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# CONTRACTS: A NEW DESIGN FOR THE AGREEMENT PROCESS

John E. Murray, Jr.†

## I

### INTRODUCTION

The orthodox doctrine of the law of contracts, particularly the offer and acceptance machinery, could not be more familiar to most lawyers. We are long indebted to Professor Hohfeld, who has enabled us to express the legal effect of an offer as creating a power of acceptance.<sup>1</sup> When an offer is extended by an offeror, he permits the offeree to exercise a power of acceptance that subjects the offeror to the legal relation called contract. The offeror is said to be under a correlative liability, because exercise of the power of acceptance by the offeree creates a right-duty relationship.

After discussing the anatomy of offers, the first-year law student is concerned with the exercise of the power of acceptance. At once he is confronted with learning how the power may be exercised.<sup>2</sup> Underlying his exploration in this fundamental area is the principle that the offeror is master of his offer. He creates the offer and may require the power of acceptance to be exercised in any manner he deems necessary or desirable. To emphasize this principle, students are typically confronted with a hypothetical offer that requires the offeree to don an Uncle Sam costume, climb a greased flagpole, and, upon reaching the gold ball at the top, whistle Yankee Doodle twice. The effect on the impressionable first-year student is significant. He will never forget that the offeror is master of his offer, and he will often justify his position through the use of even more outlandish hypotheticals. Of course, he is obliged to use hypotheticals, just as his teacher was, since no recorded case makes the point so clearly. That offerors rarely, if ever, operate in this fashion does not concern the student striving to understand this fundamental area.

The orthodox doctrine prevails upon the student to believe that, if

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<sup>1</sup> W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923). See also Corbin, *Legal Analysis and Terminology*, 29 *YALE L.J.* 163 (1919).

<sup>2</sup> "[A]lmost the first question to ask about an offer is: what particular kind of acceptance did this offer call for; and especially: was it for a promise or was it for an act?" Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 *YALE L.J.* 779, 780 (1939).

the offeror requires a promise, the only manner of acceptance is by promise, and, if the offeror requires an act, the only manner of acceptance is by performance. Derived from the principle that the offeror is master of his offer, this logic is unassailable. But usually the offeror is indifferent to how the offeree accepts.<sup>3</sup> The doctrine that either a promise or an act is *required* is unrealistic.<sup>4</sup>

The offeror's indifference to the manner of acceptance was first asserted by Professor Llewellyn with respect to commercial contracts.<sup>5</sup> It is not remarkable, therefore, that the Uniform Commercial Code, which reflects much of the Llewellyn philosophy, adopted this position. Enactment of the Code in every state except Louisiana reflects a change in the conventional wisdom concerning the manner of acceptance, at least in relation to contracts for the sale of goods. More recently, a tentative draft of the *Restatement (Second) of Contracts*<sup>6</sup> has adopted the Code philosophy for all contracts.

If it is determined that the offeror in most cases is indifferent to the manner of acceptance, all the rules concerning acceptance must be rebuilt. The Code draftsmen performed some rebuilding, and the new Restatement has attempted to incorporate the changes. But with regard to certain problems, the language used in the new Restatement is different from that of the Code. The difference is an extraordinary phenomenon: The American Law Institute, a private though highly respected organization, has "restated" the law of contracts for the sale of goods in language different from a code duly enacted by almost every American legislature. The unusual result is that courts might use the new Restatement to help interpret certain Code language that some observers believe is infelicitous.

## II

### MANNER OF ACCEPTANCE UNDER THE FIRST RESTATEMENT

#### A. *Offers that Expressly Request Neither a Promise nor Performance*

With one notable exception, the first Restatement adopted the philosophy that the offeror is master of his offer. The classic dichotomy was suggested in section 52:

<sup>3</sup> See, e.g., *id.* at 780-81.

<sup>4</sup> Absent such doctrinal changes as those suggested in this article, Professor Lawrence Friedman may be correct in suggesting that the traditional contracts course "can only be justified as a mental exercise, as a way of inducting the young into the world of the law." L. FRIEDMAN, *CONTRACT LAW IN AMERICA* viii (1965).

<sup>5</sup> Llewellyn, *supra* note 2, at 786-89.

<sup>6</sup> Tent. Draft Nos. 1 (1964), 2 (1965), and 3 (1965), covering the first 175 sections of the original Restatement.

Acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror. If anything except a promise is requested as consideration no contract exists until part of what is requested is performed or tendered. If a promise is requested, no contract exists, except as stated in § 63, until that promise is expressly or impliedly given.<sup>7</sup>

Thus, the section assumed that, when an offeror "requests" a certain manner of acceptance, he will insist upon it.<sup>8</sup> Further, it suggested that the words used to express the requested manner of acceptance are clear, or at least can be clarified by interpretation. And if the offeree complied with the "request," there was a contract; otherwise, no contract. What could be simpler?

If the offeror had ambiguously indicated the manner of acceptance, section 31 resolved the problem:

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.

The presumption in favor of promissory acceptance was preferred because that manner immediately and fully protects both parties.<sup>9</sup> Nevertheless, it was assumed that a choice must be made between two exclusive manners of acceptance. Why such an assumption when the offeror did not see fit to request either manner of acceptance? Is it possible the offeror did not care how the power was exercised? Section 31 insisted that the offeror cared, but ineffectively manifested his intention. When the offeror failed to request either an act or a promise, the only recourse was to treat the matter equitably and protect everyone as quickly as possible; and the presumption favoring acceptance by promise best served this purpose.

The first Restatement assumed that the problem of the ambiguously requested acceptance would arise infrequently. The comment to section 31 stated: "It is not always easy to determine whether an offer requests an act or a promise to do the act." But the comment might have stated: "In the usual offer, the offeror does not request an act or promise." Of course, such a statement would have undermined the established dichotomy. The actual language suggested that normally the offer does request one to the exclusion of the other. Thus, the comment language reinforced the exclusivity of the two methods of accep-

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<sup>7</sup> RESTATEMENT OF CONTRACTS § 52 (1932).

