REDEFINING *OFFER* IN CONTRACT LAW

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INTRODUCTION

In contract law a fundamental question is: What facts create the legal relationship called a *contract* (and hence create a legal duty to perform the promise or promises within that

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relationship)?[1] Once it is decided what facts have that effect, it is most useful to set out each as a separate element of a contract to help determine if, in a given situation, such a relationship arose.[2]

And this is what the law has sought to do with respect to an informal or simple contract.[3] Every judge, lawyer, and law student knows that the elements of such a contract—along with two or more parties with legal capacity, reasonably certain terms, and a lawful purpose—are the manifestation of mutual assent and consideration.[4] And every judge, lawyer, and law student knows that the manifestation of mutual assent ordinarily takes the form of an offer and an acceptance.[5] Thus, the basic elements of an

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[1] *See* Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 169 (1917) [hereinafter Corbin, *Offer and Acceptance*] ("In the study and the practice of the law, our constant problem is: what legal relations are the result of facts that occur; or, starting from the other direction with a given set of legal relations (such as a contract, or a debt, or the ownership of land) our problem is: what facts will operate to cause such a result?"). Just because one has a moral duty to perform (or not perform), a particular act does not mean one has a legal duty. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[2] *See* Arthur L. Corbin, Book Review, 29 YALE L.J. 942, 942 (1920) (reviewing SAMUEL WILLISTON, 1 THE LAW OF CONTRACTS xxiii, 1155 (1920)) [hereinafter Corbin, *Review of Williston*] ("[C]lear and definite concepts, accurate analysis into simple and invariable elements, a terminology that conveys to other minds the exact idea intended, are always exceedingly desirable and are often essential."); Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 163 (1919) [hereinafter Corbin, *Legal Analysis*] ("With . . . simple concepts and definite phraseology the student [of the law] can more easily analyze a complex problem, arrive at a correct solution, and explain it clearly to others. He can thus be led to avoid much unnecessary obscurity and difficulty.").

[3] An informal or simple contract is a legally enforceable promise other than a contract under seal, a recognizance, a negotiable instrument or document, or a letter of credit. RESTATEMENT (SECOND) OF CONTRACTS § 6 (1981); *see also* BLACK'S LAW DICTIONARY 373 (9th ed. 2009) (defining "simple contract" as an "informal contract").

[4] RESTATEMENT OF CONTRACTS § 19 (1932); SAMUEL WILLISTON, 1 THE LAW OF CONTRACTS 17 (1920) [hereinafter WILLISTON, CONTRACTS]; Kortum-Managhan v. Herbergers NBGL, 204 P.3d 693, 697 (Mont. 2009); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (requiring reasonably certain terms for formation of contract).

[5] *See* RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (1981) (noting that the manifestation of mutual assent ordinarily takes the form of an offer and an acceptance); RESTATEMENT OF CONTRACTS § 22 (1932) (same); WILLISTON, CONTRACTS, *supra* note 4, at 27 (same). "A manifestation of mutual assent may be made [however] even though neither an offer nor acceptance can be identified and even though the moment of formation cannot be determined." RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (1981). An example of when an offer might not exist is when a third party proposes to two other persons a contract between those other persons and each of them simultaneously assents. RESTATEMENT OF CONTRACTS § 22 cmt. a (1932); *see also*

informal or simple contract are commonly stated to include an offer, an acceptance, and consideration.[6] For these elements to serve their purpose, however, there should be a clear distinction between them.

Contract law's generally accepted definition of *offer*, however, overlaps with the element of consideration by incorporating within it the proposal of a bargain, potentially resulting in confusion when analyzing contract formation. Thus, at least for the purpose of using contract elements as a tool for determining formation, contract law's definition of *offer* should be changed. Specifically, any reference to proposing a bargain should be removed. Also, if the definition is changed, certain other revisions should be made to make the definition more useful as a tool for analyzing contract formation. For example, the word *promise* should be added to emphasize that most offers are promises, and the requirement of communication or delivery to the offeree should be included.

Part I of this Article explains the general requirement of a bargain to render a promise legally enforceable. Part II discusses the basic elements of a bargain: offer, acceptance, and consideration. Part III explains how contract law's generally accepted definition of *offer* is likely to cause confusion when analyzing whether an informal contract has been formed. Part IV proposes a new definition of *offer* to be used when analyzing contract formation, one that will better serve the purpose of determining if a contract has been formed. Part V responds to potential objections to the new definition. Part VI provides an example of how the new definition would be used.

RESTATEMENT (SECOND) OF CONTRACTS § 22 cmt. a (1981) ("It is theoretically possible for a third person to state a suggested contract to the parties and for them to say simultaneously that they assent. Or two parties may sign separate duplicates of the same agreement, each manifesting assent whether the other signs before or after him.").

[6] *See* Shaw Constr. v. Rocky Mt. Hardware, 275 P.3d 1238, 1242 (Wyo. 2012) ("The basic elements of a contract include an offer, acceptance and consideration."). Even if there is an offer and an acceptance, there is not a manifestation of mutual assent, however, "if the parties attach materially different meanings to their manifestations" and neither party was more at fault for the misunderstanding. RESTATEMENT (SECOND) OF CONTRACTS § 20 (1981); *see, e.g.*, Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864) (holding that a contract was not formed when the parties each believed the proposed sale was for cotton arriving on a different ship with the same name).

I. THE REQUIREMENT OF A BARGAIN

Though there might be a moral obligation to keep a promise,[7] the legal system does not enforce all promises.[8] This is not surprising because it would be difficult, if not impossible, for a legal system to enforce all moral duties.[9] Thus, a moral duty to keep a promise has never meant that there is automatically a legal duty to keep a promise.[10]

At early English common law, "courts flexibly answered the question: 'What promises should be actionable?'"[11] In the late nineteenth and early twentieth centuries, however, the test for legal enforceability in the United States was narrowed principally to whether the promise was given as part of a bargain.[12] Oliver Wendell Holmes Jr., writing in 1881, stated: "[T]he root of the

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[7] *See* Curtis Bridgeman, *Civil Recourse or Civil Powers?*, 39 FLA. ST. U. L. REV. 1, 5 (2011) ("[O]ne likely has a moral obligation to keep one's promises . . . ."); JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 182 (9th ed. 2008) ("We are morally and ethically obliged to keep our promises . . . ."); CHARLES FRIED, CONTRACT AS PROMISE 14-17 (1981) (explaining why there is a moral duty to keep a promise).

[8] *See* DAWSON, *supra* note 7, at 1 ("Not all promises are legally enforceable."); RESTATEMENT OF CONTRACTS § 75 cmt. a (1932) ("No duty is generally imposed on one who makes an informal promise unless the promise is supported by sufficient consideration.") (citation omitted).

[9] *See* THEOPHILUS PARSONS, THE LAW OF CONTRACTS 767-78 (1855) ("The law of morality, which is the law of God, acknowledges but one principle, and that is the duty of doing to others as we would that others should do to us . . . . But this would be perfection; and the law of God requires it because it requires perfection; that is, it sets up a perfect standard, and requires a constant and continual effort to approach it. But human law, or municipal law, is the rule which men require each other to obey; and it is of its essence that it should have an effectual sanction, by itself providing that a certain punishment should be administered by men, or certain adverse consequences take place, as the direct effect of a breach of this law. If therefore the municipal were identical with the law of God, or adopted all its requirements, one of three consequences must flow therefrom; either the law would become confessedly, and by a common understanding, powerless and dead as to a part of it; or society would be constantly employed in visiting all its members with punishment; or, if the law annulled whatever violated its principles, a very great part of human transactions would be rendered void. Therefore the municipal law leaves a vast proportion of unquestionable duty to motives, sanctions, and requirements very different from those with it supplies.").

[10] *See, e.g.*, Mills v. Wyman, 20 Mass. (3 Pick.) 207 (Mass. 1825) (rejecting the argument that a moral obligation is sufficient to render a promise legally enforceable).

[11] Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 140 (2000).

[12] KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 223-27 (1990).

whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise."[13] In 1903 he wrote: "It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting."[14]

It has been argued that what Holmes asserted "promptly became the truth—the indisputable truth—of the matter for his own and succeeding generations."[15] And, in 1932, the first *Restatement of Contracts* provided that something must be "bargained for and given in exchange for the promise."[16] Thus, by the early twentieth century it was established as a general rule that an informal promise would only be enforceable if given as part of a bargain.[17] It has therefore generally become necessary to identify a bargain to determine if a contractual relationship has been created.[18]

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[13] OLIVER WENDELL HOLMES, THE COMMON LAW 230 (Mark DeWolfe Howe ed., Little Brown & Co. 1963) (1881).

[14] Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386 (1903).

[15] GRANT GILMORE, THE DEATH OF CONTRACT 21 (1974).

[16] RESTATEMENT OF CONTRACTS § 75(1) (1932).

[17] TEEVEN, *supra* note 12, at 223-27. There were, of course, exceptions. The promisee's reliance remained a basis for legal enforceability under certain circumstances (promissory estoppel). *See* RESTATEMENT OF CONTRACTS § 90 (1932) ("A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if justice can be avoided only by enforcement of the promise."). Also, on occasion, unjust enrichment was a basis for legal enforceability of a promise to pay for a benefit received (promissory restitution). *See* Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935) (enforcing a promise to pay for injuries suffered by the promisee when protecting the promisor from harm); *see generally* Stephen J. Leacock, *Echoes of the Impact of* Webb v. McGowin *on the Doctrine of Consideration Under Contract Law: Some Reflections on the Decision on the Approach of its 75th Anniversary*, 1 FAULKNER L. REV. 1 (2009); Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971).

[18] Identifying a bargain is particularly important because claims based on promissory estoppel, promissory restitution, and charitable pledges (at least those that lack consideration or reliance) have not been well received by the courts. *See, e.g.*, Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998) (reporting a low success rate for promissory estoppel claims); Leacock, *supra* note 17, at 3 (recognizing that promissory restitution is a minority rule); Congregation Kadimah Toras-Moshe v. DeLeo, 540 N.E.2d 691, 693 (Mass. 1989) (rejecting *Restatement (Second) of Contracts* § 90(2), which would dispense with the requirement of consideration or reliance to enforce a charitable pledge). Also, most jurisdictions no longer recognize the seal as a

A *bargain* is "an agreement to exchange promises or to exchange a promise for a performance or to exchange performances."[19] The American Law Institute has explained that "[b]argain has a narrower meaning than agreement, since it is applicable only to a particular class of agreements" (those for an exchange of promises or performances).[20] But it has a broader meaning than *contract*.[21] For example, "[i]t includes agreements which are not contracts, such as transactions where one party makes a promise and the other gives something in exchange which is not consideration, or transactions where what would otherwise be a contract is invalidated by illegality."[22] For a bargain to be a contract, it must be one that the legal system either provides a remedy for breach or in some other way recognizes performance as a legal duty.[23]

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basis for legal enforcement. *See* DAWSON, *supra* note 7, at 187 ("Today, more than half of the American states have legislation, cast in general terms, depriving the seal of all legal effect (i.e., abolishing any distinction between sealed and unsealed contracts).") Not everyone welcomed the decline of the seal. *See, e.g.*, James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.) ("The common law provided for [legal enforceability] by sealed instruments, and it is unfortunate that these are no longer generally available.").

[19] RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) ("A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances."); *see also* RESTATEMENT OF CONTRACTS § 4 (1932) ("A bargain is an agreement of two or more persons to exchange promises or to exchange a promise for a performance.").

[20] RESTATEMENT (SECOND) OF CONTRACTS § 3 cmt. c (1981); *see also* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION 15 (1952) ("[A] bargain is one kind of agreement. There are many agreements that are not bargains . . . .").

[21] *See* RESTATEMENT OF CONTRACTS § 4 cmt. a (1932) ("[Bargain] has a broader meaning than contract.").

[22] RESTATEMENT (SECOND) OF CONTRACTS § 3 cmt. c (1981); *see also* RESTATEMENT OF CONTRACTS § 4 cmt. a (1932) ("It includes transactions where one party makes a promise and the other gives something in exchange which is insufficient consideration. It also includes transactions where what would otherwise be a contract is invalidated by illegality.").

