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Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise

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INTRODUCTION

One of the most notorious rules of traditional contract law holds, in its original form, that an offer of a unilateral contract may be accepted only by completed performance, and that consequently the offeror may revoke his proposal as long as the offeree has not done all that is required of her. Many contracts profes-

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sors have delighted in illustrating this rule as follows. The professor offers to pay a student a sum of money if she rides a bicycle across the Brooklyn Bridge or shinnies up a greased flagpole. The student eagerly commences. Just before the student reaches her goal, the professor mysteriously appears and shouts "I revoke."[1]

Under traditional contract law, the professor has made an offer of a unilateral contract. As with bilateral contracts, a binding agreement arises only upon acceptance. In contrast to bilateral contracts, however, the student cannot accept by saying "I accept," but only by completing performance of the required act, that is by cycling across the entire length of the bridge or reaching the top of the flagpole. Because she has not finished performance, she did not accept the offer. The professor is thus free to revoke the proposed contract and owes her nothing.

Particularly around the first half of this century, the traditional rule was widely labeled unjust, even if it might have some appeal as a matter of logic. In Part I of this Article, I summarize the origins of the rule, the criticisms leveled against it, and the solutions proposed to mitigate its harsh effects. In contrast to the original rule, the modern rule holds that once an offeree begins to perform a unilateral contract, the offeror can no longer revoke. Nonetheless, the offeree usually has no right to damages until she has completed performance. In effect, the modern rule maintains the traditional notion that a contract is not formed until the offeree has accepted by finishing the requested performance. The modern rule does, however, protect those who rely on the offer before acceptance.

Unfortunately, the modern approach has fashioned a more just remedy at the expense of logic. Because no contract arises before acceptance of a unilateral offer, the offeror remains unbound and—at least in theory—must logically be free to revoke until the offeree accepts by completing performance. On the other hand, the modern rule recognizes the injustice of allowing such free

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[1] *See, e.g.*, K. N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 787 n.9 (1939); I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136-37 (1916). Another classic case involves an offeror who promises $25 in return for the offeree's moving a heavy safe to an office in another building and then revokes when the offeree has carried the safe to the door of that building. Clarence D. Ashley, *Offers Calling for a Consideration Other than a Counter Promise*, 23 HARV. L. REV. 159, 160-61 (1910).

revocability. It therefore limits the right to revoke even though that right is inherent in the traditional view that the offeror can demand that the offeree accept only by completing performance.[2] Perhaps because the harshness of the traditional remedy (or lack of one) has been tempered, little attention has been paid to the ensuing dissonance between the theory regarding how unilateral contracts are formed and the remedial rule that prevents revocation after an offeree begins performance.

This Article attempts to articulate an approach to unilateral contracts that does not sacrifice logic on the altar of justice. In large measure, it is possible to present such a theory now because during the second half of this century, linguists and philosophers have made great strides in understanding speech acts such as offer, acceptance, and especially promise. This Article therefore strives not only to address the specific issue of unilateral contracts, but also to demonstrate how progress in understanding speech acts like offering and promising can contribute to an analysis of what might appear to be a strictly legal problem.

Part I reviews the historical discussion about the formation of unilateral contracts and describes the prevailing present view. Part II then examines the speech acts of offer, acceptance, and promise. A promise is quite similar to the reciprocal speech acts of offer and acceptance in that with both, when successfully performed, speakers *commit* themselves to carrying out a specified future act. The critical distinction between promise and offer/acceptance is that an offer commits the speaker only after it has been accepted. For this reason, offer and acceptance are sometimes called *cooperative* speech acts; neither by itself can create commitment. On the other hand, a promise does not need acceptance and binds the speaker from the moment it is made.

Part III applies this crucial distinction to unilateral contracts. The main point of this Article is that both the traditional as well as the modern theory of unilateral contracts fail to sufficiently dis-

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[2] Williston maintained that as a theoretical matter, the offeror should be able to revoke a unilateral offer at any time before acceptance by completed performance, but he advocated restricting this power because of the "great injustice" that may arise if revocation is allowed. CONTRACTS TREATISE NO. 1(A) SUPPORTING RESTATEMENT NO. 1 § 68, at 132 (1925) (Samuel Williston rep.), *cited in* E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1453 n.251 (1987). *See also* 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 5.13, at 687 (Richard A. Lord ed., 4th ed. 1990).

tinguish the cooperative or bilateral speech acts of offer and acceptance from the speech act of promise, which is effectuated unilaterally. A unilateral contract is not an offer that commits the speaker only after acceptance, but is rather a promise that, like all others, need not be accepted at all. Like other promises, a so-called "offer" of a unilateral contract commits its maker immediately.

The current view of unilateral contracts, as embodied in the *Second Restatement of Contracts*, thus rests on a theoretical misconception of how unilateral contracts are formed. The *Restatement* has abandoned the term "unilateral contract" and expresses doubts regarding the utility of the distinction between unilateral and bilateral agreements itself.[3] In reality, however, that distinction remains significant, albeit for different reasons than traditionally assumed. Unilateral contracts are distinct from bilateral agreements in that the former arise by a promise, while the latter require offer and acceptance. Although the unilateral "offeror" does not oblige himself to act until the "offeree" has completed her performance, he nonetheless commits himself to performance—subject to the condition precedent—from the moment he makes the promise. For this reason we should abandon the adage that contracts arise through that familiar duo of offer and acceptance. What is needed to form a legally enforceable agreement is simply commitment.[4]

The Article concludes in Part IV by examining the consequences of this new view of unilateral contracts for awarding damages. As noted, the *Restatement* at least nominally adheres to the traditional rule that unilateral offers can only be accepted by full performance. The *Restatement*, however, mitigates the harshness of that rule by providing for the creation of an option contract after the offeree tenders or begins performance, or tenders the beginning of it.[5] I argue that this remedy does not take into account the diverse situations in which unilateral contracts are actually used. I therefore propose that repudiation or breach of a unilateral contract, which includes repudiation or attempted revocation at any time after the promise is made, should presumptively entitle the injured party to expectation damages, as with

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[3] RESTATEMENT (SECOND) OF CONTRACTS § 1 reporter's note, cmt. f (1979).

[4] Of course, consideration is also required traditionally. This is discussed *infra* in section III.C.

[5] RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979).

bilateral agreements. Nonetheless, as a general principle of contract law, courts often use a lesser measure when damages are uncertain or speculative, as damages often are with unilateral contracts before full performance. These principles are applied to a number of different types of unilateral agreements, including employee benefit cases, commission agreements, and reward offers. Because of this new view of unilateral contracts, the distinct remedy of *Restatement* section 45 is not necessary, and indeed, more equitable results can be achieved via generally applicable rules of contract law.

Despite the emphasis in this Article on the nature of promising, I do not take any position on its relation to the philosophical basis of contract law.[6] I am instead concerned with the practical effects of promises and related acts of commitment. Given a society in which people expect others to carry out their commitments, those to whom the commitments are made can usually rely on them and will likely be injured if the promises are not performed. Thus, promising is important to contract law regardless of whether the law enforces contracts because of the promisor's self-imposed moral obligation or because of the injury that a breach causes the promisee.

I. An Overview of the History of Unilateral Contracts

A. The Revocability Problem

Although contracts have a venerable history in the common law, the notion that they arise by means of offer and acceptance is comparatively recent. According to Simpson, the doctrine of offer and acceptance was adopted from civil law and superimposed on the English common law as late as the nineteenth century.[7]

In the United States, Christopher Columbus Langdell enthusiastically embraced offer and acceptance analysis, applying it not only to bilateral, but also to unilateral contracts.[8] But although in

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[6] For a recent discussion of this issue, see Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489 (1989), and the sources cited therein.

[7] A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 Law Q. Rev. 247, 258 (1975).

[8] 1 Samuel Williston, A Treatise on the Law of Contracts § 13, at 19 n.3 (Samuel Williston & George J. Thompson eds., rev. ed. 1936).

Karl Llewellyn suggested that Langdell applied the doctrine to unilateral

his view both types of contract arose by offer and acceptance, Langdell stressed the distinction between them, noting that the "consequences of a contract's being unilateral or bilateral are many and important."[9] A bilateral contract arises when someone makes an offer promising to perform a particular task, subject to the offeree *promising* to do something in return. The offeree's return promise is an acceptance of the offer and cuts off the offeror's right to revoke. In contrast, the unilateral offeror promises to do something in exchange for an *act* by the offeree. Langdell insisted that a unilateral offeree, who made no promise, could accept a unilateral contract only by fully performing the requested act, and that logically the offeror was free to revoke until that time.[10]

At the beginning of this century there raged a debate in the law reviews on the justice of Langdell's rule.[11] Wormser initially defended the position that a unilateral contract was freely revocable until the offeree had completed performance.[12] Other con-

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contracts in order to create symmetry with bilateral contracts. K. N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 228 (1941).

Teeven has observed that "[t]he doctrine of offer and acceptance signalled a shift from the unilateral notion of a promise supported by consideration to the bilateral concept of whether, under the consensus or 'will theory,' the parties had a concurrence of intention. Once a contract was viewed as a bilateral consensus formed by an offer and acceptance, attention was drawn to the anomaly of the modern version of the unilateral contract, and there was a fitful attempt to rationalize it under the doctrine of offer and acceptance. This analysis was made first in reward cases and spread to other cases wherein acceptance, without notice, was inferred from the performance of the consideration." KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN LAW OF CONTRACT 179 (1990). In support of his thesis, Teeven refers to First Nat'l Bank v. Watkins, 154 Mass. 385, 387 (1891); Williams v. Carwardine, 110 Eng. Rep. 590 (1833); Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893). TEEVEN, *supra*, at 204 n.22.

9 C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 187, at 253 (2d ed. 1880).

10 *Id.* § 4, at 3-5, § 183, at 248-49.

11 The debate is summarized in Farnsworth, *supra* note 2, at 1407-20, 1424-29. The courts also wrestled with this question. For example, the Supreme Court of California decided that after part performance of a unilateral contract, it became a *bilateral* contract. Los Angeles Traction Co. v. Wilshire, 67 P. 1086 (Cal. 1902).

12 Wormser, *supra* note 1. However, Wormser retracted his position in a subsequent article. I. Maurice Wormser, Book Review, 3 J. LEGAL EDUC. 145, 146 (1950).

tracts scholars described the result of the traditional rule as "stupidly harsh."[13] In attempting to protect the offeree from the harsh effects of the traditional rule, contracts scholars have proposed alternative solutions to the problem of unilateral contracts. Ashley, for example, suggested that after the offeree had relied on the unilateral offer, an estoppel might arise to prevent revocation.[14] McGovney proposed a more specific means of reaching a similar result. He suggested that a unilateral offeror be viewed as making two offers, the "principal" offer and a "collateral" offer, to keep the principal offer open for a reasonable time if the offeree began work at once. Thus, by beginning performance, the offeree accepted the collateral offer and the offeror could no longer revoke.[15] Corbin took a more direct approach but also reached a similar conclusion. Under his proposal, when an offer can be accepted "only by performing a series of acts requiring an appreciable length of time and effort or expense, such offer shall be irrevocable after the offeree has begun the performance of the requested acts, unless the offeror expressly reserved the power of revocation."[16] By the mid 1920s, Williston, who previously was sympathetic to the Langdell position, jumped ship, and with Corbin's assistance, essentially adapted the McGovney proposal to create what ultimately became section 45 of the first *Restatement of Contracts*.[17]

Section 45 of the original *Restatement of Contracts* provided in essence that if an offer of a unilateral contract is made, and the offeree partly performs, the offeror is bound to the contract. The offeror's duty to perform, however, is conditional on the full performance being given or tendered within the time stated in the offer or, if no time is stated in the offer, within a reasonable time. The solution adopted in *Restatement* section 45 formed the basis for the similar language in the *Restatement (Second) of Contracts*.[18]

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[13] L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L. REV. 373, 410 (1937).

[14] Ashley, *supra* note 1, at 163-67.

[15] D. O. McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 658-60 (1914).

[16] Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 195 (1917); *see also* Henry W. Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94, 96-97 (1921) (stating that courts treat unilateral contracts as partially executory contracts).

[17] Farnsworth, *supra* note 2, at 1453-54.

[18] (1) Where an offer invites an offeree to accept by rendering a

That is largely where the matter rests.

B. The Unilateral/Bilateral Distinction

During the debate leading to the adoption of *Restatement* section 45, no one seriously challenged the classification of contracts into unilateral and bilateral. In fact, the first *Restatement* endorsed this distinction.[19] So did Williston and Corbin.[20] In the late 1930s, however, the legal realist Karl Llewellyn mounted a full-scale attack on the classification itself.[21]

Llewellyn's premise was that the theory of the initiation of business agreements was out of touch with the reality of the cases and therefore needed to be revised.[22] He emphasized that use of the

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

RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979).

[19] "A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee." RESTATEMENT OF CONTRACTS § 12 (1932).

[20] Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 553 (1983).

Although there was general agreement at this time regarding the category of unilateral contracts, there were differences of opinion regarding the meaning of the term. Corbin, for example, applied the term "unilateral contract" to a promise or group of promises made by one of the contracting parties only, and usually—though not always—assented to by the other. He apparently included promises that are enforceable despite lack of consideration and acceptance, such as a charitable subscription promise. 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 21, at 52 & n.59 (1963). The first *Restatement of Contracts* used the term in reference to any contract in which no promisor receives a promise as consideration for his promise. RESTATEMENT OF CONTRACTS § 12 (1932). This definition encompassed several types of transactions: (1) promises that do not contemplate a bargain, such as a promise under seal to make a gift; (2) certain option contracts, such as an option under seal; and (3) a bargain completed on one side, such as a loan which is to be repaid. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 reporter's note, cmt. f (1979). Williston stressed that the term unilateral *contract* should be limited to cases where a legal obligation has been created, but where nonetheless only one party has promised. 1 WILLISTON, *supra* note 2, § 12, at 23-26.

[21] K. N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance, I*, 48 YALE L.J. 1 (1938); Llewellyn, *supra* note 1.

[22] Llewellyn, *supra* note 21, at 1.

terms "offer" and "acceptance" does not decide the question. "The issue is, have the parties, for the parties' purposes, agreed on what is to the parties a closed deal?"[23] Llewellyn concluded that it was time to reassess the "great dichotomy in the orthodox doctrine of Offer and Acceptance . . . between bilateral and unilateral contract."[24]

Llewellyn was troubled by the radically differing meanings of the critical term "acceptance," depending on whether it was used in a unilateral or a bilateral context. He observed that bilateral acceptance bars an offeror from revoking before he has received "an iota" of the ultimate substance of his bargain. Acceptance of a unilateral offer, on the other hand, refers to obligating an offeror only after he has received the "uttermost jot" of everything bargained for.[25]

To Llewellyn, the decisive question was whether there has been an initiation of a business deal, not whether a contract is unilateral or bilateral. Llewellyn concluded that the "great dichotomy of the first year classroom," the distinction between bilateral and unilateral contracts, should be abolished.[26] The unilateral contract is at best a "curiosity" that belongs in the "freak-tent."[27] In its place, Llewellyn advocated a "common horse sense approach": a definite offer can be accepted in any reasonable way of expressing agreement unless the offeror specifically requires otherwise.[28] Real people outside of lunatic asylums do not offer a promise for a promise. What businessmen offer is an assurance that after a deal is "on," it will not be withdrawn, and that performance will occur in due course.[29] Courts likewise require assurance that the deal is on. Courts should not look for acts in contrast to promises, or promises in contrast to acts. It is their business to look for any overt expression of agreement.[30]

The orthodox conception that revocation of unilateral contracts is possible until full performance was not only "unjust and inequitable," according to Llewellyn, but was "so *improbable* as to

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23 *Id.* at 30.

24 *See id.* at 32.

25 *Id.* at 33. Llewellyn's notion of acceptance is discussed in greater detail *infra* at III.A.1.

26 Llewellyn, *supra* note 21, at 36.

27 *Id.*

28 Llewellyn, *supra* note 1, at 788-89.

29 *Id.* at 789-90.

30 *Id.* at 803.

scandalize good sense."[31] He admitted that some offers did not contemplate making an agreement-based contract, and that for those offers, active agreement without performance is not enough to work acceptance-in-law. In such cases, the issue focuses on when the offeree has placed enough reasonable reliance on the promise to call for enforcement.[32]

Llewellyn's point, in other words, was that most offers can simply be accepted by an expression of agreement, including beginning performance, and that such an expression will close the deal and prevent revocation. When the offeror does not want a promise from the offeree, the offeree's reliance will at some point bar revocation. Llewellyn advocated banishing the unilateral/bilateral dichotomy in order to stress that in the initiation of business deals, there is but one critical issue: when is the deal on.

Some twenty years later, the contracts scholar Samuel Stoljar reached comparable conclusions.[33] Stoljar distinguished between an expectation-bargain, which comes about through offer and acceptance, and a reliance-bargain, which does not require a return promise or express acceptance.[34] In a reliance-bargain, a promisee who relies on a promise by beginning performance accepts the promise. To the extent that the promisee's reliance is protected, the promise becomes irrevocable and enforceable, and a future bargain is formed by offer and acceptance.[35] Like Llewellyn, Stoljar concluded that "the distinction between bilateral and unilateral contracts is false."[36]

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[31] *Id.* at 805-06, 816.

[32] *Id.* at 816-18.

[33] Samuel J. Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 YALE L.J. 515 (1955).

[34] *Id.* at 520.

[35] *Id.* at 522-23. Pollock likewise suggested that beginning performance should count as acceptance. Sir Frederick Pollock, Book Review, 28 LAW Q. REV. 100, 101 (1912).

[36] Stoljar, *supra* note 33, at 534. Stoljar argued that an offeror does not offer a bilateral or unilateral contract; all he does is make a promise. Once he does this, he becomes bound for its direct consequences, because the law protects the promisee's expectation or reliance. *Id.* at 524.

This approach also entails that a promisee can be bound even without having promised to perform. Suppose that a promisor asks a promisee to build a house for a particular price, and the promisee makes no promise but simply begins building, only to abandon performance later, to the damage of the promisor. In an orthodox unilateral analysis, the promisee made no promise and cannot be liable for any damages. Stoljar's solution was that when the promisee accepts the offer by commencing performance, the

Largely in response to these criticisms, the *Second Restatement of Contracts* abandons the term "unilateral contract" and expresses doubts regarding the value of the distinction between unilateral and bilateral agreements.[37] But the *Restatement* retains the dichotomy implicitly. In particular, section 50 provides that an offer can be accepted either by a promise, like the traditional bilateral contract, or by a performance, like the exchange of a promise for an act that typifies the traditional unilateral contract.[38] Further, the *Restatement* adheres to the rule that when an offeror demands an *act* in return for a promise, the offeree cannot accept by beginning performance, but only by completing the requested act. Where the offer can only be accepted by performance and does not invite a return promise (the stereotypical unilateral contract), "a contract can be created only by the offeree's performance. . . . In

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promisor is entitled to rely on its completion. *Id.* at 529-30. Some courts have gone further and held that beginning performance converts this into a bilateral contract. Stoljar rejected this approach as "artificial." *Id.* at 529.

[37] RESTATEMENT (SECOND) OF CONTRACTS § 1 reporter's note, cmt. f (1979). The rules in the second *Restatement* regarding offer and acceptance were heavily influenced by Karl Llewellyn. *See generally* Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302 (1964). Regarding the second *Restatement*'s approach to contract formation, see Melvin P. Stein, Note, *The Restatement of Contracts Second and Offers to Enter into Unilateral Contracts*, 29 U. PITT. L. REV. 546 (1968); Bennett J. Yankowitz, Note, *Acceptance by Performance When the Offeror Demands a Promise*, 52 S. CAL. L. REV. 1917 (1979); John Yetter, Comment, *Unilateral Contracts: An Examination of Traditional Concepts and the Proposed Solution of the ALI Restatement of Contracts, Second (Tentative Draft No. 1)*, 5 DUQ. L. REV. 175 (1966).

[38] RESTATEMENT (SECOND) OF CONTRACTS § 50 (1979). Similarly, § 30 provides that an offer "may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act . . . ." *Id.* § 30.

Where there is doubt whether an offer invites the offeree to accept by promising to perform what the offer requests or to accept by rendering performance, the offeree may choose. *Id.* § 32. According to *Restatement* § 62, in that case the tender or beginning of the invited performance, or the tender of a beginning of it, constitutes an acceptance of the offer and operates as a promise to render complete performance. *Id.* § 62.

The basic effect of these rules is that whenever an offer can conceivably be accepted by an expression of assent, beginning to carry out the requested task will be interpreted as acceptance, thus forming the traditional bilateral contract in which both parties have committed themselves to perform certain tasks. Although at times interpreting such conduct as an expression of assent may be fictional, this approach has the virtue of protecting the offeree by creating an enforceable agreement as soon as she relies on the offer.

such cases the act requested and performed as consideration for the offeror's promise ordinarily also constitutes acceptance."[39] Furthermore, "[i]n the normal case of an offer of a promise for an act, the offer itself is a promise, revocable until accepted."[40] Because the offeror did not invite promissory acceptance, a return promise is legally irrelevant.[41]

But while the *Restatement* adheres to the traditional doctrine that a unilateral offer is revocable until acceptance by full performance, it undermines that doctrine in section 45. Section 45 provides that when an offeror does not invite a promissory acceptance (intending a unilateral contract), an option contract is created when the offeree tenders or begins performance, or tenders a beginning of it.[42] Beginning performance "completes the manifestation of mutual assent and furnishes consideration for an option contract."[43] As a result, the offeror cannot revoke. Under the *Restatement* scheme, the offeree is not bound to complete performance, having made no promise.[44] But the offeror need not pay her unless and until she fully performs.[45]

The *Restatement* not only questions the utility of the distinction between unilateral and bilateral contracts, but suggests that true unilateral contracts are a very marginal species, limited mainly to offers for a reward, prizes, and noncommercial arrangements among relatives and friends.[46] These assumptions have recently been challenged in an article by Mark Pettit, Jr.[47] Pettit observed that:

> [t]he drafters of the *Second Restatement of Contracts* . . . considered it a step forward when they not only minimized the importance of the unilateral-bilateral distinction but sought to eliminate the

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39 *Id.* § 50 cmt. b.

40 *Id.* § 24 cmt. a.

41 *Id.* § 32 cmt. b.

42 *Id.* § 45.

43 *Id.* § 45 cmt. d.

44 *Id.* § 45 cmt. e. Oddly, beginning performance does not function to accept a true unilateral contract because the offeror, who is master of his offer, wants acceptance only by full performance. Yet the master of the offer is completely powerless to prevent the law from implying a mostly fictional option contract which *can* be accepted by beginning performance. Presumably, this roundabout solution prevents binding the offeree as soon as she begins performance.

45 *See id.* (stating that offeror need not pay until offeree fully performs).

46 *Id.* § 32 cmt. b.

