–78 (1900) (describing and criticizing the logic behind the theory).

92. See Balganesh & Menell, supra note 7, at 308–09 (describing how the ALI came to explicitly adopt this position under the leadership of Herbert Wechsler).

93. Restatement (First) of Torts (Am. L. Inst. 1934).

94. Id. § 339.

95. William L. Prosser, Handbook of the Law of Torts 440 (2d ed. 1955); see also Leon Green, Landowners' Responsibility to Children, 27 Tex. L. Rev. 1, 10 n.33 (1948) (citing cases that demonstrate how section 339 "influenc[ed] many courts to change or clarify their doctrines").

96. See, e.g., Gimmestad v. Rose Bros. Co., 261 N.W. 194, 196 (Minn. 1935); Bartleson v. Glen Alden Coal Co., 64 A.2d 846, 851, 529 (Pa. 1949); see also Green, supra note 95, at 10 n.33.

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

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.[98] 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.[99] The substantive merits of this criticism remain unclear insofar as it failed to account for improvements (often significant ones) that were passed off as descriptive accounts, such as was seen in section 339 discussed above. Stylistically, of course, the criticism had merit since the Restatements never expressly embraced reform even when carrying it out.[100]

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: "[W]e 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."[101] Drawing a direct analogy to prominent common law decisions that had created new law—such as *Palsgraf*,[102] *MacPherson*,[103] and *Ultramares*[104]—Wechsler argued that the Restatements had "embraced" a similar position to keep up with such decisions.[105] In other words, since the Restatements dealt with the common law, they were

98. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

99. See, e.g., Edward S. Robinson, Law and the Lawyers 36–37 (1937) (criticizing the Restatements as formalist); Thurman W. Arnold, Institute Priests and Yale Observers—A Reply to Dean Goodrich, 84 U. Pa. L. Rev. 811, 813 (1936) ("The Restatement . . . is not seeking the 'truth' about the institutional habits of our complex judicial system."); Clark, supra note 4, at 656 ("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.").

100. See Robinson, supra note 99, 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*. They were not to publish argumentative support for their conclusions . . . .").

101. 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) (quoting the 1967 ALI Proceedings).

102. Paslgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

103. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

104. Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931).

105. Wechsler, supra note 110, at 190.

seen as empowered to adopt not just the content of the common law but also its mechanism of evolution and growth.[106]

Despite being entrenched within the content of the Restatements, this "voice" wasn't formalized by the ALI until it published its *Style Manual* in 2005.[107] 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."[108] 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."[109] An early version of the *Style Manual* further observed that black-letter provisions of the Restatements (such as section 339) "assume the stance of describing the law as it is,"[110] a noticeably misleading observation that came to be omitted in subsequent editions.[111]

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. Numerous courts have read their declaratory tone as 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 their descriptive and normative provisions since the distinction breaks down for a primary source.[112] This is especially true

106. 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).

107. See ALI, Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 3 (2005) [hereinafter ALI, Capturing the Voice 2005].

108. Id. at 4.

109. ALI, Capturing the Voice 2015, supra note 11, at 4.

110. ALI, Capturing the Voice 2005, supra note 107, at 4.

111. ALI, Capturing the Voice 2015, supra note 11, at 5.

112. See, e.g., Alfaro-Huitron v. Cervantes Agribusiness, 982 F.3d 1242, 1250 (10th Cir. 2020) (noting that various Restatements have been treated as authoritative in the courts of

when a Restatement deals with an issue for which the court lacks directly applicable precedent.[113]

To be sure, a few courts have recognized the paradoxes underlying the Restatements' authoritativeness and cautioned against treating them as such without further inquiry.[114] 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.[115]

New Mexico); Ackerman v. Sobol Fam. P'ship, 4 A.3d 288, 300 (Conn. 2010) (noting that the Restatement has served as authoritative support in many decisions of the Supreme Court of Connecticut); Gianetti v. Norwalk Hosp., 779 A.2d 847, 854 (Conn. App. Ct. 2001), aff'd in part, rev'd in part, 266 Conn. 544 (2003) (noting that Connecticut appellate courts frequently rely on the Restatement as an authoritative source); Sahgal v. DMA Elec., Inc., 270 P.3d 1230, 1230 (Kan. Ct. App. 2012) (noting that Kansas appellate courts frequently rely on the Restatement as an authoritative source); Venaglia v. Kropinak, 956 P.2d 824, 829 (N.M. App. 1998) (noting that the Restatement provides authoritative guidance on the common law); Nationwide Mut. Ins. Co. v. Hassinger, 473 A.2d 171, 175 (Pa. Super. Ct. 1984) (noting that courts in Pennsylvania frequently rely on the Restatement as an authoritative source); Dep't of Pub. Assistance v. Hurlbutt, 39 Pa. D. & C. 466, 469 (Ct. Com. Pl. 1941) (explaining that the court would accept the Restatement in the absence of authoritative law in Pennsylvania).

113. See, e.g., Wilson v. Good Humor Corp., 757 F.2d 1293, 1312 (D.C. Cir. 1985) (Bork, J., concurring) ("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."); DeLoach v. Alfred, 952 P.2d 320, 322 (Ariz. Ct. App. 1997) ("[W]e follow the Restatement in the absence of prior Arizona decisions.").

114. See Barsness v. Gen. Diesel & Equip. Co., 383 N.W.2d 840, 842 (N.D. 1986) (noting the fallacy of "adopt[ing]" a Restatement provision); Coulter Prop. Mgmt., Inc. v. James, 970 P.2d 209, 214 n.4 (Or. 1998) (requiring caution in treating Restatements as authoritative); Anderson v. Fisher Broad. Co., 712 P.2d 803, 808 (Or. 1986) ("The exact formulations of the Restatements are not necessarily authoritative statements of the law of this state . . . .").

115. *Barsness*, 383 N.W.2d at 842 n.1 (quoting Restatment (Second) of Torts, at VII (Am. L. Inst. 1965)).

Such statements of caution and precision are exceptionally rare, with a vast majority of courts doing just the opposite and accepting (or "adopting"[116]) 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.[117] 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."[118] 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.[119]

The annotations generally list cases that have cited to or quoted specific Restatement provisions.[120] All the same they do not specify the form of reliance placed by such courts on the Restatement in citing to or quoting them.[121] 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.[122] 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

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116. See, e.g., Jaiguay v. Vasquez, 948 A.2d 955, 973 n.21 (Conn. 2008) (adopting the Restatement as law); Ludman v. Davenport Assumption High Sch., 895 N.W.2d 902, 910 (Iowa 2017) (same); Dyer v. Me. Drilling & Blasting, Inc., 984 A.2d 210, 212 (Me. 2009) (same); Freeman v. Hoffman-La Roche, Inc., 618 N.W.2d 827, 842 (Neb. 2000) (same); Reitmeyer v. Sprecher, 243 A.2d 395, 398 (Pa. 1968) (same); Kessler v. Mortenson, 16 P.3d 1225, 1228 (Utah 2000) (same); Fox v. Pretasky, 501 N.W.2d 471, 471 (Wis. Ct. App. 1993) (same); Distad v. Cubin, 633 P.2d 167, 176 (Wyo. 1981) (same).

117. See ALI, The Restatement in the Courts (1934).

118. Id. at 1.

119. See ALI, Restatement in the Courts (1976).

120. See Restatement (Second) of Property § 6.1 (Am. L. Inst. 1983).

121. Id.

122. See, e.g., Rampone v. Wanskuck Bldgs., Inc., 227 A.2d 586, 588 (R.I. 1967) (noting that an increasing number of courts have modified the common law in accordance with the Restatement); Holtzscheiter v. Thomson Newspapers, Inc., 506 S.E.2d 497, 512 (S.C. 1998) (same); Johnson v. Yousoofian, 930 P.2d 921, 925 (Wash. Ct. App. 1996) (same).

reality before 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."[123] 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."[124] *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 "black letter" since it is placed in boldface.[125] Every Restatement's black letter 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 lawmaking is something that is taken for granted today. While initially associated with the actual content of laws, this commitment to publicity and openness has over the years come to be extended to the very process of lawmaking.[126] Transparency in lawmaking has come to be seen as particularly crucial to the public legitimacy of laws.[127] Even within this understanding, legislatures pride themselves in being the "most transparent" of any "governmental 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]

123. Founding Committee Report, supra note 12, at 19.

124. Id. at 20.

125. ALI, Capturing the Voice 2015, supra note 11, at 36 ("It is called black letter because it is highlighted in boldface type.").

126. Walter J. Oleszek, Cong. Rsch. Serv., R42108, Congressional Lawmaking: A Perspective on Secrecy and Transparency 1 (2011).

127. Id.

the confidence of the public."[128] 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.[129] 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.[130]

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.[131] 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.

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.[132] The process of restating an area of law begins with the selection of one or more reporters for the project by the ALI Council.[133] The reporters are chosen for their expertise in a field and remain responsible for drafting the text of the Restatement.[134] The ALI also appoints a committee of experts for each Restatement, known as the project advisers.[135] The advisers play an entirely advisory role and can make

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128. Id. (citation omitted); see also Elizabeth Goitein, The New Era of Secret Law 28–29 (2016) ("If it emerged that there was a secret volume of the U.S. Code containing the laws Congress chose not to publish, the scandal would rival Watergate.").

129. Oleszek, supra note 126, at 1.

130. See David E. Pozen, Transparency's Ideological Drift, 128 Yale L.J. 100, 154–59 (2018) (documenting the concerns with transparency that have moved it away from being understood as an unencumbered good).

