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Joel M. Ngugi
University of Washington School of Law

PROMISSORY ESTOPPEL: THE LIFE HISTORY OF AN IDEAL LEGAL TRANSPLANT

Joel M. Ngugi *

I. INTRODUCTION

This article hopes to accomplish three things. First, it will revisit the historical origins of the doctrine of promissory estoppel in the American law of contracts and the role that Samuel Williston,[1] the Chief Reporter of the *Restatement (First) of Contracts*[2] (*"First Restatement"*) played in the evolution of the doctrine. The dominant theory is that Williston conceptualized the new promissory estoppel doctrine in a way that retarded and blunted the doctrine shortly after its birth.[3] This theory is adhered to by both critics and proponents of the expansion of promissory estoppel as a ground of promissory obligation.[4] According to both the critics

* Assistant Professor of Law, University of Washington School of Law. S.J.D., LL.M, Harvard Law School; LL.B, University of Nairobi, Kenya. I would like to thank Adam Reuben Franklin and Marie V. Ericson for their excellent research assistance.

1. Samuel Williston was a professor at Harvard Law School. He was one of the founding members of the American Law Institute (ALI) as a "movement . . . which should have the broad object of improving the law." SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 310 (1940). It was Williston, together with Professor Joseph Beale of Harvard Law School, and Mr. William Draper Lewis (who later become the Director of ALI) who proposed that ALI undertake the "project of a Restatement of the common law in as brief, exact, and simple form as was possible." *Id.*

2. RESTATEMENT (FIRST) OF CONTRACTS (1932).

3. *See, e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT 60–65 (1974); Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation,* 43 DUQ. L. REV. 11, 25 (2004). However, Professor Mark Movsesian has recently argued that Williston, in fact, championed section 90's version of the doctrine of promissory estoppel. *See* Mark Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 220 (2005). Professor Movsesian disputes Gilmore's account and argues that by the time of drafting the First Restatement, Williston had become an "enthusiastic[]" supporter of the doctrine of promissory estoppel. *See id.* at 247–48.

4. For example, Professor Teeven, a partisan of the doctrine of promissory estoppel, notes that Williston failed to point to the commercial applications of justifiable reliance as a ground of promissory obligation and contributed to a "formalist retreat from previous expansion of promissory liability grounded upon natural law principles." Kevin M. Teeven,

and proponents, the Willistonian original formulation of section 90 in the *First Restatement* was meant to make sure that the new doctrine was limited in reach and growth potential.[5] While the critics of promissory estoppel praise Willistonian genius in the limiting formulation, the proponents of promissory estoppel assail him for what they see as undue formalism in his comprehension of promissory obligations.[6] In this article, I argue that notwithstanding Williston's motivations, hopes, or original intent in structuring the principle of justifiable reliance in section 90 of the *First Restatement*, his solution facilitated the growth and evolution of promissory estoppel, not its limitation and restriction. I will demonstrate that by hoisting the new doctrine aimed at enforcing unbargained-for promises on to a concept of estoppel, Williston unwittingly liberalized estoppel and unshackled it from its previous restrictive doctrinal moorings.[7] The result was bound to be the expansion—not constriction—of the possible range of factual scenarios covered by the new doctrine.

Second, this article recasts the story of the origins of the American concept of promissory estoppel as a legal transplant.[8] While the origins of promissory estoppel have been told in numerous law review articles and books, there have been few attempts to tell its history as a legal transplant from English law and how it both was shaped and in turn helped shape English law.[9] In this regard, this article describes how, by mid-nineteenth

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Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement, 34 U. MEM. L. REV. 499, 533 (2004). On the other hand, Grant Gilmore, a noted critic of the doctrine explains that Williston refused to encapsulate the doctrine of promissory estoppel in section 75 of the *First Restatement* because Williston, like Oliver Wendell Holmes, Jr., conceived consideration as "a tool for narrowing the range of contractual liability." GILMORE, *supra* note 3, at 21.

5. *See, e.g.*, GILMORE, *supra* note 3, at 66 (critic); Teeven, *supra* note 4, at 532–33 (proponent).

6. *See, e.g.*, Teeven, *supra* note 4, at 603–04.

7. Before the *First Restatement*, with the exception of proprietary estoppel, the general doctrine of estoppel could not support a cause of action. Estoppel could be used defensively as a "shield" but not as a "sword." *See infra* Parts V–VII.

8. For the meaning of a legal transplant, see *infra* notes 241–42 and accompanying text.

9. Professor Eric Mills Holmes has traced the evolution of the American concept of promissory estoppel through four stages—estoppel, contract, tort, and equity—but did not specifically focus on the doctrinal basis of promissory estoppel from the other classifications of estoppel as they existed in English law at the time the doctrine of promissory estoppel was invented. *See generally* Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45 (1996) [hereinafter Holmes, *Four Phases*]; Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263 (1996). Simi-

century, American courts and jurists were grappling with the problem of relied on, unbargained-for promises and shows how a selective importation of ideas from the English concept of estoppel enabled them to fashion a remedy that crystallized in the new doctrine of promissory estoppel.[10] I analyze the development of the new doctrine of promissory estoppel as "borrowed" from the general English concept of estoppel to determine if it was a successful legal transplant or not.[11]

Third, this article traces the influence of the doctrine of promissory estoppel, as it emerged in the United States, exerted in England and the rest of the world. In the case of England, of course, this would be a classic case of "reverse influence" or reverse importation.[12] I tentatively suggest that the doctrine of promissory estoppel is an "ideal" legal transplant. This is because the doctrine of promissory estoppel is essentially a flexible, equitable doctrine which lays out a general structure capable of being filled with local content. The malleability of the doctrine is an open invitation to comparativists and legal reformers to borrow it. While the success of the diffusion of legal thought is often credibly explained in instrumental terms (for example, the cultural prestige of the producing legal system or gun-boat diplomacy or outright imposition of foreign law through colonization), the influence of promissory estoppel in England and the rest of the world would suggest that legal ideas that are pragmatic can also spread because of their sheer utility.

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larly, Professor Kevin M. Teeven has produced a meticulous history of the origins of promissory estoppel, *see* Teeven, *supra* note 4, but his account is aimed at demonstrating that contrary to the claims of Samuel Williston, the Reporter to the *First Restatement*, courts regularly granted commercial promisees relief from reliance hardship in the absence of consideration long before the *First Restatement* came into being. *See, e.g., id.* at 506–07.

10. *Infra* Parts II–IV.

11. *Id.*

12. I have borrowed the term "reverse influence" from Assaf Likhovski. *See* Assaf Likhovski, *Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence*, 4 THEORETICAL INQUIRIES IN L. 621, 635 n.55 (2003). In a footnote, Assaf gives two non-law examples of reverse influence: the emergence of the academic study of English literature in nineteenth-century India and its re-exportation back to England towards the end of that century and the emergence of modern economics and other social sciences. *See id.*

II. THE PROBLEM THAT NECESSITATED THE BIRTH OF PROMISSORY ESTOPPEL

Like all legal inventions or transplants, the American doctrine of promissory estoppel was developed to address a perceived problem in the extant legal doctrines.[13] The problem which the doctrine of promissory estoppel was meant to address has been described in dozens of articles and commentaries.[14] Only a brief rehash is necessary here. By the beginning of the twentieth century, due to the influences of Classical Legal Thought (CLT) on the evolution of the doctrines of contract law, the doctrine of consideration had been defined in singularly narrow terms to exclude all non-bargain promissory transactions.[15] This emergence of the bargain theory of contracts meant that all promises in which the promisor did not specifically bargain for a return promise or performance went un-enforced even if the promisee had suffered substantial detriment as a result of her reliance on the promise.[16] A promise would not be enforced even if the promisee had relied on it to incur substantial detriment as long as the promisee's acts of reliance were not bargained for or requested by the promisor in

13. Professor Alan Watson argues that transplants are the main source of legal change. *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (1974). Lawyers prefer to imitate laws and principles from other jurisdictions rather than react directly to solve societal problems with an "original" rule or principle. *See id.* at 99.

14. *See, e.g.*, Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 679–684 (1984); Holmes, *Four Phases*, *supra* note 9, at 45–56; Teeven, *supra* note 4, at 512–43.

15. The term "Classical Legal Thought" was coined by Professor Duncan Kennedy to refer to the "form of American legal thought that emerged between 1850 and 1885 and flourished between 1885 and 1940." Duncan Kennedy, The Rise & Fall of Classical Legal Thought 7 (1975) (unpublished manuscript copy on file with author). Professor Kennedy termed it Classical Legal Thought because this mode of legal thought amounted to a "rationalistic ordering of the whole legal universe." *Id.* According to Professor Kennedy, Classical Legal Thought was:

> [A]n *ordering*, in the sense that it took a very large number of actual processes and events and asserted that they could be reduced to a much smaller number with a definite pattern. What was ordered was the enormous mass of rules and standards courts applied to different kinds of cases. The particular simplification that developed was influenced by the actual content of the rules it organized and, in turn, constantly influenced them . . . The basic mode of this influence of theory on results is that the ordering of myriad practices into a systematization occurs through simplifying and generalizing categories, abstractions that become tools available when the practitioner (judge or advocate) approaches a new problem.

Id. at 13 (emphasis in original).

16. *See* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1196 (1998).

making her promise. Such reliance was termed "unbargained-for reliance" and did not meet the requirements of consideration.[17] Hence, the definition of consideration sometimes worked harsh results.

The possibility of working unfairness on promisees became greater in American contract law when the definition of consideration explicitly embraced the bargain element toward the end of the nineteenth century.[18] Before this evolution to the bargain theory, consideration was mainly defined only in terms of benefit to the promisor or detriment to the promisee.[19] A good American example is the definition of consideration given in the venerable case of *Hamer v. Sidway*,[20] a leading case in almost all first-year contracts case books.[21] In this case, Judge Parker endorsed the definition of consideration given by treatise writer Anson:

> Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him."[22]

This definition of consideration closely tracked the definition then obtaining in England. For example, Judge Parker in *Hamer* also approvingly cites the definition of consideration supplied by the English Exchequer Chamber in *Currie v. Misa*[23] in 1875: "A 'valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.'"[24]

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17. Orvill C. Snyder, *Promissory Estoppel in New York*, 15 BROOK. L. REV. 27, 28–29 (1949); *see also* LON L. FULLER, BASIC CONTRACT LAW 363–64 (1947).

18. *See* Knapp, *supra* note 16, at 1194–95; Teeven, *supra* note 4, at 513–20.

19. Knapp, *supra* note 16, at 1194.

20. 27 N.E. 256 (N.Y. 1891).

21. *See, e.g.*, RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINES, 608–13 (3rd ed. 2003); JOHN P. DAWSON ET AL, CONTRACTS: CASES AND COMMENT, 204–06 (8th ed. 2003); CHARLES KNAPP ET AL, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS, 41–45 (5th ed. 2003).

22. *Hamer*, 27 N.E. at 257 (quoting WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT 63 (Jerome C. Knowlton ed., 2d American ed. Chicago, Callaghan and Co. 1887)).

23. 10 L.R. Exch. 153 (1875).

24. *Hamer*, 27 N.E. at 257 (quoting *Currie*, 10 L.R. Exch. at 162).

Both these English and American definitions of consideration required that a plaintiff prove only one element in order to succeed on a contract theory: a benefit to the defendant or a detriment to the plaintiff. To this pre-classical element of consideration—namely benefit to the promisor or detriment to the promisee—CLT sought to add a second element. This was the element of bargain.[25] According to CLT, it was not merely sufficient that the promisor had benefited or that the promisee had suffered some detriment: CLT insisted that the benefit or the detriment must have been conferred, or suffered as the case may be, as an inducement for the promise—i.e., the action conferring benefit or inflicting detriment must have been bargained for in exchange for the promise.[26] This changing definition of consideration heralded the rise of the bargain theory of consideration.[27]

As Professor Charles L. Knapp has noted, this changing definition of consideration was "more notable for what it excluded rather than for what it included."[28]

> By insisting that the "detriment" [or benefit must have been] . . . given in exchange for the promise, . . . [this definition of consideration] effectively ignored the possibility of the promisee's substantial change of position in reliance on the promise, not bargained for as the price of the promise, but substantial and detrimental nevertheless.[29]

Among the greatest supporters for the bargain-based definition of consideration in the United States was Justice Oliver Wendell Holmes.[30] Indeed, Justice Holmes was explicitly attacking the

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25. *See* Knapp, *supra* note 16, at 1194–95.

26. In 1896, Professor Reuben Benjamin defined consideration in the following words:

> When, at the desire of the promisor, the promisee, or any other person on his behalf, confers or promises to confer any benefit upon the promisor, or incurs or promises to incur any detriment, and such benefit, detriment, or promise is the inducement of the promisor's promise, it is a sufficient consideration for the promise.

REUBEN M. BENJAMIN, THE GENERAL PRINCIPLES OF THE AMERICAN LAW OF CONTRACT 21 (Indianapolis and Kansas City, Bowen-Merrill Co. 1889) (citations omitted).

27. *See* Knapp, *supra* note 16, at 1194–96; Teeven, *supra* note 4, at 511–20.

28. Knapp, *supra* note 16, at 1194.

29. *Id.*

30. Oliver Wendell Holmes, Jr., has been famously described as "the great oracle of American legal thought." Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 787 (1989). Holmes's writings at the time were interpreted as an attack on Langdellian formalism, and he was therefore considered as the first legal realist. *See, e.g.*, Steven J. Burton, *Introduction* to THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY

detriment-benefit definition of consideration when he put forth his famous definition of consideration in terms of bargain.[31] Holmes was interested in narrowing—not expanding—the range of contractual liability.[32] Hence his bargain theory:

> It is said that any benefit conferred by the promisee on the promisor, or any detriment incurred by the promisee, may be a consideration. It is also thought that every consideration may be reduced to a case of the latter sort, using the word "detriment" in a somewhat broad sense.
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> . . . .
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> It appears to me that it has not always been sufficiently borne in mind that the same thing may be a consideration or not, as it is dealt with by the parties. . . .
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> . . . [I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.[33]

The definition given by Justice Loevinger of the Supreme Court of Minnesota in *Baehr v. Penn-O-Tex Oil Corp.*[34] illustrates the bargain theory of consideration:

> The test that has been developed by the common law for determining the enforceability of promises is the doctrine of consideration. This is a crude and not altogether successful attempt to generalize the conditions under which promises will be legally enforced. Consideration requires that a contractual promise be the product of a bargain. However, in this usage, "bargain" does not mean an exchange of things of equivalent, or any, value. It means a negotiation resulting in the voluntary assumption of an obligation by one party upon the condition of an act or forbearance by the other.[35]

OF OLIVER WENDELL HOLMES, JR. 2 (Steven J. Burton ed., 2000).

31. *See* Peter Linzer, *Consider Consideration*, 44 ST. LOUIS U. L.J. 1317, 1320 n.17 (2000).

32. GILMORE, *supra* note 3, at 21.

33. OLIVER WENDELL HOLMES, THE COMMON LAW, 289–94 (48th prtg. Boston, Little, Brown and Co. 1923) (1881).

34. 104 N.W.2d 661 (Minn. 1960).

35. *Id.* at 665 (citations omitted).

By the time the *First Restatement* was being drafted, this bargain theory of consideration had achieved predominant status.[36] Williston wanted to propagate this "modern" definition of consideration, but faced the problem of how to deal with the cases that had enforced unbargained-for promises.[37] Professor Grant Gilmore's re-created account of how section 90 of the *First Restatement* came into being describes the hesitation with which Williston and the other Restaters[38] (with the exception of Arthur Corbin) had to include the section in the *First Restatement*:

> In the debate [on the definition of consideration] Corbin and the Cardozoeans lost out to Williston and the Holmesians. In Williston's view, that should have been the end of the matter.
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> Instead, Corbin returned to the attack. At the next meeting of the Restatement group, he addressed them more or less in the following manner: Gentlemen, you are engaged in restating the common law of contracts. You have recently adopted a definition of consideration. I now submit to you a list of cases—hundreds, perhaps or thousands?—in which courts have imposed contractual liability under circumstances in which, according to your definition, there would be no consideration and therefore no liability. Gentlemen, what do you intend to do about these cases?
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> . . . .
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> The Restaters, honorable men, evidently found Corbin's argument unanswerable. However, instead of reopening the debate on the consideration definition, they elected to stand by § 75 but to add a new section—§ 90—incorporating the estoppel idea although without using the word "estoppel."[39]

Several writers have plausibly impugned the historical accuracy of Gilmore's account.[40] One also may question Gilmore's de-

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36. *See* Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 306–11 (2002).

37. *See* GILMORE, *supra* note 3, at 63–64.

38. *Id.* The other Restaters were: Professor Arthur Corbin of Yale Law School; Professor William H. Page of the University of Wisconsin; Professor Merton L. Ferson of the University of Cincinnati; Professor Dudley O. McGovney of the University of California; Professor George P. Thompson of Cornell Law School; and Professor William E. McCurdy of Harvard Law School. *See* WILLISTON, *supra* note 1, at 312.

39. GILMORE, *supra* note 3, at 63–64.

40. *See, e.g.*, Movsesian, *supra* note 3, at 247–48 ("The conventional story, popularized by Gilmore, holds that Williston reluctantly agrees to include a promissory estoppel provision in the Restatement only after his adviser Arthur Corbin embarrasses him by pointing out a number of cases relying on the doctrine. In fact, though, nobody has to shame Williston into accepting promissory estoppel. On the contrary, Williston repeatedly claims credit for having invented the doctrine and for making it a success. Indeed, according to Corbin, Williston helps "bludgeon[]" advisers into going along with promissory estoppel, and the

piction of all the "honorable" Restaters (with the exception of Arthur Corbin) as conservative Langdellians. Indeed, some of them, like Professor William H. Page, had openly experimented with ideas which would be considered "realist" or "relational contract theory" today.[41] Notwithstanding the historical inaccuracy of Gilmore's account, however, it is fair to conclude that Williston's preferred definition of consideration (in terms of the bargain theory) left no room for a theory of justifiable reliance within the doctrine of consideration.[42] Professor Kevin M. Teeven has argued the point further, that in fact Williston's preference for the bargain theory of consideration led him to diminish the role of justifiable reliance in the law of contracts:

> Williston's claim [that actionable justifiable reliance had been generally applicable to cases of charitable subscriptions] reinforced his position that the doctrine of consideration was grounded upon reciprocity of bargain, and his marginalization of past justifiable relief cases thereby insinuated that his proposed promissory estoppel section was only needed only for charitable and family promises that necessarily fell outside the bargain construct. Williston's attempt to limit the scope of promissory estoppel would retard reliance relief for the subsequent generation.[43]

III. THE WILLISTONIAN SOLUTION

Williston wanted to generalize a rule which would apply to the disparate situations whereby unbargained-for promises were en-

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records of the ALI discussions on the Restatement suggest that, more than anyone else, Williston champions the doctrine against its conservative detractors.") (alteration in original) (citations omitted).

