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Is an Advertisement an Offer? Why It Is, and Why It Matters

JAY M. FEINMAN* AND STEPHEN R. BRILL**

INTRODUCTION

Courts and scholars uniformly recite the contract law rule familiar to all first-year students: An advertisement is not an offer. The courts and scholars are wrong. An advertisement is an offer. This Article explains why the purported rule is not the law, why the actual rule is that an advertisement is an offer, why that rule is correct, and what it tells us about contract law in particular and legal doctrine in general.

I. THE TRADITIONAL RULE: AN ADVERTISEMENT IS NOT AN OFFER

It is Hornbook law1 that an advertisement is not an offer. Williston self-assuredly declared the rule to be an application of the dividing line between preliminary negotiations and offers:

Frequently, negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers, or suggesting the terms of a possible future bargain than making positive offers. Especially is this likely to be true where the words in question are in the form of an advertisement [circular, catalog, or the like]. Thus, if goods are advertised for sale at a certain price, it is not an offer, and no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at that price. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer.2

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1. It is "Hornbook™ law" in that the Calamari and Perillo text, part of West's trademarked Hornbook series, states the rule, see JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 36-37 (4th ed. 1998), and, to the extent that "hornbook" is commonly used to refer to any one-volume legal text, "hornbook law," as well, is indicated by the citation to other texts in this Part.
2. 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 27, at 32–33 (1920) (footnote omitted).
Corbin frequently disagreed with Williston, but not on this point:

It is quite possible to make a definite and operative offer to buy or to sell goods by advertisement, in a newspaper, by a handbill, [a catalog or circular] or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way. Neither the advertiser nor the reader of [the] notice understands that the latter is empowered to close the deal without further expression by the [advertiser]. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear.3

Seventy and fifty years, respectively, after original publication, the modern revisions to the Williston and Corbin treatises have barely altered these statements of the rule.4 In addition, all of their modern counterparts—Calamari and Perillo, Farnsworth, and Murray—concur.5 Indeed, only Calamari and Perillo regard the doctrine as surprising, though conceding that, "[r]ightly or wrongly, at an early date it was decided and the law is now settled that there is no offer."6 The Restatement (Second) of Contracts clearly states the rule: "Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell."7 Both the first and second Restatements provide an identical illustration that confirms its application: "A, a clothing merchant, advertises overcoats of a certain kind for sale at $50. This is not an offer, but an invitation to the public to come and purchase."8 The legal encyclopedias American Jurisprudence 2d and Corpus Juris Secundum agree.9 Only the author of an American Law Reports article demurs, observing cautiously: "It appears to be a generally accepted proposition that an advertisement for the sale or purchase of goods at a certain price may or may not constitute an offer the acceptance of which will consummate a contract, the issue turning on the particular facts and circumstances of each case."10

4. See 1 Arthur Linton Corbin, Corbin on Contracts § 2.4, at 116–17 (Joseph M. Perillo ed., rev. ed. 1993) (qualifying Corbin's statement of the common understanding that no offer is being made by stating that this "usually" is the case); 1 Samuel Williston, A Treatise on the Law of Contracts § 4.7, at 285–90 (Richard A. Lord ed., 4th ed. 1990) (citing considerable authority for the proposition that an advertisement is not an offer).
8. Id. § 26 cmt. b, illus. 1; Restatement of Contracts § 25 cmt. a, illus. 1 (1932).
Scores of cases also recite the rule that an advertisement is generally not an offer.\textsuperscript{11} The recitation is typically succinct, deferring to the weight of judicial and scholarly authority. In the well-known case of Leonard v. PepsiCo, Inc., for example, Pepsi's television commercial advertising the availability of a Harrier jet fighter in exchange for the submission of seven million points collected from Pepsi products was held not to be an offer.\textsuperscript{12} Judge Kimba Wood's extensive analysis began with the simple proposition "[t]he general rule is that an advertisement does not constitute an offer," citing the Restatement, Corbin, Williston, Farnsworth, and New York cases.\textsuperscript{13}

Courts and scholars justify the rule on two principal grounds.\textsuperscript{14} The more specific rationale is that a typical advertisement is too general to be an offer, particularly because it contains no notice of to whom it is directed and no limitation on the number of persons who may accept by attempting to purchase the advertised item. An advertisement were


\textsuperscript{12} Leonard, 88 F. Supp. 2d at 119.

\textsuperscript{13} Id. at 119, 122-23; see also Zanakis-Pico, 47 F.3d at 1236 (noting "substantial agreement among the courts"). An older British decision states the rule more colorfully:

Parke B at least felt no doubt about the matter, for, when counsel suggested that: "If a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked," the learned judge peremptorily cut him short with the reply: "No; if you do, he has a right to turn you out." M.P. Furmston, Cheshire, Fifoot and Furmston's Law of Contract 33 (12th ed. 1991) (citing Timothy v. Simpson, (1834) 6 C & P 499, 500).

\textsuperscript{14} Perillo also suggests that the rule promotes the publication of "valuable market information," so that a contrary rule would injure sellers who would be less able to publicize their wares and buyers who would be denied access to the information. See generally Calamari & Perillo, supra note 1, at 36.
construed to be an offer, "the advertiser could be bound by an excessive number of contracts requiring delivery of goods far in excess of amounts available." 15 Mesaros v. United States exemplifies the problem; the United States Mint was deluged with applications to buy Statue of Liberty-Ellis Island commemorative gold coins, but the quantity available had been limited by the Act of Congress authorizing the striking of the coins. 16

The quantity rationale extends to a second, broader rationale, which is that an advertisement is reasonably understood as a notice of goods available and an invitation to examine, negotiate, and buy, but it is not reasonably understood as an offer the acceptance of which obligates the advertiser to sell. This rationale is based partly on the general nature of the advertisement and the quantity problem. As Farnsworth notes, "A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory." 17 More broadly, this "reasonableness" rationale is grounded in an empirical assumption that both advertisers and consumers typically understand that a general advertisement is a form of publicity and solicitation, and not the penultimate step in the creation of a legal relationship. 18 Therefore, an advertisement is not an offer because the consumer "knows or has reason to know that the person making it does not intend to conclude a bargain." 19 This rationale reflects the objective theory of contracts.

The "reasonableness" rationale also suggests the exception to the rule: Where there are unusual facts such that the reasonable consumer would understand that an advertiser is manifesting willingness to enter into a bargain, the advertisement is an offer that the consumer can accept. 20 This is often the case when the advertisement uses "language of commitment or some invitation to take action without further communication" 21 and when the advertisement contains more than the usual detail. 22 In the classic case Lefkowitz v. Great Minneapolis Surplus
Store, Inc., the court formulated the much-cited test of whether “the offer is clear, definite, and explicit, and leaves nothing open for negotiation.” The store advertised “Saturday 9 A.M. . . . 1 Black Lapin Stole Beautiful, worth $139.50 . . . $1.00, First Come First Served.” This advertisement met the commitment requirement because “some performance was promised in positive terms in return for something requested.” Since it was much more specific as to subject matter, offeree, and manner of acceptance than the ordinary advertisement, it constituted an offer that the plaintiff could accept by being the first one in the store on Saturday.