131. See Parrillo, supra note 27, at 280–81 ("[L]egislative history could be of great value in guiding . . . 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.").

132. For a general overview of the ALI's elitist orientation at its founding, see White, supra note 8, at 15.

133. See Founding Committee Report, supra note 12, at 48.

134. Id. at 54 ("The reporters will be selected because they already know a great deal concerning their topics.").

135. ALI, Capturing the Voice 2015, supra note 11, at 15–16.

suggestions for the improvement of a Restatement's text.[136] The reporters, however, are free to disregard these suggestions altogether.[137] Self-selected groups of ALI members are also free to offer suggestions to the reporters in a similar vein.[138] The reporters then present their draft to the ALI Council, which has actual oversight over the reporters' work product.[139] The Council must then approve (or disapprove) a project draft, for it to move forward.[140] Once the Council approves of a draft, it is then placed before the entire membership of the ALI for a vote.[141] If a majority of the membership votes to adopt a draft (or portions of it), the adopted draft becomes final—and usable by courts.[142]

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.[143] They are instead accessible only to the ALI's membership and the project's advisers. Additionally, and perhaps more 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.[144] 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 published draft since the vote routinely authorizes reporters to make any necessary amendments, thus operating as little more than an in-principal approval.[145] The drafting "history" of a project, so to speak, remains secret.

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136. Id.

137. Id. (noting how the advisers have "no authority" over the reporters or the direction of the project).

138. Id. at 16–17.

139. Id.

140. Id. at 17–18.

141. Id.

142. Id. at 19.

143. It is worth noting that insofar 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 Macey, supra note 8, at 1225 (describing the evolution of interest groups' incentives to lobby the ALI); Alan Schwartz & Robert E. Scott, The Political Economy of Private Legislatures, 143 U. Pa. L. Rev. 595, 648–51 (1995) (finding that the ALI process is equally susceptible to such influence).

144. 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 DeMott, supra note 25, at 75, 79, 79 n.17.

145. 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

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 black letter changes the law using its declaratory tone, and a court is then forced to both identify the change and 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* generated a dissenting and concurring opinion by Justice Scalia, which called into question the nature and value of Restatements as sources of law.[146] Central to his pointed critique was section 39 of the Restatement (Third) of Restitution and Unjust Enrichment.[147]

Section 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.[148] In such situations, section 39 contemplates awarding the non-breaching party the profits earned by the breaching party.[149] 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.[150] One such crucial difference was the element of "opportunistic breach." Whereas earlier versions of section 39 required a showing that the breach was opportunistic—that is, 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.[151] A comment accompanying the final published

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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." Frequently Asked Questions, supra note 57.

146. 574 U.S. 445, 475–76 (2015) (Scalia, J., concurring in part and dissenting in part).

147. See id.; Restatement (Third) of Restitution & Unjust Enrichment § 39 (Am. L. Inst. 2010).

148. Restatement (Third) of Restitution & Unjust Enrichment § 39(1).

149. Id.

150. Compare Restatement (Third) of Restitution & Unjust Enrichment (Am. L. Inst., Tentative Draft No. 4, 2005), with Restatement (Third) of Restitution & Unjust Enrichment (Am. L. Inst., Tentative Draft No. 7, 2010).

151. Restatement (Third) of Restitution & Unjust Enrichment (Am. L. Inst., Tentative Draft No. 7, 2010); see also Restatement (Third) of Restitution & Unjust Enrichment § 39(2) (Am. L. Inst., Tentative Draft No. 4, 2005) (expressly defining an "opportunistic" breach).

version confirms this omission, noting how "the motivation of the breaching party" does not need to be proven.[152] 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 section 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.[153] 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 section 39.[154] 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 Clarence Thomas, who characterized the entire provision as a "novel extension" that was unsupported in the case law, itself a questionable assertion.[155] In the dissent's view, a reckless (i.e., knowing) breach was not "deliberate" since it lacked an opportunistic motive, the obvious purpose behind section 39.[156] Therefore, the dissent implicitly 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 section 39 would have undoubtedly benefited from a clear record shedding light on how section 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 (section 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 section 39—the only legislative history of the

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152. Restatement (Third) of Restitution & Unjust Enrichment § 39 cmt. b ("[T]here is no requirement under this section that the claimant prove the motivation of the breaching party.").

153. Kansas v. Nebraska, 574 U.S. 445, 462 (2015) (describing how *Comment f* accompanying section 39 explains the state of mind required for deliberate behavior).

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

155. Id. at 483 (Thomas, J., dissenting).

156. See id. at 483–84.

provision that exists—it would have been of little use.[157] That record reveals queries from multiple members about the provision's use of "deliberate" to describe the breach, none of which prompted the reporter to clarify the term.[158] Further, the membership's final vote allowed the reporter to make additional changes to the provision,[159] which produced a different structure altogether,[160] rendering any discussion or commentary non-probative of the membership's *intent* in adopting it.

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.[161] 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; they are free to consult any number of sources regardless of legislative direction to the contrary.[162] 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.[163] 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 and notes by

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157. See Discussion of Restatement of the Law Third, Restitution and Unjust Enrichment, 82 A.L.I. Proc. 249, 250–74 (2005).

158. Id. at 253–54, 261–62, 267, 268.

159. Id. at 296–97.

160. Compare id. at 252–53 (outlining the structure considered at the meeting), with Restatement (Third) of Restitution & Unjust Enrichment § 39 (Am. L. Inst. 2011).

161. See, e.g., Discussion of Tentative Draft, Agency Restatement No. 2, 5 A.L.I. Proc. 283, 304 (1927) [hereinafter ALI, Discussion of Tentative Draft 1927] ("[T]he Section is the Statute, the Restatement of the law, and the comments are mere advice.").

162. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 674 (1990) (explaining that judges have discretion as to which sources they consult when interpreting statutes); Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 11 n.47 (1993) (noting that the legislature generally cannot dictate methods of statutory interpretation); Alan R. Romero, Note, Interpretive Directions in Statutes, 31 Harv. J. Legis. 211, 225 (1994) (discussing constitutional protections of the judicial function of statutory interpretation).

163. See, e.g., Ark. Code Ann. § 1-2-102 (2019) (referencing annotations and other interpretive guides published along with enacted statutory text); Ga. Code Ann. § 1-1-1 (2021) (same).

denying the latter any legal effect.[164] 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 black-letter provisions. In addition to tersely worded black-letter 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 black letter in a Restatement are "Comments." Comments seek to explain the meaning of the black letter 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."[165] They are therefore meant to "clarify[] the black letter's meaning and scope" by "mak[ing] explicit what is only implicit or suggested" by the statute-like text.[166]

Being expository in nature, Comments function as the principal interpretive guide to the black-letter text. All the same, they are produced, approved, adopted, and published through the exact same process as the black letter, and are thus considered "the official product" of the ALI.[167] In so being approved and adopted in identical fashion as the black letter, Comments occupy a somewhat peculiar position in the Restatements. On the one hand, they embellish the black letter with context and commentary. Since they are not written with an eye toward statutory "precision," they are often fairly elaborate and descriptive in nature. Yet on the other hand, they function as independent authority within the Restatement since, as a formal matter, their "authority" is no less than that of the black letter, 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 black letter on authoritativeness. Inasmuch as the black letter 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 black letter.[168] Nevertheless, in being adopted into the body of a Restatement, courts have come

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164. Ark. Code Ann. § 1-2-115(c); Ga. Code Ann. § 1-1-1(c).

165. ALI, Capturing the Voice 2015, supra note 11, at 42.

166. Id.

167. Id.

168. For an early recognition of this, see ALI, Discussion of Tentative Draft 1927, supra note 161, at 304 ("[T]he Section is the Statute, the Restatement of the law, and the comments are mere advice.").

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.[169] The court was called upon to apply section 402A of the Restatement (Second) of Torts, which deals with the special liability for the sale and manufacture of an unreasonably dangerous product sold in a defective condition.[170] *Comment k* accompanying section 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.[171]

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.[172] 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 section 402A.[173] 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.[174] Finally, it 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.[175]

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."[176] In their view, the Comments 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 that needed to itself be interpreted.[177]

While few courts have overtly applied the techniques of statutory interpretation to Comments in the manner that *Pollard* did, most courts,

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169. 793 S.W.2d 394, 397 (Mo. Ct. App. 1990) (en banc).
170. Restatement (Second) of Torts § 402A (Am. L. Inst. 1965).
171. Id. cmt. k (emphasis omitted).
172. *Pollard*, 793 S.W.2d at 399.
173. Id. at 400.
174. See id.
175. Id.
176. Id. at 406 (Smith, J., dissenting).
177. Id.

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 black letter, an approach that is defensible given the manner in which Comments are produced and included in the text of Restatements.[178] What was thus meant to be an extrinsic aid to interpreting the black letter 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 *Style 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.[179] All the same, it notes that some courts have been unwilling to treat Comments as "germane to the interpretation" of the black letter, and cautions against using Comments to "fill in gaps or alter or modify the meaning or scope of proposed [black-letter] language."[180] 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 ULC, where the utility of similarly framed comments has remained a topic of debate among scholars and courts.[181]

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178. See, e.g., Priv. Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc., 296 F.3d 308, 314 (4th Cir. 2002) (discussing reasons to adopt a comment into law); Ellis v. Coleman Co., 232 F.3d 894, 2000 WL 1131893, at *2 (9th Cir. Aug. 9, 2000) (unpublished table decision) (discussing the potential adoption of a comment by the state of Alaska); Bifolck v. Philip Morris, Inc., 152 A.3d 1183, 1187 (Conn. 2016) (acknowledging the adoption of a comment as law); Delaney v. Deere & Co., 999 P.2d 930, 946 (Kan. 2000) (rejecting the adoption of a comment); Larkin v. Pfizer, Inc., 153 S.W.3d 758, 770 (Ky. 2004) (adopting a comment into law); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 337 (Tex. 1998) (rejecting the adoption of a comment); Grundberg v. Upjohn Co., 813 P.2d 89, 92 (Utah 1991) (adopting a comment into law).

