

Contract Formation as a Speech Act

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1. Introduction

According to conventional contract law the formation of a valid agreement requires an offer, an acceptance, and consideration. The former two elements typically take place through spoken or written language: An offeror proposes to do something in exchange for something of value to be given by an offeree. The latter may then accept the offer, reject it, or make a counteroffer. What is it that makes this particular verbal exchange so special, and how does it differ from other acts of speech that also may entail legal consequences, such as issuing a threat, offering a bribe, defaming someone, or perjuring oneself? ¹ To answer this question I shall make use of *speech-act theory*, a linguistic approach to meaning advocated by two language philosophers, John Austin and John Searle. ² Speech-act theory investigates how speakers interact through language and how the types of words used by them perform specific functions within the communicative process, such as reporting events, creating obligations, or bringing about new states of affairs. This theory offers a novel approach for accommodating the three traditional components of a contract. ³

The discussion begins with Austin's distinction between utterances that state facts or describe events and those that serve to perform the very acts that they denote. I then turn to Searle's theory of speech acts. There are five basic types of speech acts (called *illocutions*) and it is the class of commissive illocutions—those where the speaker is committed to the performance of a future act—that will be of most interest because this

category includes promises, offers, and acceptances. I present Searle's requirements (called *felicity conditions*) that commissive illocutions must satisfy in order to be well-formed speech acts.

Traditional contract law maintains that every offer contains a promise of a future performance and it even equates the offer to a promise.⁴ Yet promise and offer are distinct kinds of commissive illocutions, because a promise encompasses a stronger mode of commitment than an offer. How then is an offer to be construed as a promise? To reconcile this discrepancy one needs to examine some of the subtle differences among unconditional promises, conditional ones, and offers. A legal offer is equivalent to a particular type of promise—namely, a conditional promise that proposes an exchange and it is precisely this property that renders a legal offer different from an ordinary, everyday one. I propose a set of necessary criteria for a valid exchange, adapted from Searle's felicity conditions, that will explicate what can count as valuable consideration, the third element of the trio: offer, acceptance, consideration.

2. Speech-act theory

2.1. Austin: Constative vs. performative utterances

The fact that speech can create specific acts perhaps may come as a surprise, for we tend to think of sentences merely as statements that describe events or situations that in principle should be verifiable: "The cat is on the mat;" "It will rain tomorrow;" "George bought my car." However, John Austin, a language philosopher, noted that speakers do not just utter true or false statements, but rather they may engage in the very acts designated by their words:⁵ A speaker who states, "I promise to repay the loan next

month” is making a commitment to a future course of action; a minister who during a wedding ceremony says, “I now pronounce you husband and wife” creates the marital state; and if after the wedding ceremony I should remark to the groom, “I congratulate you on your marriage,” I am obviously not informing him about his new marital status but rather I am engaging in the very act of congratulating. Austin referred to these kinds of utterances as *performative* because speakers perform the actions denoted by the verbs, whereas he called *constative* those statements that do describe events or states, such as “George bought my car.”

Austin noted some interesting grammatical features of performatives.⁶ The subject of such sentences is in the first person *I* or *we*, and the utterance is always directed to an expressed or an implied second person *you*. Moreover, its verb must be in the simple present tense. Observe the effect of a past-tense verb: A speaker who says, “I promised to repay the loan” or “I congratulated you on your marriage” is neither making a promise nor offering congratulations but rather is reporting a past act of promising or of congratulating. Hence, sentences with past-tense verbs will always be constative. As a further means for identifying performative utterances Austin proposed the *hereby* test, whereby the word *hereby* may be inserted into a performative sentence but never into a constative one. Thus, one can say, “I hereby pronounce you husband and wife,” but not “I hereby pronounced you husband and wife.”

2.2. Searle: Types of speech acts

John Searle, also a language philosopher, first proposed the term speech act, a term that is particularly appropriate as it directly suggests that the performance of an act can come

about through speech.⁷ In fact, a speech act may be just as valid as a physical act. It may stand alone or occur along with a nonverbal act. Thus, one may propose to bet on the outcome of a sporting event by uttering the words, “I bet you that San Diego will beat Miami in next Sunday’s football game,” or by offering a hand shake, or even by performing both acts—the verbal and the physical—simultaneously.

