THE REVOCATION OF OFFERS

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INTRODUCTION

The school of classical contract law placed the process of offer and acceptance on center stage. Under the teachings of that school, *contract* was virtually identical to *bargain*, and bargains were conceived to be formed by offer and acceptance. A.W.B. Simpson has shown that the central role given to the offer-and-acceptance process by classical contract law was a late development. As Simpson puts it, not until the nineteenth century was offer-and-acceptance doctrine superimposed upon the sixteenth-century requirement of consideration and made to perform some of the same functions.[1]

Modern contract law, like pre-nineteenth-century contract law, recognizes that contractual liability can attach without a bargain, and that even in a bargain context, contractual liability can attach without a sequence of offer and acceptance. However, although the offer-and-acceptance process is only one road to contractual liability, it is an extremely important road. At the instant that a bargain contract is formed by an offer and acceptance, a promisor becomes potentially liable for expectation damages even if he changes his mind a nanosecond later.[2] Because the formation of a contract has such potent consequences, much can ride on the rules that govern the offer-and-acceptance process.

One of these rules is that an offer confers upon the offeree a power of acceptance—that is, a power to conclude a bargain and therefore a

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1. A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. REV. 247, 258 (1975). Simpson adds:

> The new doctrine of offer and acceptance reached its most flamboyant statement in Sir Walter Anson's Principles of the English Law of Contract—I quote from the second edition of 1882. To Anson the doctrine reached the status of an analytical universal truth about life:
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> > Every expression of a common intention arrived at by two parties is ultimately reducible to question and answer. In speculative matters this would take the form: "Do you think so and so?" "I do." In practical matters and for the purpose of creating obligations it may be represent[ed] as, "Will you do so and so?" "I will."

Id.

2. Here and in the balance of this Article, unless the context indicates otherwise, I will use the masculine pronoun to refer to an offeror or a promisor and the feminine pronoun to refer to an offeree or a promisee.

contract. Another rule is that an offeree's power of acceptance terminates after the offer has lapsed—that is, after the expiration of a time limit for acceptance that is set in the offer, or if no time limit is set, after a reasonable time. Still other rules provide that an offeree's power of acceptance may be terminated, even before the offer has lapsed, by events that are either offeree- or offeror-centered. The most prominent offeree-centered events that have this effect are rejections, counteroffers, and conditional acceptances. The most prominent offeror-centered events that have this effect are valid revocations and certain types of events that contract law assimilates to revocations.

The primary focus of this Article concerns these offeror-centered events. Under what circumstances a power of acceptance should be terminated by these events is an important issue in itself. The issue is also important because it brings out both the fault lines between classical and modern contract law and certain difficulties in modern contract law itself. The main thrust of this Article is normative: for the most part, the Article concerns what the law in this area should be. As I will show, however, the law in this area is reasonably close to, although certainly not identical with, what it should be.

Part I of this Article concerns the nature of an offer. Against that background, Part II considers whether an offeror should be able to terminate the offeree's power of acceptance by communicating a termination to the offeree—that is, by revoking the offer—even though he has expressly or implicitly promised to hold the offer open. In this connection, I address both offers for bilateral contracts and offers for unilateral contracts. Part III concerns whether an offeree's power of acceptance should be terminated by certain offeror-centered events that do not involve communication by the offeror to the offeree, such as the withdrawal of a general offer by a publication that does not come to the offerree's attention.

I. THE NATURE OF AN OFFER

I begin by considering the nature of an offer. Section twenty-four of the *Restatement (Second) of Contracts* (the "Second Restatement") defines an offer as a "manifestation of willingness to enter into a bargain, so made as to justify [the addressee] in understanding that his assent to the bargain is invited and will conclude it."[3] Little or no attention has been paid to why an offer should have this effect.

One possible reason for the rule that an offer has that effect is that it is socially useful to have institutions that facilitate the creation of legally enforceable bargains, and allowing an actor to create a power of

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3. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

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acceptance is one such institution. That would be a feasible explanation, but there is a better one, which sets offers in a larger context. The better explanation is that an offer is a promise. Specifically, an offer is a promise to perform a specified act as part of a bargain if a given condition—acceptance—occurs. Suppose, for example, that *A* says to *B*, "I will sell you my 1990 Camry for $900." Here *A* has made an offer to *B*, and the offer consists of a promise to *B* that *A* will transfer the Camry to *B* for $900 if *B* accepts the offer in a valid and timely way. This promise is implied rather than express. However, many promises are implied rather than express. Indeed, interpretation is commonly required even to determine whether an expression is an offer at all. In the Camry hypothetical, for example, *A* does not say, "I offer to sell" but simply, "I will sell." It is only by looking at *A*'s expression in the context of community usage that we can infer that "I will" means "I offer to"—and "I promise to."

The promissory nature of offers is exemplified by legal usage. For example, contracts are conventionally classified as either bilateral or unilateral. A bilateral contract consists of a bargain formed by an exchange of promises. One of the requisite promises consists of an offer. A unilateral contract consists of a bargain formed by the exchange of an act for a promise. Again, the requisite promise consists of an offer. Similarly, under the law of consideration, an exchange of bargain promises yields an enforceable contract. Normally, one of the requisite promises is an offer. And the comment to Section 24 of the Second Restatement states that "[i]n the normal case" an "offer itself is a promise."[4]

Some take the position that an offer is not a promise. Learned Hand took that position in *James Baird Co. v. Gimbel Bros., Inc.*[5] Baird, a general contractor, was about to bid on a contract for the construction of a public building. Gimbel made an offer to Baird to supply the linoleum required on the job. The offer stated that "we are offering these prices for reasonabl[y] . . . prompt acceptance after the general contract has been awarded."[6] Apparently Baird used the offer in making its bid.[7] After Baird won the contract, but before it accepted Gimbel's offer, Gimbel revoked.[8] Baird sued on the ground that Gimbel's offer was enforceable under the doctrine of promissory estoppel.[9] Hand decided in favor of Gimbel on the ground that the

4. *Id.* § 24 cmt. a; *see also* 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 25 (1920).

5. 64 F.2d 344 (2d Cir. 1933).

6. *Id.* at 345 (internal quotations omitted).

7. *Id.*

8. *Id.*

9. *Id.* at 346.

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doctrine of promissory estoppel was not applicable because Gimbel had not made a promise:

> [A]n offer for an exchange is not meant to *become a promise* until a consideration has been received, either a counter-promise or whatever else is stipulated. To extend [the doctrine of promissory estoppel to an offer] would be to hold the offeror regardless of the stipulated condition of his offer. In the case at bar the defendant offered to deliver the linoleum in exchange for the plaintiff's acceptance, not for its bid, which was a matter of indifference to it. That offer could *become a promise* to deliver only when the equivalent was received; that is, when the plaintiff promised to take and pay for it.[10]

Hand's position that an offer is not a promise was stated in conclusory terms, but others have arrived at the same conclusion on analytical grounds. For example, Robert Samek, a philosopher of language, argues that:

> "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 that a promise does not. . . . A promise, on the other hand, contemplates a unilateral performance by the promisor, and the [promisor] is committed as soon as he makes the promise.[11]

Employing a parallel analysis, Peter Tiersma argues that an offer is not a promise because a promise is a commitment and an offer is not.[12] Tiersma's argument is important, and I therefore quote it at length.

> A promise is a speech act by which the speaker places herself under an obligation to carry out a particular future course of action.[[13]] . . . [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

10. *Id.* (emphasis added).

11. Robert Samek, *Performative Utterances and the Concept of Contract*, 43 AUSTRALASIAN J. PHIL. 196, 204–05 (1965).

12. Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1, 20–21 (1992).

13. A *speech act* is an utterance. "Fundamental to the basic framework of speech act theory is the notion that all utterances have a particular force, irrespective of their precise semantic content." Bethany K. Dumas, *Performatives in Speech Act Theory: An Introduction*, 58 TENN. L. REV. 367, 367 (1991); *see also* JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 192–98 (1985).

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obligation to do so. I cannot change my mind later without breaking my promise.

. . . .

. . . .

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 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. 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.

. . . .

. . . 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. . . . In contrast, [in the case of an offer there is] a condition on the *commitment* itself[, which] determines whether or not a person becomes committed in the first place. I refer to this as *conditional commitment.*

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. . . . 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.[14]

14. Tiersma, *supra* note 12, at 20–23 (footnotes omitted); *see also* JOHN P. DAWSON, GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED 213 (1980); Margaret N. Kniffin, *Innovation or Aberration: Recovery for Reliance on a*

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The position that an offer is not a promise is incorrect. It is not only inconsistent with general legal usage; it is inconsistent with the offer-and-acceptance process. If an offer is not a promise, then an offeror makes no promise. If an offeror makes no promise, then an offeree cannot by her unilateral act of acceptance transmute the offeror into a promisor. Instead, an offeror would be free to respond to an acceptance as follows: "Your 'acceptance' is an interesting phenomenon, which I duly note. However, in making my offer I made no commitment, and therefore no promise. Since I made no promise, I am not committed to treating your would-be 'acceptance' as concluding a contract. And in fact, I choose to not treat it that way. Have a nice day." In contrast, when an offer is understood as a promise there is no nced to explain why the offeror cannot walk away if his offer is accepted. He cannot walk away because by making his offer he promised to perform on stated terms if his offer was properly accepted.

