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The Death of Offers

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The Death of Offers

VAL D. RICKS*

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INTRODUCTION

The power to accept an outstanding offer of contract terminates when the offeror dies. That is the *dying offer* rule: The offeror's death dispatches the offer. Academics have denounced the rule for at least one hundred years.¹ The rule is "a relic of the

* Professor of Law, South Texas College of Law. The author was once an apprentice mortician and has always wanted to write a title beginning "The Death of . . ." The author wishes to thank South Texas College of Law, which provided part of a sabbatical so that this Article could be written, and Chad Dunn and Danielle Andrasek for valuable research assistance.

1. See RESTATEMENT (SECOND) OF CONTRACTS § 48 (1981) (criticizing the rule but retaining it anyway); CLARENCE D. ASHLEY, THE LAW OF CONTRACTS 28 & n.2 (1911); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 90-91 (1998); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 54 (1963) [hereinafter CORBIN]; E. ALLAN FARNSWORTH, CONTRACTS § 3.18 (3d ed. 1998); RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON § 5.19 (1990); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 111-12 (3d ed. 1990) ("Notwithstanding universal criticism, the rule remains intact except for isolated statutory changes."); WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 147 (1920); JOSEPH M. PERILLO, CORBIN ON CONTRACTS BY ARTHUR LINTON CORBIN § 2.34 (1993); SAMUEL WILLISTON, THE LAW OF CONTRACTS § 62 (1920); Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 198-99 (1916-17) [hereinafter Corbin, *Relations*]; Merton L. Ferson, *Does the Death of an Offeror Nullify His Offer?*, 10 MINN. L. REV. 373 (1926); Saul Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 715-17 (1987); Herman Oliphant, *The Duration and Termination of an Offer*, 18 MICH. L. REV. 200, 209-12 (1920); A.E. Papale, *The Effect of Death in Pre-Contract Negotiations*, 4 LOY. L. REV. 109 (1948); W.J. Wagner, *Some Problems of Revocation and Termination of Offers*, 38 NOTRE DAME LAW. 138, 152-55 (1963); Note, *Termination of Offers*

obsolete view that a contract requires a 'meeting of the minds.'² This is the single instance in our contract law canon of a strict requirement that both parties subjectively assent to formation of a contract.³ Notwithstanding the criticism, judges have held fast to the dying offer rule throughout the last one hundred fifty years.⁴

Contemplating Unilateral Contract by Death, Insanity, or Bankruptcy of the Offeror, 24 COLUM. L. REV. 294 (1924). A few commentators have mentioned the rule without criticizing it. FREDERICK A. WHITNEY, *THE LAW OF CONTRACTS* 59-60 (6th ed. 1958); Donald E. Wieand, *Recent Cases*, 54 DICK. L. REV. 482 (1949-50). Professor James Lewis Parks spoke in favor of the rule but attempted to re-ground it on other than a reference to subjective assent. James Lewis Parks, *The Effect of an Offeror's Death upon His Outstanding Offer*, 23 MICH. L. REV. 475 (1925) [hereinafter Parks, *Offeror's Death*]; James Lewis Parks, *Indirect Revocation and Termination of Offers by Death*, 19 MICH. L. REV. 152 (1921) [hereinafter Parks, *Indirect Revocation*].

2. RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a (1981).

3. *Id.*; ASHLEY, *supra* note 1, § 17 ("An offer necessarily presupposes that there is a mind behind it."); CALAMARI & PERILLO, *supra* note 1, at 91; CORBIN, *supra* note 1, § 54; FARNSWORTH, *supra* note 1, § 3.18; LORD, *supra* note 1, § 5.19; MURRAY, *supra* note 1, at 142; PERILLO, *supra* note 1, § 2.34; WILLISTON, *supra* note 1, § 62; Ferson, *supra* note 1, at 374-75; Litvinoff, *supra* note 1, at 715-16 (Louisiana law); Oliphant, *supra* note 1, at 210; Papale, *supra* note 1, at 110-11; Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 464-65 (2000); Wagner, *supra* note 1, at 152; *accord* Beall v. Beall, 434 A.2d 1015, 1020 (Md. App. 1981); Groh v. Calloway, 292 S.W. 65, 67 (Mo. 1927); New Headley Tobacco Warehouse Co. v. Gentry's Ex'r, 212 S.W.2d 325, 327 (Ky. 1948) ("In the making of a contract there must be two minds, at least But this cannot occur if there be but one of the . . . parties in existence."); Aitken v. Lang's Adm'r, 51 S.W. 154, 155 (Ky. 1899); Succession of Aurianne, 53 So. 2d 901, 904 (La. 1951) ("The will of both parties must unite on the same point. If the party making the offer dies before it is accepted . . . , [t]he unity of will necessary for the formation of a contract is not present here."); Twenty-third St. Baptist Church v. Cornwell, 23 N.E. 177, 177 (N.Y. 1890) ("The promise . . . was merely a good intention, which did not survive her."); Am. Chain Co. v. Arrow Grip Mfg. Co., 235 N.Y.S. 228, 235 (Sup. Ct. 1929) ("In a contract of sale there must be two minds, at least, concurring at the moment of its completion; but this cannot be if there be but one contracting party in existence."); Thompson v. McAllen Federated Woman's Bldg. Corp., 273 S.W.2d 105, 108-09 (Tx. Civ. App. 1954) ("Before the estate can be held liable it must be shown that the [offeree], while [the offeror] was alive and possessed the mental ability to revoke her promise had she desired to do so, . . . [relied to its detriment].").

4. See Fed. Deposit Ins. Corp. v. Fagan, 674 F.2d 302, 305-06 (4th Cir. 1982); Chain v. Wilhelm, 84 F.2d 138 (4th Cir. 1936) (*dicta*, *rev'd on other grounds*, 300 U.S. 31 (1937)); Braman v. Mut. Life Ins. Co. of N.Y., 73 F.2d 391, 397 (8th Cir. 1934); Paine v. Pac. Mut. Life Ins. Co., 51 F. 689, 692 (8th Cir. 1892); Ivie v. Int'l Life Ins. Co., 117 So. 176, 177-78 (Ala. 1928); Bard v. Kent, 122 P.2d 8, 9-10 (Cal. 1942); Valentine v. Head Camp, Pac. Jurisdiction, Woodmen of the World, 180 P. 2, 6 (Cal. 1919); Grand Lodge of the Indep. Order of Good Templars v. Farnham, 11 P. 592, 592-93 (Cal. 1886); Shaw v. King, 218 P. 50, 51-52 (Cal. Dist. Ct. App. 1923); Pratt v. Trs. of the Baptist Soc'y of Elgin, 93 Ill. 475 (Ill. 1879); Ritchie v. Rawlings, 186 P. 1033, 1034-35 (Kan. 1920); New Headley Tobacco Warehouse Co. v. Gentry's Ex'r, 212 S.W.2d 325, 327 (Ky. 1948); Fid. Mut. Life Ins. Co. v. Heltsley, 71 S.W.2d 1017, 1018-19 (Ky. 1934); Aitken v. Lang's Adm'r, 51 S.W. 154, 155-56 (Ky. 1899); Succession of Aurianne, 53 So. 2d 901, 904 (La. 1951); Union Sawmill Co. v. Mitchell, 48 So. 317, 318 (La. 1909); Hart v. Hart, 3 La. App. 622 (Ct. App. 1926); Beall v. Beall, 434 A.2d 1015, 1020-22 (Md. 1981); Johnson v. Moreau, 82 N.E.2d 802, 803 (Mass. 1948); Killoren v. Hernan, 20 N.E.2d 946, 949 (Mass. 1939); First Nat'l Bank of Boston v. McGowan, 5 N.E.2d 5, 7 (Mass. 1936); Hyland v. Habich, 22 N.E. 765, 765 (Mass. 1889); Browne v. McDonald, 129 Mass. 66 (1880); Cottage St. Methodist Episcopal Church v. Kendall, 121 Mass. 528

The Restatement (Second), in an attempt to please both academics and judges, retains the rule⁵ but suggests that *legislation should correct it*,⁶ as if the Restatement

(1877) (implied); *Jordan v. Dobbins*, 122 Mass. 168 (1877); *Pearl v. Merchs.-Warren Nat'l Bank of Salem*, 400 N.E.2d 1314, 1315 (Mass. App. Ct. 1980); *In re Estate of Severtson*, 1998 WL 88253 (Minn. App. March 3, 1998); *Am. Oil Co. v. Estate of Wigley*, 169 So. 2d 454, 458-63 (Miss. 1964); *Tucker v. Rucker*, 73 So. 2d 269, 272 (Miss. 1954); *Murphree v. Nat'l Life & Acc. Ins. Co.*, 150 So. 534, 535-36 (Miss. 1933); *Groh v. Calloway*, 292 S.W. 65, 66-67 (Mo. 1927); *Twenty-third St. Baptist Church v. Cornwell*, 23 N.E. 177, 177 (N.Y. 1890); *Jones v. Union Cent. Life Ins. Co.*, 40 N.Y.S.2d 74, 77-78 (App. Div. 1943), *aff'd*, 50 N.E.2d 293 (N.Y. 1943); *Am. Chain Co. v. Arrow Grip Mfg. Co.*, 235 N.Y.S. 228, 233-35 (Sup. Ct. 1929); *Herrlich v. Hyman*, 113 N.Y.S. 971, 972 (Sup. App. 1909); *Wallace v. Townsend*, 3 N.E. 601, 604 (Ohio 1885); *Lewis v. Motorists Ins. Cos.*, 645 N.E.2d 784, 790 (Ohio Ct. App. 1994); *Cohen v. Goldberg*, 244 A.2d 763, 765 (Pa. 1968); *In re Kern's Estate*, 33 A. 129, 130 (Pa. 1895); *Slagle v. Forney's Ex'rs*, 15 A. 427, 428 (Pa. 1888); *In re Helfenstein's Estate*, 77 Pa. 328 (1875); *Illinois Roofing & Supply Co. v. Gorton*, 6 Pa. D. 407 (C.P. 1897); *Phipps v. Jones*, 20 Pa. 260, 264 (1853); *In re Baird's Estate*, 7 Weekly Notes of Cases 439, 440 (Pa. 1879); *Hutsell v. Citizens' Nat'l Bank*, 64 S.W.2d 188, 190-91 (Tenn. 1933); *Foust v. Bd. of Publ'n*, 76 Tenn. 552 (1881); *Thompson v. McAllen Federated Woman's Bldg. Corp.*, 273 S.W.2d 105, 108-09 (Tex. Civ. App. 1954); *Mich. State Bank v. Estate of Leavenworth*, 28 Vt. 209 (1856); *Exch. Nat'l Bank of Spokane v. Hunt*, 135 P. 224, 225 (Wash. 1913).

Some courts have held only that notice of the offeror's death terminates the offer and have made no holding regarding the effect of the offeror's death alone. *See Valentine v. Donohoe-Kelly Banking Co.*, 65 P. 381, 382-83 (Cal. 1901) (dicta); *Am. Oil Co. v. Estate of Wigley*, 169 So. 2d 454, 458-63 (Miss. 1964) (stating in dicta that notice is irrelevant because death alone is sufficient); *In re Lorch's Estate*, 131 A. 381, 382-83 (Pa. 1925) (dicta); *Nat'l Eagle Bank v. Hunt*, 13 A. 115, 116-18 (R.I. 1888); *Exch. Nat'l Bank of Spokane v. Hunt*, 135 P. 224, 225 (Wash. 1913) (dicta).

A few courts have rejected the dying offer rule, holding that the offer is revoked only when the offeree has notice of the offeror's death. *See Davis v. Davis*, 9 So. 736, 737 (Ala. 1891), *aff'g the same decision in prior appeal of the same case*, *Garrett v. Trabue*, 3 So. 149, 152 (Ala. 1887); *Gay v. Ward*, 34 A. 1025, 1025-28 (Conn. 1895); *Buckeye Cotton Oil Co. v. Amrhein*, 121 So. 602, 604 (La. 1929); *Menard v. Scudder*, 7 La. Ann. 385 (1852) ("[S]o far as we may judge from the analogies of the law, the mere death, without notice or knowledge, ought not to defeat the creditors' indemnity for advances, made in good faith, after that event."); *Knotts v. Butler*, 31 S.C. Eq. (10 Rich. Eq.) 143 (1858) (holding that a published general notice to creditors of the offeror's estate would be insufficient). *Ivie* is in considerable tension with *Davis* and *Garrett*; *Union Sawmill and Hart with Buckeye Cotton Oil and Menard*.

5. RESTATEMENT (SECOND) OF CONTRACTS § 48 (1981); *see also* RESTATEMENT OF SURETYSHIP & GUARANTY § 16 (1996); RESTATEMENT OF SECURITY § 87 (1941). Farnsworth reports that this result with respect to the contract restatements was not foreordained:

Under the original draft of the first Restatement, as written by Williston and his advisers, the unknown death of the offeror did not revoke the offer. But the Council of the American Law Institute changed the statement of the rule so that it does. Williston conceded, concluding that "though the amount of actual authority is not impressive, there is a very general opinion among lawyers that death, even though unknown, does revoke an offer and does revoke an agency." He noted that it was vital that the Restatement rule for contracts coincide with that for agency.

FARNSWORTH, *supra* note 1, § 3.18 (citing 3 Am. L. Inst. Proc. 198 (1925)). Murray tells the same story. MURRAY, *supra* note 1, § 34. This Article shows that, while Williston may have been correct that death revokes both an offer and an agency, he overlooked the inconsistency in the legal results that contract law and agency law draw from those parallel rules. The legal effect of the dying offer rule in contract law is to place the burden of the offeror's death on the offeree.

has given up trying to convince the judiciary. A statute reversing the dying offer rule is not likely, however. The rule and the cases to which it applies are too obscure to rise to a legislature's attention.

But legislators' failure to abolish the rule is just as well, because commentators, including the Restatement (Second), have largely missed the point. Academics' theoretical criticisms of the rule are correct, as Part I of this Article explains. The dying offer rule *is* a relic of the rejected view that contract requires mutual subjective assent. But other grounds support the dying offer rule's use in cases in which it is applied.⁷ In actual cases employing the dying offer rule, the rule generally reaches just results.

The rule is applied to three types of cases:⁸ Those in which the offeree

a) attempts to accept the offer or rely on it after receiving

The legal effect of the dying agency rule in agency law is not to place the burden of the principal's death on the third-party offeree but rather on the agent—an actor on the principal's side of the contract. *See infra* Part I.B. Though the rules seem logically parallel, they reach opposite legal results with respect to offerees.

6. RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a (1981) ("This rule seems to be a relic of the obsolete view that a contract requires a 'meeting of minds.' . . . In the absence of legislation, the rule remains in effect."). Others have also recommended correcting legislation. *E.g.*, ASHLEY, *supra* note 1, at 28 n.2 ("It may be that the rule is now too well settled to permit of any change by the Courts, but in that case legislation might be advisable."); LORD, *supra* note 1, § 5.19 ("A statute, however, would undoubtedly be necessary to bring about this result.").

7. Corbin once said that the dying offer rule "may be in harmony with the public interest." Corbin, *Relations*, *supra* note 1, at 198. To my knowledge, he never explained why. This Article will explain why. James Lewis Parks also agreed with the rule's results. Parks, *Indirect Revocation*, *supra* note 1, at 160.

8. A number of cases holding to the dying offer rule do not relate sufficient factual information to allow the reader to discern where in this listing the case falls. *See, e.g.*, *Braman v. Mut. Life Ins. Co. of N.Y.*, 73 F.2d 391 (8th Cir. 1934); *Valentine v. Head Camp, Pac. Jurisdiction*, *Woodmen of the World*, 180 P. 2 (Cal. 1919); *Grand Lodge of the Indep. Order of Good Templars v. Farnham*, 11 P. 592 (Cal. 1886); *Ritchie v. Rawlings*, 186 P. 1033 (Kan. 1920); *Union Sawmill Co. v. Mitchell*, 48 So. 317 (La. 1909); *Johnson v. Moreau*, 82 N.E.2d 802 (Mass. 1948); *Pearl v. Merchs.-Warren Nat'l Bank of Salem*, 400 N.E.2d 1314 (Mass. App. Ct. 1980); *Twenty-third St. Baptist Church v. Cornwell*, 23 N.E. 177 (N.Y. 1890); *Herrlich v. Hyman*, 113 N.Y.S. 971 (Sup. App. 1909); *Wallace v. Townsend*, 3 N.E. 601 (Ohio 1885); *In re Helfenstein's Estate*, 77 Pa. 328 (1875); *Baird's Estate*, 7 Weekly Notes of Cases 439 (Pa. 1879); *Thompson v. McAllen Federated Woman's Bldg. Corp.*, 273 S.W.2d 105 (Tex. App. 1954). Part of the reason for this ambiguity is that application of the dying offer rule renders discussion of negotiations following the offeror's death unnecessary. Because the death of the offer ends negotiations, in cases in which the rule applies whether acceptance occurred with notice of the offeror's death, or whether reliance also occurred, is technically irrelevant. Nevertheless, the categories of cases listed here include all possible variations. In all cases in which an offeror dies and litigation results, the offeree takes some further act: at least acceptance or reliance. In all cases, the offeree at the time he acts either has notice of the offeror's death or not. These variables, along with the offeror's intention, if any, that her offer survive her, exhaust the possibilities for these cases and usefully categorize the cases legally, in fact patterns that indicate the jurisprudential concerns that should determine their outcomes.

In several other cases, the rule is only dicta and did not apply to the facts of the case. *See, e.g.*, *Valentine v. Donohoe-Kelly Banking Co.*, 65 P. 381, 382-83 (1901); *First Nat'l Bank of Boston v. McGowan*, 5 N.E.2d 5, 7 (Mass. 1936); *Exch. Nat'l Bank of Spokane v. Hunt*, 135 P. 224, 225 (Wash. 1913); *accord Chain v. Wilhelm*, 84 F.2d 138 (4th Cir. 1936), *rev'd on other grounds*, 300 U.S. 31 (1937) (holding that the dying offer rule was inapplicable to the facts of this case but not rejecting the dying offer rule properly applied).

notice of the offeror's death;

b) attempts to accept the offer before receiving notice of the offeror's death but in which no reliance on the offer occurs; or

c) before receiving notice of the offeror's death reasonably incurs costs in reliance on the offer or on the offeree's reasonable belief in the existence of a completely formed contract.⁹

As I explain in Part II.A, application of the dying offer rule to category *a* cases generally reaches a just result: no contract forms.¹⁰ In fact, injustice could result toward the offeror's estate without the rule's protection. But the result is correct not because of a failure of subjective assent. Part II.A explains that a far better rationale in category *a* cases would be not failure of assent, but destruction of the offeree's expectations caused by notice of the offeror's death and the changed circumstances that death suggests. Though the offeror's manifestation of assent remains unchanged, notice of the offeror's death indicates that the offer is no longer "made [so] as to justify [the offeree] in understanding that his assent to that bargain is invited and will conclude it."¹¹ These conclusions are required to protect the offeror's estate.

