

REVERSING THE RELIANCE REVOLUTION IN CONTRACT

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Abstract: During the past century, leading American academics have attempted to rewrite in radically altered form the theoretical foundation of liability in contract. In derogation of the historical bases for contractual liability in Anglo-American law, namely voluntary mutual exchange and “formal” contract, these intellectual revolutionaries desire to impose strict liability in contract on the basis of unilateral, unbargained-for reliance.

The centerpiece of this revisionist effort has been the novel and artificial doctrine of “promissory estoppel,” first advanced by Williston and Corbin in the Restatement of the Law of Contracts published in 1932. The invention of this doctrine has been accompanied by related conceptual developments across the spectrum of academic scholarship and other articulations of contract law.

On the basis of the relevant history, this Article argues that the historical and proper foundations of liability in contract are mutual exchange and formal contract rather than naked, unilateral reliance on informal promise in the absence of exchange. A return to the historical foundations of contract would repudiate the century-long effort from within academia artificially to alter this field of law.

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Error, indeed, is never set forth in its naked deformity, lest, being thus exposed, it should at once be detected. But it is craftily decked out in an attractive dress, so as, by its outward form, to make it appear to the inexperienced . . . more true than the truth itself.¹

—Irenaeus of Lyons

The past was erased, the erasure was forgotten, the lie became truth.²

—George Orwell

1. IRENAEUS OF LYONS, *ADVERSUS HAERESIS* [AGAINST HERESIES] bk. I, preface (c. 175-185 A.D.), in *1 ANTE-NICENE FATHERS* 315, 315 (A. Cleveland Coxe ed., Alexander Roberts & James Donaldson trans., Buffalo, N.Y., Christian Literature Publ'g Co. 1885). The quoted passage relates to Irenaeus' criticism of the theological assertions of the early gnostics.

2. GEORGE ORWELL [ERIC ARTHUR BLAIR], 1984 [originally published as *NINETEEN EIGHTY-FOUR*] 75 (1949).

INTRODUCTION

An intellectual struggle has been in progress for now close to a century over the doctrinal foundation, and thus future, of American contract law. Arrayed on one side are those voices, those intellects, of the past who over the better part of a millennium erected the structure of Anglo-American contract law founded upon the enforcement of mutually agreed exchange and so-called “formal” contract. Taking the field against them are leading modern academics, undeclared revolutionaries who, commencing with the project to draft the initial Restatement of the Law of Contracts (First Restatement) in the 1920s,³ and continuing with the Restatement (Second) of Contracts drafted in the 1960s and 1970s,⁴ have attempted to efface that history and effectuate a tectonic shift in the field of contract law to reward reliance irrespective of whether exchange is present. The principal, though not only, expression of this revolutionary reliance principle is the novel and largely artificial doctrine of “promissory estoppel,” which purports to impose potential liability for unfulfilled “promise” even though no consideration has been given therefor.⁵

As conceived and drafted by Samuel Williston of Harvard Law School in the First Restatement,⁶ the doctrine of promissory estoppel makes no mention of either mutual consideration or mutual agreement between the parties.⁷ It thus purports to sweep aside as unnecessary, indeed irrelevant, the two fundamental requisites for the existence of contract under classical rules. Its alleged principle of liability requires no more, really, than the

3. RESTATEMENT OF THE LAW OF CONTRACTS (AM. LAW INST. 1932).

4. RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981).

5. See RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981). The term “promissory estoppel” was first coined by Professor Samuel Williston in his major treatise published shortly before the First Restatement project was undertaken. See 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS 308 (Baker, Voorhis & Co. 1924) (1920) [hereinafter WILLISTON TREATISE] (Williston’s copyright on the treatise was 1920; printed publication of the multiple volumes occurred over several years, resulting in Baker, Voorhis and Co.’s 1924 date here). Although Williston set forth his substantive concept of promissory estoppel in Section 90 of the First Restatement, he did not use the “promissory estoppel” moniker whatsoever to describe that concept in the First Restatement itself. Even in the Restatement (Second), which appeared a number of decades later, the term “promissory estoppel” arises *sotto voce* in a comment to Section 90, rather than as an actual section title. See RESTATEMENT (SECOND) OF CONTRACTS § 90, cmt. a (AM. LAW INST. 1981).

6. On Williston’s role as the individual who first coined the term “promissory estoppel,” personally drafted the text of Section 90, and served as the principal advocate thereof during the First Restatement drafting process, see Eric Alden, *Rethinking Promissory Estoppel*, 16 NEV. L.J. 659, 661 n.2, 663 n.13, 664–68 (2016).

7. Indeed, in the First Restatement the doctrine of promissory estoppel appeared under a heading explicitly entitled “Informal Contracts Without Assent or Consideration.” RESTATEMENT OF THE LAW OF CONTRACTS ch. 3, topic 4 (AM. LAW INST. 1932).

foreseeability of reliance by another: “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.”⁸

Historically, liability in contract is strict—that is, does not require culpable conduct—but does require mutual consideration, mutual exchange. By contrast, liability in tort is generally not strict, inasmuch as negligence or more culpable conduct is typically required for the imposition of liability.⁹ Promissory estoppel embarks upon terra nova, purporting to impose liability founded upon neither mutual exchange nor upon harmful negligence or other culpable conduct. It is thus neither fish nor fowl, neither contract—properly viewed—nor traditional culpability-based tort. Rather, despite having been packaged and marketed by Williston as a supplement to contract, promissory estoppel in truth constitutes a newfound and essentially unprecedented strict liability tort for unfulfilled promise.¹⁰

As trenchantly observed by Grant Gilmore of Yale Law School in the 1970s, this radically new principle of liability for unfulfilled promise stands not just in stark contrast to, but in literal abnegation of, the rules and requirements of traditional contract law.¹¹ They are mutually exclusive, “matter and anti-matter,” “Contract and anti-Contract.”¹² Promissory estoppel literally denies the two core, essential requirements for the imposition of contractual liability, namely mutual consideration and mutual agreement. Over time, one or the other principle will win out. “The one thing that is clear,” Gilmore wrote, “is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up.”¹³ Our society will either return to classical rules of contract, or promissory estoppel will metastasize ever further, ultimately supplanting the principle that one must pay for that which one wishes to receive with a fundamentally new principle, namely

8. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981). For discussion of the manner in which the “should reasonably expect” language functionally serves as no more than the traditional requirement of foreseeability in tort, see Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 672.

9. In certain discrete exceptions, tort liability applies on a strict basis, such as for harm arising from the use of dynamite and, as a more modern innovation, harm arising from product defects. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 20 cmt. e (AM. LAW INST. 2010) (blasting); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a (AM. LAW INST. 1998) (product liability). For obvious reason, tort does not require consideration.

10. See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 671–74.

11. GRANT GILMORE, *THE DEATH OF CONTRACT* 61 (1974).

12. *Id.*

13. *Id.*

that one need not pay, rather only rely. Gilmore welcomed that latter prospect. The Author, and this Article, do not.

The objective of this Article is therefore to illuminate the conceptual battlefield and to argue for a return to the principles which have animated contract law since the earliest days of Anglo-American civilization. The objective is to reverse the reliance revolution in contract.

The heart of this endeavor lies in close examination of the relevant legal and intellectual history—how the rules and requirements of contract developed, and how the doctrine of promissory estoppel was conceived and advocated. Detailed knowledge of that history is indispensable in order correctly to evaluate and judge the genesis, justification, and advisability of the antithetical legal principles here at issue.

Accordingly, Part I reviews the historical development and contours of the rules of contract from the Norman invasion of England through the American revolution, by which time Anglo-American contract law had largely assumed its modern shape. Part II explores the intellectual history of the reliance concept and attempts by academics during the twentieth century to undermine the requirement of consideration for the enforceability of contract. Part III looks to those changes required to return contract law to its traditional and proper configuration. This would entail, *inter alia*, more robust application of the concept of implied unilateral contract, as well as more rigorous grappling with the issue of whether in any given case a sufficiently definite “promise” has in fact been made. It would also entail returning the American Law Institute’s restatement to a doctrinal description bearing greater fidelity to the true record of history and precedent. The Article then concludes.

I. TRADITIONAL CONTRACT LAW

In proposing that his radical new principle of promissory liability be included in the First Restatement—misleadingly held out as merely reciting “the law as it is, not as a new law”¹⁴—Williston was at pains to present his novum as enjoying precedential legitimacy. His two central claims were that the origins of Anglo-American contract law in the Middle Ages rested upon what was essentially promissory estoppel, and that various latter-day cases setting forth exceptions to the consideration requirement should be expanded into promissory estoppel’s universal

14. *Minutes of the Third Annual Meeting*, 3 A.L.I. PROC. 82, 159 (1925).

exception to the requirement.¹⁵ The latter claim shall be addressed *infra*.¹⁶ The prior is addressed here.

A. *The Foundations: 1066 to 1350*

Anglo-American contract law originally developed in medieval England following the Norman conquest in 1066.¹⁷ Unlike continental Europe, which began during the Middle Ages consciously to pattern its laws on those of ancient Rome, England followed a semi-autonomous path of legal development under the Normans, clearly informed by certain Roman legal concepts yet charting its own distinct path forward.¹⁸ Our own American contract law of today descends directly from the fundamental legal structures crafted by the British during the half millennium from 1066 to 1602.¹⁹

In brief, during the earliest phases of Anglo-American contract law, vast numbers of day-to-day commercial exchange transactions were enforced pursuant to what was referred to at the time as “debt upon contract.”²⁰ In such claims, one party had, pursuant to mutual agreement, conveyed property to or performed a service for another, or paid another for a property or service, and the counterparty had then failed to render their agreed-upon counterperformance.²¹ The party which had already performed their side of the exchange could then bring suit.²² Such

15. See Eric Alden, *Promissory Estoppel and the Origins of Contract Law*, 9 NE. U. L. REV. 1, 10–12 (2017) [hereinafter Alden, *Origins of Contract Law*]; Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 678–705.

16. See *infra* section II.C.2.a.

17. See generally JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (4th ed. 2007); JOHN H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750 (1986) [hereinafter SOURCES]; C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT (1949); WILLIAM HOLDSWORTH, 2 A HISTORY OF ENGLISH LAW (4th ed. 1936); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956) (1929); 1–2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (Cambridge Univ. Press 2d ed. 1968) (1895) [hereinafter POLLOCK & MAITLAND]; A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT (1975); SAMUEL JACOB STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW (1975).

18. This was of course due in no small part to the geographic and thus cultural separation afforded by the English Channel. On the semi-autonomous nature of English legal development, see 2 POLLOCK & MAITLAND, *supra* note 17, at 193; PLUCKNETT, *supra* note 17, at 298–99. As to the influence of Roman legal concepts upon the development of early English law, see Alden, *Origins of Contract Law*, *supra* note 15, at 35–42.

19. See discussion *infra* section I.C.

20. See STOLJAR, *supra* note 17, at 10–11.

21. *Id.*; see BAKER, *supra* note 17, at 318–25.

22. See STOLJAR, *supra* note 17, at 11.

contracts did not need to be in writing to be enforceable—all that was required was that the plaintiff have rendered their own performance as a precondition to seeking legal remedy.²³ These were contracts predicated on voluntary mutual exchange.

Distinct from such actions sounding in debt upon contract were two principal species of so-called “formal” contract, in which one party would make a formal promise to another in a manner characterized by high evidential quality. These two species of formal contract were, respectively, “debt upon obligation” and “covenant.”²⁴

In debt upon obligation, one party would acknowledge in a formal, “sealed” writing—in the parlance of the day, a “deed”—that the party owed a specified sum of money to another.²⁵ The high formality of crafting a document written on parchment, sealed with melted wax, not infrequently accompanied by ribbons, and stamped with a personally customized seal die²⁶—in a day and age when many could neither read nor write proficiently²⁷ and the instruments for creating such documents were presumably often not at hand—served a severalfold purpose. It demonstrated conclusively to third parties for evidential purposes that a contractual “promise” had in fact been made.²⁸ It set forth in writing the precise contours of the promise, not subject to either outright mendacity or the vagaries of *ex post* memory tainted by the motivation of self-interest.²⁹ And it served an admonitory function, putting the promisor on notice of the contractually binding nature of the obligation thus undertaken.

Though deeds acknowledging a monetary debt were presumably written overwhelmingly in circumstances where the nominal debtor had in fact received value in exchange therefor—why, after all, would one

23. *Id.*

24. *See id.* at 4–10; BAKER, *supra* note 17, at 318–25.

25. *See* BAKER, *supra* note 17, at 323.

26. On the physical mechanics of seals, see generally P.D.A. HARVEY & ANDREW MCGUINNESS, *A GUIDE TO BRITISH MEDIEVAL SEALS* (1996).

27. Milsom characterized this earlier period in our history as “a largely illiterate age.” MILSOM, *supra* note 17, at 248. For a brief overview discussion of the incremental growth of literacy and the impact of written documents in medieval England even prior to Gutenberg’s invention of the printing press circa 1440, see Nazareth A. M. Pantaloni III, *Legal Databases, Legal Epistemology, and the Legal Order*, 86 *LAW LIBR. J.* 679, 682, 684–87 (1994), though it has been estimated that by the 1600s still only one third of English men were literate. Allegra di Bonaventura, *Beating the Bounds: Property and Perambulation in Early New England*, 19 *YALE J.L. & HUMAN.* 115, 144 (2007).

28. This is distinct from those run-of-the-mill, forward-looking statements of anticipation or intent which every one of us utters many times a day without any expectation—by either speaker or listener—that the statement would have any legally binding effect.

29. *See* 2 POLLOCK & MAITLAND, *supra* note 17, at 220.

formally acknowledge that one is indebted for a fixed sum of money to another if one has not actually received anything?—the deed was of such “‘high nature’ for evidential purposes” that inquiry into the specifics of the exchange was not required.³⁰ The party issuing the deed had, as it were, signaled an absolute intent to be bound and effectively waived the proof of counterperformance that would be requisite, for example, in an informal action of debt upon contract. Debt upon obligation, evidenced by such a deed, was formal contract.

Similarly, one could enter into any other manner of future-oriented promise and render it enforceable by creating a formal, sealed deed. This was known as covenant.³¹ Again, though such formal promises may overwhelmingly have been entered into in exchange for some delivered or promised counterperformance,³² the “‘high nature’ for evidential purposes”³³ of the deed rendered technical inquiry into counterperformance unnecessary. This was likewise formal contract, not entirely dissimilar to the formal *stipulatio* of ancient Rome.³⁴

The foregoing description sets forth the main lines of Anglo-American contract law in its earliest formulation during the centuries following the Norman conquest.³⁵ Exchange contracts were enforceable, with or without a writing, as long as the plaintiff had rendered their own performance. Formal contracts, even if reflecting underlying exchange transactions—as they presumably typically did—due to their high evidential nature obviated the need to inquire into the counterparty’s counterperformance or counterpromise.

B. Procedural Shift: 1350 to 1600

Between roughly 1350 and 1600, English contract law then underwent a gradual change in the procedural mechanism used to bring contract suits. Whereas theretofore the actions of debt upon contract and debt upon obligation had constituted the principal avenues for contract litigation in

30. See BAKER, *supra* note 17, at 324–25; STOLJAR, *supra* note 17, at 9.

31. See FIFOOT, *supra* note 17, at 255–58.

32. See STOLJAR, *supra* note 17, at 38.

33. BAKER, *supra* note 17, at 324.

34. *Stipulatio* was oral rather than written, but it followed a prescribed formula of counterpart recitations before a witness. See MILSOM, *supra* note 17, at 249; PLUCKNETT, *supra* note 17, at 632.

35. The description given here reflects the law of contract as practiced in the King’s courts as distinct from local courts. For example, local courts in London did not require specialty (a formal deed) for the enforcement of covenant. See John H. Baker, *Deeds Speak Louder than Words: Covenants and the Law of Proof, 1290–1321*, in LAWS, LAWYERS AND TEXTS: STUDIES IN MEDIEVAL HISTORY IN HONOUR OF PAUL BRAND 177, 177–78 (Susanne Jenks et al. eds., 2012); SIMPSON, *supra* note 17, at 16.

the King's central courts, debt upon contract was burdened with a severe and often crippling weakness from plaintiff's point of view: The defendant in a debt upon contract case could simply deny, upon defendant's faith, the existence of the debt or duty to render counterperformance.³⁶ Known as "wager of law," this could consist of either an assertion that no money, property, or services had in fact been received by the defendant, or that the defendant had already paid or rendered counterperformance therefor.³⁷ In either case, the defendant would not be under any current contractual obligation. If the defendant could pull together a dozen "compurgators" likewise willing to swear that they believed defendant's assertion, the defendant was absolved of liability.³⁸

This extraordinary, and by today's standard antiquated, primitive defense created an enormous incentive for plaintiffs, and for judges seeking justice in cases where defendant's denial seemed suspect, to search for an alternative "writ," or procedural form of action, by which to bring contract suits.³⁹ The candidate upon which they landed was the tort writ of trespass upon the case sounding in assumpsit, or simply "assumpsit" for short.

In its original, early form, the plaintiff's essential allegation in assumpsit was that the defendant had assumed an obligation to do something, and then through negligence in the performance thereof—a "neglect" in the terminology of the day—brought harm to the plaintiff or plaintiff's property.⁴⁰ Founded upon negligence, this early form of assumpsit sounded in tort.

Given its origin in negligence, thus a nonconsensual harm to plaintiff, rather than in mutually agreed exchange, assumpsit had a cardinal advantage over debt upon contract as a vehicle for plaintiff's claim—the defendant in an assumpsit claim could not skirt liability by waging their law.⁴¹ A plaintiff choosing to bring their claim in debt upon contract might find themselves frustrated by defendant's wager of law, but if the claim could somehow be formulated in a manner permitting use of the writ of assumpsit, that defense fell away entirely.