Lefkowitz is particularly instructive because, to use the cliché, it is the exception that proves the rule. The first Restatement offered the following hypothetical: “A, a clothing merchant, advertises overcoats of a certain kind for sale at $50. This is not an offer, but an invitation to the public to come and purchase.” The second Restatement added a variation to the hypothetical in order to conform with Lefkowitz: “The addition of the words ‘Out they go Saturday; First Come First Served’ might make the advertisement an offer.” As in Lefkowitz, an advertisement that is more detailed may be an offer. The Restatement demonstrates the application of the rule and also its force; a general advertisement “is not” an offer, and the addition of more details only “might make” the advertisement an offer.

II. THE ERROR OF THE SUPPOSED RULE THAT AN ADVERTISEMENT IS NOT AN OFFER

Judicial opinions and the scholarly literature are replete with recitation of the rule that an advertisement is not an offer. But the recitation is an instance of Cardozo’s aphorism that “the half truths of one generation tend . . . to perpetuate themselves in . . . law as the whole truth[s] of another, when constant repetition brings it about that qualifications, taken once for granted, are . . . forgotten.” For three reasons, the proposition that “an advertisement is not an offer” is not the law. First, the cases that recite the proposition do not apply it. Second, other legal rules and other business practices prevent the proposition

24. Lefkowitz, 86 N.W.2d at 690.
25. Id. at 691 (citing SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 27, at 58 (rev. ed. 1936)).
26. Id.
27. RESTATEMENT OF CONTRACTS § 25 cmt. a, illus. 1 (1932).
28. RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b, illus. 1 (1981); id. Reporter’s Note (stating that the illustration is based on Lefkowitz).
from being applied. Third, the proposition is inconsistent with the basic principles of contract law.

A. THE CASE LAW

In the paradigmatic application of the rule, a merchant publishes, in a broad public medium such as a newspaper, an advertisement that is specific as to subject matter and price but contains no more details. A potential customer attempts to buy the advertised item at the advertised price but the store declines to sell, which it is permitted to do because an advertisement of designated merchandise at a designated price is not an offer.

A survey of the cases that have invoked the rule over the past twenty years, along with the most-cited older cases for the rule, demonstrates that virtually no case ever has applied the rule to the paradigm. The cases fall into three categories. Some cases recite the rule but do not involve the issue of whether an advertisement is an offer. Many cases discussing the issue arise from facts so unlike those in the paradigm case that they fail to provide support for the rule. That leaves only one case in the past twenty years, and perhaps one or two older cases, that actually apply the rule to the paradigm case.

1. Wrong Issue

Some cases that recite the rule arise in the context of a sale of an advertised item but deal with an issue other than whether the advertisement creates a power of acceptance in the reader. A few of these cases present issues that are worlds apart from that issue. In MLMC, Ltd. v. Airtouch Communications, Inc., for example, the issue was whether a price quotation constituted an offer so that an invention had been offered for sale more than one year before a patent application was filed, thus preventing the seller from obtaining a patent. In People v. Gimbel Bros., the issue was whether publishing a newspaper advertisement and having clerks available to take telephone orders violated a law against selling goods on Sunday.

In another subset of these cases, the issue was whether the advertiser bears the risk of a typographical error in the advertisement for which it is not at fault. Properly understood, these cases do not involve the issue of whether an advertisement is an offer; rather, they concern who bears the risk of error under the law of mistake. In Chang v. First Colonial Savings Bank and Woods v. Morgan City Lions Club, two cases within the

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31. See 115 N.Y.S.2d 857, 857–58 (1952); see also Fisher v. Bell, (1961) 1 Q.B. 394. In Fisher, a store owner was prosecuted for displaying a switchblade knife with a displayed price. Id. at 394. The court noted “most lay people” would view the knife as being offered for sale, but Parliament would be presumed to know the common law rule that an advertisement or display is not an offer. Id. at 399.
exception of definiteness, the courts held that the advertiser
was responsible for the error where it had not informed the recipient of
the error in a timely manner. In O'Keefe v. Lee Calan Imports, Inc., by
contrast, the court held that an advertiser was not responsible for a
typographical error which was not its fault, on the grounds that the
advertisement was only an invitation to make an offer. The O'Keefe
court distinguished Lefkowitz because terms were left open. However,
that argument appears to be disingenuous on the facts of the case; the
alleged indefiniteness included what warranty accompanied the sale, a
term that surely could be read into the contract by standards of
reasonableness. In Donovan v. RRL Corp. the court avoided decision on the
vitality of the basic rule, holding that a specific advertisement for a
car constituted an offer because of a provision of the California Vehicle
Code that required licensed automobile dealers to sell a car at the
advertised price, and held that the dealer could rescind the offer on the
basis of unilateral mistake.

2. Wrong Facts

Next, there are cases that confront directly the issue raised by the
paradigm case—whether an advertisement is an offer. But nearly all of
these cases arise on facts that are unlike the paradigm case of a merchant
who publishes, in a broad public medium, an advertisement that is
specific as to subject matter and price but contains no more details.

A large number of these cases arise in the wholly different context
of a bidding process for public or private projects. These cases take two
basic forms: invitations to bid from the contracting authority, where a
bidder claims that the invitation was an offer that it has accepted by
submitting the lowest bid; and circulation of price quotations to bidders

32. Woods v. Morgan City Lions Club, 588 So. 2d 1196, 1200 (La. Ct. App. 1991); Chang v. First
34. Id.
35. Id.
36. 27 P.3d 702, 710–13 (Cal. 2001) (citing CAL. VEH. CODE § 11713.1(e) (West 2000)).
37. Id. at 716.

Where the plaintiff has no reason to know of and does not cause the defendant’s unilateral
mistake of fact, the defendant must establish the following facts to obtain rescission of the
contract: (1) the defendant made a mistake regarding a basic assumption upon which the
defendant made the contract; (2) the mistake has a material effect upon the agreed
exchange of performances that is adverse to the defendant; (3) the defendant does not bear
the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the
contract would be unconscionable.