In type *b* cases, also, the dying offer rule reaches a just result, as Part II.B explains. Type *b* cases are more interesting theoretically. In fact, they reach into the heights and depths of contract enforcement theory. In these cases, by definition no reliance occurs. The offeree's only interest is a mere expectation. This expectation itself becomes unreasonable when the offeree learns that the offeror died before acceptance occurred. At that point, no policy supports enforcement of the offer.

This Article examines liability based on (1) economic efficiency, (2) autonomy, (3) reliance (actual or potential), (4) benefit, and (5) expectation. The death of the offeror removes any presumption of efficiency. Personal autonomy is suspect if one party has died. Reliance has been defined out of type *b* cases. No benefit has been given. And protecting the offeree's mere expectation interest (or potential reliance) in these circumstances does not serve the goals of contract law. The agreement is therefore not worthy of legal enforcement. The more difficult question in type *b* cases is whether any such cases exist—cases devoid of reliance, actual or potential. This Article does not resolve this more difficult inquiry. The cases employing the dying offer rule appear to assume that some type *b* cases do exist. This Article shows how they should be handled if they occur.

9. In all but one of the cases found for this study, the offeror did not manifest any intention that her offer should survive her death. See cases cited *supra* note 4. (Non-specific offerors are female in this paper; offerees male.) So the facts of the cases studied here include the offeror's silence as to her offer's survivability. (I discuss the offeror's intention that the offer survive in Part III. The case in which the offeror manifested an intention that her offer survive her is *In re Estate of Severtson*, 1998 WL 88253 (Minn. App. March 3, 1998).) I have also set aside and do not discuss cases in which the offered contract would have required the personal performance of the offeror and the court has resolved the case on that ground. In those cases, the death of the offeror would have discharged the offeror's obligation even had a contract formed.

10. *Accord* Ferson, *supra* note 1, at 373 ("In most cases where the death of an offeror occurs, that fact may be deemed to revoke the offer without much, if any, injustice resulting."). Ferson's article does not consider all the circumstances affecting a just result in cases to which the dying offer rule has been applied, however. See *id.* A broader inquiry is in order.

11. The quoted language is from RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981), which defines *offer*.

Only in type *c* cases are the results of the dying offer rule questionable and in some cases unjust. This Article recommends in Part II.C that these cases be handled under the reliance-based doctrine set forth in Restatement (Second) of Contracts section 90.¹² The only difference between a type *b* and a type *c* case is the presence of reliance. Reliance provides the only basis for liability, making section 90 apropos as a tool of corrective justice. However, in every type *c* case, the offeree eventually learns that the offeror died before reliance occurred. At that point, the offeree's future expectations become unreasonable, as in a type *b* case. For this reason, prospective expectation damages in category *c* cases are inappropriate. Only retrospective damages should be awarded, because damages can be based only on reliance. Section 90 is therefore particularly fitted to type *c* cases because section 90 allows damages to be "limited as justice requires."¹³

No single theory justifies the results this Article advocates for the three types of cases. But the three types are easily distinguishable from each other in ways that should be legally relevant. Their disparate facts require disparate theoretical and policy treatment. That the dying offer rule's antiquated theory has been unable to handle all of these cases is no surprise. But the theoretical reforms recommended by this Article, which literally reground the dying offer rule, render the cases employing the rule immune from the academic criticism discussed in Part I.

Part II deals only with cases in which the offeror manifests no intention that her offer survive her. If the offeror had manifested the intention that her offer survive her, that intention would change this Article's analysis dramatically. Part III therefore discusses the single case found in which an offeror intended her offer to survive, incidentally a type *a* case, and considers hypotheticals corresponding to the other types of cases *b-c*. The dying offer rule would as presently written and understood apply to these cases, too, and a discussion would not be complete without Part III.¹⁴

12. Section 90 reads:

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 the enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

13. *Id.*

14. This Article does not discuss cases in which the offeree dies before the offer is accepted. *See, e.g.*, Estate of Watts v. Dickerson, 208 Cal. Rptr. 846, 848 (App. 1984); LORD, *supra* note 1, § 5.19 n.14. Death of offeree cases differ from death of offeror cases both factually and theoretically. The death of offeree cases are thought to rest on the quite reasonable notion that the offer is personal to the offeree, and not assignable, so that the death of the offeree leaves no one left to accept the offer. *See id.* ("This classic contract principle follows from the elementary rule of contracts that an offer to contract is not assignable, it being purely personal to the offeree.") (internal quotations omitted); accord PERILLO, *supra* note 1, § 2.34 ("There is not much reason to criticize this result, since the representative [of the offeree] has knowledge of the death and there can be no change of position with unforeseen injury."); Wagner, *supra* note 1, at 155 ("An offer can only be accepted by the person to whom it is made . . ."). Of course, difficulties with this rationale exist. The rationale might over-emphasize the "personalness" of the offer to the offeree. Papale, *supra* note 1, at 111 n.7. Moreover, an agent whose agency was coupled with an interest could accept on the offeree's behalf, even though the offeree had died. *Id.* This brief discussion proves that the policies animating the results in cases

I. WHY OFFERS ARE SUPPOSED TO DIE, AND WHY THOSE SUPPOSITIONS FAIL

A. *Historically Speaking: A Source for the Dying Offer Rule*

The earliest reference I have found in American law to the dying offer rule is in *Mactier's Administrators v. Frith*.¹⁵ *Mactier's* cites only Pothier¹⁶ for the rule.¹⁷ Subsequent early references cite either *Mactier's*, a loose analogy to agency law, or nothing for the rule,¹⁸ so the best bet is that *Mactier's* is the rule's initiation into American law.

From *Mactier's* we turn to Pothier, who credits the rule to Bruneman.¹⁹ Bruneman himself does not mention the dying offer rule but does discuss contracts made by post, another example of parties bargaining at a distance.²⁰ Bruneman's conclusions rely on analyses of Bartolus²¹ and Johannes Petrus Surdus.²² Surdus in turn explains the dying offer rule, relying in part on Bartolus's explanation of contracts formed between parties not present to each other.²³ Surdus's position is more or less adopted by Pothier

of death of the offeree differ from those animating cases involving death of the offeror.

15. 6 Wend. 103 (1830).

16. ROBERT JOSEPH POTHIER, TREATISE ON THE CONTRACT OF SALE (special reprint ed., L.S. Cushing trans., 1988) (1839). *Mactier's* cite is to the French version, ROBERT JOSEPH POTHIER, TRAITÉ DU CONTRAT DE VENTE (1806).

17. 6 Wend. at 113-15 & 113 n.* (dicta, citing POTHIER, *supra* note 16, at 18 (Part I, § 2, art. 3, no. 32)).

18. The next case chronologically is *The Palo Alto*, 18 F. Cas. 1062, 1067 (D. Me. 1847), which cites no authority specifically for the rule but notes the rule in a discussion of *Mactier's*, Pothier, and other civil sources. The next two cases, from Pennsylvania and Vermont, cite no authority for the dying offer rule. See *Phipps v. Jones*, 20 Pa. 260, 264 (1853) ("There can be no contract without correlative parties, and it is generally essential that there be something more than a moral duty as the bond of the relation and basis of the promise. Where the undertaking is entirely one-sided, there is no right of enforcement. There can be no relation without correlation."); *Michigan State Bank v. Leavenworth's Estate*, 28 Vt. 209 (1856) (citing only agency law), *overruled on other grounds*, *Austin v. Curtis*, 31 Vt. 64 (1858). *Contra* *Menard v. Scudder*, 56 Am. Dec. 610, 618 (La. 1852) (citing to civilian agency law but rejecting the dying offer rule).

19. JOHANNIS BRUNEMANNI JC, COMMENTARIUS IN LEGES PANDECTARUM (1670) [hereinafter BRUNEMAN]. See POTHIER, *supra* note 16, at 18 ("This is the opinion of Bartholus and other jurists cited by Bruneman, *ad* 1, § 2. *D. de contrah. empt.* (18, 1, 1, § 2), who very properly reject the contrary opinion of the Gloss, *ad dictam legem.*").

20. See BRUNEMAN, *supra* note 19, at 550.

21. BARTOLI A SAXOFERRATO, OMNIUM IURIS INTERPRETUM ANTESIGNANI, COMMENTARIA (Jacobi Anelli De Bottis comment., Petri Mangrellae illus., 1590). Not all editions of Bartolus contain the paragraph on *quod iussu* to which Bruneman cites. The Venice edition (resident at South Texas College of Law) published by Baptista de Tortis, 1526-1529, for instance, lacks the paragraph. The copy of Bartolus cited above resides at Southern Methodist University's Underwood Law Library Rare Book Room. Thanks to Prof. Joseph McKnight for sending the paragraph on *quod iussu*.

22. JOHANNES PETRUS SURDUS, CONSILIA L.1, cons. 136, nos. 47-54 (1584).

23. See *id.* at cons. 136, no. 48:

Et pro hoc facit quod dicimus, espistolam uel nuntium obligare non posse scribetem uel mittentem, † si is decedat antequam ad eum peruenerint, cum quo erat contrahendum, quia cum per mortem deficiat scribentis consensus, non potest dici q eius scriptura loquatur. c. sin. cum ibi not. per Inno. de successio. ab intest. & ita determinat. Butr. in. c. fina. col. 6. de

as natural and French civil law in the 1750s:

The consent of the parties, which is of the essence of the contract of sale, consists in a concurrence of the will of the seller, to sell . . . , and of the buyer, to buy

This will is presumed to continue, if nothing appears to the contrary; but, if I write a letter to a merchant living at a distance, and therein propose to him, to sell [to] me . . . ; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain; or if I die; . . . although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death . . . , makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract of sale. This is the opinion of Bartholus and the other jurists cited by Bruneman [primarily, Surdus, the other jurist Bruneman cites for this principle,²⁴ unless one includes indirectly those whom Surdus cites²⁵] . . . , who very properly reject the contrary opinion of the Gloss, *ad dictam legem*.²⁶

"If nothing appears to the contrary" is the key language in this passage. An offeror's letter of revocation or an offeror's death is for Pothier an example of the offeror's will appearing not to continue, whether the offeree is aware of it or not. Under Pothier's position, it need not appear *to the offeree* that the offeror's mind has changed or that the offeror has died. The cessation of the will to contract had to be apparent only to another observing person, as if the objective evidence of the cessation

consens. ubi Imol. reputat singulare Alex. in consi. 24. nu. 10. uol. 5. per epistolam eum praesens uidetur absenti loqui, sed mortuus non loquitur. Ideo cessat praesumptio seu coniectura. Rom. in l. nuda ratio nu. 12. ff. de don. ubi dicit esse mirabile. Iaf. in repet. l. admonendi. nu. 138 uer. 2. limita. ff. de iure iuran. ubi ait esse singularem limitationem. sequitur ibi Rip. nu. 136. quia post mortem interuenire non potest simultaneous consensus.

Id. As Buckland notes, the Digest contains "no direct evidence, for contract, as to the effect of death of a party on an unaccepted offer." W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 413-14 n.8 (3d ed. 1963). This explains the existence of later arguments about the issue during the late middle ages and the reconciliation of views in Surdus. The dying offer rule appears to be a rather textbook example of the kind of borrowing from Roman, natural law, and medieval philosophy described by James Gordley. See JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991). As the quote above shows, Surdus is working from earlier discussions of this and related issues by Pope Innocent IV (d. 1254), Butrigarius (d. 1348), Johannes de Imola (d. 1436), Alexander Tartagna de Imola (d. 1477), Ludovicus Pontanus de Roma (d. 1439), Jason de Maino (d. 1519), and Johannes Franciscus de Ripa (d. 1534). A few sentences earlier, Surdus cites to Bartolus. Surdus in fact relates his explanation of the issue to Bartolus's conclusion that the carrier of a letter was, like a kind of agent, only an extension of the sender, so that the carrier lost authority (or the will of the sender) when the sender changed his mind or died. See SURDUS, *supra* note 22, cons. 136, nos. 48-52; GORDLEY, *supra*, at 45-49.

24. See BRUNEMAN, *supra* note 19.

25. See *supra* note 23.

26. POTHIER, *supra* note 16, at 17-18.

of will were required, not to protect the offeree against reliance on the offer, but only to show in court that the law's presumption of continued will was not warranted.²⁷ Thus, the offeror's death caused lack of assent even though the offeree did not know of it.

B. Theoretically Speaking: What's Wrong with Pothier's Explanation

The common law has generally held a more party-centered view of the requirement of objective assent than Pothier expressed. The requirement that assent be manifest is, in the common law, generally meant to protect the other party to the contract and ensure that expectations of both parties are reasonable.²⁸ Ensuring also that the court can discern the offeror's will would be only an incidental benefit. Thus, in the common law of contract, a party's manifestation of assent to the other party—not her subjective intent—is usually the operative fact; in a conflict between objective and subjective assent, objective assent controls. Generally at least one party must subjectively assent to an agreement under American contract law. Otherwise, a contract could be formed from a jest²⁹ or a misunderstanding.³⁰ But such exceptions aside, the requirement of assent is satisfied if both parties manifest assent to each other. With these rules in mind, American lawyers can make the following three valid criticisms of the dying offer rule.

First, the offeror's death may not mean the end of her subjective assent. The law assumes it does, but this determination is one of policy rather than judicial notice of a fact. Simply put, the offeror's death does not prove factually that her subjective assent has ceased. No proof exists that death terminates a person's will or ability to assent.³¹ The will is, classically, an attribute of the soul,³² the part of a human that survives death.³³ If the will survives, then perhaps even the will to form a certain contract

27. That the requirement of objective manifestation of the cessation of the will did not protect the offeree is why Pothier also held that, though no contract forms, the offeror must indemnify the offeree for any costs the offeree incurred in reliance on the offer. *See* POTHIER, *supra* note 16, at 18-19. This was held not as a rule of contract law, but of equity. *Id.*

28. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 18 (requiring a manifestation of assent), § 2 & cmt. b (“A promisor manifests an intention if he believes or has reason to believe that *the promisee* will infer that intention from his words or conduct.”) (emphasis added); CALAMARI & PERILLO, *supra* note 1, §§ 2.1-2.4; FARNSWORTH, *supra* note 1, §§ 3.6-3.8.

29. *See* RESTATEMENT (SECOND) OF CONTRACTS § 18 & cmt. c (1981). If both parties manifest intention to agree in jest or as a sham, no contract forms.

30. *See, e.g., id.* § 20. If both parties manifest what would seem to be agreement to a bargain or contract, but neither “knows or has reason to know the meaning attached by the other” to its manifestation, *id.* § 20(1)(a), then no contract forms.

31. *Contra* LORD, *supra* note 1, § 5.19:

To the extent that the formation of a contract at one time was thought to require a mutual mental assent of the parties, so that the offer and acceptance were merely evidence of such assent, it would obviously be impossible for a contract to be formed where either party to the transaction died before the assent was obtained.

32. *See generally* ARISTOTLE, DE ANIME [ON THE SOUL] (W.S. Hett trans., Harvard Univ. Press 1975).

33. *See, e.g., Matt.* 10:28 (King James) (“And fear not them which kill the body, but are not able to kill the soul . . .”). Socrates relied on our ignorance of the final fate of souls in

survives. Of course, death makes further evidence of subjective assent difficult to obtain, and this difficulty perhaps suggests that the law treat the assent of the dead as a nullity. But lack of evidence of a thing does not prove its nonexistence. Science, religion, and, indeed, most disciplines assume items they cannot prove.³⁴ Factually, once an offeror dies, no one really knows whether she still assents.³⁵ Unless the law wishes to adopt a position of faith on this matter, it must remain agnostic and assume it knows nothing of an offeror's assent after death. If the law remains agnostic, then the subjective intent theory of the dying offer rule merely assumes without any supporting premise that death terminates passive subjective assent. The dying offer rule *is* that assumption employed as law. The rule is thus the conclusion of a circular argument.

Second, and the most common criticism of the dying offer rule, subjective assent of both parties to a contract is not required by our law; thus, even if death causes subjective intent to cease, a contract could still form.³⁶ The classic case illustrating the

arguing that death might be beneficial:

[T]here is great reason to hope that death is a good; for one of two things—either death is a state of nothingness and utter unconsciousness, or, as men say, there is a change and migration of the soul from this world to another.

PLATO, APOLOGY 40c-d. Death as unconsciousness would be good because dreamless sleep is of the most restful quality, Socrates argued. *Id.* at 40d-e. But if death be but a journey to another world, then

what good, O my friends and judges, can be greater than this? If indeed when the pilgrim arrives in the world below, he is delivered from the professors of justice in this world, and finds the true judges who are said to give no judgment there . . . , and other sons of God who were righteous in their own life, that pilgrimage will be worth making. What would not a man give if he might converse with Orpheus and Musaeus and Hesiod and Homer? Nay, if this be true, let me die again and again. . . . Above all, I shall then be able to continue my search into true and false knowledge; as in this world, so also in the next; and I shall find out who is wise, and who pretends to be wise, and is not. . . . In another world they do not put a man to death for asking questions: assuredly not. For besides being happier than we are, they will be immortal, if what is said is true.

Id. at 40e-41c.

34. Science can prove neither the missing link nor the gravity particle (or, if someday those are found, some other fact that the present theory needs will yet remain missing). Geometry and logic begin with unproven axioms. Sometimes the discipline is not even sure what the unprovable item is. For instance, $\sqrt{-1}$ is vital to mathematics but unsolvable.

