MODERN UNILATERAL CONTRACTS*

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* Professor Mark Pettit served as the *Public Interest Law Journal*'s faculty advisor for many years during his illustrious career at Boston University School of Law. The *Journal*'s staff members, both past and present, are eternally grateful for the guidance and support that he so generously offered during his time with us. He will be greatly missed not only by the members of the *Journal* but also by his colleagues and the many students that were lucky enough to have him as a professor. In his memory, the *Journal* has decided to republish his seminal work, *Modern Unilateral Contracts* (republished with the permission of *Boston University Law Review*).

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Why would anyone write about unilateral contracts today? After all, Karl Llewellyn argued convincingly more than forty years ago[1] that unilateral contracts are rare and unimportant and should be relegated to the "freak tent."[2] Academics, he said, created the "Great Dichotomy" between unilateral and bilateral contracts; lack of support for the unilateral contract idea in the cases required those academics to illustrate the concept with ridiculous hypotheticals about climbing greased flagpoles and crossing the Brooklyn Bridge. The drafters of the *Second Restatement of Contracts* thus considered it a step forward when they not only minimized the importance of the unilateral-bilateral distinction but sought to eliminate the term "unilateral contract" from the lexicon of the law. Today, those commentators who still deem the subject worthy of mention applaud the burial of the unilateral contract.[3] Why unearth the decaying corpse?

This Article suggests that in fact unilateral contract never died, but is alive and thriving as never before. An examination of American cases, decided since the first tentative draft of the *Second Restatement* was published in1964,[4] reveals not only that lawyers and judges continue to employ unilateral contract analysis in traditional areas, but that they find the concept useful for expanding contractual analysis into new areas. Of particular importance is the use of unilateral contract to establish one-way obligations of such institutions as employers, governments, and schools

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[1] *See* Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance* (pts. 1 & 2), 48 YALE L.J. 1, 779 (1938-1939).

[2] Id. at 36.

[3] *See, e.g.*, J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 92-96 (2d ed. 1977); F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 290-92 (2d ed. 1970); Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Law*, 11 VILL. L. REV. 213, 234-35, 258 (1966); Murray, *Contracts: A New Design for the Agreement Process*, 53 CORNELL L. REV. 785, 785-86, 802, 805-06 (1968); Comment, *Unilateral Contracts: An Examination of Traditional Concepts and the Proposed Solution of the ALI Restatement of Contrasts, Second (Tentative Draft No. 1)*, 5 DUQ. U.L. REV. 175, 187-89 (1966-1967); Note, *Acceptance by Performance When the Offeror Demands a Promise*, 52 S. CAL. L. REV. 1917, 1926-31 (1979).

[4] The first tentative draft of the *Second Restatement of Contracts* included Chapter 1, "Meaning of Terms," Chapter 2, "Formation of Contracts—Parties and Capacity," and Chapter 3, "Formation of Contracts—Mutual Assent." Most of the sections relevant to the unilateral-bilateral distinction appear in Chapters 1 and 3. These chapters have not been substantially changed from the 1964 version.

toward individuals with whom they deal. Unilateral contract has become an important concept in defining relationships that arise in our increasingly organized society. Despite the efforts of Llewellyn and the drafters of the *Second Restatement* unilateral contracts are overcrowding the freak and spilling over into the Big Top.

According to traditional doctrine, contracts—whether unilateral or bilateral—generally are initiated when one party (the offeror) makes a promise (the offer). The distinguishing feature of the unilateral contract is that the second party (the offeree) has not made a promise in return. Llewellyn found implied promises by offerees, not in order to allow offerors to enforce those implied promises but rather to bind offerors to their offers. Modern courts share Llewellyn's goal of binding the original promisor, but feel more free to do so without inferring a return promise.

Eliminating the need to find return promises has made it easier to expand contractual analysis into new areas to increase the scope of civil obligation. Given this development, the crucial question shifts from whether the offeree made a return promise to whether the offeror made any promise in the first place. In other words, the increased use of unilateral contract ultimately raises questions about the appropriate limits of contractual analysis—questions that require an exploration of the sources of contractual obligation.

I. THE UNILATERAL-BILATERAL DISTINCTION AND CRITICISM OF THE "GREAT DICHOTOMY"

The first *Restatement of Contracts* divided contracts into two mutually exclusive groups:

A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee.[5]

In simpler (and less precise) terms, a unilateral contract results from an exchange of a promise for an act; a bilateral contract results from an exchange of promises.[6]

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[5] RESTATEMENT OF CONTRACTS § 12 (1932). Apparently there are some contracts that do not fall into either category. If *A* promises *B* in consideration of *B*'s promise to *C*, the promises are not mutual and therefore do not fit the definition of a bilateral contract. Since *B* is a "promisor" who "receives a promise as consideration for his promise," the contract is not unilateral either. These cases "are properly kept separate." *Id.* comment e.

[6] For explanations of why the first *Restatement* did not adopt this popular terminology, see Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts,* 64 YALE L.J. 515, 516 n.11 (1955) [hereinafter cited as Stoljar, *The False Distinction*] (citing Stoljar, *The Ambiguity of Promise,* 47 NW. U.L. REV. 1, 2-5 (1952)). *See also* 1 A. CORBIN, CONTRACTS § 21, at 56 (1963); Murray, *supra* note 3, at 802 n.45.

Williston claimed that the "vital distinction" between uniateral and bilateral contracts "was fully recognized three hundred years ago, but lack of appropriate names caused the distinction and its consequences to be frequently overlooked in the later history of the law."[7] Williston found the first use of the terms "unilateral" and "bilateral," in the sense in which he defined those terms, in a few judicial opinions in the mid-nineteenth century. But he credited Christopher Columbus Langdell, that famous discoverer of legal doctrine at Harvard in the latter part of the nineteenth century,[8] with popularizing unilateral-bilateral terminology.[9]

Corbin suggested that the primary reason for drawing the distinction between unilateral and bilateral contracts is to prevent the errors caused by misapplication of the concept of "mutuality of obligation."[10] It has sometimes been asserted that not only are two parties necessary to produce a contract but that both must become obligated—that "both parties must be bound or neither is bound."[11] As both Williston and Corbin pointed out,[12] this ill-considered attempt at generalization fails to take account of unilateral contracts, which, by definition, are formed without any promise by the offeree to do anything. Courts that failed to understand the distinction, according to Corbin, refused to enforce unilateral contracts that should have been enforced. Since Williston was the Reporter and principal draftsman of the first *Restatement,* and since Corbin was his Special Adviser and principal assistant, it is not surprising that the first *Restatement* gave primacy to the unilateral-bilateral distinction.

In the late 1930's Karl Llewellyn vigorously attacked the distinction between unilateral and bilateral contracts.[13] He argued that the "Great Dichotomy" of unilaterals and bilaterals "misfits" real life situations and therefore misfits the cases.[14] The notion that an offeree must accept an offer either by making a return promise or by performing an act, depending on which of these two methods the offeror desires, reflects confusion about what happens in real life and spawns analytic difficulties.[15] Even worse, the

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[7] 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS§ 13, at 18, 19 & n.3 (rev. ed. 1936).

[8] *See* G. GILMORE, THE LAW OF CONTRACT 5-6, 97-98 (1974).

[9] *See* 1 S. WILLISTON, *supra* note 7, at 19 n.3.

[10] *See* 1 A. CORBIN, *supra* note 6, § 21, at 52-53, 59.

[11] *Id.* at 53 n.60.

[12] *See id.;* 1 S. WILLISTON, *supra* note 7, § 13, at 19-20.

[13] *See* Llewellyn, *supra* note 1.

[14] *See id.* at 31-32, 779-80.

[15] *Id.* at 36, 787-89.

The simple act of asserting the unilateral-bilateral dichotomy suggests that the distinction is important—a suggestion which Llewellyn rejected.

To be sure, no line of analysis can properly be said to be wrong, merely because it divides

unilateral-bilateral distinction can lead to unjust results in particular cases. If a court determines that an offer calls for acceptance by performance, the traditional rule that the efferor can revoke his offer at any time before acceptance[16] means that he can revoke up until the time that the offeree completes performance. If the offeree cannot perform the desired act instantaneously, he remains unprotected from the offeror's revocation while he is expending effort and expense in carrying out his performance. To Llewellyn, a doctrine that could produce this result was not only "unjust and inequitable"; it was also "so *improbable* as to scandalize good sense."[17]

The drafters of the first *Restatement* attempted to deal with this revocation problem in Section 45, which provided that if the offeror made an offer for a unilateral contract, a giving or tender of part performance by the offeree bound the offeror to the contract.[18] Llewellyn believed that, although Section 45 was an important step in mitigating the harsh effects of unilateral contract analysis, the analysis itself was faulty and had to be changed.

Llewellyn asked why a concept as nonsensical as the traditional theory of the unilateral contract managed to persist. He explained that the traditional analysis gained support from the fact that it seemed to cause relatively little trouble in two types of cases. The first type involved what Llewellyn called the "pseudo-unilateral," an agreement-based deal in which the offeree's performance could be accomplished "substantially at one stroke."[19] When the offeree performed without first promising to perform, judges simply said that his performance constituted the necessary acceptance. Contracts of this type are not truly classical unilaterals according to Llewellyn because they involve offers that can be accepted by return promises.

Llewellyn's second type—the "classical" or "true" unilateral case[20]—involved "the offer for a speculative prize," the offer of a reward or a broker's commission or the like. Llewellyn argued that true unilateral contracts are rare. What is unusual about them is that neither words nor

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mankind, say, into such a dichotomy as those who are bearded ladies and those who are not. But such a line of analysis does suggest the presence of more bearded ladies than there are, which tends to mislead.

Id. at 36.

[16] *See, e.g.*, 1 S. WILLISTON, *supra* note 7, § 55; 1 A. CORBIN, *supra* note 6, § 38; RESTATEMENT OF CONTRACTS § 35(1)(e) (1932).

[17] Llewellyn, *supra* note 1, at 805 (emphasis in original).

[18] RESTATEMENT OF CONTRACTS § 45 (1932). Although the offeror is "bound by a contract," his duty of performance "is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." *Id.*

[19] Llewellyn, *supra* note 1, at 805-06.

[20] *Id.* at 806.

actions by the offeree provide any assurance of success to the offeror by "moving with business certainty toward the performance."[21] In addition, the consideration promised for success often greatly exceeds the per diem value of the offeree's services. The offeree is in effect competing for a prize; he is gambling with his time and effort in hopes of hitting the jackpot.[22] Llewellyn concluded that it is only in these rare "prize" cases that a return promise by the offeree would not bind the offeror. In the overwhelming majority of cases, the offeror does not care whether he receives a return promise or some action moving toward performance—all he wants is to know whether "the deal is on."[23]

An Australian scholar, Samuel Stoljar, launched another assault on the unilateral-bilateral distinction in 1955.[24] Stoljar argued that the unilateral-bilateral distinction incorporates a logical error in the conception of the nature of contract formation.[25] Applying the analysis of the famous Fuller and Perdue article,[26] he suggested that the proper approach recognizes the hierarchy of interests—restitution, reliance, and expectation, in that descending order—and determines whether a bargain is "set afoot" by looking for the presence of these interests.[27] The traditional theory of the unilateral contract is incoherent, he argued, because it protects the expectation interest while ignoring the more basic and important reliance interest.[28] Again, allowing revocation before complete performance in the unilateral contract situation creates the practical problem. An offeree who acts in reasonable reliance on another's promise should be protected.

Both Llewellyn and Stoljar attacked the unilateral-bilateral distinction on broad, doctrinal grounds, but both were concerned primarily with the revocation problem. Both argued for greater enforceability of promises.

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 788, 790, 807.

[24] *See* Stoljar, *The False Distinction, supra* note 6.

[25] *See id.* at 516 & n.6.

[26] Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936-1937).

[27] *See* Stoljar, *The False Distinction, supra* note 6, at 517-18, 519.

[28] *See id.* at 534. Like Llewellyn, Stoljar was not satisfied with the "curious provision" in Section 45 of the first *Restatement* that "the promisee may accept the unilateral contract by part performance." *See id.* at 535, 527 n.53. Stoljar believed that Section 45 was merely an attempt to avoid some of the harsh results of the unilateral-bilateral distinction without confronting the illogic of the distinction itself and its failure to recognize the importance of the reliance interest. *See id.* at 527 n.53.

But Stoljar did not consider whether reliance should be the appropriate *measure* of recovery. He argued only that reliance by the promisee is a stronger reason than the promisee's return promise for enforcing the original promise. *See id.* at 522-24.

They believed that minimizing or eliminating the concept of the unilateral contract would be an important step toward preventing unjustified evasions of promissory liability. Although their arguments were convincing and appropriate in the limited context of the revocation problem, neither scholar could foresee the modern uses of the unilateral contract.

II. THE SECOND RESTATEMENT

Chapter 3 of the *Second Restatement,* "Formation of Contracts—Mutual Assent," reveals the unmistakable influence of Karl Llewellyn.[29] The *Second Restatement* omits all references to "unilateral" and "bilateral" contracts. A Reporter's Note to Section 1 explains: "Section 12 of the original Restatement defined unilateral and bilateral contracts. It has not been carried forward because of doubt as to the utility of the distinction, often treated as fundamental, between the two types.[30] But the *Second Restatement* continues to distinguish between acceptance by performance and acceptance by promise.[31] Although this simple substitution of labels might not appear to be significant, it is possible that merely substituting descriptive terminology for a non-descriptive (or perhaps misdescriptive) label might influence substantive results.[32]

The changes effected in the *Second Restatement* purport to go beyond changes in terminology, however.[33] Section 31 of the first *Restatement* provided that in case of doubt an offer is presumed to invite the formation of a bilateral contract. Section 32 of the *Second Restatement* states a new principle: "In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by

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[29] *See* Braucher, *Offer and Acceptance in the Second Restatement,* 74 YALE L.J. 302, 303-04, 306-07 (1964). The late Professor and Justice Braucher was the Reporter for the early (pre-1971) tentative drafts of the *Second Restatement.*

[30] RESTATEMENT (SECOND) OF CONTRACTS § 1, Reporter's Note, comment f (1981). The Reporter's Note also suggests that the term "unilateral contract" produced confusion because under the original *Restatement* the definition included three different types of transactions: 1) promises not contemplating a bargain, 2) certain option contracts, and 3) bargains completed on one side. *See id.*

[31] *See id.* § 50.

[32] See Braucher, *supra* note 29, at 303, for an appropriate remark made in commenting generally on the innovations in the first tentative draft of the *Second Restatement:* "But it should not be surprising that a stylistic revision may be symptomatic of fundamental shifts in modes of thought."

