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“PROVE ME WRONG” CASES AND CONSIDERATION THEORY

*Daniel P. O’Gorman**

INTRODUCTION

Courts describe a particular category of contract cases as “prove me wrong” cases.¹ These cases involve a promisor promising to pay a specified sum of money to anyone who can disprove the promisor’s factual claim.² As the description suggests (prove *me* wrong), the promisor has a stake in the promisor’s factual claim being true. In other words, in prove-me-wrong cases the promisor is not promising a sum of money as an incentive for someone to disprove a factual claim that the promisor disbelieves. Rather, the promisor is promising the money to demonstrate the promisor’s confidence in the factual claim and to thus give the claim credence.

Courts hold that these promises are enforceable unilateral contracts, provided that a reasonable person would believe the promisor was serious and provided that the promisee does, in fact, disprove the promisor’s factual claim.³ This Article maintains, however, that prove-me-wrong promises are usually not supported by consideration and are therefore typically not enforceable as a unilateral contract, even if a reasonable person would believe that the promisor was serious, and even if the promisee disproves the promisor’s factual claim.

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¹ *Rosenthal v. Al Packer Ford, Inc.*, 374 A.2d 377, 381 (Md. Ct. Spec. App. 1977).

² See *Kolodziej v. Mason*, 774 F.3d 736, 739 (11th Cir. 2014) (alleged offer of \$1 million to anyone who could prove that defense attorney’s client could have committed a particular murder); *Republican Nat’l Comm. v. Taylor*, 299 F.3d 887, 888 (D.C. Cir. 2002) (offer of \$1 million to anyone who proved that balanced budget bill had not increased Medicare spending by more than 50 percent); *Newman v. Schiff*, 778 F.2d 460, 462 (8th Cir. 1985) (offer of \$100,000 to anyone who proved that there was a legal duty to file a tax return); *Rosenthal*, 374 A.2d at 383 (offer of \$20,000 to anyone who proved that offeror was not selling automobiles at \$89 over factory invoice price); *James v. Turilli*, 473 S.W.2d 757, 759 (Mo. Ct. App. 1971) (offer of \$10,000 to anyone who proved that the outlaw Jesse James was shot and killed in 1882); *Barnes v. Treece*, 549 P.2d 1152, 1154 (Wash. Ct. App. 1976) (offer of \$100,000 to anyone who proved that there were rigged punchboards).

³ See *Kolodziej*, 774 F.3d at 741; *Republican Nat’l Comm.*, 299 F.3d at 891; *Newman*, 778 F.2d at 466; *Rosenthal*, 374 A.2d at 382; *James*, 473 S.W.2d at 762; *Barnes*, 549 P.2d at 1155.

Courts have assumed that there is consideration simply because the promise to pay was conditioned on the performance of an act (disproving the factual claim), thereby making it an offer of a unilateral contract, and have likened the cases to those involving a reward offer (which are clearly supported by consideration).⁴ But the focus on the parties' manifestation of mutual assent (the promisee accepting by performance) and cases involving reward offers has caused courts to overlook the requirement that an agreement, to be a contract, must have consideration.⁵ And simply because a promise is conditioned on the performance of an act does not mean it has consideration.⁶

This Article maintains that, because prove-me-wrong promises are usually not given for consideration, whether a prove-me-wrong promise is enforceable should typically depend on whether the requirements of promissory estoppel have been established. Thus, the promisee should be required to establish not only that a reasonable person would believe that the promisor was serious and that the promisee disproved the factual claim, but that the promisee relied on the promise, and that injustice would result unless the promise is enforced.⁷

To help understand the legal issues involved with prove-me-wrong offers, Part I of this Article describes several related, but distinct, types of offers and promises—advertisements for goods or services; reward offers; offers of a prize; warranties; and, of course, prove-me-wrong offers. Part II surveys the reported opinions involving the enforceability of prove-me-wrong offers. Part III provides a background of the law of consideration and promissory estoppel. Part IV explains why there is usually no consideration for prove-me-wrong offers. Part V explains why promissory estoppel is a preferable theory for determining whether a prove-me-wrong offer is enforceable. The last Part is a brief conclusion.

I. "PROVE ME WRONG" OFFERS DISTINGUISHED FROM SIMILAR OFFERS AND PROMISES

To understand the legal issues involved in the enforceability of prove-me-wrong offers, it is useful to compare such offers to similar, but distinct, types of offers and promises. Prove-me-wrong offers share characteristics with each of these other types of offers but are different from each in im-

⁴ See *Newman*, 778 F.2d at 465 (likening a prove-me-wrong offer to a reward offer).

⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

⁶ See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 4.5, at 156-57 (6th ed. 2009) (distinguishing a condition on a promise of a gift from consideration).

⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981) (setting forth elements of promissory estoppel).

portant ways. Recognizing these differences is necessary to avoid grouping prove-me-wrong offers with one of these other categories and thereby overlooking an important characteristic that a prove-me-wrong offer might not share with the category into which it has been grouped.

This Part briefly describes four types of offers or promises that are similar to prove-me-wrong offers—advertisements for goods or services; reward offers; offers of a prize; and warranties—and identifies the typical legal issues involved in the enforceability of such offers. This Part concludes by describing how the legal issues involved in prove-me-wrong offers are similar to, yet different from, these other types of offers.

A. *Advertisements for Goods or Services*

The first category of offers that is similar to the prove-me-wrong variety involves a business enterprise advertising goods or services to the general public through the Internet, television, radio, newspaper, display, sign, catalog, price list, circular, or handbill.⁸ The key issue in these cases is usually whether the advertisement is an offer that can be accepted by a consumer without a further manifestation of assent from the business enterprise, or whether it is simply a solicitation for offers from consumers.⁹ If an advertisement is an offer, consideration is rarely an issue because the business enterprise is selling the goods or services for a price, and, thus, the promise to sell and the promise to buy serve as the consideration for the agreement.¹⁰ No one doubts that the advertiser's motive in offering the goods or services for sale is to obtain the purchase price from the buyer, particularly because the audience is the general public as opposed to relatives or friends (thus negating the possibility of a pretense of a bargain).

The general rule is that such an advertisement is not an offer but an invitation for offers, and thus merely a preliminary negotiation.¹¹ There are two principal reasons why an advertisement for goods or services is not ordinarily considered an offer. First, the terms of the proposed bargain are often incomplete, thus suggesting that the business enterprise does not in-

⁸ See *id.* § 26 cmt. b ("Business enterprises commonly secure general publicity for the goods or services they supply or purchase" and that such advertisements can be "by display, sign, handbill, newspaper, radio or television" or "catalogues, prices lists and circulars . . .").

⁹ See *id.* ("Advertisements . . . are not ordinarily intended or understood as offers It is of course possible to make an offer by an advertisement directed to the general public, but there must ordinarily be some language of commitment or some invitation to take action without further communication." (citation omitted)).

¹⁰ See *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661, 663 (M.D. Ga. 1973) ("A promise to buy certain goods is good consideration for a promise to sell those goods.").

¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (AM. LAW INST. 1981). But see Jay M. Feinman & Stephen R. Brill, *Is an Advertisement an Offer? Why It Is, and Why It Matters*, 58 HASTINGS L.J. 61, 86 (2006) (asserting that the general rule is the opposite).

tend to conclude a deal until the details are agreed upon.¹² For example, the advertisement might not specify the number of items being offered for sale or provide details regarding the items. Second, it is believed that sellers do not usually intend for advertisements to be offers that can be accepted without a further manifestation of assent from the seller, and it is also believed that consumers do not understand them as such.¹³ The general rule that advertisements are not offers holds even if the terms of the suggested offer are stated in some detail.¹⁴ For example, the *Restatement (Second) of Contracts* includes the following illustration: "A, a clothing merchant, advertises overcoats of a certain kind for sale at \$ 50. This is not an offer, but an invitation to the public to come and purchase."¹⁵

There is, however, "a very narrow, yet well-established, exception to this [general] rule, which arises when an advertisement is 'clear, definite, and explicit, and leaves nothing open for negotiation.'"¹⁶ For such an advertisement to be an offer, there "must ordinarily be some language of commitment or some invitation to take action without further communication."¹⁷ For example, the *Restatement (Second) of Contracts* provides that, with respect to the above illustration involving the clothing merchant, "[t]he addition of the words 'Out they go Saturday; First Come First Served' might make the advertisement an offer."¹⁸ It further provides that the following advertisement would be an offer: "A advertises that he will pay \$ 5 for every copy of a certain book that may be sent to him."¹⁹

A second issue in some of the advertisement cases is whether, assuming that the advertisement was an offer, the business enterprise has the power to void the contract under the doctrine of unilateral mistake.²⁰ For example, some of the advertisement cases involve a typographical error in

¹² See RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. c (AM. LAW INST. 1981) ("Incompleteness of terms is one of the principal reasons why advertisements . . . are ordinarily not interpreted as offers.").

¹³ See *id.* § 26 cmt. b (stating that advertisements "are not ordinarily intended or understood as offers to sell").

¹⁴ *Id.*

¹⁵ *Id.* § 26 cmt. b, illus. 1.

¹⁶ *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P.3d 1222, 1237 (Haw. 2002) (quoting *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957)).

¹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (AM. LAW INST. 1981).

¹⁸ *Id.* § 26 cmt. b, illus. 1.

¹⁹ *Id.* § 26 cmt. b, illus. 2.

²⁰ See, e.g., *Donovan v. RRL Corp.*, 27 P.3d 702, 724-25 (Cal. 2001) (holding that a unilateral mistake with respect to the price of a car in the advertisement rendered the contract voidable); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 949 (Fla. Dist. Ct. App. 1991) (remanding case involving typographical error regarding the amount of jackpot at a dog track); *Woods v. Morgan City Lions Club*, 588 So. 2d 1196, 1201 (La. Ct. App. 1991) (holding that a unilateral mistake with respect to a typographical error on an advertisement for a bingo game did not render the contract voidable); *Chang v. First Colonial Sav. Bank*, 410 S.E.2d 928, 930 (Va. 1991) (holding that a typographical error in a newspaper advertisement did not render the contract voidable).

the printed advertisement.²¹ Finally, a third issue in some of the advertisement cases is whether the advertiser was making a serious proposal or simply joking. For example, in *Leonard v. PepsiCo, Inc.*,²² the court held that a reasonable person would not have taken the advertiser seriously when, at the end of a television commercial, it offered a military jet in exchange for a specified number of Pepsi Points.²³

B. *Offers of a Reward*

The second type of offer that is similar to a prove-me-wrong offer is an offer of a reward. In these cases, the offeror usually promises money in exchange for the performance of some act, such as finding a fugitive, returning a lost dog, or finding a lost diamond bracelet.²⁴ These offers are similar to offers advertising the sale of goods or services in that they are often made to the general public and are thus advertised.²⁵ But these offers differ from advertising goods or services in that the offeror, not the offeree, is the one to pay money.²⁶ In reward cases it is clear that the offeror's motive in making the offer is to induce the offeree to perform the requested act. For example, the offeror wants the fugitive captured, the dog returned, or the bracelet found, and offers the reward money as an inducement to increase the chance that the desired event will occur.

The issues in reward cases usually differ from those in cases involving the advertising of goods or services. Offers of reward are not usually characterized by the incompleteness often found with advertisements for goods or services. They typically specify how to accept the offer (perform the requested act), and because they ordinarily promise a sum of money, the offeror's promised performance tends to be sufficiently definite.²⁷ Although the number of persons who can accept the offer is often not specified, rules of interpretation usually limit the number. For example, the *Restatement (Second) of Contracts* includes the following illustration:

²¹ See *Donovan*, 27 P.3d at 706; *Jackson*, 585 So. 2d at 949; *Woods*, 588 So. 2d at 1197; *Chang*, 410 S.E.2d at 929.

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

²³ *Id.* at 130.

²⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 32 cmt. b (AM. LAW INST. 1981) (discussing reward offers); *id.* § 32 cmt. b, illus. 3 (providing an example of a reward offer).

²⁵ See *id.* § 32 cmt. b (noting that reward offers are often "made to a large number of people").

²⁶ See *Reward*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (defining the noun *reward* as "something that is given in return for good or evil done or received or that is offered or given for some service or attainment"); RESTATEMENT (SECOND) OF CONTRACTS § 32 cmt. b, illus. 3 (AM. LAW INST. 1981) (providing an example of a reward offer in which the offeror promises to pay \$50 for the return of a diamond bracelet).

²⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 32 cmt. b, illus. 3 (AM. LAW INST. 1981).

A publishes an offer of reward to whoever will give him certain information. There is no indication that A intends to pay more than once. Any person learning of the offer has the power to accept, but the giving of the information by one terminates the power of every other person.²⁸

Also, unlike an advertisement for goods or services, the offeror usually intends her communication to be an offer, and the offeree so understands it. Thus, there is rarely an issue of whether an offer has been made.

The most common issues in reward cases are whether the offeree accepted the offer;²⁹ whether the offeree was aware of the offer;³⁰ whether the person performing the act was an offeree at the time of performance;³¹ and whether there was consideration.³² With respect to acceptance, a reward offer is the classic offer of a unilateral contract, under which the offeree accepts by performing the requested act, not by promising to perform it.³³ Also, for an offeree to accept an offer of a unilateral contract, the offeree must have been aware of the offer at the time he or she performed the act.³⁴ Further, some reward offers can only be accepted by certain persons.³⁵

²⁸ *Id.* § 29 cmt. b, illus. 1 (citation omitted).

²⁹ *See, e.g.,* *Denney v. Reppert*, 432 S.W.2d 647, 649 (Ky. 1968) (holding that claimants could not recover reward because "they did not follow the procedure as set forth in the offer of reward in that they never filed a claim with the Kentucky Bankers Association"); *Alexander v. Lafayette Crime Stoppers, Inc.*, 28 So. 3d 1253, 1257 (La. Ct. App. 2010) (holding that the plaintiffs did not accept reward offer because they had failed to comply with the offer's terms).

³⁰ *See* *Sumerel v. Pinder*, 83 So. 2d 692, 693 (Fla. 1955) (holding that plaintiff could not accept reward offer before offer was made); RESTATEMENT (SECOND) OF CONTRACTS § 23 cmt. c (AM. LAW INST. 1981) (indicating that an offeree cannot accept a reward offer unless the offeree is aware of the offer at the time of completing the required act).

³¹ *See, e.g.,* *Consol. Freightways Corp. of Del. v. Williams*, 228 S.E.2d 230, 233 (Ga. Ct. App. 1976) (affirming finding that the plaintiff was an offeree under the terms of the offer).

³² *See, e.g.,* *Slattery v. Wells Fargo Armored Serv. Corp.*, 366 So. 2d 157, 159 (Fla. Dist. Ct. App. 1979) (holding that there was no consideration for providing information leading to arrest and conviction because offeree was under a legal duty to provide such information).

³³ *See* *Sharp Elecs. Corp. v. Deutsche Fin. Servs. Corp.*, 216 F.3d 388, 393-94 (4th Cir. 2000) ("[P]rinciples of 'purely' unilateral contracts are most often applied to offers of a reward . . ."); *Davis v. Jacoby*, 34 P.2d 1026, 1030 (Cal. 1934) ("[A]n offer of a reward is a clear-cut offer of a unilateral contract which cannot be accepted by a promise to perform, but only by performance."); *Greene v. Heinrich*, 319 N.Y.S.2d 275, 277 (N.Y. App. Term) ("[F]amiliar principles of law, governing unilateral contracts, . . . apply in actions to recover on offers of reward . . ."), *aff'd*, 327 N.Y.S.2d 996 (N.Y. App. Div. 1971); *Nasser v. Cty. of Lackawanna*, 28 Pa. D. & C.3d 46, 50 (Pa. Ct. Com. Pl. 1980) ("[P]ublished offers of a reward for some desired action are nearly always offers of a unilateral contract in which the offeror makes a promise to pay in exchange for which he asks for either action or forbearance [sic] as acceptance, not for a promise to act or to forbear."); RESTATEMENT (SECOND) OF CONTRACTS § 32 cmt. b (AM. LAW INST. 1981) (noting that a reward offer is an example of offer that can only be accepted by performance).

³⁴ *See* RESTATEMENT (SECOND) OF CONTRACTS § 23 (AM. LAW INST. 1981) (an offeree cannot accept a reward offer unless the offeree is aware of the offer at the time of completing the required act).

³⁵ *See id.* § 52 ("An offer can be accepted only by a person whom it invites to furnish the consideration.").

As noted, another common issue is whether there was consideration for the offeror's promise.³⁶ Although there is no doubt that the offeror was motivated to make the promise to induce the offeree to perform the requested act, a frequent question is whether the offeree was under a preexisting legal duty to perform the act. If the promisee was under a preexisting legal duty, then the act does not qualify as legally sufficient consideration (i.e., it is not considered a "legal benefit" to the promisor or a "legal detriment" to the promisee).³⁷ For example, if a police officer was under a legal duty to attempt to apprehend a fugitive, the police officer cannot claim the reward.³⁸

C. *Offers of a Prize*

The third kind of offer similar to a prove-me-wrong offer is an offer of a prize.³⁹ Prize offers come in different varieties, including moneymaking games (e.g., pay-to-play offers), where the offeree pays a fee to play; competitions, where prizes are based on success at a contest of skill or effort (e.g., a type of prize offer that, if the offeror is genuinely seeking the result, is virtually indistinguishable from a reward offer); games incidental to a sale; and games requiring no purchase (e.g., the no-purchase-necessary mechanism perhaps motivated by a desire to avoid lottery laws).⁴⁰ Additionally, many of the promoters have prize-indemnity insurance.⁴¹

³⁶ Although an offer of a unilateral contract does not have mutuality of obligation, consideration is still required. *See Int'l Shoe Co. v. Herndon*, 133 S.E. 202, 203 (S.C. 1926) ("It is very true that mutuality of obligation is not an essential element in unilateral contracts, such as option contracts, contracts evidenced by a subscription paper, contract of offers of rewards or a guaranty, or in many other instances readily put in ordinary business affairs. The nonrequirement of mutuality in such contracts, however, does not dispense with the necessity of a valuable consideration.").

³⁷ *See, e.g., Slatery v. Wells Fargo Armored Serv. Corp.*, 366 So. 2d 157, 159 (Fla. Dist. Ct. App. 1979) (holding that there was no consideration for providing information leading to arrest and conviction because offeree was under a legal duty to provide such information).

³⁸ *See, e.g., Denney v. Reppert*, 432 S.W.2d 647, 649-50 (Ky. 1968) (holding that police officers within their jurisdiction could not accept reward offer, but a police officer acting outside of his jurisdiction could accept the offer).

³⁹ Mark B. Wessman, *Is "Contract" the Name of the Game? Promotional Games as Test Cases for Contract Theory*, 34 ARIZ. L. REV. 635, 661-62 (1992) (discussing offers of a prize).

⁴⁰ *See id.* at 655-69 (describing the categories of promotional games and similar devices).

⁴¹ *See* Leavitt Group, *Paying for Prizes—How Prize Indemnity Insurance Helps Get Fans Fired Up*, LEAVITT GRP., <https://news.leavitt.com/publications/paying-for-prizes-how-prize-indemnity-insurance-helps-get-fans-fired-up/> (July 16, 2014) ("Want to know the dirty little secret behind hole-in-one prizes, million-dollar bingo tournaments, and of course that staple of NBA half-time entertainment: the fan half-court shot? More often than not these promotions are facilitated by prize indemnity insurance, a little-known type of insurance policy that offloads the risk of a possible payout for the price of the premium.").

Prize offers are similar to advertising goods or services in that they are often advertised to the general public.⁴² They differ, however, from advertisements for goods or services in that the offeror is often promising a sum of money.⁴³ In this respect, prize offers are similar to reward offers in that they promise a sum of money upon the performance of some act and are often analogized to them.⁴⁴ And, like reward offers, they are offers of a unilateral contract.⁴⁵ They are different from reward offers, however, in that a prize is “something offered . . . in competition or in contests of chance.”⁴⁶ And, unlike a reward offer, the offeror of a prize often does not desire the act necessary to win the prize. For example, in many such cases the act necessary to win the prize—such as hitting a hole-in-one or bowling a perfect game—is of little, if any, benefit to the offeror.⁴⁷

Unlike advertisements for goods or services, and similar to reward offers, with prize offers there is usually no issue as to whether an offer has been made. The parties usually understand that the offeror is serious and intends to conclude a bargain without a further manifestation of assent from the offeror. Prize offers generally do not create issues regarding what is necessary to accept the offer because they often involve games with well-known rules or the rules are otherwise spelled out by the promoter.⁴⁸ In these types of offers, it is sometimes best not to consider the act of winning the prize as the acceptance itself, but simply a condition precedent to the promoter’s duty to pay, because winning is often outside of the offeree’s control and is thus not a manifestation of assent by the offeree.⁴⁹

With respect to consideration, in prize offers involving an entrance fee or the purchase of a product, the consideration is the fee or the purchase, and, thus, consideration is not an issue.⁵⁰ In prize offers without an entrance fee, the consideration is usually some other act, such as coming to the offeror’s store.⁵¹ To the extent a participant is required to come to the store to

⁴² See RESTATEMENT (SECOND) OF CONTRACTS § 32 cmt. b (AM. LAW INST. 1981) (noting that reward offers are often “made to a large number of people”).

⁴³ See Wessman, *supra* note 39, at 637-38.

⁴⁴ See *id.* at 645 (“[P]romotional games and contests . . . are frequently analogized to offers of rewards.”).

⁴⁵ See *Simmons v. United States*, 308 F.2d 160, 164 (4th Cir. 1962) (“The offer of a prize or reward for doing a specified act, like catching a criminal, is an offer for a unilateral contract.”).

⁴⁶ *Prize*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

⁴⁷ See, e.g., *Champagne Chrysler-Plymouth, Inc. v. Giles*, 388 So. 2d 1343, 1344 (Fla. Dist. Ct. App. 1980) (offer of a car if offeree bowled a perfect game); *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248, 1249 (Pa. Super. Ct. 1989) (offer of a car if offeree hit a hole-in-one).

⁴⁸ Wessman, *supra* note 39, at 657-58.

⁴⁹ See, e.g., *Frankel v. United States*, 118 Fed. Cl. 332, 336 (2014) (“[A] contract was formed between the FTC and each of the competitors when the competitors accepted the offer embodied in the competition by submitting entries. The FTC was obligated to provide the winner of the competition—who followed the rules—the \$50,000 first place cash prize.”).

⁵⁰ Wessman, *supra* note 39, at 658.

⁵¹ *Dorman v. Publix-Saenger-Sparks Theatres, Inc.*, 184 So. 886, 889-90 (Fla. 1938).

play, coming to the store is consideration because the owner benefits from the person's presence, as he might buy something he otherwise would not have.⁵² There is also consideration if the participant is required to provide useful information to the offeror as a condition of participation.⁵³

As for games that do not require an entrance fee or purchase of any kind, or even coming to the store or providing useful information about the participant, there is theoretically an issue of consideration,⁵⁴ though the issue is seldom raised in reported decisions.⁵⁵ The courts that have found consideration have sometimes done so on theoretically unsound reasoning, such as the intent that the promotion will increase sales⁵⁶ or that those who do buy provide consideration for those who do not.⁵⁷ In cases involving employment (such as a promise of a performance bonus), the preexisting-duty rule may be implicated.⁵⁸ Lastly, whether any resulting contract is an illegal lottery can be an issue in prize cases.⁵⁹

D. *Warranties*

The fourth type of offer that is similar to a prove-me-wrong offer is a warranty. A warranty is "[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised."⁶⁰ Warranties usually involve either a representation regarding an existing or past fact or a promise that an event not within the promisor's control will or will not occur, with an implied promise to pay damages if the warranted fact is untrue or the promised event does not come to pass.⁶¹ An example of the former is a warranty that a horse is sound or that a ship arrived in a particular port some days previously.⁶² An example of the latter is when a homebuilder warrants that a house will never burn down.⁶³

Warranties are similar to advertisements for goods or services in that they tend to be made by business enterprises, though they differ from them in that the warranties are not necessarily made by advertisement. In addi-

⁵² Wessman, *supra* note 39, at 675, 680.

⁵³ *Gottlieb v. Tropicana Hotel & Casino*, 109 F. Supp. 2d 324, 329-30 (E.D. Pa. 2000).

⁵⁴ Wessman, *supra* note 39, at 668.

⁵⁵ *Id.* at 671.

⁵⁶ *Id.* at 671-72.

⁵⁷ *Id.* at 672.

⁵⁸ *Id.* at 660.

⁵⁹ *See, e.g., Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248, 1250 n.1 (Pa. Super. Ct. 1989) (discussing whether an offer of a car for hitting a hole-in-one was an illegal gambling contract).

