

2004

Promises of Rewards in a Comparative Perspective

Pablo Lerner

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [Other Law Commons](#)

Recommended Citation

Lerner, Pablo (2004) "Promises of Rewards in a Comparative Perspective," *Annual Survey of International & Comparative Law*: Vol. 10: Iss. 1, Article 4.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol10/iss1/4>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

PROMISES OF REWARDS IN A COMPARATIVE PERSPECTIVE

PABLO LERNER*

John owns a dog. The dog has disappeared and John publishes an ad in a newspaper offering a reward to the person providing him information regarding its whereabouts. Peter finds the dog and returns it to John. He did not know about the ad. Is he entitled to the reward? What legal framework is appropriate to characterize John's promise?

In speaking of reward we are talking about a declaration made to the public promising a determined tribute - a sum of money or something else - to the person or persons who fulfill a specific act.¹ While in some legal systems one who performs the object is entitled to the prize even if he did not know about the notice, in others knowledge is essential. In other words, some legal systems define the promise of reward as a unilateral act, and others - particularly under the common law - characterize the reward as a contract.

I will deal with the different aspects of the promise of rewards, comparing the unilateral solution, inspired by the tradition in civil law countries, with the solution in the common law jurisdictions, and I will try to show why in my opinion the unilateral approach prompts better and more coherent solutions.

Against the background of the analysis of reward, we will have the opportunity to elaborate some ideas about the meaning of such basic

* Abogado (Univ. of Buenos Aires); LL.D. (Univ. of Jerusalem); Senior Lecturer, Academic College of Law (Ramat-Gan).

1. In some cases this may be forbearance.

concepts as contract, promise or bargain. Then I will try to distinguish between reward and other offers to the public, a distinction that is justified if the reward is to be characterized as a unilateral promise. In the last part of the paper I will deal with practical questions related to reward, like withdrawal of the promise, and performance.

The 1984 reform to the Civil Code of Louisiana² introduced the promise of reward, depicting it as a unilateral act that is, establishing the binding of the promisor without need of acceptance by the performer.³ The Louisiana solution regarding rewards clearly differs from the contractual approach in other American jurisdictions. An analysis of the code after its reform shows that today Louisiana law also frames different expressions of the civilian law tradition,⁴ and more precisely French law and German law. That is, a code that was originally framed after the French model⁵ incorporates within its framework solutions from German system.⁶ Pursuant to the French ideas on the merits, the original LCC did not refer to the unilateral will as a source of obligation. The 1984 reform defined reward as a unilateral promise according to the German model.⁷

In a world that is moving towards harmonization the understanding of ideas or concepts that originated in a particular legal tradition⁸, and have been adopted by or transplanted into another legal system is particularly important in order to achieve a clear picture of a general worldwide trend towards the unification of law.

2. Hereinafter also referred as the LCC.

3. I prefer to use the terms "promisor and performer", not "offeror-offeree" since these are at odds with the definition of reward as a unilateral promise and not a contract.

4. Regarding the evolution of the codification in Louisiana see Sh. Herman, *The Louisiana Civil Code: A European Legacy of the United States*, N. Orleans, 1993.

5. Regarding the adoption of the French model, and not the Spanish law seemingly in force upon Louisiana's annexation to the United States see the A. Yiannopoulos, "The Civil Codes of Louisiana" *Louisiana Civil Code 1998 Edition*, West, 1998, pp. XXVII-XL. See also V. Palmer, "In a Race Against Time: the Founding of Louisiana's Mixed System, 1803-1812", *Mélanges en l'Honneur de Denis Tallon*, (Société de Législation Comparée, ed), Paris, 1999, 179-192.

6. And not only with regard to reward. Also in the subject of mandate, for example the Louisiana Code reform also adopted the German solution.

7. Although this reform would not be understood as a plain transplant, since the idea of reward was not inconsistent with the spirit of Louisiana law nonetheless it enhances the mixed character of Louisiana law. See S. Litvinoff, *Louisiana Civil Law Treatise Obligations (I)*, S. Paul, 1969, 288.

8. Today the division of legal systems into families must be understood within the general framework of unification of law, and therefore the traditional distinction loses some of its relevance. See A. Barak, "The Tradition and Culture of the Israeli Legal System", *European Legal Traditions and Israel* (A. M. Rabello, ed.), Jerusalem, 1994, 473-498. See also P. Legrand, "European Legal Systems are not Converging", 45 *International and Comparative Law Quarterly* 52 (1996).

I. THE NOTION OF PROMISE

The definition of reward as a unilateral promise is linked to a more general question - the place of the unilateral will as a source of obligations.⁹ Although the idea of a unilateral juridical act is very old and does not raise particular questions,¹⁰ the recognition of the unilateral will as a source of obligation, that is, that a person may be committed to a promise without express or tacit acceptance or reliance, is relatively new in the Continental tradition.¹¹

A. FROM *POLLICITATIO* TO CONTRACT

Most scholars who have written about the unilateral promise begin their research with the *pollicitatio*, recognition by Roman law of the unilateral promise as a source of obligation.¹² The *pollicitatio* was a declaration of someone, generally a rich person, announcing publicly his intent to benefit a city through the construction of a public building, like a temple. It is assumed that this declaration obligated the promisor, although no formal acceptance by anyone was needed.¹³ I would not suggest identifying the *pollicitatio* with the idea of unilateral promise so readily.¹⁴ It is true that Ulpianus, for example, effectively distinguished between the agreement - *pactum* - and the *pollicitatio*: "A pact is an agreement and convention of two people but an undertaking [*pollicitatio*] is the promise only of the person who makes it [...]."¹⁵ But it would be far-

9. This is in an aspect of a more general question concerning the value of the promise and what sort of promises the legal system will enforce.

10. The classic example is the will, recognized in all legal systems as a unilateral juristic act. Concerning unilateral acts see the classic work of J. Martin de la Moutte, *L'Acte Juridique Unilateral*, Paris, 1951. See also A. Rieg, *Le Rôle de la Volonté dans l'Acte Juridique en Droit Français et Allemand*, Paris, 1964.

11. See L. Moccia, "Promessa e Contratto", 40 *Rivista di Diritto Civile* 819 (1994).

12. See for example R. Wittmann "Auslobung", (J. Von Staundigers) *Kommentar zum BGB*, 1995, sec. 658 at 223.

13. See A. Berger, "Pollicitatio", *Encyclopedic Dictionary of Roman Law*, Philadelphia, 1953, at 634; A. Torrens, *El Negocio Jurídico en el Derecho Romano*, Oviedo, 1984, 45-46; A. Nussbaum, "Comparative Aspects of the Anglo-American Offer and Acceptance Doctrine," 36 *Columbia Law Review* 920, 923 (1936); J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Oxford, 1991, at 80; Moccia, op. cit., at 822. It is possible to distinguish between - *pollicitatio* and *votum*. The *pollicitatio* was a promise to the gods.

14. J. Roussier, "Le sens du mot 'pollicitatio' chez les juristes romains," 3 *RIDA* 295 (1949)

□ See also Albertario, *Studi di Diritto Romano v. 3 Obbligazioni*, Milano, 1936, passim.

15. Dig. 50, 12, 3: "Pactum est duorum consensus atque conventio, pollicitatio vero offerentis solius promissum." Translation from Th. Mommsen, P. Krueger, A. Watson, *The Digest of Justinian*, Pennsylvania, 1985, v. 4, p. 927. The words "promise/offer" should be understood in the meaning of unilateral declaration. See E. Bucher, "art 8", in H. Honsell, N. Vogt, W. Wiegand, (eds.), *Kommentar zum Schweizerischen Privatrecht Obligationrecht I*, Basel, 1992, at 99; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Oxford, 1992, 32, 80. C. Graziani, "Le Promesse Unilaterali", *Trattato di Diritto Privato* (P. Rescigno, ed.) 2d ed., Torino, 1999, v. 9 at 776 ff.

reaching to conclude that the *pollicitatio* constitutes a broad basis for recognizing the unilateral promise as a source of obligation. First of all, the *pollicitatio* enjoyed different meanings¹⁶ and even as late as Justinianus there was no recognition of it as a source of obligation.¹⁷ Only in the Digestum¹⁸ do we find *pollicitatio* with the accepted meaning of today.¹⁹ Moreover, the Roman texts from which it is possible to learn about *pollicitatio* as a unilateral promise are *interpolatio*, introduced in later times. Thus the *pollicitatio* hardly constitutes a basis for finding recognition of the unilateral promise in Roman law, and in any case it is not a promise of reward in the accepted sense today.

Regarding promises of rewards, it is clear that they were known in Rome.²⁰ We find in the Digest texts referring to promises for the return of slaves,²¹ establishing for example that if someone gives money to another to reveal the whereabouts of a runaway slave or of the thief of his property, the payment cannot be recovered,²² or that a payment received for giving information about runaway slaves is not illegal.²³ But these rules, rather than being understood as recognition of the reward as a unilateral promise, should be studied in the framework of contract law²⁴.

In the Middle Ages, the promise of reward for finding a lost object or for information regarding people who had disappeared was common. But searching the *ius commune*²⁵ for references to reward as a unilateral promise yields nothing more than speculation. The question arose among the Post-Glossatores but since there was not agreement between the principal authors of this time, Bartolus and Baldus, regarding the nature

16. See E. Albertario, op cit, 245 ff.

25. Albertario, op cit at 252.

26. Martianus. D. 50,12,4

19. In the classical period the meaning of *pollicitatio* was that of *stipulatio*, different from the *nudum pactum*.

20. As can be seen from the ruins of Pompeii where inscriptions regarding rewards were found. It was common to promise prizes - through public notices or even orally - for finding persons who had disappeared. See C. Martinez de Aguirre, *La Promesa Pública de Recompensa*, Barcelona, 1985, 34 ff.

21. See K. Dreiocker, *Zur Dogmengeschichte der Auslobung*, Diss., Univ. Christian Albrecht, Kiel, 1969, pp. 27 ff.; M. de Aguirre, op. cit., pp. 35 ff.

22. Dig. 12, 5, 4, 4. "Si tibi indicium dederō, ut fugitivum meum inidices vel furem rerum mearum, non poterit repeti quod datum est: nec enim turpiter accepisti [...]."

23. Dig. 19, 5, 15. "Solent, qui noverunt servos fugitivos alicubi celari, indicare eos dominis ubi celentur; quare res non facit eos fures; solent etiam mercedem huius rei accipere et sic indicare; nec videtur illicitum esse hoc quod datur [...]."

24. Dreiocker, op. cit., at 38.

25. *Ius commune* refers to the legal system in force in Continental Europe during the Middle Age based on the Roman law, and more particularly the Corpus Iuris Civile of Justinian and canon law. See for example A. M. Rabello, "The Codification Process", *The Unidroit Principles and the National Codifications* (A. M. Rabello, ed.) Jerusalem, 2001, pp. 149 ff; A. Gambaro, R. Sacco, *Sistemi Giuridici Comparati*, Torino, 1999, pp. 235 ff.

of the promise of reward,²⁶ it is impossible to discern in their work recognition of the unilateral promise.

In canon law a more decisive acceptance of the idea of the unilateral promise is evident, especially given the importance the Church gave to the person's words and vows.²⁷ However, the canonist always reconciled the idea of *pollicitatio* with the idea of *pactum*. Canon law had a less formalistic approach to promise than Roman law, but at bottom it speaks not of a unilateral promise but an accepted promise.

The natural law school also seems to be close to the idea of the unilateral promise. But this should not lead to misconceptions about the value of the promise which, according to the ius-naturalists also, enjoyed a clear-cut consensualist approach. Grotius, for example, distinguished between *pollicitatio* and *promissio*, but his ideas nevertheless were not so far from the traditional contractual path: From his point of view the *pollicitatio* obligates the promisor only if the promisee accepts it.²⁸ If Puffendorf definitively installed the *pactum* as the central idea, it was Domat who simplified the problem by putting forth the agreement as the only expression of the autonomy of will.²⁹ His ideas were adopted by the French legislator, and so the French code does not recognize the unilateral will as a source of obligation. By and large this is the position of French doctrine today, refusing to attach almost any legal meaning to the unilateral declaration of will³⁰ and refusing the idea of unilateral promise as superfluous and unclear.³¹

26. Martinez de Aguirre, op.cit. at 46 ff.

27. See Graziani, op. cit. pp. 633 ff.; L. Moccia, "Promessa e Contratto", 40 Rivista di Diritto Civile, 819, 825 ff (1994); J. Gordley, "Good Faith in Contract Law in the Medieval Ius Commune", Good Faith in European Contract Law (R. Zimmermann, S. Whittaker, eds.), Cambridge, 2000, pp. 93, 95 ff.

28. Grotius in any event talks about promise in general and not specifically regarding promises of reward. H. Grotius, Introduction to Dutch Jurisprudence (trans. Ch. Herbert) London, 1845, pp. 270 ff; Moccia, op. cit., at 841; R. Zimmermann, The Law of Obligations, Cape Town, 1990, pp. 567-568; S. Riesenfeld, "The Impact of Roman Law in the Common Law System", 1 Lesotho Law Journal, 267, 269 (1985).

29. See J. Gordley, The Philosophical Origins of Modern Contract Doctrine, Oxford, 1992, pp. 79 ff.

30. Somewhat paradoxically, the French conception of the promise of reward is very similar to the Anglo-American one: in both cases the promise will be binding if it is accepted by the performer, the promisee.

31. See for example H., L., J. Mazeaud, Leçons de Droit Civil - Obligations (théorie générale), 9e. Ed. Paris, 1998, pp. 347 ff; G. Marty, P. Raynaud, Droit Civil - Les Obligations, 2e ed., Paris, 1988, pp. 367 ff; F. Terré, Ph. Simler, Y. Lequette, Droit Civil - Les Obligations, 5e ed., Paris, 1993, pp. 39 ff; Ch. Larroumet, Droit Civil, 4e ed., Paris, 1998, v. 3, pp. 74 ff; R. Sacco - G. De Nova, Il Contratto, Torino, 1993, vol. 1, pp. 42 ff. Nonetheless, some authors consider that the theory of the unilateral promise should be accepted in French law. See B. Starck, Droit Civil - Obligations, Paris, 1971, pp. 349 ff. See also the notes of jurisprudence of J. Mestre in the Revue Trimestrielle de Droit

The change in concept, that is, the idea that the unilateral declaration of a will may constitute a source of obligation, appeared in German law, and later in Italian law. But before referring to the reward as unilateral promise, it is worthwhile analyzing how the common law understands the notion of promise.

B. THE PROMISE IN COMMON LAW

While the Continental legal systems were reluctant to commit the autonomy of the will to the notion of promise and preferred the use of the agreement-contract formula as a framework suitable for every bargainable exchange, the common law put the promise as the axis of contract law.

In common law we find the notion of promise linked either to the concept of contract or to the concept of offer. Anglo-American law does not refer to the promise-contract dichotomy in the Continental way³² since historically; at least, the basis of contract in English law has been the promise rather than the agreement.³³ While according to the civil law system the basis of the contract was offer and acceptance,³⁴ the English notion of contract was linked more to the notion of promissum than the notion of convention; that is why, until today, the standard definition of contract remains based on the concept of promise.³⁵

In Anglo-American law a promise³⁶ involves at least two parties: a promisor and a promisee.³⁷ Moreover, as is well known, at least in the

Civil, 84 (1985) 730, 86 (1987) 102, 88 (1989) 746. Compare A. Sériaux, "L'Engagement Unilatéral en Droit Positif Français Actuel", *L'Unilateralisme et le Droit des Obligations*, (Ch. Jasmin, D. Mazeaud, eds.), Paris, 1999, pp. 7-20

32. Moccia, *op. cit.* at 846.

33. G. Samuel J. Rinkes, *The English Law of Obligations in Comparative Context*, Nijmegen, 1991, at 42.

34. See the remarks of Lon Fuller confusing the function of consideration with the function of agreement due to his reliance on Demogue who considered that the unilateral declaration in certain circumstances must be a source of obligation, and so did not accept the French dogma of consensus. See L. Fuller, "Consideration and Form", 41 *Columbia Law Review* 798-824 (1941) at 819 note 31.

