



University of Richmond
UR Scholarship Repository

Law Faculty Publications

School of Law

2006

Bearded Ladies Walking on the Brooklyn Bridge

David G. Epstein

University of Richmond, depstein@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

 Part of the [Contracts Commons](#)

Recommended Citation

David G. Epstein & Yvette Joy Liebesman, Bearded Ladies Walking on the Brooklyn Bridge, 59 Ark. L. Rev. 267 (2006).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Bearded Ladies Walking on the Brooklyn Bridge

David G. Epstein* and Yvette Joy Liebesman**

Prologue—Dick Atkinson Memories

Remembering Dick is easy. He was unique—a unique combination of charm, consideration, intelligence. He was such a vivid person that memories are vivid.

I remember living in Dick's house on Gray when I came to Fayetteville. Our house on Woolsey Road—which surely must have been the inspiration for the PBS "This Old House" series—was in the process of being put back together, and Dick graciously offered to share his house with me. And what a wonderful house. Like Dick, it was a combination of what's best about small towns in the South and the big cities of the East—comfortable, yet elegant. As memorable as the house

* I teach at the Dedman School of Law of Southern Methodist University and am grateful for the opportunity to work with SMU students and a wonderful research librarian, Laura Justiss. I am also grateful for the many other professional opportunities that I have had, including teaching Yvette and 110 other students contracts at the Georgetown University Law Center.

I am especially grateful to the University of Arkansas School of Law, which gave me the opportunity to serve as Dean and is now giving me the opportunity to participate in this *Arkansas Law Review* issue honoring Dick Atkinson. While I was Dean, I did not appreciate how important Dick was to the Law School—how much he helped students, staff, and faculty, what a difference he made in the lives of people at the Law School. I regret that I did not properly recognize and reward him—not that recognition or reward was ever important to Dick.

** I am a fourth-year (evening) student at the Georgetown University Law Center and eagerly anticipate a May 2006 graduation. Next year, I will be serving as a law clerk for the Honorable Helen E. Hoens of the New Jersey Superior Court, Appellate Division. I am grateful for the opportunity to work with such wonderful faculty as Professor Epstein throughout my law school career and hope to continue to do so for many years. While I never had the pleasure of meeting Dean Atkinson, I am honored to have the opportunity to be associated with this tribute to him.

We would also like to thank the participants of the faculty workshops at Emory Law School, Dedman School of Law of Southern Methodist University, and Wake Forest School of Law for their valuable input and suggestions.

was, even more memorable was the constant stream of people at the house.

There was also a constant stream of students in and out of Dick's office. I remember being in Dick's office at the Law School on one of those rare occasions that the office was not full of students. I was concerned about a student—about whether a troubled student might be suicidal. I had talked with Jim Miller about the student, and Miller suggested that I talk with Dick. As always, Miller's advice was good advice. Dick had noticed the problem long before I had and was already spending extra time with the student.

And, I remember more recently meeting Dick at a Law School alumni meeting here in Dallas. So easy for a Dean at that kind of function to spend all of his time with the major donor prospects and ignore everybody else. Not Dick. He made each person there—including Diane and me—feel as though he or she were the most interesting and important person that Dick had ever met.

Remembering Dick makes you feel good. Think about it. Every memory of Dick is a good memory. He could be so much fun to be with. He could make you realize how good people can be, how nice it is to be nice.

Remembering Dick feels "right." While the memorial service for Dick was wonderful (<http://law.uark.edu/atkinson/video.htm>), and I am sure that the new sculpture garden and this memorial issue of the law review will be also, for the thousands of people who knew him, the most lasting memorial to Dick Atkinson will be our memories of Dick.

DGE

I. INTRODUCTION

Consider the following “law school” hypotheticals:¹

1. O sends the following email to A: “Understand you painted my neighbor’s fence for \$1000. Will pay you \$1200 if you paint my fence before the end of the month.”
2. O sends the following email to A: “Understand that you painted my neighbor’s fence for \$1000. Will pay you \$1200 if you paint my fence before the end of the month and this offer can be accepted only by painting the fence and not by promising to paint the fence.”

If A flawlessly paints the fence before the end of the month, is there a contract in #1? In #2? If so, which of the contracts are unilateral contracts? Does it matter? Why? Shouldn’t A have a right to be paid \$1200 for her painting work regardless of whether she promised before she painted?

If A paints the fence before the end of the month with minor flaws that O can fix for \$100, is there a contract in #1? In #2? If so, which of the contracts are unilateral contracts? Does it matter? Why?

If, instead, A starts painting the fence but is then notified by O that “I have changed my mind about having the fence painted—the deal is off,” can A then collect from O for breach of contract in #1? In #2? Does the law of unilateral contracts affect any of your answers to these questions?

Or, if A starts painting the fence and then stops, and O’s costs in having another painter finish painting the fence are \$1400, can O recover \$200 from A in #1? In #2? Again, does the law of unilateral contracts affect any of your answers to these questions?

Is there still a “law” of unilateral contracts? If so, when is it helpful?

1. Your authors disagree as to whether these very hypotheticals were used in our contracts class at the Georgetown University Law Center in the spring of 2003. We agree, however, that a series of law school hypotheticals is an appropriate beginning for an article on the distinction between bilateral and unilateral contracts, as the distinction was originally established in law school class material and today should be material primarily used in law school classes.

Similar questions about unilateral contracts are regularly asked by law professors in their first-year contracts classes. In looking for answers, students find no help in the American Law Institute's ("ALI") Restatement (Second) of Contracts ("Restatement Second"). For more than twenty-five years, there has not been a "law" of unilateral contracts in the Restatement Second. In 1979, the ALI approved the Restatement Second. Professor Robert Braucher, the Reporter for the early drafts of the Restatement Second,² described its "main innovations . . . as stylistic rather than substantive."³ One such innovation was the deletion of definitions of "bilateral contract" and "unilateral contract" from the statement of the rules.⁴ Although the writers of the restatements have apparently stopped using the terms "bilateral contract" and "unilateral contract," the writers of both reported opinions and materials on contract law continue to use the terms. Different writers have different definitions of the terms.

In most of the recent reported cases that use either of the terms, however defined, the use is obiter dictum. And, in those opinions that base a holding on some distinction between "bilateral contract" and "unilateral contract," there is generally a more sound basis for the holding. This article discusses the post-Restatement Second use, misuse, and abuse of the terms "bilateral contract" and "unilateral contract" and answers the hypotheticals in the first paragraphs of the article.

II. THE BILATERAL/UNILATERAL DISTINCTION BEFORE THE RESTATEMENT SECOND

Just as the Second Restatement did not end the bilateral/unilateral distinction, the "First" Restatement did not begin the distinction. Langdell did.

2. Lance Liebman, *Allan Farnsworth, ALI Reporter*, 105 COLUM. L. REV. 1429, 1429 & n.1 (2005). Professor Robert Braucher served as Reporter for the Restatement Second until he was appointed to the Supreme Judicial Court of Massachusetts in 1971. *Id.* Thereafter, Professor Allan Farnsworth served as Reporter. *See id.* at 1429.

3. Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302, 303 (1964). Professor Lance Liebman, Director of the ALI, describes the Restatement Second somewhat differently: "No ALI work comes closer to the goals of the Institute's founders . . ." Liebman, *supra* note 2, at 1429.

4. Braucher, *supra* note 3, at 304.

A. Christopher Columbus Langdell's "Unilateral Contract" and Before

Starting with Professor Williston, law professors have "credited" Professor Langdell with popularizing the terms "bilateral contract" and "unilateral contract."⁵ Langdell did not use these words in the first edition of his contracts casebook, *A Selection of Cases on the Law of Contracts*.⁶ Indeed, that 1871 edition had none of Langdell's words—only a few hundred cases, without commentary.⁷

The 1879 second edition of the Langdell casebook contained not only most of the same cases as the first edition, but also a summary written by Langdell.⁸ The 250-page summary at the end of the casebook, like an early version of Gilbert's,⁹ was obviously written primarily to help students

5. 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 13 & n.42, at 11 (1920) [hereinafter WILLISTON, *CONTRACTS*]; see also SIR WILLIAM R. ANSON, *PRINCIPLES OF THE LAW OF CONTRACT* 26 & n.1 (Arthur L. Corbin ed., 3d ed. 1919). Understand that Williston was not a Langdell "groupie." According to Williston, "my personal relations with Mr. Langdell were always so slight because of his reticent and aloof habits" SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 138 (1941) [hereinafter WILLISTON, *LIFE AND LAW*]. Keener, not Langdell, taught Williston contracts. *Id.* at 75. President Charles Eliot, not Dean Langdell, offered Williston his first teaching job. *Id.* at 129. Williston's first article was critical of Langdell. See Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27, 32-38 (1894) (describing Professor Langdell's distinction between unilateral and bilateral contracts and noting that there "is but one case in which the court takes the distinction"). One of Langdell's few law review articles was critical of Williston's criticism. See C.C. Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496, 498 (1901) (arguing that Professor Williston's article came close to calling him "either incompetent or dishonest"). We particularly like the footnote in which Langdell responds to the unasked but obvious question of why he waited seven years to respond to Williston's article published in their law school's law review: "it was not till about a year ago that my attention was first called to the article." *Id.* at 498 n.1.

6. See C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871).

7. See *id.* at xiii-xvi. Obviously, the preface and the index had Langdell's words, but not the words "bilateral contract" or "unilateral contract." See *id.* at v-vii, xiii-xvi. In a review of Langdell's contracts casebook, the index was described as "suggestive matter hidden away there in a few lines . . . to be found by the careful student." Book Notices, 14 AM. L. REV. 233, 233 (1880).

8. C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* 985-1094 (2d ed. 1879) [hereinafter LANGDELL, *A SELECTION OF CASES* (2d ed.)]. With minor revisions, the summary was separately published as C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (2d ed. 1880) [hereinafter LANGDELL, *SUMMARY*].

9. Generations of law students have wrongly blamed Langdell for inventing casebooks instead of praising Langdell for "inventing" Gilbert's. Cf. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 261 (1950) (crediting John

learn contract law from the casebook.¹⁰ The summary, focusing primarily on the cases listed, covered the areas of contract law that were covered in the casebook.¹¹ Langdell organized the summary differently from the casebook. Both editions of the casebook had three chapters: (1) Mutual Consent, (2) Consideration, and (3) Conditional Contracts. The summary is organized around sixteen “titles,” arranged in alphabetical order, starting with the title “Acceptance of Offer” and ending with the title “Unilateral and Bilateral Contracts.”¹² Langdell did not wait until this last title to mention “bilateral contracts” and “unilateral contracts”; throughout, Langdell discusses what makes a contract “bilateral” and what makes a contract “unilateral.”¹³ Langdell’s use of the terms “bilateral contracts” and “unilateral contracts” begins in the title “Acceptance of Offer” with this comparison: “in a unilateral contract the offer becomes a contract in consequence of what the offeree *does*, in a bilateral contract in consequence of what he *says*.”¹⁴ Langdell thus distinguishes bilateral contracts from unilateral contracts on the basis of what the *offeree* does or says rather than on the basis of what the *offeror* said. In summary, Langdell would find a unilateral contract in both of our introductory hypotheticals if A painted the fence.

Norton Pomeroy for using cases for law teaching in the 1860s); *see also* WILLISTON, LIFE AND LAW, *supra* note 5, at 205 (“It is chiefly due to Ames that the case method of study developed into a case method of teaching. At any rate, after his first years at the School, Langdell’s increasingly defective eyesight led him to teach exclusively by lectures.”).