179. ALI, Capturing the Voice 2015, supra note 11, at 42.

180. Id.

181. The use of comments as interpretive devices in legislation produced by the ULC proved to be controversial. For a useful overview of the controversy in relation to the U.C.C., see Sean Michael Hannaway, Note, The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code, 75 Cornell L. Rev. 962 (1990) (arguing that courts ought to defer to the guidance the Comments offer as to the proper application of Code provisions). The principal drafter of the U.C.C., Karl Llewellyn, emphasized the importance of comments as a way of ensuring that courts interpreted and consistently applied the open-ended language of the statute. Id. at 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(1)–(2) (Am. L. Inst. & Unif. L. Comm'n, May 1949 Draft) (directing that the U.C.C. "shall be liberally construed and applied to promote its underlying reasons, purposes, and policies," and designating only the "Official Comments" as the source that "may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act"). This provision ultimately proved to be quite controversial. See ALI, Consideration of Proposed Final Draft of the Uniform Commercial Code, 27

In thus seeking to facilitate the interpretation of the black letter, Comments routinely introduce new content into a Restatement by extending or limiting the application of the black letter. The Comment at issue in *Pollard* is an apt illustration of this phenomenon. The supposed precision of the black letter 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.[182]

2. *Reporter's Notes.* — Quite independent of Comments, Restatements contain an additional level of commentary that is also meant to aid courts in their interpretation of the black letter: Reporter's Notes. These Notes typically contain a discussion of the sources that the reporters relied on in drafting the black letter and Comments, and any other details that they were unable to include in the preceding sections for being "too peripheral" to their substance.[183] What sets Reporter's 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 black letter and Comments.[184] 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.[185] The idea that the latter is

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A.L.I. Proc. 1, 7–22 (1950) (documenting some of the controversy during the discussion and debate over the provision).

182. See Jonathan R. Siegel, The Use of Legislative History in a System of Separated Powers, 53 Vand. L. Rev. 1457, 1460–61 (2000) (arguing for such enactment but recognizing its problems); see also John F. Manning, Putting Legislative History to a Vote: A Response to Professor Siegel, 53 Vand. L. Rev. 1529, 1533 (2000) (arguing that such enactment would be unconstitutional).

183. ALI, Capturing the Voice 2015, supra note 11, at 45.

184. See id.

185. For courts relying on Reporters Notes, see Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 713 (2021) (citing a Reporter's Note as evidence in the Court's discussion of the expropriation exception); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318–19 (2005) (referring to a Reporter's Note as evidence of how some jurisdictions treat violations of federal statutes as negligence per se); Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295, 1298 (Fed. Cir. 1986) (including several references to Reporter's Notes to support the court's reasoning regarding landlord–tenant law); Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 260 (Ill. 2007) (citing a Reporter's Note to support the court's assertion regarding strict liability); Bongaards v. Millen, 793 N.E.2d 335, 351 (Mass. 2003) (citing the Reporter's Note to support the court's proposition); Wells Fargo Bank, NA

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.[186] 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,[187] Restatements do not attempt to demarcate the Reporter's Notes as less important within their text. Here, too, 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 black letter, the Restatements utilize imprecise, expository descriptions to augment the black letter in the rest of the document. Indeed, these non-black-letter parts constitute an overwhelmingly large portion of the Restatement as a whole. And since they have the same "authoritativeness" as the black letter, they function as an unstated safety valve for Restatements, enabling them to enter 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 black letter 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

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v. SBC IV REO, 896 N.W.2d 821, 838 (Mich. App. Ct. 2016) (citing and adopting the approach taken by the Reporter's Note).

186. See, e.g., Estate of McFarlin v. State, 881 N.W.2d 51, 59–60 (Iowa 2016); id. at 69 n.9 (Hecht, J., concurring in part) ("The reporter's note, standing alone, is not nearly as significant as the majority suggests.").

187. See, e.g., Ark. Code Ann. § 1-2-115(c) (2019) (clarifying that all "title, chapter, and subchapter analyses, historical citations, annotations, and notes" included in the code are not part of the law); Ga. Code Ann. § 1-1-1(c) (2021) (indicating matter included in the text that should have no bearing on the law).

required restating—was judge-made law, i.e., the common law.[188] 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 black letter.

In essence, Restatements attempt to informally *codify* judge-made law into precise rules. This was widely recognized to be true from their very inception.[189] 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.[190] This inevitably involved digesting case law into "precise statements" that captured the rule or principle at issue in general terms, while leaving a good amount of discretion to judges in applying it.[191] 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.[192]

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 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 toward 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"[193] is routinely quoted. 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

188. See Founding Committee Report, supra note 12, at 13 (discussing the "great volume of case law" and the need to analyze the "thousands of decisions" as the basis for Restatements).

189. See, e.g., Nathan M. Crystal, Codification and the Rise of the Restatement Movement, 54 Wash. L. Rev. 239, 265 (1979) (stating that the Restatement movement was a continuation and modification of the nineteenth-century codification movement); Hessel Yntema, The Restatement of the Law of Conflict of Law, 36 Colum. L. Rev. 183, 198 (1936) (describing the Restatement as a mode of promulgation).

190. Founding Committee Report, supra note 12, at 19–20.

191. Id. at 20–21.

192. Id. at 21.

193. Oliver Wendell Holmes, Jr., Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1, 1 (1870).

> 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.[194]

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.[195] 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 . . . ."[196]

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 of a judicial opinion as though it was a statute.[197] The origins of this canon can be traced back to Chief Justice Marshall's opinion in *Cohens v. Virginia*, in which 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."[198] 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.[199]

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. As described above, the substantive concern is 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-

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194. Id. at 1–2.

195. See Founding Committee Report, supra note 12, at 21.

196. Clark, supra note 4, at 646; see also James Gordley, European Codes and American Restatements: Some Difficulties, 81 Colum. L. Rev. 140, 156 (1981) ("[I]t is hard to make the rules any clearer than the thought behind them.").

197. See, e.g., Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 35 (2012) ("We resist reading a single sentence unnecessary to the decision as having done so much work."); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."); Reiter v. Sonotone Corp., 442 U.S. 330, 341–42 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with the language of a statute.").

198. 19 U.S. (6 Wheat.) 264, 399 (1821).

199. E.g., Illinois v. Lidster, 540 U.S. 419, 424 (2004).

made law into rules.[200] 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, that is, 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 case law 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.

While the substantive concern with accuracy is undoubtedly alleviated to some extent by the Comments and Notes accompanying Restatement black letter, it nevertheless cautions courts against treating the black letter as equivalent to statutory text. Perhaps more importantly, insofar as courts remain willing to rely on such black letter 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 black letter rather than taking the synthetic black-letter provision as an accurate distillation and representation of such jurisprudence. Further, insofar as the black letter—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] the language of a statute."[201]

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,

200. 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) (codified at 15 U.S.C. § 1051 et seq. (2018)); see also Inwood Laby's, Inc. v. Ives Laby's, 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").

201. *Reiter*, 442 U.S. at 341.

Restatement black letter 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 and 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.

FIGURE 1: SPECTRUM OF RELIANCE ON RESTATEMENTS

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"[202] within the relevant

202. See, e.g., Alfaro-Huitron v. Cervantes Agribusiness, 982 F.3d 1242, 1250 (10th Cir. 2020) ("New Mexico courts have treated the Restatement (Second) of Agency (1958) and, more recently, the Restatement (Third) of Agency (2006), as authoritative on various aspects of agency law."); DeCoursey v. Am. Gen. Life Ins. Co., 822 F.3d 469, 477 (8th Cir. 2016) ("We think that the Missouri Supreme Court would find the Restatement's guidance persuasive, especially since that court frequently regards Restatements as authoritative . . . ."); Ackerman v. Sobol Fam. P'ship, 4 A.3d 288, 300 (Conn. 2010) ("Restatements of the Law . . . have served as authoritative support for many of our holdings."); Foley v. Lacasse, No. CV010086449S, 2002 WL 31686680, at *2 (Conn. Super. Ct. Nov. 14, 2002) ("Section 129 of the Restatement (Second) [is] recognized as authoritative by our Supreme Court . . . ."); Randazzo v. Cochran, No. CV K16C-07-024 JJC, 2018 WL 1037455, at *2 (Del. Super. Ct. Feb. 22, 2018) ("[T]he Delaware Supreme Court recognized Section 220 of the *Restatement (Second) of Agency* . . . as an authoritative source for guidance."); Carr v. Vannoster, 281 P.3d 1136, 1144 (Kan. Ct. App. 2012) ("The Kansas Supreme Court has regularly relied upon the

jurisdiction, or that it "is the law"[203] 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.[204] Once such assertions are made, the court at issue—and indeed later courts which treat the prior opinion as binding on them—make direct recourse to the Restatement provision as applicable law, not just to the precedent.