35. Restatement 2d Contracts sec. 1: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Compare sec. 3: "A bargain is an agreement to exchange promises [...]." See Samuel, Linkes, *op. cit.* at 58-59. See also M. Eisenberg, "World of Gift and of Contract", 85 *California Law Review* (1997) 821, 825; Moccia, *op. cit.*, 844 ff; Llewellyn, *op. cit.*, pp. 798 ff.

36. As a matter of principle a promise is a statement of intention; a manifestation of the promisor that he will act or refrain from acting in the future. Williston, v. 1 at 267. This is also the language of the Restatement: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." (sec. 2(1)).

37. Anson's *Law of Contract*, Oxford, 1998, at 27; S. Stoljar, "Promise, Expectation and Agreement", 47 *Cambridge Law Journal* 193 (1988).

traditional common law there is no place to enforce the promise without consideration, a requisite which presupposes an expressed or implicit agreement of the promisee.³⁸ Short of the case of the contract under seal, a unilateral promise that has not been accepted, or relied upon, cannot cause any loss to the promisor.³⁹ Whenever the expression “unilateral promise” appears in the research of some American scholars, the meaning American jurists give it is different from the meaning that is given in Continental law⁴⁰ and that appears in the Louisiana Civil Code.

When reading the American research concerning promises one should be well aware of how the American doctrine uses the notion of promise, to avoid reaching misleading conclusions. So, for example, the idea that the contract is based upon a *promise* was developed by Prof. Ch. Fried in his book *Contract as Promise*,⁴¹ a title that expresses, in brief, his central thesis. He deals at length with the question of the binding force of the promise, but it must be clear that his thesis has nothing to do with recognizing the unilateral promise as a source of obligation. Prof. Fried ascribes to the will theory, justifying the basis of the promise in the will of the parties.⁴² He links the legal value of the promise with moral considerations but remains within the traditional framework of the bilateral conception of promise: Like the Ius naturalists of the past,⁴³ Fried is talking about an *accepted* promise.⁴⁴ The same awareness is needed to avoid misunderstanding the ideas developed by Yorio and Thel,⁴⁵ or, from another perspective, the thesis of Prof. Atiyah, who raises the contract-promise dichotomy using them as interchangeable expressions and sometimes referring to promise as a moral commitment

38. Nevertheless, I will try to show that it is possible to reconcile the idea of consideration with the unilateral promise.

39. Atiyah, *Promises, Morals and Law*, op. cit. at 9

40. See for example K. Llewellyn, “On Our Case-law of Contract: Offer and Acceptance”, 48 *Yale Law Journal* 1, 35 (1938-39); R. Posner, *Economic Analysis of Law*, 2d ed. Boston, 1977, p. 188 (the paragraph referring to the unilateral promise does not appear in the 3d ed.); Murray, op. cit. at 31.

41. Ch. Fried, *Contract as Promise*, Cambridge, Mass., 1981

42. This position was refuted by Atiyah. See Atiyah, op. cit. at 138 ff. See also G. Gilmore, *The Death of Contract*, 1974.

43. This is not the first time that we find the basis of the autonomy of will in the promise. In Grotius the argument was clear that the promise obligates. As explained before, even though he uses the term “*pollicitatio*”, he, like Fried, was talking about an accepted promise. See Fried, op. cit., at 21. See also Gordley, *The Philosophical Origins ...*, op. cit. at 234.

44. Notwithstanding Barnett’s efforts to distinguish his “consensual” theory from the theory of Fried, R. Barnett, “A Consent Theory of Contract”, 86 *Columbia Law Review* 269 (1986).

45. In their article “The Promissory Basis of Sec. 90”, 101 *Yale Law Journal* 111 (1991).” See the critique of M. Eisenberg, “World of Contract and World of Gift”, op. cit.

while the contract is the legally binding act.⁴⁶ But Atiyah does not even raise the question of an unaccepted promise.

As to the use of promise with the meaning of offer, this is a consequence of the evolution of the common law of contract. It was with the reception of the offer-acceptance framework in the 19th century that it became common to refer to "the promissory character of offer." An offer becomes a promise after being accepted, or, in other words, the promise is an offer that has been accepted.⁴⁷ Thus, in the first Restatement the defined offer is as a conditional *promise*. Although in the Restatement 2d this definition does not appear, the promissory character of the offer is peculiar to common law.⁴⁸ American courts use the word "offer" and "promise" interchangeably in the sense of commitment.⁴⁹

It may be argued that the mechanism of the offer differs from the mechanism of the promise, a distinction underscored by American authors. For example, the expansive use of promissory estoppel, which characterizes American jurisprudence, has served as grounds for scholars⁵⁰ to claim that while the promise is linked to the idea of commitment, and is enforceable on the ground of the reliance, the offer is a part of a bargain.⁵¹ But this type of thesis which enhances the analysis of contract should be not understood as accepting the idea of unilateral promise. In most cases reliance is no more than a form of acceptance, tacit acceptance,⁵² and so the distinction between promise and offer on the ground of how it is to be accepted is no more than semantic. The

46. P. S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, 1979, pp. 1-7

47. See F. Pollock, *Principles of Contract Law*, 10th ed., London, 1936, pp. 3, 7; Compare the position of Tiersma distinguishing between promise and offer. P. M. Tiersma, "Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise", 26 UC Davis Law Review 1, 20 (1992).

48. See Williston, v. 1 at 266.

49. Rhode Island Hospital Trust National Bank v. Varadia & others, 647 NE 2d 1174, 1177 (1995).

50. See E. Holmes, "The Four Phases of Promissory Estoppel", 20 Seattle University Law Review (1996) pp. 45-79, at 67 ff. See also Tiersma, op. cit. at 19; M. Kniffin, "Innovation or Aberration: Recovery for Reliance on a Contract Offer, as Permitted by the New Restatement (Second) of Contracts", 62 University of Detroit Law Review (1984) 23, 27 ff.

51. This approach may find some support in the very redaction of sec. 2 of the Restatement 2d Contracts.

52. Some cases of reliance are proposals for the benefit of the offeree. In such a case there is no need of reliance, since it could be argued that when an offer is to the exclusive benefit of the offeree, silence implies acceptance. This is the solution, for example, in France (not expressly recognized in the Civil Code but admitted by jurisprudence. See P. Owsia, "Silence: Efficacy in Contract Formation. A Comparative Review of French and English Law" 40 International Comparative Law Quarterly, 748 (1991)), Italy (sec. 1333 Cod. Civil) and Israel (Contract Law, General Part (1973), sec. 7; Gift Law (1968), sec. 3).

problem is not even the border between contract and unilateral promise, but the border between contract and tort.⁵³

This overlapping of promise and contract -- and offer -- has led some authors to suggest giving up the idea of promise.⁵⁴ This question is beyond the scope of this article. What I am trying to show is that there is room for “non-contractual” promises.⁵⁵ The clearer case is the promise of rewards, but the characterization of the reward as a unilateral promise is not obvious. From a comparative point of view, the common law approach which sees the reward as a contract is clearly distinguished from the civil law tradition that in a large number of countries sees it as a unilateral promise.

II. THE PROMISE OF REWARD: COMPARING APPROACHES

Three elements constitute the promise of reward: notice to the public, the object of reward and the prize offered.⁵⁶ These elements appear in all legal systems. The difference is principally regarding the enforcement of a promise when the performer did not know (or even did not rely upon) the notice. In order to show the differences I will explain the evolution of the idea of reward as unilateral promise, focusing on the LCC solution. Afterwards I will deal with the solution adopted by American courts as a model of the contractual approach.

A. THE REWARD AS A UNILATERAL PROMISE

The idea that a unilateral declaration may constitute a source of obligation began to take form in German law, and more precisely as a consequence of the work of the Austrian jurist, H. Siegel.⁵⁷ Siegel tried to show the differences between the German and the French law traditions,

53. As it was pointed out by G. Gilmore, *The Death of Contract*, Columbus (Ohio), 1974, passim (especially chapter 4).

54. There are grounds for stating that the idea of promise as a basis for contract is being relinquished. We see, for example, that the UCC refers to contract in terms of agreement, not promise. See UCC sec. 1-201 (3) and 1-201 (11). See J. E. Murray, Jr. *On Contracts*, 3d. ed. Charlottesville, Virginia, 1990, at 16.

55. I am aware of Prof. Corbin's idea that if the courts are ready to enforce the promise even if the one who rendered the desired equivalent knew nothing of it, there is insufficient reason for refusing to call that enforceable promises a contract. A. Corbin, *On Contracts* (rev. ed. J. Perillo), St. Paul, 1993, v. 1, at 328. But the question is not only one of calling certain promises “unilateral promises”, but of seeing them from a different approach. I must also be clear that I do not deal with the question of consent as a basis of contract, which is a completely different issue. See R. Barnett, “A Consent Theory of Contract”, 86 *Columbia Law Review* 269, 305 (1986) and compare R. Martini, “The Dogma of Consensus”, *European Legal Traditions and Israel* (A. M. Rabello, ed.) Jerusalem, 1994, pp. 191-195.

56. See P. Gauch, W. Schluep, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 6th ed., Zürich, 1995, p. 191.

57. H. Siegel, *Das Versprechen als Verpflichtungsgrund in heutigen Recht*, Berlin, 1873

explaining that in German law it is possible to find recognition of the binding force of the unilateral promise, one example being the promise of reward. His idea received at least partial⁵⁸ legislative expression in the BGB, which defined the reward - *auslobung*⁵⁹ - not as a contract but as a unilateral promise that does not require acceptance.⁶⁰ According to section 657 of the BGB:

A person, who by public notice announces a reward for the performance of an act, in particular for the production of a result, is bound to pay the reward to any person who has performed the act, even if he [the latter] did not act with a view to the reward.

The understanding of the promise of reward as a unilateral promise received strengthened recognition with the enactment of the Italian civil code.⁶¹ While in the German code the promise to the public is indeed characterized as a unilateral promise but there is no a clear-cut position regarding general recognition of the unilateral promise as a source of obligation, in the Italian code the unilateral promise is flatly defined as a source of obligation.⁶²

In Italy, as in Germany, the obligation entailed in the promise of reward is the consequence not of a contract which presupposes the existence of

58. It must be emphasized that not all of Siegel's ideas were received into the BGB, which recognizes only some particular cases of unilateral promise. Short of the reward we find, for example, that the charity (*Stiftung*) is recognized in the BGB as a unilateral promise. See BGB sec. 80 ff. Regarding the *Stiftung* in German law see W. Seifart, A. Freiherr von Campenhausen, *Handbuches des Stiftungsrechts*, 2. ed., München, 1999; W. Flume, *Allgemeines Teil des Bürgerliches Rechts 2. Teil Die juristische Person*, Berlin, 1983, pp. 130 ff; T. Wachter, *Stiftungen Zivil- und Steuerrecht in der Praxis*, Köln, 2001; S. Schauhoff, *Handbuch der Gemeinnützigkeit*, München, 2000, pp. 95 ff; W. Leisner, "Le Régime Juridique des Foundations en Droit Allemand", *Le Droit des Foundations en France et à l'Étranger* (R. Dupuy, ed.), Paris, 1989, pp. 97-108.

59. See J. Medicus, *Schuldrecht II*, 11 ed. München, 1999, at 223; W. Fikentscher, *Schuldrecht*, 9 ed., Berlin, 1997, pp. 602 ff.; J. Esser, H. Weyers, *Schuldrechts - besonderer Teil*, 7 ed., Heidelberg, 1991, v. 2, pp. 330 ff. The *auslobung* is not the only case of unilateral promise in the BGB. There are other cases of unilateral will, like the foundation. Regarding characterization of the acknowledgment of debt as a case of unilateral will, the opinions are divided. The study of these questions is beyond the scope of this paper.

60. Constituting an exception to sec. 305 which established: "For the creation of an obligation by legal transaction [*rechtsgeschäft*] and for any modification of the substance of an obligation, a contract between the parties is necessary, unless otherwise provided by law." See W. Flume, *Allgemeiner Teil des Bürgerlichen Recht*, 2 ed., Berlin, 1975, pp. 135 ff.

61. See C. Falqui Massida, M. Jacchia, *Promesse Unilaterali, Gestione d'Affari, Indebito Arricchimento*, Torino, 1968, pp. 101 ff.; Graziani, *op. cit.*, 771, 782 ff. See also P. Lerner, *The Unilateral Promise*, Jerusalem, 2001 (Hebrew) pp. 221 ff.

62. Indeed the Brazilian Civil Code of 1916 preceded the Italian in putting the reward in an independent chapter and not within the chapter on contracts. See C. Bevilacqua, *Codigo Civil dos Estados Unidos do Brasil - edição histórica*, 2d ed., Rio de Janeiro, 1977, at 642. Also the Mexican Civil Code of 1928 contains explicit recognition of the unilateral promise. Nevertheless it was the Italian doctrine which, on the basis of the *Codices Civile*, developed an enhanced concept of the unilateral promise different from the German one.

an offer and acceptance, but of the declaration of the promisor who through his promise assumes an obligation towards an undetermined person.⁶³ Unlike the German code, the Italian legislator adopted an enhanced framework for the reward including the promise of award in a determined situation,⁶⁴ blurring to some extent the boundary between a public offer to make a gift, that is a bilateral promise, and a unilateral promise of reward.⁶⁵

Today the general trend is to accept the reward as based upon a unilateral promise according to the German or the Italian model. This solution has been adopted by Japan,⁶⁶ China,⁶⁷ Mexico,⁶⁸ Brazil,⁶⁹ Paraguay,⁷⁰ Peru,⁷¹ Quebec,⁷² Ethiopia,⁷³ Egypt,⁷⁴ and Syria⁷⁵ among others.

As pointed out before, in the 1984 reform, the Louisiana law-maker adopted the German-oriented solution, reserving the promise of reward only for the case of performance of a specific fact. According to sec. 1944:

An offer of a reward made up to the public is binding upon the offer or even if the one who performs the requested act does not know of the offer.

From a formal point of view the Louisiana solution is different from the German and Italian models. In the German BGB, the promise of reward is dealt with in a separate chapter in the book of contract (although it is defined as a unilateral promise and not a contract). In Italy the lawmaker included the promise of reward in a special chapter dedicated to the unilateral promise, enhancing the unilateral promise to the rank of an autonomous source of obligations. This is not the case in Louisiana,

63. See Cass. 20.3.60, n. 693, FI 1960, I, 1147.

64. See Italian Civil Code sec. 1989: "A person who, addressing himself to the public, promises a given performance in favor of a person *who is found in a specific situation* or who performs a specific action, is bound by such promise as soon as it is made public [...]" (emphasis added).

65. I will refer to this distinction *infra*.

66. Japan Civil Code, sec. 559.

67. Chinese Civil Code, sec. 164 ff.

68. Civil Code of the Federal District, sec. 1861 ff.

69. Civil Code, sec. 1512 ff.

70. Civil Code, sec. 1802 ff.

71. Civil Code, sec. 1959 ff.

72. Civil Code, sec. 1395.

73. Civil Code, sec. 1689.

74. Civil Code, sec. 162.

75. Civil Code, sec. 163.

where reward is dealt with in three sections⁷⁶ included in the general part of the law of obligations, part of which deals with the formation of the contract. From a strictly technical point of view, there is room to ask if this solution coheres with the characterization of reward as a unilateral promise. The LCC use the term *offer* of reward, although it should rather have used the word promise: the reward is not an offer because it does not require acceptance.