[33] For discussions of the differences between the first and second *Restatements* on the subject of contract formation, see Braucher, *supra* note 29; Murray, *supra* note 3; *Comment, supra* note 3; Note, *supra* note 3; Note, *The Restatement of Contracts Second and Offers to Enter into Unilateral Contracts,* 29 U. PITT. L. REV. 546 (1968).

rendering the performance, as the offeree chooses."[34] Section 62 of the *Second Restatement* provides that where an offer invites the offeree to choose between acceptance by promise and acceptance by performance (presumptively the usual case under Section 32) the tender, beginning, or tender of a beginning of the invited performance constitutes an acceptance by performance that operates as a promise to render complete performance. In other words, the mere tender or beginning of performance is an acceptance that binds the offeror and also the offeree.[35]

The combined effect of Sections 32 and 62 apparently makes it unnecessary to distinguish in the great majority of cases between offers calling for performance and offers calling for return promise. Either performance or promise will suffice as an acceptance, binding both parties. The *Second Restatement* still allows an offeror to require that acceptance be by performance only. In such a case, Section 45, rather than Section 62, applies. It should be emphasized, however, that the drafters intended that Section 45 apply only to a small minority of cases; they believed that only

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[34] Comment *a* to Section 32 indicates that this section is a "particular application of the rule stated in § 30(2)." Section 30(2) provides: "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." These sections reflect Llewellyn's strong belief, evident also in Section 2-206 of the Uniform Commercial Code, that most offerors do not call for acceptance either by performance only or by promise only, but rather are indifferent to the mode of acceptance. *See* Llewellyn, *supra* note 1, at 809. Llewellyn pointed out that Whittier expressed the same idea years earlier. *See id.* (citing Whittier, *The Restatement of Contracts and Mutual Assent,* 17 CALIF. L. REV. 441, 453 (1929)). For a discussion of the difference in language between Section 30(2) of the *Second Restatement* [Section 29(2) of the first tentative draft] and Section 2-206(1)(a) of the Uniform Commercial Code, see Murray, *supra* note 3, at 793-95.

[35] Section 62 states in unqualified terms the rule binding the offeree who chooses to accept by beginning performance. Nevertheless, comment *c* to Section 62 states unequivocally that the rule binding the offeree "yields to a manifestation of contrary intention under § 53(2)." *See* Braucher, *supra* note 29, at 307. Section 53(2), however, says only that the offeree can notify the offeror that the offeree's rendering of a performance does not constitute an acceptance at all. It does not explicitly state that the offeree who begins performance can bind the offeror without binding himself by expressing his intention to do so. In any event, Section 53(2) requires the offeree "to notify" the offeror of his intention; it does not explicitly permit the court to find a "contrary intention" absent some reasonable notice to the offeror. Various other comments in the *Second Restatement* suggest that the offeree might not be bound in all Section 62 cases, but these comments simply refer the reader back to Section 62 or make no reference to any section. *See* RESTATEMENT (SECOND) OF CONTRACTS § 18 comment b; § 32 comments a & b; § 50 comment b & illustration 2; § 62 comment b (1981). The result of all this is that an offeree who responds to a "doubtful offer" (an offer that does not clearly specify that acceptance can be made only by performance) by beginning performance will find it difficult under the *Second Restatement* to argue that he is not liable to the offeror if he fails to complete his performance.

rarely do offerors intend to limit the mode of acceptance to performance.[36] Even if Section 45 does apply, it uses the same terminology as Section 62 (tender, beginning, or tender of a beginning of performance) to describe what action by the offeree is necessary to bind the offeror.[37] The primary concern of those who criticized the unilateral-bilateral distinction was the problem of offerors revoking their offers after part performance by offerees. The *Second Restatement* provides identical protection to offerees who begin or tender performance regardless of whether a promise is a permissible mode of acceptance. The difference between Section 45 and Section 62 is that under Section 45 the *offeree* is not bound to complete the performance he has tendered or begun, as he is under Section 62.

A *Restatement* reflects—in unspecified proportion—the drafters' views of what judges have done and what they should do.[38] The *Second Restatement* seems to say that judges who have not done so already should: 1) cease employing the terms "unilateral contract" and "bilateral contract"; 2) recognize that the one-sided-promise transaction is a rare species; and 3) hesitate to proclaim the discovery of one of these rarities. Like the amateur birder, they should resolve all doubts in favor of the more common variety.

III. THE PROLIFERATION OF UNILATERAL CONTRACTS CASES

If you ask a law student (or law teacher, for that matter) to give an exampe of a unilateral contract, you are quite likely to hear an interesting story about tracking down an alleged criminal or purchasing a smoke ball to ward off influenza[39] These stories involve disputed claims for rewards or prizes, and serve in casebooks as memorable illustrations of unilateral

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[36] The drafters state in two places that the typical illustrations of offers that can be accepted only by performance are offers of rewards or prizes and offers made in non-commercial arrangements among relatives and friends. *See* RESTATEMENT (SECOND) OF CONTRACTS § 32 comment b; § 45 comment a (1981); *see also id.* § 1, Reporter's Note, comment f: "Finally, the effect of the [unilateral-bilateral] distinction has been to exaggerate the importance of the type of bargain in which one party begins performance without making any commitment, as in the classic classroom case of the promise to pay a reward for climbing a flagpole."

[37] Section 45 provides that where an offer invites acceptance by performance only, the tender, beginning, or tender of a beginning of the invited performance creates an "option contract." Section 25 defines "option contract" as "a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer."

[38] *See generally* H. M. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 748-71 (tent. ed. 1958); Casner, Restatement (Second) of Property *as an Instrument of Law Reform,* 67 IOWA L. REV. 87 (1981).

[39] *See, e.g.,* Shuey v. United States, 92 U.S. 73 (1875); Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256.

contract analysis.[40] More common, but less dramatic, traditional unilateral contracts cases involve broker commissions, options to purchase or lease, loans and guaranties, insurance, and releases. It is probably not surprising that the *Second Restatement* has not eliminated the use of unilateral-bilateral analysis in any of these traditional areas.[41] But the concept of the unilateral contract is not merely holding its own; lawyers and judges are using the idea in an increasing number and variety of modern contexts.

A. *Unilateral Contracts Between Employers and Employees*

The most notable expansion of unilateral contract analysis has occurred in disputes between employers and employees.[42] Cases arising from the

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[40] Other favorite cases, used in the current casebooks to illustrate the unilateral-bilateral distinction, involve offers that say in effect: "You take care of me now, and I'll take care of you in my will." *See* Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026 (1934); Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917). Recent cases of this type include: Sommerville v. Epps, 36 Conn. Sup. 323, 419 A.2d 909 (1980); McCandlish v. Estate of Timberlake, 497 S.W.2d 191 (Mo. Ct. App. 1973).

These cases may soon be replaced by some of the "nonmarital cohabitation" cases. The most famous of these cases, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), involved an alleged exchange of promises. Although judges apparently have not yet employed explicit unilateral contract terminology in these cases, whenever one party provides services and the other party promises to pay for those services in the future, courts could invoke unilateral contract analysis. The promise might be: "You take care of me now, and I'll take care of you when I acquire fortune and fame." *See, e.g.,* Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976).

[41] *See, e.g.,* broker cases: Real Estate Listing Serv., Inc. v. Connecticut Real Estate Comm'n, 179 Conn. 128, 425 A.2d 581 (1979); Dixon v. Betten, 2 Ill. App. 3d 708, 277 N.E.2d 355 (1971); Judd Realty, Inc. v. Tedesco, 400 A.2d 952 (R.I. 1979); options cases: Aerojet-General Corp. v. Kirk, 318 F. Supp. 55 (N.D. Fla. 1970), *aff'd,* 435 F.2d 819 (1971), *cert. denied, 409 U.S. 892 (1972);* Palo Alto Town & Country Village, Inc. v. BBTC Co., 11 Cal. 3d 494, 521 P.2d 1097, 113 Cal. Rptr. 705 (1974); Erich v. Granoff, 109 Cal. App. 3d 920, 167 Cal. Rptr. 538 (1980); loans and guaranties: Hills v. Gardiner Sav. Inst., 309 A.2d 877 (Me. 1973); Knight v. Seattle First Nat'l Bank, 22 Wash. App. 493, 589 P.2d 1279 (1979); insurance: Warren v. Confederation Life Ass'n, 401 F.2d 487 (1st Cir. 1968); Rittenhouse Found., Inc. v. Lloyds of London, 443 Pa. 161, 277 A.2d 785 (1971); releases: Coffman Indus., Inc. v. Gorman-Taber Co., 521 S.W.2d 763 (Mo. Ct. App. 1975); Brown v. Hammermill Paper Co., 88 Wis. 2d 224, 276 N.W.2d 709 (1979).

[42] Judicial use of unilateral contract analysis in employment cases is not new. *See, e.g.,* Henderson Land & Lumber Co. v. Barber, 17 Ala. App. 337, 85 So. 35 (1920); Orton & Steinbrenner Co. v. Miltonberger, 74 Ind. App. 462, 129 N.E. 47 (1920); Wellington v. Con P. Curran Printing Co., 216 Mo. App. 358, 268 S.W. 396 (1925); Roberts v. Mays Mills, Inc., 184 N.C. 406, 114 S.E. 530 (1922); Wallace v. Northern Ohio Traction & Light Co., 57 Ohio App. 203, 13 N.E.2d 139 (1937); Scholl v. Hershey Chocolate Co., 71 Pa. Super. 244 (1919); Scott v. J.F. Duthie & Co., 125 Wash. 470, 216 P. 853 (1923); Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N.W. 769 (1912). More recently, however, these cases have

employer-employee relationship now comprise the largest and most important group of cases in which courts invoke the concept of the unilateral contract. Cases involving unilateral contract analysis of claims for broker commissions, which earlier commentators found to be the most common unilateral contracts cases,[43] are still important, but now appear less frequently in the reports than do the employment cases.

The typical cases involve claims by employees against present or former employers for employment benefits of one kind or another. Employees may assert rights to pension benefits,[44] bonus or incentive payments,[45] profit sharing benefits,[46] severance pay,[47] or other benefits.[48] A few cases

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proliferated. *See, e.g.*, cases cited *infra* notes 44-49.

[43] Navin, *Some Comments on Unilateral Contracts and Restatement 90,* 46 MARQ. L. REV. 162, 166 (1962) ("Real estate brokerage contracts make up a sizeable portion of the total number of cases [in which the courts have consciously applied the theory of unilateral contract]."); *see* Stoljar, *The False Distinction, supra* note 6, at 525; Note, *supra* note 33, at 556-57. Even as recently as 1982, a leading commentator writes: "The major area for the practical application of § 45 has been the real estate brokerage transaction." E.A. FARNSWORTH, CONTRACTS 181 (1982).

[44] There have been more than fifty retirement-benefit cases reported since 1964 in which unilateral contract analysis has been used either explicitly or implicitly. *See, e.g.,* Hoefel v. Atlas Tack Corp., 581 F.2d 1 (1st Cir. 1978), *cert. denied,* 440 U.S. 913 (1979); Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975); Marvel v. Dannemann, 490 F. Supp. 170 (D. Del. 1980); Hardy v. H.K. Porter Co., 417 F. Supp. 1175 (E.D. Pa. 1976); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Fries v. United Mine Workers, 30 Ill. App. 3d 575, 333 N.E.2d 600 (1975); Harvey v. National Bank of Commerce, 504 P.2d 424 (Okla. 1972); Rose City Transit Co. v. City of Portland, 271 Or. 588, 533 P.2d 339 (1975); Amicone v. Kennecott Copper Corp., 19 Utah 2d 297, 431 P.2d 130 (1967); Jacoby v. Gray's Harbor Chair & Mfg. Co., 77 Wash. 2d 911, 468 P.2d 666 (1970).

[45] There have been more than twenty employee-bonus or incentive cases reported since 1964 in which unilateral contract analysis has been used either explicitly or implicitly. *See, e.g.,* Stone v. Moore, 375 F.2d 110 (5th Cir. 1967); Leone v. Precision Plumbing & Heating, Inc., 121 Ariz. 514, 591 P.2d 1002 (1979); Sigrist v. Century 21 Corp., 519 P.2d 362 (Colo. Ct. App. 1973); Gustafson v. Lindquist, 40 Ill. App. 3d 152, 351 N.E.2d 280 (1976); North Pac. Lumber Co. v. Moore, 275 Or. 359, 551 P.2d 431 (1976); Walker v. American Optical Corp., 265 Or. 327, 509 P.2d 439 (1973); Thompson v. Burr., 260 Or. 329, 490 P.2d 157 (1971); Peloquin v. Arden Eng'g Co., 104 R.I. 671, 248 A.2d 316 (1968); Toch v. Eric Schuster Corp., 490 S.W.2d 618 (Tex. Civ. App. 1972); Thatcher v. Wasatch Chem. Co., 29 Utah 2d 189, 507 P.2d 365 (1973).

[46] *See, e.g., Morse v. J. Ray McDermott & Co., 344 So. 2d 1353 (La. 1977);* Couch v. Administrative Comm. of Difco Labs., Inc. Salaried Employees Profit Sharing Trust, 44 Mich. App. 44, 205 N.W.2d 24 (1972); Russell v. Rpinceton Labs., Inc., 50 N.J. 30, 231 A.2d 800 (1967); Evo v. Jomac, Inc., 119 N.J. Super. 7, 289 A.2d 551 (1972); *Novack v. Bilnor Corp., 26 A.D.2d 572, 271 N.Y.S.2d 117 (1966);* Schlaifer v. Kaiser, 84 Misc. 2d 817, 377 N.Y.S.2d 356 (Sup. Ct.), *aff'd,* 50 A.D.2d 749, 378 N.Y.S.2d 639 (1975); Graham v. Hudgins, Thomson, Ball & Assocs., Inc., 540 P.2d 1161 (Okla. 1975); Garner v. Girard Trust Bank, 442 Pa. 166, 275 A.2d 359 (1971); Levitt v. Billy Penn Corp., 219 Pa. Super.

involve employee challenges to terminations.[49] Not all courts invoke the theory of the unilateral contract in these cases, of course. Judges often decide these disputes without inquiry into questions of contract formation; frequently, they make no effort to explain the contracting process or even to use contract terminology.[50] In such instances, lawyers, judges, and indexers to not treat these cases as "contract" cases at all, but rather as "employment" or "pension rights" cases, for example. With the enactment of the Employee Retirement Income Security Act of 1974 (ERISA),[51] judges sometimes can dispose of certain benefit claims simply by construing particular ERISA provisions,[52] although ERISA does not require

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499, 283 A.2d 873 (1971); Simmons v. Hitt, 546 S.W.2d 587 (Tenn. Ct. App. 1976).

[47] *See, e.g.,* Ingrassia v. Shell Oil Co., 394 F. Supp. 875 (S.D.N.Y. 1975); Chapin v. Fairchild Camera & Instrument Corp., 31 Cal. App. 3d 192, 107 Cal. Rptr. 111 (1973); Dahl v. Brunswick Corp., 277 Md. 471, 356 A.2d 221 (1976); Cain v. Allen Elec. & Equip. Co., 346 Mich. 568, 78 N.W.2d 296 (1956); Gaydos v. White Motor Co., 54 Mich. App. 143, 220 N.W.2d 697 (1974); Clarke v. Brunswick Corp., 48 Mich. App. 667, 211 N.W.2d 101 (1973); Dangott v. ASG Indus., Inc., 558 P.2d 379 (Okla. 1976); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976).

