THE FALSE DISTINCTION BETWEEN BILATERAL AND UNILATERAL CONTRACTS

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*"We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time."*

T. S. Eliot: *Little Gidding*

THE distinction between bilateral and unilateral contracts has long been considered fundamental.¹ It has been regarded as an axiomatic truth revealing the basic order of the contractual system.² First enunciated by Professor Langdell,³ it has gained almost universal recognition,⁴ and achieved its final glory when

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1. Williston called this a "vital distinction." 1 WILLISTON, *CONTRACTS* § 13 (rev. ed. 1936). Similarly Corbin warned against the failure to recognize it, although the distinction "has not yet been very thoroughly grasped by the multitude of lawyers." 1 CORBIN, *CONTRACTS* § 21 (1950). See further ANSON, *CONTRACTS* § 15 (3d Am. ed. 1919); PAGE, *CONTRACTS* § 130 (2d ed. 1920); GRISMORE, *PRINCIPLES OF THE LAW OF CONTRACTS* § 5 (1947); FERSON, *THE RATIONAL BASIS OF CONTRACTS* 29, 40 (1949). See also Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 48 *YALE L.J.* 1, 32 n.61 (1938). In England the distinction is used with greater hesitation. See SALMOND & WILLIAMS, *CONTRACTS* 13-18 (1945); CHESHIRE & FIFOOT, *CONTRACTS* 33 (3d ed. 1952). Nevertheless it has the imprimatur of the English Law Revision Committee. See SIXTH INTERIM REPORT 23 (1937).

2. See especially 1 WILLISTON, *op. cit. supra* note 1, §§ 60, 60B. Indeed one writer said: "It is logical in theory, simple in application and just in result." Wormser, *The True Conception of Unilateral Contracts*, 26 *YALE L.J.* 136, 142 (1916).

3. LANGDELL, *SUMMARY OF CONTRACTS* 248-53 (2d ed. 1880). But see also Austin's earlier classification of bonds and covenants as unilateral, and mutual promises as bilateral contracts. 2 AUSTIN, *LECTURES IN JURISPRUDENCE* 907-08 (5th ed. 1885). Llewellyn has suggested that Langdell formulated the distinction only to achieve some symmetry (or *elegantia juris*) in the welter of contractual principles. See Llewellyn, *Of the Good, True and Beautiful in Law*, 9 *U. CHI. L. REV.* 224 (1942). It may be, however, that this is another instance of Langdell's fondness for Pothier whose continental ideas he drew on wherever possible. For a similar example, see Stoljar, *The Contractual Concept of Condition*, 69 *L.Q. REV.* 485, 500 (1953). In the civil law, bilateral and unilateral contracts fulfill a somewhat different function. See BURDICK, *PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 392 (1938); 3 WILLISTON, *op. cit. supra* note 1, §§ 895 *et seq.*; AMOS & WHARTON, *INTRODUCTION TO FRENCH LAW* 145, 181 (1935).

4. Even the greatest critics of this distinction have attacked it mainly on the ground of its harsh results rather than its demonstrable falsity, except perhaps Professor Ballantine: "There must surely be some weakness in the legal logic or the premises which produce this monstrous result, this *reductio ad absurdum*." Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 *MINN. L. REV.* 94, 98 (1921).

laid as a theoretical cornerstone in the *Restatement of Contracts*.⁵ But the time has come to look once more at this distinction. For, as we shall see, it incorporates an important error,⁶ an error the effect of which has been to precipitate complicated, though unnecessary, problems⁷ as well as to obstruct a consistent and comprehensive theory of bargain. This article is an attempt to unravel and remove some of our "dogmatic" muddles.⁸

I

Analysis is best begun with an examination of two well-known definitions. A contract is called bilateral if "there are mutual promises between two parties to the contract; each party being both a promisor and a promisee."⁹ On the other hand, a contract is unilateral "in which no promisor receives a promise as consideration for his promise."¹⁰ In the former case, there is a promise for promise; in the latter, a promise for an act.¹¹

However, these definitions explain nothing of real value, for they merely describe a dichotomy of *existing contracts*.¹² If *ex hypothesi* a contract does exist, what difference does it make, in terms of legal consequences, whether two promises were consideration for each other, or no promise was consideration for the promisor's promise? Of course, the definitions do, indirectly, tell us something: in the bilateral contract, there being two enforceable promises,

5. See RESTATEMENT, CONTRACTS § 12, and comments (1932); and see also *id.* §§ 75, 76. But the *Restatement* also contains provisions, *e.g.*, §§ 31, 45, 90, which are entirely inconsistent with this basic classification. The distinction has, of course, now been abolished in the Uniform Commercial Code, although this abolition has little to no practical importance and looks more like a symbolic gesture. In sale of goods and the other transactions covered by the Code, the distinction has never been either prominent or obnoxious. See also note 45 *infra*.

6. The emphasis here is on the logically infirming nature of the error which shows the inconsistency and inefficiency of the distinction. Moreover, by clearly exposing this error it is hoped to close a matter over which "[c]ommentators have been engaged in an apparently interminable controversy . . ." Note, 33 COLUM. L. REV. 463 (1933).

7. From a practical viewpoint these problems concern mainly three distinct strands of development: the commission (and reward) contract, the application of promissory estoppel, and the firm offer. But theoretically, the distinction has much deeper and very far-reaching implications.

8. Some of the ideas in this paper were touched upon, though not fully developed, in Stoljar, *Ambiguity of Promise*, 47 NW. U.L. REV. 1 (1952).

9. See RESTATEMENT, CONTRACTS § 12 (1932).

10. *Ibid.*

11. The reason why the *Restatement* Reporter did not adopt this shorter and more expressive terminology is that the so-called "self-executory" sale was improperly regarded as a unilateral instead of a bilateral contract. As a unilateral contract, however, it could not be described as a "promise for an act." The matter is fully dealt with in Stoljar, *supra* note 8, at 2-5.

12. Williston strongly insisted that "contract" in these definitions refers to existing contracts, not loosely to contracts *in fieri*; see Williston, *Is an Offer a Promise?* 22 ILL. L. REV. 788 (1928). For the confusing usage of "unilateral contracts," see also Corbin, *The Offer of an Act for a Promise*, 29 YALE L.J. 767 (1920).

either promisor may commit a breach of contract, while in the unilateral contract only one party may fail in his performance, the other having already performed his side of the bargain. But this is, to say the least, scant information. And, at any rate, it is not the kind of knowledge which deserves a grandiose distinction.¹³

Furthermore, and this is the main objection, the bilateral-unilateral distinction generates an erroneous conception of the nature of contractual formation. The distinction assumes that a contract can be "formed" in two ways only: either by the sequence of a promise and a counter-promise or by the sequence of a promise and an act. But promises, counter-promises, and acts are purely physical events which in themselves are neutral.¹⁴ It is therefore necessary to explain why these events are singled out and given a special legal significance.¹⁵ It is necessary, in other words, to elucidate the interests which these events represent and inquire whether, and to what extent, they are legally protected.