Of course, the promise embedded in an offer is conditional, but as Tiersma recognizes, many promises are conditional.[15] Tiersma's central premise is that analytically an offer is not merely a conditional *promise* but a conditional *commitment*. More specifically, he argues that an offeror makes no commitment at all unless and until the condition of acceptance occurs,[16] because an offer can be freely revoked any time after it is made.[17] This premise is incorrect. An offer is a commitment and a promise to perform a specified act if a given condition—acceptance—properly occurs. In a purely hypothetical world, an offeror might make and revoke an offer in the same breath, so that the offeree could not possibly accept. In the actual world, however, offers are not made that way, and indeed it is not easy to see why such an expression would even constitute an offer. Because real offers are not made and revoked in the same breath, there is always some interval in which an offeree can accept before the offer is revoked. Even under a very narrow analytical view, therefore, it is not the case that an offeror can revoke a real-world offer before the offeree can accept. On the contrary, the real-world offeree always has an interval, however small, to accept.

This characteristic of offers was the basis of the decision in *Gurfein v. Werbelovsky*.[18] Seller and Buyer made a contract for the sale of five cases of plate glass.[19] The glass was "'to be shipped within three

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Contract Offer, as Permitted by the New Restatement (Second) of Contracts, 62 U. DET. L. REV. 23, 26 (1984).

15. Tiersma, *supra* note 12, at 20-23.
16. *Id.*
17. *Id.*
18. 118 A. 32 (Conn. 1922).
19. *Id.* at 32.

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months'" of the contract date, but Buyer had an option to cancel the order before shipment.[20] Seller argued that by virtue of the cancellation clause, Buyer made no promise (or more accurately, made only an illusory promise), and therefore gave no consideration for Seller's promise. The Connecticut Supreme Court disagreed. It held that Buyer did make a promise, because Seller had one clear opportunity to enforce the contract by shipping as soon as he received the order.

> This is all that is necessary to constitute a legal consideration and to bring the contract into existence. If [Seller] voluntarily limited his absolute opportunity of enforcing the contract to the shortest possible time, the contract may have been improvident, but it was not void for want of consideration.[21]

A similar position was taken in *Barry v. Davies*,[22] in the context of auctions. The rule that normally governs auctions is that an auctioneer who puts a commodity or "lot" up for auction does not thereby make an offer, but instead invites offers in the form of bids. Because the auctioneer does not make an offer, he is free to withdraw a lot from auction even after bidding has begun.[23] A different rule applies, however, if the auctioneer states that the auction is "without reserve." In that case, the auctioneer cannot withdraw a lot once it has been put up for auction unless bidding does not begin within a reasonable time.[24] Under this rule, by stating that an auction is without reserve the auctioneer impliedly promises not to withdraw a lot once timely bidding has begun. In *Barry*, it was argued that this promise is unenforceable because the bidder gives no consideration for it. The court rejected this argument on the ground that a bidder does give consideration, because making a bid is a "detriment to the bidder, since his bid can be accepted unless and until it is withdrawn."[25]

It can now be seen why an offer creates a power of acceptance. An offer is a promise by the offeror to enter into and perform a bargain if the offeree accepts.[26] Such a promise should be and is enforceable because it is ancillary to a bargain, and bargains serve important social-welfare purposes. Bargains lead to gains through trade. Bargains also facilitate private economic planning. They allow actors to shift risks

20. *See id.* at 32–33.

21. *Id.* at 33.

22. [2001] 1 All E.R. 944 (C.A. 2000); *see also* J.W. Carter, *Auction 'Without Reserve'*—Barry v. Davies, 17 J. CONT. L. 69 (2001) (discussing the case in detail).

23. *See* U.C.C. § 2-328.

24. *See id.*; *see also Barry*, 1 All E.R. at 947–48; *see also infra* Part II (discussing this rule).

25. *Id.* at 949.

26. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 24 & cmt. a.

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and to coordinate and stabilize their economic activity. They allow sellers to confidently engage in long-term production projects. They allow buyers to confidently make fixed-price forward contracts with their own buyers and to make expenditures on contract-specific and wealth-enhancing reliance, such as advertising and the acquisition of control over complementary inputs and factors of production. Enforcing promises that are ancillary to bargains furthers the social-welfare purposes that bargains serve.

II. TERMINATION OF AN OFFER BY A COMMUNICATION FROM THE OFFEROR TO THE OFFEREE

A. Introduction

As shown in Part I, an offer is a promise to perform a bargain on stated terms if the offeree accepts before the offeror properly revokes. Often, the offeror supplements this basic promise by making an express or implied promise that the offer will be held open—will not be revoked—for a given period of time. This period may be fixed in the offer or may be dependent on circumstances. Here are two examples of such offers, drawn from Section 87(a) of the Second Restatement. In the first example, illustration 4, the period of time during which the offer will be held open is fixed in the offer:

> A leases a farm to B and later gives B an "option" to buy the farm for $15,500 within five years. With A's approval, B makes permanent improvements in the farm buildings, builds roads, drains and dams, and contours plow land, using his own labor and expending several thousand dollars. Toward the end of the five years, A purports to revoke the option, demanding a higher price. B then gives written notice of acceptance in accordance with the terms of the offer. Specific performance by A may be decreed.[27]

In the second example, illustration 6, the period of time during which the offer will be held open is dependent on circumstances:

> A submits a written offer for paving work to be used by B as a partial basis for B's bid as a general contractor on a large building. As A knows, B is required to name his subcontractors in his general bid. B uses A's offer and B's bid is accepted. A's offer is irrevocable until B has had a

27. *Id.* § 87(a) cmt. e, illus. 4.

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reasonable opportunity to notify A of the award and B's acceptance of A's offer.[28]

In the usual nomenclature, an offer that is supplemented by an express or implied promise that the offer will be held open for a period of time is referred to as an *option* if that promise is given in exchange for consideration—often, even nominal consideration—and as a *firm offer* if it is not.[29] Whether an offer *is* supplemented by a promise that the offer will be held open for a period of time will sometimes be a matter of interpretation. So, for example, an offer that states that it must be accepted by a certain date is not necessarily a firm offer. It may simply mean what it says—that the offeree can accept no later than the designated date. Whether such a statement also gives rise to an implied promise to hold the offer open until that date will depend, like any other question of interpretation, on the exact language used, the background circumstances, and any applicable usages.

Assume that an offer is supplemented by such a promise, and takes the form of an option. In that case, if the offer is revoked, then the offeror is liable for expectation damages based on the value of the proposed contract. There are good reasons for this rule. To begin with, an option is a bargain. Bargains promote social welfare, and the social-welfare purposes that bargains serve are furthered by legal enforceability. Next, damage measures provide incentives or disincentives for the amount of precaution that a promisor takes to ensure that he will be able to perform, and for his decision whether to perform or breach. A regime of expectation damages places on the promisor the value of the contract to the promisee, and thereby efficiently sweeps that value into the promisor's calculus of self interest when he is making decisions on precaution and breach. Correspondingly, the promisee can plan more effectively under the expectation measure, because once a contract is made, at least in principle she can order her affairs with the confidence that she will realize the value of the contract, either by performance or by damages.[30]

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28. *Id.* § 87(a) cmt. e, illus. 6.

29. Presumably, illustration 4 to Section 87(a) puts the term "option" in quotes in illustration 4 because *B* did not give *A* consideration in return for *A*'s promise to hold the offer open.

30. During the last fifteen or twenty years, some law-and-economics scholars have constructed models that are based on goals of contract law other than achieving efficiency in precaution, performance, and contract-specific investment. Among these goals are efficient activity levels, efficient enforcement, and efficient precontractual investigation. Normally, each model is constructed to establish a claim that expectation damages do not provide the best incentive for achieving the goal that the model concerns. The models and claims are synthesized and elaborated by Richard Craswell in *Instrumental Theories of Compensation: A Survey*. 40 U.C. SAN DIEGO L. REV. 1135

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B. *Offers for Bilateral Contracts*[31]

In contrast to the treatment given to options, under classical contract law, firm offers were not enforceable.[32] I will call this rule in its general form the *unenforceability rule*, and I will call the rule as applied to a firm offer for a bilateral contract the *firm-offer rule*. The unenforceability rule reflected the nature of legal reasoning in classical contract law. Reasoning in common-law areas, such as contracts, may be formal or substantive. I will call propositions of legal doctrine *doctrinal propositions*, and I will call nondoctrinal propositions—in particular, propositions of morality, policy, and experience—*social propositions*. The premise of formal legal reasoning is that law consists of doctrinal propositions that are autonomous from social propositions.

(2003). I find these claims unpersuasive, for reasons I plan to discuss in more detail in a forthcoming paper. Briefly:

(1) The models and claims have little or no regard for institutional considerations. For example, it is often claimed that the prospect of expectation damages will lead contracting parties to overrely—that is, to invest more heavily in reliance than efficiency requires—because expectations damages fully insure all of the promisee's reliance. When institutional considerations are taken into account, however, in most cases overreliance normally cannot occur. Even when it can occur, the expectation measure does not in fact fully insure reliance. *See* Melvin A. Eisenberg & Brett McDonnell, *Expectation Damages and The Theory of Overreliance*, 54 HASTINGS L.J. 1335 (2003).

(2) Most and perhaps all of the models fail to provide a remedy that is administrable. For example, after considering what damage measure would provide the best incentive for the precontractual investigation of potential risks, Craswell concludes that "the optimal damage measure [for this purpose] could be either above or below expectation damages, with the exact measure depending on the exact costs and benefits of further investigation." *Id.* at 1164; *see also id.* at 1165 (discussing indeterminacy of damages designed to maximize efficient incentives in the search for contracting partners); *id.* at 1169 (discussing indeterminacy of damages designed to maximize efficient enforcement).