Notwithstanding its difference from the German or Italian models, the Louisiana model has adopted a clear-cut unilateral approach because it does not require agreement, or even knowledge on the side of the performer. Thus, although this is not express, the solution of Louisiana Civil Code should be deemed recognition of the unilateral will as a source of obligation, in accord with the accepted trend in civil law systems.⁷⁷ It is claimed that the obligation of a reward that emerged should be defined as a "legal obligation."⁷⁸ I am not sure that this approach prompts an accomplished definition. Why would we say that the reward is a legal obligation, but the obligation produced by a contract is the consequence of the autonomy of will? In both cases the obligation is enforced on the ground that it is recognized by the law. This is not tantamount to seeing in the reward a legal obligation.⁷⁹ The lawmaker recognized that in some cases the unilateral will may bring about a commitment that is enforceable and in this way the unilateral will becomes a source of obligation like contract or tort.

Here there is room to query the scope of this rule. Is it an *ius cogens* rule? Should the offeror nevertheless have the power to establish expressly in his ad that he will pay the reward *only* if the performer knew about the promise? There is no categorical answer in the systems that have adopted the unilateral approach, but an answer in the negative is called for. In my view, if we adopt a unilateral approach we should not admit this as a way to avoid paying rewards. Several theories may be used to avoid a promise of reward that does not obligate the promisor without the knowledge of the performer, for example, likening this sort of promise to an illusory promise (since it leaves payment within the pure will of the promisor) or arguing that this is a promise at odds with the good faith principle... . If the idea is to stimulate the performer to restore and to perform promises, such a rule may jeopardize these goals.

76. These three sections do not cover all the situations that can arise regarding a promise of reward.

77. see P. Lerner, "La declaración unilateral de voluntad en el Proyecto de Reforma al Código Civil", 65 La Ley (Arg) 2001, n. 149.

78. See Litvinoff, "Consent...", op. cit. at 718.

79. As, for example, in the case of an obligation for maintenance which is plainly legal.

In any event the condition of knowing about the ad should be clearly expressed and courts should admit claims against “sophisticated” promisors who intend to avoid paying by arguing that the ad included the “implicit” condition of knowing about the promise.

It is time to see how the American law refers to reward.

B. THE CONTRACTUAL APPROACH

If one asks a student of American law about a promise of reward, he will refer to it as an example of contract, more precisely a unilateral contract.⁸⁰ American courts also see the reward as a clear-cut example of unilateral contract, repeating almost incessantly that the reward is the outcome of an offer accepted by performance.⁸¹ Even one of the most important American scholars to research the subject did not hesitate to define the reward as the only example of unilateral contract.⁸²

The first step is to answer the question, what is a *unilateral contract*? In a comparative perspective, we should keep in mind that the definition of unilateral contract in the civil law tradition differs from its definition in the common law tradition. In Louisiana law, as generally in Continental law, the idea of unilateral contract is based upon mutuality, that is, a unilateral contract is one in which only one side gives the performance. A contract “is unilateral when one or more persons are obligated towards one or more others without there being an engagement on the part of the later”⁸³ or, in the language of sec. 1907 of the Louisiana Code:

A contract is unilateral when the party who accepts the obligation of the other does not assume a reciprocal obligation.

80. See M. Petit, “Modern Unilateral Contracts”, 63 Boston Univ. Law Review 551, 558 (1983).

81. Berthiaume v. Doe, 22 Cal. App. 78, 133 p. 515; Davis v. Jacoby, 34 P 2d 1026 (1934) (defining the reward as a clear-cut example of unilateral contract); Simmons v. United States 308 F. 2 160 (1962).

82. K. Llewellyn, “Our Case-Law of Contract: Offer and Acceptance”, 48 Yale Law Journal 779, 806 (1939). This was even defined as “simple” unilateral law. M. Wessman, “Is ‘contract’ the name of the game? Promotional games as test cases for contract theory”, 34 Arizona Law Review (1992) 635, 658. As I will show, there is room to ask if the reward must be viewed as a contract.

83. Code Civil sec. 1103 (The Fench Civil Code, trad. par J. Crabb, Littleton, 1995). See J. Ghestin, *Traité de Droit Civil - La Formation du Contrat*, 3me ed., Paris, 1993, pp. 14 ff.; Ch. Larroumet, *Droit Civil t. 3 Les Obligations - Le Contrat*, 4me ed. Paris, 1998, at 157; L. Cariota Ferrara, *Il Negoziò Giuridico*, Napoli, 1948, pp. 281 ff.

Unilateral contracts in Continental law are generally gratuitous contracts although several distinctions may be drawn between the gift and other gratuitous contracts.⁸⁴

At common law, the idea of unilateral contract is linked to how the relationship is formed. A unilateral contract is formed not by an exchange of promises but of a promise with an act.⁸⁵ Only one party promises performance, the consideration from the promise being something other than a promise.⁸⁶ In a civil legal system this mechanism would not be allocated to the framework of the unilateral contract but to the realm of the formation of contract: It is the case in which acceptance is given not by notice but by the very performance.⁸⁷

From a historical perspective, the notion of unilateral contract in common law pertains to a particular evolution of the legal system, when the contract, or more accurately, breach of contract, took primacy over breach of promise.⁸⁸ Until the 19th century decision in *Adam v. Lindsell*,⁸⁹ no real attention was paid in English law to the process of contract formation or to the unilateral or bilateral character of the promise.⁹⁰ But when the contract between absent parties became a matter of course, it was necessary to focus not only on how to enforce the contract but also on how the contract is formed. The offer-acceptance mechanism became part of English contract law, closing the gap between the Continental and common law systems.⁹¹ It was necessary to find a new framework for those promises that did not fit into the framework of offer and acceptance (the bilateral contract): When there was no promise in response to the offer but acceptance was the consequence of a particular behavior, the contract was defined as "unilateral."

84. See sec. 1523 ff. The Louisiana law recognizes the existence of onerous donations and remunerative donations which are not purely gratuitous contracts.

85. On the unilateral contract in common law see G. Marini, *Promessa ed Affidamento nel Diritto dei Contratti*, Napoli, 1995; Sh. Allen, "Rewards for the Return of Lost Property: Are They Void in New York?" 24 *St. John's Law Review* 287-295 (1950). For a critical approach to the theory of the unilateral contract see P. Atiyah *Introduction to the Law of Contract*, 5th. ed., Oxford, 1995, pp. 77 ff; S. Stoljar, "The ambiguity of promise" 47 *Nw. U. L. Rev.* 1, 9 (1952).

86. Williston, *op. cit.*, v. 1, p. 41; *Anderson v. Douglas and Lomason Co.* 540 NW 2d 277, 283 (1995).

87. LCC 1939 ff.

88. A. W. Simpson, "Innovation in the Nineteenth Century Contract Law", 91 *Law Quarterly Review* 257, 265 (1975).

89. 1 B & Ald. 681 (1818).

90. See K. Teeven, *A History of the Anglo-American Common Law of Contract*, N. York, 1990, p. 177 ff.; Gordley, *op. cit.*, pp. 139 ff.

91. We are witnessing the consolidation of what is known as the traditional conception of contract theory, the bargain theory of contract, which may be formulated simply: A promise is enforceable if it is given as a part of a bargain. See R. Cooter, Th. Ulen, *Law and Economics*, 3rd ed, N. York, 2000, pp. 178 ff. See the criticism of this theory in M. Eisenberg, "The Principle of Consideration", and 67 *Cornell Law Review* 640, 642 ff (1982).

Focusing the analysis on American law, we find that the “unilateral contract” received expression in the first Restatement⁹² and, although the term “unilateral contract” was abandoned in the Restatement 2d⁹³, the idea is still preserved in the phrase “Where an offer invites an offered to accept by rendering a performance and does not invite a promissory acceptance”⁹⁴ Nevertheless, the concept of unilateral contract has undergone changes. Now it is used to include situations the reporters to the first Restatement did not have in mind, embracing tenors of contract that in the past were not seen as unilateral contracts.⁹⁵

The peculiarities of the unilateral contract in American law brought some authors to claim that the mechanism of unilateral contract is not one of offer and acceptance and so there is no need of acceptance,⁹⁶ or to go even farther and not see an acceptance in every case of performance in the unilateral contract.⁹⁷ In my view, one should understand that in the framework of a “promise for an act” are actually found two different types of proposals or declarations of will: one is the offer aimed at being accepted by the performance⁹⁸ (let us call it an *individual unilateral contract*, since the offer is directed to a determinate person), and the other is the proposal to the public to perform a certain act, the *promise of reward*, or promise to the public, as it is called in some legal systems. While the first is aimed at concluding the contract, the acceptance being the consequence of the behavior of the promisee, the second does not seek *acceptance* by performance but the performance itself. In the case of an “individual” unilateral contract the knowledge of the offer is obvious. Only in a theoretical situation will John paint the room of Peter without knowing about Peter’s promise of payment. This is not the case with the promise of reward. The inclusion of the reward in a framework that is suitable for the individual unilateral contract gives place to shortcomings and contradictions.

92. Sec. 12.

93. See sec. 45. See *infra*. Treitel wonders if this is redaction is clearer than before. G. Treitel, *The Law of Contracts*, 10th ed., London, 1999, at 36.

94. Restatement 2d Contract, sec. 45 (1). See *Asmus v. Pacific Bell et al.* 96 Cal. Rptr. 2d 179,184 (2000).

95. Regarding the unilateral contract as a legal framework for employment cases see Pettit, “Modern Unilateral Contracts”, 63 Boston U.L. Review 551 (1983); *Asmus v. Bell*, *supra* n. 94.

96. See Tiersma, *op. cit.* at 25.

97. S. Stoljar, “The False Distinction between Bilateral and Unilateral Contract”, 64 Yale Law Journal, 515, 518 ff. (1955).

98. Similar to the situation described in sec. 1327 of the Italian Civil Code: “Performance before reply by the acceptor: When at the request of the offeror or by the nature of the transaction or according to usage the performance should take place without prior reply, the contract is concluded at the time and place in which the performance begins [...]”

In my opinion if the American scholar wants to find a promise different from an offer he should look at the promise of reward. If we understand the reward not as a unilateral contract but as a unilateral promise, relinquishing the need of knowledge on the part of the performer (the "promisee") we will succeed in defining the promise of reward more accurately and, at the same time, achieve a more refined definition of unilateral contract.

III. WHY PREFER THE UNILATERAL APPROACH?

In order to show why the unilateral approach is preferable, I will further explain the shortcomings involved in the bilateral approach, showing the "acceptance" of a reward to be a condition that is incoherent in theory and inefficient in practice. The understanding of a reward as a contract is far from being a coherent solution, for to explain the mechanism of rewards in terms of offer and acceptance we must over expand the limits of the contract, adopt fictions and, no less problematic, be ready to reach unjust solutions. To be clear my intention is not to convince American lawyers of the superiority of Continental law⁹⁹ but to point out the problems, the shortcomings, of encompassing the promise of reward within the offer-acceptance frame. Explaining a promise in terms of contract or bargaining is the dogmatic outcome of understanding agreement as the unique expression of the autonomy of will.

A. REFUTING THE "DOGMA OF CONSENSUS"

The particular difference between the Continental and the common law approaches¹⁰⁰ is in the requirement of substantial knowledge of the promise in order to be entitled to the promised prize.¹⁰¹ A first clarification: in American law this rule applies only to promises of reward from private parties, and not those from public authorities. A reward does not require knowledge if the promise was made via statute.¹⁰² So a promise to the public will be enforced when made by a

99. One of the "founding fathers" of the Louisiana Civil Code, Edward Livingston, was a New York lawyer who immigrated to Louisiana in 1803 and became convinced that the civil law system was better than the common law. See Yiannopoulos, *op cit* at XXIX.

100. I will refer to American law as tantamount to common law, notwithstanding the cases where there is room to distinguish.

101. Murray at 121; *Glover v. Jewish War Veterans of United States* 68 A. 2d 233 (1949).

102. See Restatement 2d Contract, sec. 23 comment c: "Standing offers of rewards made by governmental bodies [...] may be regarded as intended to create a climate in which people do certain acts in the hope of earning unknown rewards. Theoretically, an act so done might create a bargain, but recovery of the reward can be justified just as well by treating the offer as a promise binding without mutual assent or consideration or as creating a non-contractual obligation." See *Glover v. Jewish War Veterans* *supra* n. 106 at 235. See also R.T.B., "Rewards-Prior Knowledge of the Offer as a Prerequisite to Recovery", and 14 Virginia Law Review 124 (1927-28).

city or state, the argument being that these are not contracts but public grants.¹⁰³ Many American jurisdictions have what are known as Rewards Statutes, which give the finder of a lost object a statutory claim.¹⁰⁴ In my discussion I will focus only on private promises of reward.

In the common law, the dogma of consensus¹⁰⁵ acquires its maximal expression in the reward, yet all the requirements of classical contract theory appear for the enforcement of a promise of reward: Since the reward is a contract there is a need for acceptance, and since there is offer and acceptance we have a contract.... In principle, if the performer did not know of the promisor's promise, the action could not have been bargained for, it could not have been given in exchange for it, and the performer cannot, therefore, enforce the promise.¹⁰⁶

But this line of reasoning leads to a contradiction with the doctrine espoused by common law scholars who clearly explain that the promise of reward is an offer that is binding *without need of further bargaining*.¹⁰⁷ The mechanism of the reward is indeed at odds with the mechanism of bargain: In the case of a reward there is no real effectiveness to bargaining, for the other side does not know about the conditions, the value of the object, alternative prices, and so on.

Moreover, the performer's acceptance is not relevant: As in every unilateral contract the promisor is not seeking acceptance but performance¹⁰⁸ but unlike individual unilateral contracts, the acceptance is also irrelevant as to other potential performers. This point demands some clarification. Generally, if both sides agree, a unilateral contract may be transformed into a bilateral contract. A offers B a sum of money if B paints his room: This is a unilateral contract. But if after receiving A's promise, B makes a counter promise of painting the room and A accepts the promise, B is bound by his promise and the unilateral contract becomes bilateral. But the unilateral promise of reward continues in force even if two sides agree, and if a third person performs the task he will be entitled to the reward unless the promisor withdraws

103. See *Choice v. City of Dallas*, 210 S.W. 753 (1919). This doctrine was reaffirmed in *Rosenthal v. Al Packer Foss, Inc.*, 36 Md. App. 349, 374 A. 2d 377 (1977).

104. This is the case, for example, in Alabama, Kansas, Tennessee, etc. See S. Stoljar, "Negotiorum Gestio", *International Enc. of Comp. Law*, Tübingen, 1984, v. 17 at 124. Compare with sec. 971 of the BGB.

105. See Martini, *op. cit.*

106. See *Broadnax v. Ledbetter*, 99 S.W. 1111 (Tex. 1907). See A. E. Farnsworth, *Contracts*, 3d ed., N. Y., 1998, at 67.

107. Treitel, *op. cit.* at 13.

108. See *Corbin op. cit.* at 360.

the promise.¹⁰⁹ Transforming the promise of reward into a bilateral contract between A and B will not transform the reward into a bilateral contract towards other potential performers.