10. Book Notices, *supra* note 7, at 234 (“[I]t is to be remembered that the book is published for use at a law school, and that for that purpose dogmatic teaching is a necessity, if any thing is to be taught within the limited time of a student’s course.”).

11. *See* Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 602 (“[T]he narrative was only a summary of the law reflected in the cases in the casebook, not a summary of the field of contracts as a whole.”).

12. *See generally* LANGDELL, SUMMARY, *supra* note 8. There is one separate section entitled “Unilateral Contracts and Bilateral Contracts.” *Id.* at § 183, at 248. We mention this for readers who adhere to Professor Gilmore’s view that Langdell was “an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius.” GRANT GILMORE, THE AGES OF AMERICAN LAW 42 (1977). For a more generous view of Langdell and his work, *see* Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 LAW & HIST. REV. 277 (2004) (“Langdell thus transformed legal education from an undemanding, gentlemanly acculturation into an academic meritocracy.”).

13. *See generally* LANGDELL, SUMMARY, *supra* note 8.

14. *Id.* at § 12, at 13.

Although Langdell's *Summary* was written for law students, it was also used and cited by courts writing opinions and law professors writing books and articles. It was urged in an 1880 review of his casebook: "for even if Mr. Langdell's results should hereafter be overruled in particular cases, they will have done very nearly as much to advance the law as if they had been adopted. For they must be either adopted or refuted, they cannot be passed by."¹⁵

In the main, courts and commentators accepted Langdell's "result" that a contract could be created by the offeree's doing what the offer required without the offeree first expressly promising that he would do what the offer required. Obviously there were cases and legal commentaries after 1880 that "passed by" Langdell's "results" on bilateral contracts and unilateral contracts by not using the terms,¹⁶ and, to the extent that Langdell's "results" on bilateral contracts and unilateral contracts were expressly "refuted," the focus was on Langdell's choice of the term "unilateral contract."¹⁷ Other cases and commentaries used the term "unilateral contract" in a manner

15. Book Notices, *supra* note 7, at 235. That same year, Oliver Wendell Holmes, Jr.—not yet forty, not yet a judge or even a professor—delivered twelve lectures that were published the next year as *The Common Law*. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (51st prtg. 1881).

16. The West Hornbook Series (the second edition of *Clark on Contracts*), without using the term "unilateral contract" or citing to Langdell's *Summary*, states, "if the offer contemplates the doing or forbearance from the doing of an act as the consideration of the promise of the offeror, unless the offer prescribes communication, the mere performance of the consideration completes the contract." FRANCIS B. TIFFANY, *HANDBOOK OF THE LAW OF CONTRACTS* 23 (2d ed. 1904) (For those who remember *Clark v. West*, 86 N.E. 1 (N.Y. 1908), and the dispute as to whether West had waived the condition that Clark abstain from the use of intoxicating beverages while writing for West, we note that the first edition was actually written by William Clark.); *see also* JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF CONTRACTS* § 330, at 125 (1887) ("If one makes an offer to another . . . and does not withdraw it while the other person . . . does the thing, such performance carries with it an acceptance of the offer; and the person who made it must pay or do what he proposed.").

17. *See infra* text accompanying notes 21, 23. Recall that Williston credited Langdell with only "popularizing" the term "unilateral contract." *See supra* note 5 and accompanying text. Williston credited an early Iowa case with the "earliest use of the words bilateral or unilateral in our law . . ." WILLISTON, *CONTRACTS*, *supra* note 5, at 11 n.42 (citing *Barrett v. Dean*, 21 Iowa 423 (1866)). The civil law sometimes refers to bilateral contracts as "synallagmatic" contracts. *See, e.g., Mitchell Franklin, Equity as Form: A Study of Frost v. Knight*, 30 TUL. L. REV. 175, 197 (1956).

different from Langdell's.¹⁸ Professor William Herbert Page objected to Langdell's use of the name unilateral contract for contracts "created by performing the act required for acceptance of the offer" because of these other uses:

The objection to [the term "unilateral contract"] is that it is already used too much, with too many meanings. . . .

An offer for value is spoken of as a unilateral contract before acceptance A gratuitous promise is often spoken of as unilateral The term often imports an unenforceable promise, as distinguished from one that is enforceable. . . . As a result of these uses of the term, it is said that a contract can not be unilateral if it is really a contract. Even if the courts are speaking of a unilateral contract, they are likely to use the term "unilateral" of the offer rather than of the contract, and to say that when it becomes a contract it ceases to be unilateral.¹⁹

The Supreme Court of Kansas²⁰ was more direct and more succinct in refuting Langdell's use of the term "unilateral contract" to describe a transaction in which the offer becomes a contract in consequence of what the offeree does: "A unilateral contract is exactly as impossible as any other one-sided thing of two sides."²¹ John S. Ewart, a prominent Canadian lawyer in the first part of the twentieth century,²² made the same point

18. See, e.g., *Berry v. Foley*, 48 A. 146, 149 (Md. 1901) ("[T]he contract and sale . . . was not a unilateral contract, but one that was binding upon both parties."); *E.C. Dailey Co. v. Clark Can Co.*, 87 N.W. 761, 762 (Mich. 1901) ("[W]ritten proposal and acceptance constituted not a mutual, but a unilateral, contract . . ."); see also 1 WILLIAM F. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS § 14, at 16 (1913) ("[W]here there is no seal and no consideration, while an agreement or a promise so accepted by the promisee as to impose no liability upon him is often called a unilateral contract, and not generally enforceable, it is for that very reason no true contract at all.").

19. 1 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 51, at 65-67 (2d ed. 1920) (footnotes omitted).

20. The judges on the Kansas Supreme Court would have had access to Langdell's *Summary* while learning and practicing law. See Robert A. Mead & M.H. Hoeflich, *Lawyers and Law Books in Nineteenth-Century Kansas*, 50 U. KAN. L. REV. 1051, 1059-60 (2002). The 1886 catalogue of Crane & Company, a Topeka, Kansas, bookseller and publisher, includes Langdell's *Summary*. *Id.* at 1059-61 & n.39.

21. *Railsback v. Raines*, 203 P. 687, 688 (Kan. 1922); see also *High Wheel Auto Parts Co. v. Journal Co. of Troy*, 98 N.E. 442, 444 (Ind. Ct. App. 1912) ("A unilateral contract is a legal solecism. There is no such thing as a one-sided contract.").

22. See 2 THE ENCYCLOPEDIA OF CANADA 305 (W. Stewart Wallace ed., 1940); Marionapolis College, Quebec History, <http://www2.marianapolis.edu/quebechistory/encyclopedia/JohnS.Ewart-Wallace.htm> (last visited May 24, 2006).

more emphatically in the *Harvard Law Review*: “Nobody would call a monologue a unilateral conversation, or a soprano solo a unilateral duet, or a lecture a unilateral debate. . . . [A] promise is always unilateral, and a contract is always bilateral at least.”²³

In the most influential contracts treatises of the era, however, there was not even a “unilateral debate” over whether a contract could be based on performance and whether such a contract was to be referred to as a “unilateral contract” as distinguished from a “bilateral contract”; Williston’s treatise described this distinction as “vital.”²⁴ Similarly, Corbin, in his American edition of the Anson treatise, distinguishes between “unilateral contracts” and “bilateral contracts” and calls the distinction “important.”²⁵ And, as early as 1897, *Bouvier’s Law Dictionary* defined the term “unilateral contract” by referencing Langdell’s *Summary*.²⁶

B. Isaac Maurice Wormser’s “Brooklyn Bridge” and After

While there was no debate as to the legal consequences of an offeree’s completing the performance requested by the offeror, there was considerable debate as to the consequences of an offeree’s beginning the performance requested by the offeror. Some argued that it had no consequence: the offeror could still revoke his offer, and the offeree was not obligated to complete performance.²⁷ Others contended that the offeree’s beginning the performance created a contract, so the offeror could not revoke, and the offeree was obligated to complete the

23. John S. Ewart, Book Review, 33 HARV. L. REV. 626, 627 (1920) (reviewing ANSON, *supra* note 5). This issue of the *Harvard Law Review* contains an article about “Professor Langdell’s services to the Harvard Law School.” Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 493 (1920). According to a recent Canadian text, contracts based on the offeree’s performance “have long been designated as ‘unilateral’ contracts.” G.H.L. FRIDMAN, *THE LAW OF CONTRACT IN CANADA* 76-77 (4th ed. 1999).

24. WILLISTON, *CONTRACTS*, *supra* note 5, at § 13, at 11.

25. ANSON, *supra* note 5, at 25.

26. 2 BOUVIER’S *LAW DICTIONARY* 1157-58 (Francis Rawle ed., 1897) (citing LANGDELL, *SUMMARY*, *supra* note 8, at § 183, at 248).

27. See, e.g., LANGDELL, *SUMMARY*, *supra* note 8, at § 86, at 106; SIR FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* 349 (Gustavus H. Wald & Samuel Williston eds., 3d ed. 1906) [hereinafter POLLOCK, *AT LAW AND IN EQUITY*].

performance.²⁸ Still others took a third position: the offeree's beginning the performance prevented the offeror from revoking, but did not obligate the offeree to complete the performance.²⁹

Professor Wormser³⁰ framed the debate with this now famous Brooklyn Bridge hypothetical:³¹

Suppose A says to B, "I will give you \$100 if you walk across the Brooklyn Bridge"

B starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment A overtakes B and says to him, "I withdraw my offer." Has B then any rights against A?³²

28. See, e.g., SIR FREDERICK POLLOCK, *THE PRINCIPLES OF CONTRACT* 19 (P.H. Winfield ed., 11th ed. 1942) (mentioning the French concept of *commencement d'exécution*); Henry W. Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94, 99 (1921) (describing a unilateral contract as a "uni-promissory or uni-obligational contract").

29. See, e.g., Clarence D. Ashley, *Offers Calling for a Consideration Other Than a Counter Promise*, 23 HARV. L. REV. 159, 161, 166 (1910); D.O. McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644, 655, 663 (1914).

30. Phi Alpha Delta Fraternity of Fordham University School of Law, Biography of Maurice Wormser, <http://www.fordhampad.com/about/wormser.php> (last visited May 24, 2006).

31. Professor Allan Farnsworth described Wormser's Brooklyn Bridge hypothetical as the "most durable and influential hypothetical in American legal education." 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.24, at 356 (3d ed. 2004). There is a suggestion in another, later article in the *Yale Law Journal* by an Australian law professor that another, earlier "classical illustration is the promise to pay a promisee \$100 if he goes to Rome, which promise (so the law holds) the promisor is entitled to revoke at any time before the promisee's arrival at his destination." Samuel J. Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 YALE L.J. 515, 518 (1955) (citing *Great N. Ry. v. Witham*, (1873) 9 L.R.C.P. 16, 19). The cited case does mention a "unilateral contract" and does state that "going to York" can result in a contract. *Great N. Ry.*, 9 L.R.C.P. at 19. There is, however, no mention of Rome (or the Brooklyn Bridge), and no discussion of revocation. See *id.* Professor Patrick Atiyah also refers to "the famous problem of the promise to give £10 to a man if he walks to York, and of its revocability after he has walked half-way there." P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 441 (1979).

32. I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136-37 (1916). The hypothetical also inspired the following literary effort:

"Ode to the Brooklyn Bridge"

A bridge never meant to be crossed.

If it were, then all would be lost:

Those hypos inane,

Law students in pain,

And debates until Hades's first frost.