(3) As Eric Posner has pointed out, each model focuses on only one or at most two incentives, and brackets out all the rest. Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 834–39 (2003). The result is that the measure of damages that any given model predicts would promote one goal almost invariably differs from the measure of damages that the other models predict would promote other goals. Which of the various goals of contract law should be given primacy when damage remedies for implementing the goals conflict is a matter of prudential judgment. My own judgment is that the goals of achieving an efficient rate of precaution and performance, and an efficient rate of contract-specific investment, are more weighty than the goals served by the alternative models.

31. Part II.B of this Article partly weaves together strands of thought that I have developed in earlier works—in particular, my paper, *The Theory of Contracts*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS (P. Benson ed., 2001), and my articles, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743 (2000), and *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005 (1998). Accordingly, a number of passages in Part II.B. either parallel or replicate passages in these earlier works.

32. *See, e.g.*, Dickinson v. Dodds, 2 Ch. D. 463, 465 (1876).

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Formal legal reasoning may be axiomatic, deductive, or both. Axiomatic legal reasoning is based on the premise that fundamental doctrines can be established on the ground that they are self-evident. Deductive legal reasoning is based on the premise that other doctrines can be established solely by deduction from fundamental axiomatic doctrines that are taken as the major premises of syllogisms. As Holmes observed, axiomatic theories may easily be coupled with deductive theories: "I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results."[33]

Classical contract law was based on just the sort of coupling of axiomatic and deductive legal reasoning to which Holmes referred. It conceived of contract law as a small set of core doctrines—axioms—that were justified on the ground that they were self-evident, and a larger set of doctrines that were justified largely on the ground that they could be deduced from the axioms. This school of thought dominated contract law from the middle of the nineteenth century through the first half of the twentieth century. Its remnants linger even today.

The unenforceability rule was based on just such a combination of axiomatic and deductive legal reasoning. It was an axiom of classical contract law that in principle only bargain promises had consideration, that is, were enforceable (although the *form* of a bargain sufficed, and an exception was tolerated on purely historical grounds for promises under seal). This axiom was the major premise in the deductive reasoning that purported to justify the unenforceability rule. The minor premise was that in the case of a firm offer, the promise to hold the offer open is not bargained for. The deductive conclusion was that a firm offer is unenforceable. Instead, a promise to hold an offer open for a period of time, if not given for separate consideration, was treated like a donative promise even though the promise was made in the world of commerce, not the affective world, and it was perfectly clear that the offeror had not the slightest intention of conferring a gift upon the offeree.

Formal legal reasoning is not defensible. To hegin with, axiomatic theories of law cannot be sustained. No significant doctrinal proposition can be justified on the ground that it is self-evident. Rather, doctrinal propositions can be justified only by propositions of morality, policy, and experience.

Deductive theories are no more sustainable than axiomatic theories. A common-law doctrine may serve as a prima facie premise for legal

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33. OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS 210, 238 (1920).

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reasoning, but it cannot serve as a conclusive premise of legal reasoning, because all common law doctrines are subject to overruling or modification on the ground that they no longer are, or never were, normatively desirable. Perhaps more to the point, all such doctrines are subject to as-yet-unarticulated distinctions and exceptions based on social propositions. Such distinctions and exceptions may be made for a variety of reasons. Perhaps the social propositions that support the doctrine do not extend to a new fact pattern that is within the doctrine's stated scope, because the new fact pattern implicates other social propositions that require the formulation of a new rule. Or perhaps the courts believe that the rule is normatively bad and therefore want to cabin the rule within its narrowest possible ambit.

In contrast to the formal reasoning of classical contract law, modern contract law reasoning is *substantive*. That is, modern contract law seeks to justify doctrines on the basis of social propositions. Of course, doctrines have a role to play in substantive legal reasoning, but this is because of the social values that underlie doctrinal stability, not because doctrines are either self-evident or can be established by deduction. I will call a rule that is the best rule on the basis of social propositions the *normatively best rule*.

I begin with offers for bilateral contracts. In the case of a firm offer for a bilateral contract, the normatively best rule is that the promise to hold the offer open should be legally enforceable. There are four overlapping reasons why this rule is best.

First, an offeror makes a promise to hold an offer open for self-regarding reasons, not other-regarding reasons. The offeror must think that he will get something for the promise that he would not get if he did not make the promise. What the offeror thinks he will get is an increase in the probability of exchange with the offeree.

In some cases, an offeree is highly unlikely to consider an offer at all unless it is firm. For example, if an offeree solicits an offer for the purpose of determining her costs in providing goods or services to third parties with whom she proposes to contract, she is unlikely to consider an offer that is not firm, because she could not reliably determine her costs on the basis of such an offer.

In other cases, an offeree is likely to give more consideration to an offer if it is firm than if it is not. In deciding whether to accept an offer, an offeree must make an investment in deliberation. The offeree is more likely to make such an investment, or is likely to make a greater investment, if she is sure that the offer will be held open for a certain period while that investment is being made. The purpose of a firm offer in this context is to induce the offeree to make such an investment so as to increase the probability of exchange. Thomas Schelling has observed:

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> Among the legal privileges of corporations, two that are mentioned in textbooks are the right to sue and the "right" to be sued. Who wants to be sued! But the right to be sued is the power to make a promise: to borrow money, to enter a contract, to do business with someone who might be damaged. If suit does arise, the right seems a liability in retrospect; beforehand it was a prerequisite to doing business.[34]

Similarly, although the firm-offer rule may serve the interests of *revoking* promisors, the rule is against the interests of offerors *as a class*, because it diminishes their ability to achieve their desired ends. An actor makes a firm offer because he thinks his interests are best served by such an offer. If firm offers are not enforceable, offerees will not take the kinds of actions that such offers are intended to induce, or at least will take such actions at a much lower rate, because of the risk of forfeiture that such action would entail if the offer is revoked. Accordingly, firm offers should be enforceable to serve the interests of offerors.

Second, a firm offer should be enforceable as a structural agreement. A *structural agreement* is a dynamic promissory structure that actors create to increase the probability of economic exchange. A promise to hold an offer open is one such type of structure. Although a firm offer has the look and feel of a unilateral act, firm offers in fact are almost invariably bargained out and agreed to by the offeror and the offeree. Firm offers do not arise out of the blue. Rather, the offeror and the offeree typically negotiate terms—description, quantity, price, and so forth—that the offeror is willing to accept and the offeree is willing to seriously entertain. Those terms are then embodied in the firm offer.

Under the bargain principle, bargain promises are enforced according to their terms.[35] Among the reasons for this principle are that bargains produce gains through trade and facilitate private economic planning; that a capable and informed actor is normally the best judge of his own utility, and that this utility is revealed in the terms of the bargain he makes. Although these reasons are typically applied to justify the enforcement of conventional bargains, they justify the enforcement of structural agreements as well. As in the case of conventional bargains, structural agreements produce gains through trade and facilitate private economic planning; a capable and informed actor who makes a structural agreement is normally the best judge of his own utility; and this utility is revealed in the terms of the structural

34. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 43 (1960).

35. *See* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982).

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agreement that he makes. The promisor in a structural agreement makes his promise because in his view the agreement will increase the likelihood of an economic exchange that he believes will be in his interests. Structural agreements, therefore, should be enforceable like bargains, and for the same reasons.[36]

Third, typically, a promise to hold an offer open is not merely a structural agreement; it is part of a conventional bargain. That bargain is a unilateral contract consisting of a promise and a bargained-for act. The promise is to hold the offer open. The offeror makes this promise to increase the probability of exchange by inducing the offeree to give the offeror a chance, through the act of giving the offer serious consideration or deliberating on the offer. If the offeree does seriously consider or deliberate on the offer, then the bargain is completed. Is the chance of an increased probability of exchange, as a result of such consideration or deliberation, actually valuable to the offeror? That is not the law's concern. The law does not need to speculate about the value to the offeror of the increased probability of exchange, because by making a firm offer the offeror reveals that *for him* this value is equal to or greater than the value he puts on his own commitment. Anyway, in most or all cases, getting an offeree to give an offeror a chance will be much more valuable to the offeror than the piddling amount of cash that can make a firm offer into an option. The value of a chance that will increase the probability of exchange is widely evidenced: book clubs give away free books for the chance to sell future books; developers give away free vacations for the opportunity to present a sales pitch; retailers offer free prizes in promotional contests to induce customers to shop; and direct sellers pay substantial amounts for mailing lists.

The value of a chance, the fact that offerors often bargain for a chance, and the fact that if the offeree gives the chance a conventional bargain is formed, are exemplified in *Harris v. Time, Inc.*[37] Joshua Gnaizda received a letter from Time. The envelope in which this letter was sent contained two see-through windows. These windows revealed, from the top of the enclosed letter, the picture of a calculator watch, and the following statement: "JOSHUA A GNAIZDA, I'LL GIVE YOU THIS VERSATILE NEW CALCULATOR WATCH FREE Just for Opening this Envelope Before Feb. 15, 1985."[38] However, the see-through windows did not reveal the following additional words in the letter, which were printed below the picture of the calculator watch: 'AND MAILING THIS CERTIFICATE TODAY!'"[39] The certificate

36. For a fuller discussion of the concept of structural agreements, see generally Eisenberg, *Probability and Chance in Contract Law*, *supra* 31, at 1005.

37. 237 Cal. Rptr. 584 (Ct. App. 1987).

38. *Id.* at 586.

39. *Id.*

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required Joshua to purchase a subscription to *Fortune* magazine to receive the calculator watch.

