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David V. Snyder

Indiana University School of Law - Bloomington

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ARTICLES

THE LAW OF CONTRACT AND THE CONCEPT OF CHANGE: PUBLIC AND PRIVATE ATTEMPTS TO REGULATE MODIFICATION, WAIVER, AND ESTOPPEL

DAVID V. SNYDER*

“Certainty is an illusion; but we love our illusions.”¹

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* Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. This Article has benefited greatly from the comments of generous lawyers, scholars, and judges including Randy Barnett, Thomas Buckley, Judge John M. Duhé Jr., E. Allan Farnsworth, Shael Herman, Robert A. Hillman, Ronald Krotoszynski Jr., William A. Levine, Judge Richard A. Posner, Stephen J. Ware, and James G. Wilson. Thanks to the University of Chicago D'Angelo Law Library for patient help when I was examining the Karl Llewellyn papers. I am also grateful to Donald Amirault, Jennifer Braman, Joseph Hatina, George Sutcliffe, and the staff of the law library at Cleveland-Marshall for research assistance. In addition, I gratefully acknowledge a research grant from the Cleveland-Marshall Fund.

1. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 n.46 (1965) (referring to Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897)); see also Roscoe Pound, *Introduction to JOHN S. EWART, WAIVER DISTRIBUTED AMONG THE DEPARTMENTS: ELECTION, ESTOPPEL, CONTRACT, RELEASE* at iv (1917) (“We come to see that there is much more to be done than . . . deduction from traditional conceptions. Nevertheless that method is a permanent acquisition of legal science and is rather to be confined to its proper field than to be discarded.”). I am grateful to Larry T. Garvin for the epigraph. See Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 174 (1998).

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I. INTRODUCTION

Contract and change are antithetical. The basic purpose of making a contract—and the basic purpose of contract law—is to prevent change, or at least to provide compensation for it. A simple example illustrates this fundamental point. The reason a buyer and seller of wheat enter into a contract is to lock in their deal. Suppose they agree that the seller will deliver and the buyer will pay for 100,000 bushels of wheat at \$2.50 per bushel on September 1. The buyer wants to ensure that the seller will deliver the goods and will not raise the price. Similarly, the seller wants to ensure that someone will pay the agreed price. If either party tries to change the deal unilaterally, the courts will force that party to pay damages to compensate for the change. The reason for the contract, and the law that makes it effective, is to freeze the deal to foreclose the possibility of change.

The same is true of more sophisticated contracts. Contracts, of course, allocate risk;² some, like those used in the securities market, do so in

2. See generally Edwin W. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335 (1924).

dizzily complicated ways. Some contracts allow for limited changes, such as the familiar output and requirements contracts. Nonetheless, common to all of these contracts is the parties' desire to lock in their deal, whether that deal be simple, complicated, or limited. Simply put, the other party—be it a hedge fund or a manufacturer or anyone else—cannot be allowed to change the contract.

The perception that contract exists to prevent change, a seemingly obvious idea, has remained obscure.³ Change in a global sense is inevitable, and changes with respect to a particular deal, if not inevitable, may at least be welcome. On first impression, it would seem that the only change contract law seeks to prevent is unilateral change. What could be wrong with a modification to which the contracting parties agreed?

Nevertheless, contract law is surprisingly resistant even to bilateral changes, perhaps because of doubt about the ability to distinguish changes that are coerced from ones that are not. At the same time, traditional contract law has the power to accommodate change under the doctrines of waiver and estoppel. The law has no coherent doctrine to ease the tension between the need to lock in the bargain and the need to allow for change. Continual practical and theoretical problems have been caused by this difficulty.⁴

This tension in contract law is drawn tighter when the contracting parties try to add to the law's constraints against change. Sometimes parties try not only to lock in the deal with a contract, but also to secure it further with a written agreement prohibiting oral modification. These "no oral modification" or "NOM" clauses are not new, but the problems they pose have yet to be resolved. Repeated efforts at legislative resolution have encountered several forms of judicial trouble. In addition, "no oral waiver"

3. Frequently the concept of contracting to protect against change is discussed in terms of the reliance or expectations of the parties. *See, e.g.,* *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 294 (7th Cir. 1974) ("[T]he buyer has a right to rely on the party to the contract to supply him with goods regardless of what happens to the market price. That is the purpose for which such contracts are made."). What the parties are relying on or expecting, however, is that the deal will not be changed. The dominance of the expectancy and reliance rubrics have perhaps left other concepts in shadow. *See* E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 41-42 (1998) [hereinafter FARNSWORTH, *CHANGING*].

4. *See* Karl N. Llewellyn, *The Karl Llewellyn Papers* C.G.3, Third Contracts Refresher Course, at 2 (not dated, but judging by surrounding documents, probably first quarter of 1946) (unpublished collection, available at the University of Chicago D'Angelo Law Library) ("I know few things more frequent"); 1 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-6, at 37 (4th ed., Practitioner's ed. 1995) [hereinafter 1 WHITE & SUMMERS] ("immense practical significance"); Beth A. Eisler, *Modification of Sales Contracts Under the Uniform Commercial Code: Section 2-209 Reconsidered*, 57 TENN. L. REV. 401, 401 (1990); Joseph H. Levie, *The Interpretation of Contracts in New York Under the Uniform Commercial Code*, 10 N.Y.L.F. 350, 355 (1964).

or “NOW” clauses have starkly divided the courts, yet the literature has largely ignored the problem.

This Article reviews the problems caused by both private and public attempts to regulate contractual change and proposes a solution for them. The proposed solution for the first time makes coercion—not duress—the test for contract modifications. The preexisting duty rule does not work, and the duress test raises too rigorous a standard for contract modifications. Duress requires an improper threat under which the party claiming duress had no reasonable alternative but to accede.⁵ Coercion, by contrast, merely requires a threat (not necessarily “improper”) to take away a legal right, and measures whether the victim acted reasonably (not necessarily with “no reasonable alternative”). The coercion solution proposed here allows the party to escape a contract modification that is unsupported by consideration without diluting the power of the duress standard.

The legislative proposal in this Article also accords greater respect to the parties’ role in making their own rules, through NOM and NOW clauses. The proposal emphasizes both the needs of the parties and the institutional requirements of the courts. Previous efforts at statutory reform have missed their mark by failing to take account of the judiciary. The compromise proposed in this Article reflects this lesson: legislative fiat is not necessarily enough to change the law of contract. Just as contracts and change are antithetical, so contract law and legislative change prove, at least in this context, to be uneasy companions.

This Article is therefore modest about the kinds of change that a statute can achieve. The proposed legislation attempts a realistic view of both how the courts will apply a statute and about what has a good chance of passing through the American Law Institute (the “Institute”), the National Conference of Commissioners on Uniform States Laws (the “Conference”), and the state legislatures. The suggested statute strikes a compromise between flexibility, certainty, and reliance. The proposed legislation respects the freedom of the parties and it protects against undue erosion of the original deal, but it also recognizes the needs of the courts and the inevitability of contractual change. Those who hope for something more certain than what is offered here are deluded by the illusion of certainty.⁶

Ultimately, this Article proposes to reconceive several doctrines by viewing them together as a group of facts and associated rules that can help resolve, if not solve, the conundrum of accommodating change while protecting the legal knot tied in the original deal. This Article, then, attempts to synthesize the doctrines of modification, waiver, and estoppel,

5. See RESTATEMENT (SECOND) OF CONTRACTS §§ 175-176 (1981).

6. See *supra* note 1 and accompanying text.

and in so doing, to allow contracting parties to have a hand in making the rules by which they plan to play.⁷

Part II of the Article examines traditional doctrine to gauge the dimensions of the central problem, preventing and accommodating change. Part III then reconceptualizes the old doctrines of modification, waiver, and estoppel, and adapts them for more precise use. Part IV examines the attempts of private parties to solidify the terms of contractual change by the use of NOM and NOW clauses, with varied results under the law. Part V proposes a partial revision of Article 1 of the Uniform Commercial Code. The proposal would clarify the doctrines of course of performance, course of dealing, and usage of trade, as well as modification and waiver, while effecting a compromise between the competing contractual values of certainty, flexibility, and reliance. Finally, Part VI explores extra-statutory opportunities to regulate contractual change, including a two-part coercion test that is intended to replace the preexisting duty rule and the duress standard for contract modifications.

7. There are two particular areas I have not addressed here because they fall outside the dialectic between contract and change. First, I do not discuss the interpretive problems incident to the statute of frauds, and how the statute does or does not apply after the original contract is concluded. The focus of these difficulties has been U.C.C. section 2-209(3) and (4). Some of the scholarly writing on the issue is discussed below when it implicates the topic under consideration here. For the most part, however, such issues are better addressed in articles—or legislation—focused on the statute of frauds itself. This conclusion accords with that of the study group appointed by the Permanent Editorial Board for the U.C.C., which concluded that U.C.C. section 2-209(3) should be deleted and that any modification should be governed by section 2-201. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 74-75 (1990) [hereinafter STUDY GROUP REPORT]. Second, there has been a broad range of recent criticism of the incorporation approach taken by the Code. These arguments suggest that the place of usage of trade, course of dealing, and course of performance should be seriously questioned. See generally, e.g., Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996) (commercial norms are inefficient); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377 (1997) (commercial practices lead to inefficient norms); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) (questioning whether the norms assumed by the Code exist). For a more philosophical treatment, see generally Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975). I acknowledge these criticisms, but since they are focused on issues other than contractual change, they are beyond the scope of this Article. Usage of trade and course of dealing, therefore, are included in the legislation proposed here simply on grounds of inertia.

II. PUBLIC ATTEMPTS TO REGULATE CHANGE

A. Traditional Iteration in the Age of the Common Law

The tension between contractual certainty and contractual change that lies at the center of this Article has not mellowed with age. As courts have invented and expanded doctrines to deal with the problem, some of those devices have themselves become part of the difficulty. Perhaps the earliest and best known statement of the issue, and the response of the common law, recalls a fleet of seafaring cases that garnered the attention of some of the finest minds and provoked some of the most beloved scholarship in the discipline.⁸

1. THE TROUBLE WITH SAILORS

At least since the eighteenth century, with beautiful regularity, seamen would agree to work for a set wage and then, far from the home port, they would demand more money. In 1791, the master of an endangered ship promised extra wages "to induce the seamen to exert themselves."⁹ Lord Kenyon ruled against the sailors' claim for extra money.¹⁰ In another case a generation later, two sailors deserted a ship while it was in Russia.¹¹ The master of the ship promised the wages of the deserters to the remaining sailors if they would sail the ship back to London, but when they returned, the shipowner refused to pay the extra wages.¹² The sailors sued and lost again. The same thing was happening on this side of the Atlantic.¹³ In *Alaska Packers' Ass'n v. Domenico*, seamen contracted in San Francisco to work the salmon season in Alaska.¹⁴ Once there, they famously refused to work without an increase in wages, and the boss had to agree.¹⁵ At the end

8. See I SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 130 (1st ed. 1920); GRANT GILMORE, *THE DEATH OF CONTRACT* 22-28 (1974) [hereinafter GILMORE, *DEATH OF CONTRACT*]; cf. *Weber v. Couch*, 134 Mass. 26 (1883) (Holmes, J.); *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917) (Cardozo, J.); OLIVER WENDELL HOLMES, *THE COMMON LAW*, lecture 9 (Mark DeWolfe Howe ed., 1963) (1881).

9. *Harris v. Watson, Peake* 102, 170 Eng. Rep. 94 (Nisi Prius 1791).

10. See *id.* at 103.

11. There are two reports of *Stilk v. Myrick*: 170 Eng. Rep. 1168, and 170 Eng. Rep. 851 (Nisi Prius 1809). The latter uses the spelling "Meyrick."

12. See *id.* at 1168, 170 Eng. Rep. at 851.

13. See *Bartlett v. Wyman*, 14 Johns. 260 (N.Y. Sup. Ct. 1817).

14. 117 F. 99 (9th Cir. 1902).

15. This case is the classic example of what is now sometimes called a "holdup." See, e.g., Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 208 (1997).

of the season, the company refused to pay the extra amounts. The men sued, and again they lost.¹⁶

Could the mariners of *Alaska Packers* have been surprised? “[N]o . . . astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other . . . takes an unjustifiable advantage of the necessities of the other party.”¹⁷ Preventing these coerced modifications, in the view of one modern court, is the most important function of contract law.¹⁸ In other words, one of the principal purposes of contract law is to prevent, or at least regulate, change.

The principal instrument of this public regulation of change has been the preexisting duty rule. *Alaska Packers* demonstrates the effect of the rule. The scamen could not win because they were already obligated to perform precisely the duties for which they wanted more money, and the shipowners were not obligated to pay more for services to which they were already entitled. The bargain theory of consideration would not be satisfied.¹⁹ No consideration supported the promise of extra money, and the promise was thus unenforceable.

The salutary result in *Alaska Packers* would seemingly deserve applause. The preexisting duty rule saved the case for the companies and foiled the apparent attempt at coercion by the seamen. The rule can have other benefits as well, in another context beset with concerns of coercion and undue influence. Suppose an insurance adjuster approaches a victim shortly after the accident, offering a relatively small sum in return for a release of the victim’s claim under an insurance policy. The release is invalid for lack of consideration, as the smaller amount does not discharge the contractual duty of the insurance company to pay according to the policy terms.²⁰ With a record like this one, then, why has the preexisting duty rule been singled out as the “adjunct of the doctrine of consideration which has done most to give it a bad reputation?”²¹

16. See *Alaska Packers*, 117 F. at 101.

17. *Id.* at 102 (quoting *King v. Duluth, M. & N. Ry. Co.*, 63 N.W. 1105, 1106 (Minn. 1895)).

18. See *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1285 (7th Cir. 1986) (Posner, J.).

19. The bargain theory is encapsulated in the RESTATEMENT OF CONTRACTS § 75 (1932) and remains in the RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). It is worth noting that Gilmore questions whether *Harris v. Watson* and *Stilk v. Myrick* were accurately received, through Williston, into modern contract law. See GILMORE, DEATH OF CONTRACT, *supra* note 8, at 22-28 (construing WILLISTON, *supra* note 8, § 130).

20. See RESTATEMENT (SECOND) OF CONTRACTS § 73 illus. 5 (1981).

21. Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 936 (1958) (citing *Rye v. Phillips*, 282 N.W. 459, 460 (Minn. 1938); *Frye v. Hubbell*, 68 A. 325 (N.H. 1907)).

2. A HORSE, A HAWK, OR A ROBE

The problem with the preexisting duty rule is that it leads to underenforcement and, if that were not bad enough, to overenforcement as well.²² The rule invalidates some changes that ought to be enforced, and it enforces some changes that ought to be invalidated. Simple examples illustrate how badly the rule can work. Returning to the earlier example of a sale of wheat (100,000 bushels at \$2.50): The seller may discover that the wheat will not be ready to deliver until October 1, instead of the promised date of September 1. The buyer may not care much; a delay of a month may mean little. Suppose, then, that in early August the buyer and seller agree to change the delivery date, but that by September the market price has fallen significantly. Consequently, the buyer no longer wants to buy from the seller at the contract price of \$2.50. On September 3, the buyer declares the seller in breach, since delivery was not made on September 1, as required by their original agreement. The buyer refuses to accept or pay for the seller's wheat, and he buys instead on the open market. The seller is forced to sell on the open market and incurs a substantial loss. (If we imagine that the market price is \$2 per bushel, \$50,000 plus incidentals is at stake.) Of course the seller wants to sue.

Wrong though it may seem, under the preexisting duty rule, the buyer would win. The preexisting duty rule would invalidate the modification of the delivery date just as it invalidated the modification of the sailors' wages. In neither case would the parties benefiting from the modification (i.e., the greedy sailors and the cheated seller) have given anything in exchange for it. With no fresh consideration, the modification does not count as a contract. True, in each case there is an agreement to the modification, but an agreement without consideration does not make a contract. Contract law is as hostile to these agreed changes as to unilateral changes. The preexisting duty rule thus results in underenforcement in the sense that it invalidates not only the coerced modification exemplified by *Alaska Packers* but also the good-faith change in delivery date in the hypothetical sale.

The preexisting duty rule also validates modifications that are objectionable. Say the seamen in Alaska stopped work and said to the boss, "We want our wages doubled. In return, we'll spread the word back in San Fran that you're a great employer." The boss, with no other labor for thousands of miles, is just as stuck as in the actual *Alaska Packers* case, and he agrees to the sailors' proposal. Here, though, the seamen are offering something in exchange for the increased wages. It may not be worth a

22. See, e.g., *Wisconsin Knife*, 781 F.2d at 1285-86.

significant wage increase, but one of the chief points of consideration doctrine is that courts, once they are satisfied that consideration exists, will not inquire whether the consideration is adequate.²³ The parties are best placed to determine the worth of the consideration, and if the courts were to interfere and set prices, according to traditional logic, the market system would crumble. The courts have made this point variously and vividly across the centuries. The seamen need only offer a “horse, hawk, or robe,”²⁴ or the infamous peppercorn, or the more likely “jug[] of beer.”²⁵ Their modern counterparts could get away with a pine nut, the “peppercorn of nouvelle cuisine,” to immunize any modification that did not sink to the level of duress.²⁶

Despite all of these drawbacks, the preexisting duty rule survived the age of the common law. Although some courts repudiated the rule,²⁷ and other courts found ways to get around it on appealing facts,²⁸ the rule has survived sufficiently intact to come forward into the *Restatements*.

B. Reiteration in the Age of the Restatements²⁹

Of course, one may well question whether the common law, even at the height of its rigidity and formalism, would consistently have held a peppercorn to be valid consideration. Now, with the refinement added by the *Restatements*, there is little doubt the courts would see through such a sham.³⁰ To constitute consideration under the bargain theory adopted by the *Restatements*, something must be “sought” by the party receiving it in

23. See RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (1981).

24. Pinnel's Case, 5 Co. Rep. 117a, 117b, 77 Eng. Rep. 237, 237 (C.P. 1602).

25. 1 W. SHEPPARD, GRAND ABRIDGMENT 64 (1675) (“a penny or a jug[] of beer is as much obliging in a promise as £100.”).

26. *Wisconsin Knife*, 781 F.2d at 1290 (Easterbrook, J., dissenting).

27. See Annotation, *Rule that Promise by Creditor to Accept, or Acceptance of, Less than Amount Due on a Liquidated Indebtedness in Discharge of the Whole, Is Not Binding upon Creditor as Regards Unpaid Amount*, 119 A.L.R. 1123 (1939).

28. For examples of delayed-delivery cases in which the courts managed to validate the delay, see *Dellicarri v. Hirschfeld*, 619 N.Y.S.2d 816 (App. Div. 1994); *Jackson v. Cobert*, 612 N.Y.S.2d 330 (Civ. Ct. 1994), *aff'd*, 637 N.Y.S.2d 613 (App. Div. 1995).

29. See generally Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680 (1982) [hereinafter Hillman, *Restatement*], for another discussion and critique of the approach in the *Second Restatement*. For the influence of the *Restatements* on the law, see generally Gregory E. Maggs, *Ipsa Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508 (1998); for the preexisting duty rule in particular, see *id.* at 508-09, 533.

30. See RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981); RESTATEMENT OF CONTRACTS § 20 (1932).

exchange for his own promise or performance.³¹ No one really seeks a peppercorn, and courts have no trouble penetrating the pretense.³² This rule, however, probably represents no change from the common law, as the rule simply emphasizes that courts will ask whether consideration is entirely lacking. The rule does not mean courts will inquire whether the consideration is adequate,³³ once they have determined that there is some consideration to support the deal. The *Restatements*, then, do not provide much of a patch for this hole in the preexisting duty rule—a rule that both *Restatements* carefully, if reluctantly, preserve.³⁴

Take the last hypothetical twist on *Alaska Packers*. Under the bargain theory, the company, represented by the boss in Alaska, must have been induced in part by the promise of the advertising. But as long as the consideration is actually given, and as long as it is not merely nominal (such as a peppercorn, or a dollar, or a pine nut), the court judging the modification would not question whether the boss really cared about the advertising. “[T]he law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other’s response and to be induced by it and that the other responds in accordance with the inducement.”³⁵ The seamen showed an intent to induce the wage increase by offering the advertising, and the boss responded accordingly. The modification would be valid, so far as can be discovered from the consideration rules. Such a result, however, would justly be disparaged as a wooden application of the rules. As the reader will see shortly, the courts have fashioned creative solutions instead of contenting themselves with mechanistic results.

The *Second Restatement* aims instead to fix the other problem with the preexisting duty rule: its habit of invalidating modifications that the law ought to honor. The illustrative case for the new rule is *Watkins & Son, Inc.*

31. RESTATEMENT (SECOND) OF CONTRACTS §§ 71(1)-(2), 71 cmt. b, 75 (1981). Perhaps the nub is this text: “A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.” *Id.* § 71(2).

32. *See id.* § 71 cmt. b (“a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal.”); *id.* § 79 cmt. d. For a classic and respectably aged example of a court seeing through such pretense, see *Schnell v. Nell*, 17 Ind. 29 (1861).

33. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

34. *See id.* § 73 (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration”); *see also id.* §§ 74, 76, 84. The current *Restatement* continues to emphasize pretense. Section 73 qualifies by providing that “a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.”

35. *Id.* § 71 cmt. b; *see also id.* § 23.

v. *Carrig*.³⁶ A contractor agrees in writing to dig a basement.³⁷ To the surprise of both the contractor and the owner, the site rests largely on rock.³⁸ They agree orally to change the price to about nine times the original amount.³⁹ The preexisting duty rule would have nullified the modification in a flash,⁴⁰ but the *Second Restatement* preserves the modification by making it binding without consideration.⁴¹ This exception to the requirement of consideration has come in handy as cases like *Watkins v. Carrig* have continued to arise,⁴² sometimes with peculiarly modern facts.⁴³

The common law before the *Restatements* had not been helpless in such situations, but courts had been forced to resort to subterfuge. Several devices are prominent. One of them, waiver, will be addressed in a separate section.⁴⁴ Others are aptly evidenced by *Schwartzreich v. Bauman-Basch, Inc.*, which cites a number of cases before concluding that the preexisting contract was rescinded and the parties simultaneously entered into a new agreement.⁴⁵ In support of this holding, the court noted that cases have been willing to assume "the new contract is evidence of rescission of the old one and it is the same as if no previous contract had been made."⁴⁶ The court also demonstrated, perhaps unwittingly, how confused the law had become by the 1920s. In addition to citing a case using the unanticipated circumstances test eventually incorporated in the *Second Restatement*,⁴⁷ the court cited some cases that employed the preexisting duty rule and invalidated the contract,⁴⁸ and cited others that found fresh consideration in "any new privilege or advantage to the promisee,"⁴⁹ including the right "to

36. 21 A.2d 591 (N.H. 1941).

37. *See id.* at 591.

38. *See id.*

39. *See id.*

40. *See id.* at 592.

41. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89(a) ("[p]romise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.") & illus. 1 (1981). There is no counterpart in the *First Restatement*. *See id.* Reporter's Note ("This section is new").

42. *See, e.g.,* *Angel v. Murray*, 322 A.2d 630, 634 (R.I. 1974).

43. *See, e.g.,* *Brian Constr. & Dev. Co. v. Brighenti*, 405 A.2d 72, 73 (Conn. 1978) (involving buried waste instead of the old solid rock).

44. *See infra* Part III.A.

45. 131 N.E. 887, 889-90 (N.Y. 1921).

46. *Id.* at 890 (citations omitted).

47. *See id.* (citing *King v. Duluth, M. & N. Ry. Co.*, 63 N.W. 1105 (Minn. 1895)).

48. *See id.* (citing *Carpenter v. Taylor*, 58 N.E. 53 (N.Y. 1900); *Price v. Press Publ'g Co.*, 103 N.Y.S. 296 (App. Div. 1907); *Davis & Co. v. Morgan*, 43 S.E. 732 (Ga. 1903); *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902); *Conover v. Stillwell*, 34 N.J.L. 54, 57 (1869); *Erny v. Sauer*, 83 A. 205 (Pa. 1912)).

49. *Id.* at 889-90 (citing *Triangle Waist Co., v. Todd*, 119 N.E. 85 (N.Y. 1918)).

secure performance in place of an action for damages for not performing."⁵⁰ The last technique, in which a court takes a magnifying glass to the underlying facts in order to find some fresh consideration, will be addressed shortly, but the method used by *Schwartzreich* was perhaps the favorite.

The logic of *Schwartzreich* eliminates the consideration difficulty entirely. As long as the contract was still at least partially executory on both sides, that is, as long as each party still had something to do under the original contract, there would be consideration for the agreement of rescission. Each party would agree to discharge the other in exchange for being discharged itself. Then the parties would enter a new contract, which would be supported by consideration too—just somewhat different consideration from the first contract. Thus a court bothered by the wheat case would find that the buyer and seller agreed to discharge each other from their respective duties to deliver wheat and to pay for it on a certain day. Then the court would find that they entered a new contract, which would be supported by consideration just like the first one, but with a delivery date of October 1 instead of September 1. In this way the court could reach an equitable result, despite the preexisting duty rule.