While this objection is theoretically fundamental, it must be at once admitted that it has no practical relevance for what is perhaps the vast majority of cases. In the usual situation it makes no difference whether we say that a contract is formed by a promise for a promise, a promise for an act, or, more broadly, by offer and acceptance; or whether we say, on the other hand, that a bargain is set afoot by the presence of certain interests to which the law

13. The distinction, however, has another relevance in connection with the *Restatement's* treatment of the doctrine of consideration: "sufficient" consideration in unilateral contracts is distinguished from "sufficient" consideration in bilateral contracts. See *RESTATEMENT, CONTRACTS* §§ 75-80 (1932); and for fuller explanation, Williston, *Consideration in Bilateral Contracts*, 27 *HARV. L. REV.* 503 (1914); 1 *WILLISTON, CONTRACTS* §§ 102-04 (rev. ed. 1936). But even in this respect the distinction seems a very cumbersome approach to something essentially more simple. The only difference in the two considerations is that in a bilateral contract a conditional counter-promise may constitute sufficient consideration, whereas in the unilateral contract only *actual* performance will be enough. But in the unilateral contract the promisee has (by definition) already given his consideration so that the "conditionality" of *his* performance is not in issue. And "conditional promise" in the bilateral contract means that performance is postponed because the promisee cannot both promise and perform at the same time. See Stoljar, *The Contractual Concept of Condition*, 69 *L.Q. REV.* 485, 494 (1953). Thus, in spite of the condition, performance must eventually materialize, except in insurance and other aleatory contracts (including output and requirement contracts) where promisor "buys" not the promisee's actual performance but the possibility of performance as security against risk. Do we need a distinction between bilateral and unilateral contracts to explain this?

14. Perhaps the most challenging exposition of the fundamental difference between *facts* and *rules* is OLIVECRONA, *LAW AS FACT* 9-28 (1939), although that author finally came to underestimate the normative quality of law. Hohfeld also repeatedly emphasized this difference. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 20 (1913); 26 *YALE L.J.* 710, 721, 725 n.34, 755 n.90 (1917). Similar, too, is Professor Hart's differentiation between "descriptive" and "ascriptive" statements. HART, *THE ASCRIPTION OF RESPONSIBILITY AND RIGHTS, IN LOGIC AND LANGUAGE* 145 (Flew ed. 1951).

15. See generally Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations*, 26 *YALE L.J.* 169 (1917).

accords protection. The reason why it makes no practical difference is that in most transactions contractual enforceability is taken for granted and is not in issue, so that the events briefly described as offer and acceptance normally coincide completely with the interests lying behind them. Hence it would be tedious and superfluous to specify the particular legally protected interests which support the usual agreement.¹⁶

Yet this theoretical objection becomes extremely relevant in a class of less usual situations. These are agreements which are held legally unenforceable because they do not fit the dichotomy of unilateral and bilateral contracts, but which exhibit interests of a type warranting legal protection. The classical illustration is the promise to pay a promisee \$100 if he goes to Rome, which promise (so the law holds) the promisor is entitled to revoke at any time before the promisee's arrival at his destination.¹⁷ Since the traditional definitions stipulate that a promise must be accepted either by a counter-promise or by complete performance, the promisor's right of revocation seems inevitable whatever the injury to the promisee in trying to complete his journey. It is true that American law in particular¹⁸ has tried to avoid such harsh results with the help of auxiliary doctrines such as promissory estoppel,¹⁹ prevention,²⁰ and firm offer. However, both harsh results and the necessity for ad hoc doctrines stem solely from the intrinsic falsity of the unilateral-bilateral distinction. In demonstrating this we shall also see how even what Professor Llewellyn has well called "self-governing" situations²¹ can be fitted into a general theory of bargain.

II

Perhaps the basic misconception derives from a failure to understand the logical hierarchy of interests protected by the law of contracts, and, in particu-

16. This also explains why what Llewellyn has called "the offer-and-acceptance-and-so-only" approach is usually justified by the circumstances. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 749 (1931). There are two additional reasons why this approach has become so firmly established. One has been the necessity to distinguish between offers and invitations to deal especially in cases of competitive (e.g., auction) bidding. See, e.g., *Payne v. Cave*, 3 T.R. 148, 100 Eng. Rep. 502 (1789). The other is the necessity to allow a mail-acceptance to clinch a contract by correspondence. For the "magic of offer and acceptance," see Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 48 YALE L.J. 1, 31 (1938).

17. See, e.g., *Great Northern Ry. v. Witham*, L.R. 9 C.P. 16, 19 (1873).

18. See Note, 33 COLUM. L. REV. 463 (1933); 1 WILLISTON, *op. cit. supra* note 13, § 60A.

19. RESTATEMENT, CONTRACTS § 90 (1932); see Note, 13 MINN. L. REV. 366 (1929); 1 WILLISTON, *op. cit. supra* note 13, §§ 139-40. American courts have now generally accepted "promissory estoppel." See A.L.I., RESTATEMENT OF THE LAW, 1948 SUPPLEMENT 196 (1949), where the cases are collected.

20. RESTATEMENT, CONTRACTS § 295 (1932).

21. Llewellyn thought that "considerable local self-government," Llewellyn, *supra* note 16, at 750, was demanded by particular fact-situations and "a general theory of contract must almost certainly come ultimately to assert a less absolute dominion over the 'entire field.'" *Id.* at 749.

lar, the peculiar nature of the interest which supports the bilateral contract. The reason why the bilateral contract is enforceable can, since Fuller and Perdue's work,²² be stated very clearly: Mutual promises give rise to an expectation-interest or to an interest of "reliance upon reliance";²³ the parties have made a bargain with performance to occur at some time in the future; in the meantime they require reciprocal assurance that their expectations, based on the eventual fulfillment of the bargain, will not be disappointed. Thus, the true reason for enforcing bilateral contracts lies in the necessity of protecting the parties' mutual trust and credit simply because without this protection a modern credit-economy could not possibly function.²⁴ From this perspective the enforceability of mutual promises has nothing to do with the traditional doctrine of consideration, because it is no longer necessary to explain that the parties incur a "detriment" merely by mouthing promises.²⁵ Nevertheless, the doctrine of consideration does retain distinct importance in differentiating gifts from bargains, and we shall have to return to it later.²⁶

But if the law protects parties' expectations—and in the aleatory contract even goes so far as to protect expectations which need not materialize in performance²⁷—it must also protect actual reliance. The law cannot logically protect the mere expected possibility of performance without also protecting injury incurred in reliance on that performance. While one could visualize a contractual system which protects actual reliance but does not protect expectation, the system would be viciously inconsistent if it protected expectation but not reliance. This argument is no more than a simple demonstration *a fortiori*. And this argument alone supports the proposition that the promisee's reliance induced by the promisor's promise is protected. Indeed, the argument holds good whether or not the promisor's promise is formally accepted. But the concept of acceptance raises several difficulties in relation to contractual formation and requires further elaboration.

22. Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936-37). The clarifying effect of this contribution is enormous, as it distinguishes for the first time the three distinctive interests—restitution, reliance, and expectation—protected by the law of contract. But while these interests are conceptually distinctive, they are not logically distinct from one another. That there exists an interrelation between them is perhaps more clearly brought out in Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810-18 (1941).

23. See Fuller & Perdue, *supra* note 22, at 63.

24. *Id.* at 57 *et seq.* The same point had earlier been made by Roscoe Pound: "Wealth, in a commercial age is made up largely of promises . . . This social interest in the security of transactions . . . requires that we secure the individual interest of the promisee, that is, his claim or demand to be assured in the expectation created . . ." POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236-37 (1922). Cf. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 239-40, 245 (1924). For a criticism of this economic approach, see Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1933).

25. This explanation (as Ames perceived long ago) has always been as thoroughly inelegant as it is misleading. Corbin described it as a "prime illustration of begging the question." 1 CORBIN, CONTRACTS § 123 (1950).