Joshua demanded the calculator watch without purchasing a subscription to *Fortune*. Time refused. Joshua then brought a class action for breach of contract. Time argued there was no contract, because the mere act of opening the envelope was valueless and therefore Time had received no consideration. The court rejected this argument on the ground that Time had bargained for the chance that a prospective subscriber would open the envelope:

> It is basic modern contract law that, with certain exceptions not applicable here (such as illegality or preexisting legal duty), *any* bargained-for act or forbearance will constitute adequate consideration for a unilateral contract. . . . Courts will not require equivalence in the values exchanged or otherwise question the adequacy of the consideration. . . . If a performance is bargained for, there is no further requirement of benefit to the promisor or detriment to the promisee. . . .
>
> Moreover, the act at issue here—the opening of the envelope, with consequent exposure to Time's sales pitch— . . . was of great value to Time. At a time when our homes are bombarded daily by direct mail advertisements and solicitations, the name of the game for the advertiser or solicitor is to *get the recipient to open the envelope*. . . . From Time's perspective, the opening of the envelope was "valuable consideration" in every sense of that phrase.[40]

A promise to hold an offer open is like the calculator watch in *Harris*: it is intended to get the offeree *to open the envelope*—that is, to give consideration to or deliberate on the offer. If the offeree does the act of giving the chance by considering or deliberating on the offer, that act concludes a conventional bargain in the form of a unilateral contract.

How do we know that an offeree *has* given the offeror the chance that the offeror was bargaining for? Usually in firm-offer cases, the issue of enforceability only arises when the offeree wants to accept the offer. Therefore, it can fairly be presumed that by making the firm offer, the offeror has induced just the consideration of his offer that he sought.

Fourth, an enforceability rule is a better default rule than an unenforceability rule because it is easy for actors to contract around an enforceability rule by a few words stating that the offer is revocable at

40. *Id.* at 587–88 (citations omitted).

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any time. In contrast, an unenforceability rule is harder to contract around because it is a rule of consideration and the rules of consideration cannot easily, if at all, be nullified by words.

Some modern scholars have advanced normative arguments in favor of a rule that firm offers should be unenforceable. In particular, it is sometimes argued that the commitment involved in a firm offer is one-sided. It is not easy to see why this should be thought of as an argument against enforceability. Classical contract law placed mutuality high in the pantheon of virtues, but there is no reason of policy, morals, or experience why mutuality should be a condition to enforceability. Every promise is by its nature a one-sided commitment. Nevertheless, as Thomas Scanlon has pointed out, if *A* provides assurance to *B* that he will do a certain act, knowing that *B* wants that assurance, *A* is under a stringent moral duty to perform the act. If *A* does not want to come under such a duty, he should warn *B* that he may not perform. That *A* can costlessly avoid being duty-bound by providing such a warning makes it easy to conclude that *A* is duty-bound if he fails to warn.[41] Scanlon analyzes this duty in terms of fidelity:

> If (1) A voluntarily and intentionally leads B to expect that A will do *x* . . . ; (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) B knows that A has the beliefs and intentions just described; (5) A intends for B to know this, and knows that B knows it; and (6) B knows that A has this knowledge and intent; then, in the absence of some special justification A must do *x* unless B consents to *x*'s not being done.
>
> The fact that potential B's have reason to insist on such a duty of fidelity is in my view sufficient to establish it as a duty unless it would be reasonable for potential A's to reject such a principle. Would the duty described impose an unreasonable burden on those who create expectations in others? They could of course avoid bearing any burden at all simply by refraining from intentional creation of any expectations about their future conduct. . . . [The fidelity principle] applies only when A knows that B wants assurance, and when A has acted with the aim of supplying this assurance and has reason to believe that he or she has done so, and when this and other features of the situation are mutual knowledge. No one could

41. Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199, 208 (1990).

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> reasonably object to a principle imposing, in such cases, at least a duty to warn at the time the expectation is created—to say, "This is my present intention, but of course I may change my mind," or to make this clear in some other way if it is not already clear in the context. Since the burden of such a duty to warn is so slight, one can hardly complain if failure to fulfill it leaves one open to the more stringent duty to perform or seek permission to substitute.[42]

Of course, Scanlon here addresses moral rather than legal commitments, but the structure of his argument applies to legal commitments as well. Indeed, the structure of his argument shows that if an actor makes either a bargain promise or a promise ancillary to bargain, there is seldom a reason to worry about freedom from contract. This is so because it is cheap and easy for the actor to prevent being contractually bound, either by warning that he may not perform or by disclaiming an intent to be legally bound.

Furthermore, just as every promise is a one-sided commitment, so too every offer is a one-sided commitment. Even if an offer is not firm, the offeror eommits himself to perform a bargain if the offeree validly accepts. Unless and until the offeree's power of acceptance is terminated, therefore, the offeree has the power to bind the offeror but the offeror does not have the power to bind the offeree.

The one-sidedness argument in favor of the firm-offer rule is frequently stressed in the context of construction bidding, where subcontractors typically make firm bids for acceptance by general contractors, as in *Baird*.[43] If firm offers are enforceable, the subcontractor is bound, although the general is not. But so what? A person who makes a firm offer knows that he is making a one-sided commitment and believes that his interests will be advanced by making such a commitment, just like a book club that offers to send four books free simply for joining. This kind of argument is no more persuasive than would be an argument that conventional bargains made by capable and informed actors should be reviewable for fairness. As Jim Gordley has said, the fact that one party is not committed does not show that one-sided commitments are unfair.[44] One-sided commitments "[are] fair if the advantage the committed party received was greater than any

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42. *Id.* at 208–09 (footnote omitted).

43. *See* Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659, 703 (1988) ("It is easy for a general contractor to prove it relied on a subcontractor's bid, but it is extremely difficult for a subcontractor to use reliance against a general contractor."); Kniffin, *supra* note 14, at 24–26.

44. James Gordley, *Enforcing Promises*, 82 CAL. L. REV. 547, 602 (1995).

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opportunity lost by making the commitment."[45] The fact that the offeror has made a firm offer is ample evidence that in his view this fairness criterion is satisfied. Why should the courts review the prudence of the commitment in a firm offer any more than they review the prudence of bargains generally?

Moreover, if the *commitment* in a firm offer is one-sided, the *agreement process* is not. On the contrary: usually a firm offer is either made as the outcome of a structural agreement, in which the terms of the offer have been agreed upon in advance, or is part of a bargain for a chance.

It is true that in the construction context there is a potential for special complications besides mere one-sidedness. A general contractor may peddle the low subcontractor's bid to other bidding subcontractors as a way to get them to reduce their bids; or he may threaten to peddle the low subcontractor's bid to induce the low subcontractor to chop down the bid so as to forestall peddling; or he may use the low subcontractor's bid but then award the subcontract to another subcontractor. However, the potential for these complications does not affect the principle that firm offers should be irrevocable, partly because there are straightforward means to handle these complications. These means include the adoption of a rule that a subcontractor's promise to hold his bid open for a period of time is subject to the implied condition that his bid not be peddled; or a rule that a general contractor's use of a subcontractor's bid creates a contract; or a rule that a general contractor who takes the time to engage in bid peddling exceeds a reasonable time within which to accept the low subcontractor's bid.

A hallmark of a normatively unsound rule is that there are many exceptions to the rule, some or all of which are inconsistent with the rule. The firm-offer rule carries this hallmark. Although the rule remains on the books and still has some bite,[46] it has been heavily eroded by exceptions.

First, a number of cases hold that a firm offer is enforceable if nominal consideration—a few dollars—changes hands, although nominal consideration is by definition not bargained-for.[47] A rule adopted in the Section 87(1)(a) of the Second Restatement goes even further. The basic principle of Second Restatement is that nominal consideration does not constitute consideration,[48] but under Section 87(1)(a) a firm offer is enforceable if it is in a writing signed by the offeror, recites a nominal consideration, and proposes an exchange on fair terms within a

45. *Id.*

46. *See* Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 720–23 (1996).

47. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 71 cmt. b.

48. *See id.* § 71 cmt. b, illus. 4–5.

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reasonable time, even if the nominal consideration does not change hands.[49] The rule that a firm offer is enforceable if there is nominal consideration is just an inconsistent way to subvert the firm-offer rule.

Second, under Section 2-205 of the Uniform Commercial Code, a firm offer to buy or sell goods is normally enforceable when made in writing by a merchant,[50] and under many state statutes, other kinds of firm offers, or even most firm offers, are enforceable if in writing. For example, under New York General Obligations Law section 5-1109, if an offer to enter into a contract is made in a writing that provides that the offer is irrevocable during a stated period, then, with minor exceptions, the offer is irrevocable during that period.[51] Section 2-205 of the Code, and statutes like those of New York, are also inconsistent with the firm-offer rule. If that rule is normatively justified, the Code and the statutes are not. The Code and the statutes can be justified only if the firm-offer rule is unjustified.

A third exception concerns auctions. As discussed above, auctions may be conducted with or without reserve. Normally, auctions are conducted with reserve. An auction with reserve is conducted on the understanding that the seller has set a reservation price, below which the auctioneer is not authorized to complete a sale. Under contract law, normally an auctioneer's act of putting a lot up for sale is an invitation to bid; bids are offers; knocking down the hammer is an acceptance; and unless and until the auctioneer knocks down the hammer he can withdraw a lot from sale.[52] In an auction that is announced to be without reserve, however, the rule is that an auctioneer cannot withdraw a lot once it has been put up for auction, unless bidding does not begin within a reasonable time.[53] In *Barry v. Davies*, the court held that the auctioneer's implied promise not to withdraw a lot from the auction block in an auction without reserve has consideration, because making a bid is a "detriment to the bidder, since his bid can be accepted unless

49. *See id.* § 87(1)(a).

50. Section 2-205 provides in full:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

U.C.C. § 2-205.

51. N.Y. GEN. OBLIG. § 5-1109 (McKinney 2001).

52. *See* U.C.C. § 2-328(2)–(3); *see also* Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1172–74 (1994).