[23] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."). It is important to recognize that the word *contract*, when properly used in contract law, does not refer to the parties' manifestations (oral or written) that are evidence of an agreement. Rather, it refers to the legal relationship that results from particular facts. Corbin, *Offer and Acceptance*, *supra* note 1, at 170. *But see* E. ALLAN FARNSWORTH, CONTRACTS 3 (4th ed. 2004) ("Sometimes lawyers use the word, as it is used in common speech, simply to refer to a writing containing terms on which the parties have agreed."). The *Second*

Professor Grant Gilmore argued that Holmes favored the bargain theory to narrow the range of contractual liability[24] and wanted liability limited "so that socially useful 'action' would not be discouraged . . . ."[25] Holmes was also likely influenced "by free entrepreneurs desirous of the predictable results of not being bound until they struck a bargain,"[26] and the bargain requirement provided "a simple, uniform doctrine mirroring the market economy of his time."[27] The bargain theory perhaps also serves the function of a legal formality, by providing evidence of the promise, acting as a check against inconsiderate action, and providing a mechanism for the parties to make promises legally enforceable.[28]

II. THE BASIC ELEMENTS OF A BARGAIN: OFFER, ACCEPTANCE, AND CONSIDERATION

To assist in determining whether a promise was given as part of a legally enforceable bargain, the law has identified two elements of such a bargain: (1) "a manifestation of mutual assent to the exchange" and (2) "a consideration."[29] The mutual-assent portion corresponds to the agreement requirement of a bargain,[30] and usually takes the form of an offer and an acceptance.[31] The consideration requirement embodies the requirement that the

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Restatement's definition of *contract*, however, as *any* promise that is legally enforceable is unfortunate because it likely conflicts with the plain meaning of *contract* among lawyers. That meaning is probably limited to legally enforceable bargains, and does not extend to legally enforceable promises that are not part of a bargain, such as some promises without consideration that induce reliance. *See, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 271 (11th ed. 2003) (defining *contract* as "a binding *agreement* between two or more persons or parties; *esp.* one legally enforceable.") (emphasis added). This Article therefore uses the word *contract* to refer only to promises that are legally enforceable because they were part of a bargain.

[24] GILMORE, *supra* note 15, at 21.

[25] *Id.* at 17.

[26] TEEVEN, *supra* note 12, at 224.

[27] *Id.* at 225.

[28] Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

[29] RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

[30] "An agreement is a manifestation of mutual assent on the part of two or more persons." *Id.* § 3.

[31] *Id.* § 22(1); RESTATEMENT OF CONTRACTS § 22 (1932); WILLISTON, CONTRACTS, *supra* note 4, at 27.

agreement be of a particular kind—an agreement for an exchange.[32]

A. An Offer (Step One of Two of an "Agreement")

Under contract law, *offer* is typically defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[33] This definition, from the *Second Restatement of Contracts*, uses the word *manifestation* to make clear that whether an offer is made is determined objectively (i.e., based on whether the alleged offeror believed or had reason to believe that the recipient would construe her words or conduct as an offer) and not subjectively (i.e., based on whether the alleged offeror intended to make an offer).[34] Typically, an

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[32] *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. d (1981) ("The element of exchange is embodied in the concept of consideration."). It also embodies the requirement that the exchange be legally sufficient. *Id.* This requirement will be discussed later.

[33] *Id.* § 24; *see also* RESTATEMENT OF CONTRACTS § 24 (1932) ("An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance."); BLACK'S LAW DICTIONARY 1189 (9th ed. 2009) (defining *offer* in contract law as "[a] promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance, or return promise being given in exchange for the promise or its performance; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.").

[34] *See* RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981) ("The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct."); City of Everett v. Estate of Sumstad, 631 P.2d 366, 367 (Wash. 1981) (holding that whether an offeror assented is based on an objective standard). The idea that assent is based on an objective standard is known as the "objective theory of contract." *See* BLACK'S LAW DICTIONARY 1178 (9th ed. 2009) (defining "objective theory of contract" as "[t]he doctrine that a contract is not an agreement in the sense of a subjective meeting of the minds but is instead a series of external acts giving the objective semblance of agreement."). Although an objective standard has always predominated, Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427-29 (2000), Holmes is credited with fending off an attack by those who believed a subjective standard should apply. TEEVEN, *supra* note 12, at 224-26. Holmes did so as part of his effort to prevent the common law from incorporating the Kantian idea that no person should be used as a means, but only as an end. HOLMES, *supra* note 13, at xi-xvii. The objective theory of contract is designed

alleged offeror will have such a reason to believe if a reasonable person in the recipient's position would infer an offer.[35] To avoid implying that a subjective standard applies, the *Second Restatement* avoids the popular phrase "meeting of the minds."[36] It has traditionally been considered that an offer gives the offeree the legal power to create a contract.[37]

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to protect the promisee's reliance on the promisor's outward expression of commitment. *See* Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 148-49 (2002) ("Because, by definition, contracts contemplate future performance, each party ought to be entitled to rely on the other's promises. Once bound, each party should be able to change his position or order his affairs with third parties in reliance on the manifest intent to be bound of his fellow contracting party. Each should be entitled to expend time, energy, effort and money on the assumption that the other contracting party will keep his end of the bargain. Such reliance is the principal reason why the objective theory of contract is so dear to modern American contract law."). Importantly, however, even though the objective theory of contract is based on protecting the promisee's reliance on the appearance of an agreement, actual reliance need not be shown. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. 22 c (1981) ("[N]o . . . change of position . . . is necessary to the formation of a bargain. . . . [T]he law must take account of the fact that in a society largely founded on credit bargains will be relied on in subtle ways, difficult or incapable of proof.").

[35] *See Estate of Sumstad*, 631 P.2d at 367 ("We impute an intention corresponding to the reasonable meaning of a person's words and acts."). The "reason to believe" standard is used, however, so that "[a] court [can] take account of the [recipient's] particular circumstances, at least to the extent that the first party was or should have been aware of them." *See* FARNSWORTH, *supra* note 23, at 116; *see also* THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS (6th ed. 2012) (Problem 12) (alleged offeror perhaps had reason to know recipient would infer offer even though reasonable person would probably understand it was intended as a joke). Because the reasonable-person standard will usually apply, this Article will refer to such standard and not the reason-to-believe standard.

[36] *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. c (1981) ("The element of agreement is sometimes referred to as a 'meeting of the minds.' The parties to most contracts give actual as well as apparent assent, but it is clear that a mental reservation of a party to a bargain does not impair the obligation he purports to undertake. The phrase used here, therefore, is 'manifestation of mutual assent . . . .'"). Unfortunately, courts continue to use the phrase "meeting of the minds." *See, e.g.*, Fiederlein v. Boutselis, 952 N.E.2d 847, 856 (Ind. Ct. App. 2011) ("The basic requirements for a contract include offer, acceptance, consideration, and a meeting of the minds of the contracting parties."); *see generally* Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 510-12 (2002) ("Judicial decisions almost inevitably contain language suggesting the primacy of the parties' intentions and the importance of enforcing their actual agreements. . . . [M]ost decisions are chock-full of 'intentions of the parties' language. . . . What . . . needs explaining is why so many contracts people persist in presenting contract law as if subjective intentions and actual agreements matter, when they do not.").

[37] Corbin, *Offer and Acceptance*, *supra* note 1, at 171. A *power* is "[t]he legal relation of *A* to *B* when *A*'s own voluntary act will cause new legal relations either

An offer is usually a promise,[38] but it is a conditional promise.[39] It is a promise that is conditioned on the offeree acting or forbearing (an offer of a unilateral contract)[40] or providing a return promise (an offer of a bilateral contract)[41] as the price for

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between *B* and *A* or between *B* and a third person." Corbin, *Legal Analysis*, *supra* note 2, at 168 (some italics added); *see also* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44 (1913) ("A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem."). If an offer does, in fact, create such a power in the offeree, it is better to state that the offeree has a power to "create" a contract as opposed to "conclude" a contract. A contract is the legal relationship that arises from a given set of facts, and the legal relationship arises immediately upon the completion of the final act necessary for its creation; it does not exist prior to that point; thus, there is no "conclusion."

[38] *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a (1981) ("In the normal case of an offer of an exchange of promises, or in the case of an offer of a promise for an act, the offer itself is a promise . . . ."). "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Id.* § 2(1). The appearance of a commitment being made to the recipient is necessary to avoid a person's mere statement of intention to act in a particular way being the cause of legal liability when the person fails to act as originally intended. *See* FRIED, *supra* note 7, at 9 (discussing how a mere statement of intention to act in a particular way is not a commitment and thus not a promise).

[39] WILLISTON, CONTRACTS, *supra* note 4, at 30. A "conditional promise" is "[a] promise that is conditioned on the occurrence of an event other than the lapse of time." BLACK'S LAW DICTIONARY 1332 (9th ed. 2009). The conditional nature of a promise within an offer led some to deny that it was, in fact, a promise. *See, e.g.*, William R. Anson, *Some Notes on Terminology in Contract*, 7 L.Q. REV. 337, 337 (1891) ("There is surely a difference, a profound difference in legal significance, between an *offer* and a *promise*. An *offer* is an expression of willingness to be bound by contract to the person to whom the offer is made, if he accepts the offer unconditionally and within a reasonable time. The offer then becomes a promise."); James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.) ("[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.").

[40] *See* RESTATEMENT OF CONTRACTS § 12 (1932) ("A unilateral contract is one in which no promisor receives a promise as consideration for his promise.").

[41] *See id.* ("A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee."). The *Second Restatement* abandoned the use of the phrases "unilateral contract" and "bilateral contract," but it was fighting a losing battle. Useful phrases tend to get used. *See* JEFF FERRIELL, UNDERSTANDING CONTRACTS 7 (2d ed. 2009) ("Although the distinction [between unilateral and bilateral contracts] was abandoned by the

the promise,[42] and doing so prior to any event terminating the power to create a contract.[43] The price is paid in the form of an acceptance of the offer by the promisee.[44]

Because an offer is a conditional promise, and because—if an informal contract is to be formed—the condition must be an event that would create a bargain, it makes sense—if moving backward from a contract to what facts create a contract—to define *offer* as including a condition that would create a bargain. As a result, it has generally been defined this way.

In 1920, Professor Samuel Williston,[45] in his classic contracts treatise,[46] wrote that:

> [a]n offer is to be known from other conditional promises . . . because the performance of the condition in an offer is requested as the exchange or return for the promise in the offer, thereby giving the offeree a power, by complying with the request, to turn the promise in the offer into a contract or sale.[47]

The *First Restatement*, published in 1932 with Williston as its Reporter,[48] adopted this concept of an offer, defining *offer* as "a promise which is in its terms conditional upon an act, forbearance

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Restatement (Second) of Contracts, and was never found in the Uniform Commercial Code, courts still commonly refer to it.").

[42] WILLISTON, CONTRACTS, *supra* note 4, at 30.

[43] *See* RESTATEMENT (SECOND) OF CONTRACTS § 36 (1981) (listing events that terminate the offeree's "power of acceptance"); RESTATEMENT OF CONTRACTS § 34 (1932) (providing that acceptance must take place prior to an offer being terminated); *id.* § 35 (listing events that terminate an offer).

[44] RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).

[45] Williston was a professor at Harvard Law School, his tenure starting in 1890 and lasting forty-eight years. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 593 (Roger K. Newman ed., 2009). His impact on contract law has been tremendous. *See id.* ("Few academics have been as influential as Williston in shaping a chosen discipline.").

[46] *See* FARNSWORTH, *supra* note 23, at 836 (referring to Williston's treatise as "a classic."); THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 45, at 593 (referring to Williston's treatise as "one of the great textbooks of Anglo-American law.").

[47] WILLISTON, CONTRACTS, *supra* note 4, at 30-31.

[48] *See* RESTATEMENT OF CONTRACTS vi (1932) (identifying Williston as the Reporter).

or return promise being given in exchange for the promise or its performance."[49]

The *First Restatement* comment to the definition of *offer* further stated: "In order that a promise shall amount to an offer, performance of the condition in the promise must appear by its terms to be the price or exchange for the promise or its performance. The promise must not be merely performable on a certain contingency."[50] Thus, the *First Restatement* made it clear that a conditional promise was only an offer if one of the conditions of the promise was the payment of a price for the promise (through an act, a forbearance, or a return promise). The *First Restatement* included the following illustration to demonstrate the point:

> *A* promises *B* $100 if *B* goes to college. If the promise, under the surrounding circumstances, is reasonably to be understood, not as requesting *B* to go to college and undertaking to pay him for doing so, but as promising a gratuity on a certain contingency, there is no offer.[51]

A definition of *offer* that was limited to a proposal of a bargain was likely necessary if an offer is considered to create a legal power on the offeree's behalf to form a contract. This is where Professor Wesley N. Hohfeld's influence likely played an important role.[52] Hohfeld, in a 1913 article considered by many to have been the most important and original work of legal science in a generation,[53] sought to clarify the proper use of eight legal terms

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[49] *Id.* § 24.

[50] *Id.* cmt. a.

[51] *Id.* illus. 3 (italics added).

[52] Hohfeld was an instructor and then professor of law from 1905 to 1918, teaching at Hastings College of Law, Stanford Law School, and Yale Law School. For Hohfeld's background, see THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 45, at 270-71; Comment, *Wesley Newcomb Hohfeld*, 28 YALE L.J. 166 (1918) (authorship attributed to Karl N. Llewellyn in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 45, at 270); DAVID KENNEDY, *Wesley Hohfeld in* THE CANON OF AMERICAN LEGAL THOUGHT 47-51 (David Kennedy & William W. Fisher III eds. 2006); Arthur L. Corbin, *Foreword* to WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING vii-xv (2004) [hereinafter Corbin, *Foreword*]. The only reference in the preceding authorities to Hohfeld teaching at Hastings College of Law is in Llewellyn's Comment. *See* Comment, *supra*, at 166.