Id. As Justice Werdegar noted in dissent, an oddity of the opinion is that the dealer never asked or
argued for rescission in either the trial court or on appeal; the issue was first raised by amici curiae
(who are unidentified in the opinion) and was barely argued on appeal. See id. at 725 (Werdegar, J.,
dissenting).

by prospective suppliers or subcontractors. The Restatement Second asserts that even where custom dictates or law requires that the lowest responsible, conforming bidder be awarded the contract, the invitation to bid is not an offer; rather "[t]he rule in such cases is much like that governing auctions—unless a contrary intention is manifested, the advertisement is not an offer but a request for offers; bidders on both prime contract and subcontract make offers when they submit bids; and all bids may be rejected."

In these cases, the rule is not applicable because the context differs markedly from the paradigm case of a general advertisement. In many cases the invitation to bid even contains a disclaimer that it does not create a power of acceptance, in language that states the authority "reserves the right to accept or reject any and all bids" or the like." Even in the absence of a disclaimer, however, the assumption that the bidder has no reasonable expectation that it will be awarded the contract arises out of a context in which it is widely understood that the contracting authority has discretion in considering, evaluating, and rejecting bids.

Other cases involve advertisements that are so much more general than the paradigm case that they fail to provide any support for the proposition. In one older case of this type, often cited in support of the rule, a department store advertised radios of various makes "at 25 per cent. to 50 per cent. reduction" and "Your choice... $22.50 to $225." The advertisement was fatally indefinite in failing to specify which particular models were being sold at which price and which discount.

More recent cases are similar, involving advertisements so general that the claims appear silly. In Trotter v. State Farm Mutual Automobile Insurance Co., the plaintiff claimed that his insurance agent had failed to advise him of exclusions in his motor vehicle policy, and relied in part on advertisements portraying State Farm agents as well-trained, qualified, and able to help clients with their insurance needs. In Bourke v.
Kazaras, the plaintiff sued the lawyer referral service of the Philadelphia Bar Association, claiming that the advertisement of the service constituted an offer which she accepted by using the service, and that one of the implicit terms of the offer was that she would be referred to a competent attorney. In Ziglin v. Players MH, L.P., the plaintiff argued that a casino's advertisement of its blackjack games constituted an offer such that it could not bar him from playing as a card counter.

A related group of cases concerns advertisements held to be indefinite because essential terms were left open. Zanakis-Pico v. Cutter Dodge, Inc. is typical. The court cited the "well-established" rule and the Lefkowitz exception, and adopted those principles, holding that "advertisements are generally not binding contractual offers, unless they invite acceptance without further negotiations in clear, definite, express, and unconditional language." In the case before the court, however, the general rule was superfluous because, although the advertisement designated vehicles for sale at stated cash prices and credit terms, it also included an explicit limitation that the sales were "on approved credit." If the plaintiff had offered cash rather than demand the advertised credit terms, a contract would have been formed, because the advertisement otherwise was sufficiently specific to fall within the exception.

Similarly, in some cases promotional advertisements were indefinite because they referred to a catalog that had more details of the terms of the intended contract. Leonard v. PepsiCo, Inc. is the most famous of these. Aside from the sheer ridiculousness of Pepsi's television commercial for its Pepsi Stuff promotion, the words and images of the commercial expressly referred consumers to the catalog, in which the purported offer of a military jet for seven million points was nowhere to be found. Similarly, in Alligood v. Proctor & Gamble Co., the notice on boxes of Pampers urging consumers to collect Teddy Bears Points specifically referred them to the Pampers Baby Catalog for the items to be acquired with the points and the terms of the promotion.

47. 36 S.W.3d 786, 788 (Mo. Ct. App. 2001).
48. Compare O'Keefe v. Lee Calan Imports, Inc., 262 N.E.2d 758, 760 (Ill. App. Ct. 1970), discussed above, which may be distinguished from this category because the missing terms were of a sort that could reasonably be supplied by trade usage.
49. 47 P.3d 1222 (Haw. 2002).
50. Id. at 1237–38.
51. Id. at 1238.
52. Id. Ford Motor Credit Co. v. Russell is similar, except there, the requirement that credit be approved was implicit, rather than explicit. 519 N.W.2d 460, 463 (Minn. Ct. App. 1994). The court also mentioned the limited capacity argument in rejecting characterization of the advertisement as an offer. Id.
54. Id. 118–19, 124.
At the other end of the spectrum lies the most numerous group of cases, those in which the traditional rule is cited but not applied because the case falls within the *Lefkowitz* exception for an advertisement that is “clear, definite, and explicit, and leaves nothing open for negotiation.”

*Johnson v. Capital City Ford Co.*, decided a year earlier than *Lefkowitz*, illustrates. The defendant’s advertisement concerned an unusual trade-in offer:

TWO FOR ONE... For two weeks BUY A NEW '54 FORD NOW TRADE EVEN FOR A '55 FORD

Don’t Wait—Buy a 1954 Ford now, when the 1955 models come out we’ll trade even for your '54. You pay only sales tax and license fee. Your '55 Ford will be the same model, same body style, accessory group, etc. A sure thing for you—a gamble for us, but we’ll take it. Hurry, though, this offer good only for the remainder of September.

The 1954 car must be returned with only normal wear and tear. Physical damage, such as dented fenders, torn upholstery, etc. must be charged to owner or repaired at owner's expense. No convertibles or Skyliners on this basis.

The court held that “[t]he advertisement denotes itself as an ‘offer’, the wording to a reader denotes a bona fide bargain offer, and it was certain and definite enough to constitute a legal offer.” Therefore, that the offer was communicated to the public through a newspaper rather than being directed to a specific customer did not matter.

A related group of cases concerns offers for rewards or prizes. The prototype is the casebook chestnut *Carlill v. Carbolic Smoke Ball Co.*

The Carbolic Smoke Ball Company offered a £100 reward to anyone “who contracts the increasing epidemic influenza... after having used the ball” as directed. The advertisement also stated that the company had deposited £1000 with a bank “shewing our sincerity in the matter.”

Carlill used the smoke ball but still contracted influenza. She claimed the reward, but Carbolic refused to pay. The court of appeal held that the advertisement constituted an offer which was definite and the seriousness of which was demonstrated by the deposit, and that Carlill

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56. The typographical error cases discussed above fall into this category as well. See *supra* notes 32–37 and accompanying text.
58. *Id.* at 77.
59. *Id.* at 79.
60. *Id.*
61. (1893) 1 Q.B. 256. For the background and reception of the case, see A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* ch. 10 (1996).
62. *Carlill*, 1 Q.B. at 257.
63. *Id.*
64. *Id.*
65. *Id.* at 256–57.
had accepted the offer according to its terms by using the smoke ball.\textsuperscript{66}

There are occasional modern successors to \textit{Carlill} which hold that a definite advertisement for a reward is an offer that can be accepted by complying with the terms of the offer; in other words, the advertisement is an offer for a unilateral contract.\textsuperscript{67} In \textit{Pastor v. Vacation Charters Ltd.}, for example, the plaintiff was designated a “grand finalist” in a time-share promotion and was informed that the grand finalist prizes were $10,000 cash, a 1987 Chrysler Sundance automobile, a projection screen color television system, or $1000 cash, of which he was entitled to receive at least two.\textsuperscript{68} The time-share promoter refused to comply, and the court held that the promotion was an offer that was accepted when the plaintiff traveled to the resort and listened to the promoter’s sales pitch.\textsuperscript{69}

The disappointed consumer does not always win, sometimes because the court finds the terms of the offer have not been complied with,\textsuperscript{70} and sometimes for other reasons.\textsuperscript{71} Nonetheless, the body of cases constitute a solid exception to the rule that an advertisement is not an offer.