41. Stewart Macaulay reports that, in 1914, Professor Page presented a paper on Ehrlich's "living law" providing that Ehrlich described his living law as:

> [I]n contrast to that which is in force merely in the courts and with the officials. The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law.

Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 367–68 (quoting William H. Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, *in* READINGS IN JURISPRUDENCE 825 (Jerome Hall ed., 1938).

42. *See infra* Part III.

43. Teeven, *supra* note 3, at 25 (internal citation omitted).

forced.[44] Consequently, several authors have labeled Williston a Langedillian.[45] Williston himself denied such a charge and distinguished himself from Langdell's view of the law—as early as 1929.[46] Still, it is fair to say that Williston was wedded to CLT, and it is this adherence that compelled him to generalize a rule which would apply to the disparate situations whereby unbargained-for promises were enforced by the courts.[47] Similarly, as

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44. *See Proceedings at the Fourth Annual Meeting*, 4 A.L.I. Proc. 86 (1926) (statement of Samuel Williston) [hereinafter, *A.L.I. Proceedings*].

45. *See, e.g.*, GILMORE, *supra* note 3, at 14 ("The [general] theory [of contract] itself was pieced together by [Langdell's] successors—notably Holmes, in broad philosophical outline, and Williston, in meticulous, although not always accurate, scholarly detail."); James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 5–6 (2003) ("Thus the 'contract' is defined through the offer and acceptance rubric, where all the parties' obligations are objectified in the stated agreement. This model has its roots in classical contract law, most commonly associated with the grand treatises and scholarship of Samuel Williston, which sought to objectify and formalize contract law through a series of universally applicable legal rules.") (footnotes omitted); Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 461 (2004) ("The general theory of contract, worked out over the course of the nineteenth century and established as fundamental in contract thinking by classical thinkers toward the close of that century, raised the level of contract thinking to the heights of abstraction. The search for abstract principles to govern all of contract seems to be a mark of classical legal thought, as evidenced by Williston's introduction to his first edition. . . .") (citation omitted).

46. SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW 114 (1929) ("Langdell is an example of a conservative revolutionary . . . . Partly owing to an inability to use his eyes to any considerable extent, an infirmity which overtook him before he had been teaching in Cambridge [at Harvard Law School] many years, he had little interest or sympathy with any development of law later than 1850. He was a legal theologian deriving the principles of his theology almost entirely from English cases prior to that date, and reasoning from those principles with relentless logic. The limits which he thus fixed for himself prevents his written work from having any wide appeal to-day."). In his autobiography, Williston repeats this almost word for word, but adds "nor did his legal thinking sufficiently take account of changes in law as a constant and necessary process, however gradual and slow." WILLISTON, *supra* note 1, at 200. Williston found Langdell's position that law was a science similar to the physical sciences untenable:

> In one respect, and a very important one, law in this sense differs from physical law. In physical law what has happened in the past will, under similar circumstances, happen in the future. Accurate observations of the past and present enable the scientist within the range of that observation to make absolute prophecies as to the future. This is not so with regard to law made by courts and legislatures. Uniform decisions of 300 years on a particular question may be, and sometimes have been overthrown in a day, and the single decision at the end of the series may establish a rule of law at variance with all that has gone before. . . . It is never quite certain that the last decision justifies a prophecy of uniformity in the future.

Id. at 201.

47. *See, e.g.*, WILLISTON, *supra* note 46, at 95. Citing the lack of uniformity and the complexity of the legal rules as major defects in American law, Williston stated:

> When the law is doubtful men are encouraged to delay the performance of their obligations, if some theory can be found to support the contention that they are under no duty. . . . Complexity of the law is opposed to simplicity.

Professor Duncan Kennedy has shown, CLT was wedded to the idea of ordering "the enormous mass of rules and standards courts applied to different kinds of cases" to a definite rule with a definite pattern.[48] As Thomas Grey has shown, "the heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order."[49] This explains why, from the beginning, Williston aimed to find a "general provision" which would cover all instances where courts had granted relief on the basis of unbargained-for promises.[50] Hence, in defense of section 88 (later renumbered as section 90) and after identifying a number of situations where "reliance on a promise, though there has been no price or consideration paid for it, renders the promisor liable,"[51] Williston stated: "If the law is to be simplified and clarified, it can be done only by coordinating the decisions under general rules not by stating empirically a succession of specific cases without any binding thread of principle."[52]

> Broad general rules are simple. Where distinctions and exceptions are numerous, even if the distinctions are well settled, the law is complex. If the distinctions and exceptions are founded on unsubstantial grounds, the complexity is unnecessary, and the lack of reasonableness makes such distinctions more difficult to remember.

Id. at 95–96.

48. Kennedy, *supra* note 15, at 13.

49. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT L. REV. 1, 11 (1983).

50. The doctrine of promissory estoppel was included as section 83(e) in the *First Preliminary Draft of the First Restatement*. As Williston explains in the comment to section 83 of the *Preliminary Draft*, the section:

> [G]rouped together a number of cases where promises have been held enforceable, and justly so, though no present exchange was given or received for them. Subdivisions (a) [on promises to pay debts barred by the statute of limitations], (b) [on promises to honor voidable contracts], (c) [on promises to correct a "plain error" in a performance which the promisor has already received] and (d) [on promises by guarantors to pay regardless of failure by the creditor to supply requisite notice] of subsection (1) cover familiar cases of the sort.
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> . . . .
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> Subdivision (e) [the promissory estoppel section] of the same subsection allows some elasticity in the law to prevent serious injustice if a promisor induces action on the faith of his promise and then refuses to perform it. It seems better to make a general provision of the kind than to attempt by a fiction to find consideration for a gratuitous promise when there is none.

RESTATEMENT (FIRST) OF CONTRACTS § 83 cmt. at 65 (Preliminary Draft No. 1, 1925) (citation omitted).

51. AMER. LAW INST., *Commentaries on Contract: Restatement No. 2*, at 14 (1926) [hereinafter *A.L.I. Commentaries*].

52. *Id.* at 19.

Williston would later repeat this defense almost word for word during the proceedings for the adoption of the *First Restatement*.[53] Hence, in the attempt to formulate the "general provision," Williston attempted to demonstrate a pattern of cases whereby unbargained-for promises had been enforced by the courts. He systematized the cases as follows: He started with the proposition that most of the cases where relief for unbargained-for promises had been granted involved promises which were gratuitous, that is, made in non-bargain settings.[54] To be sure, Williston acknowledged that there were few exceptions, but he thought the greater weight of authority was against these exceptions.[55] Williston then reasoned that most of these "exceptional" cases were decided on a theory of "estoppel."[56] Williston found this jurisprudential basis troubling because he thought these situations did not give rise to a "true" estoppel.[57] He also found "estoppel" troubling as a concept because it was too elastic.[58]

Williston therefore suggested section 90 of the *First Restatement*—fastidiously avoiding calling it an "estoppel."[59] However, as he had admitted, "there [was] a binding thread in all the classes of cases . . . namely, the justifiable reliance of the promisee."[60]

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53. *A.L.I. Proceedings*, *supra* note 44, at 86 ("Now, if the law is to be simplified or clarified, one must try to reduce to broader or more general principles, so far as possible, large groups of cases where the courts reach a decision in favor of enforcing promises because of such reasons as are stated in section 88, although the courts may not formulate the reasons in just those words.").

54. *See* 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS, § 139, at 308 (1931).

55. *See id.* at 313.

56. *See id.* at 307–14. Williston entitled this section of his treatise, "Estoppel as a Substitute for Consideration." *Id.* at 307.

57. *Id.* at 313 ("A class of cases where a genuine estoppel exists must be distinguished from those discussed in this section."); *see also A.L.I. Proceedings*, *supra* note 44, at 89–90 ("I should like to confine the meaning of the word "estoppel" to a misrepresentation of some fact that was relied upon. There is no misrepresentation of fact here; there is simply a gratuitous promise which the promisor knows is gratuitous and which the promisee knows is gratuitous.").

58. *See A.L.I. Proceedings*, *supra* note 44, at 89. When asked whether the precursor to section 90 of the *First Restatement* was meant to cover "equitable estoppel," Williston said that "equitable estoppel" "was a very bad name for it." *Id.* Williston explained: "I don't know [what I would call the new doctrine]; and nearly anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel. . . ." *Id.*

59. For the controversy of whether Williston had initially decided to completely exclude unbargained-for but relied on promises from inclusion in the *First Restatement*, but acquiesced when he was confronted by Arthur Corbin with a pile of cases demonstrating the point. *See supra* footnotes 37–38 and accompanying text.

60. *A.L.I. Commentaries*, *supra* note 51, at 19–20.

While he formally avoided using the terminology "estoppel" because he perceived it to be too elastic, Williston unwittingly was founding his new doctrine firmly on the jurisprudence of estoppel by using the language of justifiable reliance. A rose by any other name, it would turn out, smells as sweet.[61]

IV. THE PROBLEM WITH THE WILLISTONIAN SOLUTION

As stated above, Williston was acutely aware of the dangers of comprehending the new doctrine under the principles of estoppel.[62] However, by finding that the golden thread that linked the disparate non-bargain cases was the justifiable reliance of the promise, Williston also, ironically, brought those cases within the jurisprudence of the dominant type of estoppel: estoppel *in pais*.[63] Bigelow, the most prominent American treatise-writer on estoppel at the time Williston was drafting the *First Restatement*, states that estoppel *in pais* "consists in holding for truth a representation acted upon when the person who made it or his privies seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained."[64]

As the above definition makes clear, the basis of estoppel *in pais* was that the person who received a representation reasonably and justifiably "acted on the representation" to her detriment.[65] Cababé identifies this essential requirement of the estoppel in the language that the person who receives the representation "must be prejudicially affected by the action he has taken."[66] He clarifies this further by stating that the party receiving the representation must have altered her position "for the worse."[67]

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61. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

62. *See supra* Part III.

63. *See infra* Part VI for a discussion of the various kinds of estoppels. Estoppel *in pais* is defined as "acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE 3 (Little, Brown & Co., 4th ed. 1886).

64. *Id.* at 543 (citation omitted). Williston cites this same edition in his treatise. *See* WILLISTON, *supra* note 54, § 139, at 308 n.24.

65. *See* BIGELOW, *supra* note 63, at 620–22; MICHAEL CABABÉ, THE PRINCIPLES OF ESTOPPEL: AN ESSAY 78–82 (London, W. Maxwell & Son 1888).

66. CABABÉ, *supra* note 65, at 78.

67. *Id.* at 79.

The point here is that Williston clearly borrowed the notion of "justifiable reliance" from the jurisprudence of estoppel *in pais*. Williston, however, had sought to cure the elasticity of the generic term "estoppel" by avoiding calling it an estoppel and instead settling on the rather inelegant, "Promise Reasonably Inducing Definite and Substantial Action."[68] It turned out, however, that not even an explicit refusal to call the new doctrine an estoppel would save it from the vagaries of the elastic and nebulous "estoppel" that Williston so resented. Two reasons accounted for Williston's inability to "save" the newly minted promissory estoppel from the nebulous fate of the generic estoppel.

First, Williston had already brought the new doctrine within the jurisprudence of the generic estoppel through the hook of "justifiable reliance."[69] Indeed, Williston himself had coined the term "promissory estoppel."[70] The consequence was that the new doctrine was treated as an estoppel *in pais*, which had been liberalized from its most restrictive element—that the misrepresentation made by the defendant had to be one of existing facts.[71] So, "promissory estoppel" was first and foremost an "estoppel"—only it was an unbound estoppel.

Second, Williston failed to note a basic tension that characterizes the jurisprudence of estoppel generally. This tension is the question of "whether estoppel is one area of law or several."[72] As I will show shortly, this question has more than pedantic significance.[73] If Williston had adverted his mind to the fact that estoppel consisted of several areas of law, he would have come upon another truism about the specific branch of estoppel from which he was borrowing: that it could not found a cause of action—it was merely a rule of evidence.[74] Had Williston taken account of this truism, he would have understood that he was not only

68. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

69. *See supra* notes 57 & 60 and accompanying text.

70. *See* Samuel Williston, *Formation of Contracts*, *in* PROBLEMS IN THE MODERN LAW OF CONTRACTS 3, 15 (1933); WILLISTON, *supra* note 54, § 139 at 253; *A.L.I. Commentaries*, *supra* note 51, at 16.

71. *See* Jorden v. Money, 5 H.L.C. 185, 214–15, 10 Eng. Rep. 868, 882 (H.L. 1854). For a discussion of the effect of *Jorden v. Money* on the law of estoppel, see *infra* pp. 188–90.

72. ELIZABETH COOKE, THE MODERN LAW OF ESTOPPEL 3 (2000).

73. *See infra* Parts VI, IX.

74. *See* Low v. Bouverie [1891] 3 Ch. 82, 101 (C.A.) (Lindley, L.J.) ("Estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself.").

bringing his new doctrine within the jurisprudence of estoppel by hooking it to the language of "justifiable detrimental reliance," but he was also enlarging the scope of that jurisprudence by not explicitly limiting its legal consequences to evidentiary issues.[75]

As noted above, in appraising the development of non-bargain-based theories of promise enforcement, Williston was quick to note that American courts had started using some form of estoppel.[76] He was also quick to notice that the form of estoppel utilized in these cases differed from the "true" estoppel—estoppel by representation.[77]

If Williston had adverted his mind to the fact that estoppel straddled more than one area of law, however, he probably would have had better luck in limiting the explosion of non-bargain-based theories of promise enforcement. He would then have noted that the American courts, which were utilizing estoppel to enforce unbargained-for promises, were not only modifying one of the essential elements of estoppel by representation, but were also enlarging its province by giving it "teeth," which "true" estoppel did not have in the traditional law of estoppel. Unlike the English courts, the American courts were permitting litigants to use estoppel as a cause of action.[78] That realization could only have come with an understanding that there is more than one form of estoppel, and that only some classes of estoppel could constitute a cause of action.[79] Under the law of estoppel, the only form of estoppel that could constitute a cause of action was proprietary estoppel.[80] As we will see shortly, the effect of the other reliance-based estoppels was only to prevent the representor from denying or going back on what she had said.[81] As such, these other reliance-based estoppels could not constitute a cause of action "although [they] may support a cause of action by blocking a defence."[82]

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75. *See infra* Parts VII.B, IX.
76. *See* WILLISTON, *supra* note 54, § 139, at 307–14.
77. *See id.* at 307, 313; *A.L.I. Proceedings*, *supra* note 44, at 89–90.
78. *See infra* Part VI.
79. *See id.*
80. *See* COOKE, *supra* note 72, at 118.
81. *See id.*; *see also infra* Parts VI, IX.
82. COOKE, *supra* note 72, at 118; *see also infra* Parts VI, IX.

This use of reliance-based estoppels would have meant, for example, that there was no need to fashion a thorough-going contractual remedy to save litigants like the plaintiff in *Greiner v. Greiner*.[83] In *Greiner*, a mother promised to convey a tract of land to her son if the son moved from one county, where he was then residing, to another, where the rest of the family lived.[84] Following the promise, the son gave up his homestead in the one county and moved to the other county, relying on his mother's promise to convey the land to him.[85] The son set up his new homestead in the eighty-acre tract of land identified by the mother, made valuable improvements thereon, and lived there for nearly one year.[86] When his mother sought to evict him from the land and recover possession of the eighty-acre tract of land, the Supreme Court of Kansas held that the son was entitled to continued possession and deed.[87] The Supreme Court of Kansas decided the case on a theory of promissory estoppel, and explicitly relied on section 90 of the draft of the *First Restatement* for support.[88] Rather than relying on this "new" doctrine of promissory estoppel, however, the court could have used the English doctrine of proprietary estoppel to reach a similar result.[89]

In the end, therefore, Williston's formulation of section 90 of the *First Restatement* ended up unwittingly contributing toward the fusing of estoppel into one area of law in the United States.[90] This fusion was brought about because under the new promissory estoppel doctrine, all representations which were justifiably relied upon could be used as the basis of a cause of action.[91] It was no longer necessary to establish whether the estoppel under which the plaintiff brought her case was a proprietary estoppel or not.[92] Since under the traditional law of estoppel only proprietary

83. 293 P. 759 (Kan. 1930).

84. *See id.* at 760, 762.

85. *Id.* at 762.

86. *Id.*

87. *See id.* at 759, 762.

88. *See id.* at 762.

89. For a description of the doctrine of proprietary estoppel, see *infra* Part IX.

90. This fusion has, in part, provided inspiration for English law to achieve the same fusion. Australia followed the U.S. lead in this regard. *See* Waltons Stores (Interstate) Ltd. v. Maher, 1988, 164 C.L.R. 387 [38].

91. *See* RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

92. *See id.* ("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

estoppel could constitute a cause of action, the Willistonian solution radically liberalized the law of estoppel and rendered the distinctions between proprietary estoppel and the other kinds of estoppel irrelevant in American law.

V. JUSTIFIABLE RELIANCE: THREE POSSIBLE ROUTES

As noted above, at the time of drafting the *First Restatement*, Williston and the other Restaters faced a major problem when outlining the basis of promissory obligations.[93] The problem was what to do with the case law that demonstrated the enforcement of unbargained-for promises if the bargain theory of consideration was maintained in the Restatement.[94] There were three possible routes the Restaters could have taken respecting the granting of relief for justifiable reliance on unbargained-for promises.

First, the Restaters could have defined consideration broadly to include acts of reliance upon promises as constituting consideration. This was Corbin's preferred definition.[95] Hence Corbin wrote:

> Indeed, there are many cases justifying the statement that consideration may consist of acts of reliance upon a promise even though they were not specified as the agreed equivalent and inducement, provided the promisor ought to have foreseen that such action would take place and the promisee reasonably believes it to be desired.[96]

Williston briefly considered this possibility as one with some "intrinsic merit" but he quickly discarded it because "it should be recognized that if [such a definition is] generally applied[,] it would much extend liability on promises, and that at present it is opposed to the great weight of authority."[97] As we have already seen, this same objection (that a definition of consideration that

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enforcement of the promise.").

93. *See supra* Part II.

94. *See id.*

95. *See* GILMORE, *supra* note 3, at 61–65; *see also,* Daniel J. Klau, Note, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, 70 B.U. L. REV. 511, 531–37 (1990).

96. WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 124 n.1 (Arthur L. Corbin ed., 3d American ed. 1919).

97. WILLISTON, *supra* note 54, § 139, at 313. Williston also stated, "[n]or has the law generally accepted the principle that reliance on a gratuitous promise makes the promise binding." *Id.* § 116, at 249.

included the reliance principle would unwarrantedly extend contractual liability) was voiced by Justice Holmes.[98] He repeated it from the bench in the case of *Commonwealth v. Scituate Savings Bank*,[99] where he said: "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."[100]

A second alternative open to the Restaters in dealing with the problem of justifiable reliance was to synthesize the various classes of cases in which courts had granted relief to justifiably relied on, but unbargained-for promises into one principle which would form a general exception to the bargain principle of promissory obligation. This, of course, was Williston's preferred method.[101] Needless to say, it was this Willistonian solution that prevailed. It was reflected in the *First Restatement* in section 90 (which was presented as a substitute to section 75 (defining consideration)).[102] This Willistonian solution is also reflected in modern American contract law.[103]

A third alternative would have been to leave the "traditional" definition of consideration intact in terms of benefit and detriment and then couple that definition with a number of enumerated exceptions. This is the position as it stands under English law today.[104] English law has stuck with the "traditional" definition of consideration.[105] English courts do not insist on the requirement that the parties must have regarded something as consideration at the time of contracting for it to be treated as such.[106] English courts "often regard an act or forbearance as the consid-

98. *See supra* notes 32–33 and accompanying text.

99. 137 Mass. 301 (1884).

100. *Id.* at 302; *see also* Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379, 386–87 (1903) (Wherein Justice Holmes again used his "reciprocal conventional inducement" test of consideration to dismiss a claim by a railway company that had begun construction of a railway in reliance on a statute giving tax relief to any person who built such a railway. When the statute was repealed and the railway company brought a suit based on the constitutional guarantee against the impairment of contractual obligation, Justice Holmes held that there was no constitutional breach because there was no contract in the first place; the railway company had given no consideration for the undertaking.).

101. *See supra* Part III.

102. *See* Eric Holmes, *Four Phases*, *supra* note 9, at 67.

103. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

104. *See* GUENTER TREITEL, THE LAW OF CONTRACT 67–161 (11th ed. 2003).

105. *Id.* at 67–69.

106. *Id.* at 71.

eration for a promise even though it may not have been the object of the promisor to secure it."[107]

Treatise-writer Guenter Treitel terms this practice "inventing consideration" where a court regards the *possibility* of some prejudice to the promisee as a detriment without regard to the question whether it has in fact been suffered.[108] The practice of "inventing consideration" is only made possible by the "traditional" definition of consideration because this definition does not require the parties to have treated the consideration as consideration at the time of their contract.[109] This practice, however, lessens or eliminates the need for a separate reliance-based contractual doctrine because a court can "invent" consideration to find a contractual relationship to alleviate the hardships suffered by a party who relied on an unbargained-for promise.[110] Indeed, subsequent justifiable reliance provides evidence that there was a *possibility* that the prejudice would be suffered at the time the unbargained-for promise was given. That *possibility* then counts as sufficient consideration. Also, under English law, "a request will be implied whenever it can be inferred that the promisor intended that his promise should induce the other to do some act or forbearance on the faith of it."[111] The bargain theory of consideration, however, made these judicial sleights of hand unavailable for American courts.

The conventional wisdom is that Williston was overly interested in unifying the law of contract so that when he was alerted to the existence of cases where promises were not supported by consideration (as he had defined "consideration" in section 75 of the *Draft First Restatement*—in bargain terms), he chose to craft a new section to deal with such cases rather than expand the definition of consideration to accommodate such cases.[112] This story suggests that Williston invented section 90 precisely because he

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107. *Id.* Treitel also cites to cases where courts treated performances or promises as consideration even though the parties themselves did not think of the performances or promises as such. *Id.* at 71 n.40.

108. *Id. But see* P.S. ATIYAH, ESSAYS IN CONTRACT 182–83 (1986) (refuting that this is the English position and accusing Guenter Treitel of "inventing" the category of "invented consideration").

109. TREITEL, *supra* note 104, at 71.

110. *Id.*

111. A.T. Denning, *Recent Developments in the Doctrine of Consideration*, 15 MOD. L. REV. 1, 1 (1952).

112. *See supra* notes 37–38 and accompanying text.

wanted to limit the spread of such cases that were decided on non-bargain basis. In other words, to the extent that most of these cases were decided on a theory that reliance on a promise could, under certain circumstances, constitute consideration, Williston wanted to retard the development of the principle of justifiable reliance. Kevin Teeven has urged:

> The generalized language in section 90 was open to the possibility of commercial promises being covered; Williston certainly knew that commercial promisees had received reliance relief because many of the unannotated cases included in his treatise's footnotes involved commercial promises. Despite the open language in section 90, however, he did not articulate its applicability to commercial promises in his commentary to the ALI nor did he encourage such use in any of his writings. He left the actual scope of section 90 up in the air for the reader of the published version in 1932 since, unlike many of the *Restatement's* sections, he provided no comments or reporter's notes. He claimed that section 90 "states a broader general rule than has often been laid down," but, if anything, he discouraged a liberal application of section 90. He dampened expectations by saying that section 90 does not assert a "sweeping rule" that reliance is sufficient support for a promise. . . . [T]he sheer fact that the *Restatement* edged justifiable reliance out of the mainstream doctrine of consideration diminished its availability and relegated it to an exceptional equitable role.[113]

If it is true that Williston was seriously interested in retarding or blunting the development of reliance relief of promissory obligations, then Williston could not have chosen a worse concept than "estoppel" to ground the new section 90 of the *First Restatement*. Rather than enumerate exceptions to the consideration principle, Williston was adamant that the *First Restatement* should "generalize" the principles illustrated in the disparate cases which enforced promises unsupported by consideration.[114] By this very insistence, he was laying the ground for the expansion of the doctrine in section 90 rather than limiting it. As widely cast as it was, section 90 could have found employment by courts inclined to do substantive justice in specific fact scenarios where the rigid application of the doctrine of consideration worked harsh results.[115]

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113. Teeven, *supra* note 4, at 532–33 (internal citations omitted).

114. *See A.L.I. Commentaries*, *supra* note 51, at 20; *A.L.I. Proceedings*, *supra* note 44, at 86.

115. Knapp, *supra* note 16, at 1197. As early as 1948, Orvill C. Snyder called section 90

As noted above, when it was suggested to Williston that the new doctrine should be called "equitable estoppel," he objected vehemently.[116] His reason for the objection was that "equitable" estoppel only applied to misrepresentation of existing facts.[117] In fact, there was another reason for such an objection: equitable estoppel does not give rise to a cause of action as the new doctrine contemplated.[118] In other words, the new doctrine was a lot more expansive than the doctrine of estoppel as it existed in Anglo-American law at the time. If Williston was in fact opposed to the new doctrine, he unwittingly fueled its growth by founding it on the jurisprudence of estoppel and calling it "promissory estoppel."[119] Williston was not merely modifying one key element of the doctrine—the requirement that the misrepresentation must be of present facts—he was transforming the whole doctrine from a "shield" to a "sword." While equitable estoppel could not under the then extant legal doctrines found a cause of action, the new Willistonian estoppel could now found a cause of action.

Thus, if Williston was interested merely in limiting the evolving doctrine, generalizing it in the language of estoppel did not help his cause at all. English contract law probably has done a better job of "containing" the explosion of reliance-based contract theories through its more diffused definition of consideration and many disparate doctrines enforcing unbargained-for promises than Williston's attempt at generalizing.[120]

If we accept the objectives of CLT in contract law as being aimed at "narrowing the range of contractual liability,"[121] Williston would have served the ends of CLT better if he had agreed to contain the emerging reliance-based doctrine as an exception within the consideration doctrine. This way, the exceptions would truly have served the purpose of being the "safety valves" that Williston intended section 90 to serve.[122] Instead, by generalizing

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the "most promiscuous statement of promissory estoppel." Synder, *supra* note 17, at 27.

116. *A.L.I. Proceedings*, *supra* note 44, at 89–90.

117. *Id.*

118. *See* COOKE, *supra* note 72, at 118; *see also infra* Parts VI–VII.

119. *A.L.I. Proceedings*, *supra* note 44, at 90.

120. *See* TREITEL, *supra* note 104, at 67–161.

121. GILMORE, *supra* note 3, at 21.

122. *See A.L.I. Proceedings*, *supra* note 44, at 86 ("As someone expressed it, in regard to this section, if you bind up too closely, with definite mathematical rules the law of consideration, the boiler will burst. You have got to leave the court a certain leeway outside of those mathematical and exact rules. This section is, so to speak, the safety valve for the

the emerging principle in section 90, Williston helped transform estoppel from a rather innocuous evidentiary rule to a potentially significant rule of substantive law and thereby unwittingly enlarged the very concept he had hoped to limit. He, therefore, ended up subverting his beloved definition of consideration.[123] To understand how the Willistonian formula transformed the law of estoppel, it is imperative that we briefly recap the classification and historical development of estoppel in Anglo-American law. Armed with this information, we will then identify the two main reasons why the Willistonian formula was a miscalculation.

VI. CLASSIFICATION AND THE HISTORICAL DEVELOPMENT OF ESTOPPEL

American contracts scholars understood the newly minted doctrine of promissory estoppel in contradistinction to what was termed "equitable" estoppel.[124] In fact, what was meant by "equitable estoppel" was "estoppel *in pais*," and the two terms were used interchangeably.[125] It was also known as "estoppel by conduct" or, at times, as "estoppel by representation."[126] All these terms bear some truth about the nature of the estoppel, but the term "equitable estoppel" gave the wrong impression—that this estoppel was founded on equity. In fact, in English law, by the late nineteenth century, this estoppel had come to be known as "common law estoppel" rather than "equitable estoppel."[127] Indeed, in English law today, a milder version of the estoppel known today as "promissory estoppel" in United States jurisdic-

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subject of consideration.").

123. *See, e.g.*, Charles L. Knapp, *Reliance in the Revised* Restatement: *The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981) ("[Promissory estoppel] has become perhaps the most radical and expansive development of this century in the law of promissory liability."); Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 474 (1983) (arguing that promissory estoppel has emerged as an independent cause of action separate from contract).

124. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 CMT. A (1981) ("Obligations and remedies based on reliance are not peculiar to the law of contracts. This section is often referred to in terms of 'promissory estoppel,' a phrase suggesting an extension of the doctrine of estoppel").

125. *See, e.g.*, Lloyd Pospishil, *Equitable Estoppel*, 19 NEB. L. BULL. 222, 227–28 (1940); Teeven, *supra* note 3, at 22.

126. *See, e.g.*, COOKE, *supra* note 72, at 18; Charles L.O. Edwards, Note, *Equitable Estoppel—Estoppel by Representation*, 12 OR. L. REV. 316, 317 (1933).

127. *See* COOKE, *supra* note 72, at 18–19.

tions is typically referred to as "equitable estoppel," "equitable forbearance," or "quasi-estoppel."[128]

In order to understand the changes Williston wrought on the law of estoppel, it is important to understand the historical development of estoppel. This undertaking is important because it will help us understand the doctrinal environment in which the drafters of the *First Restatement* were working. This background will also enable us to understand both the shift Williston heralded in the law of estoppel, and how the Willistonian solution facilitated the evolution of law in this area.

A convenient, but grossly simplified, way to understand the historical development of estoppel is to begin where Sir Edward Coke began more than five centuries ago—by subdividing estoppel into three main categories.[129] The virtue of beginning here is that such a classification will help us understand exactly where the modern American contractual doctrine of promissory estoppel fits today in the taxonomical development of estoppel. This will, in turn, assist in making sense of the modern-day arguments we hear from English jurists and judges about the need to "unify" the law of estoppel—a proposal which, I argue, has been fueled by the developments of promissory estoppel in the United States.[130]

Of the classes of estoppel, Sir Edward Coke said:

> Estoppeth cometh of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth . . . [T]here be three kinds of estoppels, viz. by matter of record, by matter in writing, and by matter *in pais*.[131]

Let us look at these three types of estoppel *in seriatim*:

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128. The doctrine is "milder" because, unlike the American doctrine of promissory estoppel, the English version "does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to enforce them." Combe v. Combe [1951] 2 K.B. 215, 219 (Denning, L.J.).

129. *See* EDWARD COKE, A COMMENTARY ON LITTLETON § 352a (photo. reprint 1979) (19th ed. 1832); 15 EARL OF HALSBURY, THE LAWS OF ENGLAND 168 (Viscount Simonds, ed., 3d ed. 1956).

130. *See infra* Part X.

131. COKE, *supra* note 129, at § 352a.

A. *"Estoppel by Matter of Record"*[132]

This refers to what is known today as estoppel *per rem judicatam*.[133] The doctrine of *res judicata* has roots in the Latin phrase *"res judicata pro veritate accipitur"* which literally means that "a matter adjudged is taken for truth."[134] The doctrine signifies a matter in dispute has been considered and settled by a competent court of justice.[135] This is an estoppel only in the sense that for the two parties who have litigated an issue, "neither the parties to that proceeding nor those claiming under them, will be allowed subsequently to controvert the truth of the facts so found."[136] In other words, the finding of the court on that matter in question is the truth—because the matter adjudged is taken as truth.

While this type of estoppel was important at the time of drafting the *First Restatement* (as it remains important today), both its policy rationale and the nature of the estoppel make it significantly different than the other estoppels. The policy rationale for this estoppel is the necessity of bringing an end to disputes.[137] It also is triggered by a judicial action, and not—as is true for all the other estoppels—by the action of one of the parties. It is safe to conclude that this class of estoppel had little to do with the development of promissory estoppel.

B. *"Estoppel by Matter in Writing"*[138]

Commentators agree that what Coke meant by "writing," in the context of estoppel, was "deed."[139] Hence, this type of estoppel is

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132. *Id.*

133. COOKE, *supra* note 72, at 6.

134. BLACK'S LAW DICTIONARY 1310 (6th ed. 1990).

135. *See* BIGELOW, *supra* note 63, at 88 n.2.

136. CABABÉ, *supra* note 65, at 2.

137. The Latin maxim frequently used by courts is: *Interest reipublicæ ut sit finis litium,* literally, "[i]t concerns the state that there be an end of lawsuits." BLACK'S LAW DICTIONARY, *supra* note 132, at 814; *see also* BIGELOW, *supra* note 63, at 88 n.2.

138. COKE, *supra* note 129, at § 352a.

139. *See, e.g.*, GEORGE SPENCER BOWER & ALEXANDER KINGCOME TURNER, THE LAW RELATING TO ESTOPPEL BY REPRESENTATION 4 (Alexander Kingcome Turner ed., 2d ed. 1966) ("Coke's second class of estoppel is 'estoppel by matter in writing,' that is, estoppel by deed, the word 'writing' in the passage cited being undoubtedly intended to indicate a 'writing obligatory' or a document under seal, as appears from the illustrations which he gives of 'matter in writing.'"); BIGELOW *supra* note 63, at 320; COOKE, *supra* note 72, at 6;

commonly called "estoppel by deed."[140] Originally, a writing under a deed was simply a writing under seal.[141] Today, an instrument does not need to be under a seal to be a deed as long as the instrument is signed by a grantor and clearly expresses the intent to convey realty.[142] Estoppel by deed did not allow a party to a sealed instrument to controvert or contradict the deed by any evidence in any proceedings based on the deed.[143] This estoppel supplemented the parole evidence rule but operated more rigidly:

> So far as a deed is intended to pass, or extinguish a right, it is concluded by its terms. . . . There are few rules of law that are better established or of greater antiquity than the one which has firmly settled the question, that a man may irrevocably bind himself by putting his seal to a grant or covenant, and that he will not be allowed to disprove or contradict any declaration or averment contained in the instrument and essential to its purpose. A recital or allegation in a deed . . . is conclusive between the parties to the controversy growing out of the instrument itself or the transaction in which it was executed.[144]

The rationale for estoppel by deed was that a litigant would not be permitted to deny the validity of her own "solemn" acts to the detriment of another.[145] Another justification was that the court would presume that a person who took the "solemn" act of executing a deed had satisfied herself as to the truth of the statements contained in the deed.[146]

Estoppel by deed was mainly applied to deeds conveying real estate and to estoppel as to title.[147] The latter arises from "the creation of a relationship which involves the grant of a legal right over property," whereby the grantor is "'preclude[d] from disputing the validity or effect of [her] own grant.'"[148] However, the es-

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JOHN S. EWART, AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION, 1 (1900).

140. *See, e.g.*, BIGELOW, *supra* note 63, at 320; CABABÉ, *supra* note 65, at 2.

141. BIGELOW, *supra* note 63, at 320.

142. *See, e.g.*, Taylor v. Burns, 203 U.S. 120, 125 (1906); Riggs v. City of New Castle, 78 A. 1037, 1037–38 (Pa. 1911).

143. HENRY M. HERMAN, THE LAW OF ESTOPPEL 231 (Albany, W.C. Little & Co. 1871).

144. *Id.* at 231–32.

145. *Id.*

146. CABABÉ, *supra* note 65, at 2–3.

147. HERMAN, *supra* note 143, at 232.

148. COOKE, *supra* note 72, at 8 (quoting First Nat'l Bank PLC v. Thompson, [1996] Ch. 231, 237).

toppel arises in modern cases mainly as an estoppel by the convention of the parties.[149] This arises where parties agree, in a formal writing, to admit as true, or to assume the truth of, certain facts as the conventional basis upon which they have entered into contractual or other mutual relations.[150]

An example of estoppel by the convention of the parties is provided by the English case of *Burroughs Adding Machine, Ltd. v. Aspinall*.[151] In this case, the parties, in an express term in their written contract, provided that "[a]ll statements of account sent by the company to the salesman shall be deemed to be accepted by the salesman as correct unless within 30 days" he shall notify the company of the non-acceptance of them.[152] The salesman routinely received statements of accounts and never objected to any.[153] When he later attempted to dispute some of the statements, he was held disentitled from doing so by virtue of this estoppel.[154]

Estoppel by deed may properly be termed a "formal" estoppel because it does not require the belief of the person receiving the representation in the assumed state of facts.[155] It is immaterial whether the person receiving the representation believes it to be true or not—such person need only believe that the representation will be treated as true.[156] It has been said, therefore, that this estoppel operates as a rule of law as opposed to a principle of equity.[157] This is because this estoppel does not implicate the discretionary power of judges to do equity.[158] Neither is reliance on the truth of the representation a necessary element in establishing its applicability.[159] Lastly, the parties' state of mind is irrelevant in establishing whether the estoppel applies or not.[160] As we will see shortly, all three of these factors are crucial to establishing a right to relief by estoppel *in pais*. In turn, it is these three

149. BOWER & TURNER, *supra* note 139, at 146.
150. *Id.*
151. 41 T.L.R. 276 (C.A. 1925).
152. *Id.* at 276.
153. *Id.*
154. *See id.*
155. *See* BOWER & TURNER, *supra* note 139, at 147; COOKE, *supra* note 72, at 8.
156. *See* BOWER & TURNER, *supra* note 139, at 147.
157. *See* COOKE, *supra* note 72, at 13.
158. *See id.*
159. *See id.*
160. *Id.*

factors that endeared estoppel *in pais* to Williston and other American courts seeking to enforce unbargained-for promises.