26. See text at notes 65-70 *infra*.

27. On aleatory contracts, see RESTATEMENT, CONTRACTS §§ 291-93 (1932).

It is necessary to distinguish between (what we may call) expectation-bargain and reliance-bargain. A pure expectation-bargain can be created only through the mechanics of mutual promises or of an express offer and an express acceptance, for mutual expectations cannot come into existence unless a promisor promises something to a promisee who, in return, promises something to the promisor. The creation of a reliance-bargain however, constitutes a very different process which does not require a return-promise or formal express acceptance. Suppose that *A* promises to *B* \$100 if he goes to Rome immediately. If *B*, in reliance on *A*'s promise, starts out for Rome, it ought to be entirely irrelevant whether or not *B*, before starting, has made a counter-promise to *A*. The kind of promise that *A* makes does not ask for *B*'s express acceptance. *A* does not say to *B*: "Promise me that you will go to Rome"; *A* says only: "Go to Rome and you will get paid." In short, where the promisor asks for a counter-promise, he must have the counter-promise before there can be a bargain; if, on the other hand, he merely asks for a performance, he does not require express acceptance. In the one case, the promisor says "promise" and the promisee promises; in the other case, the promisor says "go" and the promisee goes.²⁸

Counter-promise is only one type of promisee acceptance, and the question still remains whether the promisor may insist upon some other form of acceptance to clinch a bargain. For the sake of complete clarity three separate meanings of acceptance must be distinguished.²⁹ First, it may mean (to make use of the previous example) that *B* actually utters some words of acceptance before starting out for Rome such as, "I accept your offer of \$100 for my going to Rome." But whatever *B*'s words are, they can only amount to a promise, since *B* cannot "accept" *A*'s offer without at the same time assuming some promissory "duty" about his going to Rome. If, then, the only possible meaning of acceptance is counter-promise, the contract is not unilaterally formed but is in fact bilateral.

The second meaning of acceptance comes from the definition of the unilateral contract. The promisee's acceptance in a unilateral contract consists not in a counter-promise but in the full completion of the act requested by the promisor. Consequently, because there is no acceptance before complete performance, the promisor may revoke his promise up to the time of completion of performance. Yet to call complete performance an acceptance is not only tautologous, it also leads to serious error. The promisee's interest after he has

28. Until modern offer-and-acceptance terminology changed our entire picture of contractual formation, this was essentially the traditional common law position. "[I]t may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise—rather than the more modern notion of purchase of a promise for a price . . ." 1 WILLISTON, *CONTRACTS* §139 (rev. ed. 1936). See also Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368 (1921). Indeed this "modern notion" seems to have completely overshadowed the existence of reliance bargains.

29. See discussion of acceptance in Ferson, *The Formation of Simple Contracts*, 9 CORNELL L.Q. 402 (1924); Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 48 YALE L.J. 1, 33 (1938).

completed performance is neither an expectation-interest, nor a reliance-interest, but an interest in restitution.³⁰ This interest is the very basis upon which the whole law of contract is founded, for the law must protect this interest if it is to enforce any promises at all.³¹ We can have a contractual system that does not protect expectation or reliance, but we can have no contracts whatever without enforcing a promise from a promisor to whom full performance has been rendered.³² Both historically and logically contracts *re* precede contracts *consensu*.³³

Now it is permissible, as a matter of language, to call complete performance a promisee's "acceptance." The trouble is that this usage leads to the erroneous belief that acceptance by complete performance is the exact counter-part of acceptance by way of counter-promise, and that an acceptance serves the same function in the unilateral contract as it does in the bilateral one. But in the bilateral contract we use "acceptance" in a strictly future sense, the acceptor saying, "I promise that I shall pay for the things which you promised you will do for me." In the unilateral contract we use "acceptance" in a past sense since what in effect the promisee says is, "I have done the things you wanted and I now claim the money you promised." Thus in the bilateral contract the function of acceptance is to make or initiate a bargain for the future; in the unilateral contract "acceptance" merely reports the historical event that the promisee completed the performance which the promisor requested. It follows that these two meanings of acceptance operate on very different levels, the former being concerned with the *formation* of a bargain and the latter with its *fulfillment* by one party. But in a contractual system, what we are interested in is not the promisee's fulfillment or completion giving rise to restitution—for the very existence of contract law presupposes the protection of that interest—what we are interested in is in what way enforceable bargains may be made *before* either party has rendered complete performance. The precise disadvantage, then, of calling complete performance an "acceptance" is that it confuses formation with fulfillment and thereby also

30. See Fuller & Perdue, *supra* note 22, at 54.

31. So firmly protected is this interest that the law, in many cases, enforces restitution by way of quasi-contract or constructive trust, even though the "restitutor" has never promised to pay anything at all, where his failure to restore would amount to unjust enrichment. See RESTATEMENT, RESTITUTION (1937).

32. Thus restitution not only "presents the strongest case for relief," Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936), it is the *sine qua non* of the existence of contracts. It is, as Fuller subsequently put it, the "Contractual Archetype." Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941).

33. This argument applies, of course, to informal contracts only and excludes such institutions as the Roman *stipulatio*, the earliest known example of a consensual but formal contract.

For the historical precedence of contracts *re*, see, e.g., Henry, *Consideration in Contracts (601 A.D. to 1520 A.D.)*, 26 YALE L.J. 664 (1917). See also Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 580 (1933).

obscures what is presently the one relevant and crucial issue: what exactly is involved in the making of *future* bargains.

This brings us to a third possible meaning of acceptance found in the formation of reliance-bargains. Consider first the following question. Is it possible to say that a promisee "accepts" a promise merely by beginning his performance? Does *B* accept *A*'s promise by starting out for Rome?³⁴ An affirmative answer produces, at first blush, a very forced meaning of acceptance. *A* said to *B*, "I will give you \$100 if you go to Rome," wanting him to go and get there. *A* did not say "I will give you \$100 as soon as you start out." In this sense, *A*'s promise to *B* is dependent upon *B*'s arrival; in this sense also, *B* must "accept" *A*'s offer by going to Rome instead of to Madrid or Honolulu. In brief, *A*'s promise requires *B* to do a certain thing before *B* can claim the money, and it requires *A* to pay the money only upon the fulfillment of the specified performance. But while *A*'s promise means that *B* must go and eventually get to Rome to become entitled to the money, it need not also mean that *A* is entitled to revoke his offer if, and this is the decisive point, *B* has already started his performance in confident reliance upon *A*'s promise. *B*'s reliance is based upon the definite, though unstated, assumption that *A* will not *arbitrarily* revoke his promise. That the promisee does make this assumption is demonstrated when its negation is stated explicitly. Take, for example, the following statement by *X* to *Y*: "I'll give you \$50 if you go to Rome, but remember that I'm at liberty to revoke this promise at any time before you reach the Holy City." Obviously, a promise of this kind would be as unusual as it is absurd. *X*'s statement is not a promise, but is merely a statement of intention that he *might* give *Y* \$50. His promise is illusory because subject to a power in himself to change his mind.³⁵ It is apparent that if *Y* acts upon such "promise," he does so at his peril: his reliance is a voluntary risk since all that he can expect is the chance of a gift.

Using these two examples we can state the precise characteristics of *X*'s statement as compared with *A*'s. While *X*'s "promise" cannot possibly induce a justifiable reliance, *A*'s promise is designed to produce just this effect as it is a demand for more or less immediate action in exchange for money. It would be nonsensical to say that *B* can rely on *A*'s promise, but that *A* still may arbitrarily revoke it. It is the essential nature of a promise, as distinct from *X*'s statement of intention, that it can result in the promisee's justifiable reliance. It follows that as soon as *B* responds to the demand for action, he *accepts* *A*'s promise. In other words, to say that *B* can rely on the promise

34. It had been suggested by Pollock that beginning performance may constitute a proper acceptance by the promisee identical with the French *commencement d'exécution*. See POLLOCK, *CONTRACTS* 34 (3d Am. ed., Wald, 1906); *id.* at 18-19 (13th Eng. ed. 1946); see also Pollock, *Book Review*, 28 L.Q. REV. 100 (1912). Unfortunately Pollock failed to give a full theory supporting this suggestion. See McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 657-58 (1914). Recently CHESHIRE & FIFOOT, *CONTRACTS* 46 (3d ed. 1952), stigmatized Pollock's proposal as an illegitimate device and as "another example of the English tendency to sacrifice logic to convenience."

