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Unilateral Contracts: An Examination of Traditional Concepts and the Proposed Solution of the ALI Restatement of Contracts, Second (Tentative Draft No. 1)

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COMMENT

UNILATERAL CONTRACTS: AN EXAMINATION OF TRADITIONAL CONCEPTS AND THE PROPOSED SOLUTION OF THE ALI RESTATEMENT OF CONTRACTS, SECOND (TENTATIVE DRAFT NO. 1)

A basic function of any legal system is to provide a set of rules to govern the consequences of conduct in society. Some degree of inflexibility must necessarily attach to the application of those rules, not only to assure equal justice, but also to explicitly define what conduct is legally permissible. Although it is desirable that the legal consequences of conduct be reasonably certain, a rigid application of rules occasionally leads to clear injustice. To avoid these hardships, courts have resorted to certain fictionalizations in order to circumvent undesirable consequences. An alternative approach is to build an element of equitable flexibility into the rules themselves.[1] This comment will attempt to illustrate these observations by examining the law pertaining to unilateral contracts.

The Restatement of Contracts provides that a "unilateral contract is one in which no promisor receives a promise as consideration for his promise."[2] What the promisor expects to receive as consideration for his promise is the doing of an act by the promisee. Theoretically, the offer is not accepted until the act is completed, and the offeror may therefore revoke his offer at any time prior to acceptance. This view was presented in 1916 by I. Maurice Wormser in *The True Conception of Unilateral Contracts*.[3] Mr. Wormser recognized that his conception of unilateral contracts could frequently work a hardship on the offeree who had begun performance at the time of revocation, but justified this hardship on the basis that since the offeree is not bound to complete performance, neither should the offeror be bound until performance is

1. Traditionally, equitable remedies have been administered on a flexible and discretionary basis. The law has been slow to adopt equitable precepts, however, and has done so only occasionally. One example of this limited adoption is section 2-302 of the Uniform Commercial Code, where the equitable doctrine of "unconscionability" is absorbed into the law of sales contracts. In Comment 1, the drafters state: "This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract." Thus, the Code drafters specifically prefer an equitable solution to a manipulation of legal rules.

2. RESTATEMENT, CONTRACTS § 12 (1932).

3. Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916).

completed.[4] He further emphasized that neither party is forced to enter a unilateral contract, but once they freely adopt that form of agreement they should be bound by its consequences.[5] Of course, an offeree who confers a benefit upon the offeror as a result of his past performance may recover the value of that benefit in quasi-contract, but, frequently, a detriment is incurred by the offeree without any concomitant benefit to the offeror.

To a certain degree the case law supports the view taken by Wormser. An extreme example is the case of *Wallace v. Northern Ohio Traction & Light Co.*[6] where plaintiffs sued defendants for damages alleged to be caused by a withdrawal of a pension plan by defendants. The plaintiff's action was based on a contractual obligation owed by the defendant company. Under the terms of the pension plan, the employees had to put in twenty years of service and reach 65 years of age. The court construed the pension plan as an offer looking toward an act (*i.e.*, faithful service to the company for twenty years and until the employee reached 65) and that the offer could be revoked at any time before acceptance in its terms.[7] The court recognized that their decision imposed a severe hardship upon the plaintiffs, but stated that "[t]o hold otherwise is to become involved in a discussion of purely ethical questions with no pertinent rule of law or related principle in equity to form a standard for our conclusion."[8] This conclusion of the court is open to criticism. It is a firmly established principle of equity that one party should not benefit unjustly at the expense of another. A pension plan is really a form of deferred compensation, and it may be argued that defendants had received services for which a portion of the compensation remained to be paid. At any rate, the *Wallace* decision clearly indicates the unfair result that a rigid application of legal rules may engender. It is safe to predict that the pension plan was an inducement in the plaintiffs remaining in the defendant's employ and that the plaintiffs undoubtedly relied upon the pension plan as a major source of support in their old age.[9]

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4. *Id.* at 138. In referring to the classic example where the offeror revokes an offer to walk across the Brooklyn Bridge after the offeree has gone half-way, Wormser says:

> The objection is made, however, that it is very "hard" upon B (the offeree) that he should have walked half-way across the Brooklyn Bridge and should get no compensation . . . . The answer to this is obvious. By hypothesis, B was not bound to walk across the Brooklyn Bridge . . . . If B is not bound to continue to cross the bridge, if B is will-free, why should not A (the offeror) also be will-free?