To Professor Wormser there was no debate:

It is elementary that an offeror may withdraw his offer until it has been accepted. It follows logically that A is perfectly within his rights in withdrawing his offer before B has accepted it by walking across the bridge—the act contemplated by the offeror and the offeree as the acceptance of the offer.³³

In the article, Professor Wormser does not cite to Professor Langdell, who had earlier reached the same conclusion—that in a unilateral contract transaction, the offeror maintains the right to revoke his offer until the offeree completes the requested performance.³⁴ Instead, Professor Wormser cites to and discusses an English case, *Offord v. Davies*,³⁵ as “correctly appl[ying] the doctrine”³⁶

Professor Wormser could have also cited to *Biggers v. Owen*, an 1888 Georgia case that supports his view.³⁷ Instead, the only American case on point that Professor Wormser cites is a California case, *Los Angeles Traction Co. v. Wilshire*,³⁸ which he calls the “most curious instance of reasoning on the subject”³⁹ The Los Angeles Traction Company (“LAT”) was building a street railway in Los Angeles.⁴⁰ To finance the construction, W.B. Wilshire (“W”) and others promised payments to LAT when the railway was completed.⁴¹ W’s promise to pay was in the form of a \$2000 promissory note held by a bank in escrow.⁴² About four months after W executed the

Douglass G. Boshkoff, *Selected Poems on the Law of Contracts*, 66 N.Y.U. L. REV. 1533, 1537 (1991).

33. Wormser, *supra* note 32, at 137 (footnote omitted).

34. See LANGDELL, A SELECTION OF CASES (2d ed.), *supra* note 8, at 988. Professor Williston took the same position in a contracts treatise that Professor Wormser had edited. POLLOCK, AT LAW AND IN EQUITY, *supra* note 27, at 349.

35. (1862) 142 Eng. Rep. 1336, 1338 (C.P.).

36. Wormser, *supra* note 32, at 140. Langdell’s casebook included *Offord v. Davies*, which he referred to in the summary as supporting this view. LANGDELL, A SELECTION OF CASES (2d ed.), *supra* note 8, at 33.

37. See 5 S.E. 193 (Ga. 1888).

38. 67 P. 1086, 1088 (Cal. 1902); see Wormser, *supra* note 32, at 141. As Professor Wormser notes, both the *Offord* case and the *Los Angeles Traction* case were included in the contracts casebook he co-edited. *Id.* at 140–41 & nn.4–5.

39. Wormser, *supra* note 32, at 141.

40. *Los Angeles Traction*, 67 P. at 1087.

41. *Id.*

42. *Id.*

note, LAT paid the City of Los Angeles \$1505 for a franchise to construct the railway.⁴³ After LAT began work on the railway, but before the work was completed, W notified LAT that he was revoking his promise to pay.⁴⁴ After LAT completed the railway, it sued on the note.⁴⁵ The California Supreme Court looked to contract law in ruling for LAT:

The contract at the date of its making was unilateral, a mere offer that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of \$1,500 for a franchise it had acted upon the contract, and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character⁴⁶

Professor Wormser found the California court's reasoning "curious" because (1) the contract cannot be bilateral: W, the offeror, asked for performance and not a promise, and the offer can control the method of acceptance;⁴⁷ and (2) no contract existed at the time that W revoked: LAT, the offeree, never agreed to build the street railway and would not have been in breach of some bilateral contract if it had not performed.⁴⁸

In an earlier law review article (also not cited by Professor Wormser),⁴⁹ Professor Clarence Ashley took the same position as Professor Wormser with respect to the reasoning of *Los Angeles Traction*: it "is a remarkable instance of confusion of thought. By what magic the offer had been turned into a 'contract' does not appear."⁵⁰ Professor Ashley did not,

43. *Id.*

44. *Id.*

45. *Los Angeles Traction*, 67 P. at 1087.

46. *Id.* at 1088.

47. Wormser, *supra* note 32, at 141.

48. *Id.* at 142; *see also* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 49, at 190 n.72 (1963) ("By saying that 'the contract had taken on a bilateral character,' the court must have meant only that the promisor could no longer revoke.").

49. *See* Wormser, *supra* note 32, at 141-42. If Professor Wormser had fully acknowledged Professor Ashley's earlier work, the title of this article might be "Bearded Ladies Moving Safes." Professor Ashley's article included the hypothetical of an offeror who promised \$25 in return for the offeree's moving a safe to an office in another building. Ashley, *supra* note 29, at 160-61. The offeror then revokes when the offeree has carried the safe to the door of the building. *Id.*

50. Ashley, *supra* note 29, at 164.

however, take the same position as either Professor Wormser or the California Supreme Court with respect to the result.⁵¹ Professor Ashley took the position that an offeree's beginning performance pursuant to an offer to enter into a unilateral contract makes the offer irrevocable and looked to equitable estoppel as the doctrinal basis for the result: "An estoppel simply prevents him from withdrawing such action when it will work injustice to permit him to do so."⁵²

Professor D.O. McGovney argued for that same result on different doctrinal grounds.⁵³ He would find that when W promised to pay the \$2000 on completion of the railway, he made a "collateral offer" to keep the main offer open.⁵⁴ This collateral offer was also an offer to enter into a unilateral contract with the requested performance being the start of construction on the railway.⁵⁵ Professor Corbin then took a corresponding position for similar reasons in his law review article.⁵⁶ More importantly, Professor Williston switched from the same position as Wormser⁵⁷ to this position when he served as Reporter for the Restatement of Contracts.⁵⁸

51. *See id.* at 164-65.

52. *Id.* at 168.

53. *See* McGovney, *supra* note 29, at 658-60.

54. *See id.* at 659.

55. *See id.*

56. Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 191-92 (1917).

57. Professor Wormser also eventually switched his position. *See* I. Maurice Wormser, Book Review, 3 J. LEGAL EDUC. 145, 146 (1950) (reviewing EDWIN W. PATTERSON & GEORGE W. GOBLE, *CASES ON CONTRACTS* (3d ed. 1949) ("I have repented, so that now, clad in sackcloth, I state frankly, that my point of view has changed.")).

58. *See* RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmts. a & b, at 53 (1932). Professor Farnsworth attributed Williston's change of position to the law review articles: "the debate in the law reviews convinced him that Langdell was wrong. . . . The battle was fought and won in the pages of the law reviews . . ." E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of An American Opinion Clipper*, 42 SW. L.J. 903, 913 (1988) [hereinafter Farnsworth, *Casebooks and Scholarship*]. Professor Farnsworth's article was based on a lecture delivered at the Southern Methodist University School of Law (now known as the Dedman School of Law of Southern Methodist University). *Id.* at 903. Understandably, the law review editors did not require Professor Farnsworth to provide a footnote explaining the basis for the statement. *See id.* at 913; *cf.* Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement*, 34 U. MEM. L. REV. 499, 563 (2004) (stating that the reason for Williston's shift in position was "obviously influenced by McGovney's suggestions in 1914").

C. Williston's Restatement of Original Contracts

Professor Williston was the Reporter for the Restatement of Contracts ("Restatement").⁵⁹ In most respects, the Restatement was Williston's Restatement.⁶⁰

1. Talking Langdell's Talk

The Restatement used Langdell's terms "unilateral contract" and "bilateral contract," but not his definitions.⁶¹ Section 12 defines the term "unilateral contract" as a contract "in which no promisor receives a promise as consideration for his promise."⁶² There are no illustrations after section 12.⁶³ There are, however, illustrations after sections 20 and 31 that suggest that whether a contract is unilateral or not depends on whether the response to an offer is performance or a promise.⁶⁴

Applying the Restatement definition of "unilateral contract" in section 12 to our two hypotheticals at the beginning of the article, A painting O's fence in #1 or #2 would result in a unilateral contract, and A would have a contract law right to

59. See RESTATEMENT OF THE LAW OF CONTRACTS. Note the unmarked introductory page entitled "The American Law Institute's Committee on Contracts." Although this Restatement was the first of two restatements of contracts and was the very first of all of the American Law Institute's restatements to be finished, it is not generally referred to as "Restatement First of Contracts." See, e.g., E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981) [hereinafter Farnsworth, *Ingredients*].

60. See Farnsworth, *Ingredients*, *supra* note 59, at 1 ("The first *Restatement of Contracts* has been characterized by Professor Herbert Wechsler of Columbia, Director of the American Law Institute, as 'a legendary success.' He attributed this in good part to Professor Samuel Williston . . ."); see also GRANT GILMORE, *THE DEATH OF CONTRACT* 59 (1974) ("Williston and Corbin were unquestionably the dominant intellectual influences in the drafting of the *Restatement of Contracts* . . . [T]he *Restatement of Contracts* is not only the best of the Restatements, it is one of the great legal accomplishments of all time."); Teeven, *supra* note 58, at 510-11; see generally Arthur L. Corbin, *Samuel Williston*, 76 HARV. L. REV. 1327 (1963).

61. See LANGDELL, *A SELECTION OF CASES* (2d ed.), *supra* note 8, at 2.

62. RESTATEMENT OF THE LAW OF CONTRACTS § 12, at 10. In the draft dated February 15, 1924, the definition of unilateral contract was in section 10: a contract "in which the promise or promises are made by one person only or several persons acting as a unit." RESTATEMENT OF THE LAW OF CONTRACTS § 10, at 7 (Tentative Draft No. 2, 1924). In the draft dated May 17, 1924, the definition of unilateral contract was in section 10: a contract "in which no promisor is also a promisee." RESTATEMENT OF THE LAW OF CONTRACTS § 10, at 10 (Tentative Draft No. 3, 1924).

63. See RESTATEMENT OF THE LAW OF CONTRACTS § 12, at 10.

64. See, e.g., *id.* at § 20 illus. 3, at 26; § 31 illus. 1 & 2, at 40.

recover the \$1200 contract price.⁶⁵ If, however, A started painting and then O told A to stop painting, we would have to apply Restatement section 45.⁶⁶

2. *Walking on Wormser's Brooklyn Bridge*

In some respects, section 45 can be viewed as Professor McGovney's section.⁶⁷ Under section 45, party A in Professor Wormser's Brooklyn Bridge hypothetical cannot revoke after B has started walking across the Brooklyn Bridge. Restatement section 45, "Revocation of Offer for Unilateral Contract; Effect of Part Performance or Tender," reads as follows:

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.⁶⁸

And the Restatement's reason for the rule reads very much like Professor McGovney's article. Comment b to Restatement section 45 provides in part:

The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for subsidiary promises.⁶⁹

65. *See id.* at § 12, at 10.

66. *See id.* at § 45, at 53.

67. Professor McGovney proposed a solution of this sort as far back as 1914, in which part performance by the offeree precludes revocation. McGovney, *supra* note 29, at 658; *see also* Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1, 7 (1992) ("Williston, . . . with Corbin's assistance, essentially adapted the McGovney proposal to create what ultimately became section 45 of the first *Restatement of Contracts*."). *But cf.* Stoljar, *supra* note 31, at 527 n.53 ("The inclusion of § 45 in the *Restatement* may perhaps be attributed to the influence of Professor Corbin who proposed a solution of this sort as far back as 1917.").

68. RESTATEMENT OF THE LAW OF CONTRACTS § 45, at 53.

69. *See id.* at § 45 cmt. b, at 53. Nothing in the ALI Proceedings is helpful in understanding the provenance or particulars of section 45. *See* 3 A.L.I. PROC. 204-05 (1925), *microformed on* Am. L. Inst. Publ'n No. 3 (William S. Hein & Co., Inc.).