35. The results of a seance are not likely to be admissible. *E.g.*, *Warren v. Compton*, 626 S.W.2d 12, 20 (Tenn. App. 1981) (Near, J., concurring and dissenting) (“[S]uch ascribed meaning [of a statute] left to the Courts the task of reading a dead man’s mind in order to ascertain his motivation in making [a] conveyance. Such a task is difficult to say the least; especially when the law will not recognize ouija boards or seances as legitimate Court tools to assist in making that determination.”).

36. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a (1981) (“This rule seems to be a relic of the obsolete view that a contract requires a ‘meeting of minds,’ and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent.”); CORBIN, *supra* note 1, § 54 (“Such general statements arose out of the earlier notion that a contract cannot be made without an actual meeting of minds at a single moment of time, a notion that has long been abandoned.”); FARNSWORTH, *supra* note 1, § 3.18; LORD, *supra* note 1, § 5.19; MURRAY, *supra* note 1, § 42(E); PERILLO, *supra* note 1, § 2.34; Oliphant, *supra* note 1, at 210 (“But no concurrence of wills is necessary.”); Wagner, *supra*

premise of this argument is *Lucy v. Zehmer*,³⁷ in which Lucy said while drinking in a bar with Zehmer that he wanted to buy Zehmer's farm for \$50,000. Zehmer said, in effect, "You don't have \$50,000. I'd sell for that much."³⁸ Lucy said, "Put that in writing," and Zehmer wrote, "I do hereby agree to sell . . . the [farm] for \$50,000.00 complete."³⁹ Lucy then indicated that he accepted.⁴⁰ Zehmer later claimed he was merely joking, trying to call Lucy's bluff.⁴¹ But the court held that, because Lucy was justified in thinking that Zehmer was serious, a contract formed and Zehmer's secret intention to jest was irrelevant.⁴² The subjective intent of one party, Lucy, was sufficient to allow a contract to form if both parties objectively manifested intent to form a contract.⁴³

Whether the law can know if the dead assent or not, if the dying offer rule rests only on a requirement of subjective assent, this criticism is valid. Under precedent such as *Lucy*, the deceased offeror's subjective assent is not necessary to the formation of a contract. A contract bound Zehmer even though he did not intend subjectively to be bound. An offeror manifesting objective intent to agree and then secretly changing her mind before the offeree accepted would also be bound.⁴⁴ In such cases, the offeror

note 1, at 152; *see also* *Chain v. Wilhelm*, 84 F.2d 138, 140 (4th Cir. 1936) ("This rule has been criticized on the ground that under the modern view of the formation of contracts, it is not the actual meeting of the minds of the contracting parties that is the determining factor, but rather the apparent state of mind of the parties embodied in an expression of mutual consent; so that the acceptance by an offeree of an offer, which is apparently still open, should result in an enforceable contract notwithstanding the prior death of the offeror unknown to the offeree."), *rev'd on other grounds*, 300 U.S. 31 (1937); *New Headley Tobacco Warehouse Co. v. Gentry's Ex'r*, 212 S.W.2d 325, 327 (Ky. Ct. App. 1948) (same as *Chain*). This criticism is cogent only because in the common contract law system only the objective manifestations of assent to the offeree matter. Objective manifestations to a disinterested third party are irrelevant. In Pothier's system, in which an objective manifestation to a disinterested third person would be effective to terminate assent, death would suffice to show lack of objective assent. *See supra* note 27 and accompanying text.

37. 84 S.E.2d 516 (Va. 1954).

38. *See id.* at 518-20.

39. *Id.* at 518-19 (giving Lucy's version of the story and Zehmer's version). Actually, Zehmer later crossed out "I" and put in "We" because his wife also had an interest in the farm; she also signed the writing after Zehmer told her secretly that it was just a joke. *Id.* at 519-20.

40. *Id.* at 518-20 (giving Lucy's version of the story, Zehmer's version, and Zehmer's wife's version).

41. *Id.* at 519-20.

42. *See id.* at 520-22.

43. *See id.* at 522 ("The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial . . . Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.").

44. *See, e.g., Air Master Sales Co. v. Northbridge Park Co-op, Inc.*, 748 F. Supp. 1110, 1115-16 (D.N.J. 1990) ("Succinctly stated, a change of mind does not bear upon the validity or existence of the contract."); *Nevets C.M., Inc. v. Nissho Iwai Am. Corp.*, 726 F. Supp. 525, 535 (D.N.J. 1989), *aff'd*, 899 F.2d 1218 (3d Cir. 1990) ("A subsequent change of mind does not bear on the validity or existence of the original agreement."); *Long v. Brown*, 582 A.2d 359, 364 (Pa. Super. Ct. 1990).

must bear the burdens resulting from her objective manifestation of assent to create a contract. And if mere mental objection to a contract does not stop it from forming, death should also be no barrier.⁴⁵ Even if death were the cessation of assent, as the dying offer rule appears to assume, death would be merely lack of assent and not as serious an obstacle to contract formation as mental objection.

Third, tying the dying offer rule to subjective assent also results in the anomaly that payment of a pittance in exchange for a promise to keep an offer open can also keep an offeror's subjective assent alive, zombie-like, for years after death.⁴⁶ If the dead offeror's offer is irrevocable—an option contract—then the law 'in fact' deems the dead offeror's juridical persona and assent to continue notwithstanding death.⁴⁷ When the optionee exercises the option, a contract for sale forms between the dead offeror and the optionee, notwithstanding that the offeror—and her assent, if that goes with her⁴⁸—may have been dead for many years. The requirements of an option

45. See, e.g., ASHLEY, *supra* note 1, § 17 n.2 ("But the same situation as to agreement exists when the offeror changes his mind, but is unable to revoke his offer before it becomes a promise."); Papale, *supra* note 1, at 111-12 & 111 n.8.

46. See, e.g., Corbin, *Relations*, *supra* note 1, at 198-99; Papale, *supra* note 1, at 130-31 ("The option . . . presents an instance where a contract can be made with a dead man, so to speak. . . . If this is possible in the case of an irrevocable offer, it should be possible in the case of the revocable offer, until it is revoked or terminated by any other means . . . except death."). Louisiana law at one time recognized the option as the exception to the dying offer rule that it is. See Litvinoff, *supra* note 1, at 717.

47. E.g., Crowley v. Bass, 445 So. 2d 903 (Ala. 1984) ("The death of an optionor before the exercise of the option causes the option to lapse if the option is unsupported by consideration. An option does not lapse at the death of the optionor if it is supported by a valuable consideration, even though it has not been exercised.") (citation omitted); Mubi v. Broomfield, 492 P.2d 700, 702 (Ariz. 1972) (holding that an offer fixed as irrevocable for ten days by rule of civil procedure is the equivalent of an option for consideration and therefore was not revoked by the death of the offeree); RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. d (1981); Papale, *supra* note 1, at 130-31. Perhaps this is why the Restatement does not consider the dying offer rule to be a rule of capacity. RESTATEMENT (SECOND) OF CONTRACTS § 48 & cmt. c (1981) (contrasting death of the offeror with deprivation of legal capacity).

An offer of option contract is both an offer to exchange and an offer to keep the first offer open for a period of time. The acceptance of this second offer and consideration paid for it constitutes the option contract. The first offer remains live until the sooner of the option period's expiration or the acceptance of the offer to exchange. A similar phenomenon occurs when an offeror makes an offer of unilateral contract and the offeree begins performance. According to the theory of the Restatement (Second) of Contracts § 45, the offeree's beginning the bargained-for performance creates an option contract that requires the offeror to hold the offer open for a reasonable time during which the offeree has the opportunity to complete the performance which constitutes acceptance of the contract. See *id.*; see, e.g., Holland v. Earl G. Graves Publ'g Co., 46 F. Supp. 2d 681, 685 (E.D. Mich. 1998); Wells Fargo Bank, N.A. v. United States, 26 Cl. Ct. 805, 811 (1992), *aff'd in part and rev'd in part*, 88 F.3d 1012 (Fed. Cir. 1996); Blackhurst v. Transamerica Ins. Co., 699 P.2d 692-94 (Utah 1985) (Howe, J., concurring) (finding § 45 applicable and holding that the offeree's death did not terminate the right of her estate to accept by continuing performance). Corbin said that the death of the offeror after the offeree begins performance should have no effect on the validity of the offer and that the offeree should retain the power to accept for a reasonable time, but he cited no case, and I have not found one. CORBIN, *supra* note 1, § 54 n.11; see also PERILLO, *supra* note 1, § 2.34 n.6. But see Papale, *supra* note 1, at 118-29 (questioning this result).

48. Again, this assumes that there is no assent after death, which some cases assume. See

contract are minimal. Most courts demand only a token amount of consideration—one dollar even⁴⁹—and some require only a recitation that consideration was paid.⁵⁰ Thus, one dollar can keep a juridical offeror and the offeror's assent alive for years. This is a small price to pay to cheat death, a price that an offeree unknowingly trying to accept a dead offer and beginning performance as if a contract existed would gladly have paid to avoid the expense of his ignorance.⁵¹

Some other criticisms of the rule are situational rather than general and theoretical, and this Article deals with them more fully *infra* in Part II, which discusses categories of cases to which the dying offer rule has been applied. The most prominent situational criticism is that, if the offeree has received no notice of the offeror's death and incurred costs in reliance on the offer, then the rule may unfairly force the offeree to bear the burden of the offeror's death. As between offeror and offeree, absent agreement, the offeror should bear the expense caused by her own death, assuming no one else is at fault for it.⁵² The offeror is the better insurer of her own life, being far better informed of the extent of its risks and burdens. In fact, it is doubtful that offerees would undertake to accept offers and begin performance, without further assurance (or perhaps insurance), if they thought they might suffer complete loss for such undertakings when they later learn that before technical acceptance occurred the offeror had died.⁵³

The remaining, residual criticism of the rule is that, as Corbin said, "there is not . . . any compelling necessity for its existence."⁵⁴ A number of other rationales for the rule have been suggested, but none of these are persuasive. Courts⁵⁵ and commentators⁵⁶

cases cited *supra* note 3.

49. See, e.g., *Dennett v. Kuenzli*, 936 P.2d 219, 223-24 (Idaho 1997); *Honeyfield v. Lambeth*, 519 S.W.2d 342, 345 (Mo. Ct. App. 1975) ("One Dollar (\$1.00) cash paid would in itself be sufficient consideration."); accord *First Nat'l Bankshares, Inc. v. Geisel*, 853 F. Supp. 1344, 1352-53 (D. Kan. 1994) (holding a recited consideration of one dollar insufficient because it was never actually paid). But see *Kelley v. Coldren*, 290 S.W.2d 424, 425 (Ark. 1956) (holding one dollar nominal and therefore not sufficiently valuable consideration).

50. *Real Estate Co. v. Rudolph*, 153 A. 438, 439 (Pa. 1930); RESTATEMENT (SECOND) OF CONTRACTS § 87(1) (1981).

51. If the offeror happens to request as acceptance of her offer a return performance rather than a return promise, the offeree's beginning performance may also keep the offeror's juridical person alive—notwithstanding her prior, actual death—long enough for the offeror to continue assenting until performance is completed. See *supra* note 47.

52. *Oliphant*, *supra* note 1, at 210 ("As between the gratuitous takers of the offeror's property and the offeree, it is perfectly clear which should suffer the consequences of the casualty of the offeror's death.").

53. See Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 515-16 (1996) (arguing that "an offeror who limits her exposure [by opting for the termination of her offer at death] may not induce the offeree to rely, even where such reliance would increase the expected value of the transaction to both parties").

54. Corbin, *Relations*, *supra* note 1, at 198; *ASHLEY*, *supra* note 1, § 17 n.2 (reasoning that personal obligations are formed and survive death for public policy reasons, so that if public policy reasons support formation of a personal obligation and survival here, then both should occur); accord *Knotts v. Butler*, 31 S.C. Eq. (10 Rich. Eq.) 143, 145-46 (1858) ("[N]o principle requires that his [then unaccepted] contract should terminate with his life.").

55. See, e.g., *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209, 216 (1856), *overruled by Austin v. Curtis*, 31 Vt. 64 (1858).

56. CORBIN, *supra* note 1, § 54; *Oliphant*, *supra* note 1, at 210-11; Note, *supra* note 1, at 296.

have often cited agency law as analogous, for instance. Corbin said:

There is some analogy between the power of an offeree and the power of an agent. Just as in the case of an offer, it has been held that the death of the principal terminates the agent's power to contract, even though the agent acts in ignorance of his principal's death.⁵⁷

But the analogy to agency law is limited. The law disregards the expectations and position of both agent and offeree when the principal or offeror dies, respectively. Aside from that, the similarity ends.⁵⁸ Death may terminate the power of a deceased principal to act. If the agent is "in theory" an extension of the principal, the principal's death should terminate the agency. But the offeree is not the extension of the offeror. The offeree needs no authority or license from the offeror to assent. Nor does the offeree form a contract *for* the offeror. A contract simply arises by law out of their independent acts.

Moreover, agency law, unlike contract law, protects the offeree when the offeror/principal dies. The burden of the offeror's death under agency law always falls on the offeror's side of the contract. For example: On day one, Principal Peter hires Agent Alice to make a contract with Teri Third Party. On day two, Peter dies. On day three, Alice (without notice of Peter's death) makes a contract with Teri. Who bears the burden of Peter's death? Agent Alice, who, because of Peter's death, has breached an implied warranty of authority.⁵⁹ As between Alice and Teri, the law reasons, Alice is the better bearer of the risk of Peter's death and Teri's reliance, because she is in the

57. CORBIN, *supra* note 1, § 54. In support of the agency rule Corbin recites, see *Washington v. Caseyville Health Care Ass'n*, 672 N.E.2d 34, 36 (Ill. Ct. App. 1996) ("Under agency principles, the death of the principal terminates the authority of the agent, even if the agent has no notice of the principal's death."); *Brantley v. Fallston Gen. Hosp. Inc.*, 636 A.2d 444, 446 (Md. 1994) (holding that the death of the client terminated the lawyer's agency relationship and nullified an appeal the lawyer filed two days after the client's death); *Smith v. Cynfax Corp.*, 618 A.2d 937, 940 (N.J. Super. Ct. 1992) (holding the same as *Brantley*); RESTATEMENT (SECOND) OF AGENCY § 120 (1958). *But see* *Schock v. United States*, 56 F. Supp. 2d 185, 195 (D.R.I. 1999) (forecasting that Rhode Island would hold otherwise), *aff'd on other grounds*, 254 F.3d 1 (1st Cir. 2001); RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 3.07(2) (Tentative Draft No. 2, 2001) (forecasting that courts will follow *Schock*); *see infra* text accompanying notes 58-67.

58. In both cases the law disregards any consideration but the subjective intention of the dead offeror/principal, but using that premise to buttress the dying offer rule would quickly make one dizzy.

59. RESTATEMENT (SECOND) OF AGENCY § 329 (1958) provides:

A person who purports to make a contract, conveyance or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized.

Illustration 2 shows the rule's application in the case of the principal's death: "P appoints A as his agent to sell land to T. That night, unknown to anybody, P dies. The following morning A executes a contract of sale to T in the name of P. A is subject to liability to T upon a warranty of authority." RESTATEMENT (SECOND) OF AGENCY § 329 illus. 2 (1958).

better position to know whether Peter has died.⁶⁰ So the answer of agency law is that the burden of the offeror's death should fall on the offeror's side of the negotiations rather than on the offeree's.⁶¹ To avoid the harsh effects of the dying offer rule, offerees should always do business with agents. Agency law, which protects the offeree from the effects of the offeror's death, offers no support for the dying offer rule.

Finally, the rule of agency law that supposedly supports the dying offer rule, that the principal's death terminates the agency even though the agent is unaware, has now

60. See *Schafer v. Fraser*, 290 P.2d 190, 208 (Or. 1955) (“[T]he principal purpose of the warranty is to safeguard the third person from the loss of a contract which he thinks is his.”); *Oliver v. Morawetz*, 72 N.W. 877, 879 (Wis. 1897) (holding that the agent “must be regarded as insuring the plaintiff against the consequences arising from the want of such authority, namely, the loss of his commission thus earned, by reason of the defendant’s want of authority to bind his co-owners”). The cases and Restatement nominally ground the agent’s implied warranty of authority on the agent’s misrepresentation that authority existed. *Tedder v. Riggins*, 61 So. 244, 245 (Fla. 1913) (“Whether it be ex contractu or ex delicto, the gist of the action is the misrepresentation made by the defendant to the plaintiff’s pecuniary injury; and the purpose of the action is compensation.”). But in the death case the rule also acts as a risk-shifting device. The warranty is implied by law. And it applies in cases of the principal’s death even though the agent was not culpable and indeed acted reasonably. RESTATEMENT (SECOND) OF AGENCY § 329 cmt. b (1958) (“The rule stated in this Section applies although the agent reasonably believes that he is authorized, and even though the agent had been previously authorized to act but, owing to an event of which he had no notice, the authority has terminated, as when the principal dies, becomes insane, or becomes an alien enemy.”). Moreover, the doctrine does not apply unless a contract would otherwise have formed between the principal and third party had the agent had authority. *E.g.*, *Wolfson v. Beris*, 295 N.W.2d 562, 565 (Minn. 1980) (“We recognize that the cause of action for breach of warranty of authority to contract can only exist if the parties purport to have made a legally binding contract.”); *Vasichek v. Thorsen*, 271 N.W.2d 555, 560 (N.D. 1978) (same). And the third party receives no damages for breach of the warranty unless the resulting contract would have been enforceable and breach of it by the purported principal would not have been excused. See *Moore v. Lewis*, 366 N.E.2d 594, 598-99 (Ill. App. Ct. 1977); RESTATEMENT (SECOND) OF AGENCY § 329 cmt. j (1958). Finally, breach of the implied warranty of authority is generally not considered to be tortious. The Restatement (Second) of Agency deals separately, in § 330, with tortious misrepresentation of authority. See *id.* § 330 (“A person who tortiously misrepresents to another that he has authority to make a contract, conveyance, or representation on behalf of a principal whom he has no power to bind, is subject to liability to the other in an action of tort for loss caused by reliance upon such misrepresentation.”)

