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NOTE

REVIVING CONTRACT CLAIMS BARRED BY THE STATUTE OF LIMITATIONS: AN EXAMINATION OF THE LEGAL AND ETHICAL FOUNDATION FOR REVIVAL

*Michael E. Chaplin**

Statutes of limitations have played a significant role in American jurisprudence from the earliest enactment of colonial laws.[1] Because of their settled place in legal history, there is little doubt that statutes of limitations are accepted as a matter of fact.

> Statutes of limitations are so widely accepted, the principle of repose so revered, and the truth-seeking function of Article III courts so important that, in an uninterrupted line of cases dating back to 1830, the Supreme Court has held that if federal statutes that confer federal rights on civil litigants are silent on the limitations question, courts should borrow from and apply analogous state or federal statutes of limitations.[2]

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1 *See* Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 131 (1955) ("It is interesting that, in a pioneer community beset by difficulties usual on the frontier, statutes of limitations were included in the earliest legislation.").

2 Ugo Colella, *The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act*, 35 SAN DIEGO L. REV. 391, 420 (1998).

However, it would appear that (at times) this acceptance is less than wholehearted. Statutes of limitations evoke both emotional praise and invective.[3] Justice Oliver Wendell Holmes referred to statutes of limitations as "pure evil."[4] On the other hand, Justice Joseph Story described statutes of limitations as "wise and beneficial law[s], not designed merely to raise a presumption of payment of a just debt . . . but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses."[5]

Regardless of one's opinion about statutes of limitations, one fact remains; once an action is barred by the statute of limitations, it cannot, normally, be revived.[6] However, in certain instances it is possible to revive just such a claim—if not as an affirmative action then, at least, as a defense to an opposing action.[7] This Note will explore various ways of reviving time-barred actions based on claims arising out of a breach of contract action and the ethical bases for these legal strategies.

Part I of this Note begins by exploring four strategies to revive actions barred by statutes of limitations. Specifically, this Part examines the strategies of recoupment, equitable estoppel, acknowledgment or promise, and agreements to waive or extend the statute of limitations. Part II analyzes the moral and ethical bases for these legal strategies.

I. STRATEGIES FOR REVIVING TIME-BARRED ACTIONS

While there may be good reasons to argue that a claim barred by the statute of limitations should not be revived, the fact of the matter is that courts recognize certain exceptions to these statutory con-

3 *See generally* Armco, Inc. v. Workmen's Compensation Appeal Bd., 667 A.2d 710, 716 n.12 (Pa. 1995) ("[S]tatutes of limitation and repose are 'vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence.'" (quoting Schmucker v. Nangle, 231 A.2d 121, 123 (Pa. 1967))); Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 500–10 (1997) (providing a detailed account of the policy arguments against statutes of limitations).

4 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

5 Bell v. Morrison, 26 U.S. 351, 360 (1828).

6 *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.").

7 *See* Gober v. Terra Corp., 100 F.3d 1195, 1207 (5th Cir. 1996) ("Defensive claims for recoupment are never subject to statutes of limitations as long as the plaintiff's action is timely.").

straints. The common law starts from the presumption that a law of limitations applies only to the remedy and does not affect the legitimacy of the contract. Accordingly, any presumption of finality may be rebutted.

> A law of limitations, or prescription, does not strike at the validity of the contract. It is of the remedy, and not of the essence or obligation of the [contract]. It is a mere rule of evidence; and is founded on the presumption, arising from the lapse of time, that the debt has been paid or satisfied. This legal presumption may be negatived by positive evidence. It is not a *presumptio juris et de jure,* which is conclusive, and cannot be contradicted; for it may be repelled . . . .[8]

As a preliminary matter, it should be observed that a claim brought in federal court based on diversity will be examined under the relevant state statute of limitations. As the court observed in *West v. Conrail,*[9] "[w]hen the underlying cause of action is based on state law, and federal jurisdiction is based on diversity of citizenship, state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period."[10] However, when the claim is based on a federal statute then federal limitations law applies.[11]

In addition, the majority position favors the view that once a claim is time-barred, it cannot be revived by a change in the law. In other words, once an action to recover property has been barred by the statute of limitations, a subsequent change in the law to remove the bar "cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law."[12]

The problem is simple enough: whether—and, if so, how—a time-barred claim can be revived. Apparently, there is no legislative solution to the problem. The Supreme Court has plainly stated that any change in the law to remove the bar is constitutionally prohibited. However, there are (at least) four common law strategies that can be employed to revive a time dead claim: recoupment, acknowledgment (or promise), equitable estoppel, and agreement to waive or extend the statute of limitations.