35. On illusory promises, see 1 CORBIN, *CONTRACTS* § 16 (1950).

means nothing else than that *B* can accept it by way and by virtue of that reliance.³⁶ And to the extent, also, that *B*'s reliance is protected, *A*'s promise becomes irrevocable or enforceable—in short, a future bargain is thus formed by offer and acceptance.³⁷

III

Before going any further, we must examine the classic theory on which the distinction between bilateral and unilateral contracts is usually supported. Professor Williston has been its chief exponent: "It seems difficult on theory successfully to question the power of one who offers to enter into a unilateral contract to withdraw his offer at any time until performance has been completed by the offeree Yet to say that the beginning of [performance] by *B* [the offeree] amounts to an assent binding on both *A* [the offeror] and *B* . . . is to change the hypothesis that *A* offered not to make a bilateral contract but a unilateral one . . . and in effect to deny the right of the offeror to dictate the terms of his offer" ³⁸ "It is urged . . . that the parties cannot contemplate that the offer may be revoked after part performance Doubtless this is true . . . [the] parties do not altogether understand the law governing the formation of contracts, but mutual assent to rules of law is not necessary" ³⁹

36. This seems to be what Austin meant when he said that a promise is binding "on account of the expectation excited in the promisee. For which reason a mere solicitation (that is, a promise made but not accepted) is not binding; for a promise not accepted could excite no expectation. So of a promise obviously made in jest." 2 AUSTIN, LECTURES IN JURISPRUDENCE 906 (5th ed. 1885).

37. The above argument is very different from both McGovney's and Corbin's theories that there is a collateral or subsidiary promise by the promisor not to revoke for a reasonable time (a kind of implied option-contract), which makes the main offer irrevocable. See McGovney, *supra* note 34, at 658-59; Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 195 (1917). This theory not only fails to state the basis for implying the subsidiary promise (unless it is that we can imply promises wherever we wish), but also fails to explain how a promisee "accepts" the offer. Corbin elsewhere suggested that the promisor "has perhaps promised by implication that [he will] not prevent the [promisee] from fulfilling the conditions." Corbin, *The Formation of Unilateral Contracts*, 27 YALE L.J. 382, 385 (1918). Although this comes nearer the true position, it is still more correct to say that the original promise implies that the promisee may rely on it, rather than that the promisor impliedly promises collaterally not to revoke. Ashley's defeatist proposal that "equitable estoppel" should be applied to make the promise enforceable involves an admission that the common law is incapable of protecting reliance-bargains and that we must appeal to Equity for help. See Ashley, *Offers calling for a Consideration other than a Counter-Promise*, 23 HARV. L. REV. 159 (1910). There is finally Ballantine's suggestion that a "unipromissory" contract may be said to arise as soon as the promisee incurs detriment by beginning performance. Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94, 99 (1921). This is a verbal variation of the idea that a reliance-bargain should be protected. For a judicial review of the various theories, see *Ruess v. Baron*, 10 P.2d 518, 519 (Cal. App. 1932).

38. 1 WILLISTON, CONTRACTS § 60 (rev. ed. 1936).

39. *Id.* at § 60 (1st ed. 1920). This passage is omitted in Williston's revised edition (1936), but its continuing relevance to Williston's general position can easily be gauged.

These words deserve several comments. In the first place, it is misleading to say that the offeror "offers" either a bilateral or a unilateral contract. The offeror offers no such contractual species as if they were distinct articles. All he does is make a promise, a contractual promise which induces or requests some action from the promisee and thus initiates a bargain. Secondly, it is incorrect to say that the offeror can "dictate," *i.e.*, wholly dictate, the terms of his promise. The offeror can, of course, dictate such terms as are within his freedom of contract or autonomy of choice:⁴⁰ he alone can say what and when he will give or do and what and when he wants in return.⁴¹ But once the offeror has made a promise, he becomes bound for the direct consequences of it because the law protects the promisee's expectation or reliance. The promisor's power of dictation ceases once the promisee accepts or acts in reliance, for the offeror cannot both make a "promise" and reserve an arbitrary right of revocation. It follows that the only relevant hypothesis is the promisor's liability on his promise. There is, therefore, no "change of hypothesis" at all when the law protects the consequences of the promise, even though the promisee has only part-performed and is still a long way from completion. Moreover, we are led to think that a "change of hypothesis" has been perpetrated only by the faulty terminology employed. Once we commit ourselves to such big verbal creatures as "offers for bilateral contracts" or "offers for unilateral contracts," instead of analyzing the transaction in terms of promises and consequences, the other mistakes follow almost naturally and inevitably.

Behind all this, however, lies yet another muddle which has its origin in the orthodox doctrine of consideration. That doctrine holds that as a bilateral contract needs the promisee's "consideration" in the form of a counter-promise, so the consideration for a unilateral contract is the promisee's full performance.⁴² Its corollary is that the offeror should be able to demand whatever "consideration" or "benefit" he wishes and thus dictate the rendering of complete performance in the same way that he may dictate the terms of a counter-promise. But the consideration doctrine considers only half the problem. The whole point about the formation of a bargain is that the promisee needs protection of his future benefits as much as does the promisor. To deny this is, in effect, to say that the promisor makes only a gift-promise until the time of the promisee's completion, and not a bargain-promise which the promisee may "reliantly" accept.⁴³ Furthermore, the language of benefits and detriments

40. See Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 914 (1942). Also see Fuller's excellent analysis of "private autonomy," Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806-10 (1941).

41. The offeror can also be said to be able to "dictate" his offer in the sense that his offer is (a) an invitation for an offer or (b) a statement of an intention to make a gift. But in neither case is there a promise, *i.e.*, a promise giving rise to justifiable reliance. A true contractual offer must always be a promise. See Stoljar, *The Ambiguity of Promise*, 47 NW. U.L. REV. 1, 5, 8, 11-13 (1952).

42. Cf. RESTATEMENT, CONTRACTS § 75 (1932).

43. See Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 935-40 (1937). Also see 1 CORBIN, CONTRACTS § 154 (1950).

is, in this context, extremely artificial.⁴⁴ In the bilateral contract, the counter-promise is obviously not the actual benefit, but only a means of ensuring the receipt of that benefit. Nor is the mere giving of a promise a genuine detriment. Mutual promises (to repeat) are enforceable because they give rise to an expectation-interest, not because half-baked "benefits" and "detriments" constitute a mysterious consideration. And once we can explain the enforceability of bilateral contracts without recourse to the doctrine of consideration, we do not need that doctrine to explain the enforceability of any other contract. For, as we have seen, the protection of expectation encompasses the protection of reliance and restitution.

A final criticism concerns Williston's statement that the parties' mutual assent to the rules of contractual formation is not necessary. This, undoubtedly, is true as a general proposition. From it Williston concludes that even though the parties may understand that the promisor is *not* to revoke his promise after part-performance, the nature of the unilateral contract is such that revocation still remains possible. But this conclusion is wholly inconsistent with Williston's previous argument that the promisor is entitled to revoke his promise because he can "dictate" his offer—the promisee, as it were, being given full notice by this "dictation" of the possibility of premature repudiation. Williston now concedes that parties do not in fact bargain on the basis of such an understanding, and yet he reaches the same conclusion that the promisor can revoke his promise. This, obviously, reduces the whole theory to contradictory statements which, in turn, vitiate the very basis upon which the unilateral-bilateral distinction is founded.

IV

Once the validity of reliance-bargains is established, we need none of the troublesome special doctrines which have been created to enforce part-performed unilateral contracts. With some of these special doctrines we may now deal in detail.

