JOKING, EXAGGERATING OR CONTRACTING?

WILLIAM A. DRENNAN*

Everyone uses hyperbole, and that's no exaggeration.[1]

"[T]he speaker is certainly not bound to the literal meaning of . . . [an exaggerated] utterance, . . . [because the speaker] is committed to the deeper emotional and interactional, thus social, truth of the statement."[2]

"The line of division between 'social engagements' that do not create legal relations and engagements that make contracts . . . . is drawn with a wide and imperfect brush, not with a draftsman's pen. Being drawn by many hands, there are gaps in places and there are conflicting lines in other places."[3]

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* Professor, Southern Illinois University School of Law. Member, American Law Institute. Partner and Associate, Husch Blackwell Sanders LLP (1985-2005). New York University School of Law, LL.M. (Executive) (2013); Washington University School of Law, LL.M. in Intellectual Property (2003); Washington University School of Law, LL.M. in Taxation (1997); St. Louis University School of Law, J.D. (1985). Professor Drennan practiced law full-time for twenty years in the areas of tax, estate planning, and business law. Special thanks to Marisa Green (Class of 2021) for her excellent research and editorial assistance. Also, special thanks to Tiffany Ketchum, (Class of 2021), and Amanda Reiter, J.D., for their excellent editorial assistance.

1. *See* CLAUDIA CLARIDGE, HYPERBOLE IN ENGLISH: A CORPUS-BASED STUDY OF EXAGGERATION 1 (2011) ("Hyperbole is commonly used . . . . [A]ll people are by nature inclined to magnify or to minimise things and nobody is content to stick to what is really the case." (quoting the Roman rhetorician Quintilian who lived from c. 35 to c. 100 C.E.)).

2. *Id.* at 12.

3. TIMOTHY MURRAY, CORBIN ON CONTRACTS: FORMATION OF CONTRACTS 248 (1993).

We love the funny, and that's no exaggeration. In a joke, a duck is the funniest animal, you'll get more laughs in a red room than a blue room, 103 characters is the optimal length for a joke, and we know all this statistically because scholarly researchers often study humor. Litigators, courts, and commentators also focus on the funny when deciding whether promissory language created a binding contract. They frequently debate and decide enforceability based on whether a party was joking.

This Article asserts, for the first time, that in many of these cases the focus should be on whether the language is figurative exaggeration. This Article considers the work of philosophers, psychologists, and linguists on humor and exaggeration and concludes that a better understanding of exaggeration, both inside and outside of humor, would lead to better decision making. It also proposes a new multifactor test to help distinguish figurative exaggeration from bona fide contractual promises and offers a reasonable remedy for aggrieved parties when there is a genuine misunderstanding.

Exaggeration attracts less attention than humor and sometimes sparks hostility. Some may say, "I hate hyperbole, and that's no

exaggeration." Although exaggeration is factually incorrect, linguistic researchers have found that it is pervasive in everyday speech and is a legitimate form of communication that can powerfully, accurately, and economically expresses a speaker's attitudes and emotions. Courts should seriously consider exaggeration, and that's no joke.

INTRODUCTION

The comic corner of contract law contains a couple cases capable of creating chuckles. Pepsi advertised a $23 million harrier jet for an astronomical number of Pepsi product coupons.[4] Geraldo Rivera offered a $10,000 reward to anyone finding a reported court opinion about someone criminally prosecuted for lying about sex.[5] A newspaper promised $1,000 to any person who could supply it with the telephone number of the local Western Union office.[6] A sales manager announced a contest for a "Toyota," and then awarded the winner a toy doll of the Star Wars character Yoda.[7]

Nevertheless, this Article asserts for the first time that many of the other contract law controversies customarily lumped in the joke category would be more accurately described as exaggeration cases. It posits that a better understanding of exaggeration inside and outside of humor would help decision making. Accordingly, this Article proposes a new category to the customary list of nonbinding promises, namely an exaggeration category, and suggests a new multifactor test to help separate bona fide contractual offers from mere figurative exaggeration.

A case demonstrating issues with current analysis is *Augstein v. Leslie*,[8] in which the court required a crime victim to pay $1 million for the return of his stolen property.[9] Harlem-based hip-hop artist,

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4. *See* Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 119 (S.D.N.Y. 1999).

5. *See* ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 52 (3D ED. 2014) (citation omitted).

6. *See* Graves v. N. N.Y. Publ'g Co., Inc., 260 A.D. 900, 900 (N.Y. App. Div. 1940).

7. *See* Keith A. Rowley, *You Asked for It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 NEV. L.J. 526, 526–27 (2003) (citing Initial Complaint, Berry v. Gulf Coast Wings Inc., No. 01-2642 (Fla. Cir. Ct. July 24, 2001)) [hereinafter Rowley, *You Asked for It*]; *see also* Keith A. Rowley, *Beware of the Dark Side of the Farce*, NEV. LAW., June 2002, at 15, 15.

8. No. 11 Civ. 7512(HB), 2012 WL 4928914, at *1 (S.D.N.Y. Oct. 17, 2012); *see infra* notes 155–65 and accompanying text (discussing *Augstein v. Leslie* in more detail).

9. *Augstein*, 2012 WL 4928914, at *1, *6.

rapper, and record-producer Ryan Leslie was robbed and initially offered a $20,000 reward for the return of his stolen duffle bag and its contents, which included $10,000 U.S.[10] About two weeks later, online, he increased the reward to $1 million, stating the property was "invaluable."[11] Eventually, a man walking his dog found the duffle bag (absent the $10,000 U.S.) and demanded the $1 million.[12] The New York Court's analysis consisted of distinguishing a bona fide joke case[13] and relying upon one sentence from a nineteenth-century English case.[14] The court apparently found nothing funny and hastily concluded that the crime victim intended to be contractually bound when he increased the amount from $20,000 to $1 million.[15] The New York Court provided little discussion about the circumstances surrounding the increase in the reward from $20,000 to $1 million and provided no list of factors that might indicate whether a party was using exaggeration as a mere figure of speech.[16] The court also failed to note that the word "invaluable" was an obvious exaggeration and that "$1 million" is the kind of number commonly used by make-believe diabolical super villains demanding a ransom and school children pretending to make wagers.[17] In regard to the result, if the court had applied a promissory estoppel analysis rather than treating the situation as a breach of contract, it could have compensated the finder with reasonable amounts for his time, effort, and expenses, rather than awarding a $1 million bonanza.[18]

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10. Amended Complaint at 3, Augstein v. Leslie, No. 11-CV-7512 (S.D.N.Y. Dec. 15, 2011).

11. *Id.* at 4.

12. *See id.* at 5.

13. Rapper Ryan Leslie argued that his YouTube video offering the $1 million reward was merely an advertisement rather than an offer. The Court, however, distinguished *Leonard v. Pepsico, Inc.*, saying that Leslie's conduct in this case was meant to induce performance. *Augstein*, 2012 WL 4928914, at *3.

14. *Id.* at *2. ("[I]f a person chooses to make extravagant promises . . . he probably does so because it pays him to make them . . . .") (quoting Carlill v. Carbolic Smoke Ball Co. [1893] 1 QB 256 at 268 (Eng.)).

15. *Id.*; *see infra* notes 387–94 and accompanying text (noting that the intent test is objective).

16. *Augstein*, 2012 WL 4928914, at *1.

17. *See* Kolodziej v. Mason, 774 F.3d 736, 741 (11th Cir. 2014) (observing that, when challenging the veracity of another's statement, one might say, "I'll pay them a million dollars if they can do it"); *see also infra* notes 355–83 and accompanying text (discussing the *Mason* case in more detail).

18. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981) (limiting damages as justice requires).

Similarly, in *Theiss v. Weiss*,[19] a somewhat intoxicated distributor of goods told a regular customer he would supply 400 barrels of flour daily for fifty consecutive days at a price significantly below the distributor's expected cost to acquire the flour.[20] Not only was the price insanely low, but the quantity greatly exceeded what the merchant normally supplied.[21] In effect, it was a financial and practical impossibility for the merchant to perform.[22] The jury found no joke, and it enforced the absurd promise as a contract.[23] The appellate court "regard[ed] the verdict as against the weight of the evidence[,]" but the court concluded, "it is out of our power to change the verdict, no matter what we may think of the effect of the testimony."[24] The appellate court enforced the crazy promise although the merchant was "utterly unable to carry out such a contract . . . ."[25] Again, the court could have reached a more reasonable and equitable result if it had considered whether the distributor was exaggerating, rather than jumping straight to a breach of contract analysis after concluding there was nothing funny.

The list of nonbinding promises typically includes the following categories: jokes, social engagements such as dinner or recreational arrangements, promises to make a gift in the future, ethical obligations such as a news reporter's commitment to keep a source's identity confidential, and a healthcare provider's promises about a patient's condition. A smattering of verbiage can be culled from existing cases to arguably support noncontractual treatment for figurative exaggerations, but the existing authorities lack a systematic method for spotting exaggeration functioning as a mere figure of speech.

In addition to proposing a separate exaggeration category and a multifactor test to identify its members, this Article suggests that any potential harshness from the failure to enforce a hyperbolic promise may be mitigated with recovery under promissory estoppel

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19. 31 A. 63 (Pa. 1895).

20. *Id.* at 67 (reporting that, during the months immediately preceding the discussion, the distributor had purchased barrels of flour for between $4.45 per barrel to $4.70 per barrel, and when "under the influence of liquor," the distributor offered to "sell 20,000 barrels of flour at $4 a barrel . . . .").

21. *See id.*

22. *See id.*

23. *See id.*

24. *Id.*

25. *Id.*

instead of breach of contract.[26] Promissory estoppel could allow a party who fails to recognize figurative exaggeration, and is harmed, to recover reliance damages and return to the status quo despite the misunderstanding. This can be far more equitable than awarding contract-style damages enforcing the literal language.

I. EXAGGERATION CASES MISLABELED AS JOKE CASES

It would be fun if the joke category of contract cases listed in the leading treatises was a veritable clown car crowded with entertaining defendants trying to be hilarious, but it is really crowded with exaggeration cases. While exaggeration can be the foundation for a joke,[27] many of these cases involve exaggeration as a way to blow off steam, express disbelief, challenge, dare, needle, bluff, or just be contrarian. These uses may be referred to collectively as nonhumorous "figurative exaggeration" or "nonliteral exaggeration."

Litigators, judges, and commentators may overuse the word "joke" in their analysis because many people want to be funny and everybody loves a good joke.[28] Jokes can draw attention and be memorable, making arguments more persuasive.[29] Some judicial opinions talk about jokes or joking when there is nothing even remotely resembling humor.[30]

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26. *See infra* note 236 and accompanying text (discussing the use of the terms "exaggeration," "hyperbole," and "overstatement").

27. *See infra* notes 171–78 and accompanying text.

28. *See* JOHN MORREALL, THE PHILOSOPHY OF LAUGHTER AND HUMOR viii (1987) ("There are few things on which most people place more value than having a good laugh.").

29. *See* SCOTT WEEMS, HA! THE SCIENCE OF WHEN WE LAUGH AND WHY 180–81 (2014) (ebook) (discussing humor as an effective teaching tool because "[h]umor forces our minds to work more than if ideas are presented in a straightforward manner" and the extra effort required improves learning and retention).

30. *See, e.g.*, N.Y. Tr. Co. v. Island Oil & Transp. Corp., 34 F.2d 655, 655–56 (2d Cir. 1929) (stating that "the form of utterance chosen is never final; it is always possible to show that the parties did not intend to perform . . . as, for example, that the transaction was a joke" when a U.S. corporation established a Mexican subsidiary to drill for oil within forty-five miles of the Mexican coast and then recorded a series of sham transactions on the accounting records); Woods v. Fifth-Third Union Tr. Co., 6 N.E.2d 987, 988–89 (Ohio Ct. App. 1936) (citing commentators and case law about jokes in connection with rejecting son's argument that he was entitled to compensation for services rendered in managing his mother's investments before her death because the mother had said he would be paid for his services); Plate v. Durst, 24 S.E. 580, 581–82 (W. Va. 1896) (rejecting a business owner's

In black letter contract law, the joke doctrine sits among related doctrines all applying the principle that a statement or action is not an offer to contract unless it manifests an intent to be bound.[31] Phrased another way, if the parties indicated that they did not intend to be contractually bound, or that a reasonable person would not have believed they intended to be bound, they did not form a contract regardless of the use of promissory language or conduct. Leading commentators customarily discuss jokes, social obligations (such as arrangements for dinner), agreements between spouses and family or friends regarding domestic matters, and agreements to make a gift in the future as categories expressing this principle,[32] but they fail to acknowledge that exaggerators do not intend to be bound.

A. Emphasis on Humor in Two Famous Contract Cases

Another reason litigators, judges, and commentators may pepper their analysis with jest terminology is because two famous cases emphasizing joke arguments dominate law school study and scholarly commentary in the area of noncontractual promises.[33] First, Judge Kimba Wood's comprehensive and engaging opinion in *Leonard v. Pepsico, Inc.*[34] is a "darling of [contract] casebook

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argument that when promising to compensate a young relative for working in his business for five years, he was merely jesting).

31. *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. L. INST. 1981) ("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.").

32. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS § 3.7 (3d ed. 1999) (including "a written agreement . . . made as a sham, for the purpose of deceiving others" and a reporter's promise to keep his source confidential); MURRAY, *SUPRA* NOTE 3; JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 31 (4th ed. 2001) (adding "bragging" cases, "statements by physicians concerning the cure of a particular malady . . . such as the duration of a hospital stay" and certain agreements between unmarried co-habitants); JOSEPH M. PERILLO, CONTRACTS §§ 2.3–2.4 (7th ed. 2014).

33. *See, e.g.*, BRIAN A. BLUM, EXAMPLES & EXPLANATIONS: CONTRACTS 68–69 (7th ed. 2017); Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235, 1259–60 (2009); Rowley, *You Asked for It, supra* note 7, at 527–30, 536–38 (discussing *Lucy v. Zehmer* and *Leonard v. Pepsico, Inc.*); *infra* notes 34–41 (addressing the two cases in law school textbooks).

