

RETHINKING PROMISSORY ESTOPPEL

Eric Alden*

Samuel Williston, the official Reporter for the ALI's first Restatement of the Law of Contracts in 1932, claimed that promises had been enforced without consideration in sufficiently many cases across different factual situations that the only way to embrace them all was to create a provision, set forth in Section 90 and generally referred to as "promissory estoppel," that purports to suspend wholesale the normal rules governing contract formation. This Article challenges that assertion as a factual matter, and challenges the claim that only a provision as broad as Section 90 could accommodate certain limited exceptions to the consideration requirement that had been observed at the time.

Since 1932, innumerable cases have been decided on the basis of promissory estoppel precisely because the ALI's restatements have held themselves out as definitive declarations of the law. Williston's initial claim of authority for Section 90 is the lynchpin upon which both the legitimacy of Section 90 as well as the doctrinal validity of those subsequent cases ultimately depends.

This Article further addresses the implications of this analysis for the future of contract law. In order to reduce the risk of contract bleeding out doctrinally into tort, the Article argues that a markedly more modest approach than that reflected in Section 90 should be taken with respect to the enforcement of promises in the absence of consideration. Specifically, the Article argues in favor of discrete, limited categorical exceptions to the consideration requirement. As to factual situations not falling within those categorical exceptions, courts should strongly consider implied unilateral contract as an analytic paradigm preferable to that of promissory estoppel.

* Associate Professor of Law, Chase College of Law, Northern Kentucky University. Harvard University, B.A. 1988; L'Institut d'Etudes Politiques de Paris (Sciences Po), Certif. d'Etudes Pols. 1986; Freie Universität Berlin, Magister Artium (M.A.) 1991; Columbia University, J.D. 1994.

Prior to entering academia, the Author was in practice for fifteen years in the field of corporate and securities law as full equity partner at two AmLaw 100 firms, one national and one global. During 2005–2006, the Author served with the Securities and Exchange Commission in Washington, D.C., as an Attorney Fellow in the Division of Corporation Finance, Office of Chief Counsel. Prior to joining Chase, the Author was a Lecturer and Research Fellow in Corporate Governance at U.C. Berkeley School of Law (Boalt Hall).

The Author wishes to thank Ian Ayres, Randy Barnett, Sidney DeLong, Michael Gibson, Robert Hillman and Jean Powers, and at Chase, the research librarians, Ursula Doyle, Nancy Firak, Jack Harrison, Kenneth Katkin, Michael Mannheimer, Gerard St. Amand, and Dean Jeffrey Standen. Particular thanks go to my friend and colleague Christopher Gulinello, without whose generous assistance this Article would not have come to pass. The Author is alone responsible for any errors and for the content of the Article.

TABLE OF CONTENTS

| | |
|--------------------------------------------------------------------------------------|-----|
| INTRODUCTION | 661 |
| I. GENESIS | 667 |
| II. TOPOGRAPHY | 669 |
| A. <i>No Consideration Required</i> | 669 |
| B. <i>No Assent Required</i> | 670 |
| C. <i>The Liability Standard</i> | 671 |
| D. <i>No Facial Requirement that the Reliance Be Reasonable</i> | 674 |
| E. <i>Avoidance of Injustice</i> | 676 |
| III. RAMIFICATIONS | 677 |
| IV. JUSTIFICATION | 678 |
| A. <i>Williston and Corbin</i> | 679 |
| B. <i>Alternative Approaches to the Treatment of Heterodox Cases</i> | 681 |
| V. THE PREEXISTING CASELAW | 683 |
| A. <i>Unilateral Contract</i> | 683 |
| B. <i>Waiver</i> | 685 |
| C. <i>Charitable Donations & Marriage</i> | 687 |
| D. <i>Gratuitous Promise to Convey, Plus Improvements to, Real Estate</i> | 688 |
| E. <i>Gratuitous Bailees</i> | 688 |
| F. <i>Miscellaneous, Isolated Cases</i> | 692 |
| 1. <i>The ALI Record</i> | 692 |
| 2. <i>Williston's 1920 Treatise and the Critical Role of Intrafamily Gifts</i> | 696 |
| VI. SUMMATION AND IMPLICATIONS FOR THE FUTURE OF CONTRACT LAW | 704 |
| CONCLUSION | 705 |

[M]odern Restatements . . . are of questionable value, and must be used with caution. . . . Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . . . Restatement sections such as that should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.¹

INTRODUCTION

The doctrine of promissory estoppel has introduced significant, continuing, and unresolved theoretical instability into American contract law.² Formally ushered onto the stage in 1932 by Section 90 of the *Restatement of the Law of Contracts (First Restatement)*,³ for which Samuel Williston served as the official Reporter, and later amended by the *Restatement (Second) of Contracts* in 1981,⁴ the doctrine of promissory estoppel eliminated at the stroke of a pen two core requirements for the imposition of contractual liability, namely mutual assent and consideration.⁵ Those two threshold requirements of classical Anglo-American contract law had served for centuries as guardians, protecting indi-

¹ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part). Although Justice Scalia referred in this passage to subsequent evolutions of such restatements, as will be demonstrated in this Article the problem to which he refers has existed since the inception thereof.

² Samuel Williston is generally credited with having first coined the term “promissory estoppel” in his major treatise on contract law appearing in 1920, just several years prior to formation of the American Law Institute and commencement of its institutional project to create “restatements” of numerous substantive areas of the common law. *See* 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 139, at 308 (1920).

³ *RESTATEMENT OF THE LAW OF CONTRACTS* (AM. LAW INST. 1932). In the *Restatement of the Law of Contracts (First Restatement)*, Section 90 read as follows: “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” *Id.* § 90.

⁴ *RESTATEMENT (SECOND) OF CONTRACTS* (AM. LAW INST. 1981). As revised by the *Restatement (Second)*, Section 90 now reads as follows:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Id. § 90.

⁵ In the *First Restatement*, Section 90 appeared under the heading of “Informal Contracts Without Assent or Consideration.” *RESTATEMENT OF THE LAW OF CONTRACTS* ch. 3, topic 4, at 100 (AM. LAW INST. 1932). In the *Restatement (Second)*, that heading was shortened to “Contracts Without Consideration,” but the note thereto makes clear that “[w]here the stated circumstances [as in Section 90] do not include mutual assent or consideration, those elements are not required,” thus reintroducing the point that assent is not required for liability under the section. *RESTATEMENT (SECOND) OF CONTRACTS* ch. 4, topic 2, intro. note (AM. LAW INST. 1981).

viduals and businesses from the imposition of strict liability in contract unless both parties had consented to a mutual exchange transaction in which each party was compensated.⁶ By eliminating the requirements of mutual assent and consideration, Section 90 made mere promises enforceable at the essentially unconstrained discretion of judges⁷ and thus created within contract law what is arguably a tort.⁸

As famously noted by Grant Gilmore, the sharp antithesis between the classical consideration requirement and the abolition thereof under Section 90 is comparable to “matter and anti-matter,” “Restatement and anti-Restatement,” and “Contract and anti-Contract.”⁹ “The one thing that is clear,” he wrote, “is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up.”¹⁰

It has been generally acknowledged that this new doctrine, at least from a doctrinal perspective, lifted the lid on Pandora’s box for a potentially wide expansion of promissory liability.¹¹ Indeed, long before the publication of Sec-

⁶ Historically, the consideration requisite to enforceability of a promise has often been described as consisting of either a benefit to the promisor or a detriment to the promisee, that in either case must have been bargained for in exchange for the promise. C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 81 (2d ed. 1880). The term “compensated” is used here in a manner understood to include such bargained-for legal detriment, i.e., specific acts or forbearance by the promisee that the promisor has sought as the quid pro quo for promisor’s promise.

⁷ With respect to such unconstrained discretion, see further discussion *infra* Part II.D.

⁸ GRANT GILMORE, THE DEATH OF CONTRACT 87–88 (1974) (“Speaking descriptively, we might say that what is happening is that ‘contract’ is being reabsorbed into the mainstream of ‘tort.’ . . . We are fast approaching the point . . . where any detriment reasonably incurred by a plaintiff in reliance on a defendant’s assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort.” (footnotes omitted)).

⁹ *Id.* at 61.

¹⁰ *Id.* As Gilmore notes:

A remarkable passage in the *Restatement (Second) § 90 Commentary* explains how most “contract” cases, if not all of them, can be brought under § 90 so that resort to § 75 and consideration theory will rarely, if ever, be necessary. By passing through the magic gate of § 90, it seems, we can rid ourselves of all the technical limitations of contract theory.

Id. at 90.

¹¹ See *infra* notes 12–13. While the focus of this Article is on the doctrinal underpinnings of promissory estoppel, other authors have already conducted research into the empirical side of the matter.

During the initial decades after promulgation of Section 90, the expansion of promissory estoppel in the court system and its crossover from gift cases into the commercial arena had been heralded by many commentators. However, during the 1990s Robert Hillman and Sidney DeLong undertook detailed empirical studies which demonstrated much lower success rates for promissory estoppel claims in the courts than had been earlier predicted by proponents of the doctrine. See Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 As Catch-22*, 1997 WIS. L. REV. 943, 943 (1997) (“Any comprehensive examination of recent [sic] appellate court decisions will disclose that the legal doctrine of promissory estoppel has not become a significant source of commercial contractual obligation.”); Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L.

tion 90, both Christopher Columbus Langdell, dean of Harvard Law School and a lion of classical contract law in the late 1800s,¹² and Samuel Williston himself,¹³ recognized that propagation of a principle along the lines of promissory

REV. 580, 619 (1998) (“Measured in terms of win rates in the courts, . . . promissory estoppel may no longer be, if it ever was, a significant theory of recovery.”); *see also* Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263, 1289–90 (1994). *But see* Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669, 670 (2010); Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really As Unsuccessful As Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531 (2002).

Yet even with lower success rates than had been assumed during the 1960s and 1970s, promissory estoppel claims are now asserted and litigated across the land. As noted by Eric Mills Holmes in 1996, in the intervening years since publication of the *First Restatement* it has come to pass that “all American jurisdictions . . . apply some form of ‘promissory estoppel,’ grounded in Section 90,” and no fewer than thirty-four of those jurisdictions had by that time advanced in their application of the doctrine to the “Tort Phase, in which courts have recognized a promisee’s right to rely and a promisor’s duty to prevent (or not cause) reasonably foreseeable, detrimental reliance.” Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 47, 51 (1996). At the level of doctrine and theory, therefore, Section 90 poses a fundamental challenge to the existing order of classical contract law.

¹² Langdell in his time discussed two well-known cases that he said had advanced views along lines generally consistent with the concept of promissory estoppel, namely *Pillans v. Van Mierop*, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765) (including opinion by Lord Mansfield), and *Alliance Bank v. Broom*, 2 Dr. & Sm. 289, 62 Eng. Rep. 631 (1864). *See* LANGDELL, *supra* note 6, at 98–101. As described by Langdell, these were

cases in which promises without consideration [had] been enforced, not because there was an antecedent moral obligation to do the thing promised, but because the promise was made with the expectation that the promisee would act or refrain from acting on the faith of it, and with the intention of inducing him to do so, and with the full knowledge that a failure to perform the promise might place the promisee in a worse position than if the promise had never been made. . . . The two cases in question, therefore, can only be supported upon a principle which would render a consideration unnecessary in any case, and thus destroy all distinction in that respect between our law and the civil law. It is by no means clear that Lord Mansfield would have shrunk from this latter consequence.

Id. at 98–101 (footnotes omitted).

¹³ In his principal treatise on contract law, Williston noted that continental Europeans in the civil law tradition had been critical of the Anglo-Saxon requirement of consideration, “and there is not infrequently observable in the decisions of American courts in cases of hardship an impatience with the requirement and an effort to enlarge the boundaries of enforceable promises.” WILLISTON, *supra* note 2, at 313. Specifically, he touched upon whether the requirement of bargain in order for consideration to exist might be eliminated:

If this sentiment should find general expression, it may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise—rather than the more modern notion of purchase of a promise for a price, and that it is a consistent development from this early basis to define valid consideration as any legal benefit to the promisor or legal detriment to the promisee given or suffered by the latter in reasonable reliance on the promise. Such a definition eliminates the necessity of a request by the promisor for the consideration.

Id. Yet such a definition was not the law of the land: “The proposition is by no means without intrinsic merit, but it should be recognized that if generally applied it would much extend liability on promises, and that at present it is opposed to the great weight of authority.” *Id.* (emphasis added).

estoppel would greatly expand the scope of liability for promise. Decades later, in the wake of the adoption of Section 90, Gilmore wrote that there had, in consequence thereof, occurred an “explosion of liability.”¹⁴

As a radical doctrine with potentially far-reaching ramifications for contract law,¹⁵ promissory estoppel has naturally given rise to prolific academic commentary over the intervening decades.¹⁶ Yet nearly universally, that commentary has accorded an extraordinarily high degree of deference, without analytic discussion, to the argument advanced by Williston in favor of promissory estoppel during the *First Restatement* drafting process.¹⁷ Williston’s view was that the optimal manner in which to address certain limited exceptions to the traditional consideration requirement that had previously developed in the caselaw would be to create a new catchall exception of such breadth and nearly unfettered judicial discretion that it could encompass not only those narrow preexisting exceptions but also untold new exceptions that courts might wish to create in the future.¹⁸ There has to date been insufficient critical inquiry into that intellectual and policy judgment.

This nearly unchallenged acceptance of Williston’s position has shaken the foundations of contract law. Apparently proceeding from an assumption that the tenets of classical contract law are no longer valid or compelling, many theoreticians are now adrift, casting about in search of a new anchor for promissory liability. The wide variety of descriptive and normative approaches pursued by commentators amply illustrates the theoretical instability that has ensued in the wake of Section 90’s adoption. Only rarely have authors set themselves at odds with the new doctrine crafted by Williston.¹⁹ Some have attempted posi-

¹⁴ GILMORE, *supra* note 8, at 65.

¹⁵ Melvin Eisenberg noted that “notwithstanding Williston’s disingenuous statement that ‘[t]he endeavor . . . is to restate the law as it is,’ Section 90 . . . is famous not because it stated ‘the law as it is,’ but because it was a radically transformative statement of contract law.” Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 854–55 (1997) (alterations in original) (footnotes omitted).

¹⁶ See, e.g., Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 309 (1992) (“[T]he literature on section 90 problems is among the richest in contract law.”).

¹⁷ As to the role played by Arthur Corbin, the principal advisor to Williston during the *First Restatement* drafting process, see *infra* Part IV.A.

¹⁸ See *infra* Part IV.B.

¹⁹ Authors who have challenged promissory estoppel include Nicholas C. Dranias, *Consideration As Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL’Y. 267, 322, 326 (2008) (stating that “there is no natural entitlement to forcible protection from detrimental reliance on a naked promise” and “the exchange of valuable consideration is what morally justifies enforcing promises”); David G. Epstein, Ryan D. Starbird & Joshua C. Vincent, *Reliance on Oral Promises: Statute of Frauds and “Promissory Estoppel,”* 42 TEX. TECH L. REV. 913, 919, 921 (2010); Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659, 661–62 (1988) (describing Karl Llewellyn’s “agreement theory” in Article 2 of the UCC, and arguing that “both sales law and contract law can operate with only a minimal use of promissory estoppel, and that the *Restatement (Third) of Contracts* should make better use of Article 2’s for-

tive descriptions of the principles that they believe either do in fact, or ideally ought to, animate judicial decisions, principles that are at times at variance with or sound differently than those of classical contract law.²⁰ Many other commentators quite evidently approve of promissory estoppel,²¹ some even describing the doctrine's progressive evolution and emerging doctrinal independence as a

mation mechanisms to relegate reliance to the relatively minor position it occupies in Article 2. In this manner, today's unnecessary, unlimited, and unwarranted expansion of promissory estoppel can be checked, and contract fully resurrected." (footnotes omitted)); Jean Fleming Powers, *Promissory Estoppel and Wagging the Dog*, 59 ARK. L. REV. 841, 844 (2007) ("When the principle at stake is the enforcement of promises and agreements, the analysis should be firmly grounded in contract. When estoppel principles are at work, estoppel should be the basis for recovery. When the principle is prevention of harm, the cases are better analyzed as tort cases. When the principle is ensuring that requirements of form, such as the statute of frauds or the parol evidence rule, do not subvert the very policies they are designed to protect, the law should craft exceptions that address those policies, not use promissory estoppel to indiscriminately undercut the requirements.").