47 Pettit, *supra* note 20, at 551.

> term "unilateral contract" from the lexicon of the law. Today, those commentators who still deem the subject worthy of mention applaud the burial of the unilateral contract.[48]

Pettit also points out that whereas now unilateral contracts are often a plaintiff's theory to impose obligation, previously they were generally a defendant's theory to avoid contractual liability.[49] He therefore argues that Llewellyn and other commentators tried to reduce the number of unilateral contracts by making as many as possible bilateral, thus sidestepping the revocation problem and creating more liability for the promisor.[50]

Nonetheless, Pettit shows that reports of the death of unilateral contracts were greatly exaggerated. Courts use unilateral contract analysis in a wide range of situations, including promises by employers to pay an employee a pension, bonus, severance pay, or other benefits, and even in such less conventional arenas as when a prosecutor promises to drop a more serious charge if the accused will plead guilty to a lesser offense.[51]

Despite this prodigious intellectual output over the course of more than a century, all writing of significance on unilateral contracts, at least in the American context, has assumed that they arise by means of offer and acceptance. As we have seen, some proposals have suggested that although a unilateral offer must be accepted by completed performance, when the offeree begins such performance, the offeror is bound by a subsidiary promise not to revoke. Others have suggested that beginning performance constitutes acceptance. No one, however, has advocated a more radical approach: that unilateral contracts do not arise by offer and acceptance at all. Because an "offer" of a unilateral contract is in reality a promise rather than an offer, no acceptance is required. To explain why this is so, the following section explores how the speech act of promise differs from offer and acceptance.

II. On the Nature of Offer, Acceptance, and Promise

This Article takes as its central premise that contract law is conceptually based on private obligations fashioned by the parties

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48 *Id.*

49 *Id.* at 575.

50 *Id.* at 595.

51 *Id.* at 562-69.

themselves.[52] The law, to varying degrees, enforces a contract because it wishes to effectuate the agreement of the parties, or because it wishes to protect the parties' reasonable reliance on the agreement. In these situations the crucial question is how the parties themselves understand and use concepts such as offer, acceptance and promise. Not all promises or agreements are legally recognized as contracts, of course, and the law may impose an obligation where there has been no agreement. But because contract law is heavily dependent on relations created by the parties themselves, it must be finely attuned to how people create obligations and how they expect those obligations to operate.[53] Only by understanding how speech acts like offer, acceptance and promise function is it possible to determine how well the present doctrine of contract formation fits the intent of those who make agreements. Fortunately, the philosophy of language has made great strides in illuminating these concepts during the past few decades.

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[52] Fuller noted that "the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations." Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941). *See also* Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968) ("In this state . . . the intention of the parties as expressed in the contract is the source of contractual rights and duties."); Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 933 (1982) (book review) ("Contract law . . . recognizes and reinforces the social practice of undertaking voluntary obligations.").

I am not necessarily taking the position that promise is the sole basis of contract law nor do I wish to minimize the importance of factors such as reliance. Nonetheless, expectations and reliance are most reasonable when they are induced by a promise. The fact of commitment is therefore extremely relevant to the law of contracts.

[53] Of course, the law could simply define concepts such as promise or acceptance to mean what it wishes, a notion that Atiyah briefly considers. P.S. ATIYAH, PROMISES, MORALS AND LAW 27 (1981). But in that case the law could no longer pretend to be carrying out the will of the parties. As Corbin has said, "The courts . . . must take the raw material that is prepared for them by contractors and draftsmen and determine its meaning . . . Most assuredly, [the problem] is not to force meanings upon contractors that they did not intend . . . ." 3A CORBIN, *supra* note 20, § 627, at 13. Furthermore, if the law does not intend to use "promise" in its ordinary meaning, it should avoid use of the term or at least make it evident that the word is being utilized in an aberrant sense. *See* Mary J. Morrison, *Excursions into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271, 321 (1989) (equating "promise" in legal sense with how word is used in ordinary language).

A. A Brief Introduction to Speech Acts

Speech act theory is a philosophical approach to language, based in large part on the work of J.L. Austin and John Searle.[54] The theory attempts to explain how the utterances of a speaker are related to, and have an impact on, the surrounding world. Searle posits that each attempt to communicate is some type of *speech act*.[55] Beyond offer, acceptance, and promise, speech acts

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[54] *See generally* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (J. O. Urmson ed., 1962); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969).

Efforts to apply pragmatics or the philosophy of language to the law include FREDERICK BOWERS, LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION (1989); DENNIS KURZON, IT IS HEREBY PERFORMED: EXPLORATIONS IN LEGAL SPEECH ACTS (1986); GEORGES A. LEGAULT, LA STRUCTURE PERFORMATIVE DU LANGAGE JURIDIQUE (1977); James Benjamin, *Rhetoric and the Performative Act of Declaring War*, 21 PRESIDENTIAL STUDIES Q. 73 (1991); Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657 (1985); Michael Hancher, *Speech Acts and the Law*, *in* LANGUAGE USE AND THE USES OF LANGUAGE 245 (Roger W. Shuy & Anna Shnukal eds., 1980); Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990); Roberta Kevelson, *Language and Legal Speech Acts: Decisions*, *in* LINGUISTICS AND THE PROFESSIONS 121 (Robert J. DiPietro ed., 1982); Morrison, *supra* note 53; Robert Samek, *Performative Utterances and the Concept of Contract*, 43 AUSTRALASIAN J. PHIL. 196 (1965); Sanford A. Schane, *A Speech Act Analysis of Consideration in Contract Law in* LANGUAGE AND LAW: PROCEEDINGS OF THE FIRST CONFERENCE OF THE INTERNATIONAL INSTITUTE OF COMPARATIVE LINGUISTIC LAW 581 (Paul Pupier & Jose Woehrling eds., 1989); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1989); Peter M. Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 193-206 (1986) [hereafter Tiersma, Comment]; Peter M. Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 311-16 (1987) [hereafter Tiersma, *Language of Defamation*]; Peter M. Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 379-84 (1990).

[55] Speech acts consist, inter alia, of two other types of acts: *propositional acts* and *illocutionary acts*. Propositional acts *refer* and *predicate*. A proposition such as "Sam smokes habitually" refers to Sam, and it predicates that he smokes habitually. The proposition "Donna smokes habitually" has the same predicate but a different reference: Donna. Notice that the same proposition may occur in utterances of different types:

1. Sam smokes habitually.
2. Does Sam smoke habitually?
3. Sam, smoke habitually!
4. Would that Sam smoked habitually.

include asserting, claiming, declaring, commanding, and many others.

Often, a speech act like promising can be identified by the use of the verb "promise," as in "I promise to take you sailing tomorrow."[56] Unfortunately, it is not always this simple. Sometimes a speaker makes a promise without using the verb "promise," as in "I will take you sailing." Obviously, it may not be clear whether such a sentence is a promise or merely an expression of intent ("I assert that I intend to take you sailing tomorrow"). In addition, the word "promise" is sometimes used in a nonpromissory way to add emphasis to an utterance or to make a threat. Neither "I promise to kick your butt if you lay a hand on my car" nor "I promise you she's home today" performs the speech act of promising, despite the use of the word.[57]

Because the proposition in these sentences is the same, each sentence performs the same propositional act. Nonetheless, the speaker's intent with respect to the proposition is quite different. In Searle's terminology, each has a different "force": the first sentence *asserts* the proposition, the second *asks* a question, the third makes a *command*, and the fourth expresses a *desire*. Searle calls these acts—asserting, asking, etc.—*illocutionary acts*; they account for the *illocutionary force* of utterances. I use the term "speech acts," as do many others, to refer to illocutionary acts. *See* SEARLE, *supra* note 54, at 22-24.

[56] Often a specific verb expresses the illocutionary force of an utterance. Using such a verb (called an "illocutionary verb" or "illocutionary force indicating device") makes the illocutionary force of the sentence explicit, as in "*I assert* that Sam smokes habitually" or "*I ask you* whether Sam smokes habitually" or "*I command* Sam to smoke habitually." Other illocutionary verbs include *greet, state, describe, warn, command, promise, object, demand, and argue*. Generally, each of these illocutionary verbs corresponds to a specific speech act.

[57] A threat is a commitment to do something *to* someone, while a promise commits the speaker to doing something *for* someone. SEARLE, *supra* note 54, at 58.

"I promise you she's home today" is not a promise if "promise" is used simply to add emphasis. It might, however, be a type of promise if the speaker were implicitly promising to ensure that that state of affairs (her being home) will exist in the future. For other nonpromissory uses of the word "promise," see Morrison, *supra* note 53, at 323.

There was some controversy in the contracts literature in the 1920's on this issue as part of a debate regarding whether all offers are promises. Part of the discussion dealt with whether an offer to be answerable for the happening (or non-happening) of an event could be called a promise. Often a seller uses express promissory words, such as "I promise that this horse is sound." On its face this does not seem to be a genuine promise, but to the extent it involves commitment to a future course of action (e.g., a

Searle posits that there are five basic types of action that a person can perform by speech, as reflected in five different classes of speech acts. These classes are *representatives*, *directives*, *commissives*, *expressives*, and *declarations*.[58] Although most lawyers have not been trained in speech act theory, they are intuitively aware that many legal issues depend on whether an utterance is one type of speech act or another. For example, if someone says, "This table costs fifty dollars," the force of the utterance is ambiguous—it might have the force of stating or asserting ("I *assert* that the price of this table is fifty dollars"), or of offering ("I *offer* you this table for fifty dollars"). The legal consequences depend on which speech act the court decides was involved. Similarly, if I consider lending money to John, and his father says, "Don't worry, he's good for the money," the father may have made an assertion regarding John's financial condition ("I *assert* that John can pay it back") or he might have guaranteed the debt ("I *guarantee* that John will pay it back").[59]

Important for present purposes is the category of commissive speech acts. Promises and offers belong to this category of speech acts. Commissives share the feature that they allow individuals to *commit* themselves to some future undertaking.[60] It is

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commitment to do something about it if the horse is not sound), it could well function as a promise. *See generally* Samuel J. Stoljar, *The Ambiguity of Promise*, 47 NW. U. L. REV. 1, 9-14 (1952).

[58] John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE IN SOCIETY 1, 10-16 (1976). For a discussion of other classifications and proposed refinements to Searle's model, see Michael Hancher, *The Classification of Cooperative Illocutionary Acts*, 8 LANGUAGE IN SOCIETY 1 (1979). Hancher briefly discusses contracts in his article. *Id.* at 7-8. *See also* STEPHEN C. LEVINSON, PRAGMATICS 226-83 (1983).

In Searle's classification, *representatives* commit the speaker to the truth of the expressed proposition, and include asserting, concluding, and so forth. *Directives* are attempts by the speaker to get the addressee to perform a particular act, and include the speech acts of requesting and commanding. *Commissives* commit the speaker to some future course of action. Examples of commissives are promising, offering, and threatening. *Expressives* express a psychological state, such as thanking, apologizing, and welcoming. Finally, *declarations* effect immediate changes in the institutional state of affairs. For instance, declaring war, christening and excommunicating are declarations. Searle, *supra*, at 10-16.

[59] For a discussion of the difference between holding and dictum from this point of view, see Tiersma, *Language of Defamation*, *supra* note 54, at 312-14.

[60] *See* JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 192-98 (1985) (discussing various types of

important to bear in mind that by performing a commissive speech act like a promise, I do not just state or express my intent to do something in the future. If I state that I intend to go sailing tomorrow, I have simply stated what my plans are by using a *representative* speech act. You could not blame me for changing my plans later. On the other hand, if I *promise* to go sailing, I *commit* myself to a future course of action, and not carrying out this action would indeed be blameworthy.[61] As the philosopher J.L. Austin has written, "But now, when I say 'I promise,' a new plunge is taken: I have not merely announced my intention, but, by using this formula (performing this ritual) I have bound myself to others, and staked my reputation, in a new way."[62] Yet while both promise and offer/acceptance create commitment, they do so in different ways, as I will now explain.

B. Offer and Acceptance

The speech act analysis of offer is quite similar to its legal definition. Although the terminology may be unfamiliar, lawyers would recognize Searle and Vanderveken's description of an offer

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commissives); *see also* Searle, *supra* note 58, at 11-12. Other commissives are represented by the verbs *consent*, *bid*, *guarantee*, and *bet*. The importance of commitment to contract law is emphasized by Charles Fried, who argues that all of contract law is based on it. CHARLES FRIED, CONTRACT AS PROMISE 11-14 (1981).

[61] Searle points out that with representative speech acts, like stating and asserting, the point is to have the words match the world. I make myself responsible for seeing to it that my statement reflects reality as closely as possible. On the other hand, with commissive speech acts the point is to make the world fit the words. By saying "I promise," I create expectations, and it is my responsibility to see to it that world matches my words by carrying out my promise. Searle, *supra* note 58, at 3-4.

[62] J.L. AUSTIN, *Other Minds*, *in* PHILOSOPHICAL PAPERS 76, 99 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

Another way of expressing the distinction between representatives and commissives is that the former *represent* the proposition to be true while the latter *commit* the speaker to having a particular intent. This is similar to Austin's original notion that performatives did not have truth value. AUSTIN, *supra* note 54, at 47. The utterance "I hereby offer you my car for $500" may be insincere, but it is not true or false in the normal sense of those words. On the other hand, "We offer the best deal in town" is a verifiable statement about reality, semantically analyzable as "We *assert* that we offer the best deal in town." Its truth depends on whether there is in fact a better deal within the city limits. Thus in this sentence, "offer" does not indicate the force of the utterance. The sentence is, rather, an assertion about offering which does not commit the speaker to a proposal.

as "a promise that is conditional on the hearer's acceptance. An offer becomes binding only on acceptance. Roughly speaking the logical form of an offer is: this speech act commits me to perform a certain course of action if it is accepted by the hearer."[63]

Like offer, acceptance is a commissive speech act. Acceptance is a response to a limited set of other speech acts, including not only offers, but also invitations and applications. "Thus if one receives an offer, invitation, or application one can accept or reject it, and in each case the acceptance commits the speaker in certain ways."[64] Searle and Vanderveken also observe that the content of an acceptance is determined by the speech act to which it is a response, known to the law as the "mirror image" rule.[65]

This symbiosis of offer and acceptance creates what Searle and Vanderveken call "reciprocal" speech acts. "One's offer becomes binding only if it is accepted, and one can accept an offer only if it has been made and has not been withdrawn."[66] Similarly, Michael Hancher classifies offer and acceptance, along with certain others, as *cooperative* speech acts that require the participation of at least two actors to become effective.[67] The reciprocal or cooperative relationship distinguishes offer and acceptance from most other speech acts. The majority of speech acts require only one speaker, who can perform the speech act unilaterally.[68]

Within the realm of contract law, the bilateral agreement is obviously a prototypical example of an obligation that arises by means of the reciprocal or cooperative speech acts of offer and acceptance. The offer is a proposal for a bargain. That bargain goes into effect when the other party accepts its terms.[69] There must, therefore, be two participants to this cooperative act: the offeror who makes the proposal, and the offeree, the person to whom the offer is made and who can, through acceptance, make

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63 SEARLE & VANDERVEKEN, *supra* note 60, at 195-96. On the linguistic form of an offer, see also Tiersma, Comment, *supra* note 54, at 196-98.

64 SEARLE & VANDERVEKEN, *supra* note 60, at 195-96.

65 *Id.* As to the mirror image rule, see RESTATEMENT (SECOND) OF CONTRACTS § 58 (1979).

66 SEARLE & VANDERVEKEN, *supra* note 60, at 196.

67 Hancher, *supra* note 58, at 12.

68 Of course, there is generally a hearer present, but the effectiveness of the speech act does not depend on anything the hearer does.

69 "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979).

the terms binding on both parties. Bilateral agreements are therefore "bilateral" not only in the sense that both parties are under an obligation to perform, but also in that it takes two people to create the reciprocal obligations.

C. Promise

A promise is a speech act by which the speaker places herself under an obligation to carry out a particular future course of action.[70] The literature on promise is extensive. This Article will focus on those features of promise that are critical to understanding unilateral contracts. The most important of these is that a promise commits the speaker when made. As soon as I promise a friend to go hiking tomorrow by saying "I promise to go hiking with you tomorrow," I am under an obligation to do so. I cannot change my mind later without breaking my promise.[71]

A related observation is that a promise, in contrast to an offer, does not require acceptance to commit the promisor. The promisee might acknowledge the promise in some sense, but does not need to assent to it.[72] If I write you a letter promising that I will visit next month, I obligate myself to do so regardless of whether you respond. You might tell me that my coming is convenient, but it would be unusual and certainly superfluous for you to write, "I accept your promise."[73]

There are thus critical differences between offer and promise.

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[70] SEARLE & VANDERVEKEN, *supra* note 60, at 192.

[71] In this sense a promise is very different from a will. My testament, though made today, does not go into effect until I die, and I am free to change it as I wish until then.

[72] Admittedly, the philosophers Searle and Vanderveken speak of an offer as a "promise that is conditional on the hearer's acceptance." SEARLE & VANDERVEKEN, *supra* note 60, at 195-96. What they apparently mean by this is that the commissive force of an offer is conditional. An offer is not a promise that is conditional, but it is *like* a promise, except for the fact that it does not go into effect until accepted. While the term "promise" is commonly used for any act of commitment, I use it here as defined in the text and use "commitment" or "act of commitment" for commissive speech acts in general.

[73] Herbert Clark and Edward Schaefer point out that people who participate in discourse engage in coordinated activities in which the speaker attempts to be heard and understood and the hearer communicates to the speaker that he has succeeded. They divide contributions into *presentation* and *acceptance*. The speaker presents a contribution and the hearer accepts by continued attention, initiating the next relevant contribution, acknowledging the contribution (oh, uh huh) and so forth. *See*

As one commentator has noted, " 'Promise' and 'offer' do not run on the same track, though the words are sometimes used synonymously. An offer looks to an acceptance or a rejection in a way a promise does not. . . . A promise, on the other hand, contemplates a unilateral performance by the promisor, and the offeror is committed as soon as he makes the promise."[74] For our purposes, there are two ways to create commitment, i.e., to bind oneself to a future course of action. One means is by the speaker unilaterally stating that she "promises" to do a particular action in the future, or uses words to like effect. From that point on, the speaker is committed to doing so.[75] The other means of committing oneself is through offer and acceptance. Here, commitment requires two parties, one to offer and one to accept. The offer is binding only after acceptance, at which point both parties are committed to its contents.

D. Conditions

A promise can, of course, be conditional. If so, the promisor does not need to perform until the condition occurs. Nonetheless, he is obliged at the time he makes the promise to perform

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generally Herbert H. Clark & Edward F. Schaefer, *Contributing to Discourse*, 13 COGNITIVE SCIENCE 259 (1989).

This explains why, after someone makes a promise, the promisee may say "all right," "okay" or the like. This is *not* acceptance in a legal sense, nor (despite Clark and Schaefer's terminology) is it the speech act of acceptance. Rather, it is merely acknowledgement of the speaker's contribution to the conversation. It functions to inform the promisor that the promise has been understood. *See also* ERVING GOFFMAN, *On Face-Work: An Analysis of Ritual Elements in Social Interaction* (1955), *reprinted in* INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIORS 38 (1967) ("When one person volunteers a message . . . someone else present is obliged to show that the message has been received.").

Another possible case of accepting a promise occurs when the promisee accepts the *benefits* of a promise. If I promise to take you sailing and you go sailing with me, you have accepted my promise in a sense. This is, however, not a question of the creation of commitment. It is quite similar to accepting the shipment of goods under U.C.C. § 2-606. *See* U.C.C. § 2-606 (1990). This has to do not with contract formation, but with its execution.

74 Samek, *supra* note 54, at 204-05.

75 The *Restatement*'s definition of "promise" recognizes that commitment is critical to this concept by defining promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1979).

the promised act if and when the condition has been fulfilled. Suppose, for instance, that I promise my friend to go hiking tomorrow if it is a nice day. I am under an obligation today to go hiking if the condition is met tomorrow.[76] Surely I cannot renege before the condition has been fulfilled without breaking my promise. Even if the condition does not occur, I have promised. If it rains tomorrow, I cannot say that we are not going hiking because I never promised anything. Rather, I must say that although I promised to go hiking, it was subject to the condition that it had to be a nice day. Because it rained, my duty to carry out the promised act never matured.

The duties that arise by offer and acceptance can, of course, also be conditional. A typical example is an insurance contract for earthquake damage to a residence. The policyholder is under a duty to pay the premium regularly. The insurer's duty is to pay for any damage to the policyholder's house, but that duty is conditional. The insurer only pays if the house is damaged by an earthquake. It is also possible for both parties' duties to be conditional. For example, two or more parties might make a contract to form a joint venture to build a water desalination plant, but both parties' duties might be conditioned on factors like approval from the county, obtaining financing, and so forth.

Although the duties that arise from an accepted offer may be conditional, it is important to distinguish this situation from the observation that offers are inherently conditional, especially since the term "conditional promise" is often used indiscriminately in both contexts. True conditional promises contain a condition on the *maturation of duty* that determines whether and when the duty to which someone has committed himself must be carried out. I will refer to this as a *conditional duty*. In contrast, the statement that offers are "conditional promises" refers to a condition on the *commitment* itself and determines whether or not a person becomes committed in the first place. I refer to this as *conditional commitment*.[77]

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[76] Stoljar notes that with a mutual promise to deliver and pay for goods "on the arrival of the ship," a contract is "immediately afoot," but the duties of delivery and payment will not mature until the arrival of the ship. He refers to this as an example of a "conditional promise." Samuel J. Stoljar, *The Contractual Concept of Condition*, 69 LAW Q. REV. 485, 493 (1953).

[77] Part of the reason for the persistence of the traditional view may be that writers have often used the terms "offer" and "promise" without carefully distinguishing them, commonly referring to an offer as a

Conditional commitment is one of the critical features that distinguishes an offer from a promise. The obligation created by an offer is inherently subject to acceptance. There is no commitment to any duty until the reciprocal speech acts have been successfully performed. Until an offer is accepted, the proposal binds no one and can be withdrawn unilaterally. On the other hand, the commitment of a promise, by its very nature, *cannot* be conditional. The speaker either commits herself by a promise or does not. As soon as the speech act is properly performed, the speaker is bound to carry out the promised act. Consequently, a promise cannot be revoked at the will of the maker.[78] When the

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"promise" or "conditional promise." Of course, the law does at times recognize the distinction between commitment that arises from offer/acceptance and that from promise. For example, §§ 82 through 90 of the *Restatement* relate to *promises* enforceable without consideration. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 82-90 (1979). Each of these sections refers in some way to a promise, but none requires offer and acceptance. These are indeed promises in the technical sense of the word.