[48] *See, e.g.,* Raybestos-Manhattan, Inc. v. Rowland, 460 F.2d 697 (4th Cir. 1972) (compensation for suggestion); Simpson v. Norwesco, Inc., 442 F. Supp. 1102 (D.S.D. 1977) (commissions), *aff'd,* 583 F.2d 1007 (1978); Harrison v. Jack Eckerd Corp., 342 F. Supp. 348 (M.D. Fla.) (stock options), *aff'd,* 468 F.2d 951 (5th Cir. 1972); Estate of Bogley v. United States, 514 F.2d 1027 (Ct. Cl. 1975) (death benefits); Newberger v. Rifkind, 28 Cal. App. 3d 1070, 104 Cal. Rptr. 663 (1973) (stock options); Haney v. Laub, 312 A.2d 330 (Del. Super. Ct. 1973) (stock options); Carlini v. United States Rubber Co., 8 Mich. App. 501, 154 N.W.2d 595 (1967) (compensation for suggestion); Melin v. Northwestern Bell Tel. Co., 266 N.W.2d 183 (Minn. 1978) (disability benefits); Ehrle v. Bank Bldg. & Equip. Corp. of America, 530 S.W.2d 482 (Mo. Ct. App. 1975) (disability benefits); McHorse v. Portland General Elec. Co., 268 Or. 323, 521 P.2d 315 (1974) (disability benefits); State v. Oregon State Motor Ass'n, 248 Or. 133, 432 P.2d 512 (1967) (vacation pay); Harryman v. Roseburg Rural Fire Protection Dist., 244 Or. 631, 420 P.2d 51 (1966) (sick leave allowance); Schott v. Westinghouse Elec. Corp., 436 Pa. 279, 259 A.2d 443 (1969) (compensation for suggestion).

[49] *See, e.g.,* NLRB v. Colonial Press, Inc., 509 F.2d 850 (8th Cir.), *cert. denied,* 423 U.S. 833 (1975); Ryan v. Upchurch, 474 F. Supp. 211 (S.D. Ind. 1979), *rev'd,* 627 F.2d 836 (7th Cir. 1980); Hepp v. Lockheed-California Co., 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978); Seco Chems., Inc. v. Stewart, 169 Ind. App. 624, 349 N.E.2d 733 (1976); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Garrett v. American Family Mut. Ins. Co., 520 S.W.2d 102 (Mo. Ct. App. 1974).

[50] *See, e.g.,* Lincoln Elec. Co. v. Commissioner, 444 F.2d 491 (6th Cir. 1971); Hanson v. City of Idaho Falls, 62 Idaho 512, 446 P.2d 634 (1968); Allen v. Crowell-Collier Publishing Co., 26 A.D.2d 516, 270 N.Y.S.2d 941 (1966), *rev'd,* 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968); Friedman v. Romaine, 77 Misc. 2d 134, 352 N.Y.S.2d 351 (Sup. Ct., Spec. T. 1974).

[51] 29 U.S.C. §§ 1001-1461 (1976 & Supp. IV 1980).

[52] *See, e.g.,* Thomas v. Marshall, 482 F. Supp. 160 (S.D. Ala. 1979); Calhoun v. Falstaff

employers to establish benefit plans, and thus does not displace contract law as the initial source of employee rights. A few courts find return promises by employees and use bilateral contract analysis.[53] Nevertheless, judicial use of unilateral contract analysis in employment cases has become so widespread that it warrants a search for explanations.

1. Cases in Which the Employee Has Fully Performed

Some courts use the term "unilateral contract" to describe a relationship in which an offeree has fully (or at least substantially) rendered the performance sought by the offeror. The contract is unilateral in the sense that only one party has any remaining obligation, as well as unilateral in the sense that the offeror did not receive a promise in return for his promise. Many of the employment cases that use the term "unilateral contract" are of this type; the employee who has fully or substantially performed sues the employer to recover promised benefits.[54] For example, in *Harvey v. National Bank of Commerce,*[55] a former employee sued his employer to recover pension benefits after his pension was discontinued. Harvey alleged that his employer had promised that, if Harvey took early retirement, he would receive a pension for life. Harvey did retire early, although it was made clear to him that he had no obligation to do so. In affirming a directed verdict for Harvey, the Supreme Court of Oklahoma held that his early retirement amounted to an acceptance of the employer's offer and created a valid unilateral contract.[56]

Cases such as *Harvey* do not seem to present any serious doctrinal problems. They often turn on whether the court finds that the employee did in fact substantially meet his performance obligations. Employers may argue that, even if the employee has substantially performed, they have no legal obligation to make the benefit payments. Courts in earlier times

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Brewing Corp., 478 F. Supp. 357 (E.D. Mo. 1979); Baeten v. Van Ess, 474 F. Supp. 1324 (E.D. Wis. 1979).

[53] *See, e.g.,* Hobson v. Eaton, 399 F.2d 781 (6th Cir. 1968); Pauley v. Industrial Comm'n, 109 Ariz. 298, 508 P.2d 1160 (1973); Knack v. Industrial Comm'n, 108 Ariz. 545, 503 P.2d 373 (1972); city Prods. Corp. v. Industrial Comm'n, 19 Ariz. App. 286, 506 P.2d 1071 (1973); Hinkeldey v. Cities Serv. Oil Co., 470 S.W.2d 494 (Mo. 1971); Vondras v. Titanium Research & Dev. Co., 511 S.W.2d 883 (Mo. Ct. App. 1974).

[54] *See, e.g.,* Bonar v. Barnett Bank, 488 F. Supp. 365 (M.D. Fla. 1980); Fontecchio v. United Steelworkers, 476 F. Supp. 1023 (D. Colo. 1979); Denzer v. Purofied Down Prods. Corp., 474 F. Supp. 773 (S.D.N.Y. 1979); Genevese v. Martin-Marietta Corp., 312 F. Supp. 1186 (E.D. Pa. 1969); Seco Chems., Inc. v. Stewart, 169 Ind. App. 624, 349 N.E.2d 733 (1976); Dahl v. Brunswick Corp., 277 Md. 471, 356 A.2d 221 (1976); Harvey v. National Bank of Commerce, 504 P.2d 424 (Okla. 1972); Thompson v. Burr, 260 Or. 329, 490 P.2d 157 (1971).

[55] 504 P.2d 424 (Okla. 1972).

[56] Id. at 427.

sometimes characterized certain employment benefits as "mere gratuities" in order to reject claims of contractual rights to them by employees.[57] This view runs counter to contemporary conceptions of the employment relationship,[58] however, and has generally been discarded.[59] Most modern courts characterize employment benefits as forms of compensation (usually deferred compensation) that employees earn just as they earn wages or salaries.[60]

When courts use the term "unilateral contract" in these "half-executed" cases,[61] they are only describing what happened—the employee completed performance without promising to perform. They are not using the term to suggest that the employee could not have accepted by making a return promise. There is simply no need to address the issue of whether a promise would have been a permissible mode of acceptance. Although the courts do not invoke the unilateral contract idea in these cases to indicate that full

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[57] *See, e.g.*, Judd v. Wasie, 211 F.2d 826 (8th Cir. 1954); Russell v. Johns-Manville Co., 53 Cal. App. 572, 200 P. 668 (1921); Arrow Mfg. Co. v. Ross, 141 Colo. 1, 346 P.2d 305 (1959); Fontius Shoe Co. v. Lamberton, 78 Colo. 250, 241 P. 542 (1925); Johnson v. Schenley Distillers Corp., 181 Md. 31, 28 A.2d 606 (1942); Burgess v. First Nat'l Bank, 219 A.D. 361, 220 N.Y.S. 134 (1927); Friedle v. First Nat'l Bank, 129 Misc. 309, 221 N.Y.S. 292 (N.Y. City Ct. 1927). *See generally* Note, *Contractual Aspects of Pension Plan Modification,* 56 COLUM. L. REV. 251, 255 n.23, 263 n.58 (1956).

[58] *See generally* M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981). Glendon argues that as legal ties among family members have weakened, the law has played a greater role in cementing the relationship between employer and employee. In the modern employment relationship, legal rights are more quickly recognized and less easily terminated. *See* Clark, Book Review, 16 FAM. L.Q. 93 (1982).

[59] *See* Note, *supra* note 57, at 266-68.

[60] *See, e.g.*, Audio Fidelity Corp. v. Pension Benefit Guar. Corp., 624 F.2d 513, 518 (4th Cir. 1980); Craig v. Bemis Co., 517 F.2d 677, 680 (5th Cir. 1975) (no recovery allowed because rights had not vested); Matthews v. Swift & Co., 465 F.2d 814, 818 (5th Cir. 1972); Rochester Corp. v. Rochester, 450 F.2d 118, 121 (4th Cir. 1971); Chapin v. Fairchild Camera & Instrument Corp., 31 Cal. App. 3d 192, 198, 107 Cal. Rptr. 111, 116 (1973); Conner v. Phoenix Steel Corp., 249 A.2d 866, 868 (Del. 1969); Winkler v. Frank-Cunningham Stores Corp., 256 A.2d 905, 907 (D.C. 1969); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 335, 563 P.2d 54, 59 (1977); Morse v. J. Ray McDermott & Co., 344 So. 2d 1353, 1357 (La. 1977); Crinnion v. Great Atlantic & Pacific Tea Co., 156 N.J., Super. 479, 483, 384 A.2d 159, 161 (1978); Schlaifer v. Kaiser, 84 Misc. 2d 817, 821, 377 N.Y.S.2d 356, 361 (Sup. Ct.), aff'd, 50 A.D.2d 749, 378 N.Y.S.2d 639 (1975); Dangott v. ASG Indus., Inc., 558 P.2d 379, 382 (Okla. 1976) (alternative ground); Levitt v. Billy Penn Corp., 219 Pa. Super. 499, 503, 283 A.2d 873, 875 (1971); Simmons v. Hitt, 546 S.W.2d 587, 591 (Tenn. Ct. App. 1976); Weaver v. Evans, 80 Wash. 2d 461, 475, 495 P.2d 639, 648 (1972); Jacoby v. Grays Harbor Chair & Mfg. Co., 77 Wash. 2d 911, 915, 468 P.2d 666, 669 (1970); Frank v. Day's, Inc., 13 Wash. App. 401, 404, 535 P.2d 479, 481-82 (1975).

[61] Lon Fuller used the term "half-completed." Fuller, *Consideration and Form,* 41 COLUM. L. REV. 799, 815 (1941); *see also* Eisenberg, *The Bargain Principle and Its Limits,* 95 HARV. L. REV. 741, 743 (1982).

performance is *the only* permissible mode of acceptance, they do employ it in reaching the conclusion that it is *a* permissible mode of acceptance. Llewellyn was right when he argued that courts do not need the concept of the unilateral contract to reach this non-controversial result. When an employee completes the performance sought by the employer, it would be strange indeed to allow the employer to avoid liability on the grounds that the employee made no promise and thus had no obligation to perform.[62] These cases present the strongest case for enforcement of the employer's promise because they are based on benefits actually conferred on the promisor by the promisee by reason of the promise.[63]

2. Cases in Which the Employee Has Partially Performed

Attempts by employers to revoke or amend benefit offers after employees only partially perform present more difficult problems. An example may help to illustrate how and why courts use the concept of the unilateral contract in these incomplete-performance cases. In *Sylvestre v. State,*[64] six retired Minnesota state district judges brought an action seeking a declaration that the state could not reduce their retirement benefits by amending the judges' retirement statute. The Supreme Court of Minnesota characterized the retirement statute that was in effect when the plaintiffs began their judicial careers as an offer for a unilateral contract. The court stated the offer as follows: "If you will stay on the job for at least 15 years and then retire after having reached the specified retirement age, we will

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[62] Section 63 of the first *Restatement* provided that, even if the offeror requested acceptance by promise, full and timely performance or tender of performance bound the offeror to a contract. Comment *a* explained: "If within the time allowed for accepting the offer full performance has been given, the offeror has received something better than he asked for and is bound, since the only object of requiring a promise is ultimately to obtain performance of it." The provision in Section 32 of the *Second Restatement* giving the offeree the choice of accepting either by promise or by performance usually will lead to the same result. *See* Braucher, *supra* note 29, at 307.

[63] The classic statement of this position is Fuller & Perdue, *supra* note 26, at 56. The authors state that the object of enforcement in this situation is the prevention of unjust enrichment. The interest protected is the "restitution interest." *Id.* at 53-54; *see also* Eisenberg, *supra* note 61, at 743-44. The *extent* to which the employer's promise should be enforced (i.e., the appropriate *remedy* for the employee) is a separate, but related, question. For a discussion of the remedial issues in the half-completed-bargain cases, see Eisenberg, *supra* note 61, at 744-48.

[64] 298 Minn. 142, 214 N.W.2d 658 (1973). Although this case is atypical in that it involves protection of benefits for judges by other judges using a state statute, it is not atypical in its analytical approach. It serves as a clear illustration of the unilateral idea at work because of the explicit nature of the analysis, and the articulation by the court of the implied promise that it found in the offer.

pay you a part of your salary for the remainder of your life."[65] Two of the plaintiffs began work under this statute, but did not reach retirement age until after the legislature amended the statute to decrease benefits. The court held that as soon as the judges took office the state was "irrevocably bound" by the terms of the statute in effect at that time, and that the statutory amendment violated the contract clauses of the state and federal constitutions.[66]

The contract analysis employed by the court in *Sylvestre* typifies the approach taken in many modern employment benefits cases. Courts continue to characterize an employer's benefit offer as an offer inviting a unilateral contract, despite the criticism that this concept has received. The primary reason for the popularity of unilateral contract analysis in the employment area is that the concept allows a finding of promissory liability of the employer without the necessity of finding a return promise by the employee.[67] These cases almost never involve any explicit promise by the employee. Furthermore, courts are reluctant to infer promises from the employee's conduct. Few legal principles are more widely shared than the notion that, unless he explicitly agrees to work for a fixed term, an employee makes no promise of continued service to his employer.[68] The judges in *Sylvestre* had no contractual obligation to continue to work for the state for fifteen years. Of course, their choice not to do so would forfeit their rights to receive pension benefits, but they would not incur any liability to the employer.

The Llewellyn approach adopted by the *Second Restatement,* which

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[65] Id. at 152, 214 N.W.2d at 665.

[66] Id. at 157, 214 N.W.2d at 667-68.

[67] In other words, the unilateral contract idea handles most easily the "mutuality of obligation" argument. *See supra* text accompanying notes 10-12.

[68] There may be situations in which a court might find an implied promise by an employee to give his employer reasonable notice of termination. For example, a fireman might be liable for leaving the scene of a fire or a corporate lawyer might be liable for walking out in the middle of a trial. Even in these circumstances, however, litigation to enforce the promise would be unlikely.

On the employer's side, the general rule remains that, in the absence of a contrary agreement, employment is at the will of the employer, and the employer, like the employee, makes no implied promise to continue the relationship. *See, e.g.,* M. Glendon, *supra* note 58, at 143-70; Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will,* 17 AM. BUS. L.J. 467 (1980); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404 (1967). Recently, however, some courts have begun to limit the doctrine of employment at will, and some have used the unilateral contract concept in the process. *See, e.g.,* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). The unilateral contract idea can be a useful device for judges who want to limit an employer's right to terminate without limiting the employee's right to do the same.

presents judges with the alternatives of Section 62 and Section 45, does not work very well in these employment benefit cases. Section 62 is unsatisfactory because it carries with it the unwanted return promise by the employee[69]—it makes the contract bilateral. On the other hand, Section 45 is limited to the "freak" cases—cases involving offers that can be accepted *only* by performance. Llewellyn's description of these "freaks" as "offers for a speculative prize"[70] does not fit the employment benefits situation. There is no speculative prize here. In fact, the situation is one in which "the action of the offeree is cumulative, and moves with some certainty toward the objective of the offer." [71] If one day of work is enough to prevent an employer from revoking a benefit plan, then a promise to work for the requisite time period should have the same effect.[72]

The employment benefits contract, in short, is neither one in which both parties are bound, nor one of Llewellyn's freak unilaterals. Courts continue to use the unilateral contract idea because they do not accept Llewellyn's test (adopted, in effect, bu the *Second Restatement*) for determining when a unilateral contract exists. For Llewellyn and the drafters of the *Second Restatement* the key question is: When is it clear that the offeror was seeking acceptance *only* by performance? In other words, when won't a promise do?[73] If this is the test, Llewellyn and the restaters are probably correct in concluding that there are few genuine unilateral contracts. The presumption in the *Second Restatement* that an offer invites either promise or performance makes good sense. The difficulty arises when Section 62 goes on to say that when either a promise or performance would suffice as an acceptance the beginning of performance operates as a promise to render complete performance.[74]

There is much to be said for a rule that infers a promise by the offeree to complete the performance he has begun. The comments set out the justifications for the rule: "to preclude the offeree from speculating at the offeror's expense . . ., and to protect the offeror in justifiable reliance on the

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[69] *See supra* note 35 and accompanying text.