⁶⁰ *Warranty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. d (AM. LAW INST. 1981).

⁶² *Id.*

⁶³ *Id.* § 2 cmt. d, illus. 1.

tion, they are like advertisements in that there might be an issue as to whether the offeror was serious. For example, many warranty cases contain the question of whether the offeror was simply puffing.⁶⁴ They are also similar to advertisements for goods or services in that the offeror sells the warranty for a price; although, often the price is incorporated into the overall price for the goods or service.

They are different from advertisements for goods or services, however, in that warranties tend to be contract provisions collateral to the sale of goods, real property, or services. Moreover, they differ from reward offers in that the offeror is not seeking an act as the method of acceptance but is usually seeking a bilateral contract with the warranty simply being a provision in the contract. Finally, they are different from prize offers in that there is no competition or contest.

E. *"Prove Me Wrong" Offers*

As noted, prove-me-wrong offers involve an offeror promising a specified sum of money to anyone who can disprove a factual claim made by the offeror. These cases are similar to offers advertising goods or services in that they are often advertised to the general public. They are also similar to the advertisement of goods or services in that it might be unclear whether the offeror was making a serious proposition. They differ from such advertisements, however, in that the offeror is not offering to sell goods or services, and the offer need not be made via the typical advertising mediums or to the general public. Also, because prove-me-wrong offers typically offer a specified sum of money in exchange for disproving a particular factual claim, the terms tend to be more complete than many advertisements for the sale of goods or services.

Prove-me-wrong offers are similar to reward offers in that they tend to be specific with regard to how to accept the offer—disprove the factual claim. And, like reward offers, they are offers for a unilateral contract. Also, as noted, they are often made by advertisement to the general public, similar to most reward offers. They differ from reward offers, however, in that the offeror typically does not make the offer to induce the offeree to perform the act necessary to claim the money. The act, if performed, would be harmful to the offeror because it would disprove the offeror's factual claim. They also differ from reward offers in that the preexisting-duty rule is not implicated because the offeree would never be under a legal duty to disprove the offeror's assertion.

Prove-me-wrong offers are similar to prize offers in that they are usually made by advertisement to the general public. They are also similar to

⁶⁴ See 1 JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE § 10:10, at 860 (6th ed. 2010) ("Sometimes, the question is whether the seller's statement was a 'puff' or an express warranty.").

prize offers to the extent that one considers a prize offer to be a challenge—a type of competition between the offeror and the offeree.⁶⁵ As noted, prove-me-wrong offers are unilateral in nature and are similar to prize offers in this respect. They are also similar to many prize offers in that the offeror does not benefit from the act necessary to claim the promised sum.

Prove-me-wrong offers are similar to warranties in that the offeror promises to pay an amount of money if a particular fact turns out to be false. They are also similar in that the offeror does not desire the factual assertion to be proven false. Further, the party giving the warranty usually gives it to enhance the claim's credibility, similar to prove-me-wrong offers. Prove-me-wrong offers are different from warranties, however, in that they are usually not made in connection with a sale of goods or services. Also, in a warranty case the offeree does not want to prove the offeror wrong and does not engage in conduct specifically intending to prove that the factual assertion is incorrect.

II. "PROVE ME WRONG" CASES

This Part discusses each of the six reported U.S. cases involving a prove-me-wrong offer, taking them in chronological order. It will also discuss the famous English case of *Carlill v. Carbolic Smoke Ball Co.*⁶⁶ immediately below because it has been suggested that *Carlill* was the first prove-me-wrong case.⁶⁷

The court in *Rosenthal v. Al Packer Ford, Inc.*⁶⁸ stated that *Carlill*, decided in 1893 by the English Court of Appeal, might be the earliest prove-me-wrong case.⁶⁹ In *Carlill*, the defendant ran an advertisement stating that it would pay £100 to anyone who used the company's smoke ball three times a day for two weeks and who, despite using the smoke ball, contracted influenza or another specified ailment.⁷⁰ The plaintiff used the smoke ball as directed, contracted influenza, and later sued the defendant for the £100.⁷¹ The court held that the defendant's advertisement was an offer that a reasonable person would take seriously because the company stated in the advertisement that £1,000 had been deposited in a specified bank to show the company's sincerity in the matter.⁷² The court also held that the plaintiff

⁶⁵ See *Challenge*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (defining the noun *challenge* as "a summons that is often threatening, provocative, stimulating, or inciting").

⁶⁶ [1893] 1 QB 256 (Eng.).

⁶⁷ *Rosenthal v. Al Packer Ford, Inc.*, 374 A.2d 377, 380 (Md. Ct. Spec. App. 1977).

⁶⁸ 374 A.2d 377 (Md. Ct. Spec. App. 1977).

⁶⁹ *Id.* at 380.

⁷⁰ *Carlill*, 1 QB at 256-57.

⁷¹ *Id.* at 257.

⁷² *Id.* at 261-62, 268, 272-73.

accepted the offer by using the smoke ball as directed.⁷³ It further held that there was consideration for the offer because the plaintiff had no legal obligation to use the smoke ball as directed and the defendant benefitted from a person using the smoke ball because such use would promote its sale.⁷⁴ The court also reasoned that the resulting bargain had reasonably certain terms despite the offer failing to indicate by when the user must contract influenza to be entitled to the money.⁷⁵

Carlill is considered a prove-me-wrong case because the company in essence offered £100 to anyone who proved that the company's smoke ball did not prevent the user from contracting influenza or other specified ailments. The case, however, is better characterized as simply a guarantee that the seller's product will provide a specified result; in other words, it involves an express warranty. It seems somewhat unusual to say that the consumer is "proving" that the company is wrong, inasmuch as all the consumer does is use the product as directed and waits to see if she contracts influenza or one of the other ailments. Also, both parties hope that the company's assertion is true (i.e., both hope that the smoke ball works as claimed). *Carlill* is likely placed in the prove-me-wrong category of cases, and not the warranty cases, because the company identified a specific amount of money if the warranty was breached, an amount that can be considered a liquidated-damages provision. It is, however, properly viewed as an express-warranty case, and not a prove-me-wrong case.

The first reported U.S. opinion involving a prove-me-wrong offer is *James v. Turilli*.⁷⁶ In *James*, the defendant operated the "Jesse James Museum," maintaining that the famous outlaw Jesse James had not, as commonly believed, been shot and killed on April 3, 1882, by Robert Ford but had lived well beyond that time, including at the defendant's museum as late as the 1950s.⁷⁷ On national television, the defendant promised \$10,000 to anyone who could prove him wrong.⁷⁸ Seeking to recover the reward, the plaintiffs, the widow of James's son and her two daughters, "submitted to him affidavits of persons in and acquainted with the Jesse James family, each stating facts constituting evidence Jesse W. James 'was in fact killed as alleged in song and legend on April 3, 1882, by Robert Ford.'"⁷⁹ The defendant refused to pay, and the plaintiffs sued and prevailed at the trial court.⁸⁰

⁷³ *Id.* at 262-63, 270, 274.

⁷⁴ *Id.* at 264-65, 271, 275.

⁷⁵ *Id.* at 263-64, 266-67, 274.

⁷⁶ 473 S.W.2d 757 (Mo. Ct. App. 1971).

⁷⁷ *Id.* at 759.

⁷⁸ *Id.*

⁷⁹ *Id.* at 758-59.

⁸⁰ *Id.* at 759.

On appeal, the defendant argued that the complaint failed to state a claim because the word "prove" suggested some entity or body capable of making the determination of whether James was in fact killed in 1882.⁸¹ The appellate court rejected this argument, holding that the defendant's use of the word *prove* simply required the jury to conclude that the evidence was sufficient to persuade an ordinary man.⁸² The defendant also argued that there was insufficient evidence to link his promise to pay \$10,000 to disproving his assertion that James was not killed in 1882 but had lived until the mid-20th century.⁸³ The appellate court rejected this argument as well, finding sufficient evidence linking the promise to the assertion.⁸⁴ The defendant further argued that the evidence presented by the plaintiff was insufficient to prove that James was not killed in 1882, but the court held otherwise.⁸⁵ The appellate court, finding no reversible error, affirmed the judgment for the plaintiffs.⁸⁶

The second prove-me-wrong case is *Barnes v. Treece*.⁸⁷ In *Barnes*, the defendant, a vice president of a company that distributed punchboards, was speaking before the Washington State Gambling Commission about punchboard legitimacy and in support of the company's application for a temporary license to distribute them.⁸⁸ The vice president stated to the commission, "I'll put a hundred thousand dollars to anyone to find a crooked board. If they find it, I'll pay it," evoking laughter from the audience.⁸⁹

The next day the plaintiff saw a news report on television regarding the proceedings and heard the vice president's comment.⁹⁰ The following day the plaintiff called the vice president and told him he had two crooked punchboards and asked him if his offer was serious, and the vice president allegedly assured him that it was and that \$100,000 was being held in escrow.⁹¹ Two days later the plaintiff met the vice president and presented him with one of the punchboards, and the vice president provided him with a receipt on company stationery signed by the vice president and the company's secretary-treasurer.⁹² The plaintiff was told that the punchboard would be taken to Chicago for inspection.⁹³ The next time they met was six days later when the plaintiff provided the vice president with the second

⁸¹ *Id.*

⁸² *James*, 473 S.W.2d at 760.

⁸³ *Id.* at 761.

⁸⁴ *Id.* at 762.

⁸⁵ *Id.*

⁸⁶ *Id.* at 763.

⁸⁷ 549 P.2d 1152 (Wash. Ct. App. 1976).

⁸⁸ *Id.* at 1154.

⁸⁹ *Id.*

⁹⁰ *Id.* He also read a newspaper story that quoted the comment. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Barnes*, 549 P.2d at 1154.

punchboard during another meeting before the Washington State Gambling Commission.⁹⁴ The vice president, however, refused to pay the plaintiff the \$100,000.⁹⁵ The plaintiff sued and won at the trial court.⁹⁶

On appeal, the vice president asserted that his statement had been made in jest and was therefore not an offer.⁹⁷ The court rejected the argument, holding there was sufficient evidence for the jury to conclude that a reasonable person would have taken the offer seriously:

Although the original statement of [the defendant] drew laughter from the audience, the subsequent statements, conduct, and the circumstances show an intent to lead any hearer to believe the statements were made seriously. There was testimony, though contradicted, that [he] specifically restated the offer over the telephone in response to an inquiry concerning whether the offer was serious. [The defendant], when given the opportunity to state that an offer was not intended, not only reaffirmed the offer but also asserted that \$100,000 had been placed in escrow and directed [the plaintiff] to bring the punchboard to Seattle for inspection. The parties met, [the plaintiff] was given a receipt for the board, and he was told that the board would be taken to Chicago for inspection. In present day society it is known that gambling generates a great deal of income and that large sums are spent on its advertising and promotion. In that prevailing atmosphere, it was a credible statement that \$100,000 would be paid to promote punchboards. The statements of the defendant and the surrounding circumstances reflect [his] objective manifestation of a contractual intent . . . and support the finding of the trial court.⁹⁸

The vice president also argued that there was an unconscionable discrepancy in consideration, but the court held that "it is only when consideration is so inadequate as to be constructively fraudulent that a court should inquire into the comparative value of an act performed in response to a promise, . . . [and, as t]he record does not suggest constructive fraud, . . . the adequacy of the consideration cannot be weighed."⁹⁹

The third prove-me-wrong case is *Rosenthal v. Al Packer Ford, Inc.* In *Rosenthal*, the defendant car dealer published an advertisement stating that it was selling brand new 1972 Ford automobiles for just \$89 over factory invoice.¹⁰⁰ The advertisement also stated that "\$20,000 Has Been Deposited In The Union Trust Bank & It Will Be Paid To Anyone Who Can Prove That This Offer Is Not Absolutely True!"¹⁰¹ The court stated that if the plaintiff had proved that the offer was "not absolutely true," the plaintiff would be entitled to the promised amount.¹⁰² The court, however, affirmed the trial court's finding that the defendant's offer was in fact true, that a

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1153-54.

⁹⁷ *Id.* at 1155.

⁹⁸ *Id.*

⁹⁹ *Barnes*, 549 P.2d at 1156 (citations omitted).

¹⁰⁰ *Rosenthal v. Al Packer Ford, Inc.*, 374 A.2d 377, 378 (Md. Ct. Spec. App. 1977).