On the other hand, the *Restatement* asserts that "[i]n the normal case of an offer of an exchange of promises, or in the case of an offer of a promise for an act, the offer itself is a *promise*, revocable until accepted." RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a (1979) (emphasis added). Of course, after an offer has been accepted and its commissive force is no longer conditional, there is usually no objection to calling the mutual obligations of the parties "promises." At that point, the offer and acceptance ritual has been performed and all that remains is commitment. More problematic is referring to offers as "promises" before acceptance, as in the *Restatement* example. In this event, the word "promise" is used in a loose sense to refer to commissive speech acts in general, rather than to the speech act of promising. So used, the term "conditional promise" becomes ambiguous and can refer both to when the commitment itself is conditional (an offer) and when the duty to perform is conditional (a promise to perform a conditional duty).

This ambiguity can be avoided by referring to an offer of a bilateral contract not as a "conditional promise" but as a "conditional act of commitment" or the like. A promise by its very nature is an *unconditional* commitment to do something. The term "conditional promise" should be reserved for true promises, where the act of commitment is operative from the beginning, but where the maturation of the duty to perform is contingent on another event.

[78] By stating that a promise normally cannot be revoked, I mean that the speaker cannot undo the promise, as though there had never been commitment. Of course, promises do not last forever—they are fulfilled, forgotten, and under various circumstances the duties contained in them may terminate. For example, I may promise to pay a child a certain amount per month as an allowance. If, after two months, I have paid the child nothing, I have broken my promise. Of course, I can terminate my duty to

promise contains an unconditional duty, that duty will mature at some time in the future, barring an unforeseen event that makes performance impossible or otherwise excuses it. Likewise, when making a promise with a conditional duty, the speaker commits herself at the time of the speaking of the promissory words. But the maturation of the duty to perform is uncertain. The speaker is surely committed, but must perform only if some future event occurs. If the condition is met, however, the promisor's failure to abide by its terms is a breach.

III. Applying the Analysis

A. Unilateral Contracts Are Not Formed by Offer and Acceptance

As explained in the preceding sections, several critical distinctions separate offer/acceptance from promise as vehicles for creating commitment. These differences can be summarized as follows:

1. An offer must be accepted; a promise need not.
2. An offer does not commit the speaker until it has been accepted and is thus revocable until then; a promise commits the speaker when it is made and is not freely revocable.
3. Two parties must perform the "ritual" of offer and acceptance to create commitment; a promise is made unilaterally.
4. With offer and acceptance, the offeror and acceptor are both bound, whereas with promise only the promisor is bound.

In this section, we will see that unilateral contracts fit the criteria for promise rather than those for offer and acceptance. As a consequence, an "offer" of a unilateral contract is in fact a promise or set of promises rather than a true offer.

The observation that unilateral contracts do not fit comfortably in the offer and acceptance mold is not novel. As Atiyah has put it, "unilateral contracts do not always fit happily into a legal framework devised largely for bilateral contracts."[79] Simpson has noted that "[t]he application of the offer and acceptance analysis

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pay an allowance with respect to future payments, but I cannot revoke the original promise and thus undo the original commitment as though it never existed. When an offer is revoked, on the other hand, it is as though it never existed, because it never created commitment.

[79] P. S. Atiyah, An Introduction to the Law of Contract 82 (4th ed. 1989).

to [unilateral] promises has never been [a] happy [one]."[80] And Stoljar, discussing the distinction between bilateral and unilateral contracts, observed "how much the language of offer and acceptance falsifies the picture."[81] This section takes these thoughts to their logical conclusion: that unilateral contracts do not belong in the offer and acceptance framework at all.

1. Unilateral Contracts Do Not Require Acceptance

According to the generally accepted view, unilateral contracts, like bilateral contracts, require formation by offer and acceptance. The offeror, who can invite the offeree to accept in any way that pleases him, requires that the offeree accept the offer not by saying "I accept," but rather by completing a particular act. For example, if I run a restaurant, I might tell a waitress that I will give her a bonus if she sells ten special desserts. In the traditional theory of unilateral contracts, my promise does not become binding until all ten desserts have been sold because this is what I, the "master" of my offer, desire. Before that time I am at least theoretically free to revoke at my pleasure, even after the waitress has sold nine desserts and has said "I accept" a dozen times.[82]

Of course, saying "I accept" is the prototypical way of accepting. The *Restatement* defines acceptance as a "manifestation of assent" to the terms of the offer.[83] And it defines an "offer" as inviting "assent" to a proposed bargain; indeed, the offeror intends that "assent" by the offeree will conclude the bargain.[84] If acceptance is assent to the terms of a bargain, the offeree should be able to accept the offer in any way that is comprehensible to the offeror as assent. She might explicitly say that she accepts. Or she might begin to do the requested performance in such a way that the offeror can infer that she is symbolically communicating assent. All of these manners of acceptance are consistent with viewing an offer as a speech act that commits the speaker to a proposal once the other party—via the speech act of

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80 Simpson, *supra* note 7, at 262.

81 Stoljar, *supra* note 57, at 19.

82 Of course, the law may protect the promisee with an option contract. But the general principle that I can revoke at any time before completed performance is the only logical view in the traditional framework, even according to the second *Restatement*. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979).

83 *Id.* § 50(1).

84 *Id.* § 24.

acceptance—also commits herself.[85]

Several commentators have observed that "acceptance" of a unilateral contract is very different from acceptance in the bilateral context. Llewellyn noted that "[a]cceptance . . . as it shuttles and shifts between the unilateral and the bilateral situations, [is] a term with radically divergent *legal* connotations."[86] He continued that bilateral acceptance bars an offeror, on his own motion, from revoking before he has received "an iota" of the ultimate substance of his bargain.[87] Acceptance in the context of unilateral contracts, on the other hand, refers to obligating an offeror only after he has received the "uttermost jot" of everything he bargained for.[88] Likewise, Stoljar remarked that "acceptance" in the context of bilateral contracts relates to *formation* of a bargain, while with unilateral contracts it relates to its *fulfillment* by one party.[89]

Obviously, "acceptance" of a unilateral offer by completing the requested act is not a "manifestation of assent." If a unilateral contract must be accepted, saying "I accept" or symbolically assenting by *beginning* performance in such a way that the offeror will notice would be perfectly sufficient. But a manifestation of assent by itself never suffices to constitute acceptance of a unilateral contract.

Although lawyers have become accustomed to the notion that an offeror "invites" the offeree to "accept" by performance,[90] consider how strange this must sound to the uninitiated: "I offer

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85 Of course, the offeror may dictate that the proposal be accepted in a particular way, such as waving a flag, but with bilateral agreements, the acceptance, whatever its mode, must be an act of communication. Corbin cites an example of conduct communicating agreement which illustrates this. If A says to B that B can accept his offer by hanging out a flag so that A can see it as he goes by, this is communication and a bilateral contract has been formed. But if A simply wants a flag hung on a certain flagpole and offers B a certain amount of money to do so, the act of hanging it constitutes B's acceptance, just as above, but now the act is not sign language and B makes no promise. 1 CORBIN, *supra* note 20, § 62, at 255-56.

86 Llewellyn, *supra* note 21, at 33 (emphasis added).

87 *Id.*

88 *Id.*

89 Stoljar, *supra* note 33, at 520-21. Elsewhere, Stoljar remarked that acceptance of a unilateral contract is a myth; a unilateral contract simply involves one party making a promise upon which the other party may justifiably rely. Stoljar, *supra* note 57, at 19.

90 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 53(1) (1979) ("An offer can be accepted by the rendering of a performance only if the offer

to pay you $100 to repair my bicycle. I invite you to accept this offer, but do not want your promise to repair my bicycle. You may accept only by completing the job, and I do not consider myself obligated in any way until then." More natural—and hence more likely to reflect how people actually structure their commercial relations—is the following: "I promise to pay you $100 to repair my bicycle. You don't need to accept or to promise anything. I just want you to do the work, if possible. I will pay you after you have finished the entire job."

Requiring the offeree to "accept" a unilateral contract suffers from another flaw. Perhaps the most important rationale for holding parties to an agreement is that they have committed themselves to it by means of a commissive speech act, such as an offer, acceptance, or promise. The other party relies on the commitment and may be injured if it is not enforced. But acceptance of a unilateral contract—in contrast to one that is bilateral—is not an act of commitment. As noted previously, the speech act of acceptance cannot make an offeror's proposal binding in the traditional theory—only full performance will achieve that goal. The offeree cannot and need not commit herself to a unilateral proposal. Because a unilateral offeree is *never* bound, an act of commitment by the offeree is superfluous. As a result, the offeree does not logically need to accept the so-called offer. The offeree simply performs the requested act and expects to be paid as promised.

The traditional view of unilateral contracts is quite correct in holding that the unilateral "offeror" does not want words of acceptance. Where it went astray was in presupposing that commitment can only arise by offer and acceptance. Because with unilateral contracts there is no real speech act of acceptance, it was necessary to label some other act or event an "acceptance" if the offer/acceptance model was to remain intact. The traditional theory chose to identify completed performance as "acceptance." Several commentators subsequently recognized that full performance does not resemble acceptance in any reasonable sense of that word. Unfortunately, rather than question the hegemony of the offer and acceptance model, they strove to find acceptance elsewhere, as in reliance or beginning performance. In reality, the fact that the offeror does not want words of acceptance simply

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invites such an acceptance."); *id.* § 54(1) ("Where an offer invites an offeree to accept by rendering a performance . . . .").

means that no acceptance is necessary to make the promise binding.

We may conclude, therefore, that with respect to not needing acceptance, unilateral contracts resemble promises rather than offers.

2. Unilateral Contracts Commit the Speaker from the Time the Promise Is Made

The second criterion that distinguishes offers from promises is that offerors commit themselves only after acceptance, and can therefore freely revoke until that time. With a promise, on the other hand, there is no need for acceptance. The promise is an unconditional act of commitment that goes into effect immediately and therefore cannot be freely revoked.[91]

Although the traditional view posits that the unilateral offeror does not wish to be bound until he has obtained full performance and can freely revoke until that time, the modern rule of *Restatement* section 45 is less clear. Practically speaking, when the offeree commences or tenders performance, revocation is no longer possible. Oddly, however, the *Restatement* seems to free the offeror from commitment until the offeree finishes performance.[92] Section 45 therefore assumes, like the traditional rule, that the offeror has not committed himself until completed performance, but by imposing an option contract it prevents him from revoking after the offeree begins to do the requested act.

Closer examination reveals how unlikely it is that someone would make an offer of the type envisioned by the traditional theory or the *Restatement*. Preliminarily, one should realize that an offeror can fully commit himself before the occurrence of completed performance. Even the common law recognizes this by enforcing certain promises without acceptance or consideration,

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[91] Of course, a promisor can break a promise, or performance may be excused. This may be a general rule governing speech acts: until they go into effect, they can freely be revoked, but after that time revocation is wrongful, at least if it causes injury to another. Consider wills, for example. A will is conditional on death, and its dispositive power does not go into effect until that time. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 1 (2d ed. 1953). As a result, the testator can revoke the will at any time before death. *Id.*

[92] *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a (1979).

as well as acts in exchange for a promise.[93] All the "offeror" has to do is use a promise to bind himself unilaterally, instead of invoking the mechanism of offer and acceptance.

Not only can people bind themselves unilaterally, but no reasonable person would intentionally create the sort of agreement that the traditional theory of unilateral contracts assumes. Suppose that a person, asserting his freedom to contract and his mastery over his offer, specifically intends to make a promise that will bind him not at the time he makes it, but only after the other party has completed a particular act in exchange. In other words, this promisor wishes to create the traditional unilateral contract. For example, he might tell the offeree that if she paints his house, he will—once she is finished—commit himself to paying her $1000. He makes it clear that he does not wish to be bound until she is completely finished, explaining to her that before she is finished he may revoke with impunity. What rational person would even buy the paint if she believed the speaker had not committed himself? No one would realistically begin to perform such an agreement. Nor should the law give damages to an offeree injured by acting so rashly; expending money and effort on the basis of such a non-promise is hardly justifiable reliance, and the law is loath to protect fools.[94]

The primary purpose of unilateral contracts, such as reward offers or promises to pay a commission to a real estate broker, is to motivate the offeree to do the requested act. In other words, their goal is precisely to induce reliance. Obviously, an "offer" to pay someone to paint a fence or find a lost dog provides precious little inducement if it remains freely revocable until full performance. An offer to pay that becomes irrevocable after the offeree commences performance (the *Restatement* approach) is more apt to entice the offeree, but even beginning performance costs time and effort, and the offeree must take the risk that she will forfeit money she spends on *preparations* to perform if the offeror revokes

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93 *See, e.g.*, 1 CORBIN, *supra* note 20, § 12, at 27-28. On acts for a promise, see *id.* § 71, at 298.

94 A similar point is made by Stoljar, *supra* note 33, at 522-23: Suppose X tells Y "I'll give you $50 if you go to Rome, but remember that I'm at liberty to revoke this promise at any time before you reach the Holy City." A promise of this type would be as unusual as it is absurd. Because it is merely a statement of intention that X *might* give Y the money, but X is free to change his mind, the promise is illusory.

before she can commence.[95] Clearly, the offeror is most likely to induce reliance if he commits himself at the time of the making of the unilateral contract. He can only do this by the speech act of promising, rather than offering.[96] The presence of commitment justifies the promisee's preparation or initial performance. If the law truly believes that the offeror is master of his offer, it should recognize that when he truly wants the promisee to perform a particular act, he will make a promise, thus binding himself from inception.

In fact, probably the best-known illustration of unilateral contracts in the second *Restatement* provides proof that they bind the speaker when made:

> A, a merchant, mails B, a carpenter in the same city, an offer to employ B to fit up A's office in accordance with A's specifications and B's estimate previously submitted, the work to be completed in two weeks. The offer says, "You may begin at once," and B immediately buys lumber and begins to work on it in his own shop. The next day, before B has sent a notice of acceptance or begun work at A's office or rendered the lumber unfit for other jobs, A revokes the offer. The revocation is timely, since B has not begun to perform.[97]

Preliminarily, note that this hypothetical reveals the "unsatisfactory distinction between 'beginning to perform' and 'preparing to perform' which haunts unilateral contract theory."[98] According to the illustration, the carpenter "begins to work" on the lumber that he bought for the project but "has not begun to perform"!

Even more telling is the merchant's comment to the carpenter, "You may begin at once." Recall that if unilateral contracts are promises, they do not require acceptance before it is reasonable to begin performing. In fact, "you may begin at once" is strong

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95 Perhaps a more serious problem is that it is highly unlikely that most offerees know the rule of § 45. Unlike the mechanisms of offer and acceptance, which rest on social institutions of which most people are aware, § 45 is an ad hoc solution to the injustice of the traditional rule and does not necessarily pretend to mirror what the parties intend to accomplish.

96 One could argue that the offeror might prefer the traditional theory, or otherwise the *Restatement*, because under these approaches his liability for breach may be less. We must assume that the promisor intends to carry out his promise, however, so calculations based on possible breach should not be given much weight.

97 RESTATEMENT (SECOND) OF CONTRACTS § 62 cmt. d, illus. 1 (1979). The example is based on White v. Corlies, 46 N.Y. 467 (1871), although the offeror in *White* seems to have anticipated a bilateral contract.

98 Pettit, *supra* note 20, at 591.

evidence that no return promise is expected or required. Amazingly, however, even though the merchant tells the carpenter he may begin immediately, the *Restatement* suggests that it is not necessarily reasonable for the carpenter to prepare to perform because the merchant has not yet committed himself and may therefore yet revoke.[99]

In reality, "you may begin at once" confirms that the so-called "offer" of a unilateral contract is intended as a promise that commits the merchant *ab initio*. The merchant, who wants the job done in two weeks, is attempting to induce immediate reliance. To accomplish this, the merchant must have committed himself to paying the carpenter for his efforts, conditional, of course, on completion of the job.

Obviously, no reasonable person can expect another to carry out a requested act if he has not committed himself to rewarding her for her efforts. Why, therefore, has the law so long insisted that the offeror does not intend to be bound until completed performance, a position even maintained, albeit with little enthusiasm, by the second *Restatement*?[100] The answer lies, I believe, in the fact that with many unilateral contracts, in particular those like rewards and brokerage agreements, offerors do not want to contribute their part of the bargain until they have received all that they asked for in exchange. Partial performance of a proposal to pay a reward or broker's commission is useless to the offeror, who simply wants a lost pet found or a house sold. He does not want to pay for failed or incomplete efforts. But this is no reason to assume that the offeror does not wish to commit himself until full performance.

Recall the distinction between *conditional commitment* and a *conditional duty*.[101] Obviously, the offeror's *duty to perform* is contingent on the offeree performing her part of the contract. Therefore, he need not pay her until she has found his dog or produced a ready, willing and able buyer for his house. At the same time, however, the offeror is unconditionally committed to pay if and when the condition is met. There is no reason to posit, as does the present rule, that the offeror intends to commit himself only after "acceptance" by full performance.

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99 RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a (1979).

100 *See id.* § 1 reporter's note, cmt. f.

101 *See supra* note 77 and accompanying text (distinguishing between conditional duty and conditional commitment).

Another good indicator of the presence of commitment is reliance behavior. For example, in the bilateral context, it is generally always reasonable for the parties to rely on an offer that has been accepted and where the parties have thus committed themselves to a proposal. Compare this to the situation before the offer has been accepted, when there is usually no commitment. In that case, a bilateral offer may become binding as an option contract only if the offeror "should reasonably expect [the offer] to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance."[102] Nevertheless, the offer is binding only "to the extent necessary to avoid injustice."[103] Courts have been reluctant to protect offerees who have relied before accepting.[104] The reason for this reluctance is obvious: until the offeror is committed, reliance on the offer is seldom reasonable. Under normal circumstances, what rational offeree would begin to spend substantial amounts of money in reliance on an offer before she has exercised her power to make the proposal binding by accepting it? What court would protect such rash behavior?

In the unilateral context, on the other hand, section 45 of the *Restatement* creates an option contract as soon as the offeree begins to perform *without inquiring* whether the reliance on the offer was reasonable.[105] In fact, a comment to section 45 states that the rule "is designed to protect the offeree in justifiable reliance on the offeror's promise."[106] The only way to explain why reliance is presumptively justified long before acceptance by completed performance is that the offeror has already committed himself. Only when the offeror attempts to reserve the power to revoke is reliance not justified, because an unlimited power to revoke is inconsistent with a true promise.[107]

The fact of the matter, as the *Restatement* implicitly recognizes, is that very reasonable people spend substantial time and money

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102 RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1979).

103 *Id.*

104 *See, e.g.*, Gruber v. S-M News Co., 126 F. Supp. 442 (S.D.N.Y. 1954) (disallowing recovery for costs incurred before contract); Hough v. Jay-Dee Realty & Inv., 401 S.W.2d 545 (Mo. Ct. App. 1966) (stating that plaintiffs are not entitled to recover damages suffered prior to execution of contract); E. ALLAN FARNSWORTH, CONTRACTS § 3.25, at 197 (2d ed. 1990).

105 RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (1979).

106 *Id.*

107 *See id.*

doing the sorts of things that unilateral contracts attempt to induce them to do. The only rational explanation for such behavior is that, as in the *Restatement* illustration of the merchant who requests the carpentry work, people believe the speaker is in fact committed *then and there* to paying the price if the conditions of the offer are met.

One possible objection to this explanation is that people rely on unilateral offers not because they believe that the offeror has committed himself to the proposal, but rather because they trust the courts to protect their reliance under *Restatement* section 45 or similar decisional law. There are several problems with this suggestion. First, under this objection the offeree reasonably relies on a unilateral offer because the law will impose an option contract as soon as performance begins. But as noted, the law imposes an option contract precisely because reliance is reasonable. The way out of this conundrum is to posit that when reliance begins, commitment already exists. In addition, the present law protects reliance only after beginning performance. It therefore cannot easily explain why people prepare to perform. In any event, it is highly unlikely that most people who make and act on unilateral contracts have any idea of the legal principles involved. They do know, however, that a promise creates commitment and that it is generally reasonable to rely on the promisor keeping his word. Additionally, the judgments of generations of contracts students and scholars that the traditional Langdellian rule was unjust suggests that intuitively they also must have believed that the professor committed himself *before* the hapless student completed the journey across the Brooklyn Bridge, since otherwise the professor's abrupt revocation of the offer would not have stirred the indignation that it did. Finally, the fact that offerees commenced performance of unilateral contracts long before courts protected such reliance proves quite convincingly that reliance before completed performance cannot be explained by the availability of legal remedies.

Reliance is thus prima facie evidence of the existence of commitment. As Atiyah has observed, "For if promises were not binding, they might not be relied upon."[108] Of course, reliance is sometimes caused by a mistaken belief that a promise has been

[108] P. S. ATIYAH, ESSAYS ON CONTRACT 38 (1986). *See also* FRIED, *supra* note 60, at 19 ("There is reliance because a promise is binding, not the other way around.").

made. Yet reliance on unilateral offers is not the result of mistake. Rather, it is a commonplace and quite reasonable reaction. It is, in addition, precisely the reaction that the offeror wishes to induce. The only logical conclusion is that unilateral "offers" commit the speaker from the time the speech act is performed. In other words, unilateral "offers" are really promises.

3. Unilateral Contracts Are Formed Unilaterally

One of the other distinctions between offers and promises is that offers require two people to perform reciprocal speech acts—offer and acceptance—before commitment arises. In contrast, promises require only one person, who commits himself unilaterally.

Unilateral contracts once again fit the criteria for promising because, as the name suggests, they can be formed unilaterally. To a great extent, this relates to the points made in the previous sections that unilateral contracts do not need acceptance and are immediately binding. If the unilateral "offeror" can commit herself, effective immediately, to a particular course of action, as the previous sections argue, there is no substantial role for the "offeree" to play in the creation of commitment.

Of course, the law may insist that until someone acts in reliance on the unilateral offer, it will not consider the offer *legally* binding. In other words, the law may not recognize that the offeror has committed himself through a promise unless another person will be injured if the offeror reneges. After all, people commit themselves every day to unenforceable promises. This is not a question of when commitment arises, however, but simply one of when the law will enforce a promise. For present purposes it suffices to note that the offeree does not need to do anything to commit the offeror. By finding, for instance, a willing purchaser for a house, the broker does not complete or bring into fruition the seller's act of commitment. The fact that the broker invested time and money looking for a buyer indicates that the buyer had already committed himself. The offeree merely completes the act that fulfills the condition on the offeror's duty to perform.

Thus, not only completed performance but also reliance by the offeree is irrelevant to the creation of commitment. Reliance is important because it signals that the offeree will be injured if the offeror does not honor his commitment. In some instances the law may not want to award damages for breach of a promise until

someone has relied on it and thus been injured, as under *Restatement* section 90. Yet both with section 90 cases and with unilateral contracts, commitment must usually exist before reliance is reasonable.[109] And the commitment in these cases is, of necessity, created by the unilateral speech act of the promisor.