53. *See* U.C.C. § 2-328(3).

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and until withdrawn."[54] Although that is a plausible view, it fails to fully explain the without-reserve rule. Under that rule, once a lot is put on the auction block it cannot be withdrawn unless bidding does not begin within a reasonable time. Accordingly, the autioneer's implied promise is enforceable even before any bid is made. A better explanation of the without-reserve rule, therefore, is that putting a lot on the auction block without reserve constitutes a legally enforceable firm offer.

Finally, under modern contract law a firm offer is enforceable if it is relied upon.[55] This principle is adopted in numerous cases, and is embodied in Section 87(2) of the Second Restatement, which states that "[a]n offer which the offeree should reasonably expect 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 is binding as an option contract to the extent necessary to avoid injustice."[56]

Here, as elsewhere, the Second Restatement gets to the door of the house of modern contract law, opens the door to go through, and almost crosses the threshold, but leaves a trailing foot dangling on the classical porch. Reliance has an extremely important place in a number of areas of contract law. The firm offer is not one of those places. The question should be not whether a firm offer was relied upon, but whether it was made. Although the prospect of reliance may help to show that a promise to hold an offer open should be implied even though such a promise is not explicitly made, the fact of reliance should be irrelevant to the enforceability of that promise. The real explanation for the reliance rule is that it provides some relief from the firm-offer rule without completely breaking apart the doctrinal box. Of course, some relief from a bad rule is better than no relief, but a rule that is not the normatively best rule is not justified simply because it is better than an even worse rule.

Furthermore, by its emphasis on reliance the Second Restatement muddies the appropriate remedy for the revocation of a firm offer. Section 87(2) provides that a relied-upon offer "is binding as an option to the extent necessary to avoid injustice."[57] This phrase parallels a sentence that the Second Restatement added to Section 90 to make clear that damages for breach of a promise that is enforceable only because of reliance can be measured by the promisee's reliance: "[t]he remedy

54. *See Barry*, 1 All E.R. 944 (discussing the issue of consideration); Frank Meisel, *What Price Auctions Without Reserve?*, 64 MOD. L. REV. 468, 468 (2001) (examining implications of *Barry*).

55. *See, e.g.*, Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958).

56. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 87(2).

57. *Id.*

granted for breach [under Section 90] shall be limited as justice requires."[58] Comment e to Section 87 makes this parallel explicit:

> Full-scale enforcement of the offered contract [under Section 87(2)] is not necessarily appropriate . . . . Restitution of benefits conferred may be enough, or partial or full reimbursement of losses may be proper. Various factors may influence the remedy: the formality of the offer, its commercial or social context, the extent to which the offeree's reliance was understood to be at his own risk, the relative competence and the bargaining position of the parties, the degree of fault on the part of the offeror, the ease and certainty of proof of particular items of damage and the likelihood that unprovable damages have been suffered.[59]

The tedious inquiry required under the comment goes down the wrong path. An offeror who revokes an option is liable for expectation damages. That rule is proper. An option is a bargain, and all the reasons that underlie granting expectation damages for other kinds of bargains apply to options as well. A firm offer should be treated just like an option. Since the revocation of an option should and does give rise to expectation damages, so too should the revocation of a firm offer.[60]

C. *Offers for Unilateral Contracts*

Suppose that *A* promises *B* that if *B* performs a specified act, *A* will pay *B* a given amount of money. *A* makes clear that he doesn't want a promise from *B*; only the act will do. Traditionally, this kind of promise has been viewed as an offer—an offer for a unilateral contract, that is, a contract to be formed by the exchange of a promise, in the form of an offer, and an act.

The rule of classical contract law was that an offer for a unilateral contract could be revoked at any time before the designated act had been completed, even if performance of the act had begun. This rule was exemplified in a pair of famous hypotheticals. In one, *A* says to *B*, "I

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58. *Id.* § 90(1).

59. *Id.* § 87 cmt. e.

60. The damages issue is somewhat complicated by the fact that firm-offer cases sometimes involve a bid by a subcontractor who revokes on the ground that his bid was based on a mathematical mistake. In, that kind of case the general contractor should be limited to reliance damages. However, this is not because the reliance measure should be used to determine damages for the revocation of a firm offer, but because the reliance measure should be used to determine damages for nonperformance of any contractual obligation that is based on a mistaken computation.

will give you $100 if you walk across the Brooklyn Bridge." After *B* has walked halfway across the bridge, *A* overtakes *B* and revokes. In the other, *A* offers *B* $50 to climb a flagpole. After *B* has climbed halfway up the flagpole, *A* calls out to *B* and revokes. The result under classical contract law was the same in both hypotheticals: the revocation was effective on the ground that an offer for a unilateral contract is revocable until performance of the act has been completed, even if performance had begun. Too bad for *B*.

I will call the rule that an offer for a unilateral contract is revocable until the act has been completed the *unilateral-contract rule*. The unilateral-contract rule was simply a special case of the unenforceability rule, and like that rule was justified almost exclusively on the basis of deductive reasoning. The major premises of this reasoning were that only a bargained-for promise was enforceable, and that an offer could be revoked at any time prior to acceptance unless the offeror had made a bargained-for promise to hold the offer open. The minor premises were that an offer for a unilateral contract was not bargained for, and was not accepted until performance of the act had occurred. The deductive conclusion was that an offer for a unilateral contract is revocable until performance has been completed.

The unilateral-contract rule defeated the reasonable expectations of offerees. Tiersma has put this point very well:

> [N]o 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? The fact of the matter . . . is that very reasonable people spend substantial time and money doing the sorts of things that unilateral contracts attempt to induce them to do. The only rational explanation for such behavior is that people

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> believe the speaker is in fact committed *then and there* to paying the price if the conditions of the offer are met.[61]

The unilateral-contract rule, like the firm-offer rule, was against the interests of offerors as a class. An actor makes an offer for a unilateral contract because he thinks his interests are best served by such an offer. It is in the interests of an actor who makes an offer for a unilateral contract that the offeree act under the offer—otherwise, the offer would not be made—and correspondingly that the offeree begin acting as quickly as reasonably possible. If, however, offers for unilateral contracts were revocable before performance was completed, offerees would not act under such offers, or at least would act at a much lower rate, because of the substantial risks of forfeiture that such action would entail.

Just as the unilateral-contract rule was simply a special case of the unenforceability rule, so too normally an offer for a unilateral contract is simply a special case of a firm offer. At the least, the rule should be that an offer for a unilateral contract becomes irrevocable when the offeree has taken any action on the basis of the offer. However, the normatively best rule is that an offer for a unilateral contract normally carries in its train an implied enforceable promise to hold the offer open until the expiration of a reasonable period for the offeree to begin acting in a way invited by the offer, and then to diligently complete performance.[62]

The framers of the *Restatement (First) of Contracts* (the "First Restatement")—in particular, Williston, as the reporter—understood that the unilateral-contract rule was unsatisfactory. However, because classical contract law was conceived as an axiomatic system, and the unilateral-contract rule seemed to flow inexorably from some of the axioms, Williston had trouble in figuring out how to break away from the rule without breaking away from the axioms on which he conceived contract law to rest.[63] Williston was willing to bend, but not to break. The result was Section 45 of the First Restatement, which provided:

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61. Tiersma, *supra* note 12, at 29.

62. Of course, if an offer does not expressly provide that it will be held open for a period, whether there is an implied promise to hold the offer open for a period is a matter of interpretation. It is possible that in a given case, considering the terms of the offer and the surrounding circumstances, an offer for a unilateral contract would not properly be interpreted to carry in train an implied promise to hold the offer open until the offeree has a reasonable time to begin acting and complete performance. The easiest such case, of course, would be one in which the offer expressly states that it can be revoked until performance begins, or the like.

63. In his article, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1453 n.251 (1987), Allan Farnsworth developed an almost imperceptible but nevertheless important progression in Williston's thinking on this matter.

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> If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.[64]

Section 45 properly took the position that an offer for a unilateral contract carries with it an implied promise to hold the offer open for a period of time, and that this promise is ancillary to a bargain. However, the framers of the First Restatement were unable or unwilling to completely break out of the classical consideration box. Having recognized that an offer for a unilateral contract carries with it an implied promise to hold the offer open for a period of time, and that this promise is ancillary to a bargain, the First Restatement should have gone on to provide that this promise is enforceable—or at the least, is enforceable once the promisee has taken action under the promise. Instead, Section 45 took the position that the promise to hold the offer open was not itself enforceable, but was made enforceable only if the offeree began to perform.[65]

Unlike Section 87(2) of the Second Restatement, Section 45 of the First Restatement took the position that when the implied promise to keep an offer for a unilateral contract open is enforceable, the remedy is expectation damages.[66] Generally speaking, the measurc of damages for breaking a promise should reflect the basis for enforcing the promise. Where a promise is enforceable if and only if the promisee takes action in reliance on the promise, normally the basis of enforceability is reliance. However, despite the fact that Section 45 liability was triggered only if the offeree took a certain kind of action, Section 45 was not conceptualized as reliance-based. If it had been conceptualized that way, then the section would have been unnecessary, because the problem could have been solved by its even more famous cousin,

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Farnsworth reports that in 1920 Williston stated, in the first edition of his treatise, that it "seems *impossible* on theory successfully to question the power [to revoke an offer for a unilateral contract before performance of the requested act has been completed] . . . though obvious injustice may arise." *Id.* at 1453–54 (quoting S. WILLISTON, THE LAW OF CONTRACTS § 60, at 100 (1920) (emphasis added)). Later, in 1925, Williston stated, in a background paper for the First Restatement, that it "seems *difficult* on theory successfully to question the power" to revoke, "but great injustice may arise" if the power continues. ALI, CONTRACTS TREATISE NO. 1 (A) SUPPORTING RESTATEMENT NO. 1, § 68, at 132 (1925).