36. See MILSOM, *supra* note 17, at 254; STOLJAR, *supra* note 17, at 7–8.

37. See STOLJAR, *supra* note 17, at 8.

38. *Id.*

39. See BAKER, *supra* note 17, at 326–27.

40. See Bukton v. Tounesende (1348), *record at* KB 27/354 m. 85, *report at* YB 22 Ass. 94, pl. 41 (KB), *translated in* SOURCES, *supra* note 17, at 358; *alternative translation of record at* 82 SELDEN SOCIETY 66 (1965) [hereinafter *The Humber Ferry Case*].

41. See, e.g., STOLJAR, *supra* note 17, at 78.

Through creative application and extension over the next two centuries, the writ of assumpsit eventually came to be applicable not only to cases involving negligence, that is, malfeasance, but also to cases where defendant simply failed to perform what was promised, that is, nonfeasance.⁴² Assumpsit thus left its tortious origin behind, ultimately becoming applicable across nearly the entire spectrum of contract disputes.⁴³ Yet though no longer founded upon negligence, the contractual use of assumpsit conveniently retained its profound procedural advantage of permitting plaintiffs to circumvent the wager of law defense available to defendants in actions sounding in debt upon contract. Plaintiffs and sympathetic judges accordingly flocked to the new form of action.⁴⁴ This evolution came to its dramatic conclusion with the epochal *Slade's Case* of 1602, by virtue of which the availability of assumpsit to plaintiff even in cases where the action might otherwise have been brought pursuant to a writ of debt was now extended from the King's Bench to Common Pleas as well.⁴⁵ As a result, the wager of law defense was rendered effectively a dead letter.

Yet precisely during the time period in which assumpsit was brought into play and expanded to cover all manner of contractual disputes, the English courts articulated a hard, absolute rule for the use of assumpsit in contract: There must be “consideration” for the promise to be enforced—that is, there must be an exchange between the parties.⁴⁶ An uncompensated promise was nothing more than that, and not enforceable at law.⁴⁷ Only if the promise were rendered in exchange for a mutually

42. For a condensed review of the grand sweep of these developments, see generally Alden, *Origins of Contract Law*, *supra* note 15, at 28–53.

43. *Id.*

44. See BAKER, *supra* note 17, at 343.

45. *Slade v. Morley* (1602), *decision at* BL MS. Add. 25203, fol. 607 (QB) (Eng.), *together with*: (i) KB 27/1336, m. 305; (ii) Exchequer Chamber, Mich. (1597): Dodderidge's speech from LI MS. Maynard 55, fol. 246; and BL MS. Harley 6809, fol. 45; Coke's reply from BL MS. Hargrave 5, fol. 67v; (iii) Serjeant's Inn, Mich. (1598): BL MS. Add. 25203, fol. 12; (iv) Serjeant's Inn (1602): BL MS. Add. 25203, fol. 496; and (v) Coke's retrospective summary: 4 Co. Rep. 92; *collated with* Coke's autograph report, BL MS. Harley 6686, ff. 526–530v; *reprinted in* SOURCES, *supra* note 17, at 420 [all of the foregoing collectively hereinafter *Slade's Case*]. The specific issue in *Slade's Case* was whether assumpsit could be used by a plaintiff as the basis for an action if debt upon contract were also available on the facts. The Court of Common Pleas said no; the King's Bench had said yes. *Slade's Case* resolved the matter in favor of the King's Bench position. See Alden, *Origins of Contract Law*, *supra* note 15, at 49–51.

46. Alden, *Origins of Contract Law*, *supra* note 15, at 49–51.

47. An uncompensated promise was referred to as *nudum pactum*, i.e., a naked pact. This short phrase came from a longer Latin sentence, *nudum pactum non parit actionem* (a naked pact does not give grounds for an action), along with substantively identical Latin grammatical variants of the same, such as *ex nudo pacto nulla oritur actio*. The principle that an uncompensated promise was not enforceable was a point frequently made, often using the Latin, in English sources at the time. See,

agreed counterperformance, or reciprocal promise of future counterperformance, could the promise be enforced in the courts. Thus, assumpsit was transmogrified into a form of action centrally founded upon the same essential criterion as debt upon contract, namely the presence of a mutually agreed exchange.⁴⁸ Exchange contract remained exchange contract. Only the procedural form through which the action was brought had changed.⁴⁹

In the aftermath of this evolution, a claim in assumpsit could still, as in early days, be predicated upon nonconsensual harm to the plaintiff, i.e., negligence, a tort, or it could alternatively be predicated upon failure to carry out a mutually agreed exchange.⁵⁰ Tortious assumpsit remained viable, but contractual assumpsit had sprung up beside it. A mere promise, however, in the absence of exchange, and without tortious negligence, was simply not actionable. This history is, of course, incompatible with Williston's later claim that contract law procedurally based on assumpsit in the late Middle Ages effectively constituted promissory estoppel, as will be discussed *infra*.⁵¹

With the resolution of *Slade's Case* in 1602, English law had at this juncture attained approximately its modern form. Though various substantial improvements and annexes would later be built onto the structure,⁵² the foundation, walls, and roof had been erected. Contract could be created either through mutual exchange or through the delivery of a highly formalized deed.

e.g., Question from the Master of the Rolls (1477) YB 17 Edw. 4, fol. 4, Trin., pl. 4 (Common Bench) (remarks of Townshend), translated in SOURCES, *supra* note 17, at 242 (discussing various situations in which a quid pro quo either would or would not be present); CHRISTOPHER ST. GERMAN, DYALOGUE IN ENGLYSSE/ BYTWYXT A DOCTOURE OF DYUYNYTE/ AND A STUDENT IN THE LAWES OF ENGLANDE [DOCTOR AND STUDENT], reprinted in 91 SELDEN SOCIETY 228 (1974) [hereinafter ST. GERMAN]; JOHN RASTELL, EXPOSITIONES TERMINORUM LEGUM ANGLIAE (circa 1525), reprinted in SOURCES, *supra* note 17, at 483 (alteration in original). For discussion of the origins of this Latin phrase, along with Roman law on point and its apparent transmission to medieval England, see Alden, *Origins of Contract Law*, *supra* note 15, at 36–42.

48. See Alden, *Origins of Contract Law*, *supra* note 15, at 52–53.

49. *Id.*

50. *Id.* at 53.

51. See *infra* section II.C.

52. In 1677, Parliament enacted the Statute of Frauds, which imposed a writing requirement for the enforcement of certain categories of contracts viewed at the time as being significant in nature. Statute of Frauds, 1677, 29 Car. 2, c. 3, reprinted in SOURCES, *supra* note 17, at 445. In the 1800s, offer and acceptance mechanics were significantly built out. See SIMPSON, *supra* note 17, at 5.

C. *Blackstone and Contract Law in America*

A mere five years later, in 1607, British settlers landed at Jamestown and shortly thereafter at Plymouth Rock. Contract law in the American colonies was thus from its very inception English contract law as it stood in the wake of *Slade's Case*. That is, American contract law was founded upon exchange contract and formal contract, not promissory estoppel.

The doctrinal statement of contract law widely used and considered definitive throughout the colonies on the eve of the American Revolution was set forth in William Blackstone's magisterial *Commentaries on the Laws of England* published in the year 1765.⁵³ His treatise stood astride the legal world of the time like a colossus, serving as the central point of reference for both English and American judges and lawyers.⁵⁴ The portrait he rendered is of English contract law in settled form after the preceding centuries of development since the Norman conquest of England.

Of signal importance is Blackstone's emphasis on the absolute requirement of consideration, of mutual exchange, for the enforcement of contract. The *Commentaries* contain a chapter dealing with the law of gifts, grants and contracts.⁵⁵ Therein, Blackstone defined "contract" as "an agreement upon sufficient consideration, to do or not to do a particular thing."⁵⁶ "The civilians hold," he stated, "that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration . . ."⁵⁷ Blackstone was crystalline that consideration must be present as a precondition to the enforceability of promise:

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it.⁵⁸

53. See generally 2 WILLIAM BLACKSTONE, COMMENTARIES.

54. See PLUCKNETT, *supra* note 17, at 287.

55. 2 BLACKSTONE, *supra* note 53, at *440.

56. *Id.* at *442.

57. *Id.* at *444.

58. *Id.* at *445. Despite this forceful statement of the general rule, there was in Blackstone's presentation an anomaly with respect to the term "consideration" as applied to certain intrafamily donative promises, discussed *infra* section I.E, and two other regards in which Blackstone used the term "contract" to describe a gratuitous arrangement. As to these two latter, one was the gratuitous bailment, and the other was gratuitous borrowing. Limitations of space prohibit full discussion of

No clearer or more forceful statement of the doctrine of consideration—to which the latter-day, artificial doctrine of promissory estoppel is literally antithetical—could be imagined. These *Commentaries* set forth in definitive terms the state of English, and thus American, contract law at the birth of our country.

D. The Anomalous Case of Intrafamily Donative Promises

That being said, there existed a possible anomaly in the received doctrine of consideration as presented in Blackstone's *Commentaries* with regard to intrafamily donative promises, i.e., a promise to make a gift to a family member not now, but in the future. Though this might at first blush appear to be an ancillary subject to touch upon, it later ended up playing a critical, indeed decisive, role in Williston's invention of the doctrine of promissory estoppel in the early 1900s.⁵⁹

Under property law, a gift is generally effective upon actual transfer of an ownership interest.⁶⁰ If, however, a putative donor merely promises to make a gift in the future, the general rule is that the gift has not yet occurred.⁶¹ As a promise is involved, the matter is then considered under contract law principles, where we have seen that the absence of consideration, the absence of exchange—and a gift is, tautologically, gratuitous—renders the promise unenforceable. Blackstone articulated the rule unambiguously:

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration⁶²

So far, so good. Yet Blackstone's presentation also contains a brief discussion of a distinction which at first blush, and again upon second

these here, but neither indicts or undermines his general statement of the requirement of consideration for all contracts. Gratuitous bailment, to address the first of these, is a highly particularized niche in the law which can and should be cabined off from contract law in general, and the principles on which it operates have been reabsorbed over the course of centuries back into tort rather than contract. See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 688–92.

59. See *infra* section II.C.4.

60. For a statement of this rule at the birth of our country, see 2 BLACKSTONE, *supra* note 53, at *441. For a modern statement thereof, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 6.1 cmt. c (AM. LAW INST. 2003).

61. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 6.1 cmt. p (AM. LAW INST. 2003).

62. 2 BLACKSTONE, *supra* note 53, at *441–42.

blush, strikes one as contradictory to everything he had earlier said regarding consideration:

A *good* consideration . . . is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors, or other third persons, of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity; for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.⁶³

In a purely gratuitous promise to a relative, the donee relative has done nothing affirmatively to convey a benefit upon the promisor, or at promisor's request upon a third person. There is no bargain, no quid pro quo, no deal. The relative has thus paid no consideration for the promise. The promise is unenforceable. And yet we have Blackstone's foregoing statement, apparently to the contrary.

An explanation suggests itself. When we dig deeper into Blackstone's text, we see that his central citation for this passage refers back to an earlier section of his treatise that this passage effectively repeats in substance.⁶⁴ That earlier section spoke of the alienation of property by deed—that is, by formally sealed document.⁶⁵ Blackstone specified that for such a deed to be enforced, it had to be based upon either valuable consideration, or upon “good” consideration.⁶⁶ “A good consideration,” he wrote, “is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation: being founded on motives of generosity, prudence, and natural duty”⁶⁷ Blackstone was thus in effect stating that a gratuitous deed of transfer—i.e., one not founded upon valuable consideration—would only be enforced if made out to the benefit of one's near relatives. A wholly gratuitous deed purporting to alienate property to some other party—not a relative—would, by negative

63. *Id.* at *444 (emphasis in original) (citations omitted).

64. *Id.* at *296–97.

65. *Id.*

66. *Id.* at *297.

67. *Id.*

inference from Blackstone's explication, not be enforceable despite having been set forth in a formal, sealed writing.

Moreover, Blackstone made clear that "[d]eeds made upon good consideration only [that is, not valuable consideration], are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bona fide* purchasers."⁶⁸ He had thus distinguished a "merely voluntary," in other words gratuitous, nonbinding, transfer, from one in which a party has incurred a legal obligation by virtue of which the counterparty becomes "as much an owner, or a creditor, as any other person."⁶⁹

Thus, Blackstone's text stated simply that even a gift deed must be founded upon some plausible motivation to benefit one's family in order to be enforced. He had therefore not contradicted himself as to the requirement of valuable consideration in true, binding contract. Subsequent American case law is consistent with this interpretation of Blackstone's intended meaning.⁷⁰

Nonetheless, Blackstone's phraseology, presumably consistent with certain precedent upon which he drew, was confusing at best, and may over time have seduced more than a few into thinking that natural love and affection, standing on their own, might constitute "consideration" sufficient to render a gift promise binding.⁷¹ There did indeed exist a well-

68. *Id.*

69. *Id.* at *444.

70. See *Fischer v. Union Trust Co.*, 101 N.W. 852 (Mich. 1904). Though without citing Blackstone directly, *Fischer* addressed a gratuitous grant deed to real property, coupled with a gratuitous promise to pay off the associated mortgages, in terms very much along the lines suggested. "The deed [to a parcel of land] was a gift, and the gift was consummated by its execution and delivery. The title to the land . . . passed as against all except the grantor's creditors," wrote the court. *Id.* at 853. The court described three classes of "consideration": (i) "valuable consideration" sufficient to create enforceable contract; (ii) "voluntary bounty," which is "for all legal purposes a mere nullity until actual performance of the promise"; and (iii) an intermediate category involving "moral duty," such as a promise for the purpose of "maintaining a wife and children." *Id.* The court clearly distinguished between the term "consideration" used in its third, intermediate terminological category to support an executed and delivered gratuitous deed granting title to real property against potential claims by other noncreditor members of a family, versus the valuable consideration involved in enforceable executory contract:

The consideration of natural love and affection is sufficient in a deed [that is, a fully executed and delivered gratuitous deed granting title to real property]; but a mere executory contract, that requires a consideration, as a promissory note, cannot be supported on the consideration of blood or natural love and affection—there must be something more, a valuable consideration, or it cannot be enforced at law

Id. at 854 (quoting *Pennington v. Gittings*, 2 Gill & J. 208 (Md. 1830)).

71. Stoljar has written that "in the eighteenth century we again hear voices, though always few and isolated, claiming love and affection (or what is now called 'moral obligation') to be a sufficient basis or consideration for a promise to pay." STOLJAR, *supra* note 17, at 67.

known case to that effect from the mid-1500s, *Sharrington v. Strotton*,⁷² though this principle enunciated in *Sharrington* did not ultimately prevail as the case law developed.⁷³ Over time, the firm rule articulated was that natural love and affection were not regarded as constituting consideration,⁷⁴ for the obvious reason that they did not involve an exchange, a quid pro quo. A transfer based purely on love and affection and without exchange is gratuitous, and therefore is a gift. If no present transfer is effectuated, and only a future transfer contemplated, it is a gift promise and not enforceable.

This subject will be reprised *infra*, when discussion turns to the genesis of promissory estoppel.⁷⁵

E. *Atrophy of Formal Contract Pursuant to Seal*

In addition to the near universal case of contract formed by mutually agreed exchange, true to English legal history Blackstone's *Commentaries* indicated that formal contract, created by the use of a seal, constituted a valid alternative method to create binding contractual obligation.⁷⁶

Over the course of American frontier history, however, there occurred a steady erosion in the formality, use, and effect of the seal to create formal contract.⁷⁷ The old solemnity of red wax impressed with an individually distinctive seal die was gradually abandoned in favor of less formal and ultimately casual means of "sealing" a document.⁷⁸ A stamped impression on the paper, or even simply words reciting that the document was "sealed," came to be viewed as sufficient.⁷⁹ Hand in hand with this relaxation of formality and concomitant decline in evidential quality of

72. *Sharrington v. Strotton* (1565) KB 27/1212, m. 253; Plowd. 298, 301, reprinted in SOURCES, *supra* note 17, at 488.

73. See John H. Baker, *Origins of the "Doctrine" of Consideration, 1535-1585*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 336, 354 (Morris S. Arnold et al. eds., 1981) [hereinafter Baker, *Origins of Consideration*] (stating that certain enumerated "seemingly unreciprocal considerations as natural love and affection" were "held good in their time, until they were struck down by the countervailing notion of reciprocity").

74. Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 110-11 (2000).

75. See *infra* section II.C.2.c.

76. 2 BLACKSTONE, *supra* note 53, at *465.

77. See generally E. ALLAN FARNSWORTH, CONTRACTS 86-88 (2d ed. 1990); 1A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW 385-458 (1963).

78. See FARNSWORTH, *supra* note 77, at 87; CORBIN, *supra* note 77, at 390-96.

79. See FARNSWORTH, *supra* note 77, at 87.

the seal, many states by statute began to provide that a seal merely provided a presumption of consideration, abolished the distinction between sealed and unsealed documents, or abolished the seal outright.⁸⁰ The states in which the seal appears still to have life are generally those which numbered among the original thirteen colonies.⁸¹ New York, however, and other principal commercial jurisdictions of later vintage such as Illinois, California, and Texas, have all either abolished the distinction between sealed and unsealed, or abolished the seal altogether.⁸²

As will be seen later, this atrophy of the seal as a means of creating an enforceable promise, without further inquiry into whether consideration is in fact present, played a significant role in subsequent events. It largely removed from the legal arsenal a simple, straightforward means to address the presumably rare case in which an individual wishes not to make a present gift, but rather wishes to render legally enforceable against him or herself a present promise to make a gift or render gratuitous services in the future. The absence of a ready tool to hand for such unusual circumstances was later to be used by Samuel Williston as the principal justification for his advocacy in the early twentieth century of the novel doctrine of promissory estoppel.