There are only a couple of problems with the rescission device: It has virtually no basis in reality, and it applies just as logically to a coerced modification as to an innocent one.⁵¹ The first problem is that in fact the parties did not agree to rescind the old contract and create a new one. The law is no stranger to fiction, however; fiction is one of the outlets through which law has grown.⁵² The second, more serious problem is that the same device that would validate the change of delivery in the wheat hypothetical would also validate the modification in *Alaska Packers*, even without the promise of the advertising. That is, a court faced with a modification issue has two accepted and precedented devices: One that would invalidate the modification (the traditional preexisting duty rule) and one that would validate it (the rescission device). A judge could decide either way, depending on which side he thought should win.

50. *Id.* at 890 (citing *Parrot v. Mexican Ccnt. Ry.*, 93 N.E. 590 (Mass. 1911)).

51. See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981).

52. See HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 15 (J.M. Dent & Sons Ltd. 1960) (1861). See generally LON L. FULLER, LEGAL FICTIONS (1967); Peter Birks, *Fictions Ancient and Modern*, in THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 83 (Peter Birks & Neil MacCormick eds., 1986).

Such rules, while infinitely flexible, are not much use.⁵³ They do not allow parties to predict the outcome of cases, since either result is equally possible. A lawyer needing to predict an outcome would not look at the rules but would examine the facts for clues as to the equities, none of which are taken into account by the rules ostensibly being applied. In other words, the rule and counterrule make the relevant facts—the facts that will determine who wins—appear irrelevant.⁵⁴ Nor does the law supposedly being applied identify the norms driving the decision. Such a state of affairs means the law has failed to provide a workable analysis; it has failed to provide a tool for plans or predictions; and it fulfills no hortatory function.

With its section 89, the *Second Restatement* avoids this difficulty, but it does not solve the problem. Nor does it advance the doctrine much beyond those cases that would dig into the facts and find consideration somewhere, anywhere, to support an equitable modification (even if a magnifying glass is necessary to find new consideration). Section 89 asks, Is there something more than the parties contemplated at the time of the agreement? A modification is binding “without consideration,”⁵⁵ the *Restatement* says, “if the modification is fair and equitable in view of circumstances not anticipated by the parties . . .”⁵⁶ This is nearly the same as the question asked by some of the older cases: “Is the person who wants more money doing something beyond what the parties contemplated in the original contract—i.e., is there something in these facts beyond the originally agreed consideration?”⁵⁷ If the parties did not anticipate that the house was built on rock, the contractor will have to do more than the parties contemplated when they entered their contract. Nothing is wrong with using an old concept if it works; that is the system of the common law. It would appear that the old cases are merely being rationalized and characterized

53. A word on the Critical Legal Studies (CLS) movement is relevant here. CLS scholars might see my argument as being in accord with their views. Such a conclusion may contain some truth, because I do acknowledge that legal rules and counterrules sometimes lead to indeterminacy. Ultimately, however, my view diverges radically from CLS. Although some rules and judicial responses to them lead to indeterminacy, I do not conclude either (a) that all rules are indeterminate or (b) that legal decision-making necessarily revolves solely or even primarily around politics, power, oppression, or the like. The indeterminacy that results from the old-fashioned preexisting duty rule leads me to propose different rules and standards, which I believe will work better and will avoid the problem of indeterminacy.

54. See generally Burton F. Brody, *Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DENV. L.J. 433 (1975).

55. See generally RESTATEMENT (SECOND) OF CONTRACTS ch. 4, topic 2 (1981).

56. *Id.* § 89(a).

57. For a more sympathetic discussion of the changed circumstances test of the *Second Restatement*, see Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335, 374-75, 381-83 (1993).

into a rule based on what the parties anticipated. If the modification involved more, then the modification stands; otherwise, it does not.

Something else is happening, though, as becomes apparent on further reflection. First, it is not at all clear why the modification rule of section 89 has to be taken out of the consideration rubric and made an exception. (Modification in section 89, like promissory estoppel in section 90,⁵⁸ is binding regardless of consideration.) If there is something sought in the modification that was not contemplated at the time of formation, it will be valid consideration and will support the modification, including an increased price. More significantly, section 89 does not explain when courts will find new consideration and when they will not. What the parties anticipated does not turn out to explain the results of the cases, as the *Restatement* would decide them.

In one example, a couple is engaged. After hearing the good news, the fiancée's father agrees with the prospective groom to pay an annuity to his daughter. Going through with the marriage—instead of exercising the right to suggest that the wedding be called off—is said to be consideration for the promise of the annuity.⁵⁹ Yet the forbearance to exercise that right seems not to have been sought in any meaningful way at the time of the contract; indeed one would presume that there was little question the wedding would go forward. Yet the *Restatement* preserves the reasoning in this Cardozo-decided case, and the courts have followed along.⁶⁰

In another illustration, a debtor owes a creditor \$100 on September 1. By late August, the debtor's solvency is questionable, and the creditor is nervous about bankruptcy. The creditor approaches the debtor and asks for payment of \$50 to discharge the debt, figuring something is better than nothing. The debtor pays. The debt is discharged because paying early is consideration for modification of the amount owed. Yet if the debtor and the creditor agreed instead to extend the debt for another year, even at a

58. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

59. See *id.* § 73 illus. 9 (based on *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917) (Cardozo, J.)); *cf.* *Shadwell v. Shadwell*, 142 Eng. Rep. 62 (1860). See generally RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. d ("consideration can be found in the fact that the promisee gives up his right to propose . . . the rescission or modification of a contractual duty.") and illustrations 6-12, where the supposed consideration suggested by the drafters appears debatable in some cases and farfetched in others. I am not the only one incredulous that the court in *De Cicco* managed to find consideration; a more prominent skeptic is GILMORE, *DEATH OF CONTRACT*, *supra* note 8, at 62, 128 n.140.

60. See *United States v. Sears, Roebuck & Co.*, 778 F.2d 810, 815 (D.C. Cir. 1985) (Ginsburg, J.) (forbearing to repudiate an agreement serves as consideration for modification), *aff'g* 623 F. Supp. 7, 11 (D.D.C. 1984) which uses the same notions that predated the *First Restatement*. See also *Schwartzreich v. Bauman-Basch, Inc.*, 131 N.E. 887, 890 (N.Y. 1921) (modification supported by consideration of "secur[ing] performance in place of an action for damages for not performing.") (citation omitted).

lower interest rate, there would still be consideration for a modification. The debtor had the right to pay off the loan on time and stop the running of interest (never mind that he did not have the money to do so), and giving up that right is consideration for the modification.⁶¹ It seems the *Restatement* can find consideration anywhere, if it wants, just like the old-fashioned common-law courts.

Reading the comments and illustrations, one begins to gather that the drafters had little patience with the preexisting duty rule.⁶² The drafters certainly understand the problem of coercion: "the lack of social utility in [coerced] bargains provides what modern justification there is for the rule that performance of a contractual duty is not consideration for a new promise."⁶³ They do not seem to think much of "what modern justification there is," however, and observe that "the rule has not been limited to cases where there was a possibility of unfair pressure, and it has been much criticized as resting on scholastic logic."⁶⁴

Yet the illustrations discussed in the preceding paragraphs show that the result under the *Restatement* is not much different. The consideration the drafters are able to find, in the absence of coercion, is not much less fictional than the rescission subterfuge relied on by some of the cases, and is nearly identical to the magnifying glass approach. Perhaps the drafters are justified in making a scholastic response to a scholastic rule, but the triumph of scholasticism is a victory for which only angels would dance in celebration (undoubtedly on the head of a pin). Concededly, section 89 contains more than the vaunted "unanticipated circumstances" test. To be enforceable under the section, modifications also must be "fair and equitable." This is admirable, but calling such a standard a "rule of law" is rather a stretch.⁶⁵

61. See RESTATEMENT (SECOND) OF CONTRACTS § 73 illus. 6-8 (1981).

62. This is true at least with regard to preexisting contractual duties; there are, of course, legal duties aside from contractual ones. The legal duty not to commit a crime is an obvious example and is treated sympathetically by the drafters. See *id.* § 73 cmts. a-b. This Article treats only the aspects of the preexisting duty rule that relate to preexisting contractual duties.

63. *Id.* § 73 cmt. c.

64. *Id.*

65. See Hillman, *Restatement, supra* note 29, at 703; Henry Mather, *Contract Modification Under Duress*, 33 S.C. L. REV. 615, 625-56 (1982) (suggesting an economic analysis instead). The factors to be considered by a court, as suggested by the *Restatement* comments, do little to elucidate what will count as "fair and equitable." Like U.C.C. section 2-209, the *Restatement* comment requires "an objectively demonstrable reason for seeking a modification When such a reason is present, the relative financial strength of the parties, the formality with which the modification is made, the extent to which it is performed or relied on and other circumstances may be relevant to show or negate imposition or unfair surprise." RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981). Aside from the reliance criterion, which is an independent ground for enforcement anyway, see *infra*,

*C. Reiteration in the Age of Statute*⁶⁶

In the best tradition of the Legal Realists, some might see the consideration problem as a mask for a different test of contract modification. A "civilized system of law," a Realist might argue, would enforce voluntary modifications entered in good faith and would invalidate those resulting from "coercion, economic duress, bad faith, and fraud."⁶⁷ As long as consideration was used to explain the result, the general preexisting duty rule would be subjected to various exceptions,⁶⁸ not all of which could hold up even to casual logical examination. A Realist such as Llewellyn would want to expose the underlying standard of decision—"the distinction between good faith and bad faith agreements," in Grant Gilmore's words.⁶⁹ The U.C.C. takes just this approach.⁷⁰ The approach is radical, in that Llewellyn & Co. fired the gatekeeper:⁷¹ Consideration is no longer required.

these comments do not make judicial decision-making more predictable, except to say that a little guy is more likely to win than a big one (under the "relative financial strength" factor). Most litigators know that already, although they are unlikely to state it as a rule of law. See James J. White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7, 7 n.2 (defendant is liable if he has a wreck with the Baptist minister in a small Iowa town, even if the minister was negligent).

66. The phrase is borrowed from GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

67. GILMORE, *DEATH OF CONTRACT*, *supra* note 8, at 76. I have here aligned Gilmore with the Realists because I think he has followed their method here. He would probably disclaim any voluntary association with Legal Realism, however. See *id.* at 3; see also Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

68. See GILMORE, *DEATH OF CONTRACT*, *supra* note 8, at 76, 137 n.191 (citing *Schwartzreich v. Bauman-Basch, Inc.*, 131 N.E. 887 (N.Y. 1921)).

69. *Id.* at 77.

70. For more extensive treatment of the U.C.C. regime and its difficulties, see Robert A. Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification Under Article Two*, 59 N.C. L. REV. 335 (1981) [hereinafter Hillman, *U.C.C.*]; Robert A. Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979) [hereinafter Hillman, *Policing*]; see also Robert A. Hillman, *Contract Modification and "Self-Help Specific Performance": A Reaction to Professor Narasimhan*, 75 CORNELL L. REV. 62 (1989); Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61 (1987).

71. See generally Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993); Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713 (1996). Radical though it is, Llewellyn's approach was not novel. The drafters were able to take advantage of the experience in New York, which had tried a similar approach some years before. The New York statutes allow a signed writing to substitute for consideration in certain circumstances. See N.Y. GEN. OBLIG. LAW §§ 5-1103 to 5-1109 (McKinney 1989). Michigan adopted a similar statute, MICH. COMP. LAWS § 566.1 (1996) (MICH. STAT. ANN. § 26.978(1) (Law. Co-op. 1999)). See generally Charles B. Blackmar, Comment, *Contracts—Proposals for Legislation Abrogating the Requirement of Consideration in Whole or in Part*, 46 MICH. L. REV. 58 (1948); Comment, *The Present*

“An agreement modifying a contract within this Article needs no consideration to be binding.”⁷² By legislative fiat, the preexisting duty rule has disappeared from the law of sales, and now from the law of leases as well (so far as goods as concerned).⁷³ Since an agreement to modify a contract is adjunct to a preexisting economic transaction, both the modification and the use of the law to enforce it may be presumed valid.⁷⁴ The old problem persists, however: Which modifications should stand, and which should fall? The answer cannot be found in the text of the statute.

The comments attempt to fill in the blank: “[M]odifications . . . must meet the test of good faith imposed by this Act.”⁷⁵ Given the intractably vague standard of good faith,⁷⁶ the comments go on to give the more specific test of whether “a legitimate commercial reason” supports the modification. The comments even suggest something that approaches an evidentiary standard: “an objectively demonstrable reason for seeking a modification.”⁷⁷

It is hard to say anything definite about such a statutory regime, which is both its virtue and its fault.⁷⁸ One obvious point is that the test for

Statutory Law of Consideration, 47 COLUM. L. REV. 431 (1947). Only one state, Pennsylvania, adopted the broader Uniform Written Obligations Act (1925). See 1927 Pa. Laws 475 (codified as 33 PA. CONS. STAT. ANN. § 6 (West 1997)).

72. U.C.C. § 2-209(1) (1999).

73. See *id.* § 2A-208(1).

74. See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a (1981). For my critique of this reasoning, see *infra* notes 324-26 and accompanying text.

75. U.C.C. § 2-209 cmt. 2 (1999). Careful readers noticed that the good faith obligation imposed by section 1-203 is only an “obligation of good faith in [the] performance or enforcement” of a contract or duty, see U.C.C. § 1-203, and that a modification to a contract is neither the performance nor the enforcement of that contract. See, e.g., Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1332 (1994) [hereinafter Speidel, *Contract Formation*]. The reporter for the Uniform Computer Information Transactions Act (U.C.I.T.A.) appears to hold the same view. See U.C.I.T.A. § 303 Reporter’s n.2 (Proposed Draft, July 1999) (last visited Oct. 12, 1999) (available at <<http://www.law.upenn.edu/library/ulc/ucita/citam99.htm>>). I am unaware of any court that has read the statute so technically.

76. Good faith is defined as “honesty in fact,” U.C.C. § 1-201(19) (1999), and for merchants good faith also requires “the observance of reasonable commercial standards of fair dealing in the trade.” *Id.* § 2-103(1)(b).

77. *Id.* § 2-209 cmt. 2. The comment suggests this rule in the context of merchants, but it could apply just as well in a transaction not involving merchants. Indeed, similar text also appears in RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. c (1981).

78. Even the most prominent theorist of good faith considers his test inappropriate for contract modifications. Instead, he reverts to the idea of “freely manifested assent” and the duress doctrine espoused by Professor Hillman. See Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1, 19-20 (1981). For the general theory of good faith, see Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980). I argue against the duress approach, although I suggest that at least part of Professor

enforceability of contract modifications ought to appear in the text of the statute. A more troublesome point is whether some test aside from "good faith" is possible. Some courts have accepted the invitation in comment 2 to look for an "objectively demonstrable reason" or a "legitimate commercial reason" for the modification.⁷⁹ What is perhaps most striking, though, is the lack of a viable test aside from good faith.

The stridency of this omission is more pronounced when one realizes that there is a common name for the problem the courts are attempting to police: "coercion." Since coerced modification is the chief concern in allowing agreed changes to a contract, this Article proposes a coercion standard to test the enforceability of modifications. This rule would expand the focus of the inquiry from the party seeking the modification, who must have a "reason" under the current formulation, to include the party agreeing to it, who should not be coerced into agreement (regardless of the other party's reason). The coercion test, as discussed below,⁸⁰ will help solve the problem of public regulation of contractual change.

III. EFFECTING CHANGE THROUGH WAIVER AND ESTOPPEL

In addressing problems of contractual change, courts have not been confined to the doctrine of modification. Waiver and estoppel have also proved to be useful tools. To understand how they work best, one must first see how these terms are used and misused.

A. *A Plea for Rigorous and Practical Terminology*

"The term *waiver* is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of sins."⁸¹ Rarely has a single word been stretched to cover so much, but one such rarity is the word "estoppel."⁸² Courts may use such words to reach

Burton's approach is consistent with a coercion standard. See *infra* Part VI.C-D.

79. See, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 146 (6th Cir. 1983); *T & S Brass & Bronze Works, Inc. v. Pic-Air, Inc.*, 790 F.2d 1098, 1105 (4th Cir. 1986); *Lumber Enters., Inc. v. Hansen*, 846 P.2d 1046, 1049 (Mont. 1993); *American Exploration Co. v. Columbia Gas Transmission Corp.*, 779 F.2d 310, 314 (6th Cir. 1985); *Weisberg v. Handy & Harman*, 747 F.2d 416, 420-21 (7th Cir. 1984).

80. See *infra* Part VI.D.

81. Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 754 (1919). Corbin cites the seminal work on waiver. See JOHN S. EWART, WAIVER DISTRIBUTED AMONG THE DEPARTMENTS: ELECTION, ESTOPPEL, CONTRACT, RELEASE (1917).

82. What Corbin said about "waiver," Williston said about "estoppel." See American Law Institute, *Proceedings at Fourth Annual Meeting*, 4 A.L.I. PROC. app. at 90-106 (1926); see also Pound, *supra* note 1, at vi (noting Ewart's work). Of similar effect is FARNSWORTH, CHANGING, *supra* note 3, at 170. Although his aim is more philosophical, I

fair results, but undisciplined use of the terms has led to a swamp of muddy thinking.⁸³ Each word has, or at least ought to have, a different definition. This Article, in an effort to avoid such difficulties, will attempt to define and use “waiver” and “estoppel” precisely. The definitions proposed in this Article recognize that the word “waiver” cannot realistically be eliminated from legal discourse;⁸⁴ instead, the proposed definitions attempt to use words and concepts likely to be familiar to lawyers now.

When asked to define “waiver,” usually the first sentence out of a lawyer’s mouth is that it is the voluntary or intentional relinquishment of a known right.⁸⁵ This definition is misleading from the start. Not only does it fail to distinguish other legal devices through which a known right might be voluntarily relinquished, such as a contract, and not only does it fail to distinguish a contractual “right” from a condition, but it also suggests that a waiver requires more purposefulness than the courts have generally required.⁸⁶ In *United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp.*, for instance, the Texas Supreme Court inferred from an insurance adjuster’s attempt to settle a claim that the insurer had waived the condition requiring the insured to file timely proof of loss.⁸⁷ Not much imagination is required to picture the consternation of the insurer and its adjuster when they were first informed that attempting to settle a claim out of court would waive the ability to assert failure of a condition as a defense to the claim. Their surprise would likely be greater if they knew that a waiver is supposed

think the approach taken here is generally consistent with Professor Farnsworth’s, except as noted below. See generally *id.* at 154-73, 181-92.

83. See EWART, *supra* note 81, at 5 (“the word [waiver] is used indefinitely as a cover for vague, uncertain thought . . . [I]t may have helped some judges do right under an appearance of legal principle . . .”); cf. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 404 (1960) [hereinafter LLEWELLYN, *COMMON LAW*] (“cases whose language was muddy, though . . . soundly decided.”); Pound, *supra* note 1, at v (“[Solving words] are but substitutes for thought. Indeed what enables them to endure is a convenient elasticity and vagueness of outline that gives a certain play to the judicial instinct while preserving the appearance of rigid logical deduction.”); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 *UCLA L. REV.* 478, 478 (1981). See also note 53 (regarding CLS).

84. Cf. EWART, *supra* note 81, at 14 (“Technical use of the word [waiver] as descriptive of a legal situation is indefensible.”).

85. BLACK’S LAW DICTIONARY 1580 (6th ed. 1990); cf. RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1981). A few cases using this definition include *Van Den Broeke v. Bellanca Aircraft Corp.*, 576 F.2d 582, 584 (5th Cir. 1978); *Farmers Elevator Co. v. Anderson*, 552 P.2d 63, 65 (Mont. 1976); and the redoubtable *Clark v. West*, 86 N.E. 1, 5 (N.Y. 1908), *aff’d*, 95 N.E. 1125 (N.Y. 1911), cited in John E. Murray, Jr., *The Modification Mystery: Section 2-209 of the Uniform Commercial Code*, 32 *VILL. L. REV.* 1, 33-34 n.140 (1987).

86. See generally E. ALLAN FARNSWORTH, *CONTRACTS* § 8.5 (3d ed. 1999) [hereinafter FARNSWORTH, *CONTRACTS*]; Murray, *supra* note 85, at 33-34 n.141.

87. 464 S.W.2d 353, 357 (Tex. 1971).

to be voluntary, or even intentional.⁸⁸ And aside from the question of intent, further confusion has resulted from failing to distinguish whether consideration or reliance is present. Different effects are obtained in each instance, and using one word for everything has hardly helped to clarify an already problematic area.

The three definitions that follow attempt to differentiate “waiver,” “modification,” and “estoppel.” These definitions do not try to jam all the law into three single sentences, but they instead emphasize the different kinds of conduct that lead to different legal results.

1. A “waiver” results from a unilateral act dispensing with a contractual condition.
2. A “modification” results from an agreement to change a preexisting contract.
3. “Estoppel” results when the conduct of one party induces cognizable reliance by the other party so that in justice the first party is precluded from contradicting its earlier conduct.

Some space is needed to unpack each of these definitions. Waiver is accomplished by the unilateral act of one party,⁸⁹ without any action on the part of the person benefiting from the waiver. Action by one of the parties to the contract is necessary; judicial *excuse* of a condition, irrespective of a party’s consent or conduct,⁹⁰ is not a *waiver* within the definition offered here. A waiver does not require agreement, consideration, or reliance, thus explaining the traditional rule that waiver is restricted to conditions that are “procedural or technical,” or at least “comparatively minor.”⁹¹ A waiver

88. Indeed, the Texas Supreme Court did use the word “intentional.” *Id.*

89. See EWART, *supra* note 81, at 13 (waiver is unilateral, “if it is anything”). Ewart probably would not have allowed waiver—a unilateral act—to alter even a minor provision of the contract, however; he would require a modification (including agreement of both parties) or estoppel. *See id.* at 133-43. Thus, Ewart would not even go as far as the restrictive definition in the *Restatement*. On the other hand, Rubin, *supra* note 83, does not focus on the waiver of contract rights, concentrating largely on waivers in the criminal or constitutional context. To the extent he discusses waiver in the context of contract law, he seems to see waiver as the loss of a right, *see id.* at 483, because of a contract. *See id.* at 518-25 (“waiver” of civil adjudication right through an arbitration clause; particular waivers must be “bargained for”). His theory of waiver, therefore, is not particularly helpful in the context of contractual change.

90. The exemplary case is *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 366 N.E.2d 1313 (N.Y. 1977).

91. See RESTATEMENT (SECOND) OF CONTRACTS § 84(1) & cmt. a (“waiver of a defense not addressed to the merits”), & cmt. d (minor conditions) (1981); FARNSWORTH, CHANGING, *supra* note 3, at 156.

cannot create duties for the waiving party or discharge the nonwaiving party's promise.

Modification of a contract is now easily distinguished, since a modification requires the agreement of the parties.⁹² Bilateral action is necessary, although reliance is not. And, unlike waivers, modifications require consideration under traditional common law rules, as discussed above. Although the consideration rules have now been changed for the sale and lease of goods,⁹³ modifications are themselves contracts, with all the effects of contracts.

A modification is commonly thought to carry forward something from the earlier contract, while a rescission or abandonment ends the earlier contract completely. This distinction, however, does not work on either a theoretical or a practical level. "Modification" is used here to describe an agreed change to a contract, regardless of whether the contract is abandoned, rescinded, discharged in whole or in part, or terminated. The goal here is to avoid the hairsplitting of *Green v. Doniger* and its ilk, which escaped statutory NOM rules by distinguishing rescissions from modifications.⁹⁴ Thus, this Article's definition of "modification" includes "contract," "novation," and probably "release" (if it is used to refer to an agreement). This definition does not include the adjustments to contracts sometimes made by courts without regard to whether the parties agreed to the adjustment.⁹⁵

Next, estoppel should be distinguished because it requires reliance.⁹⁶ It is thus bilateral like modification, but unlike waiver. Estoppel can be distinguished from modification in that it does not require agreement, and it has never required consideration. Perhaps more importantly, estoppel is uncertain, whereas a modification is a binding contract, and its requisite elements are clear. When reliance is the argued basis for enforcement, and that reliance does not constitute consideration, the enforceability of the

92. See, e.g., U.C.C. § 2-209(1) (1999). For a recent case applying the agreement requirement, see *United States Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201, 1206 (D. Kan. 1998).

93. See U.C.C. §§ 2-209(1), 2A-208(1) (1999).

94. See *Green v. Doniger*, 90 N.E.2d 56 (N.Y. 1949); see also, e.g., *Jackson v. Cobert*, 612 N.Y.S.2d 330, 331 (Civ. Ct. 1994), *aff'd*, 637 N.Y.S.2d 613 (Sup. 1995). See *infra* Part IV.B.

95. Such adjustments are typified by *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 80 (W.D. Pa. 1980). See generally Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265 (1999); Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1 [hereinafter Hillman, *Court Adjustment*].

96. See EWART, *supra* note 81, at 13; FARNSWORTH, CHANGING, *supra* note 3, at 164.

statement that was relied on will be doubtful, because whether the reliance is cognizable depends on uncertain requirements like reasonableness and foreseeability. Consideration certainly has its problems, but it can at least be analyzed in cold terms. By contrast, whether a supposed estoppel will have any effect at all is probably unknowable until a court gives its opinion.