61. Damages for breach of the implied warranty of authority are the harm resulting from the belief that the agent had authority. Many courts hold that the agent is not liable on the contract. *E.g.*, *Tedder v. Riggins*, 61 So. 244, 245 (Fla. 1913) (limiting damages to the extent of reliance on the authority of the agent, and holding that profits that could have been under the contract had the purported agent acted with authority are not directly compensable through this action); *Feinberg v. Great Atl. & Pac. Tea Co.*, 266 N.E.2d 401, 404 (Ill. App. Ct. 1970); *White v. Madison*, 26 N.Y. 117, 124 (1862); *Hudock v. Donegal Mut. Ins. Co.*, 264 A.2d 668, 672 (Pa. 1970). Some other cases suggest, rather, that the agent becomes a contractual party in place of the principal. *E.g.*, *Williams v. De Soto Oil Co.*, 213 F. 194, 197 (8th Cir. 1914) (stating that “when a party making a contract bona fide believes that such authority is vested in him, but as a matter of fact has no such authority, he is still personally liable upon the contract”); *Cargo Ships El Yam, Ltd. v. Stearns & Foster Co.*, 149 F. Supp. 754, 763 (S.D.N.Y. 1955) (“Thus, in some jurisdictions, liability is based on the contract itself. Other jurisdictions, and the majority of them, hold that the agent is not liable on the contract but is liable for the breach of implied warranty of authority.”).

been questioned. In *Schock v. United States*,⁶² a federal district court forecasted that the Rhode Island Supreme Court would reject that rule and hold that the agent's apparent authority survives the death of the principal.⁶³ The court thought it only fair and efficient, given the principal's manifestations that the agent was authorized, that the agent's authority to bind the principal continue until the third party had notice of the principal's death or some cessation of the principal's consent that the agent serve.⁶⁴ Even were the common law not moving in that direction, the rule that death terminates all authority has been undercut legislatively if a written power of attorney created the agency. The Uniform Durable Power of Attorney Act provides that an agent's authority under a written power of attorney continues after the death of the principal as to third persons without knowledge of the principal's death.⁶⁵ The Uniform Act is law in forty-seven states.⁶⁶ The Restatement (Third) of Agency now proposes to modify the common law rule to conform to *Schock* and the Uniform Act:

The death of an individual principal terminates the agent's actual authority. The termination is effective only when the agent has notice of the principal's death. The termination is also effective as against a third party with whom the agent deals when the third party has notice of the principal's death.⁶⁷

Thus, agency law offered only spurious support for the subjective intent theory supposedly behind the dying offer rule, and recent changes and trends in agency law openly oppose that theory.

Other proposed rationales for the dying offer rule are not even superficially supportive. "[O]ne cannot contract with a dead man," some say.⁶⁸ Ashley responded

62. 56 F. Supp. 2d 185, 193 (D.R.I. 1999) (forecasting Rhode Island law), *aff'd on other grounds*, 254 F.3d 1 (1st Cir. 2001).

63. *Id.* at 193-94.

64. *Id.* at 193 ("The doctrine of apparent agency exists in order to allow third parties to depend on agents without investigating their agency before every single transaction. If a third party had to confirm the agency relationship repeatedly, then it might as well deal directly with the principal. [The plaintiff] seeks to place the risk that a principal has died onto third parties, rather than on the principal. That is absurd.")

65. UNIF. DURABLE POWER OF ATTORNEY ACT § 4, 8A U.L.A. 255 (1979); *see* UTAH CODE ANN. § 75-5-502(1) (Supp. 2003) ("The death, disability, or incompetence of any principal who has executed a power of attorney in writing . . . does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives. This power is exercisable notwithstanding the lapse of time since the execution of the instrument, unless the instrument states a time of termination.")

66. Uniform Law Commissioners, *A Few Facts About the Uniform Durable Power of Attorney Act*, at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-udpaa.asp (last visited Jan. 19, 2004).

67. RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 3.07(2) (Tentative Draft No. 2, 2001).

68. ASHLEY, *supra* note 1, at 28 n.2; *see, e.g.*, *Fed. Deposit Ins. Corp. v. Fagan*, 674 F.2d 302, 305-06 (4th Cir. 1982) (citing RESTATEMENT OF SECURITY § 87 for the proposition, "A dead surety can make no contract . . ."); *Valentine v. Donohoe-Kelly Banking Co.*, 65 P. 381, 382 (Cal. 1901) ("A dead [offeror] can make no promise."); *Pratt v. Trs. of the Baptist Soc'y*, 93 Ill. 475, 478-79 (1879) ("The continuance of an offer is in the nature of its constant

persuasively that the “dead man” dicta is “simply a form of speech, and does not indicate any essential principle. A promise is simply the obligation which the law places upon a man when certain preceding facts concur,” and the law can simply say that the dead offeror’s offer “shall constitute one of such facts, so that the law may place the obligation upon his estate instead of upon the offeror himself.”⁶⁹ Ashley was correct. The “dead man” rhetoric is only a metaphor, and unless some policy is given to support it, use of it to ground the dying offer rule is merely and circularly to assume the conclusion of the argument.

Some courts have said that the dying offer rule is required because it “takes two to contract.”⁷⁰ “[I]t is impossible to have a meeting of the mind of a dead person with the mind of a living one.”⁷¹ Corbin’s answer was that “the offer is made by a living man and is accepted by another living man. One and one makes two.”⁷² Ashley’s response to the prior criticism is also persuasive: This dicta is “simply a form of speech, and does not indicate any essential principle,”⁷³ except perhaps a reliance on subjective intent, which I have already discussed.

Others have proposed that the dying offer rule is “based on the theory that the continuance of an offer is in the nature of a constant repetition, which necessarily requires some one capable of making this repetition.”⁷⁴ The repetition theory of the continuance of offers is itself a fiction, however, created in *Adams v. Lindsell*.⁷⁵ Only by the fiction that the offer continues while in the post could the *Adams* court square contract formation by post with the older common law rule that mutual promises must be made at the same moment in time.⁷⁶ Now, by contrast, the rule that mutual promises must be made at the same moment has been forgotten by all but historians, superseded by our rules of offer and acceptance.⁷⁷ The fiction of a continuing offer is no longer

repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.”); *Bedford v. Kelley*, 139 N.W. 250, 252 (Mich. 1913) (“Each renewal of the notes was a new transaction with a new consideration, and when made was indemnified by a continuing and, in effect, living guarantor. Dead guarantors can make no new promises.”); *Am. Chain Co. v. Arrow Grip Mfg. Co.*, 235 N.Y.S. 228, 235 (Sup. Ct. 1929) (holding the same as, and citing, *Valentine*); RESTATEMENT OF SURETY § 87 cmt. b (1941) (“A dead surety can make no contract nor can a dead man request a creditor to make the advances.”); *Oliphant*, *supra* note 1, at 210 (noting the argument); *Papale*, *supra* note 1, at 113 (calling it a trite expression).

69. ASHLEY, *supra* note 1, § 17 n.2.

70. *Fidelity Mut. Life Ins. Co. v. Heltsley*, 71 S.W.2d 1017, 1019 (Ky. Ct. App. 1934).

71. Note, *supra* note 1, at 295; see *Papale*, *supra* note 1, at 111; see also *Am. Chain Co.*, 235 N.Y.S. at 235 (“In a contract of sale there must be two minds, at least, concurring at the moment of its completion; but this cannot be if there be but one contracting party in existence.”). This proposition raises other questions: Where do minds meet? Do they play mind games? Where do lost minds go? Does Georgia weigh heavily? Do you burden Willie Nelson’s mind? Is “out of” the opposite of “right”? Do all minds contain time, which can be taken out?

72. CORBIN, *supra* note 1, § 54.

73. ASHLEY, *supra* note 1, § 17 n.2.

74. Note, *supra* note 1, at 295; *Papale*, *supra* note 1, at 111-12 n.8.

75. 106 Eng. Rep. 250 (K.B. 1818).

76. See, e.g., *Cooke v. Oxley*, 100 Eng. Rep. 785 (K.B. 1790); *Nicholas v. Raynbred*, 80 Eng. Rep. 238 (K.B. 1615).

77. See, e.g., *Akers v. J.B. Sedberry, Inc.*, 286 S.W.2d 617 (Tenn. Ct. App. 1956) (“Ordinarily, an offer made by one to another in a face to face conversation is deemed to continue only to the close of their conversation, and cannot be accepted thereafter.”);

necessary and should be as forgotten as is the rule it was meant to supersede.

Herman Oliphant correctly characterized the dying offer rule as the application of "logical processes *only* to the solution of practical problems."⁷⁸ This Article likewise concludes that the logical processes discussed in Part I have utterly failed to justify the dying offer rule's existence. This Article now turns to the practical problems themselves, to see if the dying offer rule reaches just results and if a better rationalization might be found.

II. ANALYSIS OF TYPES OF DYING OFFER CASES

As noted in the introduction, the cases to which the dying offer rule has been applied are factually distinguishable into three groups, legally distinct categories to which disparate policies and analyses are relevant. The first and most simple case to which the dying offer rule has been applied is the case in which the offeree receives notice of the offeror's death before accepting or incurring expense in reliance on the offer.

A. Cases of Acceptance or Reliance Only After Notice

1. Liability of the Offeror's Estate

Cases are many in which the offeree receives notice of the offeror's death before attempting to accept the offer or before incurring other expense in reliance on it.⁷⁹ These cases present the least sympathetic facts in favor of finding the offeror's estate liable on a contract. An example of this case is *In re Lorch's Estate*.⁸⁰ In August 1923, partners George and Louis Lorch signed a continuing guarantee assuring payment of the partnership's debts as should arise to American Wholesale Corporation of Baltimore ("AWCB"). A continuing guarantee is deemed in law to be a standing offer

RESTATEMENT (SECOND) OF CONTRACTS § 41 (1981) ("An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time."); Ferson, *supra* note 1, at 375.

78. Oliphant, *supra* note 1, at 210 (emphasis added).

79. See, e.g., Fed. Deposit Ins. Corp. v. Fagan, 674 F.2d 302, 305-06 (4th Cir. 1982); Paine v. Pac. Mut. Life Ins. Co., 51 F. 689, 692 (8th Cir. 1892); Ivie v. Int'l Life Ins. Co., 117 So. 176, 177-78 (Ala. 1928); New Headley Tobacco Warehouse Co. v. Gentry's Ex'r, 212 S.W.2d 325, 327 (Ky. Ct. App. 1948); Succession of Aurianne, 53 So. 2d 901, 904 (La. 1951); Buckeye Cotton Oil Co. v. Amrhein, 121 So. 602 (La. 1929); Menard v. Scudder, 7 La. Ann. 385, 391 (1852); Hart v. Hart, 3 La. App. 622 (La. 1926); Beall v. Beall, 434 A.2d 1015, 1020-22 (Md. 1981); Hyland v. Habich, 22 N.E. 765, 765 (Mass. 1889); Cottage St. Methodist Episcopal Church v. Kendall, 121 Mass. 528 (1877); Bedford v. Kelley, 139 N.W. 250, 252 (Mich. 1913) (holding that the offeree had notice but that none was necessary because death itself revoked the offer even before notice and later reliance occurred); Am. Oil Co. v. Estate of Wigley, 169 So. 2d 454, 458-63 (Miss. 1964); Tucker v. Rucker, 73 So. 2d 269, 271-72 (Miss. 1954); Murphree v. Nat'l Life & Acc. Ins. Co., 150 So. 534, 535-36 (Miss. 1933); Groh v. Calloway, 292 S.W. 65, 68 (Mo. 1927); *In re Lorch's Estate*, 131 A. 381 (Pa. 1925); *In re Kern's Estate*, 33 A. 129, 129 (Pa. 1895); Slagle v. Forney's Ex'rs, 15 A. 427, 428 (Pa. 1888); Nat'l Eagle Bank v. Hunt, 13 A. 115, 116-18 (R.I. 1888); Hutsell v. Citizens' Nat'l Bank, 64 S.W.2d 188, 190-91 (Tenn. 1933); Foust v. Bd. of Publ'n, 76 Tenn. 552 (1881).

80. 131 A. 381 (Pa. 1925). See also *New Headley Tobacco Warehouse Co. v. Gentry's Ex'r*, 212 S.W.2d 325 (Ky. App. 1948).

of guarantee that is accepted anew each time new credit is extended.⁸¹ Louis Lorch died two months later, in October 1923. His executor advertised notice to creditors in the newspaper,⁸² and AWCB in any event learned of the death before March 3, 1924, when it obtained a new guarantee solely from George Lorch.⁸³ AWCB after March 1924 extended credit to George Lorch⁸⁴ but claimed to have given it in acceptance of Louis Lorch's continuing guarantee. AWCB on this ground sought to bind Louis's estate for this new credit. The court rejected AWCB's claim, holding that "death ends the liability as to [acceptances] occurring after actual . . . notice thereof has been received."⁸⁵

In re Lorch's Estate explicitly relied on notice of death as the operative legal fact. Other courts in similar cases have also framed a holding around notice. Nearly every authority to address the effect of notice of the offeror's death concludes that notice terminates the offeree's power to accept.⁸⁶ Not all cases recognize notice as the

81. The continuing guaranty without present consideration is a standing offer to guaranty the debts of a third party. The offer is accepted each time credit is given to the third party, but the law deems the guaranty accepted and consideration given for it only to the extent of the credit given. As to future acceptances, the guaranty remains revocable. *See* Associated Catalog Merchandisers, Inc. v. Chagnon, 557 A.2d 525, 529-30 (Conn. 1989); Aitken v. Lang's Adm'r, 51 S.W. 154, 155 (Ky. 1899); Jordan v. Dobbins, 122 Mass. 168, 170 (1877); RESTATEMENT OF SECURITY § 87 & cmt. b (1941). This kind of continuing guaranty is contrasted with a guaranty paid for at the time the guarantor promises, which binds the guarantor from that moment for all credit later given to the third party. *See, e.g.,* United States *ex rel* Wilhelm v. Chain, 300 U.S. 31, 34 (1937) ("[A] continuing guaranty, if supported at the outset by a sufficient consideration, is a binding contract which is neither revocable by the guarantor nor terminable by his death . . ."); Estate of Rapp v. Phoenix Ins. Co., 113 Ill. 390, 396-97 (1885) (holding that consideration paid for the guaranty when it was first given meant that the guaranty was a completed contract at that time and survived the death of the guarantor).

82. *In re Lorch's Estate*, 131 A. at 382.

83. *Id.* at 383.

84. Though the court does not discuss the issue, I assume that the Lorches' partnership dissolved when Louis died. Thus, AWCB's extension of further credit could only have been to George Lorch, not to the partnership of George and Louis.

85. *In re Lorch's Estate*, 131 A. at 382.

86. *See, e.g.,* Chain v. Wilhelm, 84 F.2d 138, 141 (4th Cir. 1936) (recognizing line of cases holding that death with notice terminates an offer), *rev'd on other grounds*, 300 U.S. 31 (1937); Valentine v. Donohoe-Kelly Banking Co., 65 P. 381, 382 (Cal. 1901) (dicta) ("The guaranty for future advances ceased when [the guarantor] died and [the guaranteee] had notice of his death."); Gay v. Ward, 34 A. 1025, 1026-27 (Conn. 1895) (holding that notice of death terminates offer, while mere death does not); Buckeye Cotton Oil Co. v. Amrhein, 121 So. 602, 604 (La. 1929) ("[A] continuing guaranty expires at the death of the guarantor, unless the party guaranteed had no notice of the death."); Menard v. Scudder, 7 La. Ann. 385, 391 (1852) ("[M]ere death, without notice or knowledge, ought not to defeat the [offer] . . ."); Hyland v. Habich, 22 N.E. 765, 765 (Mass. 1889); Bedford v. Kelley, 139 N.W. 250, 252 (Mich. 1913) (holding continuing guaranties "are determined by [the guarantor's] death and notice of that event"); Am. Oil Co. v. Estate of Wigley, 169 So. 2d 454, 459-62 (Miss. 1964); Am. Chain Co. v. Arrow Grip Mfg. Co., 235 N.Y.S. 228, 234-35 (Sup. Ct. 1929); *In re Lorch's Estate*, 131 A. at 382-83; Nat'l Eagle Bank v. Hunt, 13 A. 115, 116 (R.I. 1888); *see also* CALAMARI & PERILLO, *supra* note 1, at 91; MURRAY, *supra* note 1, § 34 ("If the offeree is aware of [the offeror's death], clearly there should no longer be a power of acceptance."); Oliphant, *supra* note 1, at 209 ("It seems clear that, where the offeree learns of the death of the offeror before he has acted in reliance upon the expectation aroused by the offer, he cannot bind the offeror's estate by a

operative fact, however. Many cases in which notice of death occurred rest merely on the dying offer rule to reach the same result.⁸⁷

In cases such as *In re Lorch's Estate*, in which the offeree seeks to enforce a contract against the offeror's estate, application of the traditional dying offer rule reaches the proper result. But no resort to subjective intent ideas is necessary. When the offeree knows that the offeror has died, the offeree loses any reasonable expectation that the offer remains available. This loss of expectation occurs not because the offeree knows that the offeror's will ceases to exist (no one knows that), but from a number of other facts.

First, notice of the offeror's death signals to the offeree that the offeror no longer owns and controls the means of performance of the contract. The offeree need have no knowledge of estate law to discern that, whatever happens to the offeror's property, the offeror can no longer control it personally.⁸⁸ The offeror's death means clearly that another entity controls the offeror's property and the means of performance. The estate may have the ability to perform satisfactorily if the offeror's performance was not uniquely personal.⁸⁹ But the dead offeror herself becomes unable, and the intention of the deceased is rarely if ever the sole intention of the estate. Notice of the offeror's death signals to the offeree that the offeree is now dealing with the offeror's estate, and the estate's intention to contract has not been manifest.