34. 88 F. Supp. 2d 116, 117 (S.D.N.Y. 1999); *see* Rowley, *You Asked for It*, *supra* note 7, at 539 n.55 (describing the *Leonard v. Pepsico, Inc.* opinion as exhaustive but not exhausting).

writers."[35] It attempts to describe when something is funny and may leave post-millennial trained attorneys with the impression that the key skill in this area is to identify the funny.[36] In *Leonard*, a series of Pepsico's TV commercials implied that a caffeine-fueled teenager could acquire a $23 million harrier jet with Pepsi coupons, and instead of taking the bus to school, the teenager could fly the fighter jet and land it immediately adjacent to their school building in a residential area.[37] Judge Wood described the commercial as the "embodiment of . . . 'zany humor,'"[38] and obviously absurd,[39] and she concluded it did not create an enforceable contract despite the customer's attempt to accept.[40]

Second, the traditional contract law favorite[41] before *Pepsico* was *Lucy v. Zehmer*.[42] In *Lucy*, the Zehmers' attorney argued that no contract was formed because of the "jest" exception,[43] but it was an ill fit. Neither party was going for a laugh.

W. O. Lucy[44] had asked to purchase the Zehmers' farm several times before,[45] and each time the Zehmers refused or backed out.[46] The court quoted testimony that the Zehmers wanted to leave the farm to their son, but subsequent commentators have suggested that the Zehmers likely chose not to sell because the farm was appreciating precipitously during "a Southern revolution in pulp-

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35. Rowley, *You Asked for It*, *supra* note 7, at 536 n.39 (listing eight law school casebooks using *Leonard v. Pepsico, Inc.* as a principal case).

36. *Leonard*, 88 F. Supp. 2d at 128.

37. *See id.* at 118–19.

38. *Id.* at 128.

39. *See id.* at 130.

40. *See id.* at 123.

41. *See* Rowley, *You Asked for It*, *supra* note 7, at 527–28 n.7 (listing ten law school casebooks reproducing *Lucy v. Zehmer* as a principal case and describing *Lucy v. Zehmer* as the case best known to contemporary American attorneys in 2003); Barak Richman & Dennis Schmelzer, *When Money Grew on Trees:* Lucy v. Zehmer *and Contracting in a Boom Market*, 61 DUKE L.J. 1511, 1511 (2012) (referring to *Lucy v. Zehmer* as a staple in most contracts courses).

42. 84 S.E.2d 516 (Va. 1954).

43. *See id.* at 518, 520.

44. *See* Richman & Schmelzer, *supra* note 41, at 1513 (identifying Welford Ordway Lucy).

45. *See Lucy*, 84 S.E.2d at 518 (summarizing the Zehmers' testimony that they had received about twenty-five offers to sell the farm in the ten years they owned it, and every time they gave the same answer—that they were not interested in selling it).

46. *See id.* ("Seven or eight years [earlier, Lucy] had offered Zehmer $20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out.").

and-paper production."[47] One evening a few days before Christmas, Lucy came to the Zehmers' restaurant with a partly filled bottle of whiskey and again started asking about the farm.[48] Apparently, both parties were very drunk even before they met and they continued drinking whiskey during their discussion.[49] Adrian Hadley (A.H.) Zehmer [50] testified, "I was . . . high as a Georgia pine"[51] and his spouse, Ida Zehmer, indicated she thought Lucy was even more intoxicated than her husband because she suggested that her husband drive Lucy home.[52] The binge-drinking conversation included challenges or dares such as Lucy saying, "I bet you wouldn't take $50,000.00 for [the farm]," and A.H. Zehmer saying, "you wouldn't give fifty."[53] "They argued 'pro and con for a long time,' mainly about 'whether [Lucy] had $50,000 in cash . . . .'"[54] During the conversation, A.H. Zehmer told his wife he was just "needling" Lucy.[55] The Zehmers' attorney argued that the agreement reached was an unenforceable joke or jest designed to be funny or incite laughter, as well as being a bluff or dare.[56] Unable to find anything funny and apparently disinterested in whether it was a bluff or dare, the court concluded the drunken parties created a binding contract for the sale of the farm.[57] The court's conclusion may reflect a tendency, in earlier times, to downplay the influence of heavy drinking on decision making capability and behavior control.[58] It also arguably reflects a failure to appreciate figurative exaggeration.

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47. Richman & Schmelzer, *supra* note 41, at 1512, 1516 (noting that, within eight years, Lucy sold the farm and its natural resources for a $142,000 profit).

48. *See Lucy*, 84 S.E.2d at 518.

49. *See id.* at 518–19.

50. *See* Richman & Schmelzer, *supra* note 41, at 1513.

51. *Lucy*, 84 S.E.2d at 519.

52. *See id.* at 520.

53. *Id.* at 518.

54. *Id.* at 519.

55. *Id.*

56. *See id.* at 520–21.

57. *See id.* at 522.

58. *See* John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 196 (2005) ("[M]any crimes are committed by those under the influence of some substance that reduces the impact of long-term consequences on decision making."); Mitchell B. Watson, *Blood, Drugs, and Lab Results: Using Agent Testimony to Establish Guilt in DUIs Involving Alcohol, Drugs, or Both*, 39 AM. J. TRIAL ADVOC. 547, 553 (2016) ("Individuals can begin to feel the effects of alcohol at 0.02%, and at 0.05%, individuals can expect alcohol to diminish their judgment, attention, control, rational decision-making, and sensory-motor skills . . . .").

B. Emphasis on Humor in Other Exaggeration Cases

In addition to these two famous cases, the leading authorities list many others as joke cases,[59] forming what at first appears to be a rather robust joke category. In an excellent article, Professor Keith Rowley gathers a lengthy roster of cases which discuss the rule that a joke is not an offer, and therefore, cannot be the basis of a contractual agreement.[60]

Although the courts in all these cases talk about a joke or jest, in many there is nothing funny and no sign of even an attempt at humor. Instead, these cases involve non-humorous exaggeration. Many feature excessive price.

In *Smith v. Richardson*,[61] while with Dr. Smith at Swisher's lumber business, Richardson boasted that since moving to Glasgow he had made only one bad investment,[62] which was his purchase of Preston Oil Company stock. Rather than complimenting Richardson on his business acumen, Swisher prodded Richardson to talk about his solitary loser.[63] Apparently this was a sore spot for Richardson, as Dr. Smith had teased Richardson about this particular mistake in judgment a dozen times before.[64]

A discussion between Richardson, Swisher, and Dr. Smith ensued.[65] Richardson proposed that he would transfer his Preston Oil Company stock to Swisher if Swisher would cancel Richardson's current account balance due for lumber previously purchased.[66] Dr. Smith interjected, "What is the account [balance]?"[67] Swisher asked his bookkeeper who said it was "$471 and some cents."[68] Dr. Smith said, "He wouldn't do it," indicating that Richardson would not actually make the exchange.[69] Richardson said, "You don't know

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59. *See, e.g.*, FARNSWORTH, *SUPRA* NOTE 32; RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON § 3:5 (4th ed. 2007); MURRAY, *SUPRA* NOTE 3, at 246 (referring to a jest or a banter); 17 C.J.S. *Contracts* § 60 (2020).

60. *See* Rowley, *You Asked for It*, *supra* note 7, at 539–42, 543–47 (citing marriage cases applying the "joke or jest" doctrine).

61. 104 S.W. 705, 705 (Ky. 1907).

62. *See id.*

63. *See id.* at 706.

64. *See id.*

65. *See id.*

66. *See id.*

67. *Id.* at 705.

68. *Id.* at 706.

69. *Id.* at 705.

whether I would or not," and then Richardson asked Dr. Smith, "what he would give for it".[70] Dr. Smith replied, "I will pay the account off for your interest."[71] Initially, Richardson responded, "No; it is worth more money," but eventually Richardson said, "You have bought it . . . ."[72] That ended the discussion at the lumber store that night.[73]

The next day, Richardson transferred the Preston Oil Company stock to Dr. Smith's name and demanded that Dr. Smith pay.[74] When they spoke later that day, Dr. Smith said, "[I] was joking."[75] Likewise, when Richardson sued Dr. Smith to pay off the account balance at the lumber store, Dr. Smith's legal argument was that he and Richardson were only joking.[76] At trial, Swisher testified he believed that Richardson was "not . . . in earnest," but "Smith was in earnest . . . ."[77] The trial court apparently found nothing funny and concluded that it was an enforceable contract.[78]

On review, the Kentucky Court of Appeals stressed that on the streets of Glasgow, the value of the Preston Oil Company stock was known to be "practically worthless."[79] The court found that Dr. Smith was not in earnest despite Swisher's testimony.[80] It believed Dr. Smith may have acted as if he was serious "for the very purpose of carrying out the joke."[81] On the other hand, the court placed great weight on Swisher's testimony that he thought Richardson was not in earnest.[82] The Kentucky Court of Appeals reversed the trial court, relying heavily on the purported agreement's exaggerated price of $471 for practically worthless property.[83] The court's opinion provides no systematic method for spotting exaggeration functioning as a mere figure of speech.[84]

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70. *Id.*
71. *Id.*
72. *Id.*
73. *See id.*
74. *See id.*
75. *Id.*
76. *See id.*
77. *Id.* at 706.
78. *See id.* at 705.
79. *Id.* at 706.
80. *See id.* at 707.
81. *Id.*
82. *See id.*
83. *See id.*
84. *See id.* at 705–07.

Smith v. Richardson exemplifies cases mislabeled as joke cases. Based on the summary of the parties' conversation in the court's opinion, it seemed unlikely Richardson was joking, jesting, or engaged in playful banter.[85] More likely, he was fed up and expressing his frustration in a dramatic manner.[86] Also, Smith's discourse does not sound like joking; it sounds more like needling or teasing.[87] The court's conclusion that Dr. Smith was "carrying out [a] joke"[88] seems far-fetched.

Similarly, a court framed *Chiles v. Good*[89] as a joke case, although it was really an exaggeration case. Chiles worked for a bank that acquired stock in a gin company as part of a foreclosure.[90] The bank needed to liquidate the stock, so banker Chiles contacted J.D. Good, an officer and shareholder of the gin company.[91] J.D. Good said the par value of the stock was "$100 per share," and the market value was "$30 or $40 per share."[92]

The conversation then took a peculiar twist. Banker Chiles said, "I'll bet you wouldn't take that [$30 or $40 per share] for yours."[93] J.D. Good said, "No."[94] Banker Chiles said, "What would you take?"[95] J.D. Good replied that "he would take $100 per share."[96] Then they both executed documents apparently providing for a sale at the inflated $100 price—banker Chiles agreeing to buy twelve shares of the gin company from J.D. Good for $100 per share (a total price of $1,200).[97]

When J.D. Good attempted to collect the $1,200, banker Chiles asserted that the "entire matter [was] a joke . . . ."[98] The trial judge apparently found nothing funny and directed a verdict to enforce the

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85. *See id.* at 707.
86. *See id.*
87. *See Needling*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1513 (2002) ("needling . . . irritatingly persistent goading or prodding . . . ."); *Tease*, *id.* at 2347 ("tease . . . to disturb or annoy by persistent irritating or provoking action . . . [or] to attempt to provoke anger . . . .").
88. *Smith*, 104 S.W. at 707.
89. 41 S.W.2d 738, 738–39 (Tex. Ct. App. 1931).
90. *See id* at 738.
91. *See id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See id.*
98. *Id.* at 739.

agreement.[99] The appellate court also used the language of joke, noting that the parties may have used the writing "for the very purpose of carrying out the joke."[100] Nevertheless, the appeals court observed that the banker "could have bought other stock in the same company on the market at that time [for $30 or $40 per share],"[101] and concluded that all the circumstances "raised a question of fact for the jury,"[102] and reversed the trial judge's directed verdict.[103]

Another exaggeration case listed in the joke category is *Keller v. Holderman*.[104] The court concluded that the transaction was an unenforceable "frolic and a banter" apparently based solely on the exaggerated price of $300 for a silver watch worth $15.[105] Again, as there was no indication of an attempt at humor, this should be considered an exaggeration case.

In *Bruce v. Bishop*,[106] the Vermont Supreme Court also stressed the joke doctrine in an exaggeration case. Sleeper and Bishop had exchanged cows.[107] While litigation over that exchange was pending, a worker for Sleeper made a remark to Bishop about the value of a cow, apparently inferring that Bishop had taken unfair advantage of Sleeper.[108] Bishop retorted that he would pay $40 for the cow today.[109] The worker then purchased the cow in question from his boss for $15, delivered it to Bishop's farm, and demanded $40.[110] The trial court found an enforceable contract, but the Vermont Supreme Court reversed because Bishop's reply "was intended and understood to be merely jocose, and not in earnest . . . ."[111] There was no discussion of exaggeration.

In addition to cases involving insanely high prices, an exaggeration case can also involve an insanely low price, as in *Theiss*

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99. *See id.* at 738.
100. *Id.* at 739.
101. *Id.*
102. *Id.*
103. *See id.* (ordering a new trial).
104. 11 Mich. 248, 248 (1863); *see also* FARNSWORTH, *supra* note 32 (citing *Keller*, 11 Mich. at 248–49).
105. *See Keller*, 11 Mich. at 249.
106. 43 Vt. 161, 161 (Vt. 1870).
107. *See id.*
108. *See id.* ("[The] cows were not worth $35.").
109. *See id.*
110. *See id.*
111. *Id.* at 164 (concluding that the trial court "erred in not submitting to the jury to find how the parties, in fact, intended and understood [Bishop's response]").

v. Weiss discussed above.[112] Also, an exaggeration case may not involve price at all. A party might ridiculously overstate his or her willingness to buy or sell. In *Lucy v. Zehmer*,[113] as discussed above, the Zehmers had told Lucy several times that they did not want to sell their farm, yet when intoxicated on a December night, the Zehmers failed to deliver that clear message.[114]

In *Deitrick v. Sinnott*,[115] a party overstated his willingness to buy. In *Deitrick*, the parties were in the business of buying and shipping stock.[116] One day, a trader lamented that he had too many carloads of cattle on the market, but "after some dickering," another trader said he would buy them.[117] When the purported seller sued to collect the purchase price, the purported buyer said it was all in fun.[118] The court considered whether the statements were made jokingly.[119] Despite failing to describe anything funny, the court ultimately concluded there was not an enforceable contract.[120] Phrasing its conclusion in the negative, the court wrote, "[we] cannot say that [the defendant] is not telling the truth about the matter and that he intended to purchase the cattle."[121]

In addition, crime victims or concerned parties might exaggerate a reward amount to grab attention. This can lead to bona fide disputes about whether the party intended to be bound.