Although the definitions suggested here will help to eliminate some confusion and obviate the need for phrases like “waiver-estoppel”⁹⁷ or “reliance waiver,”⁹⁸ waivers can differ in important ways depending on whether they apply to executory parts of the contract—in other words, depending on the extent to which the waiver is directed at the past and to what extent at the future. These are issues that Ewart classified under the rubric of “election,” and they are treated in greater depth in the next Section. For now, simply note that a reference to a waiver should specify whether it applies to conditions that have already failed or to conditions that are part of an executory part of the contract.

Some examples may help illustrate these definitions. Recall the agreement for the sale of 100,000 bushels of wheat at \$2.50 per bushel with delivery on September 1. If the market price escalates to \$4.00, the seller may ask to change the price to \$3.50. Within a long-term relationship, the buyer may well agree. Both parties have agreed to the change; it is therefore a “modification.” Under traditional common law the modification would be invalid for lack of consideration, but it is a modification nonetheless, at least under the definition used here.

Suppose now that instead of a market shift, the seller’s carrier delivers the wheat a week early. The buyer’s agent inspects the wheat and faxes the seller the message that the wheat was “received in good order per our contract.” The buyer may be said to have “waived” the condition that the wheat be delivered September 1. If the seller delivers a week late and the buyer’s agent sends the same message, the buyer may again be said to have “waived” the condition of September 1 delivery.

There are important distinctions in the last two situations, however. First, the waiver of the early delivery may well ripen into an estoppel if the seller relies on it. For instance, the seller may receive the fax and be surprised to learn that the carrier delivered early. Although the seller may have been able to have the carrier hold the goods until September 1, the seller may well decide not to take up the matter with the carrier in light of

97. See Eisler, *supra* note 4, at 434; see also 1 WHITE & SUMMERS, *supra* note 4, §1-6, at 41.

98. See STUDY GROUP REPORT, *supra* note 7, at 76 n.48 (“there are two basic types of waiver, ‘election’ waiver and ‘reliance’ waiver.”); Speidel, *Contract Formation*, *supra* note 75, at 1333 (“because of what might be called a ‘reliance’ waiver[, i]n effect, the buyer is estopped . . .”).

the accepting fax.⁹⁹ The buyer's initial, unilateral waiver might become an estoppel, the bilateral requirement being met by the seller's reliance on the buyer's conduct. Since estoppel is based on factors like reasonableness and equity, only a court can settle the question with certainty. One may be certain that there is not a modification, however; even though both parties have taken action, there is no manifestation of assent from both parties, and therefore, no agreement.

The other difference in the early and late delivery situations arises because modification, waiver, and estoppel differ in their permanence. A modification is as permanent as any other contract. An estoppel may be too, if a court applies the doctrine, but that question is less certain. A waiver, on the other hand, could conceivably be retracted. In this sense, a waiver could be ephemeral. The next Section discusses this aspect of waiver, for it affects how one thinks about changing contracts, and the possibility of changing them back.

B. Changing Changes

What happens if one or both parties take some step to change the contract but then think better of it?¹⁰⁰ The issue this Section addresses is not so much whether the contract can accommodate further change, but whether a change, once accomplished, can be undone. The issue is most familiar in the context of waiver. In particular, can a waiver be retracted?

1. RETRACTION AND THE PROBLEM OF ELECTION

Authorities have differed over whether a waiver may be retracted, and if so, under what circumstances. A fair amount of older case law held that a waiver, once made, was permanent.¹⁰¹ Law students today are still likely to learn about waiver from *Clark v. West*, which states bluntly that a waiver "can never be revoked."¹⁰² Under this older rule, the effect of a waiver differs little from the effect of a modification. In some ways, this is not surprising, as the term "waiver" has at times included what is today called a "modification." Using the definitions proposed here, however, a waiver would be a unilateral act, not a bilateral one; there could be no agreement, and no consideration.

99. See U.C.C. § 2-606(1)(a) (1999).

100. See generally FARNSWORTH, CHANGING, *supra* note 3.

101. See, e.g., *Clark v. West*, 86 N.E. 1, 5 (N.Y. 1908), *aff'd*, 95 N.E. 1125 (1911).

102. *Id.* at 5 (quoting *Kiernan v. Dutchess County Mut. Ins. Co.*, 44 N.E. 698, 700 (N.Y. 1896)).

Under these circumstances, a waiver ought to be retractable. The modern rules state as much, both in the U.C.C. and in the *Second Restatement*, insofar as the waiver applies to an executory part of the contract.¹⁰³ An exception is provided in the case of reliance, however. If “the retraction would be unjust in view of a material change of position in reliance on the waiver,”¹⁰⁴ then the court is charged simply to settle the matter justly. With considerably more verbiage, the *Second Restatement* states the same exception.¹⁰⁵ Notably, however, the lack of retractability is based on reliance, and thus *estoppel* as opposed to *waiver*, under the definitions above.

The injustice standard is obviously mushy, although perhaps it is the most realistic way to predict what a court will do, and thus the most accurate possible statement of the law.¹⁰⁶ Still, one might well question the utility of a standard as broad as “be[ing] unjust.”¹⁰⁷ And aside from its indeterminacy, the subsection does not even purport to answer some basic questions regarding retraction. What if the waiver does not affect an executory portion of the contract?

This question highlights the importance of timing. A return to the wheat sale example will illustrate. Weather is bad at harvest time, and faced with possible delay, the buyer faxes a message to the seller: “We still want it, but we don’t need the wheat till the end of the month. We’ll take it then and won’t hold this against you.” The seller has not yet delivered, and until the seller changes position in reliance on the waiver, the buyer may retract the waiver. This result seems unobjectionable enough.

Now suppose instead that the wheat contract calls for delivery in installments. The seller delivers the first installment a month late. The buyer’s purchasing agent says to the seller, “Don’t worry, we’re taking the wheat anyway, and you should go ahead with the next installments. We won’t hold this against you.” A little later, before the seller has changed its position, the buyer’s CEO finds out what happened. Deciding that the delay substantially impairs the value of the whole contract to his company,¹⁰⁸ the CEO contacts the seller and cancels the order for remaining installments. Seller responds, “You can’t do that. You waived it.” Later, the seller’s lawyer argues that the waiver affects only an executed part of the contract—the first delivery—and the waiver cannot be retracted. The

103. See U.C.C. § 2-209(5) (1999); RESTATEMENT (SECOND) OF CONTRACTS § 84(2) (1981).

104. U.C.C. § 2-209(5) (1999).

105. See RESTATEMENT (SECOND) OF CONTRACTS § 84(2) (1981).

106. See KARL LLEWELLYN, *THE BRAMBLE BUSH* 3 (1960).

107. See U.C.C. § 2-209(5) (1999).

108. See *id.* § 2-612(3).

statute allows only retraction of waivers affecting an executory portion of the contract, and this waiver cannot be retracted.

This situation, in more traditional terms, involves an "election." The buyer, after seller's material breach, had two alternative, inconsistent choices: Do nothing, in which event the contract would continue in force,¹⁰⁹ or cancel it, thus ending the contract.¹¹⁰ Since the buyer cannot both end the contract and leave it in place, it must make an "election" between the two choices. Put another way, a court may characterize the buyer's conduct as a "waiver" of the condition that the seller perform on time. A waiver as to a past event, however, is different from a waiver that applies to executory parts of the contract.¹¹¹ The question remains: Under what circumstances should a court recognize a change in a contract?

Under traditional election doctrine, an election is not retractable. A traditionalist argued that in their original contract the parties "so agreed. If they have not also agreed that the elector may undo what he has done, he has no power to vary or reverse it."¹¹² This rule is unrealistic, however. Except in a rare case, the parties' bargain will not have addressed the effect of elections; nor will the agreement have answered the question of retractability. Indeed, the unexpected and harsh consequences of the election doctrine have led to its discredit and rejection,¹¹³ and perhaps has led to the prevalence of NOW clauses, as well as clauses providing for cumulation of remedies.

There are several alternative solutions to this problem of contractual change. One possibility is to follow the approach of established election law, which arguably is preserved by the current version of U.C.C. section 2-209(5) and section 84 of the *Second Restatement*: waivers are irrevocable if they apply to conditions that have failed and can no longer be corrected.¹¹⁴ Under this approach, the buyer in the late delivery case would be out of luck. Another possibility is to allow NOW clauses to require such waivers in writing, and the legislation proposed in this Article takes this

109. See EWART, *supra* note 81, at 25.

110. See U.C.C. § 2-106(4) (1999).

111. Some commentators try to be more specific with such terms as "election waiver," FARNSWORTH, *CONTRACTS*, *supra* note 86, § 8.5, at 543, or "waiver after breach," Murray, *supra* note 85, at 42. Because of its negative connotations, this Article has avoided "election" terminology and uses "waiver," following the persistent usage of courts.

112. EWART, *supra* note 81, at 75; see also *id.* at 100-05. For a more recent and more philosophical defense, see FARNSWORTH, *CHANGING*, *supra* note 3, at 183-86.

113. See U.C.C. § 2-703 cmt. 1 (1999); FARNSWORTH, *CHANGING*, *supra* note 3, at 188. Although these authorities discuss election of remedies, the same criticisms may be leveled at a traditional election, or as I have put it here, a waiver that applies to past conduct.

114. See FARNSWORTH, *CONTRACTS*, *supra* note 86, § 8.5, at 543-44. For an example, see Speidel, *Contract Formation*, *supra* note 75, at 1334.

course. The third possibility, tempting but unsupported by authority,¹¹⁵ is to require a formality (such as the formal waiver contemplated by section 1-107 of the current Code),¹¹⁶ for a waiver to be held irrevocable.

The last option is most appealing because it accords best with the basic idea of contract law. In the absence of consideration, reliance, formality, or anything aside from a casual remark, a unilateral oral statement ought not to have irrevocable legal consequences. Under current "election" law, casual remarks or ill-considered conduct, such as an attempt to settle an insurance claim, are given the force of contract.¹¹⁷ Such results are anomalous in contract law and seem unsupportable. A formal waiver requirement, by contrast, would serve evidentiary, cautionary, and channeling functions.¹¹⁸ Because of the lack of substantial authority, the legislation proposed in this Article has not adopted this position. Parties can easily include NOW clauses in their contracts, however, to gain the benefit of such a rule, and thereby achieve the cautionary function of consideration.¹¹⁹

2. INTERPRETATION, MODIFICATION, AND HIERARCHY

Assessing the permanence of a change, or attempted change, also depends on how the parties' words and conduct are construed. The most basic version of this issue is whether a party's conduct should prevail over the express terms of a contract. The problem arises under the U.C.C. in a logical paradox reminiscent of Escher (Figure 1). The ranking of express terms over course of performance may at first seem clear, but on closer examination the hierarchy dissolves, just as the viewer cannot tell which of Escher's flights is the highest. Under the Code, (1) the parties' "agreement" consists of the express terms of the agreement, plus the parties' course of performance, but (2) express terms prevail over course of performance; (3) course of performance can result in waiver when it is inconsistent with the

115. Professor Farnsworth lends some support to this notion, as he advocates "a rule requiring a formality for a discharge." FARNSWORTH, *CHANGING*, *supra* note 3, at 157. Although a discharge is not the same, I believe that Professor Farnsworth has the same concern in mind. I cannot claim him for authority, however, as he defends the traditional rule with respect to election. *See id.* at 183-86.

116. *See* U.C.C. § 1-107 (1999) (written waiver or renunciation that is signed and delivered).

117. *See* FARNSWORTH, *CONTRACTS*, *supra* note 86, § 8.5, at 543.

118. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799-801 (1941).

119. *Cf.* *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1286 (7th Cir. 1986) (finding that because the U.C.C. drafters abolished consideration, they might well choose to validate NOM clauses to some extent and thus allow the parties to substitute this formality for the functions otherwise served by consideration).

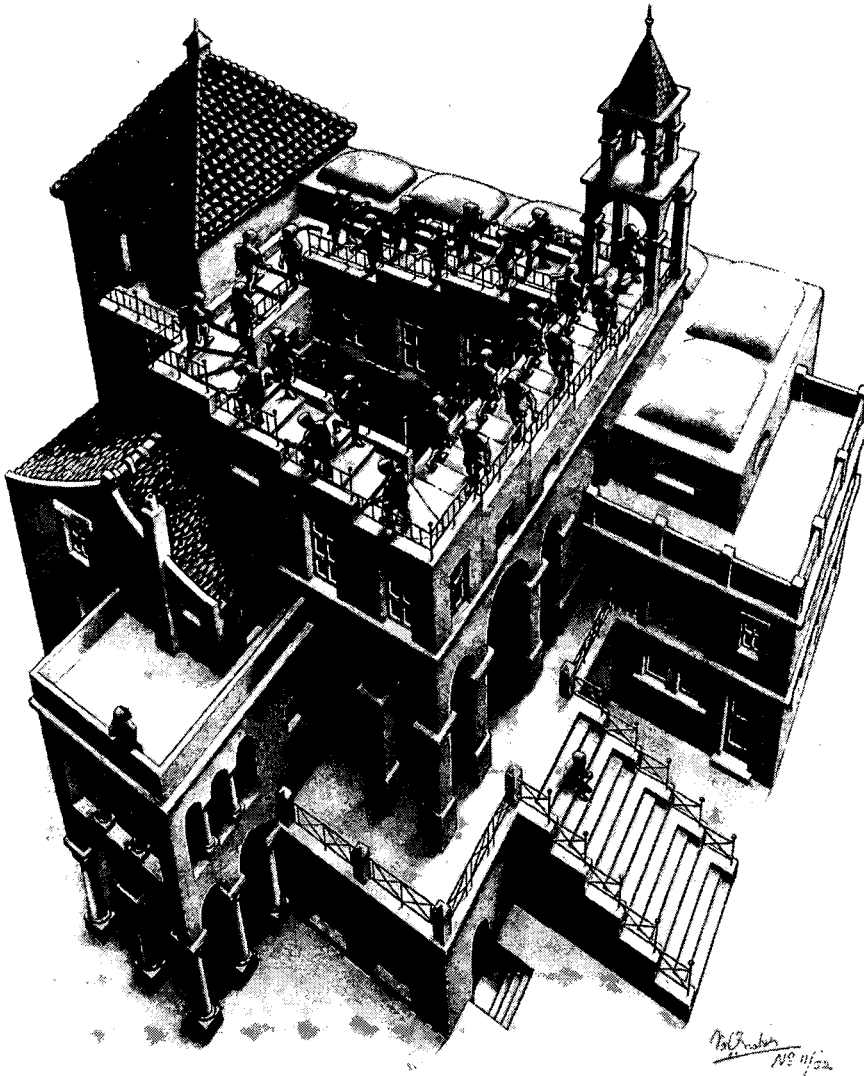


Figure 1.

M.C. Escher's "Ascending and Descending"

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express terms, and (4) a waiver displaces the express terms of the contract.¹²⁰ The first three propositions are given by the statute. The fourth is obvious: waiver, if it is going to have any effect at all, must at least temporarily displace the terms that gave rise to the condition being waived. The fourth proposition, however, is diametrically opposed to the second. Now what?¹²¹

There are several choices, all revolving around the differing effects of three or four legal doctrines: waiver, modification, and interpretation or construction.¹²² For example, suppose two parties agree to do *X*. On several occasions during the course of the contract, one party does *Y* and the other party acquiesces. Thus *Y* becomes established as a course of performance, which is "relevant to determine the meaning of the agreement."¹²³ If *X* stands for "make payments on the first of each month," and *Y* stands for "pays by personal out-of-state check," the agreement will likely be taken to mean that payment may be made by personal out-of-state check. If *Y* is viewed as a consistent additional term, then the operation of section 2-208 is no trouble.¹²⁴ If instead *Y* stands for "pays ten to fourteen days after the stated due date," the choices of how to use course of performance become starker, and worse, mutually exclusive.

120. See U.C.C. §§ 2-208, 2-209. Actually, the parties' agreement is defined to include not only express terms and course of performance but also course of dealing and usage of trade, *see id.* § 1-201(3), but the latter two are not relevant here.

121. The exposition of the problem here is simplified. For a more thorough discussion and criticism, see Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997); see also David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1856-63 (1991). The problem is not merely theoretical. Recent inconsistent cases include *Exxon Corp. v. Crosby-Mississippi Resources Ltd.*, 40 F.3d 1474 (5th Cir. 1995), *Sethness-Greenleaf, Inc. v. Green River Corp.*, 65 F.3d 64 (7th Cir. 1995), *Solar Motors, Inc. v. First Nat'l Bank*, 537 N.W.2d 527 (Neb. Ct. App. 1995), *aff'd*, 545 N.W.2d 714 (Neb. 1996), and *Central Ill. Pub. Serv. Co. v. Atlas Minerals, Inc.*, 965 F. Supp. 1162 (C.D. Ill. 1997). See generally 1 WHITE & SUMMERS, *supra* note 4, § 1-6.

122. Contracts literature often attempts to distinguish *interpretation* from *construction*. The process of *interpretation* is focused on ascertaining the meaning of contracting parties' language or conduct, while *construction* determines the legal effect of that language or conduct. See RESTATEMENT (SECOND) OF CONTRACTS § 200 & cmt. c (1981). The distinction is sometimes straightforward. Sometimes, however, interpretation and construction merge, especially when courts hold that the legal effect is identical to "the intent of the parties." While this Article attempts to follow the rigorous usage, the reader must recognize that in the present context, construction and interpretation will often yield identical results, and any distinction therefore blurs toward oblivion.

123. U.C.C. § 2-208(1) (1999); see also RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981).

124. *Cf.* U.C.C. § 2-202 (1999).

One possibility is to hold that the agreement permits variation in the time of payment by a couple of weeks or so. An analogy may help demonstrate the appeal of this argument. A court could be expected to hold that an agreement between two rug merchants providing for the sale of "handmade, all-wool Persian rugs measuring 9' X 12'" permits the rugs to measure, say, 8 feet 8 inches by 11 feet 9 inches. As a matter of fact, "9' X 12'" means "9 feet by 12 feet, give or take a few inches." A court might so hold as a matter of usage of trade, but course of performance would do just as well.¹²⁵ The hypothetical case involving *X* and *Y*, a debtor might argue, is the same. Using the course of performance to determine what the agreement means is precisely what the statutory text requires. It is no different than interpreting a cannery contract for 10,000 one-quart cans of oil at a dollar apiece to permit a delivery of 8518 cans or 10,124 cans, where the trade usage allows quantity variations of ten or twenty percent.¹²⁶

Another possibility is to hold that construing *X* and *Y* as consistent with each other is unreasonable, so that *X*, which is an express term, prevails over *Y*, which is implied by course of performance. In the hypothetical, then, the debtor who regularly pays a week or two late would be in breach, and the creditor in all likelihood would be entitled to take remedial action.

With more facts, however, this construction becomes problematic. If the creditor has accepted ten late payments in a row without objection, the debtor may be lulled into a belief that paying within a couple of weeks of the due date is fine. After all, such an interpretation is regularly given to bills that say they are "due upon receipt." A court, therefore, may sympathize with a debtor who is outraged when his car is repossessed after the tenth late payment when the creditor has never objected to late payments.¹²⁷ Under section 2-208(2), however, a court must either decide for the repossessing creditor (if *X* and *Y* are not reasonably consistent with each other), or allow the debtor to pay two weeks late for the duration of the agreement (if *X* and *Y* are reasonably consistent), since the meaning of the agreement is really "pay within two weeks of the first of the month."

The court gains more flexibility under section 2-208(3), which allows two more possible holdings. A "course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." If *X* and *Y* are inconsistent, then instead of allowing *X* as an express term to trump *Y*, the court may find that *Y* constitutes a modification.

125. See *id.* §§ 1-205(1), 2-208(1). The reader should realize that handmade oriental rugs are rarely, if ever, a precise number of feet in measurement.

126. See *id.* § 2-207 cmt. 4.

127. See, e.g., *Tillquist v. Ford Motor Credit Co.*, 714 F. Supp. 607, 617 (D. Conn. 1989) (awarding punitive damages and attorney's fees to debtor in suit against repossessing finance company).

If both parties' conduct indicates agreement that the contract calls for *Y* rather than *X*, then there has been a modification.¹²⁸ In that case, the result is much the same as when course of performance is used for interpretation and construction: The contract calls for *Y*, either from the beginning under an interpretation or construction theory, or by subsequent agreement under a modification theory. The debtor will be allowed for the duration of the contract to pay within two weeks of the first of the month.

On the other hand, if the court chooses waiver rather than modification, the waiver can be retracted, as long as it affects executory parts of the contract and reliance does not present a problem. Understandably, the comments encourage a finding of waiver "[w]here it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver."¹²⁹ The comment should go further and express a preference for waiver over modification as well as the preference for waiver over interpretation.

To return to the hypothetical: The creditor must do something to retract the waiver, so it must inform the debtor that late payments will no longer be acceptable. As to the future payments, the debtor will have to pay on time, since they are an executory part of the contract, and the debtor cannot yet have any reliance interest. Where the creditor has done nothing to inform the debtor who has made ten late payments without objection, the debtor may justly be said to have relied on the course of performance, that is, on the waiver. But where the debtor has been informed that such conduct will not be permitted in the future, he cannot reasonably rely.¹³⁰

Professor Bernstein has identified a related problem with the U.C.C. approach. She points out that there is a difference between what parties want during an ongoing relationship and what they want during a litigated fight.¹³¹ While there is hope for future dealings, the parties may accommodate each other, in all likelihood without ever making, or at least intending, any change to the contract. In court, the last thing they want is for accommodations made during the relationship to be held against them. This,

128. See U.C.C. § 2-209(1) (1999).

129. *Id.* § 2-208 cmt. 3.

130. See, e.g., *Alden v. Presley*, 637 S.W.2d 862 (Tenn. 1982) (reliance, to be legally cognizable, must be reasonable). Cognizable reliance is unlikely, although it is possible to conceive of such a situation: Say the debtor, after the course of late payments was established, entered another contract which meant that he did not have much cash at the beginning of the month but had plenty in the middle of the month. Such situations ought to arise, at most, rarely, and under the proposed legislation courts are accorded the flexibility to deal with such problems.

131. She thus distinguishes "relationship-preserving norms" from "end-game norms." Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796 (1996) [hereinafter Bernstein, *Merchant Law*].

the parties might argue, is quite unfair; they are being penalized for being accommodating. Put in economic terms, as Professor Bernstein does, too exalted a role for course of performance results in disincentives to utility-enhancing adjustments in the ongoing relationship. Put more simply, a party may not want to be legally bound to be nice the next time.¹³² Given that desire, the U.C.C. rule that makes course of performance binding discourages parties from making adjustments. Rigidity, instead of the desired flexibility, results.¹³³ Patterson suggests another scenario that raises similar concerns: a “nervy and persistent contract-breaker, who, as against a less aggressive opponent, tries to bull his way through a course of conduct which does not always satisfy the explicit terms of the contract.”¹³⁴

A waiver approach can help solve this problem. If the course of performance is a waiver, it can be retracted (assuming the opposing party has not relied in a way that would give rise to an estoppel), at least for executory portions of the contract, and if the approach of this Article is followed, for executed portions as well. The opposing party, of course, will argue that the course of performance should be taken as evidence that the contract has been modified, or should be used to interpret the agreement. The comments of the U.C.C. anticipate these arguments by expressing a preference for waiver over interpretation.¹³⁵ The same reasoning, which “preserve[s] the flexible nature of commercial contracts” while maintaining the traditional contractual stance in favor of the original deal, mandates a similar preference for waiver over modification.

A final point is especially relevant to Professor Bernstein’s focus. Parties, and especially merchants, are often able to opt out of the usual legal system—and its supposedly immutable legal rules—by choosing arbitration.¹³⁶ Merchant arbitrators who sell wheat or deal in diamonds will

132. See *id.* at 1807-15; see also Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781 (1999) (agreeing with Bernstein’s conclusion, but for different reasons). An analogy to another branch of the law is instructive: To encourage amicable settlements and remedial measures, the rules of evidence limit the admissibility of such matters. See FED. R. EVID. 408-410. To encourage certain kinds of activities (engaging in settlement talks, taking remedial measures), the law wisely limits the legal consequences of those activities.

133. Professor Bernstein’s cogent exposition of this problem captures well, for me, the foundational flaw in the relational theory of contractual change. For discussions of relational contract theory in this context, see Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789, 793-94, 804 (1993), and Hillman, *Court Adjustment*, *supra* note 95.

134. 1 NEW YORK LAW REVISION COMM’N, STUDY OF THE UNIFORM COMMERCIAL CODE 637 (1955) [hereinafter NEW YORK STUDY].

135. See U.C.C. § 2-208 cmt. 3 (1999). Compare Professor Eisler’s structural argument in response to Patterson in Eisler, *supra* note 4, at 409 n.57.

136. See Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein,

decide cases based on criteria other than the U.C.C., whether the criteria be religious law, trade usages, or just guts. Those who leave their disputes to the courts should expect to have the concerns of the larger world taken into account. The law does so when it takes seriously the parties' own conduct and when it recognizes certain kinds of reliance as worthy of protection. Parties who wish to avoid these norms can choose arbitration.

It must be admitted that the law has not made its concerns or even its doctrine very clear so far. At least the abolition of the preexisting duty rule with respect to sales and leases shows a willingness to improve the situation. The "good faith" solution of the U.C.C. is another step in that direction, and the good faith standard should be considerably hardened by the two-part coercion test offered below. The analysis of contractual change should be further clarified by the above definitions of modification, waiver, and estoppel. Clarity about those doctrines allows a sensible ranking of express terms and course of performance, helping courts to see what is part of the original contract, what is a change in the contract, and how those changes should be treated.