[70] *See supra* text accompanying notes 20-23.

[71] Llewellyn, *supra* note 1, at 806.

[72] A legally enforceable promise to work for a certain period of time is not worthless to the employer-offeror in the same sense that, for example, a promise to catch a criminal would be. Absent unusual circumstances, a promise should be a permissible mode of acceptance of an offer to provide employment benefits. Of course, the employee is not entitled to the benefits until he completes his performance of the promise.

[73] Llewellyn would have objected to phrasing the question in terms of "promise." He probably would have preferred: When won't an "overt expression of active agreement" do? *See, e.g.,* Llewellyn, *supra* note 1, at 792-98, 815.

[74] See *supra* note 35 for a discussion of the possible qualification of this rule.

offeree's implied promise."[75] There are situations, however, in which judges believe that inferring a promise would be inconsistent with the parties' reasonable understanding of the nature of their relationship or with the judges' own views about what that relationship should be.[76] In these situations judges find the unilateral contract concept a useful one.

Judges generally do not ask the hypothetical question: When won't a promise do? Rather they ask: Was there a promise here? In those cases in which the offeree simply completed performance, judges are likely to call the contract "unilateral" without speculating about whether a promise would have been another permissible mode of acceptance. In part-performance cases, judges seem to need a category that is made difficult for them by the *Second Restatement.* They need a category for offers which *could have been* accepted either by promise or performance but where the offeree chose to accept by performance without making a promise.[77] In some of these cases judges characterize the contract as unilateral in order to avoid the necessity of finding an obligation of the offeree. Moreover, the unilateral characterization does not leave the offeree unprotected since part performance limits the offeror's power to revoke.[78] The unilateral contract idea continues to be useful today because there are more than a few relationships in modern life in which only one of two parties can be said to be engaging in promissory activity, even if one grants great latitude to the process of inferring promises.

B. *Some Less Traditional Uses of the Unilateral Contract Idea*

Inertia might explain the continued use of the unilateral contract concept in traditional areas such as broker commissions, options to purchase, and prizes or rewards.[79] Judges often are reluctant to rethink or reverse established precedent. One could argue that even the employment benefits cases, while proliferating in number, simply build on old precedents.[80] The expansion of unilateral contract analysis into less traditional areas, however, suggests that courts are finding some important continuing utility in the concept.

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[75] RESTATEMENT (SECOND) OF CONTRACTS § 62 comment c (1981).

[76] *See generally infra* Part IV.

[77] It is possible to argue that the *Second Restatement* allows for such a category by making the rule of Section 62(2) (inferring a promise by the offeree to complete performance) "yield to a manifestation of contrary intention." RESTATEMENT (SECOND) OF CONTRACTS § 62 comment c (1981). But this argument is not without its difficulties. *See supra* note 35.

[78] *See supra* note 37 and accompanying text.

[79] *See supra* notes 39-41 and accompanying text.

[80] *See supra* note 42.

1. Plea Bargains

What law determines whether or not courts will enforce "bargains"?[81] It should not be surprising that judges confronted with attempts by criminal defendants to enforce plea bargains have turned to contract law. Some courts characterize a prosecutor's offer to drop a criminal charge in exchange for a plea to a lesser charge as an offer for a unilateral contract.[82] Under this theory, the criminal defendant has no obligation to enter the plea, but if he does the prosecution is bound to the terms of the prosecutor's offer.

The results of these cases are mixed. Unilateral contract analysis protects the criminal defendant if the prosecutor reneges on his promise after the plea is entered, even though the defendant was never obligated to enter the plea.[83] But sometimes this approach also leads courts to conclude that the prosecutor can revoke at any time until the defendant formally enters the plea.[84] The concept of "beginning performance," which usually mitigates the harshness of the revocation problem in unilateral contracts cases, often does not work in the plea bargain cases. It is difficult to construct an argument for the existence of part performance in entering a plea. Frequently, it is also difficult for a defendant to prove any action in reliance on the prosecutor's promise, although testifying against criminal associates[85] or waiving a right to a speedy trial[86] might suffice. If the defendant is unable to show reliance, most courts deny relief if the prosecutor withdrew the offer before the defendant entered the plea. [87]

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[81] Although Corbin distinguished between "bargain" and "contract," he noted that "[w]ithout doubt, the word 'bargain' is often used as substantially synonymous with agreement and contract." 1 A. CORBIN, *supra* note 6, § 10; *see also* 1 S. WILLISTON, *supra* note 7, § 2A; RESTATEMENT OF CONTRACTS § 4 (1932).

[82] *See, e.g.,* Government of Virgin Islands v. Scotland, 614 F.2d 360, 364 (3d Cir. 1980); People v. Barnett, 113 Cal. App. 3d 563, 571-72, 170 Cal. Rptr. 255, 259 (1980); State v. Reasbeck, 359 So. 2d 564, 565 (Fla. Dist. Ct. App. 1978); State v. Collins, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980).

[83] *See, e.g.,* Santobello v. New York, 404 U.S. 257 (1971); United States v. Serubo, 502 F. Supp. 290 (E.D. Pa. 1980); Tully v. Scheu, 487 F. Supp. 404 (D.N.J.), *rev'd,* 637 F.2d 917 (1980), *cert. denied,* 454 U.S. 854 (1981).

[84] *See, e.g.,* Government of Virgin Islands v. Scotland, 614 F.2d 360, 365 (3d Cir. 1980); State v. Reasbeck, 359 So. 2d 564, 565 (Fla. Dist. Ct. App. 1978); State v. Edwards, 279 N.W.2d 9, 11 (Iowa 1979); State v. Collins, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980).

[85] *See* Tully v. Scheu, 487 F. Supp. 404, 411 (D.N.J.), *rev'd,* 637 F.2d 917 (1980), *cert. denied,* 454 U.S. 854 (1981).

[86] *See* People v. Barnett, 113 Cal. App. 3d 563, 574, 170 Cal. Rptr. 255, 261 (1980); Bullock v. State, 397 N.E.2d 310, 313 (Ind. Ct. App. 1979) (dissent).

[87] In Cooper v. United States, 594 F.2d 12 (4th Cir. 1979), the Fourth Circuit held that the criminal defendant's constitutional rights extend beyond his contract rights and ordered specific performance of a prosecutor's promise even though the prosecutor withdrew his

It has been argued that there is no constitutional impediment to a bilateral theory of the plea bargain agreement, and that courts could enforce a defendant's promise to enter a plea without violating his constitutional rights.[88] Although theoretically possible, binding the defendant to his promise to enter a plea would create practical difficulties. Courts have established elaborate requirements to make sure that a defendant who pleads guilty waives his rights voluntarily and intelligently.[89] If courts were to recognize a binding contract to plead guilty, presumably similar requirements would have to be met at the time of the defendant's promise. The desire to avoid these complications is undoubtedly one reason for the judicial preference for unilateral contract theory in plea bargain cases. Most judges, however, choose unilateral contract analysis simply because it accords with their view that plea agreements between prosecutors and criminal defendants do not call for the defendant to undertake any legally enforceable obligation to enter a plea. As in the employment setting, the parties understand that only one of them is making a promise.

2. Other Citizen-State Relationships

The plea bargaining cases invoke the concept of the unilateral contract, in addition to constitutional due process principles, to define a relationship between the criminal defendant and the state. As illustrated by *Sylvestre v. State,*[90] courts sometimes use unilateral contract analysis together with the contract clause to define the relationship between the government employee and his employer.[91] The government-as-employer cases involve use of the unilateral contract idea to restrict the power of legislatures to rescind their prior actions. Once a legislature has established a pension program for government employees, for example, it cannot change that program to the detriment of existing employees, at least absent a compelling reason.[92]

The unilateral contract idea also can be used to restrict administrative

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promise before the defendant entered a plea, and even though the defendant failed to allege reliance. Id. at 16-17. Several courts have rejected the Cooper analysis. *See, e.g.,* Government of Virgin Islands v. Scotland, 614 F.2d 360, 365 (3d Cir. 1980); State v. Edwards, 279 N.W.2d 9, 12 (Iowa 1979); State v. Collins, 300 N.C. 142, 148, 265 S.E.2d 172, 176 (1980); State v. Beckes, 100 Wis. 2d 1, 4-6, 300 N.W.2d 871, 873 (1980).

[88] Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 CALIF. L. REV. 471, 525 n.189 (1978). The authors recognize the difficulties suggested in the next few lines of text.

[89] *See, e.g.,* Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238 (1969); Marchibroda v. United States, 368 U.S. 487 (1962).

[90] 298 Minn. 142, 214 N.W.2d 658 (1973); *see supra* text accompanying notes 64-66.

[91] *See, e.g.,* Pineman v. Oechslin, 494 F. Supp. 525, 538-54 (D. Conn. 1980); Marvel v. Dannemann, 490 F. Supp. 170, 174-77 (D. Del. 1980).

[92] *See infra* note 114 and accompanying text.

action. In *Seneca Nursing Home v. Kansas State Board of Social Welfare,*[93] the plaintiffs, a group of licensed nursing homes in Kansas, prevailed on a unilateral contract theory in an action challenging a change in the method of calculating the amount of payments for nursing services under state and federal institutional care programs. The Kansas State Board of Social Welfare attempted to effectuate the change in policy by announcing it in an "Adult Care Homes Manual" and later by issuing an amended regulation. The Tenth Circuit first upheld the trial court's finding that the attempted change was inconsistent with the applicable Kansas statute.[94]

The question then became whether the plaintiffs could sue the state agency. The Tenth Circuit approved the trial court's conclusion that they could do so because a unilateral contract existed between the State Board of Social Welfare and the plaintiffs. The court said that the terms and conditions of the plaintiffs' services were contained in state plans filed with the Secretary of Health, Education and Welfare. The method of compensation set forth in the Kansas statutes was part of the arrangement. By performing the required services the plaintiffs became entitled to the statutory payment amounts.

The court, in affirming the declaratory judgment for the plaintiffs, rejected without comment the defendants' claim that the Kansas statute establishing the method of payment was "a legislative act and therefore not a contract of the Board."[95] The court also rejected the argument that the plaintiffs could not prevail because a Kansas statute declared that state agencies are immune from liability on an implied contract. The court said that the plan, the statutory measure of payments, and the requirements for licenses were enough to create an express contract.[96]

The *Seneca* analysis suggests another potentially open-ended use for unilateral contract theory. If courts characterize statutory rights as "contractual," presumably the "contracting parties" can enforce them. In other words, the existence of an implied private right of action may depend on the courts' willingness to employ contractual analysis.

The combination of unilateral contract analysis with a reinvigorated contract clause[97] creates enormous possibilities for restricting reductions in

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[93] 490 F.2d 1324 (10th Cir.), *cert. denied,* 419 U.S. 841 (1974).

[94] *See* id. at 1329-32. The Kansas statute provided for the payment to participating nursing homes of "reasonable, usual and customary" charges. The manual and subsequent regulation adopted by the Board of Social Welfare authorized payment on a "cost plus a limited profit" basis. The Tenth Circuit affirmed the trial court's holding that the administrative language was inconsistent with that of the statute.

[95] Id. at 1332.

[96] *See id.*

[97] *See, e.g.,* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (Minnesota Private Pension Benefits Protection Act, which imposed obligations on employer beyond

governmental obligations not only to government employees and military personnel but to recipients of public benefits as well. Citizens beginning public job training programs, students in public schools and colleges, and perhaps even Social Security recipients can make plausible unilateral contract claims.[98] In the present period of retrenchment, courts may be faced with a large number of such cases. I expect courts to be cautious about "locking in" governments to particular programs, policies, and procedures, particularly in an age of attempts to reduce taxes and the size of governments.[99]

Although there has been a significant movement toward contractual analysis in some areas of government-citizen relations, in others courts continue to reject it.[100] The crucial questions thus become how and why

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those voluntarily assumed, violates the contract clause of the United States Constitution); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (contract clause prohibits retroactive statutory repeal of a statutory covenant limiting the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for bonds issued by the Port Authority); Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause,* 1979 SUP. CT. REV. 95; Note, *Revival of the Contract Clause:* Allied Structural Steel Co. v. Spannaus *and* United States Trust Co. v. New Jersey, 65 VA. L. REV. 377 (1979).

[98] The current position of the United States Supreme Court is that Social Security benefits are not contractual. *See* Flemming v. Nestor, 363 U.S. 603 (1960). In *Flemming* the Court upheld a section of the Social Security Act that terminated the plaintiff's old age benefits after he was deported. The Court took the position that the benefits were not contractual because "each worker's benefits . . . are not dependent on the degree to which he was called upon to support the system of taxation." Id. at 609-10. The Court expressed concern that making Social Security benefits "accrued property rights" would deprive the system of the "flexibility and boldness" necessary to meet changing conditions. Id. at 610. *See also* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980) ("[R]ailroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time."). Public policy considerations, not inescapable logic or contract theory, have produced these results. If the Justices decide to weigh these policy considerations differently, they could easily construct a contractual theory to support different results. *See infra* Part IV C.

[99] This caution probably will be manifested as a reluctance to apply contract analysis at the outset, because once a court determines that a contractual right does exist, an abrogation of that right in order to lessen expenditures is generally considered to be no defense to a contract claim against the government. *See* Caola v. United States, 404 F. Supp. 1101, 1107 (D. Conn. 1975) (quoting Lynch v. United States, 292 U.S. 571, 580 (1934)).

[100] For example, United States v. Harris, 453 F.2d 862 (9th Cir. 1972), *aff'g* 325 F. Supp. 1122 (N.D. Cal. 1971), involved an appeal from a conviction for refusal to submit to induction. Defendant argued that his application for voluntary induction was an offer for a unilateral contract that could be withdrawn at any time before acceptance, that the only acceptance would be the act of induction, and that failing to report for induction was a revocation of the offer before acceptance. The trial court found that defendant's application for voluntary induction was indeed an offer for a unilateral contract. *See* 325 F. Supp. at

courts determine that expectations created by legislative action are "contractual"—questions that will be explored in Part IV. In any event, when courts do seek to impose contractual obligations on governmental bodies, the unilateral contract serves as a convenient device for that end because it does not require the imposition of a promissory obligation on the private citizen or organization.