3. The Paradigm Case

Finally, there are the relatively few cases that directly concern the paradigm case and apply the rule. In the past twenty years only one case falls within this category. Among the older, often-cited cases, there are perhaps two others.

The recent case is \textit{Mesaros v. United States}.\textsuperscript{72} To fund the renovations of the Statue of Liberty and the Ellis Island immigration facilities, Congress directed the U.S. Mint to produce and sell commemorative coins.\textsuperscript{73} The authorized number of half-dollar clad and one-dollar silver coins sufficed to meet demand, but orders for the five-dollar gold coins far exceeded the authorized supply.\textsuperscript{74} Due to an error by the bank processing credit card orders for the Mint, some prospective purchasers who submitted early orders, including the Mesaroses, failed to receive their coins even though other buyers who ordered later did have their

\textsuperscript{66}. \textit{Id.} at 266–67 (Bowen, L.J.).
\textsuperscript{67}. See Keith A. Rowley, \textit{You Asked for It, You Got It... Toy Yoda: Practical Jokes, Prizes, and Contract Law}, 3 \textit{ Nev. L.J.} 526, 552–54 (2003). Rowley’s title refers to \textit{Berry v. Gulf Coast Wings Inc.}, in which a Hooters restaurant ran a contest among waitresses in which the prize was orally announced to be a new Toyota, and the winning waitress was awarded an action figure of a Jedi master—a new toy Yoda. See \textit{Complaint} at 1–2, No. 01-2642 Div. J (Fla. 14th Cir. Ct., Bay County, filed July 24, 2001).
\textsuperscript{69}. \textit{Id.} at 557.
\textsuperscript{70}. \textit{E.g.}, Newman v. Schiff, 778 F.2d 460 (8th Cir. 1985) (offer expired).
\textsuperscript{71}. \textit{E.g.}, Harris v. Time, Inc., 237 Cal. Rptr. 584, 589 (Ct. App. 1987) (de minimis principle barred a remedy).
\textsuperscript{72}. 845 F.2d 1576 (Fed. Cir. 1988).
\textsuperscript{73}. \textit{Id.} at 1577.
\textsuperscript{74}. \textit{Id.} at 1578.
orders processed successfully. The purchasers responded to a mailing announcing the sale of the coins, which included statements such as:

VERY IMPORTANT—PLEASE READ: YES, Please accept my order for the U.S. Liberty Coins I have indicated. I understand that all sales are final and not subject to refund. Verification of my order will be made by the Department of the Treasury, U.S. Mint. My coins may be delivered in multiple shipments. If my order is received by December 31, 1985, I will be entitled to purchase the coins at the Pre-Issue Discount price shown. I have read, understand and agree to the above.

The U.S. Mint reserves the right to limit quantities shipped, subject to availability. Mint may discontinue accepting orders should bullion prices increase significantly. Credit card orders will be billed upon receipt by the U.S. Mint.

The Federal Circuit Court of Appeals held, as a matter of law, that these materials did not constitute an offer that the Mesaroses could accept by submitting an order. It began by noting that the “great weight of authority is against the plaintiffs” because mail solicitations of this type are “no more than advertisements or invitations to deal.” The court then referred to the more general principle that “whether an offer has been made depends on the objective reasonableness of the alleged offeree’s belief that the advertisement or solicitation was intended as an offer.” Applying that principle, “a thorough reading, construction, and interpretation of the materials sent to the plaintiffs by the Mint makes clear” that it was unreasonable to regard the solicitation as an offer. Particularly important was the statement, on the credit card form, “YES, Please accept my order . . . .,” which indicated that the buyer was making an offer to be accepted by the Mint. Underlying the court’s opinion was the concern that, in light of the Congressional limitation, the Mint could not accept all orders. The court distinguished *Lefkowitz* on that basis, because the coins had not been offered first-come, first-served.

In *Craft v. Elder & Johnston Co.* the defendant’s newspaper advertisement displayed a particular sewing machine, stated a price of

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75. *Id.* at 1579.
76. *Id.* at 1578 & n.2. A more recent solicitation from the Mint for Chief Justice John Marshall commemorative coins includes the following qualification: “The United States Mint reserves the right to limit quantities and may discontinue accepting orders at any time.” United States Mint, Bulk Purchase Agreement Form (2004), http://www.usmint.gov/downloads/consumer/AgreementForm.pdf.
77. *Mesaros*, 845 F.2d at 1581–82.
78. *Id.* at 1580.
79. *Id.* at 1581.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 1580–81.
$26, and included the words "Thursday Only Special." The court held that the advertisement contained an offer for a unilateral contract that could be withdrawn anytime before acceptance, and the plaintiff's attempt to purchase the sewing machine for the advertised price did not constitute acceptance. Oddly, the court distinguished its rationale from the usual rule that an advertisement is not reasonably understood to be an offer. After citing judicial authority, Williston and other treatises, the original Restatement, and the Restatement's paradigmatic hypothetical, it remarked, "With all due respect to the pronouncements of able jurists, we are not impressed with these theories." Further, although the case was submitted to the appellate court on the narrow issue of whether the advertisement constituted an offer, it is apparent from the facts that more was going on in the case. This needs more explanation. The plaintiff alleged that the sewing machine, advertised at a price of $26, had a value of $175. It is likely, therefore, that the case was a Lefkowitz-style come-on, a typographical error case, or a case of bait and switch.

*Geismar v. Abraham & Strauss* is similar. A department store's newspaper advertisement listed a set of dishes for sale at $39.95 and listed the regular price of $280. The store refused to sell them to Geismar, and the court cited the rule in holding that the advertisement was not an offer. It then concluded, however, that the advertisement violated the false advertising statute, which entitled Geismar to statutory damages. The court considered the possibility that the advertised price was a typographical error which the reasonable person would disregard, but concluded that there was sufficient evidence that it was not, because the ad included other deeply discounted merchandise and a statement that the prices were "40% to 50% off regular prices."