A big money reward case involved three men and a murder. In *Hoggard v. Dickerson*,[122] Dickerson was a prominent businessman and the owner of the Dickerson ranch.[123] Walter Dipley was a ranch-hand working at the Dickerson farm.[124] Stanley Ketchel was the reigning world middleweight boxing champion and a close friend of

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112. *See supra* notes 19–25 and accompanying text (discussing *Theiss v. Weiss* in more detail).

113. *See supra* notes 42–58 and accompanying text (discussing *Lucy v. Zehmer* in more detail).

114. *See* 84 S.E.2d 516, 521–22 (Va. 1954).

115. 179 N.W. 424 (Iowa 1920).

116. *See id.* at 425.

117. *Id.*

118. *See id.* at 425, 427.

119. *See id.* at 428.

120. *See id.*

121. *Id.*

122. 165 S.W. 1135 (Mo. Ct. App. 1914).

123. *See id.* at 1136.

124. *See id.*; *see also Pair Found Guilty of Ketchel Murder*, LINCOLN DAILY STAR, Jan. 24, 1911, at 1, 1 ("Dipley, under the name of Walter A. Hurtz, was employed as a farm hand.").

Dickerson.[125] They were all at the Dickerson ranch on October 15, 1910, when Dipley murdered—and robbed—Ketchel.[126] "The shooting of [the middleweight champ] occurred in the morning, and Dipley, . . . at once fled, heavily armed."[127] "There was little or no doubt at the time that . . . Walter Dipley . . . was the guilty party . . . ."[128] Upon being informed of the murder, Dickerson "was . . . very much wrought up"[129] and leaped into action, offering a $5,000[130] reward to anyone delivering the murderer's body, emphasizing that the reward was "for him dead, not one cent for him alive."[131] Dickerson gathered bloodhounds, friends, and "all the officers within reach" to search for the killer on the day of the murder.[132] He repeated the $5,000 reward multiple times on the day of the murder.[133] Each time, the $5,000 amount did not vary, but sometimes Dickerson said "shoot him first and cry halt afterward,"[134] but other times he said "dead or alive" or merely referred to the murderer's "capture."[135] Dickerson and his posse did not catch Walter Dipley on the day of the murder, but a farmer in

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125. Stanley Ketchel was called the "Michigan Assassin" and won fifty-three professional fights—fifty by knockout—before his death at age twenty-four. *See Hoggard*, 165 S.W. at 1136; *see also Stanley Ketchel American Boxer*, BRITANNICA, https://www.britannica.com/biography/Stanley-Ketchel (last visited Feb. 27, 2021).

126. *See Hoggard*, 165 S.W. at 1136.

127. *Id.*; *see* JAMES CARLOS BLAKE, THE KILLINGS OF STANLEY KETCHEL 1 (2005) (noting that the murder of twenty-four-year-old Stanley Ketchel was the subject of a novel); *see also* LARRY CARLI, THE TOP TEN MIDDLEWEIGHT CHAMPIONS OF ALL TIME: WHO WAS THE GREATEST? 1 (2017); ERNEST HEMINGWAY, *The Light of the World*, *in* WINNER TAKE NOTHING 27, 34 (1933) (showcasing how Ernest Hemingway mentioned Ketchel in a short story as "Steve Ketchel" and "Stanley Ketchel"); MANUEL A. MORA, STANLEY KETCHEL: A LIFE OF TRIUMPH AND PROPHECY 1 (2010); *Stanley Ketchel*, WIKIPEDIA, https://en.wikipedia.org/wiki/Stanley_Ketchel (last visited Feb. 6, 2021) ("Upon being informed of Ketchel's death, his manager Wilson Mizner reportedly said, 'Tell them to start counting [to] ten over him. He'll get up.'").

128. *Hoggard*, 165 S.W. at 1136.

129. *Id.*

130. Based on increases in the cost of living from 1910 to 2021, the $5,000 reward in 1910 would have been worth approximately $137,100 in 2021. *See Value of $1 from 1910 to 2021*, IN2013DOLLARS, https://www.in2013dollars.com/us/inflation/1910?amount=1 (last visited Feb. 27, 2021) (reporting that under the Bureau of Labor Statistics consumer price index, "$1 in 1910 is equivalent in purchasing power to about $27.42 today").

131. *Hoggard*, 165 S.W. at 1136.

132. *See id.*

133. *See id.* at 1137.

134. *Id.*

135. *Id.*

Webster County caught Dipley the next morning.[136] The farmer delivered Dipley, very much alive, to the sheriff of Webster County, and the farmer demanded the reward.[137]

Dickerson refused to pay the $5,000 reward and a jury found for the farmer.[138] On appeal, the court concluded that the jury was entitled to "put a construction on this offer which would make it a valid and bona fide offer . . . ."[139] The condition that Walter Dipley be dead was ignored.[140] Despite noting Dickerson's extremely emotional state on the day of the murder, his inconsistent enunciation of the reward, and his apparent desire for revenge, the appeals court affirmed the judgment enforcing the reward without discussing the possibility that Dickerson was exaggerating.[141]

Decided twenty-one years before *Dickerson*, in *Higgins v. Lessig*,[142] a trial court enforced a $100 reward offered for apprehension of a criminal and the return of stolen property.[143] The appeals court reversed after considering the emotional state of the offeror.[144] In *Higgins*, a blacksmith owned a double harness worth perhaps $15, and after if it was stolen, he offered a $100 reward for its return and the identification of the thief.[145]

Mrs. Phillips spotted the thief, she told the blacksmith, the harness was recovered, and a court adjudged the thief insane.[146] The blacksmith refused to pay Mrs. Phillips the $100 reward.[147] At trial, Mrs. Phillips obtained a verdict for $100.[148] The appellate court ultimately reversed because Mrs. Philips was neither the first to discover the thief nor was she the first to report his identity to the blacksmith.[149] More important for this analysis, the appellate court also observed that the blacksmith did not intend to be bound.[150] The blacksmith's statement of the reward was accompanied by "rough

136. *See id.* at 1136.
137. *See id.*
138. *See id.* at 1137.
139. *Id.*
140. *See id.* ("No valid offer of reward involving the commission of a crime could be made . . . .").
141. *See id.* at 1140.
142. 49 Ill. App. 459 (1893).
143. *See id.* at 460.
144. *See id.* at 461.
145. *See id.* at 459–60.
146. *See id.* at 460.
147. *See id.*
148. *See id.*
149. *See id.* at 461.
150. *See id.*

language and epithets concerning the thief."[151] The court said the blacksmith's "language was in the nature of an explosion of wrath . . . coupled with boasting and bluster . . . . [and] was indicative of a state of excitement . . . out of proportion to the supposed cause of it . . . ."[152] Furthermore, the $100 amount was very liberal for the return of an old harness. Indeed, when a young boy found a piece of the harness a few days after the theft and returned it to the blacksmith, the blacksmith gave the boy a mere quarter and promised one dollar upon the return of the entire harness.[153]

A more recent reward case is *Augstein v. Leslie*, discussed briefly in the introduction of this Article.[154] Rapper Ryan Leslie was robbed while on tour in Cologne, Germany.[155] Initially—on October 24, 2010—he offered $20,000[156] for the return of his stolen duffle bag, which held $10,000 U.S. cash, his passport, a laptop, and an external hard drive containing recorded musical performances.[157] About two weeks later—on November 6, 2010—Ryan Leslie released a YouTube video stating that the recorded music on the hard drive was "invaluable"[158] and that he was increasing the reward to $1 million. During an MTV interview five days later—on November 10, 2010—Ryan Leslie said, "I got a million-dollar reward for anybody that can return all my intellectual property,"[159] and that "I actually had my whole new album on there . . . ."[160] A couple weeks later (on or about November 26, 2010), ten miles from Cologne, a man (Augstein) walking his dog found the duffle bag (apparently without the

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151. *Id.* at 460.

152. *Id.* at 461.

153. *See id.* at 460.

154. *See supra* notes 8–16 and accompanying text (discussing *Augstein v. Leslie* in more detail).

155. *See* Augstein v. Leslie, No. 11 Civ. 7512(HB), 2012 WL 4928914, at *1 (S.D.N.Y. Oct. 17, 2012).

156. *See id.* at *1–2. Ryan Leslie's YouTube posting about the reward included the following: "[T]hat [$20,000] is really not even close to the value of everything that we lost. . . . So last night, the tools that I have to share with all of you, the videos I have of all the tours, the memories that we've made together, the music that I make, everything is gone . . . ." *See* Amended Complaint, *supra* note 10.

157. *See* Amended Complaint, *supra* note 10, at 4. Other items in the duffle bag included a UMTS Stick, a USB Stick, CDs, a Sim Card, and credit cards. *See id.* at 3.

158. *See id.* at 4. He also tweeted, "I had so many amazing music & visual projects on that MacBook that I was working on to share with u [sic] this winter." *Id.* at 5.

159. *Id.* at 5.

160. *Id.*

$10,000 U.S. cash), turned the duffle bag into German police, and requested the $1 million reward.[161] After the German police returned the duffle bag, Ryan Leslie said he and his team attempted to recover the recorded material from the hard drive, but the hard drive was damaged and virtually worthless.[162] He refused to pay the $1 million, and the finder sued.[163] The finder challenged Ryan Leslie's version of the facts, asserting that Ryan Leslie intentionally damaged the hard drive after the finder requested the $1 million.[164] The court ordered Ryan Leslie to pay the $1 million reward without discussing whether the $1 million figure might have been figurative exaggeration.[165]

A category of cases previously enforced under contract law also demonstrates the judicial use of joke language when nothing seems humorous. In 2003, Professor Rowley observed, "[t]he richest vein of reported case law on the enforceability of agreements made in jest arises out of sham marriages."[166] Apparently, the paradigm case was *McClurg v. Terry*.[167] After a night on the town among a group of young revelers, the nineteen-year-old plaintiff "challenged the defendant to be married to her on the spot, [and] he in the same spirit accepted the challenge, and the justice [of the peace, who was among the partygoers] at their request, performed the ceremony . . . ."[168] Although this situation could be better described

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161. *Id.*

162. Augstein v. Leslie, No. 11 Civ. 7512(HB), 2012 WL 4928914, at *1 (S.D.N.Y. Oct. 17, 2012). Unable to recover any data or images from the hard drive, the manufacturer merely gave Ryan Leslie a new one. *See id.*

163. *See id.*

164. *See id.* Augstein apparently gave the stolen items to the German police without checking if anything was on the hard drive. Ryan Leslie claimed that his assistant attempted to retrieve the data on the hard drive but was unable to do so. Eventually the hard drive was sent to the manufacturer, Avastor, which ultimately deleted anything that may have been on the hard drive. In contrast, the finder argued that Ryan Leslie caused the hard drive to be erased after Augstein requested the $1 million reward. *See id.* After discussing the arguments, the court said this was a "heavily disputed issue." *Id.* Ultimately, the court concluded that Ryan "Leslie and his team were at least negligent in their handling of the hard drive" and the court imposed a sanction against Ryan Leslie of an adverse inference, specifically an inference that the desired intellectual property was present on the hard drive when the finder returned it to the German police. *Id.* at *6.

165. *See id.* at *6.

166. Rowley, *You Asked for It*, *supra* note 7, at 539.

167. 21 N.J. Eq. 225 (N.J. Ch. 1870).

168. *Id.* at 226.

as a challenge, dare, or bluff, the court stated it was "a mere jest" when annulling the marriage.[169]

II. TOWARD A BETTER UNDERSTANDING OF EXAGGERATION IN AND OUT OF HUMOR

Exaggeration can be funny, but linguistic scholars document that it has legitimate communicative functions outside of humor.[170] This Part of the Article discusses attempts to define, describe, and explain humor and exaggeration, with a view to developing a multifactor test for detecting figurative exaggeration.

A. Exaggeration as Humor

Exaggeration can be humorous.[171] In *An Anatomy of Humor*, Professor Arthur Asa Berger lists forty-five cognitive techniques or mechanisms used to generate humor.[172] The list includes exaggeration, in which, "[s]omething can be made funny by highlighting it and blowing it out of proportion."[173] Master comedian Johnny Carson used a common setup for recurring exaggeration jokes.[174] In a typical variation, Carson might say, "I was visiting a small town last week."[175] The audience would respond, "How small was it?" Carson would then deliver a funny exaggeration, such as, "The Enter and Exit signs for the town were on the same pole."[176] A commentator asserts, "The majority of jokes that people write and

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169. *Id.* at 227.

170. *See infra* Part II.D.

171. *See* CLARIDGE, *supra* note 1, at 2 (mentioning exaggeration's comic appeal); STEVEN GIMBEL, TAKE MY COURSE, PLEASE! THE PHILOSOPHY OF HUMOR 61 (2018) ("[Some] jokes . . . involve deliberate exaggerations . . . .").

172. *See* ARTHUR ASA BERGER, AN ANATOMY OF HUMOR 18 (1993) (listing fifteen techniques under the heading of "language," including "exaggeration," listing twelve techniques under the heading of "logic," listing fourteen techniques under the heading of "identity," and listing four techniques under the heading of "action"). Professor Berger asserted that reversals of techniques also should be included, such as understatement as a reversal of exaggeration. *Id.* at 16; *see also* Little, *supra* note 33, at 1242 (mentioning "as many as twenty-one varieties of humor").