¹⁰¹ *Id.*

¹⁰² *Id.* at 382.

charge for replacing the car's AM radio with an FM radio was a transaction separate from the sale of the car, and, therefore, the defendant's statement was not false.¹⁰³

The fourth prove-me-wrong case is *Newman v. Schiff*.¹⁰⁴ In *Newman*, the defendant had made a career out of maintaining that there was no legal duty to pay taxes, authoring several antitax books.¹⁰⁵ During a live television program that included viewer phone-ins, he stated, "If anybody calls this show—I have the Code—and cites any section of this Code that says an individual is required to file a tax return, I will pay them \$100,000."¹⁰⁶ Several hours later the portion of the program including the offer was rebroadcast on a morning news show on the same network.¹⁰⁷ The plaintiff, an attorney, saw the rebroadcasted offer and located several portions of the Internal Revenue Code that he believed disproved the defendant's assertion.¹⁰⁸ The following day the plaintiff telephoned the morning news show and provided those sections of the Internal Revenue Code.¹⁰⁹ He then wrote to the show asserting that he had provided the consideration necessary to receive the promised \$100,000.¹¹⁰ The defendant, however, refused to pay.¹¹¹ The plaintiff sued the defendant for breach of contract, and the trial court held that, although the defendant renewed the offer through the rebroadcast, the plaintiff's attempted acceptance was untimely because he had not responded on the morning of the rebroadcast.¹¹²

On appeal, the appellate court referred to the defendant's offer as "a special type of offer: an offer for a reward."¹¹³ The court then noted that, had anyone called during the live show and cited the relevant Code provision, a contract would have been formed and the defendant would have been obligated to pay the promised sum.¹¹⁴ The court held, however, that the defendant had not renewed his offer when it was rebroadcast on the morning news show because a reasonable person would construe it as simply a news report showing he had made an offer on the prior show to be accepted by calling that show.¹¹⁵

¹⁰³ *Id.* at 382-83.

¹⁰⁴ 778 F.2d 460 (8th Cir. 1985).

¹⁰⁵ *Id.* at 461.

¹⁰⁶ *Id.* at 462.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Newman*, 778 F.2d at 462-63.

¹¹¹ *Id.* at 463.

¹¹² *Id.* at 463-64.

¹¹³ *Id.* at 465.

¹¹⁴ *Id.* at 466.

¹¹⁵ *Id.* at 466-67.

The fifth prove-me-wrong case is *Republican National Committee v. Taylor*.¹¹⁶ In *Republican National Committee*, the Republican National Committee (“RNC”) published a “Million Dollar Medicare Challenge” in two newspapers.¹¹⁷ The challenge included a promise by RNC to pay \$1 million to the first American who could prove the following statement false: “In November 1995, the U.S. House and Senate passed a balanced budget bill. It increases total federal spending on Medicare by more than 50% from 1995 to 2002, pursuant to Congressional Budget Office standards.”¹¹⁸ RNC denied all claims to payment, and when one of the claimants sued for breach of contract, RNC filed an interpleader action joining all of the claimants.¹¹⁹ The trial court rejected RNC’s argument that the advertisement was a parody that could not be taken seriously but still granted summary judgment in RNC’s favor, finding that the statement was not proven false.¹²⁰ On appeal, RNC did not challenge the trial court’s conclusion that a reasonable person would have taken the advertisement seriously.¹²¹ The appellate court, however, affirmed the trial court’s conclusion that the claimants had not proven that RNC’s statement was false.¹²²

The sixth prove-me-wrong case is *Kolodziej v. Mason*.¹²³ In *Kolodziej*, an attorney was representing a defendant in a murder trial.¹²⁴ His client had an alibi, asserting that when the murders were committed in Bartow, Florida, he was on a business trip in Atlanta, Georgia.¹²⁵ The alibi was supported by the defendant being videotaped at an Atlanta hotel several hours before and several hours after the murders.¹²⁶ The defendant’s attorney gave an interview on national television, and when discussing the implausibility of the defendant being in Bartow when the murders were committed and back at the hotel in Atlanta when he was videotaped—including having to go from the Atlanta airport to the hotel in twenty-eight minutes—stated: “I challenge anybody to show me, and guess what? Did they bring in any evidence to say that somebody made that route, did so? State’s burden of proof. If they can do it, I’ll challenge ‘em. I’ll pay them a million dollars if they can do it.”¹²⁷ The television network did not air the attorney’s statements during the trial, but broadcast an edited version after the trial con-

¹¹⁶ 299 F.3d 887 (D.C. Cir. 2002).

¹¹⁷ *Id.* at 888-89.

¹¹⁸ *Id.* at 889.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 889-90.

¹²¹ *Id.* at 891.

¹²² *Republican Nat’l Comm.*, 299 F.3d at 894.

¹²³ 774 F.3d 736 (11th Cir. 2014).

¹²⁴ *Id.* at 738.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 738-39.

cluded.¹²⁸ The edited version did not include the attorney's reference to the State's burden of proof, and his statement aired as, "I challenge anybody to show me—I'll pay them a million dollars if they can do it."¹²⁹

A law student who had been following the criminal trial saw the edited version of the attorney's interview and took the offer seriously.¹³⁰ He then recorded himself traveling from the Atlanta airport to the location of the hotel within twenty-eight minutes, and then demanded the money from the attorney.¹³¹ The attorney refused to pay, asserting that the offer had not been serious, and the law student sued the attorney for breach of contract.¹³² The trial court granted summary judgment in the attorney's favor, finding that the law student had not been aware of the unedited version of the alleged offer and could not accept an offer of which he was not aware.¹³³ Further, it held that the unedited version was unambiguously directed at the prosecution only.¹³⁴ The trial court did not address the attorney's arguments that it was not a serious offer and that, even if it was, the law student had not proven the attorney wrong.¹³⁵

On appeal, the appellate court affirmed on a different ground than the trial court, concluding that a reasonable person would not have taken the attorney's offer seriously.¹³⁶ The court relied on the language used, stating that it appeared colloquial and that the use of "'a million dollars'—the common choice of movie villains and schoolyard wagerers alike"—suggested it was hyperbolic.¹³⁷ The court noted that the attendant circumstances further suggested the attorney was not serious:

Here, [the defense attorney] made the comments in the course of representing a criminal defendant accused of quadruple homicide and did so during an interview solely related to that representation. Such circumstances would lead a reasonable person to question whether the requisite assent and actionable offer giving rise to contractual liability existed. Certainly, [his] statements—made as a defense attorney in response to the prosecution's theory against his client—were far more likely to be a descriptive illustration of what that attorney saw as serious holes in the prosecution's theory instead of a serious offer to enter into a contract.¹³⁸

The court further noted that the attorney did not discuss his comments with the law student, and, prior to the law student demanding payment,

¹²⁸ *Id.* at 739.

¹²⁹ *Kolodziej*, 774 F.3d at 739.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 740.

¹³⁴ *Id.*

¹³⁵ *Kolodziej*, 774 F.3d at 740.

¹³⁶ *See id.* at 741.

¹³⁷ *Id.*

¹³⁸ *Id.* at 742.

there was no communication between the parties.¹³⁹ Also, the attorney neither confirmed that he made an offer nor asserted he had been serious.¹⁴⁰ And, unlike prior cases, the attorney did not put the money in escrow or declare that he had set the money aside.¹⁴¹

Further, the attorney had not made his career out of the assertion that the prosecution's case was implausible; he did not make the statement in the context of trying to sell goods or his business; "[h]e did not create or promote the video that included his statement;" and he did not increase the amount at issue (as had been done in a particular reward offer case cited by the court).¹⁴² Also, he did not provide, nor did the show include, any information to contact him about the challenge.¹⁴³ The court noted that none of the attorney's surrounding commentary indicated that his statement was anything other than a figure of speech.¹⁴⁴ The court believed that the attorney "merely used a rhetorical expression to raise questions as to the prosecution's case."¹⁴⁵

III. THE LAW OF CONSIDERATION AND PROMISSORY ESTOPPEL

With respect to the enforceability of a promise, the common law starts with the presumption that a promise is not legally enforceable, unless an exception exists to make it binding.¹⁴⁶ In the past, when the writ system prevailed, promises were enforced under the writs of covenant, debt, and assumpsit.¹⁴⁷ The first two provided only limited bases for enforceability. Covenant could only be used if the promise was made under seal,¹⁴⁸ and debt could only be used if the creditor had provided something to the debtor (a so-called *quid pro quo*) and the debtor owed the creditor a sum certain.¹⁴⁹

With respect to assumpsit, at the beginning of the fifteenth century common-law courts would only enforce a promise under this writ if there had been misfeasance by the promisor in the performance of the promise.¹⁵⁰ In the second half of the fifteenth century, however, assumpsit was expanded to cases in which there was simply a nonfeasance by the promisor, pro-

¹³⁹ *Id.* at 743.

¹⁴⁰ *Id.*

¹⁴¹ *Kolodziej*, 774 F.3d at 743.

¹⁴² *Id.* at 743-44.

¹⁴³ *Id.* at 744.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ E. ALLAN FARNSWORTH, *CONTRACTS* § 1.5, at 11 (4th ed. 2004).

¹⁴⁷ *Id.* §§ 1.5-1.6, at 13-14.

¹⁴⁸ *Id.* § 1.5, at 13.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* § 1.6, at 14.

vided that the promisee relied to his detriment on the promise.¹⁵¹ At the end of the sixteenth century, *assumpsit* was further expanded to render a mere exchange of promises enforceable.¹⁵²

During the sixteenth century and the expansion of the enforceability of promises, the word *consideration* came to be used to describe the necessary conditions for a promise to be binding in *assumpsit*.¹⁵³ At that same time a test arose to determine whether there was consideration, and it included several elements: "Most importantly, from the *quid pro quo* of debt, by way of the later extension of general *assumpsit*, came the notion that there must be a benefit to the promisor. From the reliance of special *assumpsit* came the notion that there must be a detriment to the promisee."¹⁵⁴ Thus, the promisee was required to give something in exchange for the promise that was either a detriment to the promisee or a benefit to the promisor.¹⁵⁵

By the end of the nineteenth century, however, the benefit-detriment test for consideration started to be replaced by the sole requirement that the promise be given as part of a bargain.¹⁵⁶ For example, the *Restatement of Contracts*, published in 1932, defined *consideration* solely in terms of bargain, without reference to benefit or detriment.¹⁵⁷ A promise or performance is considered to be bargained for "if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."¹⁵⁸ In fact, the *Restatement (Second) of Contracts* expressly provides that if consideration is established under the bargain test, there is no further requirement of a benefit to the promisor or a detriment to the promisee.¹⁵⁹ The rise of the bargain test rendered unenforceable those exchanges that did not take place through a bargain and also made bargains enforceable that otherwise might not have been because there was no detriment to

¹⁵¹ *Id.* § 1.6, at 15.

¹⁵² FARNSWORTH, *supra* note 146, § 1.6, at 15-16.

¹⁵³ *Id.* § 1.6, at 18; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a (AM. LAW INST. 1981) ("Historically, [consideration's] primary meaning may have been that the conditions were met under which an action of *assumpsit* would lie.").

¹⁵⁴ FARNSWORTH, *supra* note 146, § 1.6, at 18. The classic statement of the benefit-detriment test was provided by the English Exchequer Chamber in *Currie v. Misa*: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." *Currie v. Misa* [1875] 10 LR Exch. 153 at 162 (Eng.).

¹⁵⁵ FARNSWORTH, *supra* note 146, § 2.2, at 47.

¹⁵⁶ *Id.*; Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 369 (2007) ("Langdell introduced the bargain theory of contract. Scholars have conventionally credited this new conception to Holmes whose bargain theory rested on 'an essentially new analysis of consideration,' namely treating consideration as the sole inducement for each party. . . . But Holmes's view again appears first in Langdell's [A] *Summary [of the Law of Contracts]*" (footnote omitted)).

¹⁵⁷ RESTATEMENT OF CONTRACTS § 75 (AM. LAW INST. 1932).

¹⁵⁸ RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (AM. LAW INST. 1981).