64. RESTATEMENT (FIRST) OF CONTRACTS § 45 (1932).

65. *Id.*

66. *Id.*

Section 90.[67] Instead, the beginning of performance was—and under the Second Restatement still is—conceptualized as completing an option contract, enforceable by expectation damages. The theory is as follows: an offer for a unilateral contract carries with it an implied promise that if part of the requested performance is given or tendered, the offeror will not revoke the offer. Rendering (or tendering) part performance completes a bargain for that promise. This makes the promise enforceable as an option under the bargain theory of consideration.

In order to maintain this conceptualization, the text and comment of Section 45, as formulated in both the First and Second Restatements, drew a sharp distinction between beginning to perform and preparing to perform.[68] Under Section 45 of the First Restatement, beginning to perform completed a bargain and therefore made the offeror's promise to hold the offer open enforceable.[69] In contrast, action by the offeree other than beginning to perform had no effect under Section 45, because it would not complete a Section 45 bargain—although to comment added that such action could have an effect under Section 90, which is not bargain-based:

> The main offer [for a unilateral contract] includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer . . . . Part performance . . . may thus furnish consideration for the subsidiary [promise]. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see § 90).[70]

Section 45 of the Second Restatement carries forward the approach of the First Restatement.[71]

The distinction in Section 45 between beginning to perform and preparing to perform is not tenable. For example, suppose *A* offers *B* $10,000 to *B* if *B* produces a solution to a famous mathematical

67. *See id.* § 90.

68. *See id.* § 45 cmt. a; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 45.

69. *See* RESTATEMENT (FIRST) OF CONTRACTS, *supra*, note 64, § 45 cmt. b.

70. *Id.*

71. Section 45, comment f of the Second Restatement provides: "*Preparations for performance.* What is begun or tendered must be part of the actual performance invited in order to preclude revocation under this Section. Beginning preparations, though they may be essential to carrying out the contract or to accepting the offer, is not enough." RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 45 cmt. f. Similarly, the comment states that preparation is not covered by Section 45 but might be covered by Section 87(2). *Id.*

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problem. *B* begins by developing some new techniques that will be needed to solve the problem, but will also have independent significance. Has *B* prepared to perform or has she begun to perform? And why should it matter? As Jim Gordley observes, the preparation-versus-performance distinction would mean that if the offeree takes one step on the Brooklyn Bridge, the offeror is bound, but if the offeree engages in massive preparations to get ready to cross the bridge, the offeror is not bound.[72] Making important remedial consequences turn on whether an offeree under an offer for a unilateral contract has begun to perform or has only acted or forborn under the offer is scholastic logic chopping.

Indeed, even the framers of the restatements had a hard time figuring out the difference between beginning and preparing to perform. Take, for example, illustrations 1 and 2 to Section 62 of the Second Restatement:

> 1. 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.
>
> 2. A, a regular customer of B, orders fragile goods from B which B carries in stock and ships in his own trucks. Following his usual practice, B selects the goods ordered, tags them as A's, crates them and loads them on a truck at substantial expense. Performance has begun, and A's offer is irrevocable.[73]

There is no substantive distinction between these two illustrations. In illustration 1, *B* has begun to work on the goods but has not rendered the goods unfit for other jobs. But in illustration 2, *B* also has not rendered the goods unfit for other jobs—*B* can simply unload the goods, uncrate them, and put them back in stock. In illustration 2, *B* incurs a "substantial expense." However, no reason is apparent why incurring substantial expense is relevant to determining whether an actor is preparing to perform or beginning to perform. In any event, buying

72. Gordley, *supra* note 44, at 605.

73. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 62 illus. 1-2.

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goods at a time when they are not otherwise needed, and doing work on goods that does not otherwise then need to be done, might well involve as much cost as tagging, crating, and loading.[74]

The untenable distinction between beginning to perform and preparing to perform serves to underline the impoverished rationale of Section 45. As in the case of firm offers for bilateral contracts, and for much the same reasons, the normatively best rule is that an implied promise to hold an offer for a unilateral contract open for a period of time should be enforceable, and the remedy for breach of that promise should be expectation damages. Section 45, like Section 87(2), does provide some relief from a bad rule. Again, however, a rule is not justified simply because it can be made to fit within the doctrinal box and is better than a worse rule.

III. OTHER OFFEROR-CENTERED EVENTS OF TERMINATION

In cases governed by the rules considered in Part II, there is no doubt that a revocation has occurred; the only issue is whether and to what extent the offer should be and is revocable. In contrast, I will assume in this Part that an offer that has not yet lapsed is revocable, either because there is no express or implied promise to hold the offer open or because the offer is revocable under the present rules of contract law. The rules considered in this Part present the problem whether certain kinds of offeror-centered events, other than a withdrawal of the offer that is communicated by the offeror to the offeree (that is, other than a revocation), should terminate the offeree's power of acceptance. These events fall into three categories: the acquisition by the offeree of reliable information that the offeror no longer wishes to be bound by his offer, often referred to as an "indirect revocation"; publication by the offeror of a notice withdrawing an offer to the general public that was in the form of a reward, prize, or contest; and the death or incapacity of the offeror, unbeknown to the offeree.

74. Richard Craswell suggests the following distinction between illustrations 1 and 2. In illustration 2, "[l]oading the truck is a relationship-specific investment, for the expense of loading is wasted if [the buyer] backs out of the transaction." Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 529 (1996). In contrast, in illustration 1, "the builder risked little . . . since even if the job offer were withdrawn, the lumber could still be used on the next job." *Id.* This suggestion, however, does not account for the builder's time value for money and labor for purchasing and working on the lumber when it was otherwise unnecessary to do so. This time value is relationship-specific in illustration 1, because it will be lost if the merchant's revocation is effective.

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A. Indirect Revocation

In the famous case of *Dickinson v. Dodds*, Dodds made an offer to Dickinson and promised to hold the offer open for three days.[75] Before the expiration of the three-day period, Dodds changed his mind. Dodds did not tell Dickinson that he had changed his mind, but his actions showed that he had changed his mind and those actions came to Dickinson's attention. Dickinson tried to accept Dodds's offer before the expiration of the three-day period but after he learned that Dodds had changed his mind. The court held that no contract was formed because, first, the offer was revocable (the issue discussed in Part II, *supra*), and second, before Dickinson accepted he became aware that Dodds had changed his mind.[76]

The school of classical contract law had a difficult time with the second rule. Williston, for example, commented:

> Certainly there are . . . theoretical . . . difficulties involved in any rule allowing an effective revocation to be made by any one but the offeror. In theory, as an offer must be made by an act of the offeror moving toward the offeree, and no statement by third persons is sufficient, so it would seem that an offer could only be withdrawn by a direct expression of volition on the part of the offeror to the person to whom he had previously made the offer. . . . [C]ommunication is essential to the existence of revocation, indeed *is* the revocation. If so, it seems that the act of the offeror is as essential to withdraw his offer as to create it, and that the only way he can make his act effective is by communication from himself or his agent.[77]

Williston's difficulties were reflected in Section 42 of the First Restatement, which accepted the second rule of *Dickinson* in only a limited and grudging way:

> Where an offer is *for the sale of an interest in land or in other things*, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree

75. 2 Ch. D. 463, 464 (App. 1876).

76. *Id.* at 472–75. American contract law also generally adopts the second rule. *See, e.g.*, McCutchan v. Iowa State Bank of Fort Madison, 5 N.W.2d 813, 816 (Iowa 1942); Normile v. Miller, 306 S.E.2d 147 (N.C. Ct. App. 1983), *aff'd as modified*, 326 S.E.2d 11 (N.C. 1985); Giovanola v. Fort Lee Bldg. & Loan Ass'n, 196 A. 357, 360-361 (N.J. Ch. 1938); Watters v. Lincoln, 135 N.W. 712, 712 (S.D. 1912); Knight v. Seattle First Nat. Bank, 589 P.2d 1279, 1281 (Wash. Ct. App. 1979).

77. 1 WILLISTON, *supra* note 4, § 57 (emphasis added) (footnotes omitted); *see also* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 181 (1880).

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> acquires reliable information of that fact, before he has exercised his power of creating a contract by acceptance of the offer, then the offer is revoked.[78]

In contrast, Section 43 of the Second Restatement adopted the rule of *Dickinson* in full: "An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect."[79]

Despite the theoretical difficulties that Williston had with *Dickinson*, he concluded that the result in the case was desirable.[80] But if the result was desirable, why were there theoretical difficulties? Correspondingly, why was Section 42 of the First Restatement limited, as the reasoning in *Dickinson* was not, to the sale of an interest in land or other things? Again, the answer lies in the axiomatic nature of classical contract law. One of the axioms of that system was that a power of acceptance could be terminated only by a closed set of events. As Williston put it in his first edition:

> The ways in which an offer may be terminated . . . are: (1) Rejection by the offeree; (2) Expiration of a time stated in the offer itself as the limit allowed for acceptance; (3) Expiration of a reasonable time, if no time limit is fixed by the offer; (4) Revocation by the offeror; (5) Death or insanity of either party.[81]

Williston's theoretical difficulty, therefore, was that none of the events that axiomatically terminated the offeree's power of acceptance had occurred in *Dickinson*. In particular, there was no revocation. As Williston correctly said, communication is an essential element of a revocation, just as it is an essential element of an offer.[82] If *A* says to *B*

78. RESTATEMENT (FIRST) OF THE LAW OF CONTRACTS, *supra* note 64, § 42 (emphasis added).

79. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 43.