II. THE RELIANCE REVOLUTION

A. *Setting the Intellectual Stage*

We now arrive at the cusp of the modern era. Before turning to Williston's advocacy for promissory estoppel in the 1920s, two preceding conceptual developments in the late 1800s and early 1900s must be addressed. Together, they contributed to obscuring the genesis and true foundation of contract law.

1. *Langdell's Dismissal of Benefit to Promisor*

Christopher Columbus Langdell served as dean of Harvard Law School from 1870 to 1895, and in that capacity played a tremendously influential

80. *Id.* at 87–88.

81. See RESTATEMENT (SECOND) OF CONTRACTS ch. 4, topic 3, stat. note (AM. LAW INST. 1981) (2016 update).

82. *Id.* The seal has also been declared by the Uniform Commercial Code to be legally inoperative as to the sale of goods. U.C.C. § 2-203 cmt. (AM. LAW INST. & UNIF. LAW COMM'N 2003) (“This section makes it clear that every effect of the seal which relates to ‘sealed instruments’ as such is wiped out insofar as contracts for sale are concerned.”).

role in the development of American legal education.⁸³ He has generally been viewed as a principal exponent of archetypal classical contract law.⁸⁴

It is thus ironic that in Langdell's treatise on the subject,⁸⁵ his analysis of consideration should prove—presumably quite unintentionally⁸⁶—to constitute a beachhead for subsequent efforts to shift the doctrinal underpinnings of the field away from mutual exchange and toward unilateral, unbargained-for reliance by the promisee. With no disrespect desired or intended to Langdell's enormous personal and professional achievements, certain statements in his treatise must be critically addressed.

In a section of the treatise entitled “To whom the Consideration must move,” we find Langdell make the following rather striking statement:

[I]t is frequently laid down as a rule, that a consideration must consist of some benefit to the promisor or some detriment to the promisee, as if either one of these would do; and in applying this rule, it is a common practice to inquire first if there is a benefit to the promisor In truth, however, *benefit to the promisor is irrelevant to the question whether a given thing can be made the consideration of a promise* On the other hand, detriment to the promisee is a universal test of the sufficiency of consideration; *i. e.* every consideration must possess this quality, and, possessing this quality, *it is immaterial whether it is a benefit to the promisor or not.*⁸⁷

Upon a careful reading and parsing of this passage and others related thereto in Langdell's treatise, one sees that he was attempting to make the narrow, technical point that one may bargain for an immediate, direct benefit (as distinct from the indirect benefit arising therefrom) to be conferred not back upon oneself but instead upon a third party, such as a family member, a friend, or a creditor under another preexisting contract,

83. As dean, Langdell innovated and introduced the case law method of law school instruction. As to the background for his ideas in this regard, see generally Bruce A. Kimball, *Young Christopher Langdell, 1826-1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189 (2002) (indicating the influence on Langdell of John Locke's writing on educational methodology).

84. See, e.g., Mark Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 IUS GENTIUM 115, 117, 119 (2006).

85. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (Boston, Little, Brown & Co. 2d ed. 1880).

86. Langdell's recitation of the doctrine of consideration is upon first impression every bit as orthodox as that of Blackstone: “The consideration of a promise is the thing given or done by the promisee in exchange for the promise. It is a familiar rule of law that contracts not under seal [i.e., all contracts not evidenced by a formally sealed deed] require a consideration to make them binding.” *Id.* at 58.

87. *Id.* at 81–82 (emphasis added).

as will be elucidated below. Yet the extraordinarily broad phrasing used by Langdell has, in the hands of certain subsequent academics, degenerated into simple assertions that detriment to the promisee is the actual core of consideration, and that—by intellectual *salto*—the presence of unilateral, unbargained-for detrimental reliance by a promisee is sufficient for the enforcement of promise.⁸⁸

The crux of Langdell's statement is his highly restricted use of the word "benefit."⁸⁹ As it there appears, he is referring solely to the person to whom the promisee's act or forbearance is immediately directed.⁹⁰ In most cases, that act or forbearance will be directed back toward the promisor. But it may be directed, as Langdell quite correctly observes, at the specific request of the promisor, to a third party.⁹¹ For example, a person might contract for a service, such as medical care, or university enrollment, to be provided for a family member. Even though the service is directed in the immediate sense to a third party, and not back toward the promisor him or herself, the promise to pay for the service is contractually binding. This is a third-party beneficiary contract, in which the promisee's provision of an act or forbearance directed towards a third party serves as consideration for promisor's promise to pay, precisely because the promisor has bargained therefor. Third-party beneficiary contracts have clearly been enforceable under common law since the Middle Ages.⁹²

In a third-party beneficiary contract, the reason a promisor has bargained for a direct benefit to be provided by promisee to a third party is that the promisor will enjoy an indirect benefit therefrom. An example is a parent contracting with a doctor or hospital to provide medical care to the parent's child. The direct benefit flows to the child. But an obvious indirect benefit accrues to the parent, the promisor. Langdell's usage of the word "benefit" in the passage cited above would posit that there exists no "benefit" to the parent in such a situation. This is an inappropriately narrow constriction of the term. It is precisely that indirect benefit to the promisor which has induced the promisor to make the promise, and which

88. A quintessential example of extrapolation is to be seen in the work of Eric Mills Holmes, a dedicated exponent of promissory estoppel. See Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 271–75 (1996).

89. See LANGDELL, *supra* note 85, at 81–84.

90. *Id.* at 81.

91. *Id.* at 80, 84.

92. See, e.g., ST. GERMAN, *supra* note 47, at 230–31 (stating the principle that if one party promises to pay another for services to be rendered to a third party, the promise is enforceable by the promisee even though the promisor "haue no worldely profyte by yt," and giving examples of the principle in application).

constitutes the legal policy basis for enforcement of the contract between the promisor and promisee.⁹³

Langdell then followed up the foregoing statement with a second which again tends, presumably unintentionally, to lead the reader badly astray: “[T]he action of assumpsit, because it was founded upon the theory that the defendant’s obligation was created by his promise, and not by a consideration received.”⁹⁴

It is wholly misguided to assert, as Langdell here did, that in contractual assumpsit “the defendant’s obligation was created by his promise, and not by a consideration received.”⁹⁵ The early assumpsit cases arising out of exchange transactions were predicated upon the defendant having committed some neglect, some negligence, which gave rise to the action.⁹⁶ They thus sounded properly in tort based on negligence, not in contract that entails strict liability even without negligence.⁹⁷

Later, both during and in the aftermath of the period when claims in assumpsit came to be permitted to succeed even without proof of negligence, English courts repeatedly articulated the requirement of reciprocity, of exchange, in such cases.⁹⁸ This requirement of reciprocity came to be articulated formally as the requirement of “consideration.”⁹⁹ That is, in order for assumpsit to move beyond tort, and thus to impose liability in the absence of negligence, there need be consideration.

Moreover, the period in which assumpsit was extended to apply not just to cover cases in which the plaintiff had already performed, but to bilaterally executory contracts, did not precede but instead coincided precisely with the period in which the term “consideration” was formally articulated to represent the already long extant requirement of

93. An example of a purely commercial third-party beneficiary contract is provided by *Kmart Corp. v. Balfour Beatty, Inc.*, 994 F. Supp. 634 (D.V.I. 1998), in which a landlord employed a contractor to build a custom facility to satisfy landlord’s preexisting contractual obligation to a major tenant.

94. LANGDELL, *supra* note 85, at 82.

95. *Id.*

96. *See, e.g.*, *The Humber Ferry Case*, *supra* note 40; *Waldon v. Mareschal* (1369) YB 43 Edw. 3, fol. 33, Mich., pl. 38, *collated with* LI MS. Hale 187, fol. 104v, *translated in* SOURCES, *supra* note 17, at 359.

97. For further discussion of this point, see Alden, *Origins of Contract Law*, *supra* note 15, at 31–32.

98. *See* *Shipton v. Dogge* (1442), *first action at* CP 40/725, m. 49d, Pasch (under name “Shepton” rather than “Shipton”), *second action record at* KB 27/717, m. 111, *second action report at* YB 20 Hen. 6, fol. 34, Trin., pl. 4 (KB), *translated in* SOURCES, *supra* note 17, at 390, and *second action report translated in* 51 SELDEN SOCIETY 97 (1933) [hereinafter Doige’s Case]. For more detailed discussion, see Alden, *Origins of Contract Law*, *supra* note 15, at 32–35.

99. *See* *Isack v. Barbour* (1563) KB 27/1207, m. 55, *discussed in* BAKER, *supra* note 17, at 340; *Stone v. Withpole* (1589) 74 Eng. Rep. 106, *report in* YLS MS. G. R29.6, fol. 81 (QB) (Eng.), *alternate report in* 1 Leon. 113, pl. 156, *reprinted in* SOURCES, *supra* note 17, at 498–99; Alden, *Origins of Contract Law*, *supra* note 15, at 46–48.

reciprocity.¹⁰⁰ Both occurred during the very same period in the latter half of the 1500s.¹⁰¹

It is thus highly misleading—even if unintentionally so—to state that in contractual, as distinct from tortious, assumpsit, “the defendant’s obligation was created by his promise, and not by a consideration received.”¹⁰² An incorrect implication can quite readily be drawn from this statement that promise alone can give rise to contractual liability in the absence of consideration. Nothing could be further from the actual historical record.

Whatever Langdell’s intent may in fact have been, these statements in his treatise, and their propagation to future generations of law students, helped set the intellectual stage for the reliance revolution to come.

2. *Ames’s Search for the Origins of Consideration in Deceit*

Next to serve as dean of Harvard Law School was James Barr Ames, holding that position from 1895 to 1910.¹⁰³ Ames had deep knowledge of English legal history, and his series of lectures on the subject, focusing particularly on contract law, constitutes a frequent point of reference for those interested in the field.¹⁰⁴

100. As to the extension of assumpsit to bilaterally executory contracts, see *Lucy v. Walwyn* (1561), record at KB 27/1198, m. 183, report at Gell’s reports, MS. at Hopton Hall, ff. 154v, 158v, reprinted in SOURCES, *supra* note 17, at 485; and *Strangborough v. Warner* (1589) 74 Eng. Rep. 686; 4 Leon. 3 (KB). As to articulation of the reciprocity requirement under the formal name of “consideration,” see *Isack v. Barbour* (1563) and *Stone v. Withipole* (1589), *supra* note 99.

101. Indeed, both developments occurred during the roughly thirty-year period from 1560 to 1590. In this regard, see the cases cited *supra* note 96.

102. LANGDELL, *supra* note 85, at 82. This is distinct from a situation in which the promisor, at the very moment of making a promise, already knows that he or she will never perform thereon. This deliberate, conscious mendacity is actionable in tort as fraud, specifically “promissory fraud.” See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 673–74.

103. See JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 6, 7 (1913). By virtue of the depth of his academic knowledge, he enjoyed the distinction of becoming the first Harvard professor appointed directly to a teaching position without having first worked in practice. Ames’s induction to a teaching post without prior significant practice experience initiated a new pattern of academic hiring which has over the course of the past century revolutionized the nature and focus of legal academia. *Id.* at 5, 8.

104. *Id.* at v–vi. Many of the lectures were published in the Harvard Law Review or The Green Bag. However, some caution with this source must be advised as portions thereof were subsequently reconstituted for publication from Ames’s own lecture notes as well as contemporaneous notes taken by students in his class, prominent among them Samuel Williston of later promissory estoppel fame. *Id.* at v. Whether Williston’s incipient personal views on the subject might, completely in good faith, potentially have affected his perception and recordation of Ames’s presentations must remain purely speculative.

Of seminal importance for the intellectual history recounted in this Article is Ames's inquiry at the turn of the last century into the medieval origins of the doctrine of consideration:

The mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirement of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol." [citing for this proposition Oliver Wendell Holmes] On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law." [citing herefor Sir John William Salmond] A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts. [citing herefor John Innes Clark Hare]

To the present writer, it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition would not have covered the cases of the sixteenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt The history of detriment is bound up with the history of special assumpsit, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*.¹⁰⁵

Pursuing a similar line of inquiry as the third cited approach, which he had attributed to Hare, Ames then went on to attempt to trace the origin of detriment constituting consideration to early cases in the medieval period involving claims of "deceit"—generally, cases susceptible to being characterized as involving tortious fraud in the inducement, the performance, or both.¹⁰⁶ Ames characterized the cases that he focused on

105. *Id.* at 129–30 (citing Oliver Wendell Holmes, Jr., *Early English Equity*, 1 L.Q. REV. 162, 171 (1885)); see OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 285 (Boston, Little, Brown & Co. 1881); Sir John William Salmond, *The History of Contract*, 3 L.Q. REV. 166, 178 (1887); JOHN INNES CLARK HARE, *THE LAW OF CONTRACTS* chs. VII, VIII (Boston, Little, Brown & Co. 1887).

106. See AMES, *supra* note 103, at 129–30, 139–47. Ames cited Hare as the original progenitor of this view. *Id.* at 145. Ames contrasted the Hare/Ames deceit theory with the opposing view of Oliver Wendell Holmes, who saw the origin of the doctrine of consideration in the requirement of *quid pro quo* in debt upon contract cases, and the view of Salmond, who posited that consideration constituted "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the

as ones in which the defendant had “intentionally misled” the other party.¹⁰⁷

The significance of Ames’s exegesis is twofold. First, he followed and reiterated the approach taken by his mentor and decanal predecessor Langdell, namely to reduce consideration to a description solely in terms of detriment to promisee, without discussion of benefit to promisor.¹⁰⁸ This helped to solidify a perspective focusing on only one aspect, and the less important aspect, of the moral and economic basis for the legal enforceability of contract.

Second, and more importantly, Ames’s search for consideration in deceit cases produced a number of passages which lent themselves to later misleading partial citation and mischaracterization by Williston to construct a justification for the novel doctrine of promissory estoppel.¹⁰⁹ The manner in which Williston misused Ames’s text for polemical purpose will be explored *infra* in connection with the drafting and promulgation of promissory estoppel in the 1920s.¹¹⁰

Suffice it to say, for current purposes, that Ames’s thesis that the origins of the doctrine of consideration might be traced to deceit cases has been countered by John H. Baker of Cambridge University, the leading living historian of English legal development:

[W]e must face the near impossibility of linking either the delictual history or the substantive principle with the “doctrine” of consideration in the way suggested by Hare and Ames. The elements of deceit and consequential loss were never incorporated in the consideration clause, but were destined to wither away as fictions. And in the cases that established “detriment to the promise” as good consideration, the consideration in question had nothing in common with the earlier deceit cases: it was a reciprocal future act, or a promise to act, by the plaintiff.¹¹¹

Fundamentally, and without disrespect to the depth of Ames’s learning or intellect, his discussion of the early deceit cases does not recognize the true role they played in the medieval evolution of contract law. As discussed in section I.B, in broader historical context the significance of the deceit cases is that they opened a creative pathway for litigants to

common law.” *Id.* at 129. For an extended discussion of Ames’s analysis in this regard, see Alden, *Origins of Contract Law*, *supra* note 15, at 10–12, 54–62.

107. AMES, *supra* note 103, at 127.

108. *See supra* section II.A.1.

109. *See Alden, Origins of Contract Law, supra* note 15, at 10–12, 54–62.

110. *See infra* section II.C.

111. Baker, *Origins of Consideration, supra* note 73, at 357.

invoke the plaintiff-friendly procedural mechanisms of the tort writ of trespass on the case to circumvent the defense of wager of law otherwise available to defendants in debt upon contract cases. While a number of early deceit cases involved true fraud, over time the mere conclusory allegation of deceit was used as a pretext for bringing a claim of trespass on the case sounding in *assumpsit*.

Rather than having its origin in deceit, the Author contends that the doctrine of consideration has its origin in the requirement of reciprocity that was recognized early in medieval English law.¹¹² The need for reciprocity had been articulated by jurists well before the word “consideration” came to be used to describe the concept, and this requirement was neatly summed up in statements that a mere promise in the absence of reciprocal obligation was “*nudum pactum*” and therefore not enforceable.¹¹³

Whatever narrow technical criticism might be lodged against Oliver Wendell Holmes’s assertion that consideration “is simply a modified generalization of the requirements of *quid pro quo* to raise a debt by parol,”¹¹⁴ the overall doctrinal orientation of his view thus does not lie far off the mark. The requirement of *quid pro quo* in debt upon contract does no more than express the concept of reciprocity in that context. As the tort writ of trespass on the case sounding in *assumpsit* came to be instrumentalized for purely procedural purpose to circumvent the defense of wager of law, the underlying principle of reciprocity as the foundation of enforceability of informal contract came likewise to be asserted in those *assumpsit* cases as the requirement of consideration.¹¹⁵

Importantly, though Ames sought to identify the origin of the doctrine of consideration in deceit cases, at no point did he renounce the principle that detriment to the promisee can only constitute the consideration necessary to justify enforcement of a promise if the detriment has been incurred at the request of the promisor.¹¹⁶ That is, there must be a

112. See Alden, *Origins of Contract Law*, *supra* note 15, at 33–35, 46–48, 50–52.

113. *Id.* at 35–36, 40–44. The parallel in this regard to earlier Roman contract law regarding *pacta* (pacts), as described in the late Roman Digest of Justinian, and the possible transmission of this principle to the Anglo-Norman court and judiciary via Bracton and others, have been separately described in detail by the Author in earlier research. *Id.* at 36–40.