The Restatement illustrates the application of section 45 with this hypothetical:

A says to B, "I will not ask you to promise to instal [sic] an intra-mural telephone system which will work perfectly in my building, but if you care to try to do it, I will pay you \$1000 if you succeed." B begins the work. When it is partly finished, A revokes his offer. If B can prove that he would have complied with the terms of the offer, he has a right to damages—the contract price less the cost of completing the installation.⁷⁰

Note that the Restatement's "intra-mural telephone system" illustration involves the start of the requested performance: "B begins the work."⁷¹ "Part performance" satisfies the requirement in section 45 of "part of the consideration requested in the offer"⁷²

Consider a revised version of the "intra-mural telephone system" illustration in which Y makes the same statement to D that A made to B, but D, instead of beginning work as B had, merely buys the special materials appropriate only for an "intra-mural telephone system" which will work perfectly in Y's building. D then moves the materials to Y's building, and Y backs out.⁷³ Section 45 would not apply to this hypothetical.⁷⁴ In other words—the words of comment b to section 45—if D was "merely acting in justifiable reliance on an offer," then D could not recover under section 45, but may recover under promissory estoppel as outlined in section 90.⁷⁵

Restatement section 90 requires neither "part of the consideration" nor "part performance."⁷⁶ Instead, section 90 requires "action . . . of a definite and substantial character"⁷⁷ That phrase in section 90 would seem to include not

70. RESTATEMENT OF THE LAW OF CONTRACTS § 45 illus. 1, at 54.

71. *Id.*

72. *Id.* at § 45, at 54.

73. *See id.* at § 45 illus. 1, at 54.

74. *See id.* at § 45 cmt. b, at 53.

75. RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmt. b, at 54 ("[M]erely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding"); *see also id.* at § 90, at 110.

76. *See id.*

77. *Id.*

only D's reliance on Y's promise, but also B's part performance of A's offer if B's part performance was "substantial."⁷⁸

Section 90 requires that any justifiable reliance be "substantial," but section 45 does not require that the part performance be substantial.⁷⁹ In Professor Wormser's Brooklyn Bridge hypothetical, then, if B takes one step on the Brooklyn Bridge, A is bound under section 45.⁸⁰ In applying the provisions of the first Restatement then, it is necessary not only to distinguish between actions that constitute part performance and other actions of reliance, but also to distinguish between offers to enter into unilateral contracts and other statements.

3. Defining Restatement Section 45's "Offer for a Unilateral Contract"

Recall that section 45 begins, "If an offer for a unilateral contract is made"⁸¹ What exactly is a unilateral contract? How can one be offered? Can there be a reverse unilateral contract? Is there a presumption favoring a particular type of contract? This sub-section answers each question in turn.

a. Definition of "Unilateral Contract"

The Restatement does not define what constitutes an "offer for a unilateral contract."⁸² It instead only defines the term "unilateral contract" in section 12 as "one in which no promisor receives a promise as consideration for his promise."⁸³ The section 12 definition of "unilateral contract" does not help

78. *See id.*

79. Compare RESTATEMENT OF THE LAW OF CONTRACTS § 90, at 110, with RESTATEMENT OF THE LAW OF CONTRACTS § 45, at 53.

80. James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 605 (1995) (concluding that "one step across the bridge binds the promisor"). Law review articles not only distinguish between the level of offeree activity required by Restatement sections 45 and 90, but also the level of offeror liability created by Restatement sections 45 and 90. *See* Melvin A. Eisenberg, *The Revocation of Offers*, 2004 WIS. L. REV. 271, 294 (2004) ("Unlike Section 87(2) of the Second Restatement, section 45 of the First Restatement took the position that when the implied promise to keep an offer for a unilateral contract open is enforceable, the remedy is expectation damages."). Professor Eisenberg (or an editor of the *Wisconsin Law Review*) cites Restatement section 45 to support that proposition directly. *Id.* at 294 & n.66.

81. RESTATEMENT OF THE LAW OF CONTRACTS § 45, at 53.

82. *Id.*

83. *See id.* at § 12, at 10.

define the phrase "offer for a unilateral contract." The Restatement defined the wrong term. We don't need a definition of "unilateral contract." If, by definition, a contract exists, we have defined away the problems. If a contract does exist, the legal consequences are the same regardless of whether the contract is "unilateral" or "bilateral."⁸⁴

Problems arise in applying the Restatement sections on formation of a unilateral contract when it is argued that there is an offer but not a contract.⁸⁵ More specifically, problems arise when it is argued that there is not a contract because the offer was an offer for a unilateral contract, and that offer has not been accepted because the offeree's performance has not yet been completed.⁸⁶ To apply these sections of the Restatement, we need a definition of "offer for a unilateral contract," not a definition of "unilateral contract."

b. Definition of "Offer for a Unilateral Contract"

Neither section 12 nor section 45 nor any other Restatement provision defines the term "offer for a unilateral contract."⁸⁷ Section 45 does, however, provide the "illustration" considered earlier.⁸⁸ Recall what A says to B in that illustration: "I will not ask you to promise to instal [sic] an intra-mural telephone system which will work perfectly in my building, but if you care to try to do it, I will pay you \$1000 if you succeed."⁸⁹ If this example is what an "offer for a unilateral contract" looks like, then only hypothetical #2 ("only by painting the house and not by promising to paint the house") looks like an "offer for a unilateral contract."

84. Stoljar, *supra* note 31, at 516-18 (stating that the unilateral-bilateral distinction "has no practical relevance for what is perhaps the vast majority of cases").

85. *See* RESTATEMENT OF THE LAW OF CONTRACTS § 31 & cmt. a, at 39; § 45 & cmt. c, at 54.

86. *See id.*

87. *See id.* at § 12, at 10; § 45, at 53.

88. *See id.* at § 45 illus. 1, at 54; *supra* notes 70-75 and accompanying text.

89. RESTATEMENT OF THE LAW OF CONTRACTS § 45 illus. 1, at 54.

c. Reverse Unilateral Contracts

There is also an example of what is called a “reverse unilateral contract”⁹⁰ in section 57, which is entitled “Unilateral Contract Where Proposed Act is to be Done by Offeror.”⁹¹ It provides that if “in an offer of a unilateral contract the proposed act or forbearance is that of the offeror, the contract is not complete until the offeree makes the promise requested.”⁹² Section 57 also provides the following illustration: “A writes to B, who is boarding A’s horse, ‘I should like to sell my horse to you, and if you will promise to pay \$200 for it, the horse is yours.’ B makes the requested promise. Ownership of the horse is thereupon instantly transferred to him.”⁹³ Neither section 57 nor its illustration is helpful in understanding what an offer to enter into a unilateral contract is. In the illustration, once B makes the requested promise, there is obviously a contract.⁹⁴

It is not obvious why A’s offer is, in the language of section 57, “an offer of a unilateral contract.”⁹⁵ Look again at the language of Restatement section 57: what is the “proposed act or forbearance . . . of the offeror”?⁹⁶ Is it the fact that B is boarding A’s horse? Would there not be a “bilateral contract,” as that term is defined in the Restatement, if A had possession of the horse and said, “If you will promise to pay \$200 immediately, I promise to sell you my horse immediately,” and B had made the requested promise? Why then is A’s offer not in the illustration to section 57, an offer that “invites the formation of a bilateral contract,” particularly in light of the presumption in section 31?⁹⁷

90. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.10, at 67 (5th ed. 2003) (“In the usual unilateral contract, the promise is made by the offeror. However, in the unusual case of a reverse unilateral contract the offeree makes the only promise. . . . The most common reverse unilateral contracts arise where the offeree silently accepts services that are rendered with the expectation of payment.”).

91. RESTATEMENT OF THE LAW OF CONTRACTS § 57, at 64.

92. *Id.*

93. *Id.* at § 57 illus. 1, at 65.

94. *See id.*

95. *See id.* at § 57, at 64.

96. RESTATEMENT OF THE LAW OF CONTRACTS § 57, at 64.

97. *See id.* at § 31, at 39.

d. Presumption of Offer to Enter into Bilateral Contract

The Restatement presumes that offers invite a bilateral contract.⁹⁸ Section 31 provides the following:

In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree.⁹⁹

The two illustrations of offers in section 31 look very much like the first hypothetical in this article.¹⁰⁰ In both of the Restatement illustrations the offeree responds to the offer with a promise, and a bilateral contract results. If this means that these offers were only “offers that invite a bilateral contract” and not also “offer[s] for unilateral contract,” then again, only our second hypothetical—“this offer can only be accepted by painting the fence”—looks like an offer for a unilateral contract.¹⁰¹ Or, as Karl Llewellyn put it, it looks like a “bearded lady.”¹⁰²

98. *Id.*

99. *Id.*

100. Compare RESTATEMENT OF THE LAW OF CONTRACTS § 31 illus. 1 & 2, at 40, with *supra* note 1 and accompanying text. Restatement section 31, illustration 1: “A says to B: ‘If you will work in my garden next week I will give you \$5 a day.’ B says, ‘I’ll do it.’ There is a bilateral contract.” RESTATEMENT OF THE LAW OF CONTRACTS § 31 illus. 1, at 40. Illustration 2: “A says to B: ‘If you will let me have that table that you are making, when it is finished, I will give you \$100 for it.’ B replies, ‘All right.’ There is a bilateral contract.” *Id.* at § 31 illus. 2, at 40. Similarly, in hypothetical #1, if A says “all right,” there is a bilateral contract.

101. *But cf.* PERILLO, *supra* note 90, at 66 (“If A says to B, ‘If you run in the New York Marathon and finish I will pay you \$1,000’ A has thus made an offer looking to a unilateral contract.”).

102. K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance I*, 48 YALE L.J. 1, 36 (1938) [hereinafter Llewellyn, *Offer and Acceptance I*].

D. Karl Nickerson Llewellyn's Bearded Ladies

Karl Llewellyn¹⁰³ taught contracts at the University of Chicago, Columbia, and Yale.¹⁰⁴ He is best known for his work on the Uniform Commercial Code ("UCC"), which somehow works as the general law for contracts involving sales of goods without using the phrases "bilateral contract," "unilateral contract," "offer to enter into bilateral contract," or "offer to enter into unilateral contract." Section 2-206(1) of the UCC simply provides: "[u]nless otherwise unambiguously indicated by the language or circumstances . . . an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment" ¹⁰⁵ After Williston and his advisers finished their work on the Restatement, and before Karl Llewellyn and his advisers began their work on the Uniform Revised Sales Act and then the UCC, Llewellyn wrote a series of articles critical of the Restatement's "Great Dichotomy"

103. For more on Karl Llewellyn, see Brian Leiter, *Llewellyn Karl Nickerson* (1893-1962), in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, 8999-9001 (Karl Ulrich Meyer ed., 2001), available at <http://www.utexas.edu/law/faculty/bleiter/LlewellynEncyclopedia.pdf> (last visited May 24, 2006); see also Karl N. Llewellyn, *Strangers to Us All, Lawyers and Poetry*, <http://www.wvu.edu/~lawfac/jelkins/lp-2001/llewellyn.html> (last visited May 24, 2006). For more than you want to know (unless you watch *Desperate Housewives* and bought a Sirius Satellite Radio to listen to Howard Stern) about the late Professor Llewellyn, see James J. Connolly et al., *Alcoholism and Angst in the Life and Work of Karl Llewellyn*, 24 OHIO N.U. L. REV. 43, 44-45 (1998) ("Llewellyn became an emotionally volatile alcoholic, plagued by severe feelings of sexual and professional failure.") (footnotes omitted).

104. See Leiter, *supra* note 103, at 8999.

105. U.C.C. § 2-206(1) (14th ed. 1995). Professor Williston was critical of this change:

Section 2-206 again seeks to vary the law of contracts. . . . The question is a general one of the law of contracts, and it is unfortunate to have a special rule on the point for sales of goods. And in this case the provision would be objectionable if made for all contracts. The *Restatement of Contracts* states that in case of doubt an offer is presumed to be for a bilateral contract, and also that if an offer is for a bilateral contract, performance without a promise creates a contract if performance is rendered within the time allowable for a promise by the terms of the offer. This states existing law and extends as far as the law should go. If a buyer makes an offer asking for actual performance, then not promises but performance should be held a condition of his offer.

Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 577 (1950) (footnotes omitted). For a discussion of the relationship of Section 2-206, the Restatement, and the Restatement Second, see John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447 (1994).

between unilateral and bilateral contracts.¹⁰⁶ In one of the articles, Llewellyn more accurately describes the “Great Dichotomy” as a “Theoretical or Classroom Dichotomy”:

the question recurs in the classrooms of the country: “Did he ask for a promise *or* for an act—for an act *or* for a promise?”—with the eternal suggestion that only one is normally asked for, and that only the one will do. This makes, as we all know, for superb classroom theatrics; I know of none which have ever given me personally equal fun. But the fun comes at a high cost to students’ real understanding.¹⁰⁷

However described by Llewellyn, we think the dichotomy discussed in his law review articles can best be described as the Restatement’s dichotomy between offers to enter into unilateral contracts and offers to enter into bilateral contracts, not a dichotomy between unilateral contracts and bilateral contracts. From the title to the first sentence to the balance of the articles, Llewellyn’s focus is on offer and acceptance—more specifically, on “certain rules about Offer and Acceptance in the initiation of business bargains, and [on] certain ‘orthodox’ rules as being either defective or false or unwise”¹⁰⁸ Llewellyn would see the offer in our introductory hypothetical #1 as an offer that could be accepted by A’s promise, A’s complete performance, or A’s starting to perform, and the offer in our hypothetical #2 as an offer that is not seen in actual business deals.¹⁰⁹ Again, we see Llewellyn’s focus on offers and the Restatement’s flawed classification of offers.

III. RESTATEMENT SECOND AND BEARDED LADIES AND WALKING ON THE BROOKLYN BRIDGE

Contract scholars working on the Restatement Second, however, saw Llewellyn’s articles as “concern” about the Restatement classification of contracts into unilateral and

106. See, e.g., K.N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance II*, 48 YALE L.J. 779, 787 (1939) [hereinafter Llewellyn, *Offer and Acceptance II*]; see also generally Llewellyn, *Offer and Acceptance I*, *supra* note 102; K.N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938).

107. Llewellyn, *Offer and Acceptance II*, *supra* note 106, at 787.

108. *Id.* at 780.

109. See *id.* at 813.

bilateral. As then-Professor Braucher, first Reporter for the Restatement Second, wrote: "In a preliminary draft . . . the reporter sought to introduce similar concern by way of comment to the definitions of unilateral and bilateral contracts in Section 12."¹¹⁰

A. Restatement Second and Bearded Ladies

There are no "bearded ladies" in the Restatement Second. At least, no one called a "bearded lady."

1. Elimination of Definitions

A Reporter's note to the first draft of the Restatement Second provided:

Section 12 of the original Restatement defined unilateral and bilateral contracts. It is deleted because of doubt as to the utility of the distinction, often treated as fundamental, between the two types. . . .

The principal value of the distinction has been the emphasis it has given to the fact that a promise is often binding on the promisor even though the promisee is not bound by any promise.¹¹¹

The Restatement Second deleted not only the Restatement section 12 definitions of "bilateral contract" and "unilateral contract," but also all references to "bilateral contract" or "unilateral contract," which now appear only in comments.¹¹² For example, Restatement Second section 55 replaces Restatement section 57.¹¹³ Both contemplate a contract based on a performance treated as an offer followed by a promise, which is treated as an acceptance. Restatement section 57 uses the term "unilateral contract" in its title and its text.¹¹⁴ Restatement Second section 55 mentions "unilateral contract" only in the title and text to Comment a.¹¹⁵ It is as if under the

110. Braucher, *supra* note 3, at 304; *see also* Tiersma, *supra* note 67, at 8-10.

111. RESTATEMENT (SECOND) OF CONTRACTS § 12, Reporter's Note, at 17 (Tentative Draft No. 1, 1964) (1973).

112. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. a, at 118; § 55 cmt. a, at 140 (1979).

113. *Id.* at § 55, Reporter's Note, at 141.

114. *See* RESTATEMENT OF THE LAW OF CONTRACTS § 57, at 64 (1932).

115. *See* RESTATEMENT (SECOND) OF CONTRACTS § 55 cmt. a, at 140:

Restatement Second it is politically incorrect to refer to “bearded ladies.” Perhaps the phrase “facially hirsute women” is more “acceptable.”¹¹⁶ And, it would seem that any such reference is unnecessary because of Restatement Second sections 32 and 62, discussed below.

2. Change of Presumption

It would also seem as if any such reference to “unilateral contracts” is unnecessary. Section 31 of the Restatement created a presumption of an offer to enter into a bilateral contract, i.e., an offer accepted by a promise.¹¹⁷ By contrast, section 32 of the Restatement Second creates a presumption of indifference: An offer can be accepted by promise or performance, whichever the offeree chooses.¹¹⁸ As Professor Robert Braucher¹¹⁹ points out: “This concept of an offer to enter into a contract which may be either unilateral or bilateral did not appear in the original Restatement.”¹²⁰

“Reverse unilateral contracts.” It is possible to offer a performance without making any promise. Like other offers, a non-promissory offer may require acceptance by performance or acceptance by promise or a combination of the two, or it may leave the mode of acceptance to the offeree’s choice. An exchange of performances is not within the definition of “contract” . . . and is beyond the scope of the Restatement of this Subject. But where a non-promissory offer is accepted by promise, there is a contract if the requirements other than manifestation of mutual assent are met. Since the contract formed by a performance in response to an offer of a promise such as an offer of reward is often called a “unilateral contract,” the type of contract referred to in this Section is sometimes referred to as a “reverse unilateral contract.” Contracts so referred to often involve incidental promises by the performing offeror, and in that event the word “unilateral” is not entirely appropriate.

Id.

116. Unless you are doing a Google search and are offended by porn

117. RESTATEMENT OF THE LAW OF CONTRACTS § 31, at 39.

118. RESTATEMENT (SECOND) OF CONTRACTS § 32, at 89.

119. In praising the work of Professor Farnsworth as the second Reporter for the Restatement Second, Professor Jean Braucher suggests that the work on the provisions of the Restatement Second relevant to the unilateral contract issues discussed in this article had been largely completed while Professor Robert Braucher was Reporter. Jean Braucher, *In Memoriam: E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420 (2005).

120. Braucher, *supra* note 3, at 307.

B. Restatement Second and Labeling People Walking on the Brooklyn Bridge

At first blush then, the Restatement Second seems to eliminate the need to identify “bearded ladies.” Blush again. While Restatement Second eliminates the Restatement section 12 definitions, and Restatement Second section 32 eliminates the Restatement’s bilateral presumption, Restatement Second sections 45 and 62 make it even more important to label properly the people walking on the Brooklyn Bridge.¹²¹

1. Restatement Second Section 45

Like Restatement section 45, Restatement Second section 45 provides that the offeror cannot revoke its offer to pay \$100 for walking across the Brooklyn Bridge if: (1) the offeree has now started walking across the Brooklyn Bridge, and (2) the offer is the type of offer that triggers section 45.¹²² And, like Restatement section 45, Restatement Second section 45 makes no provision as to whether the offeree has incurred any legal obligation to complete walking across the bridge.¹²³

The major difference between Restatement section 45 and Restatement Second section 45 is the language as to when the section applies.¹²⁴ Compare the limiting language of Restatement section 45—“If an offer for a unilateral contract is made”¹²⁵—with the limiting language of Restatement Second section 45—“Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance”¹²⁶

The language in Restatement section 45 needs to be read together with Restatement section 31, which, in essence, creates a presumption against the application of Restatement section 45.¹²⁷ And, the language in Restatement Second section 45

121. See RESTATEMENT (SECOND) OF CONTRACTS § 45, at 118; § 62, at 149.

122. *Id.* at § 45, at 118.

123. *Id.*

124. *But cf.* Tiersma, *supra* note 67, at 7 (“The solution adopted in *Restatement* section 45 formed the basis for the similar language in the *Restatement (Second) of Contracts*.”).

125. RESTATEMENT OF THE LAW OF CONTRACTS § 45, at 53.

126. See RESTATEMENT (SECOND) OF CONTRACTS § 45, at 118.

127. See RESTATEMENT OF THE LAW OF CONTRACTS § 31, at 39.

needs to be read together with Restatement Second section 32, which, in essence, creates a presumption against the application of Restatement Second section 45.¹²⁸ The presumption against applying Restatement Second section 45 is clearer if not stronger than the presumption against applying Restatement section 45.¹²⁹

If we apply the language of Restatement sections 45 and 31 to introductory hypotheticals #1 and #2, we conclude that the start of performance by A in #2 (but not #1) triggers Restatement section 45—"the offeror O is bound." A, in introductory hypothetical #2, however, is not legally obligated to finish performance. Similarly, applying the different language of Restatement Second sections 45 and 32 to introductory hypotheticals #1 and #2, we conclude that the start of performance under #2 (but not #1) triggers Restatement Second section 45—"creates an option contract," i.e., "the offeror O is bound." And again, A, in introductory hypothetical #2, is not legally obligated to finish. To finish the application of Restatement Second to our two introductory hypotheticals, we need to look again at introductory hypothetical #1 and Restatement Second section 62.¹³⁰ There is not a Restatement counterpart to Restatement Second section 62.

2. Restatement Second Section 62

Section 62 of Restatement Second, "Effect of Performance by Offeree Where Offer Invites Either Performance or Promise,"¹³¹ provides:

128. See RESTATEMENT (SECOND) OF CONTRACTS § 32, at 89.

129. See *id.* § 1 cmt. f, at 7; RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmt. a., at 118; see also Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 558 (1983) ("[T]he drafters intended that Section 45 apply only to a small minority of cases; they believed that only rarely do offerors intend to limit the mode of acceptance to performance."); cf. RESTATEMENT (SECOND) OF CONTRACTS § 32 cmt. b, at 90. *But cf.* Farnsworth, *Ingredients*, *supra* note 59, at 5 ("Sometimes innovation does not take the form of a new substantive rule but rather of a new perspective on the problem, reflected in the substitution of a new terminology or analysis for a traditional one. For example, the *Restatement (Second)* abandons the terms 'unilateral' and 'bilateral' as descriptive of contracts . . .").

130. *But cf.* CHARLES L. KNAPP ET AL., RULES OF CONTRACT LAW (Supp. 2005-2006). This student supplement with "selections" from the Restatement Second did not "select" section 62.

131. RESTATEMENT (SECOND) OF CONTRACTS § 62, at 149.

(1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance.

(2) Such an acceptance operates as a promise to render complete performance.¹³²

Section 62 of Restatement Second leads to a new and different result in introductory hypothetical #1. Restatement Second section 62 applies when “an offer invites an offeree to choose between acceptance by promise and acceptance by performance”¹³³ Like Restatement Second section 45, section 62 focuses on the offer—it is what the offer says that determines whether section 45 or section 62 applies. Under the clear presumption of Restatement Second section 32, Restatement Second section 62 applies to our introductory hypothetical #1. And, when Restatement Second section 62 applies, the beginning of performance—A’s starting to paint O’s house—is “acceptance.” In other words, in hypothetical #1, governed by Restatement Second section 62, A’s starting to paint imposes contract obligations on both O and A, while in hypothetical #2, governed by Restatement Second section 45, A’s starting to paint only obligates O.