Along somewhat related lines, Randy Barnett has recommended modifications to Section 90 that would limit the circumstances in which it would be applicable. Randy E. Barnett, *Foreward: Is Reliance Still Dead?*, 38 SAN DIEGO L. REV. 1, 8 (2001) (proposing that a promise without consideration would be binding if "accompanied by a formality that manifests an intention to be legally bound," or "with the knowledge of the promisor, the promise induces reliance by the promisee (a) that is so substantial that it would be unlikely in the absence of a manifested intention by the promisor to be legally bound . . . and, (b) the promisee expects the promise to be enforceable and is aware that the promisor has knowledge of the promisee's reliance, and (c) the promisor remains silent concerning the promisee's reliance" (quoting RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 872 (2d ed. 1999))).

²⁰ See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270, 319–20 (1986) (proposing a "consent theory of contract" focused on "a manifested intention to be legally bound" as the "criterion of enforceability," and explaining that "[c]onsent is the moral component that distinguishes valid from invalid transfers of alienable rights."); Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 484 (1996) ("[I]n cases where the party now seeking to withdraw had a reason to be committed (in order to induce efficient reliance by the other party), courts have been . . . quite willing to resolve every . . . legal issue in favor of an enforceable obligation."); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 945 (1985) (proposing "as a new standard for enforcement that all promises made in furtherance of economic activities be enforced without regard to the presence of consideration or reliance"); James Gordley, *Enforcing Promises*, 82 CALIF. L. REV. 547, 548 (1995) ("Promises intended to enrich the promisee at the promisor's expense are enforced if the promisor's decision is likely to have been sensible."); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 113 (1991) (arguing that the actual basis on which promissory estoppel decisions are reached is whether "the promise is proven convincingly and is likely to have been serious and well considered when it was made").

²¹ See, e.g., Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents* (pts. I & II), 50 MICH. L. REV. 639, 50 MICH. L. REV. 873 (1952); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969); Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1334 (1998); Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 905–06 (1987); Kevin M. Teeven, *A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance*, 72 TENN. L. REV. 1111 (2005).

new basis of liability distinct from both contract and tort.²² Then come those who believe that Section 90 did not go far enough in overthrowing the foundations of classical contract law, proposing instead revolutionary alternative theories and bases of liability.²³ The adoption of Section 90 and its aftershocks have left us with theoretical chaos.²⁴

This Article will return to the basis for Williston's seminal judgment of nearly a century ago.²⁵ The objective is forensic. Williston persuaded his colleagues in the ALI to promulgate Section 90 on the strength of specific factual assertions regarding certain preexisting caselaw at that time. This Article will examine the strength of those assertions and consider the implications of that examination for Section 90 as it currently stands.

The history of legal developments is central to understanding their intellectual and moral validity. Part I therefore leads off by reviewing the origins of

²² See, e.g., Holmes, *supra* note 11, at 48, 56; Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel As an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 474 (1983).

²³ These alternative theories generally favor the creation of a new framework for liability predicated upon status or relationship rather than upon consent and consideration between freely contracting parties. See, e.g., Feinman, *supra* note 16, at 304, 311 (proposing to replace both classical contract law and promissory estoppel with a new theory of liability based on relationship: "Indeed, we ought to abandon not only promissory estoppel but also the framework of contract thinking that has given it vitality. . . . I propose that contract law should . . . embrace a truly relational analysis. This relational approach would constitute revolutionary science, rather than a further attempt to refine the normal science of neoclassical law."); Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER RACE & JUST. 47, 47, 102 (2013) (calling for a "rights oriented analysis of promissory estoppel" to advance the goal of "grant[ing] underprivileged promisees who cannot adhere to contract law formation formalities access to contract"); Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1957 (2001) ("[I]t would be more useful to think about contract as a framework for cooperation, the central element of which is the set of relationships whose terms are potentially regulated by the state. This conception is both a better account of judicial practice, and a way to improve on that practice by ridding it of those commitments that have the effect of limiting contract's . . . redistributive potential." (footnotes omitted)).

²⁴ See, e.g., Barnett, *supra* note 20, at 270 (referring to "the current lack of a consensus concerning the proper basis of contractual obligation"); Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 678-79, 716-17, 718 (1984) ("Associated with the expanded use of promissory estoppel have been dramatic changes in the theory and method of contract jurisprudence. . . . Since the publication of the [First Restatement], liberal scholars and judges have pressed a broad-based attack on . . . the traditional substantive principles embodied in the [First Restatement] Courts and scholars applied and interpreted the [reliance] principle [of promissory estoppel], but in the process they eroded what remained of the classical structure. . . . Since the collapse of classicism, we have searched for a way to return to certainty. The implication of my analysis . . . is that the search is futile.").

²⁵ As discussed *infra*, the formal institutional argument in favor of Section 90 during the *First Restatement* drafting process is to be found in the writings of Williston. Only some two decades later, in 1950, did Arthur Corbin publish his own major treatise, in which he made a similar case in favor of the section. As discussed *infra*, Corbin's analysis and citations ran generally along the same lines as that articulated by Williston in writing during the *First Restatement* drafting process. See *infra* Part IV.A.

Section 90 in the ALI's program to create "restatements" of the existing common law in numerous substantive fields. Part II reviews the topography of Section 90 as actually promulgated, with an eye toward its extraordinary theoretical breadth. Part III notes the doctrinal instability and uncertainty that Section 90 has introduced into the field of contract law. The objective of these first Parts is to demonstrate the enormous challenge posed by promissory estoppel to the classical order. A revolutionary new doctrine should not be introduced for trivial or insufficient cause.

With this in mind, Part IV then reviews the various alternative approaches available to the drafters of the *First Restatement* in addressing certain anomalous categories of cases, and the justification advanced by Williston in favor of Section 90 as drafted. His central claim was that if certain preexisting caselaw were to be fully embraced, Section 90 was the necessary, ineluctable answer. Part V undertakes a detailed forensic review of those cases cited by Williston and of the contentions he adduced on the basis thereof. As will be argued, Williston's precedential use of the preexisting caselaw is highly questionable, relying not infrequently on factual speculation at odds with court recitations or even on incorrect reading of case holdings. The citations that survive such scrutiny generally fall into a handful of narrow, discrete exceptions to the consideration requirement without metastasizing into the overall body of contract law and could quite comfortably have remained so confined. As will be seen from the ALI's internal debate over draft Section 90 and the *First Restatement's* examples of the application of promissory estoppel, Williston's argument to his colleagues ultimately ended up turning in critical respect quite simply on the treatment of intrafamily gifts. On that basis, a revolution in contract doctrine was unleashed. This Article accordingly concludes that the doctrinal legitimacy of promissory estoppel, and of many of the cases decided on the basis thereof, is open to serious question.

I. GENESIS

The ALI was expressly organized to reduce the uncertainty and complexity of American common law by distilling out of published cases generalized principles and rules and promulgating them in the form of "restatements" of the various substantive areas of the common law.²⁶ One of those areas was contracts, and Samuel Williston was named as the official Reporter to lead the drafting effort.²⁷

From its inception, the ALI's goal, at least internally, was not merely descriptive but also aspirational. Though "[c]hanges in the law which are, or which would, if proposed, become a matter of general public concern and dis-

²⁶ See *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. pt. I, at 6, 13, 40–41 (1923) [hereinafter *Report of the Committee*].

²⁷ See *id.* pt. II, at 4–5.

cussion should not be considered, much less set forth, in any restatement of the law such as we have in mind,”²⁸ the drafters of the various restatements were encouraged to “take account of situations not yet discussed by courts or dealt with by legislatures but which are likely to cause litigation in the future.”²⁹ In cases of conflicting precedent and authority, the ALI’s objective was to “make clear what is believed to be the proper rule of law,”³⁰ and to suggest modifications of existing law “on clear proof of its advisability.”³¹

In presenting the draft of the *First Restatement* to the assembled body of the ALI for discussion in late 1925, Williston described its text as being consistent with existing law: “The endeavor in this Restatement is to restate the law as it is, not as a new law.”³² When ultimately published, the *First Restatement* likewise presented itself as a descriptive document, rather than as an innovative or even revolutionary one: “The function of the courts is to decide the controversies brought before them. The function of the [American Law] Institute is to state clearly and precisely in the light of the decisions the principles and rules of the common law” to produce “a correct statement of what may be termed the general common law of the United States.”³³

Yet it was clearly in the aspirational sense that Section 90 of the *First Restatement* had been drafted. In explaining and defending his draft to his colleagues, Williston described Section 90 with rather extraordinary modesty as “a broader general rule than has often been laid down.”³⁴ What he and his advisor, Arthur Corbin,³⁵ had in fact done was to venture significantly beyond the law as it was to craft a broad catchall provision of far-reaching scope, covering not only certain existing exceptions to the consideration requirement, but also untold further exceptions that the authors imagined, and perhaps hoped, might be carved out in the future. Section 90 was born: “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”³⁶

²⁸ *Id.* pt. I, at 15.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 18.

³² Samuel Williston, *Discussion of the Tentative Draft, Contracts, Restatement No. 1*, 3 A.L.I. PROC. 159, 159 (1925).

³³ RESTATEMENT OF THE LAW OF CONTRACTS intro., xi, xiv (AM. LAW INST. 1932).

³⁴ SAMUEL WILLISTON, AM. LAW INST., COMMENTARIES ON CONTRACTS: RESTATEMENT NO. 2, at 14 (1926).

³⁵ See *infra* Part IV.A.

³⁶ RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932). The *Restatement (Second)*, drafted during the 1960s and 1970s and finally promulgated in 1981, modified Section 90 in several respects, the cumulative effect of which was to widen yet further the scope of the provision.

II. TOPOGRAPHY

To understand the extent to which Section 90 departed from the tenets of classical contract law, it is necessary first to review its technical topography. That review will be interlaced with observations as to the propriety of its structure.

A. *No Consideration Required*

What is immediately noticeable and most striking about this *First Restatement* provision, of course, is that it made no mention of consideration being provided by the promisee to the promisor as compensation for that which has been promised.³⁷ On the face of Section 90, promisors need not have received any compensation for the legal liability to which they are now potentially subject.³⁸

It has been fashionable among not a few commentators either subtly or overtly, to evidence disdain for the consideration requirement of classical contract law as a mere technical formality, a morally meaningless and unnecessary hurdle to the imposition of liability.³⁹ Nothing could be further from the truth. As a matter of morality, it is not obvious whatsoever that one person can fairly and legitimately invoke the power of the state to forcibly strip another person of his property, simply because that other person failed to fulfill a promise for which he received nothing by way of compensation. The consideration requirement goes to the moral core of enforcing promises in contract law: If someone has been paid for the promise they have made, if they themselves have received something of benefit, then it is fair and just to hold them to that promise, to their side of the bargain.⁴⁰ This ancient principle of *quid pro quo* descends from the very origins of western law.⁴¹ If there has been no *quid pro quo*, then either another moral foundation for the imposition of liability in contract must be found, or liability should be abjured.⁴²

³⁷ See RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932). This remained the same in RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

³⁸ See *supra* notes 3, 4.

³⁹ See, e.g., Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 454–56 (1937).

⁴⁰ Dranias, *supra* note 19, at 326; Powers, *supra* note 19, at 851.

⁴¹ See, e.g., 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 194–97 (2d ed., Cambridge Univ. Press 1968) (1898).

⁴² Under both Roman and early English contract law, an alternative means of rendering a promise legally enforceable was the “formal” promise of *stipulatio* in Rome, and the wax-sealed written “deed” in England. See, e.g., W.W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 434–43 (3d ed. 1963); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 634 (5th ed. 1956). In both cases, the formality of the process guaranteed both a high level of evidential certainty as to the existence and scope of the promise as well as the conscious, deliberate creation of a legally binding obligation by the promisor without the need to inquire as to whether consideration for the promise had

B. No Assent Required

Classical contract law requires that the promisor have offered to enter into a bargained-for exchange transaction with the promisee, sufficiently definite as to its material terms, which offer the promisee may through counterpromise or performance accept. Section 90 discards this requirement, purporting to impose liability without such mutual assent to an exchange transaction.⁴³

At first blush, the manner in which deletion of the mutual assent requirement might adversely affect the promisor is not necessarily evident. After all, is it not inherent in the act of promising that one has made a commitment, has expressed assent to an obligation?

Yet subtleties quickly cloud the picture in this respect. If there is no requirement of an exchange prerequisite to enforceability, then there is no need to spell out the material terms of any such exchange. All that matters is that some statement as to future intent was made by the “promisor,” under circumstances in which it is reasonably foreseeable that another party might rely, even if the statement remains vague or completely undefined in various material respects. Definiteness as to material terms is no longer necessary. Since the adoption of Section 90, numerous courts have now held that the definiteness requirement of classical contract law does not apply to promissory estoppel claims.⁴⁴

This may easily become operationally significant for the “promisor.” Much of day-to-day discourse between human beings involves future-oriented communication—plans, hopes, expectations, anticipations, intent. These future-oriented communications are not ordinarily subject to careful negotiation, precise specification of material terms, or the formality of mutually agreed quid pro quo. In other words, many of the processes and steps ordinarily present in contract formation that serve to put a promisor on notice that they are now entering upon a formal obligation, will not be present. Yet due to the absence of the classical definiteness requirement, someone making a vague, broad, or open-ended future-oriented communication may well become subject to promissory estoppel liability.⁴⁵ The risk of inadvertently tripping over the line into

been given. The formality of such process stands in sharp distinction to promissory estoppel, which purports to create potential liability for entirely informal, oral promises, including “promises” lacking sufficient definiteness to be considered an offer. *See Corbin, supra* note 39, at 454; *see also supra* text accompanying note 39. Modern American law has generally abandoned the seal as a means to create a formal, legally binding promise without inquiry into consideration. *See E. ALLAN FARNSWORTH, CONTRACTS 87–88 (2d ed. 1990).*

⁴³ For reasons that are not clear, while the *First Restatement* clearly labeled Section 90 as falling under the heading “Informal Contracts Without Assent or Consideration” (emphasis added), the *Restatement (Second)* changed the heading to simply “Contracts Without Consideration.” The notes thereto, however, make clear that mutual assent is not required for Section 90. *See supra* note 5.

⁴⁴ *See, e.g.,* *Blinn v. Beatrice Cmty. Hosp. & Health Ctr., Inc.*, 708 N.W.2d 235, 247 (Neb. 2006); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 275 (Wis. 1965).

⁴⁵ Consider, for example, a recent promissory estoppel case involving a mortgage foreclosure, *Aceves v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218 (2011). In *Aceves*, a bank had told a

legal liability becomes significantly aggravated. Precisely this potential for inadvertent triggering constitutes one of the principal reasons not to view the invention and propagation of Section 90 with sanguine equanimity.