According to Searle’s theory, which I shall adopt for an analysis of contract formation, utterances are assigned to one of five possible speech acts or *illocutions*: assertive, commissive, directive, declaration, and expressive.⁸

2.2.1. Assertives

It is the assertive speech act that most closely resembles Austin’s constative utterance. The speaker asserts a proposition that represents a condition or a state of affairs that in principle could be true or false: “I *admit* that I failed to stop at the intersection;” “I *claim* that the defendant was the person I saw leaving the bank.” These two utterances represent *explicit* assertives as there is an overtly stated assertive verb (i.e. *admit*, *claim*) preceding the propositional content of the assertion and it is the presence of this verb that leaves no doubt about the nature of the illocution being expressed. Other English verbs that function as explicit assertives include: *maintain*, *report*, *predict*, *inform*, *accuse*, *testify*, *confess*, *state*, *swear*. These various verbs differ from one another by the force or strength of the assertion. For example, to maintain is a stronger way of asserting than just to inform, and to swear about something is more forceful than merely to state it. However, it is generally more common and natural sounding for there to be no explicit illocutionary verb but instead for the type of speech act to be *implicit*: “I failed to stop at the

intersection;” “The defendant was the person I saw leaving the bank.” In spite of the lack of any overt assertive verb, we still understand such utterances as assertives. The sentences previously cited as examples of Austin’s constative category would also be instances of implicit assertives.

2.2.2. Commissives

In performing a commissive speech act a speaker commits himself or herself to perform or not to perform a future action: “I *offer* to sell you my car for \$2500;” “I *promise* not to drink when driving.” Other verbs that function as commissives include: *vow, pledge, guarantee, swear*.⁹ Among the various commissive illocutions a promise is the strongest mode of commitment that one can make. Here too it would be more usual for a commissive utterance to be expressed implicitly: “I will sell you my car for \$2500;” “I will not drink when driving.” It is the commissive speech act that will be most relevant for contract formation.

2.2.3. Directives

In performing a directive speech act a speaker directs a hearer to perform or not to perform a future action: “I *order* you to pay the defendant \$2000 as damages;” “I *advise* you not to make a U-turn from this road.” Other verbs that function as directives include: *ask, command, request, recommend, suggest*. Once again we find that directive utterances are frequently expressed implicitly: “You will pay the defendant \$2000 as damages;” “Don’t make a U-turn from this road.” Commissives and directives share a same restriction: That which is to be performed or refrained from can take place only in the

future. It is not possible, for example, to promise to do or to order someone else to do an act that has already taken place. However, there is no such tense restriction for assertives. Note the previous examples: “George bought my car (past);” “The cat is on the mat” (present); “It will rain tomorrow” (future).

2.2.4. Declarations

In performing a declaration a speaker brings about, as the very words are being spoken, the condition or the state of affairs enunciated in the proposition: “We, the jury, *find* the defendant to be not guilty;” “I [umpire] *declare* that you [player] are out.” A particularly spectacular declaration is reported in *Genesis 1.3*. “God said: *Let* there be light! And there was light.” As these examples show only certain individuals under special circumstances are authorized to make specific declarations. Other verbs that function as declarations include: *pronounce, name, bless, christen*. Declarations too may be expressed implicitly: “Not guilty!;” “Out!” What is significant about declarations is that a situation or a state of affairs that did not exist previously comes into fruition at the very moment of speaking. For this reason, declarations can be made only in the present tense.

2.2.5. Expressives

In performing an expressive speech act a speaker expresses a feeling or an emotion about a proposition presumed to be true: “I *congratulate* you on your marriage;” “We *are sorry* that you did not prevail in your law suit.” Other verbs and verbal forms that function as expressives include: *thank, apologize, compliment, be happy, be angry, be surprised*. Expressives have no implicit variants since their purpose is to inform the hearer about the

precise nature of the emotion or the feeling that the speaker harbors in regard to what is stated. The verb of the presupposed proposition can appear in any of the three tenses. For example, I can be happy about something you did in the past, about something you are doing right now, or about something you will do in the future.