In practice, the most frequent type of unilateral contract is not the if-you-go-to-Rome bargain,⁴⁵ but the commission or brokerage contract.⁴⁶ Take the

44. See *id.* § 123; Corbin, *Non-Binding Promises as Consideration*, 26 COLUM. L. REV. 550 (1926).

45. It has been said that "Unilateral contracts made outside the classroom will usually be found to shade off from this type [*i.e.*, promises for simple acts], to situations involving a series of fairly distinct and often different acts." Note, 33 COLUM. L. REV. 463, 466 (1933). If this statement is to mean that there is a substantive difference between hypothetical classroom illustrations and real situations it is rather misleading. The reason why promises for prolonged acts have been the typical subject of litigation is that the promisor has more time to change his mind and to revoke. This also is the explanation why the distinction between unilateral and bilateral contracts has found no application in sale of goods. Where the contract is for a specific article *inter presentes*, the buyer will say "give, etc." and the seller will give. Where, on the other hand, the contract is *inter absentes*, or the goods are unascertained, a bilateral contract will naturally result since the parties, delivery being future, will have to extract promises from each other.

46. For a full discussion of these and similar contracts, see Notes, 60 YALE L.J. 1043 (1951); 32 COLUM. L. REV. 1194 (1932); 33 COLUM. L. REV. 463 (1933).

familiar situation where an owner of land promises to pay a commission to an agent if the latter finds an able and willing purchaser. Since this is a promise for an act, the promisor is (by dint of the traditional definition) entitled to revoke this promise before the completion of that act. Moreover, because of the relatively long duration of the agent's "act," the principal has ample opportunity to withdraw, although the agent may have spared no effort or expense in reliance on his promise.⁴⁷ With this as the operative theory in this type of transaction, the agent's position is one of great risk indeed. In England this theory is firmly established.⁴⁸ But in American law the agent or broker has long been more effectively protected,⁴⁹ although the technical solution adopted for this purpose is far from satisfactory from the points of view of both theory and practice. In theory, the solution is based upon the doctrine of prevention of conditions⁵⁰ which doctrine, however, cannot logically be applied to unilateral contracts still in the process of formation. A unilateral contract, in order to be a *contract*, requires the promisee's full (or, at any rate, "substantial" or "equivalent")⁵¹ performance, so that the promisor can be under no *contractual* duty to refrain from "preventing" performance by the promisee, until and unless this performance has been rendered. In practice, the solution has led to an inelegant distinction between "prevention" and "co-operation." While it seemed possible to say that the promisor must not actively prevent the completion of performance, it, apparently, seemed impossible to say, there being no contract, that the promisor must cooperate with the agent in the fulfillment of the bargain.⁵²

The doctrine of prevention, as applied to unilateral commission contracts, is curious in another respect. In building contracts, for example, there are other and more literal forms of prevention, but in the brokerage or commission contract all that prevention typically means is premature repudiation. Thus, to say that the promisor must not actively prevent performance only amounts to saying that the promisor must not revoke his promise. But once the law holds in effect that the promisor cannot revoke the promise even before completion, it is, in reality, protecting the promisee's reliance, through the medium of an auxiliary doctrine whose terminology does not at all suggest that a

47. "It is elementary that any offer to enter a unilateral contract may be withdrawn before the act requested to be done has been performed." Kellog, J., in *Patterson v. Pattberg*, 248 N.Y. 86, 88, 161 N.E. 428, 429 (1928). See also Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916).

48. For the modern English law, see POWELL, AGENCY 278-95 (1952); for a critique, see Stoljar, *Prevention and Co-operation in the Law of Contract*, 31 CAN. B. REV. 231, 243-49 (1953).

49. The American law is summarized in RESTATEMENT, AGENCY §§ 445-49 (1933).

50. See Note, 33 COLUM. L. REV. 463 (1933).

51. See *id.* at 471-72, for the meaning of "substantial" or "equivalent." See also the "effective cause" theory, RESTATEMENT, AGENCY § 448, comment *a* (1933).

52. The strongest example of this is *Patterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928), fully discussed in 29 COLUM. L. REV. 199 (1929), where further literature is cited. And *cf.* *Amies v. Wesnofske*, 255 N.Y. 156, 163, 174 N.E. 436, 438 (1931).

reliance-interest is involved.⁵³ Thus, the practical effect of the doctrine of prevention is the disguised enforcement of certain reliance-bargains, in spite of the official definition of the unilateral contract.⁵⁴

Needless to say the recognition of a commission contract as a reliance-bargain does not solve all problems. This recognition only concerns the formation of a bargain. The parties' "performatory" rights and duties still require specific definition: Is the agency "sole" or "exclusive"? Or is the agent to compete with other agents? Is he to perform within a specified time?⁵⁵ It is important to see, however, that these and similar questions are not peculiar to reliance-bargains and that identical questions arise in the bilateral contract. In whatever way a bargain has been formed, there still remains the problem of what kind of performance the agent must render. On the the other hand, once problems of performance are properly distinguished from questions of formation, there is no difficulty in making the promisor liable not only for his so-called prevention but also for his own "performatory" failure to take co-operative or affirmative action.

In another way the commission contract illustrates the nature of the interest protected by the unilateral contract. In the more typical unilateral contract the promisee has already conferred a benefit on the promisor such as actual delivery of goods, or the construction of a house, or the rendering of a beneficial service. In the commission contract, the dispute is not over benefits actually conferred, but over the promisor's refusal to accept the benefits which the agent wishes to confer. Thus, when the promisor is compelled to pay for the agent's efforts, whether or not he takes advantage of the tendered benefit, it is clear that the law is protecting not a restitution-interest but a reliance-interest. An understanding that a reliance-interest is involved permits us to avoid the inelegant distinction in the doctrine of prevention between "prevention" and "co-operation." Since the doctrine's true effect is the protection of the agent's re-

53. Apart from the doctrine of prevention of conditions, the *Restatement* contains, *inter alia*, two further provisions applicable to unilateral contracts, § 45 and § 90. Section 90 deals with the now well known doctrine of "promissory estoppel." Section 45 provides that the promisee may accept the unilateral contract by part performance. Two difficult and separate questions arise in this connection. First, the *Restatement* does not clarify the respective scopes of § 45 and § 90. See Note, 33 COLUM. L. REV. 463, 465 n.11 (1933). Second, how can either of these provisions square with the basic scheme of the *Restatement*? If the bilateral-unilateral distinction is meant to have consistent meaning, it must apply to all transactions, including those producing harsh results, because it is precisely there that the distinction unfolds its whole and effective meaning. The inclusion of § 45 in the *Restatement* may perhaps be attributed to the influence of Professor Corbin who proposed a solution of this sort as far back as 1917. See Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 193 (1917). For further discussion of § 45, see Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 373, 410-17 (1936).

54. Although the *Restatement* (cf. § 295) does not expressly make the doctrine of prevention applicable to unilateral contracts still *in fieri*, it apparently permits this application *sub silentio*.

55. See RESTATEMENT, AGENCY §§ 445-47 (1933).

liance, this protection should extend to the full extent of his reliance. Hence the principal's eventual failure to cooperate or to accept performance, should be a matter of indifference to the agent.⁵⁶

Another seeming anomaly in the orthodox law of brokerage contracts is that, while the principal may become liable to the agent for prevention, the agent will incur no liability to the principal for his failure to look for a buyer. The anomaly has been rationalized by way of the definition of the unilateral contract: since there is no contract until complete performance, there can be no breach of contract when the agent does nothing.⁵⁷ But this involves circular reasoning which puts the cart of performance before the horse of formation. The better explanation is that the agent may do nothing simply because he has not promised to do anything and has not caused an expectation or reliance on the part of the principal.⁵⁸ The picture that emerges is that of a "one-sided" bargain, so "one-sided" as, perhaps, to justify the nonexistence of a contract until the promisee has fully rendered his performance, were it not for the fact that this idea leads to too restricted a view of the nature of a bargain. The principal says, "Find a purchaser and I will pay you," so that provided the agent relies on, and thus accepts, the promise, the principal has induced a "doing" of something for him for his money. It is precisely this inducement which constitutes the whole "formative" aspect of bargain. If later the principal repudiates his promise and the agent stops performance upon that repudiation the parties never complete the bargain, but this does not mean that they never made one. The phrase "one-sided bargain" may therefore become misleading because the question of the *promisor's* reliance on the promisee and the *promisee's* liability to the promisor does not arise in the usual commission contract situation.