For contrary assertions as to the possible transmission of Roman legal principle in this regard, see Baker, *Origins of Consideration*, *supra* note 73, at 351–52, discussing St. German and Plowden writing in the 1500s. The Author’s own research has instead looked to significantly earlier potential absorption by the Anglo-Normans of the principle of reciprocity from Roman law, during the 1100s and 1200s. See Alden, *Origins of Contract Law*, *supra* note 15, at 35–42.

114. Oliver Wendell Holmes, *Early English Equity*, *supra* note 105, at 171 (emphasis omitted); see Baker, *Origins of Consideration*, *supra* note 73, at 354–55 (discussing Holmes’s view).

115. See Alden, *Origins of Contract Law*, *supra* note 15, at 48, 50–51.

116. See AMES, *supra* note 103, at 129, 143, 147.

bargained-for, mutual exchange for contract to exist. This fundamental verity was not merely ignored but indeed affirmatively obfuscated by Williston in the 1920s, as will be discussed next.

B. The Birth of “Promissory Estoppel”

This historical account now arrives at its decisive moment: the birth of “promissory estoppel.”

Early in the twentieth century, the American bar embarked upon a project to summarize the vast array of case law decisions constituting the American common law of contract into a collection of concise doctrinal statements of generally accepted rules applied by the courts. The American Law Institute (ALI) was formed in 1923 for the purpose of drafting and promulgating such “restatements” of major areas of the common law.¹¹⁷ Samuel Williston was chosen as official Reporter to lead the effort during the mid-1920s to draft and promulgate the ALI’s Restatement of the Law of Contracts, commonly known as the “First Restatement.”¹¹⁸

This restatement represented an enterprising and arguably laudatory effort by the American bar of that day to bring order and predictability to substantive legal rules developed through the myriad court decisions of common law precedent. However, though Williston’s formally stated aim for the project was merely to “restate the law as it is, not as a new law,”¹¹⁹ in his hands the First Restatement innovated in key respect—it introduced onto the stage the hitherto unknown legal doctrine of “promissory estoppel,” set forth in Section 90 thereof.¹²⁰ As originally drafted by Williston, this section read: “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.”¹²¹

117. *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 (1923).

118. *An Account of the Proceedings at the Organization of the Institute*, 1 A.L.I. PROC. pt. II, at 4–5 (1923).

119. *Minutes of the Third Annual Meeting*, *supra* note 14, at 159.

120. RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932); *see also supra* note 5 and accompanying text (discussing the origination of the term “promissory estoppel”).

121. *Id.* The Restatement (Second) of Contracts, published by the A.L.I. in 1981, and for which E. Allan Farnsworth served as successor Reporter, modified the wording of Section 90 in certain regards but did not dilute in any respect its essential claim to impose liability without either

1. *Discontinuous Break with History*

The central doctrinal assertion of the newfound doctrine of promissory estoppel—namely, that a naked promise can be enforced as contract despite the absence of any consideration therefor—was diametrically at odds with the universally understood requirement of Anglo-American law that a promise only becomes enforceable if the promisee has paid or done something at promisor's request.¹²² Promissory estoppel radically denied the essential principle of reciprocity that had been firmly established for centuries as the foundation of liability in Anglo-American contract.

The First Restatement thus presented as actual, established law, presumptively predicated on the pedigree of centuries of organic case law development, a novel doctrine enjoying no such historical foundation or legitimacy. It thrust a parvenu, an invention, into the alleged corpus of existing American contract law which was, as the very title of First Restatement proclaims, merely being “restated,” not fabricated whole cloth.

Such statements may initially strike the reader as shocking, particularly where one has been raised through the American law school system in which promissory estoppel is taught in contemporary first year contracts class without comment or objection as received, sacrosanct writ. Yet nothing could be further from the truth.

How did such a momentous occurrence come to pass? Particularly where no less than Samuel Williston, widely hailed at the time as the nation's leading contract law scholar at Harvard Law School, served as official Reporter and personally drafted the text of Section 90 embodying the novel doctrine?¹²³ And where no less than Arthur Corbin of Yale Law School served as Williston's right hand, strongly advocating the cause of promissory estoppel?¹²⁴ These two men, both tremendously intelligent

consideration or mutual assent. For the Restatement (Second) formulation of the section, see *supra* text accompanying note 8.

122. “Done” is here used to include both affirmative action as well as abstaining to take action, in either case at promisor's request.

123. Williston's high stature in the legal academic community and the warm regard in which he was held by colleagues and students is attested to in, for example, Erwin N. Griswold, *In Memoriam: Samuel Williston*, 49 ABA J. 362 (1963) and Austin W. Scott, *Samuel Williston*, 76 HARV. L. REV. 1330 (1963). It is therefore with genuine regret, but under obligation to the subject matter and historical record, that the Author has written in the critical vein herein set forth.

124. The significant and possibly leading role of Corbin in pressing the novel doctrine has been suggestively described by fellow Yale Professor Grant Gilmore based on conversations between the two men many years after the First Restatement drafting project. See GILMORE, *supra* note 11, at 62 n.135, 63. It appears clear, however, that it was Williston himself who personally drafted the text of proposed Section 90. See Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 962 n.55 (1997).

and learned, represented the academic establishment of their day. Yet the innovation of promissory estoppel, introduced by the First Restatement, deviated radically from established contract law doctrine.

2. *Williston's 1920 Treatise: Crack in the Dam*

The irony is immense. In 1920, Williston had himself brought out an enormous treatise on Anglo-American contract law¹²⁵ in which he had very clearly stated the requirement of consideration for the enforceability of contract.¹²⁶ He was generally regarded as a bastion of the rules-oriented establishment not a revolutionary.¹²⁷

Yet a crack in the dam of Williston's doctrinal thought was, upon closer inspection, already visible. In his treatise, Williston included a section entitled "Estoppel as a substitute for consideration."¹²⁸ Therein he cited an array of cases that he claimed constituted precedent for the creation of contract without consideration:

It is generally true that one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two deny the truth of the representations, and *some courts have sought to apply this principle to the formation of contracts*, where, relying on a gratuitous promise, the promisee has suffered detriment.¹²⁹

Moreover, it was Williston who wrote the commentaries intended to provide doctrinal and historical justification for the novel doctrine, and he who orally advocated therefor in debate with his ALI colleagues. See SAMUEL WILLISTON, AM. LAW INST., COMMENTARIES ON CONTRACTS: RESTATEMENT NO. 2, at 14 (1926) [hereinafter WILLISTON, FIRST RESTATEMENT COMMENTARIES]; *Discussion of the Tentative Draft, Contracts Restatement No. 2, Proceedings at the Fourth Annual Meeting*, 4 A.L.I. PROC. APP. 90 (1926) [hereinafter *ALI Debate on Section 90*].

125. 1-4 WILLISTON TREATISE, *supra* note 5.

126. See 1 WILLISTON TREATISE, *supra* note 5, §§ 12, 99, at 10, 191. Williston's references there are to what he termed "simple contracts," i.e., contracts other than formal contracts. *Id.*

127. See generally Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

128. 1 WILLISTON TREATISE, *supra* note 5, § 139, at 307-14.

129. *Id.* § 139, at 307 (emphasis added). A situation where "one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two deny the truth of the representations," is a long-standing legal doctrine known as "equitable estoppel." *Id.* It only applies to representations of past or existing fact, not to forward-looking statements of prediction or intent. See *Union Mut. Life Ins. v. Mowry*, 96 U.S. 544, 547 (1877). Equitable estoppel is therefore inapplicable to promises. *Id.* The quoted passage from Williston's treatise asserts that some courts had nonetheless applied equitable estoppel to forward-looking promise, thus creating in effect an enforceable contract, in derogation of the universally understood rules regarding the limitation of equitable estoppel to statements of past or existing fact.

In his treatise, Williston then coined the entirely novel term “promissory estoppel” to cover this supposed vein of case law.¹³⁰

His assertion in this regard will be held up to closer inspection momentarily. It is of vital importance, however, to note Williston’s telling admission in this connection that he was consciously toying with doctrinal heresy. As to the proposition that one might enforce a promise upon which another has reasonably relied, even though the promisor in no way requested such reliance, he wrote, “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*.”¹³¹ Indeed, a more accurate statement would have been that such a proposition was opposed to the overwhelming, effectively universal weight of authority.

Nor was this the only deviation from an orthodox understanding of contract law to appear in Williston’s work. As will be discussed *infra* in section II.E, in multiple other respects as well Williston’s 1920 treatise opted for doctrinal statements and descriptions whose tendency was to steer the field from the comfort of well-traveled terra firma toward alien terra incognita.

3. *Williston Proposes Section 90*

For reasons now unknown to historical memory, several short years after publication of his treatise Williston embraced the heresy of promissory estoppel wholeheartedly. Perhaps it was a natural evolution of his own intellectual tropism toward enforcement without consideration. Perhaps also he was encouraged to take the leap by his second, Corbin.¹³²

130. See 1 WILLISTON TREATISE, *supra* note 5, § 139, at 308.

131. *Id.* § 139, at 313 (emphasis added).

132. See GILMORE, *supra* note 11, at 62–64 (discussing a conversation Gilmore and Corbin had a number of years earlier). As described by Gilmore, in that discussion, Corbin presented himself as the true progenitor and motive force behind the creation of promissory estoppel during the A.L.I. drafting process. *Id.* at 62–63. The precise roles of Williston and Corbin in the genesis of the idea cannot at this late date be determined with absolute certainty. Williston, however, wrote the actual text of Section 90 personally, wrote the written academic case in favor thereof, and led the oral defense of the novel doctrine in open debate within the A.L.I. as recorded in the minutes thereof. See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 679–80. This Article focuses on the written evidentiary record left by Williston.

The ultimate motivation behind Williston's change of mind must remain speculation. But the fact of that change is indisputable, as will be seen.

The rubber hit the road in 1926, when Williston, in written commentaries¹³³ and open debate with his ALI colleagues,¹³⁴ set forth his justification for proposing that a doctrine of promissory estoppel be created and included in the First Restatement. Williston personally drafted text expressing his concept and labeled it in a manner that revealed its essential character: "Informal Contracts Without Assent or Consideration."¹³⁵ Numbered Section 90 of the First Restatement, it reads 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."¹³⁶

C. *The Asserted Justification*

Williston claimed two alleged precedential bases for adoption of this revolutionary principle. First, he asserted that the origins of contract law in the Middle Ages lay in simple reliance on a promise, rather than exchange.¹³⁷ Second, he drew on the line of argumentation laid out in his treatise published six years earlier, where, as discussed *supra*, he had suggested that various much more recent cases had chosen to enforce promises without consideration therefor.¹³⁸ Both claims are misleading.

1. *Assumpsit in the Middle Ages*

As to his claim that the origins of Anglo-American contract law in the Middle Ages lay in simple reliance on a promise rather than reciprocal exchange, Williston selectively mined certain statements from the lectures and writings of his mentor and predecessor Ames.

To recall the prior discussion, Ames did not deny, and in fact affirmed, that detrimental reliance by a promisee constituted consideration if it was in fact requested by the promisor—thus creating the reciprocal exchange of promised performance on the one side coupled with requested

133. WILLISTON, FIRST RESTATEMENT COMMENTARIES, *supra* note 124, at 14.

134. ALI Debate on Section 90, *supra* note 124, at 90.

135. See RESTATEMENT OF THE LAW OF CONTRACTS ch. 3, topic 4 (AM. LAW INST. 1932). As to Williston himself having personally drafted the text, see DeLong, *supra* note 124, at 962 n.55.

136. RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932).

137. See *infra* section II.C.1.

138. See *infra* section II.C.2.

detrimental action or forbearance on the other.¹³⁹ Ames did, however, search for the origins of the consideration concept in deceit cases.¹⁴⁰ To reprise, Ames hypothesized, as had Hare, that deceit gave rise to damage to the promisee, which he believed gave rise to the concept of detriment to the promisee, which can constitute consideration.¹⁴¹

Yet, as Baker has pointed out, this was not in fact the genesis of the detriment concept constituting consideration.¹⁴² Detriment was recognized in cases where it was requested by the promisor and where there was thus a reciprocal exchange.¹⁴³ As the case law evolved, the allegation of deceit was made simply for the purpose of moving the case out of the contract categories of debt and covenant, where plaintiffs faced significant hurdles, into the procedurally more favorable category of tort, in which the writ of trespass on the case sounding in assumpsit circumvented those hurdles.¹⁴⁴ The allegation of deceit was a mere expedient. The heart of the matter was reciprocal exchange, upon which the courts came to insist explicitly—under the name “consideration”—immediately following the expansion of assumpsit to apply to all debt upon contract cases, that is, to the great majority of day-to-day commercial contracts.¹⁴⁵

Ames’s search for the genesis of consideration in deceit cases, however, combined with his Langdellian focus on detriment to the promisee rather than benefit to the promisor, led him to pen certain statements that later lent themselves to partial and misleading citation by Williston. In fact, Williston’s commentaries that formed the foundation of his argument in favor of promissory estoppel based his claim as to the medieval treatment of contract entirely on three brief quotes from Ames, taken out of context in a manner that leaves the impression that naked, unbargained-for reliance by a promisee was historically sufficient to enforce promise in contract. Specifically, Williston wrote:

The action of Assumpsit was originally based on reliance by the plaintiff on a promise rather than on a bargain. It was not until the old action of Debt was swallowed and extended by the action of assumpsit that the idea of exchanging consideration as the price of a promise became the predominant one. Professor Ames in his

139. See *supra* text accompanying note 116; AMES, *supra* note 103, at 143.

140. See *supra* text accompanying notes 106–111; AMES, *supra* note 103, at 129.

141. See *supra* text accompanying note 106; AMES, *supra* note 103, at 129.

142. See *supra* text accompanying note 111; Baker, *Origins of Consideration*, *supra* note 73, at 357.

143. See *supra* note 142.

144. See *supra* section I.B.

145. See *id.*; Alden, *Origins of Contract Law*, *supra* note 15, at 46–48.

History of Assumpsit (Lectures on Legal History, page 142), summing a preceding argument, says:

“The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property” etc.

Mr. Ames further says (page 143):

“That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant’s promise, is reasonably clear, although there are but three reported cases.”

and (page 144):

“Both in equity and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.”¹⁴⁶

Comprehensive refutation of Williston’s use of these quotations has been separately published by the Author.¹⁴⁷ The principal results of that research may be summarized as follows.

Williston’s italicized claim in the preceding block quote implies that there existed some proto-history, some early period of assumpsit which sounded, effectively, in promissory estoppel rather than exchange-based contract.¹⁴⁸ The history, however, does not support such a characterization.

Roughly put, the evolution was as follows. During the earliest period relevant for this purpose, from *The Humber Ferry Case* in 1348 onward, we have assumpsit cases predicated upon negligence or fraud, and thus upon tort rather than contract.¹⁴⁹ In that 1348 case, for example, a ferryman who had agreed to carry a mare across the Humber River overloaded his boat with other horses, causing the loss of the mare.¹⁵⁰ As such, the cases do not support the notion that assumpsit was used as some early form of promissory estoppel, which very specifically purports to apply liability without the presence of negligence or fraud.

In the next period, from *Doige’s Case* in 1442 onward, we have the contractual use of assumpsit—that is, its application where no negligence

146. WILLISTON, FIRST RESTATEMENT COMMENTARIES, *supra* note 124, at 14 (emphasis added).

147. See Alden, *Origins of Contract Law*, *supra* note 15, at 10–12, 54–62.

148. One hears in Williston’s claim an intellectual echo of Langdell’s earlier statements criticized in section II.A.1 that “benefit to the promisor is irrelevant,” and that, in the early days of contract, “defendant’s obligation was created by his promise, and not by a consideration received.” LANGDELL, *supra* note 85, at 82; see *supra* text accompanying notes 83, 88.

149. See *The Humber Ferry Case*, *supra* note 40; Alden, *Origins of Contract Law*, *supra* note 15, at 31–32.

150. *The Humber Ferry Case*, *supra* note 40, at 358–59.

was present—but where courts were clearly articulating the reciprocity principle.¹⁵¹ In that case, defendant Dogge had contracted to sell two parcels of land to plaintiff Shepton, but breached by first conveying the parcels to a third party.¹⁵² In the transcript of the case, multiple judges reasoned that if one party could bring an action versus the counterparty (as Dogge could have sued Shepton had he refused to pay), then the counterparty must also be able to sue, as “each party to a bargain should be bound by an action” and every “good contract must bind both parties.”¹⁵³ On that basis, the court allowed the plaintiff Shepton to proceed in an action against defendant Dogge for deceit, and rejected defendant’s attempt to have the case dismissed on grounds that the action should have been brought pursuant to a writ of covenant.¹⁵⁴

The third period relevant to Williston’s quote—the period when “the old action of Debt was swallowed and extended by the action of assumpsit”¹⁵⁵—commenced in 1532 with *Pykeryng v. Thurgoode*¹⁵⁶ In that case, seller breached his agreement to deliver malt to a London brewer.¹⁵⁷ The court permitted plaintiff brewer to bring an action on the case even though he could have brought the action based on debt.¹⁵⁸ This opened the floodgates to the use of trespass on the case sounding in assumpsit to circumvent the wager of law defense available to defendants in debt cases.¹⁵⁹ Within several decades following *Pykeryng v. Thurgoode*, as contract plaintiffs began to flock to assumpsit, courts came to refer to the reciprocity principle by the moniker “consideration,” stating specifically that it was an absolute requirement for the contractual use of assumpsit.¹⁶⁰

151. See Alden, *Origins of Contract Law*, *supra* note 15, at 33–44; Doige’s Case, *supra* note 98.

152. Doige’s Case, *supra* note 98, at 390.

153. *Id.* at 394–95.

154. *Id.* at 391, 393–95.