3. Contracts with Schools

In recent years the relationship between students and colleges or universities has generated unprecedented levels of litigation and scholarly attention.[101] Although much of the discussion in the cases and journals involves contractual analysis of the relationship, few courts or scholars explicitly characterize the student-school contract as either unilateral or bilateral. At first glance the contract may appear bilateral; the school promises to provide the curriculum and to award a degree upon the student's satisfactory completion of the academic program, and the student promises to pay the tuition and to follow the school's rules and regulations.[102]

1124. The court convicted the defendant, however, on the grounds that the federal government accepted his offer by sending him an accelerated order to report for induction before he revoked.

The Ninth Circuit began by saying: "The argument made in support of the appeal is imaginative, but it fails." 453 F.2d at 863. It rejected entirely the contract approach: "This contract approach ignores the fact that duties under the Selective Service System are not consensual." *Id.* And in a footnote: "We cannot believe that Congress in enacting [the Selective Service Act], or the Selective Service System in adopting [administrative regulations] had hidden intentions to incorporate into law a unilateral contract concept which would be disruptive of the orderly conduct of the system." Id. at 863 n.1.

[101] *See, e.g.,* Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Peretti v. Montana, 464 F. Supp. 784 (D. Mont. 1979), rev'd, 661 F.2d 756 (9th Cir. 1981); Paulsen v. Golden Gate Univ., 25 Cal. 3d 803, 602 P.2d 778, 159 Cal. Rptr. 858 (1979); Zumbrun v. University of S. Cal., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); Blatt v. University of S. Cal., 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (1970); Abrams v. Illinois College of Podiatric Medicine, 77 Ill. App. 3d 471, 395 N.E.2d 1061 (1979); Eisele v. Ayers, 63 Ill. App. 3d 1039, 381 N.E.2d 21 (1978); Essigmann v. Western New England College, 1981 Mass. App. Adv. Sh. 846, 419 N.E.2d 1047; Jones v. Vassar College, 59 Misc. 2d 296, 299 N.Y.S.2d 283 (Sup. Ct. 1969); Drucker v. New York Univ., 57 Misc. 2d 937, 293 N.Y.S.2d 923 (N.Y. Civ. Ct. 1968), *rev'd,* 59 Misc. 2d 789, 300 N.Y.S.2d 749 (Sup. Ct., App. T. 1969), *aff'd,* 33 A.D.2d 1106, 308 N.Y.S.2d 644 (1970); Dizick v. Umpqua Community College, 33 Or. App. 559, 577 P.2d 534 (1977), *rev'd,* 287 Or. 303, 599 P.2d 444 (1979); Lewis v. Curry College, 89 Wash. 2d 565, 573 P.2d 1312 (1978); Ray, *Toward Contractual Rights for College Students,* 10 J.L. & EDUC. 163 (1981); Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance,* 26 STAN. L. REV. 95 (1973).

[102] *See* Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979) (quoting Note, *Expulsion of College and Professional Students—Rights and Remedies,* 38 NOTRE DAME

Most schools, however, do not permit the student to accept the offer of admission with a promise to pay tuition; the student cannot register until tuition is paid.[103] In this situation, the school's offer is an offer for a unilateral contract. Compliance by the student with the rules and regulations of the school is required for the continued provision of instruction and the eventual granting of the degree, but it is not the subject of an independent promise enforceable in court. Perhaps some evidence that the relationship is unilateral is that, with very few exceptions,[104] all the cases are brought by students against schools and not by schools against students.

Sometimes schools will offer honors or awards for special performance: "If your grade point average is in the top five percent of those of all students, we will grant your degree, magna cum laude." The student obviously has made no promise to attain a certain average; failure to do so does not subject him to liability. When viewed in this manner, the school's offer for these honors seems analogous to offers for rewards—the classic "true unilaterals."[105] Once again, the unilateral contract concept can supply the legal theory for students using the courts to establish or expand their legal rights against schools.

C. *The Adaptability of the Unilateral Contract Concept*

Courts have employed unilateral contract analysis in a wide range of factual settings since the publication of the first tentative draft of the *Second Restatement of Contracts* in 1964. These cases demonstrate that the *Second Restatement* has not succeeded in relegating unilateral contracts cases to Llewellyn's "freak tent." One reason that judges and lawyers have not curtailed their use of unilateral contract analysis is that they have never accepted the Llewellyn test for determining the existence of a unilateral contract. The Llewellyn test focuses on the offeror; a true unilateral contract can be formed only if the offeror would not be satisfied with a promissory acceptance.[106] Judges and lawyers focus on the offeree; a unilateral contract is formed when the offeree does not make any promise.

A more important reason for the continued use of unilateral contract

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LAW. 174, 183 (1962)).

[103] It could be argued that a student's letter to a school "accepting" the school's offer of admission and perhaps enclosing a small deposit should be enough to prevent the school from revoking its offer. On the other hand, to conclude that the student by these actions undertakes a legally enforceable obligation to pay tuition seems inconsistent with the expectations of both parties in this era of multiple applications for admission.

[104] *See* Albermarle Educ. Found., Inc. v. Basnight, 4 N.C. App. 652, 167 S.E.2d 486 (1969).

[105] *See supra* text accompanying notes 20-23.

[106] *See supra* text accompanying notes 71-78.

analysis in contemporary litigation is that it has proved adaptable to the needs of judges and lawyers in areas unforeseen by Llewellyn and apparently by the drafters of the *Second Restatement.* Relatively few of the modern unilateral contracts cases involve traditional commercial exchanges (sales of goods), and it was primarily the traditional commercial context that Llewellyn had in mind when he unleashed his attack on the unilateral contract idea. Llewellyn did not foresee the usefulness in a highly organized society of a concept that allows a plaintiff to assert the defendant's promissory obligation and at the same time preempt the argument that he himself did not undertake any obligation. Many of the modern unilateral contracts cases involve claims by an individual offeree against an organizational offeror—the little guy against the big organization. In this context courts often are quite willing to conclude that the organization made a promise even though the individual did not.

Cook v. Advertiser Company[107] provides a good illustration of how far the unilateral contract idea can be extended. A group of black plaintiffs brought an action against a newspaper publisher for violation of their constitutional and statutory rights in maintaining an all-white society page. The plaintiffs alleged that the defendant newspaper distributed printed forms to those wishing to have a wedding announcement appear on the society page. When whites submitted completed forms and pictures, the newspaper always published them on the society page; when the plaintiffs submitted the same items, the defendant refused to publish them on the society page but said they would be published only on a "Negro news page."[108] The plaintiffs claimed that the newspaper made an implied offer to publish upon presentation of the picture and questionnaire. The Fifth Circuit majority held that there was no contract, implied or otherwise. "There was no agreement to publish and there was no consideration received for any publication actually made."[109] Judge Wisdom, concurring specially, took a somewhat different approach. After setting forth the unilateral contract argument, which he found "appealing," he stated: "Yet the argument proceeds from a mistaken premise. Not every exchange of conferred benefits creates a contract."[110] He went on to say that no one, white or black, has an enforceable right to publication of a wedding announcement. Such a right would run counter to the first amendment: "It is most unlikely that any court in our land could constitutionally enforce a 'promise' by a newspaper to publish any particular item of news."[111]

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[107] 458 F.2d 1119 (5th Cir. 1972), *aff'g* 323 F. Supp. 1212 (1971).

[108] Id. at 1120-21.

[109] Id. at 1122.

[110] Id. at 1123.

[111] *Id.* A recent case held, however, that ordering specific performance of a contract to

In *Cook,* the plaintiffs used the unilateral contract idea to attempt to vindicate an infringement of civil rights because the absence of "state action" precluded a direct attack on the newspaper's alleged discriminatory practices.[112] Judge Wisdom apparently rejected the analysis only because of its impact on first amendment rights. It is hard to imagine a case that is further removed from traditional unilateral contract fact patterns. Modern unilateral contracts cases such as *Cook* explore the limits of obligation in evolving areas of law that have little to do with commercial exchange.

IV. SEARCHING FOR LIMITS ON THE USE OF UNILATERAL CONTRACT

A. *Unilateral Contract as a Tool for Expanding Civil Obligation*

I have attempted to demonstrate that lawyers and judges recently have been choosing unilateral contract analysis with remarkable and increasing frequency. In assessing this trend toward the unilateral contract, however, it is important to recognize an important change in the way that unilateral contract is being used. In Llewellyn's time, unilateral contract was predominantly a defendant's theory; the plaintiff pressed a bilateral contract argument and the defendant claimed to have made an offer for a unilateral contract which he revoked before the plaintiff's acceptance by performance. In modern times, unilateral contract is predominantly a plaintiff's theory. With some exceptions,[113] courts employ unilateral contract analysis when they find liability and reject it when they deny liability.

The crucial, difficult question facing the courts in the modern cases is not whether to choose unilateral or bilateral contract analysis, but whether no employ any contractual analysis at all. Judges and lawyers have been expanding contract analysis into new areas and situations. It is no coincidence that they have resorted to unilateral contract in this process. The need to find an enforceable return promise provides some limitation on

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print a political advertisement does not infringe first amendment rights. Herald Telephone v. Fatouros, 431 N.E.2d 171 (Ind. Ct. App. 1982).

[112] The plaintiffs advanced the theory of implied contract in order to establish a claim under 42 U.S.C. § 1981 (1976), which provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 458 F.2d at 1121. The district court initially dismissed the Section 1981 claim on the grounds that that section did not apply to private action. 323 F. Supp. at 1217. The Fifth Circuit subsequently decided in Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971), that a claim could be stated against a private individual under Section 1981.

[113] Some of the plea bargaining cases, *see supra* notes 81-89 and accompanying text, and the "exploding-soda-bottle" cases, *see infra* notes 154-65 and accompanying text, involved defensive use of unilateral contract theory.

the use of bilateral contract theory to impose liability. Plaintiffs pursuing a bilateral theory have to prove, and sometimes subject themselves to, their own promissory obligation. Plaintiffs using the unilateral contract device, like tort plaintiffs, have to prove only the defendant's obligation.

More often than not, the source of the defendant's obligation in modern unilateral contracts cases is an implied, rather than an express, promise. Moreover, the implied promise often takes the following form: "As long as you keep doing what you've been doing, or are about to do, I'll keep doing what I've been doing, or am about to do."[114] In other words, the defendant's alleged promise is a promise to maintain the status quo, and the plaintiff's performance is simply continuing the status quo. The only limit on the use of unilateral contract theory is the court's willingness to find the alleged implied promise. Any assessment, therefore, of the appropriateness of modern judicial use of unilateral contract theory must focus on the promissory basis of the asserted obligation: Did the defendant really make a promise and, if so, should that promise serve as the basis for determining the existence and extent of liability?

B. *The Promissory Basis of Unilateral Obligation*

The *Second Restatement of Contracts* defines a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[115] As this definition suggests, whether it is appropriate to infer a promise depends on the facts of each case; general pronouncements cannot provide much assistance.[116] Charles Fried begins his book, *Contract as*

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[114] Some judges qualify the implied promise: "I will keep doing what I have been doing unless I have a good reason to change." Judges thus attempt to insure some flexibility by applying reasonableness standards to modifications of existing policies. *See, e.g.,* Pineman v. Oechslin, 494 F. Supp. 525, 552-53 (D. Conn. 1980); Marvel v. Dannemann, 490 F. Supp. 170, 176 (D. Del. 1980); Babbitt v. Wilson, 9 Cal. App. 3d 288, 290-91, 88 Cal. Rptr. 623, 624 (1970); Hanson v. City of Idaho Falls, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968); Drans v. Providence College, 119 R.I. 845, 856-58, 383 A.2d 1033, 1039-40 (1978); Weaver v. Evans, 80 Wash. 2d 461, 478, 495 P.2d 639, 648-49 (1972).

[115] RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981).

[116] Indeed, Corbin argued that there is really no distinction between express and implied contracts. Words are a form of conduct, which, like other conduct, can be susceptible to different interpretations. He cites the following language from Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603 (7th Cir. 1917):

Precedent can throw but little light on the sound interpretation of such contracts, especially as to implying unexpressed obligations; each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even the most formal agreement, but elliptical expressions of the mutual understanding.

1 A. CORBIN, *supra* note 6, at 40-41 & n.40. *See generally id.* ch. 25.

Promise, by articulating the principle underlying the promissory basis of obligation (he calls it the "promise principle") as "that principle by which persons may impose on themselves obligations where none existed before."[117] The concept of the self-created obligation provides the key for evaluating judicial use of unilateral contract theory to impose liability. Are courts imposing liability because of words or actions of the defendant manifesting an intention to make a commitment, or are they using unilateral contract as a device to enforce obligations arising from some sense of community standards?[118]

In most cases, of course, both the defendant's actions and community standards play a role in determining liability, and it is difficult to separate and weigh the contributions of each. If the defendant's commitment-making actions do not predominate, unilateral contract is an inappropriate rationalization that allows judges to avoid confronting their true motivations.[119] This section will examine first the employment benefit cases, in which judges generally have used the unilateral contract idea appropriately, and then a group of personal injury cases, in which judges have misused unilateral contract theory.[120]

1. The Employment Benefit Cases

Although judges usually are reluctant to find legally enforceable obligations of employees in employment benefit cases,[121] they often are willing to recognize employer obligations. Sometimes employers make

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[117] C. FRIED, CONTRACT AS PROMISE 1 (1981).

[118] In Chapter 1 of *Contract as Promise* Fried explains nicely the debate between those (like himself) who believe that contractual obligation is "essentially self-imposed" and those who "den[y] the coherence or the independent viability of the promise principle." He explains the latter position as follows:

Legal obligation can be imposed only by the community, and so in imposing it the community must be pursuing its goals and imposing its standards, rather than neutrally endorsing those of the contracting parties.

Id. at 2-3.

[119] The assumption here is that judicial candor generally leads to better judicial decisions. *See, e.g.,* 3 A. CORBIN, *supra* note 6, § 561, at 279.

[120] The purpose here is not to question the results in these cases but rather to evaluate the appropriateness of the methods of analysis that the judges have employed. Any ultimate judgment about results would require an articulation of the ultimate goals of legal regulation (such as wealth maximization, fairness in wealth distribution, or the like). This Article also does not consider the effect of the judicial results on primary behavior. For example, inferring a promise by an employer to continue a benefit plan might have some impact on future decisions of that employer and other employers about whether to institute new benefit plans. *See generally* Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract,* 89 YALE L.J. 1261 (1980).

[121] *See supra* text accompanying notes 67-78.

express promises (to maintain a certain level of pension contributions, for example) in written or oral employment agreements. Courts have little difficulty enforcing such promises, usually by saying that an employee accepted the employer's promissory offer by beginning to work or by continuing to work for the employer.[122] In a majority of the reported decisions involving unilateral contract analysis, however, employers have not made express promises.

When courts do not find express promissory language, they are not reluctant to infer promises. If a personnel manual or statement of company policy contains a description of existing benefit plans, courts often infer a promise that the employer will maintain these plans as described, even though the manual or policy statement does not contain any language about the future existence of the plans.[123] Sometimes the employee does not even offer evidence of "promise," beyond a past pattern of paying the benefits in question.[124] Even in these situations, courts often are willing to find an implied promise.