Relatedly, the offeror's death usually frustrates the offeror's purposes in entering into the contract, and knowledge of the death should cause the offeree to question whether the contract remains desirable to the offeror. Present frustration of purpose has, either on its own account or as a subset of mutual mistake, been a ground for rescission of a contract or excuse for non-performance since the early nineteenth century.⁹⁰ The Restatement (Second) of Contracts describes present frustration of purpose as follows:

subsequent acceptance."); *Papale, supra* note 1, at 136; *Parks, Offeror's Death, supra* note 1, at 476; *Wagner, supra* note 1, at 153; *accord Davis v. Davis*, 9 So. 736, 737 (Ala. 1891) (affirming the decision in *Garrett, immediately infra*, that death without notice of death did not terminate an offer); *Garrett v. Trabue*, 3 So. 149, 152 (Ala. 1887) (holding that death, without notice, had no effect on the viability of an offer); *LORD, supra* note 1, § 5.19. *But see* *Knotts v. Butler*, Adm'r, 31 S.C. Eq. (10 Rich. Eq.) 143 (1858) (holding an offer of continuing guaranty to continue notwithstanding the death of the guarantor-offeror and his administrator's publishing a notice to creditors throughout the following 12-month period).

87. *Paine v. Pac. Mut. Life Ins. Co.*, 51 F. 689, 692 (8th Cir. 1892); *New Headley Tobacco Warehouse Co. v. Gentry's Ex'r*, 212 S.W.2d 325, 327 (Ky. Ct. App. 1948); *Succession of Aurianne*, 53 So. 2d 901, 904 (La. 1951); *Beall v. Beall*, 434 A.2d 1015, 1020 (Md. App. 1981); *Tucker v. Rucker*, 73 So. 2d 269, 272 (Miss. 1954); *Kern's Estate*, 33 A. 129, 130 (Pa. 1895); *Slagle v. Forney's Ex'rs*, 15 A. 427, 428 (Pa. 1888); *Hutsell v. Citizens' Nat'l Bank*, 64 S.W.2d 188, 190-91 (Tenn. 1933); *Foust v. Bd. of Publ'n*, 76 Tenn. (8 Lea.) 552, 555 (1881).

88. *See, e.g., Valentine v. Donohoe-Kelly Banking Co.*, 65 P. 381, 382 (Cal. 1901) ("At his death his property vested in others . . ."—reasoning why notice of death should terminate an offer).

89. The estate can usually perform the dead offeror's contract if the performance was not the uniquely personal service of the offeror. For example, an estate could perform a contract to pay money or transfer property.

90. *See Val D. Ricks, American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663, 668 n.27, 702-04 & n.206, 730-38 (1998).

Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises⁹¹

With very few exceptions, offerors enter contracts on the basic assumption that they will live to enjoy its benefits. The offeror's principal purpose is nearly always personal to her—it is her self-interest she means to serve. The ability to serve self-interest is perhaps *the* basic assumption of bargain-based contracts.⁹² Death *ipso facto* prevents self-interest's fulfillment, frustrating or at least threatening to frustrate the offeror's principal purpose in entering the contract.⁹³ What the offeror's purpose is, specifically, does not matter. The offeror's death will usually prevent her from achieving it as much as the "non-existence" of any other fact, because, unless the offeror intends to effect some purpose post-mortem, the offeror's purposes likely cease (or at least change) with her death. The offeror's frustration does not mean that if a contract formed, the offeror would have an excuse for non-performance. Courts nearly always hold that a party to a contract bears the burden of its own death,⁹⁴ and the dying

91. RESTATEMENT (SECOND) OF CONTRACTS § 266(2) (1981). The concluding language of the section, "unless the language or circumstances indicate the contrary," appears superfluous. *Id.*

92. *See generally id.* "Basic assumption" is the Restatement (Second) of Contracts term of choice to describe an event the non-occurrence of which may undo a contract. It appears in sections setting forth doctrines of mutual mistake (§ 152), unilateral mistake (§ 153), mistake in transcription (§ 155 cmt. b), supervening impracticability (§§ 261-64), supervening frustration (§ 265), and present impracticability and frustration (§ 266).

93. *See Gold v. Salem Lutheran Home Ass'n of the Bay Cities*, 341 P.2d 381, 384 (Cal. Dist. Ct. App. 1959) (holding that a life care contract was frustrated when the patient died before the contract period began). In *Beall v. Beall*, 434 A.2d 1015, 1022 (Md. App. 1981), the court noted:

Upon [one of two married joint offerors'] death, the original reasons, economic and otherwise, why [the spouses] chose to offer their land for sale . . . were no longer applicable. The needs of [the couple], as of any married couple, may not necessarily coincide with the needs of [the surviving spouse] alone, as a widowed spouse. More important, [the surviving spouse's] responsibilities, both legal and personal are vastly different today. For example, the rights of her individual creditors, if any, may now attach to the subject property, which, before [the deceased spouse's] death, could only be attached by the creditors of both.

94. *See, e.g., Coyne v. Pac. Mut. Life Ins. Co.*, 47 P.2d 1079 (Cal. App. 1935) (holding that an annuitant assumed the risk of his death with respect to an annuity contract, even though the death occurred prior to the date that the first and only \$10,000 annuity premium became due, and therefore the annuitant's estate was liable for the premium notwithstanding its purpose was frustrated). Moreover, the estate is bound by the contracts of the deceased, even though the death increases the difficulty of performance. *See, e.g., Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 720-22 (Tenn. Ct. App. 1999) (holding an estate liable on a contract related to the family business even though the wife and other relatives had to run the business after husband's decease); *In re Estate of Zellmer*, 82 N.W.2d 891 (Wisc. 1957) (holding an estate liable to pay the face amount of a \$5000 insurance policy insuring the life of the deceased promisor, who had promised but failed to maintain the policy on behalf of the plaintiff). The exception to this rule is when the estate is unable in a reasonable person's view to perform satisfactorily for the

offer rule actually prevents such a case from arising. But a reasonable offeree with notice of the offeror's death will realize that the offeror's purposes have likely been frustrated and question whether a dead offeror still intends to contract.

Third, the offeror's death means there is no one to whom an acceptance can reasonably be sent. Professor James Lewis Parks argued: "Suppose A makes B an offer; that prior to its acceptance A dies and B knows this fact. All would probably agree that B could not thereafter accept because, with this information in hand, B's reaction would be 'there is no one now with whom I may contract.'"⁹⁵ To whom should the offeree manifest acceptance? The offeror can no longer attend a closing, accept a fax, or answer the phone. It is true, Corbin points out, that even though the offeror has died, "[t]he offer was made by a living human and is accepted by another living human."⁹⁶ But acceptance must ordinarily be sent somewhere, manifest to someone, and death means that there is no one to whom notice of acceptance should be sent or otherwise manifest. A lawyer might counsel an offeree to drop an acceptance letter in the post on the ground that, because the acceptance by post is effective even though it never arrives,⁹⁷ acceptance by post should be effective even if the offeror is dead. But the mailbox rule and constructive notice principles should not help the offeree here. Sending the notice to the offeror's old address would take unfair advantage of the deceased. The offeree knows that the offeror has a new, unknown address⁹⁸ (in fact, no one knows how to notify the deceased in a manner that would be admissible in court).⁹⁹ Notice could be sent to the estate, but that method of acceptance was not invited by the offeror in the cases we are considering.¹⁰⁰

Finally, notice of the offeror's death collapses the offeree's reasonable expectation with respect to the offer because, as the reasonable offeree should know, the offeror's

obligee, or as the Restatement (Second) puts it, "the existence of a particular person is necessary for the performance of a duty." RESTATEMENT (SECOND) OF CONTRACTS § 262 (1981). In that case, the Restatement reasons, the death of that person will discharge the obligor's obligation to perform that duty. *Id.* at § 262 cmt. a. Usually the deceased person is the obligor, and the performance is a "personal service." *In re Estate of Bajonski*, 472 N.E.2d 809, 810 (Ill. App. 1985) (holding that a duty to approve the sale of a painting was personal); *Presley v. City of Memphis*, 769 S.W.2d 221, 223 (Tenn. Ct. App. 1988) (suggesting that the duty to produce Elvis Presley in concert was discharged when Presley died—a holding that disappoints Elvis impersonators and also conspiracy theorists who maintain that Elvis is still alive).

95. Parks, *Offeror's Death*, *supra* note 1, at 476-77 (some internal quotations deleted).

96. PERILLO, *supra* note 1, § 2.34.

97. *Roye Realty & Dev., Inc. v. Arkla, Inc.*, 78 F.3d 597, 1996 WL 87055, at *8 (10th Cir. Feb. 28, 1996) ("Generally, an acceptance is effective even if it is lost in transit and never received by the offeror."); *Vassar v. Camp*, 11 N.Y. 441 (1854).

98. One could try to send the acceptance, but where? *Cf. Mayo v. Satan and His Staff*, 54 F.R.D. 282, 283 (W.D. Pa. 1971) ("We note that the plaintiff has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process."). Reasoning similar to that of *Mayo* may also apply to those deceased who find themselves in happier places.

99. *See supra* note 35. If the law assumes there is no life after death, then notice would be ineffective. If the law adopts a belief that life exists after death, then unless it is willing to adopt several other beliefs regarding what that life is like, still it would be unable to formulate what notice should be required.

100. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 30, 50(1), 65 (1981). Notice to the estate was not invited by the offeror in the line of cases we have been considering, in which the offeror made no manifestation that her offer was to survive her.

death allows the offeree to speculate unfairly and perhaps inefficiently. Offers are generally revocable. The offeree knows that the offeror may receive an offer for a better deal at any moment. The power to revoke an offer at any time is a valuable bargaining chip in the offeror's pocket, one the law has carefully guarded by requiring something more than the mere manifestation of intent of the offeror in order to make an option contract binding.¹⁰¹ Reversing the rule that notice of the offeror's death revokes an offer would transfer this chip to the offeree's pocket when the offeror dies. The offeror could no longer accept a competing offer, and the offeree would be free until the offer lapsed to speculate in the market at the expense of the offeror regardless of changes in price or other circumstances that may have induced the offeror to revoke.¹⁰² The reasonable offeree would know that the offeror never intended to allow him that latitude and for this reason also should consider his expectation at an end when he learns of the offeror's death.

Perhaps more significantly, this last argument introduces a rationale supporting the protection of offerors' estates in these cases, grounded not in assent or analysis of the offeree's reasonable expectations but in public policy. The law has every reason to think that a dead offeror will not act rationally: She cannot gain new information or, if she can, she cannot act on it by re-allocating resources in response. A danger that the offeree will act opportunistically exists in such cases and increases the longer after death and notice of death the offeree waits to act.¹⁰³ The resulting transaction may be

101. See, e.g., *Lewis v. Fletcher*, 617 P.2d 834 (Idaho 1980) (denying enforcement of an option because the consideration of \$20 recited in the option contract was not actually paid); *Real Estate Co. of Pittsburgh v. Rudolph*, 153 A. 438 (Pa. 1930) (requiring only a recitation of some nominal consideration in an option contract); *RESTATEMENT (SECOND) OF CONTRACTS* § 87(1) (1981) (same as *Rudolph*).

102. Farnsworth gives the following example:

If, for example, there is a period during which the seller is bound to sell apples at \$100 but the buyer is not bound to buy them, the buyer has an option to buy at \$100 during that period. If the market price rises to \$110 during the period, the buyer can take advantage of the lower price at which the seller is bound under the option and insist on delivery of apples for \$100. But if the market price falls to \$90 during the period, the buyer can ignore the option and take advantage of the lower market price by buying apples elsewhere, leaving the seller to sell the apples on the depressed market. The party that is not bound has the opportunity of speculating on market changes at the expense of the party that is bound. The unfairness of giving this advantage to one of the parties, at least if the other party has not agreed to it, indicates that without some agreement the courts generally ought not to allow that result to occur.

FARNSWORTH, *supra* note 1, § 3.2.

103. The danger of opportunism is illustrated in two cases in particular: *Union Sawmill Co. v. Mitchell*, 48 So. 317 (La. 1909) and *Ritchie v. Rawlings*, 186 P. 1033 (Kan. 1920). In *Mitchell*, the offeree waited until after the offeror's death to see if the offer would be worth accepting. *Mitchell*, 48 So. at 318. Speculators, the offerees, who hoped a railroad would be built, procured from a landowner named Loper an offer for the sale of Loper's timber. *Id.* The speculators obtained offers from other landowners, too. *Id.* The offers were written so as to give the impression that they were to be accepted by the speculators immediately. *Id.* Loper died soon after executing the offer. *Id.* But the speculators waited more than a year to accept the contract, until they *knew* a railroad would be built. *Id.* at 319. Of course, during this time, Loper was no longer free to withdraw his offer, and the speculators were speculating unfairly at

less than optimal, as a result, and perhaps may do more overall economic harm than good. Thus, notice of the offeror's death not only destroys the offeree's reasonable expectations but also gives courts a plausible policy rationale for preventing contract formation even if the notice of the offeror's death does not have in each case all of the effects on the offeree's expectations that are posited here.

For the foregoing reasons, in cases where the offeree receives notice of the offeror's death before accepting or otherwise acting in reliance on an offer, the reasonable expectations of the offeree with respect to the offer are destroyed, and the estate deserves legal protection. Just how best to fit this conclusion into existing law is a difficult question. Some have suggested that notice of the offeror's death revokes the offer because notice shows *objectively* that the offeror no longer assents: "If we adopt a test objective as to the offeror and ask 'What is the scope of the offeree's reasonable expectation?', it would seem that notice of the death should be required to terminate the offer."¹⁰⁴ But revocation depends on a manifestation of intent to revoke.¹⁰⁵ Indirect revocation likewise depends on a manifestation of intent.¹⁰⁶ The dead offeror has manifested no intent to revoke. And mere notice of death does not itself manifest that the offeror's subjective assent does not exist because, as noted, death does not itself

Loper's expense. "[T]heirs was a pure speculation," the court said. *Id.* "If the railroad came to make the timber valuable, they accepted; if not, not. We do not think the intention was to allow them this opportunity for speculation." *Id.*

In *Ritchie*, the offeree (the son) waited to accept because he wanted to negotiate even better terms; he accepted only when he learned that the offeror had died and no better terms were forthcoming. *Ritchie*, 186 P. at 1034. A mother died and left under her will some farmland to her husband and three children by a prior marriage: two daughters and the son. *Id.* at 1033. The husband and daughters agreed on an arrangement respecting the farmland that was favorable to the children. *Id.* They mailed a letter to the son around November 9, 1917. The son did not respond before November 28, 1917, when the husband died intestate. *Id.* The son thereafter signed the letter. *Id.* at 1034. Husband's heirs were his parents, but they refused to abide by the letter's terms. *Id.* at 1033. They justified their refusal on grounds that the letter never formed a contract. *Id.* The court agreed with husband's parents, holding that the letter never formed a contract because husband died before son accepted. *Id.* at 1034. The court justified its use of the dying offer rule on the ground that son held out from signing the letter only to see if son could negotiate an even better deal with husband. *Id.* at 1034-35. Son apparently accepted only when he knew that husband's ability to give any better deal was at an end. *Id.* at 1034.

104. Note, *supra* note 1, at 295; *see also* Oliphant, *supra* note 1, at 211 ("[M]ost if not all of the problems concerning the duration and termination of an offer can be reduced to the basic question of fact, 'What was the objective will of the offeror?' the obverse of which is, 'What, as a matter of fact, is the scope of the expectation reasonably attributable to the offeree?"). The same thought underlies the suggestion that requiring notice would square the rule with the objective theory of contracts. *See* WILLISTON, *supra* note 1, § 5.19.

Parks argued that both parties to negotiations could be assumed to have agreed as a condition of acceptance that the other party was alive. Parks, *Offeror's Death*, *supra* note 1, at 475, 477; Parks, *Indirect Revocation*, *supra* note 1, at 158-59. Given that Parks thought contractual assent or its lack must be based on reasonable expectations, however, Parks, *Indirect Revocation*, *supra* note 1, at 152, his argument is circular, merely the assumption of a reasonable expectation in all parties. In fact, in some cases death will *not* destroy the offeree's reasonable expectations, because he is unaware either of the death, *see infra* Part II.B & C, or that the law will in all cases hold that death will terminate the offer (as, say, when the offeror intends her offer to survive her, *see infra* Part III).

105. RESTATEMENT (SECOND) OF CONTRACTS § 42 (1981).

106. *Id.* § 43 (1981); *see also* Dickinson v. Dodds, 2 Ch. Div. 463 (Ct. App. 1876).

prove the absence of subjective assent.¹⁰⁷ The law (unless it rests on faith) must be agnostic as to the content of an offeror's will after death. Thus, death cannot mean lack of assent either subjectively or objectively.

Though notice of the offeror's death does not show lack of assent, it renders the offeree's reasonable expectations mere uncertainties, no longer expectations or no longer reasonable.¹⁰⁸ This conclusion is best explained as other than resting on some defect in the offeror's assent. Perhaps we could say the offer itself *fails*. An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."¹⁰⁹ Notice of the offeror's death changes the "so made as to justify" part of this test. The offeror is unable personally to perform, and the offeror's estate now owns the means of performance. The offeror's purposes in making the offer probably have changed. She can no longer receive a manifestation of acceptance, nor is she any more participating in the relevant market. Thus, no longer should the offeree think that his assent is invited and will conclude a bargain. The offeror's objective manifestation of assent is therefore no longer an offer. When the offer fails in this manner, the offeree's power to accept ends just as if it were terminated by revocation or another method. That the offer *failed* is a reasonable way to say this (there may be other ways). Thus, the offer by the deceased offeror may not be accepted after notice of the offeror's death is given to the offeree. The dying offer rule is itself an effective expression of this result. The dying offer rule thus works well in these cases, which are re-theorized in the manner described here.

2. Liability of the Offeree

I have been unable to think of any arguments supporting the result reached by the dying offer rule when the estate wishes to enforce the contract accepted by the offeree after receiving notice of the offeror's death. The objections to enforcing an agreement between a dead offeror and an offeree with notice of the death arise primarily out of a need to protect the offeror or the offeror's estate. Because the offeree has notice of the death, the offeree, by accepting, waives any protections the offeree might otherwise deserve.¹¹⁰ What if the offeror's estate sues to enforce the agreement that the offeree

107. See *supra* Part I. Ashley points out also that, if one assumes that death terminates the will or intent, death also cannot be revocation because there is no will or intent left to intend to revoke. ASHLEY, *supra* note 1, at 28.

108. Oliphant, *supra* note 1, at 211 ("There may be cases, however, where this is not true [that the expectation reasonably attributable to the offeree is the obverse of the objective will of the offeror].").

109. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981); accord *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689, 691 (Minn. 1957); *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 122-23 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

110. Corbin suggested, for example, that the offeree might wish to be protected against contracting with someone other than the offeror, in the case in which the offeree sent off an acceptance to a deceased offeror that was received by the offeror's estate. CORBIN, *supra* note 1, § 54. But if the offeree knows the offeror is dead when the acceptance is sent, then the offeror waives that protection. The offeree would also understand, after receiving notice of the offeror's death, that the offeror's agents probably no longer represent the offeror, because death terminates the agency. See RESTATEMENT (SECOND) OF AGENCY § 329 (1958) ("A person who purports to make a contract . . . on behalf of another who has full capacity but whom he has no

has accepted after notice of the offeror's death?

This occurred in *Groh v. Calloway*,¹¹¹ which helpfully illustrates this issue. Calloway owned real estate on which he was building a dwelling.¹¹² Stephen Groh and his wife wished to buy the tract. Their son Edward negotiated with Calloway on Stephen's behalf. Calloway's attorney drafted a contract. Edward objected to it, and it was redrafted. Edward then took the redrafted contract to his parents, who both signed it on November 22, 1922. Edward delivered the contract to Calloway on November 23rd or 24th. Stephen Groh died on November 30th. Calloway spoke with Edward six days later, and asked if they could still do the deal. Edward and Calloway met with their attorneys on December 12th, at which time Calloway signed the contract. But Calloway later refused to perform. Stephen Groh's widow, heirs, and administrator sued for specific performance.¹¹³

The offeree in Calloway's position should be held to such an agreement. The offeree in accepting a contract knowing that the offeror is dead waives any protection that the dying offer rule or any other law should offer. Calloway entered this deal knowing exactly what had happened. Moreover, Calloway should not be able to take advantage of a rule meant to protect the offeror's estate in order to deprive the estate of the reasonable expectation he created in it by his knowing agreement.

The estate has also waived any protections that the law should offer it.¹¹⁴ The estate as new owner of the offeror's property wishes to dedicate it to the contract. The offeror's inability to perform personally is irrelevant when the offeror's estate wishes to perform and is able. The estate is free to waive any frustration of purpose concerns. And the estate (and the offeror's surviving wife, in *Groh*), the only other real party in interest, is willing and able to receive the offeree's acceptance. In such a case the market failures causing concerns about efficiency when an offeror dies are cured by the estate's judgment that the contract remains in its best interests.

The most compelling aspect of a case such as *Groh* is that everyone involved agreed with full knowledge of the circumstances. No one would dispute the right of Groh's wife and Stephen Groh's estate, on one hand, and Calloway, on the other, to form a contract for the sale of Calloway's land. And essentially that is what happened here. Calloway, with his lawyer's advice, should have known that he was in essence making a contract with Mrs. Groh and Mr. Groh's estate. He should therefore be held to it. Calloway could point to no prejudice against him resulting from his having contracted with Stephen Groh's survivors. A decision against the Groh parties would hardly be fair to Groh's wife and Groh's heirs, who had no substantive reason to suspect that their deal would not be upheld.

power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, *unless . . . the other party knows that the agent is not so authorized.*" (emphasis added)).

111. 292 S.W. 65 (Mo. 1927).

112. *Id.* at 65.

113. *Id.* (Mrs. Groh is not identified further in the opinion).

114. *E.g.*, *Buckeye Cotton Oil Co. v. Amrhein*, 121 So. 602, 604 (La. 1929). In this case, the heirs ratified the acts of their father and husband, who had made an offer of continuing guaranty. *Id.* In holding that they had waived the law's protection of the estate, the court said, "[W]e know of no principle of law, and can imagine none, by which the heirs or successors of the deceased [offeror] may not for themselves extend such [offer] and waive the expiration thereof by the death of their ancestor." *Id.* The court held the estate liable for debts incurred after the guarantor's death.

An analogous case is that in which an offeror dies immediately after acceptance. In that case, the law deems the death to be irrelevant, and the contract binds both the offeror's estate and the offeree. In a case in which the offeror dies before acceptance, the offeree with notice of the death accepts the offer, and the estate elects to enforce the contract, the parties themselves have manifested that they think the death irrelevant. The law should respect this manifestation of the parties as much as it would any other reasonable expectation. With both parties entering the agreement knowing all relevant facts, they have waived any protections the law should otherwise offer, and their agreement is worthy of enforcement.¹¹⁵

Notwithstanding these arguments (and there is no evidence the court even considered them), the *Groh* Court held for Calloway solely on a citation to the dying offer rule.¹¹⁶ At best, *Groh* merely exalts form without substance by, in effect, insisting on the estate as a formal party to the contract rather than Stephen Groh.¹¹⁷ But changing the dying offer rule is unnecessary in order to reach a just result in such a case. A much better result would have been to reform the writing to add the estate as a party and delete Stephen Groh himself.¹¹⁸ Reformation requires an agreement, a writing reflecting that agreement, and a variance between the agreement and the writing.¹¹⁹ All three existed here: an agreement between Stephen Groh's heirs and

115. See Papale, *supra* note 1, at 115 ("If [an offeror] submits the offer with knowledge of the death of the other party, he should not be heard to complain when the personal representatives of the deceased party accept the offer, nor should the personal representatives of the deceased be permitted to defeat the contract on the ground that there was no power of acceptance created in them.").

116. 292 S.W. at 66-67.

117. *Id.* at 67. *Groh* cannot be grounded on a requirement that every signatory to a contract subjectively intended to contract, because no one could know whether Stephen Groh still assented to the deal.

118. Other courts have reformed contracts to change parties' names or to add parties. See, e.g., *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1214 (5th Cir. 1969) ("[R]eformation for mutual mistake may be obtained when the policy as written does not insure the person or interest intended to be insured."); *Cotton Bros. Baking Co. v. Indus. Risk Insurers*, 774 F. Supp. 1009, 1026 (W.D. La. 1989) ("Where, as here, the mutual mistake concerns identity of the named insured and destroys coverage on the risk actually assumed by the insurer, the insurer is estopped to deny its liability even in the absence of reformation and estopped from opposing reformation of its policy to cover such risks incurred by the party at interest."); *West v. Madison County Agric. Bd.*, 82 Ill. 205, 206-07 (1876) (reforming deed of trust to insert the proper grantor); *Harden v. Desideri*, 315 N.E.2d 235, 242 (Ill. App. Ct. 1974) ("We can find no reason why a lease cannot be reformed to substitute the name of the intended lessor for the name of the lessor mistakenly inserted, if the mistake was mutual and one of fact."); *Bohanan v. Bohanan*, 3 Ill. App. 502, 509 (1878) ("A great many authorities are cited to show that a court of equity can, where the evidence is strong enough, correct mistakes in the description of land in deeds, and also in the names of grantees, but as this is so well known among lawyers and judges, we do not deem it necessary to cite them all."); *Cheperuk v. Liberty Mut. Fire Ins. Co.*, 693 N.Y.S.2d 304, 306 (App. Div. 1999) (allowing reformation for mistake in transcription of name of mortgagee in a homeowners policy of insurance); *Anand v. GA Ins. Co. of N.Y.*, 643 N.Y.S.2d 661, 662-63 (Sup. App. 1996) (reforming insurance policy to change the named insured to the owner of the covered property where mistake in transcription exists); *Archer v. McClure*, 81 S.E. 1081, 1082-83 (N.C. 1914) (reforming a bond to replace the obligee with the proper party's name); RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981).

119. RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981); CALAMARI & PERILLO, *supra*

Calloway, a writing reflecting that agreement, and a variance between the agreement and the writing—namely that Groh was listed as a party instead of his survivors. The court should have reformed the writing to make only the survivors parties, and enforced the agreement against Calloway.

B. Cases of Mere Acceptance Without Notice

Some cases citing the dying offer rule appear to involve facts in which the offeree accepted the offer before receiving notice of the offeror's death but did nothing in reliance on the offer, or on a contract, until learning that the offeree had died before the acceptance occurred.¹²⁰ Because the offeree has done nothing in reliance on the offer or on a contract, at issue are what are often called bilateral, executory agreements. Generally in cases such as these the offeree learns soon after accepting, and at any rate before reliance occurs, that the offeror died.

An example can be adapted, from an actual case,¹²¹ of the mere acceptance of an otherwise dead offer on which no reliance occurred before the offeree received notice of the offeror's death. In this hypothetical, the offeree is the plaintiff, but analysis of this case does not depend on who is seeking enforcement of the agreement. Juliet makes an offer, then dies. The offeree, Romeo, not having heard of the death, dispatches an acceptance in the post (or effects some other constructive notice of acceptance, actual notice being impossible to prove).¹²² Then, before taking any action in justifiable reliance on the existence of a contract or the offer, Romeo learns that

note 1, at 361.

120. Courts have suggested that this has occurred in the following cases: *Shaw v. King*, 218 P. 50, 51-52 (Cal. Dist. Ct. App. 1923); *Fid. Mut. Life Ins. Co. v. Heltsley*, 71 S.W.2d 1017, 1018 (Ky. 1934); *Jones v. Union Cent. Life Ins. Co.*, 40 N.Y.S.2d 74, 75-77 (N.Y. App. Div. 1943), *aff'd*, 50 N.E.2d 293 (N.Y. 1943); *Lewis v. Motorists Ins. Cos.*, 645 N.E.2d 784, 789-90 (Ohio Ct. App. 1994).

121. The facts recited here are adapted from *Union Sawmill Co. v. Mitchell*, 48 So. 317 (La. 1909). Finding an actual example of a case involving mere acceptance without notice of the offeror's death and without action taken in reliance on the offer or the contract has been difficult. Several cases come quite close, including *Mitchell* and *Ritchie v. Rawlings*, 186 P. 1033 (Kan. 1920); *Pearl v. Merchants-Warren Nat'l Bank*, 400 N.E.2d 1314 (Mass. App. Ct. 1980); and *Helfenstein's Estate*, 77 Pa. 328 (1875), but in each of these cases the court declines to say whether notice of death occurred before acceptance occurred. For instance, in *Pearl* the court tersely recites only that Dudley Rogers gave a "Memorandum of Option" to Samuel Pearl in January, 1957, and confirmed it again in writing in March 1959. 400 N.E.2d at 1314. Both instruments were recorded in 1968, but neither was accepted before Rogers's death. *Id.* at 1314-15. On these facts, the court held that the dying offer rule prevented acceptance of the option. *Id.* at 1315. The court did not say whether Pearl knew of Rogers's death at the time he tried to accept. The opinion implies the proposition that notice of the death is irrelevant, but one can not be sure—without knowing that no notice occurred—whether or not this proposition is obiter dicta. Of course, even in these cases, one is not sure whether the offeree passed up other opportunities in reliance on the offer. Nothing in the court's inquiry would have called for proof of such facts.

122. Aside from a séance (close your eyes, hold hands, and see *supra* notes 35 & 98) one could talk to the corpse or perhaps open the corpse's eyes and show it a written acceptance. Though one cannot be sure, these may only constitute constructive notice, too. Assuming the deceased is able to receive information from this world, that the body would be the means of receipt seems doubtful. The body's inability to function caused death, after all. Cremation is the extreme example of a case in which speaking to the remains would undoubtedly be only constructive notice.

Juliet had died before acceptance occurred. Romeo then sues Juliet's estate to enforce the contract. *Romeo v. Juliet's Estate* (hereinafter "*R v. JE*") is a case of mere acceptance without notice of death.

The dying offer rule aside, if we take our rigid conceptions of contract formation seriously, *R v. JE* fact patterns would appear to form a contract. Romeo's reasonable expectations remain intact at the moment of acceptance. In fact, the offeror's death aside, the *R v. JE* fact pattern does not differ substantively from any other on which the existence of a contract is normally based. As Corbin said, "[T]he offer was made by a living [wo]man and is accepted by a . . . living man."¹²³ For all either know, the other is living when assent occurs, and both manifest assent to the agreement. Absent the death of one, apparently a contract would form. Because the objective manifestation of the offeror's assent is unchanged by mere death,¹²⁴ and the reasonable expectations of the offeree remain intact at the time the offeree also manifests assent, some have said that a contract should form in this instance based on objective assent.¹²⁵ In support, they cite as analogous the case in which the offeror dies just after acceptance occurs.¹²⁶ Clearly in this latter case the law would bind the offeror's estate to a contract. The facts of *R v. JE* differ from that case, it is claimed, only in the fortuity that the offeror died before the unknowing acceptance, rather than after.

Because the offeree lacks notice of the offeror's death at the time of the attempted acceptance, and the offeree's reasonable expectations with respect to the offer remain intact, the analysis in Part II.A is inapplicable. The offeror's manifestation remains "so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."¹²⁷ The offeree continues to believe that the offeror owns the means of performance and remains able to perform, has a purpose for forming the contract, and can receive the acceptance.

In such a case, the offeree remains unaware that he may now speculate on the market at the offeror's expense, so the danger of opportunism ceases. It is true that when the offeror dies she can no longer withdraw the offer; hence, the offeree has, from that time until the offer lapses or notice of death occurs, the economic equivalent of an option contract. But the offeree does not know the offeror can no longer withdraw, so the offeree will continue to act as if the offeror could withdraw. Rather than speculating on the market, the unknowing offeree is likely to assent when it appears that the offeree will most likely obtain the greatest net benefit from the deal without the offeror withdrawing. The same considerations will likely guide the offeree's decision as would occur were the offeror alive. Thus, though the offeree obtains the equivalent of an option right, the offeree receives little if any benefit from it. Reasonable expectations remaining intact, a contract should form. This case involves a quite different policy analysis than a case in which the offeree receives

123. CORBIN, *supra* note 1, § 54.

124. At least, this is true under the common law's view of the purposes of objective manifestation of assent. See *supra* notes 27-30 and accompanying text.

125. See, e.g., CORBIN, *supra* note 1, § 54; Ferson, *supra* note 1, at 381 ("The death of an offeror should not,— on grounds of either expediency or logic—revoke the offer, as long as the offeree is unaware of the death."); Oliphant, *supra* note 1, at 210 ("The offerer by his offer aroused a reasonable expectation in the mind of the offeree upon which, by hypothesis, he has reasonably acted.").

126. E.g., CORBIN, *supra* note 1, § 54.

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

notice of the offeror's death before accepting. Many of the policies forbidding contract formation in a case of prior notice do not apply.

On the other hand, the affirmative conclusion that a contract *should form* on the facts of *R v. JE* flows not from a discussion of relevant policy but only from a rather wooden application of a number of contract formation rules: that a contract must form at a discrete moment in time, that a final expression of assent establishes a contract, and so on. The more policy-centered analysis of the problem relies on the wisdom of the result rather than on such "excessive ratiocination."¹²⁸ A full consideration of the problem requires that deductive walls around the analysis fall to let in the light that an open, fresh view might yield.

With the walls flat, the case presents a fascinating policy question. Factually, the only difference between the *R v. JE* case and those cases discussed in Part II.A, in which notice of death occurs before acceptance, is that the order between acceptance and notice is switched. In *R v. JE*, after the offeree sends his manifestation of assent, he learns that, at the time he accepted, the offeror was dead. Thus, at the time of acceptance, the offeror was no longer able personally to perform, was perhaps without any purpose in entering the contract, and was unable to receive the offeree's acceptance. In the meantime the offeree speculated in a market in which the offeror could no longer take part. In fact, the offeree learns that, had he known before acceptance what he knows now, he would not have thought he could accept. The question in *R v. JE* is actually: Should the bare unknowing acceptance make any difference?

The answer depends on how much the law values an unused right to rely on another's manifestation of assent to a contract. Two persons are not fully involved in this contract. One died before the agreement was complete, and we who are left in this world generally have no idea whether the offeror still assents or would have withdrawn. Likewise, we have no idea whether the deceased offeror harbors a reasonable expectation. But certainly she cannot act on it in this world. Reliance by the offeror on the acceptance is impossible. Thus, only the offeree's expectations are at issue. They and policies supporting them are the only arguments in favor of a contract here. Again, should the bare unknowing acceptance make any difference?

I can not think of any reason why it should. This conclusion does not rest on any supposed failure of subjective assent that is supposed to underlie the dying offer rule. It remains agnostic as to the offeror's assent. But I have been unable to think of a reason sufficient to warrant enforcement of the offeror's offer. All of the traditional rationales for enforcement do not seem to apply.¹²⁹ Normally, the bare trading of objective assent to a bargain warrants protection as a contract, our law has judged.¹³⁰ That is the

128. Oliphant, *supra* note 1, at 211.

129. The following arguments in Part II.B only apply to a case in which the offeree accepts a contract after the offeror's death but does nothing in reliance on it after learning of the offeror's death. The arguments in Part II.A apply whether reliance occurs or not.

130. *See, e.g.,* Griese-Traylor Corp. v. Lemmons, 424 N.E.2d 173, 184 n.5 (Ind. Ct. App. 1981) ("The courts of this state have long applied the doctrine of breach by anticipatory repudiation in cases involving executory, bilateral contracts."); *Garrett v. Am. Family Mut. Ins. Co.*, 520 S.W.2d 102, 122 (Mo. Ct. App. 1974) ("The doctrine of anticipatory breach applies to contracts which embody mutual and interdependent conditions and obligations. The general rule is that the doctrine of anticipatory breach does not apply to a contract which the complaining party has fully performed."); RESTATEMENT (SECOND) OF CONTRACTS § 253(2) (1981).

bilateral, executory contract.¹³¹ A number of theoretical reasons justify enforcement of bilateral, executory agreements. None of them apply here.

Some propose that enforcement of bilateral, executory agreements generally is likely to allocate economic resources efficiently.¹³² That presumptive conclusion is questionable in this case, in which one party—the dead offeror—became, before the bargain was complete, unable to gain further information, had its resources frozen, and departed from the market before the agreement was concluded.¹³³ That the offeree did not speculate knowingly at the offeror's expense is also no assurance that the offeree acted efficiently. In this case the presumption of efficiency that might otherwise attend a freely negotiated executory agreement is somewhat undercut.