Again, it is O’s offer that determines whether Restatement Second section 45 applies so that only the offeror is obligated, or Restatement Second section 62 applies so that both the offeree and the offeror are obligated. Common sense suggests that in cases like our house painting hypotheticals, the offeror would almost always frame her offer so as to trigger Restatement Second section 62, so that once A starts painting her house, A is obligated to finish painting.

Common sense also suggests that only in a reward or prize situation like Wormser’s Brooklyn Bridge hypothetical¹³⁴ would an offeror not intend that if he is obligated, the offeree should also be obligated. In other words, all the “bearded ladies” or “facially hirsute women” are walking on the Brooklyn Bridge; none of them are painting houses or doing other commercial

132. *Id.*

133. *Id.*

134. See *supra* notes 31-33 and accompanying text.

things.¹³⁵ The comments to Restatement Second can be read as supporting that common sense suggestion.¹³⁶ But that is not what law students are reading in the twenty-first century counterparts to Langdell's *Summary*, or what lawyers are reading in reported cases.

IV. MATERIALS FOR LAW STUDENTS

Recall that Langdell first contrasted bilateral and unilateral contracts in a summary he wrote for law student use.¹³⁷ Accordingly, let's look at the treatment of bilateral and unilateral contracts in the "summaries" law students use today.¹³⁸

The summary most used by law students is *The Conviser Mini Review*.¹³⁹ It has a section entitled "Unilateral or Bilateral

135. Cf. E. ALLAN FARNSWORTH, *CONTRACTS* § 3.24, at 183 (4th ed. 2004) ("The popularity of the Brooklyn Bridge hypothetical has been due in part to the lack of more practical illustrations."); see also generally Mark B. Wessman, *Is "Contract" the Name of the Game? Promotional Games as Test Cases for Contract Theory*, 34 ARIZ. L. REV. 635, 636 (1992) (discussing promotional games as a more practical illustration).

136. We agree with Professor Pettit who relied on (1) Comment f to Restatement Second section 1, Reporter's Note, (2) Comment b to Restatement Second section 32, and (3) Comment a to Restatement Second section 45 to conclude that "the drafters intended that Section 45 apply only to a small minority of [non-commercial] cases; they believed that only rarely do offerors intend to limit the mode of acceptance to performance." Pettit, *supra* note 129, at 557-58 & n.36.

137. See generally LANGDELL, *SUMMARY*, *supra* note 8; see also *supra* text accompanying note 10.

138. We know that Langdell's summary was physically a part of a casebook. See LANGDELL, *A SELECTION OF CASES* (2d ed.), *supra* note 8 and accompanying text. And, we know that Professor Farnsworth wrote two articles about contracts casebooks as "scholarship." See Farnsworth, *Casebooks and Scholarship*, *supra* note 58, at 903; E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406 (1987). We do not know whether casebooks are "scholarship," at least as that word is used at "top tier" law schools like Georgetown. We do know that while the summaries discussed in this article are not "scholarship," however that word is used, students at all tiers of law school read these summaries more than they read casebooks.

To the extent that students still read casebooks, they are reading much less about "unilateral contracts" and "bilateral contracts." Compare LON L. FULLER & ROBERT BRAUCHER, *BASIC CONTRACT LAW* 308-50 (1964) (including a forty-two page section on unilateral contracts), with LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 434-36 (7th ed. 2001) (containing only a "note" slightly longer than one page on offers to enter into unilateral contracts, although there are also five other page entries under "unilateral contract" in the index).

139. A recent antitrust suit alleges that more than 95% of the students who take the bar and take a bar review course take the course with Barbri. Complaint at 12, Rodriguez v. West Publ'g Corp., No. CV05 3222 (C.D. Cal. Apr. 25, 2005), available at

Contract,” which states “[m]odern courts generally interpret an offer as unilateral only if its terms clearly warn that an act is required for acceptance.”¹⁴⁰ *The Conviser Mini Review* also reviews the rule of Restatement section 45 without mentioning the Brooklyn Bridge, Restatement section 45 or Restatement Second section 45: “The offeror’s power to revoke is limited if . . . [i]n the case of a *unilateral contract*, the offeree has embarked on performance”¹⁴¹

A popular summary other than *Conviser* is *Gilbert Law Summaries*.¹⁴² And Gilbert’s¹⁴³ uses both the term “unilateral contract”¹⁴⁴ and the Brooklyn Bridge hypothetical.¹⁴⁵ Professor Robert Hillman’s popular new “concise hornbook” on contracts uses a piano problem instead of a Brooklyn Bridge hypothetical¹⁴⁶ and defiantly uses the terms “unilateral contract” and “bilateral contract”: “Despite the Restatement drafters’ conclusion that the terminology ‘unilateral and bilateral’ contract was obsolete, the terms are still helpful in encapsulating *the concepts* and you should not hesitate to use them. (If anybody criticizes you, please tell them to call me).”¹⁴⁷ Professor Hillman discloses neither his phone number nor what

<http://www.lawschool.com/BarBriComplaint.pdf>; see also Jeremy Blachman, *Good Luck With That . . .*, THE REC., Feb. 3, 2005, available at <http://www.hlrecord.org/media/paper609/news/2005/02/03/Opinion/good-Luck.With.That-851848.shtml?norewrite&sourcedomain=www.hlrecord.org> (“There’s a book called the ‘Conviser Mini Review.’ I assume Conviser is a Latin word meaning ‘horribly unpleasant to read.’”).

140. THE CONVISER MINI REVIEW: CONTRACTS 10 (2005). “Clearly warn”—interesting choice of words. I don’t know what “warn” means in this context. You need to know that although I do bar review lectures for the company that Conviser runs, BAR/BRI, I did not write any part of the Mini Review.

141. *Id.* at 5-6. “Embarked on performance.” Again, an “interesting” choice of words—again, not our words.

142. We had thought we would be the first law review authors to cite to a Gilbert Law Summary. We are not even the first law review authors to cite to the Gilbert Contract Law Summary. See Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course Powerpoint, Laptops, and the Casefile Method*, 44 ST. LOUIS U. L.J. 1289, 1290 n.2 (2000).

143. Just as “Conviser” did not write the “Conviser” Mini Review, “Gilbert” did not write “Gilbert” Law Summaries. Professor Melvin A. Eisenberg, one of our heroes, wrote *Gilbert Law Summaries on Contracts*. We are reasonably certain that Professor Eisenberg did not write the *Conviser Mini Review*.

144. MELVIN A. EISENBERG, GILBERT LAW SUMMARIES ON CONTRACTS § 33 (2002).

145. *Id.* at § 245.

146. See ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 55 (2004).

147. *Id.* at 47-48 (emphasis added) (footnote omitted).

he means by “the concepts” that are encapsulated in the terms.¹⁴⁸

V. POST-RESTATEMENT SECOND REPORTED CASES USING THE TERMS UNILATERAL CONTRACT AND BILATERAL CONTRACT

Like Professor Hillman, courts continue to use the terms “unilateral contract” and “bilateral contract” without directly indicating what the terms are “encapsulating.”¹⁴⁹ More than twenty years ago, Professor Mark Pettit, Jr. reported:

An examination of American cases, decided since the first tentative draft of the *Second Restatement* was published in 1964, reveals not only that lawyers and judges continue to employ unilateral contract analysis in traditional areas, but that they find the concept useful for expanding contractual analysis into new areas. Of particular importance is the use of unilateral contract to establish one-way obligations of such institutions as employers, governments, and schools toward individuals with whom they deal. Unilateral contract has become an important concept in defining relationships that arise in our increasingly organized society.¹⁵⁰

A review of American cases shows 435 reported cases since January 1, 2000, that have used the phrase.¹⁵¹ While “unilateral contract analysis” is clearly being used, less clear is whether courts are using it, or should be using it, to expand such contractual analysis into new areas. Two examples of the areas that Professor Pettit mentions are particularly worth discussing: government contracts and employment contracts.

148. See *id.* It is (607) 255-4902; see also Cornell Law School Faculty, Robert A. Hillman, http://www.lawschool.cornell.edu/faculty/faculty_bios/hillman.html (last visited May 24, 2006).

149. See, e.g., *D.L. Peoples Group, Inc. v. Hawley*, 804 So. 2d 561 (Fla. Dist. Ct. App. 2002); *Papas v. Michigan Gaming Control Bd.*, 669 N.W.2d 326 (Mich. Ct. App. 2003).

150. Pettit, *supra* note 129, at 551-52 (footnote omitted).

151. Based on a Westlaw search conducted in December 2005 in the “all cases” database for “unilateral contract.”

A. Government Contracts: Contract Zoning

In law school, zoning is taught in property law classes and is also taught in constitutional law classes because it is part of the police power.¹⁵² Zoning in the United States dates from the 1916 New York City comprehensive zoning ordinance¹⁵³ and the 1926 decision in *Village of Euclid v. Amber Realty Co.*¹⁵⁴ A recent law review article describes the zoning process as follows: “The traditional zoning process consists of the adoption of a comprehensive plan and the issuance of local zoning ordinances pursuant to the plan. The adoption of local zoning ordinances is accomplished by a hearing and public participation.”¹⁵⁵

“Contract zoning” is based on bargaining between a governmental entity and a land owner. The use of the phrase “contract zoning” in reported cases dates from dicta in the 1960 New York Court of Appeals decision in *Church v. Town of Islip*.¹⁵⁶

Appellants’ arguments all revolve about the idea that this is illegal as “contract zoning” because the Town Board, as a condition for rezoning, required the owners to execute and record restrictive covenants as to maximum area to be occupied by buildings and as to a fence and shrubbery. Surely these conditions were intended to be and are for the benefit of the neighbors. Since the Town Board could have, presumably, zoned this Bay Shore Road corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation. Since the owners have accepted them, there is no one in a position to contest them. Exactly what “contract zoning” means is

152. See JOHN E. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 321 (1962) (“So extensive a regulation can be justified only under the police power of the state.”).

153. Cf. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 592 (2000) (“In 1920, only New York and a few other cities had comprehensive zoning.”).

154. 272 U.S. 365 (1926) (upholding the constitutionality of the Euclid zoning ordinance under the city’s police power).

155. Shelby D. Green, *Development Agreements: Bargained-for Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 386 (2004) (footnotes omitted).

156. 168 N.E.2d 680 (N.Y. 1960). There were earlier decisions that invalidated what today would be called “contract zoning” without calling it “contract zoning.” See, e.g., *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956); *V.F. Zahodiakin Eng’g Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 131-32 (N.J. 1952).

unclear and there is really no New York law on the subject. All legislation “by contract” is invalid in the sense that a Legislature cannot bargain away or sell its powers. But we deal here with actualities, not phrases. To meet increasing needs of Suffolk County’s own population explosion, and at the same time to make as gradual and as little of an annoyance as possible the change from residence to business on the main highways, the Town Board imposes conditions. There is nothing unconstitutional about it. Incidentally, the record does not show any agreement in the sense that the owners made an offer accepted by the board.¹⁵⁷

Exactly what “contract zoning” means is still unclear.¹⁵⁸ The arguments, however, that “contract zoning” is “illegal” are now more clearly stated. For example, in *McLean Hospital Corp. v. Town of Belmont*, the Massachusetts Court of Appeals explained: “The process is suspect because of the concern that a municipality will contract away its police power to regulate on behalf of the public in return for contractual benefits offered by a landowner whose interest is principally served by the zoning action.”¹⁵⁹ In *Chung v. Sarasota County*, a Florida court provided a different reason:

157. *Church*, 168 N.E.2d at 683.