No less problematic is finding a coherent answer to the question, when is the effective time of knowledge, the beginning of the performance or during the performance? The first Restatement adopted the first answer but Corbin exposed a different position: If someone offers a reward for the return of a lost article the fact that the party returning it found it prior to the offer being made or prior to the party's knowledge is immaterial.¹¹⁰ American courts accepted the rule that a performance begun without knowledge of the reward being offered or even before the reward is offered, if it is completed, entitles the party to the reward after the performance.¹¹¹ Accordingly, the Restatement 2d established that even if the performer learns about the promise during the performance, he is entitled to the reward.¹¹² I do not see why a person who did not know about the promise is less entitled to the reward than one who became aware of it at the last minute!

In American law although some decisions grant the reward even if the performer did not know of the advertisement,¹¹³ most of the decisions demand knowledge. At least one American judge estimated that the adoption of the contractual approach, and specifically the need for knowledge, is the consequence of an *obiter* opinion given in a 1845 decision¹¹⁴ and there was no reason to adopt it as a general rule since the case dealt with the arrest of a felon by a sheriff, so the question concerned not knowledge but legal duty.¹¹⁵ According to this position, the need for knowledge would have no real roots in American law.¹¹⁶ I

109. Regarding withdrawal see *infra*.

110. A contract is created by rendering the specific service requested (the return) with knowledge of the offer. Corbin, *op. cit.*, v. 1 p. 332.

111. *Genesee County v. Pailthorpe*, 224 N.W. 418, 419 (1929). See also Murray, *op. cit.* at 130.

112. Compare UCC 2-206 where the beginning of performance can be effective as acceptance only if followed within a reasonable time by notice to the offeror.

113. These are old decisions. At least once, American jurisprudence even expressly adopted the unilateral approach pursuant to the German code. See *Oldfield v. City of Reading*, 18 Pa. Dist. Rep. 833 (1909), citing E. Schuster, *Principles of German Civil Law*, Oxford, 1907, p. 322. This author also refers to *Carlill v. Carbolic* as an example of reward. (I will refer to *Carlill* later). Sometimes it is possible to see that although the conclusion is right the grounds are problematic. For example in *Eagle v. Smith*, 4 Houst. (Del.) 293 (1871), the idea that guided the court to reject the need for knowledge was that the sum offered was a gratuity in the service required to be agreed or assented to by the person performing it. As we will see, the reward should not be defined as a gift or liberality. See also *Dankins v. Sappington*, 26 Ind. 199 (1860) and Annotations in 53 ALR 542, 543.

114. *Stampler v. Temple* 25 Tenn. 113 (1845).

115. Regarding legal duty see *infra*.

116. See the minority opinion of Nearn J. in *Stephen v. City of Memphis*, 556 SW 2d 213, 217. Regarding legal duty see *infra*.

think this conclusion is too far-reaching since the idea of reward as a contract also appears in English law,¹¹⁷ and American law goes along with this English tradition.

It should be pointed out that not all American judges have been satisfied with the outcome of applying the unilateral contract theory to rewards, and so the courts tend to emphasize the ethical position of the particular claimant in light of public policy considerations.¹¹⁸ Some authors do not hesitate to show adamant discomfort with the need for knowledge¹¹⁹ but, preferring the use of the "unilateral contract" model; American scholars have not yet paid attention to analysis of the European solution or raised the convenience of adopting the unilateral approach.

It is also commonly accepted that in order to form a unilateral contract not only must the offeror know about the offer (since without knowledge there is no power of acceptance)¹²⁰ but he must also act with the intention, actual or apparent, of accepting it.¹²¹ But if we apply this criterion, suitable for the private unilateral contract, to a promise of reward, we cannot know which sort of behavior is tantamount to acceptance. Sometimes it was claimed that for a unilateral contract to be legally enforceable an offeree's performance must have been induced by the promise made,¹²² but in other decisions the courts held that so long as the outstanding offer was known to a person, he could accept an offer for a unilateral contract by rendering performance even if he did so primarily for reasons unrelated to the offer.¹²³ Moreover, American courts shifted from a traditional approach that evidence of the offeree's subjective intention to accept or not to accept is both relevant and admissible, whereas according to modern views the offeree's subjective intention is

117. See the well-known case of *Gibbons v. Proctor*, 64 L.T. 594 (1891), cited as an example of enforcement of reward without a need for knowledge. But this case was not followed in England or in American doctrine.

118. J. Calamari, J. Perillo, *Contracts*, 3d ed., St. Paul, 1999, p. 74.

119. See Murray, *op. cit.* at 129. See also Corbin, *op. cit.* at 328, criticizing the distinction between rewards offered by public authorities and by private persons or institutions.

120. See Corbin, at 327; *Reynolds v. Charbeneau*, 744 Sw 2d 365 (1988).

121. See Calamari, *op. cit.*, at 73; *Chitty On Contracts*, 28th. ed, London, 1999, at 102.

122. See *Vitty v. Eley*, 51 App. Div. 44 (1900). In this case it was decided that there was no place for awarding the reward since the performer did not voluntarily give up the information that led to the imprisonment of an outlaw but it was dragged out of him by threatening him with prosecution, since he was friend of the outlaw and lived in the same dwelling. The case concerned the theft of items from a school and the reward was \$ 25! In my opinion the plaintiff was entitled to the reward and it would have been better for the court to have adopted the criterion of *Williams v. Cawardine* that is, not paying attention to the motives. Compare *Drown v. Howlett* 1999 US Dist. Lexis 19834.

123. *Simmons v. United States* 308 F2d 160, 165 (1962). See the British decision in *Williams v. Carrardine*, 172 E.R. 1101, 110 E.R. 590 (1833), where it was established that the motives were irrelevant.

not relevant. Absent words or deeds to the contrary, an offeree's intent to accept is presumed.¹²⁴

The bilateral concept leads in one way or another to somewhat casuistically solutions. Seeking after intention appears to be the upshot of transferring to reward the patterns accepted in cases of *negotiorum gestio*¹²⁵ but here is no reason to encompass the reward within this framework because the juristic nature of *negotiorum gestio* and reward is different. It is true that in both cases we are faced with a unilateral act of the *gestor* or the performer. The reward however is a unilateral promise while in the *negotiorum gestio* there is no "promise" but the formation of an obligation conditioned upon the intention of the agent to demand compensation from the principal. The basis of the action of the *gestor* is the law that assumes an express or implied agreement with the principal,¹²⁶ so establishing the intention of the *gestor* is essential to ground the claim. This is not necessarily true with reward, because there is an express promise and so no need to seek "implicit agreement."

This is the solution in Louisiana law¹²⁷ as it is in Germany¹²⁸ and Italy,¹²⁹ to point out some examples. The requisite of intention is not linked to the need to seek an implicit agreement but to distinguish between one who acts assuming that he will receive restitution and acting with the exclusive idea of benefiting another.

B. REWARDS AND RELIANCE

A common law scholar, who can hardly understand how a promise might be enforceable without reliance, may argue that the unilateral promise solution makes reliance superfluous since the performer is entitled to the reward even when he did not depend upon the notice of reward to perform. The question of enforcing a reward without reliance corresponds with the question of why generally to enforce promises not

124. See *Drown v. Howlett*, 1999 US Dist. Lexis 19834.

125. "Management of affairs" in the language of the Louisiana Civil code (sec. 2292 et seq.) The *negotiorum gestio* is a typically civilian institution although with "parallel" frameworks in the common law. See for example the Restatement of the Law of Restitution, chapter 5 ("Benefits voluntary conferred without mistake coercion or request").

126. See B. Markesinis, W. Lorenz, G. Dannemann, *The Law of Contract and Restitution: A Comparative Introduction*, Oxford, 1997, at 711.

127. sec. 2292 LCC.

128. B.G.B. sec. 685 (1).

129. See Civil Code sec. 2028. To use Roman terminology, in order to be entitled to restitution, the *gestor* should act with *animus gerendi*, not *animus donandi*. See G. Cian, A. Trabucchi, *Commentario Breve al Codice Civile*, 4th ed., Padova, 1992, at 1652 ff.

based in reliance.¹³⁰ Although obligations and remedies based on reliance are not peculiar to the law of contracts,¹³¹ I will admit that it seems difficult to reconcile the idea of unilateral promise with the idea of reliance. Difficult but not impossible. Contrary to what appears at first blush, as a matter of fact, the unilateral conception does not obviate the question of reliance but it does ground enforcement on a different and enlarged approach to reliance.

Beginning with Williston, who systematically exposed the theory of promissory estoppel in the first edition of his treatise, and following with the famous article of Fuller and Perdue,¹³² American scholars have long discussed the importance of reliance in contract law.¹³³ It is not by chance that the main section of the Restatement dealing with reliance - section 90 - is perhaps the best known. The Louisiana Civil Code admits the reliance interest although numerous questions arise regarding implementation.¹³⁴ The discussion about the nature of reliance and its importance is clear and I will not deal with the multiple questions involved in this topic. Nevertheless, it seems important to clarify two or three points.

Reliance has two aspects: One is a contractual concept that protects the right to rely on a promise and proceed accordingly,¹³⁵ the second is the tort-like concept, whereby it is necessary to compensate for detriment

130. See R. Craswell "Against Fuller and Perdue", 67 The University of Chicago Law Review (2000) 99, 128.

131. See comment a. Sec. 90 Restatement 2d Contracts.

132. L. Fuller, W. Perdue "The Reliance Interest in Contract Damages", 46 Yale Law Journal 52, 373 (1936).

133. See e.g. S. Henderson, "Promissory Estoppel and Traditional Contract Doctrine", 78 Yale Law Journal, 343 (1969); Ch. Knapp, "Rescuing Reliance: the Perils of Promissory Estoppel", 49 Hastings Law Journal 1191 (1998); R. Barnett, "The Death of Reliance", 46 Journal of Legal Education 518(1996); D. Farber, J. Matheson, "Beyond Promissory Estoppel: Contract Law and the Invisible Handshake", 52 Univ. Chicago Law Review 903 (1985); E. A. Farnsworth, Changing your Mind: the Law of Regretted Decisions, New Haven, 1998, pp. 36 ff.; R. Craswell, "Offer, Acceptance and Efficacy Reliance", 48 Stanford Law Review 481(1995-96). The idea of reliance is not strange to the civil law tradition, beginning with the rule of *venire contra factum proprio* in Roman times, through the fundamental work of Jhering. See A. M. Rabello, "The Theory Concerning *Culpa in Contrahendo*: Precontractual Liability from Roman Law to the German Legal System- A Hundred Years after the Death of Jhering", European Legal Traditions and Israel, (A.M. Rabello, ed.), Jerusalem, 1994, at 70. In recent years a new trend is based on focusing enforcement in the promise (or in the promisor) and not in the promisee and generally the whole idea of reliance is being reanalyzed. This, for example, is the position of Fried, Yorio and Eisenberg. By enforcing contract we support principles of trust and integrity. Ch. Fried, Contract as Promise, Cambridge, Mass., 1981, pp. 14 ff.; E. Yorio, S. Thel, "The Promissory Basis of Section 90", 101 Yale Law Journal (1991) 111; M. Eisenberg, "The World of Contract and the World of Gift", 85 California Law Review (1997) 821, 839.

134. see J. Adcock "Detrimental Reliance", 45 Loyola Law Review 753-770 (1984/85).

135. See Barnett, op. cit., at 522.

incurred in the case of detrimental reliance; or in other words, reliance as a ground for enforcement and as a measure of damages.¹³⁶

If we define the reward as a unilateral contract, the idea of reliance will play a central role since there is some sort of symbiotic relationship between the idea of promissory estoppel and the unilateral contract.¹³⁷ In both cases a promise is the basis, in one case, for reliance and in the other for performance. The unilateral contract is formed not exactly because the offeree has relied upon the offer but because he performed, "accepted," the offer. What is the difference between one who relied on the promise and another who performed a certain act according to the other's promise? In the common law view, the difference is in the consequences and, more specifically, the measures of damages, since in one case the performer will be entitled to reliance damages and in the other to expectation damages.

The linkage between reward and reliance led to some incoherent solutions. Let us look at the following example. A publishes a promise of reward for the return of his lost dog. Let us suppose that B reads the ad in the newspaper and begins to look for the dog but C, entirely by accident, finds it before B. According to the principles accepted without hesitation by American courts, the first performer is the one entitled to the reward. In this case, C, the first performer, would not be entitled since he did not know about the reward but this fact does not entitle the second performer to the reward, notwithstanding his reliance, since he did not achieve the goal. Only the achievement of the result is a basis for enforcement.

I do not think that the idea of reliance is forfeited absolutely by the theory of the unilateral promise, but it provides a different, more accomplished framework for the reliance interest. The unilateral approach underscores the importance of the *reliance of the public*. In a promise of reward, the reliance is not of the particular performer, according to the traditional common law idea, but of the public in general which is interested and relies upon the fact that promises of

136. See W. Slawson, "The Role of Reliance in Contract Damages", 76 Cornell Law Review 197, 223 (1990).

137. M. Pettit, Jr. "Modern Unilateral Contracts", 63 B.U.L. Rev. 551 (1983); J. Murray, "Contracts: a New Design for the Agreement Process", 53 Cornell L. Rev. 785 (1968); P. M. Tiersma, "Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise", 26 UC Davis Law Review 1, 49 (1992).

reward will be fulfilled.¹³⁸ When the promise of reward is enforceable in any case, it adds seriousness and enhances the value of the promise.¹³⁹

Regarding the means of establishing damages, reliance is almost irrelevant to determining the measure of damages since the performer is entitled to the sum established in the reward.¹⁴⁰ As Prof. Eisenberg explained, with rewards the granting of expectation is the appropriate measure of damages, representing the minimum value that the promisor places on the benefit he received as a consequence of the performance.¹⁴¹ I do not agree, however, that reliance accords more with altruism and communitarianism, and that awarding expectation damages accords more to individualism,¹⁴² certainly not with regard to rewards.

C. REWARDS AND LEGAL DUTY

In defense of the bilateral approach an American scholar is likely to argue that the unilateral theory of rewards is at odds with the well based "legal duty" rule. The idea of legal duty may appear in different circumstances: the general duty imposed by law, as in the case of the duty to return lost property; the duty imposed by law on certain groups of people like policemen, firemen and so on to perform certain acts; and the duty that a person assumes on the basis of a contractual relationship.

American courts have denied the right to reward in the case of the return of lost property on the ground that there is no binding promise,¹⁴³ since the realizing act is not consideration because there is a legal duty to return the property. When a person acts according to a legal duty - or preexisting duty- he is not entitled to the reward.¹⁴⁴

As to reliance, the linkage between consideration and legal duty also led to the adoption of somewhat cumbersome solutions. As enforcement is grounded in consideration or in reliance, if the finder knew about the

138. See *infra*.

139. Regarding reliance damages, this could be allowed if the promise is revoked not in good faith, as was established in the Swiss code of obligations. I will refer further to this solution when dealing with the question of withdrawal.

140. It is also possible to say that this is the measure of the expectation damages. In any case reliance damages cannot exceed the expectation damages in a contract where a sum was established.

141. See M. Eisenberg, "Probability and Chance in Contract Law", 45 UCLA Law Review 1005, 1048 (1998).

142. D. Kennedy, "Form and Substance in Private Law Adjudication", 89 Harvard Law Review 1685, 1713 (1976); R. Cravell, "Against Fuller and Perdue", 67 University of Chicago Law Review 99, 129 ff (2000).