155. WILLISTON, *FIRST RESTATEMENT COMMENTARIES*, *supra* note 124, at 14.

156. (1532), *record at* KB 27/1073, m. 70, *report at* 94 SELDEN SOCIETY 247 (1977), *and* 93 SELDEN SOCIETY 4 (1976), *translated in* SOURCES, *supra* note 17, at 411.

157. *Id.*

158. *Id.* at 411–13.

159. See Alden, *Origins of Contract Law*, *supra* note 15, at 44–48; *Pykeryng v. Thurgoode* (1532), *record at* KB 27/1073, m. 70, *report at* 94 SELDEN SOCIETY 247 (1977), *and* 93 SELDEN SOCIETY 4 (1976), *translated in* SOURCES, *supra* note 17, at 411.

160. See Alden, *Origins of Contract Law*, *supra* note 15, at 48.

There is no room in that history for some imagined period of assumpsit being applied in the absence of negligence and the absence of reciprocity, of consideration, as promissory estoppel would have it.

That Williston's precedential claim for promissory estoppel is not truly supported by the quotes he selected from Ames's historical writings is therefore not surprising. Careful reading of Ames's full text reveals that the first passage quoted by Williston, *supra*, in fact relates not to unbargained-for reliance but quite the converse.¹⁶¹ The full passage, which Williston abridged with his cryptic "etc.," and the paragraph in which it is embedded, describe third-party beneficiary contract on the basis of bargained-for exchange in which the promisor has specifically requested the detriment incurred by promisee.¹⁶² The passage provides no support for promissory estoppel.

Likewise, the second and third passages both relate to a small handful of cases cited by Ames that appear to be founded upon promissory fraud—a true tort.¹⁶³ Ames was clear in his text that that particular handful of cases involved situations in which the defendant had "*intentionally misled*" the other party.¹⁶⁴ Where culpable conduct in the form of negligence or fraud are present, a case may be brought in tort without having to prove the consideration necessary to liability in contract. Conversely, where no negligence or fraud or other tortious conduct is present, then an exchange founded upon mutual consideration must be shown in order to establish liability in contract. Tort cases sounding in the tort of promissory fraud do not, therefore, provide precedential support for Williston's claim that assumpsit was used to impose liability without either contractual consideration or tortious culpability, which is the central assertion of the supposed doctrine of promissory estoppel.

2. *Idiosyncratic Exceptions to the Consideration Requirement*

Thus, Williston's argument for promissory estoppel in his commentaries led with misleading historical claims regarding the origins of contract law. He augmented that effort with claims regarding preexisting case law exceptions to the consideration requirement.¹⁶⁵

161. *See id.* at 54–55.

162. *Id.*; AMES, *supra* note 103, at 142.

163. *See* Alden, *Origins of Contract Law*, *supra* note 15, at 55–62.

164. AMES, *supra* note 103, at 127 (emphasis added).

165. These claims were made by Williston in his commentaries and the ALI debate regarding the First Restatement. They also drew on cases he had previously cited and interpreted in his earlier 1920 treatise. *See* WILLISTON, *FIRST RESTATEMENT COMMENTARIES*, *supra* note 124, at 15–19; *ALI Debate on Section 90*, *supra* note 124; WILLISTON *TREATISE*, *supra* note 5, at 307–14.

Detailed forensic investigation thereof, however, reveals radically thinner support for this proposition than one might at first suppose. The details of this forensic investigation have been laid out by the Author in a prior article on the subject.¹⁶⁶

Broadly stated, upon close examination Williston's support for the foregoing proposition reduces to: (i) a handful of discrete, narrow, idiosyncratic exceptions of long standing to the otherwise universal requirement of consideration; (ii) interpretive claims and assumptions by Williston which are not well founded with respect to a smattering of isolated recent American cases which he cited; and (iii) a single rogue decision regarding an intrafamily donative promise.

a. Discrete, Limited Exceptions

As to the idiosyncratic exceptions to the consideration requirement cited by Williston, they fall into a mere handful of discrete categories which had long existed within classical contract law: (i) waiver within an existing contractual relationship; (ii) charitable donation; (iii) gratuitous promise in connection with marriage; (iv) gratuitous promise to convey real estate, in reliance upon which improvements thereto have been made; and (v) gratuitous bailment.¹⁶⁷ Equitable reasons for each of these narrow exceptions to the consideration requirement may be adduced and have been discussed at length in prior published research by the Author.¹⁶⁸ The principal salient point is that each of these categories had over time been carved out as a narrow, limited exception to the consideration requirement, without metastasizing into rejection of the principle of reciprocity more generally. They are, as it were, doctrinal cysts, or benign tumors, within the body of contract law—not cancer. Contained, limited, and best left so.¹⁶⁹

b. Isolated Cases

Williston sought to augment those discrete, limited exceptions to the consideration requirement with his interpretation of a handful of American cases from the 1800s and early 1900s.¹⁷⁰ Those interpretive

166. See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 683–704.

167. See WILLISTON TREATISE, *supra* note 5, at 307–14.

168. See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 685–92.

169. See *infra* section II.C.5 regarding Williston's contrary view on this point.

170. See *Bassick Mfg. Co. v. Riley*, 9 F.2d 138 (E.D. Pa. 1925); *Wilson v. Spry*, 223 S.W. 564 (Ark. 1920); *Devecmon v. Shaw*, 14 A. 464 (Md. 1888); *Rerick v. Kern*, 14 Serg. & Rawle 267 (Pa. 1826).

claims, however, generally overreached or overstated.¹⁷¹ In a number of instances, Williston either misread the holding of cases,¹⁷² or made factual assumptions at odds with those actually recited by the courts as the foundation for their reasoning.¹⁷³ Thus, while Williston's treatise gives the impression that a number of cases created solid precedent for the concept of promissory estoppel, they do not hold up upon closer inspection.

c. Intrafamily Donative Promises

This leaves us with the rogue decision based on an intrafamily donative transfer, *Ricketts v. Scothorn*.¹⁷⁴ Out of all the cases cited by Williston, *Ricketts* truly is the one opinion which clearly and unambiguously stands for the proposition he articulated as promissory estoppel, though that neologism was later coined by Williston and did not appear in *Ricketts* itself.¹⁷⁵ The case is now famous as the shining exemplar of promissory estoppel routinely taught in first year contract classes across the nation.

The case involved a grandfather who promised to give his granddaughter \$2,000 so that she would not have to work anymore.¹⁷⁶ In evidence thereof, he handed her a promissory note in such amount.¹⁷⁷ The court went to great pains to stress that the grandfather made his promise without demanding any quid pro quo, any reciprocal exchange.¹⁷⁸ It was thus, as presented by the court, an entirely gratuitous promise to pay \$2,000, for which there was no consideration.¹⁷⁹ The grandfather passed away before the note was paid out.¹⁸⁰ Litigation arose when the granddaughter sought payment on the note, which effort was resisted by another member of the Ricketts family serving as executor of the estate.¹⁸¹ Despite the absence of consideration for the note, the court enforced it on

171. See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 692–96.

172. See *id.* at 693, 695–96; *Bassick Mfg. Co.*, 9 F.2d 138; *Wilson*, 223 S.W. 564.

173. See Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 693–95; *Devecmon*, 14 A. 464.

174. 77 N.W. 365 (Neb. 1898).

175. There was one other case, again dealing with an intrafamily donative transfer, cited by Williston that contained language along lines substantially similar to *Ricketts*. See *Estate of Switzer v. Gertenbach*, 122 Ill. App. 26, 28–29 (1905). In *Switzer*, however, the court indicated that “[i]t is not our purpose to enter into a discussion of the evidence,” instead remanding the case as to applicability of the statute of limitations. *Id.* at 29–31.

176. *Ricketts*, 77 N.W. at 366.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 365–66.

the basis of “equitable estoppel,” applied to preclude the estate from denying the existence of consideration as a defense.¹⁸²

Presumably, other relatives of the grandfather, rather than the granddaughter, would ordinarily have been entitled to the proceeds of the estate at issue. Had the grandfather wanted to give \$2,000 to his granddaughter, he could of course have given her the cash promptly. The case, however, suggests that this might not have been an attractive or even practicable option, insofar as the grandfather apparently would have needed to sell his farm in Ohio to do so.¹⁸³ Alternatively, he could have included her in a will, which he appears not to have done. Instead, he promised to give her the money in the future—a promise to make a gift.¹⁸⁴

Under existing legal rules of long standing, the granddaughter was not entitled to compel payment of the promised gift out of the estate.¹⁸⁵ For good and compelling reason—circumstances may change, a prospective donor’s state of emotion or intention may change—the general rule is that a gift, including a gift of cash, is effective upon delivery and at no time before.¹⁸⁶ Handing over a promissory note does not constitute delivery of cash, but rather delivery of a promise to hand over cash in the future.¹⁸⁷ At the time of the *Ricketts* decision, as the court itself freely conceded, the established rule was that a gratuitous promissory note constituted no more than a promise to make payment in the future, in exchange for no consideration at all.¹⁸⁸ Such a promissory note would be a naked promise, wholly gratuitous, and unenforceable at law.¹⁸⁹

But the court clearly desired to reach a decision in the granddaughter’s favor, against the interest of those other relatives of the grandfather who would otherwise have been entitled to the proceeds of the estate. The moral force of those competing claims by other relatives was not touched upon by the court. Certainly, the facts as presented by the court pull at any normal person’s heartstrings, though it is notoriously easy for a court to present the facts of a case in such manner as to lay an apparently unimpeachable moral foundation for the motivated conclusion in the opinion. At any rate, in driving toward its objective the court found itself hard up against two universally acknowledged rules of hoary precedent:

182. *Id.* at 367.

183. *Id.* at 366.

184. *Id.*

185. See discussion *supra* section II.C.4.

186. See generally Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341 (1926).

187. *Ricketts*, 77 N.W. at 366.

188. *Id.*

189. *Id.*

(i) a gratuitous promissory note is not enforceable, for it constitutes no more than a gratuitous promise to make a gift in the future¹⁹⁰; and (ii) equitable estoppel applies only to statements of past or existing fact, or to statements of intention to abandon an existing right, but does not otherwise apply to promises or other forward-looking statements.¹⁹¹

Confronted with two rock solid rules that would bar a decision in favor of the granddaughter, the court did what courts on occasion do in such situations—it obfuscated, it ignored. As to the gratuitous note, the court reached out to wholly inapplicable precedent for assistance, namely charitable donation cases.¹⁹² Presumably founded upon public policy considerations in favor of eleemosynary activity, courts have long favored promises to make charitable donations in the future and, as mentioned *supra*, had crafted an exception to the ordinarily applicable requirement of consideration for the enforceability thereof.¹⁹³ Although nothing in the *Ricketts* fact pattern had anything to do with charitable donations—it was, after all, the promise of a private gift to a personal family member—the court simply cross-applied charitable donation precedents to a noncharitable case as alleged justification for its decision.¹⁹⁴

Even more blatantly, the court did not mention the universally understood limitation that equitable estoppel applies only to statements of existing fact and not to forward-looking promises.¹⁹⁵ Perhaps the court deliberately turned a blind eye. Perhaps the court was simply unaware of the established contours of equitable estoppel. Either way, the rule was ignored. Against all precedent, and without any explanation of any kind, the court applied equitable estoppel to enforce a promise to make a gift in the future.¹⁹⁶

What one is left with, at the end of the day, is a rogue case. One might or might not be amenable to the motivated result. Certainly, one wishes the granddaughter to win at an emotional level based on the facts recited

190. *Id.*

191. *See, e.g.,* *Union Mut. Life Ins. v. Mowry*, 96 U.S. 544, 547–48 (1877) (finding that oral promise by life insurance company agent that the company would give advance notice to insured of premium due dates did not give rise to estoppel claim, since it related to future intention with respect to a contract not yet made, rather than to a statement of fact or intended abandonment of an existing right).

192. *Ricketts*, 77 N.W. at 366–67.

193. *See supra* section II.C.2.a.

194. *Ricketts*, 77 N.W. at 366–67.

195. *See Union Mut. Life Ins.*, 96 U.S. at 547. The exception to this rule is estoppel arising from the promise of an intended waiver of an already existing right, as distinct from the creation of a new obligation. *See id.*

196. *Ricketts*, 77 N.W. at 367. The court's 1898 ruling referred only to "equitable estoppel," as the phrase "promissory estoppel" had yet to be invented by Williston in his 1920 treatise. *See supra* section II.B.

by the court—her wholly understandable tears of joy and gratitude upon receipt of the note, the absolute clarity of the grandfather’s promise, and her reliance on that promise in temporarily—though not permanently—resigning her employ. And perhaps the result is therefore morally justifiable. But the court should have set forth the legal quandary in an honest manner, forthrightly acknowledging the existence of clear, unambiguous rules to the contrary. If the court wished to differ from those rules, it should have wrestled openly with the equitable and practical considerations figuring into such a deviation from doctrine. The ultimate result should have presented as the unicorn, as the outlier, that it was. Instead, the court simply ignored or misapplied longstanding, controlling precedent on point.

3. *Williston’s Unbounded Extrapolation*

Largely upon the basis of *Ricketts*, and upon wide-sweeping extrapolation by Williston, we now have promissory estoppel. This statement may initially seem exaggerated, but on closer examination the evidence bears it out.

In the ALI’s internal debate, Williston justified his proposed doctrine of promissory estoppel on his stated anticipation that untold numbers of exceptions to the consideration requirement would arise in the future, other than those limited, narrow niche exceptions—including intrafamily donative promises à la *Ricketts*—discussed *supra*:

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.¹⁹⁷

As a result, wrote Williston, the nearly unbounded liability principle of promissory estoppel “cannot be made more definite. The variety of circumstances that may arise is such that it is impossible to enumerate them all.”¹⁹⁸

During the internal ALI debate over the advisability of Williston’s proposed promissory estoppel Section 90, he was strongly challenged by Victor Morawetz. Morawetz made the point that cases one might decide on the basis of Williston’s proposed doctrine of promissory estoppel could often be resolved much more conservatively, in a manner consistent with

197. *ALI Debate on Section 90*, *supra* note 124, at 107 (remarks of Samuel Williston).

198. *Id.* at 100.

existing rules of contract law. Specifically, where one party has made a promise for the purpose of inducing another to rely on that promise, it is child's play to enforce that promise on the basis of implied unilateral contract.¹⁹⁹ Anglo-American courts had been enforcing implied contracts—where the quid pro quo is not explicitly stated by the parties but is reasonably implicit based on the presence of an exchange transaction in fact—ever since the early 1600s.²⁰⁰ No recourse to anomalous new theories of liability was requisite.

Williston's reply—his sole reply—to this compelling objection was that he wished to create liability for gift promises, thus overturning the longstanding existing rule declaring gift promises unenforceable.²⁰¹

Moreover, of cardinal and conclusive importance, the three brief fact patterns at the end of Section 90, which Williston listed in the First Restatement to illustrate how the principle of promissory estoppel should be applied, were all based on intrafamily gift cases.²⁰² Two of those three need not necessarily have been promissory estoppel examples at all, potentially sounding in classical contract with mutual consideration instead.²⁰³ The third was clearly based on the *Ricketts* fact pattern.²⁰⁴

That is, although Williston had justified promissory estoppel on asserted grounds that myriad new exceptions to the consideration requirement might arise in the future, when push came to shove under challenge from Morawetz, and when the First Restatement gave actual examples of how Section 90 was intended to apply in practice, the only new exception actually specified was intrafamily donative promise.

While neither the *Ricketts* opinion nor Williston specifically referred to the language in Blackstone's treatise regarding intrafamily gift promises discussed *supra*,²⁰⁵ and while Blackstone's own intended articulation of the rules may be open to some degree of interpretive speculation,²⁰⁶ one may perhaps hear a whisper in the historical pines—a whisper that the enforceability of a promise to one's own kin, to one's own lineal descendants, might serve the promisor's interest in a manner not captured by the consideration rule. This is particularly true where enforcement is sought not against the promisor while living, but against the promisor's

199. *Id.* at 88 (remarks of Victor Morawetz).

200. See BAKER, *supra* note 17, at 367.

201. *ALI Debate on Section 90*, *supra* note 124, at 89 (remarks of Samuel Williston).

202. See RESTATEMENT OF THE LAW OF CONTRACTS § 90 illus. 1–3 (AM. LAW INST. 1932); Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 702–04. The fourth illustrative example is described therein as “not binding” and is thus not applicable here. *Id.* at 702 n.216.

203. Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 702–04.

204. *Id.* at 703.

205. See *supra* section I.E.

206. See *supra* text accompanying notes 60–70.

estate. Conceivably, there arises on a recurring basis equitable discomfort in the courts with declaring intrafamily donative promises not enforceable, established legal rules to the contrary notwithstanding. It may well be that situations present themselves from time to time in which a senior has made clear their intent with respect to disposition of their assets upon passing but, perhaps out of ignorance of the rules of probate, wills, and trusts, fails to provide therefor in a legally efficacious manner. One can imagine judges desiring to intercede to do equity. If so, a limited, discrete exception to the ordinarily applicable consideration rule for intrafamily gift promises might be taken under advisement—or, indeed, a different solution for such situations, as discussed *infra*.²⁰⁷

D. Ramifications

In sum, despite Williston's unbounded speculation as to the potential emergence of other exceptions to the consideration requirement in future, promissory estoppel was in fact founded upon an exceedingly narrow basis—intrafamily donative promise.