173. GIMBEL, *supra* note 171, at 135; *see also* BERGER, *supra* note 172, at 16.

174. *See* Todd Strong, *Writing Down the Funny Bones: The Exaggeration*, PERCEPTUAL MOTION, https://www.toddstrong.com/comedywriting/exaggeration.php (last updated Dec. 24, 2020).

175. *Id.*

176. *Id.*

perform involve some form of exaggeration,"[177] and he provides a multi-step process for creating exaggeration jokes.[178]

B. Humor's Undeniable Appeal yet Elusive Definition

As mentioned above, litigants and courts may focus on humor in part because of its attention-getting potential. "Humor is fun. . . . We all love a good laugh."[179] "People crave [humor] desperately . . . It is all pervasive; we don't know of any culture where people do not have a sense of humor."[180] The ancient Greek plays and festivals regularly included comedies, sometimes called satyr plays.[181] Fourth century C.E. Rome produced a book with "256 jokes which [in the opinion of one philosopher] could have been transcribed from . . . a Bazooka Joe comic."[182] Although totalitarian systems may seek to suppress humor, indications are that people in those societies still seek and enjoy humor.[183]

Nevertheless, a precise definition of humor is not available.[184] "The quest for a single, universal definition of humor is reminiscent of the search for personality and intelligence, neither of which has definitions accepted by all."[185] Psychology Professor Jon E. Roeckelein's tome *The Psychology of Humor* includes almost eighty pages describing attempts to define humor.[186] Webster's Dictionary provides multiple definitions, including "that quality in a happening, an action, a situation, or an expression of ideas which appeals to a sense of the ludicrous or absurdly incongruous; [a] comic or amusing quality . . . ."[187] Humor is a broad term potentially encompassing or associated with wit, comedy, satire, irony, sarcasm, parody, riddles,

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177. *Id.* (under "The Exaggeration"); *see also* Sandra Peña & Francisco J. Ruiz de Mendoza, *Construing and Constructing Hyperbole*, *in* HUMAN COGNITIVE PROCESSING 56: STUDIES IN FIGURATIVE THOUGHT AND LANGUAGE 42–43 (ANGELIKI ATHANASIADOU ED., 2017) (asserting that hyperbole "plays a fundamental role in humor, especially in . . . *scalar humor*, i.e. the type of humor that is related to the manipulation of a conceptual scale").

178. *See* Strong, *supra* note 174 (under "The Exaggeration").

179. GIMBEL, *supra* note 171, at 207.

180. JON E. ROECKELEIN, THE PSYCHOLOGY OF HUMOR 9 (2002) (citation omitted).

181. *See* GIMBEL, *supra* note 171, at 113.

182. *Id.* at 15.

183. *See id.* at 6.

184. *See* ROECKELEIN, *supra* note 180 (citation omitted).

185. *Id.* at 21 (citation omitted).

186. *See id.* at 9–86.

187. *Id.* at 10.

puns, jokes, cartoons, and caricatures.[188] Humor may invoke laughter, but the terms are not synonymous. Laughter is a physical reaction that may or may not be triggered by humor.[189] Laughter may result from tickling, intoxication, or laughing gas, and people can laugh at will with no outside stimulus.[190] Researchers have found that among adults, a great deal of laughter merely functions as a social lubricant to reduce tension in otherwise stressful or threatening interactions.[191]

C. Emphasis on the Study of Humor in the Arts and Sciences

Historically, scientists and philosophers did not intensely study humor,[192] with notable exceptions. "[A] survey of over 136 introductory psychology textbooks . . . published between 1885 and 1996 . . . found only three books that make reference to humor and humor-related topics . . . ."[193] "[C]ontributing to the elusive nature of humor, perhaps, is the reluctance of the earlier researchers . . . to 'take humor seriously' and to regard it as a proper topic for scientific, empirical, and experimental investigation . . . ."[194] Others suggested that the study of humor would be counterproductive. A famous quote about the study of humor is attributed to E.B. White, the author of *Stuart Little* and *Charlotte's Web*: "Humor can be dissected, as a frog can, but the thing dies in the process . . . ."[195]

As philosophers began thinking seriously about sports, the reluctance to study humor receded.[196] Since the 1970s, psychologists and philosophers have produced a significant amount of research focused on humor.[197] Philosophers now can present at least six

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188. *See id.* at 16 (including many other related words and phrases); *see also* Little, *supra* note 33, at 1243 ("[T]he term 'humor' has now become 'the umbrella term for all things laughable.'" (citation omitted)).

189. *See* GIMBEL, *supra* note 171, at 24.

190. *See id.* (discussing laughing yoga); *see id.* at 49 (listing laughing gas).

191. *See id.* at 43–44, 53–54.

192. *See id.* at 80; *see also* MORREALL, *SUPRA* NOTE 28 ("[I]mportant features of human life are still barely mentioned by philosophers, and one of them is . . . humor."); ROECKELEIN, *supra* note 180, at 1.

193. ROECKELEIN, *supra* note 180, at 3.

194. *Id.* at 1.

195. Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 128 (S.D.N.Y. 1999) (citation omitted); *see also* BOB MANKOFF, HOW ABOUT NEVER—IS NEVER GOOD FOR YOU? MY LIFE IN CARTOONS 160 (2014) (attributing the quote to E.B. White).

196. *See* GIMBEL, *supra* note 171, at 208.

197. *See, e.g.*, WEEMS, *supra* note 29, at 23 (referring to the surveys of Richard Wiseman, psychologist at the University of Hertfordshire, which concluded that for

different theories of humor. The general goal of humor theory is to identify the necessary and sufficient causes or conditions "that pick out all and only instances of humor."[198] Each of the six theories is incomplete,[199] as it is possible to have humor outside each theory and the behavior or language described by each theory may not be humorous in some situations.[200] Nevertheless, together the six theories can help identify and classify most humor.

First, in the fourth century B.C.E., Plato championed what is now called superiority theory.[201] In this theory, humor is the realization of "glory arising from a sudden conception of some eminency in ourselves by comparison with the infirmity of others . . . ."[202] The joke teller and the audience enjoy a feeling of superiority over the butt of the joke. In the ancient Greek play *The Cloud*, Aristophanes ridiculed Plato's mentor Socrates, perhaps facilitating the execution of Socrates.[203] The superiority theory does not provide a complete picture of humor. It fails the necessary test—puns, excessive alliterations, and other forms of verbal play can be humorous, and no one is diminished in stature.[204] Also, the superiority theory is not sufficient because people can be ridiculed or otherwise made to feel inferior, and there may be nothing humorous about it.[205]

Second, with inferiority theory, humor results when a person in a position of superiority knowingly declines in status in a way that inspires empathy or connection. This describes self-deprecating humor in which the joke teller is the butt of the joke.[206] Again, this clearly is not a complete explanation of humor. There are many

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jokes, the funniest animal is a duck, the funniest time of the day is 6:03, the funniest day of the month is the fifteenth, and jokes with 103 letters tend to generate maximum laughs).

198. GIMBEL, *supra* note 171, at 271.

199. *See* MORREALL, *supra* note 28, at 38.

200. *See* BERGER, *supra* note 172, at 2 ("[A]fter thousands of years spent trying to understand humor, there is still a great deal of controversy about what humor is or why something is funny.").

201. *See* GIMBEL, *supra* note 171, at 172; *see also* JOHN MORREALL, TAKING LAUGHTER SERIOUSLY 4 (1983) ("[L]aughter involves a certain malice toward [others], and malice is a harmful thing. . . ."); ROECKELEIN, *supra* note 180, at 22 ("Humor that degrades some group, such as racial or ethnic jokes, may be based on feelings of superiority . . . .").

202. BERGER, *supra* note 172, at 2.

203. *See* GIMBEL, *supra* note 171, at 176.

204. *See id.* at 181; *see also* MORREALL, *supra* note 28, at 11.

205. *See* GIMBEL, *supra* note 171, at 170.

206. *See id.* at 197.

other ways to be funny, and one can self-deprecate without being funny.[207]

Third, play theory, endorsed by Aristotle and Saint Thomas Aquinas, asserts that humor arises when the participants believe they have entered into a safe space in which no one is trying to seriously influence or provide information to another.[208] In the play space, chickens can cross the road, horses can walk into a bar and order a drink, and so on, and no one takes it seriously.[209] Aristotle and Saint Thomas Aquinas believed the virtuous life should include a reasonable amount of time in the play space; a complete absence of humor would make an individual a boor who "fails to fully appreciate the joys of human life,"[210] and one prone to excessive humor is a buffoon.[211] While a great deal of humor occurs in a play space, insult humor, satire, and political cartoons can lack playfulness, and not all play is humorous.[212]

Fourth, under relief theory, Sigmund Freud and others viewed humor as a necessary release of energy or tension building up in the human mind from conflicts.[213] For Freud, tension built up as the superego struggled to suppress urges from the id.[214] "Joking (like dreaming) serves as a safety valve for forbidden feelings and thoughts . . . ."[215] Over time, with scientific advances such as imaging of the brain, other views of the mind developed and tended to replace the Freudian model.[216] Nevertheless, some later

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207. *See id.* at 199.

208. *See id.* at 213.

209. *See id.* at 213–16, 247 (discussing the "play-frame").

210. *Id.* at 211.

211. *See id.* at 203; *see also* MORREALL, *supra* note 28, at 14 ("The moral ideal is to avoid the extremes of the humorless boor and the 'anything for a laugh' buffoon . . . .").

212. *See* GIMBEL, *supra* note 171, at 205.

213. *See* BERGER, *supr*a note 172, at 3 ("[Jokes] make possible the satisfaction of an instinct . . . in the face of an obstacle that stands in its way."); *see also* MORREALL, *supra* note 28, at 28 ("We use jokes . . . in order to let into our conscious minds forbidden thoughts and feelings, which our society has forced us to suppress."); ROECKELEIN, *supra* note 180, at 22 ("[Humor involves] discharging pent up psychic energy . . . ."); Little, *supra* note 33, at 1249 ("[J]okes express taboo desires.").

214. *See* GIMBEL, *supra* note 171, at 221 ("The id tells the mind that it has the desire for something, while the superego tells the mind it cannot pursue that thing.") (discussing generally SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS (1905)).

215. MORREALL, *supra* note 28, at 111.

216. *See* GIMBEL, *supra* note 171, at 221 ("[O]nce imaging technology allowed access to the brain[,] . . . a more mechanistic neuroanatomical picture came to dominate . . . .").

philosophers still espoused the release theory, viewing humor as a way to relieve the mental energy generated from trying to understand the setup of the joke or guess the punch line.[217] Relief (or release) theory is not all-encompassing because sometimes humor increases tension, as with insult humor[218] or satire. It can also increase tension and anxiety in a person who is the butt of a joke.[219]

Fifth, incongruity theory "is probably the most important and most widely accepted of the explanations of humor."[220] One philosopher opined that it "gives an exceptionally good account of how verbal jokes work."[221] Webster's Third New International Dictionary defines humor as "an expression of ideas which appeals to a sense of the . . . absurdly incongruous . . . ."[222] Under incongruity theory, the setup of the joke causes the mind to anticipate one thing or struggle to decide what will come next, and then the punch line is different.[223] For example, in the setup the comedian might talk about a father washing the family car with his son, and in the punch line the son asks, "Dad, are you sure we couldn't just use a sponge?"[224] The "humor arises from the juxtaposition of two incongruous or inconsistent phenomena,"[225] involving the word "with." Although incongruity theory explains a great deal of humor, arguably it does not explain caricature humor.[226] More significant, there are all sorts of incongruities that are not at all humorous, such as a car running a red light and causing a traffic accident.[227] "[T]he incongruity theorists need to tell us what it is about certain

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217. *See id.* at 223.

218. *See id.* at 222.

219. *See* Little, *supra* note 33, at 1241 (observing that humor can cause "greater depression and anxiety") (quoting Nicholas A. Kuiper et al., *Humor Is Not Always the Best Medicine: Specific Components of Sense of Humor and Psychological Well-Being*, 17 HUMOR: INT'L J. HUMOR RSCH. 135, 144, 161–62 (2004)).

220. BERGER, *supra* note 172, at 3; *see also* GIMBEL, *supra* note 171, at 237.

221. GIMBEL, *supra* note 171, at 237.

222. *Humor*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1102 (2002).

223. *See* MORREALL, *supra* note 28, at 16 ("Nothing produces laughter more than a surprising disproportion . . . .").

224. GIMBEL, *supra* note 171, at 250; *see also* BERGER, *supra* note 172, at 3 (discussing the "difference between what one expects and what one gets").

225. Little, *supra* note 33, at 1245–46.

226. *See* GIMBEL, *supra* note 171, at 253.

227. *See id.* at 254; *see also* MORREALL, *supra* note 28, at 19 (discussing finding a cobra in a refrigerator).

incongruities and not others that make them humorous."[228] Also, many people find jokes and other material humorous even when they know the punch line.[229] For example, comedic television shows can be successful as reruns.

Sixth, cleverness theory describes humor as a conspicuous act of playful cleverness, with cleverness meaning an advantageous mental trait.[230] This theory emphasizes humor as an intentional art form. Someone slipping on ice may make us laugh, but when Charlie Chaplin intentionally slipped on ice, it was a clever, artistic expression worthy of being called humor.[231] The cleverness theory fails to explain all humor because so-called "shock" comedians can be humorous simply by violating social norms, such as using foul or obscene language.[232] Moreover, people can be clever without being humorous, as in writing a whodunit mystery novel or performing magic.

D. Exaggeration as a Legitimate Form of Communication Outside of Humor

The study of exaggeration lags behind the study of humor.[233] "[A] huge amount of work remains to be done . . . and that is no exaggeration."[234]

Exaggeration is ubiquitous.[235] Hyperbole, exaggeration, and overstatement are often part of daily conversation.[236] Phrases like

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228. GIMBEL, *supra* note 171, at 254; *see also* Little, *supra* note 33, at 1247 (listing poetic metaphors, magic tricks, and whodunit thrillers as non-humorous incongruities) (footnote omitted).