5. *Ibid.*

6. 57 Ohio App. 203, 13 N.E.2d 139 (1937).

7. *Id.* at 143.

8. *Ibid.* In Pennsylvania, a similar case was decided in favor of the employees on a promissory estoppel theory. Trexler's Estate, 27 Pa. D. & C. 4 (1936).

9. Other decisions supporting the Wormser approach are Cowan v. Dewitt, 205 Misc. 130, 129 N.Y.S.2d 724 (Sup. Ct.), *aff'd* 284 App. Div. 998, 135 N.Y.S.2d 379 (1954); Bartlett v. Keith, 325 Mass. 265, 90 N.E.2d 308 (1950); Northampton Institute for Sav. v. Putnam,

Fortunately, the *Wallace* decision represents the minority view. Most courts have attempted to evade the resultant hardship by certain interpretative manipulations, which can be classified into four categories.[10] These categories are:

(1) *Interpreting the original offer as seeking a return promise rather than an act, thus forming a bilateral contract upon acceptance by the offeree, rather than a unilateral contract.*[11]

In order to apply this theory a return promise by the offeree must be implied from the commencement of performance. The theory remains tenable only so long as it is supported by the facts of the case. It should not be used to torture a unilateral offer into a bilateral offer, since then both parties become bound to perform in a manner in which neither intended. Using the classic Brooklyn Bridge example, where A offers B $10 to walk across the bridge, if the court finds that a bilateral contract has been formed, not only must A pay B $10 if B performs, but A can also sue B (on B's implied promise) for failure to completely perform, or for breach of an executory bilateral contract if B never initiates performance. This inequity arises from the implication of a return promise from B when neither A nor B intended that B should be obligated upon a promise to perform. Therefore, it appears that this approach has utility only so long as sufficient facts exist to justify a bilateral interpretation.

(2) *Interpreting the original offer as an offer for a unilateral contract, but holding that once performance has commenced a bilateral contract has been formed.*[12]

Thus, if A offers B $10,000 to build a street car line, once B has partly performed, the contract takes on a "bilateral character."[13] The cases applying this theory have invariably and exclusively used it to obligate the offeror to perform the terms of his offer. However, if given equal dignity, it could also be used to obligate the offeree to complete performance, once he has begun performance. No case has been decided on

313 Mass. 1, 45 N.E.2d 936 (1934); Smith v. Canthen, 98 Miss. 746, 54 So. 844 (1911); Biggers v. Owen, 79 Ga. 658, 5 S.E. 193 (1888). In Kovacs v. Countess Mara, 275 App. Div. 970, 90 N.Y.S.2d 172 (1949), *aff'd* 301 N.Y. 805, 96 N.E.2d 193 (1950) the court, by way of dictum, said, "Further, since the alleged contract was unilateral, the defendant . . . *might at any time before complete performance withdraw her offer.*" (Emphasis added.)

10. See generally, 1 WILLISTON, CONTRACTS §§ 60 and 60-A (3d ed. 1957); MURRAY, GRISMORE ON CONTRACTS 48-50 (1965).

11. Nat'l Dairymen Ass'n v. Dean Milk Co., 183 F.2d 349, 352-53 (7th Cir. 1950); Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026 (1934); 1 WILLISTON, CONTRACTS § 60 note 2 (3d ed. 1957); RESTATEMENT, CONTRACTS § 31 (1932).

12. Harris v. McPherson, et al., 97 Conn. 164, 115 Atl. 723 (1922); Hughes v. Bickley, 205 Ala. 619, 89 So. 33 (1921); Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086 (1902).

13. These are substantially the facts in Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086 (1902).

this point, but in *Offord v. Davies*,[14] it was said by way of dictum that both the offeror and the offeree would be obligated. Thus, injustice could be caused by imposing an obligation on the offeree which neither party intended he should bear.

(3) *Interpreting the offer as one for a unilateral contract, but holding that once part performance is rendered the offeror is bound to the terms of his offer; his obligation is conditional upon complete performance by the offeree.*[15]

This approach was adopted by § 45 of the Restatement of Contracts. It is an improvement upon the first two theories in that it avoids the "bilateral machinery" which can operate to bind the offeree to complete performance once part performance has commenced. Nevertheless, it is a departure from reality, in that the offeror contemplated complete performance as consideration for his promise, while he is bound to comply with the terms of his offer after less than complete performance by the offeree. The offeree, on the other hand, is under no obligation to complete performance at any time. Therefore, although this theory can be effectively used to prevent hardship to the offeree in a particular case, its universal application to all cases may clearly operate at the expense of the offeror.