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 "under" a black-letter provision of a Restatement, even when that provision itself is merely synthesizing prior case law.[205] With it being

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Restatement (Second) of Torts for authoritative guidance in fashioning controlling doctrine . . . ." (quoting Estate of Belden v. Brown County, 261 P.3d 943, 962 (Kan. 2011))); Monsanto Co. v. Reed, 950 S.W.2d 811, 812 (Ky. 1997) ("Section 388 of the Second Restatement of Torts[] [is] recognized as authoritative . . . ."); Venaglia v. Kropinak, 956 P.2d 824, 829 (N.M. 1998) ("For authoritative guidance on the common law we look to the Restatement."); Nationwide Mut. Ins. Co. v. Hassinger, 473 A.2d 171, 175 (Pa. 1984) ("The charge to the jury with regard to intent accurately recites the Restatement (Second) of Torts, Section 8A, which has been cited as authoritative in Pennsylvania.").

203. See, e.g., Meyers v. Pittsburgh S.S. Co., 165 F.2d 642, 644 (6th Cir. 1948) ("This appears to be the conclusion reached in the Restatement . . . and is the law of Ohio."); Addie v. Kjaer, 51 V.I. 836, 844 (D.V.I. 2009) ("[T]he Restatement's position is the law of the Virgin Islands."); Alcombrack v. Ciccarelli, 363 P.3d 698, 702 (Ariz. Ct. App. 2015) ("Restatement Second § 322 clearly is the law in Arizona."); Smartt v. Lamar Oil Co., 623 P.2d 73, 75 (Colo. App. 1980) (agreeing that a particular Restatement is the law in Colorado); Scott v. Kay, 227 A.2d 572, 574 (Del. 1967) ("We are satisfied that the rule of the Restatement is the law in Delaware."); Van Ingen v. Wentz, 70 Pa. D. & C.2d 555, 558 (Ct. Com. Pl. 1975) (noting a section of the Restatement as the law of Pennsylvania).

204. For example, the code of the Virgin Islands provides 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.C. § 4 (2019); see also Bank of Am. v. J. & S. Auto Repairs, 694 P.2d 246, 248 (Ariz. 1985) ("In the absence of contrary authority Arizona courts follow the Restatement of the Law."); Estate 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) ("[R]eliance on the Restatement occurred only after we acknowledged that restatement law could only apply in the absence of Commonwealth written law.").

205. See, e.g., Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348, 1354 (D. Md. 1982) (concluding that a tort liability arose under a particular Restatement); Harvey v. Fresno Cnty. Econ. Opportunities Comm'n, No. F045399, 2005 WL 2108135, at *8 (Cal. Ct. App. Sept. 1, 2005) (noting sections of the Restatements (Second) of Torts as providing that a person may be liable for certain acts of negligence); Estate of Massad ex rel. Wilson v. Granzow, 886 So. 2d 1050, 1051 (Fla. Dist. Ct. App. 2004) ("[T]he amended complaint stated a cause of action under section 324 of the Restatement . . . ."); Smith ex rel. Smith v. George, 534 N.E.2d 224, 226 (Ill. App. Ct. 1989) (acknowledging a theory of liability arising under the Restatement (Second) of Torts); Larsen v. Phila. Newspapers, Inc., 543 A.2d 1181, 1183 (Pa. Super. Ct. 1988) (evaluating whether the appellant "plead[s] facts giving rise to a cause of action under . . . the Restatement (Second) of Torts"); Cahalin v. Rebert, 10 Pa. D. & C.3d 142, 147 (Ct. Com. Pl. 1979) (acknowledging a cause of action arising under the Restatement (Second) of Torts); Olney v. Beaman Bottling Co., 418 S.W.2d 430, 432 (Tenn.

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 black letter with little additional scrutiny. In this framing, the relevant Restatement provision is treated in identical manner as an ordinary statute.[206]

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.[207]

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 decisionmaking, 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 directly (and sometimes exclusively) to the black letter of the Restatement for a statement of the law,

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1967) (same); Donahue v. Polaris Indus., Inc., No. 02-11-00279-CV, 2012 WL 1034908, at *2 (Tex. App. Mar. 29, 2012) (same).

206. For language used by courts when identifying an action or rule originating in a statute, see, e.g., Fry ex rel. E.F. v. Napoleon Cmty. Schs., 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) (beginning the opinion by noting that the Court needed to "decide whether respondent . . . under the Lanham Act").

207. See, e.g., Jaiguay v. Vasquez, 948 A.2d 955, 973 n.21 (Conn. 2008) ("[W]e adopt the test from §§ 6 and 145 of the Restatement . . . ."); Ludman v. Davenport Assumption High Sch., 895 N.W.2d 902, 910 (Iowa 2017) (adopting an analysis from a Restatement); N. Country Villas Homeowners Ass'n v. Kokenge, 163 P.3d 1247, 1249 (Kan. App. Ct. 2007) ("We adopt Restatement (Third) of Property . . . ."); In re Estate of Campbell, 876 P.2d 212, 216 (Kan. App. Ct. 1994) (expressly adopting a Restatement rule); Dyer v. Me. Drilling & Blasting, Inc., 984 A.2d 210, 215 (Me. 2009) ("We adopt today the Second Restatement's imposition of strict liability for abnormally dangerous activities . . . ."); Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1004 (Mont. 2000) (adopting a Restatement's analysis of conflict of laws); St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 194 (Nev. 2009) ("[W]e adopt the Restatement rule."); Lydia v. Horton, 583 S.E.2d 750, 751 (S.C. Ct. App. 2003) (noting the lower court adopted certain sections of the Restatement); Kessler v. Mortenson, 16 P.3d 1225, 1228 (Utah 2000) (adopting a Restatement rule); Birchwood Land Co. v. Krizan, 115 A.3d 1009, 1015 (Vt. 2015) (same); Bank of Am., N.A. v. Prestance Corp., 160 P.3d 17, 29 (Wash. 2007) (same); Distad v. Cubin, 633 P.2d 167, 175 n.7 (Wyo. 1981) (same).

abjuring any analysis of the adopting court's actual application of the provision in its case.[208]

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 black letter 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.[209] This process goes on incrementally and generatively over time in the common law, in turn both constraining and liberating subsequent courts.[210]

When a court instead treats a black-letter provision of a Restatement as law and cites to it as such, subsequent courts routinely eschew any scrutiny of how the black letter is actually applied in an individual case, and instead treat the abstract (statute-like) language of the black letter 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 black letter as law, in short, stymies traditional common law accretion in a fundamental way.[211]

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208. 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) (providing an example where the case "require[d] no greater caution than is called for by section 339" per the Supreme Court of Pennsylvania).

209. For a well-known account, see generally Benjamin N. Cardozo, The Nature of the Judicial Process 20–23 (1921) [hereinafter Cardozo, Nature of the Judicial Process] (describing the process of deciding cases to include when a judge "must then fashion law for the litigants before [her]").

210. See Edward H. Levi, An Introduction to Legal Reasoning 2–4 (1948).

211. See generally Adams, The Folly of Uniformity, supra note 9 (discussing how the Restatements are used as the default common law in the Virgin Islands, which hindered a natural development of common law in that jurisdiction). Kristen 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." Id. at 426 (internal quotation marks omitted) (quoting V.I.C. Code § 4 (2019)). Adams argues that such adoption has interfered with local courts' ability to create

FIGURE 2: ALTERATION IN COMMON LAW RULE DEVELOPMENT

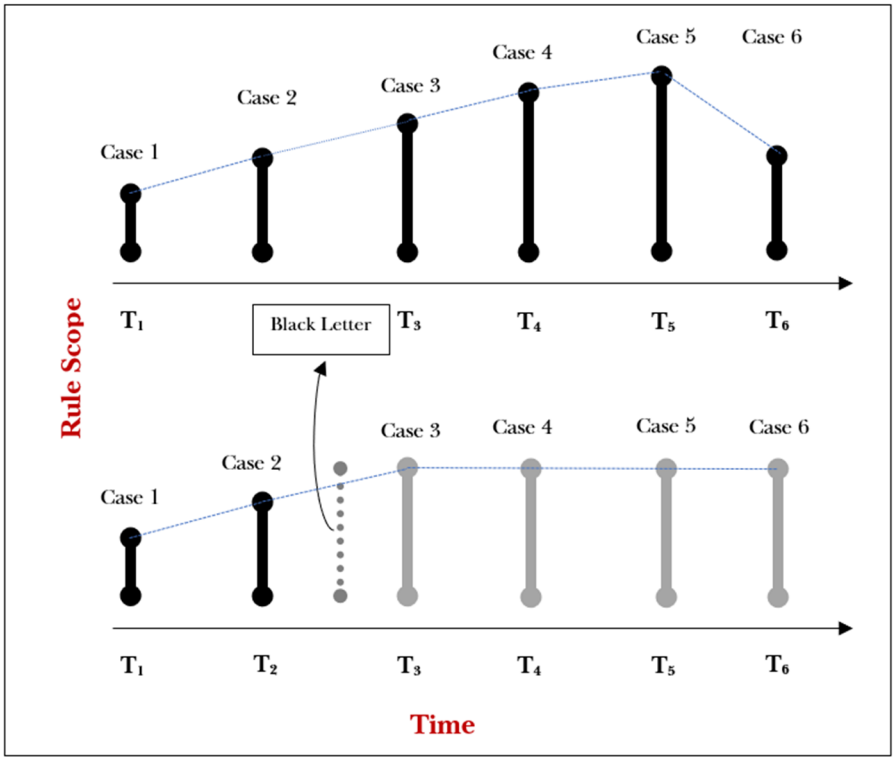

Figure 2 identifies this effect graphically. The top graph in the figure shows the generally linear process through which a common law rule grows incrementally over time. In each successive case, a court has the ability to modify (however slightly) the scope of the decision rule that it draws from the precedent so as to adapt it to the relevant facts of the dispute before it. The lower graph reveals how this changes when a black-letter rule is formally adopted by a common law court (Case 3), or treated as the authoritative rule of decision. Courts subsequent to such adoption or treatment (Cases 4 to 6) find their ability to adapt the decision rule to be

judge-made law and interrupted "the natural development of Virgin Islands law." Adams, supra note 9, at 424. 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. Unlike in wholesale contexts where it is exogenous (i.e., legislative), the constraint in sporadic situations is internal to the common law process. 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.

significantly curtailed, with the effect that the abstract (and precise) formulation of the black-letter substitutes for the case-by-case adaptation with a uniform rule.