<sup>8</sup> See *id.* § 52, comments *a-b*.

<sup>9</sup> *Id.* § 31, comment *a*.

tance, with rare departures for cases of doubtful offers.<sup>10</sup> When the offer had to be characterized as doubtful, it was placed in a bilateral category, so that the net result was still two exclusive ways in which to accept the offer.

Illustration 1 to section 31 stated: "A says to B: 'If you will work in my garden next week I will give you \$5 a day.' B says, 'I'll do it.' There is a bilateral contract." The illustration set forth a doubtful offer, which, when accepted by promise, formed a contract, since doubtful offers invite promissory acceptances. This model could not have been more clear, nor could the result have appeared more just. Suppose, however, *B* had not promised to perform, but began to perform the work in the garden. That *B* had commenced performance rather than promising certainly should not affect characterization of the offer as doubtful. Yet, by presumption, a promissory acceptance was required. The difficulty of the rule is exposed if *A* decides to revoke the offer before *B* completes the work. While dim recollections may suggest that the offer cannot be revoked once performance has begun, that is a fond memory of section 45, applicable to unilateral contracts, but not to our presumed bilateral contract.<sup>11</sup>

Is there no way to protect *B*, who has not expressly promised but has started to perform? Section 31 required only an "acceptance amounting in effect to a promise." Perhaps, then, an offeree could be protected by finding an implied promise in his commencement of performance. Of course, if the offeree did not intend his acts to be so construed, the implication of a promise to complete might be overly burdensome to the offeree.<sup>12</sup> In the vast majority of actual situations, however, when an offeree begins to perform, he intends to complete. Thus, implication of a promise is a viable method of protecting *B* in the hypothetical case.

Significantly, however, the implication comes from a phrase in section 31, which was to be used only in the unfortunate doubtful offer situation. Yet, when faced with the necessity of characterizing the offer ("If you will work in my garden . . . I will give you \$5 a day") after the offeree had started to perform, a court probably would not have

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<sup>10</sup> The term "methods" is used to refer to the "manner" of acceptance and not to the details of methods of acceptance.

<sup>11</sup> If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

RESTATEMENT OF CONTRACTS § 45 (1932).

<sup>12</sup> See p. 795 & note 28 *infra*.

bothered to call the offer doubtful. The easier course was to characterize it as requesting an act, thereby protecting the performing offeree under the irrevocable offer theory of section 45.<sup>13</sup>

One other possibility for protecting the offeree who has started to perform in response to a doubtful offer was suggested in section 63 of the first Restatement.<sup>14</sup> Designed as an exception to the general principle that the offeror is master of his offer,<sup>15</sup> that section declared the existence of a contract when, in response to an offer expressly requesting a promise, the offeree instead completely performs within the time allowed for promising. The basis for the exception was that the offeror has received something better than the promise he requested, to wit, performance.

While section 63 was designed to protect the offeree who had completely performed during the time allowed for promising, some enigmatic language in the comment to the section suggested an argument for our garden worker, *B*, who merely *started* to perform:

Beginning to perform within the time allowed for accepting the offer but not completing performance within that time will not amount to an acceptance, unless the offeree also seasonably undertakes to complete the performance, since the offer requested a promise.

Continuation of performance after the deadline for promising might be deemed a "seasonable undertaking," and our offeree who has partly performed before the deadline in response to a doubtful offer would be protected in a manner similar to that suggested under section 31.<sup>16</sup>

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<sup>13</sup> See, e.g., *Hollidge v. Gussow*, Kahn & Co., 67 F.2d 459 (1st Cir. 1933); *Lyon v. Goss*, 19 Cal. 2d 659, 123 P.2d 11 (1942); *Petroleum Research Corp. v. Barnsdall Ref. Corp.*, 188 Okla. 62, 105 P.2d 1047 (1940). These cases are cited in RESTATEMENT (SECOND) OF CONTRACTS § 63, comment *b*, Reporter's Note at 263 (Tent. Draft No. 1, 1964).

<sup>14</sup> If an offer requests a promise from the offeree, and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract, subject to the rule stated in § 56, provided such performance is completed or tendered within the time allowable for accepting by making a promise. A tender in such a case operates as a promise to render complete performance.

RESTATEMENT OF CONTRACTS § 63 (1932).

<sup>15</sup> The exception, of course, offers some theoretical difficulties. See *Goble, Is an Offer a Promise?*, 22 ILL. L. REV. 567 (1928), and the reply by Williston in 22 ILL. L. REV. 788 (1928).

<sup>16</sup> At first it seems improper to protect an offeree who seeks protection of his part performance even though he has failed to meet the deadline given. After all, if he believes the doubtful offer requests performance, then he must believe the deadline given is for the completion of performance. Significantly, under § 45 (quoted in note 11 *supra*) an offer for a unilateral contract is made irrevocable upon the beginning of performance, but irrevocability is conditioned upon full performance within the time stated in the offer.

But the case is different when no express deadline is given and thereby a "reasonable

However, the phrase "seasonably undertakes" has not been interpreted by any court and a more reasonable interpretation is that the partly performing offeree must expressly or impliedly promise prior to the deadline that he will complete performance.

In summary, the doubtful offer problem in the first Restatement was resolved in favor of the offeree. If his response was a promise there was a contract. If, instead of promising as required by the presumption in section 31, the offeree completely performed, there was a contract under the special rule of section 63. If the offeree merely started to perform but did not give an express promise, an argument could have been made that the partial performance was an implied promise under the language of section 31 ("amounting in effect to a promise"), though this required binding the partly performing offeree. Finally, if the offeree merely started to perform in response to a doubtful offer and then "seasonably undertook" to complete performance, there was a contract under the comment language of section 63.