(4) *Interpreting the original offer as one for a unilateral contract, but dividing the offer into a "main offer" and a "collateral offer" as follows:*

> (a) The "main offer," in which the offeror promises to perform his obligation in return for acceptance by the offeree through complete performance.
>
> (b) The "collateral offer," in which the offeror promises that once the offeree begins performance, the offeror will not revoke the "main offer" for a reasonable time; thus giving the offeree an opportunity to completely perform.[16] The consideration supporting the "collateral offer" and thus maturing it into an obligation upon the offeror, is the beginning of performance by the offeree. Should the offeror attempt to withdraw his "main offer" the offeree may theoretically recover damages measured by his expected realization upon the "main offer," although only the collateral obligation has been reached.[17]

This theory is open to the same objection as theory number three; namely that once the offeree begins performance the offeror is bound as

14. 12 C.B. (Wis.) 748, 753 (1862).

15. Brackenburg v. Hodgkin, 116 Ore. 399, 102 Atl. 106 (1917). See also, 1 WILLISTON, CONTRACTS § 60 note 3 (3d ed. 1957).

16. This theory was initially suggested by McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 654-663 (1914).

17. *Id.* at 659.

if he had entered a bilateral contract, while the offeree has absolutely no obligation to complete performance.

This brief summary of the four interpretative procedures that have been suggested to protect the offeree of a unilateral contract indicates that some implicit deficiencies exist. Theory number one (*i.e.*, interpreting the offer as one for bilateral contract) really does not meet the problem of the clearly unilateral offer, but is perfectly acceptable as long as the facts justify a bilateral interpretation. In reviewing the remaining three theories, the following proposition becomes evident: they will all present a workable solution in a case where the offeree is the plaintiff and is suing the offeror for revoking after the offeree has commenced performance. Nevertheless, they all embody certain residuary implications which, if given universal application, can *result* in hardship, rather than *circumvent* it. It would seem that once a jurisdiction adopts any of the above interpretative procedures, it would be bound to apply it to all actions involving unilateral contracts, and could not restrict it to a hardship-circumventing tool to be used solely in cases where the offeror has revoked after part performance by the offeree.

It is against this rather intricate background of theories, that ALI Restatement of Contracts, 2d (Tentative Draft No. 1) is projected. It is interesting to consider what advances are proposed by this document. The problem is dealt with as follows:

> §45. OPTION CONTRACT CREATED BY PART PERFORMANCE OR TENDER.
>
> (1) Where an offeror invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Section 24A of the Tentative Draft provides that "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." Since § 24A specifies that an option contract must be supported by all the requirements for the formation of a contract, Comment D to § 45 states that ". . . The beginning of performance [by the offeree] . . . completes the manifestation of mutual assent and furnishes consideration for an option contract."

When stripped of new terminology, it is apparent that § 45 of the Tentative Draft has substantially adopted McGovney's proposal initially suggested in 1914.[18] That proposal was that an offer for a unilateral con-

18. Discussed *supra* at 5.

tract really embraces two offers; *i.e.*, the principal offer which is accepted by performance in accordance with its terms; and a collateral offer not to revoke the principal offer. The collateral offer is accepted by commencement of performance by the offeree. McGovney states that the consideration for the collateral offer is supplied by the seasonable commencement of performance,[19] which is the same theory proposed by § 45, Comment D of the Tentative Draft. Under both theories, the offeror is contractually bound not to revoke his offer for a reasonable time, once the offeree commences performance. The offeror's principal obligation does not mature until complete performance by the offeree. Thus, § 45 of the Tentative Draft really has not introduced any new concepts, but has applied some new terminology to an old problem.

The writer does not believe that the option contract proposal of § 45 is a substantial improvement upon any of the theories discussed earlier. The proposal provides an effective machinery for adjudicating a case in favor of a wronged offeree. The four theories discussed above will accomplish this result with equal effectiveness, but, as indicated earlier, involve certain inadequacies. Therefore, if § 45 of the Tentative Draft is an approach free of similar inadequacies, it would constitute a distinct improvement. But many of the same objections remain.