143. See *Corbin*, v.1 at 326.

144. *Slattery v. Wells Fargo Armored Services Corp.* 366 So. 2d 157 (1979); *Chester v. State*, 176 So 2d 104 (1965).

reward before finding the object he is entitled to the reward (since because of his reliance upon a reward he comes into possession of lost property in order to return it to its owner), but if he knew about the reward after the lost object was in his possession (and perhaps held the lost property until the offer of reward is made), there is no consideration, because of the legal obligation to return the property!¹⁴⁵ This distinction does not take into account another possibility, the case when a person not knowing about the reward finds a lost object and, makes reasonable efforts to learn if a reward has been published.

The realization of the act -- the return of the lost property¹⁴⁶-- is a legal duty in the sense that the law requires it, but this legal duty does not annul the obligation that the promisor imposed upon himself through his unilateral declaration, just as a legal duty cannot override an obligation imposed by contract. If John enters into a contract with Peter to look for a lost watch, and John finds it, he will not be entitled to rewards because there is a legal duty to return the property. But, what about statutes that establish a particular compensation for the finder?¹⁴⁷ Why, in these cases, if there is an obligation to restore, does the law provide for a prize?¹⁴⁸ The private autonomy of the promisor is no less effective than the lawmaker.

The enforcement of rewards even when the finder did not know about the promise not only is not at odds with the legal duty but it actually strengthens it particularly in cases where the law sets up an obligation to return lost property but there is in principle no obligation to take charge of it. For example, the law in California establishes that any person who finds a lost thing is not bound to take charge of it, but if he does so he is henceforth a bailee for the owner.¹⁴⁹ It should also be noted that the duty of restitution may be accomplished through different means (like handing the object over to the police) and that the return demands active

145. See *Rheinbauer v. De Krieses*, 67 NYS 2d 211, 213 (1946). But this doctrine seems to have been overtaken in modern decisions. For instance in *Greene v. Heinrich* 319 NYS 2d 275 (1971) a more just principle was established: the purchaser whose initial possession is not wrongful and who returns the stolen goods voluntarily and in reliance upon a promise to pay a reward is entitled to it. But compare *People v. Dadon*, 640 NYS 2d 425 (1996) where it was decided that one who acquires lost property which he knows to have been lost or mislaid and who does not take reasonable measures to return it to its owners, commits larceny. In my opinion it is necessary to distinguish between the obligation to return and the right to the reward.

146. It should again be noted that the scope of rewards exceeds by far the question of the return of lost property.

147. See *supra* note 107.

148. No one will assume that one who does not know the law is not entitled to the reward, so why should one who did not know about the advertisement not be entitled to the reward?

149. *Statutes of California*, 1967, chapter 1512, at 3601, sec. 1.

behavior by the finder to take the object. This behavior is to be encouraged by promises of reward.

According to section 3419 of the LCC, "one who finds a corporeal movable that has been lost is bound to make a diligent effort to locate its owner or possessor and to return the thing to him." A similar provision can be found in other legal systems.¹⁵⁰ Moreover, according to section 521 of the LCC the owner of a lost thing may reclaim it from the finder¹⁵¹ but this rule does not deny the payment to which the finder is entitled. As a principle the duty to return lost things is not at odds with the legal commitment of the promisor. The finder is obliged to return and the promisor is obliged to pay the finder being entitled to choose between reimbursement of expenses¹⁵² or receiving the sum promised in the notice of reward.¹⁵³

A somewhat different question arises when the legal duty is the consequence of the duty imposed by law on public officials acting within the scope of their official duty. When the performance was by a person fulfilling a governmental task, like policemen, firemen and so on, there will be no right to enforce the promise of reward.¹⁵⁴ In American law the question of consideration is used to solve problems arising out of the performance of the act by persons who have an obligation to perform it.¹⁵⁵ The enforcement will not be valid if the task was within the scope of the policeman's duty or authority.¹⁵⁶ On the other hand, a policeman who is off duty and not within his jurisdiction may be entitled to claim and receive the reward.¹⁵⁷ Beyond the question of consideration is the problem of whether a person who fulfills a legal duty is entitled to

150. See sec. 965 B.G.B.: "A person who finds a lost thing and takes possession thereof shall immediately notify the loser or the owner [...]."

151. See a. Yiannopoulos, *Louisiana Civil Law Treatise - Property*, 3d. ed., St. Paul, 1991, 683 ff.

152. In German law we find detailed reference to the sums to be reimbursed: 5% of the value of the object returned for objects up to DM 1000 in value, 1% for objects above this value; for return of an animal 3% of value, and so on. See sec. 971 BGB.

153. see in German law, Grunsky/Staundiger, *Kommentar zum BGB*, op cit, sec. 971, at 660.

154. In Spain see for example, E. Soto Nieto, "Voluntad Unilateral Generadora de Obligaciones", 313 *Información Jurídica* (1972) 7, 18; in Switzerland, Bucher, "Section 8", op. cit, at 104.

155. See Restatement 2d Contracts, sec. 73. The Restatement indeed includes the idea of legal duty in the chapter on consideration.

156. See *In Re Waggoner* 199 NW 244 (1924); *Taylor v. American Bank Trust Co.* 135 So. 47 (1931). In civil law terms we could rather say that the obligation of the promisor lacks a lawful cause. See S. Litvinoff, "Consent Revised: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of Louisiana Law of Obligation", 47 *Louisiana Law Review* 699-759 (1987). See also M. Eisenberg, "The Principles of Consideration", at 648; Corbin, vol. 1, op. cit at 358.

157. See *Denney v. Reppert* 432 SW 2. 647, 649 (1968).

enforce the award of a prize for performing a task for which he is receiving payment from the authorities.¹⁵⁸

A similar solution will be achieved in the case in which the finder (the performer) had assumed a contractual obligation with the promisor.¹⁵⁹ Take, for example, the case of a contract with a private investigator, offering him \$200 to find a lost dog. Some days later the owner also publishes a promise of reward offering \$300 for finding the dog. Is the private investigator entitled to that reward? In the same way that there is no room for a quasi-contractual claim when there is a contract between the sides,¹⁶⁰ the right to demand a reward should not be admitted when there is a contract between the sides.

D. THE UNILATERAL APPROACH, EFFICIENCY AND ALTRUISM

The unilateral approach finds justification not only in technical legal aspects but also the economic analysis of reward. Reward helps achieve an outcome with a low-cost investment. A reward permits the promisor to obtain results without paying for the efforts if the efforts are unsuccessful, while the risks are borne by the performer.¹⁶¹ If the promisor is interested in obtaining the collaboration of a professional, the amount of the reward must be high to encourage a professional finder to undertake the work in reliance upon the proposed reward. But if the reward is aimed at everyone who performs, the promisor need not consider the relationship between the finder's efforts and reliance and the value of the object. For example, a lost cat has a value of 200 for the owner (including the emotional value) and 50 for the finder. For restorer to receive 100 is economically good for both. It is cheaper to pay a reward than to employ a private investigator.¹⁶²

The question is which approach is more efficient to achieve the goals for which the reward is published - the unilateral one or the bilateral one? To find an answer to this question, Posner proposed distinguishing between professional seekers that is those who look for rewards ads in order to

158. In the case of the policeman, the question may arise whether he is entitled to receive the compensation, the gift, or will it be limited in accordance with administrative regulations.

159. See *Forsythe v. Murnane* 113 Minn. 181; *Slattery v. Wells Fargo Armored Services Corp.*, Fla. App. 366 So. 2d (1979)157, 158; see M. Eisenberg, "The Principles of Consideration", 67 Cornell Law Review (1982)640, 644.

160. See e.g. *County Commissioners of Caroline County Maryland v. J. Roland Dashiell and Sons* 747 A. 2d 600 (2000); Stoljar, "*Negotiorum Gestio*", op. cit. at 45.

161. See W. Landes, R. Posner, "The Private Enforcement of Law", 4 Journal of Legal Studies (1975) 1, 44.

162. Although there may be differences in the effectiveness of the work. (To avoid misunderstandings I refer to the return of lost property although the reward may include a broad range of items).

collect rewards, and “casual finders.” According to Posner, when the legal system is ready to enforce the promise on the basis of knowledge, it encourages the efficiency of the professional searcher and not the casual finder. The fact that casual finders know that in every case they are entitled to the reward induces them to return lost objects, so the professional finder will have less incentive to search, due to the competition. It is more likely that the incentive of the casual finder will increase the number of recoveries. The unilateral approach allows greater effectiveness at less cost for the promisor. Nonetheless if there is no need for knowledge, the number of claims will increase and the reward will become an expensive institution due to the costs involved in litigation. So the bilateral approach is preferable, as being cheaper. The analysis to this point is Posner’s. I would suggest a critical look at this.

Regardless of the difficulties in determining who is a “professional” searcher, I think the assumption that the bilateral approach may avoid claims is far-fetched, because under the contractual thesis that there are more problems in proving whether the performer knew about the ad or not. A long trial may be needed in order to demonstrate whether the promise had knowledge of the reward before he began the performance, or did not know and later became aware of the compensation offered, and whether he is lying or not.¹⁶³ And what is it necessary to prove? Sometimes it has been established that a person cannot claim a reward unless he knows that it has been offered,¹⁶⁴ but in other cases it is reliance on the offer that is needed¹⁶⁵ or even acting with the intention of claiming it.¹⁶⁶ On the other hand, other courts have established that motivation is irrelevant.¹⁶⁷ Due to the characteristics of reward it is difficult to know the psychological state of the performer. The unilateral approach allows economy of costs since it avoids the investment in time and money

163. Moreover it may be that the best way for every finder is to claim the reward promised even if he does not know if there was a reward or not. In the negative case the promisor who has not published will answer the question with astonishment. But it may be that he really has published and nevertheless refuses to recognize it, and so forth.

164. *Tobin v. Mc. Comb*, 156 S.W. Reporter 237 (1913); *Stephens v. City of Memphis et al.*, 565 SW 2d 213 (1977); but compare the minority opinion. See also *Slattery v. Wells Fargo Armored Services*, 366 So. 2d 157, 159 (1979).

165. *Genesee County v. Pailthorpe et al*, 224 N.W. 418 (1929). See also *Otworth v. The Florida Bar*, 71 F. Supp. 2d 1209 (1999); *Reinhauer v. De Kriesges*, 67 NYS 2d 211 (1946).

166. *Braum v. Northeast Stations and Services Inc.*, 461 NYS 2d 623, 624 (1983); *Drown v. Howlett*, U.S.D. Ct. Nebraska, 1999 US Dist. Lexis 19834; *Glover v. Jewish War Veterans* 68 A 2d 233 (1949). Compare *R. Price Jr. et al. v. The City of East Peoria*, 507 NE 2d 228 (1987).

167. *Braun v. Northeast Stations and Services, Inc.*, 461 NYS 2d 623 citing *Reynolds v. Eagle Pencil Co.* 285 NY 448 (1941). Compare the English decision *Williams v. Cawardine*, 4 B and A. 621 (1833). As was pointed out, both decisions, those which require and those which dispense with knowledge, are based on *Williams v. Cawardine*. See *Oldsfield v. City of Reading* 18 Pa. D. R. 833, 836 (1909). Indeed *Williams v. Cawardine* does not refer to knowledge but to the motives.

needed to inquire into the circumstances of the performer's performing the task.

The usefulness of the unilateral approach concerns not only litigation costs. Let us suppose that the performer knows that the rule is that the reward will be awarded only if he knows about the promise. Since, in accord with the jurisprudence, this knowledge could also be achieved after performance, a performer should be interested in finding out if there is a reward. To do so, he should pay attention to newspapers and other publications (and the Internet) to see if there is an ad regarding the reward. In this case he could claim that he knew about the reward and as a fiction claim that he acted in reliance upon the promise. If he does not find an advertisement regarding the reward, maybe he will think it not worthwhile to find the owner and will invest no more effort in returning the lost object. Llewellyn has observed that the time a potential performer invests in the performance is relatively small.¹⁶⁸ This premise will become false if any potential performer is asked to look for ads regarding rewards. The need for knowledge renders the performance much more expensive, due to the investment in time in seeking ads, and so it contributes to discouraging performers. These efforts could be used to find the owner rather than the reward!

The unilateral approach not only represents a more efficient solution, it also supports an attitude of solidarity. I completely reject the conclusion of some authors, like Flour and Aubert, who dismiss any social interest in paying the reward to the performer who did not know about the promise.¹⁶⁹ As explained earlier, enforcing unilateral promises is a way to strengthen the public's confidence in this sort of promise and, at bottom, to stimulate the public to invest its time and effort in a task for the benefit of another person. Construing a reward as a unilateral promise shows that social solidarity is not at odds with the efficiency required to achieve the aims the promisor is interested in. Without dealing with the question whether the common law has a more individualistic approach while civil law is more humanist in orientation,¹⁷⁰ it is better to recognize a general right to the reward since in this way we encourage good Samaritans to return property and help others in various ways. On the other hand, the contractual approach may lead to the conclusion that an

168. Llewellyn, op. cit. at 806. See also Eisenberg, "Chance...", op. cit. at 1044.

169. J. Flour, J. L. Aubert, *Les Obligations - L' Acte Juridique*, 8e ed., Paris, 1998, at 374.

170. See J. Dawson, "*Negotiorum Gestio*: The Altruistic Intermeddler", 74 *Harvard Law Review* 817 (1961). The contrast between both conceptions is not as dramatic as it sounds. See Zimmermann, op. cit. at 448.

altruistic person who returns property is not entitled to anything, but a mercenary indeed is entitled ... because he has “accepted” the offer.¹⁷¹

And what about one who proceeds exclusively on an altruistic basis?¹⁷² His altruist motivation will not be diminished. Not only is the unilateral approach not at odds with altruism, it strengthens it, since a potential performer without notice about the reward performs the task on an altruist basis (not knowing if he will receive any compensation). But in the end he will be entitled to decide, and if he is acting only on the grounds of an altruistic motivation, he can always waive the reward.¹⁷³

IV. THE SCOPE OF THE REWARD

Adopting the unilateral approach strengthens the need to understand the limits between the reward and other proposals to the public which are not unilateral juristic acts but declarations of will aim at setting up a contractual relationship.

As with other proposals to the public, the offer of reward requires certain publicity directed to the public¹⁷⁴ or at least to a certain group of people. Regarding this pattern, there is no difference between a promise of reward and other proposals to the public that are the basis for a future contract.

A. PROMISE OF REWARD AND OFFER TO THE PUBLIC

We may assume that offers to the public belong to the “bilateral world” while the promise of rewards belongs to the unilateral world. Section 1944 of the LCC establishes that “an offer of a reward made to the public is binding upon the offeror” From this point is possible to understand that there are other offers to the public that fall short of the definition of section 1944 and should not be included in the regimen of the promise of rewards. So, how is possible to draw the distinction between rewards and other promises to the public? When does an offer to

171. Murray, *op. cit.*, at 129.

172. On altruism see H. Dagan, *Unjust Enrichment: A Study of Private Law and Public Values*, Cambridge, 1997, at 25 ff; S. Stoljar, “Negotiorum Gestio”, *International Enc. of Comp. Law*, Tübingen, 1984, v. 17 at 4.

173. And why impose a reward on one who is acting for altruistic motives? The performer is not obliged to accept anything: in every case he may renounce the reward. See Restatement 2d Contract sec. 53 (3) and illust. 3. But the performer’s waiver is not related to the contractual or unilateral character of the promise of reward. He is entitled to renounce money whose legal source is the unilateral will of the promisor.

174. *Genesee v. Pailthorpe et al*, 224 N.W. 418 (1929).

the public become an offer (promise) of reward that binds the promisor without need of acceptance?