### B. The Statutes

Under general contract law, if an advertisement is not an offer, the merchant publishing the offer may fail to honor it, change its terms, or withdraw it with impunity. But general contract law is not the only body of law that regulates advertisements. Section 5 of the Federal Trade

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85. *Id.* at 417–18.
86. *Id.* at 419.
87. *Id.* ("A, a clothing merchant, advertises overcoats of a certain kind for sale at $50. This is not an offer but an invitation to the public to come and purchase.").
88. *Id.*
89. *Id.* at 417.
91. *Id.* at 1006.
92. *Id.*
93. N.Y. GEN. BUS. LAW § 350 (McKinney 2005).
95. *Id.* at 1007–08.
Commission Act declares unlawful "unfair or deceptive acts or practices in or affecting commerce" and authorizes the FTC to prohibit unfair or deceptive practices. An amendment to the original Act also prohibits any "false advertisement" and makes the dissemination of a false advertisement a Section 5 violation. "False advertisement" is defined in part as an advertisement that is "misleading in a material respect."

Every state has adopted a "little FTC Act" and most have adopted other regulatory legislation—known variously as unfair trade practices acts, unfair and deceptive practices acts, or consumer fraud acts—that regulates advertising or provides penalties or remedies for false advertising. Some of the statutes contain general prohibitions of unfair and deceptive practices as the FTC Act does, and others go on to specify particular kinds of wrongful behavior in general and particularly with respect to advertising.

The effect of these substantial bodies of federal and state law is to negate the rule that an advertisement is not an offer. In many, perhaps most circumstances, a merchant is legally bound to honor the terms of its advertisement and may be subject to sanction for failing to do so. The law prohibits behavior that ranges from the fraudulent to the negligent to sometimes even the innocent, and in contexts including bait and switch schemes, failure to have on-hand adequate quantities of goods advertised or to provide rain checks, misrepresentation of terms in an advertisement, and failure to fully disclose terms in an advertisement.

"Bait and switch' describes an offer which is made not in order to sell the advertised product at the advertised price, but rather to draw the customer to the store to sell him another similar product which is more profitable to the advertiser." The forms of bait and switch are as variable as the ingenuity of sleazy merchants, but examples include advertising one product and then having that product unavailable when the customer attempts to purchase it, advertising a product and subsequently disparaging it or presenting it in shoddy condition, advertising sale or financing terms that turn out to be unavailable, and advertising a product at one price and increasing the price in the contract documents (also known as "low-balling").

The FTC has prohibited bait and switch as an unfair and deceptive

97. Id. § 52.
98. Id. § 55(a)(1).
practice, has published Guides Against Bait Advertising, and has brought proceedings against merchants in a variety of industries. Bait and switch is also unlawful under state deceptive practices statutes, and state authorities and consumers have pursued violations. Many of these cases resemble the paradigm case of a merchant advertising particular goods for sale on particular terms, which are then, through simple denial or more elaborate chicanery, not made available. In a typical FTC proceeding, for example, In re Holiday Carpets, Inc., a carpet dealer ran newspaper ads with representations such as “wall-to-wall ... 100% continuous filament nylon, ... free vacation for two, ... bank financing, ... as low as $2.00 a week [no down payment].” In fact, the merchant did not comply with the terms of its advertisement. The dealer often did not show the advertised carpet or steered customers away from it, the vacation was not free, financing was not provided by a bank, and low payment or no down payment terms were not available.

Bait and switch is the most egregious means of using advertising to defraud customers, and therefore the legal prohibitions against the practice may be the easiest refutation of the general contract rule that an advertisement is not an offer. But less offensive tactics are also regulated in ways that negate the rule.

FTC and state law prohibit advertising an item and “not hav[ing] the advertised products in stock and readily available to customers during the effective period of the advertisement” or “not hav[ing] that product in stock in sufficient quantities to meet reasonably anticipated customer demand.” General consumer fraud statutes also prohibit the practice, as when a developer advertised the availability of low-cost government mortgages but only had a limited supply which it allocated first-come, first-served. There are exceptions, as when the merchant “clearly and adequately discloses that supplies of the advertised products are limited”—that is, when the advertisement contains an explicit qualification on the merchant’s obligation. Another exception is when the merchant has attempted in good faith to procure adequate supplies but is unable to because of conditions beyond its control. In that case, the
merchant must provide a rain check or a substitute product, indicating
the advertisement is binding though it contains an implicit term of
substitutes in the event of unavailability. However, in some
jurisdictions even good faith is not a defense. When the merchant has an
adequate supply which is depleted before an advertised sale or
when the inadequacy is due to a typographical error, it is still responsible for
not having a reasonable supply.

It is also a violation of consumer fraud regulations to misrepresent
the terms on which a contract is available, to fail to disclose limitations
on an advertised offer, or to offer terms that are not actually available,
particularly with respect to credit terms. An automobile dealer’s “Sign
and Drive” program’s failure to disclose that a credit check was
required and a bank’s advertising “Same-As-Cash” without disclosing
that minimum monthly payments were required are examples of
advertisements that were held to be deceptive on this basis.

The weight accorded to advertisements by protective legislation is
confirmed by an application of the principle that a misleading or
incomplete advertisement cannot be cured by a subsequent accurate or
complete disclosure. For example, when a vanity press advertised “Two
fact-filled, illustrated brochures tell how to publish your book, get 40% royalties,” the FTC found deception even though anyone who followed
up on the advertisement was immediately sent a brochure that explained
that the 40% “royalty” included payments that constituted a return of
the author’s investment in the book.

C. THE GENERAL CONTRACT PRINCIPLES

The rule that an advertisement is not an offer is an application of the
definition of an offer: “An offer is the manifestation of willingness to
enter into a bargain, so made as to justify another person in
understanding that his assent to that bargain is invited and will conclude
it.” The key to this definition is that the other person is justified in
understanding that a legally binding relationship has been proposed, so

114. E.g., Conn. Agencies Regs. § 42-110b-22 (2006); Ill. Admin Code tit. 14, §§ 475.620, 475.630;
117. See also Donovan v. RRL Corp., 27 F.3d 702, 712-13 (Cal. 2001) (noting that California
Vehicle Code requires automobile dealers to sell car at advertised price).
118. See Sheldon & Carter, supra note 100, at 189-90.
120. Restatement (Second) of Contracts § 24 (1981).
the definition is itself an application of the fundamental principle that contract law aims to protect the reasonable expectations of parties. If the advertisement rule is congruent with both the definition of an offer and that fundamental principle, in the great majority of cases the application of the rule should yield the same result as the application of the general definition or the even more general principle. Therefore, the essential question in assessing the rule is whether a reasonable person understands that a merchant manifests the intention to create a binding relationship when it publishes an advertisement specific as to subject matter and price but containing no more details.

The question of reasonable expectations is a mixed empirical and normative inquiry. Like the reasonable person in tort law, reasonable expectations are not those held by the average consumer or the majority of consumers but are derived from the court’s perceptions of what a typical consumer believes or is entitled to believe based on normal usage in the marketplace.