#### B. *Beginning Performance in Response to an Offer for a Unilateral Contract*

Probably no provision in the first Restatement was more popular than section 45.<sup>17</sup> Whether the hypothetical offeree was climbing the flagpole or walking across some well-known bridge, what student will ever forget the lesson that the offer becomes irrevocable once the offeree starts to perform? It may have been the first antinomy that he remembers confronting in his legal education. Ordinarily, offers are revocable unless the offeror has a duty not to revoke under a separate contract. If the offeror is paid not to revoke his offer, it is an option contract. The offeree who begins to perform in response to an offer requiring an act, however, has entered into no contract. The offeror has not promised to keep the offer open in exchange for the offeree's starting to perform. Why, then, is the offeree protected from revocation? If he knew or reasonably should have known that the offer could be revoked at any time during performance, is it unfair to say he assumed that risk? Perhaps not, if the offeror clearly indicated that the power of revocation could be exercised at any time during the performance. In the absence of clear reservation of the power of revocation, however, the reasonable offeree assumes that, once performance is begun, he will

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time" is implied by law; a reasonable time for promising may well be shorter than a reasonable time for performing. Thus, when an offeree has begun performance in response to a doubtful offer, it may be perfectly reasonable for him to have failed to complete performance by the implied deadline for promising.

<sup>17</sup> Quoted in note 11 *supra*.

have an opportunity to complete it. And allowing revocation under such circumstances would be very burdensome on an offeree who has already partly performed.

Neither section 45 nor the comments thereto expressed this rationale. There was also a curious conflict between the language of the section and the legal theory that the comments said it represents. The section stated that there is a contract once performance has begun. This contract binds only the offeror, and only on the condition that full performance is given or tendered by the offeree within the appropriate time. Section 45 was limited to unilateral contracts, which are typically formed when the act requested in the offer is completed. At that time, there is one right (in the offeree) and one duty (in the offeror). Yet, under the language of section 45, a contract exists as soon as the offeree starts to perform; there is a conditional right in the offeree and a conditional duty in the offeror. Since the effect of this machinery was to make the offer irrevocable, why was it necessary to provide for the formation of a contract as soon as performance began? This is particularly unfortunate in light of the comment language:

The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted.<sup>18</sup>

This suggested that, once performance is started by the offeree, there is a separate contract by which the offeror may not revoke his offer. It is, in effect, an option contract created by the implied offer ("If you start to perform, I will not revoke") and the acceptance of that implied offer by commencement of performance. The main offer, which requires completion of the act, is not accepted until performance is complete. Thus, the comment expressed a theory that accomplishes the result of the irrevocable offer but that remains compatible with the usual concept of a unilateral contract.

Notwithstanding the difficulty of its language, section 45 was widely used to prevent revocation of an offer once performance had begun.<sup>19</sup> This popularity was directly traceable to the manner-of-acceptance dichotomy. If an offer does not expressly request a promise and the offeree begins performing, a court will be strongly inclined to interpret the offer as requiring an act rather than as being doubtful.<sup>20</sup> Sec-

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18 RESTATEMENT OF CONTRACTS § 45, comment *b* (1932). For a discussion of this and other theories making the offer for a unilateral contract irrevocable, see G. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS 49:51 (J. Murray rev. ed. 1965).

19 See G. GRISMORE, *supra* note 18, at 50.

20 See cases cited note 13 *supra*.

tion 45 then protected the offeree, and the court could avoid the problems resulting from the presumption favoring bilateral contracts. Thus, the courts have circumvented the problems resulting from the acceptance dichotomy by avoiding the first Restatement as an initial analytical device. The first Restatement has been relegated to the supporting citation following the court's analysis of the controversy without its aid. This was inevitable, of course, since it did not accord with reality.

Despite the first Restatement's attempt to define an exclusive manner of acceptance, courts have considered the transaction in context, often deciding whether there is a contract simply by whether the parties act as if the deal is on. If the court is convinced that the circumstances require a contract, it can support its decision with citations to appropriate Restatement sections. Thus, if the offeree promises to perform when the offer does not clearly require a promise, a court could use section 31 and presume a promissory acceptance. If the offeree has begun to perform when the offer does not require either manner of acceptance exclusively, the court could simply characterize the offer as if it *did* require an act, thereby permitting application of section 45, which made the offer irrevocable. If the offeree completely performs when the offer either expressly requires a promise or presumptively requires a promise under section 31, the court could rightfully use the exception stated in section 63 to declare a contract on the ground that the offeror received something better than the promise he required.

That the sections are only sometimes used according to their stated purposes indicates that courts have not been able to rely on the structure of the first Restatement. They have managed to circumvent strict application of the provisions through characterization of the offer. This entire experience, of course, is a manifestation of the pragmatism of American case law. Theoretical application of the first Restatement simply did not work in many situations, and thus it was not applied as theoretically intended. The needs of a modern exchange society demanded a change in the theory. The reaction to this demand is seen in the Uniform Commercial Code and the New Restatement.

### III

#### MANNER OF ACCEPTANCE UNDER THE RESTATEMENT (SECOND) AND THE CODE

Under the second Restatement and the Code, the offeror is master of his offer without exception;<sup>21</sup> he remains free to require a particular

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<sup>21</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 28, comment *a*; § 29, comment *a* (Tent.

manner of acceptance. The fundamental change is the elimination of the principle that normally the offeror requires either a promise or an act. The new Restatement and the Code proceed on the assumption that, in the overwhelming majority of cases, the offeror is indifferent to the manner of acceptance. This fundamental policy is expressed in both documents by almost identical language. Section 29(2) of the new Restatement states: "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner . . . reasonable in the circumstances." Section 2-206 of the Uniform Commercial Code states: "Unless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract shall be construed as inviting acceptance in any manner . . . reasonable in the circumstances." The chief difference in the provisions is the obviously conscious omission of the strong word "unambiguously" from the new Restatement draft.<sup>22</sup>

Comment 1 to section 2-206 of the Code states: "Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear that it will not be acceptable." Comment 2 indicates that the purpose was to reject "the artificial theory that only a single mode of acceptance is normally envisaged by an offer."