4. Unilateral Contracts Bind Only One Party

The final criterion distinguishing offers from promises is that offers, when accepted, bind both parties, while promises bind only their maker. Of course, even under the traditional theory, unilateral contracts are just like promises in this respect.[110]

By now it should be clear that unilateral contracts arise by means of the speech act of promise rather than through offer and acceptance. The next section will explore the nature of this promise.

B. Unilateral Contracts as Conditional Promises

In reality, a unilateral contract is nothing more than a type of conditional promise. The promisor commits himself to doing a particular act on the condition that the promisee first perform another act in exchange. Semantically, it takes roughly the following form: *I promise that I will do X if you (first) do Y.*[111] Most or

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[109] A number of cases have required an actual *promise* before promissory estoppel can be invoked. *See, e.g.*, Perlin v. Board of Educ., 407 N.E.2d 792, 798 (Ill. App. Ct. 1980) (requiring unambiguous promise); S.M. Wilson & Co. v. Prepakt Concrete Co., 318 N.E.2d 722, 724 (Ill. App. Ct. 1974) (recognizing that actual promise is required before applying promissory estoppel); Malaker Corp. Stockholder's Protective Comm. v. First New Jersey Nat'l Bank, 395 A.2d 222, 230 (N.J. Super. Ct. App. Div. 1978) (requiring "clear and definite" promise), *certification denied*, 401 A.2d 243 (N.J. 1979).

Henderson has noted that "promissory estoppel protects reasonable reliance, and that, in the nature of things, reliance is reasonable only if it is induced by an actual promise." Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 361-62 & n.93 (1969). *But see* Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 Sw. L.J. 841 (1990) (arguing that courts have sometimes enforced promises when promisees have relied on indefinite promises). *See also* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (contending that in actual cases, judges enforce promises rather than protect reliance).

[110] *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. e (1979).

[111] Ronald Butters, Professor of English at Duke University, has observed (personal communication) that there seems to be a tendency for

all traditional unilateral agreements can be phrased in this way: "I promise that I will pay you $1000 if you paint my house;" "I promise to pay you six percent of the sale price if you find a ready, willing and able buyer for my house within three months;" or "I promise to pay you $100 if you find and return my lost dog." Note that this structure is quite similar to more general conditional promises like "I promise to go hiking with you tomorrow if it is a nice day."

As with other conditional promises, it is not the commitment of a unilateral agreement that is conditional, but the promisor's duty to perform. Because this is a promise—a unilateral act of commitment—the speech act of acceptance is not required. The promise, if correctly made, is an effective act of commitment when spoken.[112]

Viewing unilateral contracts as conditional promises rather than as offers reflects more accurately the expectations of the parties. My promise to pay if you find a buyer for my house binds me from the time I utter the words. Because I have committed myself, you can quite reasonably begin to look for a buyer. This, of course, is precisely what brokers do. But my duty to pay the money does not mature until you fulfill the condition by finishing the task, even though commitment exists from the beginning. Once again, this conforms to my expectation that I will not have to pay you unless you actually find a qualified buyer.

Consequently, the question when someone is initiating a business deal is not whether the offer invites the offeree to accept by a return promise, or by performance. Instead, the critical issue is whether the speaker is making an offer or a promise. Does he

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speakers to phrase the condition in the present tense when a unilateral contract (conditional promise) is contemplated: *I will pay you ten dollars if you mow my lawn*. On the other hand, the condition is often expressed in the future when a bilateral agreement is contemplated: *I will pay you ten dollars if you will mow my lawn*. Of course, a promise always contemplates a future act. As a result, when a promise for a promise is proposed, the speaker will tend to use the future tense for both proposed obligations.

[112] Perhaps this point was to some degree anticipated in an article by Henry Ballantine. Ballantine, *supra* note 16. Ballantine proposed that a "uni-promissory" contract arose as soon as the offeree began to perform the acts that the offeror requested. "The duty to perform is subject as in a bilateral contract to an implied condition of performance of the executory part of the consideration. A distinction may thus be drawn between the time when the unilateral contract arises and the time when the duty of performance or payment becomes operative." *Id.* at 98-99.

wish to induce the addressee to do what is requested, without further ado? In that case he must have made a promise, since it would be unreasonable to expect the addressee to begin unless he had committed himself. A promise is particularly appropriate where the speaker does not really care if the promisee commits herself to perform, or if the promisee cannot promise because the performance (e.g., finding a lost dog) is too speculative. On the other hand, if the speaker wants the addressee to commit herself to doing the act in the future, either because she cannot begin immediately, or because he wants assurance that she will complete the task, he has made an offer that must be accepted before commitment arises.

C. Consideration

The law traditionally enforces only those agreements that have consideration.[113] It is therefore commonly said that a contract requires offer, acceptance and consideration. Once those elements are present, the measure of damages for breach is presumptively expectation (or contract) damages. Under the customary view of unilateral contracts, the offeree cannot supply consideration except by rendering full performance.[114] On the other hand, this Article argues that the commitment of a unilateral contract arises at the time the promise is made, not on completed performance. Does the consideration requirement, to the extent it still holds sway, mean that an enforceable unilateral *contract* nonetheless arises only after completed performance?[115]

In a most general sense, consideration merely categorizes those promises that the law will enforce.[116] Consideration is hence con-

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[113] *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979) (stating that, except as otherwise provided, "the formation of a contract requires a bargain in which there is . . . consideration").

[114] Llewellyn notes that with full performance, three elements coincide: acceptance, bargained-for consideration, and the offeree's performance. Llewellyn, *supra* note 1, at 780.

[115] Section 45 apparently retains the rule that there is no consideration for a unilateral offer until completed performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979). But although there is no consideration for the main promise, § 45 posits that the option contract created by beginning performance *is* supported by consideration and is therefore an enforceable contract. *Id.* § 45 cmt. d. Nonetheless, § 45 makes it clear that the offeror's duty under this option contract is conditional on completion or tender of the offeree's performance. *Id.* § 45(2).

[116] Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L.

cerned not with formation of the speech act (i.e., has the speaker committed herself), but rather with the *content of the proposal.*[117] Whether I promise to go hiking with you, or to pay you a six percent commission for selling my house, I have committed myself. But the proposal in the first promise is to go hiking, while that of the latter is to pay a commission in exchange for your finding a buyer. Only the latter promise is traditionally held to be "supported by consideration," based on the content of the proposal.

Consideration is currently defined according to the "bargain theory." A performance or return promise constitutes consideration if it is bargained for,[118] which means it is "sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."[119] Suppose I promise you $100 in exchange for your promise to paint my house, envisioning a bilateral contract. Because I seek your promise in exchange for my promise, and you give me your promise to paint the house in exchange for my promise to pay, my promise is supported by consideration and is legally enforceable. Now suppose that I promise you $100 in exchange for your future *act* of painting my house, envisioning a unilateral contract. Once again, I seek your performance in exchange for my promise. But under the traditional model of unilateral contracts, you do not supply consideration until you have completely performed by painting my house. Thus, my promise becomes legally binding in the bilateral case as soon as you make your promise, which occurs at the time we both commit ourselves via offer and acceptance. On the other hand, if I make a unilateral contract I am traditionally

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REV. 1107, 1112 (1984); *see also* Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 640 (1982) (arguing that consideration, which might better be understood to relate to enforceability, is but one of several alternative conditions for enforcing a contract); Stoljar, *supra* note 57, at 17 (stating that the concept "sufficient consideration" merely classifies the types of promises the law will hold enforceable).

[117] Searle refers to this as the *propositional act*, which is one of the components of the speech act. Whether the speech act is a promise or merely a statement of intention, on the other hand, has to do with its *illocutionary force*. Often the difference can be expressed syntactically. In the sentence "I promise that I will go hiking with you tomorrow," the force is expressed by the main verb "promise," while the content of the proposition is the subordinate clause, "I will go hiking with you tomorrow." *See* SEARLE, *supra* note 54, at 30-31.

[118] RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1979).

[119] *Id.* § 71(2).

not bound at the time I commit myself because you have not yet given me your performance.

It is hard to justify this distinction, which is based not so much on the nature of the proposal, but rather on whether the promisor, at the time of commitment, is *then and there* receiving what he bargained for: a return promise or performance.[120] Furthermore, this view holds that a contract arises *after* the offeree has completed performance, leaving only a debt on the part of the offeror, hardly a typical "contractual" relationship. Indeed, the offeror's commitment appears to spring into existence after the offeree has completed her performance. This suggests that the offeror's promise—which traditionally arises when the unilateral contract is accepted—is supported by past consideration, and thus no consideration at all.

A more logical approach is to enforce promises that *propose* or *contemplate* an economically-motivated exchange. All that should matter is that the promise *proposes* a bargain: the exchange of the promisor's act for that of the promisee, and vice versa. If I promise to pay you $100 for the act of painting my house, I propose to exchange $100 for your painting of the house. Since I have committed myself to a commercial exchange with you that is highly likely to induce reliance, the law should simply enforce my promise from the time that I make it.[121] In other words, consideration should rest not on a *completed* exchange of a promise for another promise or act, but should rather arise when parties *commit* themselves to such an exchange.

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[120] The principle that consideration must be bargained for seems to mischaracterize most unilateral contracts. Even under the traditional doctrine, the promisor generally proposes the terms on a take-it-or-leave-it basis. There is rarely any bargaining. Normally, the promisee can only acquiesce to the terms of the proposal.

The requirement of bargaining is plausible only with bilateral contracts, where the process of offer and acceptance creates at least the semblance of dickering over terms. But even in that context it is often fictitious. The majority of bilateral contracts today are probably form contracts, where bargaining plays little role.

[121] This is consistent with suggestions by some contracts scholars that the law enforces or should enforce *commercial* agreements. *See* James D. Gordon III, *A Dialogue about the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 1003-06 (1990) (proposing that consideration be replaced by simply enforcing commercial—as opposed to gratuitous—promises and defining commercial promise as one related to an exchange in value); Stoljar, *supra* note 57, at 17 (stating that generally, only bilateral contracts that have some commercial content will be enforced).

D. Implications for the Theory of Contract Formation

As explained in the preceding sections, some important distinctions separate unilateral from bilateral contracts. Most of those distinctions relate to when and how commitment arises. By fixating on offer and acceptance, the law has failed to recognize that parties can commit themselves to a proposal in more than one way. A likely reason that unilateral contracts were forced into the offer-and-acceptance model is that agreements arising through an accepted offer have normally been enforced in Anglo-American contracts law. "Mere" promises, on the other hand, have traditionally been deemed unenforceable, with certain specific exceptions. To place unilateral contracts in the same category as bilateral contracts in terms of offer and acceptance thus permitted the law to distinguish enforceable agreements from generally unenforceable simple promises. Unfortunately, although this parallelism was attractive, it was also misleading. Because crucial differences exist in the formation of unilateral and bilateral contracts, the distinction between the two remains relevant.

Despite these differences, the similarities between unilateral and bilateral contracts are ultimately of far greater significance. Contracts, whether unilateral or bilateral, share the attribute that both are formed by speech acts of commitment, usually either a promise or offer/acceptance, through which one or both parties place themselves under an obligation to carry out a future act. Therefore, *the method of formation should not determine what renders a proposed bargain enforceable.* It is in this sense that Llewellyn's argument against the dichotomy between unilateral and bilateral contracts is especially cogent.[122] The essential issue is whether a person has committed herself to do something in the future, or in Llewellyn's terms, whether a business deal is "on."[123]

Of course, Uniform Commercial Code section 2-204 has gone a long way in this direction by providing that a contract for the sale of goods may be made "in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract," and even if the moment of its making is undetermined.[124] Likewise, the *Restatement* provides that a manifestation of mutual assent may exist "even though neither offer nor acceptance can be identified and even though the

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[122] *See* Llewellyn, *supra* note 1, at 786-89.

[123] *Id.* at 790.

[124] U.C.C. § 2-204 (1990).

moment of formation cannot be determined."[125] The proposal in this Article goes beyond these rules by positing that the presence of commitment, rather than mere agreement or mutual assent, is critical to contract formation. Once there is commitment, reliance on that commitment is reasonable and injury will result if the promisor does not adhere to his promise.

Focusing on the presence of commitment, instead of merely offer and acceptance, will allow the law to respond better to challenges posed by modern large-scale dealmaking. Many such "deals" are complex transactions that do not fit well in the offer and acceptance framework. Their terms do not normally arise by a relatively complete proposal being offered to the other party, but result rather from a long process of negotiation, the results of which may be encompassed in several documents. Final agreement is reached roughly simultaneously at the closing, during which parties sign and exchange the documents.[126] Despite the clear presence of commitment, it may be impossible to pinpoint offer and acceptance in such modern business transactions. Likewise, contract formation should be possible when, in the presence of two parties, a third person suggests the terms for an agreement and the parties, without further ado, simultaneously agree. Again, offer and acceptance are absent, but there is plainly commitment.[127] What is therefore critical to the formation of a contract is not specifically offer and acceptance, or even agreement, but some act of commitment.

IV. DAMAGES

This Article has attempted to show that the commitment of unilateral and bilateral contracts comes about in different ways. As a result, the law does not accurately reflect when and how commitment *arises* with unilateral contracts. But once the commitment

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[125] RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (1979).

[126] FARNSWORTH, *supra* note 104, § 3.5, at 116-18. *See also* 2 FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 1585-86 (Rudolf B. Schlesinger ed., 1968).

[127] JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 2-1, at 25 (3d ed. 1987) ("[I]t is possible to have mutual assent even though it is impossible to identify the offer and the acceptance. Thus if A and B are together and C suggests the terms of an agreement for them, there would be a contract without any process of offer and acceptance if they simultaneously agreed to these terms.") (citations omitted).

exists, the method by which it arose should not lead to fundamentally different remedies upon repudiation or breach.

Under decisional law and *Restatement* section 45, the unilateral offeree's interest is now often protected in some manner. Nonetheless, the thesis of this Article has potential repercussions for the nature of damages to be awarded upon repudiation or breach. At present, of course, expectation damages are awarded for breach after a unilateral contract is deemed under the traditional theory to have arisen, that is after full performance by the offeree. But if the maker of a unilateral contract commits himself at the time he promises, it logically follows that contract (expectation) damages should be available, at least in theory, from the time the promisor committed himself. That, with some important adjustments, is the conclusion of this Article. Before continuing, however, it is necessary to explore certain shortcomings of *Restatement* section 45, which is presently applied to unilateral contracts, as well as section 90, which is sometimes mentioned as an alternative.

A. Restatement Section 45

The adoption of section 45, which has been described as possibly the most familiar section of the original *Restatement*,[128] has greatly mitigated the "harsh" effects of the traditional rule, where assertion that a contract was unilateral was mostly a device to defeat liability entirely. Nonetheless, because section 45 rests on the conception that unilateral contracts are not binding until the offeree has fully performed, it does not always operate in the most logical or economically efficient manner.

As noted previously, section 45 creates an option contract when the offeree tenders or begins the invited performance, effectively making the offer irrevocable. But within the traditional theory, the irrevocability created by the option contract clashes with the notion that the offeror, as master of his offer,[129] does not wish to be bound until completed performance. If the main contract does not bind the parties until completed performance because this is what the offeror desires, then logically the offeror should not be bound against his wishes by an option contract.

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[128] JOHN E. MURRAY, MURRAY ON CONTRACTS § 43, at 120 (3d ed. 1990).

[129] Even in the second *Restatement* the offeror remains the "master" of his offer. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 29 cmt. a, § 30 cmt. a (1979).

Aside from this theoretical difficulty, practical problems exist as well. In many cases the parties themselves have not created an option contract, at least not expressly.[130] A promise not to revoke may be appropriately implied when a house seller offers an exclusive listing to a particular broker, promising a commission if a qualified buyer is found within a specified period of time, only to hire another broker after the first has spent time and effort. But a promise not to revoke is far less appropriate with an open listing, made to several brokers, or with a reward offer, even if a particular broker or reward seeker has devoted some time and effort to the task. Courts therefore have seldom used section 45 in the case of an open listing or a reward offer, even though on its face it ought to apply.[131] Interestingly, reward offers and open brokerage listings are stereotypical unilateral contracts, since it is impossible for an offeree to genuinely promise to perform the requested act and thus create a bilateral agreement. It is ironic and highly significant that section 45, devised specifically for unilateral contracts, has least relevance to the most genuine unilaterals.

The problem with section 45 is thus not so much that it implies an option contract, but that it virtually *always* does so. Suppose that I manage a restaurant and promise to pay a bonus to the first waiter or waitress who sells ten special desserts. I emphasize, however, that I retain the right to discharge personnel at any time and that the promise ceases to operate if I decide to terminate the introduction of the new desserts for any reason. Here, I have made a unilateral promise to pay the bonus—I am clearly committed to paying once someone fulfills the conditions. But I have not promised to allow the restaurant personnel a fixed period or even a reasonable time to meet the conditions. Nonetheless, if the bonus is sufficiently attractive, they may willingly take the risk that they will be discharged, or that the program will be terminated, before someone can meet the conditions.[132] *Restatement* section

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130 For example, Atiyah notes that the implication of an option contract is often artificial, since often parties assume the risk of revocation. ATIYAH, *supra* note 108, at 199-201. Corbin also observed that in many situations the inference of an option contract would be "contrary to fact." Corbin, *supra* note 16, at 205.

131 *See infra* note 191 (citing open listing and reward offer cases in which courts failed to use § 45).

132 Because I have made a promise, however, I am under a duty of good faith not to act arbitrarily, particularly not to terminate the dessert program

45 does not seem to allow for promises of this kind because—with one narrow exception[133]—it envisions an option contract for *all* unilateral contracts whenever a promisee commences performance.

Another difficulty with the *Restatement* approach occurs after an option contract is created and the offeror's duty to perform is conditional on completion or tender of the invited performance.[134] As a result, the offeree at least in theory cannot collect damages after the offeror attempts to revoke, but must complete the requested act first. This contradicts the principle of efficient breach, which posits that a party should be able to breach and pay damages when it is economically efficient to do so. If a unilateral promisor attempts to revoke his promise, he presumably no longer wants the requested service, can obtain it more cheaply elsewhere, or is no longer able to pay for it.[135] For example, suppose that I promise a commission to a broker if she produces a buyer ready, willing and able to purchase my house within three months. Under section 45, if the broker has commenced performance, she is at least theoretically entitled to continue searching for a buyer during the entire listing period, even if I am no longer willing or able to sell.[136] Assuming she finds a buyer, I will have to pay for something that is of no value to me, and the broker will have engaged in a useless economic activity.

An illustration of how this works in practice is provided by *Garrett v. Richardson.*[137] In *Garrett*, the owners of a house gave an exclusive listing to a real estate broker for a specific period of

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simply to deprive a waitress who has sold nine desserts of the bonus. In other words, the personnel does not take the risk that I can somehow entirely negate any commitment.

133 RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979). The one exception to this is that the rule of § 45 yields to a manifestation of contrary intention that makes reliance unjustified. "A reservation of power to revoke after performance has begun means that as yet there is no promise and no offer." *Id.* § 45 cmt. b. Yet in the example in the text, there clearly is a promise. *See infra* note 187 and accompanying text (discussing how offeror's retention of right to revoke affects the option contract analysis under the *Restatement*).

134 *Id.* § 45(2).

135 MURRAY, *supra* note 128, § 43, at 123.

136 Farnsworth refers to this aspect of § 45 as "curious." FARNSWORTH, *supra* note 104, § 3.24, at 195.

137 369 P.2d 566 (Colo. 1962).

time.[138] The broker advertised the property and made unsuccessful attempts to sell it. During the listing period, the owners informed the broker they had decided not to sell the house. Later, the broker produced a qualified buyer, but the owners refused to sell. The court held that through the broker's devotion of time and energy, the listing became irrevocable.[139] Even though the owners no longer wanted to sell, and the broker's efforts were no longer of value to them, the broker was entitled to find a buyer and to receive the full commission.[140] Indeed, one court has explicitly stated that if an owner attempts to revoke a brokerage contract, the broker may refuse to consider the contract rescinded, may continue with efforts to find a buyer, and is entitled to the full commission if successful.[141]

A comment to section 45 suggests a possible way to avoid this result by providing that the condition requiring full performance may be excused if the offeror prevents or waives performance, or repudiates.[142] In *Garrett*, the owner might be viewed as having repudiated by attempting to revoke. But it is difficult to imagine how an offer can repudiate an option contract that is implied by law and of which he may not even be aware. If he is repudiating anything, he is declaring that he will not abide by the original "offer." However, the original offer is not yet a contract in the

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138 *Id.* at 567. The agreement further provided that in case of any sale by the owners, the broker, or any person during the period for which listed, the broker would be entitled to his commission. *Id.*

139 *Id.* at 568-69 (citing Hutchinson v. Dobson-Bainbridge Realty Co., 217 S.W.2d 6 (Tenn. Ct. App. 1946)).

140 *Garrett*, 369 P.2d at 570. A similar case is McMenamin v. Bishop, 493 P.2d 1016 (Wash. Ct. App. 1972), *review denied*, 80 Wash. 2d 1008 (1972). The owner of a house gave an exclusive listing to a broker. *Id.* at 1017. Admittedly, the seller agreed to the boilerplate language that "[i]n the event of any sale, by me or any other person, or of exchange or conveyance of said property, or any part thereof, during the term of your exclusive employment, *or in case I withdraw the authority hereby given prior to said expiration date*, I agree to pay you the said commission just the same as if a sale had actually been consummated by you." *Id.* (emphasis in original). The seller lost her job and took the house off the market during the listing period. *Id.* Afterwards, the broker nonetheless found a ready, willing and able buyer. *Id.* The court held that although the listing agreement did not specifically require the broker to search for a buyer, the parties had entered into a bilateral contract. *Id.* at 1018. It found the seller liable for the *full* commission. *Id.*

141 Sunshine v. Manos, 496 S.W.2d 195, 199 (Tex. Ct. App. 1973).

142 RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. e (1979).

traditional theory and therefore cannot be repudiated; it is merely an offer that can be revoked.

In the alternative, the promisor may be deemed to waive performance of the condition requiring full performance.[143] This hardly promotes efficient breach, however, since waiver of the condition simply means that the owner's duty to pay the full commission will immediately mature. Some courts have indeed taken this route and have held that a broker is entitled to her full commission after revocation by the owner, even if she did not locate a buyer and could not show that she would have been able to do so.[144] To circumvent this result, a court might decide that the broker had only prepared to perform,[145] or require the broker to prove that she would have been able to locate a buyer absent the breach,[146] and on that basis award no remedy, or minimal dam-

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[143] Generally, after the formation of a contract the waiver of a material part of the agreed upon exchange is not effective. CALAMARI & PERILLO, *supra* note 127, § 11-31, at 493. It is unclear whether and how that rule might apply here.