There is apparently no research on the empirical question of whether people regard advertisements as manifesting intent to create a binding relationship. For judges, the basis of the assumption that advertisements are not regarded as serious offers rests more on ordinary experience than on scientific research. The Corbin treatise suggests that, “Usually, neither the advertiser nor the reader of the notice understands that the reader is empowered to close the deal without further expression by the advertiser.” But ordinary experience may well be to the contrary. Professor Melvin Eisenberg poses a hypothetical to prove the

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121. See Eisenberg, supra note 10, at 1137 (on the concept of congruence between doctrines). Eisenberg also has a broader concept of congruence, linking legal doctrines to social propositions. See Melvin A. Eisenberg, The Concept of National Law and the Rule of Recognition, 29 FLA. ST. U. L. REV. 1229, 1231 (2002).

122. See Farnsworth, supra note 5, § 3.6 at 208–12.

123. There are bodies of literature supporting the common insights that people understand that advertisers are attempting to persuade them, see, e.g., Marian Friestad & Peter Wright, The Persuasion Knowledge Model: How People Cope with Persuasion Attempts, 21 J. CONSUMER RES. 1 (1994), and that consumers often view those attempts with skepticism, see, e.g., Carl Obermiller et al., Ad Skepticism, 34 J. ADVERTISING 7 (2005). The degree and effects of persuasion knowledge and ad skepticism depend on the individual, the advertisement, and the context. Our common experience suggests, however, that a consumer may view with skepticism claims about the attributes or quality of a product but may still maintain a narrower expectation that an advertiser is willing to sell an advertised product on the terms advertised. On the normative question, moreover, it is worth noting a comment from the developers of the ad skepticism theory:

It has been widely presumed that some level of consumer skepticism is "healthy" for the marketplace because it encourages honesty from advertisers. ... We suggest, however, that skepticism is both a cause that encourages advertisers to be honest and an effect of consumer experience of dishonesty. In the latter case, too much skepticism is an impediment to an efficient market. Useful information cannot succeed in the marketplace if consumers do not believe it and act upon it.

Obermiller, supra, at 16.

124. CORBIN, supra note 4, at 116.
point:

Suppose a store advertises 17-inch Sony TVs at $350, a customer comes in and says he will buy the TV at that price, and the salesman responds, "We're not selling the set at $350, but we'll sell it at $400." The reaction of the customer would not be, as Corbin would have it, "Of course; I understand; your advertisement was only inviting me to consider and examine and negotiate," but instead, "You people are liars, cheats, or both."  

Ordinary experience is reflected in the practices of merchants as well as the expectations of consumers. Merchants generally do not advertise goods that they do not have available for sale, even if the advertisement is of a general nature—"17-inch Sony TVs at $350"—without the addition of more specific language—"Saturday at 9:00 a.m., First Come, First Served," as in Lefkowitz. They do not generally refuse to sell advertised goods for idiosyncratic reasons ("You're too fat, so you should watch less TV") or, indeed, for any reason. When there is a typographical error in an advertisement prepared in advance, they often will publish a correction, and when they advertise goods that turn out to be unavailable, they either publish a notice to that effect or offer customers substitute goods or rain checks.

In many cases, stores probably behave this way not as a reflection of their perception of reasonable expectations, which they want to honor to maintain good customer relations, but in order to comply with consumer protection legislation. That legislation ought to shape—perhaps determine—the content of reasonable expectations for the common law rule as well. In tort law, violation of a statute constitutes negligence per se, a prima facie case of negligence, or some evidence of negligence, depending on the jurisdiction. The legislature has established a standard of conduct that ought to at least be considered in assessing the reasonableness of a person's action and may even be conclusive in making that assessment. Put another way, the reasonable person does not ordinarily violate the law, particularly where the statutory prohibition is designed to prevent the type of risk that the person's conduct creates toward a group of people whom the statute aims to protect.

The same result should be obtained in contract law. The statutes and the cases applying them variously prohibit merchants (sellers, lenders, and others) from advertising a product or contract terms with the intention to have the product unavailable, to steer the customer to another product, or to offer it on other terms (bait and switch); advertising an item and not having adequate supplies of the items to

125. Eisenberg, supra note 10, at 1167–68.
126. Lefkowitz v. Great Minneapolis Surplus Store, Inc., 86 N.W.2d 689, 690 (Minn. 1957).
meet reasonably anticipated demand or all demand within the period covered by the advertisement, even if the failure to do so is innocent; and misrepresenting the terms on which a contract is available, failing to disclose limitations on an advertised offer, or offering terms that are not actually available. The effect of these statutes is to render inoperative the common law rule about the status of advertisements.

Some of these restrictions are imposed by federal law and are therefore binding in every state. Other statutes are broader or narrower from state to state. Some statutes are designed to protect consumers directly, as shown by a cause of action created for them. Other statutes provide enforcement by public authorities or competitors and therefore protect consumers indirectly through the establishment of standards of fair dealing in the marketplace. As a matter of general contract law, however, the important issue is not the particulars of the statutes but the broad principle they enact. A merchant is bound to the terms of its advertisement, and a consumer is entitled to expect that a merchant will honor those terms.128

The principle of reasonable expectations, properly understood, addresses the two specific arguments against viewing an advertisement as an offer, namely that it is indefinite regarding to whom it is directed and the number of people who may accept it. In a classic phrase in support of the common law rule, Professor Percy Winfield concluded, "A shop is a place for bargaining, not for compulsory sales."129 On the contrary: A shop, or at least most shops, was not a place for bargaining when he wrote in 1939 and is even less so today. Winfield's justification lies principally in the offeree problem: "If the display of such goods were an offer, then the shopkeeper might be forced to contract with his worst enemy, his greatest trade rival, or a ragged and verminous tramp."130 This is incorrect. The reasonable consumer assumes that the advertisement is directed at an expected population of potential consumers which, in the ordinary case, includes anyone who wishes to buy. Best Buy does not distinguish among its customers. The reasonable consumer also knows

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128. One often-cited standard for consumer expectations is that of "a reasonable consumer acting reasonably under the circumstances." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995). The New York courts had previously applied a standard more generous to consumers, that of the "ignorant, unthinking and credulous who, in making purchases, do not stop to analyze." Guggenheim v. Ginzburg, 372 N.E.2d 17, 19 (N.Y. 1977). The FTC Act is still more interpreted under the more generous standard. See Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1172 (11th Cir. 1985); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944). The language echoes the view in the Queen's Bench decision in Carlill v. Carbolic Smoke Ball Co. that "advertisements do not appeal so much to the wise and thoughtful as to the weak and credulous portions of the community." (1892) 2 Q.B. 484, 488, aff'd, (1893) 1 Q.B. 256.