As discussed earlier, section 339 of the Restatement of Torts is an example of this phenomenon.[212] As noted, section 339 was considered a landmark shift in the law relating to the liability of landlords for trespassing children.[213] 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."[214] 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."[215] This "adoption" of section 339 gave it an altogether independent authoritativeness.

Even though section 339 was not a significant departure from prior case law (in Pennsylvania), its formal adoption gave it the facade of an altogether new rule.[216] Consequently, later opinions confronting the issue eschewed any reliance on prior case law addressing the point and focused entirely on the wording of section 339 to apply it to their facts.[217] To the extent that they looked to precedent, it was principally to buttress their reading and interpretation of section 339, an approach that has continued for multiple decades since.[218] Section 339 therefore became the law of Pennsylvania—through the common law—even though its mechanism of authority operates independent of the common law method, effectively stripping courts of the power to modulate the scope of the rule as circumstances demand. Thus, for instance, if a later court wanted to alter an

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212. See supra notes 93–97 and accompanying text.

213. William L. Prosser, supra note 95, at 438–40; see also Green, supra note 95, at 10 n.33 ("The Restatement of Torts, Section 339, was a great factor in influencing many courts to change or clarify their doctrines.").

214. Allen v. Silverman, 50 A.2d 275, 277 (Pa. 1947) (noting how section 339 was "adopted" in earlier precedents from 1942 and 1944).

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

216. Gladstone, supra note 208, at 565–66.

217. See Rush v. Plains Twp., 89 A.2d 200, 201 (Pa. 1952) (agreeing with a prior case that the Restatement section is the relevant law to be applied); Verrichia v. Soc'y Di M. S. Del Lazio, 79 A.2d 237, 238–39 (Pa. 1951) (following the Restatement of Torts approach noting that the court has "consistently" followed that rule and "expressly overruled all cases contrary to it" following the first adoption); McGuire v. Carey, 79 A.2d 236, 236–37 (Pa. 1951) (per curiam) (applying the Restatement of Torts to the facts without an explanation); Gallagher v. Frederick, 77 A.2d 427, 429 (Pa. 1951) (referring to the "rule set forth in § 339 of the Restatement, Torts, which is law in this State"); Bruce v. Hous. Auth., 76 A.2d 400, 402 (Pa. 1950) (noting that the section of the Restatement of Torts "has been cited, with approval, numerous times by this Court" before applying it to the facts).

218. See Jennings v. Glen Alden Coal Co., 87 A.2d 206, 208 (Pa. 1952) (referring to *Verrichia* to explain that "[a]ll these requirements must be met before a possessor of land is liable for injuries to trespassing children"); G.W.E. v. R.E.Z., Jr., 77 A.3d 43, 46–48 (Pa. Super. Ct. 2013) (relying on multiple cases to guide the interpretation of section 339).

aspect of this rule that was inconsistent with the language of section 339, it would now have to *un*-adopt the provision rather than just incrementally modify the law.

A more recent example from the same jurisdiction highlights the ossificatory consequences of courts' reliance on Restatement black letter 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.[219] Early on, courts adopted the logic of English common law and sided with landlords.[220] Since an owner's liability to nonowners 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.[221] While undoubtedly formalist, this reasoning nevertheless formed the dominant position in the early twentieth century.[222] In its early cases, the Supreme Court of Pennsylvania endorsed this position, following the logic of the early common law.[223]

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

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219. See, e.g., Jacobson v. Leventhal, 148 A. 281, 281 (Me. 1930) (noting that the landlord is liable for breach of contract, but not tort, for failing to repair the defective cellar stairway); Miles v. Janvrin, 82 N.E. 708, 708 (Mass. 1907) (providing an example of a tort for personal injuries where the owner said he would repair the broken steps during the inspection process, but failed to make the repairs); Dustin v. Curtis, 67 A. 220, 222 (N.H. 1907) (stating that there is "no duty . . . imposed by law upon a landlord to make repairs upon leased premises for the benefit of his tenant"); Cullings v. Goetz, 176 N.E. 397, 397 (N.Y. 1931) (providing an example of an oral lease for a garage and a suit where the plaintiff sued the lessee of the garage for injuries caused by the sliding garage doors); Harris v. Lewistown Tr. Co., 191 A. 34, 35 (Pa. 1937) (describing a suit where damages are sought for the collapse of a cellar stairway because the tenant principally relied on a promise by the agent of the owner to repair the stairway at the time of negotiation of the oral lease).

220. Courts usually traced this logic back to the case of Cavalier v. Pope [1906] AC 428 (HL) 433 (Eng.), where the House of Lords held that "[t]he power of control necessary to raise the duty . . . implies something more than the right or liability to repair the premises . . . . It implies the power and the right to admit people to the premises and to exclude people from them."

221. *Harris*, 191 A. at 35.

222. Id. ("The general rule in this country, and also in England, is that an agreement to repair does not impose upon the owner a liability in tort at the suit of the tenant or others lawfully on the land in the right of the tenant . . . .").

223. Id. at 36 ("We adopt the prevailing doctrine because it is sound in reason and supported by a preponderance of juridical opinion in this country and in England."); see also Kolojeski v. John Deisher, Inc., 239 A.2d 329, 330 (Pa. 1968) (noting that a landlord has no duty to repair leased premises, and that a tenant takes the premises as they find it); Hayden v. Second Nat'l Bank, 199 A. 218, 219 (Pa. 1938) (noting the general rule that a landlord who is entirely out of possession is not liable for bodily harm caused to the tenant).

and darling" of the common law, rather than its "stepchild."[224] Much of this shift in attitude was produced by changing socio-economic conditions in the market, including the extreme housing shortage documented at the time,[225] which was shown to have produced an asymmetry in bargaining power between landlords and tenants in the marketplace.[226] In 1965, the Restatement (Second) of Torts—in section 357—recognized this changed landscape and proposed a modification, one that would impose liability on the landlord.[227] Such liability was recognized to still be a minority position, though significantly less so than a few decades earlier.[228]

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

> 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

224. Edward H. Rabin, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 517, 519 (1984); see also Samuel B. Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U. L. Rev. 1, 2 (1976) (stating that "courts and legislatures have radically altered the distribution of rights between residential tenants and their landlords"); Charles Donahue, Jr., Change in the American Law of Landlord and Tenant, 37 Mod. L. Rev. 242, 242 (1974) (noting that "changes have been greatest in the law of residential tenancies"); Mary Ann Glendon, The Transformation of American Landlord-Tenant Law, 23 B.C. L. Rev. 503, 503 (1982) (acknowledging "the fundamental shifts in the technical foundations of commercial and residential landlord-tenant law"); Charles J. Goetz, Wherefore the Landlord-Tenant Law "Revolution"?—Some Comments, 69 Cornell L. Rev. 592, 592 (1984) ("It would be impossible to deny that very great changes, rising even to the level of a 'revolution,' have occurred in landlord-tenant law during the past two decades."); Gerald Korngold, Whatever Happened to Landlord-Tenant Law?, 77 Neb. L. Rev. 703, 703–04 (1998) (noting the upheaval in traditional landlord–tenant law and the resulting groundbreaking case law and Restatement).

225. See Abbot, supra note 224, at 98 (summarizing an extensive study of census data by the Joint Center for Urban Studies, which found "extensive housing deprivation in 1970").

226. See, e.g., President's Comm. on Urb. Hous., A Decent Home: The Report of the President's Committee on Urban Housing 95–96 (1968) ("Many of our problems in this area arise from imperfections in the operation of the housing market which deprive the poor of the full benefit of what little purchasing power they possess.").

227. Restatement (Second) of Torts § 357 (Am. L. Inst. 1965).

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

> 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. [229]

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 "adopted" the language of section 357 into the law, noting that "[w]e adopt Section 357 of [the Restatement] as the sound and sensible approach to the instant problem."[230]

The text of section 357—and not the court's opinion—thus became *the law* of the jurisdiction. Section 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 black letter of the Restatement, the court implicitly ignored the possibility of *further* evolution and change that might be needed, independent of the text of the black letter. In other words, it denied later courts the opportunity to move beyond section 357 without having to reject or unadopt its text as the law of the jurisdiction. Indeed, in the many years since the court's "adoption" of section 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.[231] This sophistication is borne out in doctrines such as the "implied warranty of habitability."[232] All the same, section 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 section 357.[233] For over half a century

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

230. 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 id. at 399 (Bell, C.J., dissenting).

231. For a useful summary, see Korngold, supra note 224, at 708.

232. See Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1076-77 (D.C. Cir. 1970) (noting that the changed nature of the modern housing market, in conjunction with a belief that the old rule be abandoned in order to bring residential landlord–tenant law into harmony with new principles, demands a landlord's obligation to keep his premises in a habitable condition).

