

# California Law Review

---

VOL. 82

OCTOBER 1994

No. 5

---

Copyright © 1994 by California Law Review, Inc.

## Expression Rules in Contract Law and Problems of Offer and Acceptance

Melvin Aron Eisenberg†

*The issue of interpretation is central to contract law, because a major goal of that body of law is to facilitate the power of self-governing parties to further their shared objectives through contracting. Modern contract law has developed a set of general principles of interpretation that give a place to both objective and subjective elements, and must be applied on an individualized basis. However, a number of narrower black-letter rules give a purely objective and standardized interpretation to certain kinds of expressions, and these standardized interpretations may often differ from the meanings such expressions would be given under the general principles of contract interpretation. These narrower rules, which the author calls expression rules, generally have not been recognized as a special legal category, and partly for that reason have not been critically examined. The author argues that the use of expression rules in contract law is in need of justification. Several possible justifications are explored, and the resulting analysis is applied to various expression rules in the law of offer and acceptance. The author concludes that many expression rules are carry-overs from classical contract law, cannot be justified under modern principles of interpretation, and should be dropped or modified.*

### INTRODUCTION

A major goal of contract law is to facilitate the power of self-governing parties to further their shared objectives through contracting. Contracts are formed by *expressions*, that is, by manifestations consisting of

---

Copyright © 1994 California Law Review, Inc.

† Koret Professor of Law, University of California, Berkeley, Boalt Hall School of Law. A.B. 1956, Columbia College; LL.B. 1959, Harvard Law School.

A preliminary version of this Article was given as the 1993 Roy R. Ray Lecture at Southern Methodist University Law School.

words, acts, or both, communicated by an addressor to an addressee. Accordingly, many contract-law problems concern the interpretation of an expression that was used by an addressor, or of an expression that was mutually used by two parties each of whom was both addressor and addressee.

Much current academic literature in contract law has focused on the distinction between default rules and mandatory rules.<sup>1</sup> Default rules can be contracted around; mandatory rules cannot. This distinction, although important, tends to obscure another significant distinction, that between interpretive and noninterpretive standards. By *interpretive standards*, I mean contract-law norms that are or purport to be based primarily on interpretive considerations, and that are applied to determine the meaning or effect of expressions. For example, the rule that the act of putting up goods at auction is not an offer, but only a request for offers, and the rule that an offeree's power of acceptance is terminated by a counter-offer, are both interpretive standards, because they purport to be based primarily on the effect that an expression (putting up goods or making a counter-offer) will have on the addressee of the expression. By *noninterpretive standards*, I mean contract-law norms that are not based primarily on interpretive considerations. For example, the rules that an unrelieved-upon donative promise is unenforceable and that death terminates the power of acceptance are noninterpretive standards; they neither are nor purport to be based on the interpretation of expressions.

Although interpretive standards can be characterized as default rules, such a characterization would be somewhat heavy-handed. It is true that, as in the case of default rules, an addressor can trump an interpretive standard by using an appropriate expression. Similarly, it is true that, as in the case of interpretive standards, default rules may be based on what persons in the parties' position probably would have agreed to had they addressed the relevant issue. For example, the rules that govern contract damages may be justified on the ground that parties bargaining under ideal conditions who addressed the issue of damages would be likely to choose the expectation measure.<sup>2</sup> Similarly, the rules governing the effect of changed circumstances may be justified on the ground that parties bargaining under ideal conditions who addressed that issue would be likely to adopt those rules.

Nevertheless, default rules as a class are not based on interpretive considerations. The principal function of an interpretive standard is to determine what is meant or intended by a given expression. In contrast, the normal function of default rules is to govern issues that the parties have not

---

1. The leading article is Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). See also Symposium, *Default Rules and Contractual Consent*, 3 S. CAL. INTERDISCIPLINARY L.J. 1 (1993).

2. Robert Cooter & Melvin A. Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432, 1461-62 (1985).

addressed in their expressions. Thus, courts that apply the rules of expectation damages or changed circumstances to a given contract do not rest that application on whether the terms of the contract show that the parties "intended" or "meant" those rules to govern. Furthermore, characterizing interpretive standards simply as default rules would obscure the importance of the very different forms that interpretive standards may take.<sup>3</sup>

Within interpretive standards, there is an important distinction, which I will develop in this Article, between the general principles of interpretation on the one hand, and expression rules on the other. By the *general principles of interpretation*, I mean principles that generally apply to the interpretation of all expressions. By *expression rules*, I mean rules that give an objective and standardized interpretation to certain kinds of expressions, or that reduce or alter the variables that would be relevant to determining the meaning of certain kinds of expressions if the general principles of interpretation were applied.<sup>4</sup> For example, the rules that an offer made in a conversation normally lapses at the end of the conversation, that putting up goods at auction does not constitute an offer, and that a rejection, counter-offer, or qualified acceptance terminates the power of acceptance, although based on interpretive considerations, give an objective and standardized meaning or effect to all members of the relevant classes of expressions.<sup>5</sup> Similarly, the rule that if there is doubt whether an offer invites acceptance by promise or by performance, the offer is to be interpreted as inviting the offeree to accept by either promise or performance, as he chooses, changes the variables that would otherwise be relevant to determining the meaning of offers if the general principles of interpretation were applied.<sup>6</sup>

The use of expression rules in contract law is in need of justification. If the general principles of interpretation in contract law are unsound, they should be revised. If those principles are sound, however, then they represent a considered judgment concerning the manner in which to best interpret expressions used in a contractual context. That being so, when an addressor uses an expression, and contract-law consequences turn on the

---

3. See *infra* text accompanying notes 36-40.

4. Because the terms *principles* and *rules* are somewhat ambiguous, I should clarify at the outset what I mean by these terms. Within the universe of legal standards, no logical distinction exists between those standards that might be called principles and those standards that might be called rules, and for most purposes the term *legal rule* therefore adequately describes all legal standards. For some purposes, however, a useful distinction can be drawn between principles and rules: principles are relatively general legal standards, and rules are relatively specific legal standards. That distinction will be employed in this Article. Accordingly, I use the terms *general principles of interpretation* and *expression rules* because the former are stated at a higher level of generality than the latter. In a broader sense, however, the general principles of interpretation are themselves rules, that is, legal standards. Accordingly, the issue in this Article is not whether the meaning and effect of various classes of expressions should be governed by rules, but whether they should be governed by the more generalized standards to which I refer as the general principles of interpretation or by the more specific standards to which I refer as expression rules.

5. See *infra* text accompanying notes 54-115, 139-46.

6. See *infra* text accompanying notes 147-54.

meaning or legal effect of that expression, the natural thing would be to interpret the expression according to the general principles of interpretation, rather than to interpret the expression under some rule that differed from those principles.

Because expression rules essentially have not been recognized as a special category, the law lacks an explanation of why such rules are utilized, and more generally lacks a jurisprudence of such rules. Partly for this reason, and partly because many or most individual expression rules have been taken as self-evident, inadequate attention has been paid to whether many of these rules are justified at all, and, if they are justified, what form they should take. These issues are addressed in this Article.

Part I of this Article develops the core general principles of interpretation under modern contract law, for the purpose of setting expression rules in perspective. Part II examines the forms that expression rules may take and the possible justifications for such rules. I will show in Part II that there are several possible justifications for expression rules, but that generally speaking, these justifications only hold if there is a high degree of congruence between the given rule and the general principles of interpretation. I will also show that the force of the justifications for an expression rule depends in part on the form that the rule takes. Part III examines a handful of expression rules in the law of offer and acceptance, to exemplify the analysis in Part II. I will show in Part III that many expression rules in contract law seem to reflect classical rather than modern principles of interpretation; that although some expression rules are justified, others should either be dropped entirely or recast in a weaker form; and that modern contract law is moving in just this direction.

## I

### THE GENERAL PRINCIPLES OF INTERPRETATION

In this Part, I develop four core principles of interpretation under modern contract law, and contrast those principles with those of classical contract law—the school of thought that found its central inspiration in Langdell, Holmes, and Williston and its central expression in the *Restatement (First) of Contracts* (“*Restatement First*”),<sup>7</sup> and which held virtually absolute sway over contract theory in the late nineteenth and early twentieth centuries. The differences between modern and classical contract law, in this regard, can be best appreciated by examining the relative positions of the two schools on some important spectra of contract law.<sup>8</sup>

The norms of contract law can be arranged along a spectrum that runs from objectivity to subjectivity. A contract-law norm falls on the objective end of this spectrum if its application depends on a directly observable state

---

7. RESTATEMENT OF THE LAW OF CONTRACTS (1932) [hereinafter RESTATEMENT FIRST].

8. Some of the following passages drew on Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 Stan. L. Rev. 1107 (1984).

of the world. A contract-law norm falls on the subjective end if its application depends on a mental state.

The norms of contract law can also be arranged along a spectrum that runs from standardization to individualization. A contract-law norm falls on the standardized end of this spectrum if its application depends on an abstract variable that is unrelated to the intentions of the parties or the particular circumstances of the transaction. A contract-law norm falls on the individualized end of this spectrum if its application depends on situation-specific variables that relate to intentions and circumstances.

A deep difference between classical contract law and modern contract law is that classical contract law tended to be objective and standardized, while modern contract law tends to include subjective and individualized elements as well. This difference is particularly striking in the area of interpretation. Classical contract law adopted a theory of interpretation that was purely, or almost purely, objective. As stated in *Woburn National Bank v. Woods*:<sup>9</sup>

A contract involves what is called a meeting of the minds of the parties. But this does not mean that they must have arrived at a common mental state touching the matter in hand. The standard by which their conduct is judged and their rights are limited is not internal, but external. In the absence of fraud or incapacity, the question is: What did the party say and do? "The making of a contract does not depend upon the state of the parties' minds; it depends upon their overt acts."<sup>10</sup>

Under modern contract law, in contrast, subjective as well as objective elements have an important place. This point is well illustrated by four central principles of interpretation under modern contract law:

*I. If the parties subjectively attach different meanings to an expression and the two meanings are not equally reasonable, the more reasonable meaning prevails.* This principle is adopted in *Restatement (Second) of Contracts* ("Restatement Second") Section 201(2)(b), which provides:

Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . .

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.<sup>11</sup>

*Principle I* is based in large part on the concept of liability for fault. If *A* and *B* engage in the formation of a contract, *A* is at fault—is negligent—

9. 89 A. 491 (N.H. 1914).

10. *Id.* at 492.

11. RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981) [hereinafter RESTATEMENT SECOND].

if he uses an expression that he should realize would lead a reasonable person in *B*'s position to understand that *A* attaches a given meaning to the expression when he does not. If *B* attaches that meaning, and suffers wasted reliance or the defeat of a legitimate expectation, *A* should compensate *B*.

*Principle I* is also supported by the policy of security of transactions, which favors the reliability of express contractual language to make commerce more secure. If an actual but unreasonable meaning prevailed over the reasonable meaning attached by the other party, a party who has made a losing contract could attempt to avoid liability simply by claiming that he had an undisclosed meaning. The claim would be hard for the other party to refute, because it would relate to the mental state of the person who made the claim. A potential for such claims might therefore make express contractual language unduly insecure.

*Principle I* is primarily objective, but has a subjective element as well, because the more reasonable meaning will prevail only if it is the meaning that one party has actually attached to the expression.

*II. If the parties subjectively attach different meanings to an expression and the two meanings are equally reasonable, neither meaning prevails.* This principle is associated with *Raffles v. Wichelhaus*, the *Peerless* case.<sup>12</sup> Seller agreed to sell to Buyer 125 bales of Surat cotton to arrive at Liverpool "ex [ship] 'Peerless' from Bombay."<sup>13</sup> There were, however, two ships named "Peerless" that sailed from Bombay. One sailed in October, and one in December. Seller meant the December Peerless, and shipped Surat cotton on that ship. Buyer meant the October Peerless, and refused to accept the cotton shipped on the December Peerless.<sup>14</sup> Seller sued for breach of contract. The court held for Buyer on the ground that there was no "consensus ad idem,"<sup>15</sup> so that no contract was formed.

Holmes argued that the result in the *Peerless* case could be explained by objective theory. "The true ground of the decision was not that each party meant a different thing from the other . . . but that each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another."<sup>16</sup> But if both parties subjectively meant the December Peerless, Buyer should have been deemed in breach; and Seller should have been deemed in breach if both parties subjectively meant the October Peerless. Holmes had it backward: the result in *Peerless* is correct because they *meant* different things, not because they *said* different things.

*Principle II* is adopted in *Restatement Second* Section 20(1):

---

12. 159 Eng. Rep. 375 (Ex. 1864).

13. *Id.* at 375.

14. The facts are as stated in Buyer's answer, to which Seller demurred. *Id.*

15. *Id.* at 376.

16. OLIVER W. HOLMES, JR., *THE COMMON LAW* 309 (1881).

There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the other; or

(b) each party knows or each party has reason to know the meaning attached by the other.<sup>17</sup>

*Principle II* does not conflict with the concept of fault, because the principle applies only if both parties are either fault-free or equally at fault. Nor does *Principle II* undermine the security of transactions. Although the principle is subjective to a considerable extent, its application rests on the existence of two meanings of an expression that are equally reasonable—a condition that is objective, relatively uncommon, and difficult to prove.

*III. If the parties subjectively attach the same meaning to an expression, that meaning prevails even though it is unreasonable.* This principle squarely reverses the strict objectivism of classical contract law, as reflected in well-known passages by Williston and Learned Hand. According to Williston:

It is even conceivable that a contract shall be formed which is in accordance with the intention of neither party. If a written contract is entered into, the meaning and effect of the contract depends on the construction given the written language by the court, and the court will give that language its natural and appropriate meaning; and, if it is unambiguous, will not even admit evidence of what the parties may have thought the meaning to be.<sup>18</sup>

According to Hand:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.

. . . [W]hatever was the understanding in fact of the banks [in this case] . . . of the legal effect of this practice between them, it is

---

17. RESTATEMENT SECOND, *supra* note 11, § 20(1).

18. 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 95, at 181-82 (1st ed. 1920) [hereinafter 1 WILLISTON (1st ed.)].

of not the slightest consequence, unless it took form in some acts or words, which, being reasonably interpreted, would have such meaning to ordinary men.<sup>19</sup>

Again, however, the objectivists had it wrong. Where both parties have the same, unreasonable, meaning, one or both parties may have been at fault in their use of language, but the fault caused no injury. Indeed, a party would be at fault to press an interpretation of an expression that he himself did not attach to the expression.

Nor does applying a mutually held subjective interpretation undermine the security of transactions. Under *Principle III*, a party will avoid liability only if he can shoulder the difficult burden of proving not only his state of mind but the other party's state of mind as well. In any event, the security of legitimate expectations may be equally or more important than the security of transactions. In cases covered by *Principle III*, the mutually held expectation is legitimate and would be defeated by applying a strictly objectivist view.

The principle that an unreasonable but mutually held subjective interpretation trumps a reasonable objective interpretation is adopted in *Restatement Second* Section 201(1). That section provides, "[w]here the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."<sup>20</sup> Under Section 201(1), reasonableness becomes relevant only where there is not a mutually held subjective interpretation. Thus, *Restatement Second* stands the classical school's position on its head by giving primacy to mutually held subjective interpretation, and resorting to an objective or reasonable meaning only in the absence of a mutually held subjective meaning.