Yet the purported principle of liability set forth in his draft Section 90 was an exception so broad as to engulf and obliterate the actual, historically founded rule concerning consideration. Section 90 quite simply asserts that promise may be enforced without any negligence, fraud or other tortious misconduct, and without any consideration for the promise.²⁰⁸ All that must be present under Section 90 is that the reliance be reasonably foreseeable (even if the promisor believes such reliance to be substantively unfair and unreasonable from an equitable perspective), and that a judge, in the judge's quite deliberately unfettered discretion, deems that injustice can only be avoided through enforcement of the promise.²⁰⁹

The logical consequence of this extraordinary claim is that there is no requirement of consideration—at least not if everyone were to adopt Williston's invented new principle of liability. As Oliver Wendell Holmes had written decades before promissory estoppel was presumably even a gleam in Williston's eye, "It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it."²¹⁰

We thus have a doctrinal revolution in American contract law. Though the narrow, limited category of intrafamily donative promise was the only

207. See *infra* section II.A.3.

208. See generally Alden, *Rethinking Promissory Estoppel*, *supra* note 6.

209. See *id.* at 671–74, 676.

210. *Commonwealth v. Scituate Sav. Bank*, 137 Mass. 301, 302 (1884).

concrete example given in illustration of its intended application, promissory estoppel was deliberately drafted in a manner of nearly unbounded scope, capable of unrestricted application and expansion in the future. Williston sold his radical proposal to the academy on the basis of two claims to historical precedent and thus legitimacy—his claim that early assumpsit constituted, in effect, promissory estoppel, and his claim that a large number of cases leading up to the First Restatement provided precedential support for the principle. As the foregoing analysis has argued, upon closer inspection both of these two weight-bearing columns—the foundation upon which the intellectual and doctrinal legitimacy of promissory estoppel depends—collapse.

E. Collateral Innovations Throughout the First Restatement

The introduction into American contract law of a novel principle in radical derogation of its two core requirements—mutual assent and consideration—would naturally engender severe doctrinal stress throughout the structure of the Restatement. At least, it would do so if the Restatement were otherwise to remain true to its stated mission of presenting existing law with fidelity. Promissory estoppel might then stand isolated on its own in Section 90, perhaps someday susceptible to cauterization in times to come—unless adjustments were undertaken to other aspects of contract law as well.

Such adjustments were forthcoming. Whether by adventitious circumstance, or through complex causal interconnection, Williston's pattern of thought as to contract law deviated from orthodoxy not just as to his novel doctrine of promissory estoppel, but in other regards as well. Those other deviations meshed conceptually with promissory estoppel in a manner furnishing that novel principle with an appearance of greater doctrinal propriety and fit with the overall structure of contract law than it would have enjoyed standing alone. These various deviations from orthodoxy had already appeared in Williston's 1920 treatise. He now enshrined them as corollary innovations to contract law in multiple sections of the First Restatement.

Williston did not designate these innovations as alterations to classical rules. Far from it. Over the repeated objection and concerns of ALI colleagues,²¹¹ he passed them off in anodyne fashion as mere technical or

211. See *Minutes of the Third Annual Meeting*, *supra* note 14, at 160–64 (1925) (remarks of Victor Morawetz) (“If this section means that the word contract . . . means a promise or a set of promises, then I believe it to be *incorrect as the Bench and Bar generally conceive of a contract as an agreement between parties creating some legal obligation on the part of one or more of them. . . .* Section 3 *is not an accurate definition of the conception which lawyers and lawmen work with or that upon which*

theoretical rephrasings of an unadulterated age-old principle. Nonetheless, the subtle, corrosive effect was to shift the focus of contract law away from mutual exchange, historically the foundation of contractual liability, to unilateral, unbargained-for reliance on promise, the breeding ground of promissory estoppel.

1. *Elimination of Consideration in the Definition of “Contract”*

A cardinal case in point is the very definition of the term “contract” at the outset of the First Restatement. For centuries theretofore, from the epochal *Slade’s Case* of 1602, through Blackstone, through William Wetmore Story²¹² and his colleagues in the mid-1800s, through Langdell, a contract had been defined along approximately the same lines as this famous passage from *Slade’s Case*: “[A]n assumption [i.e., a contract] is nothing other than a mutual agreement between the parties for something to be performed by the defendant in consideration of some benefit which

the body of the law is based. It may accord with what is called the objective theory . . . but I do not believe in that theory . . .” (emphasis added)).

Id. at 169–72 (remarks of Homer Albers) (“I read that definition to one of the justices of the highest court in one of our States, to two practicing lawyers and to six students, and *only one pretended to know what was meant by the definition*, and that was one of the students who, in my opinion, knew the least about it of any of them. . . . What are you going to do with the well known case . . . ‘Peerless?’” (emphasis added)).

Id. at 178 (remarks of Charles W. Pierson and Samuel Williston) (Pierson: “Your definitions . . . limit the definition of contract to an executory contract. Is not confusion likely to result if we do that, from the fact that contract, as used in the Constitution of the United States, means an executed contract as well as an executory contract? A deed is as much a contract under the impairment of contract clause as a promise for the future.” Williston: “Undoubtedly that is true.”).

Id. at 180 (remarks of Helm Bruce) (“*Blackstone’s definition is very familiar* to the profession and to practicing lawyers and judges on the bench. *The form of statement given here is something entirely new It would strike that judge as something he never heard of before.*” (emphasis added)).

Id. at 181 (remarks of Clarence N. Goodwin) (“I particularly agree with the Reporter in his statement that in making a Restatement *you are not to change the law. . . . [T]he present [re]statement of the law is, in the main, unscientific, contradictory and casual. Apparently in every attempt at definition there has been a statement made which subsequently appeared to be inaccurate* and which was followed not by a correct restatement but by some patch-work or the creation of legal fictions.” (emphasis added)).

Id. at 185 (remarks of Merritt Lane) (“[T]his section . . . was intended, as I understood it, to withdraw from the definition of a contract any intent, actual intent to contract. Actual intent is something which the law has always conceived to be in the concept of a contract and it is something upon which the whole structure of equitable jurisprudence is based.”).

212. W.W. Story was the son of well-known Justice Joseph Story of the U.S. Supreme Court. W.W. Story wrote a major treatise on contract law published in the mid-1800s and dedicated to his father. See WILLIAM WETMORE STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL (Boston, C. C. Little & J. Brown 1844).

must depart from the plaintiff, or of some labour or prejudice which must be sustained by the plaintiff.”²¹³

Williston, however, determined to rephrase the definition of contract in the First Restatement to read as follows: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”²¹⁴

Anyone who has taken a first-year contracts class in law school and spent time considering this definition critically, recognizes at once that it says very little. It is an internally self-referential circularity—the law shall enforce that which it chooses to enforce. This definitional implosion effaces from historical memory the age-old, heritage definition of contract, which turned on the presence of both mutual consideration and mutual agreement. No whisper of consideration, no whisper of agreement, remains. This essentially meaningless, empty vessel of a definition was, of course, precisely what was requisite to accommodate within its capacious, ill-defined parameters the doctrinal heresy of Section 90.

It was again Morawetz who objected, citing multiple sections of the draft restatement, including Williston’s proposed new definition of “contract”:

I believe that in his restatement of the law there are many sections which fail to state the law as clearly and as simply as it might be stated, and, above all, the restatement is based upon certain conceptions, certain fundamental conceptions, which are artificial and unusual, which are not the conceptions which lawyers and laymen commonly hold, and which, in my opinion, cannot be made the basis of a philosophic and clear and simple restatement of the law.²¹⁵

Williston deflected, saying of Morawetz’s criticism, “of course with many things he says I agree; nobody could disagree; but although I have had the advantage of his views before, I have persisted in section 1 [the definition of ‘contract’]. The word contract has had a varying meaning in the law.”²¹⁶

213. *Slade’s Case*, *supra* note 45, at 429; *accord* 2 BLACKSTONE, *supra* note 53, at *442; STORY, *supra* note 212, at 1; LANGDELL, *supra* note 85, at 58.

214. RESTATEMENT OF THE LAW OF CONTRACTS § 1 (AM. LAW INST. 1932). This same vague, circular, entirely novel formulation of the definition of contract had, with somewhat different wording, appeared shortly before in Williston’s treatise. WILLISTON TREATISE, *supra* note 5, at 1.

215. *Minutes of the Third Annual Meeting*, *supra* note 14, at 161 (remarks of Victor Morawetz).

216. *Id.* at 164 (remarks of Samuel Williston).

2. *Elimination of Executed Contracts*

Williston's comments then illuminated the next respect in which his definition of contract was to differ from that which had gone before. Blackstone, he said, included within the term "contract" a transaction wholly executed on both sides, such as a current sale of goods for cash.²¹⁷ Williston chose to exclude such transactions, since time immemorial an enormous component of day-to-day commercial relations, from the definition of contract entirely:

A sale over the counter for a price paid down is, under Blackstone's definition, a contract.

Now, under the division of law that we propose to adopt here, we dealt, and propose to deal, with the subject of sales as part of the law of property and not as part of the law of contracts, confining the law of contracts to executory obligations.²¹⁸

Again, the effect of Williston's definition was to deemphasize the role of exchange as the foundation of contract, focusing the subject instead on promise. Indeed, one of the First Restatement's explanatory comments literally excluded from the term "contract" the promisee's counterperformance constituting consideration for a unilateral promise:

When an act is done as the consideration for a unilateral contract . . . and is essential to make the promise obligatory, the act is not a part of the promise, and hence is not part of the contract as contract is here defined.²¹⁹

That is, one half of the exchange transaction—actually rendered performance—was to be excluded from the definition of contract, in order that reference only be made to the promise, and not to the exchange.

This pattern of exclusive focus on the existence of promise, and obfuscation, indeed quasi-effacement, of reference to an underlying exchange transaction, lent itself to Section 90's expansion of liability for promise to situations in which no exchange whatsoever is present.

3. *Elimination of Agreement*

Hand in hand with the foregoing went a subterranean tectonic shift that undermined the age-old requirement of contract law that the promisor

217. *Id.* at 165; see 2 BLACKSTONE, *supra* note 53, at *443 ("A contract may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; [sic] in which case the possession and the right are transferred together: [sic] or it may be *executory*, as if they agree to change next week . . .").

218. *Minutes of the Third Annual Meeting*, *supra* note 14, at 165 (remarks of Samuel Williston).

219. RESTATEMENT OF THE LAW OF CONTRACTS § 1 cmt. d (AM. LAW INST. 1932).

have assented to an exchange transaction. Williston subtly signaled his aversion to Blackstone's definition of contract as one in which there is agreement between two parties: "Blackstone defines a contract as an 'agreement upon sufficient consideration to do or not to do a particular thing,' and that definition has been frequently quoted, and I suppose that the prevalence of the word agreement is largely due to the fact that Blackstone uses it."²²⁰ In gently dismissive manner, this presentation thus demoted the importance of agreement, of mutually agreed exchange, at the heart of contract to a mere choice of words by Blackstone.

Further undermining the importance of voluntary agreement to an exchange transaction, Williston also opted for a strong form of the so-called "objective" theory of mutual assent. Historically, courts had routinely considered it essential to the formation of a contract that both parties have consciously assented thereto, that there be a "meeting of the minds."²²¹ This was the "subjective" theory of mutual assent.²²²

A fairly straightforward anti-abuse rule in this regard maintains that a party is not at liberty to make a statement which to any other reasonable person would appear to be a promise, and then later simply to deny having subjectively intended the statement as a promise. In such a case, the "objective theory" of mutual assent holds the speaking party to the meaning any other reasonable person would ascribe to their words.²²³ The objective theory was and is nothing more than a sophisticated, adult articulation of the childhood playground rule, "no crossies"—in other words, a party shall not be permitted to escape liability by subsequently asserting a secret intention (physically expressed by crossing one's fingers hidden behind one's back) at odds with that party's externally manifested conduct and communications.

The most appropriate way to describe the objectivist legal principle would simply be to observe that, since a person's true, internal subjective intent can never be known with absolute certainty absent a concession thereof, in certain circumstances courts and juries must of necessity infer subjective intent from external, objective indicia. It is not that subjective intent is irrelevant to contract formation, but merely a statement of the practical realities involved in attempting to ascertain a party's true subjective intent at the time a statement was made if that party later attempts to deny the facially obvious import of their words or conduct.

220. *Minutes of the Third Annual Meeting*, *supra* note 14, at 164–65 (remarks of Samuel Williston).

221. Williston himself had conceded this in his treatise. See WILLISTON TREATISE, *supra* note 5, at 3 n.7 (internal citation omitted).

222. "The view here criticised," wrote Williston, "was developed as part of the system of philosophy, law and economics, which, during the first half of the nineteenth century laid emphasis on the will." *Id.* at 21.

223. See FARNSWORTH, *supra* note 77, at 118–19.

Williston chose a sharply worded formulation of this anti-abuse rule in Section 20 of the First Restatement, however, which gave certain of his colleagues pause:

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but . . . neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.²²⁴

Likewise, a comment to Section 71 of the First Restatement announced that “[t]he mental assent of the parties is not requisite for the formation of a contract.”²²⁵

Again, the practical effect of this strong and repeatedly emphasized formulation of the objective test, insofar as promissory estoppel is concerned, was to deemphasize the promisor’s intent in making a statement and to focus attention nearly exclusively on how the statement may have been perceived by a counterparty. It was an intellectually subtle shift, but one that contributed to the overall sea change in favor of promissory estoppel. The promisor need not subjectively have intended to make any kind of verbal commitment to another—but if a counterparty might reasonably have interpreted the statement as a promise, the speaker is legally bound. To reprise, First Restatement promissory estoppel Section 90 was organized under the rubric of informal “contracts” which require neither consideration nor *assent*.²²⁶

4. *The Academy Accedes*

The totality of the innovations introduced by Williston caused no little agitation among his colleagues. Repeatedly, they expressed concern that Williston’s formulations did not accurately reflect the actual rules of contract law as universally understood by bench and bar.²²⁷ He assured

224. RESTATEMENT OF THE LAW OF CONTRACTS § 20 (AM. LAW INST. 1932). As to objection, see the remarks of Victor Morawetz and Merritt Lane, *supra* note 211.

225. RESTATEMENT OF THE LAW OF CONTRACTS § 71 cmt. a (AM. LAW INST. 1932).

226. *Id.* ch. 3, topic 4. For further discussion of whether the counterparty must be reasonable in their decision detrimentally to rely on a statement by the speaker for which the counterparty has not paid (a supplemental requirement subsequently imposed by some courts but not in fact required by Section 90 itself), and whether that statement need even be sufficiently definite to constitute a true “promise” within the parameters of normal, classical contract law (which definiteness requirement a number of courts have rejected in applying Section 90), see Alden, *Rethinking Promissory Estoppel*, *supra* note 6, at 670–71, 674–76.

227. See *Minutes of the Third Annual Meeting*, *supra* note 14, at 160–64 (remarks of Victor Morawetz); *id.* at 169–72 (remarks of Homer Albers); *id.* at 178 (remarks of Charles W. Pierson); *id.*

them again, as at the outset, that no mutation of principle was being undertaken, that the objective was merely to present the law as it was, not as a new law. The following exchange between Williston and Merritt Lane is illustrative in this regard:

Lane: It seems to me that this restatement, so-called, is not in fact a restatement, but rather a new statement of what we might wish to be the law. To be effective it would seem that it should restate the law as it is and not as we might wish it to be.

Williston: I quite agree that the law should be stated as it is.²²⁸

Yet at the end of the day, Williston's innovative formulations of the law remained in the First Restatement text as adopted and published by the ALI.

In the wake of this revolutionary document, American academics rallied to the new banner of promissory estoppel which had been raised. This may have reflected the temper of the times, which during the Great Depression witnessed a sharp shift in American politics and thought entailing a host of philosophic and policy preferences conducive to promissory estoppel. This may have reflected the overawing status of the ALI and its proclamation of "the law as it is."²²⁹ It may have reflected the imprimatur of the elite educational establishment imparted by Williston and Corbin themselves. It may have reflected the riptide of crowd psychology and the overwhelming instinct in many to avoid taking positions at odds with socially "acceptable" opinion. It may well have reflected a combination of some or all of these. The end result was the rapid and uncritical assimilation of American academia to the new, unprecedented paradigm.

F. Forward Momentum

1. Third Party Reliance in the Restatement (Second)

The momentum of the innovatory effort carried forward to the drafting in the 1960s and 1970s, and publication in 1981, of a Restatement of the Law of Contracts, Second, commonly referred to as the "Restatement (Second)."²³⁰ Following Williston's example, the Restatement (Second) undertook modifications to Section 90 to widen yet further the scope of potential liability for promise.

at 179–80 (remarks of Helm Bruce); *id.* at 180–83 (remarks of Clarence N. Goodwin); *id.* at 184–85 (remarks of Merritt Lane).

228. *Id.* at 185 (remarks of Samuel Williston and Merritt Lane).

229. See *Minutes of the Third Annual Meeting*, *supra* note 14, at 159 and accompanying text.

230. See RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981).

According to revised Section 90, a promisor could now face liability not only to the party to whom they had spoken, the promisee, but now also to others, to third parties, as long as it was reasonably foreseeable that such third parties might rely on the promise.²³¹ The historical, precedential foundation for such an extraordinary assertion remains wholly mysterious.

2. *An Entirely New Fundamental Category of Law?*

Latter day proponents of promissory estoppel have indeed sought to elevate the doctrine to the status of an equitable category of law standing on its own, separate from both tort and contract.