229. *See* GIMBEL, *supra* note 171, at 223 (discussing a study, in connection with relief theory, which concluded that people find jokes the funniest when they see the punch line coming).

230. *See id.* at 257.

231. *See id.*

232. *See id.* at 259.

233. *See* CLARIDGE, *supra* note 1, at xiii ("Hyperbole is still a largely under-researched field . . . ."); *see also* Maria Christodoulidou, *Hyperbole in Everyday Conversation*, 19 FREDERICK U. 143, 143 (2011) (comparing research on exaggeration to research on irony and humor). *But see* Peña & Ruiz de Mendoza, *supra* note 177, at 42 ("[H]yperbole has received considerable attention within rhetoric and literary studies . . . .").

234. Michael McCarthy & Ronald Carter, *"There's Millions of Them": Hyperbole in Everyday Conversation*, 36 J. PRAGMATICS 149, 178 (2004); *see also* Christodoulidou, *supra* note 233 (referring to hyperbole as "a long neglected form of non-literal language despite its pervasiveness in everyday speech").

"I'll be back in a second,"[237] "They're never at home,"[238] or "She always wins,"[239] are routine. English Linguistics Professor Claudia Claridge writes that exaggeration "may be wired in the cognitive structuring of our experience . . . ."[240] Exaggeration is found in love poetry, tall tales, classical mythology, political rhetoric, newspaper headlines and stories, advertising,[241] and everyday speech.[242] In *There's Millions of Them: Hyperbole in Everyday Conversation*, two University of Nottingham linguists examined a five million word database of spoken English and found, "[i]t is a regular feature of informal talk that speakers exaggerate narrative . . . ."[243]

Researchers have found that speakers "make assertions that are overstated, literally impossible, inconceivable or counterfactual in many different types of discourse . . . ."[244] Perhaps it should not be surprising that people sometimes exaggerate when talking about items or services under a contract.[245]

A linguist provides the following general definition of exaggeration—an expression that "exceeds the (credible) limits of

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235. *See, e.g.*, CLARIDGE, *supra* note 1; Tonja Jacobi & Matthew Sag, *Taking Laughter Seriously at the Supreme Court*, 72 VAND. L. REV. 1423, 1426 (2019) (discussing Justice Breyer's use of hyperbole during an oral argument).

236. Hyperbole exists in different forms of formal and persuasive speech such as in political speech or news broadcasting. The words "exaggeration" and "overstatement" may be used more colloquially and interchangeably. Of the three terms, based on the Oxford English Dictionary, hyperbole is the oldest (from 1520), followed by exaggeration (from 1565) and overstatement (from 1803). *See, e.g.*, CLARIDGE, *supra* note 1, at 2, 6–7; McCarthy & Carter, *supra* note 234, at 151, 156–57.

237. CLARIDGE, *supra* note 1, at 11.

238. *Id.* at 1.

239. Peña & Ruiz de Mendoza, *supra* note 177, at 42. A corpus-based study indicated that speakers use certain words and phrases primarily when exaggerating, such as: been dying to, for ages, light years, gigantic, massive, enormous, huge, infinitely, and everywhere. Speakers use the phrase "zillions of" only in exaggeration as it otherwise has no proper use. Examples of sentences could include: we've got truckloads, I haven't seen him in ages, and there were millions of people in the shop. Some linguists highlight the use of the word "literally" in connection with exaggeration. *See* McCarthy & Carter, *supra* note 234, at 149, 151, 162, 176–77. "*Literally* is an interesting case, with almost all of its occurrences framing utterances not intended to be taken as 'literal.'" *Id.* at 176.

240. CLARIDGE, *supra* note 1.

241. *See id.*

242. *See, e.g.*, Christodoulidou, *supra* note 233; McCarthy & Carter, *supra* note 234, at 150, 156–57.

243. McCarthy & Carter, *supra* note 234, at 150.

244. Christodoulidou, *supra* note 233.

245. *See supra* Part I.

fact in the given context."[246] The definition also includes understatements with the same degree of departure from the factual truth.[247] The linguist acknowledges the absence of a universal guideline for when the difference between a statement and the facts are sufficient to qualify as exaggeration.[248]

Despite the paucity of study, the available research may provide some insight into the motivations for exaggeration and its nature and characteristics as a legitimate form of communication. Exaggerators are frequently trying to convey their emotions rather than facts.[249] Exaggerators can express strong feelings and can produce strong impressions.[250] In particular, exaggeration can convey emphasis and a sense of intensity.[251] Exaggeration "comes in handy when you're trying to make a point . . . [or] tell a story."[252] It can convey empathy, solidarity, antipathy, informality, intimacy, and humor.[253] It can "bring[] the listeners into the perspective of the speaker in a powerful way."[254] In hyperbole the "speaker [is] disproportionally increasing a magnitude that will have to be adjusted (through the converse operation of mitigation) to real-world proportions by the hearer . . . ."[255] For example, if a speaker carrying a suitcase tells his friend it "weighs a ton," it is understood that the listener will not believe his friend can carry 2,000 pounds, but that the suitcase is heavy, yet portable.[256] Particularly relevant to possible contractual settings, speakers can use exaggeration

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246. CLARIDGE, *supra* note 1, at 5; *see also* Peña & Ruiz de Mendoza, *supra* note 177, at 42 ("[Hyperbole is] a 'description of the world in terms of disproportionate dimensions.'" (citation omitted)).

247. *See* CLARIDGE, *supra* note 1, at 10 n.5.

248. *See id.* at 10.

249. *See id.* at 19, 37; *see also* McCarthy & Carter, *supra* note 234, at 150 ("[H]yperbolic expressions usually pass without challenge by listeners, who accept them as creative intensifications for evaluative or affective purposes . . . ."); Peña & Ruiz de Mendoza, *supra* note 177, at 51 ("Hyperbole . . . has the function of drawing the hearer's attention to the speaker's emotional reaction with respect to a real-world situation or event . . . .").

250. *See* CLARIDGE, *supra* note 1, at 20 (referring to hyperbole rather than exaggeration).

251. *See id.* at 12.

252. McCarthy & Carter, *supra* note 234 (quoting a student conversation).

253. *See id.* at 176.

254. Christodoulidou, *supra* note 233.

255. Peña & Ruiz de Mendoza, *supra* note 177, at 43.

256. *See id.* at 50 (observing that "the hearer [will] scale down to a realistic level," yet it will still convey the speaker's emotion).

sarcastically or in an ironic manner[257] to convey that the speaker is frustrated, fed up,[258] or otherwise complaining.

Exaggeration can also be "an optimally economical way of conveying . . . implications . . . ."[259] For example, the sentence "Everybody likes Paul McCartney,"[260] may be a "highly economical and maximally communicative choice[]," for the speaker trying "to communicate his strong personal admiration for Paul McCartney's immense popularity."[261]

As a further indication that exaggeration can be a legitimate means of communication,[262] linguists assert that in many situations exaggeration may be distinguished from lying or deception.[263] A lie generally involves an intentional attempt to mislead whereas an exaggeration can be an attempt to demonstrate the speaker's emotions and attitudes.[264] While exaggerations "give a wrong representation of the truth . . . they give some indication of the true state of affairs . . . which is in fact necessary for reaching their desired effect."[265] Although acknowledging that "small-scale exaggerations . . . can be (employed as) lies," other exaggerations advertise themselves as untrue and therefore are definitely not a lie.[266]

Linguists point out that when attempting to draw boundaries in close cases, a complicating factor is that often a level of "contextual knowledge . . . is necessary for identifying a potential case of hyperbole . . . ."[267] As a result, "[i]t is of course possible that one would miss extremely content-specific hyperbole,"[268] and that "different hearers or readers can have different understandings, hyperbolic or nonhyperbolic, of the same utterance."[269]

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257. *See* McCarthy & Carter, *supra* note 234, at 177.
258. *See* CLARIDGE, *supra* note 1, at 6.
259. Peña & Ruiz de Mendoza, *supra* note 177, at 67–68.
260. *Id.* at 65.
261. *Id.* at 67.
262. *See id.* at 41.
263. *See id.* at 42.
264. *See* CLARIDGE, *supra* note 1, at 18.
265. *Id.*; *see also* Dibakar Pal, Of Exaggeration, 2 (2012) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885570) ("Exaggeration may be good or bad.").
266. CLARIDGE, *supra* note 1, at 18.
267. *Id.* at 6.
268. *Id.* at 16.
269. *Id.* at 13; *see also* Peña & Ruiz de Mendoza, *supra* note 177, at 67 (observing that the same sentence "can easily have either hyperbolic or non-hyperbolic interpretations" depending on the knowledge of the listener).

III. PROPOSING A MULTIFACTOR TEST TO IDENTIFY EXAGGERATION

Linguistic researchers and dictionaries generally define "exaggeration" as an expression that conveys an overstatement or understatement,[270] but these definitions do not provide a clear, bright-line test to distinguish a figurative exaggeration from a simple mistake, error, or false statement. Linguists observe that for many words and phrases, rather than requiring a precise definition, it is sufficient to identify a series of characteristics. These characteristics can then indicate whether particular items bear a family resemblance to the items clearly within the group.[271] For example, a precise definition of the word "chair," that captures everything commonly described as a chair and excludes everything that is not a chair, is elusive.[272] Defining a chair as "a thing with legs that you can sit on"[273] could include a table or desk, but it would exclude a bean bag chair.[274] Nevertheless, when surveyed, people tend to agree on whether a particular item is or is not within a group of items that should be considered a chair.[275] As a result, although a precise definition furnishing a bright-line test may not be available, sometimes it can be worthwhile to identify characteristics associated with the item.[276]

A review of judicial opinions and scholarly linguistic commentary suggests several characteristics are often present when a speaker uses figurative exaggeration. This list is not exclusive, and neither a single factor, nor a tallying of factors, would be determinative.

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270. *See Exaggeration*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 790 (2002) (defining "exaggeration" as "going beyond the bounds of truth, reason, or justice" and as an "overstatement").

271. *See* GIMBEL, *supra* note 171, at 138 (referring to a "set of conditions in your head that you use as a sort of dictionary definition").

272. Indeed, Webster's Dictionary includes the word "usually" in defining a chair. *See Chair*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 370 (2002) (defining "chair" as "a usually moveable seat that is designed to accommodate one person and *usually* has four legs and a back and often has arms" (emphasis added)).

273. GIMBEL, *supra* note 171, at 161.

274. *See id.* at 139, 161.

275. *See id.* at 139 ("[Y]ou can be a competent speaker of the language who knows full well what chairs are without having to be able to write down dictionary entries.").

276. *See id.* (discussing "clusters" of words, or a "script," to identify whether an item or situation fits).

A. Characteristic #1: Emotions from Empathy and Camaraderie to Frustration and Rage

Linguists report that a speaker often chooses to exaggerate to powerfully and accurately communicate emotions.[277] Linguists have identified a wide range of emotions a speaker may express with exaggeration, and some may be at play in contractual-type settings.[278]

A speaker may communicate empathy or camaraderie when using exaggeration to demonstrate a willingness to assist the other party, or at least be agreeable. For example, the slightly intoxicated merchant in *Theiss v. Weiss*[279] might have wanted to convey his willingness to work with the customer and be flexible when he offered to sell his product for a price far below his expected cost and at quantities beyond what he had ever delivered before. The buyers in *Chiles v. Good*[280] and *Deitrick v. Sinnott*[281] may have been trying to express similar light-hearted emotions. The speakers in these cases may have been in the same spirit with the merchants who say, "The shipment will be there in no time at all," or "We're open eight days a week," or "I'll pay any price," or "We can deliver anywhere," or "I'll let you have it for a song," although the latter are more extreme expressions and easier to identify as exaggeration.

Exaggerating speakers in contractual-type settings frequently express negative emotions, such as envy, frustration, anger, or attempt to evoke those negative emotions or feelings in others. A great example in a commercial setting is found in *Smith v. Richardson*.[282] Dr. Smith had needled Richardson many times before about Richardson's ill-advised investment in the Preston Oil Company.[283] One time, Richardson replied that he would sell the Preston Oil Company stock for the cancellation of his debt at the lumber store.[284] Perhaps Richardson simply wanted to change the

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277. *See supra* notes 249–57 and accompanying text.

278. *See supra* notes 256–57 and accompanying text.

279. 31 A. 63, 67 (Pa. 1895); *see supra* notes 19–25 and accompanying text (discussing *Theiss v. Weiss* in more detail).

280. 41 S.W.2d 738, 739 (Tex. Ct. App. 1931); *see supra* notes 89–103 and accompanying text) (discussing *Chiles v. Good* in more detail).

281. 179 N.W. 424, 425 (Iowa 1920); *see supra* notes 115–21 and accompanying text (discussing *Deitrick v. Sinnott* in more detail).

282. 104 S.W. 705, 706 (Ky. 1907); *see supra* notes 61–86 and accompanying text (discussing *Smith v. Richardson* in more detail).

283. *See Smith*, 104 S.W. at 706.

284. *See id.*

subject, as that amount apparently greatly exceeded the value of the oil company's stock.[285] Dr. Smith's exaggerated affirmative reply may have been an attempt not only to prolong the conversation but to add to Richardson's frustration.

In *Higgins v. Lessig*,[286] the court identified a crime victim's offer of a $100 reward for the capture of the alleged thief and the return of the stolen property as an explosion of wrath.[287] The crime victim's use of "rough language and epithets regarding the thief" contributed to the court's finding.[288] Furthermore, the court observed that the $100 amount was very liberal when compared to the value of the stolen property, which was an old double harness.[289]

B. Characteristic #2: Inappropriate Amount or Unnecessary, Impractical, or Impossible Terms

An exaggeration often departs from reality by overstating or understating an amount. The greater the inaccuracy, the stronger the signal to the listener that the speaker does not intend to be bound. In *Keller v. Holderman*,[290] the court considered almost no facts other than the buyer's offer of $300 for a silver watch worth $15.[291]

Nevertheless, exaggeration may be at play even when the amounts are not outrageous. "[T]he contrast should perhaps not be too great[, and] the hearer should still be able to see the connection easily . . . ."[292] A linguist observes, "[t]here is no clear boundary or cut-off point between exceeding the truth somewhat (without truly exaggerated force?) and real hyperbole, but [instead there is] a transitional area where the amount of contextual knowledge and personal preferences will play a role for the hyperbolic or non-hyperbolic interpretation."[293]

Promises that are unnecessary, impractical, or impossible to perform are likely mere exaggerations and figures of speech.