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8 Sturges v. Crowninshield, 17 U.S. 122, 189–90 (1819).

9 481 U.S. 35 (1987).

10 *Id.* at 39 n.4.

11 *See* South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 518 (1986) ("These are federal claims, and the statute of limitations is thus a matter of federal law.").

12 Stewart v. Keyes, 295 U.S. 403, 417 (1935).

A. Recoupment

Recoupment is used to offset mutual debts when one debt is time-barred and both debts arise out of the same transaction.[13] For example, take the situation in which company *A* owes five million dollars to company *B*, and *B* owes ten million dollars to *A*. Further assume that *B*'s claim for the five million-dollar debt is time-barred, but *A*'s is not. If *A* sues *B* for the ten million dollars, courts will normally allow *B* to recoup its five million dollars,

> notwithstanding [that] the statute of limitations had barred an independent suit against [company *A*] therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.[14]

1. Recoupment and Set-Off

It is perhaps easiest—at least conceptually—to think of recoupment and set-off as close cousins. The two look like members of the same family, but they do not act quite the same. While recoupment is related to set-off, it is different in application because "a claim growing out of an independent transaction (set-off) must be specially pleaded, while a claim arising out of the same transaction (recoupment) need not be, but may be proved under a general issue plea, unless an affirmative judgment is sought by the defendant."[15]

In other words, recoupment is a defense that may be argued because it flows out of the main action, whereas set-off is a separate transaction. Therefore, "recoupment differs from setoff in two important respects. First, a matter properly assertable as recoupment *must* be asserted defensively against a plaintiff's claim. . . . Second, a recoupment right properly asserted enjoys immunity from the various statutes of limitations, as it may 'relate back' when asserted as a counterclaim."[16]

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13 *See* Woelffer v. Happy States of Amer., Inc., 626 F. Supp. 499, 503 (N.D. Ill. 1985) ("A recoupment or set-off consists of valid counter causes of action or mutual debts that offset one another.").

14 Bull v. United States, 295 U.S. 247, 262 (1935).

15 Eisenberg v. Air Conditioning, Inc., 170 A.2d 743, 748 (Md. 1961).

16 Gary E. Sullivan, *In Defense of Recoupment: Why "Setoff" of Prepetition Utility Deposits Against Prepetition Debt Is Not Subject to the Automatic Stay*, 15 BANKR. DEV. J. 63, 70 (1998).

While some jurisdictions have eliminated the differences among recoupment, set-off, and counterclaims,[17] the more common view holds that recoupment is different from set-off. Traditionally, recoupment is a defense, whereas set-off is a cross-claim confined to mutual debts arising out of related but separate obligations. "The basic principle underlying the law of set-off is that a defendant has the right to set off against the plaintiff's demand or claim any claim or demand that he may have against the plaintiff extrinsic to the transaction out of which the plaintiff's claim arises . . . ."[18]

Generally, then, a claim for set-off arises out of a different transaction from the one sued on. "'The right of setoff (also called "offset") allows entities that owe each other money to apply their mutual debts against each other . . . .' The defining characteristic of setoff is that 'the mutual debt and claim . . . are generally those arising from *different* transactions.'"[19] Because set-off is a separate transaction, it is subject to the statute of limitations applicable to the claim raised by the set-off.[20] On the other hand, a "recoupment 'is the setting up of a demand arising from the *same transaction* as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of