From the taxonomical perspective, it is also worth noting that the imposition of civil liability in the absence of mutual agreement to enter into binding legal relations is strongly redolent of tort law.

C. *The Liability Standard*

A complex and thorny inquiry next arises as to how best one might describe the liability standard under Section 90.

Several fundamental questions complicate the matter. Is promissory estoppel best described as contract (as the drafters of the two *Restatements* would have it), as tort (as Gilmore described it),⁴⁶ or as a novel sui generis form of equitable remedy distinct from and on equal footing with both contract and tort (as argued by Eric Mills Holmes)?⁴⁷ If viewed as tort, is promissory estoppel best categorized as an intentional, negligent, or strict liability tort? This latter inquiry is in turn rendered less than immediately obvious by the fact that the harm in promissory estoppel cases arises not from a single event, but from the three-step composite of promise by promisor, followed by promisee's voluntary choice to change position in reliance on that promise, followed by nonperformance by promisor.⁴⁸ Moreover, the first of those three steps, the promise, differs from many other tortious acts in that it consists of communicative conduct that, at least from a third party objective standpoint, arguably suggests or invites reliance. Finally, is Section 90's requirement that the promisor have made

defaulting borrower that it would "work with" the borrower with respect to a potential loan modification. *Id.* at 225. The court held that, although the bank had not promised to undertake such a modification, the bank's words constituted a "promise to *negotiate*" regarding such a modification, and the bank had failed to honor such promise to negotiate prior to foreclosing. *Id.* at 226. Though the facts of the case indicate a motive for the bank to have made such statements in order to affect the borrower's choice of bankruptcy posture (and that the bank thus did not have clean hands), the case illustrates the potential breadth of promissory estoppel to impose liability with respect to vague, broad and open-ended future-oriented communications.

Indeed, the word "promise" is itself a loaded term. Much of the day-to-day interaction among individuals in which they indicate their thoughts, expectations, anticipations, or intentions with respect to the future will not formally have been designated by the speaker as a "promise." Yet as all of us know from early childhood interactions with siblings, peers, and parents, there is an important linguistic and moral distinction to be drawn between merely saying that one currently plans to do something, or will do something, and promising to do it. There is a solemnity and admonitory character to the words "I promise" that imports binding moral obligation. The use of the words "promise" and "promisor" in Section 90, if engaged in too casually, to describe thoughts, expectations, anticipations, or intentions with respect to the future, may tempt one to presuppose the very matter to be decided.

⁴⁶ See GILMORE, *supra* note 8, at 87.

⁴⁷ See Holmes, *supra* note 11, at 48.

⁴⁸ See *supra* notes 3, 4.

“[a] promise which the promisor should reasonably expect to induce” reliance⁴⁹ best thought of as constituting a negligence standard, or simply as specifying a foreseeability requirement of the type long familiar in tort law and applicable in both negligence and strict liability settings?⁵⁰ That is, is promissory estoppel best thought of as a negligence-based tort, or more properly as one that sounds in strict liability, subject only to the unconstrained discretion of the judge?

Although picking through the foregoing analytic briar patch would exceed the scope of this Article, two major observations can be made that illustrate the stunning extension of potential liability represented by promissory estoppel.

To begin with, contract is generally conceded to be a strict liability regime, at least with respect to performance pursuant to the contract.⁵¹ If promissory estoppel is to be viewed through the lens of contract, then it likewise imposes strict liability as to performance, yet without the need to allege and prove the existence of any contract in the classical sense of the word.

⁴⁹ The *First Restatement* required further that the action or forbearance, i.e. the reliance, be of “a definite and substantial character.” RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932). One of the alterations to Section 90 undertaken by the *Restatement (Second)* was to eliminate this requirement that the action or forbearance be of definite and substantial character, demoting it instead to the list of nonmandatory, permissive factors which a court might choose to weigh in making its injustice determination. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981); see also *infra* note 52. The obvious effect of the alteration was to expand the scope of potential liability under Section 90.

⁵⁰ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981) (“The promisor is affected only by reliance which he does or should *foresee* . . .” (emphasis added)).

Foreseeability is the crux of the proximate cause requirement for liability in tort. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 444 (2001) (“The most general and pervasive approach to proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct Conversely, he is not a proximate cause of, and not liable for injuries that were unforeseeable.”).

As to applicability of the proximate cause limitation in the strict liability context, see *id.* at 959; W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 79, at 560 (5th ed. 1984) (citing *Fowler V. Harper*, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001, 1005 (1932) (stating that strict liability in tort extends “only for proximate consequences”)).

⁵¹ See DOBBS, *supra* note 50, at 5.

Breach of contract is not in itself a tort. . . .

. . . Contract law is at least formally strict liability law. Most of tort law, on the other hand, is at least formally fault-based. Specifically, a person is often liable for a contract breach even if he is not at fault and made every effort to perform the contract as promised. But one is not ordinarily liable under tort law even for conduct that causes horrible injuries unless he is at fault in some way. The reasoning and the formal themes of tort law thus differ enormously from those of contract law.

Id.; see also RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (AM. LAW INST. 1981) (specifying that “[w]hen performance of a duty under a contract is due any non-performance is a breach,” without regard to whether the nonperformance was due to negligence or any other reason—the nonperformance in and of itself gives rise to liability irrespective of cause (though subject to various potential excuses for nonperformance, such as impracticability, etc.)).

If, to the contrary, promissory estoppel is to be viewed through the lens of tort, it represents a radical extension beyond the traditional scope of promissory liability under tort law, as reflected in the intentional tort of promissory fraud. Promissory fraud consists of making a promise without, at the moment of promising, any intention ever to perform. Just how closely promissory fraud and promissory estoppel are related to each other, and in precisely which respect promissory estoppel varies from the requirements of promissory fraud, is best seen through a head-to-head comparison of the elements of the two causes of action.

To take just one state's law as an example from among many, in California the elements of promissory fraud are:

- (1) a promise made regarding a material fact without any intention of performing it;
- (2) the existence of the intent not to perform at the time the promise was made;
- (3) intent to deceive or induce the promisee to enter into a transaction;
- (4) reasonable reliance by the promisee;
- (5) nonperformance by the party making the promise; and
- (6) resulting damage to the promise[e].⁵²

If one removes all of the intent-based elements of the preceding definition, and simply adds the unremarkable specification that the harm (i.e., the detrimental reliance) must have been reasonably foreseeable, one is left with a promise, upon which reliance was reasonably foreseeable, the occurrence of reliance, non-performance of the promise, and resulting damage to the promisee. In other words, start with the intentional tort, remove the intent requirement, and promissory estoppel results.

As observed by Randy Barnett and Mary Becker, tort law has traditionally declined to impose promissory liability in such circumstances.⁵³ Rather, in traditional tort law, liability for promise requires intentional mendacity, namely that the promisor already knows at the moment the promise is made that the promisor does not intend ultimately to perform as promised.⁵⁴ Viewed as a tort,

⁵² Behnke v. State Farm Gen. Ins. Co., 196 Cal. App. 4th 1443, 1453 (2011). California's law regarding promissory fraud has a long history and is statutorily anchored. *See, e.g.*, CAL. CIV. CODE § 1572(4) (West 1982); *id.* § 1710(4) (West 2009); Lawrence v. Gayetty, 20 P. 382, 384 (Cal. 1889); Berkey v. Halm, 224 P.2d 885, 890 (Cal. Dist. Ct. App. 1950).

⁵³ Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 491–92 (1987); *see also* RESTATEMENT (SECOND) OF TORTS § 522C cmt. e (AM. LAW INST. 1977) (stating that in order for strict liability for misrepresentation in connection with an exchange transaction to apply, “there must be a misrepresentation of fact [Strict liability] does not apply to misrepresentations of . . . intention” (emphasis added)); DOBBS, *supra* note 50, at 1369 (stating that there exists a general rule in tort law that “misrepresentations are not actionable unless they state ‘past or existing facts,’” and stating further that a “defendant’s present intent is a factual matter distinct from promises . . . , so a false statement of present intention is actionable if it meets all the other requirements for establishing fraud”).

⁵⁴ Barnett & Becker, *supra* note 53, at 492 (“For over a hundred years, . . . common law courts have repeatedly held that tort liability for promissory misrepresentation requires that the promise be a lie when made. The tort standard has become fairly rigid, and promissory estoppel is a relatively new, and certainly more flexible basis for liability.” (footnote omitted)).

Section 90 thus extends promissory liability well outside the precinct of existing law.

The only other limitation to which promissory estoppel is nominally subject, and that does not appear as an element of promissory fraud, is that the court must determine that injustice can only be avoided through enforcement.⁵⁵ As will be explored below, that vague, open-ended determination is in effect wholly discretionary in the hands of the court, and may, but is by no means required, to include any consideration of the promisor's state of mind or culpability of conduct with respect to the promise.⁵⁶

While reasonable minds may differ as to the queries raised above, the results of this head-to-head comparison of promissory fraud and promissory estoppel are taxonomically suggestive. Yet whatever conclusion one may reach as to how best to describe the nature of the claim and the applicable liability standard under promissory estoppel, it is clear that Section 90 represents a radical expansion of potential liability for promise. It permits the imposition of promissory liability despite the absence of classical contract and well beyond the bounds of the traditional tort for promissory fraud.

D. No Facial Requirement that the Reliance Be Reasonable

It is tempting to describe Section 90 as requiring that the promisee's reliance have been reasonable. Williston himself has done so.⁵⁷ To a rather surprising degree, the phrase "promisor should reasonably expect" is easily susceptible to casual cognitive transposition into a supposed requirement that the promisee reasonably have relied.⁵⁸ And yet that is not how Section 90 in fact

For a general discussion of the tort of promissory fraud, see Ian Ayres & Gregory Klass, *Promissory Fraud*, 78 N.Y. ST. B. ASS'N. J., May 2006, at 26.

⁵⁵ See *supra* notes 3, 4.

⁵⁶ See *infra* Part II.D.

⁵⁷ For example, during the ALI debate concerning draft Section 90, Williston spoke of the section being applicable "wherever a promise is reasonably relied upon." Samuel Williston, *Discussion of the Tentative Draft, Contracts Restatement No. 2*, 4 A.L.I. PROC. app. at 90 (1926) [hereinafter *ALI Debate on Section 90*].

Indeed, the title of Section 90 in the *First Restatement*, "Promise Reasonably Inducing Definite and Substantial Action," might inadvertently lead one to infer that "reasonably inducing" implies that the reliance itself must have been reasonable on promisee's part. RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932). Any such misapprehension is belied by the text of the section itself, in which the word "reasonably" simply modifies the word "expect," yielding "promisor should reasonably expect." *Id.* The provision reads in the same manner in this regard in RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

⁵⁸ Williston's advisor Corbin did so in his treatise published many years later. ARTHUR LINTON CORBIN, 1A CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW 235 (1963) (stating that Section 90 addresses "when a promise without any agreed consideration . . . is made enforceable by reason of a substantial change of position *in reasonable reliance* on it" (emphasis added)).

reads.⁵⁹ The section simply states that the promisor must reasonably expect the promise to induce action or forbearance.⁶⁰

Now it may be argued that reasonableness of the promisee's reliance is necessarily inherent when it is said that the promisor "should reasonably expect" the reliance to occur. Yet this would be too facile an inference. It runs counter to the *Restatement's* simple description of the foreseeability requirement as precisely that, "reliance which he does or should foresee," without any explicit imposition of a reasonableness requirement thereon.⁶¹

As a practical matter, reasonable minds might very well differ, both as to whether a true "promise" was in fact made and as to whether it was reasonable to engage in such reliance without having paid for the right to do so. The language of Section 90 as drafted would not bar such a suit, leaving it to judicial discretion as to whether injustice could only be avoided through enforcement. Though one might hope that judges would routinely accord heavy weight to the reasonableness of a plaintiff's reliance in their injustice analyses (and in many cases judges undoubtedly do so),⁶² results-oriented judges, motivated by their

For recent examples of cases that have done so, see *Dierker v. Eagle Nat'l Bank*, 888 F. Supp. 2d 645, 651 (D. Md. 2012); *FDIC v. Frates*, 44 F. Supp. 2d 1176, 1223 (N.D. Okla. 1999).

⁵⁹ The closest Section 90, at least in its current incarnation under the *Restatement (Second)*, comes to introducing reasonableness of promisee's reliance into the analysis is not in connection with the foreseeability requirement, but rather in connection with the final clause of Section 90 with respect to the avoidance of injustice. The *First Restatement*, which set forth Section 90 with four illustrative examples and no commentaries, simply stated an unconstrained maxim that a promise could be enforced under Section 90 "if injustice can be avoided only by enforcement of the promise." RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932). In the *Restatement (Second)*, a gloss was added in this regard to suggest factors that a court might choose to consider in making its injustice determination. Thus, the *Restatement (Second)* cites reasonableness of the promisee's reliance as only one among a handful of nonexclusive, nonmandatory factors that "may," but need not, be requisite to a finding that injustice can only be avoided through enforcement of the promise:

Character of reliance protected. The principle of this Section is flexible. The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981). The comment goes on to give an example that makes clear that not every factor need be present in order to find that injustice can be avoided only through enforcement. *See id.*

⁶⁰ *See supra* notes 3, 4.

⁶¹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (AM. LAW INST. 1981).

⁶² There exist numerous cases in which courts have, in effect, rewritten Section 90 to include a requirement that plaintiff's reliance have been reasonable, though they are constrained by neither the text of Section 90 nor the commentaries thereto to do so. For a sampling of recent such cases, see *Ruivo v. Wells Fargo Bank, N.A.*, 766 F.3d 87, 92 (1st Cir. 2014); *Ulrich v. Goodyear Tire & Rubber Co.*, 792 F. Supp. 1074, 1081 (N.D. Ohio 1991); *Russell v. Bd. of Cty. Comm'rs*, 952 P.2d 492, 503 (Okla. 1997).

own sense of injustice, may easily proceed to enforcement without any facial need to consider whether the reliance was itself reasonable.

That such potential plaintiffs exist or may exist is entirely to be expected. It is precisely this type of factual situation that presents some of the greatest concerns with the potential scope of promissory estoppel over the long term.⁶³

E. Avoidance of Injustice

The principal substantive check upon application of Section 90 is that it applies “if injustice can be avoided only by enforcement of the promise.”⁶⁴ This was, by design, an open-ended standard, vesting broad discretion in the judge.⁶⁵ The authors of Section 90 deliberately sought to create a restatement provision that could be employed across the entire spectrum of factual circumstances which might arise.⁶⁶ From the standpoint of the rule of law, such unconstrained discretion and the prospect of the standardless application of legal force justifiably raise great concern.⁶⁷

⁶³ The potential problem of the not necessarily substantively reasonable, yet nonetheless reasonably to be expected, plaintiff, coupled with the results-oriented judge, becomes more acute when one considers a later innovation in Section 90 undertaken by the *Restatement (Second)*. That innovation includes reliance by third parties, as distinct from reliance by the actual promisee, within the ambit of the section. See *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (AM. LAW INST. 1981) (“[P]romisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person . . .” (emphasis added)). Thus, a person indicating their thoughts, expectations, anticipations, or intentions with respect to their own future conduct must consider not only whether the person to whom they have actually spoken might foreseeably be a potential plaintiff, but whether there are any other third parties who might choose to rely on the statements made and later sue.

⁶⁴ *RESTATEMENT OF THE LAW OF CONTRACTS* § 90 (AM. LAW INST. 1932). This provision remained the same in the *Restatement (Second)*, though commentaries were added to Section 90 that suggested various factors which a court might choose to look to in making its injustice determination. See *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (AM. LAW INST. 1981).