IV. PRIVATE ATTEMPTS TO REGULATE CHANGE

The confusion of public attempts to regulate change has led contracting parties to fashion their own rules to govern adjustments. Perhaps the most typical provision of this sort has been dubbed a "no oral modification" (NOM) clause. Clauses purporting to invalidate oral waivers have now become common, but they have not yet received much scholarly attention. This Article labels them "NOW clauses." After discussing the problem with NOM clauses, this Section will explain how NOW clauses complicate the picture.

A. An Acetylene Torch

A typical lawyer-drafted contract includes a clause that says something like, "This agreement cannot be modified except in a writing signed by the party to be charged," or "No purported modification to this agreement shall be binding upon *X* unless such modification shall be evidenced by a writing signed by *X*." Parties have been including such provisions in their agreements for well over a century. In *Bartlett v. Stanchfield*, Holmes himself held that the NOM clause had no effect.¹³⁷ It might as well have been left out of the contract. "Attempts of parties to tie up by contract their

Opting Out]; see also Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

137. 19 N.E. 549, 550 (Mass. 1889) (Holmes, J.).

freedom of dealing with each other are futile."¹³⁸ Holmes's holding was fully in accord with the common law of the time, as was Cardozo's thirty years later with respect to NOW clauses. In the face of a "covenant that there shall be no waiver or amendment not evidenced by a writing," he unhesitatingly held that "[t]he prohibition of oral waiver may itself be waived."¹³⁹ The holding accords with the results in many other older NOW cases.¹⁴⁰

A few modern lawyers, and certainly many of their clients, would be surprised to learn that the treatment of NOM and NOW clauses under the common law has not changed much. "The most ironclad written contract can always be cut into by the acetylene torch of parol modification The hand that pens a writing may not gag the mouths of the assenting parties."¹⁴¹ Courts continue to so hold.¹⁴² Outside the U.C.C., at least, the common-law rule is still going strong in some places.

This rule may seem odd, especially in contract law, which devotes much of its energy to giving effect to parties' agreements. Indeed, some courts seem never to have heard of such a rule, although they do acknowledge that NOM clauses can be waived.¹⁴³ The older cases ought not to be dismissed too quickly, however. While some might argue that the parties' agreement to a NOM clause ought to be given full legal effect, like an agreement to another procedural term such as arbitration, this argument fails to account for a crucial distinction: In the context of a NOM-clause dispute, the parties have reached an agreement subsequent to their original

138. *Id.*

139. *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 381 (N.Y. 1919) (Cardozo, J.). *Union Cent. Life Ins. Co. v. Whetzel*, 65 N.E. 15, 17 (Ind. App. 1902), also finds a waiver of the non-waiver clause. *See also* *Headley v. Cavileer*, 82 A. 908, 910 (N.J. 1912).

140. As much of the law of waiver developed in the insurance area, *see* *Clark v. West*, 86 N.E. 1, 5 (N.Y. 1908), *aff'd*, 95 N.E. 1125 (1911), so did many of the NOW cases. *See, e.g.*, *Beebe v. Ohio Farmers' Ins. Co.*, 53 N.W. 818 (Mich. 1892); *Smaldone v. Insurance Co. of N. Am.*, 44 N.Y.S. 201 (App. Div. 1897); *Copeland v. Hewett*, 53 A. 36 (Me. 1902); *Mix v. Royal Ins. Co.*, 32 A. 460 (Pa. 1895); *Orient Ins. Co. v. McKnight*, 64 N.E. 339 (Ill. 1902); *Ross-Langford v. Mercantile Town Mut. Ins. Co.*, 71 S.W. 720 (Mo. Ct. App. 1902). The principle had been established by the eighteenth century, however, in an English case involving a lease. *See* EWART, *supra* note 81, at 287 n.4 (citing *Roe v. Harrison*, 2 T.R. 425 (1788)).

141. *Wagner v. Graziano Constr. Co.*, 136 A.2d 82, 83-84 (Pa. 1957).

142. *See, e.g.*, *Autotrol Corp. v. Continental Water Sys. Corp.*, 918 F.2d 689 (7th Cir. 1990) (applying Texas law); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) (applying Wisconsin law); *Estate of Connelly v. United States*, 398 F. Supp. 815 (D. N.J. 1975), *aff'd*, 551 F.2d 545 (3d Cir. 1977).

143. *See* *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 678 N.E.2d 519, 525, 528 (Ohio 1997). One prominent scholar has doubted the viability of the common-law rule in the absence of reliance. *See* FARNSWORTH, CONTRACTS, *supra* note 86, § 7.6, at 450.

contract. The question for the court is not whether to honor the parties' original agreement, but rather which of their agreements should be effective. To say that contract law should enforce the parties' agreement, therefore, does not resolve the issue. The question is whether to enforce the first agreement or the second.

The common-law courts addressing NOM issues chose the second. This choice makes a fair amount of sense; the later agreement probably reflects what the parties want better than their earlier agreement does. This is not to say that there are no reasons to enforce the NOM clause in the earlier agreement—those reasons will receive considerable attention below¹⁴⁴—but the point for now is that the common-law NOM rule is not as anomalous as it may at first appear.

B. Reform, Rebuffed at the Beachhead: A New York Case Study

By this point it should be obvious that contract law does not easily accommodate changes to contracts. This Section adds a corollary: Not only is it hard to change contracts; it is also hard to change contract law, at least without the participation of the judiciary. The following case study illustrates this proposition.¹⁴⁵

The law of contract, of course, developed as common law, fashioned by the courts as the demands of cases required. This common law created the rule that NOM clauses are ineffective. The legislatures tried to undo the rule, but early efforts met with surprisingly sharp resistance from the bench, while later efforts were received with judicial ambivalence. The problem of regulating modification, even when the parties choose their own mode of restriction, has so far proved unsusceptible to legislative solution. The story begins in New York.

Cardozo had set the stage by forcefully adhering in *Beatty v. Guggenheim Exploration Co.* to the common-law rule that NOM and NOW clauses are “nugatory.”¹⁴⁶ In his words, “[w]hat is excluded by one act is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again.”¹⁴⁷ In 1941, the New York

144. See *infra* Part V.C.3.

145. See generally Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387 (1996) (preexisting duty rule, despite decades of constant criticism, has and will survive); Robert A. Hillman, *Contract Modification in Iowa—Recker v. Gustafson and the Resurrection of the Preexisting Duty Rule*, 65 IOWA L. REV. 343 (1980).

146. 122 N.E. 378, 380-81 (N.Y. 1919) (Cardozo, J.).

147. *Id.* at 381 (citing *Pechner v. Phoenix Ins. Co.*, 65 N.Y. 195 (1875); *Solomon v. Vallette*, 46 N.E. 324 (N.Y. 1897); *Fireman's Fund Ins. Co. v. Norwood*, 69 F. 71 (8th

Legislature, after study by the New York Law Revision Commission,¹⁴⁸ rejected this rule and adopted a statute giving effect to NOM clauses.¹⁴⁹

In an early case applying the new law, the legislature appeared to have succeeded. Following the familiar pattern, a construction contract required modifications to be written.¹⁵⁰ The plaintiff nonetheless claimed to have done extra work under an oral modification, and it demanded an extra payment. The court dismissed the claim under the new statute. The holding would have been a remarkable victory for the new efficacy of NOM clauses had the contractor suffered a loss, but there was no loss. The court found that there was no proof of damage, and that the alleged extra work actually was included in the original contract, and thus the original contract price. While the court applied the NOM legislation, the legislation hardly made any difference.

In *Green v. Doniger*,¹⁵¹ the new legislation came before the New York Court of Appeals and promptly failed its first real test.¹⁵² In *Green*, a traveling salesman sued to collect bonuses. Oral agreements with his employer allowed the claimed bonuses, but written employment contracts, each including a merger and NOM clause, did not.¹⁵³ The salesman had

Cir. 1895); *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143 (1876); EWART, *supra* note 81, at 286). The argument that plaintiff did nothing in reliance on the oral consent did not bother Cardozo.

148. See NEW YORK STUDY, *supra* note 134, at 642 n.148 (citing REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION 345 (1941)).

149. See 1941 N.Y. Laws 329 (codified then at N.Y. PERS. PROP. LAW § 33-c (1941); amendments discussed *infra*).

150. See *Morris Glasser & Son, Inc. v. Jonwal Constr. Co.*, 60 N.Y.S.2d 25 (App. Term 1946).

151. 90 N.E.2d 56, 58 (N.Y. 1949).

152. Notably, Karl Llewellyn had predicted this result three years beforehand: In New York you have a half-way road through that (which I still don't think you can altogether trust) because under the influence of the Law Revision Commission New York has provided that we can in an agreement in writing include an effective clause which will keep the agreement from being modified except by a signed writing. Even so the road by way of waiver is open to the court in order to allow the unsigned modification to stand out.

Karl N. Llewellyn, *The Karl Llewellyn Papers C.G.4*, Fourth Contracts Refresher Lecture, at 3 (Mar. 4, 1946) (unpublished collection, available at the University of Chicago D'Angelo Law Library).

153. See *Green v. Doniger*, 90 N.E.2d 56, 58 (N.Y. 1949). The provision in question was a combination merger-NOM-termination clause:

This constitutes the entire agreement and understanding between us and it may be terminated by either of us at any time upon thirty (30) days written notice to the other; and it shall not be considered modified, altered, changed or amended in any respect unless in writing and signed by both of us.

Id. (emphasis added by the court).

received some bonus payments during the years in question, but not as much as had been agreed orally. He sued and won. The court distinguished between a modification, in which case it would have applied the newly legislated rules, and an abandonment, or "rescission."

The court held that the parties had rescinded the written contracts and made new oral ones, perhaps even simultaneously with the rescission. This mechanism should sound familiar; it is the same subterfuge employed by courts that needed to circumvent the preexisting duty rule.¹⁵⁴ The legislative validation of NOM clauses, then, received no greater respect from the bench than the infamous common-law preexisting duty rule. Three judges dissented,¹⁵⁵ but there could be no further appeal.

The legislature was not ready to give up. It had amended the statute once already,¹⁵⁶ but it still attempted to change the rule of *Green v. Doniger*.¹⁵⁷ The solution was not easy, for it is no simple matter to restrain a court. The statute is reproduced here primarily to show that even a page of statutory netting is not enough to hold a strong court that is inclined to escape.¹⁵⁸ The statute does seem to have closed down the rescission-then-

154. See *supra* notes 45-50 and accompanying text. Of course, not all courts would succumb to this distinction. For a relatively recent example, see *Smith v. Richardson*, 709 S.W.2d 529, 531-32 (Mo. Ct. App. 1986) (decided under U.C.C.).

The *Green* court must have known what it was doing, for it cited one of its precedents from the generation before, which had forthrightly found a rescission as well in order to avoid the preexisting duty rule. See *Green*, 90 N.E.2d at 60 (citing *Schwartzreich v. Bauman-Basch, Inc.*, 131 N.E. 887, 889-90 (N.Y. 1921) ("If this which we are now holding [that where "an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration"] were not the rule, parties having once made a contract would be prevented from changing it no matter how willing and desirous they might be to do so, unless the terms conferred an additional benefit on the promisee.")).

155. See *id.* at 60-61 (Fuld, J., dissenting, joined by Desmond & Bromley, JJ.).

156. See 1944 N.Y. Laws 588.

157. See NEW YORK STUDY, *supra* note 134, at 642 (1955); see also 1952 N.Y. Laws 831. See generally Ronald M. DeKoven, Comment, *Modification of a Contract in New York: Criteria for Enforcement*, 35 U. CHI. L. REV. 173 (1967).

158. The statute now reads:

1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.

2. A written agreement or other written instrument which contains a provision to the effect that it cannot be terminated orally, cannot be discharged by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the discharge is sought, or by his agent, and cannot be terminated by mutual consent unless such termination is effected by an executed accord and satisfaction other than the substitution of one executory contract for another, or is evidenced by a writing signed by the party against whom it is sought to enforce the termination, or by his agent.

new-contract path,¹⁵⁹ but that is not the only device at the disposal of the courts. It would take longer to get back to the court of appeals this time, but a couple of lower court decisions, handed down within a few years of the anti-*Green* amendment, intimated that judges would not hesitate to use estoppel to circumvent the statute.¹⁶⁰

In 1977, the New York Court of Appeals approved the reasoning of the lower courts.¹⁶¹ In *Rose v. Spa Realty Associates*, developers sued to enforce an oral agreement modifying a written agreement.¹⁶² The sellers invoked the NOM clause contained in the written agreement. The court had to decide the case under the NOM legislation, as the parties did not plead the statute of frauds.¹⁶³ The developer had obtained some of the necessary governmental approvals, taken title to an acre of the land, and built four houses on it, investing substantial sums.¹⁶⁴ With that kind of reliance at stake, the court followed the earlier decisions that had used estoppel to

3. a. A discharge or partial discharge of obligations under a written agreement or other written instrument is a change of the agreement or instrument for the purpose of subdivision one of this section and is not a discharge or termination for the purpose of subdivision two, unless all executory obligations under the agreement or instrument are discharged or terminated.

b. A discharge or termination of all executory obligations under a written agreement or other written instrument is a discharge or termination for the purpose of subdivision two even though accrued obligations remaining unperformed at the date of the discharge or termination are not affected by it.

c. If a written agreement or other written instrument containing a provision that it cannot be terminated orally also provides for termination or discharge on notice by one or either party, both subdivision two and subdivision four of this section apply whether or not the agreement or other instrument states specifically that the notice must be in writing.

4. If a written agreement or other written instrument contains a provision for termination or discharge on written notice by one or either party, the requirement that such notice be in writing cannot be waived except by a writing signed by the party against whom enforcement of the waiver is sought or by his agent . . .

6. As used in this section the term "agreement" includes promise and undertaking.

N.Y. GEN. OBLIG. LAW § 15-301 (McKinney 1989).

159. See *Bank of N.Y. v. Kranis*, 592 N.Y.S.2d 67 (App. Div. 1993); *Meadow Brook Nat'l Bank v. Feraca*, 224 N.Y.S.2d 846, 849-50 (App. Div. 1962).

160. See *Gray v. Met Contracting Corp.*, 167 N.Y.S.2d 498, 501 (App. Div. 1957); *Rosenbaum-Grinnell Inc. v. Bart Schwartz Int'l Textiles, Ltd.*, 182 N.Y.S.2d 441, 442 (App. Div. 1958).

161. By this point, two versions of the earlier statute, one applying to real estate and the other to personal property, had been consolidated into the General Obligations Law. N.Y. GEN. OBLIG. LAW § 15-301 (McKinney 1989).

162. 366 N.E.2d 1279, 1281 (N.Y. 1977) (agreement stated that "it may not be changed or terminated orally").

163. See *id.* at 1282.

164. See *id.*

defeat the NOM clause and the statute giving it effect.¹⁶⁵ The court held that "when a party's conduct induces another's significant and substantial reliance on the agreement to modify, albeit oral, that party may be estopped from disputing the modification notwithstanding the statute."¹⁶⁶ New York courts continue to estop parties from invoking NOM clauses,¹⁶⁷ although the reliance giving rise to the estoppel must be incompatible with the unmodified, written agreement.¹⁶⁸

After *Rose*, the New York Legislature left the statute well enough alone. The lesson is an important one. The legislature, or more to the point of this Article, the Conference and the Institute, need to keep the courts in mind when drafting legislation. Judges are the ones faced most immediately with real, particularized fact-situations, and understandably the courts seek an equitable result. The drafters have to understand the troublesome fact-situations the courts will face, and reach a compromise whose merit will garner judicial support. Such a statute must minimize unjust outcomes and should sing out its fact-oriented approach to deciding which contractual changes should be enforced.¹⁶⁹ To do less is to invite legislative revision from the bench,¹⁷⁰ to the detriment of uniformity, reliability, and the host of values that go with them.

165. See *id.* at 1283 (citing *Zolar Publ'g Co. v. Doubleday & Co., Inc.*, 529 F.2d 663 (2d Cir. 1975); *Imperator Realty Co. v. Tull*, 127 N.E. 263 (N.Y. 1920); *Thomson v. Poor*, 42 N.E. 13 (N.Y. 1895); *Gray v. Met Contracting Corp.*, 167 N.Y.S.2d 498 (App. Div. 1957); *The Savage Is Loose Co. v. United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555 (S.D.N.Y. 1976)).

166. *Id.* at 1281.

167. See, e.g., *Dellicarri v. Hirschfeld*, 619 N.Y.S.2d 816 (App. Div. 1994); *Latham Four Partnership v. SSI Med. Servs.*, 581 N.Y.S.2d 891 (App. Div. 1992); *Indemnity Ins. Co. of N. Am. v. Levine*, 563 N.Y.S.2d 811 (App. Div. 1990); *Jackson v. Cobert*, 612 N.Y.S.2d 330 (Civ. Ct. 1994), *aff'd*, 637 N.Y.S.2d 613 (App. Term. 1995); *Bank of N.Y. v. Spring Glen Assocs.*, 635 N.Y.S.2d 781 (App. Div. 1995). *Union Chelsea Nat'l Bank v. PGA Marketing Ltd.*, 561 N.Y.S.2d 174 (App. Div. 1990), may indicate a harsher judicial stance that is more willing to enforce the NOM clause. See also *Village on Canon v. Bankers Trust, Co.*, 920 F. Supp. 520 (S.D.N.Y. 1996), *construed in Banking Briefs*, 114 BANKING L.J. 160-61 (1997).

168. See *Rose*, 366 N.E.2d at 1283; *Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 522 (2d Cir. 1990); *Goodridge v. Harvey Group Inc.*, 728 F. Supp. 275, 285 (S.D.N.Y. 1990); see also *Rose*, 366 N.E.2d at 1283 (part performance must be unequivocally referable to modification); *National Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 675-76 (S.D.N.Y. 1991), *aff'd*, 962 F.2d 1 (2d Cir. 1992); *National Westminster Bank, U.S.A. v. Vannier Group*, 554 N.Y.S.2d 482, 483-84 (App. Div. 1990); *Tierney v. Capricorn Investors, L.P.*, 592 N.Y.S.2d 700, 703 (App. Div. 1993).

169. See Karl N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 250 (1941); LLEWELLYN, *COMMON LAW*, *supra* note 83, at 183, 246-47.

170. For an argument that a judicial power of statutory revision is good (or perhaps unavoidable) in the age of statutes, see CALABRESI, *supra* note 66, at 2-3.

To avoid such a result, the legislation proposed below emphasizes both the parties' "bargain in fact"¹⁷¹ and their reliance interests. It attempts to fashion a rule that will allow sufficient predictability for the parties and sufficient flexibility for the courts. It takes a similar approach to waiver. Modification and waiver—and NOM and NOW clauses—are two facets of the single problem of contractual change. This approach takes account of the lesson of New York and the limits on innovation by statute.

C. The U.C.C. and the Importance of Waiver

The New York experience is instructive because the legislature and the courts of that state have had much longer to mull over the statutory approach to the issue. Most other states used the common-law rules until they adopted Article 2 of the U.C.C. The operative provisions of Article 2 provide that "[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded," but "an attempt at modification or rescission [that] does not satisfy [such a] requirement[] . . . can operate as a waiver."¹⁷² The U.C.C., then, gives some effect to NOM clauses, but harsh results can be tempered by construing a failed modification as a "waiver." The tension between these two rules famously split Judges Posner and Easterbrook in *Wisconsin Knife Works v. National Metal Crafters*,¹⁷³ and one of the leading writers on the problem still sees the subject as "shrouded in mystery."¹⁷⁴

The scheme of the current Code works like this: NOM clauses are valid. An attempted modification that contravenes a NOM clause is legally ineffective as a modification.¹⁷⁵ The failed attempt, however, "can" be effective as a waiver.¹⁷⁶ A waiver may be retracted, but only if it pertains

171. I do not argue that this emphasis is new. Just the opposite: I have tried to be faithful to the overarching themes of the Code. See STUDY GROUP REPORT, *supra* note 7, at 11; Robert A. Hillman, *Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509, 1511 (1994) [hereinafter, *Standards*]. As should be clear from the text, the proposed legislation is offered in the spirit of the Code itself. See John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 342 (1988).

172. U.C.C. § 2-209 (1999); *accord id.* § 2A-208.

173. 781 F.2d 1280 (7th Cir. 1986). The issue has continued to split the courts. See Eisler, *supra* note 4, at 434 & nn. 232-33 (collecting cases).

174. Robert A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses*, 21 CORNELL INT'L L.J. 449, 449 (1988) [hereinafter Hillman, *CISG*].

175. See U.C.C. § 2-209(2) (1999); see also 1 WHITE & SUMMERS, *supra* note 4, § 1-6, at 35.

176. U.C.C. § 2-209(4) (1999).

to an executory part of the contract and only if the other party has not relied on the waiver.¹⁷⁷

The problem is the “schizophreni[a]” reflected on the face of the rules.¹⁷⁸ Not surprisingly, courts and commentators have struggled to reconcile the left hand, which taketh away the modification, and the right hand, which giveth a waiver.¹⁷⁹ Some cases enforce NOM clauses,¹⁸⁰ other cases have enforced NOM clauses outside of Article 2,¹⁸¹ and at least one court simply ignored NOM clauses when faced with such rules.¹⁸² On the other hand, parties have been estopped from invoking NOM clauses,¹⁸³ and such provisions can be waived.¹⁸⁴

As the Seventh Circuit has held, however, the U.C.C. could not possibly mean that the same action that is ineffective as a “modification” becomes effective under the different label of “waiver.” In *Wisconsin Knife*, the court divined reliance as the ingredient necessary to transform a failed modification into an effective waiver.¹⁸⁵ *Wisconsin Knife* was a fractured opinion, however, and scholars have not shown much more unity on the subject of section 2-209. Professors White and Summers find support for

177. See *id.* § 2-209(5).

178. See Douglas K. Newell, *Cleaning Up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487, 489 (1990).

179. See Eisler, *supra* note 4, at 401; Hillman, *U.C.C.*, *supra* note 70, at 335; Levie, *supra* note 4, at 355; Murray, *supra* note 85, at 33; Newell, *supra* note 178; Frank A. Rothermel, Comment, *Role of Course of Performance and Confirmatory Memoranda in Determining the Scope, Operation and Effect of “No Oral Modification” Clauses*, 48 U. PITT. L. REV. 1239, 1239-40 (1987). The cited articles collect a number of cases, of which *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), is certainly the best known. A sampling of cases might also include *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108 (5th Cir. 1984), and *Brookside Farms v. Mama Rizzo’s, Inc.*, 873 F. Supp. 1029 (S.D. Tex. 1995).

180. See *Green Constr. Co. v. First Indem. of Am. Ins. Co.*, 735 F. Supp. 1254, 1261-62 (D. N.J. 1990); *Indussa Corp. v. Reliable Stainless Steel Supply Co.*, 369 F. Supp. 976, 978-79 (E.D. Pa. 1974).

181. See *Pavco Indus., Inc. v. First Nat’l Bank*, 534 So. 2d 572, 576 (Ala. 1988) (enforcing NOM clause in note); *National Westminster Bank USA v. Vannier Group*, 554 N.Y.S.2d 482, 483 (App. Div. 1990) (same); *Pantano v. McGowan*, 530 N.W.2d 912, 915 (Neb. 1995) (stock purchase).

182. See *In re Estate of Upchurch*, 466 S.W.2d 886, 889-90 (Tenn. Ct. App. 1970).

183. See *Knutson Shipbuilding Corp. v. Rogers Constr. Corp.*, 6 U.C.C. Rep. Serv. (CBC) 323 (N.Y. Sup. Ct. 1969).

184. See *West Point-Pepperell, Inc. v. Bradshaw*, 377 F. Supp. 154 (M.D. Ala. 1974); *Albany Roller Mills, Inc. v. Northern United Feeds & Seeds, Inc.*, 397 N.W.2d 430 (Minn. Ct. App. 1986); *Linear Corp. v. Standard Hardware Co.*, 423 So. 2d 966 (Fla. Dist. Ct. App. 1982); *Knoxville Rod & Bearing, Inc. v. Bettis Corp.*, 672 S.W.2d 203 (Tenn. Ct. App. 1983); *Gold Kist, Inc. v. Pillow*, 582 S.W.2d 77 (Tenn. Ct. App. 1979).

185. See *Wisconsin Knife*, 781 F.2d at 1286-87.

for the *Wisconsin Knife* majority in the statutory text,¹⁸⁶ while Professor Farnsworth appears to side with the dissent.¹⁸⁷

With all the divisions provoked by the U.C.C. rules regarding NOM clauses, one might think it best that the Code ignores NOW clauses altogether. There is no disagreement in the scholarship, which pays them little attention.¹⁸⁸ The courts, however, have been required to consider such clauses and have reached starkly divided results. Some cases have managed to avoid the difficulty;¹⁸⁹ others have followed varying paths. For example, some courts have bluntly ruled that NOW clauses are invalid¹⁹⁰ and have continued to follow the traditional rule,¹⁹¹ while another line of authority gives effect to the NOW clauses just as they are written.