C. *"Estoppel by Matter* in Pais"[161]

At the time of Coke, estoppel *in pais* consisted of acts that were by "liverie, by entry . . . by acceptance of an estate."[162] Cababé long ago claimed that by dint of these old acts estoppel *in pais* is obsolete.[163] Bigelow and Ewart, however, both argue that estoppel by acceptance of rent still prevails, though it has changed character.[164] Suffice it to say, the most important development in the law of estoppel occurred through the extension of this class of estoppel. While at the time of Coke, estoppel *in pais* was only a consequence of the three narrow formal actions (livery, entry and partition—and later, acceptance of estate), courts of equity soon started using the logic of this class of estoppel to extend the doctrine.[165] The logic was that a party was estopped from denying that which the party had indicated to another, through conduct or words, to be true if the other party had suffered detriment following such representation.[166] When thus extended by the courts of equity, this estoppel came to be known as "common law estoppel."[167] This explains the nomenclature "equitable" that still attaches to this class of estoppel.[168]

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161. COKE, *supra* note 129, at § 352a.

162. *Id.*

163. CABABÉ, *supra* note 65, at 3–4.

164. BIGELOW, *supra* note 63, at 446; EWART, *supra* note 139, at 1.

165. *See* BIGELOW, *supra* note 63, at 445–47.

166. *See, e.g.,* Evans v. Bicknell, 6 Ves. 174, 174, 31 Eng. Rep. 998, 998 (Ch. 1801).

167. COOKE, *supra* note 72, at 18–19.

168. Pospishil, *supra* note 123, at 228 n.30 ("In a note to Duchess of Kingston's Case, 2 Smith Leading Cas. [711], it is said that the doctrine of estoppel in pais originated in chancery but is now adopted in courts of law. This is contrary to what seems to be historically true. Estoppel in pais during the time of Coke embraced estoppels by livery, by entry, by acceptance of rent, by partitions, and by acceptance of an estate. These, as it has been seen, were recognized and acted upon at common law. It would seem therefore, that estoppel in pais originated in the common law courts to do justice, but that it was later taken over by the equity tribunals to develop what is now known as 'equitable estoppel,' this has displaced the estoppel in pais of Lord Coke's time."). Vice Chancellor Bacon also explained the origins of the doctrine as:

> The common law doctrine of estoppel was, as I have said, a device which the Common Law Courts resorted to at a very early period to strengthen and lengthen their arm, and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into instruments by which they could obtain an end which the Court of

In this expanded version, estoppel was re-introduced in the common-law courts of England.[169] The case that clearly and unmistakably enunciated the principle in common law was *Pickard v. Sears* decided in 1837.[170] This was an action of trover for machinery.[171] The plaintiff was the mortgagee to the machinery and did not disclose the fact of the mortgage to the defendant, who purchased the machinery for value and in good faith without notice of the mortgage.[172] As a defense to the action, the defendant asserted that the plaintiff had, by his conduct, induced the defendant to believe that he had acquired clear title to the machinery and should therefore not be permitted to dispute the same.[173] The King's Bench gave a decision in favor of the defendant.[174] Lord Chief Justice Denman stated the rule thus:

> [W]here one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.[175]

Not unlike Samuel Williston almost a century later, Lord Denman did not give a name to the "rule" he originated in *Pickard*. Indeed, he does not use the word "estoppel" anywhere in the decision. However, in the broad statement he made, he laid the foun-

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> Chancery, without any foreign assistance, did at all times, and I hope will at all times, put into force in order to do justice. But the doctrine of estoppel is purely legal.

Keate v. Phillips, 18 Ch. D. 561, 577 (1881). However, Bigelow seems to believe that the origins of the doctrine were in equity, not common law. *See* BIGELOW, *supra* note 63, at 445–47.

169. *See* BIGELOW, *supra* note 62, at 446.

170. 6 Ad. & El. 469; Eng. Rep. 179 (K.B. 1837). However, an argument has been made that the concept of "equitable estoppel" as "estoppel by representation" was first introduced in the common law courts almost a century earlier by Lord Mansfield in *Montefiori v. Montefiori*, 1 Black W. 363, 96 Eng. Rep. 203 (K.B. 1762). *See* COOKE, *supra* note 72, at 20. Bigelow says that although the principle of "equitable estoppel" had been foreshadowed and applied in earlier cases at common law, *Pickard v. Sears* "was the case in which, after the way had been pointed out, fire of the English Chancery was stolen, carried away, and permanently appropriated." BIGELOW, *supra* note 63, at 544.

171. In common law practice, an action for trover was an action on the case for the recovery of damages for wrongful conversion of goods belonging to the plaintiff. *See* BLACK'S LAW DICTIONARY, *supra* note 132, at 1545.

172. *See Pickard*, 6 Ad. & El. at 470–71, 112 Eng. Rep. at 180.

173. *Id.* at 473–74, 112 Eng. Rep. at 181.

174. *Id.* at 474, 112 Eng. Rep. at 181.

175. *Id.*

dation of the extension of equitable estoppel. In *Pickard*, the rule stated by Lord Denman was a *defensive* rule: it precluded the plaintiff from disputing a fact.[176] The consequence of such preclusion was to deny the plaintiff's cause of action any efficacy: if the plaintiff was not permitted to prove that he was the mortgagee, then his action in trover had to fail. Soon afterwards, courts in equity would use the same principle *offensively* to make good representations generally.

This trend is exemplified by the case of *Hammersley v. De Biel*.[177] This was a case involving a marriage settlement.[178] A father had, through marriage proposals, induced a suitor to marry his daughter on the representation that a sum of £10,000 would be settled upon her and her future children by his last testament.[179] The plaintiff sought to enforce the settlement against the father-in-law's estate and was allowed.[180] In his judgment, Lord Campbell cited Lord Cottenham with approval and stated that: "A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation."[181]

The hope that equitable representation, however, would eventually be used to make good *all* representations (subject to the limitation already imposed by *Jorden v. Money*—that to be actionable the representations must respect existing facts, not future intention), was soon dashed. It was the case of *Low v. Bouverie*[182] which in 1891 brought this onward expansion of estoppel to a screeching halt. The plaintiff, in this case, wanted to loan money to a beneficiary of a trust on the security of the beneficiary's life interest in the trust fund.[183] Before loaning the money, the plaintiff inquired from the trustee about any encumbrances on the trust fund.[184] The trustee reported some encumbrances but

176. 12 Cl. & Fin. 45; 8 Eng. Rep. 1312 (H.L. 1845).
177. 12 Cl. & Fin. 45; 8 E.R. 1312 (H.L. 1845).
178. *Id.* at 46–47, 8 Eng. Rep. at 1313.
179. *Id.* at 45, 8 Eng. Rep. at 1312.
180. *Id.* at 55, 8 Eng. Rep. at 1317.
181. *Id.* at 88, 8 Eng. Rep. at 1331.
182. [1891] 3 Ch. 82 (C.A.).
183. *Id.* at 83.
184. *Id.* at 107 (Kay, L.J., concurring).

forgot to report others.[185] The plaintiff proceeded to loan money on the faith that the only existing encumbrances were those that had been reported.[186] It emerged later, but only after the beneficiary failed to repay the money and the plaintiff sought to realize the security, that there were other unreported encumbrances.[187] The additional encumbrances made the security inadequate for the debt the plaintiff had extended to the beneficiary.[188] The plaintiff brought an action against the trustee seeking to make the trustee liable for the total amount due because he had relied on the trustee's statement of facts, which turned out to be incorrect.[189] For his claim to succeed, the plaintiff would have to rely on the trustee's misstatement of facts as the basis of his claim for damages.[190] Since the misstatement was not fraudulent, and the trustee had no duty to take care in responding to inquiries such as the plaintiff's, the Court of Appeal refused to let the plaintiff use the misstatement as the basis of his cause of action.[191] All the assistance the plaintiff could get from estoppel would be to estop the trustee "from denying the truth of something which he has said"—but that in itself was not a legal basis for a claim for damages.[192] As Lord Justice Bowen famously explained:

> But we must be guarded in the way in which we understand the remedy where there is an estoppel. Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.[193]

While, as we will see shortly, *Jorden v. Money*[194] and its progeny restricted the enforcement of equitable estoppel to misrepresentations of existing facts (as opposed to representations of fu-

185. *See id.* at 84–85.
186. *See id.*
187. *See id.* at 85.
188. *Id.*
189. *Id.* at 85–86.
190. *See id.* at 87.
191. *See id.* at 105 ("[T]here is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist (sic) a duty to be careful—not to give information except after careful inquiry.") (Bowen, L.J.).
192. *See id.*
193. *Id.*
194. 5 H.L.C. 185, 10 Eng. Rep. 868 (H.L. 1854).

ture intentions), *Low* restricted the estoppel's role to a *defensive* one. Equitable estoppel could no longer be used as a cause of action. The most the remedy could do would be to "preclude[] [the defendant] from denying the truth of the fact which he is supposed to have asserted."[195]

VII. WILLISTON'S MISCALCULATIONS: WHY WILLISTON FAILED TO CONTAIN PROMISSORY ESTOPPEL

There are at least three reasons why Williston's attempts to limit the expansion of section 90 of the *First Restatement* were doomed to fail. First, by tightening section 75 of the *First Restatement*, he only made it more likely that courts would latch onto section 90 as the "safety valve," thereby enlarging promissory estoppel rather than attempting to "fit" the cases within section 75.[196] Second, his assertion that reliance-based theories were only used in enforcing gratuitous promises was historically inaccurate.[197] Third, by freeing his newly minted estoppel from the constraints of evidentiary law and placing it alongside proprietary estoppel as a rule of substantive law, he laid the ground for a more ubiquitous use of the doctrine.[198] In this part, I discuss in detail the last two reasons.

To be fair, Williston seemed aware of the dangers of hoisting the new section 90 onto the estoppel doctrine. He objected to the use of "equitable estoppel" but allowed it to be called "promissory estoppel."[199] He also complained that judges had the habit of calling anything and everything "estoppel."[200] He thus fastidiously avoided calling the new section estoppel, but the language he used too closely paralleled the language used in estoppel cases, but without the leash that *Low v. Bouverie* had placed on the use of the doctrine—that it could not be used as a cause of action.[201]

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195. *Low*, [1891] 3 Ch. at 106.

196. *See A.L.I. Proceedings*, *supra* note 44, at 86.

197. *See generally* Teeven, *supra* note 4 (describing the development of promissory estoppel).

198. *Infra* Part V.

199. *A.L.I. Proceedings*, *supra* note 44, at 89–90.

200. *See id.*

201. *See infra* Part VII.

By the time Williston and the other Restaters were writing the *First Restatement*, American contract law closely paralleled and followed English contract law. This meant that the cases which were used to persuade Williston that unbargained-for promises were occasionally enforced by some American courts would also have been enforced under English law (except charitable subscription cases—which were often enforced on restitution grounds).[202] After the writing of the *First Restatement*, American law diverged substantially from English law by enlarging the scope of enforceable unbargained-for promises. In this regard, despite the charge of the Restaters "to state clearly and precisely in the light of the decisions the principles and rules of the common law,"[203] section 90 of the *First Restatement* ended up doing more than mirroring the law as it existed. It transformed the law.

Without section 90, for example, it is unlikely that unbargained-for promises à la *Hoffman v. Red Owl Stores, Inc.*[204] would have been enforceable under a contractual theory. The newly minted principle of promissory estoppel combined with the peculiarly American duty to negotiate in good faith to produce results such as *Hoffman*.[205] What this means is that Williston's concep-

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202. English courts never enforced charitable subscriptions, even as exceptions to the consideration doctrine. *See, e.g.*, *In re* Hudson, 54 L.J. Ch. 811, 811 (1885); *In re* Cory 29 T.L.R. 18, 18 (Ch. 1912). However, many American jurisdictions had, even before the emergence of the doctrine of promissory estoppel, enforced charitable subscriptions on a variety of theories. *See, e.g.*, Cottage St. Methodist Episcopal Church v. Kendall, 121 Mass. 528, 530 (1877) (holding there is consideration in the subsequent acts of the promisee); Keuka College v. Ray, 60 N.E. 325, 326–27 (N.Y. 1901) (holding where money has been spent or liabilities incurred, the court will import an implied promise to meet the obligation).

203. RESTATEMENT (FIRST) OF CONTRACTS, at xi (1932).

204. 133 N.W.2d 267, 272–73 (Wis. 1965). The court frames one of the issues on appeal as "[w]hether this court should recognize causes of action grounded on promissory estoppel as exemplified by sec. 90 of Restatement, 1 Contracts." *Id. See generally* Metzger & Phillips, *supra* note 123, at 474–75 (discussing the development of promissory estoppel as a cause of action).

205. English law does not recognize an implied duty to negotiate in good faith. *See* TREITEL, *supra* note 104, at 60. Treitel cites the English case of *Walford v. Miles* [1992] 2 A.C. 128, 138 (H.L.), as authority for this position. *Id.* In *Walford*, Lord Ackner, in a speech in which the rest of the House of Lords concurred, stated:

> However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adverserial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. . . . duty to negotiate in good faith is as unworkable in practice

tualization of section 90 of the *First Restatement* ultimately proved not to be a constraint on the full "equitable" promise of its underlying principle—but to unshackle it from potential restrictions.

So, how could Williston have managed to do what, if we are to believe Gilmore and Teeven, he was so avowedly against? Here, we discuss in detail two possible explanations.

A. *Williston Believed Section 90 Would Be Restricted to Gratuitous Promises*

When he drafted section 90 of the *First Restatement*, Williston believed that it would be restricted to gratuitous promises only—and not to promises given in a commercial setting.[206] This is because he believed that courts had granted relief for unbargained-for promises only in cases where such promises were gratuitous. Professor Kevin M. Teeven has persuasively shown, through meticulous historical analysis, that Williston was, in fact, inaccurate in his claim that courts had primarily only granted justifiable reliance relief on gratuitous promises.[207]

Even though Williston was mistaken that justifiable reliance had been used as a basis for contractual relief, he was not entirely mistaken. He derived this belief from the then existing conceptualization of estoppel by misrepresentation. Since most of the courts that granted relief for justifiable reliance had used language analogous to the estoppel doctrine, it was only logical that Williston would use the estoppel lens to analyze these cases.[208] By dint of the existing jurisprudence of reliance-based estoppel, Williston was right in concluding that the doctrine could not be used to protect a party which could otherwise have protected itself by contract.[209] Estoppel by misrepresentation was used to protect an

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as it is inherently inconsistent with the position of a negotiating party. *Walford*, [1992] 2 A.C. at 138.

On the other hand, American law has been more willing to accept that such a duty to negotiate in good faith exists. *See, e.g.*, *Channel Home Centers v. Grossman*, 795 F. 2d 291, 292 (3d Cir. 1986) (holding that an agreement to negotiate in good faith is enforceable in Pennsylvania); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

206. *See* WILLISTON, *supra* note 54, § 96, at 307–13.

207. *See* Teeven, *supra* note 4, at 528–31.

208. WILLISTON, *supra* note 54, § 96, at 307–13.

209. BIGELOW, *supra* note 63, at 555; CABABÉ, *supra* note 65, at 59; LANCELOT

innocent party who relied, to her detriment, on a representation made to her when the "person who made it or his privies seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained."[210] Estoppel by misrepresentation was not intended to protect a party who could otherwise protect itself by contract.[211] This was the explanation for the rigid requirement that an estoppel by representation only arose where the misrepresentation was one of facts, not of future intention or promise.[212] The leading treatise on estoppel at the time Williston was drafting the *First Restatement* says of this rigid requirement:

> The representation or concealment must, in the second place, like a recital, in all ordinary cases have reference to a present or past state of things; for if a party make a representation concerning something in the future it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract with the peculiar consequences of a contract.[213]

Speaking specifically about unbargained-for promises, Cababé, writing in 1888, similarly wrote:

> Even if a party has gone so far as to promise to do something, he is not bound to fulfill such promise, however much other parties may have acted on the faith thereof, unless there be a consideration for his promise; and to invoke the doctrine of estoppel for the purpose of compelling a party to do that which he has expressed an intention of doing, or made a naked promise to do, is to use it for the purpose of enlarging by a side wind the boundaries of contractual obligation; when the elements necessary for the formation of a contract are wanting, but could (if the parties had so wished) have been supplied.[214]

Estoppel was never meant to protect the indolent or the incompetent. Thus, if a party could have protected itself with a contract, estoppel would not be used to protect her. This was be-

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FEILDING EVEREST, THE LAW OF ESTOPPEL 279 (3d ed. 1923).

210. BIGELOW, *supra* note 63, at 543.

211. EVEREST, *supra* note 209, at 279 ("A party cannot turn what is in its nature a mere promise into a contract, by simply asserting that on the faith of the promise certain things were done by him; that is to say, he cannot turn a promise into a contract by *rei interventus*, so to speak.").

212. *See, e.g.*, Jorden v. Money, 5 H.L.C. 185, 223–24, 10 Eng. Rep. 868, 885 (H.L. 1854); BIGELOW, *supra* note 63, at 555–59; CABABÉ, *supra* note 65, at 58–60; EVEREST, *supra* note 209, at 279–81.

213. BIGELOW, *supra* note 63, at 555 (citations omitted).

214. CABABÉ, *supra* note 65, at 59.

cause, under CLT's ethos of individualistic self-reliance, reliance could never be reasonable unless a party had concluded a bargain in which the party exchanged something for the promise.[215] The only aspect of the estoppel doctrine Williston consciously thought he was tinkering with was acknowledging that at times a party might not have had an opportunity or means to protect itself from a representation. It follows that a party would only be in such a situation (i.e., not able to protect itself from a representation) where the promise given by the other party was gratuitous rather than one entered into in the commercial or exchange context. This explains why Williston was at pains to explain that section 90 of the *First Restatement* reflected decisions in cases that had been decided in the areas of intra-family promissory gifts, marriage settlement, charitable subscriptions, and gratuitous agencies—all areas characterized by gratuitous promises in situations where a bargain was not contemplated.[216] Since the promisees in these instances could not protect themselves by bargaining, it was right for the law to come in to aid them if they suffered detriment in reliance on the promises.