233. See, e.g., Reed v. Dupuis, 920 A.2d 861, 866 (Pa. Super. Ct. 2007) (describing the claim as arising "under" section 357); Kelly ex rel. Kelly v. Ickes, 629 A.2d 1002, 1007 (Pa. Super. Ct. 1993) (stating section 357 was "designed to place a tenant on equal footing with his or her landlord, simply by holding a landlord responsible for the safety of tenants when [they have] retained 'control' over a portion of the leased premises by contractually agreeing to maintain it"); Bonacci v. Pal, No. 15 CV 4501, 2017 Pa. Dist. & Cnty. Dec. LEXIS 11155, at *9–10 (Ct. Com. Pl. 2017) (asserting a landlord's liability for "physical harm caused to a tenant . . . as a result of a dangerous condition of the leased property" arises from section 357 (citations omitted)).

now, section 357—as the "adopted" law of Pennsylvania on the issue—remains unchanged, which is somewhat ironic for a provision triggered by a revolution. To be clear, section 357 and its adoption were substantively salutary and heralded important normative changes in the area; it is the courts' mechanism of achieving those changes that proved problematic in impeding further (and possibly even more salutary) advances.

It is crucial to appreciate the precise sense in which the treatment of Restatement black letter as the law of the jurisdiction impedes further common law development. One might of course point to the reality that most black-letter language—especially that 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.[234] In no sense does a court's treatment of black-letter text as the law convert such a standard into a rule; this is hardly the sense in which the ossification described 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 black-letter 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 or 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 or 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.[235]

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234. 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 143, at 609.

235. 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, that is, as having a statutory component as well. This impedes the courts' 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

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,"[236] 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."[237] 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:

> 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."[238]

The court's observations above echo almost precisely the concern with ossification and outsourcing of legal change just described.

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; as such, courts relying on Restatements in this capacity do so when convinced of the bases for their positions.

Development of Copyright, *in* Intellectual Property and the Common Law 177, 179–80 (Shyamkrishna Balganesh ed., 2013).

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

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

238. Tincher v. Omega Flex, Inc., 104 A.3d 328, 354–55 (Pa. 2014).

Reliance on Restatements as secondary sources, that is, as the opinion of experts, is usually characterized by the court finding an independent basis for its rule of decision that it then finds support for in a Restatement.[239] Such independent basis is usually the relevant applicable precedents, or decisions, from other jurisdictions (which have but a persuasive value).[240] 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.[241] 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

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

240. See, e.g., Shyface v. Sec'y, Health & Hum. Servs., 165 F.3d 1344, 1349 (Fed. Cir. 1999) ("[T]he 'but for' test [adopted by Montana courts] finds support in the Restatement (Second) of Torts."); 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.").

241. 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.

future courts'—discretion in modifying or expanding the rule 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 section 402A of the Restatement (Second) of Torts. Section 402A, which dealt with liability for defective products, was one of the most influential provisions of any Restatement adopted by the ALI.[242] Section 402A proposed a rule of strict liability for sellers of defective products that were in an unreasonably dangerous condition.[243] 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.[244] Once adopted by the ALI, it soon came to be adopted by courts in rapid succession, which some described as a "prairie fire."[245] One set of scholars remarked that section 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.[246]

As section 402A grew in popularity, several state courts around the country all too readily "adopted" the provision into their law.[247] The Supreme Court of Pennsylvania, for instance, expressly adopted the provision's "language as the law of Pennsylvania."[248] This produced the effect previously described.[249] 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.[250] Canvasing the history of the field, scholarly writing in the domain,

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242. Restatement (Second) of Torts § 402A (Am. L. Inst. 1965). See generally George W. Conk, Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished, 26 Rev. Litig. 799 (2007) (reviewing the influence of section 402A and its reasons).

243. Restatement (Second) of Torts § 402A.

244. See, e.g., William L. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 793 n.9 (1966) ("The speed of transition [to a strict products liability regime] is indicated by the fact that § 402A of the second Restatement of Torts was adopted by the American Law Institute three times."); Jay M. Smyser, Products Liability and the American Law Institute: A Petition for Rehearing, 42 U. Det. L.J. 343, 343 (1965) (noting that the adoption of section 402A has been described as "the most radical and spectacular development in tort law in this century").

245. Conk, supra note 241, at 800.

246. 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).

247. See, e.g., Brooks v. Dietz, 545 P.2d 1104, 1108 (Kan. 1976) (adopting section 402A of the Restatement); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966) (same); Johnson v. Am. Motors Corp., 225 N.W.2d 57, 58 (N.D. 1974) (same); Dippel v. Sciano, 155 N.W.2d 55, 63 (Wis. 1967) (same).

248. Webb v. Zern, 422 A.2d 853, 854 (Pa. 1966).

249. See supra text accompanying notes 207–208.

250. 210 N.E.2d 182, 186 (Ill. 1965).

and the landmark pre-Restatement cases (some of which had motivated the drafting of section 402A), the court in *Suvada* then concluded that "public policy" justified the move toward a strict liability standard in Illinois.[251] Further, instead of simply adopting section 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."[252]

The move was more than symbolic and had a discernible effect on the approach taken by later courts. Instead of merely relying on section 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.[253] Section 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.[254] The court's response was simple. Reiterating the primacy of the common law method, it observed: "We closed our courtroom doors without legislative help, and we can likewise open them."[255]

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 or 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

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251. Id. at 186–87.

252. Id. at 187.

253. See, e.g., Lamkin v. Towner, 563 N.E.2d 449, 457 (Ill. 1990) ("This court has indicated that strict product liability in Illinois follows the formulation set forth in section 402A of the Restatement . . . ."); Palmer v. Avco Distrib. Corp., 412 N.E.2d 959, 962 (Ill. 1980) ("[If the Suvada elements] are proved, liability will attach despite the exercise of due care by the seller and regardless of contractual relationships."); Anderson v. Hyster Co., 385 N.E.2d 690, 693 (Ill. 1979); Hunt v. Blasius, 384 N.E.2d 368, 372 (Ill. 1978) ("[B]ased on a theory of strict liability, in which there was sufficient evidence to sustain the finding that the product was so designed that it was not reasonably safe . . . .").

254. *Suvada*, 210 N.E.2d at 188.

255. Id.

highlight "any differences" between its chosen position and the underlying case law.[256] Even today, the *Style 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.[257]

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.[258] In the decades since their emergence, Restatements have therefore routinely had to choose among competing rules.[259] 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.[260] 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.[261]

Not surprisingly, when confronted with an issue involving competing positions for the first time, that is, as a matter of first impression within the

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256. Founding Committee Report, supra note 12, at 20, 22.

257. ALI, Capturing the Voice 2015, supra note 11, at 5.

258. Founding Committee Report, supra note 12, at 22 ("The legal profession will never have confidence in the result unless those responsible for the work . . . have set forth any differences between the law expressed in the statement of principles and . . . the decisions of the courts in each State . . . .").

259. ALI, Capturing the Voice 2015, supra note 11, at 7 ("When decisions among state courts conflict, a Reporter should report the conflict but is not bound to adhere to the majority view.").

260. See, e.g., Restatement of the L. of Liab. Ins. § 27 cmt. d (Am. L. Inst. 2019); Restatement of Emp. L. § 8.06 cmt. e (Am. L. Inst. 2015); Restatement (Third) of Restitution & Unjust Enrichment § 23 (Am. L. Inst. 2011); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 10 cmt. b (Am. L. Inst. 2010); Restatement (Third) of the L. Governing Laws. § 36 cmt. c (Am. L. Inst. 2000); Restatement (Third) of Prop. (Mortgs.) § 4.1 cmt. a(2) (Am. L. Inst. 1997); Restatement (Second) of Prop.: Donative Transfers § 6.1 reporter's note (Am. L. Inst. 1983).

261. See, e.g., Restatement (Second) of Prop.: Donative Transfers § 6.1 (adopting the minority position).

relevant jurisdiction, courts rely on the groundwork done by a Restatement in exercising this choice. This form of reliance is perfectly justifiable as a matter of efficiency and judicial economy. Relying on the *work of* synthesizing and collating prior precedent on an issue makes logical sense. 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, that is, 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.[262] This approach is more than just rhetorical. It instead has the salutary effect of allowing the court to preserve its own common law decisionmaking for the 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.[263]

In many respects, this form of reliance on Restatement choice tracks courts' use of Restatements as secondary sources, that is, 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 or minimal) on the normative basis of the choice involved; it is also a tempered acceptance of the Restatement's very

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262. See, e.g., Correa v. Curbey, 605 P.2d 458, 460 (Ariz. Ct. App. 1979) ("While there is some authority to the contrary requiring a showing of negligence in all cases involving the use of explosives before liability is imposed, we believe the majority position read in terms of the Restatement is the better view." (internal citation omitted)); McGoey v. Brace, 918 N.E.2d 559, 567 (Ill. App. Ct. 2009) ("Although section 4.8(3) of the Restatement has not been explicitly adopted in Illinois . . . the principles animating the Restatement standard are reflected . . . in our subsequent case law interpreting *Sullivan*. Thus, we find that the substantiality standard of *Sullivan* is more consistent with the Restatement approach than the traditional common law view."); Ferrero Const. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1140 (Md. Ct. App. 1988) ("In addition, the Restatement has adopted the majority position. Therefore, "[i]n light of this widespread acceptance of the majority view, [the court] should hesitate before attempting an exception to the Rule Against Perpetuities for right of first refusal."); Zutz v. Nelson, 788 N.W.2d 58, 73 (Minn. 2010) (Anderson, J., dissenting) ("The diverse collection of authorities [including the First and Second Restatement of Torts] discussed above underlies my disagreement with the majority."); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467, 474 (Okla. 1987) ("After considered reading of [prior] cases, we believe the Restatement (Second) of Torts § 323 approach under the majority position to be the preferable and most rational theory.").