*IV. If the parties, A and B, attach different meanings, M and N, to an expression, and A knows that B attaches meaning N while B does not know that A attaches meaning M, meaning N prevails even if it is less reasonable than meaning M.* This principle is adopted in *Restatement Second* Section 201(2):

Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

19. *Hotchkiss v. National City Bank*, 200 F. 287, 293-94 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

20. RESTATEMENT SECOND, *supra* note 11, § 201(1). *Restatement Second* Section 20 reflects the same principle:

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the other; or

(b) each party knows or each party has reason to know the meaning attached by the other.

*Id.* § 20.



(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party . . . .<sup>21</sup>

Although *Principle IV* is largely subjective, and although it allows an unreasonable meaning to prevail, it is supported by a fault analysis. *B* may have been at fault in attaching meaning *N* to the expression, but *A* was more at fault in allowing *B* to proceed on the basis of an interpretation that *A* knew *B* held (at least when *B* did not know that *A* held a different interpretation). *Principle IV* does not undermine the security of transactions, because *B* will prevail only if he can shoulder the difficult burden of proving *A*'s state of mind. Furthermore, a strictly objectivist view would defeat *B*'s legitimate expectation.

## II

### THE FORMS AND JUSTIFICATIONS OF EXPRESSION RULES

#### A. *Background Considerations*

As Part I shows, the general principles of interpretation of classical contract law were generally objective and standardized. In contrast, the general principles of interpretation of modern contract law are highly individualized and include subjective as well as objective elements. These modern principles of interpretation protect legitimate expectations by giving appropriate roles to the objective terms of an expression, the objective circumstances under which the expression was made, the actual subjective intentions of the parties, and fault. In sharp contrast, expression rules depart from these general principles, either by giving an objective and standardized meaning to a given class of expressions, or by reducing or otherwise changing the variables that would be relevant under the general principles of interpretation.

Expression rules raise issues at varying levels. The most basic issue is why, in any area of law, an established general principle should be made to give way to specific rules that are adopted under the umbrella of the principle, but that in practice may not always yield the same result as would the principle. This problem transcends issues related to the interpretation of expressions. For example, in the law of torts there has been a persistent though futile tendency to formulate more specific rules under the umbrella of the general principle of negligence. The Prosser text comments:

---

21. *Id.* § 201(2). Similarly, *Restatement Second* Section 20 provides:

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party . . . .

*Id.* § 20.

Almost invariably [such rules have] broken down in the face of the necessity of basing the standard upon the particular circumstances, the apparent risk, and the actor's opportunity to deal with it.

Especially noteworthy in this respect is the attempt of Mr. Justice Holmes, in *Baltimore & Ohio Railway v. Goodman*,<sup>22</sup> to "lay down a standard once for all," which would require an automobile driver approaching a railroad crossing with an obstructed view to stop, look and listen, and if he cannot be sure otherwise that no train is coming, to get out of the car. . . . A long series of cases in which gates were left open, or the driver relied upon the absence of a flagman, or it was clear that the conduct specified would have added nothing to the driver's safety, made it quite apparent that no such inflexible rule could be applied. Finally, in the subsequent case of *Pokora v. Wabash Ry.*,<sup>23</sup> where the only effective stop had to be made upon the railway tracks themselves, in a position of obvious danger, the court discarded any such uniform rule, rejecting the "get out of the car" requirement as "an uncommon precaution, likely to be futile and sometimes even dangerous," and saying that the driver need not always stop.<sup>24</sup>

On a more specific level, the issue is raised: why should general principles of interpretation give way to expression rules? This problem does not transcend interpretation, but it does transcend contract law. For example, the law of donative transfers utilizes various rules of construction that are essentially expression rules, such as constructional preferences for early vesting, indefeasibility, and nondisinheritance of a line of descent.<sup>25</sup> Similarly, the law of statutory interpretation utilizes various maxims or canons that essentially function as expression rules,<sup>26</sup> such as the maxim that general words following an enumeration of specifics should be interpreted to apply only to the same classes as those specifically mentioned. Although this Article focuses on expression rules in contract law, much of the analysis in Part II can be extended to other areas of law as well.

---

22. 275 U.S. 66 (1927), *overruled by Pokora v. Wabash Ry.*, 292 U.S. 98 (1934).

23. 292 U.S. 98 (1934).

24. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 35, at 218 (5th ed. 1984) (footnotes omitted).

25. See *RESTATEMENT (THIRD) OF PROPERTY (DONATIVE TRANSFERS)* § 12.2 & cmt. (Preliminary Draft No. 2, 1992); EDWARD C. HALBACH, JR. & EUGENE F. SCOLES, *PROBLEMS AND MATERIALS ON FUTURE INTERESTS* 72-73 (1977).

26. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1221 (tentative ed. 1958); see also 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 there are two opposing canons of construction in every point of statutory interpretation and listing 28 pairs of "thrust" and "parry" canons); Max Radin, *A Short Way with Statutes*, 56 *HARV. L. REV.* 388, 423 (1942) (discussing the role of the canons of interpretation in statutory interpretation); Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 *VAND. L. REV.* 529 (1992).

The central problem posed by expression rules in contract law can be stated as follows. If an expression rule is completely congruent with the general principles of interpretation, in the sense that applying the rule always yields the same result as applying the general principles, then no difficulty is presented. For example, *Restatement Second* Section 24 defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." This definition is (or at least can be read to be) completely congruent with the general principles of interpretation. Expression rules that take this form can be justified on the administrative ground that they provide lawyers and judges with a shorthand version of the principles of interpretation tailored to the type of expression at issue.

Typically, however, an expression rule is not perfectly congruent with those principles, so that there will be at least some cases where applying an expression rule produces a different result than would follow from applying the general principles. Accordingly, the application of an expression rule is likely to involve a certain rate of error compared to a perfect application of the general principles of interpretation. Given this chance for error, what would justify the adoption of an expression rule?

Contract law currently provides few or no answers to that question. Perhaps as a legacy of the axiomatic nature of classical contract law, many expression rules are apparently not perceived to be what they are—departures from the general principles of interpretation—but instead seem to be perceived as self-evidently correct descriptions of the application of the general principles of interpretation to particular classes of cases. Because the tension between any given expression rule and the general principles of interpretation is often unrecognized, the justification of the rule, and even the very form and force of the rule, is often left unarticulated. In fact, however, every expression rule represents a prudential choice between interpreting a given class of expressions under the general principles of interpretation or under a special rule.

The problem of justifying specific rules that are adopted under the umbrella of a general principle is not unique to law. For example, utilitarians face the problem why conduct should be governed by a number of special moral rules, rather than the single general principle that one should act in any given situation in the manner that maximizes welfare by producing the best consequences possible. John Rawls' analysis of this issue in his essay *Two Concepts of Rules*<sup>27</sup> provides a useful starting point for an investigation of the problem in a legal context.

Rawls develops three types of rules of conduct. The first he calls "rules of thumb." Rules of thumb are nonbinding summaries of past deci-

---

27. John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955). Except as otherwise indicated, the passages in text accompanying notes 28-35, *infra*, paraphrase or follow that essay.

sions.<sup>28</sup> Take, for example, a rule of thumb that covers conduct in Situation *S*. Before the rule is developed, under utilitarian theory every actor confronted with Situation *S* should decide how to conduct himself by applying the general utilitarian principle. However, if over time application of the general principle leads to the same decision by many different persons, a rule of thumb, Rule *R*, is formulated: "In Situation *S*, conduct yourself as follows . . ." Thereafter, Rule *R* can be used by others as a *guide* to conduct in Situation *S*.

In a society where knowledge was complete and rationality was perfect, rules of thumb would serve no purpose, because every individual could apply the general utilitarian principle to every situation directly, smoothly, and without error. In a real society, marked by incomplete knowledge and imperfect rationality, individuals use rules of thumb as guides that have been tested by the experience of generations. In principle, however, every individual is entitled to reconsider the correctness of a rule of thumb and to question whether it is proper to follow the rule in a particular case.

Rawls calls a second type of rule "general rules":

One is pictured as estimating on what percentage of the cases likely to arise a given rule may be relied upon to express the correct decision, that is, the decision that would be arrived at if one were to correctly apply the utilitarian principle case by case. If one estimates that by and large the rule will give the correct decision, or if one estimates that the likelihood of making a mistake by applying the utilitarian principle directly on one's own is greater than the likelihood of making a mistake by following the rule, and if these considerations held of persons generally, then one would be justified in urging its adoption as a general rule.<sup>29</sup>

In contrast to rules of thumb, Rawls' general rules have a real, although not definitive, bite. They are not merely guides to action, but normally *should* be followed. Nevertheless, even such a rule may give way to a direct application of the utilitarian principle "in extraordinary cases where there is no assurance that the generalization will hold and the case must therefore be treated on its merits. Thus there goes with this conception the notion of a particular exception which renders a rule suspect on a particular occasion."<sup>30</sup> This feature apparently explains why Rawls calls these rules general rules—they need be followed only generally, not invariably.

A third kind of rule that Rawls develops are rules that define and constitute a "practice." By a practice, Rawls means a social institution that is defined and constituted by rules.<sup>31</sup> Practices are created for various reasons. One important reason is that many areas of life require coordination

---

28. Rawls, *supra* note 27, at 23.

29. *Id.* at 23.

30. *Id.* at 24.

31. *Id.* at 24.

among actors. Coordination ordinarily cannot be achieved simply by each actor's trying to foresee how other relevant actors will conduct themselves under the circumstances. Therefore, a practice or institution is defined by a set of rules under which those who engage in the practice coordinate their actions.

Unlike rules of thumb and general rules, constitutive rules are logically prior to particular cases that fall under the rules, because "there cannot be a particular case of an action falling under a rule of a practice unless there is the practice."<sup>32</sup>

One may illustrate this point from the game of baseball. Many of the actions one performs in a game of baseball one can do by oneself or with others whether there is the game or not. For example, one can throw a ball, run, or swing a peculiarly shaped piece of wood. But one cannot steal base, or strike out, or draw a walk, or make an error, or balk; although one can do certain things which appear to resemble these actions such as sliding into a bag, missing a grounder and so on. Striking out, stealing a base, balking, etc., are all actions which can only happen in a game. No matter what a person did, what he did would not be described as stealing a base or striking out or drawing a walk unless he could also be described as playing baseball, and for him to be doing this presupposes the rule-like practice which constitutes the game.<sup>33</sup>

Constitutive rules differ from rules of thumb and general rules in another important respect. Once such rules are adopted, they are definitive; action under such rules is not a proper subject for application of the general utilitarian principle. Rather, it is essential to a practice or institution that the rules that constitute the practice always be followed:

If one wants to do an action which a certain practice specifies then there is no way to do it except to follow the rules which define it. Therefore, it doesn't make sense for a person to raise the question whether or not a rule of a practice correctly applies to *his* case . . . . If someone were to raise such a question, he would simply show that he didn't understand the situation in which he was acting . . . .

This point is illustrated by the behavior expected of a player in games. If one wants to play a game, one doesn't treat the rules of the game as guides as to what is best in particular cases. In a game of baseball if a batter were to ask "Can I have four strikes?" it would be assumed that he was asking what the rule was; and if, when told what the rule was, he were to say that he meant that on this occasion he thought it would be best on the whole for him to have four strikes rather than three, this would be most kindly taken as a joke. One

---

32. *Id.* at 25.

33. *Id.* at 25.

might contend that baseball would be a better game if four strikes were allowed instead of three; but one cannot picture the rules as guides to what is best on the whole in particular cases, and question their applicability to particular cases as particular cases.<sup>34</sup>

Legal rules take a variety of forms that do not fall within Rawls' three categories. For example, of the three types of rules that Rawls describes, only constitutive rules cannot be set aside in an individual case by an actor who thinks that doing so is best on the whole. In contrast, no legal rule can be set aside by a court in an individual case simply because on the whole it seems best not to apply the rule in that case, although a legal rule can either be abolished or modified in a manner that applies to all future cases. The existence of legal rules that have this characteristic is not inconsistent with Rawls' analysis. As Rawls points out, his analysis is not intended to be comprehensive: "there are further distinctions that can be made in classifying rules, [and] which should be made if one were considering other questions."<sup>35</sup> Nevertheless, the analysis is extremely useful in considering expression rules, because it is suggestive both as to taxonomy and justification.

### B. *The Forms of Expression Rules*

With this background, I now turn directly to expression rules. Such rules may take a variety of forms. One possible form is that of a *maxim*—a nonbinding legal norm that sums experience and guides decisions without compelling decisions: the legal equivalent of Rawls' rule of thumb. An expression rule in this form is simply a guide on how to interpret a given type of expression. Maxims are seldom found in American law. The most familiar examples are the maxims of statutory interpretation,<sup>36</sup> although the California Civil Code codifies a number of more general maxims.<sup>37</sup> Because maxims are not binding, they do not easily fit the everyday concepts of law, such as the positivist concept that laws are commands backed by the threat of official force. It may well be, however, that the concept of a maxim has been underutilized in the law. I argue precisely this point in Part III, where I suggest that some expression rules might best be cast in that form.

An expression rule may also take the form of a *presumption*, under which a type of expression, *E*, is interpreted to have a prescribed meaning or legal effect, *M*, unless the adversely affected party meets the burden of proving that under the circumstances the particular expression at issue should have a different meaning or effect. An example of an expression rule that takes this form is the rule that an offer made in the course of a

---

34. *Id.* at 26.

35. *Id.* at 29.

36. See authorities cited *supra* note 26.

37. CAL. CIV. CODE §§ 3509-3548 (West 1994).

conversation ordinarily lapses at the end of the conversation unless a contrary intention is indicated.<sup>38</sup> There are two different, although related, ways to give content to a presumption. First, a presumption may allocate the *burden* of proving that the prescribed interpretation should not hold. That is, a presumption may mean that the party who asserts that a particular Type *E* expression does not have meaning or effect *M* must establish that proposition by a preponderance of the evidence. Second, a presumption may intensify the *standard* of proof, by requiring that a party who asserts that a particular Type *E* expression does not have meaning or effect *M* must establish that proposition by more than a preponderance of the evidence—for example, by clear and convincing evidence. A court that decides not to follow a maxim does not have to provide a highly convincing explanation for its decision. In contrast, a court that decides that a presumption has been rebutted may or may not need to provide such an explanation, depending on whether the presumption affects the burden of proof or the standard of proof, and, if the latter, how high the standard is set.

Finally, an expression rule may take the form of a *categorical rule*, by which I mean a rule that a given type of expression *always* has a certain meaning or legal effect (for example, the rule that a counter-offer terminates the power of acceptance),<sup>39</sup> or that special interpretation principles are *always* applicable to a certain type of expression (for example, the rule that in case of doubt an offer is interpreted as inviting the offeree to accept either by promise or by performance, as the offeree chooses).<sup>40</sup> Categorical expression rules differ from presumptions in an important respect. If an expression rule takes the form of a presumption, a court can hold that the rule does not determine the outcome of a given case to which the rule is applicable, without modifying or distinguishing the rule, on the ground that the presumption has been overcome. In contrast, if an expression rule takes a categorical form, a court cannot hold that the rule does not determine the outcome of a given case to which the rule is applicable, although the court can hold that the rule does not determine the action by modifying or distinguishing the rule.

### C. *The Justifications of Expression Rules*

The extent of justification that an expression rule requires will depend in part on the form of the rule. If an expression rule takes the form of a maxim it will need relatively little justification, because the rule will only be a nonbinding guide and therefore will not introduce error if properly utilized. If an expression rule takes the form of a presumption it will need more justification; how much more will depend on the nature and strength

---

38. See *infra* text accompanying notes 61-70.

39. See *infra* text accompanying notes 74-85.

40. See *infra* text accompanying notes 147-54.

of the presumption. If an expression rule takes a categorical form it will need particularly strong justification.