2.3. Searle: Felicitous conditions

The Restatement of the Law: Contracts, 2d, a compendium of the principles underlying American contract law, defines a contract as “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.”¹⁰ For a unilateral contract a promisor promises to do something in exchange for a promisee’s performance: “I will pay you \$200 if you paint the fence in my yard.” For a bilateral agreement there is to be an exchange of promises: “I will drive you to the airport tomorrow morning if you will drive me there next week.” We have seen that a promise is a type of commissive speech act. Now just because someone has engaged in a speech act, it is not always without fault or *felicitous* (a term employed by Searle). For example, specific persons may be authorized to perform certain speech acts. This restriction is particularly apparent for declarations: only a minister or a justice of the peace may declare a marriage union, or just the umpire assigned to a particular game may call a player out. In addition, there are constraints on the speech act itself. Searle has provided an in-depth analysis of the speech act of promising and he has proposed six conditions that this commissive illocution must satisfy in order to be valid or felicitous.¹¹ Two of them apply to the act of promising and the other four to what is being promised.

The *sincerity* and the *essential* conditions apply to the act of promising. The former establishes the promisor's good intention to carry out the promise and the latter requires that the promisee be aware of this commitment. Consider the application of these two conditions to the following promise: "I promise you that this afternoon I will deposit funds to your account." I am *sincere* provided that I indeed *intend* to deposit the funds this afternoon. If I have no intention of doing so or if I have made a promise in jest, then I have violated the sincerity condition. In addition, it is *essential* that you, the promisee, understand from my choice of words that I have made a promise and that I am committed to carry it through. The law too expects that the participants to an agreement will deal with each other in good faith and that the promisee will be aware of the promisor's intention to contract.¹²

The futurity, ability, benefit, and non-expectancy conditions apply to what is being promised. The *futurity* condition requires that the promised performance or forbearance is to take place in the future. In other words, I cannot promise to do something that I have already done. As noted previously, it is the very nature of commissive illocutions to require a speaker to engage in a future act. The *ability* condition stipulates that the promisor will have the necessary physical, mental, and/or financial means to carry out that which is promised. For example, I cannot promise to tutor you in French if I do not know the language. The *benefit* condition concerns the promisee. It presupposes that he or she will derive some benefit from what has been promised and furthermore is amenable to being the recipient of that benefit. Thus, if I promise to take you out to dinner tonight, I have reason to believe that you would like for me to do that. The *non-expectancy* condition stipulates that what I promise to do is not

something that I would be expected to do in the ordinary course of events. It would be bizarre for me to promise to take you out to dinner tonight if we typically eat out every night or to promise to arrive to work on time if I have never been late in the past.

3. Contract formation

3.1. Promise vs. offer

In its discussion of “offer” the *Restatement* refers to both unilateral and bilateral agreements by asserting that an offer “may propose the exchange of a promise for a performance or an exchange of promises,” but it concludes the discussion by stating “*the offer itself is a promise, revocable until accepted*” (emphasis added).¹³ We are now faced with an apparently contradictory situation. Although both offers and promises are types of commissive illocutions, they are by no means on equal footing. To see how they differ one needs to distinguish between two kinds of speech acts—*autonomous* ones that go into effect immediately upon being uttered, and *cooperative* ones that first require a response from the addressee.¹⁴ An example of an autonomous speech act would be the action of firing someone and of a cooperative one the making of a bet. Thus, if I as your employer, say to you, “You’re fired,” I have performed autocratically the act of discharging you. On the other hand, if I bet you \$50 on the outcome of next Sunday’s football game, then you must accept my proposal—by a handshake or by saying something like “You’re on!,” before the bet can take effect. It is this distinction between autonomous and cooperative speech acts that differentiates *ordinary* promises from offers: A promise is an autonomous speech act; an offer is a cooperative one.¹⁵ For example, if I *promise* to drive you to the airport tomorrow I become immediately

obligated to do so—that is, no response is required from you in order for me to be obligated. Of course, subsequently you may choose to release me from that obligation, but that act is separate from the original commitment. On the other hand, if I *offer* to drive you to the airport I am obliged to do so only after you have accepted my offer. If you neither accept it nor reject it then I am free to change my mind and to retract it. Just as a bettor can call off a bet that is not taken up, an offeror can withdraw an offer that is not immediately accepted, but a promisor, acting in good faith, cannot renege on a promise.