The only way, however, Williston could permit the doctrine of estoppel to aid such promisees was by relaxing the rigid requirement that, for an estoppel to arise, the representation relied on must have been one of an existing or a past state of facts.[217] By relaxing that rule, all reasonably relied-on representations—be they of existing facts or future intentions—could give rise to an estoppel.[218] It is important to understand that what Williston and the Restaters were proposing here was in fact a significant change in the law of estoppel.

Since the mid-nineteenth century, English law had been categorical that the "doctrine [of estoppel] does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do."[219] This was emphatically stated by the House of

215. *See* Metzger & Phillips, *supra* note 123, at 502 ("[P]romisees who relied without the protection of an enforceable bargain might have been deemed morally unworthy of recompense due to their foolishness.").

216. *See* WILLISTON, *supra* note 54, § 139, at 494–502.

217. *See Jorden*, 5 H.L.C. at 215–16, 10 Eng. Rep. at 882; BIGELOW, *supra* note 63, at 555–59; CABABÉ, *supra* note 65, at 58–60; EVEREST, *supra* note 209, at 279–81.

218. *See* RESTATEMENT (FIRST) OF CONTRACTS § 90.

219. *Jorden*, 5 H.L.C. at 214–15, 10 Eng. Rep. at 882.

Lords in *Jorden v. Money*.[220] As Elizabeth Cooke noted, the effect of the decision in *Jorden* ensured that the doctrine of estoppel could not form a general principle of reliance-based promise enforcement.[221] The House of Lords subsequently made this clear in *Maddison v. Alderson*[222] where Lord Chancellor Earl of Selborne stated:

> I have always understood it to have been decided in *Jorden v. Money* that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts . . . .[223]

Williston's section 90, however, explicitly sought to change this long-standing principle. Yet, in accord with the existing estoppel jurisprudence, Williston hoped that this expansion of the doctrine would only apply to gratuitous promises. If Williston was secretly hoping, however, that the doctrinal history of the doctrine of estoppel would limit its application to gratuitous and gift contexts, he was sorely mistaken. Once he had returned the stream of estoppel to its pre-*Jorden* course, there was simply no means of redirecting some of its waters to the post-*Jorden* course by distinguishing promises made in the commercial setting from those made in a non-commercial setting. Attempts by some classically-minded judges to limit the application of section 90 of the *First Restatement* to gratuitous promises were soon overrun by the great weight of realist judges who saw no utility in such formal, conceptual distinctions.[224]

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220. *Id.*

221. COOKE, *supra* note 72, at 23.

222. 8 App. Cas. 467 (H.L. 1883).

223. *Id.* at 473. The requirement that an estoppel can only rest on representations of existing facts was consistently approved by various English courts, including *Chadwick v. Manning*, [1896] A.C. 231, 232, 238–39 (P.C.) (appeal taken from N.S.W.) (Macnaghten, L.J.), and *In re Fickus*, [1900] 1 Ch. 331, 334 (Ch.) (Cozens-Hardy, J.).

224. *See* Steve Allen Ungerman, Note, *Extension of the Doctrine of Promissory Estoppel into Bargained-for Transactions*, 20 SW. L.J. 656, 656, 661 (1966). *Compare* Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (holding that when a general contractor had relied on a subcontractor's bid in computing her own bid, the subcontractor would not be permitted to revoke her bid, even though the general contractor had not yet accepted the subcontractor's bid), *with* James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933) (holding, on a remarkably similar set of facts, that the general contractor could not succeed on a theory of promissory estoppel because there was no "promise" in an offer; the court noted that the doctrine of promissory estoppel had been used "chiefly" in cases in-

B. *Williston Unwittingly Liberalized the Doctrine of Estoppel*

Second, in his conceptualization of section 90, Williston did not take into account that estoppel had hitherto been held only to be a rule of evidence and not a rule of substantive law.[225]

Despite the trend towards liberalization of the requirements for an estoppel action in American courts in the late nineteenth to early twentieth century—a trend which led Williston to focus on only one of the two key limitations of the doctrine of estoppel as it existed in common law—several courts in American jurisdictions had clearly held that an estoppel could not give rise to a cause of action.

A clear example is the case of *Berry v. Massachusetts Bonding & Insurance Co.*[226] decided in 1920. In this case, an employer's liability insurance was issued to "Thomas J. Berry, doing business as Berry Iron & Steel Company."[227] In the policy, the assured was described as an "individual."[228] During the coverage period, T.J. Berry died but not before he conveyed his business, a foundry, to C.R. Berry.[229] Neither the insurance company nor its branch office was officially informed of the death and conveyance, although the local insurance broker who originally sold the policy to T.J. Berry and a local attorney who handled insurance claims on behalf of the insurance company knew of the death by virtue of living in the same locale as T.J. Berry.[230] From the time of the issuance of the policy, including the time after the death of T.J. Berry and conveyance of the business to C.R. Berry, reports of accidents were sent to the insurance company on blank paper supplied by the insurance company.[231] These reports were usually transmitted to the insurance broker, who, in turn, conveyed them to the insurance company.[232] The insurance company received these reports and, in the three occasions where suits were filed, assumed

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volving charitable subscriptions).

225. *Low v. Bouverie*, [1891] 3 Ch. 2 82, 105 (C.A.).

226. 221 S.W. 748 (Mo. Ct. App. 1920).

227. *Id.* at 748 (quoting the insurance policy).

228. *Id.*

229. *Id.* at 749.

230. *Id.*

231. *Id.*

232. *Id.*

the defense of the suits.[233] The insurance company later withdrew from defense of the suits, however, and informed the new owners of the foundry business that it would not honor the policy because the policy had been issued to an individual, T.J. Berry, who was deceased.[234] It was clear that there was no contract between the insurance company and C.R. Berry and his assigns in the foundry business, the new owners, since the policy had been issued to T.J. Berry as an "individual," "'doing business as Berry Iron & Steel Company.'"[235] The new owners therefore argued that the insurance company was "'estopped to deny that there was any contractual relation existing between them" because the insurance company had led the plaintiffs to believe that such an insurance contract existed between them and the company by receiving reports of the accidents after T.J. Berry's death and in assuming the defense of the suits based on accidents which had occurred after T.J. Berry's death.[236]

The court held for the defendants, not on the ground that there was no "promise" in the conduct of the defendants in receiving the accident reports and assuming defense of the suits, but on the legal ground that even if the plaintiffs had established an estoppel, such an estoppel could not found a cause of action:

> [W]e know of no case wherein estoppel "alone" has been permitted to "create" a cause of action. A cause of action must have its foundation either in a contract or in an actionable wrong done. There is nothing in the petition or in the evidence tending to show a wrong done, or a cause of action arising ex delicto. In the case at bar the right asserted is something having no relation to a wrong and, in the very nature of things, is one that can hardly arise except through a contractual relationship. . . . "An estoppel does not in itself give a cause of action."[237]

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233. *Id.* at 749–50.

234. *Id.* at 750.

235. *See id.*

236. *Id.* The plaintiffs argued that:

> We are not limiting ourselves to the terms of that policy; if we did, we couldn't recover; we are not attempting to recover by contract; it is by estoppel. . . . The insurance company should be held liable . . . not on the ground that it was bound by contract to do so, but by reason of its conduct and by reason of its having assumed that responsibility.

Id. at 751.

237. *Id.* at 751 (quoting Seton v. Lafone, 19 Q.B.D. 68, 70 (1887)).

It is noteworthy that in reaching this conclusion, the court relies heavily on English decisions.[238]

American commentators during the period when the *First Restatement* was being drafted also seemed equally aware of the fact that equitable estoppel could not found a cause of action. For example, Silas Alward wrote in the pages of *Harvard Law Review* in 1905 that: "Not being a cause of action, the measure of damage in the application of this doctrine [of equitable estoppel] is not compensation, but the placing of the one relying upon it in the same position as if the representation, or assumed state of facts, were true."[239]

As such, Williston liberalized promissory estoppel by unshackling it from its evidentiary moorings, allowing it to drift into the sea of substantive obligations. While Williston did advertently think of the new promissory doctrine as tinkering with the element of "representation," he did not advertently think of the new doctrine as changing the very nature of the estoppel by making it a basis for a cause of action. So, in the aftermath of the formulation of section 90 of the *First Restatement*, litigants could simply found a cause of action on an unbargained-for promise whereby in the past, they would have had to:

1) either rely on a different cause of action (using estoppel only in aid of their position by estopping the other party from contesting the veracity of what the party had earlier represented to be true); or

2) bring their claim under one of the "exceptions" to the rule that consideration was required to enforce a promise.

In Williston's new world, a party could simply use the unbargained-for promise as her substantive cause of action. To be sure, this was not completely unknown even under English law, but, only proprietary estoppel could be a basis of a cause of action.[240] What became known as "promissory estoppel" could only act as a substantive source of rights in very limited circumstances—one of which is an existing contractual relationship between the parties.

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238. The court directly cites, quotes, and relies on the Court of Appeal's decisions in *Seton*, 19 Q.B.D. at 70, and *Le Lievre v. Gould*, [1893] 1 Q.B.D. 491, 497–97.

239. Silas Alward, *A New Phase of Equitable Estoppel*, 19 HARV. L. REV. 113, 113 (1905).

240. *See* COOKE, *supra* note 72, at 118.

Thus, Williston helped hasten three tremendous legal developments simultaneously. First, he "naturalized" the definition of consideration in bargain terms. Second, and more significantly, his preferred definition of consideration spawned a need for a "safety valve" in the form of a separate doctrine to tamper the harshness wrought by his preferred definition of consideration—the doctrine of "promissory estoppel." To be clear, a broader definition of consideration would have made it unnecessary to come up with a second doctrine as a basis for enforceable promises. Finally, in cobbling together this "new" doctrine, Williston borrowed from existing ideas in English law but also clearly considered himself less constrained by the contours of the estoppel doctrine as it had developed under English law. The result was that Williston "transplanted" the doctrine of promissory estoppel from English law but "refracted" it to suit the role he wanted it to play in the United States's contract law.

In the next section, I introduce the concept of legal transplant, and then briefly rehash the history of promissory estoppel under English law in order to demonstrate the "refraction" the doctrine underwent as it crossed the Atlantic Ocean in Williston's conceptual ship.

VIII. PROMISSORY ESTOPPEL AS A LEGAL TRANSPLANT: THE CONCEPT OF LEGAL TRANSPLANTS

A legal transplant is a body of law or individual legal rule that was copied from a law or rule already in force in another country, the host country, rather than developed by the local legal community, the receiving country.[241] Differently put, it is "any legal notion or rule which, after being developed in a 'source' body of law, is then introduced into another, 'host' body of law."[242]

Since Alan Watson gave a name to the phenomenon in the 1970s, there has been a raging debate in the literature on whether "legal transplants" can be engineered or not.[243] Watson

241. Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 887 & n.1 (2003).

242. Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 199 (1994).

243. *See generally* ALAN WATSON, LEGAL TRANSPLANT: AN APPROACH TO COMPARATIVE LAW 21–31 (1974) (outlining Professor Watson's theories on how law is transplanted).

famously argued that legal transplants are the main source of legal change.[244] He argued that "borrowing (with adaptation) has been the usual way of legal development."[245] The explanation Watson gives for the prevalence of legal transplants is that lawyers prefer to imitate laws and principles from other jurisdictions rather than react directly to solve societal problems with an "original" rule or principle.[246] Many scholars of comparative law, however, especially those from the Law and Society school of thought, believe that legal transplants are impossible.[247] Their foremost objection to Watson's theory of legal transplant is espoused in the following paragraph by Pierre Legrand:

> A rule is necessarily an incorporative cultural form. As an accretion of cultural elements, it is buttressed by important historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that defines a legal culture; the part is an expression and a synthesis of the whole: it resonates.[248]

This debate is significantly complicated by the lack of a uniform meaning to the term "legal transplant."[249] Even where scholars agree on the meaning, there is significant disagreement on what a "successful" legal transplant is.[250] Finally, there is the pragmatic question on what the conditions for a "successful" legal transplant, however defined, actually are.[251] The Willistonian transplantation of the doctrine of promissory estoppel from England to the United States provides an excellent opportunity to in-

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244. *Id.* at 7, 95, 99.

245. *Id.* at 7.

246. *See id.* at 95, 99.

247. *See, e.g.*, R.B. SEIDMAN, THE STATE, LAW, AND DEVELOPMENT 29–48 (1978) (arguing that laws are generally not transferable between different nations); Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785, 794–97 (1982) (reviewing ALAN WATSON, SOCIETY AND LEGAL CHANGE, 1977); Lawrence Friedman, *Some Comments on Cotterrell and Legal Transplants*, in ADAPTING LEGAL CULTURES 93 (David Nelken & Johannes Feest eds., 2001); Otto Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (arguing that "we cannot take for granted that rules or institutions are transplantable" without taking into account national differences in culture, geography, wealth, religion and other factors).

248. Pierre Legrand, *What "Legal Transplants"?*, *in* ADAPTING LEGAL CULTURES, *supra* note 247, at 55, 59.

249. *See, e.g.*, Oñati Inst., *Introduction* to ADAPTING LEGAL CULTURES, *supra* note 247, at 3, 3–6.

250. *See* David Nelken, *Towards a Sociology of Legal Adaptation*, *in* ADAPTING LEGAL CULTURES, *supra* note 247, at 7, 37–39.

251. *See id.* at 39–46.

vestigate these issues. For example, if one looks at the doctrine of promissory estoppel as it existed under English law and as it was transplanted into United States law without taking into consideration the historical context of Willistonian borrowing, one might conclude that the estoppel was an "unsuccessful" legal transplant—due to the extent that the doctrine underwent significant changes in its American version. Of course, one might interpret this very modification as a sign of "success" of the notion of estoppel as a legal transplant.[252] To this extent, whether the estoppel was a successful legal transplant or not depends on one's perspective and the context.

First, I briefly look at the history of promissory estoppel under English law. The aim is two-fold. First, this provides an opportunity to assess how "successful" Williston's legal transplant was. Second, we glean from this history how the "refraction" of the doctrine in the United States eventually started influencing further developments of the doctrine under English law—a case of "reverse influence."[253] At the end of this discussion, I conclude this article with a few tentative speculations about why the doctrine of estoppel has been so "successful" as a legal transplant—so much so that there are calls to re-import it back to England via some Commonwealth countries, notably Australia.

IX. PROMISSORY ESTOPPEL IN ENGLAND BEFORE THE *FIRST RESTATEMENT* (1932)

A. *"Promissory Estoppel" Under English Law Before 1932*

As we saw in Part VI of this article, the reliance-based estoppel began with roots in the rather formal estoppel *in pais*.[254] It was ultimately extended to become a more thorough-going, reliance-based estoppel through which courts could, and did, fashion remedies aimed at enforcing representations made so as to reasonably induce action by the representee. This expansion reached its zenith around the mid-nineteenth century.[255] We earlier saw

252. *See, e.g.*, WATSON, *supra* note 243, at 27–29.

253. *See* Likhovski, *supra* note 12, at 635 n.55.

254. *See supra* Part VI.

255. *See* P.D. Finn, *Equitable Estoppel*, *in* ESSAYS IN EQUITY 60, 62–64 (P.D. Finn ed., 1985).

that the case that neatly epitomizes this trend of expanding reliance-based estoppel is *Hammersley v. De Biel*.[256] In this case, the plaintiff sought to enforce a promise by his father-in-law to make a marriage settlement in reliance on which the plaintiff married.[257] No cause of action could lie in contract since, clearly, there was no consideration for the promise.[258] Nonetheless, the House of Lords held the father-in-law's estate liable to pay the amount promised by the father-in-law.[259] Lord Campbell cited with approval Lord Cottenham, who heard the case at first instance, in laying out what is, perhaps, the broadest statement of promissory estoppel in England to date: "A representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a Court of Equity, for the purpose of realising such representation."[260]

It should be fairly clear this statement by Lord Cottenham, made in 1845, is essentially the kernel of the promissory estoppel doctrine as it later emerged and developed in the United States generally, and in particular, as espoused in section 90 of the *First Restatement*.[261]

Hammersley, then, stood for the then remarkable proposition that equity would enforce *all* representations, including representations of intention, if such representations were made for the purpose of influencing the conduct of another person, who then acted in reliance on such representations.[262]

Only a decade after *Hammersley*, the House of Lords began checking this expansion of actionable representations. First, in *Maunsell v. Hedges*,[263] Lord Cranworth sought to minimize the

256. *See supra* notes 177–81 and accompanying text.

257. *See* 12 Cl & Fin. 45, 45–47, 8 Eng. Rep. 1312, 1313 (H.L. 1845).

258. *See id.* at 65, 66, 8 Eng. Rep. at 1322 (Brougham, L., concurring).

259. *Id.* at 61, 8 Eng. Rep. at 1320.

260. *Id.* at 88, 8 Eng. Rep. at 1331.

261. This impugns the claim by Justice Cardozo in 1927 that promissory estoppel was a "new" doctrine. In *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927), Justice Cardozo says "there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled 'a promissory estoppel.'" *Id.* at 175.

262. For other cases in this line of reasoning see *Loffus v. Maw*, 3 Giff. 592, 66 Eng. Rep. 59 (V.C. 1862), *Piggot v. Stratton*, 1 De G.F. & J. 33, 45 Eng. Rep. 271 (Ch. 1859), and *Prole v. Soady*, 2 Giff. 1, 66 Eng. Rep. 1 (V.C. 1859).