Tillquist v. Ford Motor Credit Co., for example, follows the most stringent rule on NOW clauses, but only because bound to do so, and the rule was not allowed to detract from the result.¹⁹² (The court merely resorted to a different theory.) The parties had presented paradigmatic facts. The plaintiff, a man who had borrowed money to finance his car, habitually paid late.¹⁹³ The finance company accepted the late payments for a long time, but eventually became exasperated and repossessed the car.¹⁹⁴ He claimed damages, apparently arguing that if the finance company was suddenly going to stop accepting late payments, it should have told him

186. See 1 WHITE & SUMMERS, *supra* note 4, § 1-6, at 34.

187. See FARNSWORTH, *CONTRACTS*, *supra* note 86, § 7.6, at 452, although Professor Farnsworth does not fully concur with either opinion. See Letter from E. Allan Farnsworth to David V. Snyder 1 (Apr. 26, 1999) (on file with author). Professor Eisler finds merit in both the majority and the dissent. See Eisler, *supra* note 4, at 435.

188. Eisler, *supra* note 4, at 418, notes: "The weight of authority gives no legal effect to an NOM clause that prohibits waivers when the party's conduct evidences a waiver under [§§ 2-209(4) and (5)]." Eisler cites only *Battista v. Saving Bank*, 507 A.2d 203, 207-09 (Md. Ct. Spec. App. 1986), which reviews opposing lines of authority and holds that a NOW clause may be waived. On the strength of *Battista*, Professor Eisler argues that a contrary case, *Marlowe v. Argentine Naval Comm'n*, 808 F.2d 120 (D.C. Cir. 1986), "was wrong." Eisler, *supra* note 4, at 418. White and Summers observe that NOW clauses may themselves be waived but caution simply that "courts should be slow to find waiver of anti-waiver provisions. When parties agree in writing that no waiver or modification shall be binding unless in writing, the one seeking a modification should get it in writing." 1 WHITE & SUMMERS, *supra* note 4, § 1-6, at 33.

189. See *PC COM, Inc. v. Proteon, Inc.*, 946 F. Supp. 1125, 1133-35 (S.D.N.Y. 1996) (alternative holding).

190. See *Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp.*, 944 F.2d 1131, 1147 (3d Cir. 1991).

191. See *Enserch Corp. v. Rebich*, 925 S.W.2d 75, 82 (Tex. App. 1996) (citing, *inter alia*, 3A ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 763 (1960)).

192. 714 F. Supp. 607 (D. Conn. 1989).

193. See *id.* at 608-09.

194. See *id.* at 609.

first.¹⁹⁵ Legally, the plaintiff's theory would be waiver: the finance company had waived the condition that payments be made on time. The company defended by asserting the NOW clause in the finance agreement, arguing that there could be no waiver without a writing.¹⁹⁶

Squarely confronted with the problem of NOW clauses, the court surveyed the different lines of authority. In the absence of a NOW clause, the court observed, "most jurisdictions adhere to the general rule that a party 'who has accepted late payments as a matter of course, must . . . give notice to the debtor that strict compliance with the terms of the contract will be demanded henceforth if repossession is to be avoided.'"¹⁹⁷ When the parties' agreement includes a NOW clause, the court continued, courts split into several camps.¹⁹⁸ One camp adheres to the same rule, despite the NOW clause, on an estoppel theory. Acceptance of late payments can set up the estoppel, preventing a creditor from repossessing without giving notice that strict compliance will be required.¹⁹⁹ Another line of cases reaches the same result on a theory of waiver rather than estoppel, and the waiver can be retracted by notice as provided by section 2-209(5).²⁰⁰ Whether these first two camps are really separate is open to some question, however, as the reliance required for an estoppel may be presumed, and whether the presumption can be rebutted appears doubtful in at least one jurisdiction.²⁰¹

The third camp, by contrast, is all the way on the other side of the battleground. The courts in that camp enforce NOW clauses as written,²⁰²

195. *See id.* at 610-11.

196. *See id.* at 611.

197. *Tillquist*, 714 F. Supp. at 611 (citations omitted); *see also* *Driftwood Manor Investors v. City Fed. Sav. & Loan Ass'n*, 305 S.E.2d 204, 207 (N.C. Ct. App. 1983) ("majority" and "better-reasoned" rule require creditor who has accepted late payments to give notice that strict compliance will be required).

198. *See Tillquist*, 714 F. Supp. at 611.

199. *See id.*; *accord* *Kelly Tractor Co. v. R.J. Canfield Contracting, Inc.*, 579 So. 2d 261, 264 (Fla. Dist. Ct. App. 1991); *Montgomery Enters. v. Atlantic Nat'l Bank*, 338 So. 2d 1078, 1080 (Fla. Dist. Ct. App. 1976); *Gonsalves v. Gilbert*, 356 P.2d 379, 384 (Haw. 1960); *Knoxville Rod & Bearing, Inc. v. Bettis Corp.*, 672 S.W.2d 203, 207-08 (Tenn. Ct. App. 1983); *Moe v. John Deere Co.*, 516 N.W.2d 332, 337 (S.D. 1994).

200. *See Tillquist*, 714 F. Supp. at 611-12 (construing *Westinghouse Credit Corp. v. Shelton*, 645 F.2d 869, 874 (10th Cir. 1981)); *accord* *Dillingham Commercial Co., v. Spears*, 641 P.2d 1, 7 (Alaska 1982); *Woods v. Monticello Dev. Co.*, 656 P.2d 1324, 1327 (Colo. Ct. App. 1982); *Smith v. General Fin. Corp.*, 255 S.E.2d 14, 15 (Ga. 1979); *Battista v. Savings Bank*, 507 A.2d 203, 209 (Md. Ct. Spec. App. 1986); *Summa Corp. v. Richardson*, 564 P.2d 181, 184-85 (Nev. 1977); *Fisher v. Tiffin*, 551 P.2d 1061, 1063 (Or. 1976); *Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7, 10 (Utah Ct. App. 1995).

201. *See Cobb*, 295 N.W.2d at 236-37.

202. *See Tillquist*, 714 F. Supp. at 611 (citing *Virgil Van Bibber v. Norris*, 419 N.E.2d 115 (Ind. 1981); *Hale v. Ford Motor Credit Co.*, 374 So. 2d 849 (Ala. 1979); *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147 (D.C.E.D. Mo. 1978)); *accord* *Williams v. Ford Motor Credit Co.*, 435 So. 2d 66, 68 (Ala. 1983); *General Grocer Co. v. Bachar*, 365 N.E.2d

and the *Tillquist* court was bound to join that camp. Citing *S.H.V.C., Inc. v. Roy*,²⁰³ the district court noted that it was bound by a decision of the Connecticut Supreme Court, despite a cogent dissent by Justice Peters.²⁰⁴ In other jurisdictions, however, the result is far from predetermined. A Maryland court, for example, conducted a similar review of authorities, and not being bound by precedent, it chose to join the camp allowing waiver of the NOW clause.²⁰⁵

As explained more fully in the following Section, the legislation proposed in this Article treats NOW clauses like NOM clauses. The parties' agreement is thus accorded respect, but the clauses are not impregnable. True estoppel, which requires reasonable, material, good-faith reliance, ought to defeat the NOW clause. The proposal, therefore, joins the estoppel camp, but requires the courts to conduct a fact-intensive inquiry into the surrounding circumstances. While some boilerplate provisions may not survive, parties who care about their NOW clause can make their fact situation one in which the court will honor the clause.

V. THE FUTURE OF STATUTE: PROPOSED REVISIONS

A. *The Move to Article 1*

My interest in this subject was sparked by an assignment as part of the current revision of the U.C.C.²⁰⁶ The first task was to determine whether particular provisions regulating modification, waiver, and estoppel (sections 2-208 and 2-209) ought to be moved to Article 1, and thus made applicable to the areas governed by all of the Code. The question was prompted in the first instance by the U.C.C. Permanent Editorial Board (PEB).²⁰⁷ The PEB noted that course of performance receives full treatment only in Article 2²⁰⁸ and not in the "general provisions" of Article 1, where it might be expected

1106, 1109 (Ill. App. Ct. 1977); *McAllister v. Langford Investigators, Inc.*, 380 So. 2d 299, 300 (Ala. Civ. App. 1980) (following *Hale* only because bound to do so).

203. 450 A.2d 351 (Conn. 1982).

204. See *Tillquist*, 714 F. Supp. at 612 & n.2; see also *Christensen v. Cutaita*, 560 A.2d 456, 459 (Conn. 1989). See generally Elizabeth C. Yen, *A Pattern of Accepting late Payments on a Loan or Lease Does Not Necessarily Preclude the Creditor from Later Considering the Debtor to Be in Default*, 107 BANKING L.J. 355, 356-57 (1990).

205. See *Battista*, 507 A.2d at 207-09; see also *Hoffman v. Glock*, 315 A.2d 551, 554-55 (Md. Ct. Spec. App. 1974).

206. The entire Code has been under revision for several years. Several articles have been revised and are now being implemented by legislatures across the country.

207. See generally PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, COMMENTARY No. 10 (Final Draft of Feb. 10, 1994) [hereinafter PEB COMMENTARY No. 10].

208. See U.C.C. § 2-208 (1999).

to appear with the provisions on course of dealing and usage of trade.²⁰⁹ The PEB could discern no plausible reason for excluding course of performance from Article 1,²¹⁰ and the Article 2 Study Group suggested that the current section 2-208 be moved during the revision process. Because sections 2-208 (course of performance and waiver) and 2-209 (waiver and modification) are so closely tied, the Article 1 Drafting Committee wondered whether both sections should be moved to Article 1.²¹¹

The Article 1 Subcommittee reached at least a tentative conclusion that sections 2-208 and 2-209 should be moved.²¹² One important reason for the move was that each of the three drafting committees with jurisdiction over such questions seemed to disagree with the other two committees on at least

209. See *id.* § 1-205. Course of performance is mentioned in the Article 1 definition of “agreement.” *Id.* § 1-201(3).

210. See PEB COMMENTARY No. 10, *supra* note 207, at n.8.

211. See Rev. U.C.C. § 1-304 note (Revised Draft of Sept. 1999, available at <<http://www.law.upenn.edu/library/ulc/ule.htm>>) [hereinafter Rev. U.C.C.]. I set out to answer this question with the collaboration of Margaret Moses. The task was given to the Article 1 Subcommittee of the American Bar Association U.C.C. Committee. Fred Miller, executive director of the Conference, describes these ABA subcommittees as “research arms” for the drafting committees. At the time I received this assignment, I was a member of the Article 1 Subcommittee. The chair, Sarah Howard Jenkins, has now appointed me to serve as “recorder” for the subcommittee.

212. This occurred at the Boston Meeting of Article 1 Subcommittee of the American Bar Association U.C.C. Committee (Apr. 3, 1997). Although some questions about opinion practice have been raised, such concerns can easily be allayed. Even without these provisions in Article 1, opinion letters frequently contain qualifications to the “enforceability” opinion (i.e., the opinion that the contract in question is enforceable in accordance with its terms). Here are sample qualifications from the form of a major Boston law firm (that wishes to remain anonymous):

- (i) enforceability of the [Agreements] may be limited by general principles of contract law which include (a) the unenforceability of provisions to the effect that provisions of the [Agreements] may only be amended or waived in writing . . . ;
- (ii) the obligations, rights and remedies of the parties may be limited by . . . general principles of equity . . . including, without limitation, the discretion of any court . . . in granting . . . equitable relief.

In addition, opinion letters only speak as of their date, do not cover subsequent events that may lead a court to find a modification or waiver, and do not include facts that have not been disclosed to the lawyers rendering the opinion. The form language states:

As to various facts material to the opinions set forth herein, we have relied without independent verification upon factual representations made by [our client] in the [Transaction Documents], upon certificates of public officials and upon facts certified to us by officers of [our client].

All of the opinions set forth herein are rendered as of the date hereof, and we assume no obligation to update such opinions to reflect any facts or circumstances which hereafter may come to our attention or any change in law which may hereafter occur.

Similar points are made in TRIBAR OPINION COMMITTEE, THE COLLECTED TRIBAR LEGAL OPINION REPORTS 1979-1998, at 15, 43, 43 n.78, 89-90 (1999).

one substantive issue.²¹³ The controversy among the drafters underscores the policy choices underlying these rules and emphasizes that learned and reasonable men and women will differ on these issues.²¹⁴ Each article of the Code, after all, has its own drafting committee, consisting of representatives of the Institute and Conference, as well as advisors from the American Bar Association.²¹⁵ Each drafting committee receives input from affected groups, and many interested parties attend and participate, to varying degrees, in drafting committee deliberations. The drafting committees generally meet several times each year and invest a tremendous amount of time and effort in the project.²¹⁶ This investment naturally leads to the usual consequences of becoming invested in a product, and this results, in turn, in a potential competition between committees that have reached different conclusions.

213. The three drafting committees were working on Article 2, governing the sale of goods, Article 2A, governing the lease of goods, and what was then called Article 2B. The American Law Institute did not vote to include Article 2B as part of the U.C.C., but the Conference decided to forge ahead on its own and in July 1999 approved the erstwhile Article 2B as the Uniform Computer Information Transactions Act (U.C.I.T.A.). Although it was immediately obsolescent, Symposium, *Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information and Commerce*, 87 CAL. L. REV. 1 (1999), is a useful collection of scholarship. As this Article was going to press, the Article 2 Drafting Committee had been reconstituted but it had not yet met and no new draft was available.

For the inconsistent treatment by different committees, including express refusal to conform to each other, compare Rev. U.C.C. §§ 2-210 with 2B-303 & note ("Article 2B will not conform") and 2A-302 note (raising issues about reliance, not mentioned in Article 2 or 2B), *supra* note 211. The drafts are continually changing, making them difficult to cite definitely, but a recent mention of the inconsistency is in Memorandum from Marion Benfield, Reporter for Article 2A, to Article 2A Drafting Committee and other interested parties, ¶ 20 (Mar. 10, 1999) (available from the author or the Conference) ("Article 2 has now reverted to the material change of position rule for retraction of waiver and for loss of ability to rely on a no-modification-except-in-writing clause. Do we wish to adopt the present article 2 version?"). U.C.I.T.A. § 303, the current equivalent of the section that had explicitly refused to conform, no longer highlights the disparity but has not conformed. U.C.I.T.A., *supra* note 75, at § 303.

214. Some may well question the institutional competence of the Conference and the Institute to make these kinds of policy choices, but that issue is well outside the scope of this Article. See generally, e.g., Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 88-106 (1993). For a collection of relevant articles, a discussion of the political criticisms, and a defense of the Code, see A. Brooke Overby, *Modeling U.C.C. Drafting*, 29 LOY. L.A. L. REV. 645, 645 n.3, 661-64 (1996).

215. For descriptions of the lawmaking process, see Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the U.C.C.*, 39 S. TEX. L. REV. 707, 712-26 (1998), which also collects a number of more critical descriptions of the process. See *id.* at 708-10, 708 n.5.

216. See *id.* at 714.

This potential has been realized, despite efforts to harmonize the competing articles of the Code, particularly in the context of contractual change.²¹⁷ The resulting inconsistency leads to a number of pernicious effects. For instance, different results may be obtained depending on whether a transaction is a sale of goods, a lease of goods, or a license of computer software. Occasionally such differences are explained by citing differences in the affected industries. Whether such explanations justify the different treatments is another question, but in the context of contractual change, no one has even pointed to any particular industry practices to explain the differences. The only explanation for the difference is that different drafting committees reached different results in this difficult and controversial area.

There is another, more insidious, problem with allowing different committees to treat the same issue. The rules, to anyone but the most careful legislature, will look the same. Legislatures are therefore unlikely to even notice the different policy decisions that each article requires. Courts may also be confused, mistakenly analogizing precedent from one article in the context of another, where the legislation calls for a different result. Only when the law becomes confused will the problem become prominent, and such a result is far from what one might expect from bodies whose *raison d'être* is to provide laws drafted by experts.

Aside from the danger of inconsistency, there is no reason not to have general principles apply uniformly throughout contract and commercial law. Courts have already applied the rules of sections 2-208 and 2-209 broadly, and the rules in those sections may well be applied as supplemental principles under section 1-103,²¹⁸ even without a specific provision for them.²¹⁹ Course of performance is recognized in the *Second Restatement*.²²⁰ And while the doctrines differ in some important respects, the U.C.C.

217. See Memorandum from Boris Auerbach, Chair, Article 1 Drafting Committee, to Committee of the Whole (July 21, 1998) (on file with author), incorporating Memorandum from Auerbach to Gene Lebrun (Sept. 30, 1997) and another attachment, about efforts to harmonize Articles 2, 2A, and then-2B (now U.C.I.T.A.). For a recent statement of inconsistency, see Professor Benfield's memorandum, *supra* note 213. Article 1, which will follow the revision of the other articles, has been assigned the role of coordinating and harmonizing the other articles where appropriate.

218. See *Northern Trust Co. v. Oxford Speaker Co.*, 440 N.E.2d 968, 971-72 (Ill. App. Ct. 1982) (law of waiver and estoppel apply to letters of credit through U.C.C. § 1-103); *Western Nat'l Bank v. Harrison*, 577 P.2d 635, 638 (Wyo. 1978) (importing general law of waiver through § 1-103 into Article 9 context); see also U.C.C. § 5-108 cmt. 3 (1999) ("substitut[ing] a strict preclusion principle for the doctrines of waiver and estoppel that might otherwise apply under Section 1-103").

219. See *National Livestock Credit Corp. v. Schultz*, 653 P.2d 1243, 1246-47 (Okla. Ct. App. 1982).

220. See RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981).

concept is not too far removed from its common-law predecessor, "practical construction."²²¹ Numerous courts have applied the rules of sections 2-208 and 2-209 throughout the different realms of contract and commercial law.²²²

The legislation proposed in this Article, therefore, assumes that the provision will appear in Article 1 and will at least apply throughout the subjects governed by the Code, and preferably throughout contract law in general.²²³

B. Baring Some Philosophical Premises

Relatively early in his career as a draftsman of commercial law, Grant Gilmore identified the principal object of drafting to be accuracy, not originality. "[D]raftsmen of general commercial legislation . . . attempt to state as a matter of law the conclusion which the business community apart from statute . . . gives to the transaction in any case."²²⁴ Certainly

221. 1 WHITE & SUMMERS, *supra* note 4, § 1-6, at 39 (citing CORBIN ON CONTRACTS § 558).

222. See *Westinghouse Credit Corp. v. Shelton*, 645 F.2d 869, 872-73 & n.3 (10th Cir. 1981) (course of performance may result in waiver of term in security agreement governed by Article 9); *Driftwood Manor Investors v. City Fed. Sav. & Loan Ass'n*, 305 S.E.2d 204, 207 (N.C. Ct. App. 1983) (Article 3 note holder who repeatedly accepts late installments waives right to accelerate because of subsequent late payment unless the payor is first notified that prompt payment will be required); *Pavco Indus., Inc. v. First Nat'l Bank*, 534 So. 2d 572, 576 (Ala. 1988) (enforcing NOM clause in note); *National Westminster Bank USA v. Vannier Group*, 554 N.Y.S.2d 482, 483 (App. Div. 1990) (same); *Pantano v. McGowan*, 530 N.W.2d 912, 915 (Neb. 1995) (enforcing NOM clause in case involving acquisition of corporation by stock purchase). Although several cases have applied waiver and estoppel principles to letters of credit governed by Article 5, see *Pro-Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847, 855 (11th Cir. 1985); *Schweibish v. Pontchartrain State Bank*, 389 So. 2d 731, 737 (La. Ct. App. 1980) (estoppel); *Northern Trust Co. v. Oxford Speaker Co.*, 440 N.E.2d 968, 971-72 (Ill. App. Ct. 1982) (law of waiver and estoppel apply to letters of credit through U.C.C. § 1-103), the revisers of Article 5 disapprove of such decisions. See U.C.C. § 5-108 cmt. 7 (1995) (citing *Schweibish* and *Titanium Metals Corp. v. Space Metals, Inc.*, 529 P.2d 431 (Utah 1974)). They would opt instead for a rule of strict preclusion and the nearly incredible formalism of *Courtaulds of N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802, 804-05 (4th Cir. 1975), *rev'g* 387 F. Supp. 92 (M.D.N.C. 1975). If such a result is to be preserved, Article 5 may have to be exempted from the general application of the waiver principles proposed here. Such an exception should not present too great a difficulty, however. A similar exception was drawn for Articles 3 and 4 from the Article 1 definition of "value." See U.C.C. §§ 1-201(44) & cmt. 44, 3-303 & cmt. 1 (1999).

223. Although the *Second Restatement* did not follow the U.C.C. with respect to the limited validation of NOM clauses, no convincing reason has been given for this omission. See E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 11-12 (1981).

224. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948) [hereinafter Gilmore, *Codifying Commercial Law*].

commercial law should aim to be congruent with commercial practice so participants in the commercial market will achieve their intended results, regardless of whether they wind up in court.²²⁵ Gilmore's point, though, was that achieving this goal "is a task of considerable difficulty."²²⁶ The passage of years since Gilmore's article has compounded the difficulty. The work of Professor Macaulay and others of the "Wisconsin School" has suggested that businesses often contract with little or no regard to the law, certainly as it is understood by the professorate, and even as it appears in the statute books and case reporters.²²⁷ The work of Professor Bernstein has called into question the very existence of uniform business practices that can be useful to the law.²²⁸

In the area of contractual change, the import of business practice is particularly indeterminate. On the one hand, many contracts include NOM or NOW clauses or both. If that practice were to be validated, such clauses would be made legally effective. On the other hand, parties often make informal adjustments to their contracts, regardless of whether the written agreement contains a NOM or NOW clause. If this practice were validated, NOM or NOW clauses would be made legally ineffective.²²⁹ What contracting parties actually do, therefore, seems to require some kind of compromise.

The idea that the law should codify commercial practice, moreover, does not take into account the different needs of the courts and the public. Business practices are enforced in informal ways, like refusing to do business with someone who is a bully or a corner-cutter. A business needs to make a unilateral decision only, justified solely by business judgment. The concerns of courts are different. Courts are public bodies, accountable to the public either directly or indirectly. The public participates in the process in the form of a jury, whose power over many decisions cannot be questioned, but whose decision-making must be channeled and controlled.

In addition, the power of the state is involved in judicial proceedings. The judgment of a court may well be effected through the use of force

225. See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 265-66 (1985).

226. Gilmore, *Codifying Commercial Law*, *supra* note 224, at 1341.

227. See GILMORE, *DEATH OF CONTRACT*, *supra* note 8, at 3 & n.1 (accusing Macaulay and the Wisconsin School of killing contract); see also LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). See generally *The Relevance of Contract Theory: A Symposium*, 1967 WIS. L. REV. 803 (1967).

228. See Bernstein, *Empirical Basis*, *supra* note 7.

229. See Hillman, *CISG*, *supra* note 174, at 450-51 (discussing the import of "actual business practices").

against unwilling judgment debtors. This power means that courts are more constrained than individual businesses, since the court must be able to justify its decision to the public. A court cannot merely tell a private board of directors that it was a “business decision,” made in the long-term interest of the company. Put more bluntly, courts must offer a broadly persuasive justification for a decision, and the persuasiveness of an opinion is much undermined when a harsh or inequitable result is reached.²³⁰ Courts resist such an outcome, even in the face of a statute to the contrary. The earlier discussion of the tennis match between the New York Legislature and the courts of the state underscores this point. In the end, one cannot be surprised to find the statutory validation of NOM clauses being judicially supplemented by principles of estoppel.

No purpose is served by a statutory rule that the courts will avoid by reverting to the common law. Certainty is nice,²³¹ but at some point a drafter of a statute must acknowledge the needs—and powers—of the courts. The statutory rule ought not to raise false hopes of certain outcomes, nor should it require heroic efforts by courts. For these reasons, the following proposal attempts to put some real teeth in NOM and NOW clauses, while recognizing that courts will not mechanically apply an unduly harsh rule. The stringency of a rule, of course, may well vary in the eyes of different beholders, but countless cases show that a rule which fails to recognize reasonable, material, good faith reliance is a rule that is ripe for supplementation, if not resistance, from the bench. There is little point in trying to make courts behave otherwise, and there is much harm in making it appear that the NOM or NOW clause is ironclad when it is not.²³²

230. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 17 (1977) (“[J]udges want to decide the cases which come before them sensibly, wisely, even justly. Sense, wisdom, and justice are community values . . .”).

231. See *supra* note 1.

232. Many readers will see a strain of Legal Realism here, and I do not deny the influence of Llewellyn, Corbin, Patterson, and their precursors. This Article is not the place, however, for a disquisition on the meaning or import of Legal Realism, or for a defense of the school and its teaching. For a discussion of Legal Realism, interested readers might start with White, *supra* note 65, William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329 (1985), and WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

C. Suggested Statutory Texts and Their Implications

1. PROPOSED LEGISLATION²³³

The foregoing explanation of the problems of changing a contract have shown that legislative revision is required. Here is my attempt:

§ 1-304.²³⁴ Course of Performance, Course of Dealing, and Usage of Trade.