This difference between a promise and an offer is reflected also in the speaker's assessment of the benefit to the addressee. In making a promise to drive you to the airport I have some reason to believe that you are in need of a ride and that you would be highly disposed to my taking you there. Because of this certainty I am able to commit myself to an immediate obligation. On the other hand, in making an offer I am less certain of your needing a ride, and if so, of my taking you there (as you may have already made previous arrangements). Because of this uncertainty, before obligating myself I will need to know whether you are amenable to my proposal.

Yet the *Restatement* has asserted that “the offer itself is a promise, *revocable until accepted*” (emphasis added).¹⁶ In equating an offer to a promise has the *Restatement* failed to differentiate adequately between these two kinds of commissive speech acts and has it erred in affirming that a promise is revocable? It has not. But to understand how an offer can be construed as a *revocable promise* (?) one needs to distinguish between *unconditional* and *conditional* promises. Unconditional promises place no restrictions on the performance nor do they require anything from the promisee: “I promise to take you

shopping later today;” “I’ll drive you to the airport tomorrow.” Conditional promises, on the other hand, require that some other event must (or must not) transpire before the promisor need perform: “I promise to take you shopping later today, if it doesn’t rain;” “I’ll drive you to the airport tomorrow, if I can borrow my brother’s car.” The law refers to such happenings as *conditions precedent*. They may be fortuitous outside events (what the *Restatement* calls *aleatory*) or under various degrees of personal control.¹⁷

3.1.1. Commitment vs. obligation

It is necessary to make an additional distinction between *commitment* and *obligation*. For an unconditional promise (e.g. “I promise to take you shopping later today”), at the moment of speaking I am both committed to keeping my promise and obligated to undertake the future performance. For a conditional promise (e.g. “I promise to take you shopping later today, if it doesn’t rain”), at the moment of speaking I am still committed to keeping my promise but I will become obligated to undertake the performance only if the condition transpires. It is this difference between commitment and obligation that makes an unconditional offer more similar to a conditional promise than to an unconditional one. For an unconditional offer (e.g. “I offer to drive you to the airport tomorrow”), at the moment of speaking I am still committed to my proposal but I become obligated to the future performance only upon your acceptance. My offer is more or less equivalent to the following conditional promise: “I promise to drive you to the airport tomorrow, if you want me to drive you there.” That is, I make an immediate commitment to a future act but am obligated to perform that act only if the conditional requirement occurs—namely, that you indicate a positive inclination toward my proposal.

Now in every-day dealings with family and friends one may feel morally bound to these kinds of unconditional or conditional promises and offers, but in the eye of the law they are *gratuitous*. In the event of a breach a promisee will generally have no recourse to a legal remedy. What then constitutes a legal promise, one that does protect the interests of a promisee? It is a conditional promise that contains a special kind of condition. In exchange for the promisor's promise it requires the promisee to perform (or to refrain from) an act or else to promise to perform (or to refrain from) an act of *benefit to the promisor*: "I will sell you my car, if you pay me \$2500;" "I will give you \$5000 on your twenty-first birthday, if you promise to give up drinking and smoking until then."¹⁸ A condition that proposes an exchange to be sure still functions as a condition precedent. Consider the immediately preceding examples: On your paying me \$2500 (the condition precedent) I will hand over to you the title to my car; and by your giving me your promise to quit drinking and smoking, I am obligated to a future payment of \$5000.

There is uncertainty associated with any kind of offer, because the offeror is not entirely sure whether the offeree desires what is being proposed (i.e. this uncertainty concerns the benefit for the offeree). For a legal offer—a promise that proposes an exchange, this uncertainty reflects not just the promisee's willingness to accept the promisor's future act but also the promisee's willingness to engage in the very performance that is requested of him or her. But now precisely because the promisor's obligation is contingent on the promisee's willingness to undertake his or her part of the bargain, the promisee needs to communicate that desire to the promisor either by performing the requested act or by promising to do so.