[53] Comment, *supra* note 52, at 167. The utility of Hohfeld's analysis is a matter of contention. *Compare* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST

that could, according to him, describe all legal relations.[54] One of these terms was *power*,[55] which Hohfeld described as the ability to change a given legal relation.[56] One of the examples of a power provided by Hohfeld was the ability of an offeree to create a contract, and thus change the legal relation between the offeror and the offeree, by accepting an offer for a bargain.[57] This was apparently the first time anyone had expressed the idea of an offer in this way.[58]

Hohfeld's article cast a spell on Professor Arthur Corbin,[59] who then applied Hohfeld's terminology to contract law in a series

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MOVEMENT 34 (1973) ("[I]t is now widely accepted that [Hohfeld's] analysis was less original and has a less widespread utility than was once thought . . . ."), *and* SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 208 (1941) [hereinafter WILLISTON, LIFE AND LAW] (asserting that Hohfeld's analysis is "of diminishing importance in legal education"), *with* Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 238 (2002) ("Hohfeld's theory is a powerful tool for teaching across a broad pedagogical range.").

[54] KENNEDY, *supra* note 52, at 47.

[55] Hohfeld, *supra* note 37, at 30.

[56] *Id.* at 44; *see also* Nyquist, *supra* note 53, at 240 ("A person with a *power* is able to change a legal relation of another . . . ."); KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 93 (Oxford Univ. Press 2008) (1930) ("*Power*, says Hohfeld, is the situation when *A can* in some significant manner *change* some one of *B*'s legal relations, any one of *B*'s legal relations.") (some italics added).

[57] Hohfeld, *supra* note 37, at 49.

[58] *See* Corbin, *Offer and Acceptance*, *supra* note 1, at 181 n.17 ("The first, and the best, presentation of this concept that has been seen by the writer is in the article on Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, in 23 YALE LAW JOURNAL 16, 49, by Professor W. N. Hohfeld, to whom the writer acknowledges great indebtedness.").

[59] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 155 (1992) ("Hohfeld's analytic scheme seemed to have had an electrifying influence on his Yale Law School contemporaries, Walter Wheeler Cook and Arthur L. Corbin."). Hohfeld submitted the article to the *Yale Law Journal*, and the editors brought it to Corbin, the journal's faculty advisor, who advised them "at once" to publish it. Corbin, *Foreword*, *supra* note 52, at vii; *see also* N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 103 (1997) (identifying Corbin as the journal's faculty advisor when Hohfeld's piece was brought to him). Corbin was so impressed with the article that he pushed for Hohfeld's appointment as a faculty member. TWINING, *supra* note 53, at 34. Corbin was a law professor at Yale from 1903 to 1943. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 45, at 128. Like Williston, he had a tremendous impact on contract law. *See id.* ("Corbin did perhaps more than any other person to move the law from the orthodoxy known as 'classical contract' to the modern incarnation that we label 'neo-classical contract,' advocating, among other things, reform of classical consideration doctrine to ensure protection of reliance and benefit,

of articles between 1917 and 1921.[60] Corbin, influenced by Hohfeld's concept of a power, defined *offer* as "an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract."[61] With the acceptance of the idea that an offer creates a power in the offeree to form a contract, a definition of offer that includes a proposal for a bargain was virtually assured. Unless an offer included within it a proposal for a bargain, it could not provide the offeree with such a power.

Williston too, in his famous 1920 treatise, adopted the idea that an offer gives the offeree a power to create a contract,[62] and he cited Hohfeld and Corbin for support.[63] Corbin then convinced the drafters of the *First Restatement* to adopt Hohfeld's terminology.[64] In 1923, Williston, as Reporter, told Corbin and Herman Oliphant—two of Williston's chosen advisers—that "he was convinced that Hohfeld's analysis was sound and that, while he could not accept all of Hohfeld's terms (e.g., 'liability'), he wished to make sure that his restatement contained nothing inconsistent with it."[65] Williston asked Corbin and Oliphant to test all of his statements for consistency with Hohfeld's analysis, a task Corbin performed until the *First Restatement* was finished in 1932.[66]

Once Hohfeld's idea of an offer giving the offeree a power to create a contract was accepted by Williston and Corbin, the *First Restatement*'s definition of offer had to include a proposal of a bargain to remain consistent with Hohfeld's analysis, which it

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an expansive approach to excuse, relaxation of barriers to the inclusion of evidence, broad recognition of the rights of third-party beneficiaries, and flexibility of remedies. His approach to contract is usually contrasted with the relative orthodoxy of Samuel Williston of Harvard . . . .").

[60] Kennedy, *supra* note 52, at 52-53. The articles are Corbin, *Offer and Acceptance*, *supra* note 1; Corbin, *Legal Analysis*, *supra* note 2; Arthur L. Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 739 (1918-19); Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1920-21).

[61] Corbin, *Offer and Acceptance*, *supra* note 1, at 171; *see also id.* at 181 ("An offer is . . . an act whereby one person confers upon another the power to create contractual relations between them.").

[62] WILLISTON, CONTRACTS, *supra* note 4, at 30-31.

[63] *Id.* at 31 n.13.

[64] TWINING, *supra* note 53, at 35.

[65] Corbin, *Foreword*, *supra* note 52, at xii.

[66] *Id.*

did.[67] Williston, when discussing the definition of *offer* during the third annual meeting of the American Law Institute in 1925, stated that "the general theory on which this restatement is based is to state the facts from which certain [presumably legal] consequences arise."[68] An attendee had previously noted that an offer creates a power, to which no one objected,[69] and it is apparent that Williston desired a definition that would state facts from which a power to create a contract would arise.

The *Second Restatement of Contracts*, published in 1981, rephrased the definition of *offer*,[70] but retains the concept that a manifestation is only an offer if it proposes a bargain.[71] The *Second Restatement* defines *offer* as follows: "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[72] Like the *First Restatement*, if the promise was simply a gratuitous conditional promise, it is not an offer. The comment to the definition of *offer* explains:

> A proposal of a gift is not an offer within the present definition; there must be an element of exchange. Whether or not a proposal is a promise, it is not an offer unless it specifies a promise or performance by the offeree as the price or consideration to be given by him. It is not enough that there is a promise performable on a certain contingency.[73]

The comment then provides the following illustration, which is based on the *First Restatement*'s similar illustration: "*A*

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[67] RESTATEMENT OF CONTRACTS § 24 (1932). The definition ultimately approved by the American Law Institute was virtually identical to the definition proposed by Williston in the first tentative draft. The only change was to substitute *return promise* for *counterpromise*. *Compare* AMERICAN LAW INSTITUTE, 3RD ANNUAL PROCEEDINGS 191 (1925) (quoting section 24 of the first tentative draft), *with* RESTATEMENT OF CONTRACTS § 24 (1932).

[68] AMERICAN LAW INSTITUTE, 3RD ANNUAL PROCEEDINGS 194 (1925) (remark by Samuel Williston).

[69] *Id.* at 193 (remark by Hugh E. Willis).

[70] *See* RESTATEMENT (SECOND) OF CONTRACTS § 24, reporter's note (1981) ("This Section is rewritten from former § 24.").

[71] *See id.* § 24 ("An offer is the manifestation of willingness to enter into a bargain . . . .").

[72] *Id.*

[73] *Id.* cmt. b.

promises *B* $100 if *B* goes to college. If the circumstances give *B* reason to know that *A* is not undertaking to pay *B* to go to college but is promising a gratuity, there is no offer."[74]

A significant change, however, from the *First Restatement*'s definition of *offer* was the removal of the word *promise*. A *Second Restatement* comment explains that "[m]ost offers are themselves promises," but takes the position that some offers will not include a promise.[75] Specifically, an offer will not include a promise if it is an offer of a "reverse unilateral contract,"[76] which is a contract under which "the offeror's performance is complete at the moment of acceptance [and thus, no promise by the offeror is made]."[77] For example, "[p]erformance may be thus complete when the offer takes the form of a tender of money or other property . . . ."[78]

The *Second Restatement* provides the following illustration of a reverse unilateral contract: "*A*, the owner of a horse in *B*'s possession, offers to sell the horse to *B* for $100 payable in thirty days. On *B*'s promise to pay in accordance with the offer, ownership of the horse is transferred to him and there is a contract."[79] (If *A* sought a return performance or forbearance from *B*, there would be no promises by either party and thus no contract.[80]) As a *First Restatement* comment recognizes, however, a reverse unilateral contract is a "rather peculiar case." [81] Nevertheless, because of this peculiar case, the term *promise* was excised from the definition of *offer*.[82] Professor Robert Braucher, later Associate Justice of the Supreme Judicial Court of Massachusetts, and the first Reporter for the *Second*

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[74] *Id.* illus. 2 (italics added).

[75] *Id.* § 55 cmt. b.

[76] *Id.* cmt. a.

[77] *Id.* § 24 cmt. b.

[78] *Id.*

[79] *Id.* illus. 3 (emphasis added).

[80] *See id.* § 1 ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."); FARNSWORTH, *supra* note 23, at 4 (noting that where the parties make a present exchange of goods without any promises—a barter—there is no contract).

[81] RESTATEMENT OF CONTRACTS § 57 cmt. a (1932).

[82] RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. b (1981).

Restatement,[83] did not believe, however, there was anything novel about the rephrased definition of *offer*.[84]

The *Second Restatement*'s definition of *offer*, which, like the *First Restatement*'s, includes a proposal for a bargain, has generally been followed by leading contracts scholars,[85] and has been adopted by *Black's Law Dictionary*.[86] Professor Joseph M. Perillo has provided a definition that does not include the requirement of a proposal for a bargain,[87] but he also takes the position that "[a]n offer empowers the offeree to create a contract by accepting the offer."[88] Because an offer can only give the offeree a power to create a contract if the offer proposes a bargain, it appears that Perillo's definition was not designed to remove the requirement of a proposal for a bargain; rather, it appears that it was designed to emphasize that most offers are promises.[89]

B. An Acceptance (Step Two of Two of an "Agreement")

An acceptance is "a manifestation of assent to the terms [of the offer] made by the offeree in a manner invited or required by the offer."[90] Like determining whether an offer was made, an

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[83] Professor Braucher served as the Reporter from 1962 to 1971, resigning upon his appointment to the Supreme Judicial Court of Massachusetts. *Id.* at vii. Professor E. Allan Farnsworth served as the Reporter from 1971 to its completion. *Id.*

[84] AMERICAN LAW INSTITUTE, 41ST ANNUAL PROCEEDINGS 324 (1964) (remark by R. Braucher).

[85] *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 61 (5th ed. 2011) (using *Second Restatement* definition); FARNSWORTH, *supra* note 23, at 111 ("*Offer*, then, is the name given to a promise that is conditional on some action by the promisee *if* the legal effect of the promisee's taking that action is to make the promise enforceable.").

[86] BLACK'S LAW DICTIONARY 1189 (9th ed. 2009) (defining *offer* in contract law as "[a] promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance, or return promise being given in exchange for the promise or its performance; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.").

[87] *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 27 (6th ed. 2009) ("An offer, with minor exceptions . . . is a promise to do or refrain from doing some specified thing in the future conditioned on the other party's acceptance.").

[88] *Id.* at 28.

[89] *See id.* (noting that the *Second Restatement* removed the word *promise* from the definition of *offer*, but not addressing the issue of whether an offer must propose a bargain).

[90] RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981); *see also* RESTATEMENT OF CONTRACTS § 52 (1932) ("Acceptance of an offer is an expression of assent to the terms

objective standard is used to determine if there has been an acceptance.[91] An offer can only be accepted by a person invited to accept it.[92]

An offeree's power of acceptance is generally terminated by (1) the offeree's rejection or counteroffer;[93] (2) lapse of time;[94] (3) the offeror's revocation of the offer;[95] (4) the offeror's or offeree's death or legal incapacity; [96] or (5) the nonoccurrence of any condition of acceptance under the offer's terms.[97] An exception to this general rule is when an offer is an option contract.[98] In such a case, the offeree's power of acceptance is not terminated by rejection, counteroffer, revocation, or the offeror's death or legal incapacity, but is still terminated by the lapse of time or the offeree's death or legal incapacity.[99]

Unless the offer indicates otherwise, and except for an offer that is an option contract, when the offeror requests a return promise from the offeree as the price for the offeror's promise (a

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thereof made by the offeree in a manner requested or authorized by the offeror."); BLACK'S LAW DICTIONARY 13 (9th ed. 2009) (defining *acceptance* as "[a]n offeree's assent, either by express act or by implication from conduct, to the terms of an offer in a manner authorized or requested by the offeror, so that a binding contract is formed.").

[91] *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 778-79 (Mo. App. 1907) (holding that whether an acceptance was made is determined by an objective standard).

[92] RESTATEMENT (SECOND) OF CONTRACTS § 52 (1981). In a case of a misunderstanding as to who is invited to accept, however, the objective theory of contract applies. *Id.* cmt. b.; *see, e.g.*, Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248, 1250-51 (Pa. Super. Ct. 1989) (holding that a golfer could claim an offered prize for hitting a hole-in-one even though the offer was intended for golfers at a prior tournament, because the golfer had no reason for knowing it was so intended).