⁶⁵ Disturbingly, Jimenez has noted in his review of more than 300 promissory estoppel cases during the 1980s that although “the data reveal that most judges require the existence of both promise and reliance before allowing a promissory estoppel claim to proceed, . . . surprisingly few judges require a plaintiff to show that the equitable principle of ‘justice’ has been satisfied.” Jimenez, *supra* note 11, at 669.

⁶⁶ See *ALI Debate on Section 90*, *supra* note 57, at 86 (remarks of Williston) (“Unquestionably, the word ‘injustice,’ . . . leaves a certain leeway . . . to the judge. . . . As to the specific inquiry what injustice means, it means something indefinite and the meaning is purposely left somewhat indefinite.” (emphasis added)).

⁶⁷ Though the *First Restatement* did not provide any guidance whatsoever as to the content of the term “injustice” in this context, the *Restatement (Second)* provided a nonexclusive, nonmandatory list of factors enumerated by the authors of the restatement that they envision potentially playing a role in such injustice determinations by judges, including the magnitude of the reliance, the reasonableness of the reliance, whether the setting is commercial, and “the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.” *RESTATEMENT (SECOND) OF CONTRACTS* § 90 cmt. b (AM. LAW INST. 1981). Notably absent from this list, or at least not expressed explicitly, is whether the defendant indicated their thoughts, expectations, anticipations, or intentions with re-

III. RAMIFICATIONS

The ALI's promulgation of the doctrine of promissory estoppel in Section 90 has had a metastatic and corruptive effect on the theoretical underpinnings of contract law.

Though the *First Restatement* set forth no more than the bare text of the section and four illustrative examples,⁶⁸ a passage in the comments to Section 90 in the *Restatement (Second)* reveals the extent of the departure from cognizable rules of yore. The passage casually proffers that, by founding liability upon essentially the sole criterion of reliance by a promisee, Section 90 "states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains."⁶⁹ As aptly remarked by Gilmore, this

remarkable passage in the *Restatement (Second)* § 90 Commentary explains how most "contract" cases, if not all of them, can be brought under § 90 so that resort to § 75 and consideration theory will rarely, if ever, be necessary. By passing through the magic gate of § 90, it seems, we can rid ourselves of all the technical limitations of contract theory.⁷⁰

Not only is Section 90 employed to dismiss mutual assent and consideration as unnecessary, but promissory estoppel has with variable success been utilized to circumvent the Statute of Frauds as well.⁷¹ Michael Metzger and Michael Phillips have even argued that the *Restatement (Second)*'s extension of

spect to their own future conduct for the deliberate, conscious purpose of inducing reliance by another.

⁶⁸ See *RESTATEMENT OF THE LAW OF CONTRACTS* § 90 (AM. LAW INST. 1932).

⁶⁹ *RESTATEMENT (SECOND) OF CONTRACTS* § 90 cmt. a (AM. LAW INST. 1981).

⁷⁰ GILMORE, *supra* note 8, at 90 (footnote omitted).

⁷¹ As to the Statute of Frauds, comment f to Section 178 of the *First Restatement* stated that a defendant might be barred on the basis of promissory estoppel from asserting the Statute of Frauds as an affirmative defense to enforceability if the defendant had orally promised to make a writing, there was reliance upon that promise, and assertion of the Statute would otherwise operate to defraud. *RESTATEMENT OF THE LAW OF CONTRACTS* § 178 cmt. f (AM. LAW INST. 1932). By the time of the *Restatement (Second)*, a new Section 139 in regards to the Statute of Frauds had been added precisely mirroring Section 90 and stating that the Statute of Frauds may simply be disregarded on the basis of promissory estoppel. *RESTATEMENT (SECOND) OF CONTRACTS* § 139 (AM. LAW INST. 1981). In an apparent nod to the fact that the various state legislatures have through democratically legitimate processes enacted Statutes of Frauds, and that there is thus controlling positive law on point in derogation of which Section 139 would at least facially operate, a comment to Section 139 concedes that "the requirement of consideration is more easily displaced than the requirement of a writing." *Id.* at cmt. b; see also Holmes, *supra* note 11, at 57–62; Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 78 (1981); Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1384, 1425–37 (1983).

Commentators have also argued that promissory estoppel has already in one prominent case de facto been, or could in future be, used to circumvent the parol evidence rule. See, e.g., Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 279–83, 303, 309, 361–63 (1996); Knapp, *supra* note 21, at 1316–30; Metzger, *supra*, at 1384, 1437–54.

promissory estoppel to encompass reliance not just by direct promisees but also by third parties carries at least the theoretical potential of being utilized by a court to impose “mass liability.”⁷² In the hypothetical factual situation they suggested, “if a troubled corporation promises the employees of an unprofitable plant in a one-industry town that the plant will continue to operate, local residents as well as the employees may suffer reliance losses when the corporation breaches the promise.”⁷³ In this situation, they argued, “one can easily flesh out the facts to create a mass of plausible third-party promissory estoppel claims.”⁷⁴

Prompted in good part by the advent of Section 90, one now stumbles across phrases in the academic literature along the following lines: “During the past forty years we have seen the effective dismantling of the formal system of classical contract theory.”⁷⁵; “As the contract rules dissolve . . .”⁷⁶; “classical model, even while its basis is crumbling on all sides”⁷⁷; and “The Failure of Classical Law.”⁷⁸ As described by Metzger,

A specter is haunting the law of contracts. The doctrine of promissory estoppel has evolved from relatively modest beginnings as a “consideration substitute” in donative promise cases to a force that threatens to engulf a major portion of contract law. . . . To the extent that this evolution continues, the future of many traditional contract rules, such as the parol evidence rule, is doubtful.⁷⁹

IV. JUSTIFICATION

Whether or not such sweeping pronouncements are ultimately borne out, they illustrate the theoretical tension between classical contract law and promissory estoppel. The question thus necessarily presents itself: Upon the basis of what mandate was such a radical shift in the tectonic plates of contract law theory undertaken?

Section 90 was sold by Williston to his American Law Institute colleagues on the strength of his argument that certain cases existed at that time in which judges had chosen to enforce promises despite the absence of bargained-for

⁷² Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 Sw. L.J. 931, 967 (1988). Metzger and Phillips “believe, although with some trepidation, that the overall benefits of extending promissory estoppel liability to third parties may exceed the costs to promisors and to society in mass liability cases.” *Id.* at 969. They cite a 1974 Wisconsin Supreme Court case that clearly states that a promisor can be directly liable under Section 90 to third parties who have relied, and that such liability is not limited solely to those who would qualify as intended third party beneficiaries under contract law. *See id.* at 956 (citing *Silberman v. Roethe*, 218 N.W.2d 723, 731–32 (Wis. 1974)).

⁷³ *Id.* at 968.

⁷⁴ *Id.*

⁷⁵ GILMORE, *supra* note 8, at 65.

⁷⁶ *Id.* at 87.

⁷⁷ P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 691 (1979).

⁷⁸ *Id.* at 693.

⁷⁹ Metzger, *supra* note 71, at 1383–84 (footnotes omitted).

consideration.⁸⁰ Moreover, argued Williston, it should be anticipated that myriad further exceptions to the consideration requirement might appear in the caselaw in future. In order preemptively to provide cover for any and all such exceptions, he proposed the text of Section 90.

A. *Williston and Corbin*

In regard to Williston's efforts to persuade his ALI colleagues to sanction Section 90, a prefatory question arises as to the role played by Arthur Corbin. Corbin served as Williston's official principal advisor during the *First Restatement* drafting process, and it has been strongly suggested by Gilmore that Corbin played an important part in adducing caselaw support for the new draft section. Yet certainty as to the extent of Corbin's influence in this regard remains somewhat more elusive than commonly conceded in the contemporary literature.

A typical example of the standard academic treatment is found, for example, in an article by Jay Feinman, who stated confidently, that during the *First Restatement* drafting process,

[o]nly the scholarly counterattack by Professor Corbin prevented the complete ascendancy of consideration: by confronting the [*First Restatement*] drafters with a multitude of reliance decisions, Corbin succeeded in carving out a place for promissory estoppel as an instance of the [*First Restatement*]'s residual category of "Informal Contracts Without Assent or Consideration."⁸¹

Feinman's sole citation for this proposition regarding Corbin's role, as is likewise the case with other commentators, is to Gilmore's *The Death of Contract*.⁸²

In those pages cited by Feinman, Gilmore wrote that during the *First Restatement* debate,

Corbin returned to the attack. At the next meeting of the Restatement group, he addressed them more or less in the following manner: Gentlemen, you are engaged in restating the common law of contracts. You have recently adopted a definition of consideration. I now submit to you a list of cases—hundreds, perhaps or thousands?—in which courts have imposed contractual liability under circumstances in which, according to your definition, there would be no consideration and therefore no liability. Gentlemen, what do you intend to do about these cases?⁸³

However, Gilmore did not personally cite to or analyze those cases. Gilmore's account of the matter is simply based on direct personal conversations he had had with Corbin many years earlier:

⁸⁰ See *infra* Part IV.B.

⁸¹ Feinman, *supra* note 24, at 679–80.

⁸² *Id.* at 680 n.10.

⁸³ GILMORE, *supra* note 8, at 63.

I reproduce the substance of conversations which I had with Professor Corbin during the early 1950s. Thus the conversations themselves took place twenty years ago and the events which Professor Corbin was describing had taken place twenty or thirty years before that. Obviously there is bound to be a certain amount of slippage between what really happened and this second-hand reconstruction of what happened.⁸⁴

Yet despite the informal, anecdotal character of this retelling, Gilmore's sweeping description has achieved near sacrosanct, unquestioned status by virtue of frequent repetition by other commentators.⁸⁵

Corbin's oral description to Gilmore concerning his role during the *First Restatement* drafting process may very well be accurate. It is more problematic, however, as a matter of formal academic scholarship to rely solely on such an oral account, without inquiry into the particular caselaw that may or may not have been cited, as the essential authority for a revolutionary new doctrine. This is particularly so where the caselaw is directly and independently accessible.

Corbin's own principal treatise on contract law was not published until 1950, many years after the *First Restatement*.⁸⁶ It is thus not known for certain what "hundreds, perhaps or thousands"⁸⁷ of cases he might have discussed with colleagues at the time of the *First Restatement*. Nonetheless, his treatise identifies and discusses at length "[t]he antecedent decisions that justified the statement, in explicit terms made in Section 90."⁸⁸ It is quite likely that this portion of his treatise sets forth whatever cases he may have cited to his ALI colleagues decades earlier.

Review of this material reveals that the various categories and individual cases featured in Corbin's 1950 treatise were broadly consistent, and indeed in many instances essentially congruent, with those cited by Williston.⁸⁹ Detailed

⁸⁴ *Id.* at 128 n.135.

⁸⁵ A rare exception to the typical treatment is found in DeLong, *supra* note 11. DeLong maintained a certain degree of amused distance to this account of Corbin's role, writing that "[t]he little story of how Section 90 came to be has now achieved the status of an originary myth among contracts scholars." *Id.* at 962. He went on to write that "[i]nterested readers may consult the sacred text in Gilmore, *Death of Contract*" and that "[d]oubt was recently cast on Gilmore's account of Williston's and Corbin's respective roles in this drama by evidence that Williston himself drafted Section 90, as noted in a letter from Arthur L. Corbin to Robert Braucher, the original Reporter for the Second Restatement of Contracts." *Id.* at 962 n.55.

⁸⁶ See CORBIN, *supra* note 58, at III.

⁸⁷ See *supra* text accompanying note 83.

⁸⁸ CORBIN, *supra* note 58, at 251. For a discussion of the material, see generally *id.* at 250–71.

⁸⁹ See *id.* at 250–71. Along with certain individual cases, Corbin's categories were: (i) "mortgagee's promise of an extension of time, or to reconvey, or to divide the proceeds of sale of land," *id.* at 254; (ii) "promise to give a license" for the use of land, i.e., *Rerick v. Kern*, 14 S. & R. 267 (1826) and its progeny, *id.* at 254 & n.70; (iii) "promise by a debtor to deliver property as further security for the debt," *id.* at 254–55; (iv) marriage, *id.* at 255; (v) bonuses and pensions to employees, though Corbin concedes that "in most such cases, a bar-

forensic analysis of Corbin's citations must, of necessity, be set forth separately due to limitations of space. Yet his thinking and analysis were along the same general lines as that articulated decades earlier by Williston.⁹⁰

What we do know is that the written arguments made during the process of drafting and defending the text of the *First Restatement* were penned by Williston, the official Reporter for the *First Restatement*.⁹¹ Moreover, Williston had in 1920 published his own massive treatise on contract law, constituting the leading reference source of the day and coining for the first time the term "promissory estoppel."⁹² That treatise served as the essential touchstone for Williston's explication of the draft *First Restatement*. Williston's Commentaries, in which he advanced his doctrinal analysis and mounted his defense of Section 90, refer repeatedly both to the text of, and to cases cited in, his own treatise.⁹³ It was Williston who argued the case for draft Section 90 in the ALI's *First Restatement* debate.⁹⁴ Whatever role Corbin may have played, the principal case for Section 90 and the doctrine of promissory estoppel is found in the writings of Williston. It is to those writings that the present Article is accordingly addressed.

B. *Alternative Approaches to the Treatment of Heterodox Cases*

Williston identified certain cases in which judges had chosen to enforce promises despite the absence of bargained-for consideration. Several approaches lay to hand in how to address those cases and their deviance from the strictures of classical contract law.

First, the mere fact a judicial opinion has been handed down does not mean that the decision was well reasoned, was deferential to relevant precedent, correctly stated or applied precedent, or gave due weight to the full spectrum of factual circumstances of the case rather than selective emphasis on certain facts to bolster a desired conclusion. As Gilmore put it, the Holmesian philosophy towards such heterodox decisions would simply be to treat them as "bad cases."⁹⁵ Yet Holmes' bracing repudiation of doctrinal deviance was no longer the temper of the times.

A second approach to such heterodox cases would have been to attempt reconciliation between those decisions and the rules of classical contract law.

gaining exchange may reasonably be discovered," *id.* at 256–57; (vi) guarantees and indemnities, *id.* at 257; (vii) irrevocable offers, limited to "some cases" in which "the offer has been held to be irrevocable after action in reliance upon it by the offeree that did not constitute a part of the requested consideration," *id.* at 260–61; (viii) gratuitous bailees, *id.* at 261; and (ix) promises to procure insurance, *id.* at 265.

⁹⁰ In a separate piece, the author will review Corbin's 1950 treatise in this regard.

⁹¹ See *Report of the Committee*, *supra* note 26, pt. II.

⁹² See WILLISTON, *supra* note 2.

⁹³ See WILLISTON, *supra* note 34, at 12.

⁹⁴ See *ALI Debate on Section 90*, *supra* note 57, at 65–114.

⁹⁵ GILMORE, *supra* note 8, at 63.

As recounted by Gilmore, this was the approach favored by Judge Cardozo, who pursued in his decisions “an expansive theory of contract” and “delighted in weaving gossamer spider webs of consideration.”⁹⁶ Yet in the debate, wrote Gilmore, neither did this approach prevail.⁹⁷

Third, one might draft a single new exception to the consideration requirement sufficiently broad to cover any and all preexisting exceptions in the caselaw. This, of course, was Section 90.