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285. *See id.*
286. 49 Ill. App. 459 (1893).
287. *See id.* at 460–61.
288. *Id.* at 460.
289. *See id.* at 460–61.
290. 11 Mich. 248 (1863); *see supra* notes 104–05 and accompanying text (discussing *Keller v. Holderman* in more detail).
291. *See* 11 Mich. at 248.
292. CLARIDGE, *supra* note 1, at 10.
293. *Id.*

Rewards for the return of stolen property or for information leading to the arrest of criminals pose interesting issues. As a theoretical and ethical matter, those rewards should be unnecessary because the police should be working for that result as part of their job and perhaps anyone with information should provide that information to the police without a monetary incentive.[294] For example, in *Hoggard v. Dickerson*,[295] Dickerson's offer of a $5,000 reward for the capture of the killer of his friend should have been unnecessary.[296] Apparently, there was substantial evidence to identify the murderer, and the risk of his escape seemed negligible. Nevertheless, in other situations, one could argue that perhaps without prompt action, the trail might grow cold.

C. Characteristic #3: Course of Dealing and Other History Between the Parties

When *interpreting* a binding contract, the history between the parties can be relevant.[297] This could also be a factor when deciding whether a promise is a mere figure of speech. For example, in *Smith v. Richardson*,[298] the Kentucky court noted that Dr. Smith had needled Richardson many times before about his bad investment in the Preston Oil Company when deciding the parties were not speaking literally on the night their verbiage evidenced an agreement for the sale of that stock.[299] In *Lucy v. Zehmer*,[300] Lucy

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294. *See, e.g.*, Emma Hallett, *Do Cash Rewards Actually Help Catch Criminals?*, BBC NEWS (June 24, 2014), bbc.com/news/uk-england-27763842 ("It would be very sad if . . . people expected to be paid for providing evidence," says Tim Passmore, Suffolk Police and Crime Commissioner); Nelson Oliveira, *Experts Ponder Moral Vs. Legal Arguments with Duty to Rescue Laws*, STAMFORD ADVOC., stamfordadvocate.com/local/article/Experts-ponder-moral-vs-legal-arguments-with-11210738.php (last updated June 14, 2017) ("Although . . . inaction . . . raises ethical questions, bystanders of crimes or emergencies in almost any U.S. state have no obligation to report . . . under the law.").

295. 165 S.W. 1135 (Mo. Ct. App. 1914); *see supra* notes 122–31 and accompanying text.

296. *See* 165 S.W. at 1136.

297. *See, e.g.*, U.C.C. § 1-303(a)–(b) (AM. L. INST. & UNIF. L. COMM'N 2014) (defining course of performance and course of dealing); U.C.C. § 2-208(2) (AM. L. INST. & UNIF. L. COMM'N 1978) (explaining that course of performance takes precedence over both course of dealing and usage of trade); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 400–01 (9th ed. 2019).

298. 104 S.W. 705 (Ky. 1907).

299. *See id.* at 706.

had offered to buy the farm many times, and every time the Zehmers had declined.[301] Arguably, this could have suggested that during their binge-drinking conversation, A.H. Zehmer may not have intended to be bound. However, the Virginia Supreme Court enforced the alcohol-aided bargain regardless of that intention.[302]

D. Characteristic #4: The Role of Round Numbers

Linguists sometimes classify exaggeration into seven hyperbolic forms; one of the seven is "Numerical hyperbole (dozens, zillions, millions, hundreds, etc . . . .)"[303] "[A] round figure . . . [is] more . . . clearly transparent as hyperbole . . . ."[304] In *Kolodziej v. Mason*,[305] the court observed that movie villains and school children making wagers often use the exaggerated amount of a million dollars.[306]

Nevertheless, an exact number may be "less expected . . . and it adds an unconventional, creative touch."[307] In her book devoted exclusively to exaggeration, Linguistics Professor Claudia Claridge began with the transcript of an interview between a BBC journalist and then teenager Beatle-member George Harrison.[308] When the BBC journalist asked Harrison if he enjoyed singing the song "Roll Over, Beethoven," Harrison replied, "No. I've been singing it for 28 years now, you know."[309] Despite the use of an exact number (namely 28) rather than a round figure, Professor Claridge apparently chose this as an example of exaggeration because it was creative, playful, and had "a more serious aspect to it: [Harrison] use[d] the exaggeration to emphasise his dissatisfaction with having to perform . . . the same song too often, implying that he [was] fed up with it."[310]

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300. 84 S.E.2d 516 (Va. 1954); *see supra* notes 42–57 and accompanying text (discussing the facts of the case in more detail).
301. *Lucy*, 84 S.E.2d at 518–19.
302. *See id.* at 522.
303. Peña & Ruiz de Mendoza, *supra* note 177, at 52.
304. CLARIDGE, *supra* note 1, at 5.
305. 774 F.3d 736 (11th Cir. 2014).
306. *See id.* at 741.
307. CLARIDGE, *supra* note 1, at 5.
308. *See id.* at 4.
309. *Id.*
310. *Id.* at 6.

E. Characteristic #5: The Importance of Doubling Down?

Frequently an exaggerator will take multiple steps to establish or explain a promise and may repeat the promise. Many factors may be at work in any particular situation, and timing may be significant in doubling down situations.

An exaggerator might double down on an oral statement by putting it in writing. In *Lucy v. Zehmer*,[311] the court emphasized that the Zehmers put their promise in a signed writing.[312] The court seemed less concerned that the signed writing was merely handwritten on the back of a restaurant receipt during a night of heavy alcohol consumption, and there was no significant time gap between the oral promise and the signed writing.[313]

A frequent method of doubling down is repetition. In *Augstein v. Leslie*,[314] the court emphasized that after releasing a YouTube video increasing the reward amount from $20,000 to $1 million, rapper Ryan Leslie repeated the $1 million amount in an interview with MTV five days later.[315] The court ultimately decided the $1 million reward offer was enforceable.[316] The court in *Hoggard v. Dickerson*,[317] emphasized that Dickerson repeated the $5,000 reward to multiple groups of people at different times, despite the fact that all of the repetitions were on the day of the murder of his good friend, and he frequently changed the requirements for claiming the reward.[318]

Doubling down may also occur with subsequent interactions between the parties. For example, in *Barnes v. Treece*,[319] Treece offered $100,000 to anyone who could produce a crooked Vend-A-Win punchboard.[320] When Barnes said he had two fraudulent punchboards, Treece not only advised Barnes that the reward offer was firm, but Treece also directed Barnes to bring the punchboards to Seattle and discussed the procedure for analyzing a punchboard.[321] The trial court concluded, "Although the original

311. 84 S.E.2d 516 (Va. 1954).
312. *See id.* at 519.
313. *See id.* at 520.
314. No. 11 Civ. 7512(HB), 2012 WL 4928914, at *2 (S.D.N.Y. Oct. 17, 2012).
315. *See id.*
316. *See id.* at *5.
317. 165 S.W. 1135 (Mo. Ct. App. 1914).
318. *See id.* at 1137.
319. 549 P.2d 1152 (Wash. Ct. App. 1976).
320. *See id.* at 1154.
321. *See id.*

statement of Treece [offering $100,000 at a public hearing] drew laughter from the audience, the subsequent statements, conduct, and the circumstances show an intent to lead any hearer to believe the statements were made seriously."[322]

Another way to double down is to provide extra details. In the nineteenth-century English case of *Carbolic Smoke Ball*,[323] the advertiser not only offered a 100-pound reward to anyone properly using the product who came down with the flu, but they also stated that they had deposited 1,000 pounds with a bank for the payment of claims.[324] Similarly, in *Barnes v. Treece*,[325] when questioned about his offer of a $100,000 reward, Treece "asserted that $100,000 had been placed in escrow . . . ."[326]

While doubling down in some situations may signal that the speaker is serious, courts also recognize that sometimes doubling down is merely a way to continue the exaggeration. For example, in *Smith v. Richardson*,[327] the court treated supporting statements as just a continuation.[328] In *Lucy v. Zehmer*,[329] the Zehmers argued that putting the promise to sell the farm in writing was just a continuation of the needling, but the court did not see it that way.[330]

A failure to double down may help support an exaggeration argument. For example, in *Kolodziej v. Mason*,[331] the court stressed that the party desiring the $1 million reward never contacted attorney Mason to see if the reward offer was valid.[332] The court seemed to expect that the listener would contact attorney Mason to determine if he was still serious about paying the $1 million.[333]

Doubling down and the related timing also can be important in bona fide joke cases. For example, after a sales manager orally announced that the winner of a contest would receive a new Toyota, "[a]s the contest progressed, [the sales manager] allegedly told the [sales force] that he did not know whether the winner would receive a Toyota car, truck, or van, but that [the winner] would have to pay

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322. *Id.* at 1155.
323. Carlill v. Carbolic Smoke Ball Co., [1893] 1 QB 256 (Eng.).
324. *See id.* at 261.
325. 549 P.2d 1152 (Wash. Ct. App. 1976).
326. *Id.* at 1155.
327. 104 S.W. 705 (Ky. 1907).
328. *See id.* at 707.
329. 84 S.E.2d 516 (Va. 1954).
330. *See id.* at 520.
331. 774 F.3d 736 (11th Cir. 2014).
332. *See id.* at 744.
333. *See id.*

any registration fees on the vehicle."[334] Eventually, the sales manager merely gave the contest winner a toy doll of the Star Wars character Yoda.[335] The winner sued; perhaps the doubling down contributed to the company's decision to settle with the winner, which included enough to purchase a Toyota car or truck.[336]

F. Characteristic #6: Other Potentially Relevant Circumstances

Other circumstances could be relevant in deciding if the speaker was using exaggeration as a figure of speech or intended to be contractually bound. If the discussion occurs away from a normal place of business or outside of normal business hours, this may suggest more informal discussions prone to figures of speech.

On the other hand, if the communication related directly to the speaker's business and may benefit the business, a court may be more likely to enforce the promise. The court's approach in the famous *Carbolic Smoke Ball* case supports this view.[337] As discussed above, the Carbolic Smoke Ball Company advertised a reward of 100-pounds to any customer who came down with the flu or certain other illnesses after properly using the Carbolic Smoke Ball.[338] The court enforced the reward saying, "[I]f a person chooses to make extravagant promises . . . he probably does so because it pays him to make them . . . ."[339] Similarly in *Barnes v. Treece*,[340] which involved a $100,000 reward to demonstrate the fairness of the Vend-A-Win punchboards, the court noted, "[i]n present day society . . . gambling generates a great deal of income,"[341] and the court enforced the reward.

As another factor, one might anticipate that an intoxicated speaker would be more emotional and more likely to speak figuratively. Nevertheless, in two cases, the courts concluded that intoxicated speakers intended to be contractually bound.[342]

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334. Rowley, *You Asked for It*, *supra* note 7.
335. *See id.* at 527.
336. *See id.*
337. *See generally* Carlill v. Carbolic Smoke Ball Co., [1893] 1 QB 256 (Eng.).
338. *See id.* at 257.
339. *Id.* at 268.
340. 549 P.2d 1152 (Wash. Ct. App. 1976).
341. *Id.* at 1155.
342. *See generally* Theiss v. Weiss, 31 A. 63 (Pa. 1895); Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954).

IV. COORDINATING THE NEW EXAGGERATION TEST WITH EXISTING LAW

A. Existing Precedent on Exaggeration

For a court seeking to conclude that promissory language was unenforceable as a figurative exaggeration, existing precedent is mixed and sparse. On the negative side, a famous nineteenth-century English contracts case strongly discourages such an approach to "extravagant promises." In *Carlill v. Carbolic Smoke Ball Co.*,[343] a London-based company advertised a reward of 100 pounds "to any person who contracts the [flu or certain other conditions] . . . after having used the [Carbolic smoke] ball three times daily for two weeks . . . ."[344] The ad also stated that the company deposited 1,000 pounds with a bank to demonstrate their sincerity in the matter.[345] Lilli Carlill used the smoke ball as directed, got the flu, and claimed the reward.[346]

Carbolic Smoke Ball Co.'s primary argument was that the offer was too indefinite to form a unilateral contract upon acceptance because it stated no time restriction—what if the customer got the flu ten years after she stopped using the product?[347] In response, after discussing other alternatives, the court concluded that as long as a customer got the flu within a reasonable time, she could claim the reward.[348] A secondary argument, which sometimes is not even reproduced when *Carbolic Smoke Ball* is included as a principal case in a law school textbook,[349] was the company's assertion that it did not intend to be bound.[350] On this point, the court tersely replied, "[I]f a person chooses to make extravagant promises . . . he probably does so because it pays him to make them, and, if he has made them,

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343. [1893] 1 QB 256 (Eng.).
344. *Id.* at 257.
345. *See id.*
346. *See id.*
347. *See id.* at 257–58.
348. *See id.* at 263–64.
349. *See, e.g.*, DAVID G. EPSTEIN ET AL., CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS 133–36 (3d ed. 2011). *But see* RANDY E. BARNETT & NATHAN B. OMAN, CONTRACTS: CASES AND DOCTRINE 310–11 (6th ed. 2017) (including quote from L.J. Bowen).
350. *See Carlill*, 1 QB at 268.

the extravagance of the promises is no reason in law why he should not be bound by them."[351]

Professor O'Gorman persuasively argues that *Carbolic Smoke Ball* should be read merely as an express warranty case with a liquidated damages clause.[352] In effect, the reward was just a promise that the smoke ball would fulfill the company's representation, and the 100-pound figure was specified as the damages for failure. Also, as with many hoary cases, perhaps these "venerable . . . precedents"[353] are merely a product of their time or should be limited to similar circumstances. The fact the company doubled down when publicizing its deposit of 1,000 pounds with a bank to pay reward claims may have seriously undermined the hyperbole argument. Nevertheless, the court's quotable sentence[354] appears as a strident rejection of excusing speakers who use hyperbole in promissory language.