This brings us to the great practical distinction between reliance and expectation bargains. In the former, the promisor demands more or less im-

56. Observe that this leaves open what measure of damages the promisee should recover, *i.e.*, damages calculated on his actual loss caused by the reliance or damages which include his loss of commission, reward or profit. This is, however, a separate question. As Fuller has pointed out: "Reliance as a basis of contract liability must not be identified with reliance as a measure of the promisee's recovery." Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810 (1941). Also see Fuller and Perdue, *supra* note 53, at 66-67.

57. See Note, 41 COLUM. L. REV. 1108, 1110-11 (1941) and cases and literature there cited.

58. This explanation applies to exclusive agencies. In the case of non-exclusive agencies, the result would be the same but the explanation different. When the agent is one of many, all in a sense competing with each other to find a suitable purchaser, only one "promisee" can finally win the payment promised, as in the reward contract. This is a competition rather than a bargain, so that a competitor must be entitled to drop out of the race. Only exclusive agency contracts should therefore be regarded as proper reliance-bargains. For a similar argument, see Note, 28 YALE L.J. 575 (1918). In practice, the "sole" agency has often been given special recognition by being converted into a bilateral contract. See note 62 *infra*. For the English position, compare *Bentall, Horsley & Baldry v. Vicary*, [1931] 1 K.B. 253, with *Hampton & Sons Ltd. v. George*, [1939] 3 All E.R. 627 (K.B.). And see also *Heyman v. Darwins Ltd.*, [1942] A.C. 356.

mediate action and, with it, immediate credit *from* the promisee: what he says is, substantially, "Do this, and rely on me for payment." In the expectation-bargain, the promisor proposes credit *to* the promisee: what he says is, basically, "Can I rely on you?" The promisor must ask this question because, for the time being, the promisee need not actually do or give anything. His performance still lies in the future. We can now understand the practical reason why a counter-promise is necessary in a bilateral bargain, but unnecessary in the reliance-bargain. The presence or absence of a counter-promise corresponds to the different credit-purposes of these transactions, and there is nothing one-sided about the one, or anything more two-sided about the other; they are just different sorts of bargain. Every bargain must be two-sided or it is not a bargain.⁵⁹

The identification of unilateral contracts with so-called one-sided bargains creates a further problem regarding the *promisor's* reliance.⁶⁰ Suppose that a promisor asks a promisee to build a house, for suitable reward, and that the promisee does not make a counter-promise but immediately starts to build. Suppose, further, that the promisee, after part performance, abandons building and causes actual damage to the promisor. Is the builder contractually liable to the promisor? If this is regarded as a "one-sided unilateral" contract, the builder cannot theoretically incur any liability since, before his full performance, there simply is no contract.⁶¹ Attempts have therefore repeatedly been made to avoid this dilemma by transforming into a bilateral what is by definition a unilateral contract,⁶² a procedure which is patently artificial.⁶³ Fortunately, a better solution is available. In discussing the formation of re-

59. Ewart's criticism of "unilateral twins" was therefore not altogether inappropriate. See Ewart, *Book Review*, 33 HARV. L. REV. 626 (1920). For Corbin's rebuke of Ewart, perhaps a trifle harsh, see Corbin, *The Offer of an Act for a Promise*, 29 YALE L.J. 767 (1920).

60. See Goble, *Is Performance Always as Desirable as a Promise to Perform?*, 22 ILL. L. REV. 789 (1928); Williston, *Reply*, *id.* at 791.

61. The classical argument supporting the promisee's immunity was advanced long ago in *Clark v. Russel*, 3 Watts 213 (Pa. 1834). Gibson, C.J.'s view was that "it is . . . folly not to guard against [this premature withdrawal] by exacting a mutual engagement instead of making a conditional one which leaves [the promisee] to earn the promised reward or not at his pleasure."

62. See 3 CORNELL L.Q. 290 (1918); 10 CORNELL L.Q. 220 (1925). This method of construction has now received the imprimatur of the RESTATEMENT, CONTRACTS § 31 (1932), which provides that in case of doubt the presumption is that a bilateral, rather than a unilateral, contract is intended. For an excellent illustration, see *Wood v. Lady Duff Gordon*, 222 N.Y. 88, 91, 118 N.E. 214 (1917), where Cardozo, J., said that although the counter promise "may be lacking . . . yet the whole writing may be 'instinct with [a bilateral] obligation' imperfectly expressed," quoting Scott, J.'s opinion in *McCall v. Wright*, 133 App. Div. 62, 68, 117 N.Y. Supp. 775, 779 (1st Dep't) (1909). Cf. *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1036 (1902), where partly performed unilateral contracts were said to "take on a bilateral character."

63. Sometimes attempts are made to convert bilateral into unilateral contracts. *National Dairymen Ass'n v. Dean Milk Co.*, 183 F.2d 349 (7th Cir. 1950). For a similar English case, see *Windschuegl v. Pickering*, 84 L.L.R. 89 (K.B. 1950).

liance-bargains, we saw that a promisee can accept a promisor's offer by relying on the promise and starting upon the requested performance, the effect of his acceptance being that the promisor cannot revoke his promise. But this acceptance has another effect. The promisee by accepting the promisor's offer gives ample justification for the promisor to rely on its completion. Thus, if an owner sees his builder begin the job he asked for, he will not (and for the time being cannot) order another builder to do the same work. The promisee's conduct creates an interest in reliance which like other reliance-interests deserves protection. And if it be asked how the promisee can become liable without a counter-promise, the answer is that a counter-promise is only of practical necessity where the promisee's performance is not immediate but entirely future. In our present example the builder must start his work more or less at once, and unless he does so the owner will secure the readier services of another builder. But if the builder does begin construction, his prompt acceptance constitutes in these circumstances a manifestation of assent to the exchange proposed by the promisor. In brief, a bargain becomes formed by active mutual reliance.⁶⁴

V

Closely related to the previous problems is the recurrent puzzle of the firm offer.⁶⁵ Suppose vendor, *V*, says to purchaser, *P*, "I hereby offer to sell my property to you." *P* replies, "I may accept, but give me a week to think it over." *V* then "firmly" promises to give *P* a week. Under contract law *V* is free to revoke this promise and sell to someone else. The reason is that *P* has not accepted *V*'s offer. However firm the offer purported to be, *P*'s statement, "I hereby accept your offer to let me think it over," would not, in classical legal parlance, constitute consideration. On the other hand, *P* can buy an option: he can pay, or promise to pay, a price for *V*'s promise to let him think it over, and in this case *P*'s acceptance does amount to consideration.⁶⁶

64. This is, though only obliquely, recognized in § 63 of the *Restatement*: "If an offer requests a promise from the offeree, and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract A tender in such a case operates as a promise to render complete performance." Since, as the comment points out, "the only object of requiring a promise is ultimately to obtain performance," actual performance is "something better" than a mere promise. *RESTATEMENT, CONTRACTS* § 63 (1932). Unfortunately § 63 is hedged by the further requirement that the promisee must complete performance within the time allowed for making the counter promise, but this seems unnecessary since the promisee's beginning of actual performance has the same effect of causing reliance by the promisor as would a counter promise. Of course, to rely, the promisor must *know* that the promisee has begun performance, hence the necessity for some notification. See *RESTATEMENT, CONTRACTS* § 56 (1932). See also *Dickinson v. Dodds*, 2 Ch. D. 463 (C.A. 1876), and its discussion in *KESSLER & SHARP, CASES AND MATERIALS ON CONTRACTS* 122 (1953).