263. 4 H.L.C. 1039, 10 Eng. Rep. 769 (H.L. 1854).

potential reach of *Hammersley* by rationalizing the outcome of *Hammersley* in contractual terms. In *Maunsell*, Mr. Eyre, the plaintiff's uncle, wrote the plaintiff, who was engaged to be married, two letters in which he promised to leave some property to the plaintiff upon his death.[264] Mr. Eyre subsequently refused to settle the property on the plaintiff and devised it to others.[265] On the plaintiff's action against the trustees of Mr. Eyre's will, it was held that the plaintiff could not recover as he had no claim in contract. Lord Cranworth, in his opinion, stated:

> Where a man engages to do a particular thing, he must do it; that is a contract; but where there are no direct words of contract, the question must be, what has he done? He has made a contract, or he has not; in the former case he must fulfill his contract; in the latter there is nothing that he is bound to fulfill. A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act on it, equity will bind him by such representation, treating it as a contract.[266]

He added: "There is no middle term, no *tertium quid* between a representation so made as to be effective for such a purpose and being effective for it, and a contract: they are identical."[267]

Referring to *Hammersley*, Lord Cranworth then commented:

> [T]hough you see the word "representation" used as it is in the speech of . . . Lord [Cottenham] . . . I cannot think that it was meant to bear the construction now attributed to it, and to raise any such distinction as is now relied on. That word is no part of the judgment. I must say that I do not think it is a word very happily employed. The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another.[268]

After so undermining the credibility of *Hammersley* as an authority for the proposition that unbargained-for but reasonably

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264. *Id.* at 1040–41, 10 Eng. Rep. at 770.
265. *See id.* at 1046–49, 10 Eng. Rep. at 772–73.
266. *Id.* at 1055, 10 Eng. Rep. at 755.
267. *Id.* at 1056, 10 Eng. Rep. at 776.
268. *Id.*

and justifiably relied-on representations were actionable under English law in *Maunsell*, Lord Cranworth severely limited the emerging principle of actionable relied-on representations in *Jorden v. Money*.[269]

The House of Lords held in *Jorden* that to be enforceable the representation forming the basis of the cause of action had to be shown to be one of existing facts, not merely intentions.[270] In *Jorden*, the House of Lords held that a bondholder could recover the money due under the bond even though the bondholder had made statements that she would not enforce the bond and had abandoned her claim under it though these statements had been acted upon by the debtor and though the debtor had entered into obligations with third parties in reliance upon the statements.[271] Lord Chancellor Cranworth held that these statements merely amounted to an expression of the bondholder's intentions and did not amount to such a representation of existing facts; thus, the doctrine of estoppel "does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do."[272]

As I previously stated, the House of Lords further limited the utility of reliance-based estoppel in England in 1891 in the case of *Low v. Bouverie*.[273] In this case, the House of Lords categorically ruled that estoppel is only a rule of evidence and cannot found an action.[274] The decision in *Low* that estoppel was not a cause of action but could only prevent rights from being enforced when it was inequitable to do so ensured that estoppel emerged from the nineteenth century as a rather mild doctrine. It was now only a defensive mechanism: a shield, never a sword.[275] With the reliance-based estoppel so consigned as a rule of evidence and a point of pleading, the doctrine of consideration emerged as the sole test of contractual obligations under English law.

One form of reliance-based estoppel, however, continued to thrive in England throughout this period of decline. This is the

269. 5 H.L.C. 185, 10 Eng. Rep. 868 (H.L. 1854).
270. *See supra* Part VI.
271. *See Jorden*, 5 H.L.C. at 223–24, 10 Eng. Rep. at 885.
272. *Id.* at 214–15, 10 Eng. Rep. at 882.
273. [1891] 3 Ch. 82 (C.A.).
274. *Id.* at 105; *see also supra* note 191 and accompanying text.
275. *See, e.g.*, Combe v. Combe, [1951] 2 K.B. 215, 219.

proprietary estoppel. Notwithstanding the House of Lords's decisions in *Jorden* and *Low*, courts continued to permit plaintiffs to establish causes of action based on relied-on representations of future intentions by the defendants where the underlying subject-matter respecting the representations was land. This exceptional doctrine of proprietary estoppel was, perhaps, developed as the judicial acknowledgement of the importance of land in feudal England. In every regard but the subject-matter, the doctrine was essentially the reliance-based estoppel à la *Hammersley*. The roots of the proprietary estoppel doctrine can be traced to early English cases where courts prevented a defendant who had encouraged or acquiesced to the plaintiff to invest in property, which the defendant—but not the plaintiff—knew belonged to the defendant, from asserting her property rights against the plaintiff.[276] The reasoning by the courts in these early cases was that an owner of land who permits another person to invest in the property, in effect, represents to that person that she would not object to the rights asserted by that person.

Another early example of this line of cases is *Huning v. Ferrers*,[277] which was decided in 1711. In this case, the plaintiff had a twelve-year lease of some mills.[278] When the lease was about to expire, the plaintiff approached the person he then thought had the power to extend the lease for another thirty years and arranged for the extension.[279] Unbeknownst to the plaintiff, this other person was only a life tenant, and was not entitled to grant the lease.[280] The defendant, however, who was entitled in the remainder, knew the life tenant was prohibited from granting a lease.[281] The defendant not only failed to warn the plaintiff but encouraged him to expend the then huge sum of £2,800 in improvements on the property.[282] When the life tenant died and the defendant became entitled to the property, the defendant attempted to evict the plaintiff from the property.[283] The plaintiff

276. *See, e.g.*, *Hobbs v. Norton*, 1 Vern. 137, 23 Eng. Rep. 370 (Ch. 1682); *Hunt v. Carew*, Nels. 47, 21 Eng. Rep. 786 (Ch. 1649).

277. Gilb. Rep. 84, 25 Eng. Rep. 59 (Ch. 1711).

278. *Id.* at 85, 25 Eng. Rep. at 59.

279. *See id.*

280. *See id.*, 25 Eng. Rep. at 59–60.

281. *Id.*, 25 Eng. Rep. at 60.

282. *Id.*, 25 Eng. Rep. at 59–60.

283. *See id.*, 25 Eng. Rep. at 60.

brought an action in Chancery to prevent the ejectment.[284] It was held that it would be fraudulent if the defendant were allowed to insist on his strict legal rights to the detriment of the plaintiff whom the defendant had encouraged to invest on the property.[285]

Similarly, in *East India Company v. Vincent*,[286] the defendant, an owner of land abutting the plaintiff's property, orally agreed that the plaintiff could erect a certain building upon terms to which the defendant acquiesced.[287] Subsequently, the defendant built a wall to obstruct the lights in the new building.[288] The defendant pleaded the Statute of Frauds in his defense.[289] Lord Hardwicke, however, ordered the defendant to pull down the wall obstructing light into the plaintiff's new building.[290] Lord Hardwicke reasoned that the plaintiffs were entitled to the benefit of the agreement relating to the lights, and should be quieted in their enjoyment.[291]

These cases were cited and relied upon in a line of cases in the nineteenth century, which shaped the doctrine of proprietary estoppel. The doctrine unmistakably developed as a cause of action—at the same time that *Low* and its progeny had established that other forms of reliance-based estoppels could not found a cause of action.

The most well known of these cases is *Dillwyn v. Llewelyn*.[292] In this case, a father "gave" land to his son, the plaintiff.[293] No formal conveyance was ever made, however, so the gift was not perfected.[294] Nonetheless, with the assent of the father, the son proceeded to build a home on the land.[295] On the death of the father, the son sought a declaration that he was entitled to the land in the face of a will granting the land to other members of the

284. *Id.*
285. *See id.*
286. 2 Atk. 83, 26 Eng. Rep. 451 (Ch. 1740).
287. *See id.* at 83, 26 Eng. Rep. at 451.
288. *See id.*
289. *See id.*
290. *Id.*
291. *See id.*
292. De G.F. & J. 517, 45 Eng. Rep. 1285 (Ch. 1862).
293. *See id.* at 520, 45 Eng. Rep. at 1286.
294. *See id.*
295. *Id.*

family.[296] The court gave the son the right to call for a proper conveyance.[297] Lord Chancellor Westbury held that while a voluntary agreement to make a gift was not enforceable in equity for lack of consideration, where the donee had, with the knowledge of the promisor, expended money on the land, the donee acquired an interest in the land because the donee had acquired a reasonable expectation in the land.[298]

The emergence of the doctrine of proprietary estoppel as used in *Dillwyn* as a self-standing doctrine with offensive capacity was categorically enunciated by Lord Kingsdown in the famous case of *Ramsden v. Dyson*.[299] Though the principle failed on the facts of the case, in a dictum, Lord Kingsdown laid down what is considered the first categorical enunciation of the doctrine in the following paragraph:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out

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296. *See id.*

297. *See id.* at 523, 45 Eng. Rep. at 1287.

298. *See id.* at 521–22, 45 Eng. Rep. at 1286–87. Lord Westbury was clear that it is the subsequent detriment suffered by the plaintiff (after the promise had been given) which entitled the plaintiff to the land—and expressly equated such detriment to consideration in an enforceable contract. Hence Lord Westbury stated:

> About the rules of the court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A. gives a house to B., but makes no formal conveyance, and the house is afterwards, on the marriage of B., included, with the knowledge of A., in the marriage settlement of B., A. would be bound to complete the title of the parties claiming under that settlement. So if A. puts B. in possession of a piece of land, and tells him, "I give it to you that you may build a house on it," and B. on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made . . . . The equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of the memorandum [which amounted to an imperfect gift].

Id.

299. [1866] 1 L.R.E. & I. App. 129 (H.L.).

> money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.[300]

Hence, in England, the doctrine of proprietary estoppel survived the period in the nineteenth century when consideration was expanded and other reliance-based estoppels were limited. As aforesaid, this may be explained by the importance of land in feudal England. Suffice it to say that plaintiffs could bring an action based on proprietary estoppel where the plaintiff had relied on an expectation created by the owner of land to the plaintiff's detriment. In the United Kingdom, this cause of action has survived to the modern times and is frequently invoked by plaintiffs who cannot otherwise base their claims on contract because of a lack of consideration.[301]

Aside from this doctrine of proprietary estoppel, in the late nineteenth century, the growth of commerce and the need for more certainty and flexibility in business necessitated a judicial revision of the restriction of the reliance-based estoppel. This relaxation came slowly and haltingly in the two cases of *Hughes v. Metropolitan Railway Co.*[302] and *Birmingham & District Land Co. v. London & North Western Railway Co.*,[303] decided in 1877 and 1888 respectively.

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300. *Id.* at 170.

301. Modern (famous) examples of this doctrine in action in England include *Gissing v. Gissing*, [1971] A.C. 886 (H.L. 1970); *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1982] 1 Q.B. 133 (Ch. 1979); *Crabb v. Arun District Council*, [1976] 1 Ch. 179 (C.A. 1975); and *Inwards v. Baker*, [1965 Ch.] 2 Q.B. 29 (C.A.). The leading modern authority is *Crabb*. In this case, the English Court of Appeal upheld a plaintiff's claim that he was entitled to a right of access to the defendant's land and a right of way along a road after he had been led to believe that he would be granted such a right of access, and had been encouraged to act to his detriment in selling part of his own land without any reservation over it of a right of way. *Crabb*, [1976] 1 Ch. at 189–90. Lord Justice Scarman stated the law thus:

> The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, *under an expectation, created or encouraged by the landlord*"—my italics—"that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.

Id. at 193 (quoting Ramsden v. Dyson [1866] 1 L.R.E. & I. App. 129, 170 (H.L.)).

302. [1877] 2 A.C. 439 (H.L.).

303. 40 Ch. D. 268 (C.A. 1888).

In *Hughes*, a landlord gave his tenant notice requiring him to do repairs within six months.[304] During that period the tenant began negotiations with the landlord for the purchase, by the landlord, of the remainder of the lease.[305] During this period of negotiations, the tenant did not do the repairs as demanded by the landlord.[306] When the negotiations for the purchase of the lease eventually broke down, the landlord tried to rely on his six month notice to eject the tenant for noncompliance.[307] It was held that, by entering into negotiations for the purchase of the lease, the landlord had led the tenant to believe that he would not enforce his notice without giving the tenant reasonable time to do the repairs.[308] Lord Chancellor Cairns, giving the leading speech, made the following statement in what is now considered by many to be the genesis of "promissory" or "equitable" estoppel in the United Kingdom:[309]

> It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.[310]

Eleven years later, in *Birmingham and District Land Co.*, the Court of Appeal endorsed and extended the doctrine of "equitable

304. [1877] 2 A.C. at 440.

305. *See id.* at 440–41.

306. *See id.*

307. *Id.* at 441.

308. *See id.* at 447, 449–50, 452–53.

309. *See, e.g.*, Susan M. Morgan, *A Comparative Analysis of the Doctrine of Promissory Estoppel in Australia, Great Britain and the United States*, 15 MELB. U. L. REV. 134, 136 (1985) ("It is generally agreed that promissory estoppel in Britain had its genesis in a statement by Lord Cairns in *Hughes v. Metropolitan Railway*."). As this part has argued, the true roots of promissory estoppel in England go much deeper than the latter half of the nineteenth century.

310. *Hughes*, [1877] 2 A.C. at 448.

estoppel" enunciated (but not so called) in *Hughes*.[311] Again, the parties here were in negotiations and it was contended by the plaintiff that the ongoing negotiations precluded the defendant from a strict insistence on its legal rights.[312] The defendant sought to limit the principle announced in *Hughes* to cases of equitable relief against forfeiture.[313] The Court of Appeal disagreed.[314] Lord Justice Lindley quoted from the above-cited speech by Lord Cairns in *Hughes* and stated "that [the principle as stated by Lord Cairns] is the general principle and I think that it is plainly applicable here" even though the case did not involve a forfeiture.[315] Similarly, Lord Justice Bowen refused to limit the principle enunciated in *Hughes* to cases of forfeiture, and famously said:

> Now it was suggested by Mr. Clare that that proposition [contained in Lord Cairns speech in *Hughes*] only applied to cases where penal rights in the nature of forfeiture, or analogous to those of forfeiture, were sought to be enforced. I entirely fail to see any such possible distinction. The principle has nothing to do with forfeiture . . . . The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.[316]

It should be clear that what is in operation here is a form of the doctrine that the American lawyer would easily identify as "promissory estoppel." It should again be clear that this doctrine closely resembles the reliance-based estoppel enunciated by Lord Cotenham in *Hammersley*.[317] It should be noted, however, that as the doctrine re-emerges in England in the second half of the nineteenth century in *Hughes* and *Birmingham & District Land Co.*, it has been significantly emasculated. To overcome the strictures placed on reliance-based estoppel by *Jorden* and *Low*, the "new"

311. [1888] 40 Ch. D. 268 (1888).
312. *See id.* at 270.
313. *See id.* at 272.
314. *See id.* at 279.
315. *See id.* at 281.
316. *Id.* at 286.
317. *See supra* notes 56–61 and accompanying text.

doctrine developed in *Hughes* and applied in *Birmingham & District Land Co.* was limited to persons who already had contractual relations, or at least "definite and distinct" legal relations.[318] If such persons induced the other party to a contract to believe that they would not strictly enforce their contractual rights, the courts would not allow them to go back on their word—even if the modification of the contractual rights had not been supported by consideration. In essence, the *Hughes* doctrine returned the state of the law to the pre-*Jorden* and pre-*Low* state—as far as parties in contractual relations were concerned. Of course, if the parties had no contractual relations prior to the representations, the *Hughes* doctrine would not come to their aid—unless, of course, they could rely on the doctrine of proprietary estoppel.

Two important conclusions can be drawn from this short history of reliance-based estoppel in England. The first point to note is that though reliance-based estoppel first emerged as a generalized estoppel with offensive capacity, it was soon blunted by the emerging force of contract law's doctrine of consideration. One, *Jorden* held that for an estoppel to arise, there had to be a representation of fact, as opposed to a representation of future intention.[319] Two, *Low* held that an estoppel does not create a cause of action but is merely a rule of evidence.[320] Nonetheless, the "new" doctrine in *Hughes* somewhat revitalized this reliance-based estoppel.[321] Under *Hughes*, parties who were already in a contractual relationship could, at least, set up an estoppel to prevent the other party from going back on their word, and thereby succeed on a cause of action based on the existing contract.[322]

The second point to note is that even though by the end of the nineteenth century the general reliance-based estoppel had undergone these limitations, one form of reliance-based estoppel—the proprietary estoppel—was still available to plaintiffs, and could found a cause of action in appropriate cases. The net effect of these developments was that during the period when the Restaters were writing the *First Restatement* in the United States, English law had already found two related, but distinct, doctrines

318. Denning, *supra* note 111, at 4.
319. *See supra* notes 189, 219–20 and accompanying text.
320. *See supra* notes 182–93 and accompanying text.
321. *See supra* note 302 and accompanying text.
322. *See supra* notes 304–08 and accompanying text.

to alleviate the problems caused by the rigidity of the doctrine of consideration. These are the *Hughes* doctrine and the doctrine of proprietary estoppel. The basic principle espoused in these two doctrines is the same one espoused in the doctrine of promissory estoppel as it developed in the United States.

If Williston and the other Restaters had taken into account these developments, the need for a brand new doctrine of promissory estoppel would have seemed less dire than it appeared to them in 1932. The point in all this is to state that English law had mitigated some of the excesses caused by the rigidity of the doctrine of consideration even before 1932. As Lord Denning would later say, referring to the inroads made by *Hughes* and *Birmingham & District Land Co.*:

> But strict legal rights are always capable of being modified by the interposition of equity; . . . The courts have repeatedly invoked equitable principles so as to neutralise ill effects of the common law doctrine of consideration. They have not done so in the formation of contract, because there was no necessity there for the intervention of equity. They have only done so in the modification or discharge of contracts.[323]

B. *"Promissory Estoppel" Under English Law After 1932*

Despite its promise, for decades, the *Hughes* doctrine was seldom used in England.[324] This remained true until 1946 when Justice Denning (as he then was) "re-discovered" it in the celebrated case of *Central London Property Trust Ltd. v. High Trees House*

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323. Denning, *supra* note 111 at 4 (internal citations omitted) (referring to *Hughes* and *Birmingham & District Land Co.*).

324. Some cases arguably applied the *Hughes* doctrine in the years ensuing the *Hughes* decision. *See, e.g.*, Buttery v. Pickard [1946] 1 W.N. 25 (K.B.); Salisbury (Marquess) v. Gilmore [1942] 2 K.B. 38 (C.A.); *In re* William Porter & Co. Ltd. [1937] 2 All. E.R. 361 (K.B.); *In re* Wickham [1917] 34 T.L.R. 158 (K.B.); and Fenner v. Blake [1900] 1 Q.B. 426. Justice Denning cites all these cases in his decision in the celebrated case of *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130 (the *High Trees* Case) which is analyzed in detail below. Of all these cases, however, the only one that made a reference to *Hughes* was *Salisbury (Marquess) v. Gilmore. See Gilmore* [1942] 2 K.B. at 43–44. Not surprisingly, Mr. A.T. Denning (who later became Justice Denning) appeared for one of the parties in the Court of Appeal, and specifically urged the court to rule for his client on the basis of the "equitable principle" laid down in *Birmingham and District Land Co. See id.* at 41–44. For an exhaustive analysis of all these cases relied on by Justice Denning in reaching his decision in the landmark *High Trees* Case, see Alexander K. Turner, "High Trees House" *Re-Inspected—Promissory Estoppel in 1963* 1 N.Z.U. L. REV. 185 (1964).