¹⁵⁹ *Id.* § 79.

the promisee or benefit to the promisor.¹⁶⁰ The rise of the bargain test shifted concern away from the adequacy of the exchange, with the focus limited to how the parties arrived at the exchange.¹⁶¹

A bargain exists when the promise and the return promise or performance are reciprocal inducements.¹⁶² As noted by the *Restatement (Second) of Contracts*, “[a] performance or return promise is bargained for if it is *sought* by the promisor in exchange for his promise.”¹⁶³ Thus, even if there has been a promise or a performance given in exchange, there is no bargain—and hence no consideration—if “the promisor was *not seeking* to induce action by the promisee.”¹⁶⁴

Therefore, the promisor’s motive in making the promise is the key inquiry. As explained by Professor E. Allan Farnsworth:

In principle, at least, the bargain test requires that the promisor’s purpose in making that commitment be to induce some action in return—to induce an exchange. If the promisor is a seller of apples that wants to exchange apples for money, the seller’s purpose in promising to deliver apples is to induce a promise to pay the price or to induce its actual payment. Although it is sometimes said that consideration should not be confused with motive, under the bargain test purpose is an element of bargain, which is in turn an element of consideration.

¹⁶⁰ FARNSWORTH, *supra* note 146, § 2.2, at 48; *see also* Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 375-76 (2002) (“By the 1920s, the ostensible black-letter rule of a growing number of jurisdictions in the United States appeared to be that the existence of a bargain constituted the sole means of fulfilling the requirement that a promise be supported by consideration. This newly-minted standard excluded other transactional obligations formerly binding on the benefit and detriment sides of consideration, some of which fell short of true bargains.”); Vincent A. Wellman, *A Common Mistake About the Common Law*, MICH. B.J., Jan. 2013, at 39, 40, <http://www.michbar.org/file/barjournal/article/documents/pdf4article2151.pdf> (“The difference between the two theories can be significant. Under the benefit-detriment theory, a promise could be enforceable if it induced detrimental reliance on the part of the promisee. Under the bargained-for test, however, reliance is significant *only if* it is undertaken in exchange for the promise *and* the promise is given in exchange for the detriment. Unbargained reliance is now enforceable only under the rubric of ‘promissory estoppel.’”).

¹⁶¹ FARNSWORTH, *supra* note 146, § 2.2, at 48; Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1195 (1998) (“[B]y stressing the law’s willingness to enforce bargains per se, whatever their terms, Holmesian contract doctrine moved away from earlier equitable notions of ‘just price’ or ‘unconscionability’ toward the proposition that virtually any exchange-based bargain, no matter how lop-sided, could and probably would be upheld as consideration-supported.”).

¹⁶² FARNSWORTH, *supra* note 146, § 2.6, at 54-55.

¹⁶³ RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (AM. LAW INST. 1981) (emphasis added).

¹⁶⁴ FARNSWORTH, *supra* note 146, § 2.6, at 55; *see also* Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 152 (2005) (“[T]he move from the benefit/detriment test for consideration to the bargained-for theory of consideration requires that a promise be given in order to induce a certain action. Action in reliance on a promise . . . is not sufficient for consideration, *even if it is something that the promisor demonstrably desires*, unless the promisor makes the promise in order to induce that action.”).

*Unless the promisor's purpose is to induce in exchange either a promise or a performance, the promisor is not bargaining, and nothing that is given in return can be consideration.*¹⁶⁵

Chancellor John Edward Murray, Jr. also emphasized the importance of assessing the promisor's purpose in making the promise and determining whether the purpose was to induce the return promise or performance:

Where the facts are not that clear with respect to a bargained-for-exchange, the analysis can be assisted by focusing upon the *purpose* of the promisor, i.e., in making the promise, was it the purpose of the promisor to induce the detriment? Did the promisor make the promise because she wanted the promisee to do something which the promisee had a legal right to forbear, or forbear an action that the promisee had the legal right to perform? . . . If . . . the promisor made the promise with no particular interest in the detriment that the promisee had to suffer to take advantage of a promised benefit, the detriment was incidental or conditional to the promisee's receipt of the benefit.¹⁶⁶

As stated by Chancellor Murray, "[f]or a detriment to induce a promise, the promisor must desire that detriment, i.e., he or she must want the promisee to suffer that detriment as the price of the promisor's promise."¹⁶⁷ Also, it is insufficient if only the promisor intends to induce the return promise or performance or only the promisee intends to induce the promisor's promise; both must exist.¹⁶⁸

Although the parties' motives are key to determining if there is a bargain, motive is determined objectively.¹⁶⁹ Thus, "it is enough that one party *manifests* an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement."¹⁷⁰ As long as a party manifests a motive to receive what the other party provides, the party's actual motive is immaterial.¹⁷¹ The *Restatement (Second) of Contracts* provides the following example:

A offers to buy a book owned by B and to pay B \$ 10 in exchange therefor. B accepts the offer and delivers the book to A. The transfer and delivery of the book constitute a performance and are consideration for A's promise. This is so even though A at the time he makes

¹⁶⁵ FARNSWORTH, *supra* note 146, § 2.9, at 64 (emphasis added).

¹⁶⁶ JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 61, at 261 (5th ed. 2011).

¹⁶⁷ *Id.* § 61, at 263.

¹⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (AM. LAW INST. 1981); *see also* PERILLO, *supra* note 6, § 4.2, at 151 ("The detriment must induce the promise. The promisor must have made the promise because the promisor wishes to exchange it, at least in part, for the detriment to be incurred by the promisee. . . . The promise must induce the detriment.").

¹⁶⁹ RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (AM. LAW INST. 1981); PERILLO, *supra* note 6, §§ 4.2-4.3, at 153.

¹⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (AM. LAW INST. 1981) (emphasis added).

¹⁷¹ RESTATEMENT OF CONTRACTS § 84 cmt. b (AM. LAW INST. 1932).

the offer secretly intends to pay B \$ 10 whether or not he gets the book, or even though B at the time he accepts secretly intends not to collect that \$ 10.¹⁷²

Also, only a part of each party's motive must be to obtain the other's promise or performance.¹⁷³ Thus, even if part of the promisor's motive is to give a gift, consideration exists as long as a part of the promisor's motive is to receive what the other party is required to give in exchange.¹⁷⁴ "Though a promisor may have had several purposes, the court will not inquire into all of them as long as one of them—not even the principal one—was to induce the exchange."¹⁷⁵ For example, there is consideration for a promise to buy a book for \$10 even if the book regularly sells for \$5 and the parties are aware that part of the promisor's motive is to give the promisee a gift of money.¹⁷⁶ There is also consideration for a promise to paint a picture for \$500 even if the promisor's chief motive is a desire for fame.¹⁷⁷

Typically, a promisor indicates a bargain motive by making performance of his promise expressly conditioned on the promisee providing a return promise, performance, or forbearance.¹⁷⁸ But, "[e]ven if a promisor expressly conditions the commitment, this may not suffice to show that the promisor is bargaining."¹⁷⁹

In many cases it is self-evident that the promisor's purpose in making the promise is to induce the promisee to provide the return promise or performance.¹⁸⁰ But there are two classic situations in which a promise is expressly conditioned on a return promise or performance, yet there is still no consideration. The first is when a reasonable person in the promisee's position would understand that the promisee's return promise or performance is included to create the pretense of a bargain, such as where the purported consideration is merely nominal.¹⁸¹ The *Restatement (Second) of Contracts* provides the following example:

¹⁷² RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b, illus. 1 (AM. LAW INST. 1981) (citation omitted).

¹⁷³ *Id.* § 71 cmt. c; PERILLO, *supra* note 6, § 4.7, at 159.

¹⁷⁴ RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (AM. LAW INST. 1981).

¹⁷⁵ FARNSWORTH, *supra* note 146, § 2.9, at 67.

¹⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c, illus. 6 (AM. LAW INST. 1981); *see also* PERILLO, *supra* note 6, § 4.7, at 159 ("Suppose A is moved by friendship to promise to sell a used car to B for \$1,000 but the car is worth \$5,000. Should the promise be enforced? If there is an element of exchange the answer is, yes, even though A's primary motive in entering into the transaction is friendship. Such an agreement will be enforced.") (footnote omitted)).

¹⁷⁷ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 293-94 (Boston, Little, Brown, & Co. 1881).

¹⁷⁸ FARNSWORTH, *supra* note 146, § 2.9, at 64-65.

¹⁷⁹ *Id.* § 2.9, at 65.

¹⁸⁰ *Id.*

¹⁸¹ RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (AM. LAW INST. 1981); PERILLO, *supra* note 6, § 4.6, at 158-59.

A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for \$1000 a book worth less than \$1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay \$1000.¹⁸²

There is no consideration in such a case because a reasonable person in the promisee's position would understand that the promisor was not motivated to pay the \$1,000 to induce the promisee to give him the book worth less than \$1. But if the promisee does not have reason to know that the promisor is introducing detriment to create the pretense of a bargain, there is consideration.¹⁸³

Second, a condition on a gratuitous promise is not consideration.¹⁸⁴ For example, and to use Professor Samuel Williston's famous hypothetical, if a benevolent man says to a tramp that he will provide him with an overcoat on the benevolent man's credit if the tramp picks one out at the store across the street, crossing the street, although a detriment to the tramp, is not consideration.¹⁸⁵ A reasonable person in the tramp's position would understand that the benevolent man's motive in making the promise was not to induce the tramp to cross the street, but simply to facilitate the giving of a gift.¹⁸⁶ Similarly, there is no consideration when an employer promises an employee a gift of a gold watch if the employee stops by the employer's office to pick it up.¹⁸⁷ A reasonable person would not believe that the employer made the promise to induce the employee to stop by the office.¹⁸⁸ Likewise, "a promise to make a gift is not made a bargain by the promise of the prospective donee to accept the gift, or by his acceptance of part of it."¹⁸⁹ The question is—"Did the promisor decide to make the promise in the first place in order to get something in return?"¹⁹⁰

Factors to consider in deciding whether a party has manifested a bargain motive include whether there was a discernible benefit to the promisor from the promisee's detriment; the extent of the promisee's detriment; and whether the promisor's purpose is favored in the eyes of the law.¹⁹¹ Chancellor Murray noted, however, that

there are . . . situations in which courts find consideration with little or no discussion of the bargained-for-exchange element. In some of these cases, there is little doubt that courts have unwittingly ignored that element. In others, there is little doubt that courts have deliberately

¹⁸² RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b, illus. 5 (AM. LAW INST. 1981).

¹⁸³ PERILLO, *supra* note 6, § 4.7, at 160.

¹⁸⁴ *Id.* § 4.5, at 156-57 (distinguishing a condition on a promise of a gift from consideration).

¹⁸⁵ 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 112, at 232-33 (1920).

¹⁸⁶ *Id.*

¹⁸⁷ FARNSWORTH, *supra* note 146, § 2.9, at 65.

¹⁸⁸ *Id.* § 2.9, at 65-66.

¹⁸⁹ RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (AM. LAW INST. 1981).

¹⁹⁰ FARNSWORTH, *supra* note 146, § 2.9, at 66.

¹⁹¹ MURRAY, *supra* note 166, § 61, at 263-64.

ignored it to achieve what they perceive to be just and desirable results. When courts ‘discover’ a bargained-for-exchange in a situation where it apparently does not exist, the result they seek to achieve is often desirable. In such cases, it would be preferable for courts to dispense with the fiction that bargained-for-exchange and, therefore, consideration exists, and to arrive at the desired result on the basis of sound policy reasons. Such an approach would promote law settlement, i.e., predictability and consistency which are, indeed, high values in any legal system.¹⁹²

Despite the rise of the bargain test for consideration, it is still often stated that consideration must consist of either a benefit to the promisor or a detriment to the promisee.¹⁹³ But the current benefit-detriment requirement is nothing more than an indication of the types of bargains that will be enforced and the requirement that the exchange be legally sufficient to constitute consideration. As described by one commentator:

Essentially, consideration requires that two tests be satisfied. The first test concerns the legal sufficiency of the purported consideration. That is, there must be a legal detriment to the promisee *or* a legal benefit to the promisor to support the promise. A legal benefit is usually defined as receiving something that one had no prior legal right to receive, while a legal detriment is defined as doing something one is not legally obligated to do or refraining from doing something one has a legal right to do. In addition, consideration demands that there be a bargained-for exchange between the promisor and the promisee. That is, the promisee’s legal detriment or the promisor’s legal benefit must induce the promisor to make his promise and the promisor’s promise must induce the promisee’s legal detriment or induce the legal benefit given to the promisor.¹⁹⁴

¹⁹² *Id.* § 61, at 264 & n.254.