[93] RESTATEMENT (SECOND) OF CONTRACTS § 36(1)(a) (1981). The offeree's power to create a contract is not terminated by a rejection if the offeror manifested a contrary intention. *Id.* § 38(1). The offeree's power to create a contract is not terminated by a counteroffer if the offeror manifested a contrary intention or the offeree manifests a contrary intention in the counteroffer. *Id.* § 39(2). If an offeree declines an offer, but "manifests an intention to take it under further advisement," it is not a rejection. *Id.* § 38(2).

[94] *Id.* § 36(1)(b). "An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time." *Id.* § 41(1).

[95] *Id.* § 36(1)(c).

[96] *Id.* § 36(1)(d).

[97] *Id.* § 36(2).

[98] *Id.* § 37. "An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." *Id.* § 25.

[99] *Id.* § 37.

bilateral contract),[100] a contract is formed when the offeree's communication of acceptance is put out of the offeree's possession (the dispatch rule or mailbox rule).[101] The effect of the dispatch rule is to render irrelevant (for formation purposes) the subsequent occurrence of an event that would otherwise have terminated the power of acceptance, or the failure of the acceptance to reach the offeror.[102] With respect to contracts other than for the sale of goods,[103] the offeree's response will not be an acceptance if it is expressly or impliedly conditioned on the offeror's assent to additional or different terms (the mirror-image rule).[104] When the offeror requests a return performance as the price for the promise (an offer of a unilateral contract),[105] a contract is formed upon completion of performance by the offeree.[106] If performance takes time, the offer of a unilateral contract becomes irrevocable upon the offeree starting performance,[107] but the offeree does not have a duty to complete performance.[108]

Although an acceptance must be made "in a manner invited or required by the offer,"[109] "[u]nless otherwise indicated by the language or the circumstances, an offer invites acceptance in any

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[100] *See* RESTATEMENT OF CONTRACTS § 12 (1932) ("A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee.").

[101] RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1981). "[A]n acceptance under an option contract is not operative until received by the offeror." *Id.* § 63(b). The phrase "mailbox rule" is unfortunate because the rule applies to any situation in which the offeree puts the acceptance out of the offeree's possession. *See, e.g.*, *id.* § 63 illus. 1, 11 (referring to the use of a telegram or an employee). Thus, the phrase "dispatch rule" is preferable.

[102] *Id.* § 63 cmts. a-b.

[103] *See* U.C.C. § 2-207 (modifying the mirror-image rule with respect to contracts for the sale of goods).

[104] RESTATEMENT (SECOND) OF CONTRACTS §§ 58, 61. Thus, the offeror is the so-called "master of his offer." *Id.* §§ 29 cmt. a, 58 cmt. a. Under U.C.C. § 2-207(1), a purported acceptance that is impliedly conditioned on the offeror's assent to additional or different terms can still be considered an acceptance, but not if it is expressly conditioned.

[105] *See* RESTATEMENT OF CONTRACTS § 12 (1932) ("A unilateral contract is one in which no promisor receives a promise as consideration for his promise.").

[106] *Id.* § 54; FERRIELL, *supra* note 41, at 253.

[107] RESTATEMENT (SECOND) OF CONTRACTS § 45(1) (1981).

[108] *Id.* § 45 cmt. e.

[109] *Id.* § 50(1).

manner and by any medium reasonable in the circumstances."[110] If the offer is one for a bilateral contract, acceptance must be made by return promise.[111] And if an offer of a bilateral contract prescribes a particular manner of making the return promise, an offeree's response must comply with the prescribed manner to be effective.[112] If the offer is one for a unilateral contract, the acceptance must be made by performance.[113] If it is unclear whether the offer invites an acceptance by performance or a return promise (or a reasonable person would believe the offeror is indifferent), the offeree can accept in either manner.[114]

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[110] *Id.* § 30(2).

[111] *Id.* § 50 cmt. c. It is important to recognize, however, that "[t]he offeree can still accept an offer for a bilateral contract by beginning performance if a reasonable person would believe that the offeree's conduct in performing *constitutes* a promise to perform." ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 48 (2004); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 4 ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."); *id.* § 50 cmt. c ("An act of performance may also operate as a return promise . . . ."). Under the *Second Restatement*, starting performance will not, however, constitute a promise to perform if the offeror is not aware of the performance at any time prior to completed performance. *See id.* § 50 illus. 3 ("*A* sends to *B* plans for a summer cottage to be built on *A*'s land in a *remote wilderness area*, and writes, 'If you will undertake to build a cottage in accordance with the enclosed plans, I will pay you $5,000.' *B* cannot accept by beginning or completing performance, since *A*'s letter calls for acceptance by promise." (italics added)); *id.* § 58 illus. 2 ("*A* offers to pay *B* $100 for plowing Flodden field, and states that acceptance is to be made only by posting a letter before beginning work and before next Monday noon. Before Monday noon *B* completes the requested plowing and mails to *A* a letter stating that the work is complete. There is no contract.") (italics added). This was a change from the rule in the *First Restatement*. *See* RESTATEMENT OF CONTRACTS § 63 (1932) ("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, . . . provided such performance is completed or tendered within the time allowable for accepting by making a promise."); *id.* illus. 1 ("*A* writes to *B*, 'I will pay you $100 for plowing Flodden field, if you will promise me by next Monday to finish the work before the following Saturday.' *B* makes no promise but completes the requested plowing before the following Monday and promptly notifies *A* that he has done the work. There is a unilateral contract.") (italics added).

[112] RESTATEMENT (SECOND) OF CONTRACTS § 60(a) (1981).

[113] *Id.* § 50 cmt. b.

[114] *Id.* § 32. In such a situation, if an offeree chooses to accept by performance, the beginning of performance "operates as a promise to render complete performance." *Id.* § 62(2). Thus, if an offeree starts to perform, a bilateral contract results. MURRAY, *supra* note 85, at 150. In operation, this rule is therefore consistent with the traditional rule that in cases of doubt, an offer is construed as one for a bilateral contract. *See* RESTATEMENT OF CONTRACTS § 31 (1932) ("In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests . . . .").

To be considered a manifestation of assent to the offer, a reasonable person must believe the offeree's communication or act appearing to have been a manifestation of assent was motivated, at least in part, by a desire to accept the offer.[115] "In practice, the principal effect of this requirement is to deny enforcement of the promise if the promisee takes the action sought by the promisor *without knowledge* of the [offer]."[116] But as long as the offer was communicated or delivered to the offeree, and the offeree made the communication or performed the required act necessary to manifest assent, there is generally reason to believe the offeree was motivated at least in part to accept the offer.[117] It is usually only when the offeree has clearly manifested intent to act solely for other purposes (e.g., explicit disclaimer of intent to accept or

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[115] *See* FARNSWORTH, *supra* note 23, at 69 (only part of the offeree's motive must be to accept the offer).

> Under the objective theory of contracts, however, it is conceivable that the offeree may be bound by an acceptance even without knowing of the offer. The appearance of a bargain in some circumstances is sufficient. For example, *A* mails an offer to *B*. Assume that *B* gets the offer, and without opening it and without suspecting that it is an offer, decides to confuse *A* by sending a letter stating, 'I accept.' Here, there would be a contract even though *B* did not know of the offer because *A* as a reasonable person could rely on *B*'s promise. The same principle operates to bind an offeree who signs a record that he knows or should know is an offer without reading it.

PERILLO, *supra* note 87, at 62 (italics added).

The offeror must have at least delivered the offer to the offeree, because "even though the intentional conduct of a party creates an appearance of assent on his part, he is not responsible for that appearance unless he knows or has reason to know that his conduct may cause the other party to understand that he assents." RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. c (1981). An offeree, however, cannot accept an offer of a unilateral contract unless the offeree actually knows of the offer when performing the act or acts necessary to accept. *Id.* §§ 23 cmt. c, 53 cmt. c. The justification for this rule is because it is impossible for an offeror to rely to his or her detriment on an apparent assent to an offer of a unilateral contract inasmuch as the offeree's manifestation of assent is actual performance, not a return promise. *See id.* § 53 cmt. c ("Where no promise by the offeree is contemplated, there is no problem of justifiable reliance by the offeror. . . . The offeree's conduct ordinarily constitutes an acceptance in such cases only if he knows of the offer.").

[116] FARNSWORTH, *supra* note 23, at 67-68.

[117] MURRAY, *supra* note 85, at 145-46; *see also* FARNSWORTH, *supra* note 23, at 69 ("[A] court will ordinarily conclude that if the [offeree] knew of the promise, the [offeree's] purpose was at least in part to take advantage of the offer."); FERRIELL, *supra* note 41, at 198-99 ("Courts usually avoid inquiries into the offeree's motives when the offeree has performed the acts necessary [to accept the offer].").

acting under compulsion) that a reasonable person will not have reason to believe the offeree was so motivated.[118]

C. Consideration (Legally Sufficient Exchange)

If there is an agreement (i.e., a manifestation of mutual assent by the parties, typically through an offer and an acceptance), any promises within that agreement will ordinarily become legally enforceable (i.e., a contract will be formed) if there is consideration.[119] In the past, the term *consideration* had varying meanings, and was sometimes used to identify any basis that would render a promise legally enforceable.[120] But under the *First Restatement*, the term *consideration* was restricted to "the price bargained for and paid for a promise,"[121] and this is essentially the definition adopted by the *Second Restatement* and *Black's Law Dictionary*.[122] This is also the meaning most lawyers likely ascribe to it.[123]

The use of the phrase "bargained for" means that for an agreement to have consideration, it must appear that each party's motive in entering into the agreement was, at least in part, to

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[118] MURRAY, *supra* note 85, at 146. Another example would be when the offeree engaged in an act one would expect the offeree to engage in even if an offer had not been made (e.g., "To accept this offer, simply leave your house tomorrow," or "To accept this offer, say nothing"). Thus, silence is usually not construed as an acceptance, even when the offeror states otherwise. RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

[119] RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981); RESTATEMENT OF CONTRACTS § 19 (1932). To in fact become legally enforceable, both parties must have legal capacity, the terms of the promise must be reasonably certain, and the contract must have a lawful purpose.

[120] *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a (1981) ("The word 'consideration' has often been used with meanings different from that given here. It is often used merely to express the legal conclusion that a promise is enforceable.").

[121] RESTATEMENT OF CONTRACTS § 75 cmt. b (1932). For a detailed discussion of the decision to provide a limited definition of *consideration* in the *First Restatement*, see Daniel J. Klau, Note, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, 70 B.U. L. REV. 511 (1990).

[122] *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981) ("To constitute consideration, a performance or a return promise must be bargained for."); BLACK'S LAW DICTIONARY 347 (9th ed. 2009) (defining *consideration* as "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee . . . .").

[123] *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 206 (2d ed. 1995) (defining *consideration* as "the act, forbearance, or promise by which one party to a contract buys the promise of the other").

obtain the price to be paid by the other party for the former's assent (i.e., the return promise, performance, or forbearance).[124] As stated in the *Second Restatement*, "In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration."[125] This is itself the definition of an exchange: "The act of transferring interests, *each in consideration for the other*."[126] Thus, "a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal." [127] Also, the promisee's performance of a condition on a promise of a gift is not consideration because it is not sought as the price for the promise

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[124] RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. a (1981).

[125] *Id.* § 71 cmt. b.

[126] BLACK'S LAW DICTIONARY 645 (9th ed. 2009) (emphasis added).

[127] *Id.*; *see, e.g.*, Fischer v. Union Trust Co., 101 N.W. 852, 853 (Mich. 1904) (holding there was no consideration when the promisee paid the promisor $1 in exchange for a promise to pay two mortgages totaling $8,000, and the payment of $1 was treated as a joke); Schnell v. Nell, 17 Ind. 29, 32 (1861) (holding there was no consideration for a promise to pay $200 in exchange for one cent because "[t]he consideration [was] . . . merely nominal and intended to be so."). Interestingly, the *First Restatement* included an illustration indicating that a pretense of a bargain was sufficient. *See* RESTATEMENT OF CONTRACTS § 84 illus. 1 (1932) ("*A* wishes to make a binding promise to his son *B* to convey *B* Blackacre, which is worth $5000. Being advised that a gratuitous promise is not binding, *A* writes to *B* an offer to sell Blackacre for $1. *B* accepts. *B*'s promise to pay $1 is sufficient consideration.") (italics added). This has been construed as an attempt "to reduce consideration to form only . . . ." Ricks, *supra* note 11, at 111 n. 56. Professor Braucher, however, could not find any support for the illustration. AMERICAN LAW INSTITUTE, 42nd ANNUAL PROCEEDINGS 251 (1965); *see also* Joseph Siprut, Comment, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration is not Binding, But Should Be*, 97 NW. U. L. REV. 1809, 1817 (2003) ("At the time of the Restatement's publication in 1932, cases existed that appeared to enforce gratuitous promises given for nominal consideration. However, upon closer examination, it becomes clear that the decisions that upheld such contracts were consistently based, at least in part, on factors extraneous both to the Restatement hypothetical and to the hypothetical introducing this Comment. That is, these promises given for nominal consideration, while upheld by courts, were not enforced because of the nominal consideration." (emphasis omitted)). The *Second Restatement* therefore includes an illustration that comes to the opposite conclusion. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 illus. 5 (1981) ("*A* desires to make a binding promise to give $1000 to his son *B*. Being advised that a gratuitous promise is not binding, *A* offers to buy from *B* for $1000 a book worth less than $1. *B* accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for *A*'s promise to pay $1000." (italics added)).