3.2. Acceptance

An offer can be accepted in one of two ways. For a unilateral offer acceptance occurs when the offeree commences the performance requested by the offeror.¹⁹ Suppose I have called up a handyman that does work for me and I leave the following message on his voice mail: “I will pay you \$200 if you paint the fence in my yard.” I arrive home later in the day and find him painting the fence. This act constitutes an acceptance of my offer. For a bilateral agreement acceptance takes place through an exchange of promises: “I will drive you to the airport tomorrow morning if you will drive me there next week.” You accept my offer, not through the performance of an act, but through language—by replying “Okay” or “I accept” or with similar words.

Acceptance of a bilateral agreement, like offer, is a commissive speech act. By uttering, “I accept” or using equivalent words, an offeree becomes committed to the terms of the offer. Hence the felicity conditions governing commissive illocutions take effect here as well: The offeree *intends* to undertake the requested performance and it is *essential* to communicate effectively this commitment to the offeror. In addition, the offeree is to perform the requested act in the *future*, has reason to believe (because of the offer) that the offeror wants the act done and will *benefit* from it, has the necessary *ability* and competence to perform the act, and is *not expected* otherwise to do so.

Recall that the first two felicity conditions—the sincerity and the essential conditions—concern the act of promising or committing, whereas the remaining four—the futurity, the benefit, the ability, and the non-expectancy conditions—apply to the requested or promised act. For a bilateral agreement, where there is an exchange of promises, perforce all six felicity conditions apply to both parties. However, for a

unilateral agreement, only the offeror has made a promise. Because the offeree has made no promise the sincerity and the essential conditions are not relevant here, but the four conditions governing the validity of the requested act will still be applicable.

In order for there to be a legal agreement an offeree must give *something of value* desired by the offeror in exchange for the promise. A valid exchange is what comprises the third element of the trio: offer, acceptance, consideration.

3.3. Consideration

Many systems of law require that some other factor be present in order for a promise to become legally binding.²⁰ In the Anglo-American tradition that additional element is consideration. Although there is no simple definition, nonetheless various principles have evolved for characterizing consideration.²¹ There must be: i) an agreed exchange or a *bargain*; ii) a *benefit* accrued by the promisor; iii) a *detriment* incurred by the promisee; and (iv) a *quid pro quo* or an equivalence in performances. Foremost is the notion of an exchange or a bargain. The promisor offers a promise as an inducement for a performance or a return promise from the promisee. However, in order for that exchange to be valid, the promisor is to reap some benefit (other than the promisee's friendship) from the requested act, and the promisee, by expending some effort or funds in carrying out that act, will suffer a detriment. But in this situation benefit and detriment turn out to be reciprocal relations: The promisor, by making a promise to do something, will also bear a detriment, and the promisee, in obtaining the promise, will thereby derive a benefit; hence, there is a *quid pro quo*.

The presence of consideration supposedly indicates that the parties really do intend to have a legal agreement and it serves to differentiate promises with legal import from merely gratuitous ones. Consider these promises: “I will drive you to the airport tomorrow, if you pay me \$25;” “I will drive you to the airport tomorrow, if you can be at my house by 7 o’clock.” In both cases the promisee has to do something in order for the promisor to become obligated. Yet not every condition imposed on a promisee will necessarily convert a promise into a legal offer.

For the first example it should be evident that there is adequate consideration, for by paying \$25 the promisee is giving something of value desired by the promisor in exchange for the promise of a ride to the airport. For the second example the promisor is not bargaining for the promisee’s showing up at the house, but rather the promisor (most likely because of an amicable relationship with the promisee) is willing to drive the latter to the airport without desiring anything of value in return so long as the promisee has some way of getting to the place from where the promisor will be leaving. This particular conditional promise is not too dissimilar from “I will drive you to the airport tomorrow, if it rains.” In one case, the condition is under the control of the promisee (“if you can be at my house at 7 o’clock”); in the other case, it is aleatory or contingent on a fortuitous outside event (“if it rains”). Both situations exemplify a condition precedent on a gratuitous promise.

What is interesting about a condition that proposes an exchange (e.g. “I will drive you to the airport tomorrow, if you pay me \$25”) is that it simultaneously plays three essential roles: (i) It too operates as a *condition precedent* on the promisor’s promise. (ii) Because the occurrence of the condition is not fortuitous but under the control of the

promisee the latter is free to accept or reject the terms, and it is this power entrusted to the promisee that has the potential to make this kind of promise equivalent to a *legal offer*. (iii) Because the condition specifies the thing of value that the promisee must give in exchange for the promisor's promise, it stipulates the necessary *consideration* for a valid offer.