At present, few if any expression rules in contract law take the form of maxims. Partly for this reason, and partly because maxims need much less justification, I will focus here on the possible justifications of binding expression rules, that is, those rules that take a presumptive or categorical form.

The clearest justification of an expression rule is that the rule is completely congruent with the general principles of interpretation, in the sense that application of either the rule or the principles will always yield the same result. In such cases, the rule is simply a shorthand version of the general principles, as those principles apply to the relevant type of expression. Suppose, however, that an expression rule is significantly but not completely congruent with the general principles of interpretation, in that most but not all cases would be decided the same way under the rule and the principles. For example, assume that expression rule *R* applies to a given type of expression, *E*, and assigns meaning *M* to that type of expression. Assume further that if the general principles of interpretation were perfectly applied to Type *E* expressions on a case-by-base basis, those expressions would usually but not always be determined to mean *M*. Adoption of expression rule *R* would then involve a certain rate of error as compared with a perfect application of the general principle of interpretation. Given that rate of error, some justification other than complete congruence with the general principles of interpretation will be required for the rule. Although a variety of justifications can be advanced, all depend on a high degree of congruence between the relevant expression rule and the general principles of interpretation.

Rawls' justification for rules of thumb and general rules provides one possible justification for an expression rule that lacks complete congruence with the general principles of interpretation: error may result from the application of an expression rule, but it may also result from applying the general principles of interpretation, because those principles may not be perfectly applied in every case. If application of an expression rule to a given type of expression would produce less error than application of the general principles of interpretation, adoption of the expression rule would be justified on the ground that it reduces error.<sup>41</sup> Call this the accuracy justification.

Assuming that the general principles of interpretation are the best possible principles of interpretation, those principles, if perfectly applied, will result in a perfect interpretation. Therefore, the accuracy justification will normally fail to support an expression rule unless for some reason the general principles of interpretation are likely to result in an unusually high rate

---

41. Rawls, *supra* note 27, at 23-24.



of error when applied to the relevant class of expressions. Furthermore, even when that is the case, the accuracy justification is likely to be sound only where the expression rule itself is very highly congruent with the general principles of interpretation. The less congruence there is between an expression rule and the general principles of interpretation, the greater will be the rate of error resulting from application of the expression rule itself, and the less likely that this rate of error will be smaller than the rate of error associated with imperfect application of the general principles.

Another possible justification of an expression rule is that the rule is supported by some noninterpretive policy. Call this the policy justification. For example, the traditional rule in contract law is that if an employment contract states no duration, either party may terminate the contract at will.<sup>42</sup> One justification of this rule has been that as a matter of policy an employee should not be forced to continue an employment relationship where he has not made a clear commitment to do so, and that for reasons of mutuality if the employee is not bound, the employer should not be bound.<sup>43</sup> Generally speaking, a policy justification of an expression rule in contract law is likely to have only limited weight, because any noninterpretive justification of an expression rule will conflict with the object of facilitating the power of self-governing parties to further their shared objectives through contracting. It is therefore not surprising that the at-will rule, which substitutes an expression rule based on a noninterpretive policy for the general principles of interpretation, has been eroding in recent times.

Still another ground on which an expression rule may be justified is that such a rule facilitates easier resolution of disputes than do the general principles of interpretation. Lawyers may more easily settle disputes, because they will often be able to make quick decisions on issues governed by such rules. Courts may more easily decide disputes, because they will often be able to dispose quickly of the issues that such rules govern. Call this the administrative justification.

The administrative justification may play a significant role in motivating the use of an expression rule, but it can have only limited weight in determining the content of such a rule. For the most part, the content of an expression rule must be dictated by considerations of substantive rationality—that is, by the likelihood that the rule captures the understanding of the parties and reflects any relevant policy—because disputes must be settled not only *easily*, but *properly*. Consider, for example, the problem of determining the duration of an offer that states no time limit for acceptance. Under the general principles of interpretation, the duration of such an offer depends on the circumstances of the individual case. The law might, alternatively, adopt an expression rule that such an offer does not lapse until

---

42. See Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484-85 (1976).

43. See, e.g., *Pitcher v. United Oil and Gas Syndicate, Inc.*, 139 So. 760, 761 (La. 1932).

revoked. That rule would be extremely easy to administer, but it would be a bad rule because it would typically fail to capture the parties' understanding in any given case, and would not be supported by any relevant policy. Accordingly, an expression rule can be properly based on the administrative justification only if it is substantially congruent with the general principles of interpretation on with a noninterpretive policy other than the policy of administrability itself.

A more complex approach to expression rules is to view such rules as constitutive rules. That approach, however, will not in itself justify any expression rule. Although an *act* under a constitutive rule can be justified by reference to the rule, any given constitutive *rule* can be justified only on the ground that it is a good rule, given the objectives of the relevant practice. Therefore, even if an expression rule is a constitutive rule it would still require independent justification.

In any event, the rules of contract law are seldom constitutive rules, because promising and contracting are social acts that are supported and governed by law, not practices that are constituted by law. For example, the rules of consideration are not constitutive of the social act of promising, and the legal principles of interpreting contractual expressions are not constitutive of the social act of interpreting contractual expressions. I cannot steal a base unless I play baseball, but I could conclude a bargain even if the law would not enforce it, and I could interpret a bargain even if the law had no principles of interpretation.

Indeed, the rules of contract law are not even constitutive of contract law, in Rawls' sense, because unlike constitutive rules, contract-law rules can be changed retroactively. As Rawls points out, a ballplayer who has just taken a third strike cannot meaningfully say to the umpire that he should be allowed a fourth strike because, all things considered, four strikes would make a better game.<sup>44</sup> In contrast, an offeree who has made a counter-offer can meaningfully say to a court that the counter-offer did not terminate his power of acceptance because all things considered the rule that a counter-offer terminates the power of acceptance is not a good rule.<sup>45</sup>

However, although expression rules are not constitutive rules, they might be justified on a basis that justifies such rules—that they facilitate coordination. It might further be argued that a coordination justification of expression rules does not depend on the degree of congruence between any given rule and the general principles of interpretation, on the theory that expression rules coordinate behavior in the manner of rules of the road, and the point of rules of the road is that they exist, not that they are right.

The force of such arguments depends in part on the extent to which private actors can reasonably be expected to know the relevant rules, because unknown rules will not facilitate and indeed may hinder coordina-

---

44. See Rawls, *supra* note 27, at 26.

45. See *infra* text accompanying notes 74-85.

tion. Traffic lights facilitate coordination because everyone knows the meaning of red and green. Similarly, players in a game normally know most rules of the game; if they do not, they cannot play the game in any meaningful sense. In contrast, private actors can contract, even if their knowledge of the law is scant, if they know the social rules of contracting.

The empirical evidence strongly suggests that private actors often do just that. Federal and state reporters document countless cases involving parties who apparently did not know contract law. For example, most bargains that are denied enforcement because they involve illusory promises could easily have been recast by knowledgeable parties to avoid that result, and most bargains that raise Statute of Frauds problems could easily have been put in writing. The very fact that lawyers must attend graduate school for three years, then serve a *de facto* apprenticeship of several more years, and thereafter take continuing-legal-education courses and keep abreast of the professional literature, evidences that nonlawyers often cannot reasonably be taken to know the law.

There is theoretical support for these empirical observations. Because the acquisition of information involves costs, rational decisionmakers will search for information only up to the point where the marginal benefit of additional information equals the marginal cost of obtaining that information. The greater the number of legal rules, and the further those rules depart from ordinary expectations, the greater the difficulty of transmitting, absorbing, and retaining information concerning those rules. So, for example, even practicing lawyers would find themselves hard put to master and practice two or three different areas that involve great numbers of rules, such as tax, securities regulation, and environmental law. Businessmen, who potentially deal in every area of law, certainly cannot be expected to learn all the legal rules that concern their conduct.

There is comparable theoretical support for the concept that a contract-law regime consisting of a relatively small number of general principles that reflect reasonable expectations is more desirable than a contract-law regime consisting of a relatively large number of specific rules. Anthony Ogus has pointed out that the likelihood that private actors will acquire information about the law depends in significant part on the costs of an adverse legal judgment. These costs may be very high where the actor's conduct either affects large numbers of persons, as in product liability cases, or where there are few victims but each may suffer a considerable amount of harm, as in conduct that may result in personal injury or death.<sup>46</sup> In contract law, however, the costs of an adverse judgment tend to be relatively low and may be largely offset by the gains from breach. Given these characteristics of contract law, private actors are likely to prefer a legal regime in which the information costs of learning the law are low. Principles that are gen-

---

46. Anthony Ogus, *Information, Error Costs and Regulation*, 12 INT'L REV. L. & ECON. 411, 418-19 (1992).

eral in character and that reflect reasonable social expectations will satisfy that preference.<sup>47</sup> Furthermore, general contract-law principles that coincide with reasonable social expectations will not normally frustrate the reasonable expectations of private actors who do not want to incur even those lower costs. Accordingly, private contracting will be less costly under a regime of a limited number of general principles than under a regime of a relatively large number of specific rules.

Of course, it is not necessary for a private actor to learn contract law if she gets advice from a lawyer before engaging in any contractual transactions or conduct. Such specific legal advice, however, is expensive both in terms of legal fees and the transaction costs of client-lawyer interchanges, including the time it takes to educate the lawyer on the transaction or conduct at hand. As a result, transaction- or conduct-specific legal advice is sought in only a small portion of all transactions and conduct that could have legal implications under contract law. Even in those types of transactions or conduct where such advice is regularly sought, such as real-estate contracts or extremely large contracts, lawyers are often called in only at a relatively late stage, after some legally relevant conduct has already occurred.

Since private actors cannot reasonably be taken to know contract law, if their expressions were given a meaning or legal effect that differed in a significant number of cases from the meaning or effect that would result from the application of the general principles of interpretation, the result would be frustration, not coordination, of legitimate expectations. Furthermore, even if private actors did know contract law, if the meaning and legal effect that an expression rule assigned to a given type of expression diverged in a significant number of cases from the meaning and effect that would be given under the general principles of interpretation, private actors would usually have to incur transaction costs to maneuver around the rule. Accordingly, with certain limited exceptions, a coordination justification of a contract-law expression rule, like any other justification of expression rules, requires a high degree of congruence between the rule and the general principles of interpretation.<sup>48</sup> One exception may exist where an expression rule backs up a constitutive social rule, so that the law supports a justified social practice. As I will show in Part III, this may be true of the

---

47. *See id.* at 416.

48. The argument that expression rules facilitate coordination can alternatively be made as an argument that they facilitate reliance. Because the reliance argument is essentially a special case of the coordination argument, the same objections apply. If a contract-law rule will often yield a result that differs from reasonable expectations, contract law will *defeat* the reliance of those persons who do not know the law and who entered into consensual dealings in reliance on social norms and ordinary understandings. Accordingly, an expression rule cannot be justified on the ground that the rule facilitates reliance unless most people will know the rule or the rule is substantially congruent with the general principles of interpretation.

expression rule that putting up goods for auction does not constitute an offer.<sup>49</sup>

The coordination rationale may also justify an expression rule, even in the absence of a high degree of congruence with the general principle of interpretation, where the rule is designed so that it facilitates coordination by private actors who do know the rule and deliberately coordinate under it, but does not tend to interfere with coordination by actors who do not know the rule or to frustrate the reasonable expectations of such actors. I will call such rules *opt-in rules*. Opt-in rules bridge the relatively complete knowledge of some private actors and the relatively incomplete knowledge of others. Opt-in rules also provide private actors with correct incentives to learn law, because they reward persons who know the law without penalizing persons who do not. Again, auctions provide an example. In some cases, a seller at an auction may want her act of putting up goods for bid to constitute an offer rather than only a request for offers. For example, the seller may believe that more people will attend the auction, or bid on an item, if the seller is committed to sell than if she is not. Under an expression rule that governs auctions, a seller can make the act of putting up the goods constitute an offer by stating that the auction is "without reserve."<sup>50</sup> This rule does not tend to interfere with coordination by those who do not know the rule, or to frustrate the expectations of such actors. On the one hand, it is extremely unlikely that a seller would use the technical term "without reserve" unless she knew the meaning that term conveyed; on the other, a seller who does not know the legal rules governing auctions, but who wants to commit to sell, can do so even if she does not use the words "without reserve."

Although opt-in rules can be justified as coordination devices, many or most expression rules do not take this form. Unlike opt-in rules, many expression rules apply even to actors who do not know the rule, and whose reasonable expectations or attempts at coordination may be frustrated by the rule. Take, for example, the expression rule, which I will discuss in Part III, that a qualified acceptance terminates the power of acceptance.<sup>51</sup> That rule applies to all offerees who respond with a qualified acceptance, whether or not they know the rule. If a significant number of offerees who respond with a qualified acceptance neither intend to terminate their power of acceptance nor are understood by the offeror to have such an intention, the rule will tend to frustrate reasonable expectations in a significant number of cases. Indeed, as this example illustrates, expression rules that do not take an opt-in form may tend to *interfere* with coordination, because parties who reasonably believe that they have achieved social coordination may come to

---

49. See *infra* text accompanying notes 139-46.

50. 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 4:9, at 320 (Richard A. Lord ed., 4th ed. 1990) [hereinafter 1 WILLISTON (4th ed.)]; U.C.C. § 2-328(3) (1990).

51. See *infra* text accompanying notes 86-104.

find that as a result of the expression rule the law will deny support to that coordination.

Given the various possible justifications of expression rules, both the desirability of any given expression rule and the form that such a rule should take depend entirely on complex prudential judgments concerning such matters as the degree of congruence between the general principles of interpretation and the expression rule; the comparative rate of error entailed by application of the general principles of interpretation and the expression rule; the comparative strength of any special noninterpretive policy that supports the expression rule and the general goal of facilitating the power of self-governing parties to further their shared objectives through contracting; and the comparative strength of that goal and administrative considerations. Normally, however, an expression rule will not be justified unless it is highly congruent with the general principles of interpretation. In the absence of such congruence, the accuracy justification will not support the rule at all, administrative considerations are unlikely to support the rule, noninterpretive policies are unlikely to outweigh the goal of facilitating the power of self-governing parties to further their shared objectives through contracting, and coordination is more likely to be frustrated than promoted.

### III

#### OFFER-AND-ACCEPTANCE EXPRESSION RULES

In this Part, I will explore a number of expression rules with a view to exemplifying the analysis in Part II, determining whether the rules in question are justified on a prudential basis, and, if not, specifying what alternative would be preferable. In some areas, this exploration is complicated by discrepancies between the expression rules stated in leading secondary authorities (such as the *Restatement*), which I will call black-letter rules, and the rules that emerge from the case law. For example, in some areas where there is a black-letter expression rule, the case law tends to apply instead the general principles of interpretation. In other areas, an expression rule that emerges from the case law has a weaker form than the black-letter rule, as where the black-letter rule is stated in a categorical form while the case-law rule is only a presumption. The reason for these discrepancies seems to be that black-letter expression rules continue to reflect the concepts of classical contract law to a greater extent than the actual case law. Whatever the reason, these discrepancies cause problems of exposition in stating the form and content of certain expression rules. Generally speaking, where such a discrepancy exists I will begin with the black-letter rule and only thereafter turn to the case law. I will show that although the black-letter rules may still influence or even control some cases, modern contract law is moving away from those black-letter expression rules that are neither highly congruent with the general principles of interpretation nor supportable on the ground that they reinforce a justified social practice.