The "option contract" approach still incorporates the inherent disadvantage of obligating the offeror, while leaving the offeree will-free. Comment E to § 45 provides in part: "Where part performance or tender by the offeree creates an option contract, the offeree is not bound to complete performance. *The offeror alone is bound*, but his duty of performance is conditional on completion of the offeree's performance." (Emphasis supplied.)

In conjunction with this principle, Comment F, to § 45 provides:

> What is begun or tendered must be part of the actual performance invited in order to preclude revocation under this Section. Beginning preparations, though they may be essential to carrying out the contract or accepting the offer, is not enough.

A concrete example of the type of hardship that these provisions can engender will clarify the problem. Suppose A offers B $100, if B will deliver 100 lbs. of grain to A over a period of 7 days. On the first day B delivers a 5 lb. sack of grain to A (worth $5 at that time). Under Comment F to § 45, quoted above, B has begun part of the actual performance requested, and thus the option contract has bound A not to revoke his offer until the 7 day period has elapsed. B then waits until the seventh day to determine if it will be profitable to complete performance, secure in the knowledge that A cannot recant from the ineptitude of his original

19. McGovney, *Irrevocable Offers*, 27 HARV. L. REV., 644, 659 (1914).

offer. A, on the other hand, is in an untenable position. If the market goes up, he must pay the increased price (conceivably to B upon a new contract) but if the market goes down, he must pay the $100 price to B (or some measure of damages). Of course, this example is open to the immediate objection that A was, in the first instance, a fool to enter such a contract. However, how could A know that his unilateral offer would be converted into an option contract with its concomitant results. In addition, this objection applies to the offeree of a unilateral contract. In his classic article Wormser states, "[S]o long as there is freedom of contract and parties see fit to integrate their understanding in the form of a unilateral contract, the courts should not interfere with their evident understanding and intention simply because of alleged fanciful hardship."[20] In the last analysis we have merely shifted the hardship from the inept offeree to the inept offeror. Admittedly, the hardship upon the offeree is a much more obvious and frequent case, but if some method of avoiding both inequities is available, it should be utilized.[21]

The case of *Alexander Hamilton Institute v. Jones*[22] illustrates the consequences that can result when a theory designed to protect the offeree from hardship is given universal application. The defendant had signed an "enrollment form" for plaintiff's correspondence course wherein

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20. Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 138 (1916).

21. Section 2-206 of The Uniform Commercial Code pertains to this example.

Section 2-206. Offer and Acceptance in Formation of Contract.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

Comment 3. The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to engage himself. For the protection of both parties it is essential that notice follow in due course to constitute acceptance. Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance.

This comment can be interpreted as meaning that notification binds the offeree to completely perform, but in the time lapse between the intiation of performance and the giving of notification, the offeror is prohibited from revoking his offer. This interpretation restricts the speculation advantage of the offeree to the time span between initiation of performance and the giving of notice; and time gap being limited to a *"reasonable time."*

Therefore suppose B delivers the 5 pounds of grain on the first day. A cannot revoke his offer under section 45, but the period of termination of the power is only a *"reasonable time,"* not 7 days. Suppose that on the second day B has not notified A of acceptance and A revokes his offer. On the third day, B sees that the market price of grain is falling rapidly and he therefore notifies A of acceptance. The question then is reduced to, what is a "reasonable time" for the giving of notice of acceptance. If it is determined to be 3 days, then A's revocation was ineffective, and B has successfully speculated at A's expense.

22. 234 Ill. App. 444 (1924).

defendant had agreed to pay $120 in $10 monthly installments in return for books and periodic lectures sent by plaintiff. The court construed the enrollment form as an offer looking toward acceptance by an act. Thus, plaintiff became the offeree and defendant the offeror of a unilateral contract. Defendant sent plaintiff $10 as the first installment payment and received 24 books in the mail. Defendant then decided that he did not wish to continue the course and informed the plaintiff of this, and also returned the books. Plaintiff contended that by sending the 24 books to defendant it had begun performance, and thus the contract became binding upon both parties.[23] The decision of the court recognized that as a general rule the offeror is bound "by the offeree engaging, within a reasonable time, to perform the contract."[24] From this point, however, the basis of the decision is unclear. The court states that the issue is ". . . did plaintiff, by shipping the books to defendant, which was the first of a series of things to be performed by it, begin such performance in a way which would bind it to complete the contract?" This statement of the issue is in complete contradiction to § 45 of the Tentative Draft, which specifically states that the offeree is *not* bound to complete performance.[25] The court apparently concluded that the plaintiff was not bound to complete performance because