Although whether it is reasonable to infer employer promises depends on the particular facts of each case, in most cases judicial recognition of an employer's implied promise to retain a benefit plan that he describes to a new or continuing employee seems justifiable. But what if the employer's description of the benefit plan (or the plan itself) expressly negates any promise?[125] What if the plan states:

This Plan shall not be deemed to constitute a contract between the Company and any employee or to be a consideration for, or a condition of,

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[122] *See, e.g.,* Leone v. Precision Plumbing & Heating, Inc., 121 Ariz. 514, 591 P.2d 1002 (1979); Haney v. Laub, 312 A.2d 330 (Del. Super. Ct. 1973); Fries v. United Mine Workers, 30 Ill. App. 3d 575, 333 N.E.2d 600 (1975); State ex rel. Nilsen v. Oregon State Motor Ass'n, 248 Or. 133, 432 P.2d 512 (1967); Harryman v. Roseburg Rural Fire Protection Dist., 244 Or. 631, 420 P.2d 51 (1966).

[123] *See, e.g.,* Miller v. Dictaphone Corp., 334 F. Supp. 840 (D. Or. 1971); Dahl v. Brunswick Corp., 277 Md. 471, 356 A.2d 221 (1976); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Cain v. Allen Elec. & Equip. Co., 346 Mich. 568, 78 N.W.2d 296 (1956); Novack v. Bilnor Corp., 26 A.D.2d 572, 271 N.Y.S.2d 117 (1966); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976); Toch v. Eric Schuster Corp., 490 S.W.2d 618 (Tex. Civ. App. 1972).

[124] *See, e.g.,* Allen v. Crowell-Collier Publishing Co., 26 A.D.2d 516, 270 N.Y.S.2d 941 (1966), rev'd, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968); Rose City Transit Co. v. City of Portland, 271 Or. 588, 533 P.2d 339 (1975); Thatcher v. Wasatch Chem. Co., 29 Utah 2d 189, 507 P.2d 365 (1973); Simon v. Riblet Tramway Co., 8 Wash. App. 289, 505 P.2d 1291, cert. denied, 414 U.S. 975 (1973); *see also* Lincoln Elec. Co. v. Commissioner, 444 F.2d 491 (6th Cir. 1971).

[125] *E.g.,* Davis v. Alabama Power Co., 383 F. Supp. 880 (N.D. Ala. 1974), *aff'd,* 542 F.2d 650 (5th Cir. 1976), *aff'd,* 431 U.S. 581 (1977).

the employment of any employee.[126]

Or what if the employer states that his action is "voluntary" and "is not to be deemed to create a contractual obligation"?[127]

It is obviously much more difficult to find an implied promise by an employer when he expressly says he is making no such promise. In recent litigation,[128] however, neither of the above clauses proved fatal to the employee's case. It seems stretching the point[129] but still defensible to say that sometimes actions speak louder than words, and that if an employer's actions indicate that he is intentionally creating expectations or inducing reliance, a verbal disclaimer should be ineffective. For example, if every year for twenty years an employer provides a Christmas bonus equal to two weeks' wages, it might be reasonable to infer a promise to continue to pay that bonus even if there is a written bonus plan somewhere that says that the employer is making no such promise.[130] On the other hand, if the judges are saying not only that the specific disclaimers in these particular cases were ineffective, but also that all attempts at disclaimer would necessarily be ineffective, then a promise by the employer cannot explain the decisions to impose liability.

There are a few cases that are perhaps even more difficult to reconcile with the promissory principle than the express-negation cases. In such cases, the employee-offeree began or continued work without any knowledge of the benefit plan he later sought to enforce through litigation. In *Dangott v. ASG Industries, Inc.*,[131] a former employee sued his employer for severance pay under a company policy which provided severance pay to employees under certain circumstances. The employer argued that the

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[126] Id. at 890.

[127] Novack v. Bilnor Corp., 26 A.D.2d 572, 573, 271 N.Y.S.2d 117, 118 (1966); *see also* Matthews v. Swift & Co., 465 F.2d 814 (5th Cir. 1972) ("No Contractual Rights Conferred").

[128] Davis v. Alabama Power Co., 383 F. Supp. 880 (N.D. Ala. 1974), *aff'd*, 542 F.2d 650 (5th Cir. 1976), *aff'd*, 431 U.S. 581 (1977); Novack v. Bilnor Corp., 26 A.D.2d 572, 573, 271 N.Y.S.2d 117, 118 (1966).

[129] Lon Fuller pointed to cases in which employees recovered bonuses from employers despite express disclaimers of legal liability as examples in which "the principle of reimbursing reliance is regarded as overriding the principle of private autonomy." Fuller, *supra* note 61, at 811 & n.16.

[130] It is interesting to note that once an employer establishes a practice of paying yearly bonuses they may constitute "wages" and "conditions of employment" within the meaning of Section 8(d) of the N.L.R.A. Thus, any proposed change in the payment of these bonuses is a mandatory subject for collective bargaining under Section 8(a)(5). *See* Century Elec. Motor Co. v. NLRB, 447 F.2d 10 (8th Cir. 1971); Beacon Journal Publishing Co. v. NLRB, 401 F.2d 366 (6th Cir. 1968); NLRB v. Electric Steam Radiator Corp., 321 F.2d 733 (6th Cir. 1963).

[131] 558 P.2d 379 (Okla. 1976).

employee who brought suit did not rely on the existence of the severance pay policy in any way, and, in fact, did not even know about the existence of the policy until a short time before his termination. The court said: "We might be impressed with such argument if we were dealing in other contract areas such as sales of real estate or personalty, or contracts dealing with warranty."[132] The court noted that the employment contract at issue was not negotiated by a strong union, and construed the contract "most strongly" against the employer.[133] Finally,

ASG promulgated the controversial administrative procedure, #9-3-29 and sent it to supervisory parties for no other purpose except to give notice and import knowledge of it to its employees, and thus stabilize and promote a contented work force. Although plaintiff did not have actual knowledge of its provisions, until shortly before his termination, publication of #9-3-29 is the equivalent of constructive knowledge on the part of all employees not specifically excluded.[134]

There are very few cases that, like *Dangott,* specifically confront the knowledge (or reliance) issue and hold that the plaintiff does not have to prove actual reliance or even actual knowledge.[135] Most do not even discuss knowledge or reliance. Opinions usually say simply that an offer was made by the creation of a benefit policy and that it was accepted by the beginning or continuation of work by the employee. In those cases that do raise the issue, judges usually say that some showing of knowledge (or reliance) is required, and go on to find that knowledge or reliance.[136] Rarely will a court deny relief to an employee because he failed to establish knowledge or reliance (assuming that the employee met all the eligibility requirements at the time of the creation or continuing existence of the policy).[137]

The traditional view, embodied in the first *Restatement,*[138] held that an offeree had to know of the existence of an offer and had to perform with the

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[132] Id. at 383.

[133] *Id.*

[134] *Id.*

[135] *But see* Martin v. Mann Merchandising, Inc., 570 S.W.2d 208, 211 (Tex. Civ. App. 1978) (holding "that the question of reliance is not significant").

[136] *See, e.g.,* Ingrassia v. Shell Oil Co., 394 F. Supp. 875, 882-83 (S.D.N.Y. 1975) (knowledge and reliance); Dahl v. Brunswick Corp., 277 Md. 471, 489, 356 A.2d 221, 231 (1976) (knowledge); Ehrle v. Bank Bldg. & Equip. Corp. of America, 530 S.W.2d 482, 491 (Mo. Ct. App. 1975) (knowledge and reliance); Rose City Transit Co. v. City of Portland, 271 Or. 588, 594-95, 533 P.2d 339, 342 (1975) (knowledge); see also Hinkeldey v. Cities Serv. Oil Co., 470 S.W.2d 494, 501 (Mo. 1971) (employee's acts in reliance result in an "enforceable bilateral contract").

[137] *But see* Molumby v. Shapleigh Hardware Co., 395 S.W.2d 221 (Mo. Ct. App. 1965). But even in *Molumby* there were other reasons for the denial of recovery.

[138] RESTATEMENT OF CONTRACTS §§ 53, 55 (1932).

intention to accept that offer in order to form a binding unilateral contract. The *Second Restatement* significantly changes these rules. It provides that an offeree who begins performance without knowledge of an offer can accept by completing performance with knowledge.[139] It presumes, in effect, an intention to accept when an offeree who knows of an offer renders the performance called for by the offeror.[140] In *Dangott,* the employer alleged that the employee learned of the severance pay policy shortly *before* termination, and thus the court could have used the *Second Restatement* to find for the employee.[141]

Although the court could have found reliance by the employee in the *Dangott* case, reliance was not the basis for its decision. Yet *Dangott* is not an aberration. To illustrate, consider two employees who begin to do the same job for the same employer at the same time and at the same pay level. The company has a severance pay policy under which any employee who works for the company for at least one year and then is discharged for reasons not his fault receives a severance pay award equal to twice his monthly wages at the time of discharge. Employee *A* knows of the policy before he starts to work for the company; employee *B* does not. After three years the company discharges both *A* and *B* when it closes down their entire department, but refuses to make the severance pay awards. *B* learns of the existence of the severance pay policy after the discharge, and both *A* and *B* sue the employer.

Few courts would rule for *A* but not for *B* in this situation. Since *A* and *B* did the same work, and were both members of the class intended to be the beneficiaries of the severance pay policy, judges would want to treat them equally. It seems then that *B* acquires rights by virtue of his status (or role)[142] as an eligible employee. That role entitles him to receive benefits even if he does not know it.

Courts frequently use the word "entitled" or "entitlement" in employment benefits cases.[143] The suggestion that an employee's status as a member of a

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[139] RESTATEMENT (SECOND) OF CONTRACTS § 51 (1981). Even this requirement might be dispensed with if the employment contract were viewed as a "standardized agreement." *See infra* note 149.

[140] *See id.* § 53 & comment b; *see also id.* Reporter's Note.

[141] Another possible approach would be to say that the employee did know about the existence of an offer; he simply did not know the particular term that he now uses as the basis of his claim. This approach might lead to an analysis of the enforceability of standardized terms. *See infra* note 149.

[142] *See* Rehbinder, *Status, Contract and the Welfare State,* 23 STAN. L. REV. 941, 950-51 (1971).

[143] *See, e.g.,* Raybestos-Manhattan, Inc. v. Rowland, 460 F.2d 697, 701 (4th Cir. 1972); Fujimoto v. Rio Grande Pickle Co., 414 F.2d 648, 653 (5th Cir. 1969); Gilbreath v. East Arkansas Planning & Dev. Dist., 471 F. Supp. 912, 922 (E.D. Ark. 1979); Hardy v. H.K.

class of eligible employees may be the underlying source of entitlement to benefits in these cases does not fully explain what is going on, however. Why should one's status or role as an employee create an entitlement? Perhaps judges are motivated by some underlying sense of values such as fairness or equality or even redistribution of wealth—values similar to those that might motivate legislators to enact a minimum wage law, for example. Under a minimum wage statute, if a person is employed as a wage earner, that status alone entitles him to a certain amount of money regardless of what he knows or understands and regardless of what his employer says or does. But judges do not require that employers provide severance pay awards to discharged employees.[144] Nor does the concept of equal treatment provide a complete explanation.[145] If employee *A* goes to work for an employer who has a severance pay policy and employee *B* goes to work for an employer in the same business who does not have such a policy, *A* gets the money and *B* does not, even though *B* has done the same work, has received the same wages, and is equally necessitous. Furthermore, *A* gets the money even if he did not know of the existence of the policy while he worked for the employer who had the policy.

The concept of entitlement by status cannot fully explain the results in the employment benefit cases. We must look to employer conduct as the source of the entitlement-creating status categories. But can we label the necessary employer conduct a "promise"? Can promise be the source of obligation to an employee who does not even know that a promise was made? Suppose that the Board of Directors of XYZ Company formally passes a resolution establishing a two months severance pay award. Through an oversight the officers of XYZ fail to implement the new policy and never announce it to the employees. A lawyer for a discharged employee happens to discover the resolution and sues for the award. I would expect most courts to deny recovery in this case, though the directors of XYZ intended that the creation of the plan be communicated to the employees and that the employees act in reliance upon it.[146]

Porter Co., 417 F. Supp. 1175, 1185 (E.D. Pa. 1976); Garrett v. American Family Mut. Ins. Co., 520 S.W.2d 102, 111 (Mo. Ct. App. 1974); Miller v. Riata Cadillac Co., 517 S.W.2d 773, 775 (Tex. 1974).

[144] Indeed, legislation which attempted to require severance payments to existing employees in the event of discharge might run afoul of the contract clause. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250-51 (1978).

[145] For an argument that the concept of equality can never provide a complete explanation for legal or moral decisions, see *infra* note 201.

[146] *See* Estate of Bogley v. United States, 514 F.2d 1027, 1033-36 (Ct. Cl. 1975) (suggesting that a communicated corporate resolution may or may not give rise to contractual rights, but an uncommunicated resolution is no more than an expression of intention or policy and cannot create contractual rights); Molumby v. Shapleigh Hardware

Although a promise generally must be communicated to the "promisee" to create any legal obligation (under some definitions, a promise must be communicated to qualify as a promise[147]), a promissory theory can support the results of even those employment cases that award benefits to employees who were ignorant of the benefits in question until after the employment relationship terminated. In these cases the employer made the promises to a *class* of employees; communication to some members of the class was sufficient for all. Most courts recognize that the relationship between an employer and his employees is based fundamentally on agreement; it is a contract. The contract, however, does not always follow the traditional model, in which individual contractors bargain over terms, and courts seek to implement individual intentions.

The modern employment contract is often a standardized agreement (one could almost say a "collective bargaining agreement" without a union) between the employer *organization* and the *class* of employees; an important goal of the parties and the courts is to promote uniformity, predictability, and stability in the relationship.[148] It would be not only unfair but also impractical and inefficient to base an employee's right to recover on whether he read through the descriptions of company benefit policies that he might not understand and almost certainly could not change.[149]

Co., 395 S.W.2d 221 (Mo. Ct. App. 1965) (concluding that a noncontributory pension plan does not become an enforceable contract without notification to the employee that the plan was in effect).

[147] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 2(1), (2), (3) (1981); 1 A. CORBIN, *supra* note 6, § 13, at 29 ("A promise is an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promisee that he may justly expect performance and may reasonably rely thereon."); C. FRIED, *supra* note 117, at 40-41 ("A promise is made *to* someone; it gives the promisee a right to expect, to call for its performance; and so by implication a promise, to be complete, to count as a promise, must in some sense be taken up by its beneficiary." (emphasis in original)).

[148] *See generally* Feller, 4 *General Theory of the Collective Bargaining Agreement,* 61 CALIF. L. REV. 663 (1973).

[149] Although this analysis perhaps stretches the "promise principle," it is within contemporary contract doctrine. Judges in cases like *Dangott* easily could invoke Section 211 of the *Second Restatement of Contracts* to find for employees who were without knowledge of particular benefits. That section, captioned "Standardized Agreements," begins by asserting that when a party assents to what he has reason to believe is a standardized writing he adopts the writing as an integrated agreement. This language incorporates the common law "duty to read" idea, and is usually employed to enforce terms of the writing against the assenting individual. But if an employee may be held to unfavorable terms of the writing despite his lack of actual knowledge of them, should be not in turn be able to enforce the favorable terms? Section 211(2) lends further support to this analysis. That subsection provides:

(2) Such a [standardized] writing is interpreted wherever reasonable as treating alike all

Employers establish benefit plans intending to create expectations and induce reliance by employees as a group. They should not be able to escape liability on the grounds that a particular employee was unaware of the plan and thus did not receive a promise. The justification for holding the employer liable to the employee without knowledge thus seems ultimately to depend on the promise principle as supplemented by notions of equity and administrative convenience.