Section 31 of the new Restatement states: "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>23</sup> Thus, acceptance in any "reasonable manner," as required generally under section 29(2), may occur by promising or performing under new section 31 unless otherwise indicated in the offer. The comment to new section 31 clearly adopts the new assumption:

[T]he usual offer invites an acceptance which either amounts to performance or constitutes a promise. . . .

. . . The offeror is often indifferent as to whether acceptance takes the form of words of promise or acts of performance, and his words literally referring to one are often intended and understood to refer to either.

Deliberate omission of the Code's "unambiguous" requirement from the new Restatement might be viewed as an expression of conceptual

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Draft No. 1, 1964). The exception to the basic principle of master-offeror under § 63 of the old Restatement has been eliminated.

<sup>22</sup> The Code language was available for adoption by the new Restatement drafters, and, other than the one omission, the new Restatement is very similar to the Code provision.

<sup>23</sup> It will be recalled that under § 31 of the old Restatement, there was a presumption of a promissory acceptance in a doubtful offer situation.

differences between them: the Code insists that an offeror's requirement of an exclusive manner of acceptance be "quite clear," whereas the Restatement does not. The result, of course, would be to have special rules for sale-of-goods contracts.

The new Restatement drafters could not have intended such a result. A portion of the introductory note to the new Restatement reads as follows:

Legislative changes in the law of contracts are incorporated in the Restatement of this Subject only where substantially similar legislative rules have been adopted in most of the States, as in the case of the Statute of Frauds, or where substantially similar legislation has been proposed to all the States, as in the case of the Uniform Commercial Code. . . .<sup>24</sup>

In addition, the repeated references to specific Code sections as supporting authority clearly indicate the intention to adopt the Code position. Since the new Restatement was intended to apply to all contracts, including those for the sale of goods, and since the Code is enacted law in this area, to suggest a different rule from the Code would be absurd. Yet, the difference in language remains unexplained.

It must be remembered that the Code was the first to change the assumption concerning what the offer normally requires as the manner of acceptance. The almost revolutionary suggestion that the offeree may normally choose his manner of acceptance wiped out years of deeply imbedded orthodoxy and restored the doctrine of contract formation to a realistic and effective place in society. With a change of such proportions, there should be no mistake about its meaning. Thus, words such as "unambiguously" and "quite clear" were inserted to avoid ambiguity.

This effort might be viewed as overzealous. It was possible to state clearly the change contained in section 2-206 and yet avoid saying, "We really mean it." This appears to be what the new Restatement does in sections 29(2) and 31 and in their respective comments. Though clearly not intended by the Code,<sup>25</sup> the use of emphatic or superfluous language may result in a narrower scope than intended for offers in which the offeror does require an exclusive manner of acceptance. The new Restatement wisely avoids this possibility. Thus, when the Code controls, the new Restatement could have the salutary effect of assisting courts

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<sup>24</sup> RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note at 3 (Tent. Draft No. 1, 1964).

<sup>25</sup> The phrase, "unless otherwise unambiguously indicated" clearly suggests that the Code is committed to the master-offeror concept. UNIFORM COMMERCIAL CODE § 2-206(1) [hereinafter cited as UCC].

to interpret its somewhat imperfect language. It can perform a positive function: helping courts insure consistency and predictability in the whole fabric of contract law.

Now that the offer may be accepted in any reasonable manner, absent contrary indications in the offer, the new foundation is laid, but the structure remains to be erected. If the offeree promises to perform or performs completely, there is a contract formed in traditional fashion.<sup>26</sup> If the offeree merely starts to perform, new section 63 is activated:

- (1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the beginning of the invited performance or a tender of part of it is an acceptance by performance.
- (2) Such an acceptance operates as a promise to render complete performance.

Unlike the old section 45 situation,<sup>27</sup> both parties now are bound upon the start of performance. A bilateral contract is formed because the start of performance "operates as a promise." Ordinarily, performance is begun with the intention to complete, but there may be situations in which both parties to the transaction should reasonably know that the offeree does not intend to be bound merely by starting to perform.<sup>28</sup> These unusual situations should not affect the workability of the new Restatement concept in normal circumstances. Moreover, its tone is one of flexibility. The comments to the new sections are extensive and do not focus on the technical operation of the sections as much as on their rationale. By more clearly indicating the purposeful nature of

<sup>26</sup> There may be a notice requirement as a condition to the offeror's duty. This matter is discussed at pp. 799-800 *infra*.

<sup>27</sup> See pp. 790-92 *supra*.

<sup>28</sup> Consider an offer for the repair of an automobile left outside a filling station before it opens. A note attached to the windshield requests repair and promises payment. Assuming the offer to be doubtful, the filling station owner chooses to begin to repair and then discovers that the required effort will constitute a serious interference with the other aspects of his business. Here, the offeror should have reasonably known that if the repair effort were that extensive, the offeree might refuse to complete after beginning to repair. Section 63 of the new Restatement should not be applied in Procrustean fashion to make the offeree liable for not completing the repairs.

On the other hand, consider a doubtful offer requesting the transport of fresh produce by the offeree's truck. The offer states that unless the produce can be delivered by the following morning, the offeree should not begin to transport but rather allow it to be transported by air. The offeree loads the produce on the truck and drives 30 miles toward the destination. He becomes tired (this could not have been known to the offeror) and decides that he should not attempt to complete the journey. The offeree returns the produce to its original location where it is subsequently picked up by a truck and delivered to air transport, arriving at its destination the following morning. Does § 63 make the offeree liable in this situation?

the changes in the new Restatement, the comments should be of great assistance to the courts.