As is commonly seen, a proposal to the public may assume different forms: It may be an invitation to offer¹⁷⁵ or an invitation to negotiate,¹⁷⁶ an offer to an undetermined person¹⁷⁷ or a general offer granting the power of acceptance to the public in general or to a part of it.¹⁷⁸ In principle an ad is merely an offer to negotiate, although sometimes it may constitute an offer if it is clear, definitive and leaves nothing open for negotiation.¹⁷⁹ By and large, the offer to the public is an element of a future contract requiring acceptance.¹⁸⁰ An offer to the public that lacks engagement is only an invitation to treat,¹⁸¹ only when it grants the power to accept may a proposal be considered an offer.

Let us return to the case with which I began this paper, relating to John and his dog. If John has lost his dog he has several ways to try to find it (short of investing personal efforts). He may publish a promise of reward for the one who returns the dog; he may publish an offer seeking the services of a detective to take care of the search; he may enter into a private contract with a particular detective or several contracts with several detectives. In which case do we say that it concerns a promise of reward?

Some authors in common law makes a distinction between the meaning of the advertisement if directed to a bilateral contract or to a unilateral contract,¹⁸² or between the general offer which indicates performance as a mode of acceptance and the offer to an individual to be accepted by

175. Like an auction.

176. *Leonard v. PepsiCo*, at 126.

177. Like the ad seeking a roommate, or selling a particular product.

178. "... [A]n advertisement for a particular automobile at a specific price constitutes an objective manifestation of the dealer's willingness to enter into a bargain on the stated terms and justifies the consumer's understanding that his or her assent to the bargain is invited and will conclude it. Such an advertisement therefore constitutes an offer that is accepted when a consumer tenders the advertised price" *Donovan v. RRL Corporation*, 27 P 3d 702 (Cal. 2001). See A. Corbin, *On Contracts* (revised by J. Perillo), St. Paul, 1993, v. 1, pp. 116 ff; M. Eisenberg, "Expression Rules in Contract Law and Problems of Offer and Acceptance", 82 *California Law Review* (1994) 1127-1180 at 1166 ff; Atiyah, *op. cit.* at 60. Compare the law in France: A. Viallard, "L'Offre Publique de Contrat," 69 *Revue Trim. De Droit Civil* 750 (1971); J Schmidt, *Négotiation et Conclusion de Contrats*, Paris, 1982, pp. 59, 80. See also R. Schlessinger, *Formation of Contract - A Study of the Common Core of Legal Systems*, N. York, 1968, v. 1, *passim*.

179. *Lefkowitz v. Great Minneapolis Surplus Store*, 86 NW 2d 689, 691 (1957), *Leonard v. PepsiCo* at 124.

180. See G. Pescatore, C. Repetto, *Codice Civile*, 10 ed. Milano, 1997, at 3489; P. Rescigno, *Codice Civile*, 3d ed., Milano, 1997, 1470.

181. See P. Klik, "Mass Media and Offer to the Public: an Economic Analysis of Dutch Law and American Common Law" 36 *Amer. Journal of Comp. Law* 235 (1988).

182. Chitty, *op. cit.*, at 96.

performance.¹⁸³ Nevertheless, and precisely due to the fact that the reward is viewed as a unilateral contract, we do not find systematic distinctions between offers to the public and promises to the public.¹⁸⁴ On the contrary, the Italian doctrine in particular has made serious efforts to determine the border between the reward and other offers to the public. At least from a formal point of view these efforts are justified, since in Italy the offer to the public and the promise to the public are in different parts of the code.¹⁸⁵ A reward (promise to the public in the Italian terminology) is a unilateral declaration, while an offer to the public is only a proposal for a future deal.¹⁸⁶ Although this legal framework seemingly allows a clear-cut characterization between them, a deeper analysis of the situation may raise some doubts concerning the distinction.¹⁸⁷

In principle it is possible to claim that the distinction between the reward and the offer to the public is that the reward is aimed at performance and it is this performance that entitles the performer (the “offeree”) to the compensation. The reward is located in an area where there is no possibility of economic interchange. There is no negotiable situation and there is no correlation between the promise and the economic value of the reward.¹⁸⁸ The reward is not aimed at setting up a deal between both sides, as in other offers to the public, but it also binds the promisor to pay one who performs a certain act. When performance is the basis for the enforcement of an obligation the promisor voluntarily assumed, and not only the premise for the existence of a bargain, come face-to-face with a unilateral promise. The unilateral promise does not claim any sort of acceptance, only the performance that enables the performer to receive the award.

In my view the relationship between lack of knowledge and reward is not one-way and we may find that there is certain dialectic between them. A reward does not need knowledge, but an offer to the public in which performance may be achieved without knowledge may also be characterized as a promise of reward, that is binding without knowledge. It is hardly thinkable that one may buy a dog without knowing about the offer to sell it (or at least without inviting the offer). But it is possible and

183. Anson, *op. cit.*, at 43.

184. But see *Oldsfield v. City of Reading* 18 Pa. D. R. 833, 837 (1909) pointing out the difference between a reward and an offer to the public.

185. Sec. 1336 - offer to the public; sec. 1989 - promise to the public [reward].

186. See Graziani, *op. cit.*, at 834 ff.

187. Graziani, *op. cit.* at 834 ff; R. Sconamiglio, *Dei Contratti in Generale*, (Commentario del Codice Civile, A. Scialoja, G. Branca, eds.), Bologna, 1970, 187 ff.

188. See Graziani, *op. cit.* 693, 702.

common for someone to return a lost dog to its owner without knowing about the publication of an ad offering a reward. What characterizes a unilateral promise is that the performance expressed by the promisor may also be fulfilled by one who has no knowledge of the proposal. Acceptance is not relevant. With the lack of knowledge possible and the promise not ancillary to the conclusion of the contract, we are dealing with a promise to the public. When the offer expressly or implicitly requires previous acceptance as a condition for fulfilling the performance, this is not a promise of reward but a simple offer to the public aimed at concluding the contract, a conclusion that may also be effected by the realization of an act.

B. REWARDS AND PRIZE

The question becomes more blurred when we try to define the borders between the promise of reward and the prize. Prof. Eisenberg has distinguished between them, pointing out that the prize is linked to competition, the reward to compensation.¹⁸⁹ I am not sure that it is possible to split the two concepts so starkly since in certain circumstances a prize may be deemed compensation. In any event, reward and compensation refer to different declarations of will.¹⁹⁰ I would say that the idea of prize is coupled with a contractual relationship between the offeror and some of the public who "accept" the offer by purchasing a product, taking part in a game or doing a specific activity requested by the offeror.

We may find different forms of prizes, like money-making prizes, competitions, games incidental to a sale at market price, games requiring no purchase, and so on.¹⁹¹ In the majority of cases, participation in the contest or purchase of the product is a condition to winning the prize (or to have the chance of winning the prize). In American law rewards and prizes are considered unilateral contracts.¹⁹² Focusing on the performance of an act as a way to conclude a contract, the common law makes a comprehensive assimilation of rewards and offers of prize, linked to the conclusion of a contract. In both cases the idea motivating the promisor is to induce the realization of a determined act. In reward the aim is to induce someone to perform a specific action, often for non-commercial reasons,¹⁹³ while with a prize relating to commercial sales, the promisor

189. Eisenberg, "Chance...", *op. cit.* at 1005. Nonetheless, the German Civil Code placed competition in the same framework as reward.

190. See Simpson, *op. cit.* at 378.

191. see Wessman, *op. cit.* 655 ff.

192. see Wessmann, *op. cit.* 645 ff.

193. See *Leonard v. PepsiCo* at 126.

is interested in inducing the conclusion of the contract, that is, the sale. The assimilation as to the effects of both promises does always allow perceiving the different juristic nature.¹⁹⁴

The idea of prize appears linked to the reward and its mechanism not only in American law¹⁹⁵ but in the Continental system as well.¹⁹⁶ For example, in German law the prize aimed at obtaining a result (competition) falls within the framework of the “auslobung.”¹⁹⁷ In Italy when the prize is conditioned on acquisition of a product, there is no room to define it in terms of a unilateral act,¹⁹⁸ but if the prize is granted in the framework of a competition the courts tend to define it as a sort of unilateral promise that is ruled by sec. 1989.¹⁹⁹ This is the upshot of the influence of German law in Italy. I would rather try to put this rule not in the framework of the promise of reward but within the irrevocable offer. In the Continental legal tradition it is admitted that the offeror may via a unilateral declaration, establish that his offer is irrevocable. This is the solution adopted in sec. 1928 of the LCC. By and large, only those who take part in the competition may deserve the prize.²⁰⁰ The prize is different from the reward because participation in a competition implies acceptance of the rules²⁰¹ and it is indeed difficult to think of someone taking part in a competition without knowing the competition exists.

In my view, characterizing a reward as a unilateral promise makes superfluous the effort to dress prizes in the reward's robes, since as a matter of fact the very claim to the prize supposes knowledge of the contest.²⁰² In the case of a contest the offer may be understood as irrevocable,²⁰³ in order to ensure that potential participants will not be defrauded by an outrageous revocation. Establishing a *sine die* offer falls short of the requirement of seriousness that this sort of offer should hold.

194. Eisenberg, “Probability and Chance...”, op cit at 1041.

195. See Rosenthal v. Al Packer Ford Inc., 374 A. 2d 377 (1977).

196. “Das Preisausschreiben ist ein sonderfall der Auslobung”, Gauch, Schluep, op. cit., at 193. In Italy it is under discussion which prizes should be considered offers and which ones promise to the public. See G. Cian, A. Trabucchi, Commentario Breve al Codice Civile, 4 ed., Padova, 1992, at 1620.

197. BGB. sec 661. See Münchener Kommentar, op. cit., v. 4, at 1760.

198. Graziani, op. cit. at 840.

199. See for example Cass. Feb. 16-1969 Giur. It. 1969-I-1, p. 1702; Cass. Jun. 9 - 1969; Giur. It. 1970-I-1, p. 723.

200. Fikentscher, op. cit. at 603.

201. While in reward the promisor has a direct interest in the subject matter of the offeree's performance, this interest is lacking in the promise of a prize. See Wessman, op. cit.

202. In most offers to the public, factually the question of knowledge cannot even arise since there is no possibility of exercising the power of acceptance without knowing about the offer. This is the case of “first come - first served.”

203. Compare Litvinoff, “Consent...”, op cit at 722.

But this requirement does not transform the prize offered into something tantamount to reward.

A particular problem exhibits the offer of a prize or penalty linked to the acquisition of a product or participation in games or lotteries. From a civil law analysis I find no particular problem in defining the prize granted to every one who purchases a determined product as a gift, and more particularly, a commercial gift. In civil law systems where consideration is not required, the gift is an enforceable contract, even when it is aimed at enhancing the number of products sold.²⁰⁴

Regarding lottery games, in Italy some voices claim that the lottery should be assimilated into the promise to the public. This approach is barely supported by doctrine.²⁰⁵ The contractual framework is suitable, since the effects of the lottery are attached in principle to the purchase of the ticket. I am aware that against this flatly contractual approach it is possible to argue that the rights of the holder are not always the outcome of a purchase, as in the case of someone legally holding a ticket without having bought it. The same argument is made regarding prizes offered with no linkage to the purchase of the product (although they are aimed at inducing the purchase), like bottle-cap promotions, whereby the one who holds a symbol or picture that is contained in only one of thousands of sold bottles will be entitled to the prize.

The fact that prizes are granted not to the one who has actually purchased the product but to the one who holds the ticket does not attach a unilateral character to the promise, since the right is linked to the title (the ticket) and not the bargain. Otherwise we could say that every contract where the ticket grants a right to use the service, to enter the cinema or the theater, to travel on the bus, is a unilateral promise since every one who found the ticket is, as a matter of principle, entitled to demand the services offered, although he has not paid for the service or travel.

In common law when dealing with the problem of delineating the boundary between prize and reward, the effects of the milestone decision of *Carlill v. Carbolic Smoke Ball Co.* cannot be dismissed.²⁰⁶ This case, referred to as a case of reward, blurred the distinction between the

204. Regarding the relationship between gift and reward see also *infra*.

205. See Graziani, *op. cit.* at 840. But this relationship may be justified in Italian law due to the broadening of the concept of promise of reward to include, as noted before, also cases of promises of gifts.

206. [1893] 1 Q.B. 256. See Chitty, *op. cit.*, at 97; *Newman v. Schiff* 778 2d 460, 465 (1976); *Leonard v. PepsiCo*, at 126; *James v. Turilli* 473 SW 757 (1971).

promise of reward and the offer to the public. There is no need to analyze the facts and the decision, which has received a lot of attention not only in the common law literature²⁰⁷ but in the civil law as well.²⁰⁸ It is enough to recall that a company offered a product that immunized against influenza and published an ad promising the payment of a hundred pounds to anyone who used the product but fell ill. To show the seriousness of the proposal, the ad stated that 1000 pounds were on deposit for the purpose. Mrs. Carlill used the product, became ill, demanded the money, and the court decided in her favor.²⁰⁹

There is no doubt as to the contribution of this case to abolishing the concept of the will theory, which sees all contracts as the consequence of offer and acceptance.²¹⁰ But in my opinion there is no need to involve a case like *Carlill* in the framework of reward. The better analysis would be to distinguish between the juristic nature of reward and the facts involved in *Carlill* since the case does not deal with a promise of reward.²¹¹ With reward there is only one claim, while in *Carlill* there was room for several.²¹² Moreover, the reward exhausts itself with the performance. In *Carlill*, the payment was aimed at a number of persons, as may be understood from the fact that a thousand pounds was deposited. The idea of reward is to induce or to pay back for a particular performance in which the promisor is interested, not to induce one to make a deal. There is no intention of achieving the formation of a contract. In *Carlill*, the promise was aimed not at realizing the act of use of the product, but at the acquisition of the product. The promise was an ancillary obligation designed to give seriousness to the proposal. It is obvious that the promise - to pay one hundred pounds - was indented to assure the buyer that the proposal was serious. Seeing this prize as a reward is also at odds with the economic basis which sustains the reward. The idea of the reward is to obtain at a low cost a result that would be much more expensive through a regular contract. In the days of the

207. On the case, its history (including curious details about the time) and a critical analysis of the evolution of English contract law as a consequence of *Carlill*, A. W. Simpson, "Quackery and Contract Law: the Case of the Carbolic Smoke Ball", 14 *Journal of Legal Studies* 345 (1985).

208. See for example, Zimmermann, op. cit. at 573; G. Gorla, *El Contrato* (trans. Ferrandis Vilella), Barcelona, 1959, at 431.

209. In order to show that the offer was serious the advertisement explained that 1000 pounds were deposited on account. This deposit raises not a few questions, like, for example, if the promise would be binding only for the first 10 persons to demand the reward....

210. Simpson, "Quackery..." op. cit., at 376.

211. The blurring between *Carlill* and a promise of reward appears in the judgment itself. Bowen J. compared the facts in the case with a reward offered to find a lost dog. Bowen J., at 270.