[144] *See, e.g.*, Carlsen v. Zane, 67 Cal. Rptr. 747 (Ct. App. 1968) (stating that broker need not show that he could have performed in order to recover commission which would have accrued if he had procured purchaser during period of listing when owner breaches "exclusive right to sell" listing agreement); McDonald v. Davis, 389 S.W.2d 494 (Tex. Ct. App. 1965) (deciding that plaintiff broker was prima facie entitled to reasonable profit equal to amount of commission after owner breached exclusive sale agency by revoking before listing expired, even though there was no evidence that owner later sold property); Seattle Investment Co. v. Kilburn, 485 P.2d 1005 (Wash. Ct. App. 1971) (awarding full commission to broker after owners revoked exclusive listing, presuming that broker would have made sale and rejecting theory that plaintiff-broker had burden of proving that he would have found a buyer), *review denied*, 79 Wash. 2d 1011 (1971).

[145] *See, e.g.*, Bretz v. Union Central Life Ins. Co., 16 N.E.2d 272, 274 (Ohio 1938) ("Acts preparatory to performance tender neither consideration nor acceptance, no matter how extensive the preparation or how large the expense involved may be."); Knight v. Seattle First Nat'l Bank, 589 P.2d 1279 (Wash. Ct. App. 1979) (finding mere preparations to perform instead of part performance and therefore deciding that contract was unenforceable.).

[146] *E.g.*, Metzenbaum v. R.O.S. Assocs., 232 Cal. Rptr. 741 (Ct. App. 1986) (deciding that mortgage broker not entitled to commission, following owner's breach of exclusive agreement, where there was no evidence that the broker either obtained or could have obtained acceptable loan within contract period); Cone v. Pedersen, 40 A.2d 274 (Conn. 1944) (disallowing damages to broker because he failed to show he could have found a purchaser); Sunshine v. Manos, 496 S.W.2d 195 (Tex. Ct. App. 1973) (stating that broker was not entitled to commission absent evidence of

ages. As a consequence, the broker gets all or virtually nothing. What is needed instead is a straightforward means, in appropriate cases, for providing reasonable compensation to a promisee when she has partly performed but the promisor no longer wants or needs completion of the requested act. Section 45 offers no principled basis for such a remedy.[147]

Part of the difficulty with section 45 arises, I believe, from the notion that the offeror wishes to retain the power to revoke the "offer" until it is accepted by completed performance. Maintaining this traditional concept has unnecessarily complicated the rules relating to unilateral contracts. But there is a more practical reason for the persistence of the rule that the offeror retains the power of revocation until an offer is accepted by completed performance. This is that someone who promises a brokerage commission or reward does not want to be committed to the terms of

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possible performance); 1 CORBIN, *supra* note 20, § 50, at 209 (stating that broker does not get full amount of promised commission unless the court is satisfied that broker would have performed according to the owner's offer and this would have entailed no material expense); FARNSWORTH, *supra* note 104, § 3.24, at 197 ("Recovery depends, at least in theory, on proof that the broker could have found a buyer had the broker been permitted to do so.").

[147] It might be argued that contract damages are available prior to full performance by awarding such damages for breach of the option contract created by § 45. This prevents some of the difficulties created by requiring completed performance before allowing expectation damages. Unfortunately, although the option contract is a bilateral agreement that normally might allow such a remedy, § 45 itself clearly stipulates that the offeror is under no duty until completed performance. RESTATEMENT (SECOND) OF CONTRACTS § 45(2) (1979). Of course, we might modify § 45 to eliminate this requirement. But the net result of such an approach would be to allow contract damages at any time after an offeree begins performance. Consequently, this approach would simply be a circuitous means of accomplishing roughly what this Article advocates should be done directly.

A further difficulty with allowing damages for the breach of the bilateral option contract is that many courts allow specific performance to the holder of an option contract, particularly when damages would be difficult to measure. *See, e.g.*, Freeport Sulphur Co. v. Aetna Life Ins. Co., 107 F. Supp. 508 (E.D. La. 1952), *modified*, 206 F.2d 5 (5th Cir. 1953); Colaluca v. Ives, 191 A.2d 340 (Conn. 1963); Ingram v. Methodist Church Dist. Bd. of Missions & Church Extension, Inc., 131 S.E.2d 848 (Ga. 1963); Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683 (Ill. 1958); Petersen v. Olson, 112 N.W.2d 874 (Iowa 1962); Shell Oil Co. v. Boyer, 381 P.2d 494 (Or. 1963). Where the offeror no longer wants an act done, allowing the offeree/optionee to complete performance is economically inefficient, just as it is with § 45.

the offer forever. Initially, the notion that the promisor can put an end to the effectiveness of a unilateral contract seems to undermine the premise of this Article that a promise cannot freely be revoked. But while a promise to pay a reward cannot be *revoked*, this does not mean that it cannot be *terminated*.

The distinction between revocation and termination of a speech act is critical. If I revoke a speech act, such as an offer, before you make the commitment operative by accepting, the offer is treated as though it never existed. For contractual purposes, we never entered into a relationship or created a commitment. On the other hand, once an accepted offer or a promise creates commitment, it can no longer be revoked in this sense. Rather, the commitment can under certain circumstances be terminated. For example, a contractual relationship like a franchise agreement or agency relationship cannot be revoked or undone after it has started, but it can be terminated under specified conditions.[148] Before termination, the parties had certain commitments to one another, and those commitments cannot simply be ignored. Because commitment existed for a period of time, the franchisee or agent may have been damaged by relying on the promise or agency while it was operative, and a remedy for that injury may be appropriate.

Section 45 views the termination of a promise to pay a brokerage commission as the revocation of an unaccepted offer. Consequently, it must logically require completed performance before granting the promisee a remedy. In the approach of this Article, on the other hand, an actual or implicit commitment to keep a promise operative for a specified or reasonable time makes the premature termination of a unilateral promise wrongful. A remedy for breach of this promise can be awarded without further ado.

Another drawback to section 45 is that it specifically excludes from coverage "preparations" to perform. Before part performance, the *Restatement* protects the promisee not under section 45, but under section 87. Section 87 provides that if "the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before accept-

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[148] For example, under agency law, a contract of indefinite duration may be terminated by either party at will. Florida-Georgia Chem. Co. v. National Lab., 153 So. 2d 752, 754 (Fla. Dist. Ct. App. 1963).

ance"[149] and if the offer does induce such action or forbearance, the offer is binding as an option contract to the extent necessary to avoid injustice. The drawback to this approach is that while beginning performance is *always* reasonable under section 45, preparing to perform is subjected to a higher burden. This rule makes sense in the bilateral context because until the offeree has accepted there is no commitment, and relying on an unaccepted offer is virtually always unreasonable. But the distinction between preparation and beginning performance is not similarly motivated with unilateral contracts. The unilateral offeree can rationally begin performance immediately. But if it is reasonable to begin right away, it is no less so to prepare to begin. Indeed, the point of a unilateral contract is often to induce the promisee to commence as soon as possible, without first requiring a return promise. The preparing-to-perform/beginning-to-perform distinction in section 45 is hence difficult to justify.[150]

Mark Pettit has suggested that promissory estoppel, as articulated in *Restatement* section 90, avoids the artificial distinction between preparing to perform and beginning performance.[151] In addition, the flexible approach of section 90, which makes a promise binding but allows the court to limit the remedy as justice requires, might provide a more equitable remedy when a promisor repudiates or breaches a unilateral contract. We therefore now consider *Restatement* section 90.

B. Promissory Estoppel (Restatement Section 90)

This is not the first time that someone has contemplated the relationship between section 90 and unilateral contracts. As noted above, Pettit has considered applying section 90 to such contracts. Murray has proposed that section 90 may be able to supplant section 45.[152] Navin has pointed out the similar fact

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[149] RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1979). The general rules regarding beginning performance in §§ 45 and 62 are not applicable to preparing to perform. *Id.* § 45 cmt. f, § 62 cmt. d.

[150] *See* Yankowitz, *supra* note 37, at 1936-38 (noting the "unprincipled" distinction between preparing to perform and beginning to perform); Yetter, *supra* note 37, at 184-85 (recognizing that Restatement § 45 does not allow a remedy for preparing to perform, even though that might at times be just).

[151] Pettit, *supra* note 20, at 591.

[152] John E. Murray, Jr., *Contracts: A New Design for the Agreement Process*, 53

patterns in cases invoking section 45 and section 90.[153] Likewise, Slawson has observed in a recent article that "[c]onduct that gives rise to promissory estoppel is often factually indistinguishable from conduct that gives rise to consideration, where the consideration is the performance requested by an offer for a unilateral contract."[154] Under the approach of this Article, unilateral contracts and promises enforced by promissory estoppel are even more similar than previously thought. Specifically, both arise by means of a true promise rather than through offer and acceptance. It is therefore logical to consider whether the notion of promissory estoppel embodied in *Restatement* section 90 might not be used to provide a remedy for breach of unilateral contracts, especially in light of the drawbacks to section 45.

Courts in many cases already apply promissory estoppel to what could be viewed as a unilateral contract. An example is *Hoffman v. Red Owl Stores*,[155] one of the best known instances of promissory estoppel. Essentially, Red Owl promised Hoffman a franchise in its supermarket chain if he took various steps, such as gaining experience in the business and obtaining $18,000 to invest. Red Owl later tried to impose additional conditions, and Hoffman sued. The Wisconsin Supreme Court used a promissory estoppel theory to enforce the original promise. The important point is that Red Owl did not simply promise Hoffman a franchise. That would be a paradigmatic case for enforcement under section 90. Rather, Red Owl conditioned its promise on Hoffman first meeting a number of requirements.[156] In other words, Red Owl made a promise for an act or series of acts by Hoffman. Many other cases decided on the basis of promissory

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CORNELL L. REV. 785, 805-06 (1968) (observing that in light of the general applicability of § 90, § 45 may no longer be necessary).

153 Walter D. Navin, Jr., *Some Comments on Unilateral Contracts and Restatement 90*, 46 MARQ. L. REV. 162 (1962).

154 W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 222 (1990).

155 133 N.W.2d 267 (Wis. 1965).

156 *Id.* at 270-71. Red Owl's statements can easily be recast as conditional promises in the form *I promise that I will do X if you (first) do Y*. As Farnsworth describes it, "Red Owl assured him that he would be granted a franchise if he took steps to gain experience." FARNSWORTH, *supra* note 104, § 3.26, at 207. Calamari and Perillo also use the language of conditional promise: "the plaintiff was assured that if he took certain steps and raised $18,000 worth of capital he would be granted a supermarket franchise." CALAMARI & PERILLO, *supra* note 127, § 6-5, at 289.

estoppel can be similarly analyzed.[157]

Yet, some important distinctions exist between promissory estoppel cases and unilateral contracts despite their similar fact patterns. One possible practical difference between applying section 45 and section 90 is that under section 45, the promisee of a unilateral contract will receive expectation damages if she completes performance. In contrast, invoking section 90 may limit the remedy for breach to reliance damages.[158] Recent studies, however, have proposed that reliance *damages* are not necessarily appropriate even though the *basis* for enforcing a promise under section 90 is indeed reliance. Farber and Matheson conclude that current promissory estoppel cases are "heavily weighted" towards giving full expectation damages, and sometimes even equitable remedies like specific performance or injunctive

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[157] A similar case, again relating to promises made prior to the main bargain, is Vasetoler v. American Can Co., 700 F.2d 916 (3d Cir. 1983). In that case, a worker was hesitant to accept a promotion from hourly employee to a salaried supervisory position. *Id.* at 917. He alleged that he accepted the position only after the company promised to credit previous hourly service towards the time needed for his pension plan to vest. *Id.* One article has remarked that the employee suffered no real financial detriment because of this promise, and that the court therefore "strained" to find reliance in the stress and emotional trauma that accompanies a supervisory position in order to enforce the promise. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 912 (1985). Here again a unilateral analysis is possible. The company promised to credit the previous service towards the employee's pension benefit in exchange for his act of accepting the supervisory position. *Vasetoler*, 700 F.2d at 917. In Oates v. Teamsters Affiliates Pension Plan, 482 F. Supp. 481 (D.D.C. 1979), the court used § 90 to enforce the Teamsters' promise that the leader of the rival union would obtain credit toward the Teamsters' pension plan for previous service. *Id.* at 489. The Teamsters made the promise to induce the leader to join the Teamsters, even though the rival union had no pension plan and the leader could thus not have detrimentally relied. Likewise, in United Steel Workers, Local 1330 v. United States Steel Corp., 492 F. Supp. 1 (N.D. Ohio 1980), *aff'd in part, vacated in part*, 631 F.2d 1264 (6th Cir. 1980), a steel company had promised to keep a steel plant open if its workers made it profitable. The court declined to apply promissory estoppel, in part because of doubts that the plant had indeed made a profit, and thus allowed the company to close it. *Id.* at 6. But, of course, this was also a promise by the company in exchange for performance by the workers. *Id.* at 4. Indeed, the court recognized it as a conditional promise but still did not apply a unilateral approach. *Id.*; *see also* cases gathered in Navin, *supra* note 153, at 166-75.

[158] *See, e.g.*, Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 27-31 (1979); Slawson, *supra* note 154, at 202-16.

relief.[159] Similarly, Slawson argues, on the basis of a survey of the case law, that the expectation measure is the proper remedy for breach.[160] Of course, to the extent that section 90 cases can be reanalyzed as involving unilateral contracts, expectation damages are fully consistent with the approach of this Article.[161]

Despite the courts' increasing willingness to award full expectation damages in cases of promissory estoppel, other reasons explain why unilateral contracts should not fall under the aegis of section 90. For example, a plaintiff must prove the existence of reasonable reliance with promissory estoppel, while with unilateral and bilateral contracts, courts essentially presume a plaintiff's reliance. But the most important reason for differentiating cases of promissory estoppel from unilateral contracts is that—as opposed to promises under section 90—promises in unilateral and bilateral agreements must contemplate a bargain or commercial exchange, traditionally known as the consideration requirement. If we exchange a certain amount of my labor for your promise to pay me $100, and you then repudiate or breach, the proposed exchange itself (specifically, your promise to pay $100) should generally provide the basis for a remedy, subject to certain adjustments like mitigation. Thus, the starting point for any damages analysis should be the contract, as is the case with the expectation measure.

C. An Alternative: Expectation or Contract Damages

Breach of contract damages, in principle, award the injured party the benefit of the bargain, as measured by the expectation interest. Contract or expectation damages thus compensate the injured party not on the basis of her out-of-pocket loss, but on what she expected to gain under the contract.[162]

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159 Farber & Matheson, *supra* note 157, at 909-10. Note also that cmt. d to Restatement § 90 states that "[a] promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate." RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1979).

160 Slawson, *supra* note 154, at 208. Slawson traces the history of promissory estoppel and argues that of the hundreds of cases applying such an analysis, only three have been seriously considered as supporting the limitation of the remedy to a reliance measure. He continues by arguing that none of the cases really requires this result. *Id.* at 199-206.

161 An interesting question is whether courts award expectation damages for reliance on unconditional promises, where there is no argument that the parties contemplate an exchange.

162 *See generally* FARNSWORTH, *supra* note 104, § 12.1, at 840-41.

Because bilateral and unilateral contracts both create commitment at the time that the respective speech acts are performed, the measure of damages should, if possible, be determined by equivalent principles. Whenever someone fails to honor the commitment of a unilateral contract, either by repudiation before completed performance, or by breach after the promisor's conditional duty has matured, the expectation measure should at least form the starting point of any damage analysis.

Of course, sometimes expectation damages are not awarded for breach of a bilateral agreement because losses are uncertain or speculative. With unilateral contracts, such uncertainty or speculativeness is often almost inherent, in particular before full performance. Practically speaking, therefore, expectation damages may frequently not be awarded prior to the finishing of the requested act. Nonetheless, as explained in the following sections, general principles of contract damages can not only supplant section 45 but can often produce more suitable results.

D. The Uncertainty Problem

Contract damages should be the point of departure in fashioning a remedy for repudiation or breach of a unilateral contract. Nevertheless, contract damages may ultimately not be appropriate in many specific cases. For example, suppose that a promisor repudiates a reward offer or an open real estate listing, having promised to keep it open for a set time, before the promisee begins performance. Often it will be impossible to determine whether the promisee would or could have accomplished the performance that entitles her to payment. Perhaps she never intended to do the job, lacked the time, or would have failed. In that event, the promisee would have incurred no real loss from the promisor's breach.[163]

This difficulty does not, however, mandate that we spurn general contract principles in favor of section 45. Normally, an injured party can only recover losses established with "reasonable certainty."[164] Many courts have mitigated the force of this rule by

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[163] In contrast, where the promisee has at least begun preparations, there is a greater possibility that she has been deprived of a justified expectation to earn the money and has suffered a loss by, for example, declining other work.

[164] *E.g.*, Midwest Sheet Metal Works v. Frank Sullivan Co., 215 F. Supp. 607, 611 (D. Minn. 1963) (stating that loss of anticipated profits must be shown with a "reasonable degree of certainty and exactness"), *aff'd*, 325

stating that what must be reasonably certain is the fact of the injury, not the amount of the loss.[165]

When full expectation damages are considered too speculative,

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F.2d 33 (8th Cir. 1964); Forest's Mens Shop v. Schmidt, 536 So. 2d 334, 336 (Fla. Dist. Ct. App. 1988) (stating that claim for lost future profits must be established with reasonable certainty), *cause dismissed*, 542 So. 2d 988 (Fla. 1989); Resorts Int'l v. Charter Air Center, Inc., 503 So. 2d 1293, 1296 n.2 (Fla. Dist. Ct. App. 1987) ("[T]he law requires only that the damages be reasonably ascertainable."); Kaiser Inv. v. Linn Agriprises, Inc., 538 So. 2d 409, 415 (Miss. 1989) ("[D]amages for breach of contract must be proven with reasonable certainty and not based merely on speculation and conjecture."); Najjar Indus. v. City of New York, 451 N.Y.S.2d 410, 414 (App. Div. 1982) ("[D]amages must be not merely speculative, possible and imaginary, but they must be reasonably certain."); Ace Vending Co. v. Davidson, 457 N.E.2d 341, 343 (Ohio Ct. App. 1982) (stating general rule of damages that lost profits "must be shown with reasonable certainty"); Bane v. Anderson, Bryant & Co., 786 P.2d 1230, 1236 (Okla. 1989) ("In determining the future effect of an injury, the law requires a showing of reasonable certainty. The evidence is sufficient if it demonstrates that the damages could be computed by just and reasonable inference."); Spang & Co. v. United States Steel Corp., 545 A.2d 861, 867 (Pa. 1988) (requiring evidence that establishes damages with reasonable certainty); Fleming Mfg. Co. v. Capitol Brick, Inc., 734 S.W.2d 405, 407 (Tex. Ct. App. 1987) (recognizing that although amount of lost profits must be shown with reasonable certainty it need not be susceptible to exact calculation); RESTATEMENT (SECOND) OF CONTRACTS § 352 (1979) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."); *see also* Perfecting Serv. Co. v. Product Dev. & Sales Co., 131 S.E.2d 9, 22 (N.C. 1963) (requiring "evidence of damages . . . sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion").

165 Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521, 536 (Miss. 1987) ("The rule that damages, if uncertain, cannot be recovered applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent recovery."), *cert. denied*, 486 U.S. 1043 (1988); Ideker, Inc. v. Missouri State Highway Comm'n, 654 S.W.2d 617, 627 (Mo. Ct. App. 1983) (stating that law does not allow escape from liability because damages are uncertain since rule against recovery of uncertain damages refers to uncertainty as to their nature, not as to their measure or extent); El Fredo Pizza v. Roto-Flex Oven Co., 261 N.W.2d 358, 364 (Neb. 1978) (stating that uncertainty as to whether any damages were sustained at all is fatal to recovery, but uncertainty as to amount is not); *Najjar Indus.*, 451 N.Y.S.2d at 414-15 (recognizing that where fact of injury is certain breaching party should not escape liability merely because amount of damages caused is difficult to prove); *Bane*, 786 P.2d at 1236 ("[W]here the issue of uncertainty of damages arises, the rule limiting recovery of uncertain damages applies to the fact of such damages, not their measure."); Jennings v. Hayes, 787 S.W.2d 1, 3 (Tenn. Ct. App. 1989) ("[S]peculative

courts often award a lesser and less speculative recovery, such as reliance damages.[166] For example, when a plaintiff loses future profits because of some action or omission of the defendant, such as delayed construction of a theater, but cannot establish the amount of the profit with certainty, a court may allow the plaintiff to recover a lesser but more certain amount, such as out of pocket losses and the rental value of the theater.[167] But in many other cases, even a lesser measure of damages may be deemed too speculative. For example, while courts generally award damages for future lost profits of an established business, because past profits may be used to predict those in the future,[168] they have tradition-

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damages . . . are only prohibited when the existence of damages is uncertain, not when the amount of damage is uncertain.").

166 United States v. Behan, 110 U.S. 338 (1884) (allowing recovery of reasonable expenditures when contractor could not prove lost profits); Las Colinas, Inc. v. Banco Popular, 453 F.2d 911 (1st Cir. 1971), *cert. denied*, 405 U.S. 1067 (1972). *See also* L. Albert & Son v. Armstong Rubber Co., 178 F.2d 182 (2d Cir. 1949) (allowing recovery of reliance damages minus costs plaintiff would have incurred had contract been performed); Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932) (stating that failure to establish lost profits from match with requisite certainty does not preclude recovery for expenses incurred in reliance on contract's full performance by other party); Hardin v. Eska Co., 127 N.W.2d 595 (Iowa 1964) (allowing recovery of expenses as reliance damages to franchisee who could not establish future profits with certainty); Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973) (allowing reliance damages when expectation damages difficult to establish); Freund v. Washington Square Press, 314 N.E.2d 419, 421 (N.Y. 1974) ("At the trial on the issue of damages, plaintiff alleged no reliance losses suffered in performing the contract or in making necessary preparations to perform. Had such losses, if foreseeable and ascertainable, been incurred, plaintiff would have been entitled to compensation for them."); Fuller & Perdue, *supra* note 13, at 374 (noting that some cases have awarded reliance damages).

167 *See* Evergreen Amusement Corp. v. Milstead, 112 A.2d 901 (Md. 1955) (allowing damages for fair rental value and actual expenses incurred); *see also* Standard Supply Co. v. Carter & Harris, 62 S.E. 150 (S.C. 1908) (measuring damages for deprivation of property as fair rental value), *overruled on other grounds*, Drews Co. v. Ledwith-Wolfe Assocs., 371 S.E.2d 532 (S.C. 1988) (deciding that new business rule does not automatically preclude recovery of lost profits).