Arguments from autonomy¹³⁴ fall flat for similar reasons. The offeror stopped exercising its autonomy with respect to the things of this world at the moment of death, so the autonomy of only one party to the agreement is at issue in *R v. JE*.¹³⁵ But when the offeror's autonomy ceased, the autonomy of the estate immediately became relevant. This emergence of the estate as a relevant, autonomous, other party occurred before the agreement was complete, when the estate gained control of the means of performance and perhaps the subject matter of the contract. Should the law for the sake of protecting the offeree's autonomy impose it unwillingly on perhaps many others who comprise the estate and whom the decedent offeror wished to favor? Autonomy

131. Here I am supposed to explain that the Restatement (Second) of Contracts recommends that the distinction unilateral and bilateral be dropped, and the terms no longer used. But the distinction remains useful, CALAMARI & PERILLO, *supra* note 1, at 65 n.9, and courts continue to use the terms. *SouthTrust Bank v. Williams*, 775 So. 2d 184, 188 (Ala. 2000) (“[A] unilateral contract results from an exchange of a promise for an act; a bilateral contract results from an exchange of promises. Thus, in a unilateral contract, there is no bargaining process or exchange of promises by parties as in a bilateral contract.”) (internal quotations and citations omitted); *St. John Med. Ctr. v. State ex rel. Dep’t of Soc. and Health Servs.*, 38 P.3d 383, 390-91 (Wash. Ct. App. 2002) (“A bilateral contract requires two independent promises: ‘A’ promises to perform and ‘B’ promises to perform. The consideration for each promise is the other promise. By contrast, a unilateral contract involves only one promise to perform and that promise is conditioned upon actual performance by the other.”) (citations omitted).

132. See, e.g., Craswell, *supra* note 53, at 481; Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); see generally F. H. Buckley, *Introduction*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 1, 2 (F.H. Buckley ed., 1999) (“Not merely does law-and-economics scholarship offer a compelling normative explanation for free contracting, but rival theories are unpersuasive.”); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 65-100 (1977).

133. With respect to Pareto efficiency, no guarantee exists that the offeror would consent to the transaction, HENRY N. BUTLER, *ECONOMIC ANALYSIS FOR LAWYERS* 77 (1998) (“[I]n order to satisfy the Pareto criterion, there must be unanimity among the parties affected . . .”), and good reason exists to think that the offeror might not, given the change in circumstances, see *supra* Part II.A. No guarantee exists of Kaldor-Hicks efficiency, either. Given the offeror's disabilities, the offeree is free to take what he wants and is in no position to gauge the extent of the offeror's gain or loss.

134. CHARLES FRIED, *CONTRACT AS PROMISE* (1981); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

135. The law could think of the offeror's right to autonomy as either at an end at this point or continuing. If the offeror's autonomy ceases, then it ceases to be relevant but the estate's autonomy immediately becomes relevant. If the offeror's autonomy continues, then the offeree risks acting contrary to that autonomy.

theorists would say “no.”¹³⁶

In a bare trade of promises, no detrimental reliance has occurred.¹³⁷ In fact, by definition in *R v. JE* no actual reliance has occurred, neither out of pocket expense nor opportunity costs. Cases in which an offeree without knowledge of the offeror’s death incurs reliance costs are discussed in Part II.C. Nor is anyone enriched in *R v. JE*.¹³⁸ Because no reliance or enrichment has occurred, corrective justice principles are irrelevant. Many view promotion of efficient reliance or potential reliance as the primary justification for enforcing executory, bilateral agreements.¹³⁹ Because *R v. JE* by definition lacks reliance costs, no potential reliance has become actual before the offeree learns that the offeror died before acceptance occurred. Thus no harm results from refusing to enforce this agreement. Rather, compensating the offeree would give him a windfall, the burden of which would be borne by the offeror’s estate. Compensating the estate would give it a windfall, at the offeree’s expense.

The offeree’s and the estate’s expectations are also rendered uncertain when notice occurs that the offeror died prior to acceptance.¹⁴⁰ We have no well-known custom (that the parties would be aware of) dictating what should happen when the offeror dies before acceptance occurs (I assume they would not know of the dying offer rule). In fact, the offeree having attempted to accept after death may well call a lawyer when he learns of the offeror’s death. The estate will likely call its lawyer when the offeree’s acceptance is found. Though estates routinely sue to collect debts on contracts formed by their deceased, normally an original agreement does not appear for the first time, freshly executed, in the mail after the estate takes over. Evidence of contracts formed during the life of the deceased might be expected in the papers of the deceased, or to arrive within days after death;¹⁴¹ but not so contracts that did not form until after death.¹⁴² That such a late agreement would be enforceable should make the estate

136. Fried, the Kantian, would say “no.” See FRIED, *supra* note 134, at 17. The death of the person whom I am by moral principles bound to treat as an end rather than a means gives no license to treat that person’s legatees or heirs as means.

137. PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 1-7 (1979) [hereinafter ATIYAH, *RISE AND FALL*] (“A person whose expectations are disappointed, but who suffers no pecuniary or other loss from the failure to perform a promise, has surely a relatively weak claim for complaint or redress.”); see also Patrick S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193, 194-95 (1978).

138. See ATIYAH, *RISE AND FALL*, *supra* note 137, at 3-4 (“A promise may be given which is at first executory, and only subsequently is it . . . paid for by the promisee. . . . I suggest that once this happens, the ground for imposing liability shifts. The liability becomes benefit-based. . . .”).

139. See, e.g., Richard Craswell, *Two Economic Theories of Enforcing Promises*, in *THE THEORY OF CONTRACT LAW* 19, 28-30 (Peter Benson ed., 2001); Goetz & Scott, *supra* note 132, at 1261-62.

140. *Phipps v. Jones*, 20 Pa. 260, 264 (1853) (“After [the offeror’s] death his administrators could not and ought not to regard the proposal as open to acceptance.”).

141. E.g., *Haarstick v. Fox*, 33 P. 251, 253 (Utah Terr. 1893) (holding a contract was formed when the offeror died after the offeree had placed the acceptance in the post).

142. See, e.g., *New Headley Tobacco Warehouse Co. v. Gentry’s Ex’r*, 212 S.W.2d 325 (Ky. Ct. App. 1948) (acceptance attempt made six months after the death of the offeror on an offer that had at the time of the offeror’s death been outstanding for three and one-half years). *Beall v. Beall*, 434 A.2d 1015, 1017 (Md. 1981) (attempted acceptance at least nine months after the offeror’s death); *Bedford v. Kelley*, 139 N.W. 250 (Mich. 1913) (attempted acceptance of continuing guaranty for up to three years after the guarantor’s death).

fearful of any other outstanding offers. Indeed, planning for the settlement and disbursement of an estate would be difficult if contracts binding the estate might appear in the mail long after contracts formed during the lifetime of the deceased were settled. Estates would generally have no way of knowing what outstanding offers the offeror made before she died, or how long those offers would last. Receipt of later-completed agreements might continue for a long time, until all offers lapse.

Indeed, both parties are likely to wonder whether the estate will be bound to a contract over which it had no control and in which it may well have no apparent interest, but which allocates assets which were under the estate's control when the agreement formed.¹⁴³ Both parties will probably wonder whether the offeree's constructive notice or manifestation of assent to a dead person is effective and will likely question whether he must also notify the estate. In such an uncertain situation, the expectations of the offeree as to the existence of a contract after notice of the offeror's death are nearly as questionable as they would be had the offeree attempted to accept after receiving notice of death.

Further, absent cause for one-sided enforcement of a contract, both parties should realize, to be fair, that if the agreement is not enforced against the offeree it should not be enforced against the estate.¹⁴⁴ So understanding that the offeree's position is ambiguous should convince the estate that its own position is equally so. Given all of these realities, neither offeree nor estate can form any reasonable expectation that such an agreement should be enforced.¹⁴⁵ Nor should the law give effect to any such expectations. Contrary to those who argue that a contract should form in *R v. JE*, these arguments show that *R v. JE* is actually quite different than the case in which the offeror dies just after acceptance. Thus, though this Article agrees that the offeror should as the superior insurer bear the burdens of, and insure, its own death, it disagrees that the kind of contract at issue in *R v. JE* should be a burden of that death. Whether the plaintiff is the offeree or offeror's estate makes no difference.

This analysis of *R v. JE* has a potentially broader application outside of that case. Suppose Romeo incurs costs in reliance on Juliet's offer between the time of his acceptance and the time he receives notice of Juliet's death. Romeo's status during that period is discussed *infra* in Part II.C. But once Romeo learns of Juliet's death, the analysis given here should apply to Romeo's expectations for the future of the agreement, just as if he had notice before reliance occurred. This Article would analyze Romeo's position at that point in time, with respect to the contractual relationship in Romeo's future, identically to its analysis of Romeo's position or expectations before reliance occurred. The mere presence of some prior reliance and even a right to compensation for that reliance does nothing to enhance Romeo's expectations for the

143. The exceptions here are life insurance, pre-paid funeral arrangements, and other agreements meant to be performed on the contingency of and/or in relation to one of the parties' deaths.

144. See Val D. Ricks, *In Defense of Mutuality of Obligations: Why "Both Should Be Bound, or Neither"*, 78 NEB. L. REV. 491, 510-30 (1999).

145. Ferson, *supra* note 1, at 379, argued that a case in which the offeree accepts a deceased offeror's offer is akin to a case of mistake as to the identify of the other party. Such cases are inapposite, however. The estate always represents and where applicable stands in the shoes of the offeror. These are not conclusively cases of mistaken identity any more than they are cases in which a contract is formed completely before the offeror's death. The facts instead lie between those two cases, and the jurisprudence of neither should be conclusive here.

future. Once notice of death occurs, Romeo's expectations are equivalent to those he has in *R v. JE*. In other words, when the offeror dies before the offer is accepted, and the offeree eventually learns of the offeror's death (as he does in every case), the liability of the estate is founded upon reliance only, not on public welfare, expectation, or consent. For mere reliance, only retrospective, compensatory damages should be available. I develop this conclusion more fully in Part II.C.

I suggest that the most difficult problem vexing the analysis in this Part II.B of whether a contract should form in a case such as *R v. JE* is that no such cases may exist. Theories that ground liability for breach of wholly executory, bilateral agreements in reliance also posit that no contract forms without reliance, at least in the form of lost opportunities.¹⁴⁶ Others disagree.¹⁴⁷ Who wins this contest may depend on whether the non-reliance theorists can think of a hypothetical in which the reliance theorists are unable to find reliance in the form of lost opportunities.¹⁴⁸ This Article is not much concerned with who wins this disagreement in an actual case. The topic is too large a digression from the task at hand. This Article is content with concluding that, if cases exist which are of type *b*, they are unworthy of enforcement. If they are of type *c*, then a different analysis applies.

C. Cases of Reliance Without Notice

The final class of cases to which the dying offer rule has been applied are those in which an offeree prior to receiving notice of the offeror's death acts reasonably in reliance on an offer (whether the offeree accepts it or not) that has under the rule terminated with the death of the offeror.¹⁴⁹ These opinions represent the most questionable use of the dying offer rule, and I will suggest that in some cases unjust results were reached.

The most striking example of this class of cases is *Browne v. McDonald*.¹⁵⁰ Bernard O'Reilly had placed his niece Margaret in Mary Browne's boarding school,

146. *E.g.*, Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, 1777-83.

147. Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 794-97 (1982) (the dancing lessons contract hypothetical). Cases in which immediate buyer's or seller's remorse occurs seem most likely to lack real reliance costs. The door-to-door vacuum salesman who receives a cancellation notice the day after a sale may well have done nothing in reliance on the deal. In fact, the law's requirement of an opportunity for cancellation in all such contracts implies that the remorse of the buyer outweighs whatever reliance interests the seller may have. See 16 C.F.R. § 429.1 (2002). Either the offeree or the offeror's estate may immediately rue the deal. Given the changes in the circumstances, it seems fair to let either out if they object before the other party's position changes. In such a case application of the dying offer rule would reach roughly the same result as contracts complying with 16 C.F.R. § 429.1.

148. See sources cited *supra* notes 146-47.

149. See, *e.g.*, *Pratt v. Trs. of the Baptist Soc'y*, 93 Ill. 475 (1879); *Aitken v. Lang's Adm'r*, 51 S.W. 154 (Ky. Ct. App. 1899); *Killoren v. Hernan*, 20 N.E.2d 946 (Mass. 1939); *Browne v. McDonald*, 129 Mass. 66 (1880); *Jordan v. Dobbins*, 122 Mass. 168 (1877); *Teplitz Thrown Silk Co. v. Rich*, 179 A. 305 (N.J. Passaic County Ct. 1935); *Am. Chain Co. v. Arrow Grip Mfg. Co.*, 235 N.Y.S. 228 (Sup. Ct. 1929); *Illinois Roofing & Supply Co. v. Gorton*, 6 Pa. D. 407, (Ct. Com. Pl. 1897); *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209 (Vt. 1856).

150. 129 Mass. 66 (1880).

with a promise “to pay a reasonable compensation for her board, teaching, and . . . clothing.”¹⁵¹ The contract was at will. Margaret remained at the school for two years. O’Reilly died after making the promise (at what point during the two years the court does not say). Moreover, at some point during the two-year period, Browne learned that O’Reilly had died. When Browne sued for Margaret’s expenses incurred during the two-year period, the estate refused to pay “for any items . . . furnished after [Browne] had notice of the death.”¹⁵² But the trial court awarded Browne everything O’Reilly promised, even expenses incurred after Browne had notice that O’Reilly had died. The estate appealed, claiming that notice of death cut off the estate’s liability.

The appellate court reversed, but the court’s reasoning went far beyond the estate’s defense. Liability was cut off not when notice of death occurred, the court said. Rather, the court applied the dying offer rule: “It was a contract which was to continue at the will of either party, and either might terminate it at any time upon reasonable notice. We are of the opinion that the death of the testator terminated this contract”¹⁵³ The court held Browne’s lack of notice of O’Reilly’s death immaterial.¹⁵⁴ The court deemed irrelevant both Browne’s substantial, reasonable reliance on O’Reilly’s promise and Brown’s reasonable expectations.

Browne differs substantially from the cases discussed in Parts II.A and B. Before notice of death occurs, for all the offeree knows the offeror is living and a contract has formed. In these cases the offeree’s reasonable expectations stemming from the offer remain intact while the offeree incurs costs in reliance on the offer or on the existence of a contract.¹⁵⁵ Thus, the analysis in Part II.A of cases involving notice of death prior to acceptance or reliance is irrelevant. Moreover, cases such as *Browne* are always brought by the offeree, never by the offeror’s estate. The estate does not know a contract exists, on which it might rely, until the acceptance arrives, and at that time the estate’s reliance would be unreasonable under the analysis set forth in Part II.B. Type *c* cases involve only the rights of offerees.

Absent reliance, the type *c* case is no different than that described in Part II.B, which analyzed cases of mere acceptance without notice of the offeror’s death. Thus, Part II.C adds only one fact to the scenario described earlier. The only question in this Part is whether reasonable reliance should make any difference.

I believe that it should.¹⁵⁶ Some rather simple arguments support this conclusion. As discussed in Part II.B, the offeree before notice of death occurs has the same expectations as would the offeree in a case in which the offeror was still living. For all the offeree knows, he can accept the contract and rely on its existence. If the offeror were still living, a contract would form. No reason exists to suggest that the offeree in this instance would act any differently than the offeree would if the offeror were living. The offeree’s actions will likely be, from his perspective, just as efficient or inefficient

151. *Id.* at 66.

152. *Id.* at 67.

153. *Id.* at 66-67.

154. *Id.* at 67.

155. MURRAY, *supra* note 1, at 112 (“Under an objective theory, the . . . holding [that the offeror’s promise is binding] can readily be justified since there is no difficulty in establishing manifested mutual assent even though the offeror has died . . . , assuming only that the offeree is not aware of that fact.”).

156. *See id.* (referring to such cases as “particularly egregious”); Ferson, *supra* note 1, at 374 (referring to such cases as producing “shocking hardships”).

as they would be were the offeror alive; the offeree will act as if expecting that his otherwise efficient reliance will be legally protected. With respect to reliance prior to notice of death, the offeree truly does stand in the same position he would have been in if a contract had formed just before the offeror died.

Unlike in a type *b* case, which lacked reliance prior to notice of the offeror's death and in which no good reason appeared warranting enforcement of the offer, type *c* cases are distinguished by the presence of costs incurred in reliance on the offer. The offeror has caused harm by inducing reliance and then dying without giving notice to the offeree, allowing reliance costs to occur. Probably the offeror did not intend to die, and caused harm innocently. But as between the offeror and offeree, the offeror should bear the burden caused by the offeror's death. Of the two, the offeror is clearly the better risk bearer with respect to her own death. The offeror has better information and better access to information concerning her likelihood of death, and has far greater control over it. Absent some agreement otherwise, the offeror should therefore bear the burden of the harm caused by her death. Accordingly, the offeror or the offeror's estate should pay as a matter of corrective justice.¹⁵⁷

157. Professor Craswell has challenged the notion that recovery for reliance injury rests alone on merely corrective justice. Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 125-28 (2000). The harm done, he notes, rests as much on the offeree's belief in the promise as on the promise itself. *Id.* at 126. And the belief must be reasonable. So causation turns as much on the reasonableness of the reliance as on the promises causing harm. Corrective justice gives no content to "reasonableness" here. Perhaps O'Reilly also promised, as part of a joke told to Browne, to pay \$1 million to the first person who could show him that the U.S. Army is hiding hard evidence that non-earthlings have flown here from outer space. Should this promise become the basis of a wrongful death claim by Browne's widow after she is shot sneaking into top secret facilities to obtain evidence? Thus, Craswell claims, those who posit that reliance alone equals causation in a case of reliance are making more than a mere corrective justice claim. I am hesitant to agree with Craswell wholly, because in many cases the promisor in fact creates the impression of a promise's reasonableness as part of the promising. Also, a reasonableness problem may in fact be a surrogate for lack of reliance on the promise. Moreover, even in cases in which Craswell's argument succeeds, the argument does not make corrective justice irrelevant. That some other theory of justice puts content into *reasonableness* does not render corrective justice as an idea inapplicable so long as *reasonableness* can be defined in some clear way prior to the imposition of liability, and the idea giving content to reasonableness is not inconsistent with corrective justice. Does the law propose a distributive scheme precluding awards to the unreasonable? That would not be inconsistent with corrective justice playing the grounding role for promissory estoppel. In our system of adjudication, the fact-finder defines *reasonableness*. Once reasonableness is defined, corrective justice ideas are as applicable here as anywhere in the law. Certainly causation is as apparent here as in any case of fraud or negligent misrepresentation, which apply a similar reasonableness standard but nonetheless presuppose that the person making a statement should be responsible for it because it caused harm when it induced reliance.