The expression rules that I consider in this Part are all drawn from the law of offer and acceptance. Some preliminary observations about that area are needed to set those rules in context. A bargain is a reciprocal transfer—an exchange—in which each party views what he gives as the price of what he gets. A bargain can be concluded in various ways. One common way of concluding a bargain is through a simultaneous exchange of promises, as by the simultaneous execution of a written contract. Often, however, a bargain is concluded by a sequential exchange of promises or of a promise and an act. A contract formed by a sequential exchange of promises is a bilateral contract. A contract formed by a sequential exchange of a promise and an act is a unilateral contract. Whether a sequential exchange forms a contract of either type is determined in large part by the rules of offer and acceptance.

Under basic principles of contract law, the remedy for breach of a bargain contract is normally expectation damages. The purpose of expectation damages is not merely to make the victim of breach whole for the costs he has incurred as a result of the broken promise, but to put him forward to the position in which he would have been if the contract had been performed.<sup>52</sup> Accordingly, damages for breach of a bargain contract can be recovered even if no costs (not even opportunity costs) were incurred by the victim of breach, and indeed even if no costs could possibly have been incurred (as where the breach occurred a nanosecond after the bargain was made). Because a contract has such potent remedial consequences, and because contracts are so often concluded by a sequential exchange, in any given case much can ride on the law of offer and acceptance.

Many, although by no means all, of the rules of offer and acceptance are expression rules.<sup>53</sup> It would be tedious to consider all the expression rules in this area, and instead I will examine a handful of central rules that are both important in themselves and reflective of a fair variety of the issues raised by expression rules. I begin with expression rules that concern the termination of the power of acceptance—first, rules concerning lapse (Part III.A), and then rules concerning rejections, counter-offers, and qualified acceptances (Part III.B). I next turn to expression rules that concern whether certain kinds of expressions are offers—in particular, advertisements and auctions (Part III.C). Finally, I consider expression rules that concern whether an offer requires acceptance by a promise or by an act (Part III.D).

---

52. See Cooter & Eisenberg, *supra* note 2, at 1438.

53. Among the noninterpretive rules of offer and acceptance are the rules that an acceptance is effective on dispatch, and that an offeror's death or incapacity terminates the offeree's power of acceptance.

### A. *Lapse*

An offer is an expression in the form of a proposal to make a deal, or bargain, that gives the addressee the power to conclude the bargain by assenting to the terms of the proposal—that is, by saying “yes” or using whatever other words or acts the offer treats as the equivalent of “yes.” Therefore, the legal effect of an offer is to create in the offeree the power to conclude a bargain—the power of acceptance. Much of the law of offer and acceptance concerns the question, what expressions or events will terminate such a power.

The modest nature of the expression rules that govern lapse makes them useful entry points for discussion. Stated in its most general terms, the concept of lapse is that a power of acceptance terminates when it is too late to accept the offer. Stated in those terms, the concept is almost tautological. The difficult questions arise in determining how late is too late. That question is an interpretive matter.

#### 1. *The Global Rule*

Some offers state a fixed time or period for acceptance. These offers seldom give rise to problems of interpretation concerning the issue of lapse. Rather, most lapse problems arise when the offer does not state a fixed time by which, or a period within which, acceptance must occur. The black-letter expression rule in such cases is that the power of acceptance lapses at the expiration of a reasonable time. As stated in *Restatement Second* Section 41(1): “An offeree’s power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.”<sup>54</sup> I will call this the black-letter global rule, to distinguish it from special black-letter rules that concern the lapse of certain specific types of offers.<sup>55</sup>

On the surface, the black-letter global rule seems easy enough; indeed, on the surface the rule seems not to be an expression rule at all, but only a stylized formulation of an obvious result. After all, if an expression constitutes an offer, and no time is specified for acceptance, a reasonable person in the addressee’s position would not believe either that the power of acceptance lapsed instantaneously or that the power never lapsed. If the power lapsed instantaneously, the expression would not really constitute an offer, because the addressee would not have the effective power to conclude a bargain—his power would lapse before it could be exercised. Conversely, an offer that never lapsed—even when, for example, the mar-

---

54. RESTATEMENT SECOND, *supra* note 11, § 41(1); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2-20, at 92 (3d ed. 1987); 1 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 36, at 147 (1963); E. ALLAN FARNSWORTH, *CONTRACTS* § 3.19, at 166 (2d ed. 1990); 1 WILLISTON (1st ed.), *supra* note 18, § 54, at 91; 1 WILLISTON (4th ed.), *supra* note 50, § 5:7, at 658.

55. An example of such a rule (concerning offers made during conversations) is discussed *infra* text accompanying notes 61-70.



ket had radically changed—would be too good to be true. And if an offer that does not specify a time for acceptance neither lapses instantaneously nor never lapses, what standard can a court employ other than that of reasonableness? In fact, however, the black-letter global rule on lapse embodies a strictly objective theory, and is therefore inconsistent with the general principles of interpretation, which incorporate important subjective elements.

It is not easy to determine why the black-letter global rule governing lapse is cast as an expression rule that differs from the general principles of interpretation by eliminating the important subjective elements of those principles. No reason is given in the Comment to *Restatement Second* Section 41(1). One possible answer is historical. As discussed above, classical contract law exhibited a very strong preference for objective and standardized rules.<sup>56</sup> In contrast, modern contract law consists of principles that properly reflect subjective and individualized elements as well. The black-letter global rule on lapse seems to be an anachronism that reflects classical contract law rather than the general principles of interpretation of modern contract law.

The black-letter global rule governing lapse finds no support in any of the possible justifications for expression rules. The rule is not justified on accuracy grounds, because there is no reason to believe that application of the general principles of interpretation to the issue of lapse poses more difficulty than application of those principles to other issues. The rule is not justified on administrative grounds, partly for the same reason, and partly because the rule still leaves open the difficult question of what constitutes a reasonable time. There is no basis for believing that the global rule serves a coordinating function. And the rule is not supported by any noninterpretive policy.

It is therefore not surprising that the case law reflects and supports the application of the general principles of interpretation, rather than the black-letter global rule, to the issue of lapse. For example, in *Mactier's Administrators v. Frith*,<sup>57</sup> Seller and Buyer were jointly interested in a shipment of brandy from France to New York. Seller, in St. Domingo, wrote to Buyer, in New York, proposing that Buyer take over Seller's interest. More than two months after receiving this offer, and two weeks after the brandy arrived in New York, Buyer posted an acceptance. Buyer's acceptance crossed in the mails with a letter from Seller renewing the offer, which was never received by Buyer. The court held that letters written by Seller but

---

56. See *supra* text accompanying notes 7-21.

57. 6 Wend. 103 (N.Y. 1830).

not received by Buyer before the latter's death were relevant to determining whether the offer was open at the time Buyer accepted.<sup>58</sup>

Other cases have reached the same result through other theories. For example, in *Forbes v. Board of Missions of Methodist Episcopal Church, South*,<sup>59</sup> an offer was made on May 14 after very extended discussions. The offer consisted of a written contract, signed by A, to convey real property to B for a designated consideration. On the following January 3, B signed the contract and delivered it to A through an intermediary. A gave the intermediary a receipt. The court held that although A might have had the right to decline B's acceptance as too late, she waived the right to complain of the delay by making no objection, receiving the proffered agreement, and giving the intermediary a receipt.<sup>60</sup>

In *Forbes* and other like cases, either both parties believed the power of acceptance was still open when it was exercised, or the offeree believed the power of acceptance was open and the offeror acquiesced in the formation of a contract. Although the waiver theory adopted in these cases is not objectionable, the principle that a mutually held subjective intent trumps objective interpretation is a cleaner explanation of the results. Thus the case law supports application of the general principles of interpretation to the problem of lapse, which include subjective elements, rather than the black-letter global rule, which is cast in purely objective terms.

---

58. *Id.* at 122-24; see also *R.E. Crummer & Co. v. Nuveen*, 147 F.2d 3, 5 (7th Cir. 1945) (holding that an offer does not lapse even after a reasonable time if the parties treat the offer as continuing in force).

59. 110 P.2d 3 (Cal. 1941).

60. *Id.* at 8. For other cases using the waiver theory to reach similar results, see *Sabo v. Fasano*, 201 Cal. Rptr. 270 (Cal. Ct. App. 1984); *Davies v. Langin*, 21 Cal. Rptr. 682 (Cal. Ct. App. 1962). In *Phillips v. Moor*, 71 Me. 78 (1880), A and B had engaged in negotiations for the sale of hay. A asked B to make an offer for the hay, and stated, "If the price is satisfactory I will write you on receipt of it . . ." *Id.* at 79. B mailed a card to A on Saturday, June 15, and A received the offer the same day. On Thursday, June 20, A mailed an acceptance, which B received that night or the next morning. B did not immediately reply, but made a bargain with a third party to haul the hay. *Id.* at 80. On strict objective theory, an immediate acceptance of B's offer was probably required in light of A's statement that "[i]f the price is satisfactory, I shall write you on receipt of it." However, B's bargain with a third party to haul the hay showed that in B's view a contract had been concluded. The court held for A, although on a somewhat different theory:

[I]f the party to whom [an offer] is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late.

*Id.* at 80. Cf. *Kurio v. United States*, 429 F. Supp. 42, 64 (S.D. Tex. 1970) (holding that an offeror cannot waive untimeliness, and a lapsed offer therefore cannot be revived, but an offeree's late acceptance is a counter-offer that can be accepted by the offeror's conduct, and if the understandings of the offeror and the offeree coincide, a contract is formed in accordance with their mutual understanding).

Generally speaking, courts have been reluctant to allow evidence of mutual subjective understanding to vary a fixed time for acceptance stated in an offer. See, e.g., *Houston Dairy, Inc. v. John Hancock Mut. Life Ins. Co.*, 643 F.2d 1185 (5th Cir. 1981); *Wax v. Northwest Seed Co.*, 64 P.2d 513 (Wash. 1937).

## 2. The Conversation Rule

In addition to the global black-letter rule, there are other, more specific black-letter expression rules that concern lapse. These rules differ not only from the general principles of interpretation, but also from the global black-letter rule itself. One of these rules concerns offers that are made in conversation. The black-letter rule on this issue is stated and illustrated as follows in Comment *d* to *Restatement Second* Section 41:

*d. Direct negotiations.* Where the parties bargain face to face or over the telephone, the time for acceptance does not ordinarily extend beyond the end of the conversation unless a contrary intention is indicated. . . .

Illustration:

4. While A and B are engaged in conversation, A makes B an offer to which B then makes no reply, but on meeting A again a few hours later B states that he accepts the offer. There is no contract unless the offer or the circumstances indicate that the offer is intended to continue beyond the immediate conversation.<sup>61</sup>

Under this rule, an offer that would have been interpreted still to be open if it had been made by a means other than conversation is presumed to have lapsed solely because it was made in conversation.

It seems unlikely that all or even most bargaining parties would conclude that an offer made in conversation, which would not have lapsed had it been made by a means other than conversation, is taken off the table the moment the conversation is over. It is not even obvious that a majority of parties would so conclude. A major problem with the conversation rule is that it fails to distinguish between face-to-face conversations and other interactive dialogues, such as those that occur by telephone, electronic mail, or fax. It is certainly not obvious that an offer made in the course of an electronic or even a telephonic conversation would be understood to lapse if not accepted immediately, when the same offer would not have been deemed to lapse had it been made by other means.

Perhaps for these reasons, the conversation rule is normally formulated as a presumption; that is, it applies unless "a contrary intention is indicated" or "the circumstances indicate [otherwise] . . ."<sup>62</sup> It is not clear, however, whether the presumption is intended to allocate the burden of proof or to intensify the standard of proof, and, if the latter, how much must be done to overcome the presumption.

Intensification may have been in the minds of the drafters of *Restatement Second*. Comment *d* gives two examples of cases in which the

---

61. RESTATEMENT SECOND, *supra* note 11, § 41 cmt. d; *see also* CALAMARI & PERILLO, *supra* note 54, § 2-20(a), at 93; 1 CORBIN, *supra* note 54, § 36, at 150-51; FARNSWORTH, *supra* note 54, § 3.19, at 166-67; 1 WILLISTON (1st ed.), *supra* note 18, § 54, at 92; 1 WILLISTON (4th ed.), *supra* note 50, § 5:7, at 660.

62. *See* RESTATEMENT SECOND, *supra* note 11, § 41 cmt. d.

circumstances "may indicate that a delayed acceptance is invited."<sup>63</sup> In one example, the offeror delivers a written offer to the offeree before the end of the conversation. In such a case, it might be said that the offer was made in writing, not in conversation. In the other example, there is an "expectation that some action will be taken before acceptance . . ."<sup>64</sup> In such a case, the acceptance could not be given until after the action, and therefore could not be expected at the end of the conversation. Accordingly, in both examples the countervailing circumstances present not only a good but a compelling reason to interpret the offer to be still on the table after the conversation is over. This may suggest that in the minds of the drafters the presumption concerns the standard as well as the burden of proof, and that the effect of the presumption on the standard of proof is very strong. On the other hand, perhaps the drafters were simply trying to use easy and noncontroversial examples.

In either a burden-of-proof or a standard-of-proof format, presumption rules represent an obvious compromise between employing the general principles of interpretation and formulating a categorical expression rule. A presumption rule allows the courts to apply the general principles of interpretation in any given case by determining that the presumption has been overcome, but nevertheless makes the resolution of disputes somewhat easier than do the general principles of interpretation taken alone. The question as to any presumption rule is therefore whether the presumption is a desirable accommodation between a case-by-case application of the general principles and a categorical rule, because the presumption has some of the benefits of each approach, or is an undesirable accommodation, because it has some of the costs of each approach. Unfortunately, the courts and the commentators have seldom analyzed expression rules in these prudential terms, and indeed (as the conversation rule illustrates) have seldom even thought through how any given presumption rule is intended to operate.

The conversation rule finds its support principally in secondary authorities. Only a handful of cases seem to have addressed the issue.<sup>65</sup> Some of these cases are really not on point, although they contain stray dicta that support the rule.<sup>66</sup> The cases that are on point are somewhat ambiguous.

---

63. *Id.*

64. *Id.*

65. As originally published, the Williston treatise cited only two cases in support of the rule, *Mactier's Adm'ts v. Frith*, 6 Wend. 103 (N.Y. 1830), and *Vincent v. Woodland Oil Co.*, 30 A. 991 (Pa. 1895). 1 WILLISTON (1st ed.), *supra* note 18, § 54, at 92 & n.33. The Corbin treatise cited no case at all. Today, the two treatises cite only three additional cases: *Akers v. J.B. Sedberry, Inc.*, 286 S.W.2d 617 (Tenn. Ct. App. 1955); *Textron, Inc. v. Froelich*, 302 A.2d 426 (Pa. Super. Ct. 1973); and *Wagenvoord Broadcasting Co. v. Canal Automatic Transmission Serv., Inc.*, 176 So. 2d 188 (La. Ct. App. 1965). See 1 WILLISTON (4th ed.), *supra* note 50, § 5:7, at 660 & n.1; 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 2.16, at 207 & n.7 (Joseph M. Perillo ed., rev. ed. 1993).