158. *See, e.g.*, *Morgan Co. v. Orange County*, 818 So. 2d 640, 642 (Fla. Dist. Ct. App. 2002) (defining “contract zoning” as any agreement between a governmental body with a landowner for zoning “for consideration”); *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 367 n.17 (Mass. 2003) (“[W]hat one court or commentator may term ‘contract zoning,’ another might now label as something else.”); *Kerik v. Davidson County*, 551 S.E.2d 186, 192-93 (N.C. Ct. App. 2001) (limiting contract zoning to agreements based on reciprocal promises).

159. 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002); *see also generally* *Green*, *supra* note 155, at 401-02 (discussing the “reserved powers doctrine”). *But cf.* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 26 (2000). Fennell explains:

the fact that a community is willing to sell the right to violate a given regulation provides a strong indication that the regulation does not constitute a true exercise of the police power.

If zoning really constituted an exercise of the police power on the same order as a ban on shouting “fire” in a crowded theater, this objection might have some bite. However, zoning was designed to do something quite different—protect property values and neighborhood environments. The planning and police power justifications were largely *ad hoc* rationalizations concocted to achieve this goal. . . . Land use regulations are quite different from traditional exercises of police power

Id. (footnotes omitted).

One of the reasons contract zoning is generally rejected is because “[t]he legislative power to enact and amend zoning regulations requires due process, notice, and hearings.” “Assuming that the developer and municipality bargain for a rezoning ordinance that is fairly debatable and nondiscriminatory, contract zoning is nevertheless illegal when they enter into a bilateral agreement involving reciprocal obligations. By binding itself to enact the requested ordinance (or not to amend the existing ordinance), the municipality bypasses the hearing phase of the legislative process.”¹⁶⁰

Note that the Florida court uses the limiting term “bilateral agreement.” Some courts have distinguished between contract zoning and “unilateral contract zoning.” Consider the following much-cited dictum from *Dacy v. Village of Ruidoso*, a case holding that contract zoning was unenforceable:

A contract to zone may be in the form of either a unilateral contract or a bilateral contract. . . . [I]n the context of contract zoning, a unilateral contract describes two possible situations: Either a municipality promises to rezone in return for some action or forbearance by the other contracting party, or the other contracting party makes a promise in return for the municipality’s act of rezoning. . . .

[W]e believe that contract zoning is illegal whenever it arises from a *promise* by a municipality to zone property in a certain manner, *i.e.*, when a municipality is either a party to a bilateral contract to zone or when a municipality is a party to a unilateral contract in which the municipality promises to rezone in return for some action or forbearance by the other contracting party.

A contract in which a municipality promises to zone property in a specified manner is illegal because, in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures. . . .

160. 686 So. 2d 1358, 1359-60 (Fla. Dist. Ct. App. 1996) (quoting Terry E. Lewis et al., *Spot Zoning, Contract Zoning, and Conditional Zoning*, in 2 FLORIDA ENVIRONMENTAL AND LAND USE LAW 9-1, 9-13 (James J. Brown ed., 2d ed. 1994); Roy P. Cookston & Burt Bruton, *Zoning Law*, 35 U. MIAMI L. REV. 581, 589 n.34 (1981)) (citations omitted).

The foregoing analysis implies that one form of contract zoning is legal: a unilateral contract in which a party makes a promise in return for a municipality's *act* of rezoning. In this situation, the municipality makes no promise and there is no enforceable contract until the municipality acts to rezone the property. Because the municipality does not commit itself to any specified action before the zoning hearing, it does not circumvent statutory procedures or compromise the rights of affected persons.¹⁶¹

The *Dacy* case involved an exchange of property between the Village and Dacy in which Dacy transferred property to the Village that the Village needed for a highway right-of-way and the Village transferred property to Dacy that the Village promised to rezone from R-1 (residential single family) to R-2 (residential multi-family).¹⁶² After the exchange of deeds, Dacy applied to the Village for the change in zoning to R-2.¹⁶³ The Planning and Zoning Commission, which advised the Village Council on zoning, recommended the rezoning.¹⁶⁴ The Village Council, however, denied the Dacy rezoning request.¹⁶⁵ Dacy sued, alleging, *inter alia*, breach of contract and misrepresentation.¹⁶⁶ The trial court ruled for the Village, and the New Mexico Supreme Court affirmed.¹⁶⁷ The New Mexico Supreme Court used the phrase "a form of unilateral contract zoning" and held the unilateral contract zoning unenforceable "because the Village attempted to commit itself to specific zoning action without following the required statutory procedures."¹⁶⁸ In *Dacy*, then, the contract zoning was not valid or invalid because of unilateral contract principles. The zoning was invalid because "required statutory procedures" were not followed.

"Contract zoning" raises difficult questions about balancing public and private interests, about the relative roles of regulation and negotiation in land use regulation, and about retaining the

161. 845 P.2d 793, 796-98 (N.M. 1992) (citations omitted).

162. *Id.* at 794-95.

163. *Id.* at 795.

164. *Id.*

165. *Id.*

166. *Dacy*, 845 P.2d at 795.

167. *Id.* at 794.

168. *Id.* at 798.

clarity and transparency benefits of the legislative process with the flexibility of the bargain. It is not helpful in working through these questions to either use the term “unilateral contract” or distinguish between “unilateral contracts” in which the government is the offeror from “unilateral contracts” in which the government is the offeree.¹⁶⁹ Land use scholars

169. See Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3, 21 n.81 (2005) (“[T]he unilateral-bilateral distinction is illusory; in either circumstance, an applicant will only accept additional property restrictions if the local government provides some countervailing benefit.”); cf. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 979 (1987). Wegner explains:

Care must be taken in evaluating this body of precedent to determine whether the terminology adopted was intended to characterize the land use control mechanisms in question for purposes of defining the applicable theoretical framework, or whether instead, it was adopted for purposes of describing the ultimate disposition of the case. An examination of the cases supports the latter view.

Id. But see *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 549 n.6 (Mass. App. Ct. 1998) (“We also think the contract analysis used by the court in *Dacy v. Ruidoso*, although not decisive, is persuasive . . .”) (citation omitted).

Similarly, the use of the term “unilateral contract analysis” is not helpful in determining whether a court should enforce a plea bargain agreement between the government and an individual. Courts have viewed a plea bargain as a unilateral contract in order to avoid two concerns: (1) “binding a defendant to a ‘promise’ to plead guilty might infringe that defendant’s Fifth Amendment constitutional rights,” and (2) “creat[ing] ‘practical difficulties’ when ensuring compliance with [Federal Rule of Criminal Procedure] 11’s knowing and voluntary plea requirements.” Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 883-84 (2004). And, “it has been suggested that Rule 11 plainly contemplates a unilateral approach because Rule 11 statutorily mandates defendant performance as a prerequisite to the receipt of his promised return.” *Id.* at 884. Again, we believe that this is once again merely using the terms or definitions of “unilateral contract” and “bilateral contract” to describe the results already reached by the court. See *United States v. Hyde*, 520 U.S. 670, 677-78 (1997).

[T]he [Federal Rules of Criminal Procedure] nowhere state that the guilty plea and the plea agreement must be treated identically. Instead, they explicitly envision a situation in which the defendant performs his side of the bargain (the guilty plea) before the Government is required to perform its side (here, the motion to dismiss four counts). If the court accepts the agreement and thus the Government’s promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain. But if the court rejects the Government’s promised performance, then the agreement is terminated and the defendant has the right to back out of his promised performance (the guilty plea), just as a binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent.

Id. But see Pettit, *supra* note 129, at 569 (“Most judges . . . choose unilateral contract analysis simply because it accords with their view that plea agreements between

disagree about moving toward negotiated land-use regulation.¹⁷⁰ We “don’t have a dog in that fight”—we are simply proposing that the move not be by bearded ladies via the Brooklyn Bridge.¹⁷¹

B. Employment Contracts: Modifying Employment-at-Will

Most employment relationships are at-will. Under the employment-at-will doctrine—a doctrine that goes back to the late 1800s—either the employer or the employee can unilaterally terminate the employment relationship at any time, for any reason, or for no reason.¹⁷² In the last twenty-five years, the employment-at-will doctrine has been restricted and modified by statutes and judicial decisions.¹⁷³ Some of these judicial decisions are based on public policy;¹⁷⁴ others seem to rely on contract law concepts.¹⁷⁵ And many of the reported cases that use contract law concepts to restrict or modify the employment-at-will doctrine use the terms “offer,” “promise,” “consideration,” “reliance,” and “unilateral contract.”¹⁷⁶

prosecutors and criminal defendants do not call for the defendant to undertake any legally enforceable obligation to enter a plea.”).

170. See, e.g., Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 STAN. ENVTL. L.J. 269, 270-71 (2005).

171. At first, Yvette, who was raised in New Jersey (and loves dogs) objected to our using that phrase in a law review article. Then I pointed out that the phrase appears twice in the same issue of the Michigan Law Review. See Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1503 (2005); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1642 (2005).

172. JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 102-03 (4th ed. 2001). Most employees feel obliged to give notice in order to maintain their professional reputation and the possibility of future employment. Cf. Amy Joyce, *Exits Without Honor*, WASH. POST, Dec. 25, 2005, at F6.

173. MURRAY, *supra* note 172, at 103-05; Teresa A. Cheek, *The Employment-at-Will Doctrine in Delaware: A Survey*, 6 DEL. L. REV. 311, 311 (2003); Susan R. Dana, *South Dakota Employment at Will Doctrine: Twenty Years of Judicial Erosion*, 49 S.D. L. REV. 47, 47 (2003).

174. MURRAY, *supra* note 172, at 103-04 & n.213; see, e.g., Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 890-91 (Mich. 1980); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986).

175. See *infra* notes 176-96 and accompanying text.

176. See, e.g., Ryan v. Prudential Ins. Co. of Am., No. Civ.A.03-CV-1674, 2004 WL 2406689 (E.D. Pa. Oct. 26, 2004); Kaplan v. Aspen Knolls Corp., 290 F. Supp. 2d 335, 337-39 (E.D.N.Y. 2003); cf. Jason A. Walters, Comment, *The Brooklyn Bridge Is Falling*

The facts in the November 16, 2005 opinion in *Long v. Copart of Connecticut, Inc.*¹⁷⁷ are representative. The plaintiff employee sued for wrongful discharge, claiming that the defendant's employee handbook "created a unilateral contract which altered her at-will employment status."¹⁷⁸ More specifically, Ms. Long was arguing that: (1) the employee handbook was the employer's offer of employment and (2) her working pursuant to that offer was both the acceptance of the offer and the bargained-for consideration for the offer.¹⁷⁹

Other law review commentary has discussed the obvious problems with such "unilateral contract" arguments by employees.¹⁸⁰ We prefer to discuss the nonobvious argument by employers that their continuing to provide employment in an employment at-will relationship turns what was an unenforceable illusory promise into an enforceable unilateral contract.¹⁸¹ For example, in *Lopez v. Ramirez*, Ramirez agreed to transfer property to Lopez, his employer.¹⁸² Ramirez later sued for a declaratory judgment that the agreement was void and unenforceable because all that he received in exchange for the

Down: Unilateral Contract Modification and the Sole Requirement of the Offeree's Assent, 32 CUMB. L. REV. 375, 382 (2002) ("Today, the vast majority of jurisdictions that recognize a handbook exception to at-will employment do so on the basis of unilateral contract theory.").

177. No. 2:04 CV 298, 2005 WL 3087850 (N.D. Ind. Nov. 16, 2005).

178. *Id.* at *2, *6.

179. *See id.* at *6; cf. MURRAY, *supra* note 172, at 103-05.