212. Simpson, "Quackery..." op. cit. at 378.

Carlill case, one hundred pounds was a very large sum, enough for someone to live on for an entire year!²¹³

More than the relationship between reward and offer to the public, *Carlill v. Carbolic* stresses the distinction between offer and warranty.²¹⁴ A warranty is not a unilateral promise but a unilateral declaration ancillary to a promise of contract. The question is not semantic: One thing is a reward, a promise to the public, and the other the different ancillary promises that may be attached to an offer to the public, as when an offeror states "I'll pay you if you prove me wrong."²¹⁵ An offeror to the public may undertake certain obligations that are not linked to the knowledge of the offer or to its express acceptance. In this case we are talking about a prize aimed at giving assurance to a statement and in this way showing that the speaker is telling the truth. When an assertion of a manufacturer is accompanied by a "promise", the plaintiff, the consumer, demands not a reward, but compensation.²¹⁶ These are not exactly rewards although the payment is related to the performance of a specific act.²¹⁷

As a matter of fact there are lots of offers to the public where knowledge of the conditions or terms established in the offer is not relevant to determining the rights of the offeree. The field of consumer protection is full of examples where the law-maker's paternalism takes the place of the consumer's knowledge. In the new form of contract-making, more than a mechanism of offer and acceptance in the traditional way, we find a general framework that is accepted by the consumer without knowing the conditions.²¹⁸ Generally he will learn about it *ex post facto*. Today in certain fields of contract law, like standardized contract, knowledge of the conditions included in the offer is not necessary. A standardized contract is interpreted without regard to the parties' knowledge or understanding of the standard terms of the writing.²¹⁹ Paradoxically, the new ways of dealing in which the agreement is understood in a "more flexible" manner require paying attention to the unilateral will and

213. The information is in Corbin on Contracts 1992 supplement, v. 1 St. Paul, 1992, at 184.

214. See Corbin, vol. 1 at 120.

215. See 36 Md. App. 349 Rosenthal v. Al Packer Fons, Inc., 374 A. 2d 377 (1977); Leonard v. PepsiCo, 88 F. Supp. 2d 116, 125 (1999).

216. See Simspon, "Quackery...." op. cit. at 378.

217. These promises are also different from the promise of gift related to purchase. See Wessman, op. cit. at 671.

218. I have dealt with this question in my book *The Unilateral Promise*, Jerusalem, 2001 pp. 5 ff. (Hebrew).

219. See Anderson v. Douglas Co., 540 NW 2d 277 (1995); Kiroshita v. Canadian Pacific Airlines, 724 P. 2d 110, 116 (1986). See Restatement 2d Contracts, sec. 211 (2).

seeing it as a real source of obligation whenever there is no need to look for a "meeting of minds."

The question is not only technical but should be related to the aims of the promise. In a prize the performance, the outcome, is not aimed at benefiting the offeror directly. Prizes fulfill other sorts of economic aim: They are intended to foster the promotion of a product, stimulate the participation of the public in a game, or simply as a way of making a gift to the public.²²⁰

American courts indeed adopt the rule that prizes - like rewards - are governed by the general rules of contract.²²¹ Although as I have pointed out before, I do not agree with the characterization of reward as a contract, I find that at least in this matter, the American approach regarding prize seems technically superior to the German and Italian approaches.²²² In my view, a promise of a prize is contractual in nature and consequently prizes should be analyzed on the basis of an agreement, express or implied (since the offeror is interested in a certain sort of contract with the performer of the skill or the purchaser of the product and that is the reason for offering the prize). The reward, however, should be based on a unilateral promise, since the promisor is only interested in the performance and the acceptance or the knowledge of the offer is not only unnecessary but even superfluous. Although the practical consequences of the distinction prizes/bilateral - rewards/unilateral are scarce, nonetheless the unilateral approach has consequences in some areas like the withdrawal of the promise or payment of the prize in case of the participation of several persons in the performance.²²³ Before dealing with these subjects I would make a reference to the relationship between reward and gift.

C. REWARDS AND GIFTS

In principle the reward should not be equated with a gift. Nevertheless I would recognize that it is not always so simple to establish that one ad is a clear-cut example of reward and another is an offer to the public of a gift. The problem is linked to the legal framework the lawmaker chooses for the promise of reward. As explained earlier, while in the German

220. As I have already pointed out, a gift via an offer to the public may be defined as a promise to the public, as in the Italian legal system, although this approach does not seem the best to me.

221. See for example Court of Special Appeals of Maryland *Rosenthal v. Al Packer Ford, Inc.* Md. App. Lexis 414 374 A. 2d 377 (1977).

222. Conf. Litvinoff, "Consent..." *op cit* at 722. See *Mears v. Nationwide Mutual Ins. Co.* 91 F. 3d 1118, 1122 (1996).

223. see *infra*.

system the reward is a promise for the performance of an act, not including the promise of a gift,²²⁴ the Italian Civil Code adopts a broader approach. Section 1989 of the Civil Code establishes that the promisor may be unilaterally bound toward one who is in a determinate situation (like, for example, a reward to the oldest man in a town). Thus, in Italy, if someone proposes granting a gift to a determinate person through an offer to the public, this would constitute not a contract of gift requiring acceptance, but a unilateral promise. This enhancement of the notion of reward (including promises that could be characterized as gift)²²⁵ was justified by the fear that in certain cases there would be no way to conclude if we are indeed confronted with the performance of an act, but in my view the solution of German law, which sees in these sorts of promises a conditional gift, is better.²²⁶ As noted before, the LCC has adopted the German model, a solution that avoids confusion between gift and reward.

In American law the distinction between reward and gift appears clearly drawn,²²⁷ and this is a suitable solution. If a reward is not for the performance of an act, but is aimed at granting a prize on behalf of certain objective circumstances or the situation of a certain person (the oldest man of a town, the victim of an accident, and so on) it should be treated as a promise of a gift, enforceable only on the grounds of sec. 90 of the Restatement 2d Contract.²²⁸ But in the eyes of a common law jurist, things are not so simple. At common law if it is accepted that the reward is contractual in nature, then it must be supported by *consideration*.²²⁹ So accepting that the reward is not a gratuitous promise, the problem is to define what is suitable consideration for it, in a way not at odds with its characterization as a unilateral promise. This question

224. See Wittmann, *op. cit.* at 224 ff.

225. See Falqui Massida, *op. cit.*, at 122 ff.

226. The same idea is found in Swiss law. See Bucher, *op. cit.* at 102.

227. See E. A. Farnsworth, "Promises to Make Gifts", 43 American Journal of Comp. Law 359 (1995). Compare Italian law where the reward includes the promise of reward through a promise to the public. This conception undermines the distinction between an offer to the public and a promise to the public. See *infra*.

228. And this without referring to the question of why a gratuitous promise should not be enforceable. See R. Posner, "Gratuitous Promises in Economic and Law", 6 Journal of Legal Studies, 411 (1977).

229. See for example *Stattery v. Wells Fargo Armored Corp.* 366 So. 2d 157 (Fla. App. 1979); *Rosenthal v. Al Packer Ford Inc.*, 374 A 2d 377 (1977); *Leonard v. PepsiCo Inc.*, 88 F. Supp. 2d 116, 125 (1999). In some civil law countries we find comparisons, mostly superficial ones, between the consideration and the *causa*. In the countries which accept the idea of *causa*, used by the Continental judge to determine if there are legal or moral grounds rendering the contract unenforceable, it may play some role in the enforcement of a reward. This is the case in Italy but not Germany, whose civil code did not receive this theory of medieval origin and doubtful utility. At any rate, analysis of the *causa* is beyond the scope of this article.

does not arise in Louisiana. As is known in Louisiana law, there is no need of consideration and the LCC accepts the French concept of *causa*.

In Anglo-American law the very idea of consideration has suffered a long evolution,²³⁰ and it has even been sustained that the doctrine of consideration contains certain oddities which interfere with the needs of modern society.²³¹ Dealing with the question of the need for consideration is beyond the scope of this paper but certainly it is necessary to ask if it is at all possible to reconcile the idea of reward as a unilateral promise with the idea of consideration. In my view American courts may adopt the unilateral approach without forsaking the doctrines established around consideration.

At first blush the question of consideration regarding reward should raise no particular question since it is clear that the act has certain value for the promisor: that is why he publicized his promise.²³² But an analysis of American decisions leads to the conclusion that this view is not always shared by the courts. As a matter of course, regarding contracts, even unilateral contracts, American courts accept that consideration may consist of either a detriment incurred by the promisor or the detriment of the promisee, and thus a benefit to the promisor is a sufficient alternative to the requirement of detriment to the promisee.²³³ But concerning the promise of reward American case law adopts a less flexible concept: The consideration is not the benefit to the promisor but rather the trouble, inconvenience or detriment to the promisee, since he has performed some act on the faith of the promise.²³⁴ This way of thinking appears as a consequence of the consensual approach to reward, since it strengthens the need for the performer to have knowledge: If the performer did not know there is no detriment... Nonetheless, in not a few cases, the idea of legal detriment has been broadly interpreted to include legal benefit to the promisor.²³⁵ It was submitted that the reason to enforce a promise of reward made by public authorities is based on the theory that the government benefits equally whether the claimant gives the information with or without knowledge of the reward and that therefore the government should pay in any event.²³⁶ And what is the difference

230. See A. W. Simpson, "Innovation in Nineteenth Century Contract Law", 91 Law Quarterly Review 247 (1975); Anson's Law of Contract 27th ed. J. Beatson, Oxford, 1998, pp. 123 ff. See also, Farnsworth, Changing your Mind..., op. cit., pp. 43 ff.

231. Calamari-Perillo, op. cit., at 67.

232. See Eisenberg, "Chance..." op. cit. at 1042.

233. See Willinston, v. 3 (1992) at 54, 62.

234. See Ryer v. Stockwell, 14 Cal. 134 (1860); Simmons v. Randforce Amusement Corp., 293 N. Y. S. 745 (1937); Sh. Allen, op. cit., at 288.

235. See Calamari-Perillo, op. cit., at 169 and cases cited there.

236. Glover v. Jewish War Veterans 68 A 2d 233, 235 (1949).

regarding a private reward? Is there not a benefit to the promisor that justifies stimulating the casual performer? In the case of reward the consideration appears very clearly in the benefit that the promisor receives.²³⁷ In my view a flexible approach to consideration,²³⁸ like that applied in *Benthiaume v. Doe*²³⁹ establishing that the return of property should be flatly admitted as sufficient consideration to support the promise, is better than the narrow approach. This broad approach to consideration is suitable for defining the reward as a unilateral promise and makes superfluous the need to find a "meeting of minds" or "reliance."

D. TO SUM UP

Defining the reward as unilateral promise is justified since this affords straightforward solutions, avoids fictions and allows achieving justifiable solutions that are more efficient. The reason American courts have adopted the bilateral model is their reliance on traditional concepts of promise and consideration that to a considerable measure have been overridden in recent decades. The Louisiana solution accords with the general trend in Continental legal systems. The blurring of the zone between the reward and other offers to the public, like for example the case of the prize, would not be attributed to shortcomings in the unilateral approach but as evidence that the contractual framework is flexible and can be understood not only in terms of traditional contract law theory which tried to reduce the mechanism of contract to a "meeting of minds." I have tried to show that the common law system may also adopt the unilateral thesis without jeopardizing traditional concepts of contract law.

It is hardly believable that in any concrete case it would be possible to determine that we are concerned with a prize and not a reward that is not linked to acceptance. The problem (that certainly is likely to bother law professors who are judges or practitioners) reflects the "friction" between unilateral and bilateral juridical acts. Adopting the unilateral approach does not reduce the scope of the analysis; rather it enhances the

237. In the case of rewards the question of benefit, should be focused on different angles, paying attention, for example not only to the promisor considered individually but promisors as a class: they will obtain a benefit in the fact that the public knows that promises of reward will be fulfilled. Prof. Eisenberg distinguishes between the interest of the promisor *ex ante* and *ex post*. Eisenberg, "Chance..." op. cit., at 1048. It may be assumed that the interest of a single promisor in paying the reward will be different after he received what was lost. A similar distinction is made in the Italian case *Panunti v. May*, Corte d'Appello d'Ancona, sent. 28-2-1986, *Il Foro Italiano*, 110, pp. 1277-83 (1987).

238. See L. Fuller M. Eisenberg, *Basic Contract Law*, 6th. ed., St. Paul, 1996, at 6.

239. 133 P. 515 (1913).

perspective, distinguishing between cases where express or tacit agreement is needed, and when the unilateral declaration should be considered the real basis for the formation of the obligation.

After considering the theoretical background of the promise of rewards, it is worthwhile to take a look at two topics related to the mechanism of reward: the withdrawal of the promise and its performance. The analysis of these two points emphasizes the effectiveness of the unilateral approach.

V. WITHDRAWAL OF THE PROMISE OF REWARD

The power to withdraw the promise of reward is one of the more cumbersome points in rewards theory, whether one subscribes to the contractual approach or the unilateral thesis.

According to sec. 1945 of the Louisiana Civil Code

An offer of reward made to the public may be revoked before completion of the requested act, provided the revocation is made by the same or an equally effective means as to the offer.

This section raises several questions regarding the substance and form of the withdrawal.

A. THE CRITERIA

The criteria applied for the withdrawal of reward focus on two aspects: the formal one regarding the requirement to publish the withdrawal in the same way that the promise was published, and the material one referring to the condition of revoking the promise.

Regarding the first criterion, there is similarity between the American and the Louisiana approaches: In both legal systems, the promisor must publish the withdrawal in the same way he published the promise.²⁴⁰ This is a rule accepted in Continental legal systems, although it should not be understood as absolute. For example the German code establishes that if the promisor has grounds to suppose that certain potential

240. Sec. 1945 Louisiana Civil Code. See also sec. 1990 Italian Civil Code; sec. 658 BGB; See Falqui Massida, *op. cit.* at 112; Esser-Weyer, *op. cit.* at 331. Regarding American law see *Shuey v. USA* 62 U.S. 73 (1875).

performers have no real possibility of knowing about the reward, it will be necessary to publish the withdrawal through special means.²⁴¹

Regarding the substantive criterion, the problem is more complex: In Continental law, one finds different solutions. The German law established that the promise may be withdrawn until performance is completed.²⁴² This was also the solution in Louisiana law before the reform of the Civil Code²⁴³ and now it has been expressly incorporated in section 1945. At this point the LCC made a clear distinction between reward and contract concluded by acceptance. In the last case the offeror may establish in the offer itself that the commencement of the performance is considered acceptance, and thus when the offeree begins the requested performance the contract is formed.²⁴⁴ This solution is hardly applicable to rewards, short of the case where the promisor establishes in the ad that the promise is irrevocable.²⁴⁵

Not all civil law systems adopt the principle of free revocation of the reward. For example, the Italian civil code established that in principle the promise is irrevocable and will be in force for a period of one year, other than cases of "*giusta causa*" (justifiable reasons) to revoke it.²⁴⁶

In American law the question of withdrawal of the reward has undergone a particular evolution due to the link established between reward and the idea of unilateral contract. The traditional approach was that the promise for an act could be retracted as long as the promisee had not fulfilled the task.²⁴⁷ That is, this conception was very similar to the Louisiana solution, although the basis was different since the American courts adopted a contractual approach: The reward is a conditional promise which, if accepted before it is revoked, creates a binding contract.²⁴⁸ When the promisee has fulfilled the task, he is entitled to the reward, and

241. See the solution in the German Civil Code, sec. 658. See R. Wittmann "Auslobung", Kommentar zum BGB (J. Von Staundigers) 1995, sec. 658 at 230 ff. Compare D'Angelo, op. cit. pp. 781 ff.

242. This solution is particularly interesting in a system like the German one where the offer, as a principle, is irrevocable. See Bucher at 98 et 105.

243. See *Youngblood v. Daily and Weekly Signal Tribune*, 131 So. 604 (1930). see Revision Comments - 1984, Louisiana Civil Code 1998 Edition, West, 1998, p. 397.

244. Sec. 1939 LCC.

245. See *infra*.

246. Sec. 1990 of the Italian Civil Code.

247. See *Carr v. Mahaska County Bankers et al.* 269 NW 494, 496 (1936); *Berthiaume v. Doe et al.*, 133 P. 515 (1913). Compare *United States v. Connor* 11 S. Ct. 229 (1891); *Wessman*, op. cit. at 640; I. Wormser, "The True Conception of Unilateral Contract", *Yale Law Journal* 26 (1936)136. Regarding withdrawal of the reward in English law see P. S. Atiyah, *An Introduction to the Law of Contract*, 4th. ed. Oxford, 1992, pp. 82 ff.