The new Restatement imposes a notice requirement when the offeree begins to perform in response to a doubtful offer and has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty. Unless the offer dispenses with the necessity of notice, or the offeror learns of the performance in some other fashion, the offeree must exercise reasonable diligence to notify the offeror within a reasonable time.<sup>29</sup>

Section 2-206(2) of the Code states: "Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance." This section can be read as treating the commencement of performance as an acceptance and notice as a condition. Thus, even if there has been an acceptance by part performance, the offeror who does not receive notice may pretend that the offer lapsed before acceptance. But, if notice is a condition and not part of the acceptance, the fiction seems unnecessary. Interpretation is made even more difficult by the language in Comment 3 to section 2-206:

The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to engage himself. For the protection of both parties, it is essential that notice follow in due course to *constitute acceptance*.<sup>30</sup>

The major problem derives from the suggestion that notice constitutes what apparently is intended to be the final stage of acceptance. This view cannot be reconciled with fundamental contract law. The offeror does not bargain for notice; he bargains for a promise or performance. If he does not care which manner of acceptance is chosen by the offeree, the offeror begins to receive the bargained-for consideration when the offeror begins performance. If the offeror would not reasonably and promptly learn of the start of performance, the offeree must exercise reasonable diligence to notify him as a condition precedent to the offeror's duty, *not* as part of the acceptance. Therefore, if performance has started but notice has not occurred, there is an acceptance of the offer but the offeror's duty under the existing contract is

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<sup>29</sup> RESTATEMENT (SECOND) OF CONTRACTS § 56 (Tent. Draft No. 1, 1964). Similar notice requirements are found in §§ 56 and 63 of the old Restatement.

<sup>30</sup> Emphasis added.

conditioned upon receiving any required notice.<sup>31</sup> It is almost startling to find language in the Code suggesting that notice constitutes part of acceptance.

Under the Code, if an offer does not require a particular manner of acceptance and the offeree begins to perform, may the offeror revoke prior to notification? The remaining language of comment 3 attempts to meet this situation: "Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance." Does this suggestion solve the problem? Consider the following example: Buyer communicates an offer that is doubtful. Under section 2-206 any reasonable manner of acceptance is permitted. Seller begins to perform. Under section 2-206(2), even if Seller begins to perform, there may be no contract until notice is sent.<sup>32</sup> Prior to notification, Buyer revokes the offer, even though the time for notification from Seller to Buyer has not expired. Is the revocation effective? The comments to section 2-206 state that the usual common law machinery is activated to preclude such revocation by the buyer. The machinery referred to, of course, must be section 45 of the Restatement. Yet, that section in both the old and new Restatements applies only to offers that *require* performance as the exclusive manner of acceptance; to use what the new Restatement hopes to make anachronistic terminology, it applies only to offers for unilateral contracts. Since section 2-206 involves offers that do not require a particular manner of acceptance, there is actually no common law machinery available to make the offer irrevocable. Moreover, under the disjunctive language of Comment 3— "or at the offeror's option, final effect in constituting acceptance"—the offeror may choose to consider the contract as having been formed upon the starting of performance by the offeree. Thus, the offeree who starts performance may be bound to a bilateral contract at the offeror's discretion; yet the offeror may be able to revoke, notwithstanding the commencement of performance, unless the offeror is notified before

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<sup>31</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 56, 63 (Tent. Draft No. 1, 1964). See also G. GRISMORE, *supra* note 18, at 64-66.

<sup>32</sup> Another ambiguity found in UCC § 2-206(2) is the use of the word "notified." In common usage this might indicate that notice must actually be received by the offeror. In Comment 3, however, the phrase "notice to the offeror" is used to indicate that reasonable and prompt efforts to notify the offeror satisfy the requirement. The definition of "notice" in UCC § 1-201(26) does not resolve the ambiguity. To achieve reconciliation between the Code and the new Restatement in this area and to adopt the analytically sounder position of the latter, the preferred interpretation should be that the sending of notice within the appropriate time fulfills the notice requirement.

the revocation is received. Clearly, the draftsmen of section 2-206 did not intend this result.

The new Restatement attempts to remain analytically sound in its notice provisions while seeking reconciliation with the Code. Illustration 1 of the new section 56 points out the difficulty sought to be remedied:

A mails a written order to B for goods to be manufactured specially for A, and requests B to begin at once since manufacture will take several weeks. Under § 63 acceptance is complete when B begins, but A's contractual duty is discharged and he may treat the offer as having lapsed before acceptance unless within a reasonable time B sends notification of acceptance or unless the offer or a prior course of dealing indicates that notification is not required.

The illustration clearly indicates that acceptance is complete when the offeree begins to perform. However, it uses the identical language of section 2-206(2) to state that, if notification is not sent within a reasonable time, the offeror "may treat the offer as having lapsed." This language is superfluously inserted after the analytically sound statement that, absent such notice, the "contractual duty is discharged." Inclusion of the "offer having lapsed" phrase is inexplicable, except as an attempt to reconcile the new Restatement with the Code.

Another problem in reconciling the Code with the new Restatement is implicit in the section 2-206 comment language, which suggests that notice must always occur when the offeree chooses to accept by starting to perform. The new Restatement position is essentially the same as that of the old Restatement: notice is required only if the offeror would not normally become aware of the starting of performance with reasonable promptness and certainty. The language of the Code's comment, if literally interpreted, suggests something similar to the special rule under the old Restatement that the offeree who begins to perform when the offer requires a promise can protect himself if he "seasonably undertakes" to complete performance. As suggested earlier, this rule might permit only a belated promise.<sup>33</sup>

It is the view of the new Restatement that this result was not intended by the Code, despite the language of the comment. The new Restatement position is that beginning performance may be a reasonable manner of acceptance of a doubtful offer. The beginning of performance operates as a promise binding the offeree to complete, and there may be a condition of notice if the circumstances suggest that the offeror would not learn of the performance with reasonable prompt-

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<sup>33</sup> See pp. 789-90 *supra*.

ness and certainty. Fortunately, the infelicitous language that causes the difficulty under section 2-206(2) is found in the comment and is not part of the statute.<sup>34</sup> Perhaps courts will wisely ignore the comment language and adopt the new Restatement analysis.