180. *See generally* E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 206-09 (1990); Pettit, *supra* note 129, at 555-65. These articles focus on three problems: First, is the employee's handbook an offer, i.e., "a manifestation of [the employer's] willingness to enter into a bargain"? Second, is the employee's continuing to do what she was already doing—working for the employer—consideration, i.e., a bargained for exchange? Third, is the employee's handbook and the employer's continuing to work the kind of "induce[d] action or forbearance" that triggers promissory estoppel? *See* RESTATEMENT (SECOND) OF CONTRACTS § 90, at 242.

181. *See Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 645 n.6 (1994). This is different from the more obvious situation in which the employer agrees to do something in addition to merely continuing employment and later does what she agreed to do. For example, in any employment-at-will, an employer promises to provide additional training and an employee promises not to compete after leaving. If the employer does provide the training, then the employer has accepted by performing and formed an enforceable unilateral contract. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 50(1), at 128; § 53(1), at 134 (1979).

182. No. 13-04-379-CV, 2005 WL 1643933, at *1 (Tex. App. July 14, 2005).

property was Lopez's offer of continued at-will employment.¹⁸³ The court first acknowledged that an employer's promise of at-will employment is illusory because in at-will employment the employer has the option of terminating employment at any time.¹⁸⁴ Nonetheless, the court granted Lopez summary judgment, reasoning that, "Assuming that Lopez's promise to employ Ramirez . . . is illusory, the parties formed a unilateral contract when Lopez actually provided . . . employment . . ."¹⁸⁵

A recent Vermont case reached a similar result by using the language of "consideration," not "unilateral contract."¹⁸⁶ *Summits 7, Inc. v. Kelly* involved the question of the enforceability of a covenant not to compete entered into during employment-at-will.¹⁸⁷ Kelly started work at Summits 7 in January 2000.¹⁸⁸ A year later, she signed a covenant not to compete.¹⁸⁹ In 2003, Kelly voluntarily left Summits 7 and went to work for a competitor.¹⁹⁰ These were good facts for the employer; they led to a good result for the employer.

The Vermont Supreme Court identified consideration as the "primary issue."¹⁹¹ The court concluded that "continued employment alone is sufficient¹⁹² consideration . . ."¹⁹³ The majority opinion in *Summits 7* was based not on policy, but precedent—"the majority of other courts, and the recent Restatement [of Employment] draft that continued employment alone is sufficient¹⁹⁴ consideration to support a covenant not to compete entered into during an at-will employment

183. *Id.*

184. *Id.* at *2.

185. *Id.*

186. *Summits 7, Inc. v. Kelly*, 886 A.2d 365, 373 (Vt. 2005).

187. *See id.* at 367.

188. *Id.* at 367-68.

189. *Id.* at 368.

190. *Id.*

191. *Summits 7*, 886 A.2d at 372.

192. We have never understood what the adjective "sufficient" adds to "consideration." Isn't a mere peppercorn enough? *See Whitney v. Stearns*, 16 Me. 394, 396-97 (1839) (stating that even a mere peppercorn, given for value, can result in a contract); Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 746 (1996).

193. *Summits 7*, 886 A.2d at 372.

194. Same "ticky" objection to the use of the adjective "sufficient" in describing consideration. *See supra* note 192.

relationship.”¹⁹⁵ A strong dissent concluded that the approach of the majority of the Vermont Supreme Court (and the majority of other courts) was “illogical and unpersuasive. Whether there is adequate consideration should be judged based on the expectations of the parties at the time they enter into the agreement.”¹⁹⁶

Since the employer’s argument in cases like *Lopez* or *Summits 7* is based on what the employer does after the employee promise, the focus perhaps should be on promissory estoppel under Restatement Second section 90, not consideration.¹⁹⁷ Employer *Summits 7* (or *Lopez*) could argue that its continuing to provide employment to Kelly (or Ramirez) after the promise not to compete (or to sell property) was (1) “action” that (2) promisor Kelly (or Ramirez) should “reasonably expect,” and (3) “injustice can be avoided only by enforcement of the promise.”¹⁹⁸

Even more promising is enforcing the employee’s promise under Professor Eisenberg’s—the Gilbert guy—theory of enforcing promises that increase probability.¹⁹⁹ He uses the following example for illusory promises:

Call the person who makes the real promise in an illusory promise transaction A, and call the person who makes the illusory promise B. In illusory promise cases . . . the promisor, A, does not make a promise to B for nothing, as a gift. He makes it for something, as a bargain. A seeks to advance his own interests by increasing the probability of exchange.

A makes his promise because he believes that B’s incentives to exchange with A rather than with others would be insufficient unless the promise is made. . . . A has a degree of confidence in the attractiveness of his performance that he believes B does not share. A therefore

195. *Summits 7*, 886 A.2d at 372.

196. *Id.* at 376 (Johnson, J., dissenting).

197. *Cf. Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 121 (Ind. 1994) (permitting use of promissory estoppel by employee); *see also* Cortlan H. Maddux, Comment, *EMPLOYERS BEWARE! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197, 218 (1997).

198. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90, at 242.

199. Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1014 (1998). Even though the Gilbert author is Melvin A. Eisenberg, it is the same guy.

makes a promise to B that is intended to change B's incentives to exchange with A so as to increase the probability of exchange. A does this by making a commitment he believes will induce B to give A a chance to show that his performance is attractive²⁰⁰

According to Professor Eisenberg's theory, Kelly made the commitment not to compete so that Summits 7 would give her a greater chance to show the quality of her work; so, her commitment increased the probability of continued employment. Similarly, Ramirez made the commitment to transfer property to Lopez so that Lopez would give him a greater chance. In describing similar situations, Professor Eisenberg used the phrase "classical unilateral contracts."²⁰¹ Again, however, the use of the phrase "unilateral contract" at best describes a result; it does not cause or even help reach the result.²⁰²

VI. A PARTING LOOK AT BEARDED LADIES AND THE BROOKLYN BRIDGE

As Professor Eisenberg's article on chance and probability illustrates, contract law professors today, in both law review articles and books, are both creative and insightful in explaining bases for contract liability. A book review of a book on contract theory²⁰³ properly concludes that "[c]ontract theory suffers from an embarrassment of riches."²⁰⁴ In his day, Professor Langdell

200. *Id.*

201. *Id.*

202. It has been argued that contract law generally should not cause the result. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 158 (2005) ("Contract law, although not wholly incompatible with employment, does not fully account for the broad range of relational interests and contexts present in employment relationships.").

203. The book on contract law theory is cleverly titled *Contract Theory* and is by Stephen A. Smith, not the ESPN commentator, but the McGill law professor. In an equally cleverly titled article on the influence of two decades of contract law scholarship on judicial rulings, Dr. Gregory Crespi begins with the statement, "Over the last two decades, a substantial and diverse body of contract law scholarship has been produced. . . . Much of this work is of a rather theoretical and abstract character." Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105, 105 (2004). He concludes thirteen pages later that "[c]ontract law scholarship, and legal scholarship generally, probably does in fact have some modest influence on at least some judicial decisions." *Id.* at 118.

204. Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1488 (2005) (reviewing STEPHEN A. SMITH, *CONTRACT THEORY* (2004)).

was creative and insightful in explaining that a combination of one person's words and another person's conduct could be a basis for contract liability and using the short phrase "unilateral contract" to describe such a contract. Nineteenth-century contract law scholarship did not suffer from an embarrassment of riches.

The important question is how a court determines whether there is a contract, not whether courts continue to use the phrase "unilateral contract." Should the court be guided by economic theories of efficiency and welfare maximization, or rights-based theories of expectation and reliance? If the latter, a court should explain why words and/or acts²⁰⁵ are singled out and given legal significance. Do the words invite a bargained-for exchange or reliance or some combination of the two?²⁰⁶ Do the acts evidence a bargained-for exchange or reliance or some combination of the two?

The words "unilateral contract" are no more important in answering these "real world" questions than the words "Denny Crane."²⁰⁷ In the usual situation, it makes no difference whether a contract is formed by a promise for a promise or a promise for an act—whether the contract is unilateral or bilateral. "Unilateral contract" can help a court describe a contract based in part on conduct; it cannot help a court determine whether there is a legal basis for such a contract.

This does not mean that unilateral contracts and the Brooklyn Bridge hypothetical are not an important part of the law school world. While we, like Llewellyn, believe that an offer to enter into a unilateral contract is as rare as a bearded lady on the Brooklyn Bridge²⁰⁸ or as a "fertile octogenarian,"²⁰⁹

205. For a discussion of the philosophical approach called "speech act theory" that blends words and acts, see Tiersma, *supra* note 67, at 15-18.

206. See Stoljar, *supra* note 31, at 534 (blending reliance together with bargain into reliance-bargain).

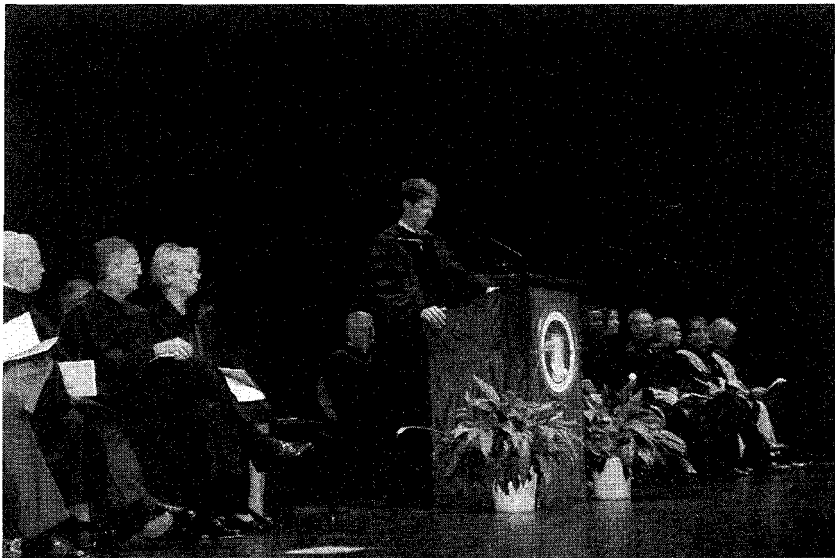
207. Denny Crane is a character on the television series, *Boston Legal* (ABC television broadcast 2004-present).

208. To borrow from the first President Clinton, the accuracy of our comparison of offers to enter into unilateral contracts and bearded ladies "depends on what the meaning of the word 'bearded' is." Cf. Steven Lubet, *The Importance of Being Honest*, 8 GREEN BAG 2D 163, 170 (2005) ("In his grand jury testimony, Clinton famously said, 'It depends on what the meaning of the word "is" is.'"). There are still some offers to enter into unilateral contracts. Offers of rewards are offers still generally considered to be offers to enter into

generations of Arkansas law students had a much richer law school experience because of Wylie Davis' and Al Witte's use of Brooklyn Bridge hypotheticals in their contracts classes and Dick Atkinson's use of fertile octogenarian hypotheticals in his property classes. We hope that their successors at the University of Arkansas Law School and their counterparts Georgetown and SMU carry on.

unilateral contracts. *See generally* Pablo Lerner, *Promises of Rewards in a Comparative Perspective*, 10 ANN. SURV. INT'L & COMP. L. 53 (2004).

209. For those who had property professors less memorable than Richard Atkinson, the "fertile octogenarian," along with the "unborn widow," are fictitious creatures in the world of wills, trusts, and estates that possess the ability to violate the Rule Against Perpetuities and thus invalidate a trust. A "fertile octogenarian" relies on the legal (and with today's technological advances not entirely absurd) presumption of the fertility of a woman throughout her life, even a woman in her eighties. She may thus bear children long after the death of the grantor of the trust. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 798-801 (6th ed. 2000).



ARKANSAS LAW REVIEW