- (a) A “course of performance” is established between parties to a particular agreement if:
- (1) the agreement involves repeated occasions for performance by a party;
 - (2) that party performs on one or more occasions;²³⁵ and
 - (3) the other party, with knowledge of the nature of the performance and opportunity to object, accepts the performance or acquiesces in it without objection.
- (b) A “course of dealing” is established between parties by conduct or expressions that are fairly to be regarded as establishing a common basis of understanding for interpreting their other expressions and other conduct.

233. I should state explicitly that I did not make up these sections from scratch. I merely revised draft provisions that had already received careful attention from one or more of the revision reporters: Neil Cohen, Article 1; Richard Speidel and Linda Rusch, Article 2; Marion Benfield, Article 2A; and Raymond Nimmer, Article 2B/U.C.I.T.A. For Professor Speidel’s discussion of some of these problems, see Speidel, *Contract Formation*, *supra* note 75, at 1332-34, which is now somewhat superseded. As this Article was going to press, no work from the new Article 2 reporter, Henry Gabriel, was yet available.

Another note is also in order: First, in accordance with the recommendation of the PEB Study Group, no counterpart of U.C.C. § 2-209(3) (regarding the application of the statute of frauds to modifications) is included in the proposed legislation. See STUDY GROUP REPORT, *supra* note 7, at 74-75. The extent to which modifications must satisfy the statute of frauds should be stated in the statute of frauds, especially since the various articles will likely make different provisions for the statute of frauds. See *supra* note 7.

234. This section is the equivalent of U.C.C. §§ 1-205, 2-208 (1999). The section number given here corresponds to the most recent available draft revision of Article 1.

235. Current law now holds that “[a] single occasion of conduct does not fall within the language of this section . . .,” *id.* § 2-208 cmt. 4; accord *Wilson v. Marquette Electronics, Inc.*, 630 F.2d 575, 581-82 (8th Cir. 1980). The revision draft changed this rule before I began my work. The change is retained here. If a party performs, even once, and the other party voices no objection at all, the performance is relevant to show what the parties agreed to, or whether a party waived a right, or whether the parties modified their agreement. The single performance is not dispositive and is obviously less persuasive than a better established course of performance. Contrary arguments may be made, but this is not a principal concern of this Article.

- (c) A “usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the agreement in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a trade code or similar record the interpretation of the record is a question of law.
- (d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which the parties are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.
- (e) The express terms of an agreement and any applicable course of performance, course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other. If such a construction is unreasonable:
 - (1) express terms prevail over course of performance, course of dealing, and usage of trade;
 - (2) course of performance prevails over course of dealing and usage of trade; and
 - (3) course of dealing prevails over usage of trade.
- (f) Notwithstanding the provisions of subsection (e) but subject to the following Section on modification and waiver, a course of performance is relevant to show a waiver or modification of any term inconsistent with such course of performance.
- (g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party such notice as the court finds sufficient to prevent unfair surprise.

§ 1-304A.²³⁶ **Modification and Waiver.**

- (a) An agreement made in good faith that modifies or rescinds a contract needs no consideration to be binding.
- (b) Except as otherwise provided in this subsection, a term excluding modification, rescission, or waiver except by an authenticated record is binding if the term is expressed in a record authenticated by the party against whom enforcement of the term is sought. However, to the extent necessary to avoid injustice, a party is precluded from asserting the term

236. This section is the equivalent of U.C.C. § 2-209 (1999).

if the party's language or conduct induced the other party to change its position reasonably, materially, and in good faith.

- (c) In the absence of a term governed by subsection (b), a waiver made through course of performance (Section 1-304(f)) or otherwise may be retracted [if the waiver affects an executory portion of the contract]²³⁷ by giving reasonable notice to the other party that strict performance will be required, except to the extent retraction would be unjust in view of a material change in position in reasonable and good faith reliance on the waiver.

The proposed sections attempt to balance the competing interests of certainty, flexibility, and reliance. The policies vying against each other call for a compromise, and a compromise creates some complexity. As this Article has attempted to demonstrate, however, an uncompromising statute simply precipitates a judicial compromise, as the New York experience attests, which means litigation with its concomitant expense and uncertainty. While some courts would be willing to enforce a harsh rule for the sake of certainty or other benefits, not all courts will do so, as the current split over NOW clauses attests.²³⁸ These divided decisions also caution that a punt to the bench can seriously undermine the uniformity of commercial law, and thus one of the chief goals of the U.C.C.²³⁹ For each of the issues identified in this Article, therefore, the proposed sections attempt to state as clear a rule as possible, but in some instances, the brightness of the line has been dimmed by the need to compromise.²⁴⁰

2. MODIFICATION AND A CLARIFIED HIERARCHY

The proposal's stance regarding whether express terms will prevail over course of performance is relatively straightforward. Express terms and any course of performance are to be interpreted consistently, so long as such an interpretation is reasonable.²⁴¹ On the one hand, if it is unreasonable, the proposal would allow a course of performance to constitute a waiver, thus

237. My preference would be to delete the bracketed words and change the rule. See *supra* notes 115-19 and accompanying text.

238. See *supra* notes 189-205 and accompanying text.

239. See U.C.C. § 1-102(2)(c) (1999).

240. For an analogous discussion, see generally James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995) (arguing that there is a continuum, and not a dichotomy, between bright-line rules and balancing tests in the context of constitutional law).

241. See Proposed U.C.C., § 1-304(e), *supra* Part V.C.1.

prevailing over the express terms of the contract.²⁴² This provision resolves the issue of hierarchy, giving greater meaning to the later manifestation of a party's intent, which presumably reflects a party's current intent more accurately than the earlier manifestation made at the time the original contract was formed. On the other hand, waiver by course of performance, like waivers in general, can be retracted, at least with respect to future performance.²⁴³ This proviso is important; it is meant to alleviate some of the concerns voiced by Professor Bernstein regarding the changeable nature of contractual relationships.²⁴⁴ A party who makes temporary concessions to preserve the contractual relationship can return to the original deal by retracting the waiver. Retraction will remain possible as long as the other party has not reasonably relied on it. With respect to future occasions for performance, reliance is unlikely to be reasonable after notice of the retraction has been served.²⁴⁵ With a NOW clause, retraction should not even be necessary in many cases, but that issue is addressed in the next section of this Article.

Following the recommendation of the PEB Study Group,²⁴⁶ proposed section 1-304A(a) moves "good faith" from the comments to the text.²⁴⁷

242. This result is achieved by subjecting proposed section 1-304(e) to subsection (f) by virtue of the "[n]otwithstanding" clause in (f).

243. See Proposed U.C.C., § 1-304A(c), *supra* Part V.C.1.

244. See Bernstein, *Merchant Law*, *supra* note 131, at 1807-15; Ben-Shahar, *supra* note 132; see also *supra* notes 131-34 and accompanying text and *infra* note 252.

245. See *supra* note 130.

246. See STUDY GROUP REPORT, *supra* note 7, at 72-73.

247. Section 1-304A(a) should not provoke too much controversy; its predecessor did not. See NEW YORK STUDY, *supra* note 134, at 306-13; N.J. STAT. ANN. § 12A:2-209 cmt. 6 (West 1999). But see *supra* note 75. One change, though relatively small, should be mentioned. U.C.C. § 2-209 refers only to "modification" in subsections (1) and (3), but uses "modification or rescission" in subsections (2) and (4). U.C.C. § 2-209(1)-(4) (1999). The U.C.C. approach in subsection (1) may make sense according to the following reasoning: An agreement to rescind a contract that is executory (or partially executory) on both sides does not lack consideration, so the rescission is valid without subsection (1). The other possible scenario is that one party has fully executed the contract and the other party has not; in that instance, the law should not allow rescission without consideration, since (A) the party that has fully performed ought to get whatever it bargained for, or (B) there is no reason for a party that has fully performed to agree to a rescission, so the rescission must have been in violation of the duty of good faith. Because such a categorical approach is inconsistent with "the flexible character of commercial contracts," *id.* § 2-208 cmt. 3, I have added "or rescission" to subsection (1). Courts may of course consider whether one party has fully performed when deciding whether a rescission was made in good faith, and that factor may be determinative in some cases. But it need not determine all cases. Plus, the addition of "or rescission" will help prevent hairsplitting arguments on the differences—if any—between modification, rescission, abandonment, or other change by mutual consent. See *id.* § 2-209 cmt. 3 (rejecting *Green v. Doniger*, 90 N.E.2d 56 (N.Y. 1949)).

There is also a minor logical knot. Because the U.C.C. and drafts define an "agreement" as a "bargain," use of "agreement" in a rule abolishing the need for consideration

Good faith is the test for the validity of a modification, and it deserves mention in the statute itself. The arguments in this Article are an attempt to persuade courts to apply the coercion standard when giving content to the requirement that modifications be made in good faith. Coerced modifications are the evil the law seeks to prevent, and coercion should therefore be the predominant issue when courts are deciding whether a contracted change should be enforced. Duress should certainly invalidate an attempted modification, but the standard for duress is, and ought to remain, high, as may be expected of a defense that will defeat even a contract supported by consideration.²⁴⁸ Some modifications may be impermissibly coerced without meeting the elements of duress (e.g., the lack of a viable judicial remedy), and the flexibility of a coercion standard is therefore necessary. The coercion standard is not proposed in the statute, however, in an attempt to keep substantive statutory change to a minimum.²⁴⁹

3. VALIDATING PRIVATE ATTEMPTS TO REGULATE CHANGE

The proposed legislation does make a substantial but necessary change with respect to NOM and NOW clauses.²⁵⁰ The legislation would enforce both kinds of clauses in the same way, but with a limited exception for reliance.²⁵¹ The proposal is based on the notion that NOM and NOW clauses have real utility, that they increase certainty, and that they are part of commercial practice. These conclusions are supported in the latest economic scholarship²⁵² and are bolstered by an insight from relational

is problematic. See NEW YORK STUDY, *supra* note 134, at 308; Hillman, *U.C.C.*, *supra* note 70, at 339 n.40; Murray, *supra* note 85, at 4 n.12. I have not found a satisfactory alternative, though, and the apparent problem does not appear to have caused any difficulties so far.

248. See *infra* Part VI.C-D.

249. See Hillman, *Standards*, *supra* note 171, at 1522 (in absence of particular reasons to change, best to "leave well enough alone") (quoting STUDY GROUP REPORT, *supra* note 7, at 64); Overby, *supra* note 214, at 645.

250. See Proposed U.C.C., §1-304A(b), *supra* Part V.C.1; see also Hillman, *CISG*, *supra* note 174, at 449 ("inadequate drafting of the U.C.C. . . . has been a major source of the confusion"); Hillman, *U.C.C.*, *supra* note 70, at 335 (U.C.C. approach unsuccessful); Hillman, *Standards*, *supra* note 171, at 1522 (current provisions "ambiguous and confusing" and "the subject of frequent and perplexing litigation"); cf. Overby, *supra* note 214, at 664-65 & n.102.

251. The reliance exception is thus consistent with the majority opinion in *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1287 (7th Cir. 1986).

252. See generally Ben-Shahar, *supra* note 132. Professor Ben-Shahar, and perhaps Professor Bernstein, might prefer to go further; they see the supposed flexibility afforded by the U.C.C. rules on modification, waiver, and course of performance as at best irrelevant, see *id.* at 794-805, and more likely, pernicious. See *id.* at 806-18; Bernstein, *Merchant Law*, *supra* note 131; see also *supra* notes 131-34 and accompanying text. Although the work of

contract theory. Informal adjustments may too easily harden into a course of performance or waiver. Parties' fear of such a result may lead to rigidity instead of flexibility in the contract, and it may also undermine the relationship between the parties. A party should have the power to prevent a variation from having legal effect;²⁵³ yet an objection would contravene the norms expected of parties who want to preserve their relationship.²⁵⁴ Clauses preventing oral modification and waiver can help with these problems, as well as the untoward results of traditional election law.²⁵⁵

The proposed legislation therefore declines to revert to the bright-line, common-law rule that rendered NOM and NOW clauses nugatory. Some have argued for such a solution, in the absence of any available empirical research, in order to avoid the confusion inherent in a compromise.²⁵⁶ But

these scholars is impressive and it informs the proposals here, I am not sure that the time has come for drastic steps. As Professor Ben-Shahar's work shows, not all the conclusions of scholars supporting these views have become generally accepted. (The first part of Professor Ben-Shahar's article disagrees with Professor Bernstein's analysis; he then agrees with Professor Bernstein's conclusion, but for different reasons.) For further disagreement between those with an economic perspective, compare Jolls, *supra* note 15, at 203 (contract law should enable the parties to agree effectively to prevent modifications), with Johnston, *supra* note 57, at 348 & n.25. For further economic analysis of contract modification problems, see the pieces collected in Johnston, *supra* note 57, at 342 nn.9-10, and Jolls, *supra* note 15, at 204 n.2.

I believe a cautious approach to statutory revision is therefore in order. See Hillman, *Standards*, *supra* note 171, at 1522. The approach I suggest allows the parties to elect a regime that is arguably better by including NOM and NOW clauses. By making them an important part of their deal, the clauses should be enforceable even after the multi-factor inquiry discussed in the text.

253. See U.C.C., § 2-208(1) (1999); proposed U.C.C. § 1-304(a)(3), *supra* Part V.C.1, (acquiescence versus objection).

254. See Bernstein, *Merchant Law*, *supra* note 131, at 1813; Ben-Shahar, *supra* note 132, at 815.

255. See *supra* notes 112-19 and accompanying text.

256. See Newell, *supra* note 178, at 497-503; Hillman, *Standards*, *supra* note 171, at 1531 (suggesting bright-line rule); Hillman, *CISG*, *supra* note 174, at 463 (favoring common law rather than compromise), 452 (awaiting empirical research), 463 (favoring enforcement of NOM clauses as empirical research about parties' actual practices likely to be "costly" and "indeterminate"). I also believe the common-law reversion, whether by statute or judicial decision, would reinforce or exacerbate the current lack of uniformity in the law. Again, New York serves as an example: Despite the prevailing common-law rule invalidating NOM and NOW clauses, New York decided legislatively to take the opposite course.

In addition, Professor Hillman's preference for the common-law approach does not consider the current jurisdictional split over NOW clauses, which suggests that a hardline rule against NOW clauses would not gain uniform respect. See *id.* at 463; see also *supra* notes 189-205 and accompanying text (discussion of divided authority). Since uniformity is one of the chief goals of the U.C.C. (and this Article), see U.C.C. § 1-102(2)(c) (1999), I have not followed Professor Hillman here, despite his great learning and insight in this area. Moreover, Professor Hillman has himself pointed out the paternalism inherent in the

NOM and NOW clauses have too much value to be relegated, again, to invalidity. The legislation proposed here accords NOM and NOW clauses legal effect: An oral attempt at modification, rescission, or waiver fails if it violates a NOM or NOW clause.²⁵⁷ The arguments offered here are not limited to the realm of commercial transactions; NOM and NOW clauses should be recognized at common law as well.

In either realm, however, the effectiveness of NOM and NOW clauses should give way in cases where they would result in real injustice. The proposed legislation validates NOM and NOW clauses, but recognizes a limited estoppel exception for reasonable and material changes of position in good-faith reliance on an oral change.²⁵⁸ The statute would thus accommodate the concerns of the courts in such situations,²⁵⁹ but it would require a party seeking to avoid a NOM or NOW clause to carry a heavy burden. The proposed statute requires such a party to show that its reliance was reasonable, material, and in good faith, despite the party's agreement to the NOM or NOW clause. Each of these showings is fraught with litigation risk, and the party seeking to enforce the NOM or NOW clause can take some comfort from the knowledge that its opponent bears a heavy burden.

Some, no doubt, will call for NOM or NOW clauses that are impregnable to a reliance challenge. They may point to inevitable uncertainty, potential litigation,²⁶⁰ and the possible confusion that almost always results from compromise.²⁶¹ Uncertainty, however, is not fatal to the statute. Contracting parties, and businesses in particular, constantly deal in

common-law attitude. *See* Hillman, *CISG*, *supra* note 174, at 451 nn.20-21. Of course, a compromise could also be avoided by making NOM and NOW clauses ironclad, *see id.* at 463, but as should be apparent from the text, I believe that hope to be an illusion.

Finally, while I share Professor Hillman's dislike for the effects of compromise, sometimes it is unavoidable. Even he has not subscribed to the view that contract modifications themselves should never be enforced, period. Such an argument can plausibly be made, especially in economic terms, *see* Varouj A. Aivazian et al., *The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability*, 22 *OSGOODE HALL L.J.* 173, 190-94 (1984), but the argument is ultimately unconvincing. *See id.* at 212.

257. *See* Proposed U.C.C., § 1-304A(b), *supra* Part V.C.1.

258. *See id.*

259. *See, e.g.,* *Rosc v. Spa Realty Assocs.*, 366 N.E.2d 1279, 1283 (N.Y. 1977). *See supra* Part IV.B (on the history New York legislation validating NOM clauses).

260. The litigation risk is greater, too, since the compromise may prevent summary judgment or dismissal in some (but not all) cases. *See Greenberg v. Frey*, 593 N.Y.S.2d 217, 218 (App. Div. 1993). On the other hand, the U.C.C. regime is no better in that respect as the so-called "waiver" exception to NOM-clause enforceability also prevents summary disposition in some (but not all) cases. *Compare Moldex, Inc. v. Ogden Eng'g Corp.*, 652 F. Supp. 584, 590 (D. Conn. 1987), and *Stinnes Interoil, Inc. v. Apex Oil Co.*, 604 F. Supp. 978, 982 (S.D.N.Y. 1985), with *Green Constr. Co. v. First Indem. of Am. Ins. Co.*, 735 F. Supp. 1254, 1262 (D. N.J. 1990) (evidence of course of dealing to show waiver required to prevent summary judgment).

261. *See* Hillman, *CISG*, *supra* note 174, at 463.

uncertainty and risk. There is no business, and no person, that deals only in certainty. Under the proposed legislation, it is enough to know that a party who relies on an oral change despite a NOM or NOW clause does so at its peril, without certainty of compensation for its reliance. Moreover, the chance of compensation is further reduced if the parties attend to the factors for enforcement, discussed below. A party who takes care to point out, or get a separate signature for, a NOM clause will enjoy a significantly lower risk of unwanted changes to the contract. The proposed legislation thus accords the parties a real ability to agree to NOM and NOW clauses that are likely to be enforced in the proper circumstances.

At the same time, the proposal does not raise an illusionistic hope that NOM and NOW clauses will always enjoy judicial enforcement. As this Article has demonstrated, a party who advocates an ironclad rule of NOM and NOW clause enforcement believing it will avoid litigation risk is probably kidding itself. At best, such a party can hope for success—after litigation—in a few jurisdictions.²⁶² In others, the courts will find a way to compensate reasonable reliance.²⁶³ As this Article has argued, statutes will be applied in the courts and must account for the need of courts to justify their decisions on broadly acceptable grounds.²⁶⁴

Nevertheless, parties who wish to escape the statutory rules can agree to arbitrate their disputes before arbitrators who are more likely than courts to share the same views. A private arbitrator, whose sole power derives from the consent of the parties, does not have the same concerns as a court, which is a part of the government, and which wields state power and even force. In addition, arbitrators are not necessarily expected to apply the law.²⁶⁵ The proposed legislation leaves the arbitration option open, then, and by choosing arbitration parties may avoid the statutory compromise.²⁶⁶

Regardless of the tribunal, it should be reemphasized that under the proposed rule many claims of modification or waiver should fail if they

262. See *Hale v. Ford Motor Credit Corp.*, 374 So. 2d 849 (Ala. 1979); *General Grocer Co. v. Bachar*, 365 N.E.2d 1106 (Ill. App. Ct. 1977); *Van Bibber v. Norris*, 419 N.E.2d 115 (Ind. 1981); *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147 (E.D. Mo. 1978); *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 678 N.E.2d 519 (Ohio 1997); see also *Martinsville Nylon Employees Council Corp. v. NLRB*, 969 F.2d 1263 (D.C. Cir. 1992) (enforcing NOM clause in collective bargaining agreement).

263. See *supra* Part IV.B (New York experience) and notes 199-201 (reviewing cases refusing to honor NOW clauses).

264. See *supra* Part IV.B.

265. See *Bernstein, Opting Out*, *supra* note 136, at 115; *Ware*, *supra* note 136, at 704.

266. Cf. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 275 (1999) (arbitration would allow party to avoid majority biases about testamentary dispositions).

violate a NOM or NOW clause. Sometimes courts can determine with ease that there was no reliance at all, most obviously when the party asserting waiver or modification has done nothing. Another clear fact pattern, which is perhaps more common, involves a party that has done nothing it would not have done anyway. A debtor often claims, for instance, that the lender promised to forbear collection. Or the debtor may simply allege that the lender granted an extension of time to repay the loan. In many such cases, the debtor will be unable to show that it did anything in reliance on the alleged change that it would not have done anyway.²⁶⁷ In other cases, the debtor will not be able to prove any damages.

4. THE RELIANCE COMPROMISE AND ITS LIMITS: FACTORS TO CONSIDER

Some cases, of course, will prove difficult. The comments to the statute suggest factors to be considered in evaluating reliance under the estoppel exception of subsection (b). Such factors include whether the NOM or NOW clause was a negotiated term, separately signed, or otherwise part of the parties' bargain in fact; or if instead it was merely a term in a standard form, unknown to the parties.²⁶⁸ The basic question when considering this factor would be whether the relying party was aware of the NOM or NOW clause at the time of reliance. Reliance on an oral waiver or modification is considerably less likely to be reasonable if the party was aware of the clause.

Trade usages would thus be relevant, too, since they can make reliance on oral changes more or less common, and thus expected and reasonable. Industry practice may suggest that a relying party should be aware of the hazard of reliance on an oral change, even if the party was not aware of the NOM or NOW clause in question.²⁶⁹

267. See, e.g., *Lakeside Nat'l Bank v. Vinson Bros., Inc.*, 607 So. 2d 1009, 1011 (La. Ct. App. 1992); *Busby v. Parish Nat'l Bank*, 464 So. 2d 374, 378 (La. Ct. App. 1985); *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 381 (N.Y. 1919); *National Westminster Bank USA v. Vannier Group*, 554 N.Y.S.2d 482, 483-84 (App. Div. 1990) (purported reliance was staying in business instead of liquidating assets); see also *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1288 (7th Cir. 1986).

268. Although a court should take account of such a situation, the proposed section omits the separate signing requirement for a form supplied by a merchant to a nonmerchant. See U.C.C. § 2-209(2) (1999). Because of the range of factors to be considered, such a provision would just add a needless complication; already that clause of section 2-209(2) has raised issues of interpretation. See *Wisconsin Knife*, 781 F.2d at 1284. Compared to the limitations of remedies and the disclaimers of warranties that generally appear in such forms without any separate assent requirement, NOM and NOW clauses seem relatively innocuous.

269. See, e.g., *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 678 N.E.2d 519, 525 (Ohio 1997) (NOM clauses universal in industry).

Course of performance would be similarly relevant, but the relationship of the parties would be a consideration. The NOM or NOW clause may have been a term in a negotiated contract where both parties, unfamiliar with each other, knew of the term and wanted it included. Nevertheless, the parties in such a contract, if it is of long duration, may have grown to trust each other, with oral modifications or waivers on both sides increasingly frequent and increasingly reasonable.

The character of the parties themselves is also relevant in determining how reasonable the reliance is. A powerful or sophisticated party may be more likely to realize the risk of proceeding on an oral change without a written confirmation. Such a party is more likely to have procedures in place that recognize the desirability of putting changes in writing. Alternatively, a large organization may be particularly vulnerable to agency problems or communications breakdowns. Because the character of the parties is taken into account, whether a party is a merchant or a consumer, for example, will be recognized. On the other hand, a merchant that is a sole proprietorship will have a different character from a merchant that is a Fortune 500 company.²⁷⁰ Similarly, a consumer who has difficulty reading a contract²⁷¹ will have a different character from a consumer who is a sophisticated transactor.²⁷² The proposed legislation therefore avoids a rule that turns simply on the status of the parties. Instead, it explicitly recognizes factors that most lawyers know courts will take into account.²⁷³ This does not mean that the "little guy" will always win; courts are able to consider this issue without succumbing to undue sympathy.²⁷⁴ Moreover, because the proposed legislation recognizes the role of reliance, there is less need for a special consumer rule or for excessive judicial solicitude.

In the same vein, both the size of the transaction and the size of the contractual change also matter. Just as the circumstances surrounding the parties' original agreement to the NOM or NOW clause are important, so are the circumstances surrounding the waiver or modification. Reliance on a modification with precise terms is more reasonable than reliance on insubstantial talk or ambiguous conduct. Representations or assurances are also relevant. Formalities matter, as do agency issues: Was there a

270. See, e.g., *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 904-05 (Kan. 1976) (plaintiff operated a heating and air conditioning service business, apparently as a sole proprietorship, and sued the telephone monopoly).

271. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (considering lack of education).

272. See *Schneider v. Miller*, 597 N.E.2d 175, 178 (Ohio Ct. App. 1991) (practicing lawyer bought used car "as is").

273. See *White*, *supra* note 65, at 7 & n.2.

274. See *Wille*, 549 P.2d at 911 (plaintiff was able to understand form contract, which was held not unconscionable).

handshake²⁷⁵ between CEO's or a brief phone conversation between underlings? Proof will also come into play. An agreement with many witnesses or otherwise susceptible clear proof is more like to lead to reasonable reliance than ephemeral, unwitnessed talk.²⁷⁶ In other words, a court must inquire into all of the surrounding facts and circumstances of the contractual change.