168 *See, e.g.*, Natural Soda Prods. Co. v. Los Angeles, 143 P.2d 12 (Cal. 1943) (basing amount of damages on past value of property), *cert. denied*, 321 U.S. 793 (1944); Innkeepers Int'l v. McCoy Motels, 324 So. 2d 676 (Fla. Dist. Ct. App. 1975) (allowing damages for lost profits when contract stated amount to be paid for plaintiff's management services and plaintiff had thirteen years experience in providing such services), *cert. denied*, 336 So. 2d 106 (Fla. 1976).

ally been more reluctant to grant any lost future profits to a new business without such a track record.[169] Consequently, the rule requiring certainty typically gives the plaintiff all that she asks, or nothing at all.[170]

Uncertainty arises from various factors. One type of uncertainty closely resembles the requirement of awarding consequential damages only when those damages are foreseeable. These cases frequently involve the extent of damages deriving from a lost opportunity to profit from collateral transactions with third parties.[171] For example, when a builder breaches by delaying construction of a commercial building, it is often foreseeable that

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[169] *See, e.g.*, Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, 519 F.2d 634, 640 (8th Cir. 1975) (recognizing that Iowa adheres to "new business rule" to deny potential profits if damages are too speculative); Anderson v. Wooten, 549 So. 2d 40, 44 (Ala. 1989) (upholding trial court's denial of lost profits "because [plaintiff] had not established past experience . . ."); Gilroy v. American Broadcasting Co., 395 N.Y.S.2d 658, 659 (App. Div. 1977) (reversing damage award in suit against broadcasting company because "plaintiff . . . [did] not have an established reputation"), *appeal dismissed*, 373 N.E.2d 371 (N.Y. 1977).

Recently, courts have begun to abandon the *per se* rule against awarding damages for the lost profits of a new business. *See, e.g.*, Fera v. Village Plaza, 242 N.W.2d 372, 373-74 (Mich. 1976) (allowing future profits as part of damage award unless amount uncertain); *El Fredo Pizza*, 261 N.W.2d at 363-64 (allowing recovery of loss of prospective profits by new business if amount is reasonably certain); *Drews Co.*, 371 S.E.2d at 532 (recognizing that "new business rule" does not automatically preclude recovery of lost profits); Shropshire v. Adams, 89 S.W. 448, 450 (Tex. Ct. App. 1905) (stating that lost profits would be allowed if established with reasonable certainty); RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. b (1979) ("[I]f the business is a new one . . . proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.").

[170] McCormick criticized the all-or-nothing approach of awarding damages for the value of a chance, advocating instead that where the chance is not outweighed by a countervailing risk of actual loss, and where it is fairly measurable by calculable odds, or by evidence bearing specifically on the probabilities, or by expert opinion, and where the amount of the loss is fixed or approximately ascertainable, the jury should be allowed to value the lost opportunity. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 31, at 122-23 (1935). *See also* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1210-15 (1970) (criticizing all-or-nothing recovery); Note, *Damages Contingent Upon Chance*, 18 RUTGERS L. REV. 875 (1964) (criticizing all-or-nothing recovery and urging recovery of the value of a chance in appropriate cases).

[171] *See generally* MCCORMICK, *supra* note 170, § 25, at 99.

the injured party, who planned to establish a business there, may lose potential profits from transactions with third parties during the time of the delay.[172] Many cases have discussed whether consequential losses of this type are sufficiently certain to permit recovery.[173]

A related type of uncertainty arises when a party repudiates a promise to provide the injured party with a share of the proceeds from the transaction that is the subject of the contract. Examples include a promise to pay royalties, a percentage of profits, or sales commissions. Generally, when a party repudiates or breaches such a contract, courts have permitted recovery of damages only when there is a reasonable means for computing the amount.[174]

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[172] *See* Evergreen Amusement Corp. v. Milstead, 112 A.2d 901, 904-05 (Md. 1955) (stating that lost profits are foreseeable but generally disallowed unless business previously established and reasonable certainty existed for determining amount of damages.)

[173] *See, e.g.*, Ericson v. Playgirl, Inc., 140 Cal. Rptr. 921, 924 (Ct. App. 1977) (stating that damages from loss of general publicity, as opposed to damages from loss of publicity related to a specific event, were speculative and conjectural); Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. Dist. Ct. App. 1990) (allowing recovery because damages not so uncertain as to bar claim), *review denied*, 581 So. 2d 1307 (Fla. 1991); Crain Automotive Group v. J & M Graphics, 427 So. 2d 300 (Fla. Dist. Ct. App. 1983) (requiring advertising agency to prove that loss was or should have been within reasonable contemplation of parties, that loss was not remote, contingent or conjectural and that damages were reasonably certain); Bass v. Carpenter, 262 S.E.2d 578 (Ga. Ct. App. 1979) (stating that damages of lost profits were not too remote or speculative to be recovered given evidence presented by plaintiff); Hoffman v. Louis L. Battey Post No. 4, 39 S.E.2d 889 (Ga. Ct. App. 1946) (deciding that damages for lost profits were within contemplation of parties and not too speculative or incapable of proof); Donovan v. Bachstadt, 437 A.2d 728 (N.J. Super. Ct. App. Div. 1981) (allowing real estate purchasers to recover expectation damages resulting from higher financing costs when vendor failed to produce good title at closing because damages were not too speculative), *modified*, 453 A.2d 160 (1982); Kenford Co. v. County of Erie, 537 N.E.2d 176 (N.Y. 1989) (denying damages for loss of anticipated appreciation in value of land when development of land was abandoned), *appeal dismissed*, 541 N.E.2d 422 (N.Y. 1989).

[174] Lexington Prods. v. B. D. Communications, 677 F.2d 251 (2d Cir. 1982) (deciding that computations of royalties received by manufacturer from distributor under exclusive marketing agreement were not speculative or uncertain where multiple bases existed for calculating them); Bloor v. Falstaff Brewing Corp., 601 F.2d 609 (2d Cir. 1979) (stating that trial court properly used combined sales of similar products sold primarily in same market to compute amount of revenue absent breach); Contemporary

When no reasonable basis exists for such computation, courts will usually not award damages. For example, in *Freund v. Washington Square Press*, a publisher breached its promise to publish a book. The court refused to award the author his expectation under the contract, because the amount of royalties he would have received from publication—or whether he would have received any royalties at all—was speculative.[175]

Unilateral contracts exhibit a number of features that may likewise complicate the measurement of damages for repudiation before completed performance. Because of the uncertainty in these cases, courts may refuse to award full expectation damages. Perhaps the most critical such factor is that if the promisor breaches or repudiates before full performance, it may be uncertain that the promisee can complete the required act and thus entitle herself to payment. In other words, the injured party can obtain the benefit of the promise only by succeeding in a speculative venture or gamble. Promises to pay a reward, a prize, or a real estate broker's commission all illustrate this type of uncertainty. Obviously, whether a particular promisee will find a lost dog, win a contest, or procure a qualified buyer is almost inherently speculative before the fact. Indeed, one of the reasons that unilateral contracts—promises in exchange for an act—have retained their vitality is precisely because people want to motivate others to undertake efforts whose success is a gamble. Of course, the promisee cannot reasonably promise to find a lost dog or procure a buyer for a house. For that reason the promisor does not negotiate for an empty return promise, but rather seeks to induce the promisee to take on the speculative venture by promising to pay a premium over what the promisee's time is normally worth. Many, though certainly not all, unilateral contracts are therefore inherently somewhat speculative.[176]

Mission, Inc. v. Famous Music Corp., 557 F.2d 918 (2d Cir. 1977) (allowing plaintiffs suing for breach of agreement to promote musical compositions to present statistical analysis to prove how successful recordings would have become absent breach); Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, 519 F.2d 634 (8th Cir. 1975) (allowing evidence of comparable fund raising to substantiate claim for lost profits from breach of contract).

[175] 314 N.E.2d 419 (N.Y. 1974). *See also* Hill v. Brown, 520 N.E.2d 1038, (Ill. App. Ct. 1988) (disallowing damages for profits anticipated by partnership because any damages would be too speculative), *appeal dismissed*, 526 N.E.2d 830 (1988).

[176] With bilateral agreements, courts normally presume that the injured

Another element of uncertainty with many unilateral contracts is whether the promisee *wants* to complete performance. If the promisee has begun looking for a lost dog or a house purchaser, for example, she probably does desire to complete.[177] But until full performance, there is no assurance that she may not be enticed by a larger reward to search for another dog or devote all her efforts to locating a purchaser for a different house.

Even if we assume that the promisee is willing and able to complete the requested act, the presence of multiple promisees in unilateral contracts introduces an additional element of uncertainty. If there are multiple promisees, neither the promisor nor the promisees typically know in advance who will complete performance and become entitled to payment. Furthermore, as the number of promisees increases, the chance that any particular promisee will be rewarded for her efforts diminishes.

So far, uncertainty has been related to factors influencing the promisee's ability or desire to complete the act entitling her to payment. An additional source of uncertainty derives from measuring the *amount* of damages when a unilateral contract is repudiated or breached before full performance. For example, unilateral contracts may be made to the public at large, rather

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party could have fulfilled her part of a bilateral agreement, unless perhaps there is evidence to the contrary. This seems reasonable in light of the injured party's promise to perform.

Courts have at times refused to award damages for breach of a bilateral contract because it was uncertain that the promisee could complete the performance that would have entitled her to payment. *See, e.g.*, Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932) (stating that damages were too speculative because performance depended on so many different circumstances). More commonly, courts deny recovery to the injured party following repudiation if it is clear that the injured party could not have performed. *See, e.g.*, Kanavos v. Hancock Bank & Trust Co., 479 N.E.2d 168 (Mass. 1985) (requiring plaintiff to prove ability to perform before allowing recovery of damages for repudiation of contract); RESTATEMENT (SECOND) OF CONTRACTS § 254 (1) (1979) ("A party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise.").

[177] The uncertainty of whether a promisee would be able to meet the conditions for the promise may underlie the *Restatement*'s distinction between preparing to perform and beginning performance. A promisee will likely be held to be preparing to perform if her conduct is not clearly referable to the offer. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. f (1979). Therefore, because it is not clear that she planned to perform at all, there is no option contract created under § 45.

than to a known individual or group. When the promisees are known and form a limited group, it is easier to establish the statistical probability of any one of the group meeting the required conditions. With offers made to the world at large, this is virtually impossible. For example, if there are five finalists in a quiz contest with a prize of $10,000, and one contestant is wrongfully denied an opportunity to continue participating, it would not be unreasonable to calculate damages by awarding the contestant one fifth of the prize, or $2000.[178] But with a prize or reward offered to the public at large, such a calculation may not be feasible because the number of contestants is unknown and perhaps unknowable.

Uncertainty of the amount of damages is also a concern with part performance of a unilateral contract, at least when the promisor requires a noncumulative performance that is valueless if not completed. In the normal case, where the requested performance is cumulative and partial performance is thus of some value to the promisor, expectation damages following repudiation can usually be calculated on the basis of the contract amount. On the other hand, it may be very difficult to determine the amount of expectation damages to which a real estate broker might be entitled after the owner takes the property off the market. The loss to the broker is not the relatively certain expectation of obtaining the full commission, but merely a *probability* of obtaining the commission. Further, the broker has conferred no real benefit on the owner, and the broker's costs avoided by the repudiation are virtually impossible to calculate. The promisor may compound the problem in the case of noncumulative performance by offering a premium well over the normal value of the promisee's time. Should compensation for part performance be based on the premium, which presupposes success, or should the promisee be compensated merely for time and costs actually expended?

One final factor that may produce uncertain damages involves noncommercial agreements.[179] If I promise to pay a professional

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[178] *See infra* notes 221-22 and accompanying text (discussing rewards and prizes).

[179] *See* Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973); *see also* Fuller & Perdue, *supra* note 13, at 396 (noting that courts give variety of reasons for not enforcing many contracts that are "social" rather than "commercial," but citing several such cases where courts give reliance damages rather than expectation measure).

It may also be the case that reliance damages are often assumed to be

painter $100 to paint my fence, and she does so, we have agreed that her work was worth $100, and this amount should form the basis for any damage award. But if I promise to take my sister out to dinner if she proofreads this Article, a noncommercial agreement, it is much less likely that what I have promised to pay represents the real value of her work.

There are thus several factors that weigh against awarding expectation damages and in favor of some lesser remedy or none at all. They can be summarized as follows:

1. It cannot be determined before full performance whether the promisee can complete the act that entitles her to payment (in other words, success is speculative or a gamble);
2. It cannot be determined before full performance whether the promisee will want to complete the performance that entitles her to payment;
3. There is more than one promisee, not all of whom can meet the required conditions to obtain the benefit of a conditional promise, so that even if it is possible to complete the requested act and all promisees are willing, it is not yet known who will in fact meet the conditions;
4. The promise was made to the public at large, rather than to a known individual or group of individuals, making it difficult to calculate the value of the chance the promisee lost because of the promisor's repudiation; and
5. The promisor requests a noncumulative performance whose value is difficult or impossible to calculate before the act is completed.
6. The agreement is noncommercial.

These criteria regarding uncertainty can now be applied to some common classes of unilateral contracts. When combined with a general presumption in favor of expectation damages, they lead to more satisfying results than those offered by section 45.

E. Employee Benefits

Unilateral contracts are increasingly being used to analyze promises of benefits to employees.[180] Here, the uncertainty char-

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appropriate in cases of promissory estoppel because promises under Restatement § 90 are sometimes thought to be of a less commercial nature or even gratuitous, as opposed to unilateral or bilateral contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmts. e, f (1979).

[180] A number of courts, for example, have viewed promises in policy manuals not to discharge employees without good cause as enforceable unilateral contracts, at least after the employee has commenced performance. *See* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257 (N.J.

acteristic of other types of unilateral contracts is somewhat less acute. Unlike reward offers, for example, a promise to pay an employee benefit is made to a known individual or group of individuals. Furthermore, those individuals are generally willing and able to meet the conditions on the promise. Depending on the nature of the promise, therefore, expectation damages may well be appropriate.

A typical example of a unilateral contract in the employment context is a promise to pay an incentive bonus, often a percentage of the employer's profits or of sales made by the employee, payable at a specific time. For instance, an employer might promulgate a profit-sharing plan based on the calendar year, with the bonus to be paid the following March.[181] Closely related to incentive bonuses are what might be termed retention bonuses. While incentive bonuses aim to induce employees to work hard and increase profits, the focus of a retention bonus is to induce the worker to stay in the service of the employer for a certain duration. Rather than providing a share of the profits, they often promise employees a lump sum payment at the end of a specified period of employment. Another type of employee benefit is the promise to provide vacation time or a pension. These are all unilateral contracts, because normally the employee promises nothing. Rather, the employer's promise to pay a bonus or provide a pension is exchanged for the employee's act of working hard or remaining on the job for a set time period.

What is the employee's remedy if her boss revokes the plan or discharges the employee before she can fulfill its conditions by remaining employed until the payment date? Under *Restatement* section 45, the employee's beginning performance (often, just

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1985), *modified*, 499 A.2d 515 (N.J. 1985) (finding that employment manual provision stating that employees would be discharged only for cause is offer of unilateral contract that becomes binding when employee continues working without being obligated to do so); *see also* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980) (stating that policy manual can modify contract between employer and employee by requiring that employees be discharged for cause only); Michael A. Chagares, Comment, *Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis*, 16 SETON HALL L. REV. 465 (1986) (arguing that employee manual promises modifying employment-at-will doctrine should be held binding as unilateral contracts that are accepted by continued employment). *See generally* Pettit, *supra* note 20.

[181] Lampley v. Celebrity Homes, Inc., 594 P.2d 605 (Colo. Ct. App. 1979).

continuing to work) would create an option contract, making the promise irrevocable but requiring the employee to complete performance before being entitled to the bonus. Few courts have explicitly applied section 45 to these situations, however.

Some older bonus cases in which the employee was discharged before the time period passed awarded no damages at all, on the ground that despite the promise of the bonus, the employer had the right to discharge the employee at any time for any reason.[182] Likewise, where a employer promises to provide a pension plan after an employee works for a stated period of time, courts do not generally make such a promise irrevocable after the employee commences performance. Absent bad faith or a promise to discharge only for cause, the employer can terminate the employee before the plan vests and will generally have no pension obligations towards her.[183]

At least with bonus cases, some courts have recently taken a more pragmatic approach, awarding the injured employee a pro-rata share of the bonus, the amount of the award depending on the proportion of the required time period that the employee had worked.[184] The same rule is often applied to retention bonuses.

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182 *See, e.g.*, Russell v. H. W. Johns-Manville Co., 200 P. 668 (Cal. Ct. App. 1921) (stating that employee was not entitled to annual bonus when defendant discharged plaintiff-employee before end of year because bonus offer did not alter defendant's right to discharge plaintiff at any time without cause); Fontius Shoe Co. v. Lamberton, 241 P. 542 (Colo. 1925) (holding that employee was not entitled to bonus where bonus plan allowed persons under the plan to be discharged for any cause whatsoever); Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337 (Ind. Ct. App. 1942) (requiring employee to meet conditions of plan before receiving benefits because employer could discharge employee at any time without cause).

183 *See, e.g.*, Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979) (disallowing equitable remedy to plaintiff who was terminated seven and a half months before the vesting of major pension benefits because plaintiff did not prove that termination was in bad faith); Kruzer v. Giant Tiger Stores, 317 N.E.2d 70 (Ohio Ct. C.P. 1974) (stating that employee was not entitled to pension benefits unless he could show that employer discharged him in bad faith or that the termination deprived him of benefits he would otherwise be entitled to receive).

184 *See, e.g.*, *Lampley*, 594 P.2d at 605 (holding that plaintiff was entitled to proportionate share of profit-sharing plan because of defendant's wrongful discharge of plaintiff); Morton v. E-Z Rake, Inc., 397 N.E.2d 609 (Ind. Ct. App. 1979) (stating that plaintiff was entitled to pro-rata portion of bonus under employment contract); Sinnett v. Hie Food Prod., 174 N.W.2d 720 (Neb. 1970) (allowing plaintiff, who was fired one day before end of year, to collect a proportionate share of bonus under an oral contract which

For example, in *American Security Life Insurance Company v. Moore*, the plaintiff and defendant entered into an employment contract commencing on March 1, 1951. The contract provided that the plaintiff would receive a ten percent salary bonus if employed on December 15 of each year. On November 29, 1951, the defendant terminated the plaintiff's employ, stating that it no longer intended to do business in the state. The court awarded the employee a pro-rata share of the promised bonus.[185] Interestingly, *Restatement* section 45 provides no direct mechanism for a pro-rata expectation award.

In yet other such cases, courts have indeed granted full expectation damages, even before completed performance. In one example, an employer had promised an employee a share of its profits at the end of the year, but discharged him before the year was over. The court held that the plaintiff had the right to regard the contract as one for a year and awarded damages not only for the time he had actually worked, but also for the remainder of the

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provided for bonus of $20 per week to be paid at end of each year of employment); Marvin Turner Engineers v. Allen, 326 S.W.2d 200 (Tex. Ct. App. 1959) (stating that plaintiff, who was discharged on December 5, was entitled to recover pro rata share of bonus that defendant customarily paid at Christmas); Ruditys v. Wing, 260 N.W.2d 794 (Wis. 1978) (allowing employee to recover benefits under former employer's profit-sharing plan when laid off for lack of suitable work). *But see* Molburg v. Hunter Hosiery, Inc., 158 A.2d 288 (N.H. 1960) (denying recovery to plaintiff under general profit-sharing plan which provided that interest of any employee would terminate when employee was no longer in defendant's employ, and plaintiff was discharged prior to final distribution date without showing of bad faith or fraud).

185 72 So. 2d 132, 134 (Ala. Ct. App. 1954). *See also* Kollman v. McGregor, 39 N.W.2d 302, 304 (Iowa 1949) ("There is much authority that where an agreement provides for a bonus for continuous service which is terminated by the employer through no fault of the employee, the latter is entitled to a proportionate share of the bonus according to the time served."); Roberts v. Mays Mills, Inc., 114 S.E. 530 (N.C. 1922) (stating that where employer promised bonus to employees who had continuously worked for a certain time, a discharged employee was entitled to amount of bonus earned up to time of discharge); *cf.* Oregon *ex rel.* Roberts v. Public Fin. Co., 662 P.2d 330 (Or. 1983). Justice Roberts noted in dissent that where "(1) the obligee's fulfillment of the condition is 'faultlessly' obviated or prevented by an act of the obligor, (2) the obligee did not clearly manifest an intention to assume the risk of the obligor's act, and (3) the obligee's part performance had an ascertainable value to the obligor . . . the obligee should be entitled to some compensation for his or her part performance." *Id.* at 338.

employment term.[186] In contrast to the pro-rata cases, here the result can be analyzed in terms of section 45: the court essentially imposed an option contract when the employee relied on the promise by commencing performance, and treated the termination of the employee as a waiver of the condition requiring completed performance, thus entitling the employee to full expectation damages.

While section 45 has difficulties accounting for these disparate results, a promissory approach that emphasizes expectation damages, tempered with the certainty doctrine, provides a more natural explanation. The critical factor, which section 45 does not directly take into account, is whether the employer has the right to terminate an employee benefit plan, either by ending the plan itself, or by discharging a covered employee. Generally, a bonus plan may legitimately be terminated if the promisor did not commit himself to keep it operative for a specified duration and does not act in bad faith. But significantly, a bonus plan cannot be *revoked*—i.e., cannot be treated as though no commitment ever existed. While the bonus offer was effective, the employer committed himself to paying it, subject to the employee meeting the specified conditions. Obviously, if the employee has completed the required performance, she will be entitled to the entire promised benefit. But what if the promise of a bonus or other benefit is repudiated, or the employee is fired, after she has only partly performed?

One common type of benefit is a pension plan. Typically a pension plan promises specific benefits that vest only after the employee has worked for, let us say, five years. Assume further that the employer makes it plain that workers can be discharged at will, and that the employee in question has indeed been fired after working only one year due to lack of business. Unless the employer acted in bad faith, this approach supports giving no pension award to the employee, at least as a matter of contract law. Although the employer made a promise, it contained conditions that were not met. It would not be especially reasonable to

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186 Parish & Bingham Corp. v. Jackson, 16 Ohio App. 51 (1921). *See also* Snyder v. Hershey Chocolate Co., 63 Pa. Super. 528 (1916) (stating that where a company customarily paid employees twenty percent of their wages as a bonus at end of calendar year, parties had an annual contract and plaintiff was entitled to bonus for entire year, since defendant employer prevented him from completing terms of offer when his services were dispensed with on December 14).

rely on a pension promise in this situation. And although it might be argued that the employer prevented fulfillment by discharging the worker, the employer expressly reserved the right to do so. In any event, a damage award would be highly uncertain. What the employer wanted is a cumulative performance, by rewarding long-term satisfactory employment with the company, which in this case did not eventuate. The employer's promise provides no basis for determining the value to him—beyond ordinary wages—of a year's service. Finally, it is quite uncertain that the employee would have stayed on the job for the required five years.