66. In *Mactier's Administrators* the offer was made in a letter, not in a conversation. *Mactier's Adm'ts*, 6 Wend. at 120. In *Vincent* and *Wagenvoord*, the issue was whether the offer was effectively revoked. *Vincent*, 30 A. at 991; *Wagenvoord*, 176 So. 2d at 190. *Vincent* also stressed that the subject

For example, in *Akers v. J.B. Sedberry, Inc.*<sup>67</sup> the court held that an offer made in a conversation lapsed at the end of the conversation, but added that in any event the offer had been rejected even before the conversation ended. In *Textron, Inc. v. Froelich*<sup>68</sup> a fabricator of steel and wire products orally offered a steel broker specified quantities of two different sizes of steel rods at specified prices. The broker responded that he thought he wanted the rods but wished to check with his customers. Five weeks later, the broker called the fabricator and agreed to buy one size of rods at the price originally discussed; two days later, he agreed to purchase the other size, again at the earlier specified price. The trial court dismissed the fabricator's claim, but the Pennsylvania Superior Court reversed:

The trial judge based his decision on the rule set forth in *Boyd v. Merchants and Farmers Peanut Co.*, 25 Pa.Super. 199 (1904) that an oral offer ordinarily terminates with the end of the conversation. The dictum in *Boyd*, however, does not preclude the possibility that in some cases an oral offer does continue past the conversation.

. . . .

There may be times when a judge could find as a matter of law that an oral offer made in the course of a conversation terminates with the end of the conversation. If there is any doubt as to what is a reasonable interpretation, the decision should be left to the jury. In this case, the appellant had informed the appellee that he wanted time to contact some customers before accepting the offer, which was only natural for a steel broker. Under the circumstances, it is possible that a jury could have found that the oral offer continued beyond the end of the conversation.<sup>69</sup>

The court's language strongly suggests that the conversation rule is more of a maxim than a presumption.<sup>70</sup>

Given the empirical uncertainty whether parties would understand that an offer that would otherwise still be open will lapse solely because it was made in a conversation, if there is to be a conversation rule it should take

---

matter of the offer, oil-producing wells, was liable to fluctuations in value that raised a presumption that time was of the essence, that a new development might at any hour materially affect the value of the wells, and that this was understood by the parties. *Vincent*, 30 A. at 991.

67. 286 S.W.2d 617, 622 (Tenn. Ct. App. 1955).

68. 302 A.2d 426 (Pa. Super. Ct. 1973).

69. *Id.* at 427.

70. *See id.*; *see also* *Caldwell v. E.F. Spears & Sons*, 216 S.W. 83 (Ky. 1919). Cobb, the plaintiff's agent, testified that the defendant had offered to accept ten cents per pound for his hemp, and that Cobb replied, "Well, I want to see what I can do here with the farmers to-day in locating crops and so on; and I will let you know." *Id.* at 84. The next day, Cobb accepted the defendant's offer. The trial court directed the jury to find for the plaintiffs if it believed from the evidence that the offer was not confined to the day upon which it was made, and the jury returned a verdict for the plaintiffs. The appellate court affirmed. "[T]he . . . question is whether the communication of the acceptance on the next day was within a reasonable time, under the circumstance of the case. That the answer should be in the affirmative we think there can be no doubt." *Id.* at 85.

the form of a maxim. Like Rawls' rules of thumb, a maxim conveys to a court the accumulated wisdom concerning the meaning and legal effect of an expression, while leaving the court free to find that the accumulated wisdom is not a good guide in any given case. A maxim therefore makes dispute settlement at least somewhat more expeditious, while posing only a minimal threat to the protection of fair expectations as reflected in the general principles of interpretation.

### *B. Rejection, Counter-Offer, and Qualified Acceptance*

A recurring problem in the area of offer and acceptance concerns the issue whether an expression by the offeree, in response to an offer, terminates the offeree's power of acceptance. Whether an expression has that effect is normally relevant only if the power of acceptance would have persisted in the absence of the expression, and was otherwise properly exercised. Accordingly, it will be assumed in the balance of this Section that the offeree followed up the relevant expression with an acceptance, and the acceptance was communicated before the offer had lapsed or had been properly revoked.

The underlying question in determining whether an offeree's expression terminates his power of acceptance is whether the parties do, or reasonably should, understand that the expression serves to take the offer off the table. If an offer is understood to have been taken off the table, the offeree has nothing to accept, any more than if the offer had never been made or if it had lapsed. Furthermore, an offeror is likely to rely on his understanding that the offer has been taken off the table. For example, suppose an offer states that it will be open for ten days. During those ten days, the offeror may take steps to prepare for performance based on his assessment of the probability of acceptance. Suppose now that as a result of an expression used by the offeree on the second day, the offeror properly believes the offer is off the table. In that case, the offeror will take no further steps to prepare for performance, and may arrange his affairs on the basis that he will not be entering into a contract. Alternatively, the offeror may make a new offer to a third party that he would not have made in the absence of the offeree's expression. If the offeree then tries to accept on the tenth day, the offeror would be caught short. Moreover, it would be difficult if not impossible for the offeror to prove that he would have acted differently in the absence of the offeree's expression, because the offeror's response to the expression may consist of nonaction or of action that is not related to the expression in an obvious way.<sup>71</sup>

The law of offer and acceptance deals with this problem through a series of black-letter expression rules. Under the most important of these

---

71. See RESTATEMENT SECOND, *supra* note 11, § 38 cmt. a; FARNSWORTH, *supra* note 54, § 3.20, at 169.

rules, a rejection, a counter-offer, or a qualified acceptance by an offeree terminates the offeree's power of acceptance even though in the absence of the expression the power of acceptance would not have terminated. These rules are normally rationalized on an interpretive basis, although they sometimes seem to be taken as axiomatically true. In evaluating these rules, a paramount question should be whether under the general principles of interpretation each type of expression would be understood to take the offer off the table.

### 1. Rejection

A rejection is an expression by an offeree turning down an offer. The black-letter rule is that a rejection terminates the offeree's power of acceptance even though the rejection is communicated before the offer would otherwise have lapsed.<sup>72</sup> It is easy to justify this rule, because it seems virtually certain that under the general principles of interpretation a rejection would be understood to take an offer off the table. Although it is conceivable that in a few cases the general principles of interpretation would lead to a different result—because, for example, neither party subjectively viewed the rejection as taking the offer off the table—such a scenario is so unlikely that a categorical expression rule is supported by the accuracy and administrative justifications.<sup>73</sup> It should be stressed, however, that even in this relatively easy case the black-letter rule represents a prudential choice. If the rule is that a rejection terminates the power of acceptance, this is not because a rejection must *logically* terminate the power of acceptance, but because the black-letter expression rule on the issue is justified by prudential considerations.

---

72. See, e.g., *Burton v. Coombs*, 557 P.2d 148, 149 (Utah 1976).

73. Corbin urged that a rejection should not terminate the offeree's power to accept an option (that is, an offer accompanied by an enforceable promise to hold the offer open for a certain period of time) unless the rejection was demonstrably relied on:

No cases have been found deciding whether a rejection by the holder of a binding and irrevocable option operates as a termination of his power. It is believed, however, that it should have no such effect. The holder of such an option has a right as well as a power, created by contract and not by a mere offer. The holder of a contract right does not terminate it and discharge the duty of the other party by merely saying that he discharges it or by expressing an intention not to enforce. Such a statement followed by a material change of position by the other party will operate as a discharge by estoppel. Similarly, a notice of rejection by an option holder, followed by a material change of position, should terminate both his contract right and his power of acceptance. Even if the notice of rejection were also the repudiation of a contract duty, which it is not, it would be subject to retraction prior to a change of position induced by it and prior to expiration of the time limit for performance. Similarly, a notice of rejection should be revocable.

1 CORBIN, *supra* note 54, § 94, at 392; see LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 23 (2d ed. 1965). This rule was adopted in *Ryder v. Wescoat*, 535 S.W.2d 269, 271 (Mo. Ct. App. 1976). However, a special rule for the rejection of options is inconsistent with one basis of the normal rejection rule—that an offeror is likely to rely on a rejection in a manner that may be difficult or impossible to prove.

## 2. Counter-Offer

A counter-offer is an offer made by an offeree to an offeror that concerns the same subject matter as the original offer but differs in its terms.<sup>74</sup> The black-letter expression rule is that a counter-offer terminates the offeree's power of acceptance.<sup>75</sup> The Comment to *Restatement Second* Section 39, which embodies this rule, rationalizes the rule on the interpretive ground that it carries out "the usual understanding of bargainers that one proposal is dropped when another is taken under consideration; if alternative proposals are to be under consideration at the same time, warning is expected."<sup>76</sup> The force of this rationalization is doubtful. The use of the qualifier "usual" is a tacit admission that application of the general principles of interpretation would at least sometimes and perhaps often produce a different result.

More important, the counter-offer rule does not even seem to capture the usual understanding. For example, *A* says to *B*, "I will sell you my used car for \$7,400, and I'll give you three days to decide." One day later, *B* responds, "I will offer you \$7,100 for the car." It is far from clear that the usual understanding would be that as a result of *B*'s response *A*'s offer is taken off the table. On the contrary, it seems likely that most people would believe that *A*'s offer remained on the table, because a counter-offer is normally intended to *continue* negotiations, not to terminate negotiations. As Corbin said:

[A] counter offer ordinarily terminates the power to accept the previously made offer to which it is a "counter," or reply, in the negotiation. The reasons given for this seem none too strong . . . . A counter offer has often been said to be a "rejection" of the prior offer; but this seems untrue in fact . . . . A counter offer is usually only a step in the higgling process, the purpose of which is to obtain the most advantageous terms.

. . . .

It seems that there is some sort of feeling that an offeree should have but one chance, to accept or not to accept; he should take it or

74. See *Landberg v. Landberg*, 101 Cal. Rptr. 335, 345 (Ct. App. 1972); *RESTATEMENT SECOND*, *supra* note 11, § 39(1); 1 *CORBIN*, *supra* note 54, § 89, at 378-82; *FARNSWORTH*, *supra* note 54, § 3.20, at 169; 1 *WILLISTON* (1st ed.), *supra* note 18, § 51, at 86-87; 1 *WILLISTON* (4th ed.), *supra* note 50, § 5:3, at 631-32.

75. *RESTATEMENT SECOND*, *supra* note 11, § 39; see also *Duval & Co. v. Malcolm*, 214 S.E.2d 356, 358 (Ga. 1975).

76. *RESTATEMENT SECOND*, *supra* note 11, § 39 cmt. a; see also 1 *WILLISTON* (1st ed.), *supra* note 18, § 51, at 86-87 ("The reason [a counter-offer operates as a rejection] is that the counter-offer is construed as being in effect a statement by the offeree not only that he will enter into the transaction on the terms stated in his counter-offer, but also by implication that he will not assent to the terms of the original offer.").



leave it. To the present writer, this does not carry much conviction.<sup>77</sup>

Of course, the circumstances may make it clear that the offeree is rejecting the original offer while simultaneously making his own counter-offer. In the used-car hypothetical, for example, *B* may respond, "I will not pay \$7,400, but I offer you \$7,100." From this answer, the parties may understand that *A*'s original offer was rejected and is no longer on the table. In the ordinary case, however, the proposition that a counter-offer implies a rejection and takes the offer off the table seems incorrect, and the black-letter rule seems unjustified. Like the global rule on lapse, the counter-offer rule appears to be a carryover from classical contract law, with its emphasis on objectivity and standardization.

The counter-offer rule reflects another attribute often associated with classical contract law. The rules of classical contract law tended to be static; in contrast, the rules of modern contract law tend to be dynamic. Under the counter-offer rule, negotiation is conceived to consist of defined episodic stages, separated from each other like watertight compartments. In fact, however, negotiation tends to be fluid rather than episodic. Application of the general principles of interpretation to determine the meaning and legal effect of any given counter-offer would properly capture the fluid and dynamic character of the negotiation process.

Although the black-letter rule concerning counter-offers is a categorical rule,<sup>78</sup> it is subject to several important exceptions, which themselves take the form of categorical rules. Under one of these exceptions, an "inquiry" regarding the possibility of different terms does not terminate the power of acceptance.<sup>79</sup> Under another, a "request" for different terms does not terminate the power of acceptance.<sup>80</sup> And a counter-offer does not terminate the power of acceptance if it is accompanied by a statement that the offer is being held under advisement.<sup>81</sup> The categorical nature of both the rule and its exceptions evidence the pseudo-scientific nature of the entire enterprise. Instead of directing the court to ask the real question, whether under the general principles of interpretation the offeree's response took the offer off the table, the relevant expression rules direct the court to answer the mechanical question, whether this response was a counter-offer, an

---

77. 1 CORBIN, *supra* note 54, § 90, at 382-83 (footnote omitted).

78. I treat the counter-offer rule as a categorical rule although the offeree's power of acceptance is not terminated by a counter-offer if the offeror has manifested a contrary intention or if the counter-offer does so. See RESTATEMENT SECOND, *supra* note 11, § 39. Whether the offeror has manifested a contrary intent is irrelevant as a practical matter, because offers rarely if ever state that they will not be terminated by a counter-offer. Giving effect to a statement in a counter-offer that the counter-offer does not terminate the power of acceptance simply reflects the concept that any expression rule can be trumped by the addressor's contrary expression.

79. *Id.* § 39 cmt. b, illus. 2.

80. Home Gas Co. v. Magnolia Petroleum Co., 287 P. 1033, 1034-35 (Okla. 1930); Stevenson, Jaques, & Co. v. McLean, 5 Q.B.D. 346, 350 (1880).

81. RESTATEMENT SECOND, *supra* note 11, § 39 cmt. c.

inquiry, a request, or a statement that the offer would be held under advisement.

The exceptions also tend to erode any administrability or coordination effect the counter-offer rule might be intended to achieve, because the line between a counter-offer, an inquiry, a request, and a statement that the offer will be held under advisement can be very unclear. If *A* offers to sell his car to *B* for \$7,400, a response of "I'll pay you \$7,100" is a counter-offer, and a response of "Will you take less?" is an inquiry. But what about "Will you take \$900?," "How about \$900?," or "At this time, I can only offer \$900, but I will get back to you if things change?"<sup>82</sup>

The Illustrations to *Restatement Second* Section 39 exemplify the brittle and unpersuasive nature of the rule and its exceptions. Illustration 1 states:

A offers B to sell him a parcel of land for \$5,000, stating that the offer will remain open for thirty days. B replies, "I will pay \$4,800 for the parcel," and on A's declining that, B writes, within the thirty day period, "I accept your offer to sell for \$5,000." There is no contract . . . .<sup>83</sup>

In contrast, Illustration 2 states:

A makes the same offer to B as that stated in Illustration 1, and B replies, "Won't you take less?" A answers, "No." An acceptance thereafter by B within the thirty-day period is effective. B's inquiry was not a counter-offer, and A's original offer stands.<sup>84</sup>

But why can it always be confidently concluded that *A* would understand his offer to be taken off the table when *B* replies "I will pay \$4,800 for the parcel," but not when *B* replies "Won't you take less?"

The state of the law concerning the counter-offer rule also shows how the rule operates almost entirely on those who do not know the law. If an offeree knows the law, he would almost certainly avoid the force of the counter-offer rule by couching his response as an inquiry or a request, or accompanying his counter-offer with a statement that the offer was being held under advisement.<sup>85</sup> Only those offerees who do not know the rule are likely to suffer from its bite.

82. See, e.g., *King v. Travelers Ins. Co.*, 513 So. 2d 1023, 1026 (Ala. 1987) ("The attorney for the defendants who handled the 'settlement' testified that there was no rejection or counter-offer, only an inquiry as to whether the plaintiffs would consider a structured settlement with a different payment arrangement. The trial court apparently believed that testimony . . . This was not plainly and palpably wrong."); see also the closely related cases discussed *infra* text accompanying notes 86-104 concerning qualified acceptances.