A separate problem of reconciliation between the new Restatement and the Code arises from section 2-206(1)(b): "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of . . . goods . . . ." This is clearly a species of the general principle that acceptance of a doubtful offer may occur in any reasonable manner. The new Restatement uses identical language in section 31, comment *c*, citing section 2-206(1)(b). Yet, if an offeree decides to ship goods (instead of promising to ship), must he notify the offeror of "shipment"? The new Restatement replies:

In such standard cases as the shipment of goods in response to an order, the acceptance will come to the offeror's attention in normal course; in other cases, the rule of § 56(2) [requiring notice to the offeror who would not reasonably know that performance has started] ordinarily requires prompt notification.<sup>35</sup>

Thus, under the new Restatement, "shipment" does not require notification. Under section 2-206(1)(b), the term "shipment" is used in the same sense as found in section 2-504(c), which requires prompt notification of the shipment.<sup>36</sup> This Code requirement is mitigated somewhat by the final paragraph of section 2-504, which states that failure to notify is a ground for rejection only if material delay or loss ensues. Therefore, the notice provision of section 2-504 is a conditional requirement. Interestingly, however, the new Restatement sets up no notice requirement at all. Once again, it is absurd to suggest that a different rule is intended from the Code, which is clearly the law in a "shipment of goods" acceptance. Apparently, the new Restatement draftsmen simply did not consider the possible grounds for rejection

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<sup>34</sup> The actual language of the subsection may be peculiar, but it is compatible with the new Restatement analysis.

<sup>35</sup> RESTATEMENT (SECOND) OF CONTRACTS § 63, comment *b* (Tent. Draft No. 1, 1964).

<sup>36</sup> Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must . . . (c) promptly notify the buyer of the shipment.

UCC § 2-504.

"Shipment" is here used in the same sense as in Section 2-504; it does not include the beginning of delivery by the seller's own truck or by messenger. But loading on the seller's own truck might be a beginning of performance under subsection (2).

UCC § 2-206, comment 2.

when material delay or loss ensues, but preferred to state the usual rule that notice is not necessary because the buyer would reasonably and promptly become aware of the acceptance. The Code provision *is* concerned with this problem and simply adds that although notice is not *essential*, failure to notify *can* be a ground for rejection.

While the Code and the new Restatement permit the offeror to maintain control of the manner of acceptance, they clearly assume that offers requiring an exclusive manner of acceptance will be rare. The offeree may promise or perform in response to a doubtful offer, and if he starts to perform, that too is an acceptance. The offeror is protected in the commencement-of-performance situation, since the offeree is bound to complete under the new Restatement. Although the preferred interpretation of the Code accords with the new Restatement, language in the comments creates significant problems, particularly relating to notice. Courts can take a sound approach by adopting the new Restatement analysis and simply ignoring the disconcerting language of the comments to the Code. In so doing they would accomplish the goal of both, *i.e.*, a realistic agreement process for the needs of a modern exchange society.

#### IV

##### OFFERS REQUIRING A PARTICULAR MANNER OF ACCEPTANCE UNDER THE NEW RESTATEMENT AND THE CODE

Since the new Restatement and the Code are committed to the view that the offeror is master of his offer, an offer requiring a promise can be accepted only in that fashion. Can it be argued that complete performance is acceptance, since the offeror has received something as good as, if not better than, the promise? Under the old Restatement there would be a contract, according to an exception to the master-offeror concept.<sup>37</sup> One reason for the exception was that, under old section 31, a doubtful offer presumptively required a promissory acceptance. Thus, if an offeree performed instead of promising in response to a doubtful offer, there would have been no acceptance under old section 31 alone. Old section 63 mitigated this result by recognizing a contract upon complete performance. Since under new section 31 an offeree may choose to accept a doubtful offer by promising or performing, there is no need for old section 63.<sup>38</sup> Inferentially, however, since

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<sup>37</sup> See p. 789 *supra*.

<sup>38</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 63, Reporter's Note (Tent. Draft No. 1, 1964).

the principle of master-offeror is absolute under the new Restatement, there is no contract when the offeree performs and the offeror required a promise. This is a significant change to be wrought through inference.<sup>39</sup>

The logic behind old section 63 approached unassailability. After all, the ultimate desideratum of the offeror was performance. And if the offeror received performance and there were no problems of notice, why should there be no contract? The suggestion that this logic should yield to the symmetrical necessity of the offeror always being master of his offer is difficult to accept. It seems preferable to recognize a contract when full performance has been rendered within the time allowed for promising and the offeror apparently had no significant purpose in requiring the promise.

The question of full performance in response to an offer requiring a promise is even more interesting under the Code, which clearly permits the offeror to require a particular manner of acceptance.<sup>40</sup> In contrast to the old and new Restatements, the Code has no provision dealing with acceptance by performance when the offer requires a promise. Would a court apply the exceptional doctrine of old section 63 and permit a contract to be declared? Unlike the new Restatement, the Code does not even inferentially suggest that the offeror is always master of his offer. On the ground that the Code does not preclude the use of common law devices in situations not expressly covered,<sup>41</sup> a court might apply the exception of section 63 in the old Restatement rather than the new absolute master-offeror concept of the new Restatement. To the extent that courts feel compelled to circumvent this absolute concept, the new Restatement will suffer the fate of the old Restatement. The significant mitigating factor is that the situation will be rare enough that the general operation of the new Restatement's desirable provisions will not be disturbed.