2. The Personal Injury Cases

A few of the cases that discuss the concept of the unilateral contract in particular and theories of contract formation in general involve attempts to recover for personal injuries. The plaintiff may be pursuing a contract theory because an immunity doctrine or a statute of limitations bars a tort claim. Even if a tort claim is available, the plaintiff may prefer a contract claim because he will not have to prove negligence. Some courts have been receptive to personal injury claims based on unilateral contract theory. In *Sims v. Etowah County Board of Education,*[150] spectators at a high school football game sued in tort and contract to recover for injuries suffered when a viewing stand collapsed. The Supreme Court of Alabama sustained a dismissal of the tort claim on immunity grounds, but reversed a dismissal of the contract claim.

> For what we have here is a unilateral contract, with the promisor- board of education, as proprietor, upon receiving the admission price, promising admission by ticket and the performance of all other contractual duties arising from the circumstances, including the implied promise that the premises are reasonably safe for the purpose of viewing the athletic contest.[151]

The contract that the *Sims* court found was "unilateral" in the "half-executed" sense;[152] only the seller of the ticket had any continuing obligation because the buyer had already performed by paying for the ticket.[153] In sale of ticket cases, as in products liability and malpractice cases, the buyer's duties end with payment, but the seller's duties do not end with delivery.

Courts have been less receptive to unilateral contract theory when it has been used to defend personal injury claims. A small group of cases dealing

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those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

[150] 337 So. 2d 1310 (Ala. 1976).

[151] Id. at 1314.

[152] *See supra* text accompanying notes 54-63.

[153] Llewellyn might have classified the *Sims* contract as a "pseudo-unilateral" on the grounds that a promise to pay for the ticket might have been a permissible mode of acceptance. *See* Llewellyn, *supra* note 1, at 805-14.

with the hazards of grocery shopping provides a good illustration.[154] In each of these cases the plaintiff was shopping in a self-service grocery store and picked up one or more bottles of soda. A bottle exploded and caused injury before the plaintiff paid for the soda at the check-out counter. The initial problem for the plaintiff seeking to recover from the grocer on a contract (breach of warranty) theory was that earlier cases had held that the contract was not formed until the buyer reached the check-out counter, because until the clerk rang up the item on the cash register the customer could return the item to the shelf.[155]

Self-service shopping seems easily susceptible to unilateral contract analysis. Either the grocer makes an offer by placing the goods on the shelf with prices attached and the customer accepts by bringing the goods to the check-out counter and tendering the price,[156] or the customer makes an offer to purchase when he tenders the groceries at the check-out counter and the grocer accepts the offer when he rings up the charge on the register.[157] In neither event does the customer incur any obligation before reaching the check-out counter.

In *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*,[158] the defendant-grocer urged a unilateral contract analysis, arguing that there was no contract because acceptance had not occurred before the bottle exploded. The court could have responded that this was indeed a unilateral contract situation but that, once the customer had begun performance by picking up the item, the store could not revoke.[159] But an irrevocable offer to sell is not

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[154] *See, e.g.,* Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976); Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 332 A.2d 1 (1975), *aff'g* Sheeskin v. Giant Food, Inc., 20 Md. App. 611, 318 A.2d 874 (1974); Gillispie v. Great Atlantic & Pacific Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972); Barker v. Allied Supermarket, 596 P.2d 870 (Okla. 1979).

[155] See, e.g., Lasky_v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946); Day v. Grand Union Co., 280 A.D. 253, 113 N.Y.S.2d 436, *aff'd,* 304 N.Y. 821, 109 N.E.2d 609 (1952); Pharmaceutical Soc'y v. Boots Cash Chemists, [1953] 1 Q.B. 401.

[156] *See* Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946).

[157] *See* Day v. Grand Union Co., 280 A.D. 253, 113 N.Y.S.2d 436, *aff'd,* 304 N.Y. 821, 109 N.E.2d 609 (1952); Pharmaceutical Soc'y v. Boots Cash Chemists, [1953] 1 Q.B. 401.

[158] 273 Md. 592, 332 A.2d 1 (1975), *aff'g* Sheeskin v. Giant Food, Inc., 20 Md. App. 611, 318 A.2d 874 (1974).

[159] Comment 3 to Section 2-206 of the Uniform Commercial Code states that the beginning of performance can be effective as an acceptance if it unambiguously expresses the offeree's intention to engage himself and if the offeree gives notice of his acceptance to the offeror within a reasonable time. The comment continues:

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.

Under this language the question would become whether the picking up of the soda was a

a contract of sale, and a sale contract must exist before the plaintiff can recover on a warranty theory.[160] Thus the court, relying on the broad language of Section 2-206 of the Uniform Commercial Code,[161] decided that a bilateral contract was formed when the customer picked up the soda. Picking up the soda was a reasonable mode of acceptance and carried an implied promise to take the soda to the check-out counter and pay for it.[162]

Perhaps Llewellyn would have approved of this use of Section 2-206. The language of 2-206 is broad, the approach is flexible, and the goal is to remove traditional impediments to contract formation. A promise to pay may be a satisfactory mode of acceptance to the grocer—at least to those grocers who allow payment by check.[163]

The difficulty is that the customer could return the item without liability. The *Giant Food* court confronted that question directly and quoted the opinion of the lower court with approval:

". . . Here the evidence that the retailer permits the customer to 'change his mind' indicates only an agreement between the parties to permit the consumer to end his contract with the retailer irrespective of a breach of the agreement by the retailer. It does not indicate that an agreement does not exist prior to the exercise of this option by the consumer."[164]

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beginning of performance or "mere preparation" for performance. If the court found it to be a beginning of performance, the offeror could not revoke. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981).

[160] The cases have held that Section 2-314 of the Uniform Commercial Code (governing implied warranties of merchantability) requires the plaintiff to prove the existence of a sale or a contract of sale in order to recover for breach of the warranty. *See* Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691, 693 (1976); Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 602-03, 332 A.2d 1, 7 (1975), *aff'g* Sheeskin v. Giant Food, Inc., 20 Md. App. 611, 318 A.2d 874 (1974); Barker v. Allied Supermarket, 596 P.2d 870, 871 (Okla. 1979).

[161] 1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances . . . .

U.C.C. § 2-206(1)(a) (1978).

[162] 273 Md. at 603-07, 332 A.2d at 8-9.

[163] Llewellyn used this argument (willingness to accept a check indicates that the offer can be accepted by promise) to exclude insurance contracts from the realm of the classical unilateral. *See* Llewellyn, *supra* note 1, at 814.

[164] 273 Md. at 606, 332 A.2d at 9 (quoting Sheeskin v. Giant Food, Inc., 20 Md. App. 611, 625, 318 A.2d 874, 883 (1974)). A similar argument was made in Gillispie v. Great Atlantic & Pacific Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972), and in Barker v. Allied Supermarket, 596 P.2d 870 (Okla. 1979). The *Giant Food* and *Barker* courts cited the Uniform Commercial Code's definition of "termination" (Section 2-106(3)) to support their position:

"Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations

Can there be a valid bilateral contract if one party can terminate his promise without notice and without liability to the other—even in this modern age?[165] It seems to me that both the customer's promise and the court's analysis are illusory.

The most notable aspect of the few "tort" cases that discuss the unilateral contract idea is that the courts adopt or reject the concept depending upon whether its use facilitates or impedes a finding of liability. These cases suggest contract theory's potential for expanding liability in personal injury cases.[166] For example, when negligence is difficult to find, tort duties may become implied promises. Moreover, holding a party to his promise might seem more palatable than imposing something as onerous as "strict liability" upon him. Nor are courts limited to products liability and malpractice cases if they wish to employ the language of contract. For example, a taxpayer whose car is damaged by a pothole on a city street or a child delivering newspapers who is hit by a falling icicle might recover on an implied promise theory.[167]

In many of these cases the "implied promise" is a fiction. The purported promisor did not intend to make a promise, and the purported promisee did not take the action which resulted in his injury in reliance on a promise. In such cases the promissory theory allows the court to avoid confronting the real source of its desire to impose civil obligation on the personal injury defendant.[168] In *Sims,* for example, the question of the board of education's obligation to compensate for injuries should not depend upon whether the

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which are still executory on both sides are discharged but any right based on prior breach or performance survives.

[165] The point here is not that parties cannot form an enforceable contract if one party can terminate at any time without obligation. Such an arrangement can result from a true bargain. But the resulting contract is not bilateral because the party who can terminate at will has not made a promise. *See* Eisenberg, *The Principles of Consideration,* 67 CORNELL L. REV. 640, 649 (1982).

[166] *See, e.g.*, Carter v. Calhoun County Bd. of Educ., 345 So. 2d 1351 (Ala. 1977) (School lunchroom worker, injured by a fall on the lunchroom floor, sued to recover for breach of her employer's implied promise to provide "a reasonably safe place in which to work."); Walker v. City of Birmingham, 342 So. 2d 321 (Ala. 1976) (Public zoo patron, injured by stepping into a hole in the zoo walkway, recovered for the city's breach of an implied contract to maintain the premises in a "reasonably safe condition.").

[167] Courts generally do not need to characterize this type of implied contract as unilateral to find liability, although the unilateral idea makes it sufficient to infer only one promise, rather than two.

[168] *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791, 814-16 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960). *But see* Shanker, *Reexamination of Prosser's Game,* 29 CASE W. RES. L. REV. 550 (1979).

spectators in the bleachers paid for a ticket to sit there.[169] If courts are dissatisfied with the results dictated by immunity doctrine, they should be candid about their efforts to limit the doctrine. As the exploding-soda-bottle cases demonstrate so well, the concept of implied promise can be used as a rationalization to justify almost any finding of liability that a court wants to make.

C. *Public Policy Limitations*

The previous section suggested that considerations of public policy sometimes impel judges to find implied promises despite the absence of words or actions that could be reasonably understood as manifesting an intention to induce expectations and reliance. Public policy concerns can push in the other direction as well, causing judges to deny the existence of implied promises (or to refuse enforcement of promises without denying their existence). Cases involving contractual claims by students against schools[170] provide a good example.

In *Blatt v. University of Southern California,*[171] a former law student employed a unilateral contract theory in an action seeking to compel his admission into a national honorary legal society. He alleged that the defendants[172] represented to him that if he graduated in the top ten percent of his class he would be eligible for membership in the honor society. He further alleged that he ranked in the top ten percent of his class, but was refused membership because of his failure to work on the school's Law Review, a requirement which the plaintiff alleged was never mentioned to him.[173] The court held that the complaint did not present a justiciable issue: "We hold that in the absence of allegations of sufficient facts of arbitrary or discriminatory action, membership in the Order is an honor best determined by those in the academic field without judicial interference."[174] Although the court went on to discuss and reject the plaintiff's unilateral contract and promissory estoppel arguments on narrower grounds, the most significant aspect of the decision is the deference the court accorded the academic decisionmaking process.[175]

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[169] Similarly, the grocer's liability for injuries caused by an exploding soda bottle should not depend upon whether the injured party had formed a contract to purchase that bottle.

[170] *See supra* notes 101-05 and accompanying text.

[171] 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (1970).

[172] Defendants were the university, the national honor society, the local chapter of the society, and members of the committee of the local chapter who had the authority to elect members from graduating students. *Id.* at 935, 85 Cal. Rptr. at 602.

[173] Id. at 938-39, 85 Cal. Rptr. at 603.

[174] Id. at 942, 85 Cal. Rptr. at 606.

[175] The United States Supreme Court, in Board of Curators v. Horowitz, 435 U.S. 78

Solicitude for the policies and decisions of academia continues to play an important role in the judicial disposition of claims brought by students against schools.[176] The general trend in the school cases, however, is toward less deference—toward more public control of the actions of private schools.[177] It seems safe to assume that the increased invocation of contract law in this area results primarily from changing views about the student-school relationship and not from increased promise-making activity by schools.

The citizen-government cases[178] evidence a similar trend toward increased contractual analysis of relationships previously thought to be outside the realm of contract law. Although it certainly can be argued that in the last half-century government has been making more promises and creating more expectations,[179] the primary explanation for increased judicial

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(1978), reaffirmed the notion of judicial deference to academia. The majority opinion, however, drew a distinction between a school's academic decisions and its disciplinary actions. According to the Court, the due process requirements for academic dismissals are "far less stringent" than those for disciplinary dismissals. Id. at 86.

[176] *See, e.g.,* Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Paulsen v. Golden Gate Univ., 25 Cal. 3d 803, 602 P.2d 778, 159 Cal. Rptr. 858 (1979); Militana v. University of Miami, 236 So. 2d 162 (Fla. Dist. Ct. App. 1970).

Courts are deferential to academic institutions even when they act as employers. In Drans v. Providence College, 119 R.I. 845, 383 A.2d 1033 (1978) and 410 A.2d 992 (R.I. 1980), a former professor sued for a declaratory judgment that he was not subject to mandatory retirement at age 65 under a policy established by Providence College. He argued that the retirement policy did not apply to him because he had secured tenure at a time when there was no mandatory retirement age; the college could not reduce his employment rights by establishing a new policy. 119 R.I. at 851, 383 A.2d at 1037. The Supreme Court of Rhode Island explained its remand of the *Drans* case to the trial court as follows:

Our remand was for the specific purpose of a trial justice's considering evidence that would indicate whether those who perform their pedagogical and administrative chores within the national academic community believe that Providence College was obligated to make a special transition provision for Professor Drans and, if so, whether the benefits furnished to him have met this obligation.

410 A.2d at 994. In other words, the trial court's function is not to make its own assessment of the reasonableness of the change in policy as it related to Drans, but rather to determine what the assessment of the "national academic community" would be. The result is a greater degree of deference to academic institutions than to most other private employers, at least with regard to academic personnel.

[177] *See, e.g.,* Zumbrun v. University of S. Cal., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 371 N.E.2d 634 (1977); DeMarco v. University of Health Sciences, 40 Ill. App. 3d 474, 352 N.E.2d 356 (1976). *See generally* Ray, *supra* note 101; Note, *supra* note 101.

[178] *See supra* notes 90-100 and accompanying text.

[179] Charles Reich argued that the vast increase in dependence on government "largess" should lead us to a new concept of property. *See* Reich, *The New Property,* 73 YALE L.J. 733 (1964). The same argument could be made for the creation of a "new contract" as a

intervention lies in social, intellectual, and political developments and not in the "promise principle."[180] As indicated earlier in this Article,[181] judges continue to be cautious in their expansion of contract analysis in governmentcitizen cases because of concerns about the political and financial consequences of locking governments into long-term commitments, not because of the inability to create plausible implied-promise arguments.

These relational[182] cases, then, seem to support those who argue that contract is becoming indistinguishable from tort[183] because in modern contract cases, as in tort cases, the existence and extent of obligation is being determined primarily by social and political factors and not by the promise principle.[184] It would be a mistake, however, to conclude that because the idea of the self-created obligation is insufficient to explain the results of the cases it is irrelevant. Most of the modern unilateral contract cases involve some combination of promissory and non-promissory sources of obligation.[185]

The unilateral contract idea provides a bridge between contract and tort. Although unilateral contract analysis begins by identifying a promise of the defendant, enforcement of a unilateral contract need never be based solely on the existence of a promise. Because, by definition, acceptance is by

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means of protecting the new property.