83. *RESTATEMENT SECOND*, *supra* note 11, § 39 cmt. a, illus. 1.

84. *Id.* § 39 cmt. b, illus. 2.

85. It is conceivable that even if *B* knew the law he might make a counter-offer to punch up his bargaining posture by taking the position that the offer price is so unacceptable that *B* is willing to voluntarily terminate his power of acceptance rather than accept that price. However, even if a counter-offer did not terminate the power of acceptance, *B* could punch up his bargaining posture by adding a rejection to his counter-offer.

In short, the counter-offer rule is incongruent in many or most cases with the general principles of interpretation, is not supported by the accuracy or administrative justifications, is not based on any noninterpretive policy, does not serve as a coordinating device, and should be either dropped entirely or downgraded to the form of a maxim.

### 3. *Qualified Acceptances and the Mirror-Image Rule*

#### a. *Qualified Acceptance*

A qualified (or conditional) acceptance is a reply to an offer that purports to accept the offer but adds terms that are not in the offer.<sup>86</sup> The black-letter expression rule is that a qualified acceptance (i) does not conclude a contract and (ii) terminates the power of acceptance.<sup>87</sup> The second element of this rule, at least, is even more incongruent with the general principles of interpretation than is the counter-offer rule. An offeror to whom is communicated an expression that includes the term "I accept" or some equivalent is much more likely to understand that the offer is still on the table than that it is off the table, even if the acceptance is qualified.

The qualified-acceptance rule is normally rationalized on the ground that a qualified acceptance is equivalent to a counter-offer. For example, Williston stated that "[a]n answer purporting to accept upon condition is . . . in effect a counter-offer, because it states in substance that the offeree will contract on the terms of the original offer if some addition or subtraction is made from them, but implies that otherwise he will not contract."<sup>88</sup> In fact, however, the implication would normally be just the other way. Where an offeree responds by using the words "I accept" or some equivalent, the offeror is likely to understand that the offeree wants to close the deal, or at least work out the last few details, not to take the offer off the table.

The qualified-acceptance rule is subject to essentially the same exceptions as the counter-offer rule, and to several additional exceptions, one of which is that the inclusion of a new term in a purported acceptance does not make the acceptance qualified if the term is implied in the original offer.<sup>89</sup> As in the case of counter-offers, the exceptions to the qualified-acceptance rule significantly erode its certainty. For example, in *Ardente v. Horan*<sup>90</sup> Buyer's attorney sent to Seller an executed copy of a contract prepared by Seller, together with a down payment of \$20,000 and a note from the attorney that stated,

---

86. See RESTATEMENT SECOND, *supra* note 11, § 59 (A qualified or conditional acceptance is "[a] reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered . . .").

87. *Id.* § 59, cmt. a.

88. 1 WILLISTON (1st ed.), *supra* note 18, § 51, at 87 (footnotes omitted). Similarly, *Restatement Second* treats a qualified acceptance as a special case of a counter-offer. RESTATEMENT SECOND, *supra* note 11, § 59 cmt. a.

89. See RESTATEMENT SECOND, *supra* note 11, § 59 cmt. b.

90. 366 A.2d 162 (R.I. 1976).

My clients are concerned that the following items remain with the real estate: a) dining room set and tapestry wall covering in dining room; b) fireplace fixtures throughout; c) the sun parlor furniture. I would appreciate your confirming that these items are a part of the transaction, as they would be difficult to replace.<sup>91</sup>

The court held that the statement about the furnishings made the note a qualified acceptance.<sup>92</sup> In contrast, in *Valashinas v. Koniuto*<sup>93</sup> A offered to purchase B's interest in a partnership for a designated price. B accepted the price but added, "I will be ready, willing and able to give you a complete Bill of Sale . . . as of December 31st . . . or sooner if you so choose."<sup>94</sup> The court held that the statement about the closing date was "no more than a suggestion, request or overture,"<sup>95</sup> so that a contract was formed.

Similarly, in *Panhandle Eastern Pipe Line Co. v. Smith*,<sup>96</sup> Panhandle, which had discharged Smith, offered to withdraw the discharge if Smith agreed to certain terms. Smith signed a letter in which he agreed to the terms but added a request to see his personnel file and a statement that he would contest any mistakes found in the file.<sup>97</sup> The court held that Smith's acceptance was not qualified, because all employees had the right to inspect their personnel files, and "[a]n acceptance is still effective if the addition only asks for something that would be implied from the offer and is therefore immaterial."<sup>98</sup> In *Johnson v. Federal Union Surety Co.*,<sup>99</sup> plaintiffs were the assignees of a claim. At a settlement meeting on April 12, defendant's agent agreed to contribute \$2,500 to a settlement fund for plaintiff.<sup>100</sup> Plaintiff's agent replied "that he was disappointed that a larger amount was not offered, but said that he would confer with the home office . . ."<sup>101</sup> On May 24, plaintiff's agent visited defendant's agent and stated "that he hoped that the company would be willing to make a contribution of \$3,333.33 . . ."<sup>102</sup> The court held that this was a valid acceptance. The statement concerning a contribution of \$3,333 was deemed to be an inquiry

---

91. *Id.* at 163.

92. *Id.* at 166.

93. 124 N.E.2d 300 (N.Y. 1954).

94. *Id.* at 301.

95. *Id.* at 302; *see also, e.g.,* *Culton v. Gilchrist*, 61 N.W. 384, 385 (Iowa 1894) (holding that an offeree's acceptance of an offer to lease farmland, accompanied by his request to build a cookroom on the farmhouse if the lease took effect, did not attach a condition to the acceptance, and therefore did not prevent formation of a contract).

96. 637 P.2d 1020 (Wyo. 1981).

97. *Id.* at 1021, 1023.

98. *Id.* at 1023.

99. 153 N.W. 788 (Mich. 1915).

100. *Id.* at 789-90.

101. *Id.* at 790.

102. *Id.*

and an “expressed . . . hope that a larger sum would be forthcoming . . . .”<sup>103</sup>

The brittle state of the law governing the meaning and effect of expressions by an offeree in response to an offer is illustrated further by the following summary of that law:

[I]f A makes an offer to B to sell an object for \$5000, the offer to remain open for thirty days, and B says “I’ll pay \$4800”, this would be a counter-offer but if he said “will you take \$4800?”, this would be a counter-inquiry. If B said “your price is too high” this could be considered to be a comment on the terms. If he said “send lowest cash price”, this would be a request for a modification of the offer and not a rejection. If B said “I accept but I would appreciate it if you gave me the benefit of a 5% discount,” this would be an acceptance which requests or suggests a modification of the contract. If B said, “I accept your offer and I hereby order a second object”, there is a contract and B has made a separate offer and not a counter-offer. A “grumbling assent” has been described as an acceptance that expresses dissatisfaction at some terms “but stops short of dissent”. If an acceptance contains a term that is not expressly stated in the offer but is implied therein there is an acceptance and not a counter-offer.<sup>104</sup>

Given the incongruence between the qualified-acceptance rule and the general principles of interpretation, as well as the brittle nature of the distinctions to the rule, the rule is not supported by either the accuracy or the administrative justifications, does not serve a coordinating purpose, and should be dropped.

#### *b. The Mirror-Image Rule*

Under classical contract law, the qualified-acceptance rule was accompanied by a companion expression rule, the mirror-image rule. Under this rule, an acceptance that deviates in any respect from the offer is a qualified acceptance. Although the mirror-image rule is often taken as a special case of the qualified-acceptance rule, in fact the two rules are separate. The qualified-acceptance rule concerns the *effect* of a qualified acceptance, while the mirror-image rule concerns *what constitutes* a qualified acceptance.

The difference between the two rules is particularly salient where merchants engage in the phenomenon known as the battle of the forms, that is, where merchants exchange a purchase order and a responding sales

---

103. *Id.* at 791; see also *King v. Travelers Ins. Co.*, 513 So. 2d 1023 (Ala. 1987) (holding that defendants in a workers’ compensation case did not reject or make a counter-offer to plaintiffs’ settlement offer by asking whether plaintiffs would consider a structured settlement with an alternative payment arrangement).

104. CALAMARI & PERILLO, *supra* note 54, § 2-20, at 99 (footnotes omitted).

order, or a sales order and a responding purchase order. Typically in such cases, there is a match in the critical terms of the proposed contract—terms dealing with such matters as description of the subject matter, quantity, and price, which must be typed into blank spaces on the forms—but the remaining terms, which are preprinted, materially diverge. Under the mirror-image rule, no contract is formed by the exchange of such forms. Under the general principles of interpretation, however, the responsive form might well constitute an acceptance, either because both parties subjectively regard the form as an acceptance, or because a reasonable person in the offeror's position, knowing that the printed forms of buyers and sellers always diverge (and choosing, if only for that reason, not to read the offeree's printed form) would conclude that an offeree's form that matches the offer on the critical terms concludes a deal.

This divergence between the mirror-image rule and the general principles of interpretation is illustrated in the well-known case of *Poel v. Brunswick-Balke-Collender Co.*<sup>105</sup> Seller had made an offer, as follows: "For equal monthly shipments January to June, 1911, from Brazil and/or Liverpool, about twelve (12) tons Upriver Fine Para Rubber at two dollars and forty-two cents (\$2.42) per pound; payable in U.S. gold or its equivalent, cash twenty (20) days from date of delivery here."<sup>106</sup> Buyer responded:

Order No. 25409  
This number must appear on  
Invoices and Cases

The Brunswick-Balke-Collender Co. of  
New York  
Review Ave., Fox and Marsh Sts.  
Long Island City, 4/6, 1910.

*M Poel and Arnold, 277 Broadway, N.Y.C.* Please deliver at once the following, and send invoice with goods:

*About 12 tons Upriver Fine Para Rubber at 2.42 per lb. Equal monthly shipments January to June, 1911.*

Conditions on Which Above Order Is Given.

Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders.

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guaranty on your part of prompt delivery within the specified time.

---

105. 110 N.E. 619 (N.Y. 1915); *see also, e.g.,* *Beaumont v. Prieto*, 249 U.S. 554 (1919) (holding that a letter in response to an offer to sell land that departed from the terms of the offer as to the time of payment was a counter-offer, not an acceptance).

106. *Poel*, 110 N.E. at 621.

Terms: F.O.B.<sup>107</sup>

The court held that no contract had been formed by this exchange, because the provision in the response that required prompt acknowledgment prevented the response from being an acceptance. “[A]n acceptance subject to other terms and conditions [is] equivalent to an absolute rejection of the offer . . . .”<sup>108</sup> It seems clear, however, that a reasonable person in Seller’s position would have thought that a deal had been made, and it seems likely that both parties so understood at the time. If Seller had focused on the “promptly acknowledge” term—which is unlikely—it would probably have thought either that the term was a mere formality, or that the term was included only because Buyer’s form (which was headed “Order”) was designed as an initiating form offer, rather than as a responsive form acceptance, and that an acknowledgement was required only when the form was used for its designed purpose as an offer.

Under modern law, the mirror-image rule has been reversed, as to the sale of goods, by Uniform Commercial Code (“U.C.C.”) Section 2-207(1). That section provides that “[a] definite and seasonable expression of acceptance . . . which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.”<sup>109</sup> Section 2-207(2) makes clear that Section 2-207(1) may apply even if the differences between the parties’ terms are material, and many cases have applied Section 2-207(1) to find an acceptance in the face of materially diverging terms in form contracts.<sup>110</sup>

Although Section 2-207(1) is often thought to be a break with the common law,<sup>111</sup> in fact that section essentially chooses one common law approach over another; that is, Section 2-207 applies to qualified acceptances the general principles of interpretation, rather than the mirror-image expression rule. And although Section 2-207(1) is confined to the sale of goods, the principle that underlies the section can be and has been extended by analogy beyond the sale-of-goods context.<sup>112</sup>

---

107. *Id.* at 621. The passages that are italicized were written; the balance was preprinted.

108. *Id.* at 622.

109. U.C.C. § 2-207(1) (1990).

110. *Id.* § 2-207(2); *see, e.g.*, *Earle Indus., Inc. v. Circuit Eng’g, Inc.*, 88 B.R. 52 (Bankr. E.D. Pa. 1988). In response to seller’s offer, buyer wrote a letter stating, “Please proceed with fabrication of this order at once. We need shipment . . . in the first week of January . . . .” *Id.* at 53 (first omission in original). The court held that there was a definite and seasonable expression of acceptance and thus a contract under 2-207. *Id.* at 55.

111. *See Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1, 7 (S.D.N.Y. 1973) (“Section 2-207 is an indication of intent of the draftsmen of the code to modify the unrealistic technical rules of the common law of sales and resolve the ‘battle of the forms,’ by substituting a set of rules and legal principles conforming to the practices and expectations of modern businessmen.”).

112. *See Knapp v. McFarland*, 344 F. Supp. 601, 612-13 (S.D.N.Y. 1971), *modified and remanded on other grounds* 457 F.2d 881 (2d Cir. 1972). The court, quoting § 2-207, held that a new provision in an acceptance concerning the timing for payment of an agreed \$155,000 bonus upon completion of litigation did not convert the acceptance into a counter-offer. “[E]xpressions of assent by an offeree,

Furthermore, the Comment to *Restatement Second* Section 59 ("Purported Acceptance Which Adds Qualifications"), which applies to all types of contracts, adopts the rule that "a definite and seasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms."<sup>113</sup> This rule is strikingly similar to U.C.C. Section 2-207(1), which the Comment cites as support. The "if" clause in the Comment ("if the acceptance is not made to depend on assent to the additional or different terms") parallels the "unless" clause of Section 2-207(1) ("unless acceptance is expressly made conditional on assent to the additional or different terms").<sup>114</sup> The latter clause has been very strictly construed by the courts, so that only the most explicit language triggers its operation.<sup>115</sup> If the similar clause in the Comment to *Restatement Second* Section 59 is interpreted in the same way, the rule stated in the Comment would undercut the mirror-image rule and significantly erode the qualified-acceptance rule.

### C. What Constitutes an Offer

As in the case of lapse, what constitutes an offer is governed by a global rule and several more specific expression rules. The global rule is that an offer is a proposal to make a deal, or bargain, that gives the addressee the power to conclude the bargain by assenting to the terms of the proposal—that is, by saying "yes" or the equivalent.<sup>116</sup> This rule is broad enough to allow free scope for application of the general principles of interpretation in determining whether any given expression constitutes an offer. However, other, much narrower rules govern the issue whether certain types of expressions constitute offers.

#### I. Advertisements

The black-letter rule governing advertisements is that an advertisement is not an offer. Some authorities state the black-letter rule as a categorical rule that is subject to exceptions. For example, Williston, in the first edition of his treatise, stated that "if goods are advertised for sale at a certain price, it is not an offer, and [therefore] no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at

---

which contain immaterial deviations from the original offer, do not constitute counter-offers but, rather, operate to bind the parties to an enforceable contract." *Id.* at 613.

113. RESTATEMENT SECOND, *supra* note 11, § 59 cmt. a.

114. U.C.C. § 2-207(1) (1990).

115. See, e.g., *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 (6th Cir. 1972) ("In order to fall within [the Section 2-207(1)] proviso, it is not enough that an acceptance is expressly conditional on additional or different terms; rather, an acceptance must be expressly conditional on the offeror's assent to those terms." (emphasis in original)).