As in the case of offers exclusively requiring a promissory acceptance, the offer exclusively requiring a performance acceptance will be rare under the Code and the new Restatement, because the typical offer no longer exclusively requires any particular manner of acceptance.<sup>42</sup> The new Restatement eliminated use of the term "unilateral

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<sup>39</sup> There is no express mention of the situation in § 63 of the new Restatement. The statement is found in the Reporter's Note:

The revision of § 31 to state that in case of doubt an offer invites either acceptance by promise or acceptance by performance, as the offeree chooses, makes unnecessary these departures from the basic principle that the offeror is master of his offer.

<sup>40</sup> UCC § 2-206(1).

<sup>41</sup> UCC § 1-103.

<sup>42</sup> Language or circumstances sometimes make it clear that the offeree is not to

contract."<sup>43</sup> Instead, the situation is more literally depicted as an offer that "invites an offeree to accept by rendering a performance and does not invite a promissory acceptance."<sup>44</sup> This is a desirable change, since the term "unilateral" has often been unsoundly described as an offer that is accepted by performance.<sup>45</sup> Under the new Restatement, any such description would be totally misleading, since a doubtful offer can be accepted by performance, and the beginning of performance operates as a promise by which the offeree is bound to complete. Therefore, to use the old terminology, a bilateral contract is created when a doubtful offer is accepted by starting performance.

If the offeree merely starts to perform in response to an offer requiring performance, the offer becomes irrevocable under section 45:

- (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it.
- (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Superficially, this language might appear to be a significant change in the theory of section 45. Some reflection, however, reveals that there is no substantial change. One of the problems in the old section 45 was that a contract by which the offeror agreed not to revoke was allegedly

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bind himself in advance of performance. His promise may be worthless to the offeror, or the circumstances may make it unreasonable for the offeror to expect a firm commitment from the offeree. In such cases, the offer does not invite a promissory acceptance, and a promise is ineffective as an acceptance. Examples are found in offers of reward or of prizes in a contest, made to a large number of people but to be accepted by only one. See § 28. Non-commercial arrangements among relatives and friends (See Comment *a* to § 21, Comment *c* to § 21B) and offers which leave important terms to be fixed by the offeree in the course of performance (§§ 32-33) provide other examples.

RESTATEMENT (SECOND) OF CONTRACTS § 31, comment *b* (Tent. Draft No. 1, 1964).

<sup>43</sup> See *id.* § 45.

<sup>44</sup> *Id.*

<sup>45</sup> In the typical unilateral situation, at the time of formulation the offeree who has performed the act has a right to accept the offer, and the offeror has a correlative duty. However, there can be a reverse unilateral contract in which the right is in the offeror and the duty in the offeree who must perform. Therefore, instead of the normal promise-requesting-an-act situation, we see the performance of the act in exchange for a promise. See Goble, *The Non-Promissory Offer*, 48 Nw. U.L. REV. 590 (1953). But see Stoljar, *Offer, Promise and Agreement*, 50 Nw. U.L. REV. 445 (1955). See also RESTATEMENT OF CONTRACTS § 57, Illustration 1 (1932), which states:

A writes to B, who is boarding A's horse, "I should like to sell my horse to you, and if you will promise to pay \$200 for it, the horse is yours." B makes the requested promise. Ownership of the horse is thereupon instantly transferred to him.

formed upon the starting of performance by the offeree.<sup>46</sup> It was suggested that such contracts are normally option contracts, in which the offeree in some fashion pays the offeror not to revoke. New section 45 merely suggests that, upon the start of performance, the effect of an option contract is created so that the offer becomes irrevocable. Using the option contract device to accomplish irrevocability clarifies the theory and makes it consistent with the result.

The type of "option contract" created by part performance is a promise contained in the offer itself, not made separately in a collateral offer to keep the main offer open.<sup>47</sup> The alternative to the option contract device would be a statement of the principle that the offer becomes irrevocable upon part performance by the offeree. This would be in keeping with the rationale that the rule of new section 45 "is designed to protect the offeree in justifiable reliance on the offeror's promise."<sup>48</sup> For purposes of clarity, a comment might then note that the stated principle operates in the same fashion as an option contract. This alternative would merely state the principle underlying both the original and the new section. Since the principle is solidly established, there appears to be no need to fictionalize the rule by resorting to the familiar category of the option contract. Apparently, some need to resort to the familiar category is still felt.<sup>49</sup> To the extent that this need must be met, the option contract is the best device.

There are also some difficult passages in comment *b* to new section 45:

The rule of this section is designed to protect the offeree in justifiable reliance on the offeror's promise, and the rule yields to a manifestation of intention which makes reliance unjustified. A reservation of power to revoke after performance has begun means that as yet there is no promise *and no offer*.<sup>50</sup>

A startling conclusion can be drawn from the last sentence: a purported offer for performance that reserves the right to revoke after performance has begun is not an offer; it creates no power of acceptance. Therefore, if *A* offers *B* \$100 to climb the pole and *A* reserves the right to revoke after performance has started, *B*'s completion of the act

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<sup>46</sup> See discussion of old § 45 at pp. 790-92 *supra*.

<sup>47</sup> RESTATEMENT (SECOND) OF CONTRACTS § 24A, comment *a* (Tent. Draft No. 1, 1964).

<sup>48</sup> *Id.* § 45, comment *b*.

<sup>49</sup> Though the new Restatement is not intended as a proposed code, there appears to be significant "legislative compromise" in any effort to produce a final draft of such magnitude.

<sup>50</sup> Emphasis added.

(reaching the top of the pole) creates no contract even though *A* has not revoked during *B*'s performance.

If *B* manages to get to the top of the pole prior to any revocation by *A*, why should there be no contract? The specific evil sought to be avoided by new section 45 is suggested in the remaining language of comment *b*:

In particular, if the performance is one which requires the cooperation of both parties, such as the payment of money or the manual delivery of goods, a person who reserves the right to refuse to receive the performance has not made an offer.