3.3.1. The criteria for a valid exchange

The speech-act felicity conditions serve to differentiate between promises that are felicitous or well-formed from those that are defective in some way. I established analogous constraints governing the requirements of a promisee's performance for the class of promises that propose exchanges. Furthermore, these joint requirements for both promisors and promisees have direct application for determining the adequacy of consideration in contract law. In order for there to be valid exchange and hence an enforceable agreement, each of the parties must satisfy the following four criteria, an adaptation of Searle's felicity conditions.²²

Criteria for a valid exchange

(a) <i>Futurity condition</i> : Each party is to perform (or refrain from performing) a future act.
(b) <i>Benefit condition</i> : Each party sincerely wants the other party's performance of an act and it is that desire that motivates entering into a bargain.
(c) <i>Ability condition</i> : Each party is able (physically, mentally and/or financially) to perform the required act and will do something to further that performance.
(d) <i>Non-expectancy condition</i> : A party is not expected to do the act in the ordinary course of affairs.

Consider the following unilateral offer: "I will pay you \$200 if you paint the fence in my yard." First let us apply the four criteria to what you, the promisee, must do: (a) The fence painting is to take place at a time future to my proposal—that is, you have not already painted the fence. (b) I want the fence painted and it is this desire that motivates me to propose a bargain. (c) You must know how to paint fences and you are physically able to do the job. (d) Given the normal course of events it is neither expected that you should paint my fence nor are you already obligated to do so.

The four criteria characterize also what I, the promisor, must do: (a) My payment of \$200 is to be made subsequent to your completion of the fence painting—that is, I have not already paid this amount for you to do the job. (b) I have reason to believe that you would like to earn \$200 and this payment is offered as motivation for you to accept my offer. (c) I have the financial means to pay you \$200. (d) It is not expected that I should otherwise give you \$200.

A violation of any of the four criteria will lead to insufficient consideration and hence invalid agreements. Consider the following examples of inadequate consideration, some of which are taken from the *Restatement*.²³

3.3.1.1. Futurity condition: “Past” consideration

A promisor makes a promise in exchange for an act already performed.

A gives emergency care to B’s adult son while the son is sick and without funds far from home. B subsequently promises to reimburse A for his expenses. The promise is not binding.²⁴

Here B promises to pay A for an act that A has already performed. Of course, had A communicated with B at the time the son fell ill, and had B at that time promised payment, A’s subsequent caring for the son would have constituted valid consideration for B’s promise.

3.3.1.2 Benefit condition: Sham consideration

A promisor makes a promise in exchange for a trifle or a ridiculously small sum of money.

In consideration of one cent received, A promises to pay \$600 in three yearly installments of \$200 each. The one cent is merely nominal and is not consideration for A’s promise.²⁵

In general, the law does not look into the economic value of the consideration, and there are clearly contracts where the parties exchange things that do not have near equivalent monetary worth. For example, one may offer to sell an item at a price beneath its market

value. If value is not at issue, then why should a cent not qualify as appropriate consideration? The benefit criterion stipulates that one is sincere in wanting what the other is to give. In this example it is highly unlikely that A is bargaining for B to pay one cent in exchange for A's payment of \$600. On the other hand, if A has a gap in his coin collection, he indeed may want B to give him a certain rare penny in exchange for a promise to pay \$600.

3.3.1.3. Benefit condition: Condition precedent on a gift

The desire aspect by itself is not a sufficient characterization of the benefit condition. The bargain element must also be present. One may indeed be sincere in wanting the other person to do something, but if that act is viewed only as a necessary condition precedent on receiving a favor or a gift, and not as something given as part of a bargain, there can be no consideration. Consider a previous example:

I will drive you to the airport tomorrow, if you can be at my house by 7 o'clock."

Under normal circumstances, this utterance would be a gratuitous promise. I assume that you are able to find your way to my house, that the distance for you to travel there is reasonable, etc. I am not asking you to meet me there in exchange for my promise, but rather as a condition for you are to enjoy the fruits of my generosity. My promise is motivated entirely out of my amicable desire to take you to the airport. I have no interest in your coming to my house at 7 o'clock other than for this purpose.