This tack has been advocated by Eric Mills Holmes, who has taken a strong position in favor of promissory estoppel and its further doctrinal extension. He sees promissory estoppel evolving from a “*Contract Phase*, in which promissory estoppel developed as a consideration substitute,” to a “*Tort Phase*, in which courts . . . applied promissory estoppel as an offensive doctrine (independent of contract) for awarding reliance damages,” to an “*Equity Phase*, in which courts assimilate the earlier three phases (estoppel, contract, and tort) and apply promissory estoppel as an equitable theory to rectify wrongs by awarding corrective relief based on the discrete facts of each case. The remedy is discretionary, with no mechanical bright line.”²³² He refers to it as a “protean,” “syncretistic doctrine of civil liability, or, more simply, a theory of American civil liability.”²³³

A few years prior to Eric Mills Holmes having written those words, the Supreme Court of Minnesota in *Cohen v. Cowles Media*²³⁴ had indeed applied promissory estoppel in a manner clearly separate from contract.²³⁵ In that early 1990s case, a source gave information to a newspaper only upon the newspaper’s promise to keep his identity confidential.²³⁶ That promise was not ultimately honored. The court determined that the parties

231. The new, revised text of Section 90 indicates that “[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.” *Id.* § 90 (emphasis added).

232. Eric Mills Holmes, *Restatement of Promissory Estoppel*, *supra* note 88, at 270.

233. Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 48 (1996). The Author has in separate scholarship sharply criticized Eric Mills Holmes’s sweeping claims as to historical precedent for promissory estoppel. See Alden, *Origins of Contract Law*, *supra* note 15, at 14–15, 62–65.

234. 479 N.W.2d 387 (Minn. 1992).

235. *Id.* at 388.

236. *Id.* at 388–89.

would not have contemplated legally binding contractual obligations to have arisen from the newspaper's promise and that "a contract cause of action is inappropriate for these particular circumstances."²³⁷ But then—despite the fact that promissory estoppel had been conceived and created by Williston as a subapplication of contract law—the court concluded that promissory estoppel should apply to the newspaper's promise.²³⁸

Like a cuckoo's egg laid in the nest of contract, such an approach would indeed, if widely propagated, lead the novel doctrine of promissory estoppel to hatch and spread its wings as an independent field of law.

III. REVERSING THE REVOLUTION

The issue now turns to what should have been done at the time of the First Restatement, and how we should proceed going forward. Despite forensic analysis demonstrating that the original claims to historical authority and precedent made to sell promissory estoppel were not valid, one may hear the question posed, why should we care now? Isn't it all water under the bridge?

The principal response is that when an alleged legal doctrine has been sold and propagated on false premises, one is entitled, indeed obligated, to reopen the original intellectual and moral case for the doctrine. This is particularly true for a fundamental field of Western law that has existed for millennia, is closely allied to the preservation of private property rights, and thus individual liberty, and has tremendous impact on the long-term health of the U.S. economy. One is required to examine from first principles whether the doctrine is advisable from an equitable and policy perspective.

False claims of historicity no longer serve to immunize the subject from fundamental doctrinal inquiry. Williston shut down objection to his proposed doctrine of promissory estoppel on the basis that it was not truly innovatory whatsoever, that it reflected ancient legal tradition stretching back through the mists of time to the Middle Ages. Revelation that the emperor in fact has no clothes calls into question the very publication of Section 90 by the ALI in the first place. It calls into question the

237. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990) (rejecting the application of contract law to the parties' agreement while holding that First Amendment precluded the application of promissory estoppel on facts of the case), *rev'd*, 501 U.S. 663 (1991) (holding that First Amendment does not preclude deciding case based on promissory estoppel, as it constitutes a law of general application), *remanded to* 479 N.W.2d 387 (1992) (applying promissory estoppel to the newspaper's promise in the agreement).

238. *Id.* at 388.

acquiescence of the American academy to a radical and historically unfounded doctrine.

This Article argues that how we should at this point proceed is severalfold. As discussed *infra*, the first step is to make significantly greater affirmative use of the concept of implied unilateral contract in purported promissory estoppel cases.²³⁹ Second, if, and only if—after careful analysis of the policies and practicalities underlying existing law—it were to be seen as desirable to create a legal mechanism for parties to enter into binding gift promises, we should apply for this purpose the time-honored concept of formal contract.

If both of the foregoing steps are taken, this Article argues that promissory estoppel would no longer have a place or proper function in American contract law. Concomitant with the foregoing recommendations, the third step would therefore be to revise the ALI's Restatement of Contracts accordingly, with an eye toward stating the rules of contract law in a manner that is historically founded and true to precedent. This would entail eliminating Section 90, returning the definition of the term "contract" to its old, familiar form, and a host of related changes designed to reverse back out various modifications Williston undertook to conform contract law to his concept of promissory estoppel.

Finally, academic analysis of contract should eschew the exaggerated and artificial focus on detriment to promisee as the policy touchstone underlying the field. As discussed *supra*, casting the discussion of consideration solely in terms of detriment to promisee was a technical overrefinement proposed by Langdell, perpetuated by Ames and Williston, and has taken on a life of its own.²⁴⁰ It has distracted numerous thinkers on the subject from the true policy grounds for the enforcement of contract at law, namely to increase the certainty, stability, and frequency of mutual exchanges in which each party enjoys a benefit exceeding the cost of one's own performance—in other words, where each party enjoys a net benefit measured in terms of their own utility. That is the core of contract. That is the reason for its existence.

A. *Conceptual Framework for Deciding Cases*

A brief tabular presentation may aid in organizing the discussion of these recommendations in light of common factual permutations which arise in practice.

239. See *infra* section III.A.1.

240. See *supra* sections II.A, II.C.1.

Prefatorily, it should be noted that in any case where a promisor has proposed in reasonably explicit terms an exchange transaction—a stated quid and a stated quo—there should be no discussion of promissory estoppel whatsoever. Such a case unambiguously falls within classical contract law and the promise will be enforceable provided there are no fundamental defenses thereto.

The table below accordingly addresses those other, more troublesome circumstances in which one party has made a forward-looking statement of intent or anticipation, without explicitly stating any quid pro quo arrangement, and another party has chosen to rely detrimentally on that statement. The factual predicates (along the two orthogonal axes), and this Article’s recommended doctrinal approaches (in the numbered interior boxes), are as follows:

**Table 1:
No Explicit Quid Pro Quo**

	Benefit to Promisor	No Benefit to Promisor
Definite Promise	1. Implied Unilateral Contract	3. Formal Contract
Vague “Promise”	2. Choose either: Implied Unilateral Contract, or No Enforcement	4. No Enforcement

1. Definite Promise; Benefit to Promisor

The first and most important step in addressing “promissory estoppel” cases is to make greater affirmative use of the concept of implied unilateral contract. A very large number of purported promissory estoppel cases need not invoke a novel and artificial doctrine for their resolution

whatsoever.²⁴¹ In situations where one party has, without any explicit quid pro quo arrangement, nonetheless made a clear, definite promise to another, for the purpose of inducing that other party to detrimentally rely in a manner which is beneficial to the promisor, the case can and should be decided on the basis of implied unilateral contract, i.e., on the basis of classical contract law. The concept of implied contract, where there is no explicit agreement between the parties but their implicit mutual assent to an exchange transaction may reasonably be inferred, has been solidly established in Anglo-American contract law for close to half a millennium.²⁴² An implied unilateral contract is one in which the promisor implicitly or constructively seeks not a promise in return, but rather specific action or forbearance by the promisee in reliance upon the promise.²⁴³

It may be objected that a promisor may have made such a promise for such purpose, not out of any assent to an exchange transaction, but precisely to avoid being legally bound. The promisor may avoid stating an explicit quid pro quo arrangement in order to induce promisee's reliance while simultaneously hoping to preclude the promisee from later claiming the existence of an actual mutual agreement. How should such cases be handled?

Cases of this type pose no insurmountable difficulty. Courts and juries have since time immemorial dealt with the practical reality that a party's subjective state of mind, their subjective intent, often cannot be known with certainty. Absent an explicit statement or implicit concession of intent, courts and juries may rely upon external, objective indicia of internal, subjective intent.²⁴⁴ What one should particularly look for in the postulated contract case is whether the promisor stood to benefit in some manner, either directly or indirectly, tangibly or intangibly, from promisee's reliance on the promise. If so, and depending on the facts and circumstances, a fact finder may easily infer from the presence of such

241. Jean Powers has likewise argued that many promissory estoppel cases might be decided on the basis of unilateral contract. See Jean Fleming Powers, *Promissory Estoppel and Wagging the Dog*, 59 ARK. L. REV. 841, 856–57 (2007).

242. See BAKER, *supra* note 17, at 367.

243. See RESTATEMENT (SECOND) OF CONTRACTS § 30(1) (AM. LAW INST. 1981) (describing, *inter alia*, an offer which requires acceptance by performance or forbearance of a specified act, though no longer using the standard, universally understood term “unilateral contract” to describe such an arrangement).

244. See, for example, *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954), in which the court stated that “[i]n the field of contracts, as generally elsewhere, ‘We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention.’” (quoting *First Nat. Bank v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937)). See also, e.g., Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 436–37, 478–80 (2014) (discussing as a general matter the role of the fact finder in drawing inferences from external evidence as to subjective state of mind).

benefit that the promisor consciously intended to induce promisee's reliance. And the presence of a benefit to the promisor, coupled with the promised benefit to promisee, constitutes an exchange transaction. Implied unilateral contract may readily be found in such circumstances.

Whether the promisor in such a situation wishes to be legally bound is immaterial. We would all, quite naturally, be delighted to enjoy benefits conferred upon us by others without reciprocal obligation. But such is not the world. When we consciously propose an exchange, and the counterparty agrees, we are bound under age-old principles of contract law to carry through on our commitment so made. Constructive mutual assent to an exchange—to contract—is present, whatever self-serving wishes one might harbor of fleeing one's own commitment. A "bad actor" who makes a promise, hoping to induce reliance by the promisee to the benefit of promisor, without reciprocal obligation, may be understandably human in motivation, but compellingly obligated in law.²⁴⁵

By way of example, an obvious application of implied unilateral contract to an area in which promissory estoppel has made an inroad is subcontractor bids.²⁴⁶ Historically governed by the rules of classical contract law, the subject was reoriented by Roger Traynor of the California Supreme Court with his promissory estoppel opinion in *Drennan v. Star Paving Co.*²⁴⁷ The fact pattern at issue there involved a bid by a subcontractor (a "sub" in common parlance) submitted to a general contractor (a "general").²⁴⁸ The general relied on the pricing in the sub's bid in drafting and submitting its own general bid for a project.²⁴⁹ After the general had been awarded the main construction contract, but before the general had accepted the sub's bid, the sub attempted to withdraw its bid.²⁵⁰ Traynor enforced the sub's bid on the basis of promissory estoppel.²⁵¹

245. The foregoing logic is of course applicable *a fortiori* in cases where the promisor either intended to be bound or simply did not give any thought to the question of whether they would be bound. The legitimacy of enforcing an implied unilateral contract in such cases is clear.

246. See generally Dorothy Hemmer Bishop, Comment, *The Subcontractor's Bid: An Option Contract Arising Through Promissory Estoppel*, 34 EMORY L.J. 421 (1985).

247. 333 P.2d 757 (Cal. 1958).

248. *Id.* at 758.

249. *Id.*

250. *Id.* at 758–59.

251. *Id.* at 760. Traynor's opinion specifically cited First Restatement Sections 45 and 90 working in tandem. *Id.* at 759–60. Section 45 stated the principle that where there has been an offer for a unilateral contract, partial performance by the offeree renders the offer irrevocable for some period, giving the offeree a fair chance to complete full performance. That is, it creates an option. RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmt. b (AM. LAW INST. 1932). Williston had introduced the concept of promissory estoppel into this provision with the following language:

Due to limitations of space, a more complete discussion of the various ways in which such subcontractor bids could be addressed must await another day. For present purposes, suffice it to say that Traynor could easily have reached the same decision, namely enforcement of the sub's bid, on the basis of implied unilateral contract, without any need to reach for the novel doctrine of promissory estoppel. It is no great intellectual leap to infer that the sub had offered to provide a specific good or service at a specific price, hoping that the general would rely on the sub's pricing in crafting its own general bid. Traynor himself made this same observation.²⁵² If the sub's pricing were low, the general's bid could be consequently lower as well. Once the general's bid were to be accepted by the project sponsor, the general would be locked in, and would have every incentive to accept the low bid of the sub upon which it had relied. This is true for the obvious reason that choosing a higher priced sub bid from a different sub would cause the general to earn lower profit or even suffer a loss on the overall project. The sub thus made a pricing promise for the specific purpose of inducing the general to conduct itself in a manner likely to be of benefit to the sub, even though the bargain, the quid pro quo, was not stated explicitly. It was implicit. When the general submitted its own bid based on the sub's pricing, the general had "performed" its side of an implied unilateral option contract²⁵³ in manner sufficient to render the sub's bid irrevocable. This is straightforward classical contract law. Traynor chose to innovate doctrinally. He did not need to.

2. *Vague "Promise"; Benefit to Promisor*

This Article now turns to the difficult cases, those in which a promisor has made a vague, nonspecific statement of intent or anticipation—arguably a "promise," arguably not—upon which another has chosen detrimentally to rely.

"Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see § 90)." *Id.* This was one of Williston's corollary innovations in the First Restatement meant to dovetail with the main promissory estoppel clause in Section 90.

252. *Drennan*, 333 P.2d at 760.

253. "An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." RESTATEMENT (SECOND) OF CONTRACTS § 25 (AM. LAW INST. 1981).

A "unilateral" option contract is one in which the option offeror desires and welcomes acceptance of the option contract solely by means of the option offeree's performance, rather than by means of a counterpromise by the option offeree. *See id.* § 30(1), at 84–85.

An "implied" unilateral option contract is one in which the option offeror has not stated the quid pro quo expressly, but where subjective or constructive assent to an exchange transaction—limitation of option offeror's power to revoke an underlying offer in exchange for some performance by the option offeree—may be inferred from the parties' respective conduct. *See id.* § 4 cmt. a, at 14.

As before, we might very well be dealing with a “bad actor” who has stated a “promise” in deliberately vague, nonspecific terms for the purpose of later being able to dodge any allegation that there was an agreement, or indeed any specific promise at all. Given human nature, these situations undoubtedly arise frequently in the rough and tumble of real world communications.

However, enforcement of a literally nonexistent promise is highly problematic. This is particularly true in view of the practical reality that many people carefully word their statements precisely in order not to be legally bound—not because they are bad actors, not because they had culpable intent—but rather because for good and legitimate reason they decline to contract and be bound on a given basis. The right to freedom of contract necessarily implies the right to freedom from contract as well. Not only bad actors decline to state a specific commitment. Lots of good actors do so as well, for entirely justifiable reasons.

The back and forth of day-to-day verbal interactions among people consists to a not insignificant degree of forward-looking statements. The proposition that any forward-looking statement of intent or anticipation may properly be made the subject of a lawsuit would be radical and historically unprecedented. Tort law has long eschewed any such extension of liability for good and compelling reason.²⁵⁴ Promissory fraud—consciously, deliberately lying at the time of making a promise by entering into a commitment one knows at its very inception one has no intention of ever performing—is actionable in tort.²⁵⁵ But to drop the requisite culpability level for liability on an uncompensated forward-looking statement below such intent to defraud is fraught with policy risk. If everyone could sue anyone who made a forward-looking statement of intent or anticipation and then failed to carry through, we could find ourselves wandering ever deeper into a litigational swamp. There is little to nothing in the formally stated doctrine of promissory estoppel to restrain such a development from progressing over time. In the prescient words of Morawetz during the First Restatement debate, “[i]f I were a judge on reading this section I should not know where to draw the line.”²⁵⁶ Section 90 contains little in the way of limiting principle.

Moreover, and of great moral significance in this context—though essentially ignored in academic writing on the subject—is the fact that it takes two to tango. Every promissory estoppel case involves a conscious, deliberate choice by a “promisee” to rely on a “promise.” No one

254. See Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 491 (1987).

255. See generally Ian Ayres & Gregory Klass, *Promissory Fraud*, N.Y. ST. BAR ASS'N J., May 2006, at 26.

256. *ALI Debate on Section 90*, *supra* note 124, at 100.

compelled them to do so. In cases where there is no clear promise whatsoever, where the precise nature of that to which the speaker has committed him or herself remains ambiguous or undefined, one introduces enormous moral hazard into the equation by enabling the listener successfully to sue. In times past, it has been thought prudent to establish bright legal lines which encourage and enable private parties to choose whether to contract, or not, and if so, on what terms. If there are no reasonably distinct lines—if even vague, imprecise statements can suddenly become the subject of suit—parties will find themselves at significantly greater risk of unfair or entirely spurious litigation.

This Article argues that the correct approach to take to these difficult, ambiguous cases, where the “promise” or other forward-looking statement is vague and indefinite, is to grasp the nettle and make an affirmative decision on the basis of classical contract law—either enforce the promise as implied unilateral contract, or do not enforce it on grounds of indefiniteness.

Declining to make that decision, and instead opting for the easy fix of promissory estoppel, is a form of intellectual abdication which brings damage to the principles and corpus of contract law. If one is willing to find for the promisee on the basis of promissory estoppel, one is willing to impose a remedy predicated upon whatever it is that promisor said. One is, in effect, finding that promisor had made some commitment specific and comprehensible enough to induce promisee’s reliance in a reasonably foreseeable manner. In other words, one could as easily wrestle directly with the issue of indefiniteness and conclude that it is indeed possible to ascertain, even if subject to interpolation and inference, the promisor’s commitment in a reasonably definite manner. Such a conclusion permits a finding of implied unilateral contract.

By contrast, if, after due deliberation, it is not possible to make out the contours of the speaker’s commitment in some reasonably certain manner, then it is necessary to conclude that no “promise” has in fact been made whatsoever. In such a case, it would be inappropriate to impose a remedy against the speaker. The issue need not and should not be decided on the basis of promissory estoppel. Classical contract law dictates the result.