Applying this language to our example, if, after *B* has reached the top of the pole, *A* may say, "I refuse to pay," and that was known or should have been known by *B*, there never was an offer and *B* never had a power of acceptance. *B* could not subject *A* to a duty to pay. Yet, is there no power of acceptance if *A* can revoke only *during* the performance by *B*, so that when *B* reaches the top of the pole he has accepted *A*'s offer? If the rule stated in new section 45 "is designed to protect the offeree in justifiable reliance on the offeror's promise," would not such justifiable reliance be present when an offeree merely assumed the risk that he would complete performance prior to revocation by the offeror?

The difficulty in the comment can be traced to the particular situation it mentions. For example, if the offeror promises to receive a lesser amount than is owed him in exchange for payment earlier than required, acceptance is complete under new section 45 when payment is tendered. But if the purported offer requires the cooperation of the offeror in *accepting* such tender and the offeror is not bound to accept, there is no offer initially. The specific reference to this and similar situations in new section 45 should help to achieve better reasoned results than heretofore recorded.<sup>51</sup> Nevertheless, the statement that "[a]

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<sup>51</sup> For example, the new Restatement would require a different result than that suggested in the familiar case of *Petterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928), assuming a tender had been made by the offeree. Though the actual facts of the case suggest that there was no tender, the court added gratuitously that the result would not have changed had there been a tender. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45, comment *c* (Tent. Draft No. 1, 1964). New § 45 is correct in its analysis of the instantaneous act type acceptance (e.g., tender) in offers requiring an act. The analysis suggested simply calls for an interpretation of the offer. Unless the purported offer clearly permits the offeror to refuse the tender, tender constitutes acceptance and a contract is formed. Although the analysis is correct, the interesting question arises, should it be included under § 45 at all? Does it really have anything to do with § 45 since no "irrevocable offer" is created by option contract? Either a contract is formed or it is not, depending upon the interpretation of the expression alleged to be an offer. A more desirable solution,

reservation of the power to revoke after performance has begun means that . . . there is . . . no offer"<sup>52</sup> is not necessary to achieve these results. In the absence of a device such as section 45, an offer for a performance can be revoked at any time during the performance. The comment just quoted suggests that, if there is a reservation of the power to revoke, there is no offer. Since the draftsmen of new section 45 have not clearly expressed the intention to achieve this unusual result, it seems appropriate to assume that it is attributable to an unfortunate choice of words in the comment.

Before leaving new section 45, it is important to inquire whether its inclusion was necessary in the new Restatement. This article does not deal with the changes in new section 90, in which an unbargained-for promise is enforceable if it induces action or forbearance.<sup>53</sup> It is, however, interesting to suggest the possible substitution of section 90 for all section 45 problems. First, new section 45 is based on a justifiable reliance theory that is indistinguishable from the theory of section 90. Second, the changed remedial provision of new section 90 is sufficiently flexible to meet any problem that would now be encountered under section 45. Finally, the significant narrowing of offers relegated exclusively to performance acceptances indicates little more than a curio existence for new section 45, which requires a performance acceptance initially and applies only when performance has been started but not completed. If section 45 were eliminated in favor of section 90, significant restructuring could occur. For example, all offers could be revocable. The partly performing offeree responding to an offer requiring performance would be compensated according to his reliance interest if the offeror revoked during performance. Another possibility is that some offers could be made irrevocable and some not, the former having the same effect under section 90 that is now achieved under section 45 and the latter allowing a reliance recovery for part performance. The difficulty in using section 90 is that it concerns the unbargained-for promise, whereas section 45 deals with part performance in typical bargained-for situations. This difficulty does not seem overwhelming.

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perhaps, would be to place the instantaneous act situation under the new definition of an offer in § 24 of the new Restatement, with a note in the comment to § 45 that the instantaneous act situation is now considered in § 24.

<sup>52</sup> See p. 803 *supra*.

<sup>53</sup> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Since the possibility of a section 90 substitution for section 45 cases is not a novel thought, perhaps one of the reasons for the retention of section 45 in the new Restatement is that a *Restatement of Contracts* without the famous section 45 is almost unthinkable.

The Code treatment of offers exclusively requiring performance does not require extended discussion. Certainly, such offers are possible under the Code.<sup>54</sup> If the offer clearly requires such a manner of acceptance, the master-offeror principle adopted by the Code would prevail. No Code provision deals with the problem concerning the start of performance in response to such an offer. A comment to section 2-206, however, suggests applying common law devices in such a situation.<sup>55</sup> Therefore, in a sale-of-goods offer requiring performance only, the beginning of performance would activate a common law device such as Restatement section 45 to make the offer irrevocable.

#### CONCLUSION

Many problems related to the changes discussed in this article have not been explored. Certainly, in relation to every specific provision of the new Restatement or the Code, fact situations can and will put the new provisions to a severe test. Consequently, it is important that courts use these provisions in terms of their purposes, and the most significant aid to courts in discovering the purposes of specific provisions is an understanding of the foundational changes. All the specific changes that have been discussed are related to the basic concept that the power of acceptance may normally be exercised in any reasonable manner unless the offeror specifies a particular manner. Generally, the structure erected on this foundation in the new Restatement is highly desirable. It should serve to make the agreement process a realistic doctrine in our modern exchange society. In addition, it can be effectively used to assist courts in their interpretation of the less cogent provisions found in the Uniform Commercial Code. If courts view the new Restatement as fulfilling this secondary function in addition to its normal function, the social institution of contract will be significantly enhanced.

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<sup>54</sup> The initial phrase in UCC § 2-206 states: "Unless otherwise unambiguously indicated . . . ."

<sup>55</sup> *Id.* Comment 3.