3.3.1.4. Ability condition: Fortuitous occurrence

The ability condition requires that the parties know how to do what they are to perform and also are physically, mentally, and/or financially able to do so. But there is another feature of this criterion. One must expend some effort in performing the act requested or alternatively be able to exercise some control over the outcome. Contrast the two following hypothetical examples, which are not from the *Restatement*:

A has applied for admission to the Yale Law School complying with all their application requirements. B, his aunt, an alumna of Yale, says to him, "If you get admitted to Yale, I'll give you \$5,000." Subsequently, A gains admission. A's acceptance by Yale is not consideration for B's promise.²⁶

A had applied to Yale before his aunt made her promise. Afterwards, he engaged in no act to further his admission to Yale. The decision for admission was completely out of his control. Essentially, it was a fortuitous event.

A has applied for admission to several law schools. Both Harvard and Yale have accepted him. Now he needs to decide which law school to choose. B, his aunt, says, "If you go to Yale, I'll give you \$5,000." A's subsequent choosing of Yale over Harvard is consideration for B's promise.²⁷

Here A had applied to Yale before his aunt made her promise, but he had also applied to Harvard. Once the aunt found out that her nephew had been admitted to both institutions, she offered him \$5000 in exchange for his choosing Yale over Harvard. Because A had

control over which law school he would eventually attend, his choice of Yale would constitute consideration for B's promise.

3.3.1.5 Non-expectancy condition: Preexisting Duty

A promisor makes a promise for an act that the other party is already committed to do.

A offers a reward to whoever produces evidence leading to the arrest and conviction of the murderer of B. C produces such evidence in the performance of his duty as a police officer. C's performance is not consideration for A's promise.²⁸

C already had an obligation to apprehend felons as part of his contractual duties as a police officer. However, the consideration will become valid whenever the other person can perform the act outside of his current contractual duties or whenever he does more than he is currently obligated to do. For example:

C's duties as a police officer are limited to crimes committed in a particular State, and while on vacation he gathers evidence as to a crime committed elsewhere. C's performance is consideration for the promise.²⁹

4. Summary

Only a conditional promise that proposes an exchange has all of the necessary constraints for being equivalent to the cooperative speech act of an offer, whereas other kinds of conditions function purely as conditions precedent and the promises associated with those conditions are never commensurate with offers. The speech-act felicity conditions serve to differentiate between promises that are felicitous or well-formed from those that are

defective in some way. An analogous set of constraints governs a promisee's performance. These joint requirements for both promisors and promisees comprise the criteria for a valid exchange, which have direct relevance for the adequacy of the consideration that each brings to the contract.

Searle's original discussion of felicity conditions dealt with ordinary unconditional promises. It had little to say about conditional promises or about the kinds of promises relevant to the law. Because legal promises nonetheless are still promises it was imperative to incorporate a modified version of the felicity conditions into a speech-act analysis of contract formation. The resulting criteria for a valid exchange serve this function. It was my purpose to show here how these constraints are able to accommodate the special requirements of contract law.

The following table summarizes the correspondence between the criteria for a valid exchange and legal outcomes.³⁰

Criteria for a valid exchange and their legal correlates

Failure to respect this condition:	Results in the following legal consequence:
1. Futurity condition	Past consideration
Each party must perform (or refrain from performing) a future act .	A party has already performed the requested act; “past” consideration is no consideration.
2. Benefit condition	Sham consideration
Each party desires an act to be performed by the other party and it is that desire that motivates entering into a bargain.	A party is not “truly” bargaining for the act; absent a bargain there is only a gratuitous promise and no consideration.
3. Ability condition	Voidable contract
Each party is able (physically, mentally and/or financially) to perform the act promised and must do something in furtherance of the performance.	A party is deemed unable or unfit to perform the required act.
4. Nonexpectancy condition	Pre-existing duty
It is not obvious that a party would do the act in the ordinary course of events.	A party is already under a legal obligation to perform the act.
5. Sincerity condition	Fraud
A promisor intends to do the act promised.	A party has acted in bad faith and with intent to deceive.
6. Essential condition	No contract
Both parties know that a commitment exists between the promisor and the promisee.	An individual is unaware of a promisor’s promise.