248. See *Shuey v. USA* 62 U.S. 73 (1875); *Jackson v. Investment Corporation of Palm Beach* 585 So. 2d 949.

from this moment on the promisor cannot withdraw his promise.²⁴⁹ The problem is that since this solution was applied not only to promises of rewards but to all kinds of unilateral contract, it led to somewhat unjust outcomes. Take, for instance, the case when an offeror promises the offeree a sum for painting his house. The offeree begins to do the work and the offeror revokes the offer just before the work is complete. Or, in the famous Brooklyn Bridge example, what happens when the offeror withdraws the promise when the promisee is in the middle of the bridge?

To avoid the injustice involved in this solution, the first Restatement set up a more “just” rule, establishing in section 45²⁵⁰ that the offeree who, in response to an offer of unilateral contract, gives or tenders the consideration binds the offeror by a contract.²⁵¹ The problem is that this solution raised several questions, too, because in order to avoid the unjust situation that could derive from withdrawal of the offer, we have a contract where it is not clear that the offeree will complete the task.²⁵²

In the Restatement 2d we see a new change, aimed at this somewhat strange outcome. It was established that the *beginning* of the invited performance creates “an option contract” in favor of the promisee, in the sense that he is entitled to complete the performance and the offeror is bound by his offer. This solution is also open to criticism since in some cases the offeree who begins the performance has no option and must finish the work, as when he began to paint the house and is not entitled to quit the work in the middle. Prof. Tiersma developed the idea that sec. 45 is not relevant to the most genuine unilateral contract - the reward.²⁵³ I agree with the conclusion that section 45 does not apply to the reward, but not with the premise that a reward is the most genuine unilateral contract. Sec. 45 should not be applied to rewards, because the pattern of the unilateral contract is not suitable for defining the reward!

First, the beginning of the performance cannot be a criterion for denying any withdrawal of the promise of reward. The classical distinction between preparation and beginning is difficult to apply to rewards. What is the preparation and what is the beginning in the performance of the

249. Compare the position of Tiersma who explains that it is necessary to distinguish between “withdrawal” and “termination” of the unilateral contract. According to him, if someone has relied upon the promise, sec. 90 of the Restatement should grant him damages. See Tiersma, *op. cit.* at 81. As I will explain further, this distinction is not correct when considering reward.

250. Section 45, like the “famous” sec. 90, retained the same number in both Restatements.

251. See Llewellyn, *op. cit.*, at 35.

252. Compare sec. 1327 of the Italian Civil Code.

253. Tiersma, *op. cit.*, at 42.

reward?²⁵⁴ Furthermore, regarding rewards, there is no empirical way to know who the potential performer is who has the “option”, because unlike in an individual unilateral promise, in a reward there can be several performances. Take the following example: A publishes a promise of reward for finding a dog. B finds it. C, who was also looking for the dog, has no rights towards B. How he could hinder the withdrawal on the basis that he had begun the search?²⁵⁵ Is beginning of the performance enough to be considered an option contract?

Illustration 4 of section 45²⁵⁶ (which did not appear in the first Restatement) contains an example where it is not a problem of option at all. The reporter raised the case in which the performer has fulfilled the task and the promisor refuses to pay. In this case also according to the unilateral approach there is no right of withdrawal²⁵⁷ since the object of the reward has been achieved. In my opinion the traditional view expressed in Shuey avoids the difficulty in interpreting and filling gaps, and is more suitable to characterizing the reward. In any case there is no right of withdrawal after the performance, even when the promisor does not know about the achievement.

Although the solution included in section 1945 is justified, nevertheless I do not think the withdrawal should be absolutely free, and the legislator or judge should set up certain limits that the promisor cannot bypass. From a comparative point of view, the Swiss solution appears more suitable: According to sec. 8 of the Swiss Obligation Code, if the promisor withdraws his offer before the performance “he is obligated to reimburse those who have incurred expenses *in good faith and in reliance upon the announcement*, but not in excess of the amount of the compensation offered and provided that the offeror does not prove that the other persons would not have successfully performed in any event.”²⁵⁸ In other words, the promisor will be able to withdraw the promise (using means similar to those used to publish it) until the performance is complete, and as a rule one who has begun performance will not be

254. Some courts have decided that on the ground of promissory estoppel preparation may render the offer irrevocable. *Abbot v. Stephay Poultry Co.* 62 A. 2d 243 (1948); *Kuchera v. Kavan* 84 N.W. 2d 207 (1957). See *Calamari-Perillo*, op. cit., at 261. This criterion is applicable to rewards.

255. I also do not agree with the idea of Prof. Farnsworth maintaining that a reward is a general offer and therefore difficult to revoke. A. Farnsworth, *Contracts*, 3d ed., 1999, at 184.

256. Illustration 4 is based in a very old case: *Wentworth v. Day*, 44 Mass. (3 Met.) 352, 37 Am. Dec. 145 (1841).

257. “[...] In no case shall the revocation be effective if the situation called for in the promise has already materialized or if the act called for has already been performed” Italian Civil Code, sec. 1990. The same solution is found in German law (see B.G.B., sec. 657).

258. Translation according to Swiss Contract Law, Swiss American Chamber of Commerce, Zurich, 1977.

entitled to the reward except in certain circumstances when the withdrawal is done not in good faith and leads to unjust circumstances, in which case the performer will be entitled to demand the damages caused by his reliance on the promise up to the limit of the reward promised.²⁵⁹ The Louisiana law does not contain a similar solution regarding the reward, but it is possible to achieve the same outcome through section 1967 of the Louisiana Civil Code (strangely located in the chapter on Cause) which provides that

A party may be obligated by a promise²⁶⁰ when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise.

B. THE IRREVOCABLE PROMISE OF REWARD

What should the solution be if the promisor decides to include a clause making the promise irrevocable? As is well known, the traditional idea in common law that an offer should be irrevocable only if there is consideration is being abandoned, particularly when there is reliance, thus developing the idea that an offer may be binding.²⁶¹ Should this case be judged according to section 87(2) of the Restatement?²⁶² In American law it will be difficult to accept a unilateral promise as irrevocable without reliance or consideration. From a normative point of view, I also have serious doubts about the convenience of adopting a policy of complete irrevocability - even if the promisor establishes this expressly in the promise itself.

The Louisiana Civil code does not include any particular reference to this point. By contrast the German Civil Code includes a specific response that accepts the fact that the promisor may establish the irrevocability of

259. "Reliance damages" will not exceed "expectation damages."

260. Note that here this is clearly the use of "promise" in the common law sense, although the chapter is on *cause* - which is one of the more civilian topics!

261. See UCC sec. 2-205; Murray, op. cit. at 115.

262. "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice." Compare sec. 62 (1): "Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance."

the promise.²⁶³ Should Louisiana courts apply section 1928 regarding irrevocable offer?²⁶⁴

On this point, the solution of the Portuguese civil code is very interesting: A promise of reward is revocable until the performance, but the promisor may establish irrevocability and in this case it will be revocable only if there is some reason in justification.²⁶⁵ This solution marks equilibrium between the framework of the autonomy of will and the possibility of public reliance on promises that are published as irrevocable. As noted earlier, the comparative analysis may lead to a better interpretation of the code. In my opinion it is also possible under Louisiana law to apply the rule of irrevocability of the offer to the reward, combining section 1928 and 1945. This solution should be tried only when the circumstances justify restraining the right of the promisor to withdraw his declaration.

C. LAPSE OF THE REWARD

We must distinguish between withdrawal and lapse. A reward is not *ad eternum* and it should be in force during the time established in the reward or during a reasonable period of time. What should the solution be if the promisor has not determined a period of time for the promise? In Italian law a default term - one year - is established but it is far from clear if this is a suitable solution.²⁶⁶ The Louisiana law does not include an answer on the matter.

In American law, illustration c, of section 41 of the Restatement speaks of the reasonable time to accept an offer. I do not see why this criterion should not be applied to rewards, even if we define them as unilateral promises. In any case the circumstances must be referred to²⁶⁷ and so, for

263. See for example the B.G.B. sec. 658.

264. "An offer that specifies a period of time for acceptance is irrevocable during that time. When the offeror manifests intent to give the offeree a delay within which to accept, without specifying a time, the offer is irrevocable for a reasonable time." Compare similar solutions in the Italian Civil Code (sec. 1329), Israeli Contract Law (General part) (1973) (sec. 3 (b)) and Vienna Convention on the International Sale of Goods (1980) (sec. 16).

265. Portuguese Civil Code, sec. 461 (1). Notice the difference between the Italian solution and the Portuguese one. In both countries we find the justifiable reason but in Italy it is necessary to justify any withdrawal of reward, and in Portugal only when the promisor established a period of time or announced that it was irrevocable.

266. Compare UCC sec. 2-205 establishing a period of 3 months for the irrevocable offer.

267. See for example *Ever-Tite Roofing Corp. v. Green* 83 So. 2d 499. See Rest. 2d Contracts; secs. 36 (b), and 41. Compare sec. 30. The illustration contained in sec. 41 is not exact. An offer of reward for the capture of a person guilty of a specific crime cannot ordinarily be accepted after the statute of limitation bars prosecution. This may be true regarding a promise of reward published immediately after the crime. But what about a promise of reward published after the limitation period or even soon before? If someone captures the criminal he will be entitled to the reward

example, a re-publication may be understood to mean that the promisor intends to maintain his offer.²⁶⁸

What is the solution in the case of the death of the promisor? If we saw an offer in the promise of reward we could argue that the death of the offeror extinguishes the offer. Using a unilateral approach, the death of the promisor does not extinguish the promise. Interestingly, this is the solution American law grants since if the reward is considered an option; the right of the promisee is not extinguished by the death of the promisor.²⁶⁹ Of course, in any case the heirs can revoke the promise in the way explained earlier, or by publishing the fact that the promisor has died.²⁷⁰

VI. PERFORMANCE OF THE PROMISE

One aspect where we see the benefit of the unilateral approach more clearly is with regard to the solution in the case of several instances of performance. The likelihood that several persons may complete the performance is definitely greater than in the case of a particular contract. If, for example, two or more persons inform the promisor about the whereabouts of the dog, it is then necessary to decide who is entitled to the reward.

In the case of several performances, the rule that the first to perform the task will be entitled to the prize was adopted by the Louisiana legal system that adopted the unilateral approach.²⁷¹ This is the solution in Continental legal systems²⁷² and also seems to be an accepted solution in American law.²⁷³ So although the system pays lip service to the contractual theory, it accepts a solution based in a unilateral approach, because if we insist on defining the reward as an offer, how is one to explain that the reward is only valid regarding the first performer? I am aware of the explanation that the offer of reward is exhausted when the first one accepts it,²⁷⁴ but this is a somewhat specious conclusion. In this point the Louisiana Civil Code is more precise: The reward belongs to

notwithstanding the fact that the promisor did not pay attention to the limitation. (The question of invalidity of the promise due to mistake is likely to arise).

268. See *Otworth v. The Florida Bar*, 71 F. Supp. 2d at 1215.

269. See Restatement 2d Contract, sec. 37.

270. See Louisiana Civil Code (ed. A. Yiannopoulos), St. Paul, 1997, sec. 1945, com. B, p. 394.

271. Louisiana civil Code, sec. 1946.

272. See German Civil Code, sec. 659; Italian Civil Code, sec. 1991.

273. See Corbin, op. cit., vol. 1 at 357.

274. See Anson, op. cit. at 35.

the first one giving *notice* of his completion of performance to the offeror.

Contrary to the German or Italian models, the Louisiana Civil Code does not include specific reference to the problem of joint performance and so in this matter it seems that comparative law may prompt suitable solutions. In Continental law,²⁷⁵ when there is no possibility of deciding that has performed the task first, the reward will be divided in equal parts among those who performed the task. If several persons contributed to obtaining a result, it should be divided proportionally. A similar solution has been adopted by American courts: "When the evidence shows that no one of the claimants fully met the requirements of the offer of reward, but that their efforts combined fully complied with its terms . . . they may receive a division of the reward in proportion to their services."²⁷⁶

And what happens when it has been a partial performance? As a matter of principle only full performance of the task entitles one to the reward. According to this rule, it was decided that the promisor was not liable for a reward offered for the arrest of two persons when the claimant captured only one.²⁷⁷ Nonetheless, in a number of situations partial performance may constitute grounds for an action on the basis of partial fulfillment, and American courts have not refrained from granting a partial reward when the result was also partial.²⁷⁸ The idea of "all or nothing" should be canvassed.

Two notes regarding the question of performance. First, sometimes partial performance is really a "complete performance." Take, for example, one who offers a reward for every part of an old naval vessel that it is possible to find. In this case the interest is to reconstruct the ship and so every partial performance is tantamount to a complete performance. Likewise the reward for "every piece of information" needed to solve a crime. Second, the question of partial performance should not be confused with the question of alternative performances. When the performer has established different alternative performances,

275. See German Civil Code, sec. 659; Italian Civil Code, sec. 1991; Brazilian Civil Code sec. 1515; Mexican Civil Code, sec. 1865.

276. *Reynolds v. Charbeneau* 744 S.W. 2d 365, 369 (1988). See also *Tobin v. Mc Comb* 156 S.W. 238, 240 (1913). In German law the B.G.B. establishes that if the prize cannot be divided, or if according to the terms of the promise only one performer is entitled to the prize, it will be decided by lot. See sec. 659. See also *Münchener Kommentar*, 3. auflage, 1997, v. 4, at 1755.

277. *Blain v. Pacific Express Co.* 6 S.W. 679 (Texas 1887). Regarding apportionment, *Chambers v. Ogle* 174 S.W. 532 (Ark. 1915).

278. See *Genesee v. Pailthorpe et al*, 224 N.W. 418, 419 (1929); *Reynolds v. Charbeneau* 744 S.W. 2d 365 (1988).

the performer will be entitled to the reward according to the kind of the act he achieved.²⁷⁹

VII. CONCLUSION

The analysis of reward as a contract or as a unilateral promise may be done on two levels: the practical one, showing why the unilateral approach is more efficient and is preferable from the point of view of potential performers and - perhaps - from the point of view of society as a whole. Without undermining the importance of this approach, the practical implications are not so huge. The real importance of the analysis of the reward, and, more generally the unilateral promise is on the second level, that is, the possibility of achieving a point of reference that allows us to look at the phenomenon of the contract from another perspective.

The idea of unilateral promise may help elaborate the relationship between promise and contract. If the scholar can get rid himself of the myth of consensus, he will be able to discover new ways to explain anew basic ideas of the theory of contract. The notions of offer, acceptance and consideration can receive different meanings in light of the principles that ground the recognition of the reward as a unilateral promise.

A straightforward recognition of the reward as a unilateral promise is better than adopting contractual ideas when there is no contract. The unilateral promise does not undermine contract law. On the contrary, the delimitation of the unilateral promise may offer a new angle for analyzing and outlining the limits of the contract. Understanding that autonomy of will may find expression through patterns different from the traditional model of offer and acceptance, makes it possible to analyze the idea of promise, contract and agreement from a broader perspective.

279. In *Shuey*, the principle of complete fulfillment was established; it may be necessary to fill the gaps. It is not possible to use the will of the parties. Here it is clear that it would be necessary to interpret according to the authentic will of the promisor taking account of the circumstances at the time of the promise. *Panunti v. May*, Corte d'Appello d'Ancona, sent. 28-2-1986, *Il Foro Italiano*, 110, pp. 1277-83 (1987).