Craswell also argues relatedly that corrective justice ideas rest in turn on clearly defined notions of property: whether correction is needed depends on whether property was destroyed. While out-of-pocket costs seem clearly defined in our law, opportunity costs are not, nor is recovery for them clearly established. So whether correction is needed to protect them is unclear. *Id.* at 126-28 (citing Orvill C. Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28 (1949); Warren A. Seavey, *Reliance upon Gratuitous Contracts or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951); and GRANT GILMORE, *THE DEATH OF CONTRACT* 88-103 (1974)). This criticism is also beside the point. Craswell's criticism, if taken seriously, would render corrective justice an entirely empty idea. While corrective justice in a property law vacuum would have

Aside from reliance, however, no good reason exists to enforce the offer. Absent reliance, type *b* case considerations continue to weigh heavily in type *c* cases. Any presumption that the agreement is likely to allocate resources efficiently is undercut, as in type *b* cases, by the offeror's prematurely departing from the market, becoming unable to gain further information or re-allocate resources before the deal closed. That the offeree may have acted without notice of the death and therefore not opportunistically does not mean that the offeree acted efficiently. The offeror also is bound without autonomy, for the same reasons as in type *b* cases, and the offeree may have acted contrary to the estate's choice.

Finally, the offeror's death and the offeree's learning of it render the offeree's expectations for the future of the deal uncertain. As in a type *b* case, a type *c* case offeree with notice of the offeror's premature death is likely to call his lawyer and ask if he has rights against the estate. In fact, the offeree is likely to call his lawyer faster in type *c* than in type *b* cases, because the offeree has sunk reliance costs at stake. The offeree will know that the estate had no control over the agreement which was completed while the estate controlled the assets affected by it. The offeree will understand that the estate's preferences probably differ from the offeror's, and the offeree will wonder whether notice of acceptance was effective. The offeree will probably also admit that if this deal is enforced the estate likely has no way of knowing what other offers are outstanding. The upshot is, as noted in Part II.B, that notice of the offeror's death destroys the offeree's expectations with respect to the future of the contract. A type *c* case becomes a type *b* case with respect to expectation interests once the offeree learns of the offeror's death.

Even though this shift from *c* to *b* should cut off prospective liability and damages, compensable reliance has already occurred, and the offeror's estate should pay for harm done. Because only reliance is at issue, however, damages should be limited to retrospective reliance rather than prospective expectation. That conclusion does not control the appropriate measure for damages in such a case. Some reliance damages, such as lost opportunity, may best be measured in appropriate circumstances as expectation.¹⁵⁸ But the limit on prospective expectation damages that would flow directly from the theory of recovery itself should be observed.

That some relief is in order in type *c* cases does not suggest a defect in the dying offer rule. Rather, it suggests that section 90 of the Restatement (Second) of Contracts, rather than a full-blown consensual contract analysis, is particularly appropriate for enforcement of type *c* cases. Section 90's elements are obviously applicable here, at least *prima facie*. Three additional arguments support the application of section 90.

little effect, in fact some property law scheme is clearly established already everywhere, with or without recovery grounded in reliance, so corrective justice has force in all systems of jurisprudence. Moreover, that recovery for reliance rests on corrective justice is not dependent on the content of the loss resulting from reliance. The loss may be opportunity costs but might also be out-of-pocket costs or any other loss of legally protected property. The thesis of this Article is less concerned with establishing property rights than in showing that the dying offer rule when combined with promissory estoppel principles is sufficient to protect whatever property rights are already established. *See supra* text accompanying notes 146-47.

158. *See, e.g., Walters v. Marathon Oil Co.*, 642 F.2d 1098, 1101 (7th Cir. 1981) (affirming trial court's awarding as a remedy for promissory estoppel lost profits of \$22,000, which was what Walters would have made on sales of gas in the first year had Marathon kept its promise, because prospective lost profits was the best measure the court could find of Walters's lost opportunity costs).

First, section 90 liability is at least nominally reliance-based. Because in this instance liability is founded on reliance, a rule resting explicitly on reliance provides the most straightforward enforcement mechanism. Second, section 90 allows a broad examination of justice, on which promise enforcement will depend. This is necessary in type *c* cases because mere reliance on a promise does not warrant enforcement. Other factors may affect a determination of liability, including the costliness of the reliance, the reasonableness of it,¹⁵⁹ the offeree's clean hands, and the presence of statutory prohibitions on liability.¹⁶⁰ Third, section 90 holds that the "remedy granted for breach may be limited as justice requires." As explained above, the remedy in a type *c* case is reliance-based. Justice requires that damages be limited to retrospective loss. The second sentence of section 90 signals courts so to limit them.

The history of the dying offer rule also indicates that section 90 should apply to these cases. We earlier traced the origins of the rule in America to Pothier.¹⁶¹ Pothier, in fact, recommends a recovery for reliance in just the circumstance I am suggesting, though Pothier's recommendation never seems to have been noticed by American courts. Recall that Pothier hypothesized a dying offer rule case in which a potential buyer sent a letter proposing that a potential seller sell to the buyer certain merchandise. In Pothier's hypothetical, the buyer died or withdrew his offer before the seller accepted, and Pothier held that no contract formed because it appeared that the buyer no longer assented when the seller tried to accept.¹⁶² Pothier next recommended that reliance damages, and specifically damages for lost opportunities, be available to the seller.

It must be observed . . . that, if [the buyer's] letter causes the merchant to be at any expense, in proceeding to execute the contract proposed; or if it occasions him any loss, as, for example, if, in the intermediate time between the receipt of [the] first and that of [the] second letter [withdrawing the offer], the price of that particular kind of merchandise falls, and my first letter deprives him of an opportunity to sell it before the fall of the price; in all these cases, [the potential buyer is] bound to indemnify him This obligation results from that rule of equity, that no person should suffer from the act of another I ought therefore to indemnify him for the expense and loss, which I occasion him by making a proposition, which I afterwards refuse to execute.¹⁶³

Pothier's further example of lost opportunities is stated in terms of the withdrawal letter rather than the death of the potential buyer, but the reasoning of the two cases in Pothier is identical, so that the principal of equity he applies here would apply equally to the case of the dying potential buyer as to the buyer who withdraws the offer.

Given the fairly obvious applicability of section 90 to type *c* cases, I was surprised

159. Section 90 phrases the reasonableness inquiry as a requirement that the "promisor should reasonably expect [the promise] to induce action or forbearance on the part of the promisee." RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). This requirement may well be redundant of § 90 also asking whether "injustice can be avoided only by enforcement of the promise." *Id.* Presumably justice requires that reliance be reasonable.

160. I am thinking of the Statute of Frauds here, especially.

161. *See supra* Part I.A.

162. *See supra* text accompanying note 27.

163. POTHIER, *supra* note 16, at 18-19.

to find that no court has yet applied its principles to protect an offeree's interests. (But, then, these cases do not reach an appellate court very often.) In one case section 90 was discussed but found inapplicable on the facts.¹⁶⁴ I have found no case asserting that section 90 would be inapplicable in principle. It should apply to type *c* cases such as *Browne*. The dying offer rule simply does not handle justly type *c* cases, in which the offeree reasonably relies on the offer or the presence of a contract before learning that the offeror died prior to such reliance. But that is no reason to reject the dying offer rule. Section 90 of the Restatement (Second) can be applied to mop up any cases that do not fit.

There may be a class of cases in which reliance is too ephemeral to generate liability under section 90 but in which it nonetheless occurs. Lost opportunities are notoriously difficult and costly to prove, and that is in part why some commentators prefer to act as if reliance were presumed in every bilateral, executory agreement—in other words, as if only type *c* and no type *b* cases existed.¹⁶⁵ As long as the dying offer rule continues to apply to any judicially recognized type *b* cases, commentators who wish such seemingly ephemeral reliance costs to be legally recognized may claim that the dying offer rule is being applied overbroadly. On the other hand, those who see section 90 as grounded in provable reliance costs will think section 90 is applied overbroadly if it is used to remedy the kind of ephemeral reliance costs postulated by those who would enforce bilateral, executory agreements wholly on grounds of presumed reliance. (I have mentioned this dispute before.)¹⁶⁶ As I said earlier, I am not concerned in this Article with who wins this war so long as both sides recognize that the dying offer rule and section 90 together (wherever the line is set between the two rules) are wholly adequate to govern the actual cases.

III. THE EXCEPTIONAL CASE IN WHICH THE OFFEROR INTENDS HER OFFER TO SURVIVE

A. Acceptance or Reliance Only After Notice

The reasons given in Part II for holding that notice of death terminates an offer or makes a contract unworthy of enforcement prospectively rest primarily on the destruction of the offeree's reasonable expectations with respect to the offer or agreement. Focusing on expectations may suggest that a careful offeror aware of her imminent death may through additional manifestations indicate that she intends the offer to survive her. She may indicate that her purposes in contracting are to be carried out even after her death, and she may approve a method of acceptance that does not require actual notice to her. She may even indicate that she intends that the offeree be able to speculate at the estate's expense. In such a case, the offeree's reasonable expectations with respect to the offer survive the offeror's demise. I have found only one example of this rare scenario: *In re Estate of Severtson*.¹⁶⁷ This relatively recent case illustrates how many of the policies discussed in Part II are controlled by the offeror's intent as manifest (or not manifest). *Severtson* involves an offeree who knew

164. *Bard v. Kent*, 122 P.2d 8, 10 (Cal. 1942).

165. See Kelly, *supra* note 146, at 1777-83.

166. See *supra* text accompanying notes 146-47.

167. No. P196405, 1998 WL 88253 (Minn. App. March 3, 1998).

of the offeror's death.

Kathy Thorson and the elderly Helen Severtson were next-door neighbors "for approximately 14 years, during which time they became good friends Kathy Thorson visited with [Severtson] almost daily when she took Severtson her mail. Mark Thorson [Kathy's husband] did odd jobs for Severtson when needed."¹⁶⁸ The Thorsons were interested in buying Severtson's property. On February 16, 1996, Severtson signed an apparent option agreement that said, "[p]urchase price agreed upon is \$100,000, to be paid to Helen Severtson if living or to the Estate of Helen Severtson if she is deceased or incapacitated"¹⁶⁹ The drafter of the document, Myron Danielson, another neighbor, testified that he drafted it so that "there would be some legal document that her wishes would be carried out" and (ironically, it turned out) so that there would not be litigation over the matter. A hand-written addendum to the agreement, initialed by both parties, said, "[i]n the event that Helen Severtson should die suddenly, persons in the quonset home [on the property] will be given three months to vacate"¹⁷⁰ Severtson apparently intended her offer to survive her. The Thorsons paid nothing for the offer. In fact, they offered Severtson payment for an option contract, but she refused it on the ground that it would cheapen their friendship.¹⁷¹ Thus, the offer never became an option contract that would under current law have survived Severtson's death.

Severtson died on August 4, 1996. With full knowledge of the fact, the Thorsons recorded the document in September and in October notified Severtson's estate of their intent to purchase the property. Of course, the estate opposed, which is why the case went to court. The trial court held that because Severtson so intended, her offer survived her death.¹⁷² The court of appeals reversed, citing the dying offer rule.¹⁷³ The court cited in support of the dying offer rule that Severtson's subjective mental assent was required at the time of formation.¹⁷⁴

The trial court's ruling is defensible. Severtson apparently knew that her estate could convey the property just as she could and intended her offer to outlast her ability personally to sign the deed. The Thorsons would have known this as well and therefore not concluded that Severtson's inability to perform and the transfer of the asset to her estate signaled that her offer failed. Severtson's friendship with Kathy Thorson perhaps explains why Severtson would enter into a contract notwithstanding her inability to enjoy its ultimate fruits. For Severtson, the prospective contract had immediate benefit: the happiness of her friend. Contemplation of present and future benefit for her friend

168. *Id.* at *1.

169. *Id.*

170. *Id.*

171. *Id.* Options survive death. See *supra* note 47. The Thorsons' counsel Jeffrey E. Thompson reports that the Thorsons tried to give money in exchange for the option to Mrs. Severtson when Mrs. Severtson signed the option, but she refused to take money because she did not wish to cheapen their friendship with the distrust implied by payment. Rather, Mrs. Severtson wished to be taken at her word. Telephone conversation with Jeffrey E. Thompson, counsel for the Thorsons (*In re Estate of Severtson*), and author (July 19, 2000) [hereinafter Jeffrey E. Thompson]. That is why no option formed.

172. *In re Estate of Severtson*, 1998 WL 88253, at *1.

173. *Id.*

174. *Id.* (citing to WILLISTON, *supra* note 1, § 62, which recites the mental assent rationale).

and \$100,000 to her heirs was apparently sufficient satisfaction of self-interest to induce Severtson to sign.¹⁷⁵ Her purpose was not frustrated. Also, Severtson's reference to her own estate in the offer indicated her intention that notice of acceptance could be made to her administrator or personal representative.

Further, Severtson may well have considered that the Thorsons would be free to speculate on the property's price after Severtson's death. Her friendship with the Thorsons may explain her willingness to take the chance that they might speculate, or her apathy as to whether they did. Moreover, the Thorsons lived next door.¹⁷⁶ Severtson may have thought that the Thorsons wanted to add the Severtson property to theirs, in which case the Thorsons would not try to sell the property on the market but instead enjoy a larger living space. Additionally, the Severtson property contained a gravel pit filled with water that could have been used recreationally as a small lake or developed commercially. The property's most valuable use may have been development as a gravel pit, but Severtson probably thought it unlikely that the Thorsons would want a gravel pit next door. So perhaps Severtson thought the Thorsons would keep the property as it was so that others would not use it or sell it as a gravel pit. In either case, speculation on the market by the Thorsons after Severtson's death was unlikely. And the Thorsons' knowledge of Severtson's comfort with the offer notwithstanding her death perhaps justified them in thinking that Severtson's death did not make the offer fail. Thus, even Severtson's exit from the market at death and consequent inability to revoke her offer were probably consistent with the Thorsons' expectations.

What is left to support the court of appeals decision following this analysis? The court of appeals cited only the dying offer rule in reversing the trial court's decision. What justified the rule's application here? Severtson's mental assent is not required for the contract to form, and the law in any event should remain agnostic as to the existence of her intent after her death. Certainly no objective assent analysis supported the decision. Only a consideration independent of the parties' expectations can account for the court of appeals' decision reversing the trial court. The rationale of the court must rest on a non-default, immutable rule or policy,¹⁷⁷ one the court thought the parties were unable to agree away. What concern for Severtson or her estate is so significant that Severtson is unable to create legitimate expectations contrary to it? I have been unable to think of any compelling reason supporting the decision. From the standpoint of contract law, the best result in a case such as *Severtson* appears to be to allow acceptance of the offer.

B. Acceptance or Reliance Before Notice

Analysis of *Severtson* provides a jumping-off point for considering related hypotheticals in which an offeror intended her offer to survive her but the offeree did not learn of the offeror's death before accepting and (i) no reliance occurred or (ii) reliance occurred. If the offeree is justified in accepting an offer from an offeror who

175. Say the last nine words in the text (considering *self-interest* as one word) three times really fast, if you can.

176. Jeffrey E. Thompson, *supra* note 171.

177. I am using *immutable* in the sense that Ayres and Gertner use the term with reference to rules. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

intends her offer to survive her, even when the offeree knows the offeror is deceased, then the offeree should be all the more justified in accepting when the offeree does not yet know of the death.

If the offeree does not know of the offeror's death, then the offeree reasonably believes that the offer may yet be accepted. As in *R v. JE* above, a contract would form without the application of the dying offer rule under other, traditional doctrines.¹⁷⁸ But when the offeror intends her offer to survive, the expectations of the offeror are themselves consistent with those doctrines' application and the offeree's belief that the offer remains open. Indeed, this is what the offeror wants. The offeror's purposes in the proposed contract are not frustrated by death. Presumably the offeror means her estate to be notified of acceptance. The offeror apparently either believed that the offeree would not speculate on the offer after the offeror's death or was not bothered by the possibility that speculation would occur. Facts surrounding the offer may, as in *Severtson*, buttress the conclusion that the potential for opportunistic speculation is not a problem. Moreover, when the offeree does not know that the offeror is deceased, such speculation is unlikely to occur. It is possible that the inability of the offeror to revoke has allowed the offeree some benefit in shopping the offer even when the offeror cannot revoke it, but this enrichment of the offeree is by accident, again, and in any event is consistent with the offeror's intentions and exercise of autonomy. Any presumption of efficiency should continue to exist. I see no reason why the offeror's death should affect the offeree's power to accept such an offer. As between the estate's desires and the decedant's clearly expressed intentions, the decedant's should control and the reasonable expectations of the offeree should be upheld.

CONCLUSION

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁷⁹

The dying offer rule was laid down by Surdus in the time of Queen Elizabeth as a matter of natural and civil law. The ground on which it was laid down, the requirement of subjective assent, was (despite the rhetoric in some cases) never a foundation for the common law of contract.¹⁸⁰ If it was, it is not now and has been forgotten. However:

A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and . . . minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received. The subject

178. *Supra* Part II.B.

179. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

180. *See* Perillo, *supra* note 3, at 428.

under consideration illustrates this course of events very clearly.¹⁸¹

It is time for the dying offer rule's new career—not its abolishment. Under present law, the dying offer rule acts as the conclusion of numerous premises indicating that the offeree retains no justifiable expectation when the offeror dies before the offeree accepts the offer. When justifiable reliance on such an offer—without notice of the offeror's death—occurs, the offeror or the offeror's estate should indemnify the offeree pursuant to other law. This is a complete regrouping of the dying offer rule without significant modification, removing the rule from academic attack on grounds that it rests solely on subjective assent. The rule thus can remain a bright line in estate litigation, subject to a showing warranting a recovery of reliance damages under section 90 or a demonstration of intent that the offer survive. The dying offer rule should yet have a long life.

181. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (DeWolfe Howe ed., 1946) (1881).