> . . . [T]his writing was an offer by defendant to make periodical payments in consideration of a series of acts to be done by the plaintiff from time to time, and that an offer of this divisible character may be revoked not only before any acceptance but also as to any portion of the offer still unaccepted.[26]

But even if we adopt the proposition that the offer was divisible, plaintiff had clearly accepted to the extent of the 24 books sent to defendant, and under the court's theory defendant should have been obligated to the extent of the 24 books received. However, defendant had returned the books to plaintiff, and the court held that plaintiff had no action upon the contract whatsoever.[27]

Let us consider the *Alexander Hamilton Institute* case from a more pragmatic point of view. The facts clearly show that the defendant had

23. Note that plaintiff did not contend that the offer became binding only upon the defendant, offeror, but conceded that it was also obligated to perform. Under the theory of § 45 of the Tentative Draft the plaintiff would have contended that defendant had lost his power to revoke by the creation of an option contract. Under either theory the defendant, offeror, is obligated to perform, upon full performance by the offeree.

24. Alexander Hamilton Institute v. Jones, 234 Ill. App. 444, 446 (1924).

25. RESTATEMENT (SECOND), CONTRACTS, § 45 Comment E. (Tent. Draft No. 1, 1964). Therefore, the court would have to search for some other manipulation to enable it to find for the defendant and to avoid injustice.

26. Alexander Hamilton Institute v. Jones, 234 Ill. App. 444, 447 (1924).

27. Apparently, plaintiff did keep the $10 which defendant had initially paid.

made an offer and that the plaintiff had begun acceptance. Therefore, a strict application of our "hardship-avoiding" rule requires that the offeror be bound not to revoke his offer. But application of the rule in this particular case imposes a much greater hardship upon the offeror than upon the offeree. That is, the defendant has absolutely bound himself to complete the correspondence course, at considerable expense to himself. The plaintiff accomplished this result by the mailing of 24 books, which could easily be returned by the defendant. Recognizing this fact, the court determines that the rule should be circumvented and the offeror allowed to revoke his offer. The approach adopted by the court is that the offeree was not bound to complete the contract because the offer was divisible in character, and therefore the offeror could revoke his offer as to any portion still unaccepted by the offeree. The court then, without comment, allows the offeror to revoke his whole offer, including the portion accepted by the offeree (*i.e.*, the 24 books sent to defendant).[28] This train of reasoning is difficult to follow, at best. Could not a more believable decision have been based upon equitable considerations, as follows:

> Yes, it is true that the general rule is that once the offeree begins performance the offeror may not revoke his offer. But the purpose of this rule is to prevent hardship to the offeree. In this case we have no such hardship. The offeree has relied upon defendant's offer only to the extent of sending him 24 books. Defendant has returned those books to the offeree. Since the offeror has restored the offeree to his original position, we decline to impose an additional hardship upon the offeror.

Let us refer back to the example where the offeree delivers 5 lbs. of grain and then waits to see if the market goes up or down before completing performance. This situation clearly gives the offeree an opportunity to speculate at the expense of the offeror. The Drafters of the Restatement 2d (Tentative Draft No. 1) are undoubtedly not unaware of this shortcoming, although it is not mentioned in any of the comments to § 45. In "§ 63, Effect of Performance by Offeree Where Offer Invites Either Performance or Promise" it is provided that: (1) Where an offer invites

28. The *Alexander Hamilton* case is an example of the dangerous consequences involved, when a court attempts to avoid the inequitable consequences of the universal application of legal rules. The result is that the chain of precedent is interrupted by an aberration, which becomes available to litigants who are not in the same factual situation as that in which the original modification occurred. For example, the *Alexander Hamilton* case could stand for the proposition that the offeror is justified in revoking his offer because the offeree is not bound to perform (a return to the traditional theory). But under Section 45 of the Tentative Draft the offeree is not bound to perform in any unilateral contract situation. Therefore, unless the particular jurisdiction alters this rule, the offeror may revoke at any time before complete acceptance. This is a complete contradiction of the original rule (aberrated by the *Alexander Hamilton* case) designed to protect offerees.

an offeree to choose between acceptance by promise and acceptance by performance, the beginning of the invited performance or a tender of part of it is an acceptance by performance.