¹⁹³ FARNSWORTH, *supra* note 146, § 2.9, at 52 & n.9; *see also* MURRAY, *supra* note 166, § 56, at 237 (“The cases are legion in which courts describe consideration in terms of a benefit to the promisor or detriment to the promisee . . .”); PERILLO, *supra* note 6, § 4.2, at 152 (“[T]he rule is often stated in terms of ‘either legal detriment to the promisee or legal benefit to the promisor.’”); Knapp, *supra* note 161, at 1194 (“[E]ven modern courts are apt to invoke both formulations when a consideration issue arises (and probably with similar results) . . .”); Teeven, *supra* note 160, at 291 (“[N]ot all jurisdictions have adopted the bargain definition as the sole test . . .”).

¹⁹⁴ George A. Nation, III, *Creating Enforceable Guaranty Agreements: Multiple Sources of Law Require Careful Analysis*, 119 BANKING L.J. 153, 155 (2002) (footnotes omitted); *see also* 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:4, at 54, 56, 60-61, 64 (4th ed. 2008) (“Both benefit and detriment in this context have a technical meaning. Neither the benefit to the promisor nor the detriment to the promisee need be actual; rather, it is a sufficient *legal* detriment to the promisee if it promises or performs any act, regardless of how slight or inconvenient, which it is not obligated to promise or perform so long as it does so at the request of the promisor and in exchange for the promise. . . . In short, detriment, as used in testing whether consideration exists for making enforceable a promise means legal detriment rather than detriment in fact. It means giving up something which the promisee was theretofore privileged to retain, or doing or refraining from doing something which the promisee was then privileged not to do, or not to refrain from doing. . . . By the same token, the term ‘benefit’ means the receiving as the exchange for a promise some performance or forbearance which the promisor was not previously entitled to receive. That the promisor desired it for its own advantage and had no previous right to it is enough to show that it was beneficial.” (footnotes omitted)); Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 SW. L. REV. 191, 192-93 (2013) (“Although not explicitly stated in the

Chancellor Murray similarly noted that the test for consideration is not simply that there be a bargained-for exchange, but that there be a bargained-for exchange of things having *legal value*, and that the courts that describe consideration as either a benefit to the promisor or a detriment to the promisee are focusing on the "legal value" element of consideration.¹⁹⁵ He then noted that "[o]ther courts remember to add the other critical element, bargained-for exchange, as part of the formula," that "[t]here is no doubt that all courts would consider the bargained-for-exchange element essential," and that "[t]he consensus is clear that the two elements are [necessary]."¹⁹⁶ Professor Joseph Perillo likewise states that the promisee must suffer a legal detriment in addition to the detriment inducing the promise and the promise inducing the detriment,¹⁹⁷ but defines a legal detriment as simply the promisee doing or promising "to do what the promisee was not legally obligated to do; or refrain or promise to refrain from doing that what the promisee is legally privileged to do."¹⁹⁸

Thus, the requirement that the things exchanged in a bargain must each be either a legal detriment to the promisee or a legal benefit to the promisor is nothing more than a reference to the promise to perform a legal duty, or the performance of a legal duty, not constituting consideration.¹⁹⁹

Restatement of Contracts Second . . . , most courts translate the Restatement Second's definition of consideration by employing the so-called benefit/detriment test to determine that a bargained for promise is supported by the magical legal glue denominated consideration. In other words, the promisee must suffer some legal detriment—that is, do or promise to do something that the promisee was not legally obligated to before the promise was received. Concomitantly, the promisor obtains a legal benefit that was not present prior to the execution of the initial promise. This benefit/detriment requirement in bargained for exchanges represents the view of consideration currently in vogue in a majority of courts.”).

¹⁹⁵ MURRAY, *supra* note 166, § 56, at 237.

¹⁹⁶ *Id.* § 56, at 237-38; *see also* Steinberg v. United States, 90 Fed. Cl. 435, 445 (2009) (“A detriment to one party may serve as consideration, but only if such detriment is bargained for.”); *id.* at 446 (“In determining whether there was consideration, the question is not whether one party received a benefit (tangible or otherwise), but whether the benefit was bargained for. If the benefit was not bargained for, and here it was not, it cannot constitute consideration necessary to support a contract.” (citation omitted)).

¹⁹⁷ PERILLO, *supra* note 6, § 4.2, at 151; *see also* MURRAY, *supra* note 166, § 57, at 240-41 (“[I]t is not possible to meet the legal value element of consideration absent a detriment to the promisee. Consequently, while the formula for this element of consideration is typically stated as a benefit to the promisor or detriment to the promisee, the emphasis is upon the detriment to the promisee since there will be no benefit to the promisor absent a detriment to the promisee.”).

¹⁹⁸ PERILLO, *supra* note 6, § 4.2, at 151 (footnotes omitted); *see also* MURRAY, *supra* note 166, § 57, at 240 (“[I]f the promisee has done or forbore something, or promised to do or to forbear doing something, the doing or forbearing of which involves the surrender of a legal right or the circumscribing of his liberty of action, the legal value element of consideration is present.”).

¹⁹⁹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration”). A test that requires the promise or performance to be *either* a legal detriment to the promisee *or* a legal benefit to the promisor supports the conclusion that the preexisting-duty rule should

But the things of legal value that are being exchanged must still be bargained for. As noted by Professor Edwin Patterson, simply stating that there is consideration for a promise if the promisor is benefitted or the promisee suffers a detriment would result in a promise of a gift being enforceable because the promisor is benefitted from the promisee accepting the gift.²⁰⁰ Also, a promise that simply induces reliance would be enforceable because the promisee incurs a detriment.²⁰¹ In any event, the bargain theory of consideration would not be undermined by a requirement that the return promise or performance be an actual benefit to the promisor or an actual detriment to the promisee (as opposed to merely a legal benefit or legal detriment) because, "if a promisor chooses to bargain for something it must be a benefit to the promisor, and if the promisor needs to bargain for something in order to extract it from the promisee, it must be a detriment to the promisee."²⁰²

The consideration requirement ensures the enforceability of promises made in the marketplace, which is vital to the economy. As stated by Professor Patterson:

In a modern "free-enterprise" society of the eighteenth to the twentieth centuries, economic institutions supported and economic processes depended upon the market (*i.e.*, a set of markets, for producer, grower, consumer, middleman, etc.) and the practice or habit of promise-making became a pattern of our culture. Since this promise-making occurred as a part of bargains, and as a means of controlling the future, a legal rule that bargained-for promises are enforceable serves to support and to reinforce the use of contract as an economic device, and thus serves the needs of society. . . . Any promise that satisfies this test has a presumptive claim to the protection of the social interest in the security of transactions. . . . Bargaining is an important pattern of conduct in economic activities that serve our material wants and many of our ideal wants (books, plays, concerts, records, etc.). Bargaining is an important means (though not the only means) to the creation and maintenance of a good society.²⁰³

The consideration requirement also excludes from enforcement promises of gifts, which have been described as "sterile transmission[s]," in the

not apply when the duty is owed to a third party. *See id.* § 73 cmt. d (preexisting-duty rule should not apply when duty is owed to third party). In such a situation, even if there is considered to be no legal detriment to the promisee, there is a legal benefit to the promisor.

²⁰⁰ Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 933-34 (1958).

²⁰¹ *See id.*

²⁰² FARNSWORTH, *supra* note 146, § 2.4, at 52; *see also* 3 WILLISTON & LORD, *supra* note 194, § 7:4, at 44-46, 52-54 ("It is often stated that the consideration required to support a promise is a detriment incurred by the promisee or a benefit received by the promisor at its request. Both the drafters of the First Restatement and more explicitly the Second Restatement, assert that neither a benefit nor a detriment is necessary and that all that is required is a bargained-for exchange. However, the case law on the subject belies that assertion, the courts in general insisting that either a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor exist before consideration will be found." (footnotes omitted)).

²⁰³ Patterson, *supra* note 200, at 945-46 (footnotes omitted).

sense that they do not increase societal welfare.²⁰⁴ Rendering promises of a gift unenforceable is also justified because such promises might have been made without sufficient deliberation.²⁰⁵

Consideration is not, of course, the only basis upon which a promise can become enforceable. The principal alternative is the doctrine of promissory estoppel.²⁰⁶ Under promissory estoppel, a promise is enforceable if the promisor should reasonably expect it to induce reliance by the promisee or a third party; it does induce such reliance; and injustice can only be avoided by enforcing the promise.²⁰⁷ Traditionally, only certain types of promises lacking consideration would be enforced as a result of the promisee's unbargained-for reliance.²⁰⁸ But in 1932 the *Restatement of Contracts* included a section providing for the enforceability of any type of promise that induced reliance, provided the requirements of that section were satisfied,²⁰⁹ and this section was also included (with slight change) in the *Restatement (Second) of Contracts*.²¹⁰

With promissory estoppel's inclusion in the *Restatement of Contracts* as a doctrine applicable to any type of promise, the doctrine gained favor with the courts and was even extended to promises made in a business setting.²¹¹ By the 1980s, promissory estoppel was no longer seen as merely the stepchild of the bargained-for-exchange contract, but was beginning to be seen as "a new and distinct cause of action in its own right."²¹² Promissory estoppel has not yet, however, attained the same respectability as bargained-for-exchange contracts, with plaintiffs often finding it difficult to establish liability under such a theory.²¹³

²⁰⁴ Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941). But see Joseph Siprut, Comment, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration Is Not Binding, but Should Be*, 97 NW. U. L. REV. 1809, 1835 (2003) ("[T]he conclusion that a gratuitous transfer produces less utility than an otherwise comparable, but bargained-for, transaction lacks support." (citing Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 49 (1992))).

²⁰⁵ Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979).

²⁰⁶ See Patterson, *supra* note 200, at 963 (noting that promissory estoppel is the principal alternative to consideration for making a promise enforceable).

²⁰⁷ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

²⁰⁸ FARNSWORTH, *supra* note 146, § 2.19, at 91-92. These included promises to convey land, promises by bailees, promises to charities, and promises within the family. *Id.*

²⁰⁹ RESTATEMENT OF CONTRACTS § 90 (AM. LAW INST. 1932).

²¹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

²¹¹ Knapp, *supra* note 161, at 1198; see, e.g., *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958) (using promissory estoppel to enforce an implied promise to keep an offer open); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 274-75 (Wis. 1965) (using promissory estoppel to enforce a promise of a franchise).

²¹² Knapp, *supra* note 161, at 1200.

²¹³ See *id.* at 1202; see also Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580 (1998) ("Contrary to the

IV. WHY THERE IS TYPICALLY NO CONSIDERATION IN "PROVE ME WRONG" AGREEMENTS

This Part explains why there is typically no consideration in prove-me-wrong agreements, despite the implicit assumption by courts that there is. As discussed below, a conclusion that such agreements have consideration is based on the mistaken belief that a condition on a promise necessarily means that there is consideration if the promisor is not seeking to give a gift.

Because a prove-me-wrong offer is a promise to pay money conditioned upon the offeree's performance of an act, it superficially fits the model of an offer for a unilateral contract.²¹⁴ It appears that the offeror bargains for the offeree's performance and, thus, there is consideration for the promise.²¹⁵ But, as previously discussed, merely because a promise is subject to a condition in the form of an action by the promisee does not mean the required act is bargained for.²¹⁶ Williston showed this in his famous tramp hypothetical, discussed previously.²¹⁷ Rather, to determine whether the required act is bargained for, a court must decide whether a reasonable person would believe that the promisor made the promise to induce the promisee to perform the act.²¹⁸

In prove-me-wrong cases, the promisor does not make the promise to induce the promisee to perform the required act, which is, of course, disproving the promisor's factual claim. Rather, the promisor hopes that the promisee will be unable to disprove the promisor's factual claim and makes the promise to increase the factual claim's credibility.

For example, in *James v. Turilli*, the defendant surely had an interest in his claim being true after alleging that Jesse James had lived with him at his museum after James was reputedly killed.²¹⁹ The success of the defendant's museum was likely tied, at least in part, to the truth of his claim.²²⁰ In *Barnes v. Treece*, the vice president had an interest in his claim that there were no crooked punchboards being true because his company wanted to

accepted wisdom, the data and analysis . . . demonstrate that the theory seldom leads to victory in reported decisions . . .").

²¹⁴ A unilateral contract involves an offeror making a promise in exchange for performance or forbearance, but the offeror does not seek a return promise. See PERILLO, *supra* note 6, § 2.10, at 56-58 (discussing unilateral contracts).

²¹⁵ See Patterson, *supra* note 200, at 945 ("In the case of the unilateral contract the promisee's reliance is coextensive with his consideration . . .").

²¹⁶ See *supra* Part III; see also PERILLO, *supra* note 6, § 4.5, at 156-57 (distinguishing a condition on a promise of a gift from consideration).