Now consider a somewhat different example. Suppose that on January 1 an employer offers a salesman 1% of all the firm's profit, payable at the end of the calendar year, but then discharges her in June. If the employer retains the right to terminate the bonus plan itself, or to discharge the employee at any time, the firing of the employee itself is not a breach. One approach is thus to hold that an employee who is promised a profit-sharing bonus after a year's service but is aware that she can be discharged at any time assumes the risk that she will be terminated, just as with the pension plan. On the other hand, the employer has clearly benefitted from the promise by being able to attract and retain a qualified and motivated employee. Likewise, the employee may have been injured by working harder or staying on the job longer because of this promise. And it is not unreasonable to assume that, if not discharged, she would have stayed on the job until the end of the year. Perhaps the most satisfactory solution is therefore, where factually possible, to conclude that the profit-sharing promise is not conditional on the worker remaining employed for a full year, but simply establishes a date for payment. The fairest result in this situation is to award the employee a pro-rata bonus. If she worked one-half of the year, she would receive half of the bonus.

These types of cases are problematic for section 45 because the *Restatement* presumes that *every* unilateral contract can be paired with an option contract. The only exception occurs when the offeror reserves the right to terminate the program or discharge an employee. In an illustration to section 45 that involves precisely this situation, the *Restatement* reaches the counterintuitive conclusion that because the offeror retains the power to revoke (i.e., to terminate the bonus plan), there is no offer or promise at

all.[187] In other words, not only is there no promise to keep the bonus offer open, but there is also no promise to pay a bonus under specified circumstances—there is merely an offer that can be accepted only by completed performance. As a practical matter, this is surely wrong. When an employer offers an incentive bonus or a pension plan that will vest in five years, that employer has not just expressed a vague intention, but has *presently* made a promise, even with an at-will employment relationship. Employees may well rely on such promises by working harder or staying on the job.

The proper focus is not whether the employer has retained the power to revoke—a promise cannot be revoked—but rather the nature of the promise or promises and whether they have been broken. Certainly an employer can promise an employment benefit, payable at the end of some time period, without promising that she will not discharge the employee before that time. This is particularly the case with pension plans.

On the other hand, an employer might, in addition to offering a bonus, promise to retain the employee for a stated duration. Particularly if the purpose of the bonus is to induce an employee to remain in service for a specified time, it may be reasonable to infer that the employer is implicitly promising to retain the employee (barring good cause for dismissal) for that period of time.[188] Where there is such a promise, express or implied, the employer who discharges an employee or terminates the bonus plan is repudiating or breaching the promise by preventing the employee from meeting the conditions for payment. If it is likely that the employee would have been willing and able to complete the required performance absent the breach, uncertainty is not a critical factor. Furthermore, the employee will quite rationally rely on having employment for the stated period and might well pass over other opportunities. Full expectation damages thus seem quite appropriate.[189]

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[187] RESTATEMENT (SECOND) OF CONTRACTS § 45 illus. 2 (1979).

[188] In contrast, when the bonus offer specifies that it does not confer employment for a specified period, the implication of a promise of employment would be negated and the employee would not be entitled to the bonus. *See* Harding v. Montgomery Ward Co., 58 N.E.2d 75 (Ohio Ct. App. 1944) (stating that where bonus plan provided no right to definite term of employment, an employee forfeited right to bonus when he was discharged before the period to compute bonus was completed).

[189] In addition, full expectation damages seem appropriate if the

F. Commissions

Commissions, especially those earned by real estate brokers, present different problems with respect to damages upon breach before completed performance. As noted previously, under section 45, when a broker commences performance, an option contract is created and makes the offer to pay the commission irrevocable. But even though real estate brokers' contracts are one of the most common types of unilateral contracts, courts have only adopted the option contract solution in limited situations.

One of the critical distinctions in the cases regarding breach of brokerage agreements is that between open and exclusive listings. Generally speaking, an open or general listing is made to brokers in general, or if made to a single broker, has no promise of exclusivity. In addition, an open listing normally has no specific duration. On the other hand, an exclusive listing is made to one particular broker, usually for a set period of time.[190] Although often unarticulated, the trend that emerges from the cases is that courts do not imply an option contract, or otherwise protect the interest of a broker, when the contract with the seller is merely an

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promisor repudiated the promise in bad faith. *See* Thompson v. Burr, 490 P.2d 157 (Or. 1971). Plaintiff had a contract with defendant that provided that any employee who worked for an entire year and remained employed until April 1 of the following year would receive a bonus. The employer fired the plaintiff on March 12 after the plaintiff would not testify in a favorable manner for the defendant in another lawsuit. Finding that the defendant had fired the plaintiff without good cause, the court held, on a unilateral contract theory, that the defendant was liable for the amount of the bonus. *Id.* at 160.

[190] An *open listing* is one where the broker gets a commission only if she finds a "ready, able, and willing" buyer before the property is otherwise sold, the listing expires, or the listing is revoked. 1 HARRY D. MILLER & MARVIN B. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 2:11, at 539 (2d ed. 1989). The listing is revocable at will by the owner in good faith at any time before performance by the broker, regardless of the efforts expended by the broker. *Id.* § 2:11, at 541. The open listing is a unilateral contract. *Id.* If one listing broker finds a buyer, the listings of any others are terminated; the seller does not have to give notice of termination to them. *Id.* § 2:11, at 540-41. An *exclusive agency listing* is one where the owner can sell or lease the property himself without paying a commission, but cannot use the services of another broker. *Id.* § 2:12, at 541-42. An *exclusive right-to-sell* listing is one where even the owner cannot sell the property without paying a commission to the broker. *Id.* § 2:13, at 343-44. *See also* CAL. CIV. CODE § 1086 (West Supp. 1992) (defining types of listings); Tetrick v. Sloan, 339 P.2d 613 (Cal. Ct. App. 1959) (explaining consequences of different types of listings).

open listing. This is so even if the broker has begun to perform by expending time and money.[191] As previously observed, the failure to make the offer irrevocable in these cases directly

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[191] *See, e.g.*, Trimmer v. Ludtke, 462 P.2d 809 (Ariz. 1969) (stating that broker with open listing not entitled to commission even after partial performance because broker assumes risk of expending efforts against chance that when he presents his buyer, seller may have already revoked the agency by a sale); Coldwell, Banker & Co. v. Pepper Tree Office Ctr. Assocs., 165 Cal. Rptr. 51, 55 n.3 (Ct. App. 1980) (" '[General listing] is revocable at the will of the owner in good faith at any time before performance, regardless of the efforts expended by the broker.' "); *Tetrick*, 339 P.2d at 613 (stating that open listing is revocable at will by owner in good faith at any time before performance by broker, regardless of effort expended by broker); Nugent v. DelVecchio, 415 A.2d 1339 (Conn. Super. Ct. 1980) (deciding that open listing agreement which did not provide broker with exclusive right to sell made broker's right to commission dependent on actual consummation of sale); Bump v. Robbins, 509 N.E.2d 12 (Mass. App. Ct. 1987) (stating that broker not entitled to commission because nonexclusive business broker listing revocable even after partial performance by broker); Frederick May & Co. v. Dunn, 368 P.2d 266 (Utah 1962) (disallowing commission to broker who obtained general listing when owner sold business himself because only minimal efforts expended to procure purchaser). *See also* Dailey v. Stevenson, 96 S.E.2d 761 (Va. 1957) (stating that broker who did not have exclusive listing may devote time, labor, and expend money but is not entitled to commission unless he procures purchaser before his authority is fairly terminated in good faith); FARNSWORTH, *supra* note 104, § 3.24, at 196 (noting that broker's reliance on open listings has not generally been protected under § 45); 1 MILLER & STARR, *supra* note 190, § 2:10, at 536, § 2:11, at 539; Stein, *supra* note 37, at 556-57 (explaining that if brokerage agreement is general, offer is usually held revocable until full performance, even if agent begins to perform, because agent runs greater risk and usually expends little effort).

The court in Marchiondo v. Scheck, 432 P.2d 405 (N.M. 1967), noted that many other decisions emphasized the exclusivity of the brokerage agreement before allowing part performance to make the offer irrevocable. *Id.* at 407. Nonetheless, it held that even a non-exclusive listing can be protected by an option contract after partial performance pursuant to the offer. *Id.* It is interesting, however, that use of this particular broker was apparently part of the proposed "deal," so no others could be involved. *Id.* at 406. This was hardly the stereotypical open listing; in actuality, the brokerage was exclusive. Incidentally, no case seems to have followed this aspect of the *Marchiondo* opinion.

With respect to unilateral contracts in general, offers open to a large group have sometimes been held irrevocable after part performance by a particular person. Typically, however, the conditions in such offers could be met by multiple offerees, so the nonexclusivity of such offers presents no problem. *See* Motel Servs., Inc. v. Central Maine Power Co., 394 A.2d 786 (Me. 1978) (finding that unilateral offer for promotional allowance for using

counters the rule of section 45, and is particularly noteworthy because open listings are stereotypical unilateral contracts.

In contrast, the courts have been more sympathetic to the plight of spurned brokers with exclusive listings. One means of affording some protection to the broker is for the court to hold that when a broker begins to perform, an exclusive listing becomes irrevocable.[192] This comes closest to the approach of the *Restatement*. Other courts reach roughly this same result by holding that an exclusive listing, though unilateral originally, becomes an irrevocable bilateral agreement after the offeree begins to perform.[193] Another means of protecting the broker is

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electricity as primary heating method in building of motel was accepted, and formed a binding contract, upon part performance).

[192] *See* Garrett v. Richardson, 369 P.2d 566 (Colo. 1962) (noting that weight of authority is that exclusive, irrevocable listing for fixed time becomes binding after broker devotes time and energy to finding buyer). *See also* Ladd v. Teichman, 103 N.W.2d 338 (Mich. 1960) (stating that where exclusive sales contract is for reasonable time limit and broker shows substantial performance, brokerage contract is enforceable); Clodfelter v. Plaza Ltd., 698 P.2d 1 (N.M. 1985) (stating that exclusive agency listing can be revoked any time before part performance and that revocation after partial performance is ineffective); White v. Ragle, 485 P.2d 978 (N.M. Ct. App. 1971) (allowing broker to recover commission where broker obtains exclusive right to sell and partly performs because owner's right to revoke at will dies); Hutchinson v. Dobson-Bainbridge Realty Co., 217 S.W.2d 6 (Tenn. Ct. App. 1946) (deciding that after broker began to perform exclusive listing, spent time and money, offer became irrevocable for time stated and broker became entitled to his commission).

[193] *See, e.g.*, Hughes v. Bickley, 89 So. 33 (Ala. 1921) (stating that expenditure of time and money supplied element of mutuality to create binding contract); Mitchell v. Vulture Mining & Milling Co., 55 P.2d 636 (Ariz. 1936) (deciding that exclusive right to sell stock became bilateral on beginning of performance); Harris v. McPherson, 115 A. 723 (Conn. 1922) (stating that reasonable efforts to find purchaser was sufficient acceptance to create bilateral contract); Abbott v. Stephany Poultry Co., 62 A.2d 243 (Del. Super. Ct. 1948) (finding that part performance is sufficient consideration to support bilateral contract); Thompson v. Hudson, 47 S.E.2d 112 (Ga. Ct. App. 1948) (deciding that exclusive right to sell listing becomes bilateral contract after broker acts on it in manner contemplated in the contract); *Motel Servs., Inc.*, 394 A.2d at 786 (finding that unilateral offer was accepted and formed binding contract upon part performance); Klawitter v. Billick, 242 N.W.2d 588 (Minn. 1976) (finding that broker's expenditure of time and money was sufficient consideration to make contract bilateral); Chamberlain v. Grisham, 230 S.W.2d 721 (Mo. 1950) (stating that exclusive listing agreement became bilateral after broker relied on it in expending efforts to procure purchaser); Bell v. Dimmerling, 78 N.E.2d 49 (Ohio 1948) (deciding that where real estate agent, under exclusive right to sell listing,

for courts to regard an exclusive right to sell listing as a bilateral agreement from inception. As such, the agreement cannot be terminated without breaching.[194] The contract is bilateral because the broker either promises or is deemed to have promised that she will use "best efforts" to find a buyer.[195]

Whether brokerage contracts are really bilateral, however, is far from clear. The promise to pay a commission is not really exchanged for a promise to use best efforts; it is exchanged only for the act of finding a qualified buyer. At most, the seller exchanges a promise to give the broker an exclusive right to sell during a limited period of time for the broker's promise to use her best efforts. But even the promise of exclusivity is quite likely unilateral. Several courts and commentators have questioned whether an assertion that the broker will use best efforts is indeed a promise.[196] Furthermore, they have observed how unlikely it is

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has expended time, effort or money in attempting to secure purchaser for property, consideration is supplied to make binding and enforceable contract); Sunshine v. Manos, 496 S.W.2d 195 (Tex. Ct. App. 1973) (stating that exclusive loan brokerage agreement becomes binding bilateral agreement after the offeree partly performs).

194 *Tetrick*, 339 P.2d at 613 (noting that exclusive right to sell listings are treated as bilateral contracts); Real Estate Listing Serv. v. Connecticut Real Estate Comm'n, 425 A.2d 581 (Conn. 1979) (finding that exclusive agency and exclusive right to sell listings create enforceable bilateral contracts); McDonald & Co. v. Fishtail Creek Ranch Ltd. Partnership, 572 P.2d 195 (Mont. 1977) (deciding that exclusive listing agreement could not be unilaterally terminated by one party to contract); Berven Co. v. Newman, 281 N.W.2d 268 (S.D. 1979) (finding that exclusive right to sell listing, in which broker promises to use reasonable efforts to secure purchaser, is valid bilateral agreement supported by consideration); 1 MILLER & STARR, *supra* note 190, § 2:10, at 536.

195 *See, e.g.*, Mark Realty, Inc. v. Rogness, 418 So. 2d 373, 376-77 (Fla. Dist. Ct. App. 1982) (deciding that listing was bilateral because broker's agreement to "endeavor to procure a purchaser" was sufficient consideration); McMenamin v. Bishop, 493 P.2d 1016 (Wash. Ct. App. 1972) (implying promise to find buyer and deciding that listing was bilateral despite lack of express promise by broker), *review denied*, 80 Wash. 2d 1008 (1972). *But see* Hummer v. Engeman, 141 S.E.2d 716 (Va. 1965) (holding that exclusive listing is revocable, apparently viewing it as unilateral contract).

196 One commentator has noted that:

> It may be true that the understanding in [a real estate broker] transaction is that the agent will use his best endeavours to sell the property, but such an understanding may well arise because it is naturally assumed that the agent will be anxious to earn his commission. It does not necessarily follow that he is promising

that any seller could ever sue a broker for not using her best efforts.[197]

But even though the value to the owner of a broker's promise to use best efforts is questionable, the distinction between a contract with such a provision and one without it has at times proved pivotal. Several courts have taken the position that if a broker with an exclusive right to sell listing did not promise to do anything, the agreement was unilateral and the owner was therefore entitled to revoke with impunity before the broker commenced performance.[198] Had the broker simply mouthed a promise to

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> to do anything. Moreover, a promise by an agent to use his best endeavours to find a purchaser would be of exceedingly little value to the client, which is why he does not normally promise to pay the agent merely for use of his best endeavours, but only in the event of those endeavours being successful. A client would find it very hard to sue an agent for breach of any such promise, and perhaps harder still to prove any damage resulting therefrom.

ATIYAH, *supra* note 108, 203-04. *See also* Dixon v. Betten, 277 N.E.2d 355, 358 (Ill. App. Ct. 1971) (finding that broker's promise to endeavor to sell property is not sufficient consideration); Yasuna v. National Capital Corp., 331 A.2d 49 (Md. 1975) (finding that broker promised to use best efforts and expended time and effort to accomplish particular result); RESTATEMENT (SECOND) OF AGENCY § 449 cmt. a (1958) ("In the ordinary listing of property with a real estate broker, the broker's promises to use his best efforts or other similarly indefinite promises are not, without other facts, sufficient to indicate that consideration has been given.").

197 Corbin observed that "[i]f the action were one brought by the owner for damages for the agent's failure to make diligent effort, it is far from certain that the court would be ready to find a promise by the agent." 1 CORBIN, *supra* note 20, § 50, at 208. One commentator claims that no cases have been reported of a broker being successfully sued for failure to use best efforts to find a buyer. D. BARLOW BURKE, JR., LAW OF REAL ESTATE BROKERS § 2.2.3, at 36 (1982).

198 In one case the court held that the agreement "does not include any promise by the plaintiff to endeavor to sell the defendants' property. The agreement contemplates the actual endeavoring as the consideration for the defendants' promise." *Dixon*, 277 N.E.2d at 356. Hence, this was a unilateral rather than a bilateral contract. *See also* Harding v. Rock, 373 P.2d 784 (Wash. 1962) (deciding that where broker did not promise to try to find buyer, exclusive listing is revocable until broker has engaged in part performance); Spatz v. Mile-Hi Realty, 589 P.2d 849 (Wyo. 1979) (stating that seller who granted exclusive right to sell for period of 180 days, during which seller promised not to revoke, could revoke at any time before broker began performance).

use best efforts, the agreement would have been bilateral and irrevocable from inception.

Practically speaking, however, it probably makes no difference to a seller whether a broker promises to use best efforts, or whether this promise is implied. If the broker has an exclusive right to sell listing that is irrevocable for a reasonable period of time, she will try very hard to find a buyer, even if she made no promise. But if the broker merely obtains an open listing, she will probably not expend her best efforts even if she promised. The more exclusive and irrevocable the listing is, the more effort the broker will expend.[199] As a result, a broker may appear to make a promise to use best efforts with an exclusive listing, or may actually do so, but realistically any such promise is virtually meaningless. The law should not base a critical determination—whether a brokerage listing is irrevocable from inception—on such a trivial distinction.[200]

In actuality, the factor that prevents an owner from revoking should not be whether or not a broker has promised to use "best efforts", or whether she has, in fact, engaged in such efforts, but rather the nature of the seller's promise. As noted above, there is a definite trend in the cases to afford a remedy prior to completed performance only to brokers with some type of exclusive listing. In California, for example, a broker with an exclusive right to sell listing is presumed to promise to use best efforts to make the sale, and the contract is therefore considered bilateral and fully enforceable *ab initio* by the broker. On the other hand, an open listing without a termination date (i.e., where the seller has not promised to keep the offer open for a specified period of time) is considered unilateral and revocable at will even if the broker promises to use best efforts or in fact makes such efforts.[201] Most cases protecting a broker prior to completed performance have

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199 BURKE, *supra* note 197, § 2.8, at 65.

200 If all brokerage contracts can be regarded as unilateral because the broker's promise to use best efforts is practically meaningless, what is the function of a "best efforts" clause? Perhaps the best analysis of such clauses is that they constitute not promises, but conditions on the seller's subsidiary promise not to terminate the commission agreement for a specified time and/or make it exclusive. If one broker does not use best efforts, the seller is freed from the commitment of that subsidiary promise and can work with another.

201 Tetrick v. Sloan, 339 P.2d 613, 617 (Cal. Ct. App. 1959); 1 MILLER & STARR, *supra* note 190, § 2:10, at 536.

involved some type of exclusive listing.[202]

An open listing can usually be freely terminated even after the broker commences performance because the seller has not promised that he will not sell the property himself, let another broker sell the property, or in some other way terminate the promise. Consequently, if the seller decides to terminate the brokerage agreement, perhaps because he no longer wants to sell, he has not broken any promise to the broker. Because the promise to pay a commission was a unilateral act, the promisor has the power to terminate it unilaterally. The seller simply promised to pay a commission to the first broker to produce a qualifying buyer before the promise was terminated in some way.[203] This is thus very much the Langdellian unilateral contract, because it can be terminated without liability (but not revoked!) before full performance.

Although the seller with an open listing obviously makes no promises that another broker or the seller himself might not procure a purchaser, thus automatically terminating the promise, the seller might promise to keep the listing open until the property is sold. If such a promise exists, a seller who withdraws property from the market too quickly would breach the contract by preventing interested brokers from carrying out their part of the bargain. Should one or more brokers be entitled to their full commission for this breach?

With an open listing to multiple and perhaps unknown brokers, there are substantial uncertainties that militate against full expectation damages before any broker has found a buyer, even if one or more of the brokers have spent time and money in reliance on the promise. For instance, there may be no way of determining whether a specific broker would have been the first to produce a qualified buyer. Even for a single known promisee, completion of

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202 *E.g.*, Nily Realty v. Wood, 325 A.2d 730 (Md. 1974) (refusing to infer promise to use best efforts, which would have made contract irrevocable, because agent had not obtained exclusive listing). As to open listings generally being revocable even after beginning performance, see *supra* notes 190-91. For cases holding that an exclusive listing is irrevocable from inception, or becomes so after beginning performance, see *supra* note 192.

203 At least in California, an open listing is one where the broker gets a commission only if she finds a "ready, able, and willing" buyer before the property is otherwise sold, the listing expires, or the listing is revoked. 1 MILLER & STARR, *supra* note 190, § 2:11, at 539. Thus an open listing can be revoked with impunity.

performance is a gamble. Finally, performance is not cumulative: all the seller wants is the completed act of finding a buyer; preliminary steps are of no real use to him. As a general matter, therefore, the ultimate success of a broker with an open listing would be highly speculative, so that expectation damages should not be awarded even if one assumes the seller breached a promise not to terminate the listing.

Of course, use of an option contract under section 45 may reduce much of this uncertainty. By making the listing irrevocable, the court might be able to wait to determine who the first broker is to find a buyer. The obvious problem, alluded to earlier, is that if the seller terminated the listing because he no longer wanted or needed the broker's services, imposing an option contract would be economically quite wasteful. Furthermore, because an open listing is a promise to brokers at large, suppose that two or three brokers commence performance. Is the option contract with all brokers, or just those who commenced performance? Assuming performance is waived or excused because the owner no longer wishes to sell, do the brokers get the entire commission, or just part? How do they divide it among themselves?

Although neither expectation damages nor an option contract seems especially appropriate in this situation, one might suggest the possibility of reliance damages. Even with an open listing, brokers might justifiably spend time showing the property to prospective purchasers and money on advertising before the listing is terminated. Reliance damages would be especially appropriate if the promise to keep the listing open is relatively clear, making the expenditures reasonable. Most likely, however, such reliance will be minimal because of the uncertainties of success. In addition, the time or money spent might simply be viewed as the price that brokers pay for the right to gamble on winning a large premium if they succeed.[204]

The uncertainty inherent in an open listing is greatly reduced when a commission is promised exclusively to a single identified broker. With an exclusive agency listing, the owner promises not

[204] Of course, the broker does not take the risk that the owner will repudiate in bad faith—for example, to avoid payment when the broker is on the verge of completing performance. The fact that the owner has promised means there is an implied covenant of good faith and fair dealing. Interestingly, under the traditional approach there should be no such covenant, because there is no binding promise.

only to pay a commission, but makes the subsidiary promises that he will keep the promise open (i.e., will not terminate it) for a specified period of time, and will not pay another broker to provide a purchaser. With an exclusive right to sell listing, the owner also promises to pay even if he finds a buyer himself. Having made these promises in contemplation of an economically-motivated exchange, the owner should be bound by them. If the owner breaches by wrongfully terminating the agent's authority, or by allowing a competing broker to locate a purchaser, the only remaining issue is the measurement of damages.