129. P.H. Winfield, Some Aspects of Offer and Acceptance, 55 L.Q. Rev. 499, 518 (1939). Winfield takes the most extreme position, rejecting even the Leftkowitz exception. Id.

130. Id.
that there are special situations in which the merchant is allowed to
distinguish among potential offerees on some basis implicit in the
advertisement. A fine restaurant may refuse to serve “a ragged and
verminous tramp” or, more likely, a diner who does not comply with its
dress code. In exceptional cases a merchant may refuse to sell to “his
greatest trade rival.” Occasionally ads for discounted merchandise will
proclaim “no dealers!” Most of the time this is probably puffery designed
to induce the belief that a great bargain is being offered, but there may
be circumstances in which a merchant should not be expected to sell to
its competitors, as when it advertises a certain item as a loss leader.

The problem of a potentially unlimited number of prospective
purchasers who could exhaust a merchant’s supply of advertised goods
and then demand more is as easily handled. In the ordinary case, the
reasonable consumer assumes that a merchant will have enough supply
to meet reasonably anticipated demand, as is required under some of the
statutes. The issue of “How much is enough?” leaves questions subject to
determination and depends on the context. A store issues a weekly
advertising circular with the Sunday newspaper; does the reasonable
consumer expect that the advertised items will be available for the entire
week, or has the merchant acted reasonably if its supply is exhausted on
Thursday? If there is a reasonably limited supply, the order in which
buyers reasonably can accept is more obvious: first-come, first-served
among the buyers to whom the advertisement is directed. This
reasonable assumption renders the Lefkowitz requirement of specific
language superfluous; surely the principle is not last come, first served.131

III. AN ADVERTISEMENT IS AN OFFER

If the supposed rule that an advertisement is not an offer is neither
the rule in fact nor defensible in principle, what is the rule and what
should be the rule? There are two possibilities. The first possibility is the
reverse of the supposed rule: An advertisement is presumed to be an
offer. The second possibility is, in effect, the absence of a rule: An
advertisement is an offer if it meets the requirements of an offer.

The first alternative rule is that an advertisement is presumed to be
an offer, or, more precisely, an advertisement that is specific as to terms,
published in a broad public medium such as a newspaper, is presumed to
be an offer. Because it is an offer, a potential customer can accept by
manifesting intent to comply with the terms of the advertisement. This
alternative rule comports with basic principles of contract law, under the
view that consumers reasonably expect that an advertisement of this kind
creates a power of acceptance, and it embodies the principle of the

131. Eisenberg, supra note 10, at 1169. Eisenberg also points out the incoherence of requiring
specific language of commitment in an advertisement. Id.
consumer protection statutes.

This rule resolves the paradigm case according to basic principles of contract law; indeed, the statement of the rule embodies the paradigm. "A, a clothing merchant, advertises overcoats of a certain kind for sale at $50." Contrary to the Restatements, the advertisement in this case is an offer. The rule also implies exceptions. An advertisement that lacks reasonable specificity of terms is not an offer. Nor is an advertisement that clearly manifests an intention not to be bound.

The rule and its implicit exceptions account for most of the decided cases better than the common law rule does. The most numerous group of cases currently are described as falling within the Lefkowitz exception for advertisements that are clear, definite, and leave nothing open to negotiation, but they are core cases under the alternative rule. Johnson v. Capital City Ford Co., in which the defendant's advertisement offered "TWO FOR ONE... For two weeks BUY A NEW '54 FORD NOW TRADE EVEN FOR A '55 FORD" and specified other details of the proposal, can be seen as a typical case rather than an exceptional case. The reward cases, successors to the venerable Carbolic Smoke Ball case, are similar.

The rule also accounts for advertisements that would still not be considered offers. These include advertisements that are vague (advertising the availability of casino games is not an offer for anyone to play them), advertisements with conditions (financing terms subject to credit approval explicitly or implicitly), and advertisements that refer to further details stated in a catalog.

This alternative rule solves the offeree problem by an implicit term. The offer may be accepted by one to whom it is reasonably understood to be directed. The more difficult question is how it addresses the supply problem. One possibility is that the rule contains an implicit limitation of reasonable quantities; the other possibility is that it implies the limitation that it is open only for a "reasonable time," and the advertiser is bound to any offeree who accepts within that time, with the consequence that the advertiser must offer a rain check, offer substitute goods, or pay damages. Which of those possibilities is chosen depends on the reasonableness in the particular context of the expectation of unlimited quantities. Under the consumer protection statutes, in at least some settings that is a reasonable assumption.

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138. See Calamari & Perillo, supra note 1, at 75.
The rule does not, however, resolve the typographical error cases, and a rule of contract formation should not do so. Those cases actually involve a distinct issue from whether a consumer can create a contract by complying with the terms of an advertisement. The issue in those cases is whether the advertiser or the customer ought to bear the risk of such an error or, more precisely, in what circumstances each ought to bear the risk of error, an issue properly dealt with by the rules governing mistake.

The second alternative rule creates no presumption that an ordinary advertisement is or is not an offer, instead resorting to the basic contract law doctrines of manifestation of assent and definiteness. Under this rule, an advertisement is an offer if a reasonable person to whom it is directed would understand that the advertiser is making a commitment. Every case stands on its own facts and requires a more individualized determination. An advertisement that is missing terms or is vague will be less likely to be considered an offer; an advertisement that is more complete will be more likely to be considered an offer. By definition, this alternative most accurately reflects fundamental principles such as reasonable expectations.

But if every case would be correctly decided under this alternative rule—the lack of a rule—why would the law ever consider adopting a more specific presumptive rule like the first alternative?

One reason is efficiency and administrability. The second alternative is a standard which, by definition, is less determinate in application than the first alternative, which is a presumption. Because a rule is easier to apply and because the consequences of its application are more predictable, judges can decide cases more efficiently under the second alternative, and lawyers can better predict the outcome of cases, facilitating the process of dispute resolution. Related to efficiency is accuracy. Because the standard is vague and the decision process is imperfect, the application of the general principles that determine what is an offer may not always yield the best results, in the sense that it may conclude that some expressions are offers when they are not, and vice versa.

Although the use of a presumption does not guarantee a correct result, its application may reduce the risk of error.

139. For example, where the typographical error creates an offer that is too good to be true, the customer should not be able to snap up the offer. On the other hand, where the advertiser is at fault in producing or failing to correct the error and the customer has incurred substantial reliance costs, the advertiser should be responsible.

140. Eisenberg points out the rules such as the advertisement is/is not an offer rule actually may take different forms: a nonbinding maxim or rule of thumb, a presumption which is rebuttable, or a binding categorical rule. See Eisenberg, supra note 10, at 1140–41. Neither the traditional rule nor either of the alternatives are categorical rules, and for present purposes the distinction between a maxim and a presumption is not significant.