²¹⁷ See *supra* text accompanying notes 185-186.

²¹⁸ 1 WILLISTON, *supra* note 185, § 112, at 232-33.

²¹⁹ See *supra* text accompanying notes 76-86.

²²⁰ See *supra* text accompanying notes 76-86.

sell punchboards.²²¹ In *Rosenthal v. Al Packer Ford, Inc.*, the car dealership surely did not want its claim about selling cars at just \$89 over factory invoice to be proven false, as doing so would damage its reputation.²²² In *Republican National Committee v. Taylor*, the RNC wanted its boast about the budget to be true; otherwise voters would not believe that the Republican-controlled Congress had increased Medicare spending.²²³ In *Newman v. Schiff*, the defendant had made a career out of maintaining that there was no legal duty to pay taxes, and his career would therefore be harmed if he were proven wrong.²²⁴ And, in *Kolodziej v. Mason*, the defense attorney obviously did not want someone to prove his client could have committed the murders.²²⁵

It could be argued that, in prove-me-wrong cases, the consideration is not *disproving* the promisor's factual claim but the *attempt* to disprove the promisor's factual claim, with disproving the factual claim simply a condition precedent to the promisor's duty to pay. For example, as previously discussed, the acceptance in *Carlill v. Carbolic Smoke Ball Co.* is best viewed as the use of the smoke ball as directed, not contracting influenza, because contracting influenza cannot be considered a manifestation of assent.²²⁶ Under this view, consideration would exist only if a reasonable person believed that the promisor's motivation, at least in part, was to induce failed attempts to disprove the promisor's factual claim, thereby increasing the claim's credibility. For example, the court in *Carlill* held that a reasonable person would believe that the defendant made the offer to induce offerees to use the smoke ball.²²⁷ A determination of whether such a motive was manifested—and hence, whether consideration existed—would need to be made on a case-by-case basis.

But in each of the prove-me-wrong cases, it is unlikely that such a motive was manifested. The promise's value was in making the factual claim appear credible, and this value existed simply by making the promise. The promise showed how confident the promisor was with respect to the factual claim. Any attempt to disprove the factual claim increased the risk that the factual claim would be disproven. Of course, if there are failed attempts, the factual claim's credibility will be increased—but only if the failed attempts are known to the public. And failed attempts are unlikely to be given publicity. If a promisee attempts to disprove the factual claim and fails, the promisee will not make a claim to the promised amount, and the failed attempt will likely never be known to the promisor or the general public. But

²²¹ See *supra* text accompanying notes 87-99.

²²² See *supra* text accompanying notes 100-103.

²²³ See *supra* text accompanying notes 116-122.

²²⁴ See *supra* text accompanying notes 104-115.

²²⁵ See *supra* text accompanying notes 123-145.

²²⁶ See *supra* text accompanying notes 70-75.

²²⁷ *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256 at 266 (Eng.).

if no one makes an attempt, the promisor can publicize the fact that no one has claimed to have disproven the factual assertion, suggesting that all attempts have failed.

The only cases in which a failed attempt will be publicized are those in which the promisee believes he has disproven the factual claim, and these are the types of cases in which the promisor is in real jeopardy of having a court hold the claim disproven, such as in *James, Barnes, and Newman*.²²⁸ Although it is possible that the plaintiff will be found to have failed in the attempt to disprove the factual claim—such as in *Al Packer Ford, Inc.* and *Republican National Committee*²²⁹—thereby benefitting the promisor by publicizing the failed attempt, the question is not whether it is possible that the promisor could benefit from an attempt to disprove the claim (through a failed attempt that is given publicity). Rather, the question is whether a reasonable person would believe that the promisor was motivated by this possibility, at least in part, to make the promise in the first place. And with the potential downside from an attempt to disprove the factual claim being so significant, a reasonable person would likely not believe that the promisor had such a motivation.

It is possible that the promisor has manifested an intention to have promisees attempt to disprove the factual claim so that each promisee will come to believe the claim, irrespective of whether their failed attempt is given publicity and persuades others, such as in *Carlill*. But the question remains whether a reasonable person would believe that the promisor prefers this as opposed to promisees simply taking the promisor's factual claim at face value based on the promisor's willingness to pay a sum of money if the claim is disproven. Although such a determination would need to be made on a case-by-case basis, it is reasonable to believe that most people making a prove-me-wrong promise would prefer that promisees simply assume the factual claim to be true.

Carlill, as an express warranty case, is distinguishable from prove-me-wrong offers because, in order to disprove the company's factual assertion, the offeree was required to use the smoke ball.²³⁰ Accordingly, as in any express warranty case, the company desired attempts to disprove the warranty.²³¹ Even if a person was not required to purchase the product, using the smoke ball would increase the likelihood that the person would become a customer.

In the prove-me-wrong cases, the promisee is not required to use the promisor's product. Often, there is not even an underlying product being sold, and even when there is, product use is unnecessary. Thus, the promisor's potential benefit from attempts to disprove the factual assertion is

²²⁸ See *supra* text accompanying notes 76-99, 104-115.

²²⁹ See *supra* text accompanying notes 100-103, 116-122.

²³⁰ See *supra* text accompanying note 70.

²³¹ *Carlill*, 1 QB at 264, 266.

likely outweighed by the risk of the claim being disproven. Also, unlike with an express warranty, a promisee who sets out to disprove a prove-me-wrong assertion is unlikely to ever become a convert.

It might be argued, however, that the mere *possibility* that the promisor desires attempts to disprove the claim is sufficient because courts do not assess the adequacy of the exchange.²³² But, as a comment to the *Restatement (Second) of Contracts* provides, "the requirement of consideration is not a safeguard against imprudent and improvident contracts *except in cases where it appears that there is no bargain in fact.*"²³³ For example, the general rule that a court will not assess the adequacy of the exchange does not prevent a court from determining whether there is a mere pretense of a bargain.²³⁴ Accordingly, the rule that a court will not assess the adequacy of the exchange applies only *after* "the requirement of consideration is met."²³⁵ Thus, a court is still required to determine if there was a "bargain in fact."²³⁶ Only then does the court take into account the adequacy of the exchange with respect to determining if a contract was formed. And, to have a bargain in fact, there must be a determination that at least one of the promisor's motives (objectively determined) was to induce the promisee to perform as required. As previously discussed, the mere fact that an agreement is in the form of a bargain is insufficient.²³⁷

With respect to consideration, prove-me-wrong offers are also not like prize offers, where the promisor challenges a promisee to a contest and the loser pays a sum to the winner. In those types of offers, each party is motivated to enter into the agreement to have a chance to obtain the sum and for the enjoyment of the challenge. In prove-me-wrong cases, the promisor is not entitled to a sum of money if the promisee fails to disprove the promisor's factual assertion and is likely not motivated to engage in a contest with the promisee for the pure enjoyment of the challenge (though there could be exceptions). Rather, the promisor is typically just trying to increase the credibility of his factual claim by "putting his money where his mouth is." Prove-me-wrong cases are also not like express warranties given in connection with the sale of goods or services. In those situations, the consideration is the money paid for the goods or service, not proving that the express warranty was breached.

Prove-me-wrong promises do not, therefore, fit within the bargained-for-exchange model. In the typical exchange, each party is left better off than he or she was before the exchange. For example, if *A* has an apple that

²³² RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (AM. LAW INST. 1981).

²³³ *Id.* § 79 cmt. c (emphasis added).

²³⁴ *See id.* § 79 cmt. d.

²³⁵ *Id.* § 79.

²³⁶ *Id.* § 71 cmt. b.

²³⁷ *See supra* Part III; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b. (AM. LAW INST. 1981) (stating that pretense of a bargain is insufficient).

she values at \$1, and *B* values the apple at \$2, each party will be better off if they exchange the apple for, say, \$1.50. *A* will now have \$1.50 when before she had just \$1 of value (the apple), and *B* will now have \$2 of value (the apple) when before she had just \$1.50. Thus, as a result of the contract's performance, each party ends up with an additional \$.50 in value, for an overall increase in societal welfare of \$1.²³⁸

If a prove-me-wrong agreement is executed, there will be no similar increase in value for each party. If the promisee disproves the promisor's factual claim, the promisor will be worse off than he would have been had the agreement not been performed. The "Jesse James Museum" will lose business, the tax protestor will not sell as many anti-tax books, the punchboard distributor will not sell as many punchboards, etc.²³⁹ This, of course, is why a reasonable person would not believe that the offeror actually wants the offeree to satisfy the condition necessary to claim the money.

Of course, by disproving the promisor's factual claim, overall societal welfare might be increased in the sense that society benefits from knowing the truth. Thus, for example, society is better off knowing that the law requires a person to pay taxes or that Medicare spending has actually been increased. In many of these cases, however, the benefit from discovering the truth is perhaps minimal, particularly when the promisor's factual claim is already widely rejected (e.g., the claim that Jesse James lived into the 1950s) or when the factual claim is one of little importance (e.g., whether a car dealership really does sell its cars at just \$89 over factory invoice—the overall price is what matters).

Also, if the question is whether the performance of such agreements is beneficial, any societal benefit must be compared to the individual harm to the promisor from having to pay the promised amount. Many of these cases involve an individual (not a business entity) promising to pay a large sum, such as Rudy Turilli, the operator of the "Jesse James Museum" promising \$10,000 in 1967 dollars, the vice president of the punchboard distributor promising \$100,000 in 1973 dollars, the antitax activist promising \$100,000 in 1983 dollars, and the defense attorney promising \$1 million.²⁴⁰ If enforced as a bargain, the promisee is entitled to damages based on the benefit of the bargain—so-called expectation damages.²⁴¹ In other words, the promisee is entitled to the promised amount, an amount that is often greatly in excess of the detriment incurred by the promisee and that could cause tremendous financial hardship to the promisor.²⁴² And, unlike many contests

²³⁸ See ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-2 (1979).

²³⁹ See *supra* Part II.

²⁴⁰ See *supra* notes 78, 89, 106, 127 and accompanying text.

²⁴¹ RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

²⁴² None of the traditional limitations on expectation damages would operate to reduce the recovery. For example, the promisee has no difficulty proving the amount of loss to a reasonable certainty,

and prize offers, the promisor has likely not obtained the equivalent of prize-indemnity insurance to cover the possibility of having to pay the promised amount. Also, the defense of unconscionability will likely fail because such offers typically do not involve procedural unconscionability, as there is no lack of meaningful choice, unequal bargaining power, or unfair surprise.²⁴³

Although a prove-me-wrong promisor benefits from making the promise, as previously discussed, a benefit to the promisor is insufficient to constitute consideration.²⁴⁴ For example, a promisor who promises to make a charitable donation presumably benefits from the favorable publicity of making the promise, but such a promise is usually not supported by consideration.²⁴⁵ If a benefit to the promisor was the only requirement for consideration, presumably any promise would be enforceable because virtually all promises provide a benefit to the promisor.²⁴⁶ As noted by Professor Farnsworth, when deciding whether there is consideration, "[i]t may be helpful to ask: *apart from the promise itself*, would the promisor benefit from the exchange?"²⁴⁷ In prove-me-wrong cases, it is the promise itself that benefits the promisor. Apart from the promise, there usually will be no benefit and, in fact, the potential for significant harm.

Furthermore, enforcement of bargained-for-exchange contracts can be justified, in part, on the likelihood that the bargaining process has induced the promisor to carefully consider the proposed deal.²⁴⁸ Many prove-me-wrong promisors, however, might not carefully consider their promises before making them. For example, in most of the prove-me-wrong cases the promise was made either during a televised interview or hearing, suggesting that the promisor might have gotten carried away in his effort to convince the audience of his factual claim.

There is also an increased chance that the promisor was not serious, a possibility that rarely exists in a more traditional bargain. This was the appellate court's conclusion in *Kolodziej*,²⁴⁹ though it seems reasonable to

see id. § 352 (stating that the amount of loss must be proven to a reasonable certainty); the promisee has no trouble proving that the loss is sufficiently foreseeable to the promisor at the time of contract formation, *see id.* § 351 (indicating the loss must be sufficiently foreseeable); and the promisee cannot avoid the loss or any part of it, *see id.* § 350 (stating that the promisee cannot recover for any loss that could have been avoided through reasonable efforts).

²⁴³ *See Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995) (en banc) ("Many courts, perhaps a majority, have held that there must be some quantum of *both* procedural and substantive unconscionability to establish a claim, and take a balancing approach in applying them."); FARNSWORTH, *supra* note 146, §4.28, at 301-03 (discussing procedural unconscionability).