Because an exclusive right to sell listing has an identified and single promisee, and because the exclusivity provision makes success far less speculative than with other types of listings, expectation damages may well be appropriate. Interestingly, even with an exclusive right to sell, the broker does not have a cumulative task—only full success will benefit the seller—and that success remains somewhat uncertain. How does this uncertainty affect the presumed expectation remedy if the seller has breached before the listing period is over? The easiest case is where the owner keeps the property on the market and he himself, or another broker, finds a buyer during the listing period. There, uncertainty is largely eliminated and the injured broker should normally be entitled to full expectation damages.[205] More problematic are those cases where the seller repudiates or breaches

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[205] *See* Carlsen v. Zane, 67 Cal. Rptr. 747 (Ct. App. 1968) (allowing brokers who obtained exclusive right to sell listing to recover full commission when owner sold ten of fifteen acres during the listing period); McDonald & Co. v. Fishtail Creek Ranch Ltd. Partnership, 572 P.2d 195 (Mont. 1977) (presuming that broker having exclusive listing would have made sales that were consummated by others during listing period, entitling broker to seven percent commission); Clodfelter v. Plaza Ltd., 698 P.2d 1 (N.M. 1985) (allowing broker to recover full commission without having to tender satisfactory buyer or prove that he was procuring cause of sale after owners sold property through second broker); Chumney v. Stott, 381 P.2d 84 (Utah 1963) (stating that broker who partly performed under exclusive listing is entitled to entire commission as expectation damages when owner made sale himself).

The same principle is applied in cases of breach of a sales commission. *See, e.g.*, Schiffman v. Peerless Motor Car Co., 110 P. 460 (Cal. Ct. App. 1910) (finding that where principal competes with sales agent who is given exclusive right to sell in specified territory, agent may recover commission based on number of sales that principal wrongfully made in agent's territory); Sparks v. Reliable Dayton Motor Car Co., 116 P. 363 (Kan. 1911) (giving agent commissions based on sales lost to principal); E.J. Brach &

but the property is not sold during the listing period. As mentioned above, some courts have nonetheless granted the full amount of the commission.[206] Other courts have refused to award expectation damages, generally because of a lack of proof that the broker would have found a buyer.[207] The broker, therefore, gets all or nothing.

In virtually all cases where the broker is awarded the full commission upon the owner's breach prior to complete performance, she reaps a windfall in excess of her expectation. While she may *hope* to obtain the full 6% commission when entering into an exclusive listing, her *expectation* is only that she will have a particular probability of obtaining it. For example, a broker may know that under the terms of the agreement and in the existing market she has roughly a 50% chance of finding a buyer during the listing period. Taking into account this probability, her expectation

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Son v. Stewart, 104 So. 162 (Miss. 1925) (allowing agent to recover commission on sales wrongfully made by principal in agent's territory).

Of course, the mere fact that someone else found a buyer is not proof positive that the injured broker could have done so, but it strongly suggests that result.

206 For cases granting full commission see *supra* note 144. *See also* Baumgartner v. Meek, 272 P.2d 552 (Cal. Ct. App. 1954) (rejecting contention that broker had legal right to continue her efforts to find purchaser after breach and was required to do so before she could recover). The court noted:

> [This rule would have required the broker] to spend additional money and time trying to find a buyer who could not have viewed the property without permission of the owner. Respondent would also have been required, in order to interest such a buyer at all, to misrepresent her position in the matter, or, what is equally as bad, to persuade a prospective buyer to enter into an agreement which she knew would not be honored by the seller, and all this for the sole purpose of placing herself in a position to collect a commission and not with the hope of making a sale. The law does not demand such absurdities or sanction such questionable practices.

Id. at 566.

207 For cases disallowing expectation damages see *supra* note 146. *See also* Davis v. Boyd, 162 S.E.2d 880 (Ga. Ct. App. 1968) (excluding loss of profits from damages in absence of showing to reasonable certainty that broker could and would have sold business on stipulated terms); H. M. Seldon Co. v. Carson, 185 N.W.2d 842 (Mich. Ct. App. 1971) (including lost profits in damages for breach of exclusive real estate brokerage contract only if broker has demonstrated that it was *reasonably certain* he would have earned commission but for breach).

can be expressed as one-half of 6%, or 3% of the sale price of the real estate.

Here again, a pro-rata expectation approach, based on the contract amount, is most satisfying.[208] The broker will be fairly paid, based on the contract, for her expectation: the probability of finding a buyer within the time of the contract. She avoids the risk of recovering nothing at all if she cannot prove she would have been able to find a buyer within the listing period. In addition, the seller can more efficiently breach because he does not have to pay windfall damages.

The pro-rata approach receives support from cases relating to breach of exclusive sales or distributorship agreements. Here, the issue is the defendant's liability for future sales that the agent would have made if the agreement had not been prematurely terminated. Although at one time damages for future sales may have been viewed as speculative, courts now allow sales agents to establish and recover commissions for probable future sales on the basis of evidence of their past sales.[209] Some cases have also allowed the jury, in estimating future sales, to consider past sales figures by competitors,[210] or to use expert opinion testimony that is not limited to the plaintiff's actual past sales.[211] Consequently, if a jury can base a damage award for a sales or distributorship agreement on an estimate of the probable volume of sales that the agent or distributor would have made during the remainder of the contract, there is no reason a jury could not likewise base a damage award for breach of an exclusive real estate brokerage

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[208] Support for this approach comes from cases involving a prize, where one of several contestants will win a prize and other contestants, nothing. If one contestant is not allowed to compete, some courts will allow her to recover the value of the chance, perhaps some fraction of the prize. *See infra* notes 221-22 and accompanying text (discussing rewards and prizes).

[209] Barnett v. Caldwell Furniture Co., 115 N.E. 389 (Ill. 1917) (awarding plaintiff future profits for remainder of term on basis of past sales and rejecting claim that such future profits were speculative); Buxbaum v. G.H.P. Cigar Co., 206 N.W. 59 (Wis. 1925) (sustaining jury's verdict of prospective profits based on evidence of profits expected during remainder of agency).

[210] *See* Randall v. Peerless Motor Car Co., 99 N.E. 221 (Mass. 1912) (allowing plaintiff to recover damages based on expected sales but for defendant's wrongful act, minus expenses saved).

[211] *See* Pacific Scientific Co. v. Glassey, 54 Cal. Rptr. 235 (Ct. App. 1966) (allowing distributor's expert testimony regarding lost future profits which considered growth in future sales because jury was not limited to considering actual sales prior to termination).

agreement on the probability that a single sale would have taken place during the remainder of the listing.

If this approach is still too speculative, perhaps because of a lack of market data, an alternative is to award the broker some type of reliance damages for time and money actually spent. Reliance damages also avoid the problem of the broker being paid a premium for an event that did not take place and which no longer benefits the seller. Especially when the seller no longer needs or wants to sell the property, the doctrine of frustration of purpose might also be invoked to relieve the seller of his contractual obligation, again limiting the broker to reliance damages for time and money actually expended. In any event, it should be evident that normal contract principles provide more flexible remedies than the option contract approach of the Restatement.

G. Rewards and Prizes

Rewards and prizes exhibit many of the attributes of brokerage agreements, especially open listings. They share the feature that success is a gamble; indeed, reward offers are usually even more speculative than brokerage agreements. Like an open listing, a promise of a reward or prize is normally made to multiple promisees. In addition, the offeror simply wants the completed act of finding a missing person, object, and so forth; performance is not incremental or cumulative. Finally, factors unique to rewards, which make them even less likely candidates for expectation damages, are that (1) often they are noncommercial, and (2) the promisees are almost always unknown, and may constitute, in theory, the entire world.

Perhaps even more than open brokerage listings, rewards are classic unilaterals. It is impossible, in good faith, to "accept" a reward offer or to promise to fulfill its conditions.[212] As a result, a reward offer must necessarily be a promise in exchange for an act. And as Landes and Posner have pointed out, unilateral contracts are particularly appropriate for rewards, where face-to-face negotiations over the terms of the offer are generally impractical.[213]

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[212] *See* Llewellyn, *supra* note 21, at 34 (arguing that one cannot seriously expect a reward seeker to accept a reward offer).

[213] William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUDIES 83, 117 (1978) (explaining that with a reward offer, because the

Yet although rewards and prizes are prototypical unilaterals, cases that have applied section 45, creating an option contract after someone began to perform, or that have in some other manner barred the offeror from revoking after the offeree begins performance, are rare or nonexistent.[214] Rather, courts typically provide a remedy only upon substantial performance.[215] In light of the nature of the promise itself, this result is hardly unex-

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potential finders of lost property will often be numerous and unidentified, there is no feasible way for the owner to negotiate with each of them and therefore, unilateral contract approach enables voluntary transactions without actual negotiations).

214 *See, e.g.*, Alderson v. Miami Beach Kennel Club, 336 So. 2d 477 (Fla. Dist. Ct. App. 1976) (disallowing damages to racer and deciding that promise was not irrevocable where greyhound race track owner promised to book greyhound racer's dogs at race track for the 1967 through 1970 racing seasons, and racer commenced performance by racing his greyhounds at the track during the 1967, 1968, and 1969 racing seasons, but track owner refused to permit racer to compete during the 1970 season); Wachtel v. National Alfalfa Journal Co., 176 N.W. 801 (Iowa 1920) (deciding that prize offer was not irrevocable and that plaintiff should not recover the full prize but only value of her chance to win it, based on value of prizes and reasonable probability of winning one); Phillips v. Pantages Theatre Co., 300 P. 1048 (Wash. 1931) (denying plaintiff damages for opportunity to appear in final contest because damages purely speculative and conjectural despite fact that she had commenced performance).

215 *See, e.g.*, Chenard v. Marcel Motors, 387 A.2d 596 (Me. 1978) (finding unilateral contract in promise by contest organizer to give new automobile to any golfer who shot hole in one in golf tournament which bound organizer once plaintiff shot a hole in one and thereby accepted defendant's offer); Haskell v. Davidson, 40 A. 330 (Me. 1898) (deciding that offeree may recover reward where he investigated crime, discovered facts, found suspect, and obtained confession, even though actual arrest was made by deputy sheriff); Crawshaw v. City of Roxbury, 73 Mass. 374 (1856) (allowing offeree to collect reward offered for apprehension and conviction of arsonist when police signed complaint and arrested suspect); Madsen v. Dakota State Bank, 114 N.W.2d 93 (S.D. 1962) (deciding that reward offering $1,000 for capture of bank robbers was accepted when offeree gave license number of car used in bank robbery to police officers, leading police to arrest robber); Zwolanek v. Baker Mfg. Co., 137 N.W. 769 (Wis. 1912) (finding substantial performance when employer fired employee one day before completion of 4,500 hours of work, which would have entitled employee to profit sharing); Blain & Kelly v. Pacific Express Co., 6 S.W. 679 (Tex. 1887) (disallowing reward for arrest of two people because only part performance of apprehending one of the two people completed).

The Restatement § 45 does have an illustration that may contemplate an option contract being created by partial performance of an offer for a prize. *See* RESTATEMENT (SECOND) CONTRACTS § 45 illus. 5 (1979).

pected. All that the promisor commits himself to do is pay a reward for a particular achievement. At least where the promise is made to the world at large, there is probably no subsidiary commitment not to terminate the promise. After all, a lost dog can be found at any time, may have died, or may return home on its own, so the seeker takes a substantial risk in any event. And even if there is an implied promise to keep the reward operative, the chance that any one of the many unknown promisees will succeed is often minuscule. In fact, even a pro-rata approach could be very difficult to carry out because of inability to determine the number of potential reward seekers who ought to share the prize. Unless the promisor acts in bad faith or prevents performance,[216] he should normally be entitled to terminate a general promise of a reward before someone meets the conditions without being liable for expectation damages.[217]

On the other hand, the promise of a prize or reward to a single person or limited group more strongly implies a promise not to terminate. This is even more so if the promise is to hold a contest or competition on a particular date, as opposed to a reward for the return of a dog. The latter promise is relatively vague, and at best allows the implication that it will remain operative for a reasonable time (however long that might be) or until someone else finds the dog. But the specific promise to hold a contest at a particular time and place carries with it a strong implication that the commitment to award a prize on that occasion will not be withdrawn.

Nonetheless, many if not most cases that have considered the matter have held that when a contest is canceled or when the contest promoter breaches a promise to award a prize, damages would be too speculative. For example, in *Wilkerson v. Wegner*,[218] Lanphere Quarter Horses, Inc. ("Lanphere") advertised a contest called a "first annual weanling halter futurity." This was a contest in which foals were to be judged and awarded prize money based on various qualities. To be eligible, a foal had to be offspring of either "Conclusive Review" or "The Ambition," two

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216 *Zwolanek*, 137 N.W. at 769 (allowing plaintiff to recover entire reward where he substantially performed and defendant prevented completion).

217 Of course, someone may reasonably have acted on the promise while it was in force and would thus have been injured by the termination. If the reliance is reasonable, Restatement § 90 should provide a remedy. *See* RESTATEMENT (SECOND) CONTRACTS § 90 (1979).

218 793 P.2d 983 (Wash. Ct. App. 1990).

stallions mentioned in the advertisement. A total purse of $75,000 was to be divided among 16 prize winners. The plaintiffs, in reliance on the prize, entered into three stallion service contracts with Lanphere, for a total cost of $800. As a result, two foals were born of Conclusive Review and one of The Ambition. Lanphere entered into 31 similar contracts with at least 22 other parties. Subsequently, the contest was canceled, and the plaintiffs (who also represented other contestants) sued for the prize money. The court held that mere speculation that a prize would have been won by a prospective contestant does not give rise to recoverable damages for breach of contract. The plaintiffs could produce no evidence that any of their foals would have been selected by the judges. Thus, their claim rested on conjecture and could not support a cause of action for damages.[219] Other cases have reached similar conclusions.[220]

Interestingly, these cases do not generally question the existence of an enforceable promise, even though the contestant promises nothing in return, and even though these cases involve unilateral contracts in which the contestant (the "offeree") has

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219 *Id.* at 987.

220 Youst v. Longo, 729 P.2d 728 (Cal. 1987) (stating that plaintiff could not recover value of lost prize discounted by probability of winning in absence of interference because outcome of the race was too speculative); McDonald v. John P. Scripps Newspaper, 257 Cal. Rptr. 473 (Ct. App. 1989) (denying recovery to spelling bee contestant who allegedly lost due to contest official's impropriety because plaintiff could not show that he would have won spelling bee otherwise), *modified*, slip. op. (1989); Alderson v. Miami Beach Kennel Club, 336 So. 2d 477 (Fla. Dist. Ct. App. 1976) (disallowing damages consisting of anticipated purses which racer might have earned as too speculative to allow recovery); Jones v. Duff, 445 N.Y.S.2d 838 (App. Div. 1981) (deciding that plaintiff failed to state claim for relief in action by manager of boxer against promoter and other boxer because it was entirely speculative whether plaintiffs' boxer would have won absent alleged conspiracy); Friedlander v. National Broadcasting Co., 241 N.Y.S.2d 477 (Sup. Ct. 1963) (allowing plaintiff's cause of action for amounts actually won but denying claim for $100,000 for winnings plaintiff allegedly would have won as too speculative), *rev'd on other grounds*, 246 N.Y.S.2d 889 (App. Div. 1964); Phillips v. Pantages Theatre Co., 300 P. 1048 (Wash. 1931) (denying plaintiff's claim for damages as overly speculative where contest promoters denied plaintiff the opportunity to appear in final round of contest); Collatz v. Fox Wisconsin Amusement Corp., 300 N.W. 162 (Wis. 1941) (reversing lower court's award to plaintiff of half the value of prize when prize wrongfully awarded to other contestant because it could not be proven that if contest had been properly completed, plaintiff would have emerged the winner).

not completely performed. Furthermore, the speculativeness of damages is in some senses considerably less than that associated with rewards or even brokerage agreements. The broker or reward seeker with an open listing takes many risks for a large premium; among the risks is that even if the promisor keeps his promise, no one will obtain the commission or reward. Even with an exclusive listing for a set period of time, it is quite possible that no one will be entitled to the commission. In contrast, with a contest it is usually certain that *someone* will win the prize. The only uncertainty is who.

Consequently, at least when the contestants are known, it seems quite reasonable to award damages for breach by the promoters of a contest. This principle has been accepted in at least one English case, and is sometimes referred to as the "English rule." In *Chaplin v. Hicks*,[221] the plaintiff had qualified for the finals of a beauty contest in which twelve prizes were to be awarded among the fifty finalists. The plaintiff failed to receive notice of the time and place of the final selections in time to appear at such selections. The plaintiff sued, and the court sustained a verdict for the plaintiff which calculated her chance of winning a prize at about one in four (50 divided by 12), and compensated her accordingly for the loss of that chance. A number of American cases have also allowed recovery of the value of a chance.[222]

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221 2 K.B. 786 (1911).

222 *See, e.g.*, Van Gulik v. Resource Dev. Council, 695 P.2d 1071 (Alaska 1985) (finding that plaintiff was entitled to share grand prize or participate in drawing between two winning tickets with showing that plaintiff would have won or tied if lottery had been properly completed); Miller v. Allstate Ins. Co., 573 So. 2d 24, 29 (Fla. Dist. Ct. App. 1990) ("It is now an accepted principle of contract law, nonetheless, that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain."), *review denied*, 581 So. 2d 1307 (Fla. 1991); Wachtel v. National Alfalfa Journal Co., 176 N.W. 801 (Iowa 1920) (allowing plaintiff to recover value of chance to win prize, based on value of prizes and reasonable probability of winning one when contest organizer wrongfully canceled contest); Kansas City, M. & O. Ry. v. Bell, 197 S.W. 322 (Tex. Ct. App. 1917) (noting that plaintiff was entitled only to recover value of chance that his hogs would have won in stock show if delivered on time).

See also RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (1979) (allowing recovery based on conditional right); MCCORMICK, *supra* note 170, § 31, at 122-23 ("[W]here the value of the chance is not outweighed by a countervailing risk of actual loss, and where it is fairly measurable by

If we apply this rule to contest cases like *Wilkerson*, we would determine the statistical probability that any particular foal would win a prize. The easiest method is to divide the purse by the number of contestants. This seems to yield a fair result. The defendants intentionally induced the plaintiffs to spend money in acquiring offspring of Conclusive Review and The Ambition. They thus must pay the prize money that they promised to provide before canceling the contest. In a sense, this is simply one more variant of a pro-rata expectation approach.

Interestingly, another situation exists where many of the uncertainties associated with reward offers are absent. This arises when part of the requested act is accomplished. For example, a claimant may find a portion of some lost property or one of two wanted criminals. This situation involves little of the uncertainty that otherwise justifies deviating from granting expectation damages. Not only is there one known promisee, but the performance is cumulative. Unless the promisor of the reward would benefit only from complete performance or has explicitly demanded it, a pro-rata allocation of the reward seems the fairest solution.[223] Some courts have indeed reached this conclusion. As one court commented, "it is certainly reasonable that the finder of a moiety of any property lost should receive for his labor and services a moiety of the sum, which the loser himself thought a reasonable compensation for finding the whole."[224]

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calculable odds, or by evidence bearing specifically on the probabilities, or by expert opinion, and where the amount of the expected gain is itself fixed or approximately ascertainable, the jury should be allowed to value the lost opportunity."); MURRAY, *supra* note 128, § 121, at 691-92 (noting that recovery permitted on value of chance as determined by jury); Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 80 (1956) (recognizing that chance can be basis of awarding damages); Elmer J. Schaefer, *Uncertainty and the Law of Damages*, 19 WM. & MARY L. REV. 719 (1978) (proposing that level of certainty be taken into account when awarding damages); Howard R. Feldman, Comment, *Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk*, 17 U. BALT. L. REV. 139 (1987) (arguing that courts should permit recovery for loss of chance).

223 The reward seeker is not entitled to the entire reward because whether he would have completed the other portion of the task remains highly speculative.

224 Symmes v. Frazier, 6 Mass. 344, 347 (1810); *see also* Deslondes v. Wilson, 5 La. 397 (1833) (allowing only part of reward offered for recovery of part of lost property).

CONCLUSION

The present theory of unilateral contracts is in need of refinement for at least two reasons. First, although it has long been observed that unilateral contracts do not fit well into the offer-and-acceptance framework, the law at least pays lip service to the rule that a unilateral contract can arise only by means of an offer that is accepted by full performance. A speech act analysis reveals critical differences between offers and promises, and shows that unilateral contracts meet the criteria for promises rather than those for offers. Consequently, unilateral contracts are formed by conditional promises rather than true offers. But while bilateral and unilateral contracts arise by different means, they are alike in that both come about by commissive speech acts in which one or more parties commit themselves to carrying out a future course of action. Concentrating on commitment rather than merely offer and acceptance accommodates the realities of modern dealmaking, where proposals are often subject to intense negotiation and where agreement may be concurrent rather than sequential.

The second problem with the present concept of unilateral contracts lies with the remedy contained in *Restatement* section 45. The device of an option contract is surely a great improvement over the Langdellian rule permitting the promisor to revoke with impunity any time before full performance. Sometimes the implication of a promise to revoke is quite reasonable. But elsewhere imposing an option contract after the promisee has begun performance is a fiction, especially in cases of open brokerage listings and reward offers. Further, it is unjust and inefficient because it either requires the promisee to complete performance and thus perform an act that no longer benefits the promisor, or—if full performance is waived—requires the promisor to pay the entire contract price even though he did not receive full performance and no longer desires it.

Even though unilateral and bilateral contracts are formed differently, once the commitment is created, promisees react to them in much the same way: they rely on promisors doing what they said they would. When a promisor breaches, therefore, the search for a remedy should begin in the contract itself. But despite the initial presumption in favor of the expectation or contract measure, such damages are not usually granted when a loss is uncertain or speculative. What distinguishes unilateral from bilateral contract damages is that unilaterals produce a large

variety of ways in which the loss can be speculative. As a result, full expectation damages are frequently not warranted before complete performance. But where possible, the breaching promisor should compensate the injured party on the basis of what he originally promised, subject to ordinary contract principles relating to uncertainty.

Surely it makes sense to employ such general contract damage rules with unilateral contracts. But the courts have rarely done so, at least explicitly. The explanation most likely rests with the traditional notion that damages for the breach of a unilateral contract, at least prior to full performance, are fundamentally different from general contract damages because the "offer" of the unilateral contract has not yet been accepted and there can thus be no breach. I hope to have shown not only that this theory of unilateral contracts is wrong, but that once we free ourselves of this misconception, it becomes possible to fashion more equitable remedies.