80. 1 WILLISTON, *supra* note 4, § 57.

81. *Id.* In later editions of Williston's treatise this list was expanded, but it remained closed and axiomatic. For example, in SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (3d ed. 1957), § 50A stated:

> The ways in which this continuing power created by the offer may be terminated . . . are: (1) Rejection by the offeree; (2) lapse of time specified or of a reasonable time where the offer is silent thereon; (3) occurrence of a condition laid down in the offer for that purpose; (4) the death or destruction of a person or thing necessary to the performance of the proposed contract; (5) supervening legal prohibition of such a contract; (6) revocation by the offeror; (7) death or legally incapacitating insanity of either party.

82. *See* Eisenberg, *supra* note 52, at 1166–72.

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that he is making an offer to *C*, that is not an offer. If *A* says to *B* that he is revoking an offer to *C*, that is not a revocation. But so what? The substantive question is not whether some event on an axiomatic list has occurred, but whether an event has occurred of a kind that should terminate an offeree's power of acceptance. The answer to that question, in this context, is clear. If an offeree has acquired reliable information that the offeror has changed his mind, and the offer is revocable at that point, the offeree has no legitimate expectation that she can conclude a bargain by her assent.

B. The Withdrawal of General Offers

It is a traditional rule of contract law, now somewhat eroded, that an advertisement is not an offer. However, there has always been a tacit exception to this rule in the case of offers for unilateral contracts that take the form of rewards, prizes, or contests. Such offers, which are commonly referred to as *general offers*, are fully enforceable although made in advertisements or through other public media.

Suppose a person who has made a general offer wishes to withdraw the offer, before it would otherwise have lapsed, by publishing the withdrawal in the medium in which the offer was published. What should be the effect of such a publication assuming that the offer is revocable? Under the rules embodied in Sections 45, 87(2), and 90 of the Second Restatement (discussed in Part II), the withdrawal of a general offer by publication will not be effective, or will not be fully effective, as to an actor who performed, began to perform, or otherwise relied, prior to the withdrawal. In contrast, such a withdrawal will be effective under those rules as to an actor who became aware of the withdrawal before she performed, began to perform, or otherwise relied. But what about an actor who performed, began to perform, or otherwise relied after the notice of withdrawal was published but before she actually became aware of it?

There are not many cases on this issue,[83] and some of those are equivocal. Two of the leading cases are *Shuey v. United States*[84] and *Long v. Chronicle Publishing Co.*[85]

In *Shuey*, on April 20, 1865, the Secretary of War published in newspapers a proclamation that the government would pay a $25,000 reward for the apprehension of John H. Surratt, one of the accomplices of John Wilkes Booth, and liberal rewards for any information that

83. *See* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 2.21 (Joseph M. Perillo ed., rev. ed. 1993); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 5.12 (Richard A. Lord ed., 4th ed. 1990).

84. 92 U.S. 73 (1875).

85. 228 P. 873 (Cal. Dist. Ct. App. 1924).

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conduced to Surratt's arrest.[86] On November 24, 1865, President Andrew Johnson published an order withdrawing the reward. Thereafter, in April 1866, Shuey informed the American Minister in Rome that he had discovered and identified Surratt, who was serving as a Zouave in the Pope's army. At the request of the Minister, Shuey kept watch over Surratt, and in November 1866 the Papal Government arrested Surratt. Both Shuey and the Minister were unaware of the publication that the reward for Surratt's arrest had been withdrawn. Eventually, Shuey was paid $10,000 under a special statute, and he sued for the balance of the reward.[87] The U.S. Supreme Court held that Shuey was not entitled to the full amount of the reward, partly on the ground that in the absence of reliance, a general offer can be revoked by a notice that is published in the same way as the offer. The Court stated:

> It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. . . . The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. . . . The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.[88]

I will refer to this approach as the *Shuey* rule.

In *Long*, the *San Francisco Chronicle* had published a contest offer.[89] The winners of the contest would be the persons who sent in the most new *Chronicle* subscriptions. During the last week of the contest, the *Chronicle* published a new contest rule. Under this rule, the new subscriptions could be accompanied by personal checks only for amounts no greater than $10, and otherwise had to be accompanied by cash, money order, or certified check. On the last day of the contest, Long sent in new subscriptions accompanied by personal checks for $30 and $18. If the new rule was effective as to Long, then she was entitled to third prize. If the new rule was ineffective as to Long, then she was entitled to second prize. The *Chronicle* awarded Long third prize, and she sued for the value of second. The court held that the new rule was ineffective as to Long, because the *Chronicle* knew who was

86. 92 U.S. at 73.
87. *Id.*
88. *Id.* at 76–77.
89. 228 P. at 874.

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participating in the contest, the participants were not that numerous, and therefore "the most natural thing to have been anticipated by each of the parties to the contract would have been an actual notification."[90]

Of the other cases on point, most accept the rule set out in *Shuey* but find it inapplicable, because either the offeror could practicably have given individual notice to the offerees, the notice of withdrawal was not publicized in the same manner as the offer, or the would-be withdrawal was not sufficiently clear.[91] Most of the cases conclude that the *Shuey* rule does not apply on the facts. The Restatement adopts the *Shuey* rule and the treatises treat that rule as law.

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90. *Id.* at 876. Section 46 of the Second Restatement adopts the reasoning of *Long* in illustration 1:

> A, a newspaper, publishes an offer of prizes to the persons who procure the largest number of subscriptions as evidenced by cash or checks received by a specified time. B completes and mails an entry blank giving his name and address, which is received by A. Thereafter, during the contest, A publishes a notice that personal checks will not be counted; B does not see the notice. Unless the original offer provided otherwise, B is not bound by the later notice, since A could have given B personal notice.

RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 46 cmt. b, illus. 1.

91. For example, in *Woods v. Morgan City Lions Club*, the defendant's bingo club advertised that $10,000 would be paid to a bingo player who covered a bingo card before fifty-three numbers had been called. 588 So. 2d 1196, 1197 (La. Ct. App. 1991). Plaintiff covered her card in fifty-two numbers, but defendant refused to pay on the ground that before the game was played, defendant had announced that a card had to be covered in no more than fifty-one numbers to win the $10,000. *Id.* The court held that although the offer of a prize is revocable before completion of the requested act if the revocation is made by the same or an equally effective means as the offer, the bingo club's announcement was insufficient because the club easily could have notified all the players individually of the changed rule when the players purchased their bingo cards. *Id.* at 1200.

In *Hoggard v. Dickerson*, the defendant orally offered a reward of $5000 for the person who shot and murdered his friend. 165 S.W. 1135, 1136 (Mo. Ct. App. 1914). The plaintiff complied with the terms of this offer, but the defendant argued that he had revoked the offer half an hour after it was made, when in another town he offered a reward only if the murderer were brought in dead. *Id.* at 1139. The court cited *Shuey*, but held that the revocation was not effective because it was made

> in a different neighborhood and in a manner and under circumstances not calculated to bring knowledge of the revocation, if such it was, home to those who heard directly or indirectly of the first offer. . . . [If the revocation] could not have been published in exactly the same manner and to the same people to whom the first offers were made, . . .[it] should have been published in the same neighborhood at least.

Id.

In *Carr v. Mahaska County Bankers Ass'n*, the court, citing *Shuey*, held that a bank's offer of a reward for the capture or information leading to the arrest and conviction of bank robbers, made by posting a notice in the bank, was not revoked by the bank cashier's act of taking the notice down and throwing it in the wastebasket. 269 N.W. 494, 495-97 (Iowa 1936); *see also, e.g.*, Vantage Point, Inc. v. Parker Bros., Inc., 529 F. Supp. 1204, 1217-18 (E.D.N.Y. 1981).

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Both the courts and the secondary sources commonly put the issue of the effectiveness of a published withdrawal in terms of how general offers can be revoked. As in the case of the rule of *Dickinson*, and for the same reason, this terminology is inapt. The real issue in this case, as in that one, is whether a published but uncommunicated withdrawal of a general offer should terminate the offeree's power of acceptance. This terminology is used in the text, although not the title, of Section 46 of the Second Restatement:

> Where an offer is made by advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available.[92]

Few if any of the authorities come to grips with the underlying problem in this area. This is because the authorities focus on the relatively formal issue, what constitutes a revocation of a general offer, rather than on the substantive issue, should the power of acceptance under a general offer be terminated by a published but uncommunicated withdrawal. The problem raised by the substantive issue is as follows. In a world of perfect and cost-free information and communication, an offeror who made a general offer would know the identity of all persons who knew of the offer, and a withdrawal would be effective only if it was costlessly communicated to those persons. In the real world, however, information is not perfect, and neither information nor communication is cost-free. What should be the effect of a published but uncommunicated withdrawal under those conditions?

A justification that is sometimes given for the *Shuey* rule is that if an offeror who makes a general offer could not terminate an offeree's power of acceptance through a published withdrawal, there would be no way for him to terminate the power of acceptance of offerees whose identity he did not know.[93] That justification is unconvincing. If the offeror did not want to get into that position, he could have refrained from making a general offer, or qualified the offer appropriately. Since the offeror has put himself in that position, there is no special reason why the law should bail him out unless it is otherwise appropriate to do so.

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92. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 48.

93. *See, e.g.*, JOHN EDWARD MURRAY, MURRAY ON CONTRACTS § 42, at 108 (3d ed. 1990).