(thus, there is no exchange).[128] A combination of an apparent exchange and an apparent gift motive is, however, sufficient to constitute consideration (even if the gift motive appears to predominate).[129] As is the case with mutual assent, whether there is consideration is determined by an objective standard; "it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement."[130]

The distinction between an offer of a bargain and a promise of a gift subject to a condition is perhaps the most difficult of all consideration issues, requiring a detailed analysis of the surrounding circumstances. The distinction between the two is best illustrated by Williston's famous tramp hypothetical.[131] In the hypothetical, a benevolent man says to a tramp, "[I]f you go around the corner to the clothing shop there, you may purchase an overcoat on my credit."[132] Even though the tramp walking around the corner could be consideration for the benevolent man's promise under certain circumstances, a reasonable person would believe, absent other facts, that the benevolent man was promising a gift that was simply conditioned on the tramp going to the clothing store and selecting an overcoat.[133] In other words, a reasonable person would not believe the benevolent man was proposing an exchange and thus charging a price for his promise. Similarly, there is no consideration when the promisor conditions a promise of a gift on the promisee accepting the gift or promising

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[128] WILLISTON, *supra* note 4, at 232-33.

[129] RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (1981); *see, e.g.*, Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank, 159 N.E. 173, 176 (N.Y. 1927) (Cardozo, C.J.) (enforcing charitable pledge where primary motive appeared to be the making of a gift, but one of the motives appeared to have been to have the fund named after the person making the pledge); Hamer v. Sidway, 27 N.E. 256, 259 (N.Y. 1891) (enforcing an uncle's promise to pay his nephew $5,000 where his primary motive appeared to be to assist his nephew financially, but one of the apparent motives was to have his nephew refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until the nephew was age twenty-one).

[130] RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

[131] The hypothetical is perhaps the most famous in contracts history. *See* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 45, at 593 (providing the "tramp" hypothetical to illustrate Williston's famous hypothetical fact patterns).

[132] WILLISTON, CONTRACTS, *supra* note 4, at 232.

[133] *Id.* at 232-33.

to accept it.[134] Some of the classic cases in contract law expressly or implicitly involve the issue of consideration versus a promise of a gift subject to a condition.[135]

Because there are some exchanges that will not render a promise legally enforceable, the *Second Restatement* adds to the definition of *consideration* the requirement that the return promise or performance given in exchange be legally sufficient.[136] It is important, however, to avoid equating the concept of legal sufficiency with a requirement of equality or adequacy of

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[134] *See* James R. Gordley, Book Review, 89 HARV. L. REV. 465 (1975) (reviewing GRANT GILMORE, THE DEATH OF CONTRACT (1974) and acknowledging that a promise to accept a gift would not be consideration for a promise to give the gift).

[135] For example, in the classic case *Kirksey v. Kirksey*, 8 Ala. 131, 132 (1845), the plaintiff's brother-in-law promised her land to live on if she would "come down and see [him]." The issue was whether the brother-in-law proposed an exchange or made a mere promise of a conditional gift (though the issue was not expressly stated this way by the court). *Id.* To decide this issue, it is necessary to determine whether a reasonable person would believe that the brother-in-law's motive in making the conditional promise was at least in part to induce his sister-in-law to "come down and see [him]." *Id.* In the classic case *Hamer v. Sidway*, 27 N.E. 256, 257 (1891), an uncle promised to pay his nephew $5,000 on his twenty-first birthday if the nephew abstained from drinking (presumably alcohol), using tobacco, swearing, and playing cards or billiards for money. Would a reasonable person believe at least part of the uncle's motive in making the promise was to induce his nephew to abstain from those activities? Or would a reasonable person believe his only motive was to help his nephew out financially? In perhaps the most famous contracts case off all, *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 372 (1927) (Cardozo, C.J.), a woman (Mary Yates Johnston) pledged $5,000 (to be paid thirty days after her death) to a college and wrote on the back of the pledge card, "In loving memory this gift shall be known as the Mary Yates Johnston memorial fund . . . ." Would a reasonable person believe at least part of Johnston's motive in making the pledge was to have the fund named after her even though she would have passed by that time? Or would a reasonable person believe her only motive was to help the college out financially?

[136] *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. d (1981) ("In some cases a promise is not binding for want of consideration, despite the presence of an element of exchange. 'Consideration' has sometimes been used to refer to the element of exchange, without regard to whether it is sufficient to make an informal promise legally binding; the consideration which satisfies the legal requirement has then been called 'sufficient consideration.' As the term 'consideration' is used here, however, it refers to an element of exchange which is legally sufficient, and the word 'sufficient' would therefore be redundant."); *id.* § 71 cmt. a ("Consideration has also been used to refer to the element of exchange without regard to legal consequences. Consistent with that usage has been the use of the phrase 'sufficient consideration' to express the legal conclusion that one requirement for an enforceable bargain is met. Here § 17 states the element of exchange required for a contract enforceable as a bargain as 'a consideration.' Thus, 'consideration' refers to an element of exchange which is sufficient to satisfy the legal requirement; the word 'sufficient' would be redundant and is not used.").

exchange. To have consideration, there is no requirement that the values exchanged be equivalent,[137] and "[o]rdinarily, therefore, courts do not inquire into the adequacy of consideration."[138] Rather, the price paid for the promise will be legally insufficient only when the promisee had a preexisting legal duty ("which is neither doubtful nor the subject of honest dispute") to act or forbear as requested (the legal-duty rule)[139] or the price was love and affection.[140]

Thus, the *Second Restatement* collapses the requirements of an exchange and its legal sufficiency under the requirement of consideration. The Reporter's Note states that "[t]he change is made in the interest of clarity of statement in a situation where usage is ambiguous. The *First Restatement* distinguished between 'sufficiency' of consideration and 'adequacy' of consideration . . . and some readers found the distinction confusing."[141] Accordingly, under the *Second Restatement*, consideration is (1) a "price [in the form of an act, forbearance, or promise] bargained for and paid for

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[137] *Id.* § 79(b).

[138] *Id.* § 79 cmt. c. This is sometimes referred to as the "'peppercorn theory' of consideration," in that even a peppercorn could constitute consideration for a promise if it was bargained for. FARNSWORTH, *supra* note 23, at 70.

[139] RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981). The most important application of this rule is to deny enforcement to a promise to modify a contract given in exchange for the promisee's return promise to perform his or her existing contract duties. *See, e.g.*, Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102 (9th Cir. 1902) (denying enforcement to a promise to pay increased wages to employees who obtained the promise through a threat to breach existing employment contracts by going on strike); *see generally* GILMORE, *supra* note 15, at 22-28 (discussing the legal-duty rule's application to promises to modify a contract). Reversing the common-law rule, a promise to modify a contract for the sale of goods does not need consideration to be binding. U.C.C. § 2-209(1). One of the modern justifications for the legal-duty rule is that it precludes the enforcement of promised contract modifications that might have been extracted through a threat to not perform a contract duty owed to the promisor. RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981). An exception to the legal-duty rule exists for a promise to not assert an invalid legal claim or defense. *Id.* § 74 cmt. a. Even though there is generally considered to be a legal duty to surrender such a claim or defense, because of a policy favoring compromises of disputes, *id.*, a promise to not assert an invalid claim or defense is consideration if "(a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or (b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid." *Id.* § 74(1).

[140] Ricks, *supra* note 11, at 111.

[141] RESTATEMENT (SECOND) OF CONTRACTS § 71, reporter's note (1981).

a promise,"[142] (2) that is legally sufficient (i.e., not a preexisting legal duty or love and affection).[143]

III. THE CONFUSION CAUSED BY CONTRACT LAW'S GENERALLY ACCEPTED DEFINITION OF *OFFER*

Though contract law's generally accepted definition of *offer* makes logical sense if working backward from a contract to the facts needed to create such an obligation, it can create confusion when working forward from a set of facts to determine if a contract was formed. It does so because it limits an offer to a "manifestation of willingness to enter into a bargain."[144] By including a proposal for a bargain within the definition of *offer*, the definition reaches beyond the agreement (mutual assent) requirement of a bargain and incorporates the exchange (consideration, minus the legal sufficiency element) requirement of a bargain. Thus, if one is analyzing whether there exists an offer, an acceptance, and consideration, an important part of the consideration analysis must be done during the offer stage.

The difficulty caused by the definition of *offer* is demonstrated by showing how an analysis of contract formation proceeds with that definition. First, one determines if there is an offer.[145] To determine this, one would have to determine whether a bargain was proposed.[146] This in turn requires one to determine whether an exchange was proposed. If an offer has been made, one will then determine whether the offeree accepted it. If so, one would determine whether there was consideration. This portion of the analysis, however, will be limited to whether what was exchanged was legally sufficient. There will be no need to determine whether the exchange requirement of consideration exists because there could not have been an offer without a proposed exchange (which is a requirement of a bargain). And, if

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[142] RESTATEMENT OF CONTRACTS § 75 cmt. b (1932).

[143] RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. d (1981); *id.* § 71 cmt. a.

[144] *Id.* § 24.

[145] *See* Express Indus. & Terminal Corp. v. N.Y. Dep't of Transp., 715 N.E.2d 1050, 1053 (N.Y. 1999) ("The first step . . . is to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract.").

[146] RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

there was an acceptance, there must have been an exchange (here, it is important to remember that the exchange that satisfies the bargain requirement in a bilateral contract is the mere exchange of promises, and not the subsequent exchange of promised performances[147]). This in turn leads to difficulty differentiating between the elements of acceptance and consideration in the contract formation analysis.

The harm potentially caused by contract law's definition of *offer* is that it might inadvertently cause one to focus exclusively on whether what is being proposed is an exchange when determining if there is an offer. This in turn would cause one to neglect what is usually the most important issue surrounding an apparent offer: whether the offeror made a promise under the objective theory of contract. When courts and parties ask whether an offer was made, they are almost always focusing on whether a reasonable person would construe the alleged offeror as making a promise (conditional on acceptance, of course), not the narrower issue of whether what is being proposed is an exchange.[148] The classic cases on whether an offer was made demonstrate this. The only difference between the cases tends to be the alleged offer's context.

In the first group of classic offer cases, the communication is an advertisement and includes cases such as *Carlill v. Carbolic Smoke Ball Co.*[149] and *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*[150] In *Carlill*, the Carbolic Smoke Ball Co. placed an advertisement in a newspaper stating that £100 would be paid by it "to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used [its smoke ball as directed]."[151] Carlill bought the smoke ball and used

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147 *Id.* § 71(2).

148 In fact, Professor Marvin A. Chirelstein, in his highly regarded book *Concepts and Case Analysis in the Law of Contracts*, has the following as the first sentence in the "offer" section: "When is a communication to be regarded as an 'offer' and when is it to be taken merely as an invitation to engage in bargaining and negotiation?" MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 41 (6th ed. 2010). Professor Chirelstein then devotes the remaining portion of the section to this issue. *Id.* at 41-45.

149 [1893] 1 Q.B. 256 (Ct. App.) (U.K.).

150 86 N.W.2d 689 (Minn. 1957).

151 *Carlill*, 1 Q.B. at 257.

it as directed but still contracted influenza.[152] The issue before the court was whether she was entitled to the £100.[153] The sub-issue surrounding an offer was "whether this [advertisement] was intended to be a promise at all, or whether it was a mere puff which meant nothing,"[154] and whether the advertisement was too vague to be a promise.[155] In *Lefkowitz*, a store advertised for the sale of three fur coats and a stole.[156] When the plaintiff (a man) arrived at the store ready to buy, the store refused to sell because the offer was intended only for women.[157] In defense, the store argued that the advertisement was simply an invitation to deal, and not an offer,[158] and the issue was whether the proposal for sale was "clear, definite, and explicit, and [left] nothing open for negotiation."[159] In neither case was the issue of an offer analyzed in terms of whether it was an offer for an exchange. For example, in *Carlill* the issue of whether the company proposed an exchange was addressed separately in the consideration analysis.[160]

In the second group of classic offer cases, an alleged offer is made during contract negotiations and includes cases such as *Fairmount Glass Works v. Grunden-Martin Woodenware Co.*[161] and *Empro Manufacturing Co. v. Ball-Co Manufacturing, Inc.*[162]

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[152] *Id.*

[153] *Id.*

[154] *Id.* at 261 (Lindley, J.); *see also id.* at 266 (Bowen, J.) ("The defendants contend next, that . . . it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball."); *id.* at 272 (Smith, J.) ("The first point in the case is, whether the defendants' advertisement which appeared in the *Pall Mall Gazette* was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by [defendants' counsel], a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy."). "Puffing" is "[t]he expression of an exaggerated opinion . . . with the intent to sell a good or service." BLACK'S LAW DICTIONARY 1353 (9th ed. 2009).