On the positive side, some language from *Kolodziej v. Mason*[355] supports inquiring whether promissory language was figurative exaggeration.[356] Attorney James Cheney Mason was representing the accused in a quadruple homicide case.[357] The murders were committed in Bartow, Florida, sixty miles from Orlando, and the victims included one of the accused's business partners and three relatives of his other business partners.[358] The accused's alibi was that he was in Georgia when the Florida murders were committed, and security camera videotape from an Atlanta La Quinta Inn showed that the accused was in Atlanta, Georgia at noon and again at 10:00 PM, on the day of the murders.[359] The prosecution asserted that on the day of the murders, after noontime, the accused flew from Atlanta's Hartsfield Airport to Orlando, rented a car, drove to Bartow, Florida, committed the murders, drove to the airport in

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351. *Id.*; *see also* Higgins v. Lessig, 49 Ill. App. 459, 461 (1893) (referring to "the extravagant exclamation of an excited man").

352. *See* Daniel P. O'Gorman, *"Prove Me Wrong" Cases and Consideration Theory*, 23 GEO. MASON L. REV. 125, 136 (2015).

353. Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 125 (S.D.N.Y. 1999).

354. *See id.*

355. 774 F.3d 736 (11th Cir. 2014), *aff'g* 996 F. Supp. 2d 1237 (M.D. Fla. 2014).

356. *See id.* at 741.

357. *See id.* at 742.

358. *See id.* at 738.

359. *See* Suzie Schottelkotte, *Polk Judge Denies Request to Delay Resentencing of Convicted Mass Murderer Nelson Serrano*, JACKSONVILLE.COM (Aug. 24, 2019, 6:42 AM), https://www.jacksonville.com/news/20190823/polk-judge-denies-request-to-delay-resentencing-of-convicted-mass-murderer-nelson-serrano.

Tampa Bay, Florida, and flew back to Atlanta, Georgia in time to be videotaped at the La Quinta Inn at 10:00 PM[360] The prosecution's theory required that the accused arrive at the La Quinta Inn twenty-eight minutes after the plane landed (the "wheels down" time) at Atlanta's Hartsfield Airport.[361] In representing his client, attorney Mason challenged the prosecution's timeline.[362] During a taped interview with NBC News, attorney Mason offered a $1 million reward for a demonstration that such a journey from the airport could be made in twenty-eight minutes.[363]

After a jury pronounced attorney Mason's client guilty of murder, and the client was sentenced to death,[364] NBC News broadcasted a deceptively edited replay of its interview with attorney Mason.[365] Dustin Kolodziej saw the edited replay and documented his trip from the Atlanta airport to the site of the former La Quinta Inn.[366] Kolodziej made the trip in less than twenty-eight minutes and submitted his recording to attorney Mason as evidence of his acceptance of the reward, which he characterized as an alleged offer for a unilateral contract.[367] When attorney Mason refused to pay and Kolodziej sued for the $1 million, the trial court resolved the dispute on two grounds. First, Kolodziej merely saw an edited version of the true offer of the reward,[368] and there were significant differences between what attorney Mason said during the actual, unedited interview with NBC News, and what NBC News broadcast on the replay which Kolodziej saw.[369] Thus, Kolodziej was not aware of the actual offer of the reward when he performed,[370] and as a matter of

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360. *See Kolodziej*, 996 F. Supp. 2d at 1239–40.

361. *See id*. at 1240.

362. *See id.* The accused's alibi unraveled when "prosecutors presented a parking receipt from Orlando International Airport's parking garage that bore Serrano's fingerprint . . . . The receipt was time-stamped about 3:49 p.m." Schottelkotte, *supra* note 359.

363. *See Kolodziej*, 996 F. Supp. 2d at 1241.

364. *See id.* at 1242. In January 2016, the U.S. Supreme Court declared Florida's death penalty process unconstitutional, and Serrano and approximately 150 other death row inmates were granted new sentencing hearings. Schottelkotte, *supra* note 359.

365. *See Kolodziej*, 996 F. Supp. 2d at 1242.

366. *See id.*

367. *See id.* at 1244.

368. *See id.* at 1243.

369. *See id.* at 1244.

370. *See id.* at 1248.

black letter contract law, he could not accept the offer.[371] Second, during the actual interview, attorney Mason clearly made the reward offer to the state prosecution only.[372] In contrast, NBC News' edited replay indicated the offer was to any member of the general public. Thus, the offer was not even extended to Kolodziej, and as a matter of black letter contract law, he therefore could not accept.[373]

The Eleventh Circuit affirmed the trial court and apparently it had no disagreement with the reasoning of the trial court.[374] Nevertheless, the Eleventh Circuit discussed additional theories for deciding in favor of attorney Mason. In particular, the appellate court found that NBC News' edited version of the reward was too indefinite and failed to state essential terms.[375] In particular, it failed to specify the precise starting point at the Atlanta airport or the various conditions at the airport at the relevant time.[376] For example, Kolodziej obtained a first–class ticket, so he could be among the first persons off the plane; in contrast, the prosecution's theory was that the accused flew in a coach seat.[377] Furthermore, the Eleventh Circuit questioned whether there truly was mutual assent between the parties because Kolodziej never attempted to confirm the existence of the offer with attorney Mason.[378]

Finally, and most relevant for this analysis, the Eleventh Circuit said that attorney Mason's reward offer was hyperbole merely intended to create a "descriptive illustration of what that attorney saw as serious holes in the prosecution's theory instead of a serious offer to enter into a contract."[379] The court said attorney Mason's language was merely a "figure of speech," a "rhetorical expression,"[380] or an "offhand remark or grandstanding"[381] and that

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371. *See id.*; ("The law is well settled in this state that before a reward . . . [can] be collected, the offeree must have knowledge of the existence of the offer of reward." (quoting Slattery v. Wells Fargo Armored Serv. Corp., 366 So. 2d 157, 159 (Fla. 1979)); PERILLO, *supra* note 32, § 2.11 ("Generally, a contract can only be formed if the offeree knew of the offer at the time of the alleged acceptance.").

372. *See Kolodziej*, 996 F. Supp. 2d at 1250 ("Mason's unedited interview can only lead a reasonable person to but one understanding[:] . . . [that the reward was offered only] to the state prosecution.").

373. *See* PERILLO, *supra* note 32, § 2.14 ("An offer may be accepted only by the offeree . . . to whom it is made . . . . [T]he power of acceptance is personal . . . .").

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

375. *See id.* at 744.

376. *See id.* at 744–45.

377. *See id.* at 745.

378. *See id.*

379. *Id.* at 742.

380. *Id.* at 744.

using "[t]he exaggerated amount of 'a million dollars'—the common choice of movie villains and schoolyard wagerers alike—indicates that this was hyperbole."[382] The court said that attorney Mason's $1 million reward offer was intended to mean the same thing as "I'll eat my hat," and the court said, "We would not be inclined to make him . . . consume his headwear . . . were he to be proven wrong; nor will we make him pay one million dollars here."[383]

An additional helpful source of precedent may be the appearance of language in some cases that a deal is simply too good to be true,[384] and the other party should not be allowed to snap it up.[385] This language could aptly describe exaggeration, but it has been used in a conclusory manner without a systematic method of analysis, and it is frequently treated as part of, or in connection with, the mistake doctrine[386] discussed below.

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381. *Id.* at 746.

382. *Id.* at 741.

383. *Id.* at 744.

384. *See, e.g.*, Meram v. MacDonald, No. 06CV1071-L(AJB), 2006 WL 8456253, at *2 (S.D. Cal. Oct. 23, 2006) (concluding that whether a statement about a $1 million payment was an offer was a question of fact for the jury).

385. *See, e.g.*, Knox Energy, LLC v. Gasco Drilling, Inc., 258 F. Supp. 3d 709, 737–38 (W.D. Va. 2017); Hyde Park Clothes, Inc., v. United States, 84 F. Supp. 589, 590 (Ct. Cl. 1949).

386. *See, e.g.*, Wender Presses, Inc. v. United States, 343 F.2d 961, 963 (Ct. Cl. 1965) (involving a contractor's mistake in a bid); Fisher v. Stolaruk Corp., 110 F.R.D. 74, 76 (E.D. Mich. 1986) (discussing four technical requirements to rescind for mistake); Hester v. New Amsterdam Cas. Co., 268 F. Supp. 623, 628 (D.S.C. 1967); United States v. Braunstein, 75 F. Supp. 137, 139 (S.D.N.Y. 1947) (involving a clerical error treating "ten cents per pound" as "ten cents per box" when there were twenty-five pounds of raisins in each box); Sumerel v. Goodyear Tire & Rubber Co., 232 P.3d 128, 134 (Colo. App. 2009) (involving a $550,000 error from a "simple mathematical calculation"); Speckel v. Perkins, 364 N.W.2d 890, 893 (Minn. Ct. App. 1985) (applying the doctrine of unilateral mistake when attorney's settlement letter was internally inconsistent) (citing 1 WILLISTON ON CONTRACTS § 94 (3d ed. 1957)); KNAPP ET AL., *supra* note 297, at 737 (discussing the elements for rescission of a contract because of unilateral mistake and stating "[s]ometimes it is said that one party may not 'snap up' an offer that is 'too good to be true'"); Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CALIF. L. REV. 1573, 1602 (2003); Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 WASH. U. L.Q. 57, 62 n.8 (1992) (discussing *Irmen v. Wrzesinski*, in which Irmen's agent erroneously offered to sell a 1968 Nolan Ryan/Jerry Koosman rookie baseball card for $12, when its real value was $1,200).

B. Fitting in with the Rest of Contract Law—Consideration, Mistake, and More

This Section highlights how a new exaggeration test could interact with several relevant contract law doctrines. A fundamental contract law principle is that contract formation is an objective test focused on the outward manifestations of the parties.[387] If "from the statements or conduct of the parties or the surrounding circumstances, it appears that the parties do not intend to be bound or do not intend legal consequences . . . there is no contract."[388] The unexpressed mental state of *one party* alone will not prevent the formation of a contract.[389] Because it is an objective test, "[i]f a party's words or actions warrant a reasonable person in believing that it intended a real agreement, its contrary, but unexpressed, state of mind is immaterial."[390] "'[I]ntent' does not invite a tour through [a party's] cranium, with [that party] as the guide . . . ."[391]

Nevertheless, even under this objective approach, if "one *intends* that one's assent have *no* legal consequences . . . . a court will honor that intention if the other party has reason to know it. . . . [or] if the other party actually knows it."[392] In connection with this standard, a court occasionally will state that an offer was too good to be true and the offeree was not entitled to snap it up, as discussed above.[393] For example, in the *Pepsico* case, Judge Wood concluded that even if Pepsico had offered to sell a $23 million harrier jet for the equivalent of $700,000, the offer would have been too good to be true,[394] and the customer could not have accepted and created an enforceable deal.

This too good to be true standard would support an exaggeration test,[395] although it appears the courts have not always been liberal in application. For example, in *Portzen Construction Inc. v. Cal-Co*

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387. Rowley, *You Asked for It*, supra note 7, at 529–32.

388. PERILLO, *supra* note 32, § 2.4 (stating this is the result "under the great majority of cases").

389. *See, e.g.*, Lucy v. Zehmer, 84 S.E.2d 516, 520 (Va. 1954) (emphasis added).

390. Knox Energy, LLC v. Gasco Drilling, Inc., 258 F. Supp. 3d 709, 737 (W.D. Va. 2017).

391. Rowley, *You Asked for It*, *supra* note 7, at 531 (quoting Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814–15 (7th Cir. 1987)).

392. FARNSWORTH, *supra* note 32.

393. *See supra* notes 384–87 and accompanying text.

394. *See* Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 129 (S.D.N.Y. 1999).

395. *See, e.g.*, *Knox Energy*, 258 F. Supp. 3d at 737 (demonstrating the test when a party knew that the other party never intended to enter into an agreement).

Insulation, Inc.,[396] a subcontractor submitted a $32,000 bid, which was $300,000 less than the next lowest bid for similar work. The court considered the too-good-to-be-true test, called the situation a "close call,"[397] but it enforced the deal despite the ten-to-one difference.[398] Also, in *Wender Presses, Inc. v. United States,*[399] a prospective purchaser's bid price was more than double the next highest bid.[400] Despite its argument that its bid was too good to be true, the court stated that "[o]rdinarily no relief will be granted to a party . . . in the case of a unilateral mistake,"[401] and the court enforced the deal.

It has been a fundamental tenant of modern contract law for more than a century that a promise is only enforceable as a contract if supported by consideration.[402] Although many exaggeration cases involve a significant disparity in price or value,[403] the consideration requirement is unlikely to excuse an exaggerator in most situations. Generally, a court will not review the adequacy of consideration.[404] This is consistent with the classical view that the parties set the terms of the bargain and the courts will not grant relief merely because a party has made a bad bargain.[405] Nevertheless, an agreement is unenforceable as a contract if the purported consideration is only nominal, a mere pretense,[406] or perhaps is so grossly inadequate as to shock the conscious,[407] although the use of this latter doctrine is rare and uncertain.[408]

While an exaggerator's argument based on lack of consideration may flounder, there are other contract principles considering a significant anomaly in price. An unconscionable agreement cannot

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396. 851 N.W.2d 854 (Iowa Ct. App. 2014) (unpublished table decision).

397. *See id.*

398. The Iowa Court of Appeals noted that Cal-Co's bid was for spray foam insulation while the higher bids involved rigid board (traditional Styrofoam) insulation. Also, the general contractor had no experience with spray foam insulation or its price. *See id.*

399. 343 F.2d 961 (Cl. Ct. 1965).