Fourth, one might simply recognize a discrete handful of exceptions to the consideration requirement, such exceptions being based upon public policy or other compelling justifications. Gilmore did not discuss such an approach in his description, but it was evidently a principal alternative to Section 90 during the ALI debate. As stated by Williston during the debate:

The first thing that seemed possible was to take these different sets of cases and say, simply grouping them together, that there were exceptions to the rule [requiring consideration] But I think the complete answer to that and the one that satisfied the committee is this statement . . . :

“If the law is to be simplified and clarified, it can be done only by coordinating the decisions under general rules, not by stating empirically a succession of specific cases without any binding thread of principle.”⁹⁸

Williston argued that not only known, preexisting exceptions to the consideration requirement should be taken into account, but also unnamed others that he hypothesized might be invented in the future:

You can enumerate all the classes of cases which I have enumerated and have a number of special instances, and then another instance will come up and it will not be covered by the Restatement. If the law is to be simplified, it seems to me it must be done by coordinating the classes of cases rather than by enumerating a lot of special instances. That is the reason why I defend Section [90].⁹⁹

The simplification juggernaut was not to be impeded.

Williston was pressed on this point by his ALI colleague, Victor Morawetz, who raised concern as to the breadth of the proposed Section 90: “The purpose of these Restatements is to clarify the law, to make it more certain. It seems to me that this Section would have the contrary effect. If I were a judge on reading this section I should not know where to draw the line.”¹⁰⁰

⁹⁶ *Id.* at 62.

⁹⁷ *Id.* at 63.

⁹⁸ *ALI Debate on Section 90*, *supra* note 57, at 108 (remarks of Williston) (quoting WILLISTON, *supra* note 34, at 19).

⁹⁹ *Id.* at 107. Williston’s actual reference was to draft Section 88, later renumbered as Section 90.

¹⁰⁰ *Id.* at 100. Morawetz’s prescience in this regard was reflected years later in the introductory comment to Topic 2, “Contracts Without Consideration,” in the *Restatement (Second)*: “In the absence of bargain, the factors bearing on the enforcement of promises appear in widely varying combinations, and no general principle has emerged which distinguishes the binding promise from the non-binding.” RESTATEMENT (SECOND) OF CONTRACTS § 81 topic 2, intro. note, at 207 (AM. LAW INST. 1981).

In response, Williston reiterated his view as to the uncontained number of possible exceptions to the consideration requirement: “It [(the liability rule of Section 90)] cannot be made more definite. The variety of circumstances that may arise is such that it is impossible to enumerate them all.”¹⁰¹ This was an expansive assertion indeed.

V. THE PREEXISTING CASELAW

A review of the cases upon which Williston’s broad claim was founded reveals that the judicial decisions were in fact rather discrete and compartmentalized. Moreover, not a few of the cases cited by Williston (and by Corbin in his treatise) to prove the necessity of adopting Section 90 could easily have been explained under traditional contract law principles. Many others appear to be founded on clear and easily identifiable public policy grounds, or rooted in practical concerns of the type that impel courts to create exceptions to general legal rules.

It is accordingly worth parsing through the cases to identify just how many and what sort of cases had given rise to enforcement in the absence of consideration. The core of this Article’s inquiry will be whether those cases required the legal academy to sweep aside the pillars of contract law, as was done with Section 90, or whether a more modest approach might have sufficed.

The records to be consulted in this respect consist of the Commentaries¹⁰² and Treatise¹⁰³ prepared by Williston to expound the rationale for the various provisions of the draft *First Restatement*, Williston’s principal 1920 treatise on contract law¹⁰⁴ (to which the Commentaries and First Restatement Treatise liberally refer), and the transcript of the Section 90 debate in which Williston defended his draft against all comers.¹⁰⁵ In particular, the casenotes in Williston’s Commentaries set forth the essential justification, in his view, for the breadth of Section 90.

A. *Unilateral Contract*

At the outset, it is worth noting that many of the cases to be discussed in which a promise has been made, seeking not a counterpromise but rather an actual act or forbearance by another, might very well be explained and justified as unilateral contracts under the preexisting doctrines of classical contract law. This is particularly so if one eschews a narrow and artificially cramped conception of consideration as solely the monetarily measurable or otherwise obvious-

¹⁰¹ *ALI Debate on Section 90*, *supra* note 57, at 100.

¹⁰² *See generally* WILLISTON, *supra* note 34.

¹⁰³ *See generally* SAMUEL WILLISTON, *CONTRACTS: TREATISE NO. 1(A) SUPPORTING RESTATEMENT NO. 1* (Am. Law Inst. 1925).

¹⁰⁴ *See generally* WILLISTON, *supra* note 2.

¹⁰⁵ *See generally* *ALI Debate on Section 90*, *supra* note 57.

ly tangible,¹⁰⁶ and is willing to find implied bargain in cases where the quid pro quo has not been expressed explicitly.¹⁰⁷ As to these cases, it can be strongly argued that there was no compelling need to formulate any doctrinally heretical novum by way of decisional justification.

Williston was pressed on this point during the debate by his colleague Mr. Morawetz:

In order that this section may apply the promisor must reasonably expect to induce certain definite action to be taken. Now, it seems to me that instead of dealing with this matter under the head of consideration, it would go more appropriately under the head of offers. What happens in these cases is that the law holds that if a man makes a promise to induce another to do a certain act, he will be held to have made an offer of a unilateral promise to take effect upon the performance of the act.¹⁰⁸

To this, Williston responded,

I want to cover more in Section [90] than offers. I understand perfectly well what you have in mind, as offers for unilateral contracts . . . but this section covers a case where there is a promise to give and the promisor knows that the promisee will rely upon the proposed gift in certain definite ways.¹⁰⁹

This is a very fine distinction. In both Morawetz's hypothetical and Williston's hypothetical, a promise has been made and relied upon. The difference lies in the fact that in Morawetz's hypothetical, the promise was made "to induce another to do a certain act"—that is, the promise was made with the intention to induce the reliance—whereas Williston in his own hypothetical uses the words "give" and "gift," and indicates simply that the promisor "knows that the promisee will rely," as distinct from the promisor intending and having the purpose of inducing the promisee to rely.¹¹⁰ Morawetz made a tremendously strong substantive argument. Moreover, Williston appears to have conceded, or at least not contested, the point that in cases where the promise is made "to induce" the reliance, a unilateral contract may be present. In such cases, no novel alternative theory of liability such as promissory estoppel might be necessary to enforce the promise. Thus confronted, Williston in effect justified promissory estoppel as designed to address cases not falling within the ambit of unilateral contract.

¹⁰⁶ An early example of such a broader view of consideration, founded upon what modern economists would today recognize as "utility" to the individual promisor, irrespective of monetizable or otherwise tangible value to the promisor, is to be found in Lord Grey's Case (1567). See J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 492–93 (1986).

¹⁰⁷ Implied-in-fact contracts have, of course, been recognized by the courts for centuries and constitute a time-honored component of classical contract law. See, e.g., PLUCKNETT, *supra* note 42, at 648 (describing a seminal early instance of implied-in-fact contracts found in *Warbrook v. Griffin* (1610) 123 Eng. Rep. 927; 2 Brownl. 254).

¹⁰⁸ *ALI Debate on Section 90*, *supra* note 57, at 88.

¹⁰⁹ *Id.* at 89.

¹¹⁰ *Id.* at 88–89.

Morawetz's point is of no small significance, as a number of the decisions cited by Williston (and decades later by Corbin in his treatise) might well be explained on the basis of unilateral contract, irrespective of the language actually used by the court in a given case.¹¹¹

B. Waiver

Turning now to cases cited by Williston as falling within the concept of promissory estoppel, one of the principal categories he identified is waiver.¹¹² Though the term waiver is susceptible of various uses and meanings, one of its notable applications is in the enforcement of promises in modification of contract without consideration.¹¹³ Such waivers can take the form of excuse of performance not yet due from the counterparty, excuse of future conditions, and the relinquishment of defenses not yet matured.¹¹⁴ Even before the *First Restatement* effort, Williston had in his major 1920 treatise on contract law described this application of the concept of waiver in contract law.¹¹⁵ Moreover, distinguishing estoppel relating to promises as to future conduct or events from estoppel relating to misrepresentations of existing fact, Williston had created the taxonomical classification of "promissory estoppel" and situated such use of the waiver concept therein.¹¹⁶

It is worth noting, however, that the most generalized definition of waiver is the intentional relinquishment of a known, existing right.¹¹⁷ That is, no new, fresh obligation is being imposed on the promisor out of the clear blue sky; rather, the promisor is simply relinquishing a right to which they were already entitled. This is certainly true of the applications of waiver cited by Williston as constituting promissory estoppel.

Therein, arguably, lies the moral and doctrinal key to such cases. When a right or condition is waived within an existing contractual relationship, the protective prerequisites of consideration and mutual assent have already been satisfied at the time the contract was entered into. The waiving party has not found themselves subjected to the imposition of a contractual relationship they might

¹¹¹ This general point that many promissory estoppel cases might rather have been decided on the basis of classical contract law unilateral contract principles has since been noted by others as well. See, e.g., Barnett & Becker, *supra* note 53, at 455–57; Powers, *supra* note 19, at 856–57.

¹¹² See *ALI Debate on Section 90*, *supra* note 57, at 107.

A lot of cases that go under the name of waiver, are really cases of promises falling within this description. They are promises to perform in spite of some non-performance of a condition or requirement of the contract. Relying on a promise, the condition is not complied with, and yet the promisee recovers.

Id. (remarks of Williston).

¹¹³ 2 WILLISTON, *supra* note 2, at 1312.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1311–14.

¹¹⁶ *Id.* at 1312.

¹¹⁷ *Id.* at 1310.

not have desired or expected. They have not been ferried across the river Styx to the Hades of strict liability in contract against volition and anticipation.

In light of the fact that the waiving party has already enjoyed such protections, and has voluntarily chosen to enter into a contractual relationship, much less is now at stake from an equitable perspective in enforcing a waiver without consideration. There is less risk that the judge might through enforcement without consideration do substantial injustice to the promising party.

This is particularly so when one considers that within an existing contractual relationship, there may be myriad indirect, deferred, and nonobvious, yet nonetheless quite important, reasons for a party to grant a modification or waiver despite the facial absence of consideration. Above all else there is the universally familiar motto, “what goes around comes around.” A contracting party knows that there may well arise circumstances over the course of the relationship in which they themselves would require or desire some concession from the other party. Only by showing similar flexibility and generosity oneself can one preserve the type of relationship in which the same courtesy may be returned in the future. An explicit *quid pro quo* in the normal contractual sense may not be present, but there might exist a subtle, implied, indefinite one in the social sense—I shall treat you with grace and decency when it is important to you now, in the hope and expectation that you shall do the same for me should it ever become necessary in the future.

The consequence of the foregoing is that the use of promissory estoppel within an existing contractual relationship under the rubric of waiver raises fewer potential concerns as to whether equity is being done than does the use of promissory estoppel to create initial contractual liability where none had existed before. Moreover, as we have seen from Williston’s 1920 treatise, there is no need in this regard to create a new broad catchall promissory estoppel provision to provide this functionality—the concept of waiver had already been developed and anchored in classical contract law before Section 90 was ever drafted.

Fact patterns falling within this waiver application of promissory estoppel include those where a debtor’s promise to pay or not to raise the Statute of Limitations defense induces a creditor not to bring legal action within the statutory period.¹¹⁸ They also include a promise by a foreclosing party that they would not stand on the statutory limitation on the period of redemption, which promise induces the other party not to redeem in timely manner.¹¹⁹ As Williston explained,

In these cases, . . . no new right is created. The court does not sustain an action on the promise; it reaches the desired result by allowing a defen[s]e to an action

¹¹⁸ WILLISTON, *supra* note 2, at 309.

¹¹⁹ *Id.* at 310.

or allowing an original right to be enforced by merely prohibiting the interposition of a defense. They properly fall under the head of waiver¹²⁰

Williston also gives as “a frequent illustration” the agreement by a buyer of goods to accept delivery of the goods on a date later than initially scheduled.¹²¹ Even though no consideration was given for this concession by the buyer, if the seller in reliance thereon does not deliver on the initially scheduled date but rather on the later agreed date, buyer’s promise to accept the goods on that later date is binding.¹²² “The law is clear that in any case where a party to a contract agrees to give up a possible future defense or forgo the advantage of a condition of an existing contract provided for his benefit, the promise is binding if the promisee relying thereon changes his position.”¹²³

C. Charitable Donations & Marriage

Moving on from waiver, two classes of decisions cited by Williston in support of Section 90 could easily have remained classified as exceptions to the consideration requirement on public policy grounds. These are gratuitous promises to make charitable subscriptions¹²⁴ and gratuitous promises in contemplation of marriage in reliance upon which marriage takes place.¹²⁵ In many areas of contract law there have arisen limited exceptions to general rules without any need to abandon the general rule altogether. It seems highly anomalous and unnecessary to wholly jettison core requirements of classical contract law, such

¹²⁰ *Id.*; see also WILLISTON, *supra* note 34, at 19.

¹²¹ WILLISTON, *supra* note 34, at 19.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 16. With respect to charitable subscriptions, the interests of the broader community are positively affected by the donation. It is true that such financial benefit to the broader community comes at the expense of aggrieved relatives of the testator/promisor. Yet even though the testator’s promise to make an intended charitable gift may not have complied with the normal prerequisites for valid testamentary disposition, it is not clear that the aggrieved relatives have a strong basis for asserting the moral superiority of their claim to the disputed assets—through the promise to make a charitable donation, the testator did express an intent and desire as to disposition of what are, after all, testator’s own assets. Though generally not explicitly articulated by the courts, equitable considerations along the foregoing lines presumably inform the judicial policy preference for enforcing promises to make charitable donations that is readily observable in the reported cases.

¹²⁵ *Id.* at 19. Two considerations come immediately to mind as to why the courts might show willingness to enforce a nonbargain promise in reliance upon which a marriage is entered into. First, the magnitude of the reliance is enormous—marriage affects a spouse in the most intimate manner and throughout all aspects of life. Moreover, in the era such cases were decided, marriage was most often for life. Second, the institution of marriage was favored and supported on a broad societal basis, such that one might observe a preference for enforcing promises tending to encourage or support financially stable marriages.

As aptly observed by Jean Powers, in other cases, where a promise has been made for the specific purpose of inducing, and is conditioned upon, marriage, for example a parent promising to transfer property to a couple if they marry, the subsequent marriage is performance in acceptance of a unilateral contract and there is no need to decide the matter on any other, novel doctrinal basis. Powers, *supra* note 19, at 869.

as consideration, offer, and acceptance, merely because the courts might have found a small handful of policy-driven exceptions appropriate in certain limited factual situations. A more modest approach to these specific situations would be to continue to treat them as discrete exceptions to the consideration requirement on grounds of public policy.¹²⁶

D. Gratuitous Promise to Convey, Plus Improvements to, Real Estate

The third major category of cases cited by Williston in favor of Section 90 are those where a promise relating to a parcel of real property has been made, either to convey the property or to refrain from foreclosing upon a mortgage, in reliance upon which another party has made improvements to the property.¹²⁷ At first blush, the obvious theory and means of remedial recourse in such a situation might appear to lie in restitution. Yet it is often difficult or impossible to remove and return the improvements to real property to the party who made them. Moreover, as to restitution by way of monetary recompense, it may be difficult to ascertain the incremental value added to the real property by the improvements. This is a class of cases where a legal remedy might appear appropriate on the equities of the situation, and a remedy would be available under other, existing legal doctrines, but for the presence of practical impediments to the imposition of the remedy. Presumably in response to these practical difficulties, a body of decisions had developed over time in which promises had been enforced under such circumstances. A more modest approach to these cases than Section 90 would be to treat them as discrete exceptions to the consideration requirement on grounds of failure of an otherwise appropriate remedy.