[155] *Carlill*, 1 Q.B. at 263 (Lindley, J.); *id.* at 265 (Bowen, J.).

[156] 86 N.W.2d at 690.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 691. The court rejected the argument that the offer could only be accepted by a woman because the offer had not indicated that limitation. *Id.* at 692.

[160] *Carlill*, 1 Q.B. at 264-65 (Lindley, J.); *id.* at 270-72 (Bowen, J.); *id.* at 274-75. Obviously, there was no issue about consideration in *Lefkowitz.*

[161] 51 S.W. 196 (Ky. 1899).

[162] 870 F.2d 423 (7th Cir. 1989).

In *Fairmount*, the plaintiff wrote to the defendant asking for the lowest price the defendant could make on the sale of ten carloads of Mason green jars.[163] The defendant responded with a quoted price "for immediate acceptance," and the plaintiff placed an order the next day by telegram.[164] When the defendant failed to deliver, the plaintiff sued for breach, and the primary issue was whether the language of the defendant's letter and the surrounding circumstances indicated a present intent to sell.[165] In *Empro*, a prospective seller and purchaser of business assets began negotiations toward the sale.[166] After negotiations broke down, the prospective buyer sued for breach, arguing that a "letter of intent" signed during negotiations constituted a contract.[167] The issue before the court was whether, under the objective theory of contract, the letter constituted a commitment by the parties.[168]

In the third group of classic offer cases, the offeror asserted that the alleged offer was intended as a joke and includes cases such as *Leonard v. PepsiCo, Inc.*[169] and *Lucy v. Zehmer*.[170] In *Leonard*, the defendant ran a television commercial advertising various merchandise that could be obtained by redeeming or buying "Pepsi Points."[171] At the end of the commercial, a fighter jet was shown with the statement "7,000,000 PEPSI POINTS."[172] The primary issue was whether a reasonable person would have understood the proposal to have been serious.[173] In *Lucy*, the defendant, while in a bar with the plaintiff, wrote on the back of a restaurant check that he and his wife agreed to sell their farm to

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163 *Fairmount*, 51 S.W. at 197.

164 *Id.*

165 *Id.*

166 870 F.2d at 424.

167 *Id.*

168 *Id.* at 424-26. A subcategory of the preliminary negotiations cases is when an offeror manifests an intention to not make an offer (or acceptance) until reducing the agreement to a written document. RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981).

169 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

170 84 S.E.2d 516 (Va. 1954).

171 88 F. Supp. 2d at 117-18. Thus, the case also fits in the advertisement category of classic offer cases.

172 *Id.* at 119.

173 *Id.* at 127. Although the defendant might have had reason to believe some of its target audience might believe the commercial was serious, the defendant likely did not have reason to believe that anyone with the ability to buy 7 million Pepsi Points (for $700,000) would believe the commercial was serious. *Id.* at 129, 132.

the plaintiff for a specified price.[174] The issue was whether a reasonable person would have considered the defendant to have been serious.[175]

These are the classic cases involving whether an offer was made, and the issue surrounding an offer in each was whether there had been a promise under the objective theory of contract, not whether an exchange had been proposed. The danger inherent in contract law's definition of offer is that in cases like these, one might inadvertently neglect this critical issue. In a case in which there clearly is a suggestion of an exchange, one might simply conclude that there is an offer because the communication makes reference to an exchange and ignore any issue of whether a promise was made. More likely, if there is, in fact, an issue regarding whether the proposal is for an exchange, by analyzing a complex exchange issue when determining if there is an offer, one might overlook a lurking promise issue. This could happen when analyzing whether a communication is a proposal for an exchange or a mere promise of a gift with a condition, or whether a return promise or performance was in fact bargained for.[176] Thus, in *Carlill*, one could easily become so involved in analyzing whether Carlill's use of the smoke ball is consideration that one neglects to consider whether the advertisement includes a promise under the objective theory of contract.

Also, most judges and lawyers would not consider cases in which the sole issue is whether the agreement was for an exchange to be one involving whether there was an offer. Rather, most would consider the issue to be the existence of consideration. Thus, contract law's definition of *offer* leads to an analysis that is inconsistent with the way most judges and lawyers believe the analysis should be conducted.

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[174] *Lucy*, 84 S.E.2d at 517-18.

[175] *Id.* at 520-22.

[176] For example, in *Kirksey v. Kirksey*, 8 Ala. 131 (1845), and *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891), the promises were made by a family member, and a traditional example of when an apparent promise will generally not be deemed a commitment under law are agreements between family members. RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. c (1981). A similar risk arises with respect to cases involving nominal consideration. Many of these cases involve agreements between family members, and it would be easy to focus solely on the issue of exchange under contract law's definition of *offer* and neglect the issue of whether a commitment had been made.

IV. A NEW DEFINITION OF *OFFER*

The best way to preserve a place for a consideration analysis that is divorced from the mutual-assent analysis is to remove the "proposal for a bargain" requirement from the definition of *offer*. By doing so, one will not be required to perform part of the exchange analysis at the offer stage and will therefore be less likely to miss the key issue involved with apparent offers—whether a reasonable person would construe the communication as a commitment (subject to the condition of acceptance, of course).

Also, a definition of *offer* that removes "bargain" from it would make it consistent with *Black's Law Dictionary*'s first, general definition of *offer*, a definition that is more consistent with *offer*'s plain meaning. *Black*'s defines *offer* as "[t]he act or an instance of presenting something for acceptance," [177] and this definition is consistent with the first definition of *offer* in standard dictionaries. [178] *Offer*'s plain meaning is simply presenting "something" for acceptance, not necessarily proposing an exchange. A legal definition that is more consistent with a word's plain meaning is preferable because it is less likely to lead to confusion when applying the term.

The idea that an offer in contract law might include something other than a proposal for an exchange was seemingly recognized by Judge Learned Hand in his famous opinion in *James Baird Co. v. Gimbel Bros.*:

> Offers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. In such cases they propose bargains; they presuppose that each promise or performance is an inducement to the other. But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute.[179]

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[177] BLACK'S LAW DICTIONARY 1189 (9th ed. 2009).

[178] *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 861 (11th ed. 2003) (defining *offer* as "a presenting of something for acceptance").

[179] 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.) (internal citations omitted).

Judge Hand's statement that "[o]ffers are *ordinarily* made in exchange for a consideration"[180] and his reference to promises that do not request an exchange[181] suggests he believed one could make an offer under contract law even though it did not propose an exchange.

Removing the "proposal for a bargain" requirement from the definition of *offer* requires, however, that substitute language be included. Consistent with the *First Restatement*'s definition of offer, the word *promise* should be reinserted. In an offer, the "something" that is presented for acceptance is almost always a promise.[182] Reinserting *promise* will focus attention on whether a commitment was expressed, including what the commitment was (which is important for determining if there was a breach by the offeror) and whether a reasonable person would construe it as a commitment. In fact, with contract law's current definition of *offer*, it might be unclear to many where the offeror's promise is to be found in the formation analysis. To currently find it, one must proceed from the definition of *offer* to the definition of *bargain* (which is incorporated into the definition of *offer*).[183] A definition of *offer* that includes "promise" directly within it focuses attention on the fact that an offeror is almost always making a promise, and this is important because contract law is, after all, about broken promises.[184]

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[180] *Id.* (emphasis added).

[181] *Id.*

[182] *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a (1981) ("In the normal case of an offer of an exchange of promises, or in the case of an offer of a promise for an act, the offer itself is a promise . . . .").

[183] Under the current definition, an *offer* is "the manifestation of willingness to enter into a bargain." *Id.* § 24. The promise within the offer is found within the definition of *bargain*, *id.* § 3, a term that is incorporated into the definition of *offer*. *Id.* § 24.

[184] *See id.* at intro. ("The Restatement of this Subject deals in general with the legal relations arising from promises and the remedies available when a promise is broken."); JEFFREY FERRIELL & MICHAEL NAVIN, UNDERSTANDING CONTRACTS 1 (2004) ("Studying the law of contracts involves studying the law of broken promises."). Professor Charles Calleros has expressed concern with including "promise" in the definition of offer because it might lead students to be too quick to conclude the offer becomes irrevocable under the promissory estoppel doctrine. *See* E-mail from Charles Calleros, Professor of Law, Arizona State College of Law, to author (Aug. 22, 2012, 1:48 PM) (on file with author); *see generally* Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958) (enforcing implied promise to keep offer open under promissory estoppel doctrine). The present author believes, however, that this risk can be

Reinserting *promise* directly into the definition of *offer* encounters potential difficulty, however, because some offers do not include a promise.[185] As previously discussed, an example of such a contract is "when the offer takes the form of a tender of money or other property," [186] a so-called reverse unilateral contract.[187] Whether such an offer includes a promise was the subject of dispute between Professors Williston, Corbin, George W. Goble, and Frederick Green in the 1920s.[188] Corbin, Goble, and Green argued that when an offer states that a particular legal relation will automatically be created, modified, or destroyed upon the offeree's acceptance there is no promise by the offeror.[189] Williston disagreed, arguing that the offer includes a promise that a particular event will occur (transfer of ownership, for example), the promise being in the nature of a warranty.[190]

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minimized by emphasizing to students that promissory estoppel applies only when injustice would result if the promise is not enforced. RESTATEMENT (SECOND) OF CONTRACTS §§ 87(2), 90 (1981).

[185] *See* RESTATEMENT (SECOND) OF CONTRACTS § 55 cmt. a ("It is possible to offer a performance without making any promise.").

[186] *Id.* cmt. b.

[187] *Id.* cmt. a.

[188] *See* Corbin, *Review of Williston*, *supra* note 2; Arthur L. Corbin, *The Offer of an Act for a Promise*, 29 YALE L.J. 767 (1920) [hereinafter Corbin, *Offer of an Act*]; George W. Goble, *Is an Offer a Promise?*, 22 ILL. L. REV. 567 (1928); Samuel Williston, *Is an Offer a Promise?*, 22 ILL. L. REV. 788 (1928) [hereinafter Williston, *Offer a Promise?*]; Frederick Green, *Is an Offer Always a Promise; Is Not Consideration Always an Act or Forbearance; Is a Promise Always a Promise of Something to Happen; Is a Promise Ever a Promise to be Answerable?*, 23 ILL. L. REV. 95 (1928) [hereinafter Green, *Offer Always a Promise?*]; Samuel Williston, *An Offer is a Promise*, 23 ILL. L. REV. 100 (1928) [hereinafter Williston, *Offer is a Promise*]; Frederick Green, *Is an Offer Always a Promise?*, 23 ILL. L. REV. 301 (1928) [hereinafter Green, *Is an Offer Always a Promise? II*]. The articles were reprinted in a volume prepared by the American Association of Law Schools, *see* SELECTED READINGS ON THE LAW OF CONTRACTS 199-220, 1246-50 (Am. Ass'n Law Schools 1931), a volume that has been called "the single most important collection of essays ever published on the law of contract." Peter Benson, *Introduction* to THE THEORY OF CONTRACT LAW: NEW ESSAYS 1, 2 n.3 (Peter Benson ed., 2001).

[189] *See* Goble, *supra* note 188; Green, *Offer Always a Promise?*, *supra* note 188; Green, *Is an Offer Always a Promise? II*, *supra* note 188; Corbin, *Offer of an Act*, *supra* note 188; Corbin, *Review of Williston*, *supra* note 2.

[190] *See* Williston, *Offer a Promise?*, *supra* note 188, at 789; Williston, *Offer is a Promise*, *supra* note 188.

The dispute was sparked by Williston's 1920 treatise and his draft of section 24 of the *First Restatement*,[191] both of which defined *offer* as including a promise.[192] Williston's position prevailed in section 24 of the *First Restatement*,[193] and he included a special note explaining his position.[194] He argued that "[e]ven in cases which seem at first sight to involve no promise by the offeror, analysis will disclose that such a promise exists . . . ."[195] With respect to an offer to have ownership of goods transferred upon acceptance, he stated as follows:

> [T]hough the owner need do nothing in fulfillment of his offer, and though it is self-operative if accepted, it nevertheless involves a promise on the part of the offeror that the offeree shall become owner of the chattel if he accepts during the continuance of the offer. This is shown by the fact that the offeror would be liable to the acceptor if he had no title to the chattel and therefore the offeree acquired none by his acceptance. . . . Though the offeror is to do nothing, he does undertake or promise that something shall come to pass on the performance of the condition stated in the offer.[196]

Williston's argument, however, did not fit with an offer to transfer title only to the extent the owner had the power to transfer title.[197] Here, there would be no guarantee that title would pass, and it is hard to find a promise.[198] Thus, the *Second Restatement*, following the lead of an article written by Goble on

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[191] *See* Goble, *supra* note 188, at 568 (referring to the draft of section 24 of the *First Restatement*); Corbin, *Review of Williston*, *supra* note 2 (critiquing Williston's treatise).