These factors take into account Professor Hillman's idea of comparing the qualities of assent given to the NOM or NOW clause and to the modification or waiver.²⁷⁷ These criteria go a step further, however, because they take into account the parties' sophistication and their reasonable expectations, as well as their relationship with each other, trade usages, and the character of the transaction and the reliance. These factors broaden the inquiry, and thus are more likely to lead to an outcome that accords with the equities of the facts.

The estoppel exception of subsection (b) is founded on concerns for basic fairness, and it reflects the courts' treatment of similar legislation.²⁷⁸ Accordingly, estoppel is not subject to the contrary agreement of the parties. In the presence of the kind of reliance required by subsection (b), then, a party would be estopped from relying on a clause stating: "No attempt at rescission, modification, or waiver shall be binding, unless stated in a writing signed by both parties. This clause shall be effective without regard to reliance by either party, and any such reliance is hereby agreed to be unreasonable." Such a clause should be held to be "a term excluding modification, rescission, or waiver except by an authenticated record" and

275. See David Ibbetson, *From Property to Contract: The Transformation of Sale in the Middle Ages*, 13 J. LEGAL HIST. 1, 5 (1992).

276. It should help, for instance, if the parties reached an oral agreement in front of twenty bishops. See RESTATEMENT (SECOND) OF CONTRACTS § 139(2)(c) (1981) (promissory estoppel exception to statute of frauds partly dependent on corroborating "evidence of the making and terms of the promise"). *But cf.* Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911).

277. See Hillman, *CISG*, *supra* note 174, at 464-66; Hillman, *Standards*, *supra* note 171, at 1527-29.

278. In addition, the exception favors freedom of contract. The policy in this context, however, can cut both ways. Should we respect the parties' contract prohibiting oral change, or should we respect their most recent, oral contract? Compare Hillman, *Standards*, *supra* note 171, at 1526-27, with Jolls, *supra* note 15, at 208. Although the question can be answered either way, the paternalism inherent in refusing to enforce NOM and NOW clauses seems undeniable. See Hillman, *CISG*, *supra* note 174, at 451 n.21. See generally Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). For a more thorough discussion of "true paternalism," "self paternalism," and "economic efficiency," see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094, 1111-15 (1972), which arguably supports enforcement of NOM and NOW clauses that the parties have agreed to include in their contract.

thus unenforceable if the reliance test is met.²⁷⁹ A court may find, though, that reliance would be unreasonable by a party who agreed to such a clause—and especially by a party that was actually aware of the clause. To reach such a conclusion, the court would need to undertake the multi-factor inquiry into reasonableness.²⁸⁰ Nevertheless, a party who included such a clause in its contracts, and who took care to obtain a separate signature, could greatly increase the strength of the clause and the likelihood of winning a summary judgment.

5. SOME LIMITS ON THE RELIANCE EXCEPTION

The reliance principle of estoppel brings with it an important limitation. When the reliance interest ends, so does the estoppel. For example, a seller or a lender who has accepted ten late payments in a row without objection should not be allowed to repossess on the ground that the eleventh payment arrived as late as the others. If the seller or lender becomes exasperated, it can inform the other party that strict compliance will be required in the future.²⁸¹ At that point, any further reliance on the course of performance would likely be unreasonable, and the creditor may justly resort to any available remedy if the next payment is late (including, for an Article 9 lender, repossession).²⁸²

This limitation also means that a NOW clause will prevent an unwritten waiver from being effective if it applies only to the past, instead of to

279. Proposed U.C.C. § 1-304A(b), *supra* Part V.C.1. Courts should so hold regardless of the form that the NOW or NOM clause takes. A clause providing that “strict compliance with payment deadlines is required even if the creditor accepts late payments” is a NOW clause just as much as one that explicitly refers to waiver.

280. In comment form, the suggested factors for a court to consider would lack the force of statutory law. Nevertheless, the text of the proposed statute makes clear that reasonable reliance is possible, even by a party that has agreed to a NOM or a NOW clause. Since this much is apparent from the text, the only question will be how to determine what constitutes reasonable reliance. Courts are, of course, free to disregard the factors included in the comments, and no doubt judges will consider a number of relevant factors not mentioned here. The important point is that some inquiry is required into reasonableness; the proposed statutory text itself precludes a holding that reliance is per se unreasonable in the presence of a NOM or NOW clause.

281. For examples of cases requiring such a notice from a party who has been accepting late payments, see *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96, 100 (Fla. Dist. Ct. App. 1973); *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232, 236-37 (Minn. 1980); *Nevada Nat'l Bank v. Huff*, 582 P.2d 364, 369 (Nev. 1978).

282. This conclusion results from the “to the extent” language and the reasonableness and good faith requirements of proposed section 1-304A(b). Proposed subsection (c), which contains a similar rule regarding retraction of waivers, buttresses this result by analogy, but does not govern the outcome. Subsection (c) applies only in the absence of a clause governed by subsection (b).

executory portions of the contract. A waiver with respect to the past, sometimes called a "waiver after breach" or "election waiver,"²⁸³ cannot be relied upon: How could the nonwaiving party rely on a waiver that has not yet happened? Although Professor Murray argues to the contrary,²⁸⁴ a party cannot change its position in reliance on the waiver until the waiver occurs. Suppose in a single-delivery contract the buyer says, "It's okay that the wheat was a week late." Since the waiver is directed at the past, there cannot have been any relevant change in position in reliance on the waiver. No reliance is possible, and in the absence of reliance, the NOW clause will be enforced.²⁸⁵ This provision thus allows parties to plan their relations in a way that will prevent the unwitting waivers and anomalies that result from the law of election.²⁸⁶

Proposed section 1-304A(b) is drafted to foreclose a different argument for escape from a NOM or NOW clause. Some have suggested that exceptions to the statute of frauds writing requirements should also be exceptions to the application of a NOM or NOW clause.²⁸⁷ According to these arguments, special manufacture, part performance, or judicial admission²⁸⁸ would ipso facto defeat the NOM or NOW clause. The proposed legislation rejects this approach,²⁸⁹ on the basis that the estoppel provided in subsection (b) should be sufficient to prevent injustice. Expanding the range of exceptions would tip the balance too far away from the enforceability of NOM or NOW clauses.

The arguments of Professor Murray to the contrary seem unconvincing.²⁹⁰ The proposal in this Article therefore follows the majority of the PEB Study Group.²⁹¹ Professor Murray's position takes a narrow

283. See *supra* Part III.B.I & n.104.

284. See Murray, *supra* note 85, at 42.

285. In an installment contract, of course, there could be reliance with respect to future deliveries. For example, the seller may think it acceptable to deliver late in the future. This fact, however, does not affect the analysis in the text, since that reliance is directed toward an executory part of the contract. The same is true if the seller has a right to cure; the seller may rely on the waiver and thus fail to cure, but the curative action is in the future and is executory. The effect of the waiver on the executory part of the contract is subject to a different rule: in the presence of a NOW clause, a multi-factor inquiry is required, and the party relying bears a heavy burden. In the absence of such a clause, the test is considerably less onerous, since no contractual agreement makes the reliance appear unreasonable.

286. See *supra* notes 112-19 and accompanying text.

287. See Murray, *supra* note 85, at 31-33, 54. *But see* Eisler, *supra* note 4, at 419-20.

288. See U.C.C. § 2-201(3) (1999).

289. Proposed section 1-304A(b) starts, "[e]xcept as otherwise provided in this subsection." Proposed U.C.C. § 1-304A(b), *supra* Part V.C.1. The negation should be bolstered by the absence of an equivalent to section 2-209(3). See *supra* note 7.

290. For his views, see generally Murray, *supra* note 85, at 28-33.

291. See STUDY GROUP REPORT, *supra* note 7, at 74.

view of the purposes a NOM clause can serve, only accounting for the evidentiary piece. Aside from the evidentiary function, cautionary and channeling concerns must also be accommodated. There are problems of agency, and of ill-considered or casual remarks.²⁹² In addition to these classic contract functions, a corporation, for example, may want paper for record-keeping, auditing, planning, or due-diligence purposes.²⁹³ These concerns are not addressed by the exceptions to the statute of frauds. Most importantly, Professor Murray's argument ignores the most basic distinction between the statute of frauds and a NOM or NOW clause. The statute of frauds is immutable, and must be satisfied whether the parties want it or not. A NOM or NOW clause appears only if the parties agree to it.

An example suggested by Professor Eisler may help to clarify this point.²⁹⁴ NOM clauses, among other things, can serve to protect parties whose agents might otherwise give away too much. For instance, a salesman might orally agree to a modification, while the home office would not agree to it. A properly drafted NOM clause should protect the principal from the salesman's oral modification. If the attempt at modification were litigated, the principal would have to admit that the salesman had agreed to an oral modification. While this admission might defeat a statute of frauds defense,²⁹⁵ and would satisfy evidentiary concerns, it ought not to defeat the NOM clause that was bargained for in order to preclude such modifications.

6. RULES IN THE ABSENCE OF A NOM OR NOW CLAUSE

The effectiveness of NOM and NOW clauses is highlighted by a comparison to the situation without such a clause. In the absence of a NOM or NOW clause, without an applicable provision of the statute of frauds, the parties are free to effect their modifications, rescissions, or waivers in whatever manner they wish. Under subsection (c), a waiver is immediately effective. If a party does waive a condition, proposed section 1-304A(c) governs whether the waiver may be retracted. The standard is similar to but purposefully different from the reliance standard of subsection (b). Waivers

292. See Hillman, *Standards*, *supra* note 171, at 1522 ("inadvertent or unwise oral changes"); cf. *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1286 (7th Cir. 1986) (according more respect to parties' attempts to regulate modifications because of the abolition of the preexisting duty rule); Hillman, *CISG*, *supra* note 174, at 453 (same).

293. Llewellyn himself recognized the special needs businesses have for writings. See Karl N. Llewellyn, *The Karl Llewellyn Papers*, C.1.4, Markup draft entitled "On Transactions and Writing," at 1 (n.d.) (unpublished collection, available at the University of Chicago D'Angelo Law Library) ("needs and internal organization of business outfits"). The same document discusses the benefits and desirability of NOM clauses at 18-19.

294. See Eisler, *supra* note 4, at 419.

295. See U.C.C. § 2-201(3)(b) (1999).

that go to executed parts of the contract would be revocable if this Article's argument about election is accepted and the bracketed language is deleted. Otherwise, traditional (and current) election doctrine will be retained, and waivers that affect executed parts of the contract could not be revoked.²⁹⁶

While retraction is possible if the waiver affects an executory part of the contract, any reliance that is more than minimal prevents retraction. While the reference to "unjust" gives the court some flexibility, the relying party bears only a light burden under subsection (c), so long as it did not act unreasonably or in bad faith. There is no NOM or NOW clause to make reliance seem unreasonable. Under subsection (b), by contrast, the relying party bears a heavier burden of proof—and of uncertainty that its reliance will be protected.

Admittedly, the scheme proposed here is complex, but the complexity is engendered by the need to compromise between the competing policies of certainty, flexibility, and reliance. This difficulty is no surprise. As observed at the beginning of this Article, change is both antithetical to contract and inevitable in actuality. The reconciliation of these opposing concepts results in real costs on each side. Some reliance will fail to meet the test of section 1-304A(b). Certainty will be undermined because NOM and NOW clauses are not impregnable. There will be litigation costs. Compromises inevitably undermine precision and certainty.²⁹⁷ The proposal here attempts to minimize these costs and to distribute them rationally. The proposed rules also attempt to give judges the tools and the flexibility to decide difficult cases, instead of prompting judicial confusion or resistance, as an all-or-nothing approach would do. At times during the revision of the U.C.C., such rigid approaches have come to the fore. As this Article has shown, however, a failure to compromise will lead to resistance or circumvention in hard cases, with corresponding confusion in the case law. The supposed certainty or predictability afforded by a bright line is an illusion.

D. Confirmation by Comparison

In attempting to solve problems in the common law, it is often instructive to consult other solutions to the same problem. As Professors Speidel and Hillman have pointed out, the United Nations Convention on Contracts for the International Sale of Goods (CISG) does address the problem of NOM clauses, and in a more straightforward way than the

296. See *supra* notes 112-19 and accompanying text.

297. See, e.g., Hillman, *CISG*, *supra* note 174, at 458.

current U.C.C.²⁹⁸ After dispensing with the preexisting duty rule,²⁹⁹ in accord with the civil law and the U.C.C., article 29 of the CISG provides:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.³⁰⁰

The provision was reconfirmed more recently when UNIDROIT adopted a nearly identical provision as one of its Principles of International Commercial Contracts.³⁰¹

As is apparent from the text, the international provision follows an estoppel approach to NOM clauses. In keeping with the current state of the law, it ignores NOW clauses. Overall, however, the international rule is the same as the one proposed in this Article. In addition, the proposed statutory language, and especially the factors suggested for consideration, should fill out the CISG provision and make it considerably more definite. This expanded treatment should help answer some of the criticisms leveled against article 29.³⁰²

298. See generally *id.*; Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 N.W. J. INT'L L. & BUS. 165 (1995); John E. Murray, Jr., *The Emerging Article 2: The Latest Iteration*, 35 DUQ. L. REV. 533 (1997). For the view that the CISG is not an appropriate model for the U.C.C. revision, see Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 995 (1998). Professor Gabriel acknowledges, however, that the CISG is appropriate for "selective borrowing." *Id.* at 2014. Cf. Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1022-24 (1996) (U.C.C. and CISG interpretive modes too different to allow comparison).

299. See United Nations Convention on the International Sale of Goods art. 29(1) (Vienna 1980) [hereinafter CISG] ("A contract may be modified or terminated by the mere agreement of the parties.").

300. *Id.* art. 29(2).

301. See UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 2.18 (Rome 1994).

302. See Hillman, *Standards*, *supra* note 171, at 1526 (CISG art. 29(2) "leave[s] open the type of 'conduct' and 'reliance' that can bar the assertion of a NOM clause"); Hillman, *CISG*, *supra* note 174, at 460-63 (discussing same).

VI. OPPORTUNITIES OUTSIDE THE STATUTE

A. *Quasi-Contract*

Aside from the proposed statutory compromise, quasi-contract represents another middle road, and it does not depend on legislative action. Permitting a quasi-contract action for unjust enrichment where a modification fails because of a NOM clause is a natural solution; courts can compensate a relying party, despite a NOM or NOW clause, but only to the extent of the restitution interest. This solution is appealing in many senses, and the proposed legislation leaves open its potential. In particular, a court so inclined could find that a party failed to meet the relatively high standard that proposed section 1-304A(b) sets for abrogation of a NOM or NOW clause. The court could nevertheless allow a quasi-contractual action ("off the contract") for unjust enrichment. Such actions limit damages to the benefit actually conferred upon the other party. This restitution measure of damages is usually considerably less than the expectancy measure, which is used in ordinary contract actions. The use of the lowest measure of damages could serve as a forceful incentive to comply with NOM clauses.

Leoni v. Delany,³⁰³ a case from the statute of frauds, demonstrates the analysis. The *Leoni* court held that "the unenforceability of an otherwise valid contract . . . gives rise to the right of relief through the medium of a common count. The law contemplates that when one receives a benefit at the expense or detriment of another, he should compensate the latter to the extent of the reasonable value of the benefit received."³⁰⁴ Put in terms of the present context, a NOM clause is a defense to plaintiff's assertion of an oral modification and its breach by defendant. A court wishing to give a strong holding of validity for NOM clauses could uphold this defense, but to prevent unjust enrichment, allow the plaintiff to reply with a showing that it conferred a benefit on the defendant.³⁰⁵

Although this Article argues that a NOM or NOW clause differs in important respects from the public statute of frauds,³⁰⁶ such clauses are like the statute in that agreements that do not meet the formal requirements are unenforceable. Recovery according to the contract, or in the present context according to the oral modification, is therefore barred. Nevertheless, if one party has conferred a benefit upon the other, compensation is allowed to the extent of the value or benefit received by the other party.

303. 188 P.2d 765 (Cal. Dist. Ct. App. 1948).

304. *Id.* at 767.

305. See Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 571 n.30 (1973).

306. See *supra* notes 287-95 and accompanying text.

The NOM case for quasi-contract is even stronger than the case for the ordinary statute of frauds. In the ordinary case, no enforceable contract exists at all. Even if a benefit is conferred, the absence of an enforceable contract raises questions about whether the benefit was the result of a gift or intermeddling, neither of which is compensable in quasi-contract. In the case of a modification met by a NOM clause defense, there is at least one enforceable contract. The existence of the contract would tend to show that the benefit was conferred with the expectation of compensation and within a contractual or commercial relationship. Concerns about volunteers and intermeddlers should be correspondingly diminished.

B. Definition of Waiver

Like current law, the proposed legislation does not purport to define "waiver," despite the recommendation of the PEB Study Group.³⁰⁷ Proposed section 1-304A(c) notes that a waiver may be made by course of performance "or otherwise," allowing the courts to find waiver in accordance with the common law as well as under the Code. This Article offers a concrete definition of "waiver," distinguishing that doctrine from both "estoppel" and "modification."³⁰⁸

An attempt at definition in the statute, however, is unlikely to prove helpful. Waiver has been an essential tool for courts to maintain the flexibility of commercial contracts. A cabined statutory definition, even if one is possible, would not aid the courts in this enterprise, nor would it provide the parties with meaningfully greater certainty.³⁰⁹ For parties or courts that need to know more about waiver, research into the common law is not only unavoidable as a practical matter but also desirable from a policy standpoint. The play and development in the common law is inescapable. Any attempt to define waiver in a short space would be at best misleading and could be unduly constraining.

307. See STUDY GROUP REPORT, *supra* note 7, at 76.

308. See *supra* Part III.A.

309. "A voluntary relinquishment of a known right" is a misleading definition, as explained above. See *supra* notes 85-88 and accompanying text. What appears to be a longer attempt at definition in the STUDY GROUP REPORT, *supra* note 7, at 76 n.48, grew larger still in one version of Rev. U.C.C. § 2-210 n.2 (draft of Jan. 24, 1997), *supra* note 211, and this longer attempt suggests that the earlier effort left out some important points. Even in this large definition there appears to be inconsistency. See Rev. U.C.C. § 2A-302 drafting comment (draft of Jan. 28, 1997) (criticizing the Art. 2 draft because draft section 2-210(d) & n.(2) limit waiver to terms that are "not part of the agreed performance" at the same time that draft section 2-210(a) eliminates consideration for good faith modifications).

C. *Why Duress Doctrine Answers the Wrong Question*

Some scholarly judges and judicious scholars have suggested that contract modification issues ought to be answered with duress doctrine.³¹⁰ A few courts have accepted this invitation, but the results should sound a warning. Duress doctrine has become diluted because it is being forced to do a job for which it was not designed. Equally disturbing is the willingness of some courts, under the guise of duress doctrine, to condone contract modifications that were admittedly coerced.

Duress doctrine developed as a means to avoid otherwise valid contracts. A contract could be perfectly supported by consideration and yet fall to a duress claim. Since a successful claim of duress can void an otherwise valid contract, the requirements of duress have traditionally been set high. The earlier days of duress doctrine recall the different atmosphere in which the common law grew up. If a party could not show actual, physical compulsion, the party would have to show a very impressive threat. Duress by threat was restricted to fear of death or of mayhem.³¹¹ Mayhem required an injury resulting in permanent dismemberment or disablement; when disfigurement was added by statute it still did not make duress exactly an easy defense to mount.³¹² The elements were stringent, but such controls were thought necessary to protect the security of contracts.

The duress defense has been liberalized over the centuries,³¹³ but even today a mere threat is not enough. Under the relatively liberal *Restatement* standard, the threat must be "improper," and not just any threat of a breach of contract will do. Moreover, the party claiming duress must have had no

310. See, e.g., *United States v. Stump Home Specialties Mfg.*, 905 F.2d 1117, 1122 (7th Cir. 1990) (Posner, J.) (citing *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1286 (7th Cir. 1986)); FARNSWORTH, *CONTRACTS*, *supra* note 86, § 4.22, at 282-83 (U.C.C. requirements of good faith conflated with duress); Hillman, *Restatement*, *supra* note 29, at 702-03; Hillman, *Policing*, *supra* note 70, at 900-01; Richard Nathan, *Grappling with the Pre-Existing Duty Rule: A Proposal for a Statutory Amendment*, 23 AM. BUS. L.J. 509, 549 (1986) (proposing economic duress as the statutory test for modifications); Mather, *supra* note 65, at 615; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.2, at 111 (5th ed. 1998); cf. Johnston, *supra* note 57, at 340 ("duress doctrine collapses entirely into the good faith test"), 383-85; I WHITE & SUMMERS, *supra* note 4, § 1-6, at 35 (not distinguishing between contract modifications that should fail because of bad faith, unconscionability, or duress); Thornton E. Robison, *Enforcing Extorted Contract Modifications*, 68 IOWA L. REV. 699 (1983) (advocating enforcement of certain extorted modifications when the extortion cannot be deterred and is better than nonperformance).

311. See *Silsbee v. Webber*, 50 N.E. 555, 557 (Mass. 1898) (Knowlton, J., dissenting).

312. See BLACK'S LAW DICTIONARY 979 (6th ed. 1990).

313. The majority opinion in *Silsbee*, 50 N.E. at 555-57, written by Holmes himself, is a prime example.

reasonable alternative but to accede to the threat.³¹⁴ With the availability of temporary restraining orders and other injunctive relief, as well as police intervention, such showings cannot often be made. This is as it should be, for if contracts are to remain meaningfully secure, they cannot be undermined by defenses that are too tempting to assert and too easy to show.

Some courts, meanwhile, have shown a tougher attitude than the *Second Restatement*. A number of cases still see the world of contract as a rugged place where participants in the market must expect rough play. These courts even refuse to allow a party to escape a contract into which it has been coerced.³¹⁵ This strong stance on duress is well-justified when applied to ordinary contracts, which ought not to be undermined too readily.

The problem comes when the duress standard is imported into a realm of contract law where consideration is no longer relevant. For the reasons explained above, the preexisting duty rule is a poor tool for preventing baneful modifications, and the rule has been abolished for good faith modifications under the U.C.C., and to some extent, outside the U.C.C.³¹⁶ Yet even the preexisting duty rule works better than duress in at least some modification situations. In a typical "holdup," for example, one party refuses to perform unless paid more. This is a threat of breach, but it does not amount to duress, even under the liberal standard of the *Second Restatement*.³¹⁷ The preexisting duty rule would have invalidated the modification, and the application of the rule to such a holdup would have been considered one of the most important functions of contract law.³¹⁸ Yet the duress doctrine might uphold such a modification. Professor Eisler, for instance, reads section 2-209 "to permit the extortion of a modification if the extortionist had a legitimate commercial reason."³¹⁹

314. See RESTATEMENT (SECOND) OF CONTRACTS §§ 175 & cmt. b, 176 (1981).

315. See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 148 (6th Cir. 1983) (citing *Business Incentives, Inc. v. Sony Corp. of Am.*, 397 F. Supp. 63, 69 (S.D.N.Y. 1975) ("in context of economic duress, coercive conduct permissible in light of contractual right to terminate"); *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285, 1290 (8th Cir. 1977) ("good faith insistence upon a legal right [with coercive effect] which one believes he has usually is not duress, even if it turns out that that party is mistaken and, in fact, has no such right.")).

316. See U.C.C. § 2-209 cmt. b (1999). See also *supra* notes 27 and 71.

317. See *Johnston*, *supra* note 57, at 384 ("It is beyond dispute that the threat to breach if a contract is not modified is not itself the sort of improper threat required to find duress."). The breach is not an effort to exact an advantage under another contract, unlike *Austin Instrument, Inc. v. Lorai Corp.*, 272 N.E.2d 533, 534-35 (N.Y. 1971).

318. See *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1285 (7th Cir. 1986).

319. Eisler, *supra* note 4, at 410.

The Sixth Circuit takes a different view, but it is also willing to allow a certain amount of coercion. *Roth Steel Products v. Sharon Steel Corp.* involved a contract for the sale of the eponymous product.³²⁰ When the market began to shift, the seller refused to deliver any more steel to the buyer unless the buyer agreed to a price increase (to simplify the facts somewhat). The court opined that “although coercive conduct is evidence that a modification of a contract is sought in bad faith, that prima facie showing may be effectively rebutted by the party seeking to enforce the modification.”³²¹ Tellingly, the court cited duress cases for the proposition that coercion is not necessarily enough to invalidate a contract.³²² Although the court found that the seller had failed to rebut the presumption of bad faith, the implications of the case are still clear enough. Under the U.C.C. regime, a modification obtained through coercive conduct may well be valid.³²³

The implication of the Sixth Circuit opinion and the apparent view of Professor Eisler show why the duress standard is too restrictive when applied to a modification. Duress will invalidate any contract, but mere coercion is not enough to constitute duress. A party being pressured should step away or bear the consequences of the contract, supported by consideration, to which it agreed. Yet for the reasons explained in the first part of this Article, the consideration doctrine has rightly been rejected for judging modifications under the U.C.C., and it should be rejected outside the U.C.C. as well. If consideration is not relevant to the enforceability of a modification, however, a party ought to be able to challenge the modification under a more lenient standard than duress.