400. *See id.* at 963.

401. *Id.* at 962 (citing Saligman v. United States, 56 F. Supp. 505, 507 (E.D. Pa. 1944)).

402. *See* KNAPP ET AL., *supra* note 297, at 137 (citation omitted).

403. *See supra* notes 61–111 and accompanying text.

404. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. L. INST. 1981); KNAPP ET AL., *supra* note 297, at 137; PERILLO, *supra* note 32, § 4.4.

405. *See* KNAPP ET AL., *supra* note 297, at 137.

406. *See* PERILLO, *supra* note 32, § 4.6.

407. *See* Dohrmann v. Swaney, 14 N.E.3d 605, 612 (Ill. App. Ct. 2014).

408. *See* KNAPP ET AL., *supra* note 297, at 137.

be enforced, and although unconscionability involves a host of factors,[409] a court may consider a disparity in price. For example, in *Ahern v. Knecht*,[410] a repairman charged $762 for a job that should have cost $150 at most. The court ordered a refund based on unconscionability.[411] In addition, gross disparity in the values exchanged may be relevant when deciding if an agreement is unenforceable because of fraud or economic duress.[412] For example, in *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co*,[413] the court concluded that a settlement agreement for $97,500 was signed under duress and was unenforceable in part because the service provider actually was entitled to between $260,000 and $300,000.[414]

Various aspects of contract formation can be a legal issue for the court, a question of fact for the jury or trial judge, or a mixed question of fact and law. "Whether and to what extent subjective intention is relevant in making a particular determination is a question of law."[415] On the other hand, whether a reasonable person would have concluded that one or both of the parties intended to be bound would be a question of fact[416] unless reasonable persons could reach only one conclusion.[417] Even where reasonable persons could reach different conclusions, the question is often held to be one of law when it involves the interpretation of a writing or other record.[418]

It might seem that under existing contract law doctrines, the affirmative defense of mistake should provide an exaggerator the best hope of escaping liability. At the heart of exaggeration is a factual mistake—the exaggerator's expression does not match reality

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409. *See* PERILLO, *supra* note 32, § 9.40.

410. 563 N.E.2d 787, 788 (Ill. App. Ct. 1990).

411. *See id.* at 793.

412. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. L. INST. 1981) (stating that gross inadequacy of consideration also could be relevant in finding a contract unenforceable under mistake, lack of capacity, duress, or undue influence).

413. 584 P.2d 15 (Alaska 1978).

414. *See id.* at 18, 23–24.

415. PERILLO, *supra* note 32, § 2.7.

416. *See* Meram v. MacDonald, No. 06CV1071-L(AJB), 2006 WL 8456253, at * 2 (S.D. Cal. Oct. 23, 2006) ("Whether a person could reasonably conclude that a contract would result if he or she accepted [the] offer, is a question to be determined by the trier of fact.").

417. *See* PERILLO, *supra* note 32, § 2.7.

418. *See, e.g.*, State Farm Life Ins. v. Brockett, 737 F. Supp. 2d 1146, 1152 (E.D. Cal. 2010).

(other than conveying the speaker's emotions or attitudes).[419] The affirmative defense of mistake, however, imposes hurdles the exaggerator may be unable to surmount. Generally, the "mistake must be of a clerical or computational error . . . or something of that sort. Avoidance is not allowed for a mistake of judgment."[420] "The bidder who makes an error in judgment should be penalized if he then refuses to execute the contract."[421] A paradigm mistake case was the U.S. Supreme Court's 1900 dispute involving "an extremely nearsighted engineer working in great haste with a voluminous number of specifications."[422] More recently, *Marana Unified School v. Aetna Cas. & Sur.*[423] summarized several cases involving mathematical and clerical errors in which courts granted relief even when the mistake involved as little as 5% of the intended amount.

A related requirement is that no relief is available if the mistake arose from negligence,[424] such as underestimating the cost of materials or labor in a bid.[425] Whether this is the case can be a fact intensive inquiry.[426] Other courts require a showing of good faith and fair dealing.[427] Courts which may relax the prohibition on mistakes in judgment may require the defendant to prove the mistake occurred despite the exercise of reasonable care.[428] Finally, rescission of an agreement on grounds of mistake is a matter of equity.[429]

Each of these requirements may prevent an exaggerator from obtaining relief under the mistake doctrine. The exaggerator's mistaken expression likely would not arise from a mathematical or clerical error and based on the particular facts, a court may view the use of inaccurate language as culpable negligence. Finally, equity

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419. *See* Christodoulidou, *supra* note 233.

420. PERILLO, *supra* note 32, § 9.27.

421. Marana Unified Sch. Dist. v. Aetna Cas. & Sur. Co., 696 P.2d 711, 717 (Ariz. Ct. App. 1984).

422. *Id.* at 715 (discussing Moffett, Hodgkins, & Clarke Co. v. City of Rochester, 178 U.S. 373 (1900)).

423. *See id.* at 714–15.

424. *See* PERILLO, *supra* note 32, § 9.27.

425. *See, e.g.*, *Marana Unified Sch. Dist.*, 696 P.2d at 717.

426. *See* DePrince v. Starboard Cruise Servs., 163 So. 3d 586, 589–94 (Fla. Dist. Ct. App. 2015).

427. *See* KNAPP ET AL., *supra* note 297, at 739.

428. S*ee* Wil-Fred's Inc. v. Metro. Sanitary Dist., 372 N.E.2d 946, 953 (Ill. App. Ct. 1978).

429. *See Marana Unified Sch. Dist.*, 696 P.2d at 715.

may not favor someone who intentionally chooses to make statements inconsistent with reality.[430]

Additional relevant doctrines may include the statute of frauds and the parol evidence rule. Under the statute of frauds, various classes of contracts must be in writing and signed by the party to be charged to be enforceable.[431] These contracts include a sale of goods for the price of $500 or more, a sale of an interest in land, and a contract that cannot be performed within one year of the making of the contract.[432] There are exceptions to the statute of frauds both at common law[433] and under the Uniform Commercial Code.[434] The statute of frauds may protect certain exaggerators unless they double down[435] and record their exaggeration in a signed writing.[436]

Also, the parol evidence rule may prevent prior oral exaggerations from becoming part of the contract, if the parties later formalized their agreement with a signed writing qualifying as a total integration.[437] There are many exceptions to the parol evidence rule.[438]

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430. *See* KNAPP ET AL., *supra* note 297, at 397 (asserting that for purposes of contract law, "a speaker should always expect his words to be understood in accordance with their normal usage") (referring to the writings of Justice Oliver Wendell Holmes).

431. *See, e.g.*, KNAPP ET AL., *supra* note 297, at 346; PERILLO, *supra* note 32, § 19.1.

432. *See* PERILLO, *supra* note 32, § 19.16 (regarding contracts for the sale of goods under the Uniform Commercial Code).

433. At common law, the statute of frauds is inapplicable if there has been part performance (but only if the plaintiff seeks equitable remedies and not money damages). *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 129 (AM. L. INST. 1981); Beaver v. Brumlow, 231 P.3d 628, 632 (N.M. Ct. App. 2010). Also, some jurisdictions make an exception if the plaintiff can recover under promissory estoppel. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 139 (AM. L. INST. 1981); KNAPP ET AL., *supra* note 297, at 375 (listing more recent cases); Alaska Democratic Party v. Rice, 934 P.2d 1313, 1316 n.2 (Alaska 1997) (listing three other cases that have allowed an exception for promissory estoppel and listing "[n]umerous decisions [that] have rejected the Restatement approach . . . .").

434. U.C.C. § 2-201 (AM. L. INST. & UNIF. L. COMM'N 1977) (including exceptions for part performance, admissions, specially manufactured goods, and confirmations between merchants); *see also* KNAPP ET AL., *supra* note 297, at 389 (discussing a "split among courts" on whether promissory estoppel is an exception to the statute of frauds under the U.C.C.).

435. *See supra* Part III.E.

436. *See, e.g.*, Lucy v. Zehmer, 84 S.E.2d 516, 517 (Va. 1954).

437. *See* PERILLO, *supra* note 32, § 3.2.

438. *See id.* § 3.7.

C. Promissory Estoppel and Reliance Damages

Promissory estoppel could provide equitable relief for an aggrieved party when a contract was not formed because of this Article's proposed new exaggeration test. An aggrieved party must satisfy a three-part test to recover under promissory estoppel.[439] First, the aggrieved party must prove that the speaker made a promise which was reasonably expected to induce action by the listener.[440] Second, the listener acted on the promise in a way that should have been expected and resulted in a substantial detriment.[441] Third, injustice can only be avoided by enforcing the promise.[442]

Although the promise could be an offer under contract law,[443] that is not required. For example, in *Pop's Cones, Inc. v. Resorts International Hotel, Inc.*,[444] the agents of a corporate landlord discussed renting commercial space to a prospective tenant, but they never made the tenant an offer. The landlord's agents made assurances that induced the prospective tenant to refrain from renewing their existing commercial lease and to place their business equipment in a storage facility, all in anticipation that they would be able to rent space from the landlord.[445] Although the prospective tenant was unable to recover on a breach of contract claim because there was no offer, the court held that a jury could find that the prospective tenant was entitled to reliance damages under promissory estoppel.[446] Thus, the prospective tenant could not obtain the benefit of the bargain either in the form of specific performance or money damages for the profits it would have made at the new location, but it was entitled to money damages based on its losses suffered from relying on the assurances. Those losses included the storage fees and the profits lost from moving out of the old location.[447] In addition, a party can recover under promissory

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439. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981).
440. *See id.*
441. *See* PERILLO, *supra* note 32, § 6.1.
442. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981).
443. *See, e.g.*, Pavel Enters., Inc. v. A.S. Johnson Co., 674 A.2d 521, 529–30. (Md. 1996).
444. 704 A.2d 1321, 1322 (N.J. Super. Ct. App. Div. 1998).
445. *See id.*
446. *See id.* at 1327.
447. *See id.* at 1326.

estoppel even when there was not sufficient consideration to support a breach of contract action.[448]

Under promissory estoppel, "[t]he remedy granted for breach may be limited as justice requires."[449] As a result, promissory estoppel may be especially apt when the exaggerator is speaking figuratively, but the listener takes it literally. For example, in *Augstein v. Leslie*,[450] if rapper Ryan Leslie was speaking figuratively according to an objective test, he would not be liable for $1 million based on breach of contract. Nevertheless, under the new exaggeration test proposed in this Article, promissory estoppel still could provide some relief for the aggrieved party. The finder (Augstein) might recover reliance damages, specifically money damages, for his time, effort, and expenses, particularly for the steps he may have taken specifically in attempting to determine if the $1 million figure was seriously intended. Likewise, in *Theiss v. Weiss,*[451] if the exaggerating merchant was not liable for breach of contract under this Article's proposed new exaggeration test, the customer might recover under promissory estoppel for reliance damages sustained, perhaps from cancelling other orders in reliance on the merchant's exaggerated promise and also for re-ordering when it became clear there had been a miscommunication.

V. CONCLUSION

"'*Shall I compare thee to a summer's day? . . .* conveyed [Shakespeare's] message more [powerfully] than if he had literally talked about the subject's personal qualities, such as kindness, charm, and beauty."[452] Figurative language is more than just decoration; it can communicate a different message than literal language.[453] Exaggeration, as a figure of speech, can express the speaker's emotions powerfully. In contractual-type settings, those

448. *See, e.g.*, Harvey v. Dow, 962 A.2d 322, 327 (Me. 2008) (involving a promise to make a gift in the future).

449. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981).

450. *See supra* notes 8–16 and accompanying text (discussing *Augstein v. Leslie* in more detail).

451. *See supra* notes 19–25 and accompanying text (discussing *Theiss v. Weiss* in more detail).

452. BARBARA DANCYGIER & EVE SWEETSER, FIGURATIVE LANGUAGE 1 (2014) (citation omitted).

453. *See id.* (noting that irony also "may heighten emotional involvement, and that may be exactly the artistic effect intended"); *supra* notes 249–57 and accompanying text.

emotions can range from camaraderie and empathy to frustration and anger.[454]

Some might say, "I hate hyperbole. And that's no exaggeration."[455] The sentiment is understandable and commendable in some circumstances.[456] Exaggeration is a distortion of reality; it is not factually accurate. When discussing the law of contracts, Justice Oliver Wendell Holmes asserted that parties should anticipate their words will be interpreted consistent with ordinary meaning and usage.[457]

A famous fourth century B.C.E. philosopher hated humor because humor also distorts factual truth.[458] Despite Plato's condemnation of humor, courts and commentators now clearly recognize joking as a legitimate form of communication which does not trigger contractual consequences. This Article proposes similar status for exaggeration. Like humor, exaggeration is factually inaccurate and can offend or create uncertainty, but it is a legitimate form of speech that "may be wired in the cognitive structuring of our experience . . . ."[459] Courts will reach more equitable results in contractual settings if they recognize exaggeration as a separate category of nonbinding speech.

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454. *See supra* Part III.A.

455. *See, e.g.*, Paul Caron, *Former UC-Hastings Dean's Advice to Those Considering Law School: 'Choose Wisely, My Friend'*, TAXPROF BLOG (May 25, 2017), taxprof.typepad.com/taxprof_blog/2017/05/former-UC-hastings-deans-advice-to-those-considering-law-school-choose-wisely-my-friend.html.

456. Dr. Ken Broda-Bahm, *Avoid Hyperbole*, PERSUASIVE LITIGATOR (Dec. 5, 2016), https://www.persuasivelitigator.com/2016/12/avoid-hyperbole.html (discussing the use of hyperbole when arguing a case to a judge or jury).

457. *See* KNAPP ET AL., *supra* note 297, at 397 ("[A] speaker should always expect his words to be understood in accordance with their normal usage.").

458. *See supra* notes 201–03 and accompanying text.

459. CLARIDGE, *supra* note 1.