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It may also be argued in favor of the *Shuey* rule that an offeree under a general offer is at fault if she does not keep posted on a daily basis with the medium in which the offer was made. This reason was suggested in *Shuey* itself, where the court stated that the offeree "should have known that the offer could be revoked in the manner in which it was made."[94] This justification is also unconvincing. If someone has seen an offer in a newspaper, why is she at fault for not reading that newspaper every day in the future? In *Long* the court said, much more plausibly:

> The original rules [of the contest] contained neither an express declaration, nor anything from which it might reasonably be inferred, that any contestant for a prize under the subscription contest was either obliged, or was expected, to read possibly the whole of each and every edition of the newspaper thereafter published for the purpose of ascertaining whether or not any of the rules of the contest had been either modified or abandoned.[95]

There is one, and probably only one, plausible rationale for the *Shuey* rule: a contrary rule could be opportunistically exploited. Because the offeror normally cannot prove that an offeree knew of a published withdrawal, if the power to accept a general offer was not terminated by publication, an offeree who did know of the withdrawal could opportunistically claim that she did not. Under this rationale, the issue is one of choosing between two competing interests: the interest in protecting the offeror from this kind of opportunism, and the interest in protecting the justifiable expectation of a nonopportunistic offeree who acted pursuant to the offer without knowing of the withdrawal.

In evaluating these competing interests, it must be borne in mind that general offers require acceptance by an act, not by a promise. This requirement gives some protection against opportunism. An offeree who becomes aware that the offer has been withdrawn is unlikely to opportunistically act pursuant to the offer, because she knows that she will be buying into trouble.

Furthermore, although the possibility of opportunism should always be weighed in determining whether a given legal rule should be adopted, that possibility is not in itself decisive. Many people will act morally rather than opportunistically, and even an opportunist will not succeed unless she perjuriously convinces the fact finder that she is telling the truth. On balance, therefore, the interest of offerees who act pursuant to

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94. 92 U.S. at 77.
95. 228 P. at 875-76.

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a general offer without knowing of a published withdrawal is more weighty than the interest of offerors in avoiding opportunism, particularly considering the offeror's ability to make a published withdrawal effective by so stating in the offer. The normatively best rule, therefore, is that a published withdrawal of a general offer that is otherwise revocable is effective against, but only against, an offeree who did not act pursuant to the offer before she knew that it had been withdrawn.[96]

C. *Death or Incapacity*

Under a traditional rule of contract law, the death or incapacity of an offeror terminates the offeree's power of acceptance if the offer is revocable when the death or incapacity occurs. This rule is unexceptionable where the offeree knows or has reason to know of the offeror's death or incapacity before she accepts the offer. The rule is also unexceptionable where, even in the absence of the rule, if a contract is formed,thc offeror's estate will be excused by the doctrine of changed circumstances. An example is a contract that involvcs personal services by the offeror. The bite of the rule, therefore, is that it applies even when the offeree accepts at a time when she neither knows nor has reason to know of the offeror's death or incapacity, and the offeror's death or incapacity will not excuse his estate from performance in the absence of the rule.

The bite of the rule should not be exaggerated. The rule would normally be inapplicable to offers made by entities that have perpetual existence, such as corporations and governmental bodies. Indeed, the rule would probably be deemed inapplicable to an offer made by any form of business organization—even one that does not have perpetual existence. Probably too, the rule would be deemed inapplicable to persons who contract in a representative rather than an individual role, such as trustees and executors. Therefore, the principal application of the rule is to cases in which the offer is made by an individual, and thc individual's estate is not excused by the death or incapacity if a contract formed.

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96. Expectation damages for revoking an offer for a unilateral contract may raise special problems in prize, reward, and contest cases, because if the offer is properly revoked before any offeree has won the prize or contest, or performed the act called for by the reward, typically it will be uncertain whether any given offeree would have won the prize or contest, or performed the act called for by the reward. *See* Eisenberg, *Probability and Chance in Contract Law*, *supra* note 31, at 1048–52. In such cases, expectation damages should be measured by the value of the offeree's lost chance, provided that value is more than *de minimis*. *Id.*

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The traditional rule has been criticized on the ground that it defeats the reasonable expectations of offerees who accept when they neither know nor have reason to know of the offeror's death or incapacity.[97] Section 48 of the Second Restatement adopts the traditional rule in the black letter, but criticizes the rule in the comment.[98] "This rule," the comment states, "seems to be a relic of the obsolete view that a contract requires a 'meeting of minds,' and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent."[99]

Occasional cases have rejected the rule. In *Swift & Co. v. Smigel*, the offeror had been declared incompetent before the time of acceptance, but the contract was nevertheless held valid.[100] The offer in that case was a guaranty of payment for merchandise supplied to a corporation in which the offeror had a substantial interest. The court stated:

> In the present instance decedent promised plaintiff to make good any bills for provisions incurred by a corporate business enterprise in which he had a one-half stock interest. Had he not done so plaintiff presumably would not have taken on the business risk of selling to the corporation. It would seem to us that if plaintiff neither knew nor had any reason to know of decedent's later adjudication as an incompetent during any portion of the time it was making the deliveries which gave rise to the debts here sued on, plaintiff's reasonable expectations based on decedent's original continuing promise would be unjustifiably defeated by denial of recovery.
>
> If the situation is judged in terms of relative convenience, it would seem easier and more expectable for the guardian of the incompetent to notify at least those people with whom the incompetent had been doing business of the fact of adjudication than for the holder of a guaranty such as here to have to make a specific inquiry as to competency of the guarantor on each occasion of an advance of credit to the principal debtor.[101]

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97. *See, e.g.*, Herman Oliphant, *Duration and Termination of an Offer*, 18 MICH. L. REV. 201, 209-11 (1919); Note, *Termination of Offers Contemplating Unilateral Contracts by Death, Insanity, or Bankruptcy of the Offeror*, 24 COLUM. L. REV. 294, 295-96 (1924).

98. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 3, § 48 cmt. a.

99. *Id.*

100. 279 A.2d 895, 896, 899-900 (N.J. Super. Ct. App. Div. 1971), *aff'd*, 289 A.2d 793 (N.J. 1972).

101. *Id.* at 899.

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The great majority of the cases, however, have upheld the rule.[102] It is easy to understand why this should be so, provided the application of the rule is limited to cutting off expectation damages against an individual's estate for nonperformance of a wholly executory contract. As a practical matter, a contract entered into by an individual will normally be worthless to his estate if the individual dies before performance is to occur, because there will be no practical way for the estate to perform. Think here of a sole entrepreneur who makes an offer in the ordinary course of business and then dies or becomes incapacitated. Consider also that there may be no one who can timely perform the contract on the estate's behalf, because it almost invariably takes time before a representative of an estate is appointed. Accordingly, it is easy to see why the courts would be reluctant to saddle an offeror's estate with expectation damages where the offeror died or became incompetent before the offeree accepted.

On the other hand, as Richard Craswell points out, it is often in an offeror's interest that the offeree's power of acceptance not be terminated by the death or incapacity of the offeror unbeknown to the offeree.[103] In particular, in certain cases it is in the offeror's interest to empower the offeree to reliably take an action that the offer is intended to induce. An obvious case of this sort is one like *Swift*, in which the offer consists of a guarantee for an extension of credit by the offeree to a third party, which will benefit the offeror.

The competing considerations that bear on the death or incapacity of an offeror can be reconciled by the following rule. If an offeree accepts an offer that was made by an individual who, unbeknown to the offeree, died or became incompetent after making the offer, the offeree should not be entitled to recover expectation damages against the individual's estate. However, the offeree should be entitled to recover damages for any justifiable reliance that occurred between the time the offeree accepted and the time she learned of the offeror's death or incompetence.

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102. *See, e.g.*, New Headley Tobacco Warehouse Co. v. Gentry's Ex'r, 212 S.W.2d 325, 327 (Ky. 1948) (holding that an offer to extend term of lease was revoked on death of offeror); Beall v. Beall, 434 A.2d 1015, 1017, 1022 (Md. 1981) (holding that when a husband and wife made an offer and the husband died, the offer lapsed); Johnson v. Moreau, 82 N.E.2d 802, 802–03 (Mass. 1948) (holding that where a partner offered partnership interest for sale but died three days before the acceptance was received, there was no contract); Am. Oil Co. v. Estate of W.E. Wigley, 169 So. 2d 454, 459 (Miss. 1964).

103. Craswell, *supra* note 74, at 515–16.

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IV. CONCLUSION

(81) Classical contract law was a formalistic system based on axiomatic and deductive reasoning rather than on propositions of morality, policy, and experience. A formalistic methodology inevitably leads to rules that are either dysfunctional, or are made functional only by twisting them out of shape, and to asking the wrong questions about when and to what extent actors should be contractually bound. Both problems were manifested in the rules concerning the termination of an offeree's power of acceptance. Under the unenforceability rule, firm offers and offers for unilateral contracts were revocable, even though revocability disserved the interests of both offerees and offerors as a class. Similarly, the rules that concerned other offeror-centered events were for the most part wooden and unresponsive to the underlying issues.

(84) Modern contract law has struggled to break out of the box of classical contract law. In many respects, this struggle has been successful, but modern contract law has not been able completely to break out of that box, and as a result is still not wholly formed. The legal rules concerning the issues, under what circumstances should an offeror have the power to terminate the offeree's power of acceptance, and what kinds of offeror-centered events should effect such a termination, are in evolution from what they were under classical contract law to the normatively best rules under applicable social propositions. In some cases, like firm offers and offers for unilateral contracts, modern contract law adopts stratagems that fix most but not all of the problems raised by the classical-contract-law rule. In other cases, such as the withdrawal of a general offer or the death or incapacity of the offeror, modern contract law has not even gotten that far. Nevertheless, because modern contract law has broken away from the formalistic methodology of classical contract law, it will continue to evolve, in offer-and-acceptance as in other areas, from what it is to what it should be.

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