Ltd.[325] (the "*High Trees* Case"). In the case, the plaintiff, a lessor of a block of flats for a term of ninety-nine years, represented to the defendant, the lessee, that the lessee could pay reduced rent due to the war conditions, and the consequent absence of people from London during the Second World War.[326] The defendant paid the reduced rent for four years.[327] By the fourth year, all the flats in the block were fully let and the lessor demanded for payment of rent in full—including the arrears for the period when the lessee had paid reduced rent.[328] The lessor instituted proceedings seeking a declaration that the rent payable was that which was stated in the lease agreement on the ground that the subsequent arrangement for reduced rent was not supported by consideration.[329] Faced with *Foakes v. Beer* (holding that part-performance is not sufficient consideration) on the one hand, and *Jorden* (holding that to give rise to an estoppel a representation must be one as to existing facts) on the other, Justice Denning resorted to the *Hughes* doctrine in holding that the lessor could not recover the arrears that had accrued. Justice Denning reasoned:

> The law has not been standing still since *Jorden v. Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said the promise must be honored . . . . The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it.[330]

After approvingly citing *Hughes* and *Birmingham & District Land Co.* Justice Denning added that "the time has now come for

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325. [1947] K.B. 130 (1946).

326. *Id.* at 131.

327. *See id.*

328. *Id.*

329. *See id.* at 131–32. *See also Foakes v. Beer* 9 App. Cas. 605 (H.L. 1884); *Pinnel's Case* 5 Co. Rep. 117a, 77 Eng. Rep. 237 (C.P. 1602). The contractual rule established by these two cases is the familiar one called the "pre-existing duty rule." Under this rule, an agreement modifying an existing contract is not supported by consideration if one of the parties merely promises to do what they were already legally obligated to do under the contract.

330. [1947] K.B. at 134 (internal citations omitted).

the validity of such a promise [i.e., one intended to induce action, and which does, in fact, induce such action] to be recognized."[331]

With these words, Justice Denning revitalized what came to be known as "equitable estoppel" or "quasi-estoppel" under English law.[332] Justice Denning was careful to point out that this "equitable principle," as he called it as counsel in *Salisbury (Marquess) v. Gilmore*, could not found a cause of action; it could only discharge or reduce prior obligations.[333] In this way, even while resurrecting reliance-based estoppel from the graveyard of obscurity and desuetude to which *Jorden* and *Low* had consigned it, Justice Denning would not go as far as the *First Restatement* had done in liberalizing the "equitable principle" he had spoken of so fondly.

Since Justice Denning gave his judgment in the *High Trees* Case in 1947, at least fifteen years after the *First Restatement* was adopted, we can only assume that he knew about the American development. Why does he then fall short of liberalizing the principle sufficiently to permit it to found a cause of action? It has been suggested by some commentators that this was Denning's ultimate goal or wish but that he felt hamstrung by the authorities.[334] This theory, however, is somewhat impugned by Denning's own judgment in *Combe v. Combe*.[335]

In *Combe*, the husband promised, during divorce proceedings, to pay the wife an annual amount for maintenance.[336] Following this promise, the wife did not apply for an official order for maintenance.[337] The husband, however, had not specifically asked the wife not to apply for such an order.[338] Subsequently, the husband failed to pay the annual amount as promised, and the wife sued.[339] Since there was no consideration for the husband's promise, the wife could not succeed on an action for a breach of con-

331. *Id.* at 135.

332. *See Ajayi v. Briscoe* [1964] 1 W.L.R. 1326, 1330 (P.C.) (appeal taken from Nig.); LORD DENNING, THE DISCIPLINE OF LAW 205 (1979); L.A. Sheridan, *Equitable Estoppel Today*, 15 MOD. L. REV. 325 (1952).

333. [1947] K.B. at 135.

334. *See, e.g.*, Cooke, *supra* note 72, at 35–36.

335. [1951] 2 K.B. 215 (C.A.).

336. *Id.* at 216.

337. *Id.*

338. *See id.*

339. *Id.* at 216–17.

tract.[340] Instead, the wife relied on the "equitable principle" established in the *High Trees* Case as a basis for her claim. She argued, on the basis of the *High Trees* Case, that the husband had made a promise, she had acted on it (by not seeking a maintenance order from the courts), and that the action had been to her detriment.[341]

In the first instance, Judge Byrne, the trial judge, accepted the wife's argument and held that the husband's promise was "enforceable on the principle stated in *Central London Property Trust Ld. v. High Trees House Ld.*"[342] On appeal, Justice Denning nipped in the bud any hopes that the *High Trees* Case principle would be extended to match the developments wrought by section 90 of the *First Restatement* in the United States. Justice Denning emphatically stated:

> Much as I am inclined to favor the principle stated in the *High Trees* case, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties.[343]

Justice Denning then adds:

> Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear [in the *High Trees* Case] which misled Byrne, J., in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it.[344]

340. *Id.* at 220–21.
341. *Id.* at 218.
342. *Id.* at 217.
343. *Id.* at 219 (internal citations omitted).
344. *Id.* at 220–21.

In this paragraph, Justice Denning indicated why he did not believe it was necessary to use the *High Trees* Case principle to supplement the doctrine of consideration in contract formation under English law: the doctrine of consideration had already, in his view, been modified sufficiently. It was not necessary to use the estoppel he developed in the *High Trees* Case to assist plaintiffs who had relied on representations by parties with whom they did not yet have contractual relations. As Justice Denning would later write in a law review, he believed that there was "no necessity" for equity to intervene to tamper the doctrine of consideration during the formation of contracts.[345] In turn, the reason he thought there was no necessity for equity to intervene during the formation of contracts was because his definition of consideration was sufficiently broader than the bargained-for definition which prevails in the United States. Hence, Justice Denning argued:

> The law for centuries has been that an act done at the request of another, *express or implied*, is sufficient consideration to support a promise. . . . The only essentials are the promise by the one and the forbearance by the other on the faith of it. Even though there was no request in fact for the forbearance, nevertheless if the promise was given with the intention of inducing the creditor to forbear on the faith of it, the law will *imply* a request . . . . In these circumstances it may be well that, instead of using the old language of "request" and "consideration" we can express the self-same principle by saying that a promise is binding in law if it was intended to create legal relations, intended to be acted upon and was in fact acted upon by the person to whom it was given.[346]

The way Justice Denning defines consideration is noteworthy because it harkens back to the notion of "invented consideration" as discussed by treatise-writer Guenter Treitel.[347] If the law is willing to "imply" a request, it follows that a majority of the cases covered by the American doctrine of promissory estoppel would immediately be transformed to "consideration" under this definition. This would, in turn, make the doctrine of promissory estoppel superfluous if offered to enforce relied-on promises—simply because the law would imply a request by the promisor to the promisee to do the actions or forbearance which would be the basis of the estoppel action hence transforming such actions or for-

345. Denning, *supra* note 111, at 4.

346. *Id.* at 1–2 (emphasis added) (internal citations omitted).

347. *See supra* note 106–07 and accompanying text.

bearance into consideration. Hence, Justice Denning said of consideration in *Bob Guiness Ltd. v. Salomonsen*:[348] "It must be remembered that that which amounts, in legal theory, to consideration, is sometimes a real consideration and sometimes not. Consideration in law is sometimes the real purchase price of a promise, and sometimes it is a mere fiction devised to make a promise enforceable."[349]

C. *"Promissory Estoppel" Under English Law Today*

As a doctrinal matter, the position reached by Justice Denning in *Combe* still has the force of law under English law today.[350] In *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*,[351] the Privy Council drew the contours of the doctrine of promissory estoppel under English law:

> Their Lordships are of [sic] opinion that the principle of law as defined by Bowen L.J. has been confirmed by the House of Lords in the case of *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* where the authorities were reviewed and no encouragement was given to the view that the principle was capable of extension so as to create rights in the promisee for which he had given no consideration. The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favor of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position.[352]

348. [1948] 2 K.B. 42.

349. *Id.* at 45.

350. *See, e.g.*, Petromec Inc. v. Petroleo Brasileiro S.A. Petrobras, [2004] EWHC 127, [155]–[166] (Comm); Tesco Stores Ltd. v. Costain Constr. Ltd., [2003] EWHC 1487, [193]–[95] (TCC); Baird Textiles Holdings Ltd. v. Marks & Spencer Plc. [2001] EWCA (Civ) 274, [34], [87]; Azov Shipping Co. v. Baltic Shipping Co., [1999] 2 Lloyd's Rep. 159, 160.

351. [1964] 1 W.L.R. 1326 (P.C.).

352. *Id.* at 1330 (internal citation omitted).

This has been generally accepted as the correct statement of the law on promissory estoppel in England.[353] As it currently exists, the doctrine has five elements:[354]

(1) There must be a clear and unequivocal promise or representation by the person against whom the estoppel is being raised;[355]
(2) The promisee must have acted on the promise or representation to her "detriment;"[356]
(3) It must be unconscionable for the promisor to act inconsistently with her representation;[357]
(4) The effect of the doctrine is to suspend rather than extinguish rights: the party who made the representation is not estopped forever; she can, where possible, resume her legal rights upon giving reasonable notice;[358] and
(5) The doctrine prevents the enforcement of existing rights in the face of concessions by the rights-holder, but does not create new rights.[359]

There is on-going debate over whether the doctrine can be used where the parties do not have contractual relations. Some courts have latched onto Justice Denning's decision in *Combe*, which re-

353. *See, e.g.*, Crabb v. Arun Dist. Council, [1976] 1 Ch. 179 (C.A. 1975); White v. Vandervell Trustees Ltd., [1974] Ch. 269; D. & C. Builders Ltd. v. Rees, [1966] 2 Q.B. 617 (C.A.); Roger Halson, *The Offensive Limits of Promissory Estoppel*, 1999, L.M.C.L.Q. 256; *Morgan*, *supra* note 309.

354. Halson, *supra* note 353, at 257–58.

355. *See, e.g.*, Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp. of India, [1990] 1 Lloyd's Rep. 391, 399 (H.L. 1989); Allied Marine Transp. Ltd. v. Vale Do Rio Doce Navegaçao S.A., [1985] 2 Lloyd's Rep. 18, 25, 28 (C.A.).

356. *See, e.g.*, Goldsworthy v. Brickell, [1987] Ch. 378, 411 (C.A.). There is considerable controversy over whether there must be "detriment" in the sense that the person to whom the representation was made is left worse off financially or otherwise, or whether it is sufficient that the promisee was influenced by or relied on the representation. Some courts have indicated all that is required is some positive acts of reliance. *Compare Ajayi,* [1964] 1 W.L.R. at 1330, *with* Tool Metal Mfg. Co. v. Tungsten Elec. Co., [1955] 1 W.L.R. 761, 783–84 (Tucker, J. concurring).

357. *See, e.g.*, Jennings v. Rice [2002] EWCA (Civ) 159, [2]–[3]; D. & C. Builders v. Rees, [1966] 2 Q.B. 617, 625 (C.A.).

358. *See, e.g.*, National Westminster Bank Plc v. Somer, Int'l (U.K.) Ltd., [2001] EWCA (Civ) 970, [35], [2002] 3 W.L.R. 64, 79 ("This [estoppel by representation] differs from the position in the case of so-called 'equitable' or 'promissory estoppel' in respect of which a specific promise to waive or refrain from enforcing rights may be withdrawn on reasonable notice.").

359. *See, e.g.*, Combe v. Combe, [1951] 2 K.B. 215, 220 (C.A.); *Petromec,* [2004] EWHC at [163]. *But see* D. Jackson, *Estoppel as a Sword* (pt. 2), 81 L.Q.R. 84, 223 (1965) (arguing that English authorities permit the direct enforcement of a relied-on representation or promise).

fers to parties' "legal relations"[360] to rule that any pre-existing relationship, even if not contractual, would suffice to entitle a party to the aid of the doctrine of promissory estoppel.[361] Of course, using the doctrine outside the contractual setting opens it up for extension, but that extension has not reached a stage where courts are willing to found a cause of action on a "naked" promissory estoppel.[362]

As we will see shortly, however, English courts are reaching a similar result, not by explicitly overruling the limitation in *Combe*, but by arguing for recognition of a "unified" estoppel which does not distinguish between promissory or proprietary estoppel. The result of such unification would be to make all justifiably relied-on representations enforceable; in other words, to bring English law in line with the American developments on the doctrine as espoused in section 90 of the *Restatement (Second) of Contracts ("Second Restatement")*.[363] Curiously, the inspiration for this "unification" seems to come not directly from the United States, where the doctrine of promissory estoppel functionally achieved such unification, but from the Commonwealth countries that have adopted the American formulation of the doctrine of promissory estoppel, such as Australia.[364] If this trend continues and becomes established English law, promissory estoppel will complete an intriguing journey as a legal transplant: from England to the United States; and back to England through the Commonwealth. In any event, that would be a remarkable success rate for a legal transplant.

This begs the question: what about the character of promissory estoppel as a doctrine makes it such a successful legal transplant? I very briefly and tentatively suggest an answer to this question in the conclusion. Before then, I briefly catalog "evidence" of the "reverse influence" of the doctrine of promissory estoppel on English law.

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360. *Combe*, [1951] 2 K.B. at 220.

361. *See, e.g.*, Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd., [1968] 2 Q.B. 839–47.

362. Halson, *supra* note 353, at 258.

363. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

364. *See, e.g.*, Derby v. Scottish Equitable Plc. [2001] EWCA (Civ) 369; *see also* Guenter Treitel, *Some Comparative Notes on English and American Contract Law*, 55 SMU L. REV. 357, 357 (2002).

X. THE REVERSE INFLUENCE OF AMERICAN PROMISSORY ESTOPPEL ON ENGLISH LAW

If one begins with the categorical statement of the law enunciated by the Privy Council in *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*, one might conclude that the American developments of the doctrine of promissory estoppel have had little effect in influencing English law. This doctrinal position, however, masks some nuanced changes to the English doctrine of promissory estoppel as it developed, or at least to the legal discourse about it.

In the first place, the courts have gradually accepted that the doctrine can be used outside the contractual context. This makes the doctrine available in a great variety of fact patterns involving relied-on representations which might have been otherwise unenforceable. The result is to bring the English doctrine closer to the American doctrine. A good example is provided by the case of *Evenden v. Guildford City Assoc. Football Club, Ltd.*[365] In this case, the plaintiff was employed by one entity, the Supporters Club.[366] He was then transferred to a separate, independent but related entity, the Football Club,[367] and was promised that he would not suffer any detriment following his transfer.[368] The question was whether this promise entitled him to layoff pay for the whole period of time he was under the employ of both related entities.[369] But for that promise, he would only be entitled to redundancy pay for the period of time he was employed by the Football Club.[370] The plaintiff sought to rely on promissory estoppel to prove his case, but the defendant raised the objection that there was no pre-existing contractual relationship when the promise was made.[371] Lord Denning affirmed that promissory estoppel is not limited to cases where parties are already bound contractually one to the other, but that "[i]t applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to

365. [1975] 1 Q.B. 917 (C.A.).
366. *Id.* at 922.
367. *Id.*
368. *Id.* at 923.
369. *Id.* at 922.
370. *Id.* at 923.
371. *Id.* at 920–21.

act upon it and he does act upon it."[372] These are exactly the sorts of scenarios where the American doctrine of promissory estoppel is used.

Secondly, the American concept has influenced English courts in latter years to openly flirt with the idea of "unifying" estoppel with the result that relied-on representations would be directly enforced even outside a contractual setting.[373] This process began in earnest in *Crabb v. Arun*.[374] It was, again, Lord Denning who led the way in this regard. In *Crabb*, the plaintiff sold part of his land without reserving a right of way for the retained part because he had been led to believe by a representative of the defendant district council that they would allow him to construct and use an alternative access over their land.[375] After the plaintiff constructed and used the alternative access, and the district council then tried to prevent him from continuing to use the road.[376] The main objection to the plaintiff's claim was that there was no definite representation, and therefore no claim of promissory estoppel could be sustained. Further, the plaintiff was not mistaken about his property rights, and therefore no claim under proprietary estoppel could lie.[377] In granting relief to the plaintiff, Lord Denning refused to pigeon-hole the claim into either promissory estoppel—which could not found a cause of action—or proprietary estoppel, which could. Instead, he only spoke of an "equity":

> [If a person] by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act on that belief—and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied.[378]

In the same case, Lord Scarman deprecated the distinction between proprietary and promissory estoppel:

372. *Id.* at 924.
373. *See, e.g.*, Derby v. Scottish Equitable Plc. [2001] EWCA (Civ) 369.
374. [1976] Ch. 179 (C.A.).
375. *Id.* at 184.
376. *Id.* at 186–87.
377. *Id.* at 182.
378. *Id.* at 188.

> I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance.[379]

Instead, like Lord Denning, Lord Scarman spoke generally of an "equity" that intervenes to aid the plaintiff where "it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff."[380] In his view, the proper analysis is for the court to "answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?"[381]

The next important case to openly call for the fusion of the different estoppels is *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*[382] Justice Oliver meticulously reviewed the relevant authorities and announced:

> [The] more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson* principle—whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial—requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behavior.[383]

Finally, Lord Denning could not have been more direct in *Amalgamated Investment & Property Co. v. Texas Commerce International Bank Ltd.*[384] Harping on the theme of flexibility and prevention of unconscionable conduct, Lord Denning stated:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. . . . It

379. *Id.* at 193.
380. *Id.* at 195.
381. *Id.* at 193.
382. [1982] Q.B. 133.
383. *Id.* at 151 (internal footnotes omitted).
384. [1982] Q.B. 84 (C.A.).