E. Gratuitous Bailees

The fourth major category cited by Williston covers promises by gratuitous bailees, such as promises to obtain insurance on bailed items.¹²⁸ To evaluate the force of Williston's argument in this regard, it is necessary to briefly touch upon the historical origins of the curious and unusual field of bailment law.

¹²⁶ The judicial inclination toward enforcing charitable donations and promises in consideration of marriage is noted by the *Restatement (Second)* itself, which went so far as to fashion a new Subsection 90(2): "A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance." *RESTATEMENT (SECOND) OF CONTRACTS* § 90(2) (AM. LAW INST. 1981). The comments note that "American courts have traditionally favored charitable subscriptions and marriage settlements." *Id.* § 90 cmt. f.

¹²⁷ WILLISTON, *supra* note 34, at 15. As Williston had earlier written in his principal treatise: "It is to be noticed that in enforcing conveyances in such cases, equity regards only possession of the land and improvements upon it. No other detriment would suffice. It is probable that the actual delivery of possession of the land has been regarded as analogous to completing a gift." WILLISTON, *supra* note 2, at 312 (footnote omitted).

¹²⁸ WILLISTON, *supra* note 34, at 18.

Bailment law developed in the Anglo-Saxon world a number of centuries ago, during roughly the same doctrinally fertile era in which the modern form of contract law began to emerge from earlier, medieval forms.¹²⁹ As in the biological arena the duck-billed, beaver-tailed platypus incongruously incorporates into a single species anatomical elements of apparently disparate provenance, the law of bailments over time came to comprise a curious hybrid set of principles and standards drawn from both tort and contract.¹³⁰ The relevant period of inquiry in this Article, of course, is bailment law as it existed at the time of Williston's writing. The description that follows therefore reflects bailment doctrine in the years leading up to the *First Restatement*.¹³¹

Writers at the time indicated that, with some exceptions, a bailment involved a bailment contract, predicated upon the mutual assent of the bailor and the bailee.¹³² It was understood that a gratuitous promise to become a bailee is a

¹²⁹ On this period of development in the common law, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 317–50 (4th ed. 2002); PLUCKNETT, *supra* note 42, at 633–51. A number of early cases that led to further developments in contract law involved bailments. See, e.g., BAKER & MILSOM, *supra* note 106, at 358 (describing *Bukton v. Tounesende* (The Humber Ferry Case) (1348)).

¹³⁰ The seminal case in which bailment law gelled into classical form was *Coggs v. Bernard* (1703) 92 Eng. Rep. 107; 2 Ld. Raym. 909. Though the opinion and the typical citation form to the case use the spelling “*Bernard*,” the underlying record shows the actual party name to have been “*Barnard*.” BAKER, *supra* note 129, at 395 n.96. It is evident from the opinions in the case that the bailee acted negligently, thus giving grounds for the imposition of liability without consideration having been given by the bailor. Nonetheless, and muddying the waters as to precisely the doctrinal foundation upon which the bailment liability was predicated, Chief Justice Holt also went on to say that “the owner’s trusting [the bailee] with the goods is a sufficient consideration to oblige him to a careful management.” *Coggs*, 92 Eng. Rep. at 109, 113, 2 Ld. Raym. at 912, 919. Where there is no bargained-for quid pro quo, we would not today say that the delivery of the bailed items in and of itself constitutes consideration.

¹³¹ See generally WILLIAM B. HALE, HANDBOOK ON THE LAW OF TORTS (1896); JOHN D. LAWSON, THE PRINCIPLES OF THE AMERICAN LAW OF BAILMENTS (1895); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS (James Schouler ed., 9th ed. 1878).

Although certain evolutions of bailment doctrine have been attempted or occurred in more recent decades, at least in academic commentary, many courts continue to rely in part or in whole on the conceptual framework of earlier times. R.H. Helmholz, *Bailment Theories and the Liabilities of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. KAN. L. REV. 97, 99 (1992). If those recent evolutions are to be considered, it is noteworthy that they tend to push bailment doctrine away from contract. Helmholz states that a “property-based definition of bailments is the most accurate,” in which liability would be predicated on negligence and not on the basis of strict liability: “Negligence is the normal rule for cases involving accidental loss or damage to the property of others” *Id.* at 97, 99. Helmholz refers to the “older, but now discredited, view that treated bailments as contractual in nature.” *Id.* at 99. For a recent hornbook statement of the relevant law, see 2A STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS 831–32 (2009) (“It is firmly established that a bailee’s liability arises only from some act of negligence on his part.”).

¹³² See STORY, *supra* note 131, at 2–4; see also LAWSON, *supra* note 131, at 12, 23. As to exceptions, Lawson points out: “A bailment may be created without any express agreement to receive and hold for a particular purpose. It may arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously or by mistake.” *Id.* at 10–11.

nudum pactum, unenforceable for lack of consideration.¹³³ However, the act by a bailee of accepting and taking physical possession of personal property from the bailor was said to give rise to a form of trust, from which arose a duty on the part of the bailee to exercise due care with respect to the bailed property.¹³⁴ This was true even if no consideration for the bailment was present—delivery of one person’s property into the physical custody of another gave rise to a duty.¹³⁵

The level of care owed by the bailee as a result of this trust relationship was a function of the respective interests of bailor and bailee in the bailment— if the bailment was solely for the benefit of the bailee, then a high degree of care was owed and slight negligence would thus trigger liability; if both bailor and bailee benefited from the bailment, then an ordinary degree of care was owed, and ordinary negligence would trigger liability; if solely the bailor benefited from the bailment, then the bailee owed only a low degree of care and gross negligence would be required to trigger liability.¹³⁶ It was understood that if the bailee had not exhibited the requisite degree of negligence, no liability would lie with the bailee for loss or damage to the bailed property.¹³⁷ The bailee’s duty to exercise due care, at whichever applicable level, attached to acts contemplated by the parties as falling within the scope of the bailment agreement.¹³⁸ Thus, if the bailee expanded the scope of the bailment by agreeing to do certain acts in connection therewith, the bailment duty of care would attach to those promised acts.¹³⁹

As to promises by gratuitous bailees, Williston stated in his *First Restatement Commentaries* that “[f]requently these cases can be supported on the ground of tort but not always. A striking recent case is *Siegel v. Spear*.”¹⁴⁰ In *Siegel*, liability was imposed on a bailee who had promised but then failed to obtain insurance on furniture delivered to bailee to hold in a warehouse.¹⁴¹ “There is no element of consideration in the case, the bailment being gratuitous,” wrote Williston.¹⁴² “There is simply reliance.”¹⁴³

In stating that not all bailment cases could be supported on the ground of tort, Williston was presumably driving at the applicable standard of liability—

¹³³ LAWSON, *supra* note 131, at 24; STORY, *supra* note 131, at 162.

¹³⁴ LAWSON, *supra* note 131, at 9–10, 24; STORY, *supra* note 131, at 4–5.

¹³⁵ LAWSON, *supra* note 131, at 24; STORY, *supra* note 131, at 162.

¹³⁶ LAWSON, *supra* note 131, at 13–14. More modern doctrine has moved toward a single, unified negligence standard for bailment actions in replacement of the earlier, trifurcated gross/ordinary/slight negligence standard in currency at Williston’s time. See Helmholtz, *supra* note 131, at 97.

¹³⁷ See, e.g., LAWSON, *supra* note 131, at 22, 27; STORY, *supra* note 131, at 173.

¹³⁸ See, e.g., LAWSON, *supra* note 131, at 30; STORY, *supra* note 131, at 34.

¹³⁹ STORY, *supra* note 131, at 157, 173.

¹⁴⁰ WILLISTON, *supra* note 34, at 18.

¹⁴¹ *Siegel v. Spear & Co.*, 138 N.E. 414, 415 (N.Y. 1923).

¹⁴² WILLISTON, *supra* note 34, at 18.

¹⁴³ *Id.*

decisions predicated upon negligence would sound in tort; those imposing strict liability would sound in contract.

Despite Williston's implication that *Siegel* should be viewed as exceptional, the decision is not surprising in light of established principles of bailment law as it existed at that time. The furniture in question was destroyed by fire.¹⁴⁴ Characterizing the bailment as gratuitous, the court applied a gross negligence standard for liability with respect to the fire itself.¹⁴⁵ There was no liability for the bailee with respect to the fire.¹⁴⁶ However, the bailee had voluntarily expanded the scope of the bailment through a promise to obtain insurance on the furniture.¹⁴⁷ Moreover, the bailee was the owner of a furniture storehouse and told the bailor, "it will be a good deal cheaper; I handle lots of insurance; when you get the next bill—you can send a check for that with the next installment."¹⁴⁸ Professional or business skill or knowledge relevant to the bailment was often grounds for reduction of the negligence standard at which liability would attach.¹⁴⁹ Ordinary, or even slight, rather than gross negligence on the part of bailee might thus explain the result in which liability was not imposed with respect to occurrence of the fire but was imposed with respect to the failure to obtain insurance.¹⁵⁰ Since the court in imposing liability on the storehouse owner did not explicitly discuss the applicable standard of conduct, we cannot know for certain whether such imposition was predicated on strict liability or some level of negligence. The latter, however, is certainly a strong possibility, and modern doctrine would likewise call for the case to be decided with reference to negligence. Negligence, of course, is a standard that sounds in tort,

¹⁴⁴ *Siegel*, 138 N.E. at 415.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ STORY, *supra* note 131, at 176. Judge Story made clear in his treatise that negligence is the true foundation of bailee liability, not only with respect to acting as a depositary of goods, but also with respect to "mandates," i.e., "a bailment of personal property, in regard to which the bailee engages to do some act without reward." *Id.* at 141. "So far as the American authorities have gone, they appear to proceed on the same principles, and to deem the mandatary, like the depositary, liable in all cases for gross negligence only." *Id.* at 175 (footnote omitted). Expounding upon this point, Judge Story wrote that

[t]he true rule of the common law would seem, therefore, to be, that a mandatary, who acts gratuitously in a case, where his situation or employment does not naturally or necessarily imply any particular knowledge or professional skill, is responsible only for bad faith or gross negligence. . . . If his situation or employment does imply ordinary skill or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge.

Id. at 175–76. That is, one with skill or knowledge relevant to the gratuitous promise will be liable upon negligence, and held in this regard to a standard lower than gross negligence, i.e., liability will attach at the level of either ordinary or slight negligence.

¹⁵⁰ For example, consider STORY, *supra* note 131, at 34: ("Thus, if a depositary should specially contract to keep the deposit safely, he might be liable for ordinary negligence, although the law would otherwise hold him liable only for gross negligence.").

not contract. Williston's characterization of *Siegel* as falling outside the realm of tort would therefore not necessarily hold.

Bailment cases such as *Siegel* not infrequently remain vague or contradictory with respect to the applicable standard for liability regarding gratuitous mandates in connection with the bailment. Yet even if we take cases in which strict liability may have furnished the basis for liability for such supplemental undertakings in expansion of the scope of bailment, we are left with the irreducible fact that gratuitous bailment cases constitute a highly factually specific, idiosyncratic niche within the law. Moreover, in many respects the doctrines of bailment law are more closely allied with tort than with contract. This is hardly a springboard for the introduction of sweeping new principles to apply across the spectrum of contract law.

The foregoing may strike the reader as an unnecessary discursion into trivia. Nonetheless, and quite tellingly, the unusual case of the gratuitous bailee played a nontrivial part in the arguments made by Williston (and decades later by Corbin in his treatise) in favor of Section 90.¹⁵¹

F. Miscellaneous, Isolated Cases

Outside the foregoing categories, each of which is fairly easily cabined and compartmented, Williston, both in the text of the debate and in his Commentaries, cited but a handful of other, anomalous cases in support of his proposed Section 90.¹⁵²

1. The ALI Record

One of these is an idiosyncratic Pennsylvania case, *Rerick v. Kern*, in which the court upheld a license to use real estate in the absence of consideration.¹⁵³ Landowner Rerick granted to Kern gratuitous permission to divert a water stream, in reliance on which Kern built a saw mill in a location designed to use the diverted water.¹⁵⁴ The landowner later removed the diversionary dam.¹⁵⁵ Though the mill owner had paid no consideration for the license to use Rerick's

¹⁵¹ This has also been noted by, for example, Benjamin Boyer, a great proponent of promissory estoppel. See Boyer, *supra* note 21, at 674 ("Promissory estoppel has its origins in diverse fields of the law. One of the most fruitful of these fields is that of gratuitous bailment. The analogies which can be drawn from this particular area have been most helpful in the formulation of the doctrine." (footnote omitted)).

¹⁵² Since Williston and Corbin predicated their advocacy for the introduction of draft Section 90 on actual, decided cases, the discussion here addresses those cases rather than mere hypothetical factual situations postulated on occasion during the course of the ALI's *First Restatement* debate on Section 90.

¹⁵³ See *Rerick v. Kern*, 14 Serg. & Rawle 267, 271–72 (1826).

¹⁵⁴ The landowner's motive for granting the permission is unclear from the opinion in the case. While it may have been from simple generosity of spirit, it does appear from the record that the permission to divert the water flow was decisive in allowing Kern to erect "a very good mill, which did a great deal of business." *Id.* at 268.

¹⁵⁵ *Id.* at 268.

land in such manner (for diversion of the water flow), nor was any deed recorded to reflect an easement, the court held for the mill owner Kern.¹⁵⁶ The court was of the view that the landowner's promise must be specifically enforced in equity, "considering that a license which has been followed by the expenditure of ten thousand dollars" might otherwise "be revoked by an obstinate man who is not worth as many cents."¹⁵⁷ Though certain other courts in subsequent years opted to follow *Rerick* in enforcing gratuitous licenses to use real property, Williston himself conceded that "[t]he cases in support of this doctrine are, however, not uniform, and the weight of authority is probably opposed to the doctrine."¹⁵⁸

Williston also indicated that "[t]his doctrine [of gratuitous license to use land enforced on grounds of detrimental reliance] has been extended at least in Pennsylvania to other cases than those involving licenses for the use of real estate," citing to *Bassick Mfg. Co. v. Riley*.¹⁵⁹ *Bassick* involved the grant of an exclusive right to distribute products of the Alemite Lubricator Company.¹⁶⁰ Although *Bassick* does quote from *Rerick*, Williston's reference to *Bassick* as support for his argument appears incorrect insofar as the analysis in *Bassick* clearly suggests that the exclusive distribution agreement at issue in that case was a bilateral contract rather than a unilateral gratuitous promise:

The contract . . . is more than one of . . . license without consideration It is a contract . . . under which the company [manufacturer] and the defendant [distributor] agrees that it will sell its products exclusively to him within certain territory for distribution by him under its terms, and at the same time, not only grant him the privilege, but require of him the duty, of distribution of its products under its name. The entire expense of maintaining a store, employing agents under him for distribution, and the building up of the business is put upon the defendant, and he has carried out those terms by large expenditures of money¹⁶¹

Where the agreement imposes an affirmative duty on the distributor, and where the incurrence of expenditures has "carried out . . . terms" of the agreement, consideration for the exclusive right to distribute is clearly present.¹⁶² A decision predicated upon the existence of a bilateral contract does not, of course, furnish precedential support for the doctrine of promissory estoppel.

The next of Williston's citations is *Devecmon v. Shaw*, in which an uncle promised to reimburse his nephew the cost of a trip to Europe.¹⁶³ Although the

¹⁵⁶ *Id.* at 269–70.

¹⁵⁷ *Id.* at 272.