65. This problem has recently been re-investigated by Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952). Although the author has learned greatly from this study, he unfortunately finds himself in utter disagreement with its conclusions.

66. See Patterson, "Illusory" Promises and Promisors' Options, 6 IOWA L. BULL.

It is important to explain the true nature of this requirement of consideration.⁶⁷ What distinguishes the above two situations is not alone the fact that *P* pays for *V*'s promise in one case, but not in the other. The price is, in addition, an indication of the content of *V*'s promise to *P*. It is evident that *P* does his "thinking over" for his own personal benefit, and that his private cerebrations are no economic return for *V*'s promise.⁶⁸ And, indeed, where *V* voluntarily promises to keep the offer open he does not even ask for such a return from *P*.⁶⁹ In the case of the option-contract *V* is not so generous. Although he promises to keep the offer open, the promisee is now required to pay a price for it. *V*'s offer to make an option contract thus has two facets: (a) it gives *P* a protracted chance, or power to buy, and (b) it asks for a return price from *P*—it proposes an exchange. It is the element of exchange which the doctrine of consideration has tried to catch, for it is this element which constitutes the functional boundary line between promises for bargains and promises of gifts. Once this is seen, the main function of consideration is not, as orthodox doctrine suggests, to make promises enforceable; the function is rather to test the content of a promise.⁷⁰ If a promise proposes an exchange, we have the first constituent of bargain, although it still requires the promisee's acceptance of the proposed exchange, by counter-promise or by reliance, for an enforceable contract to be formed. If the promise does not contain a proposal for exchange, but merely announces the promisor's intention to do or give something to the promisee, the promise is gratuitous, and as such (subject to certain exceptions which do not affect the present argument) is not enforceable at common law.⁷¹

129, 209 (1921); Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571 (1925). See also Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 742 (1931).

67. See the recent discussion of consideration in 1 CORBIN, CONTRACTS §§ 110-51 (1950).

68. It is sometimes said that *P*'s "thinking over" does constitute an economic return for *V*'s promise to the extent that it increases *V*'s chance of selling to *P*. While this is true, to regard this possibility as the proper subject matter of an enforceable bargain meets two difficulties. The first is that such a bargain would go even farther than the requirement contract in protecting imponderable and fortuitous contingencies. In the ordinary aleatory contract, at least, these contingencies are objective, i.e., non-personal; in the firm offer situation, *P* alone, and not objective events, would determine his purchase. The second difficulty is the assessment of the damages which *P* may be said to sustain from *V*'s revocation. How can *P*'s lost opportunity (not expectation) of buying *V*'s property be evaluated?

69. For fuller discussion of gratuitous promises, both commercial and noncommercial, see Beale, *Gratuitous Undertakings*, 5 HARV. L. REV. 222 (1891); 9 CORNELL L.Q. 54 (1923); and more generally, KESSLER & SHARP, *op. cit. supra* note 64, at 119, 232-37.

70. The idea of exchange is often expressed by the concept of mutuality of consideration. See especially Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 134 (1914). Unfortunately "consideration" was torn from its historic bargain context to become an independent and separate contractual requirement.

71. For exceptions to the nonenforceability of gratuitous promises, see RESTATEMENT, CONTRACTS §§ 85-89 (1932). A gift-promise cannot be accepted because it calls for no

Yet if a gift-promise to keep an offer open is not enforceable, how can putting it in writing make it enforceable? Why, more precisely, does the Uniform Commercial Code say that "firm offers" are "irrevocable for a reasonable time" provided they are "on a form supplied by the offeree separately signed by the offeror?"⁷² Is the writing to be a new version of the deed which still needs to be signed and (presumably) delivered but (perhaps as a concession to the modern mind) no longer needs to be sealed? Whatever the explanation may be, this new type of "binding" firm offer highlights a puzzle of a very special kind. It reveals the continuing impact of written symbols on the recognition of legal remedies; it shows how a "documentary" ritual can convert into a legal right what is originally an unprotected interest.⁷³

Ordinarily, the problem of the firm offer can arise only where the promisee cannot validly accept the promisor's offer because it is a gratuitous offer. But the firm offer problem has recently been mooted also with regard to another situation where the dilemma of the unacceptable offer does not exist.⁷⁴ The situation is that of a general contractor who, before tendering his own bid, asks for offers from suppliers or subcontractors, and the latter make "firm" offers to enable the general contractor to rely on them in the preparation and submission of his bid. In this situation a special firm offer seems entirely redundant. The general contractor has in fact the power to accept the subcontractor's offer since he can accept by way of counter-promise to place his orders with the offeror should his own bid prove successful.⁷⁵ His counter-

exchange from the promisee. What the bargain-promisee accepts is not that part of the promise which commits the promisor to action, but the part which requests action by the promisee. In the gift-promise, the promisor commits himself to action irrespective of the promisee's return, and what the promisee "accepts" therefore is not action on his own part, but merely the benefits promised by the donor. In short, in a bargain, acceptance means commitment to an exchange; in a gift, acceptance means "Thank you." For discussion of conditional promises which may contain proposals for exchange, see Stoljar, *The Contractual Concept of Condition* 69 L.Q. REV. 485, 504-06 (1953).

72. UNIFORM COMMERCIAL CODE § 2-205; for similar provision see UNIFORM WRITTEN OBLIGATIONS ACT § 1, and for New York, see Note, 43 COLUM. L. REV. 487 (1943). For comments, see Williston, *The Law of Sales in the Proposed Commercial Code*, 63 HARV. L. REV. 560, 876 (1950); Lloyd, *Consideration and the Seal in New York—An Unsatisfactory Legislative Program*, 46 COLUM. L. REV. 1 (1946); Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 451 (1937).

73. The continuing impact of symbols, rituals, and form upon our modern law is still a very vexed problem. See generally, 1 CORBIN, CONTRACTS § 110 (1950), and the famous discussion in *Pillans v. Van Mierop*, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765). See also Sharp, *Promises, Mistake and Reciprocity*, 19 U. CHI. L. REV. 286, 292 (1952); Sharp, *Promissory Liability*, 7 U. CHI. L. REV. 1, 250, 252 (1939-40); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Williams, *Language and the Law*, 61 L.Q. REV. 71, 76 (1945).

74. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237, 238 (1952).

75. Professor Schultz does not deal with the possibility of acceptance by the general contractor. He rather assumes the situation in which the general only "uses" the subcontractor's bid. But why should not the general accept the offer if he has a power so to do and thus bind the sub's bid and at the same time preclude himself from "bid

promise would be a conditional promise which does constitute sufficient consideration, and the bilateral contract thus created would, in effect, be indistinguishable from an ordinary requirement contract. The upshot is that, as applied to the construction contract, the firm offer problem is wholly artificial, and artificial because it is based on the false assumption that the offeree is not in a position to accept the offer.

But what, we must ask, is the ultimate origin of the assumption that a firm offer between the sub and general contractor is needed? The main source of this misunderstanding is, again, the distinction between bilateral and unilateral contracts. Since there is no unilateral contract, as the general's performance is still future and fortuitous, and since there is no bilateral contract simply because the promisee fails to accept by counter-promise, the situation produces an apparent need for a third method of creating a contractual relation. This method was found in the device of the firm offer. The paradox, however, is that the new device springs directly from a conceptual dichotomy whose role is to decree that a contract is either bilateral or unilateral, or else no contract at all. This paradox drives home the lesson of the theoretical and practical utility of the reliance-bargain. In terms of reliance, the subcontractor would be liable on his promise whether it is couched in firm, written, or ordinary language; and correspondingly, by "using" and thus accepting the offer, the general would become liable to the subcontractor. Both parties would gain the mutual protection required by their bargain.