Up to this point § 63 parallels the basic theory of § 45. But then, § 63 provides that: (2) Such an acceptance operates as a promise to render complete performance. Comment C to § 63 states that the rule of subjection (2) is to "preclude the offeree from speculating at the offeror's expense *where no option contract is contemplated by the offer. . . .*" (Emphasis supplied.)

The underlying assumption to this reasoning is that one who has voluntarily made an option contract has assumed the risk of speculation by the offeree.[29] But the offeror of a unilateral contract has no intention of assuming any such risk; it is imposed involuntarily by § 45.

To neutralize the speculation possibilities Professor Corbin has suggested that "[U]nless the part performance is so rendered as to justify the implication of a promise to render the entire performance proposed in the offer, such part performance leaves the offer revocable at the will of the offeror as to all but the part performance."[30] A statement to this effect could have been inserted in § 45; *i.e.*, the option contract is not created until the offeree has begun the invited performance in such a manner as to imply complete performance.

There are two immediate objections to this approach. First, it would indicate that the unilateral offer has been converted into a bilateral contract, under which both the offeror and offeree are obligated, and it would involve a difficult factual question as to how much part performance is sufficient to imply full performance.

A second deficiency of § 45 of the Tentative Draft is that it does not protect the offeree who detrimentally relies on the offer, but has not yet begun a part of the requested performance. Suppose A offers B $5,000 if B will deliver a fire engine to A by a certain date. B goes to substantial expense in building the fire engine, but before he can deliver it to A, A revokes the offer. Under proposed § 45, Comment F, A's offer does not become irrevocable until B begins a part of the performance requested. A has clearly requested *delivery* or tender of the fire engine, not its construction. Therefore his offer is revocable until tender is made by B.[31] Not only may A revoke his offer, but B could probably not recover on a quasi-contractual theory because no benefit has been conferred on A.

29. This proposition is stated in RESTATEMENT (SECOND), CONTRACTS § 64 (Tent. Draft No. 1, 1964).

30. 1A CORBIN, CONTRACTS § 152 (1963), and cases therein cited. This statement was cited with approval in Friedman v. Tappan Development Corp., 22 N.J. 523, 126 A.2d 646 (1956).

31. This example is suggested by the case of Hosmer v. Wilson, 7 Mich. 293, 74 Am. Dec. 716 (1859).

Therefore, all clever offerors should frame their offers in terms of tender or delivery, rather than in terms of construction.[32] This illustration should probably fall within the purview of § 90 of the Restatement of Contracts,[33] and the promise would be enforced on a promissory estoppel theory. Nevertheless, should this argument fail, the offeree would be left without a remedy, and with a fire engine on his hands. Comment B to § 45 specifies that "the rule of this Section is designed to protect the offeree in justifiable reliance on the offeror's promise. . . ." However, the operation of § 45 restricts that protection to reliance that is part of the requested performance. The argument could be made that any offeree who entered such a bargain should not be justified in relying upon it. But it has actually occurred in the past[34] and could conceivably occur in the future.

A final problem raised by proposed § 45 is what legal rights and obligations arise upon breach by the offeror. Let us return to the fire engine example, but assume that in this case the offeror is not quite so clever. A offers B $5,000 if B will *build* a fire engine for A. B starts construction and after expending $500 in labor and materials A revokes his offer. B brings suit against A claiming A's revocation was a breach of contract and seeking to recover $500, *i.e.*, the amount of expenditures made by B in reliance upon A's offer. Might not A defend the suit along the following lines: "It is true that I attempted to revoke my offer to B. However, under § 45, when B began performance an option contract was created. § 24 A, Comment D, specifies that the effect of an option contract is that '[a] revocation by the offeror is not of itself effective, and the offer is properly referred to as an irrevocable offer.' Therefore my attempted revocation was completely ineffectual and the offer remained open. Under § 45(2) my duty of performance is conditional upon completed performance on B's part. Since B has not completed performance, he therefore cannot compel my performance, or recover any damages for my failure to perform."