263. 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 section 299A had rejected it for the majority rule).

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 and 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 reliance looks to the Restatement not just as opinion, but also as "evidence of the law."[264]

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 their lawyer's representation-related files after the attorney-client relationship had ended.[265] Even though the relevant Restatement provision had canvased 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.[266] Upon identifying the majority and minority positions for itself and explicating the rationale for both, it chose "the majority position, as adopted in the . . . *Restatement* . . . [as] the sounder view."[267] 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.[268] Other courts have adopted the same modality of reliance in their reasoning.[269]

In contrast to the cautionary approach is a form of reliance that outsources the assessment of majority and 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.[270] 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 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.[271]

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264. For analytical articulations of the distinction, see J.W. Bingham, What Is the Law?, 11 Mich. L. Rev. 1 (1912); 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).

265. 689 N.E.2d 879, 880–81 (N.Y. 1997).

266. Id. at 881–82.

267. Id. at 882.

268. Id. at 882–83.

269. See supra note 262.

270. 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 section 96(2)).

271. Id.

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.[272] 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."[273] 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."[274] Additionally, the new position that it was advancing sought to replace a position taken by the prior Restatement on the subject (section 402A, discussed previously), which innumerable courts had come to adopt and follow.[275]

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."[276] 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.[277] The court's logic was driven in part by the legislature's own creation of the supreme court, which it then vested with the power to make "local law" for the jurisdiction.[278] Despite thus reaffirming its discretion on the matter, the court nevertheless chose to follow the Restatement principally because it was the "majority rule" around the country.[279] 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 additional scrutiny.[280] In effect, the court outsourced both the choice of rule and its underlying basis to the Restatement.

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272. Restatement (Third) of Torts: Prods. Liab. §§ 1–3 (Am. L. Inst. 1998).

273. Id. § 2(b) (outlining the reasons a product may be considered "defective").

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

275. See discussion at supra notes 170–174.

276. 1 V.I.C. § 4 (2019).

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

278. Id. at 980.

279. Id. at 982–83.

280. Id.

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 "th[e] Court ha[d] already adopted" portions of that Restatement, despite perceptions of the law having changed in the interim.[281]

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.[282] 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.[283] 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.[284] 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.[285]

Now, one might argue that the incautious approach is more efficient than the cautionary one in that it doesn't waste judicial resources redoing the synthesis and examination of majority and minority positions, but instead outsources and delegates that to the Restatements. The problem with this argument is that it of course prizes efficiency over other considerations, the most important of which is a court's considered judgment. As noted previously, the very classification of competing lines of cases is a normative exercise, predicated on the identification of varying normative goals and values. And while efficiency is valuable, it need not come at the cost of the court's deliberative wisdom. The cautionary approach achieves an ideal balance between the two.

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 previously discussed,

281. Davis v. UHP Projects, Inc., 74 V.I. 525, 533 (2021).

282. Tincher v. Omega Flex, Inc., 104 A.3d 328, 395–400 (Pa. 2014).

283. Id. at 395.

284. 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.").

285. Id. at 353 n.6.

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 Restatement "language as the law"[286] 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.[287] 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 black letter is a good example here inasmuch as it conceals the nature of a court's reliance. A court may "adopt" the provision as its decision rule in the case,[288] "adopt" the rationale underlying the provision into its reasoning,[289] or alternatively it may "adopt" the provision as the law of the jurisdiction.[290] 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.[291] Each of these *adopt*ions represents a different form of reliance along the primary/secondary spectrum.

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

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286. Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966) (adopting section 402A of the Restatement (Second) of Torts as "the law of Pennsylvania").

287. See, e.g., *Tincher*, 104 A.3d at 354 ("[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.'" (quoting Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383, 1385 (Pa. 1991))).

288. See, e.g., Dexter v. Town of Norway, 715 A.2d 169, 172 (Me. 1998) (adopting the Restatement provision as a valid cause of action).

289. See, e.g., Peragallo v. Sklat, 466 A.2d 1200, 1202 (Conn. Super. Ct. 1983) (adopting the Restatement's reasoning as a basis for its holding); Great Atl. & Pac. Tea Co. v. Yanofsky, 403 N.E.2d 370, 374 (Mass. 1980) (similar); Dunning v. Buending, 247 P.3d 1145, 1149 (N.M. Ct. App. 2011) (similar).

290. See, e.g., *Webb*, 220 A.2d at 854.

291. See, e.g., Restatement (Third) of Torts: Prods. Liab. § 1 (Am. L. Inst. 1998).

This Part takes the first steps toward 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.[292] 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 decisionmaking and opinion-writing.[293]

To be sure, courts can use and manipulate canons of construction to simply rationalize their results.[294] But evidence still suggests that judges use canons as tools of persuasion (even if not decisionmaking) in their actual opinions, which obviously plays an important role in shaping future common law decisions.[295] Further, judges' knowledge and awareness of the canons play an unstated—often even subconscious—role in their approach to legal questions and thus serve a constraining role, even if they do not consciously think or reason in terms of individual canons.[296] If the four Restatement-related canons proposed here end up playing an equivalent role in judicial reasoning, it will indeed go a long way in streamlining judicial reliance on Restatements.

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292. See William N. Eskridge, Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution 33 (2016) ("[T]he canons constitute an *interpretive regime*, namely, a set of conventional considerations relevant to statutory interpretation that ought to be laid out systematically in one volume available to students, attorneys, judges, agencies, and legislative drafting offices."); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, at xxix (2012) (arguing that textualism would "provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law"); Anita S. Krishnakumar & Victoria F. Nourse, The Canon Wars, 97 Tex. L. Rev. 163, 181 (2018) (explaining where canons derive their authority and legitimacy from).

293. 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).

294. 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, 401–06 (1950) (arguing that the canons fail to adequately constrain judicial decisionmaking). But see William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 65–66 (1994) ("[B]y rendering statutory interpretation more predictable, regular, and coherent, interpretive regimes can contribute to the rule of law. This goal is subject to Llewellyn's criticism, but the Supreme Court is itself aware of that criticism and can therefore be expected to counteract its force."); Jonathan R. Macey & Geoffrey P. Miller, The Canons of Statutory Construction and Judicial Preferences, 45 Vand. L. Rev. 647, 647–48 (1992) (arguing that whether the canons effectively constrain judges or not does not matter because courts have discretion regarding whether or not to invoke them).

295. Gluck & Posner, supra note 293, at 1330.

296. See id. at 1331 (stating that most judges see the canons as helpful guidelines or tools that reinforce a conclusion, serving as a checklist of norms that they consult in statutory cases).

A. *The Canon of Secondarity*

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 courts' inability and 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 exclusively uses (i.e., cites to or relies on) a Restatement as a *secondary* legal source. In other words, a court is presumed to treat Restatement language and black letter as having no more than persuasive value.

The canon of secondarity will likely produce a few salutary effects. First, it would compel courts to locate the authority for the Restatement proposition in an independent and formal (i.e., primary) legal source such as precedent. By forcing courts to recognize the black letter as "secondary" to another primary source, the canon effectively signals the incompleteness inherent in a courts' bare reliance on Restatements. Second, in the absence of an appropriate primary source, the court's reasoning itself—rather than the Restatement language—would be treated as the proposition's primary authority. 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 due to a procedural rule or legislative directive giving it such status. A good example is the law of the Virgin Islands, which designates Restatement black letter as the law of the jurisdiction in the absence of local authority.[297]

The canon of secondarity will likely have a direct impact on courts' anomalous practice of "adopting" Restatement black letter and language as the law of the state.[298] By presuming the secondary status of such Restatement text, the canon denies the "adoption" any independent normative significance akin to legislative enactment. Instead, when a 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, who must then rely on that holding and application rather than the Restatement in isolation. Under the canon, any attempted "adoption" would default to secondary source status. While the canon is of course unlikely to immediately change the judicial practice of adopting

297. See 1 V.I.C. § 4 (2019) ("The rules of the common law, as expressed in the restatements . . . 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.").

298. See supra text accompanying notes 112–116.

Restatement provisions, it will nevertheless cast new light on the meaning and significance of such adoption for later courts (and lawyers).

B. *The Canon of Faux Codification*

Nongovernmental (i.e., privately produced) codifications of judge-made law should 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 black letter simply for its statute-like precision by directly recognizing that the similarity between the black letter and actual legislative codification is purely stylistic. Even when the simplicity and precision of the black letter are alluring enough for courts to gravitate toward it, the canon would emphasize the artificiality of its codification and require courts to examine the extent to which the black letter is an accurate representation of the case law 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 black letter using statutory interpretation techniques, (ii) locate a legislative "intent" behind the black letter, and (iii) presume the existence of a transparent and democratic legal process behind the production of the black letter.

Restatements are a synthesis of judge-made law into precise rules. As previously described, 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 generated more and more detailed commentary about their own black-letter rules with each subsequent Restatement. The canon of faux codification acknowledges—but does not eliminate—the normative nature of the black letter'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 that Restatement's black letter or make the judgment on its own while using the black letter 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 *American Jurisprudence*, and to treatises that attempt succinct code-like formulations of the common law.[299]

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299. See Jeanne Benioff & Kathleen Vanden Heuvel, American Jurisprudence 2d, 3 Legal Reference Servs. Q. 59, 59–61 (1983) (describing the nature of the encyclopedia); Robert C. Berring & Valerie Wedin, Corpus Juris Secundum, 1 Legal Reference Servs. Q. 67, 67–68 (1981) (same).