NOTES

¹ In regard to some of the crimes involving the use of language, for threats see Shuy 1993:Ch. 5, Solan & Tiersma 2005:Ch. 10; for bribes see Shuy 1993:Ch.2 & 3, Solan & Tiersma 2005:Ch. 9; for defamation see Tiersma 1987; and for perjury, see Tiersma 1990, Shuy 1993:Ch.7, Solan & Tiersma 2005:Ch. 11.

² Austin 1962; Searle 1969.

³ See also Schane 1989, 2006; Tiersma 1986, 1992.

⁴ “In the normal case of an offer of an exchange of promises, or in the case of an offer of a promise for an act, the offer itself is a promise.... *Restatement* 1981:72, §24.

⁵ Austin 1971:13-22.

⁶ Austin 1962:53-66.

⁷ Searle 1969.

⁸ Searle & Vanderveken 1985:179-216.

⁹ Some verbs belong to more than one illocutionary category. The verb *swear* is a commissive in “I swear to tell the truth;” it is an assertive in “I swear I deposited funds into our bank account yesterday afternoon.”

¹⁰ *Restatement* 1981: 5, §1.

¹¹ Searle 1969:57-62.

¹² In traditional contract law one who returns a lost article but was unaware of an offer of an award is not entitled to the reward. The requirement of being aware of a promisor’s intention to contract is the legal correlate of the essential condition.

¹³ *Restatement* 1981:72, §24.

¹⁴ Hancher 1979.

¹⁵ Ordinary, everyday promises are autonomous speech acts, but legal promises are cooperative ones for (as I demonstrate shortly) they are equivalent to offers.

¹⁶ Restatement 1981:72, §24.

¹⁷ “A party may make an aleatory promise, under which his duty to perform is conditional on the occurrence of a fortuitous event.” *Restatement* 1981:193, §76.

¹⁸ A promisee’s giving up of something or not acting in a certain manner can be of benefit to a promisor and can constitute a valid condition on an exchange. In *Hamer v. Sidway*, Court of Appeals of New York, 1891 (124 NY 538), an uncle promised his nephew that if he would refrain from drinking and using tobacco until he became 21 years of age, the uncle would pay him \$5000. The nephew’s forbearance was sufficient to qualify as a legal detriment; as for the uncle, he benefitted from seeing his nephew refrain from activities that the uncle found unwholesome.

¹⁹ In classical contract law an offeree to a unilateral contract could accept the offer only by *completion* of the requested act. This had the undesirable consequence that an offeror could withdraw the offer at any time prior to completion thereby putting at a disadvantage an offeree that had already commenced performance. The modern view is that acceptance takes place on *commencement*, at which moment the offeror may no longer revoke. However, it is still the case that the offeror need perform his or her part of the bargain only after completion by the offeree. Tiersma (1992) has proposed that only a bilateral agreement contains an offer, whereas a unilateral one is based on promise and hence cannot be revoked. I argue in the text that a conditional promise that proposes an exchange is by its very structure equivalent to an offer. Therefore, I maintain that both bilateral and unilateral agreements contain offers.

²⁰ In Roman law a *nudum pactum*, a bare promise, was not enforceable. There had to be present some other *causae*, factors, to turn it into a *pactum vestitum*, a promise vested with the proper form. (Corbin 1952: Sect. 310, 302.)

²¹ Corbin 1952:164-7, §110..

²² Searle 1969 deals exclusively with unconditional promises. I have modified the felicity conditions, thereby extending the analysis to legal promises (i.e. those that propose an exchange backed by consideration).

²³ Some of the examples presented here first appeared in Schane 1989.

²⁴ Restatement 1981:224, §86, 1. This example is based on the famous case of *Mills v. Wyman* (3 Pick, 297, Mass. 1825) that involved a sick son cared for by strangers.

²⁵ Restatement 1981:202, §79, 5.

²⁶ Schane 2006:168.

²⁷ Schane 2006:168.

²⁸ Restatement 1981:181, §73, 1.

²⁹ Restatement 1981:181, §73, 2.

³⁰ The table is an adaptation from Schane 2006:153.

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