²⁴⁴ *See supra* text accompanying notes 156-161.

²⁴⁵ RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (AM. LAW INST. 1981).

²⁴⁶ FARNSWORTH, *supra* note 146, § 2.4, at 52.

²⁴⁷ *Id.* § 2.9, at 66 (emphasis added).

²⁴⁸ Fuller, *supra* note 204, at 800, 803, 816 n.27.

²⁴⁹ *Kolodziej v. Mason*, 774 F.3d 736, 746 (11th Cir. 2014).

believe that this should have been an issue for the fact finder to decide. The court might have been swayed by some of the concerns raised above, including the amount of money promised and the strong possibility that the promisor had not carefully considered what he was saying. Thus, it seems likely that the decision was in fact based on a variety of concerns that are common to prove-me-wrong promises.

It might be suggested that a promisor should be held liable as long as a reasonable person would believe that the promisor was serious, simply because the promisor made the promise. This, of course, was the argument famously made by Professor Charles Fried in *Contract as Promise*, in which he argued that the moral obligation to keep a promise should result in a legal obligation to keep a promise.²⁵⁰ As Professor Fried recognized, however, such a theory is inconsistent with the requirement of consideration.²⁵¹ Thus, a promisor's mere promise to pay a promisee if she could disprove the promisor's factual claim is itself insufficient to make the promise binding under consideration theory.

The failure of courts to recognize the possibility that there is no consideration for prove-me-wrong promises is likely based, in part, on an application of the benefit-detriment test for consideration, without also applying the bargained-for requirement. Under such an approach, because the offeree had no legal duty to disprove the offeror's claim, the offeree has suffered a legal detriment and has thereby provided consideration for the promise. But, as previously discussed, the detriment must be bargained for to be consideration.²⁵²

This failure is also likely based in part on the notion that there are two types of promises—promises supported by consideration and promises of gifts. Under this premise, if a promise is not for a gift, it necessarily must be supported by consideration (unless what is being exchanged is not legally sufficient under the preexisting-duty rule). Because a prove-me-wrong promisor is not seeking to give a gift, then the case cannot involve a gratuitous promise subject to a condition, and the condition must therefore have been bargained for and constitute consideration (or so the argument goes).

This approach, however, fails to account for the possibility that there are conditional promises that are neither bargains nor promises of gifts. A prove-me-wrong promise is an unusual type of promise that is neither a bargain—because the promisor is not induced to make the promise to have the condition occur—nor a promise of a gift—because the promisor does not want the promisee to have the promised amount of money.

One might argue that merely because a prove-me-wrong promise is not a bargain does not necessarily mean that it should be treated the same as a lowly (according to law) promise of a gift. This, however, overlooks the

²⁵⁰ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1 (1981).

²⁵¹ *Id.* at 35.

²⁵² See *supra* Part III.

fact that merely because a promise is not part of a bargain does not mean that it is not enforceable. As previously discussed, consideration is only one way in which a promise can be legally enforceable.²⁵³ And, as discussed in the next Part, the leading alternative method of enforceability—promissory estoppel—is perfectly equipped to weigh the competing interests at stake in determining whether a prove-me-wrong promise should be enforced in a particular case.

V. PROMISSORY ESTOPPEL AS A PREFERABLE THEORY FOR DETERMINING THE ENFORCEABILITY OF A "PROVE ME WRONG" PROMISE

While bargains are enforced because they generally move resources to the users that value them the most, courts will not assess the adequacy of the exchange.²⁵⁴ Thus, consideration is more like a rule—the only relevant fact is whether the form of a bargain existed—than a standard—asking whether a particular exchange was mutually beneficial.²⁵⁵ Promissory estoppel, by contrast, is more like a standard—asking whether injustice would result if the promise was not enforced—than a rule—simply asking whether there had been detrimental reliance, perhaps of a definite and substantial character. As a comment to the promissory-estoppel section of the *Restatement (Second) of Contracts* states, "The principle of this Section is flexible."²⁵⁶ Promissory estoppel's case-by-case approach to the enforceability of a promise is therefore perfectly suited to take into account the competing interests inherent in the question of whether to enforce a prove-me-wrong promise.

The Restatement's promissory-estoppel comment "b" notes that the court may take into account the formality with which the promise was made and whether the cautionary function of form is met.²⁵⁷ Thus, the court may take into account that the promisor might have gotten caught up in the moment and not seriously considered his promise, something that might have occurred with the oral promises made on national television.²⁵⁸ In this respect, whether the promise was made orally or in writing, and thus whether

²⁵³ See *supra* Part III.

²⁵⁴ RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (AM. LAW INST. 1981).

²⁵⁵ See *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) ("A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-94 (1976) (discussing the distinction between rules and standards).

²⁵⁶ RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981).

²⁵⁷ *Id.* The cautionary function of form refers to the fact that requirements of form induce promisors to carefully consider their promises before making them. Fuller, *supra* note 204, at 800.

²⁵⁸ See *supra* Part II.

the cautionary function of form is satisfied, can be considered. The court may also take into account the possibility that the promisor was not serious, even if a reasonable person would believe that the promisor was more likely than not serious (something bargain theory does not consider as a result of the objective theory of contract).²⁵⁹

The Restatement comment also notes that the court may take into account the "definite and substantial character [of the reliance] in relation to the remedy sought."²⁶⁰ Thus, the court may consider whether the promisee spent a substantial amount of time or money trying to disprove the promisor's factual claim or whether the promisee simply telephoned a television station and quoted an Internal Revenue Code provision that had been easily found.²⁶¹ The court may also take into account whether compelling the promisor to perform would significantly harm the promisor by imposing a financial burden that the promisor is not able to handle.

The Restatement comment further notes that the court can take into account "the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant."²⁶² Accordingly, the court may consider whether disproving the factual claim provides a benefit to society and, if so, the extent of the benefit. The court may also weigh whether the promisor has benefitted from the public's mistaken belief in the factual claim and whether holding the promisor liable is necessary to discontinue the promisor from making the factual claim and to publicize the truth so that the public will not be misled in the future. For example, the comment notes that "[t]he force of particular factors varies in different types of cases" and, thus, reliance need not be of a substantial character in charitable-subscription cases,²⁶³ presumably because of the benefit derived from the performance of such promises.²⁶⁴ Similarly, in prove-me-wrong cases, factors can include the type of factual assertion involved and the value of disproving it.

The court may also take into account the strength of the promisee's proof that the promisor's factual claim is false. Of course, to recover under the terms of the promise, the promisee must disprove the promisor's factual claim. But unless the promise provides otherwise, the promisee presumably need only do so under an objective standard, based on a preponderance of the evidence. However, this standard might be inconsistent with the promisor's subjective intention if the promisor uses the word *prove* in the sense of proving falsity beyond a reasonable doubt. For example, in a case like

²⁵⁹ See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 522-23 (Va. 1954) (enforcing a promise to sell a farm allegedly made in jest because a reasonable person would have believed that the promisor was serious).

²⁶⁰ RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981).

²⁶¹ See *supra* Part II.

²⁶² RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981).

²⁶³ *Id.*

²⁶⁴ See *id.* § 90 cmt. f.

James, involving a matter where there is likely evidence on both sides, the promisor probably did not intend a mere preponderance of the evidence standard to apply. Rather, he was probably seeking conclusive evidence. Under a promissory-estoppel analysis, this can be taken into account in deciding whether enforcement of the promise is justified.

Also, as in *James*, the promisor might contemplate the truth or falsity of the factual assertion being determined by a body of experts, not a jury of laypersons. The fact that the promisee has simply convinced a jury of laypersons (by a preponderance of the evidence) hardly seems to disprove the factual claim in the sense contemplated by the promisor, or even in the sense of putting the matter beyond further dispute. Unlike a breach-of-contract analysis, a promissory estoppel analysis could take this into account.

The court may also consider whether the promisor in fact believed the factual claim. For example, was the promisor intentionally seeking to mislead the public to make a buck or for other gain, or was the promisor acting altruistically, intending to provide truthful information to what the promisor believed was an otherwise misled public? In the former case, justice might dictate enforcement as a form of deterrence, whereas in the latter case, it might not.

And, perhaps most importantly, if the promise is enforceable under promissory estoppel, "[t]he remedy granted for breach may be limited as justice requires."²⁶⁵ Thus, the court need not award expectation damages as a matter of course, as in a promise that is enforceable because it is part of a bargain. Rather, depending on the circumstances, the court may award reliance damages or restitution.²⁶⁶ Thus, the choices are not full enforcement or no enforcement, two choices that in a prove-me-wrong case often smack of either overcompensation and punitive damages or undercompensation.

The Restatement's promissory-estoppel comment "d" notes that the same factors that bear on whether to enforce the promise may be considered in determining the remedy,²⁶⁷ and, thus, if the court has concerns about enforcing the promise but decides that enforcement is justified, the court can give partial effect to these concerns in reducing the amount awarded.²⁶⁸ Accordingly, if a prove-me-wrong promisor with limited funds promises an excessive sum without giving the promise much deliberation, and the promisee's reliance is minimal, a partial award would likely be appropriate in the event of enforcement.

²⁶⁵ *Id.* § 90(1).

²⁶⁶ *Id.* § 90 cmt. d. Reliance damages are designed to put the promisee in the position that she was in prior to the promise being made. *Id.* § 344(b). Restitution is designed to return to the promisee any benefit that he has conferred on the promisor. *Id.* § 344(c).

²⁶⁷ *Id.* § 90 cmt. d.

²⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (AM. LAW INST. 1981).

It might be argued, however, that promissory estoppel's case-by-case analysis of whether enforcement is justified reduces predictability and will increase the cost of determining enforceability. This, of course, is the typical argument against a standard (like promissory estoppel) as opposed to a rule (like consideration).²⁶⁹ Whether a rule or a standard is appropriate for the resolution of any particular legal issue depends on the legal issue involved.²⁷⁰ A rule is appropriate for determining the enforceability of bargains because the ability to rely on the enforceability of bargains is crucial to a well-functioning market economy. A standard is appropriate with respect to the enforceability of promises outside of the bargain context presumably because the benefits of rendering nonbargain promises enforceable are not as strong. Whether this latter proposition is true for all nonbargain promises, it is certainly true with respect to prove-me-wrong promises, as the detriments to enforcing many of these promises has been previously explained. And these promises are sufficiently unusual that any difficulty in predicting their enforceability and the remedy will have few, if any, harmful consequences to the overall functioning of contract law.

The ability to declare some promises unenforceable, or to limit the extent of their enforceability based on the circumstances, underscores that even though there is usually a moral obligation to keep a promise, in some cases there is a moral obligation not to hold a promisor to his promise or to at least not hold the promisor to the full extent of his promise. For example, Professor Fried supports the requirement that a promisee take steps to mitigate the harm caused by the promisor's broken promise based on the similarity between the promisee and a Good Samaritan who has a moral obligation to save another from harm.²⁷¹ Even though there might be a desire to automatically hold the prove-me-wrong promisor to his promise, whether he sought to benefit from misleading the public, he acted arrogantly, or simply because promises should be kept, acting on this impulse ignores countervailing moral considerations. Of course, it also ignores consideration theory.

²⁶⁹ *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) ("Rules have the advantage of being definite and of limiting factual inquiry but the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being both over- and underinclusive!). Standards are flexible, but vague and open-ended; they make business planning difficult, invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate—and yet when based on lay intuition they may actually be more intelligible, and thus in a sense clearer and more precise, to the persons whose behavior they seek to guide than rules would be.").

²⁷⁰ *See id.* ("No sensible person supposes that rules are always superior to standards, or vice versa, though some judges are drawn to the definiteness of rules and others to the flexibility of standards. But that is psychology; the important point is that some activities are better governed by rules, others by standards.").

²⁷¹ Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 8 (2007).

CONCLUSION

A reasonable person would not typically believe that a prove-me-wrong promisor was induced to make his promise to have the promisee disprove the promisor's factual claim. Also, a reasonable person would not ordinarily believe that the promisor desired promisees to even attempt to disprove the claim. Accordingly, there is usually no consideration for such a promise, even though the promisor derives a benefit from making the promise and the promisee suffers a detriment.

Thus, whether such a promise is enforceable should ordinarily be determined based on the doctrine of promissory estoppel. The flexible nature of promissory estoppel—both in terms of determining enforceability and the appropriate remedy—enables a court to take into account important factors that should bear on enforceability and the remedy, factors that could not be considered if the promise is mistakenly considered part of a bargain.