The emphasis upon the verbal "firmness" of firm offers, coupled with the fact that such promises are enforceable only by way of promissory estoppel,⁷⁶ has created the impression that "firm offer law" is a distinct and independent branch of contract governed by its own rules and considerations.⁷⁷ Consider, for example, the following situation. A subcontractor makes a "firm" offer at a price based on an error in computation. This mistake the general contractor does not notice before submitting his bid, but soon the subcontractor detects his error and immediately notifies the general, trying to revoke or at least to rectify the offer. The emerging awkward problem is to decide whether the offeror is entitled to a rectification or whether, on the other hand, the offeree may continue to "use" the erroneous offer, since to alter his bid would seriously jeopardize his chances of success.⁷⁸ In brief, the problem is how

peddling" after the contract is awarded? The "hiatus" between law and business does not exist. See *id.* at 238-39.

76. Both judicial and academic opinion is still divided whether the doctrine of promissory estoppel, RESTATEMENT, CONTRACTS §90 (1932), should apply to the firm offer. This matter is fully documented and discussed by Schultz, *supra* note 74, at 240-56.

77. See *id.* at 240, 282; and see also Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 742 (1931).

78. The problem becomes still more awkward if the general has put in his own bid and there is no time to submit a new one. Here a withdrawal would not only entail the certain loss of the award, but also loss of the security-deposit. Even if there is time to submit a new bid, a withdrawal might damage the general's reputation as a bidder.

to distribute a certain monetary loss as between sub and general contractor. Who is to suffer for the mistake? The general for not discovering the (perhaps obvious) discrepancy? Or the sub for not taking sufficient initial care? Whatever the best practical solution may be, the present point simply is that exactly the same problem may arise when the general contractor accepts the bid by counter-promise and a valid bilateral contract is created. The question to what extent the offeree may continue to use the mistaken offer, the mistake and the offeror's desire for rectification having been brought to his attention, must receive substantially the same answer whether the situation be one of firm offer as enforced by promissory estoppel or one of bilateral contract.⁷⁹ Since in the case of breach of contract the promisee comes under a duty to mitigate his loss and to take appropriate measures against greater loss, the criteria for the delimitation of this duty must be the same criteria which would determine the offeree's "reasonable reliance"⁸⁰ under the doctrine of promissory estoppel. Thus, even the most sensitive problems in this area are not peculiar to firm offers and estoppel but are germane to ordinary contracts. No separate firm offer law is therefore required.

VI

Thus, the distinction between bilateral and unilateral contracts is false because it establishes a contrast between expectation- and restitution-contracts but totally ignores the reliance-bargain. The distinction completely obscures the logical interrelation involved in the protection of the three contractual interests. If our law of contract at one end protects restitution (and indeed must protect promised restitution if promises are to be enforceable at all), and at the other end protects promised expectations (including purely aleatory expectations), the law must logically also protect actual reliance justifiably induced by the promisor. Again, by confusing two different meanings of acceptance, the distinction disregards a third type of acceptance and hides the identity of acceptance and reliance in the reliance-bargain. The promisee's reliance is as much a manifestation of assent to the exchange which the promisor proposes in his promise as is the counter-promise in the bilateral contract.⁸¹ These deficiencies also lead to wider error. The analysis of contractual *formation* requires a differentiation not between protected expectation-and restitution-interests, but between expectation- and reliance-bargains for only the latter two transactions

79. Schultz, *supra* note 74, at 244, seems to imply that this answer would be different since in the case of the firm offer the offeree's right to use the mistaken bid depends upon "the words of the offer itself" or "the intention of the subcontractor in making the offer." But verbal firmness of the firm offer is not relevant. For the firm words are only designed to organize a contractual relation; they are not designed to solve the problem of loss-adjustment. Further, the law should not take refuge in verbal analysis without first deciding who ought to bear the burden of the mistake.

80. Cf. the wording of RESTATEMENT, CONTRACTS § 90 (1932).

81. See, on all this, Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 48 YALE L.J. 1, 33-36, 779, 792-98 (1938-39).

explain how future bargains are initiated.⁸² The necessity for restitution can arise only *after* the promisee has completed his side of the bargain. And the promisee cannot possibly complete his part of the exchange unless there is an original bargain (either by mutual promises or by a promise inducing reliance) and unless the promisor refrains from interrupting the promisee's completion by a premature revocation of his promise. In this way the bilateral-unilateral distinction both confuses formation with fulfillment and obfuscates the formative sense of bargain as machinery for future exchange. Furthermore, the requirement of full completion in the unilateral contract transforms into a virtual promise of a gift what is in fact a bargain-promise which causes the promisee to begin the performance of his exchange.

Once we discard the bilateral-unilateral distinction, we can also shelve all those auxiliary doctrines designed to enforce partly performed unilateral contracts: in the presence of the reliance-bargain there is no further need for a special doctrine of prevention, for an independent theory of firm offers, for the curious provision in Section 45, for the rule of construction that prefers bilateral to unilateral contracts,⁸³ and for the doctrine of promissory estoppel.⁸⁴ As regards the last, there is a further reason for its dismissal. While estoppel may help to enforce appropriate promises of gifts,⁸⁵ the enforcement of gifts poses considerations rather different from those accompanying the enforcement of bargains. Enforceable bargains, very broadly, are essential to operate our economic system. The ultimate reason for enforcing donative promises, however, is mainly sentimental.⁸⁶ In addition, promissory estoppel "to a modified extent substitutes reliance for the bargaining element without which simple contracts are not normally enforceable,"⁸⁷ so that the danger is that the doctrine might create growing dependence upon the tort law of misrepresentation, with a consequent neglect for those important criteria of assent and exchange which are the distinctive features of a bargain. The ad hoc doctrines of prevention, firm offer and promissory estoppel have yet another significance. Their cumulative effect

82. *Id.* at 36: "The truth of the matter is that out of the decisions a relatively clear and homogeneous doctrine of offer and acceptance can be built to cover *the initiation of business deals . . .*" (Italics in original). The analytical optimism in this later article compares refreshingly with Llewellyn's somewhat "determinist" indeterminism in Llewellyn, *What Price Contract?*, 40 YALE L.J. 704 (1931).

83. See RESTATEMENT, CONTRACTS § 63 (1932).

84. A further doctrine may be mentioned which was invented to avoid the effects of the unilateral contract. Thus in *Zwolanek v. Baker Mfg. Co.*, 150 Wis. 517, 525, 137 N.W. 769, 773 (1912), it was said that premature repudiation "would result in the perpetration of a fraud," so that promisors "cannot arbitrarily withdraw their offers for the purpose of defeating payment."

85. Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 65 (1936): "The promises coming under § 90 . . . are restricted only by a negative definition—they are not bargains."

86. See Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 817 (1941).

87. Seavey, *Reliance upon Gratuitous Promises or other Conduct*, 64 HARV. L. REV. 913, 925 (1951). See also Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 22 (1932).

is to protect precisely those interests which the distinction between unilateral and bilateral contracts expressly vetoes. Surely our conceptual arrangements need not be grotesquely absurd as merely to rob Peter to pay Paul, where Paul and Peter are same person. In final analysis, every distinction must satisfy the test of Occam's Razor,⁸⁸ which is that categories or abstractions must not be multiplied without necessity. Enough has here been said to show that the distinction between bilateral and unilateral contracts is not needed.

88. See STEBBING, *MODERN INTRODUCTIONS TO LOGIC* 453 (6th ed. 1948).