> has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.[385]

This evolution of promissory estoppel under English law—from the resurrection of the limited *Hughes* doctrine by Lord Denning to the more recent proposals to "unify" estoppel as a single principle of equity—parallels the evolution of American estoppel. Professor Eric Holmes has described the four stages in the evolution of the American concept of promissory estoppel.[386] In the first stage, the "estoppel phase," promissory estoppel is barely emerging from, and hardly distinguishable from, the doctrine of equitable estoppel.[387] In this stage, the doctrine of promissory estoppel, Professor Holmes argues, serves a defensive function—much like estoppel generally does.[388] In this stage, courts permit promisees to employ the doctrine of promissory estoppel to prevent promisors from setting up technical legal rules such as the Statute of Frauds, the statute of limitations, and the parol evidence rule as defenses to contract enforcement.[389] In the second stage, which Professor Holmes calls the "contract phase," the doctrine of promissory estoppel has evolved sufficiently to serve as a substitute for consideration.[390] This was the stage in which the doctrine found itself during the drafting of the *First Restatement*.[391]

In the third stage, the "tort phase," courts employ the doctrine of promissory estoppel offensively as an independent ground for recovery and not merely as a substitute for consideration in a con-

385. *Id.* at 122.
386. *See* Holmes, *Four Phases*, *supra* note 9.
387. *Id.* at 56–64.
388. *Id.* at 56.
389. *Id.* at 57–58.
390. *Id.* at 65.
391. *See id.*

tract action.[392] In this phase, courts enforce promises seriously made and reasonably relied on independent of a contract.[393] Finally, in the fourth stage, the "equity phase," courts "have assimilated the first three phases (estoppel, contract, and tort) and have applied promissory estoppel equitably to rectify wrongs by awarding relief based on the discrete facts of each case."[394] "The remedy . . . is discretionary. No . . . mechanical [bright line] rule applies. . . . [I]t is equitably molded . . . for each case. . . ."[395] In this fourth stage, courts are no longer concerned with questions of whether the cause of action is sounding in contract, tort or equity; they are concerned about applying the "four Chancery principles" of "good faith, conscience, honesty and equity" to do justice by the parties in specific cases.[396] As Professor Knapp captures Professor Holmes's fourth stage, promissory estoppel in this phase is "a kind of meta-law, a super-hero with a roving commission to do justice wherever justice cries out to be done."[397]

If this account of the evolution of promissory estoppel by Professor Holmes is correct, it means that the American doctrine has not only unshackled itself from its original status as a "shield," but has now grown out of the stage of only serving as a basis for a cause of action in contract and tort. Now American courts are at a point where they are primarily employing the concept as an unabridged "equity" aimed at protecting the right of a promisee to rely without regard to whether the suit sounds in tort, contract, equity, or property law.[398] This is precisely where Lord Denning wants the English estoppel to be, as stated in *Amalgamated Investment & Property Co.*

Lord Denning has received support for this position from both judges and legal scholars. English courts, however, have not yet accepted this "unified" estoppel as the law.[399] As one commentator

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392. *Id.* at 67–68.

393. *See id.*

394. *Id.* at 51.

395. *Id.* at 75.

396. *Id.* at 73.

397. Knapp, *supra* note 16, at 1250.

398. Holmes, *Four Phases*, *supra* note 9, at 77–78.

399. The legal position under English law is still that expressed by Lord Justice Millet in *First National Bank PLC. v. Thompson* [1996] Ch. 231 (C.A.):

> [An] attempt to demonstrate that all estoppels other than estoppel by record are now subsumed in the single and all-embracing estoppel by representation and that they are all governed by the same requirements has never won gen-

has stated, "The tendency of the English courts is still to compartmentalise the doctrine and has resulted in decisions which, while justified under one type of estoppel, could equally have fallen to be decided under another."[400] Curiously, though, both the judges who have supported the idea of a "unified" estoppel from the bench and leading legal commentators who have supported the idea in their writings find their inspiration from a line of Australian cases on promissory estoppel decided in the last two decades of the twentieth century.[401] The first and most well known of these cases is *Waltons Stores (Interstate) Ltd. v. Maher*.[402] In this case, Chief Justice Mason and Justice Wilson suggested that the reason courts intervene in equitable estoppel cases is to prevent "unconscionable conduct," and, therefore, the court would intervene even if that entails the enforcement of voluntary promises.[403] Hence, Chief Justice Mason and Justice Wilson reached the remarkably radical position that under Australian law, representations not supported by consideration could found a cause of action, by re-defining estoppel singularly in terms of the need to prevent unconscionable conduct.[404] They both copiously cite Justice Oliver in *Taylors Fashions Ltd.* and Lord Denning in *Amalgamated Investment & Property Co.*

There is no doubt, however, as to where Chief Justice Mason and Justice Wilson drew most of their inspiration: section 90 of

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eral acceptance. Historically unsound, it has been repudiated by academic writers and is unsupported by authority.

Id. at 236; *see also* Republic of India v. India S.S. Co., [1998] A.C. 878, 914 (H.L.) (Steyn, L.).

400. Mark Lunney, *Towards a Unified Estoppel—The Long and Winding Road*, 1992 CONV. & PROP. LAW. (N.S.) 239, 250 (citation omitted).

401. *See infra* notes 401–08 and accompanying text.

402. (1988) 164 C.L.R. 387.

403. *Id.* at [32], [34].

404. The Justices observe that:

> Because equitable estoppel has its basis in unconscionable conduct, rather than the making good of representations, the objection, grounded in Maddison v. Alderson, that promissory estoppel outflanks the doctrine of part performance loses much of its sting. Equitable estoppel is not a doctrine associated with part performance whose principal purpose is to overcome noncompliance with the formal requirements for the making of contracts. Equitable estoppel, though it may lead to the plaintiff acquiring an estate or interest in land, depends on considerations of a different kind from those on which part performance depends. Holding the representor to his representation is merely one way of doing justice between the parties.

Id. at [32].

the *Second Restatement*.[405] They first point out that English and Australian courts have been "reluctan[t] to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future."[406] Then, after citing scholars who have argued against this position, they explicitly cite the developments in the United States as being more in tune with the ostensible functions of the doctrine of promissory estoppel. They stridently state:

> It is perhaps sufficient to say that in the United States, as in Australia, there is an obvious interrelationship between the doctrines of consideration and promissory estoppel, promissory estoppel tending to occupy ground left vacant due to the constraints affecting consideration.
>
> The proposition stated in [section] 90(1) of the Restatement seems on its face to reflect a closer connection with the general law of contract than our doctrine of promissory estoppel, with its origins in the equitable concept of unconscionable conduct, might be thought to allow. This is because in the United States promissory estoppel has become an equivalent or substitute for consideration in contract formation, detriment being an element common to both doctrines. Nonetheless the proposition, by making the enforcement of the promise conditional on (a) a reasonable expectation on the part of the promisor that his promise will induce action or forbearance by the promisee and (b) the impossibility of avoiding injustice by other means, makes it clear that the promise is enforced in circumstances where departure from it is unconscionable. Note that the emphasis is on the promisor's reasonable expectation that his promise will induce action or forbearance, not on the fact that he created or encouraged an expectation in the promisee of performance of the promise.[407]

This decision became the fountainhead of the American-style doctrine of promissory estoppel in Australia.[408] This Australian development caught the eye of several English judges who are now citing to this line of cases to urge a reconsideration of the English position. This trend is exemplified by the decision of Lord Justice Walker in *Gordon Derby v. Scottish Equitable Plc.*[409] While not basing his decision on the "unified" estoppel, Lord Justice Walker supported its evolution in the following paragraph:

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405. (1988) 164 C.L.R. 387, at [24], [26], [34].

406. *Id.* at [21].

407. *Id.* at [25]–[26].

408. Other decisions in this line of cases include *Foran v. Wright*, (1989) 168 C.L.R. 385, and *Commonwealth v. Verwayen*, (1990) 170 C.L.R. 394.

409. [2001] EWCA (Civ) (369) at [48].

> Will estoppel by representation wither away as a defence to a claim for restitution of money paid under a mistake of fact? It can be predicted with some confidence that with the emergence of the defence of change of position, the court will no longer feel constrained to find that a representation has been made, in a borderline case, in order to avoid an unjust result. It can also be predicted, rather less confidently, that development of the law on a case by case basis will have the effect of enlarging rather than narrowing the exception recognised by this court in *Avon County Council v. Howlett*. That process might be hastened (or simply overtaken) if the House of Lords were to move away from the evidential origin of estoppel by representation towards a more unified doctrine of estoppel, since proprietary estoppel is a highly flexible doctrine which, so far from operating as "all or nothing," aims at "the minimum equity to do justice." Paul Key has drawn attention to two decisions of the High Court of Australia (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394) which he describes as a fundamental attack on the traditional perception of estoppel as a complete defence.[410]

These Australian cases have been cited in a number of other English cases.[411] English legal commentators have also drawn inspiration from the Australian developments to urge English courts to "unify" estoppel into a single doctrine with offensive capacities.[412] Leading English contracts scholar, Guenter Treitel, gives a clue about the reason for this curious development.[413] He hypothesizes that the *Waltons Stores* doctrine is "perhaps more likely than the American doctrine to be influential in England since the Australian and English judicial styles of argument and analysis are closer to each other than either is to the American."[414]

Fourth, beyond these calls for a "unified" estoppel, some American legal commentators have also openly called on English courts to emulate American courts in endorsing the American

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410. *Gordon Derby*, [2001] EWCA (Civ) 369, (citations omitted); *see also* Nat'l Westminster Bank PLC v. Somer Int'l (UK) Ltd., [2001] EWCA (Civ) 970, [2002] 3 W.L.R. 64 (Potter, L.J.).

411. *See, e.g.*, Petromec Inc. v. Petroleo Brasileiro S.A. Petrobras, [2004] EWHC (Comm) 127; Brennan v. Bolt Burdon [2003] EWHC (QB) 2493; Actionstrength Ltd. v. Int'l Glass Eng'g, [2003] UKHL 17, [2003] 2 W.L.R. 1060; *In re* Goldcorp Exch. Ltd. [1994] 3 W.L.R. 199.

412. *See, e.g.*, Mark Lunney, *supra* note 400 at 239; P.T. Evans, *Choosing the Right Estoppel* 1988 CONV. & PROP. LAW (N.S.) 346.

413. Treitel, *supra* note 364, at 357.

414. *Id.*

version of promissory estoppel.[415] One of the leading authorities on English contract law has stated that the process of growth of promissory estoppel in the United States "is one from which [the English] can learn."[416] As noted above, these calls have increased with Australia's embrace of section 90-like promissory estoppel.[417]

XI. PROMISSORY ESTOPPEL AS BOTH A SUCCESSFUL AND UNSUCCESSFUL LEGAL TRANSPLANT

The account of the "genesis" and evolution of promissory estoppel in early-twentieth century United States suggests two ways to interpret what happened to the idea of estoppel in the drafting of the *First Restatement*. One way is to read it as a story of invention and a successful legal transplant. Williston invented a new form of estoppel, and in so doing, he modified the old form of estoppel borrowed from merry old England to suit the American circumstances: the representation no longer had to be of some past or existing fact, and the representation itself, without more, could found a cause of action. It is a story of a successful transplant: a concept borrowed advertently, with a clear understanding of its nature and functions in the exporting legal system and crafted carefully to consciously suit the objectives of the borrowing legal culture.

A second way to read it is as the more familiar story of an "unsuccessful" legal transplant: where the importer has a particular idea about the concept being transplanted and how it operates in the exporting legal culture and then tinkering with it to suit one's purpose in the importing legal culture. It later turns out that the importer, however, in transplanting, edits and deflects the concept due to either an imperfect understanding of the transplant and how it operates in its original legal culture ("deflection") or a refraction caused by the exact circumstances in which the transplanting takes place.

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415. As early as 1929, Professor Winfield had called for the importation of the doctrine into English law. *See* P.H. Winfield, *The American Restatement of the Law of Contracts* 11 J. COMP. LEGIS. & INT'L L. 179, 186 (1929) ("We should like to see the rule of [section] 90 incorporated into English law.").

416. P.S. Atiyah, *When Is an Enforceable Agreement Not a Contract? Answer: When It Is an Equity*, 92 LAW Q. REV. 174, 179 (1976).

417. *See supra* notes 405–08 and accompanying text.

If we conceive the American concept of promissory estoppel as a legal transplant, was it a successful one or not? First of all, let us take stock of what we know. This account has shown that although there were no significant "cultural" differences between England and the United States at the turn of the twentieth century, the importation of English ideas of estoppel into the United States underwent some "editing," "reflection," and "refraction" in the process of importation.[418] The "mutation" of the transplanted concept was, contrary to what conventional theories of legal transplants would hypothesize, not because of any "cultural" differences.[419] Rather, this "mutation" was a result of "pragmatic borrowing": the borrowing of a concept from another system with a clear idea about the role that the borrower would want the borrowed concept to play in the importing legal system. In this situation, the borrower often "misreads" both how the concept functions in its autochthonous legal culture and the mutation that the transplant is likely to undergo when placed in foreign soil.[420] Such misreading, however, may also increase the legal transplant's chances of success by aligning the legal transplant with the borrower's pragmatic concern. In such cases then, a transplant becomes successful precisely by being "unsuccessful," i.e., by facilitating a "mutation," the borrower ensures that the legal transplant will not be received in its pristine nature, and improves the chances that the transplant will serve the function required by the borrowing legal system.[421] Looking at the doctrine of promissory estoppel from this perspective, one may argue that the American doctrine of promissory estoppel was both a successful and unsuccessful legal transplant.

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418. *See supra* Parts III and IV.

419. *See supra* Kahn-Freund, *supra* note 247.

420. An example of how, often, both indigenous legal concepts and foreign legal concepts sought to be borrowed are misunderstood when transplanting new legal norm, is afforded by the attempts to export "Western" private property rights to developing countries. *See, e.g.*, Joel Ngugi, *Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration,* 25 MICH. J. INT'L L. 467 (2004).

421. Alan Watson argues that in fact such facilitated "mutation" makes it possible for the legal transplant to be "reformed or made more sophisticated [hence giving] "the recipient society a fine opportunity to become a donor in its turn." WATSON, *supra* note 13, at 99. Watson argues that a legal transplant can also be influential even when it is totally misunderstood and gives the famous example of Montesquieu's misunderstanding of the doctrine of separation of powers under the English Constitution. Although Montesquieu's description of the English Constitution was far from reality, "his views were of fundamental importance to the framers of the American constitution though they were under no illusion as to the true nature of the English constitution." *Id.*

The argument that the development of the American concept of promissory estoppel is an instantiation of an "unsuccessful" legal transplant could go as follows. Not only did Williston fail to take sufficient account of the fact that the estoppel he had in mind had never been a cause of action ("refraction"), but also some of the courts that had relied on the concept had failed to "notice" that equitable estoppel was restricted to representations of fact ("deflection").[422] While the deflection helped persuade Williston that courts had already created such a principle in practice, it is Williston's refraction that eventually led to the expansion of the principle. Williston was also mistaken about extant legal doctrines in particular, the *Hughes* doctrine and the doctrine of proprietary estoppel—which could address the concerns he had about the doctrine of consideration.

Yet, this story of "unsuccessful" transplant is a success story in another important way. The newly minted concept of promissory estoppel proved immensely successful in transforming the law of contract. Indeed, the transplant was so successful that it unleashed efforts to modify estoppel in the "mother" country from whence it was plucked. It would seem, therefore, that the American concept of promissory estoppel was "successful," as a transplant simply by being "unsuccessful," i.e., by undergoing sufficient revision and edition from its original form in the mother country in the process of borrowing.

Why do some legal transplants succeed while others fail? From Profesor Alan Watson's theory, the more mechanical a legal concept, the more likely it would succeed.[423] Recent experiences in transplanting commercial codes to a host of transition economies, however, suggests otherwise. Many of these transplants have failed.[424] On the other hand, an extension of Professor Duncan Kennedy's theory would suggest that a transplant is more likely

422. The perfect example here is *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

423. *See* WATSON, *supra* note 13, at 1–7, 95–99.

424. *See, e.g.*, YVES DEZELAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS (2002); John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam*, 51 INT'L & COMP. L.Q. 641 (2002); Mark Goodale, *The Globalization of Sympathetic Law and Its Consequences*, 27 LAW & SOC. INQUIRY 595 (2002); Inga Markovits, *Exporting Law Reform—But Will it Travel?*, 37 CORNELL INT'L L.J. 95 (2004); Laura Nader & Elizabetta Grande, *Current Illusions and Delusions about Conflict Management—In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573, 574 (2002).

to succeed if there is a "prestige" premium.[425] A legal transplant is more likely to be successful if the donor is deemed to be "culturally prestigious."[426] This would adequately explain the real reasons for transplanting but would be limited in its explanatory power as to why some of these transplants succeed while others fail.

Given the history and account of the development of promissory estoppel in the United States that I have given above, I wish to tentatively hypothesize that a legal transplant stands the best chance of "succeeding" when it is a "conceptual" rather than a "mechanical" transplant.

A "conceptual" transplant is one whereby the borrower is interested only in the substantive doctrine and the broad functions it is supposed to play in the legal system. This leaves plenty of room for the recipient to tinker with the transplant to let it fit in the recipient's legal system. It follows that doctrines that are "equitable" in nature are more likely to fit into this mold than entirely "legal" doctrines. It also follows that a doctrine such as "promissory estoppel" would fair better than a conglomeration of legal rules like a corporate code. The former is "equitable;" it takes the shape and color of the legal system in which it is transported, and it is filled with local content. The latter is rigid; it seeks to recreate the conditions from whence it was plucked, and it resists legal content.

It would seem from this account that promissory estoppel has been successful as a legal transplant neither because it is "mechanical" nor because of the "prestige" premium. Rather, it seems that promissory estoppel is influential precisely because it defies rigid characterization as a formulaic "model" of addressing doctrinal lacunae. Instead, promissory estoppel characterizes itself as a flexible, equitable, and malleable doctrine that acquires the

425. Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631 (2003).

426. For example, Gianmaria Ajani explains that one reason why laws transplanted from Western countries to Eastern Europe in the aftermath of the collapse of communism took root is the "prestige factor." Prestige works in two ways. First, laws borrowed from countries which are considered "culturally prestigious" are likely to be more successful because they are likely to be accepted by the politicians, lawyers, technocrats, civil society, and citizens of the receiving country. Second, passing such laws is an attached prestige necessary to impress international institutions and foreign investors. *See* Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995).

form and substance of the legal system where it is borrowed, allowing it to fit with the local circumstances. Promissory estoppel does well as a concept precisely because it is defined in singularly broad, "equitable," and "promiscuous" terms that defy rigid formulation. The local conditions are left to supply the actual contours of the concept through application and derivation of principles.

XII. CONCLUSION

This article recast the history of the American doctrine of promissory estoppel as a legal transplant. In doing so, it moved beyond the orthodox accounts of its development in late-nineteenth century America, and traced its roots to earlier forms of the English conception of estoppel *in pais*. By pursuing the history of the doctrine under English law, the doctrine gave us an opportunity to consider, and approve the theory that the need for the invention of the theory of promissory estoppel in American contract law was only necessitated by the revision in the definition of the doctrine of consideration in bargain terms by Samuel Williston—a revision that was, in turn, made necessary by the prevailing ethos of the CLT. In inventing the American doctrine of promissory estoppel by "borrowing" and modifying the estoppel concept from English law, however, Williston unwittingly "liberalized" estoppel by unshackling it from some of the restrictive doctrinal rigidities it labored under in English law. The result was that, contrary to Williston's intentions, the American doctrine of promissory estoppel ended up expanding, not restricting, the range of contractual liability. Nonetheless, this Willistonian "invention" of promissory estoppel by "borrowing" from England became so successful in the United States that, in a curious case of "reverse influence," there are calls to re-import the American version of the doctrine back to England. I used this historical account to hypothesize on what makes legal transplants successful.

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