C. *The Canon of Common Law Preservation*

In reading Restatement text, courts should 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,[300] Restatements—especially in their black letter—routinely choose between competing concepts, principles, and languages, as they synthesize judge-made law into a precise statement of rule. Yet those choices, unlike similar ones made when drafting ordinary statutes, are not binding on courts, a reality that courts routinely fail to acknowledge. 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.[301]

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."[302] The logic behind this longstanding canon 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 so that the fecundity of the common law could flourish unabated.[303] Since legislatures could not have anticipated a myriad of unforeseen situations, they were never presumed to have readily eliminated courts' ability to adapt the law to those situations. Limits on the common law were therefore generally disfavored unless clear and express.

The canon of common law preservation would do something similar for Restatements. But the concern is not—as it is in the statutory context—with change in the common law: It is instead 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 section 339 of the Restatement (First) of Torts.[304] As previously noted, Pennsylvania courts "adopted" section 339 and emphatically declared that all prior case law derogating the provision was to be disregarded from then on.[305] As has been pointed out, section 339 did not effect major change in

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300. See ALI, Capturing the Voice 2015, supra note 11, at 6 (observing how Restatements attempt to emulate the inquiry of an "excellent common-law judge").

301. For a general account of common law discretion and its working, see Cardozo, Nature of the Judicial Process, supra note 209, at 18–19. See generally 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) (reviewing Karl Llewellyn, The Common Law Tradition: Citing Appeals (1960)).

302. 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, 438 (1950).

303. Scalia & Garner, supra note 292, at 318–19.

304. Restatement (First) of Torts § 339 (Am. L. Inst. 1934).

305. See discussion at supra text accompanying note 215.

the law. Instead, it merely made preexisting rules and concepts more obvious and easily discernible: Indeed, pre-adoption jurisprudence remained relevant even after the provision was adopted.[306] Still, the courts' collective attempt to read section 339 as a major change in order to signal a break with the past regrettably forced later courts to focus more narrowly on the choices made in section 339. As a result, some of the nuances of the prior position came to be disregarded altogether despite being perfectly compatible with the new position.[307] If the Pennsylvania courts had instead read section 339 as merely continuing their line of existing cases, later courts could have incorporated these nuances into their application of the section 339 rule.

D. *The Canon of Statutory Primacy*

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

Although Restatements began in fields dominated by the common law and therefore principally operated at the state level, they have since moved into areas of federal law dominated by statutes.[308] 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 purport to synthesize this body of interpretive jurisprudence into an additional set of precise black-letter rules.[309] 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 black letter that is presented in codified form. In such situations, the canon would caution courts to do the obvious: "[B]egin, as usual, with the statutory text" and then move to additional sources.[310] 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.[311] Ironically, the ALI's founders were prescient enough to recognize that the Restatements might

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306. Despite its continued relevance, however, it was not cited or quoted because of the supposed break in continuity. See Gladstone, supra note 208, at 567–68.

307. See id. at 566–86 (offering a case study of Pennsylvania courts' somewhat narrow adoption of a Restatement rule).

308. Richard L. Revesz, Letter of the Director of the American Law Institute, Restatements and Federal Statutes, 38 A.L.I. Proc. 3 (2016).

309. Id. at 3 (discussing how black letter for statutory Restatements would mimic the working of black letter for common law subjects).

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

311. Cf. Balganesh & Menell, supra note 7, at 287–98 (analyzing the development of the Restatement of Copyright, and thus being one of the few pieces of literature exploring the relationship between Restatements, case law, and statutes).

eventually enter this area and therefore cautioned against developing new black-letter language for a Restatement that did not reproduce the exact language of the relevant legislative provision in its entirety.[312] 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; it would have them recognize that they should be undertaking the interpretive process afresh, choosing their own sources and methodologies rather than outsourcing those normative choices to the Restatement. In this respect, the canon would highlight the reality that even though statutory interpretation and common law rulemaking—both by courts—have many similarities, they involve different institutional choices that an unthinking reliance on Restatement black-letter text could readily miss.[313]

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It bears emphasizing that these canons are unlikely to eliminate all of the concerns and problems attending courts' reliance on Restatements. But they can be expected to introduce a degree of predictability and coherence into courts' reliance on Restatements, thereby insulating the judicial decisionmaking process from the arbitrariness of that reliance.[314] Inasmuch as canons are meant to be "grounded in experience [and] developed by reason,"[315] they will, over time, likely come to streamline judicial engagement with Restatements.

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."[316] Yet he presciently cautioned

312. See William Draper Lewis, Report on Business Associations, 2 A.L.I. Proc. 281, 359 (1924) ("Where the law is common law . . . it is possible to arrive at the best statement of the principle and set it forth in the Restatement as 'the law.' But where the law is expressed in statutes, and those statutes differ in each State, it is not possible to do this.").

313. For an early articulation of this difference, see Cardozo, Nature of the Judicial Process, supra note 209, at 18–19.

314. See Eskridge & Frickey, supra note 293, at 66 (describing canons of statutory construction as part of an "interpretive regime," a system that can "provide[] some degree of insulation against judicial arbitrariness; by rendering statutory interpretation more predictable, regular, and coherent, interpretive regimes can contribute to the rule of law").

315. 3 Roscoe Pound, Jurisprudence 506 (1959).

316. Benjamin N. Cardozo, The Growth of the Law 10 (1924) [hereinafter Cardozo, Growth of the Law]; Benjamin N. Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113, 117 (1921).

that "[i]n breaking one set of shackles, we are not to substitute another."[317] The goal was to "set the judges free" rather than limit them to the language of the black letter.[318] Cardozo was also confident that Restatements would come to "be invested with *unique authority*, not to command, but to persuade."[319] Despite these predictions, the nature of this "unique authority" continues to confound the judicial engagement with Restatements a century later.

Restatements remain deeply influential in the development of judge-made law in the United States, especially in 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, the Restatement production process undoubtedly simplifies and clarifies 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 United States.

But their substantive appeal has come at a rather significant cost that embodies both analytical and structural dimensions. In focusing almost exclusively on Restatements' substantive merit as representing the consensus of experts in the field, courts have all too commonly treated them as actual sources of law; in the process, they have overlooked the "unique authority" that Restatements possess. Restatements' modality of influence has subsequently moved—almost always without any justification by courts—from the domain of persuasion to that of command. Perhaps more importantly, this move has affected how common law courts operate when under the influence of Restatement black letter. 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.

Courts' tendency to treat Restatements as actual sources of law has generated much controversy in recent years. Some states have even enacted legislation restricting judicial reliance on Restatements or declaring that they "are not controlling" within the jurisdiction.[320] Justice Scalia's previously noted well-documented criticism of Restatements was driven almost entirely by the concern that lower courts would mechanistically rely

317. Cardozo, Growth of the Law, supra note 316, at 10.

318. Id.

319. Id. at 9 (emphasis added).

320. See, e.g., Tex. Civ. Prac. & Rem. Code § 5.001 (2020).

on Restatement black letter without further scrutiny.[321] And yet, the controversy appears to have provoked surprisingly little reflection and assessment from courts themselves, or indeed the ALI.

Returning Restatements to their appropriate role in the hierarchy of legal authority—as strongly persuasive secondary sources[322]—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 will likely help that process become more systematic 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 Restatement language afforded could be "illusory" and impede the growth of the law if judges abandoned reason and fixated on a rule's precision.[323] 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.[324] Cardozo believed that judges would realize this balance through the sheer wisdom of the common law process. And yet, nearly 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 now dominated by statutes and regulations. Put another way,

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321. See Kansas v. Nebraska, 574 U.S. 445, 475–76 (2015) (Scalia, J., concurring in part and dissenting in part) (noting that "modern Restatements . . . are of questionable value, and must be used with caution").

322. In recent work, Schauer has criticized my use of this phrase, arguing that it is "a status justifiable on neither jurisprudential or empirical grounds." Frederick Schauer, The Restatements as Law, *in* The American Law Institute at 100: Centennial Essays (Andrew Gold & Robert Gordon eds., forthcoming 2023) (manuscript at 25 n.67), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4198224 [https://perma.cc/X6WP-LPG4]. His view is predicated on the idea that there is no such thing as a persuasive authority, and that the distinction is really between the degree to which a source of law is controlling or optional. Id. (manuscript at 23). Adopting a positivist account of law, he thus concludes that Restatements are "optional but respectable" authorities that should nevertheless be "considered as law." Id. (manuscript at 23–24). As Schauer himself admits, even the ALI does not take this position, a position that he sees as potentially modest or strategic. Id. (manuscript at 17). While the idea of persuasive authority may have its analytical deficiencies, it is a staple of common law thinking, which reform efforts cannot ignore. See Black's Law Dictionary 164 (11th ed. 2019); see also Grant Lamond, Persuasive Authority in the Law, 17 Harv. Rev. Phil. 16, 32 (2010) (noting how legal positivism relies on an assumption that renders it incompatible with theoretical—as opposed to practical—authority).

323. Cardozo, Growth of the Law, supra note 316, at 10, 17. For a more elaborate account of Cardozo's account of certainty in the common law and its connection to Restatements, see Shyamkrishna Balganesh, Cardozo and Uncertainty in the Common Law, 34 Yale J.L. & Humans. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219852 [https://perma.cc/ADN5-86W2].

324. Cardozo, Growth of the Law, supra note 316, at 19–20.

Cardozo grossly underestimated the overbearing allure of certainty and precision that the Restatements embody.