A's argument is not without logic although it is doubtful that any court would give it credence. The vehicle of the option contract has been generally restricted in its use to the sale of land, where performance by the offeree involves only tender. In those cases, it has been held that the option contract makes the principal offer to sell irrevocable, and the offeree can compel specific performance of the principal offer, notwith-

32. This lesson was illustrated by the classic case of Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428 (1928).

33. § 90 Promise Reasonably Inducing Definite and Substantial Action.

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 injustice can be avoided only by enforcement of the promise. RESTATEMENT, CONTRACTS § 90 (1931).

34. Hosmer v. Wilson, 7 Mich. 293, 74 Am. Dec. 716 (1859).

standing its revocation by the offeror.[35] Necessarily, to compel specific performance of the principal offer, the offeree also had to comply with all the terms of that offer. But since those terms involved only a tender, the offeree could easily comply. On the other hand, if the terms required a substantial performance of the services, the offeree would have to fully perform, as a condition precedent to enforcing the principal obligation. The result would not be an anticipatory breach on the part of the offeror and would not justify the cessation of performance by the offeree.

As discussed above, the language of the Tentative Draft is not adverse to this interpretation. This would dictate that the offeree actually increase his damages after repudiation by the offeror, a tactic expressly forbidden by the law of damages.[36]

Since it is unlikely that a court would suggest this result, let us assume that the court allows B to sue A on the basis of breach of the option contract. This approach raises an additional problem of computing damages due to A's breach, which would involve both B's reliance interest (*i.e.*, past expenditures in labor and material) plus B's expectation interest (*i.e.*, the ultimate profit expected to be made).[37] It would seem to be more in keeping with the nature of a unilateral contract if A's liability to B were limited to restoration. As Wormser so accurately put it, the fundamental concept of a unilateral contract is that both parties remain will-free until complete performance by the offeree.[38] The inherent advantage, historically speaking, of a unilateral contract was with the offeror. Nevertheless, exertion of that advantage can undeniably lead to unjust injury to the offeree. That injury can be compensated by restoration to the offeree; that is, by protecting his reliance interest in the offeror's promise. It is unnecessary to convert the offeree's initial disadvantage, into a distinct advantage by enabling him to recover an expectation interest

35. Mier Co. v. Hadden, 148 Mich. 488, 111 N.W. 1040 (1907).

36. Transport Mft. & Equipment Co. v. Fruchauf Trailer Co., 295 F.2d 223 (8th Cir., 1961); Ellerman Lines Limited v. The President Harding, 288 F.2d 288 (2d Cir., 1961); Thompson v. DeLong, 267 Pa. 212, 910 Atl. 251, 9 A.L.R. 1326 (1920). 25 C.J.S., DAMAGES § 33. This problem is discussed in McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 650-654 (1914), wherein the author concludes that upon repudiation by the offeror, the offeree would be bound to stop performance and sue for damages resulting from breach of the option contract. The suggested measure of damages is full recompense for part performance plus indemnity for loss in respect to the part left unexecuted, citing Clark v. Marsiglia, 1 Denio (N.Y.) 317 (1845).

37. This is the terminology formulated in Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936). The authors divided damages for breach of contract

(1) The restitution interest—"prevention of gain by the defaulting promisor at the expense of the promisee."

(2) The reliance interest—"damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant's promise has caused him."

(3) The expectation interest—placing "the plaintiff in as good a position as he would have occupied had the plaintiff fulfilled his promise."

38. Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916).

upon the offeror's unilateral promise, particularly when the offeror contemplated acceptance as the only condition to his liability.

In view of these considerations the writer feels that § 45 of the Restatement of Contracts 2d (Tentative Draft No. 1) continues to embrace some of the inadequacies of the earlier theories. As stated at the outset of this comment, the Restatement solution is framed in the terminology of inflexible rules. The universal application of the rules of § 45 could lead to all of the difficulties discussed above and perhaps more. As an alternative it is suggested that the possible hardship be recognized, and a flexible equitable provision be made to remedy it. A theory similar to § 90 of the Restatement of Contracts could be adapted to the problem of revocation of unilateral offers. Section 90 of the Restatement of Contracts provides that:

> 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 injustice can be avoided only by enforcement of the promise.