¹⁵⁸ WILLISTON, *supra* note 34, at 15.

¹⁵⁹ *Id.* (citing *Bassick Mfg. Co. v. Riley*, 9 F.2d 138 (E.D. Pa. 1925)). There is a small typographical error in the Commentaries, in which the case name is referred to as "*Bassett Mfg. Co. v. Riley*." WILLISTON, *supra* note 34, at 15.

¹⁶⁰ *Bassick*, 9 F.2d at 138.

¹⁶¹ *Id.* at 139.

¹⁶² *Id.*

¹⁶³ 14 A. 464, 464 (Md. 1888).

court's language is otherwise, Williston speculated that the uncle's reimbursement promise might have been purely gratuitous.¹⁶⁴ Formally, however, the court decided the case on the basis of express unilateral contract in which consideration was present:

[T]he plaintiff [nephew] incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay.¹⁶⁵

Williston's intuition as to the true nature of the conversations between uncle and nephew might of course be accurate. Certainly if one looks at personal motive, as distinct from the technical matter of consideration, one might easily suppose that the uncle's motive may have been a desire born of family affection to benefit his nephew. However, on the facts of the case as recited by the court, the uncle requested that the nephew undertake the trip.¹⁶⁶ Drawing the line between an unenforceable conditional gift and an enforceable unilateral contract can be a notoriously difficult judgment call.¹⁶⁷ Yet when the promisor has affirmatively requested that the promisee act, or forbear to act, in a certain manner, this can constitute a valid and enforceable unilateral contract. This is true even when the benefit to the promisor is of a psychic rather than monetary character and even when the requested course of conduct is arguably in promisee's best interest. In such circumstances, promisee's acting in the manner affirmatively requested can still constitute legal detriment sufficient for a finding of consideration.¹⁶⁸ While Williston may have been correct as to the uncle's

¹⁶⁴ Williston suggested that certain decisions were reached

by a finding on the part of the court, or an acquiescence of the court in a finding by a jury, that the acts done in reliance have in fact been requested as the consideration of the promise, though were it not for the desire to achieve a just result, it may be questioned whether such an interpretation of the facts would be permitted.

WILLISTON, *supra* note 34, at 17. As to *Devecmon v. Shaw* specifically,

[i]t can hardly be supposed that this was anything other than the promise of a gift for a special purpose, yet the injustice of denying recovery after the promise had been relied upon, was of such compelling force that the court held the question should be submitted to the jury.

Id.

¹⁶⁵ *Devecmon*, 14 A. at 465.

¹⁶⁶ *Id.* at 464.

¹⁶⁷ This was earlier noted by Williston himself in his 1920 treatise. See WILLISTON, *supra* note 2, at 232–33.

¹⁶⁸ The classic case in this regard is of course *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891), in which an uncle promised to pay his nephew \$5,000 if the latter would refrain from drinking, smoking, swearing, etc. until the age of twenty-one. It was later contended that there was no consideration, insofar as the promisee by this altered course of conduct “was not harmed, but benefitted.” *Id.* at 257. The court rejected this argument: consideration in this context means that promisee “limits his legal freedom of action in the future, as an inducement for the promise” by promisor. *Id.* (quoting FREDERICK POLLOCK, PRINCIPLES OF CONTRACT: A TREATISE ON THE GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND 166 (5th ed. 1889)). Admittedly, forswearing the entertainments discussed in *Hamer* much more intuitively and obviously constitutes a legal detriment than does spending time on a trip to Europe.

motive, and might or might not have been correct in questioning the court's characterization of the facts of the case—the court's characterization that the promisor made an affirmative request could well have been motivated by a desire to generate a particular legal result. The court recited the presence of such a request by the promisor and on those grounds the court arguably had a technically permissible basis for finding the presence of consideration. Conjecture counter to the facts recited and analysis proffered by the court, however intuitively appealing in the instant case, constitutes thin support for a proposed new doctrine of such sweeping scope as promissory estoppel.

Following *Devecmon*, Williston next cited *Wilson v. Spry*¹⁶⁹ as support for his proposed Section 90: “So in *Wilson v. Spry*, . . . the Supreme Court of Arkansas held that making an expensive examination of land under a gratuitous option was sufficient consideration to make the option binding. Obviously there was nothing but reasonable reliance on the promise in the option.”¹⁷⁰ Yet this attempted characterization of *Wilson* by Williston hardly appears to be well-founded. *Wilson* involved an option on an option, and there was nothing gratuitous about it. In the case, Wilson owned 10,000 acres of land in Arkansas, and Spry wished to examine the land with an eye toward a possible purchase thereof.¹⁷¹ Wilson and Spry accordingly entered into a contract pursuant to which “Wilson on his part bound himself to grant to Spry 45 days to examine the lands, and in the meantime bound himself not to sell the lands to another, and Spry on his part bound himself to put estimators on the land at once and to complete the examination.”¹⁷² If within the initial forty-five-day period of time Spry was still interested, he would then have the right, by making certain payments, to acquire an option on the land.¹⁷³ Repeatedly, the written option-on-option agreement used the passive or infinitive form of verbs in identifying specific affirmative covenants of the respective parties, reading in relevant part: “Mr. Spry to put estimators on at once and complete examination.”¹⁷⁴ As stated by the court, the exchange of landowner's no-shop for an express agreement by the potential purchaser to conduct a due diligence investigation involved “mutual covenants.”¹⁷⁵ The court continued:

It is a mistake to say that there was no consideration to Wilson for the contract The obligation of making a continuous cruise of the lands [(the examination of the property)] within the time limit was imposed upon Spry by the

¹⁶⁹ 223 S.W. 564 (Ark. 1920).

¹⁷⁰ WILLISTON, *supra* note 34, at 17.

¹⁷¹ *Wilson*, 223 S.W. at 566.

¹⁷² *Id.* at 568.

¹⁷³ *Id.* at 565.

¹⁷⁴ *Id.* at 565. Other examples include “Mr. Wilson is not to sell,” “Title to be good,” “Deed to be executed . . . and put in escrow . . . and to be delivered,” “Mr. Wilson to pay proportion of taxes and rates for this year up to date of Mr. Spry's decision, and Mr. Spry to pay taxes and rates for time up to his decision as to buying for \$200,000,” “Ward to continue collecting rent, and net surplus . . . to be paid to Mr. Spry.” *Id.*

¹⁷⁵ *Id.* at 568.

terms of the contract and the obligation . . . was not alone for the benefit of Spry. Therefore the case is differentiated by the facts from the cases relied on and cited by counsel for appellants, where the contract imposed no condition to be performed by the optionee, and where he makes the investigation solely for his own information and benefit. The rule is well established that, where the contract binds the promisee . . . to perform some act . . . , there is a sufficient consideration for the agreement.¹⁷⁶

The facts and analysis in the case speak for themselves.

The foregoing constitutes Williston's argumentative support in favor of his draft of Section 90 as included in the written record of the ALI's consideration of the subject.

2. *Williston's 1920 Treatise and the Critical Role of Intrafamily Gifts*

Turning now to Williston's principal treatise on contract law published in 1920, prior to the ALI's *First Restatement* drafting process in the mid-to-late 1920s, we find there also a brief section on contract enforcement in the absence of consideration, though with a noteworthy distinction—Williston in 1920 quite evidently did not yet fully subscribe to the views he was to come to advocate a mere handful of years later in the *First Restatement* debate.¹⁷⁷

Yet even though Williston's thinking was clearly of somewhat different tenor at the time, his 1920 treatise does cite a small handful of additional, miscellaneous cases that do not fall under one of the foregoing clearly defined categories and that require review and analysis in order to do justice to his thinking on the subject.¹⁷⁸

As to one of these cases, *Wood v. Danas*,¹⁷⁹ Williston once again demonstrated his willingness to view a promise as likely gratuitous where the opinion of the court was otherwise: “[N]o doubt also courts allow juries to find an intent to make a bargain in cases where it is difficult to believe there was more than detrimental reliance on a gratuitous promise.”¹⁸⁰ In this case, an employee noticed a missing step in a flight of stairs that she had been directed by her employers to use.¹⁸¹ She complained of the dangerous condition to her employer, whereupon the employer promised to fix the stairs.¹⁸² The case was decided against the backdrop of a then-prevailing legal presumption that employees assumed the risk of preexisting dangers in the workplace:

By the implied term of the contract of service which governed the relations of the parties, the defendants were not required to change the obvious conditions or employment existing when the contract of service began. It might be found,

¹⁷⁶ *Id.* at 568–69.

¹⁷⁷ See *supra* note 13; see also WILLISTON, *supra* note 2, at 313.

¹⁷⁸ See WILLISTON, *supra* note 2, at 307 n.22, 308 n.25.

¹⁷⁹ 120 N.E. 159 (Mass. 1918).

¹⁸⁰ WILLISTON, *supra* note 2, at 308 n.25.

¹⁸¹ *Wood*, 120 N.E. at 160.

¹⁸² *Id.* at 162.

Spring 2016]

PROMISSORY ESTOPPEL

697

however, that this implied term of the contract was modified by a subsequent arrangement.¹⁸³

Based on the conversation between the employee and her employer regarding the missing stair, the court wrote,

On this evidence, the jury could say, that the plaintiff [employee] no longer agreed that the defendants owed her no duty respecting the manifest danger, but insisted that the place should be made safe, and that the employer assented to this and agreed to make the repair; that is to say, the parties by mutual agreement changed what had been an implied term of the contract into an express term by which the stairs were to be made safe.¹⁸⁴

The consideration given by the plaintiff employee for the employer's promise to repair was her continuation in service.¹⁸⁵

It is not obvious why Williston's interpretation of the case is necessarily superior to that of the court. The court simply permitted the jury to find an implied unilateral contract in a commercial setting. The motives, and thus the intent, of both employer and employee were presumably commercial in nature. To find an implied bargain in such circumstances would not appear facially impermissible. Even if reasonable minds might potentially differ as to the optimal characterization of the facts, it is difficult to discern clear error here by the court, and in the absence of such clear error, to find compelling precedential support in this case for Williston's proposed new doctrine of promissory estoppel.¹⁸⁶

Another miscellaneous case cited by Williston, *Estate of Switzer v. Gertenbach*, involved services rendered by a stepson to a stepfather on a farm and in a store, and whether such services had been rendered pursuant to either an express or implied agreement that the stepson would be compensated therefor.¹⁸⁷ In this connection, the appellate court did make a sweeping statement in line with the doctrine of promissory estoppel as later embodied in draft Section 90:

A mere promise to make a gift out of the promisor's estate, even where it is evidenced by a promissory note delivered in the lifetime of the maker is only an unexecuted intention to make a gift which is revoked by the death of the donor. But where money has been expended or liabilities incurred in reliance upon the promise, which, as a legal necessity, will cause loss or injury to the person to whom the promise is made, unless the promise is enforced, the donor or promi-

¹⁸³ *Id.* at 161–62 (citations omitted).

¹⁸⁴ *Id.* at 162.

¹⁸⁵ *Id.*

¹⁸⁶ Moreover, even if we were, *arguendo*, to accept Williston's rather than the court's own view of the case, we would at most have a gratuitous modification of an already extant contractual relationship. As discussed above, *supra* Part V.C, that is a factual circumstance in which the enforcement of a gratuitous promise raises far less policy concern than in the context of initial contract formation, and for which a discrete, limited exception to the otherwise applicable consideration requirement might well suffice.

¹⁸⁷ *Estate of Switzer v. Gertenbach*, 122 Ill. App. 26, 26–28 (1905).

sor is required, in good conscience, to pay, and the same may be collected out of his estate.¹⁸⁸

Yet the court cited as authority for this proposition a case in the same jurisdiction involving a charitable donation to a college, which in turn was predicated upon a host of other charitable donation precedents.¹⁸⁹ In other words, the *Switzer* court may have carelessly and inappropriately cited to precedent more properly viewed as limited to the charitable donation context. Moreover, the *Switzer* court declined to render judgment on the facts: “It is not our purpose to enter into a discussion of the evidence, since, under the view we take, the case must be reversed and remanded for other reasons,” namely whether the statute of limitations was applicable, based “on the terms of the alleged contract” with respect to when compensation for the services would become due.¹⁹⁰

While the *Switzer* statement as to enforceability on the basis of reliance alone is not necessarily dictum per se, it is certainly not the heart of the case. It is instead a sweepingly broad statement ancillary to the primary issue in the case and one that appears predicated on misapplication of precedent from a distinct and quite different factual context. It is not an improper citation, but neither is it a strong one, and certainly not a precedent that would justify the sweeping statements later made by Williston himself to justify the adoption of draft Section 90.

This brings us to the final and most important of the miscellaneous cases cited by Williston, one which graces the pages of many a first-year contract law casebook: *Ricketts v. Scothorn*.¹⁹¹ Among the cases cited by Williston, *Ricketts* without question presents the clearest theoretical articulation and exposition of the doctrine of promissory estoppel, as well as the purest fact pattern (at least as the facts have been presented by the court) for its application. This is the case on which, in many respects, the argument in favor of promissory estoppel turns.

In *Ricketts*, a grandfather gave to his granddaughter, as a gift, a promissory note for \$2,000.¹⁹² According to testimony at the trial, the grandfather told his granddaughter, “I have fixed out something that you have not got to work any more,” and that “none of my grandchildren work, and you don’t have to.”¹⁹³ The granddaughter “took the piece of paper and kissed him, and kissed the old gentleman, and commenced to cry.”¹⁹⁴

Testimony from the granddaughter’s mother was along similar lines: “he informed [granddaughter’s mother] that he had given the note to [his granddaughter] to enable her to quit work; that none of his grandchildren worked,

¹⁸⁸ *Id.* at 28–29 (citations omitted).

¹⁸⁹ *Id.* at 29 (citing “*Beatty v. Western College*, 177 Ill. 280,” now more usually cited as *Miller v. W. Coll. of Toledo*, 52 N.E. 432 (Ill. 1898)).

¹⁹⁰ *Id.* at 30–31.

¹⁹¹ 77 N.W. 365 (Neb. 1898).

¹⁹² *Id.* at 365–66.

¹⁹³ *Id.* at 366.

¹⁹⁴ *Id.*

and he did not think she ought to.”¹⁹⁵ In apparent reliance on the note, the granddaughter quit work for roughly a year before resuming employment with the grandfather’s consent and assistance.¹⁹⁶ The grandfather had paid one year’s interest on the note, but not yet the balance, at the time he passed away.¹⁹⁷

In pointed manner, the court stated that this testimony

conclusively establishes the fact that the note was not given in consideration of the plaintiff [granddaughter] pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do, or refrain from doing, anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros., and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no quid pro quo. He gave the note as a gratuity, and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle, as she might choose. The abandonment of [the granddaughter’s] position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note.¹⁹⁸

The court then went on to observe that a gratuitous promissory note, “being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named. Ordinarily, such promises are not enforceable, even when put in the form of a promissory note.”¹⁹⁹ As a general rule, a valid gift requires a present transfer of an ownership interest.²⁰⁰ When personal property is at issue, this transfer can be accomplished through either delivery or an inter vivos donative document.²⁰¹ A promise to make a gift in the future is not enforceable.²⁰² If construed as a promise to make a gift of money in the future, the promissory note would not, therefore, be enforceable. This was a principle widely understood and accepted at the time of the *Ricketts* decision.²⁰³ To enforce against the estate of a deceased promisor an unconsummated promise to make a gift would violate rules governing the legally recognized means for making valid testamentary dispositions.