Contrary to the position of the *Restatement* drafters,³²⁴ the fact that the modification is incident to a preexisting bargain does not allow any hope for the coerced party. This fact is no more relevant than the rescission device used by some of the old cases. Both criteria apply equally to modifications “induced by unfair pressure”³²⁵ and to modifications made in good faith, all of which are auxiliary to preexisting exchanges.³²⁶ Although the preexisting contract may suggest that the relationship has social “utility,” as the

320. See *Roth Steel Prods.*, at 705 F.2d at 137.

321. 705 F.2d 134, 148 (6th Cir. 1983).

322. See *id.* (citing *Business Incentives*, 397 F. Supp. at 69; *Jamestown Farmers*, 552 F.2d at 1290).

323. See U.C.C. §§ 2-209(1), 2A-208(1) (1999).

324. See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a (1981) (“[A]djustments are ancillary to exchanges and have some of the same presumptive utility . . . [R]elation to a bargain tends to satisfy the cautionary and channeling functions of legal formalities.”).

325. *Id.* § 89 cmt. b.

326. See *id.* § 89 cmt. a.

Restatement says, the preexisting contract does nothing to protect against baneful modification.

At bottom, then, neither the duress standard, nor the preexisting duty rule, nor the *Second Restatement* does an adequate job of preventing coerced modifications. Moreover, importing the duress standard into contract modification would do harm in at least two ways. First, it would likely dilute the duress standard, and arguably has already done so.³²⁷ Consideration-supported contracts that ought to be valid would be voidable as the bar is lowered to take into account transactions lacking a bargain. Second, as *Roth Steel* shows, the bar is still too high for modifications without consideration, since at least some modifications that are avowedly coerced will be valid. Duress, in short, would operate as a doctrine that leads both to under- and over-enforcement—a doctrine no better than the one it replaces.³²⁸

D. A New Test: Coercion

Instead of following the path of duress or simply leaving the good-faith standard formless, this Article proposes a coercion standard for judging modifications. I hope it will appear in the comments to the revised U.C.C., and in any event, the courts should adopt it as a matter of common law. The proposed test for coercion, like the test for duress, has two prongs: (1) there must be a threat to deprive the victim of a legal right, and (2) the victim must act reasonably.³²⁹ That the test for coercion is less stringent than the test for duress should be readily apparent since duress requires (1) not just a threat but an improper threat and (2) that the victim have no reasonable alternative but to accede to the threat. Because coercion lowers the bar from the duress standard, coercion would be appropriate for modifications that may lack consideration. This proposed new standard has the benefit of separating the law of duress, which would continue to apply to contracts supported by consideration, from the modification context, which ought not to be hobbled with the preexisting duty rule or the strict duress standard. As a result, the problem of under- and over-enforcement, inherent under both the preexisting duty rule and the duress standard, would be reduced or eliminated.

327. See POSNER, *supra* note 310, § 4.7, at 126 (including monopolies as duress); Garvin, *supra* note 1, at 135-38 (arguing that demanding an adequate assurance of performance under U.C.C. section 2-609 “certainly looks like” or “might be looked at as an example of duress”).

328. For a different criticism of the duress standard in this context, see Johnston, *supra* note 57, at 383-85.

329. The remarkable clarity of ALAN WERTHEIMER, COERCION (1987) has helped me to think about the formulation of this test.

In justifying this new standard, it is appropriate first to notice what is lost with the abolition of the preexisting duty rule. Consideration, after all, serves important evidentiary, cautionary, and channeling or signaling functions.³³⁰ Where there is consideration, there is more likely to be evidence of the agreement. If a party is going to have to exchange something in order to get what it wants, it is more likely to be cautioned before entering the transaction. And the bargain serves to signal which agreements the law will enforce. Each aspect is similarly relevant in the context of modification. When there is some new element on both sides of the exchange, a modification is more likely to be proven with greater certainty. A party who has to give up something is more likely to pay due attention before agreeing to a change in the contract, and is more likely to realize that it will be held to the change.

If the preexisting duty rule is abolished, however, consideration will not serve the functions it has traditionally served in supporting contract modifications. And the cases and casebooks teach that alleged modifications are as troublesome as the original contract; if anything, the problem of coercion seems more prevalent in the modification context than in cases involving initial contracts.³³¹ Some added protection for the party resisting an allegation of a modification is necessary. This protection may be in two forms. One form of protection can come by way of the parties' own planning at the drafting stage. They can accord themselves greater insulation against change by including NOM and NOW clauses. As discussed above, the proposed legislation recognizes the value of those clauses, and they are given as much effect as is realistically possible. The second form of protection against change is the power of invalidation, held by the courts. Coercion is the standard suggested here for determining which alleged modifications to enforce, in the absence of stricter requirements that the parties impose on themselves.

Perhaps the primary theoretical objection to the new standard is that virtually all contracts can include some degree of compulsion.³³² Behind

330. See *supra* note 118.

331. As Professor Garvin has observed, several leading casebooks teach duress and modification together. See Garvin, *supra* note 1, at 135 n.293 (citing JOHN P. DAWSON ET AL., *CASES AND COMMENT ON CONTRACTS* 569-603 (6th ed. 1993); E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* 352-71 (5th ed. 1995); CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 786-807 (3d ed. 1993)).

332. The seminal work is perhaps Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). See also ROBERT L. HALE, *FREEDOM THROUGH LAW* 124 (1952) ("there is compulsion in all contracts"); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); I WHITE & SUMMERS, *supra* note 4, § 1-6; Mather, *supra* note 65, at 615 (difficult "to identify [what] forms of coercion are wrongful").

each bargain is the implicit statement, "If you don't give me what I want, I won't give you what you want."³³³ In common parlance and prevailing mores, however, this kind of so-called "compulsion" or "coercion" is not only tolerated but encouraged.³³⁴ The question becomes, then, what constitutes coercion.

The first prong of the test requires a threat to deprive the victim of a legal right. Suppose *A* makes a proposal to *B*, and a court must determine whether that proposal is a threat. This prong attempts to capture the difference between a *threat*, in which *A* proposes to make *B* worse off, and an *offer*, in which *A* proposes to make *B* better off. Then the question becomes, better or worse off than what? Several possible answers appear in the philosophical literature. The answer could be: Better or worse off than (a) where *B* could expect to be if *A* acted morally, (b) where *B* could expect to be if *A* acted in accordance with statistical likelihoods, and (c) where *B* could expect to be if *A* acted in accord with *B*'s subjective expectations.³³⁵ The philosophers do not agree on which baseline to use, but some baseline is necessary.³³⁶ The proposed test uses the baseline that is within the competence of the law: where *B* could expect to be if *A* does not violate *B*'s legal rights. If *A* proposes to deprive *B* of something to which *B* is legally entitled, then *A* has made a threat within the meaning of the coercion test. Note that such a threat is not necessarily an "improper threat" under the duress test, since many threats of breach are not improper but do threaten to deprive *B* of a contractual right.

Stated hypothetically, then, when *A* and *B* have no contract and *A* says, "I won't give you my wheat unless you give me \$2.50 a bushel for it," the statement says only that the speaker will keep what is his already. If the

333. The same thing, but the other way around, is expressed in ADAM SMITH, THE WEALTH OF NATIONS 118 (Penguin Books Ltd. 1982) (1776): "Whoever offers to another a bargain of any kind, proposes to do this: Give me that which I want, and you shall have this which you want . . ."

334. This Article takes an unabashedly pro-capitalist view. Professor Robert Nozick goes a fair way toward justifying the capitalist scheme against coercion claims, first with his influential chapter *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 447-53 (Sidney Morgenbesser et al. eds., 1969) [hereinafter Nozick, *Coercion*], and later in ANARCHY, STATE, AND UTOPIA 262-63 (1974). WERTHEIMER, *supra* note 329, at 251-55, also gives a cogent critique of the left-wing theories, Marxist and non-Marxist. The philosophers, however, address considerably broader questions than those discussed here; I simply assume a capitalist system of commercial and contractual transactions, more or less along the lines of the one we have in the United States (i.e., with a basic assumption of freedom of contract, but with occasional regulatory intervention). I also assume that all involved (courts, legislatures, contracting parties, lawyers) consider that system to be good.

335. See Nozick, *Coercion*, *supra* note 334, at 447; WERTHEIMER, *supra* note 329, at 204.

336. For a discussion of the problem and citations to the literature, see WERTHEIMER, *supra* note 329, at 204-14.

sailors, however, say "We will breach our employment contract with you unless you double our wages," they are threatening to take away something that the shipowner already has a right to. Because of the preexisting contract, the shipowner, in a sense, already owns the right to have the sailors work. If they threaten to take this right away, they are taking the shipowner's property.³³⁷ This is a kind of threat the law should not condone, and the first prong of the test is satisfied.

The second prong, that *B* act reasonably, must also be met if *B* is to escape the modification. Even if *A* has made a threat, *B* is not allowed unreasonably to string *A* along. Again, concrete examples may help illustrate. Recall the wheat sale, where *A* contracts to sell *B* wheat at \$2.50 a bushel on September 1. Suppose the price rises sharply and *A* threatens not to deliver unless *B* pays \$5 a bushel. In this holdup, *A* has made a threat, but *B* must act reasonably. Courts should find that *B* meets the second prong of the test where *B* agrees to the higher price because of commitments to its own customers, because of likely loss of good will from those customers for failed delivery (for which damages are likely uncertain and therefore unrecoverable in a suit against *A*), and because there are no available alternative suppliers (which is conceivable in the kind of conditions that cause prices to double).

This case is too easy, though; it may even meet the "no reasonable alternative" prong of the duress test. Suppose instead that a breach by *A* would not lead *B* to suffer an unquantifiable loss of good will. Now *B* has two reasonable alternatives: To sue on *A*'s breach and recover damages or to agree to pay \$5 to *A*. The second course may be more attractive, especially in view of the expense, delay, and risk inherent in litigation, but suit on the contract is nevertheless a reasonable alternative (at least in the eyes of the law). *B* cannot meet the duress test. If *B* agrees to the \$5 price, however, it can escape the coerced modification.

A matrix of cases (Figure 2) may help show more ways in which this distinction between duress and coercion matters, as well as how the proposed test predicts the results (if not the reasoning) of cases in the area.³³⁸ To keep the situations plausible, it is best to change the facts. "*A*, a large university food service, has purchased all of its produce from *B*, a

337. See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 295-96 (1975); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 966-67 (1982).

338. See e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 148 (6th Cir. 1983); *Business Incentives Co., Inc. v. Sony Corp. of Am.*, 397 F. Supp 63, 69 (S.D.N.Y. 1975).

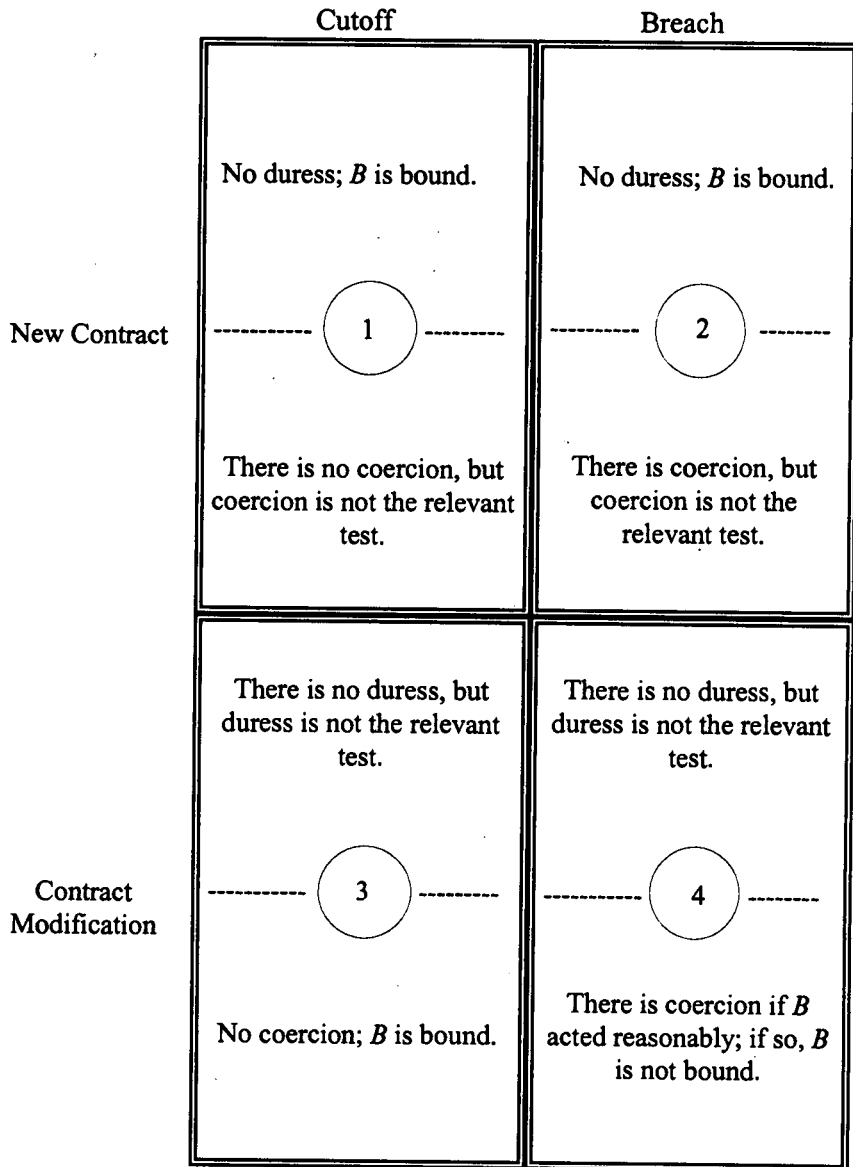


Figure 2.
Different applications of the coercion and duress tests.

produce wholesaler. *A* now accounts for fifty percent of *B*'s sales.³³⁹ *A* and *B* have worked under a series of six-month contracts. Suppose four separate scenarios occur in the fourth month of the current contract, and in each *A* makes a statement to which *B* agrees: (1) "We will not renew your contract for the next six months unless you cut your prices for the next contract by twenty percent." When *B* agrees, a new contract (as opposed to a modification) is formed, and the duress test applies. *A* has not made a threat, much less an improper one, and the duress test is not met. *B* will be bound by the contract. (2) "We will not pay you under the current contract, and you'll have to sue us to get your money unless you cut your prices for the next contract by twenty percent."³⁴⁰ Again, a new contract is formed when *B* agrees. Although *A* has made a threat as defined by the coercion test, a court should hold that the threat is not an improper one. Even if it is an improper threat, *B* has a reasonable alternative to acceding: *B* should sue. The test for duress is not met, although the test for coercion is.

In the next two scenarios a modification rather than a new contract is presented: (3) "We will not renew your contract unless you cut your prices for this contract by twenty percent." When *B* agrees, the current contract is arguably modified. The coercion test therefore determines whether *B* is bound. Because there is no threat to deprive *B* of a legal right (*B* has no right to the contract renewal), *B* is bound. (4) "We will not pay you under the current contract, and you'll have to sue us to get your money unless you'll take twenty percent less than we owe you." There is a threat; *A* is proposing to deprive *B* of a contractual right. It is probably not an improper threat, and *B* probably has the reasonable alternative of suing *A*. There is no duress, but because there is a threat, *B* may be able to make out a case of coercion if agreeing to the cut and then suing for the lacking twenty percent was reasonable. If *B* had a pressing need for the money, such a course would in fact be reasonable, and the coercion test would be met, although the duress test would not.

One other paradigm case must be addressed: The modification made in complete good faith despite a "threat" (or perhaps a "warning" or "prediction") of breach. Take the scenario in which bad weather would result in a late delivery of wheat. Seller and buyer agree amicably that a later delivery date is acceptable. Is the modification binding? This question highlights the importance of the second prong of the coercion test. The first prong, after all, may well be met: The seller may threaten, however unwillingly, not to deliver according to the buyer's contractual right. Although current law might protect the seller because of the unwilling

339. These facts and variations are taken from or suggested by WERTHEIMER, *supra* note 329, at 210, and his discussion of *Business Incentives*, *see id.* at 215 & n.40

340. *See, e.g., Haekley v. Headley*, 8 N.W. 511 (Mich. 1881).

nature of the “threat,” that approach is unattractive (for reasons discussed in the next paragraph). The second prong of the test works better; it requires the buyer to act reasonably. If the buyer (*B*) intends to stand on its right to timely delivery, it should say so rather than simply agreeing to the late delivery.³⁴¹ The fundamental question is whether *B* has acted reasonably in first assenting to *A*'s proposal and then seeking to have that assent nullified.

It is worth stating explicitly that the coercion test in some ways departs from the U.C.C. conception. The “legitimate commercial reason” or “objectively demonstrable reason” tests suggested under the current U.C.C. regime³⁴² or by some commentators³⁴³ is different; they concentrate on the motivation of the party seeking the modification. Such factors could be relevant to whether the modification was coerced,³⁴⁴ but they would not be dispositive. A party who suffers a cost increase has a strong incentive to modify the contract, and this change external to the contract gives a powerful incentive to seek a change to the contract itself. A manufacturer who suffers skyrocketing costs of raw materials would want to change the price of its manufactured goods, and it would have a legitimate commercial reason for seeking a modification of any fixed-price contract. The buyer, however, may resist, as is its right. That was the whole point of the fixed-price contract: to shift such risks to the seller. If the seller then extorts a modification through behavior that does not amount to duress, but which results in coercion—as through a holdup, and as happened in *Roth Steel*³⁴⁵—the modification should not be enforced.³⁴⁶ This focus is more congruent with the basis for contractual liability, which centers on the assent of the party being charged.³⁴⁷

341. See *United States ex rel. Crane Co. v. Progressive Enters., Inc.*, 418 F. Supp. 662, 664 (E.D. Va. 1976) (stating that if buyer wanted to insist on pre-modification price, it should have said so).

342. See U.C.C. § 2-209 cmt. 2 (1999).

343. See Johnston, *supra* note 57, at 374-75.

344. For example, when *A* makes a “threat” unwillingly, it may be open to finding an accommodation for *B* or even to perform as required if *B* makes clear its insistence on the contract. In such situations, *B* does not act reasonably by agreeing to the modification, and the second prong of the coercion test is not satisfied.

345. 705 F.2d 134, 148 (6th Cir. 1983).

346. See *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1285 (7th Cir. 1986).

347. An analogy to the defense of misrepresentation buttresses this point. Although fraudulent intent may be relevant to a tort action for deceit, a perfectly innocent misrepresentation gives rise to a contractual defense. So far as the misled party is concerned, the motivations of the other party matter little. What matters is that the consenting party was misled. See generally *RESTATEMENT (SECOND) OF CONTRACTS* §§ 162(2), 164(1) (1981); *RESTATEMENT OF CONTRACTS* §§ 470, 476 (1932). For a collection of other relevant cases, see *Halpert v. Rosenthal*, 267 A.2d 730 (R.I. 1970).

The chief benefit of the coercion standard is that it already underlies judicial decision-making in this context. As explained at the outset, one of the primary reasons for making a contract is to prevent change. The courts—and contract law—are therefore skeptical of any changes, but are willing to honor them if they are not coerced. Coercion is what the opinions speak of already,³⁴⁸ but it is part of some other analysis. Even the proponents of the duress test cannot avoid the coercion standard.³⁴⁹ The *Second Restatement* itself uses the coercion standard, even though it is relegated to comments.³⁵⁰

The courts should focus on the relevant issue—coercion—as the test itself, instead of letting it rest in a supporting role behind another inquiry. The good-faith standard is included in proposed section 1-304A(a) because of this Author's fundamental wariness of innovation by statute.³⁵¹ At least the ineluctably vague reference to good faith should be transparent enough to invite the courts to apply a more meaningful test. Coercion is that test. Not only is coercion inconsistent with good faith; coercion is central to everyone's thinking already. The courts should accept the invitation, both in cases governed by the U.C.C. and in those governed by the common law. This Article proposes a simple two-prong test that should be easy to apply.³⁵² Given the eagerness with which the courts embraced the criteria

348. See, e.g., *United States v. Stump Home Specialties Mfg.*, 905 F.2d 1117, 1122 (7th Cir. 1990) (Posner, J.); *Palmer v. Safe Auto Sales, Inc.*, 452 N.Y.S.2d 995, 998 (Civ. Ct. 1982); *Roth Steel*, 705 F.2d at 148; *Angel v. Murray*, 322 A.2d 630, 636 (R.I. 1974); *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 102 (9th Cir. 1902); see also *Wisconsin Knife*, 781 F.2d at 1285; *Lowey v. Watt*, 684 F.2d 957, 969 (D.C. Cir. 1982). The "compulsion" element in the English law of duress is similar. See Roger Halson, *Opportunism, Economic Duress and Contractual Modifications*, 107 L.Q. REV. 649, 664-69 (1991).

349. See Hillman, *U.C.C.*, *supra* note 70, at 375 ("ensure that voluntary modifications are enforced and that coerced ones are not enforced"); Hillman, *Restatement*, *supra* note 29, at 681 ("fundamental goal of contract modification law is to promote enforcement of freely-made alterations of existing contractual arrangements and to deny enforcement of coerced modifications"); cf. Hillman, *Restatement*, *supra* note 29, at 703 ("[d]uress is a superior vehicle for analyzing the voluntariness of a modification").

350. See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981).

351. See, for example, Sir Matthew Hale's warning against the "over-busy" revision of the law. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 243 (3d ed. 1990) (citing 1 LAW TRACTS 249 (F. Hargrave ed. 1787)). See also Overby, *supra* note 214, at 645 (quoting Erasmus' exhortation), as well as Professor Overby's own defense of tradition in Code drafting, see *id. passim*.

352. Thankfully two problems that have persisted in the philosophical literature can be ignored in this context. First, the proposed test does not attempt to gauge the degree of coercion or the amount of pressure. Measurement would be difficult at best, and it is enough to say that *A* coerced *B*'s assent to a degree that can survive dismissal for being de minimis or immaterial. True, duress requires a greater degree of coercion, but it has its own test. The law can competently apply legalistic, two-part tests, with each part speaking in terms familiar to the law (e.g., legal rights, reasonableness). A court need not answer questions like, "How

in the comments to section 2-209, judges should pick up the coercion test just as readily.

VII. CONCLUSIONS

The most fundamental purposes of contract law are implicated in the struggle with change. The whole point of making a contract, and the primary purpose of contract law, is to tie the parties to their deal. The classic *vinculum juris*, or "legal knot," of centuries of common and civil law is a metaphorical attempt to capture this conception. Accommodating change will necessarily prove insusceptible of a simple solution. In the confusion of competing voices for certainty and flexibility, for freedom of contract and reliance, each clamors for recognition. These seemingly irreconcilable concerns have led some to call for drafters who will "swallow hard and then decide simply" for a rule favoring one interest or another.³⁵³

This Article has taken another approach. Rather than ignore or reject the competing policies, compromise is required. Choosing one rule or the other is too likely to lead to wrong results too much of the time. Judges will resist unfair outcomes, and as hard facts make bad law, confusion would result. At the same time, benefits would be lost from the alternative solutions that an all-or-nothing rule would exclude.

The compromise struck here attempts to be as realistic as possible, not only about contemporary practices, but about the needs of the courts. Premised on the notion gleaned from case law that coerced changes are the ones that ought not to be permitted, this Article proposes a straightforward test of coercion for contract modifications. At the same time, the proposed legislation permits the parties to lock in their deal more securely with NOM and NOW clauses, while giving courts a key to the lock in order to protect reasonable, material, good-faith reliance.

coerced was B?"

Second, I do not undertake to discuss whether a coerced action is voluntary or free. Some notions of coercion, often labeled "Aristotelian," focus on whether the will of the party was overborne. Such ideas accord with old-fashioned or Continental will theory in contract law, but they are less important under the modern objective theory of assent. See generally RESTATEMENT (SECOND) OF CONTRACTS § 2 & cmt. b (1981); P.S. Atiyah, *Economic Duress and the "Overborne Will,"* 98 L.Q. REV. 197 (1982). The importance of the overborne will persists to a greater degree in criminal law, perhaps, but the concerns there are different. See generally John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275 (1999), which includes recent and extensive discussions of the philosophical literature. The test for coercion that I have offered, which is influenced by the writings of Professors Nozick and Wertheimer, admittedly raises the issue of voluntariness, see WERTHEIMER, *supra* note 329, at 287-90, but I do not believe the larger philosophical question needs to be answered here.

353. Hillman, *CISG*, *supra* note 174, at 463.

This compromise, like all compromises, has costs. But a realistic regard for the fact situation is a more important constituent of security of transactions and predictability of decisions, compared to a bright-line rule that will prove troublesome in the courts. The proposed legislation therefore rejects a rule that would make NOM and NOW clauses impregnable. The story of the New York legislation, with a history twice as long as that of the U.C.C., should teach this lesson. This Article has tried to take into account not only that lesson, but also the disparate doctrines, and their related problems, that all revolve around the issue of contractual change. This explanation, unified under the rubric of change, should encourage legislatures to adopt the proposed statutory sections. It should also help persuade the courts to follow not only the statute but also the coercion standard, both in the realm of the Code and as a matter of common law. Simpler solutions, while appealing, have only the deceptive attraction of an illusion.