[180] This is a major theme of Patrick Atiyah's monumental study of English contract law, *The Rise and Fall of Freedom of Contract* (1979).

[181] *See supra* text accompanying notes 99-100.

[182] The modern unilateral contracts described in this Article generally involve continuing relationships rather than discrete transactions. This distinction and its implications for contract law have been explored most fully by Ian Macneil. *See, e.g.,* Macneil, *The Many Futures of Contracts,* 47 S. CAL. L. REV. 691 (1974).

[183] Charles Fried identifies Patrick Atiyah, Lawrence Friedman, Grant Gilmore, Morton Horwitz, Duncan Kennedy, Anthony Kronman, and Ian Macneil as critics who "den[y] the coherence or the independent viability of the promise principle." C. FRIED, *supra* note 117, at 2-3 & n.7.

[184] A colleague has suggested that perhaps the *existence* of the legal obligation is determined to a considerable extent by social factors, but the *content* of the obligation is determined by the defendant's own actions. Although this suggestion may describe properly some situations, the distinction can work the other way as well. Forty years ago Max Radin observed that "the modern marital relationship" is one in which the obligation is self-created but the content of the obligation is fixed by external sources. Radin, *Contract Obligation and the Human Will,* 43 COLUM. L. REV. 575, 578 (1943).

[185] It is important to recognize that promissory and non-promissory sources of obligation build on each other. Fried argues: "There is reliance because a promise is binding, and not the other way around." C. FRIED, *supra* note 117, at 19. The contract-as-tort theorists, *see supra* note 183, would argue that a promise is binding because there is reliance. But both sides would probably acknowledge that there is at least some truth in both statements; the difference is only one of emphasis.

performance (or tender or beginning of performance), a unilateral contract is never totally executory; it cannot be formed without some benefit to the promisor or some detriment to the promisee.[186] Furthermore, unilateral contract, like tort, involves a relationship in which only one of the parties has any legally enforceable obligation. It should not be surprising, therefore, that as contract becomes more like tort, unilateral contract becomes more important.

Unilateral contract analysis allows courts to recognize the promissory basis of obligation without the restriction of a necessary return promise. But most modern unilateral contract cases require a balancing of public and private interests that cannot be accomplished if the only question posed is whether or not the defendant made a promise. All that we can hope for from judges is an explicit recognition of both the privately-created and the socially-imposed justifications for imposing (or denying) liability and a candid articulation of the relative roles of each in the decisionmaking process.

D. *The Choice Between Unilateral Contract and Promissory Estoppel*

The doctrine of promissory estoppel[187] provides an alternative to unilateral contract[188] in cases that stand astride contract and tort. Promissory estoppel, like unilateral contract, establishes a promissory basis of obligation without requiring a return promise. The promissory estoppel approach has some important advantages over unilateral contract analysis. Its formulation in the *Second Restatement of Contracts* specifically recognizes the need for courts to go beyond the promise principle by making the promise binding "if injustice can be avoided only by enforcement of the promise."[189] The doctrine thus encourages courts, as unilateral contract does not, to address specifically the non-promissory determinants of liability—exactly the position urged in the preceding

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[186] The offeree of a unilateral contract must at least tender or begin performance to create legal obligations of the offeror. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981). Part performance will usually, although not always, constitute a benefit to the offeror. In any event, part performance will be reliance by the offeree, although in those cases where the performance is simply continuing the status quo, *see supra* note 114 and accompanying text, the reliance may be more theoretical than real.

[187] Section 90 of the *Second Restatement of Contracts*, entitled "Promise Reasonably Inducing Action or Forbearance," sets out the principle of promissory estoppel:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

[188] *See generally* Murray, *supra* note 3, at 805-06; Navin, *supra* note 43; *Comment, supra* note 3, at 187-89.

[189] *See supra* note 187.

section.[190] In addition, promissory estoppel protects reasonable reliance that cannot be characterized as "part performance"; unilateral contract theory works only for plaintiffs who can argue successfully that they have begun performance. Promissory estoppel analysis avoids the unsatisfactory distinction between "beginning to perform" and "preparing to perform" which haunts unilateral contract theory.[191]

There is no doubt that lawyers and judges are invoking the promissory estoppel idea with increasing frequency in modern litigation.[192] Yet in the areas discussed in Part III of this Article, and particularly in the employment benefits area, judges continue to prefer unilateral contract to promissory estoppel.[193] One reason for this preference is that unilateral contract appears to have the virtue of a long tradition,[194] and judges generally want to justify their decisions in the most traditional way possible.[195] More importantly, judges tend to choose unilateral contract over promissory estoppel when they view the relationship (between employer and employee, for example) as fundamentally one of exchange. The employer is getting something from his employees in exchange for offered benefits; there is little or no reliance by the employees which does not benefit the employer.

The key question is the role of reliance in establishing a right to recovery. Consider again cases like *Dangott*[196] in which an employer establishes a benefit plan for a group of its employees. Plaintiff is an employee who meets all the eligibility requirements for the benefit but is unable to prove any reliance on the existence of that benefit. Promissory estoppel, which specifically makes proof of reliance necessary to recovery,[197] might result

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[190] *See supra* text accompanying notes 183-86.

[191] *See Comment, supra* note 3, at 188.

[192] *See generally* Henderson, *Promissory Estoppel and Traditional Contract Doctrine,* 78 YALE L.J. 343 (1969); Knapp, *Reliance in the Revised* Restatement: *The Proliferation of Promissory Estoppel,* 81 COLUM. L. REV. 52 (1981).

[193] *But see, e.g.,* Landro v. Glendenning Motorways, Inc., 625 F.2d 1344 (8th Cir. 1980); Oates v. Teamster Affiliates Pension Plan, 482 F. Supp. 481 (D.D.C. 1979); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981).

[194] Judges might recall being told that in English law unilateral contracts were the first judicially-enforced agreements. These early unilateral contracts were not enforced unless and until the plaintiff completed performance; they fit into the category of "half-executed" contracts. *See* P. ATIYAH, *supra* note 180, ch. 6 & 441-43; J. DAWSON & W. B. HARVEY, CONTRACTS: CASES AND COMMENT 361 (3d ed. 1977); 1 S. WILLISTON, *supra* note 7, § 13, at 19.

[195] *See generally* Atiyah, *Judges and Policy,* 15 ISRAEL L. REV. 346 (1980).

[196] Dangott v. ASG Indus., Inc., 558 P.2d 379 (Okla. 1976), *discussed supra* text accompanying notes 131-42.

[197] *See supra* note 187. It has been argued that it is particularly appropriate to look to reliance as both the source and measure of liability when only one party makes a promise.

in the denial of the plaintiff's claim. It would be possible for judges to find an employee's "general reliance" on the fact that whatever benefit policies do exist will be fairly applied to him. Alternatively, courts could invoke the concept of "market reliance"; the existence of a benefit policy means that the employer is paying lower wages, and therefore the employee who accepts the lower wages has suffered detrimental reliance.[198] But it would be hard to meet the requirement of promissory estoppel that the promise of the benefit actually induce action or forbearance by the individual claimant.[199]

There are two reasons for granting recovery in such cases, even without proof of reliance. The first reason is a practical one; it is simply too hard to determine the existence and extent of actual reliance. We do not want employees on the stand testifying about how carefully they read the terms of their employer's benefit plans and about how much they relied on particular terms. This pragmatic problem becomes even more difficult if we look to reliance not only as the *source* of obligation but also as the *measure* of obligation.[200] The second reason for eliminating the reliance requirement in these cases is that all employees who meet the eligibility requirements established by the employer *should* be treated equally, regardless of the extent of their actual reliance.[201] This argument also has a

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See, e.g., Comment, supra note 3, at 187-89; Note, *Acceptance of Unclear Offers,* 60 YALE L.J. 1043, 1049 (1951).

[198] Some courts have advanced a similar argument to meet the reliance requirement for private actions under SEC rule 10b-5. *See, e.g.,* Panzirer v. Wolf, 663 F.2d 365 (2d Cir. 1981), *vacated,* 103 S. Ct. 434 (1982); Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (en banc), *cert. denied,* 103 S. Ct. 722 (1983); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976); Note, *The Fraud-on-the-Market Theory,* 95 HARV. L. REV. 1143 (1982).

[199] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), *quoted supra* note 187.

[200] The difficulty of measuring reliance damages is a frequently cited reason for resorting to expectation damages. *See, e.g.,* Eisenberg, *supra* note 61, at 787-98; Fuller & Perdue, *supra* note 26, at 60-62.

[201] *But see* Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982). Professor Westen argues that the concept of equality cannot itself justify rights; one must look first to other criteria to establish who qualifies to be placed in the group that gets equal treatment. In our context, the equality argument could be used to deny recovery to those who have not actually relied on the employer's promise ("They are not equal because they did not rely.") or to grant recovery to employees in identical jobs with different employers ("They are equal because they did the same work."). The concept of equality alone cannot fully explain the results of the cases. As Westen realizes, however, changing the statement from one of equality ("All workers who meet the eligibility requirements for an employment benefit should be treated equally without regard to individual reliance.") to one of rights ("Workers have a right not to be denied benefits for which they are otherwise eligible because they cannot prove reliance.") does not add any explanatory power. "Rights," like "equality," is an empty word. Westen, *On "Confusing Ideas": Reply,* 91 YALE L.J. 1153 (1982). Westen's

practical side; treating similarly situated employees unequally can lead to resentment and dissension among employees. Ultimately, however, the justification rests on political and moral grounds. Defenders of the promise principle would say that at bottom it is right that these employees be treated equally because the employer made a commitment that they would be treated equally. Others would argue that the ultimate basis is not the action of the employer but a community judgment that it would be wrong to distinguish among these employees on the basis of individual reliance even if the employer tried to do so in making the original promise. The choice between these arguments depends not only on one's belief about what contract law should be but also on one's convictions about what kind of society we should have.

V. CONCLUSION

The theory of the unilateral contract rests on two factual findings: 1) one party made a promise; and 2) the other party did not. This Article considered the second requirement first. Karl Llewellyn and the drafters of the *Second Restatement of Contracts* believed that there were very few contracts that did not involve promises by both parties. Their approach was to infer the offeree's promise and make the contract bilateral. An examination of American case law since the promulgation of the first tentative draft of the *Second Restatement* in 1964 reveals, however, that judges have not abandoned their use of unilateral contract theory in favor of a bilateral contract approach. On the contrary, not only have they continued to invoke the unilateral contract idea in traditional areas, but they have expanded its use into new areas.

Courts generally have acted appropriately in recognizing the one-way nature of many modern contractual obligations. The concept of one-party obligation is often particularly appropriate in analyzing relationships between individuals and large organizations. Although Llewellyn's criticism of unilateral contract was persuasive for the time and context in which it was written, modern judges need not be reluctant to use unilateral contract theory when they think it appropriate in defining exchange relationships in the modern corporate state.

The first requirement (that the defendant made a promise) presents more difficult questions in determining whether unilateral contract theory is appropriate in a particular case. In the modern cases judges generally use unilateral contract to impose liability. They begin by finding an implied promise by the defendant and then justify enforcement of that promise

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argument is that "equality" is confusing in a way that "rights" is not, because "equality" "tends to mask the substantive normative standards it incorporates by reference . . . ." Id. at 1165.

solely by invoking the unilateral contract idea. The unilateral contract rubric often allows judges to avoid disclosing their true motivations in finding implied promises and in deciding to enforce them. In most situations, and particularly in contexts in which courts are expanding the scope of obligation into new areas, there are both promissory and non-promissory reasons for imposing liability. Recognition and articulation of each might lead to better-reasoned and more consistent decisions.

The history of the unilateral-bilateral distinction records a movement toward increased contractual obligation. We are told that unilaterals were the first judicially-enforced contracts.[202] Later, courts accepted the idea that giving a return promise justified enforcement of the first promise. Bilateral contract became the paradigm for the development of contract law. With the bilateral model in mind, some courts employed language to the effect that "unless both parties are bound, neither is bound." Application of this "mutuality of obligation" test to the traditional unilateral contract situation led to unacceptable denials of liability. Scholars and judges articulated the unilateral-bilateral distinction in part to respond to this problem.[203] They argued that the mutuality of obligation idea applied, if at all,[204] only to bilaterals; promisors who made promises contingent upon performance of certain actions by promisees should be held to their promises after the offeree's performance even though the promisee had no obligation to perform.

Courts, however, often refused to enforce promises for promisees who had not completed performance prior to the promisor's revocation of the promise. The theory was that the promisee could accept only by complete performance, and that the promisor-offeror could revoke at any time before acceptance.[205] Against this background, Llewellyn and other commentators attempted to reduce the number of unilateral contracts by making them bilateral. They urged the bilateral model primarily to deal with the revocation problem—to create more liability of the offeror—although they also sought to impose a promissory obligation on the original promisee.

Courts today often seek to impose liability on offerors in situations where it would be difficult or undesirable to infer a promise by the offeree. In these situations the unilateral contract idea is used to justify still more liability for offerors. At the same time, courts have been placing

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[202] *See supra* note 194.

[203] 1 A. CORBIN, *supra* note 6, § 21, at 52-53; *see* 1 S. WILLISTON, *supra* note 7, § 13, at 19-20.

[204] See the debate between Oliphant and Williston over the usefulness of the mutuality of obligation idea: Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law,* 25 COLUM. L. REV. 705 (1925), 28 COLUM. L. REV. 997 (1928); Williston, *The Effect of One Void Promise in a Bilateral Agreement,* 25 COLUM. L. REV. 857 (1925).

[205] *See supra* text accompanying notes 16-17.

restrictions on the right of offerors to revoke their offers without liability. Now the beginning of performance (or even the tender of the beginning of performance) is usually enough to prevent effective revocation.[206] Throughout this century the path has been toward increased enforceability of promises, express or implied, that have been followed by some action on the part of the promisee.[207] The unilateral contract has been one tool used to clear this path.

There is a double irony in the course of events that has followed Llewellyn's criticism of the unilateral-bilateral distinction. Llewellyn criticized the distinction as primarily an academic construction that accorded much more significance to the unilateral contract than could be supported by an examination of the cases.[208] Now it is academics who are trying to minimize the importance of the unilateral contract in the *Second Restatement,* and judges who are expanding the use of the idea. It is not that courts simply are slow to adopt new theory. Courts have found the unilateral contract concept useful in areas not contemplated by Llewellyn. The deeper irony is that the unilateral contract—a concept perceived by Llewellyn as an obstacle to expanding the scope of promissory obligation—has become an effective tool for achieving that end.

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[206] *See* RESTATEMETNT (SECOND) OF CONTRACTS § 45 (1981).

[207] The increased use of unilateral contract theory to enforce promises followed by full or partial performance by the promisee suggested in this Article is consistent with Professor Atiyah's general observations about trends in English contract law. *See* P. ATIYAH, *supra* note 180, at 713-14, 759. Atiyah argues that "[t]he past hundred years have witnessed a resurgence of reliance-based liabilities, as well as of benefit-based liabilities." *Id.* at 771. The expansion of promissory estoppel and unilateral contract theory suggests a similar, although perhaps more recent, resurgence in this country. Atiyah also argues that there has been a related decline in enforceability of wholly executory bilateral agreements; that argument is beyond the scope of this Article.

[208] *See* Llewellyn, *supra* note 1, at 36.