Strict application of these common law rules, however, could on occasion work to defeat what appear to be the wishes of the donor. The money belonged to the grandfather. He had clearly indicated that he wished for his granddaughter to receive the \$2,000, had never renounced the obligation, and had reiterated

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ For a recent statement of the rule, see, for example, RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.1 cmt. f (AM. LAW INST. 2003).

²⁰¹ *Id.* § 6.2.

²⁰² *Id.* § 6.1 cmt. p.

²⁰³ *See id.*

this desire shortly before his passing.²⁰⁴ Do third persons, who might otherwise receive proceeds out of the grandfather's estate, have a superior moral claim as to how the money should be applied above that of the grandfather himself?

Presumably moved by such considerations, in order to allocate a portion of the estate to the granddaughter in accordance with the grandfather's expressed wishes, the laws of testamentary disposition notwithstanding, the court took two positions at odds with long lines of precedent. First, the court chose to transplant charitable donation cases outside the context of gifts to charitable institutions, without articulating any policy justification for such transplantation. Second, the court, either deliberately or through simple ignorance of the relevant caselaw, and without analytic discussion or justification, chose to markedly alter well-established common law as to the contours of equitable estoppel.

As to transplantation of the charitable donation cases, the court observed that "it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration."²⁰⁵ Although "the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee on the faith of the promise constitutes a valuable and sufficient consideration," wrote the court, "[i]t seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration."²⁰⁶ Here lies the beating heart of the nascent promissory estoppel doctrine.

The court did not enter upon any discussion of why a policy-driven exception developed in the context of gifts to charitable institutions operating in the broader public interest should be applied outside of that context to intrafamily gifts.

The court wrote, "[u]nder the circumstances of this case, is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is."²⁰⁷ The court then cited to a legal treatise for a definition of the term equitable estoppel—a definition that did not, however, set forth a critical limitation on application of the doctrine.²⁰⁸ That limitation, commonly understood at the time and articulated by the U.S. Supreme Court, is that equitable estoppel applies only to statements of existing or past fact, and not to forward-looking statements of future intent.²⁰⁹ At the stroke of a pen, the *Ricketts* court thus rewrote the law of gifts and the law of equitable estoppel.

²⁰⁴ *Ricketts*, 77 N.W. at 366.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 367.

²⁰⁸ *See id.* (citing 2 Pom. Eq. Jur. 804).

²⁰⁹ *See, e.g.,* *Union Mut. Life Ins. Co. v. Mowry*, 96 U.S. 544 (1877). In *Mowry*, a case involving a promise by an insurance agent to notify the insured of deadlines for paying premiums, the Supreme Court wrote,

A close, detailed analysis of the facts and holding of *Ricketts* immediately suggests alternative routes one might have taken in response to the holding.

First and most obviously, one might simply have rejected the case as an anomaly in derogation of well-established common law principles articulated by other courts throughout the land over the course of many years. Even Williston himself was not shy of declaring his opposition to a holding when he believed it was wrongly decided.²¹⁰

A second alternative response would have been to conclude that Ricketts identified factual circumstances in which a limited, discrete exception should be made to the otherwise applicable delivery requirement under the law of intrafamily gifts: In situations where the donee has justifiably and detrimentally relied on a declared intention to make a future gift, the gift could be considered immediately effective, prior to actual delivery.²¹¹

In other words, there was no need to generalize the holding of *Ricketts* outside of the context of intrafamily gifts.

An exchange during the *First Restatement* debate is quite telling in this regard. As noted earlier,²¹² Williston was pressed by his colleague Morawetz as to whether the familiar concept under classical contract law of unilateral contract might not cover the various types of factual situations to which Williston was averring during the debate:

Now, it seems to me that instead of dealing with this matter under the head of consideration, it would go more appropriately under the head of offers. What happens in these cases is that the law holds that if a man makes a promise to in-

The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact, [t]o a present or past state of things. *If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a cha[n]ge of circumstances of which neither party can have any certain knowledge.* The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. *An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.*

Id. at 547 (emphasis added). The proposition ventured two decades later in *Ricketts* is directly antithetical to this unambiguous statement by the U.S. Supreme Court in *Mowry*.

²¹⁰ For example, he wrote of *Kirksey v. Kirksey*, 8 Ala. 131 (1845),

The defendant wrote his sister-in-law promising her part of his land to live upon. The circumstances clearly indicated that his motive was merely charitable, and that the promise was to make a gift. A majority of the court held the promise unenforceable though the plaintiff had broken up her home and moved to a distance wholly changing her position on the faith of the promise. The injustice of the result is manifest.

WILLISTON, *supra* note 34, at 17–18.

²¹¹ If this approach were to run afoul of legitimate admonitory or evidentiary policy concerns in the field of property law, thus militating against the advisability of such innovation, those same or similar policy concerns might well be of equal weight in evaluating the propriety of Section 90 in the field of contract law.

²¹² See *supra* Part V.A.

duce another to do a certain act, he will be held to have made an offer of a unilateral promise to take effect upon the performance of the act.²¹³

Williston responded:

I want to cover more in Section [90] than offers. I understand perfectly well what you have in mind, as offers for unilateral contracts, and they are covered under offers; but this section covers a case where there is a promise to *give* and the promisor knows that the promisee will rely upon the proposed *gift* in certain definite ways.²¹⁴

Williston then gave as his example hypothetical the case of a promised gift of land, with possession of the land passing into the hands of the donee, upon which the donee, in reliance on the promise of the gift, made certain improvements to the land.²¹⁵

Likewise, when we examine the three illustrative examples given in the *First Restatement* as to how the drafters of Section 90 envisioned it might affirmatively apply in practice, all appear to involve reliance on a promise of an intrafamily gift (or situations in which the promise would already be enforceable under existing principles of classical contract law).²¹⁶

Illustrative example number one reads: “A promises B not to foreclose for a specified time, a mortgage which A holds on B’s land. B thereafter makes improvements on the land. A’s promise is binding.”²¹⁷ Although the *First Restatement* does not explicitly state the source of this illustration, it is fairly evident from Williston’s writings that it was based on *Faxon v. Faxon*.²¹⁸

Faxon involved a family in which the father passed away, leaving a widow and young children.²¹⁹ The father’s half-brother held mortgages against the family’s farm.²²⁰ According to testimony by the oldest son in the family, when the son

was contemplating a removal to another region [the half-brother/uncle] urged and persuaded him to remain and undertake the care of the land and of the younger children on a promise that the mortgages should never be enforced against them; and that on this urgency [the son] did so, and carried out all that was desired. The testimony shows beyond dispute that [the half-brother/uncle] made the requests very urgently, and exhibited an extreme desire to have them

²¹³ *ALI Debate on Section 90*, *supra* note 57, at 88.

²¹⁴ *Id.* at 89 (emphasis added).

²¹⁵ *Id.*

²¹⁶ There are actually four illustrative examples in total, but in the fourth such, the promise is described as not binding and is accordingly not treated here. See *RESTATEMENT OF THE LAW OF CONTRACTS* § 90 (AM. LAW INST. 1932).

²¹⁷ *Id.* § 90 illus. 1.

²¹⁸ See *Faxon v. Faxon*, 28 Mich. 159 (1873). The case is nearly universally cited with the spelling “*Faxton v. Faxon*,” though it is evident from the body of the case that this appears traceable to a typographical error in the header in the relevant original case reporter. See *id.*

As to how it is known that *Faxon* likely furnishes the basis for illustration number one, see *WILLISTON*, *supra* note 34, at 15; *WILLISTON*, *supra* note 2, at 312 n.39.

²¹⁹ *Faxon*, 28 Mich. at 159.

²²⁰ *Id.*

complied with for the sake of the family; and that [the son] acceded to them. It also shows an unequivocal assurance on various occasions that the securities should be cancelled and that the family should have the benefit of it.²²¹

On these facts, an express bilateral or unilateral contract with mutual consideration may very well have existed,²²² though the court did not feel obliged to decide that matter. This is because, even if there was no “absolute agreement,” the half-brother/uncle/mortgagee

may have estopped himself without any positive agreement, if he intentionally led defendants to do, or to abstain from doing, any thing involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages. . . . There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on.²²³

This holding falls within the ambit of abandonment of an existing contractual right (as distinct from the de novo creation of an initial contractual liability), which Williston himself in his principal treatise had described as coming under the heading of waiver, as discussed above.²²⁴

Even if one ignores for a moment the nature of the case as involving abandonment of an existing contractual right, and ignores whether a bilateral or unilateral contract under classical rules of contract law may well have been present, one would still be left with, at most, an intrafamily donative transaction.

Illustrative example number two reads: “A promises B to pay him an annuity during B’s life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A’s promise is binding.”²²⁵ This example appears roughly consonant with *Ricketts*, an intrafamily gift case.²²⁶

Illustrative example number three reads: “A promises B that if B will go to college and complete his course he will give him \$5000. B goes to college and has nearly completed his course when A notifies him of an intention to revoke the promise. A’s promise is binding.”²²⁷ While Williston conceded that this might simply be viewed as a unilateral contract, his own view was that this

²²¹ *Id.* at 159–60.

²²² For example, the court wrote that a young man was induced to give up his projects for his own advancement, and devote himself to the preservation of property [as to which the half-brother/uncle held a mortgage] A promise is not gratuitous which is made to procure such efforts and results

Id. at 161–62.

²²³ *Id.* at 161.

²²⁴ See *supra* Part V.B.

²²⁵ RESTATEMENT OF THE LAW OF CONTRACTS § 90 illus. 2 (AM. LAW INST. 1932).

²²⁶ Another alternative is that the example is intended to reflect an employer’s promise to pay an employee a pension. As such examples were not arrayed by Williston as part of his argumentative support for Section 90 in either the ALI debates or his related commentaries, they are not further addressed here.

²²⁷ RESTATEMENT OF THE LAW OF CONTRACTS § 90 illus. 2 (AM. LAW INST. 1932).

should be treated as a conditional gift.²²⁸ Even if one accepts Williston's characterization, we thus once again have what is presumably an intrafamily gift.

What we are left with, then, is that Section 90, despite its tremendous, indeed nearly unbounded scope, was sold in critical respect as a rule that would allow the enforcement of certain intrafamily gifts that might otherwise not be valid. This was the factual situation cited by Williston to answer Morawetz's nearly insuperable argument that much of what was being discussed simply constituted implied unilateral contract within the parameters of classical contract law. And when all the discussion of preexisting caselaw came to a close, these were the examples actually given in illustration of Section 90.

VI. SUMMATION AND IMPLICATIONS FOR THE FUTURE OF CONTRACT LAW

To sum up the foregoing review, close factual analysis of the preexisting caselaw yields a rather different picture than that painted by Williston in his advocacy for Section 90. Some of his case citations rested on an incorrect reading of the holding in the case. Others rested on factual speculation at odds with recitations in the case itself. As to those cases that remain, they generally can be grouped into a small number of discrete, easily compartmented exceptions to the ordinarily applicable consideration requirement that had grown up over time and co-existed peaceably next to classical rules within the overall structure of contract law.²²⁹ The one area in which genuine novelty is manifest relates to the narrow niche of intrafamily donative transfers outside the realm of ordinary testamentary disposition. Rather than constituting grounds for a radical break with classical principles of contract formation, this type of factual situation could have been addressed as simply another discrete exception to the consideration requirement, or indeed as simply an exception to the delivery requirement under the law applicable to gifts.²³⁰

In view of the significantly narrower, significantly weaker precedential foundation upon which Section 90 rests than has heretofore been conceded in

²²⁸ *ALI Debate on Section 90*, *supra* note 57, at 87.

²²⁹ It is precisely against this type of compartmentalized exception that advocates of promissory estoppel strive. *See, e.g.*, Boyer, *supra* note 21, at 674 ("Obvious also is the compartmentalization which has existed in the application of the doctrine [of promissory estoppel]. So long as it is applied only when the fact situation fits a preconceived pattern, such as a gratuitous promise to give land, or a gratuitous bailment, its possibilities will not be completely utilized. *The restraints of compartmentalization must be overcome* if the courts are to recognize that the doctrine of promissory estoppel is one of universal application." (emphasis added)).

²³⁰ That such an exception could easily be compartmented and limited in its factual application is also suggested by the relative infrequency with which such claims arise. *See, e.g.*, Henderson, *supra* note 21, at 352 (referring in the late 1960s to "the scarcity of gift promises arising under Section 90. . . . And if the gratuitous promise is no longer relevant to the theory of Section 90, policy considerations developed in relation to the conventional idea of promissory estoppel will have to be carefully examined before Section 90 is made a vehicle for relieving injustices occasioned by business bargains").

the academic literature, what implications may be drawn for the development of contract law going forward? Two major steps suggest themselves.

First, the categorical exception approach to the consideration requirement should return to the center of analytic focus and potentially be extended. That approach has historically provided doctrinal flexibility in defined special circumstances posing practical or policy particularities without threatening to destabilize the corpus of contract law generally. Courts should accordingly analyze claims against the backdrop of, and in presumptive deference to, that handful of discrete, limited and time-honored exceptions to the consideration requirement discussed above. Moreover, detailed and critical study should be conducted into the question of whether the categorical exception approach should be supplemented by the addition of a new variance from the consideration requirement for intrafamily donative promises. Such inquiry should carefully consider the interaction of any such new exception with existing legal rules, and the policies and practical considerations which inform those rules, regarding testamentary disposition and inter vivos donative transfers.

Second, for factual situations not falling within a defined categorical exception, the imposition of liability on grounds not sounding in classical contract law should become subject to far greater critical scrutiny than has heretofore been the case. What does not suffice as adequate authority for a judicial result is mere talismanic invocation of the largely artificial, overreaching, and doctrinally revolutionary Section 90.

Courts presented with promissory estoppel claims should thus conduct fundamental and rigorous inquiry into whether the case might be decided pursuant to, or on bases and reasoning more closely consistent with, the tenets of classical contract law. In particular, further study is called for into the question of whether courts might predicate a decision in favor of a plaintiff upon implied unilateral contract rather than on promissory estoppel. This may be especially appropriate where an explicit quid pro quo does not exist, yet circumstances are present which permit a reasonable inference that the promisor consciously intended to induce the promisee to rely in a particular manner, to the benefit of the promisor.²³¹

CONCLUSION

The doctrine of promissory estoppel, as embodied in Section 90 of both the *First Restatement* and *Restatement (Second) of Contracts*, stands in profound tension with the principles of classical contract law. Doctrinal destabilization has been the result. Nor was the promulgation of Section 90, as drafted, ineluctably necessary. Rather, Section 90 represents an extra-legislative legal and policy judgment by Williston, Corbin, and other proponents of the doctrine. That

²³¹ In this connection, a broad definition of consideration appears eminently sensible, not limited to the economically measurable but rather understood to embrace any act or forbearance by promisee for which the promisor has implicitly bargained.

judgment was predicated upon broad claims as to the state of preexisting caselaw. To date, those claims have remained unchallenged in the academic literature. Close analysis of the cases, however, reveals significant infirmity in Williston's initial argument for promissory estoppel. Accordingly, with an eye toward reducing the risk of contract law bleeding doctrinally into tort law, this Article recommends a markedly more cautious approach than that taken by Section 90. Renewed reliance should be placed on limited, discrete exceptions of long standing to the consideration requirement. In cases not falling within those limited exceptions, rigorous analysis should be undertaken to ascertain whether the decision might be predicated upon bases more nearly consistent with classical contract law. In particular, courts should consider whether the paradigm of implied unilateral contract might furnish a more appropriate analytic framework than does promissory estoppel, particularly in circumstances in which it appears that the promisor may have made a promise with the intent to induce specific reliance by the promisee to the benefit of the promisor.