Of course, the doctrine of "promissory estoppel" was created by, and has been limited to reliance upon gratuitous promises. In *James Baird Co. v. Gimbel Bros.*[39] the court held that if the promise was made under circumstances indicating that a bargain or exchange was contemplated, mere reliance on the promise would not make it binding. This holding should have validity where an offeror makes an offer *seeking a return promise.* If the offeree relies to his detriment upon the offer, but does not give the requested return promise, he should not be permitted to maintain an action on a promissory estoppel theory. But this argument does not have equal force as to offers for unilateral contracts. There, acceptance by performance may stretch over a period of time whereas acceptance by a return promise is instantaneous. Therefore, once the offeree has begun performance, the legal position of the offeror is not substantially different from that of a gratuitous promisor; that is, he had made a promise upon which the offeree has relied but to which the offeror is not legally bound. Under these circumstances, the injustice to the relying party is seen to be identical. Therefore, in theory and in practice there should be no objection to the application of a promissory estoppel to unilateral offers as a device to avoid unjust results. But even assuming that certain theoretical objections do exist, based upon certain jurisprudential notions as to the nature of estoppel, this should not preclude its application if it is a practical solution to the problem.[40]

39. James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933).

40. See Navin, *Some Comments on Unilateral Contracts and Restatement 90*, 46 MARQ. L. REV. 162 (1962), for an argument against applying Section 90 to unilateral contracts.

It is believed that a promissory theory is an improvement upon previous solutions to the problem because:

(1) It does not permit speculation by the offeree. In the example where A offers B $100 to deliver 100 lbs. of grain to A over a period of seven days and B delivers 5 lbs., B's part performance would not operate to terminate A's power of revocation. A could revoke his offer and expose himself to damages resulting from B's reliance prior to revocation, *i.e.*, delivery of 5 lbs. of grain. Should A return the 5 lbs. of grain, both parties would be returned to the status quo and no injury would result to either party.[41] Thus the final result would be more in keeping with the original purpose of unilateral contracts. This purpose is that the offeror seeks a completed performance as the condition precedent to his obligation, which is totally frustrated by § 45 of the Restatement of Contracts 2d (Tentative Draft No. 1).

(2) It would compensate the offeree who has detrimentally relied upon the offer, but has not yet begun a part of the requested performance. Section 45 of the Tentative Draft provides that the option contract does not arise until the offeree has begun the performance specifically requested. A could revoke at any time prior to delivery, and B could have expended $4,000 in building the fire engine but would have no remedy. Under a promissory estoppel theory, the offeree can recover from the offeror for all amounts expended in good faith reliance upon the offer.

(3) A promissory estoppel approach would naturally emphasize restoration of the injured offeree to his original position, and would not entitle the offeree to maintain an action for his whole expectation interest after only minimal part performance. Thus the revoking offeror would not be faced with a damage situation identical to that of a bilateral obligation, an obligation which he manifestly did not seek to assume. On the other hand, the offeror could not inflict undue hardship upon the offeree and would be held to make restoration for past justifiable reliance.

Of course, the promissory estoppel theory would require that the offeror's promise reasonably induce the actual reliance of the offeree and that the reliance be of a substantial nature.[42]

In view of all of the foregoing considerations, it is submitted that Section 45 of the Restatement of Contracts 2d (Tentative Draft No. 1) portends unjust consequences if given universal application.[43] It is further

41. It is interesting to note that this was the actual result arrived at by the court in Alexander Hamilton Institute v. Jones, 234 Ill. App. 444 (1924), discussed *supra* at page 181 to 183, although the court did not frame it in the suggested manner.

42. It is arguable that a requirement that "injustice can be avoided only by the enforcement of the promise" is unnecessary surplusage and could be dispensed with. See MURRAY, GRISMORE ON CONTRACTS § 61 (1965).

43. This statement leads into a question of what the ultimate function of a Restate-

submitted that an extension of a promissory estoppel theory to unilateral offers, would not only remove many of the deleterious results of present approaches, but would also provide needed flexibility to the courts to enable them to reach a just result in the particular case.

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ment should be. If one accepts the view that a Restatement should only state existing law, then § 45 probably fulfills that function. At least § 45 leads to the same results as other existing theories, although it may use different terminology. If this is the accepted view, then the writer does not criticize § 45 as a solution to the problem, since it is not intended to be the Drafter's solution. The criticism, in that event, must be directed at the existing law, not at the Restatement.