[192] *See* Goble, *supra* note 188, at 568 (quoting the draft of section 24); WILLISTON, CONTRACTS, *supra* note 4, at 30 (stating that an offer "must always be promissory in terms.").

[193] *See* RESTATEMENT OF CONTRACTS § 24 (1932) ("An offer is a promise . . . .").

[194] *Id.*

[195] *Id*. Williston defined *promise* broadly as simply an undertaking that something will happen in the future. *See* Goble, *supra* note 188, at 568 (quoting the draft of section 24); WILLISTON, CONTRACTS, *supra* note 4, at 31 ("A promise from the very meaning of the word involves an undertaking to do something in the future.").

[196] RESTATEMENT OF CONTRACTS § 24, special note (1932).

[197] *See* Green, *Is an Offer Always a Promise?*, *supra* note 188, at 95 ("[I]f I say 'Promise me five dollars before I retract my offer, and I am willing that any interest I have in this horse shall pass to you, provided that my expressed willingness and your promise are sufficient in law to accomplish that result, as to which I know and undertake nothing,' it seems to me that there is an offer without a promise.").

[198] *See id.*

the topic in 1953,[199] properly took the position that there can be an offer without a promise and labeled the resulting contract a "reverse unilateral contract."[200]

However, for purposes of a definition of *offer* that is designed to make formation analysis simpler, this unusual situation should be ignored.[201] The price for exactness would be either the removal of promise from the definition of *offer* (the *Second Restatement* approach) and reinsertion of "bargain," which would likely cause greater harm by hiding the fact that almost all offers are promises and conflating the mutual assent and consideration analyses, or a longer and more complicated definition that would make it less user friendly.

The requirement that an offer be communicated or delivered to the offeree[202] should also be placed in the definition of *offer*. If the plain meaning of *offer* is "presenting something for acceptance," [203] it makes sense to include communication or delivery of the offer to the offeree in the definition of *offer* so that this matter will be addressed during the offer analysis.

Thus, contract law should use the following definition of *offer* to determine if the elements of an informal contract have been established: An offer is (1) a promise or set of promises, (2) conditioned on acceptance by the offeree, (3) that is communicated or delivered to the offeree. This definition avoids the overlap between mutual assent and consideration caused by the current definition of *offer*, emphasizes that most offers are promises, and incorporates the requirement of communication or delivery to the offeree.

Most importantly, under this definition an offer would include any promise that is subject to acceptance by the promisee,

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[199] George W. Goble, *The Non-Promissory Offer*, 48 NW. U. L. REV. 590 (1953). The Reporter's Note to section 55 of the *Second Restatement* cites to Goble's 1953 article as support for the section. *See* RESTATEMENT (SECOND) OF CONTRACTS § 55, reporter's note (1981).

[200] RESTATEMENT (SECOND) OF CONTRACTS § 55 (1981); *id.* cmt. a.

[201] But perhaps they are making a comeback. Shrink-wrap licensing agreements have been described as reverse unilateral contracts by some commentators. Apik Minassian, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569, 570 (1997).

[202] *See* FARNSWORTH, *supra* note 23, at 68.

[203] BLACK'S LAW DICTIONARY 1189 (9th ed. 2009); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 861 (11th ed. 2003).

not simply an offer of an exchange. Therefore, if *A* promises *B* to pay for *B*'s lunch if *B* consents, that would be an offer because it is a promise to *B* conditioned on *B*'s acceptance (*A* is committing to pay for *B*'s lunch, but only if *B* manifests assent—e.g., "That would be great."). Similarly, if *A* promises to *B* to give *B* the use of a parcel of *A*'s land if *B* moves onto it (*Kirksey v. Kirksey*[204]), that would be an offer because it is a promise to *B* conditioned on *B*'s acceptance (moving onto the land). But these offers are not necessarily offers for an exchange. Whether they are will be determined when analyzing the third element of an informal contract (consideration), which is where most judges and lawyers would expect the issue to be addressed. If, however, *A* promises *B* $2000, but does not require any form of acceptance by *B* (i.e., *B* is not required to do or not do anything to receive the $2000),[205] it is not an offer. Hence, it would not be enforceable under the bargain theory because an element of such a claim would not be established.

V. RESPONDING TO POTENTIAL OBJECTIONS TO THE NEW DEFINITION OF *OFFER*

There are at least three possible objections to this Article's proposed definition of *offer*. The first will be called the "Hohfeldian objection;" the second the "indivisible trinity objection;" and the third the "'no offer and acceptance necessary' objection." Each is addressed below.

A. The Hohfeldian Objection

A likely objection to this Article's proposed definition of *offer* is that it is inconsistent with the Hohfeldian idea included in the *First Restatement*, which provided that an offer gives the offeree a power to create a contract.[206] An offer can only provide the offeree with a power to conclude a contract if the offer proposed an exchange. By removing the requirement of a proposed bargain

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[204] 8 Ala. 131 (1845).

[205] *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365, 367 (Neb. 1898) (a grandfather promised his granddaughter $2,000 so she would not have to work, but he did not condition his promise on her quitting employment).

[206] *See* RESTATEMENT OF CONTRACTS § 34 (1932) ("An offer until terminated gives to the offeree a continuing power to create a contract by acceptance of the offer.").

from the definition of *offer*, an offer would not necessarily provide the offeree with a power to create a contract. Rather, it might simply give the offeree the ability to create an agreement.

The *Second Restatement*, however, abandoned the notion that the power given to an offeree by an offer is necessarily the power to create a contract. Rather, under the *Second Restatement* "[a]n offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer."[207] The comment acknowledges that exercising the power of acceptance does not satisfy all of the elements of a contract because consideration might be lacking.[208] For example, even under the generally accepted definition of *offer* (which includes a proposal for a bargain),[209] the offer will not create a power to form a contract if the proposed exchange did not include consideration under the legal-duty rule.[210]

The *Second Restatement*'s revision shows that the modern trend is away from the position that an offer alone gives the offeree a power to create a contract, a position that is consistent with even the generally accepted definition of *offer*. Although an offer might, under certain circumstances, give the offeree a power to form a contract, some offers will do no more than give the offeree the privilege to create an agreement.[211]

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[207] RESTATEMENT (SECOND) OF CONTRACTS § 35(1) (1981).

[208] *Id.* § 35 cmt. c.

[209] *Id.* § 24.

[210] *Id.* § 73.

[211] *See id.* § 35(1) ("power to complete the manifestation of mutual assent"). The *Second Restatement*'s retention of the term *power* is puzzling because power, in the Hohfeldian sense, means the ability to change a legal relation, *see* Hohfeld, *supra* note 37, at 44, and a power to complete the manifestation of mutual assent does not necessarily result in a change to a legal relation (for example, consideration might be lacking). The drafters might not have been using *power* in the Hohfeldian sense, but the retention of that term (particularly when it was used in former section 34 in the Hohfeldian sense) is peculiar and confusing. When the duration of the offeree's "power" of acceptance was discussed at the 41st annual American Law Institute Proceeding in 1964, Professor Braucher stated, "I think probably there is less change [from the *First Restatement*] in this group than in most of what we have done," and with respect to what is now Section 35 simply stated, "[It] states the general principle which was stated in the old 34 and in part of the old 35." AMERICAN LAW INSTITUTE, 41ST ANNUAL PROCEEDINGS 328 (1964). There was no reference to or discussion about whether the term *power* should be retained. If an offer does not necessarily provide the offeree with a power to form a contract, the most that can be said is that the offeree has a privilege to complete the manifestation of mutual assent. Under Hohfeld's terminology, *privilege*

Also, in Hohfeld's discussion of an offer, the reason why his example gave the offeree a power to create a contract was because the offer did, in fact, propose an exchange with legally sufficient consideration.[212] He was simply using this as an example of a situation in which a power arose. Hohfeld, who was not a contracts scholar, was not seeking to define an offer for purposes of analyzing contract formation. Rather, he was merely explaining the legal relations that result from certain facts (such as an offer for an exchange with legally sufficient consideration). It therefore makes little sense to base a definition of *offer* (designed for use in determining contract formation) on Hohfeld's illustration when Hohfeld was simply illustrating a particular situation in which a power would, in fact, arise. Williston, who generally accepted Hohfeld's terminology,[213] acknowledged that the terminology was of limited use in working forward from a set of facts:

> [T]he analysis involved in the application of Hohfeld's terminology generally required an assumption, rather than a discovery, of the proper decision in a given state of facts. Only after it was determined that the plaintiff could or could not recover under a variety of situations, could appropriate names for the legal relations become available. The recognition of these limitations has made exercises in distributing the legal relations of litigants into Hohfeld's classes of diminishing importance in legal education.[214]

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has the same meaning as *liberty*, Hohfeld, *supra* note 37, at 42; LLEWELLYN, *supra* note 56, at 90, and is "the legal freedom to do or not to do a given act." BLACK'S LAW DICTIONARY 1316 (9th ed. 2009); *see generally* Hohfeld, *supra* note 37, at 32 (discussing privilege). An offer gives the offeree the legal freedom to create an agreement. Because, however, an agreement is not per se legally enforceable, it is incorrect to refer to the offeree as having a "power" to create an agreement. *But see* LLEWELLYN, *supra* note 56, at 93 ("[W]hen I make you an offer I create in you a *power to accept*, and the whole negotiation between us gains clarity if we think of it in terms of what you now, by your sole act *independent of me*, are able to accomplish in changing our relation with each other."). An example of a true power in contract law is a party's power to void a contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981) ("A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to *avoid the legal relations* created by the contract . . . ." (emphasis added)).

[212] Hohfeld, *supra* note 37, at 49. There is no suggestion that either party was under a preexisting legal duty to perform as promised. *See id.*

[213] Corbin, *Foreword*, *supra* note 52, at xii.

[214] WILLISTON, LIFE AND LAW, *supra* note 53, at 208.

Williston's and Corbin's desire to align the definition of *offer* with Hohfeld's illustration had the unfortunate effect, however, of derailing the step-by-step analysis of contract formation to be performed through offer, acceptance, and consideration. Its abandonment should therefore cause little concern.

B. The Indivisible-Trinity Objection

A second likely objection to this Article's definition of *offer* is that it is impossible to completely separate the ideas of offer, acceptance, and consideration because they "are an indivisible trinity, facets of one identical notion which is that of bargain."[215] The promise within the offer supplies the consideration for the offeree's return promise or performance, and the offeree's return promise or performance within the acceptance supplies the consideration for the offeror's promise. Also, if consideration is about an exchange, consideration subsumes offer and acceptance because an exchange requires mutual assent. Thus, any attempt to disentangle mutual assent from consideration is futile (so the argument goes).

This objection, however, fails to appreciate that identifying the basic elements of an informal contract is designed to aid in determining whether such a contract has been formed. Defining those elements should therefore serve that purpose. This Article's proposed definition of *offer* in no way alters the established requirements of an informal contract and does not conflict with the notion that offer, acceptance, and consideration are an indivisible trinity. Rather, acknowledging that they are an indivisible trinity, and recognizing that this can make contract-formation analysis difficult, it seeks to provide workable definitions that will avoid this difficulty.

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[215] C.J. Hanson, *The Reform of Consideration*, 54 L.Q. REV. 233, 234 (1938). For a recent argument to this effect, *see* Val D. Ricks, *Assent Is Not an Element of Contract Formation*, 61 U. KAN. L. REV. (forthcoming 2013). The present author has little if any disagreement with Professor Rick's outstanding analysis. Our point of disagreement is about the best solution to the problem of the overlap between the assent and consideration requirements. The present author regrets that he was not aware of Professor Rick's forthcoming article sooner, so that more attention could have been devoted to it in this Article. This portion of the Article does, however, address in brief some of the arguments made by Professor Ricks.

Whereas the indivisible trinity argument seeks to eliminate assent and consideration as separate elements because of the overlap, the present approach seeks to redefine the elements to minimize the overlap. Although under the present approach the consideration element is a qualification of a prior requirement (it serves to identify the type of agreement that has been reached), and is thus perhaps not truly an element (in the sense of not having any overlap with other requirements), the goal is improving analysis. When such is the goal, the process of analysis should not be driven by matters of what is, or is not, truly an "element." If it is helpful to have an analysis that starts broad (was there an agreement?) and then narrows (was the agreement for an exchange?), it should be used. Also, the present approach is preferable to subsuming assent analysis into consideration analysis because the idea that they are separate requirements is so ingrained in judges that a solution that retains them as separate requirements is more likely to be favorably received than one that does not.

C. The "No Offer and Acceptance Necessary" Objection

A third likely objection to this Article's proposed definition of *offer* is that no definition of *offer* (old or new) is needed because "[a] manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined."[216] But this ignores the usual practice of parties, which is to form a contract through an offer and an acceptance.[217] In fact, the *First Restatement* noted that "[t]he manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties."[218] Thus, a definition of *offer* is needed for most cases involving an analysis of contract formation.

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[216] RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (1981); *see also* U.C.C. § 2-204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement . . . ."); *id.* § 2-204(2) ("An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.").