116. See RESTATEMENT SECOND, *supra* note 11, § 24.



that price.”<sup>117</sup> However, Williston added that “there can be no doubt that a positive offer may be made even by an advertisement . . . . The only general test which can be submitted as a guide is the inquiry whether the facts show that some performance was promised in positive terms in return for something requested.”<sup>118</sup> Similarly, *Restatement Second* states:

Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell. . . . It is of course possible to make an offer by an advertisement . . . but there must ordinarily be some language of commitment or some invitation to take action without further communication.<sup>119</sup>

Other authorities formulate the rule as a presumption. For example, Corbin stated that “It is quite possible to make a definite and operative offer to buy or sell goods by advertisement . . . [but] the presumption is the other way.”<sup>120</sup>

The black-letter advertising rule is normally rationalized on interpretive grounds. Corbin argued:

Neither the advertiser nor the reader . . . understands that the latter is empowered to close the deal without further expression by the former. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear.<sup>121</sup>

Similarly, the Comment to *Restatement Second* Section 26 claims that “[a]dvertisements . . . are not ordinarily intended or understood as offers to sell.”<sup>122</sup>

The black-letter advertising rule, however, has the matter precisely upside down. A person who reads an advertisement for a specific item at a specific price will normally understand that the advertiser *is* offering the item for sale at that price. Suppose a store advertises 17” Sony TVs at \$350, a customer comes in and says he will buy the TV at that price, and

117. 1 WILLISTON (1st ed.), *supra* note 18, § 27, at 33.

118. 1 WILLISTON (1st ed.), *supra* note 18, § 27, at 35. This exception was repeated in the next two editions of WILLISTON ON CONTRACTS. See 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 27 (Samuel Williston & George J. Thompson eds., rev. ed. 1936); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 27, at 62 (Walter H.E. Jaeger ed., 3d ed. 1957). The fourth edition, revised by Richard A. Lord, somewhat restates the exception:

The only general test for determining in any particular case whether an offer exists is to ask whether the facts show that some performance was promised in positive terms in return for something requested by the person making the promise, and asking whether the person to whom the manifestation was made might reasonably have supposed that by acting in accordance with it a contract could be concluded.

1 WILLISTON (4th ed.), *supra* note 50, § 4:7, at 296-97 (footnotes omitted).

119. RESTATEMENT SECOND, *supra* note 11, § 26 cmt. b.

120. 1 CORBIN, *supra* note 54, § 25, at 74-75.

121. *Id.* § 25, at 75.

122. RESTATEMENT SECOND, *supra* note 11, § 26 cmt. b.

the salesman responds, "We're not selling the set at \$350, but we'll sell it at \$400." The reaction of the customer would not be, as Corbin would have it, "Of course; I understand; your advertisement was only inviting me to consider and examine and negotiate," but instead, "You people are liars, cheats, or both."

In an English case, *Fisher v. Bell*,<sup>123</sup> a statute made it unlawful to "offer for sale" a switchblade knife.<sup>124</sup> Bell was prosecuted for having displayed such a knife in his shop window with a ticket reading "Ejector knife—4s" (shillings).<sup>125</sup> The court held for Bell on the ground that "according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat," but added,

I confess that I think most lay people and, indeed, I myself when I first read the papers [in this case], would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense.<sup>126</sup>

Similarly, the Uniform Deceptive Trade Practices Act provides that "A person engages in a deceptive trade practice when . . . he . . . advertises goods or services with intent not to sell them as advertised . . . [or] with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity . . . ."<sup>127</sup> If Corbin and the *Restatement* were right that an advertisement is just a proposal to negotiate, the Uniform Act would be wrong, because a person who advertised without an intent to sell at the advertised price would simply be doing what, in Corbin's and the *Restatement's* view, he is entitled and indeed expected to do.

It is sometimes said that advertisements should not be construed as offers because to do so would subject an advertiser to the risk of overacceptance—that is, to the risk that the number of acceptances would exceed the advertiser's supply. That argument, however, will not support the rule, because it is implied in an advertisement that the advertiser has a limited (although reasonable) supply, and will sell first-come first-served while the

123. 1 Q.B. 394 (1960).

124. *Id.* at 395.

125. *Id.* at 395-96.

126. *Id.* at 399.

127. UNIF. DECEPTIVE TRADE PRACTICES ACT § s 2(a), 2(a)(9), 2(a)(10), 7A U.L.A. 277, 280 (1985). Also relevant is Federal Trade Commission Rule § 424.1 ("Unfair or deceptive acts or practices") which provides:

In connection with the sale or offering for sale by retail food stores of food, grocery products or other merchandise . . . it is an unfair or deceptive act or practice . . . to offer any such products for sale at a stated price, by means of an advertisement disseminated in an area served by any stores which are covered by the advertisement, if those stores do not have the advertised products in stock and readily available to customers during the effective period of the advertisement, unless the advertisement clearly and adequately discloses that supplies of the advertised products are limited or the advertised products are available only at some outlets.

16 C.F.R. § 424.1 (1994).

supply lasts.<sup>128</sup> In the 17<sup>th</sup> Sony case, a customer who is told, "We had fifteen of these sets, but they are all gone," will have a very different reaction than a customer who is told, "We're not selling the set at \$350, but we'll sell it at \$400."

As might be expected, given the incongruence of the advertising rule, the exceptions to the rule are incoherent. For example, Williston stated that the rule does not apply when "the facts show that some performance was promised in positive terms in return for something requested . . ."<sup>129</sup> This exception is incoherent because it can be made to fit any advertisement of specified items for specified prices, so that whether the rule or the exception applies is almost completely arbitrary. The *Restatement* states that the rule does not apply when there is "some language of commitment or some invitation to take action without further communication,"<sup>130</sup> and illustrates the rule and the exception as follows:

A, a clothing merchant, advertises overcoats of a certain kind for sale at \$50. This is not an offer, but an invitation to the public to come and purchase. The addition of the words "Out they go Saturday; First Come First Served" might make the advertisement an offer.<sup>131</sup>

As this Illustration shows, however, the *Restatement* exception is also incoherent, or more precisely, the rule and the exception are incoherent when taken together. Why is an advertisement of a certain kind of overcoat at a certain price not "language of commitment"? What is the purpose of an advertisement that lists goods and selling prices if not to invite the customer to "take action"—coming to the store—"without further communication"? And why should "Out they go Saturday; First Come First Served" change the result that would otherwise obtain? Do the drafters of the *Restatement* believe that an advertiser normally does not intend to move out its merchandise, or intends to sell Last Come First Served? Under either the Williston or the *Restatement* formulation, it is almost wholly arbitrary whether in any given case the court determines to apply the rule or the exception.

Thus the black-letter advertising rule is not justified on either accuracy or administrative grounds, and is not supported by a noninterpretive policy. Nor does it serve as a coordinating device—on the contrary, the cases are in complete disarray, which is not surprising given the unsoundness of the black-letter rule and the incoherence of the exceptions. A number of cases

---

128. See CALAMARI & PERILLO, *supra* note 54, § 2-6, at 37.

129. 1 WILLISTON (4th ed.), *supra* note 50, § 4:7, at 296.

130. RESTATEMENT SECOND, *supra* note 11, § 26 cmt. b.

131. *Id.* § 26 cmt. b, illus. 1.

follow the rule,<sup>132</sup> a number reject the rule,<sup>133</sup> and a number purport to follow the rule but either find some way to hold against the advertiser or find that the case comes within an exception.<sup>134</sup>

The modern cases are divided, but it appears that a majority have imposed liability on the advertiser. One of the best-known of the modern cases, *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*,<sup>135</sup> provided the basis for Illustration 1 to *Restatement Second* Section 26. Great Minneapolis had published the following advertisement:

Saturday 9 A.M.  
 2 Brand New Pastel . . .  
 Mink 3-Skin Scarfs  
 Selling for \$89.50  
 Out they go  
 Saturday. Each. . . \$1.00  
 1 Black Lapin Stole  
 Beautiful,  
 worth \$139.50. . . \$1.00

---

132. See, e.g., *Georgian Co. v. Bloom*, 108 S.E. 813, 814 (Ga. Ct. App. 1921) ("A general advertisement in a newspaper for the sale of an indefinite quantity of goods is a mere invitation to enter into a bargain . . ."); *O'Keefe v. Lee Calan Imports, Inc.*, 262 N.E.2d 758, 760 (Ill. App. Ct. 1970) (holding that a newspaper advertisement that listed an erroneous price, through no fault of the advertiser, and that listed no other terms, was not an offer); *Ehrlich v. Willis Music Co.*, 113 N.E.2d 252, 252 (Ohio Ct. App. 1952) (holding that a newspaper advertisement that described the merchandise, listed a price, and gave the seller's name "was no more than an invitation to patronize the store"); *Craft v. Elder & Johnston Co.*, 38 N.E.2d 416, 417 (Ohio Ct. App. 1941) (holding that an advertisement for the sale of a sewing machine at a specified price on a certain day was a unilateral offer which, "not being supported by any consideration could be withdrawn at will and without notice").

133. See, e.g., *Salisbury v. Credit Serv., Inc.*, 199 A. 674, 682-83 (Del. Super. Ct. 1937) (holding that a corporate prospectus was in such form as to amount to an offer); *Izadi v. Machado (Gus) Ford, Inc.*, 550 So. 2d 1135, 1139 (Fla. Dist. Ct. App. 1989) (holding that an advertisement proffering a \$3,000 minimum-trade-in value toward the purchase of a new car could be objectively read as conveying an offer); *Seymour v. Armstrong*, 64 P. 612, 612 (Kan. 1901) ("A contract may originate in an advertisement addressed to the public generally, and, if the proposal be accepted . . . without qualifications or conditions, the contract is complete."); *Oliver v. Henley*, 21 S.W.2d 576, 578 (Tex. Civ. App. 1929) (holding that an advertisement for the sale of cottonseed that was "clear, definite, and explicit, [and which] left nothing open for negotiation," was an offer); *Chang v. First Colonial Sav. Bank*, 410 S.E.2d 928, 930 (Va. 1991) (holding that a bank's newspaper advertisement promising \$20,136.12 upon maturity of a \$14,000 savings certificate was "clear, definite, and explicit and left nothing open for negotiation," and therefore constituted an offer).

134. See, e.g., *Steinberg v. Chicago Medical Sch.*, 371 N.E.2d 634, 639 (Ill. 1977) (holding that a college catalog was not an offer, but a student's admission application was an offer and a school's acceptance of application fee was an acceptance).

It is possible to massage the cases to get more or less consistent results. For example, many of the cases that hold that an advertisement is not an offer could be distinguished on the ground that the advertisement in question involved a unilateral mistake in price. See the *Georgian Co.*, *O'Keefe*, and *Ehrlich* cases cited *supra* note 132. Conversely, many of the cases that hold that an advertisement is an offer could be distinguished on the ground that the advertiser had accepted money from a consumer before disclaiming the terms of the advertisement, so that the advertisement constituted an implied term of the later-formed contract. However, because cases on both sides can be distinguished away, after all the distinctions are drawn we are back to square one—disarray.

135. 86 N.W.2d 689 (Minn. 1957).

First Come

First Served.<sup>136</sup>

Lefkowitz was the first to present himself at the appropriate counter. He demanded the Lapin (rabbit) stole and tendered \$1. Great Minneapolis refused to sell the stole.<sup>137</sup> The court held for Lefkowitz, relying on Williston's statement of the exception:

There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract. . . .

The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested."

The authorities . . . emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer . . . .

. . . We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation.<sup>138</sup>

*Lefkowitz* is open to several interpretations. It might be said that the advertisement was special because it involved foreseeable reliance—but so, really, does any other advertisement whose primary purpose is to induce customer response. Alternatively, it might be said that the advertisement in *Lefkowitz* was distinguishable from other advertisements on the ground that it stated the quantity available and the first-come-first-served method of allocating the quantity. However, it is implied in every advertisement that (only) a reasonable quantity is available and that the quantity will be allocated first come first served. The best explanation for *Lefkowitz* is that the expression rule that advertisements are not offers is unsound, and in modern

136. *Id.* at 690. .

137. *Id.*

138. *Id.* at 691. A week earlier, Great Minneapolis had run the following newspaper advertisement:

"Saturday 9 A.M. Sharp  
3 Brand New  
Fur  
Coats  
Worth to \$100.00  
First Come  
First Served  
\$1  
Each

*Id.* at 690. Lefkowitz was the first to present himself at the appropriate counter and demanded a coat. Great Minneapolis refused to sell. As to this ad, the court held for Great Minneapolis, but only on damages grounds. *Id.* For a trenchant critique of this branch of the case, see Ayres & Gertner, *supra* note 1, at 105-06.

courts will be therefore inclined to distinguish the rule on the flimsiest of grounds.

## 2. Auctions

The basic rule governing auctions is a categorical expression rule under which the act of an auctioneer in putting a commodity up for sale is not an offer, so that the auctioneer is free not to sell to the highest bidder. Under a related expression rule, a seller at an auction who wishes to make an offer can do so by using the phrase "without reserve." In effect, therefore, the basic expression rule is a default rule under which the auction of an item is with reserve unless it is declared to be without reserve.

Reserves can take various forms. In some auctions, the seller can simply withdraw her goods if the last bid is not acceptable. In others, the seller can buy back her goods. In still others, a reserve price is set by a seller, below which her goods may not be sold. The reserve price may be publicly announced, but usually is not; nor is it always announced that a reserve price applies to a particular item at an auction. If the highest bid does not equal the reserve price, the auctioneer may state that the reserve price has not been met, or may purport to recognize a fictitious bid equal to the reserve price.<sup>139</sup>

At least at first glance, the basic rule governing auctions seems incongruent with results that would follow from application of the general principles of interpretation, because many auction bidders have an expectation that auctioned items are offered for sale to the highest bidder. Even Williston recognized, in the first edition of his treatise, that the basic rule was at least questionable:

As an original question it seems fairly open to argument whether an auctioneer by putting up goods for sale makes an offer which ripens into a contract or sale when the highest bidder accepts the offer; or whether putting up the goods for sale is merely an invitation to those present to make offers which they do by making bids, one of which is ultimately accepted by the fall of the hammer.<sup>140</sup>

Nevertheless, the rule may be justified. The expression rules that govern auctions differ from most other expression rules in several important respects. To begin with, although most private actors are unlikely to know the rules of offer and acceptance, most, although not all, bidders at an auc-

---

139. See RALPH CASSADY, JR., AUCTIONS AND AUCTIONEERING 227-28 (1967); CHARLES W. SMITH, AUCTIONS 100 (1989). Smith adds

The seller who withdraws goods is normally still liable for a commission or equivalent charge, though there are often discounts for such scratches and buy-backs. Restrictions may also be placed on the future sale of the withdrawn goods, such as not being able to reacquire them for a period of time.

*Id.*

140. 1 WILLISTON (1st ed.), *supra* note 18, § 29, at 39. Williston added, "The latter view, however, seems more in accordance with the facts." *Id.*

tion are likely to know the rules that govern the auction. Taking auctions as a whole, the great bulk of dollar volume is undoubtedly accounted for not by naive bidders, but by sophisticated bidders who are repeat players. This is most obviously true of auctions to the trade, such as auctions of tobacco or freshly landed fish.<sup>141</sup> Even those auctions that are open to all comers, however, will often involve knowledgeable repeat players, as in the case of high-priced art auctions or regular local antique auctions dominated by neighboring dealers and collectors. (I dropped in on such an auction in England, and could not tell who was bidding. I was informed that all the bidders were regulars, so the auctioneer knew their private signals.) As a result, the basic expression rule is unlikely to frustrate the expectations of most bidders.