141. Id. at 1142–44.
Neither the efficiency nor the accuracy justifications are compelling in this situation because of the character of the rule at issue. The first alternative rule, like the traditional rule, is actually a rule with numerous exceptions. The first alternative rule states that an advertisement that is specific as to terms constitutes an offer. The rule is situated in a factual universe, however, in which some cases fall within it and others outside it because the advertisements are nonspecific or conditional. If the court must determine, for example, whether an explicit or implicit condition of “approved credit” renders an advertisement outside the alternative rule, then nothing is saved by having the rule in place.

To an extent, this question turns on how many cases of what type courts will face. Looking at the decided cases, the first alternative rule is at least more efficient and accurate than the traditional rule because there are many cases involving specific advertisements, so it makes sense to have those cases treated under the main rule rather than the *Lefkowitz* exception to the main rule.

The accuracy and efficiency justifications focus on the results in decided cases, but there is a broader dimension to the question. What effect would either of the alternative rules have on the primary conduct of advertisers, relative to the traditional rule? The first alternative attaches greater consequences to an advertisement, and the second alternative somewhat greater consequences, than the traditional rule. This might lead advertisers to be more careful about their advertisements, but most advertisers already are regulated in similar ways by the trade practices and consumer protection statutes, and many of them honor advertisements even though they are not required to do so, so the extent of change might be small. Perhaps the greatest effect is hortatory and symbolic, and that may be reason enough to prefer the first alternative rule, that an advertisement is an offer. As the court said in *Meyer v. Packard*, a case observing the *Lefkowitz* exception to the common law rule:

> It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair dealing. Such a change, in my judgment, would not be so much in the line of revolution as in the line of reasonable reform. Honest men need not fear it; dishonest men should be kept in fear of it. 142

**IV. BEYOND THE RULE**

Beyond the question of what type of rule, or non-rule, is most desirable, the issue of whether an advertisement is an offer illustrates a deeper dimension of contract law. The starting point is what Professor

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Stewart Macaulay described as the “Bambi meets Godzilla” problem. Macaulay’s complaint was that failing to recognize the significance of the statutes offers an incomplete and misleading view of the law applicable to contracts (as distinguished from contract law). His concern in particular was that this view may be disabling for students when they become lawyers, and that a focus on doctrinal contract law understates the political influences of the law that the enactment and interpretation of the statutes brings out. As noted previously, several casebooks now mention the statutes, but “Godzilla” still rules the contracts classroom. If practitioners rested on what they learned in law school, this dominance would truly be disabling. For many practitioners, particularly specialists in consumer or business law, however, continuing legal education, lawyer-oriented texts, and knowledge learned in practice cultures fills in the gaps. For others, particularly generalists confronted with only an occasional advertising context, the common law orientation may be a problem.

Seeing the conflict between the statutory “Bambi” and the common law “Godzilla” leads to a broader point, however: What do we mean by law? Today, as for generations past, judges, scholars, teachers, and lawyers recite the rule that an advertisement is not an offer. But the supposed rule does not accurately state the holdings of the overwhelming majority of cases dealing with the issue, even though most of those cases recite the rule. And the statutes applicable to the same set of cases dictate that it cannot be the law.

The rule is, therefore, not the law in the sense of a controlling rule of law, because it does not reflect the result in most decided cases. Nor is it the law because it significantly affects primary conduct, because many merchants, to the extent that they attend to the law at all in preparing advertisements, are subject to the regulatory statutes. But the rule is the law in the sense that it is perceived to be the law. That perception may influence judges’ decisions in a few cases, or lawyers’ advice in a few matters, but its greater significance is ideological.

In this sense, law is not so much a rule structure as an expression of a belief system and an argument structure. For the law as a whole and for individual subjects such as contract law, the system or structure is not complete or consistent; for the individual lawyer, judge, or scholar, the

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143. See Macaulay, supra note 99, at 576.
144. Id.
145. Id. at 589.
146. See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 133–212 (1997).
structure is not likely to be well-formed. Nevertheless, it provides
direction to the actor and a degree of coherence to a pattern of decisions.

Combining the perspective of law as ideology with the “Bambi
meets Godzilla” insight suggests an important role for the traditional
rule. The rule that an advertisement is not an offer constitutes an
element of a traditional structure of contract ideology. That ideology
includes ideas that private ordering is superior to state regulation, that
the pursuit of individual wealth maximization serves the public good,
that obligation should not be imposed except where it has been assumed,
that economic exchange is more important than social exchange, and so
on. Because the ideology is limited and not a complete expression of
social values or individual beliefs, it is constantly under attack. One way
of reaffirming the strength of the ideology is to repeat the traditional
rules that express it, even when those rules do not dictate the results in
cases.

Indeed, from time to time it seems as if the ideology’s representation
is in decline. The rise of promissory estoppel, unconscionability, the
Corbin approach to the parol evidence rule, contextual interpretation,
and other modern contract doctrines in the 1960s and 1970s suggested
such a decline. But here Macaulay, writing in 1989, was prescient:

Of course, it is possible that we may look back in the year 2001 and
discover that [unfair trade practices and consumer protection] statutes
have thrown academic contract and much of Article Two of the U.C.C.
into the dustbin of history. More probably, in a very conservative
America of the early twenty-first century, we may have found that
these statutes were largely symbolic gestures with little real impact.
The taught tradition of the common law and the law schools may turn
out to be the Godzilla that slaughters the Bambi of the UDTP
statutes.

The statutes retain more than symbolic effect, but the broader trend
in contract law is the more conservative approach Macaulay foretold.
The classical revival in contract law aims to reinstate the Gilded Age
principle that courts should simply enforce the contracts people make
through formalistic rules of formation and interpretation and should not
impose terms or evaluate the fairness of bargains. This trend is part of a
broader vision that the market is the measure of all things and

147. Id.
149. See Jay M. Feinman, Un-Making Law: The Conservative Campaign to Roll Back the
Common Law 78–189 (2004) [hereinafter Feinman, Conservative Campaign]; Jay M. Feinman, Un-
Feinman, Classical Revival].
150. See Feinman, Conservative Campaign, supra note 149, at 78–110; Feinman, Classical Revival,
supra note 149, at 14–29.
government is the problem, not the solution to our problems. From this perspective, deciding to openly abandon the traditional rule that an advertisement is not an offer reflects a statement about ideology and politics as well as contract doctrine. An advertisement is an offer because it is right for the public to expect, the legislature to dictate, and the courts to enforce standards of fairness in the marketplace.

151. See Feinman, Conservative Campaign, supra note 149, at 7–10; Feinman, Classical Revival, supra note 149, at 55–59.