[217] RESTATEMENT (SECOND) OF CONTRACTS § 22 cmt. a (1981).

[218] RESTATEMENT OF CONTRACTS § 22 (1932).

VI. APPLYING THE NEW DEFINITION OF *OFFER*

Under this Article's proposed definition of *offer*, the first step in analyzing if a contract has been formed is to determine whether an offer was made. At this stage, one must determine whether: (1) a reasonable person would construe the alleged offeror as having made a promise (i.e., a commitment) (unless the offeror has proposed a reverse unilateral contract, which is rare), (2) the promise is conditioned on acceptance (i.e., the promise is conditioned upon the promisee acting or forbearing, as opposed to the promise simply being a promise with no conditions or a condition beyond the promisee's control), and (3) the promise was communicated or delivered to the promisee. If each of these elements exists, there is an offer; otherwise, there is no offer. Importantly, as long as each element exists, there is an offer even if there was not a proposal for an exchange. If there was an offer, the offeree is given the privilege to form an agreement, but not necessarily the power to form a contract.

If there was an offer, the second step is to determine whether the offeree accepted it. At this stage, one must determine whether: (1) a reasonable person would believe the offer was intended for the offeree,[219] (2) a reasonable person would construe the offeree's response as indicating an intent to accept,[220] (3) the purported acceptance mirrored the offer,[221] (4) the offeree accepted in a manner invited or required by the offer,[222] and (5) the offeree still had the privilege to form an agreement at the time of the purported acceptance.[223] If there was an acceptance, the parties

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[219] *See* RESTATEMENT (SECOND) OF CONTRACTS § 52 (1981) ("An offer can be accepted only by a person whom it invites to furnish the consideration.").

[220] *See id.* § 50 (providing that an acceptance requires a "manifestation of assent"). This element is to an extent intertwined with the consideration element, but there could be an acceptance without the offeree manifesting an intention to obtain the offeror's promise. An example would be when an offeror proposes that the offeree promise the offeror a gift subject to a condition (e.g., "If you promise to let me borrow your coat tomorrow, I promise to return it to you at the end of the day"). The offeree's acceptance would not be consideration.

[221] *See id.* (providing that the manifestation of assent must be to the terms of the offer).

[222] *See id.* (providing that an acceptance must be made "in a manner invited or required by the offer").

[223] *See id.* § 36 (setting forth the events that will terminate the offeree's "power of acceptance").

manifested mutual assent and there is an agreement.[224] Unlike contract law's current definition of *offer*,[225] there would not necessarily be a bargain simply because there was a manifestation of mutual assent. There could, for example, be a manifestation of mutual assent to a promise of a gift.

If there is an agreement (i.e., a manifestation of mutual assent), the third step is to determine whether there was consideration. This requires that the agreement be for an exchange that is legally sufficient. It would thus have to be demonstrated that a reasonable person would believe that: (1) one of the conditions of acceptance by the offeree was providing a return promise, act, or forbearance, and that at least part of the offeror's motive in making the promise in the offer was to obtain such return promise, act, or forbearance, (2) at least part of the offeree's motive in accepting was to obtain the offeror's promise,[226] and (3) the exchange did not involve a preexisting legal duty or love and affection.[227]

If an offer, an acceptance, and consideration each exist, an informal contract is formed as long as both parties have legal capacity, the terms are reasonably certain, and the bargain is not

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[224] *See id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons."). It is tempting to say that, at this point, the offeror's promise (assuming it was not an offer of a reverse unilateral contract) is no longer conditional, but this would not be true if the offer was for a bilateral contract with the offeree's promise to be performed first. In such a case, the offeror's promise is impliedly conditioned on the offeree substantially performing the return promise first. *See id.* § 237 ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at any earlier time."); *see generally* Kingston v. Preston, [1773] 2 Dougl. 689 (K.B.) (holding that a constructive condition of a party's duty to perform is the performance by the other party of any duties due at an earlier time). The offeror's promise might also be expressly conditioned on events in addition to acceptance. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 9, topic 5, intro. note (1981) ("An obligor will often qualify his duty by providing that performance will not become due unless a stated event, which is not certain to occur, does occur.").

[225] *See* RESTATEMENT (SECOND) OF CONTRACTS § 35 cmt. c (1981) ("Exercise of the power of acceptance concludes an agreement and a bargain . . . .").

[226] *See id.* § 17(1) (requirement of a bargained-for exchange); *id.* § 71(1) ("To constitute consideration, a performance or a return promise must be bargained for."); *id.* § 71(2) ("A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise . . . ."); *id.* § 81(1) ("The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.").

[227] *Id.* § 73.

against public policy.[228] If an offer, an acceptance, or consideration is lacking, the promise will only be enforceable if a "bargain substitute"[229] exists, such as reliance (promissory estoppel),[230] unjust enrichment (promissory restitution),[231] a charitable pledge,[232] or a sealed instrument.[233] Of course, the unique elements of any such alternative basis must be established to render the promise enforceable.

The classic case of *Allegheny College v. National Chautauqua County Bank*[234] can be used to illustrate how the formation analysis would proceed with the new definition of *offer*. In the case, Mary Yates Johnston pledged $5000 to a college, the amount to become due thirty days after her death.[235] On the back of her pledge card, she wrote: "In loving memory this gift shall be known as the Mary Yates Johnston memorial fund . . . ."[236] She paid $1000 before her death, and the college set the money aside to be held as a scholarship fund.[237] Later, Johnston repudiated her promise, and after she died, the college sued to recover the unpaid

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[228] RESTATEMENT OF CONTRACTS § 19 (1932); WILLISTON, CONTRACTS, *supra* note 4, at 17; Kortum-Managhan v. Herbergers NBGL, 204 P.3d 693, 697 (Mont. 2009); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (requiring reasonably certain terms for formation of contract).

[229] Courts sometimes use the phrase "consideration substitute." *See, e.g.*, Lord v. Souder, 748 A.2d 393, 400 (Del. 2000) (referring to promissory estoppel as a "consideration substitute"). The phrase "bargain substitute" is preferable because it avoids the suggestion that a manifestation of mutual assent is necessary to enforce a promise on bases other than being given as part of a bargain. For example, promissory estoppel does not require a manifestation of mutual assent unless the promise so provides. RESTATEMENT (SECOND) OF CONTRACTS, ch. 4, topic 2, intro. note (1981).

[230] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

[231] *Id.* § 86. This is a minority rule. *See* Leacock, *supra* note 17, at 3 (recognizing that promissory restitution is a minority rule).

[232] RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981). This is a minority rule. *See* FERRIELL, *supra* note 41, at 85 ("[O]nly a few courts have adopted this view, which is probably more of an expression of how the drafters of the Restatement hoped the law would develop than a true 'restatement' of cases that had already been decided.") (footnote omitted).

[233] RESTATEMENT (SECOND) OF CONTRACTS § 95(1) (1981). This is a minority rule. *See* DAWSON, *supra* note 7, at 187 ("Today, more than half of the American states have legislation, cast in general terms, depriving the seal of all legal effect (i.e., abolishing any distinction between sealed and unsealed contracts).").

[234] 159 N.E. 173 (N.Y. 1927) (Cardozo, C.J.).

[235] *Id.* at 174.

[236] *Id.*

[237] *Id.*

balance.[238] The issue was whether the promise was enforceable, which in turn was based on whether it was given as part of a bargain.

To decide this, the first sub-issue would be whether Johnston made an offer. Applying the new definition (and ignoring reverse unilateral contracts because Johnston made a promise), an offer is (1) a promise or set of promises, (2) conditioned on acceptance by the offeree, (3) that is communicated or delivered to the offeree. Because Johnston clearly made a promise that was communicated to the college, the only issue regarding whether there was an offer could be whether a reasonable person would construe her promise as being conditioned on acceptance.

Plausible arguments can be made either way. For example, Chief Judge Benjamin N. Cardozo,[239] writing for the majority, believed that Johnston "imposed [upon the college] a condition that the 'gift' should 'be known as the Mary Yates Johnston Memorial Fund.'"[240] If this was so, there would be an offer under the new definition because the promise was conditioned on an act by the college. Judge Kellogg, however, who dissented, believed that "Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known."[241] To him "the words used merely expressed an expectation of wish on the part of the donor . . . ."[242] If this was so, there would be no offer because the promise was not conditioned on an act by the college.

If there was an offer, the second sub-issue would be whether the college accepted Johnston's offer. To determine this, one must decide whether: (1) a reasonable person would believe the offer was intended for the college, (2) a reasonable person would construe the college's response as assenting,, (3) the purported acceptance mirrored the offer, (4) the college accepted in a manner

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[238] *Id.*

[239] Cardozo served on the New York Court of Appeals from 1914 to 1932 and on the U.S. Supreme Court from 1932 to 1938. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 45, at 95-96. "Cardozo was by common consent the outstanding state court judge during his time of service, with a reputation second only to that of Oliver Wendell Holmes." *Id.* at 95.

[240] *Alleghany Coll.*, 159 N.E. at 175.

[241] *Id.* at 177 (Kellogg, J., dissenting).

[242] *Id.*

invited or required by Johnston, and (5) no event occurred prior to the college's attempted acceptance that terminated its privilege to complete an agreement.

Johnston clearly intended the offer for the college, and, if there was an acceptance, it mirrored the offer (i.e., the college did not add or change any terms). The first question would therefore be whether a reasonable person would construe the college setting the $1000 aside as assenting. Cardozo believed there was a manifestation of assent, stating that "[m]ore is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use."[243] Rather, according to Cardozo, it was an implied promise to name the fund after her,[244] which would be a manifestation of assent. Conversely, one could argue that setting aside the funds was an ambiguous act that did not suggest acceptance of the offer.

If a reasonable person would construe the college as assenting to the offer, the final questions would be whether Johnston prescribed a particular manner of acceptance and whether Johnston's death terminated the college's privilege to complete an agreement prior to its manifestation of assent. Here, it is important to ask whether a reasonable person would construe Johnston's offer as requiring acceptance by performance (a unilateral contract) or by return promise (a bilateral contract). Cardozo, writing for the majority, construed Johnston's offer as seeking a return promise to name the fund after her.[245] Kellogg construed the offer as seeking a return performance (actually naming the fund after her).[246] If Cardozo was correct, the college manifested assent before the event that terminated its privilege to complete an agreement (Johnston's death). If Kellogg was correct, the college did not manifest assent before the event that

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[243] *Id.* at 175 (Cardozo, C.J.).

[244] *Id.* at 175-76.

[245] *Id.* at 175 ("The moment that the college accepted $1,000 as a payment on account, there was an assumption of a duty . . . .").

[246] *Id.* at 177 (Kellogg, J., dissenting) ("[I]f an offer indeed was present, then clearly it was an offer to enter into a unilateral contract. The offeror was to be bound provided the offeree performed such acts as might be necessary to make the gift offered become known under the proposed name. . . . In other words, she proposed to exchange her offer for a donation in return for acts performed.").

terminated its privilege to complete an agreement (because, when she died, it had not yet named the fund after her).

If there was an acceptance, the third sub-issue would be whether there was consideration. This would depend on: (1) whether a reasonable person would believe Johnston's promise was conditioned on an act, forbearance, or return promise from the college (naming the fund after her), and, if so, whether a reasonable person would believe Johnston's motive in making the charitable pledge was at least in part to obtain such act, forbearance, or return promise, (2) whether at least part of the college's motive in accepting the offer was to obtain Johnston's promise, and (3) whether the exchange was legally sufficient. If the first element is established, the second and third elements will be as well, and thus the issue of consideration depends solely on the first element.

If the consideration analysis is reached, it is because one believes Johnston's promise was an offer inasmuch as it was conditional on the college naming the fund after her. Thus, the consideration issue depends on whether a reasonable person would believe Johnston had the requisite exchange motive.

Here, Cardozo believed that part of Johnston's motive was, in fact, to have a memorial to perpetuate her name.[247] He distinguished the facts from a situation in which there is a mere promise of a gift with a condition by pointing out that Johnston would benefit from the occurrence of the condition.[248] Conversely, one could argue that a reasonable person would believe that even if Johnston's promise was made on the condition that the fund be named after her, her sole motive was to make a gift, and this is supported by her reference to it as a gift.[249] Also, the benefit to Johnston from the college's act (naming a fund after her after she dies) is so small it could be argued a reasonable person would believe she was in no way motivated by this. A reasonable person might believe that Johnston assumed a charitable pledge could always be named after the donor, so she simply added that as a condition after making the decision to make the pledge. What is important, however, is that under the new definition of *offer*, these

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[247] *Id.* at 175-76 (Cardozo, C.J.).

[248] *Id.* at 176.

[249] *See id.* at 174 ("[T]his gift shall be known as . . . .").

types of arguments will be made in the consideration analysis, not the offer analysis.

CONCLUSION

Once the policy choice of what facts will result in the creation of a *contract* is made, categorizing those facts into separate elements has no purpose other than achieving clarity of analysis. A listing and description of such elements must therefore always be directed toward such purpose. And if they can be improved upon, they should. Hopefully, by proposing a new definition of *offer*, this Article has taken a step in that direction.