Furthermore, the social rules governing reserves may be viewed as true constitutive rules, because auctions are social practices that are both constituted and defined by social rules, including rules about reserves. Accordingly, although the basic legal rule that the auctioneer is not bound to sell to the highest bidder is not a constitutive rule, the legal rule may be viewed as effectively adopting and supporting the constitutive social rules.

That reserve rules are constitutive rules does not in itself justify the rules, because constitutive rules are not self-justifying. However, reserve rules do appear to be justified within the social practice of auctions. Reserve rules cannot be taken in isolation, but rather are part of a web of interrelated rules that define and constitute any given auction. Reserves may be set for a number of reasons. Among these are a seller's concern that the highest price at an auction may be unduly low because not enough interested buyers will show up, or because the price will be held down by tacit or explicit collusion among potential bidders who have formed a ring.<sup>142</sup> These problems may be accentuated when buyers rather than sellers control an institutionalized auction, as where buyers have organized the auction or a group of buyers participates in the auction on a regular basis while any given seller participates on only an episodic basis.<sup>143</sup> From this perspective, reserves are part of a complex of rules through which the relative needs and power of the members of various auction communities can be accommodated:

When . . . buyers are in control, it is important for the auctioneer to develop a special relationship with the sellers to ensure their trust. This is clearly what happens in tobacco auctions and many local commodity auctions; in fact, the need to protect the sellers—or at

---

141. See CASSADY, *supra* note 139, at 15-19 & *passim*; SMITH, *supra* note 139, at 1-19 & *passim*.

142. See CASSADY, *supra* note 139, at 228-29; SMITH, *supra* note 139, at 99-102. Smith reports that auctions frequently result in lower prices than would have been achieved by privately negotiated sales, and that auctioneers often know that an item is being bid at less than its market value and respond accordingly. *Id.* at 83-90, 101.

143. See SMITH, *supra* note 139, at 96-97.

least to be seen as doing so—was stressed by auctioneers from the New England Fish Exchange to the tobacco floors of Kentucky.<sup>144</sup>

\* \* \*

The acceptance-nonacceptance of auction rings, both formal and informal, is just one example of the various types of accommodations and adjustments common to auctions. The social flux and context of auctions requires flexibility from its participants. In practice, different types of auctions give assorted advantages to distinct players. Sometimes the auctioneer is allowed to maintain a reserve against which he or she may bid, which normally favors sellers. Sometimes sellers and buyers are permitted to enter into such preauction arrangements as the use of floor bids in publishing or similar agreements in which buyer and seller negotiate a price subject to modification in the auction. Sometimes sellers are able to withdraw their goods after the auction is over such as the right of fisherman to take back their entire catch if they feel the total price received for the catch is too low. Varied situations require giving the parties different handicaps if a "legitimate" price is to be determined; no single set of rules can do this in all situations.<sup>145</sup>

Of course, not everyone who attends every auction knows all the rules, because certain auctions are open to nonprofessionals who may not know the rules. This might be true, for example, of tourists who drop in on an antiques auction in New England, or persons who attend a moderately priced auction at Sotheby's for the first time. In such cases, the basic expression rule may frustrate the reasonable expectations of at least some bidders. On the other hand, even those who drop in on a given auction for the first time may have attended other auctions in the past and become familiar with reserve rules. Furthermore, a variety of administrative and substantive problems would be presented if reserve rules were applied to experienced players at an auction but not to naive players. Undoubtedly, the best approach for an auctioneer would be to announce any reserve rules in advance. Many auction catalogs probably do so.<sup>146</sup> Even where that is not done, however, the basic legal rule seems justified on the ground that it supports a justified constitutive rule.

#### *D. What Type of Acceptance an Offer Requires*

Some offers require acceptance by an act; others require acceptance by a promise. The two types of offers are known as offers for unilateral and bilateral contracts, respectively. Any given offer may need to be interpreted

---

144. *Id.* at 100-01.

145. *Id.* at 93-94.

146. This is apparently the practice of both Christie's and Sotheby's. Conversation between Nellwyn Voorhies and Elizabeth Williams of Christie's (Mar. 11, 1993).



to determine what type of acceptance is required, and the consequences of an incorrect interpretation may be significant. For example, if an offer is revocable and the offeree utilizes the wrong mode of acceptance, the offeror can revoke despite the purported acceptance. Similarly, if the offeror's subjective intention concerning the type of acceptance required differs from the proper interpretation of the offer, the offeror may be bound by the offeree's response although the conditions of becoming bound, as she understood them, have not occurred.

In many cases, interpretation of an offer is not critical because the offeree's response consists of an act that can be properly interpreted as both the beginning of performance and a promise, so that the act completes a bargain whichever interpretation is placed on the offer. For example, if *A* says to *B*, "I'll give you \$200 to paint my fence," and *B* immediately picks up a brush and starts painting, *B*'s act can be interpreted as both a beginning of performance and a physical expression of promissory assent. If *A*'s offer is properly interpreted as requiring acceptance by performance, *B*'s act will be an acceptance that binds *A* because the act constitutes a beginning of performance, and under modern contract law an offer for a unilateral contract cannot be revoked once performance has begun.<sup>147</sup> Correspondingly, if *A*'s offer is properly interpreted as requiring acceptance by promise, *B*'s act will be an acceptance that binds *A* because the act constitutes a promissory assent.

Nevertheless, there will invariably be residual cases that cannot be resolved by such a finesse. For example, the beginning of performance may not fairly give rise to an implied promise, or the offeree may respond solely with a promise. An obvious way to resolve the ambiguity in these residual cases is to determine what type of acceptance is required by applying the general principles of interpretation to the offer. Section 31 of *Restatement First*, however, adopted an expression rule, in the form of a presumption, to govern these cases:

In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree.<sup>148</sup>

The presumption embodied in *Restatement First* Section 31 was not congruent with the general principles of interpretation, because when an offer is ambiguous as to the required mode of acceptance, no reason is apparent why there is more than an even chance that the offer is better interpreted to require acceptance by promise than acceptance by act. The Comment to Section 31 justified the presumption on the basis of a noninter-

---

147. See *RESTATEMENT SECOND*, *supra* note 11, § 45.

148. *RESTATEMENT FIRST*, *supra* note 8, § 31.

pretive policy: "As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed."<sup>149</sup> In fact, however, the presumption of Section 31 was doubtful on policy grounds, because it could cause substantial hardship to an offeree. Suppose an offeree interpreted a doubtful offer to require acceptance by performance, and began to perform. Section 31 provided that there was a presumption that such an offer was for a bilateral contract. An offer for a bilateral contract cannot be accepted by the beginning of performance, and an offer is normally revocable until accepted. Therefore, under the presumption of Section 31 in the case of an ambiguous offer the offeror could revoke, despite the offeree's beginning of performance, unless the beginning of performance also constituted a promise. (Revocation would not be barred on the ground of reliance, because reliance must be reasonable to be effective under contract law. If the offer is presumed to require acceptance by promise, beginning to perform without having made a promise would not be reasonable.) This result could work significant hardship on the offeree, because the offeree would have rendered a part performance that would be a total loss unless he could sell it on the market.

*Restatement Second* Section 32 dropped the presumption of *Restatement First* Section 31, but adopted a new expression rule in its place: "In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses."<sup>150</sup> *Restatement Second* Section 32 is itself ambiguous, because it is not clear what is meant by "doubt." Perhaps "doubt," as used in Section 32, is intended to apply to offers as to which the bilateral and unilateral interpretations are in perfect equipoise. If so, Section 32 would conflict with the *Peerless* principle that if two interpretations are equally reasonable, and the parties subjectively hold different interpretations, no contract is formed.<sup>151</sup> Or perhaps "doubt" is intended to apply to cases in which although one interpretation is better than the other, it is only slightly better. If so, Section 32 would conflict with the principle that when the parties hold different interpretations, and one is more reasonable than another, that interpretation prevails. Or perhaps "doubt" means any doubt. In that case, as a practical matter Section 32 would supplant the general principles of interpretation in virtually all contested cases. Whichever interpretation is to be given to "doubt," it is clear that Section 32 effectively substitutes an expression rule for the general principles of interpretation.

Is the rule embodied in *Restatement Second* Section 32 justified? The Comment to that section rationalizes the rule on interpretive grounds: "The offeror is often indifferent as to whether acceptance takes the form of words

---

149. *Id.* § 31 cmt. a.

150. *RESTATEMENT SECOND*, *supra* note 11, § 32.

151. *See supra* notes 12-17 and accompanying text.

of promise or acts of performance, and his words literally referring to one are often intended and understood to refer to either."<sup>152</sup> However, that an offeror is "often" indifferent as to the mode of acceptance hardly justifies a rule that presumptively treats offerors as though they were always indifferent as to the mode of acceptance; and that words that refer to one mode of acceptance are "often" intended and understood to refer to either mode hardly justifies a rule that presumptively deems such words to be always so intended and so understood.

The rule of *Restatement Second* Section 32 might more plausibly be justified on noninterpretive policy grounds, based on the difference in the probable losses of the offeror and the offeree in cases where the required mode of acceptance is ambiguous. In most contract cases involving an issue of interpretation, one party or the other will suffer a loss, depending on which interpretation is accepted, and there is no way to determine *a priori* which party will suffer the greater loss. This may not be true, however, in the case of offers that are ambiguous as to the required mode of acceptance. If an offeree attempts to accept by performance when he should have accepted by promise, he stands to suffer a considerable loss, because he will often forfeit the value of his performance. In contrast, an offeror is likely to suffer only a minimal loss if he is bound by a mode of acceptance that is at least reasonable. For example, suppose the offeror wants a promissory acceptance and instead gets the beginning of performance. Under Section 32 the offeror may be bound even though he reasonably expected to be bound only if the offeree was bound himself by a promise. In most such cases, however, even if the offeree is not *legally* bound to complete he will be *economically* bound to complete, because if he does not complete he is likely to lose the value of the performance he has rendered. Therefore, typically the only loss to the offeror will be the difference between having the offeree legally bound to complete and economically bound to complete.

Suppose now that an offeror wanted an act and gets a promise instead. Again, the offeror's loss under Section 32 is likely to be minimal. Under modern contract law, if an offer calls for acceptance by an act, the offeror is bound when the offeree begins performance, even though the offeree is not bound.<sup>153</sup> If the offeree, instead of beginning performance, makes a promise, the offeree will be fully bound. Although the offeror may not have gotten the kind of acceptance he wanted, he will not be too badly off.

Under these circumstances, a presumption that in case of doubt an offer permits acceptance by either a promise or performance may be ratio-

---

152. RESTATEMENT SECOND, *supra* note 11, § 32 cmt. a. The Comment also states, "The rule of this Section is a particular application of the rule stated in § 30(2)." *Id.* Section 30(2) provides: "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." *Id.* § 30(2).

153. RESTATEMENT SECOND, *supra* note 11, § 45.

nalized on the policy ground that it tends to avoid wasted reliance for which the offeror is at least partly responsible. A related point has been made by Ayres and Gertner in an analogous context:

Courts can retain the common law's general reluctance to enforce indefinite contracts so that both parties will have an incentive to make the contracts more definite. . . . [But w]hen the indefiniteness is clearly attributable to one party and induces inefficient reliance from the other party, punitive enforcement may be efficient to drive out inefficient indefinite offers.<sup>154</sup>

### *E. A Look Back*

Generally speaking, the black-letter expression rules of the law of offer and acceptance are not justified either on interpretive grounds or on the basis of a policy that applies to the subject matter of particular rules. It might be argued, however, that these rules are justified by a noninterpretive policy that applies to the law of offer and acceptance generally. For example, it might be argued that these rules are justified by a policy that contract formation should not be made easy, because if it were, liability concerns might diminish the rate of contracting. Such a policy, however, would be inconsistent with the basic goal of facilitating the power of self-governing parties to further their shared objectives through contracting. Furthermore, such a policy would have questionable explanatory power, because some rules of offer and acceptance make contracting easier, not harder. This is true, for example, of the rule that in case of doubt an offer can be accepted by either promise or performance as the offeree chooses, and the rule that an acceptance is effective on dispatch even if it crosses with an earlier dispatched revocation or is delayed or lost in the mails. More generally, the entire trend of modern contract law has been to expand the ease of contract formation through such principles as reliance and the duty to negotiate in good faith.

Alternatively, it might be argued that the black-letter expression rules of offer and acceptance are justified by a policy that contract formation should not be made easy because of the bite of expectation damages in the case of quick breach. Under the principles of contract law, the moment a contract is formed each party is subject to liability for expectation damages for breach, even if the breach consists of repenting and recanting only hours or even minutes after the contract was formed. Expectation damages in such cases may seem draconian where no plans could have been made, and no opportunities forgone, between contract formation and breach. Making contract formation difficult may serve to prevent that result.

This explanation also runs into severe problems. Again, the explanatory power of such a policy is questionable because many rules of offer and

---

154. Ayres & Gertner, *supra* note 1, at 106 (footnote omitted).

acceptance make contract formation easy, not hard. Moreover, the magnitude of expectation damages in the case of quick breach will often be ameliorated by the doctrine of mitigation of damages, because if a quick breach occurs, an alternative opportunity is likely still to be available to the innocent party, and under the mitigation doctrine a failure to take the opportunity will reduce damages by the value of the opportunity. Furthermore, although it is true that granting expectation damages for quick breach presents difficulties, so would the converse rule. In some kinds of contracts—such as those concerning stocks or commodities—hours, minutes, and even seconds may be crucial. Serious administrative problems would be presented if courts were required to determine on a case-by-case basis how quick was too quick to grant expectation damages.

Finally, if there was indeed a policy against granting expectation damages for quick breach, that policy should apply even if contracts have clearly been formed. Implementing such a policy in a covert way, by formulating expression rules that are not substantially congruent with the general principles of interpretation, will only result in the inconsistent treatment of comparable transactions.

In short, an expression rule of offer and acceptance that is not justified by considerations of accuracy, administration, or coordination, or by a noninterpretive policy that specifically applies to that rule, cannot be saved on the basis of a noninterpretive policy that applies to the rules of offer and acceptance as a class.

#### CONCLUSION

Some black-letter expression rules in contract law can be justified on prudential grounds; others cannot. The latter rules appear to be survivals of classical contract law. In part, these rules probably owe their continued existence to the time required for the principles of modern contract law to work their way through the legal system. However, there has also been a failure to recognize that even the most soundly based expression rules, like the rule that a rejection terminates a power of acceptance, reflect prudential choices, not axiomatic truths. As a result of this failure, most expression rules have not come under a searching analysis. Moreover, little if any attention has been directed to the soundness of most expression rules, and the related question whether, if an expression rule is desirable, it should take the form of a maxim, a categorical rule, or a presumption (and, if the last, of what type and how strong the presumption should be).

As a first step, therefore, it is necessary to recognize expression rules as a legal category—that is, to recognize that many rules of contract law are based on interpretive considerations, but supplant the general principles of interpretation. Next, it must be recognized that a number of expression rules often yield results that are different from the results that would be reached under the general principles of interpretation. Once the air is

cleared in this way, the justifications for any expression rule that is not completely congruent with the general principles of interpretation should be examined to determine if those justifications outweigh the rate of error that results from the rule. If the justifications are insufficient, the rule should be dropped. Even if the justifications are sufficient, however, the form of the rule should be examined. Generally speaking, only an exceptionally high degree of congruence will justify a categorical expression rule. For the most part, therefore, expression rules that are justified at all should be cast as either weak presumptions or as maxims. If we look past the black-letter rules to the case law, that is just the direction in which contract law is moving.