An excellent example to examine in this regard is *Blinn v. Beatrice Community Hospital and Health Center, Inc.*²⁵⁷ In that case, a hospital employee nearing retirement age wished to have certainty that he would remain employed by Beatrice until retirement.²⁵⁸ Otherwise, he would

257. 708 N.W.2d 235 (Neb. 2006).

258. *Id.* at 240.

accept an outstanding offer of competing employment elsewhere.²⁵⁹ His supervisor responded, “Bob, we’ve got at least five more years of work to do.”²⁶⁰ Blinn stayed at Beatrice Hospital, turned down the competing offer, and was fired by Beatrice roughly six months later.²⁶¹

The court reversed and remanded in Blinn’s favor on the basis of promissory estoppel.²⁶² Notably, the court concluded that the supervisor’s statement was too vague and indefinite to form the basis of a contractual promise, but that indefiniteness is no defense to a promissory estoppel claim.²⁶³

This Article submits that this was not a proper basis upon which to decide the case. By finding for Blinn, the court was, in effect, concluding that the supervisor had in fact made a statement that Blinn could reasonably, foreseeably interpret as a commitment to continue his employment until retirement. If so, then the court could as easily have concluded that the supervisor’s statement, though vaguely worded, was sufficiently definite to enforce in contract as a promise.²⁶⁴ The court in *Blinn* could and should have reached its decision on the basis of classical contract law rather than promissory estoppel.

In the hypothetical alternative, if a court faced with similar facts were ultimately unable to conclude that the supervisor had made a commitment to continue Blinn’s employment through retirement, then there would be simply no commitment, hence no promise, and hence no enforcement would be appropriate.

Either way, the result turns on the classical question of whether a sufficiently definite commitment has been made by the speaker. No recourse to promissory estoppel is necessary. Courts can and should step up to the true intellectual issue at the heart of such cases and reach an affirmative decision as to definiteness on the basis of classical contract law.

3. *Definite Promise; No Benefit to Promisor*

Thus far, this Article has examined situations in which an exchange transaction may reasonably be inferred. Such cases may be decided in

259. *Id.*

260. *Id.*

261. *Id.* at 241.

262. *Id.* at 247.

263. *Id.*

264. The case would then become rather like *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777 (Mo. 1907), in which the court enforced in contract a similarly “squishy” statement by an employer.

favor of enforcement on the basis of implied unilateral contract. By contrast, where promisee's reliance brings no reasonably cognizable benefit to the promisor, or where the promisor has made perfectly clear that the promised conduct is unconditional and will occur even if the promisee declines to act or forbear in any particular manner, then there can be no implied quid pro quo—in Oliver Wendell Holmes's words, no "reciprocal conventional inducement"²⁶⁵—and thus no implied unilateral contract.

Yet there may arise circumstances in which a promisor desires to render legally binding a current promise to make a gift of property, or to render a service, on a wholly gratuitous basis in the future. Such promises are presumably typically made, if ever, either to charitable institutions or to family members. How should such cases be handled?

As an analytic starting point, as discussed *supra*,²⁶⁶ under classical contract law the gratuitous nature of the promise ordinarily renders it unenforceable.²⁶⁷ Courts have, however, carved out an exception to the consideration requirement for charitable donations due to a judicial policy preference in favor thereof.²⁶⁸ Promises of gratuitous transfers to family members, as private rather than charitable, do not of course fall within that policy rationale and are thus generally not enforceable in contract. If one wishes to make a gratuitous intrafamily transfer, one therefore either makes a current gift including actual delivery, or complies with the legal formalities applicable to voluntary testamentary disposition, namely a will or a trust.²⁶⁹

265. HOLMES, *supra* note 105, at 293–94.

266. See *supra* section I.D.

267. See, e.g., Schnell v. Nell, 17 Ind. 29 (1861) (gratuitous promise by surviving husband to make payments to relatives, in order to give effect to inoperative provisions of wife's will, was not enforceable); Fischer v. Union Trust Co., 101 N.W. 852 (Mich. 1904) (gratuitous promise by father to pay off mortgages on land he gifted to daughter not enforceable against his estate); Dougherty v. Salt, 125 N.E. 94, 94–95 (N.Y. 1919) (gratuitous promissory note from aunt to nephew not enforceable against her estate). See generally Melvin Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821 (1997).

268. See, e.g., Danby v. Osteopathic Hosp. Ass'n, 104 A.2d 903, 907 (Del. 1954). That case involved a gratuitous personal guarantee of borrowings by a hospital. With the goal of encouraging "the massive machinery of benevolence," wrote the court, "[t]here can be no denying that the strong desire on the part of the American courts to favor charitable institutions has established a doctrine which once would have been looked upon as legal heresy," namely that a promise made to a charitable institution need not be supported by consideration in order to be enforceable. *Id.* See generally FARNSWORTH, *supra* note 77, at 93–94.

269. It is worth noting in this context that a person may change their will at any time, and many forms of trust are freely revocable. A promise pursuant to "formal contract," as discussed *infra*, would not be revocable and would thus bear significant functional difference to many common forms of testamentary disposition.

Williston, however, sought to create a mechanism to enforce a promise to make a gift in the future, despite the absence of consideration therefor and despite the absence of compliance with those legal rules which otherwise govern voluntary testamentary disposition. As discussed *supra*, it was in order to create a legal mechanism for creating such binding gift promises that Williston justified his proposed doctrine of promissory estoppel in debate within the ALI and in the illustrative examples furnished with Section 90.²⁷⁰

Yet promissory estoppel sweeps far too wide, carving a swath of destruction through the foundations of contract law like Sherman's march to the sea, in order to achieve such a narrow, discrete, and niche exception to the consideration requirement. A better, far more modest, far more appropriate solution lies to hand.

Much has been written on the subject of whether donative promises should be enforced at law, with various academics staking out positions both pro and con.²⁷¹ The goal of this Article is not to revisit the totality of those arguments. There are numerous reasons to leave the existing rule in this regard under classical contract law untouched—meaning that wholly gratuitous promises to make a gift in the future would remain unenforceable. If, however, upon full reflection, state legislatures were ultimately to determine that a mechanism should be created for promisors at their will to render such promises to family members enforceable, a narrowly tailored, precisely targeted approach would suffice admirably. There is no need for the destruction of Georgia.

A principal concern to be addressed with the enforcement of wholly gratuitous intrafamily promises is how terribly easy they are to allege, and how easily a jury or court might be misled by a talented fabulist, of which human experience proves there are many. Simply declaring gratuitous promises to family members, without more, enforceable, could constitute a litigational landmine.²⁷²

The obvious solution to that problem is to couple enforceability with a requirement that the promisor have reduced the promise to writing, and perhaps include specialized language stipulating that the promisor waives consideration for the promise. This approach could, if so desired, further be limited to intrafamily donative promises, rather than gratuitous

270. See *supra* section II.C.2.c.

271. See generally Eisenberg, *supra* note 267.

272. There are compelling reasons why property law features safeguards designed to protect donors in this regard. Inter vivos gifts generally require delivery, and testamentary gifts by will generally require a writing signed in the presence of witnesses. For recent discussion of these formal requirements, see generally Adam Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 798, 815, 824 (2014).

promises to unrelated third parties. A stronger variant would require the writing to be notarized. Yet stronger would require the document to have been drafted by professional counsel admitted to the bar. Strongest would be to require the notarized, professionally drafted promise to be filed with a specified public office or court. These latter variants in particular would constitute a species of modern day formal contract counterpart, if one will, to the red wax seal of yesteryear.²⁷³

It is worth noting in this context that an alternative form of the first, least strict of these variants has already been attempted and failed signally. During the same period in the mid-1920s that Williston was working on crafting the First Restatement, he also encouraged the National Conference of Commissioners on Uniform State Laws to propose the Uniform Written Obligations Act. Under that contemplated uniform state statute, no consideration would be required for enforcement of a promise set forth in a writing which expressly states that the signatory intends to be legally bound.²⁷⁴ The statute is only in effect in Pennsylvania.²⁷⁵ Pennsylvania stands alone. Perhaps the relative informality of the suggested approach did not appeal.

It is thus unclear and may sincerely be doubted whether state legislatures—on a nationwide and uniform, rather than ad hoc, minority, basis—would have any appetite for creating a legal mechanism to render gratuitous formal promises binding. The vast majority of U.S. states have abandoned formal contract in whole or in part, and there is little reason to suppose them ready to come rushing back home.

If, however, the temper of the times has changed, and if it comes widely to be seen as desirable to create a mechanism for gratuitous formal promise, particularly in the intrafamily context, the several discrete, limited variants suggested in this Article would be entirely sufficient to the purpose. Nothing militates in favor of the gaping, nearly unbounded liability principle of promissory estoppel. The various approaches suggested here each present a targeted, precise solution for a discrete situation, rather than a systemically toxic “cure” which kills the patient.²⁷⁶

273. The variants suggested in this Article, particularly the latter ones, would also represent a different and more robust mechanism for indicating and achieving formality than the degenerated forms of “seal” which came into practice over the years, such as the mere written initials “L.S.” (standing for *locus sigilli* (place of the seal)). See discussion *supra* section I.F.

274. See Hirsch, *supra* note 272, at 836 n.192.

275. See Uniform Written Obligations Act, 33 Pa. Cons. Stat. § 6 (2018) (enacted 1927).

276. It is highly noteworthy in this connection that England has retained the use of formal, sealed contracts to render gratuitous promises binding, and has rejected the radical concept of promissory estoppel. See MILSOM, *supra* note 17, at 356.

4. *Vague “Promise”; No Benefit to Promisor*

Where someone has not made a clear, definite promise, but instead only a vague forward-looking statement of intent or anticipation, for which they receive nothing by way of recompense, but another chooses detrimentally to rely on that statement, it should go without saying that enforcement of that statement as a contractual “promise” would be inappropriate.

Interestingly, Section 90 would permit such enforcement, if a judge believes that it was reasonably foreseeable that the “promisee” might rely thereon, and the judge in their unfettered discretion deems enforcement necessary to avoid injustice. Though it may be unlikely that a judge would come to such a conclusion, there is nothing in Section 90 that would pose an impediment thereto. Section 90 is facially overbroad. Cases in this category should be denied enforcement, on a straightforward classical contract law analysis.

5. *Reliance by Third Party*

Perhaps the most striking aspect of Section 90’s facial overbreadth appears in its Restatement (Second) incarnation, which purports to extend potential liability to third parties—i.e., not the promisee—who have relied on a “promise” that was not even made to them.²⁷⁷ Classical contract law restricts enforcement by third parties to “creditor beneficiaries” and “donee beneficiaries.” The former are, broadly, parties to whom the promisor owed a preexisting legal duty, which the promisor now seeks to fulfill through a new contract with another party.²⁷⁸ The latter are parties whom the promisor consciously sought to benefit.

New Section 90 purports to sweep those limitations aside. A “promisor” who has made a statement, which need not meet the definiteness requirement of classical contract, may potentially face liability to third parties to whom the promisor owes no preexisting legal duty, and to whom the promisor was not even speaking, if it was

277. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. c (AM. LAW INST. 1981).

278. A quintessential example of such a situation is where a landlord has contracted with a tenant in a lease agreement to build or renovate space on the property for the tenant. The landlord hires a contractor to perform the work landlord owes under the lease. Depending on the circumstances, the tenant might be able, as a third party creditor beneficiary of the construction contract, to sue the contractor directly for any breach by the contractor. *See, e.g., Kmart Corp. v. Balfour Beatty, Inc.*, 994 F. Supp. 634 (D.V.I. 1998) (permitting tenant as third-party beneficiary to sue contractor for storm damage to building).

reasonably foreseeable that such third parties might rely on that statement.²⁷⁹

The consequent hypothetical possibility of “mass liability” under Section 90 was painted out by Metzger and Phillips in a 1989 article.²⁸⁰ They postulated a situation in which a large corporation states publicly that it does not anticipate a factory closure, but later due to poor economic circumstances proceeds to shutter the plant.²⁸¹ For example, anyone in town who, in reliance on the company’s earlier public statement, chose not to sell their houses and pursue employment in another region, might attempt a claim under Section 90’s third party prong.²⁸² Nothing on the face of Section 90 would stand in the way of such a result.

This Article submits, fevered dreams of the plaintiffs’ bar notwithstanding, that a purported liability provision of such facial overbreadth has no historical foundation nor proper place in Anglo-American contract law doctrine.

B. Bringing the Restatement into Line with Its True Function

Significant responsibility for returning contract law to its true foundation lies with the ALI, whose restatements have failed to adhere to its asserted mission of stating the law as it is. The ALI should accordingly undertake a revision to the Restatement (Second) with several objectives.

Most importantly, Section 90, which sets forth the doctrine of promissory estoppel, should simply be deleted. The separate subrule at the end of Section 90, which applies only to charitable subscriptions and marriage settlements,²⁸³ could be turned into a discrete, limited, categorical exception to the consideration requirement for such promises. So-called “promissory estoppel” cases should be decided on the basis of classical contract law, in particular whether the parties’ conduct has given rise to an implied unilateral contract.

Likewise, Section 87(2), which provides that an offer can be binding as an option contract on the basis of promissory estoppel²⁸⁴—rather than on the classical basis of mutual assent and consideration to the option—should be deleted. Option contracts should be addressed as they are in

279. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. c (AM. LAW INST. 1981).

280. Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931, 967 (1989).

281. *Id.* at 968.

282. *Id.*

283. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. LAW INST. 1981).

284. *Id.* § 87(2), at 229.

classical contract law, including the ability of courts to find an implied option contract where the facts warrant such a conclusion.

Next, Section 1's definition of the term "contract"²⁸⁵ should be modified to take on its historically founded, legitimate form. Such definition would include reference both to the "agreement" of the parties and to the presence of "consideration." The definition given by Tanfield in the seminal *Slade's Case*, or any reasonable equivalent thereof, could serve this purpose admirably: "a mutual agreement between the parties for something to be performed by the defendant in consideration of some benefit which must depart from the plaintiff, or of some labour or prejudice which must be sustained by the plaintiff."²⁸⁶ The essence of the matter is that the definition requires both mutual assent and mutual consideration—that is, the parties must have agreed to an exchange transaction in which each party acts or forbears or changes a legal relation at the request of the other. In other words, there must be a bargain, a deal.

The definition of "contract" in Section 1, and the comments thereto, should also make clear that a bargain transaction between two parties where both sides perform immediately—a so-called "executed" contract—is indeed every bit as much a contract as making a promise to do or deliver something in the future—a so-called "executory" contract. Historically, this has been fully understood.²⁸⁷ It would also be consistent with the approach taken by the Uniform Commercial Code, which recognizes that a "contract for sale" includes a "present sale of goods," i.e., "a sale which is accomplished by the making of the contract."²⁸⁸ The essence of contract is a voluntary exchange transaction between two parties, irrespective of whether it is performed immediately or only with some delay.

A host of other changes consonant in spirit should be undertaken throughout the Restatement (Second) where it is evident that definitions, rules, and comments have been stated anomalously in a manner which accommodates the discordant concept of promissory estoppel but does disservice to traditional, time-honored principles of contract law.²⁸⁹

285. *Id.* § 1, at 5.

286. *Slade's Case*, *supra* note 45, at 429 (remarks of Tanfield, J.).

287. *See, e.g.*, 2 BLACKSTONE, *supra* note 53, at *443; STORY, *supra* note 212, at 8.

288. *See* U.C.C. § 2-106(1) (AM. LAW INST. & UNIF. LAW COMM'N 2003).

289. These include without limitation: RESTATEMENT (SECOND) OF CONTRACTS § 17(2) (AM. LAW INST. 1981) (requirement of a bargain); § 17 cmt. e (informal contract without bargain); § 34 cmt. D (reliance and appropriate remedies); § 50 cmt. b (acceptance by performance); § 72 cmt. b (substantive bases for enforcement); § 79 cmts. b, f (benefit and detriment, mutuality); ch. 4, topic 2, intro. note (bases for enforcement, omitted cases); § 87(2) and § 87 cmt. e (reliance); and § 89 cmt. d (reliance).

C. *Recursion to Mutual Net Benefit as the Crux of Contract*

Finally, academic analysis of contract should eschew the exaggerated and artificial focus on detriment to promisee as the policy touchstone underlying the field. As discussed *supra*, casting the discussion of consideration solely in terms of detriment to promisee was a technical overrefinement proposed by Langdell, perpetuated by Ames, and has taken on a life of its own.²⁹⁰ It has distracted numerous thinkers on the subject from the true policy grounds for the enforcement of contract at law,²⁹¹ namely to increase the certainty, stability and frequency of mutual exchanges in which each party enjoys a benefit exceeding the cost of one's own performance—in other words, where each party enjoys a net benefit measured in terms of their own utility. That is the core of contract. That is the reason for its existence.

CONCLUSION

The past century of academic writing and judicial decisions in the field of contract law have been clouded and confused by the thankless task of attempting to reconcile two not only grossly incompatible but indeed diametrically opposed propositions—the age-old requirements of mutual assent and mutual consideration in classical contract law, versus the insistence of the novel and artificial “doctrine of promissory estoppel” that neither assent nor consideration is requisite in order to render promise enforceable. A house divided against itself shall not stand. The American academy should return to the true and historically founded basis of contract law, namely the enforcement of mutual exchange transactions, and eschew the attempt of Williston, Corbin, and their latter-day confederates to alter the doctrines of contract law by main force. Conscientious application of the principles of classical contract law, particularly implied unilateral contract, combined with reinvigoration of formal contract for future-oriented intrafamily donative transfers, can and should be used to resolve so-called promissory estoppel cases. Section 90 should be withdrawn.

290. See *supra* sections II.A, II.C.1.

291. See Eric Mills Holmes, *Restatement of Promissory Estoppel*, *supra* note 88.

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