17 *See generally* Mark VII Financial Consultants Corp. v. Smedley, 792 P.2d 130, 133 (Utah Ct. App. 1990) (concluding "that the distinctions between recoupment, setoff, and counterclaim have likewise been dissolved in Utah"). However, the Utah Court of Appeals was referring to eliminating the distinction only insofar as pleading is concerned. The *Smedley* court did not face the issue of time-barred claims. For actions barred by the statute of limitations, however, the distinction between recoupment and set-off is still alive in Utah. For example, the Utah Supreme Court, in *Sharon Steel Corp. v. Aetna Casualty & Surety Co.*, 931 P.2d 127 (Utah 1997), faced a situation in which a cross-claim was potentially time-barred. In overcoming the statutory bar, the court explained the difference between recoupment and setoff and then allowed the cross-claim because it was "not an independent action for affirmative relief. . . . [Accordingly, it] relate[d] back to the date of the filing of the original complaint and was therefore timely filed." *Id.* at 133; *see also* Dudek, Inc. v. Shred Pax Corp., 626 N.E.2d 1204, 1212 (Ill. App. Ct. 1993) (noting that Illinois had statutorily eliminated the differences between recoupment, setoff, and counterclaim). The *Dudek* court did not address time-barred claims. Further, the courts in Illinois have not made it clear whether the distinction between recoupment and set-off has been eliminated for procedure or if substantively there is no longer any difference.

18 Ghingher v. Fanseen, 172 A. 75, 78 (Md. 1934).

19 Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1398 (9th Cir. 1996) (quoting Citizens Bank v. Strumpf, 516 U.S. 16, 18 (1995), and 4 COLLIER ON BANKRUPTCY ¶ 553.03, at 553–14 (Lawrence P. King et al. eds., 15th ed. 1995)).

20 *See generally In re* Gober, 100 F.3d 1195, 1207–08 (5th Cir. 1996); Maryland Cas. Co. v. Shafer, 208 P. 197, 198 (Cal. Ct. App. 1922); Van Ness v. Kenyon, 101 N.E. 881, 884 (N.Y. 1913).

such claim.'"[21] This difference also explains why, while a claim for set-off may be barred by the statute of limitations, a claim for recoupment is not so long as the primary claim itself is not time-barred.[22]

2. Recoupment and the Statute of Limitations

As an independent action, a claim for set-off is controlled by the applicable statute of limitations. However, recoupment—because it is a defense—is controlled by the statutory limitation of the main action and not by the limitations applicable to the action if the recoupment had been pleaded as an independent claim.[23] Consider our original illustration based on the hypothetical companies *A* and *B*. For *B* to recoup its five million dollars three things must be true: (1) the two claims (the one for ten million dollars and the other for five million) must be transactionally related; (2) *A*'s claims must be timely; and (3) *B*'s claim must be set up as a defense to *A*'s claim.[24]

For example, the court in *Nathan v. McKernan*[25] held that "the defense of recoupment or reduction of plaintiff's claim must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations."[26] In *Nathan*, the plaintiff moved to foreclose on a real estate mortgage. In defense, the McKernans claimed, by way of recoupment, fraud on the part of the mortgagee. The plaintiff argued that a fraud defense was barred by the statute of limitations because the defendants took no action for more than four years after discovering the plaintiff's alleged fraud. However, the court concluded that so long as the recoupment arises out of the same transaction as the plaintiff's claim, and provid-

21 *Newberry*, 95 F.3d at 1399 (quoting 4 COLLIER ON BANKRUPTCY ¶ 553.03, at 553–15 (Lawrence P. King et al. eds., 15th ed. 1995)).

22 *See* Bull v. United States, 295 U.S. 247, 262 (1935).

23 *See* Reiter v. Cooper, 507 U.S. 258, 264 (1993) ("Recoupment claims are generally not barred by a statute of limitations so long as the main action is timely.").

24 *See* United States v. United States Cas. Co., 218 F. Supp. 653 (D. Del. 1962).

> An incident to the principle of recoupment is well expressed in *Bull v. United States*, 295 U.S. 247, 262 [(1935)], "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely." This seems to be the rule of universal acceptation both prior to the Rules of Civil Procedure and subsequent thereto.

Id. at 655–56.

25 Nathan v. McKernan, 101 N.W.2d 756 (Neb. 1960).

26 *Id.* at 766.

ing that the plaintiff's claim is timely, then the recoupment is not barred by the statute of limitations.[27]

The discussion in *McCoy v. Goldberg*[28] is quite instructive because it demonstrates the ability of recoupment to overcome time constraints—even when multi-jurisdictional issues must be considered. In *McCoy*, the plaintiff (an elderly widow) sued Goldberg (an investment advisor) for urging her to make several unwise investments. The defendant filed a third party complaint against eleven limited partnerships (NTS Properties) in which the plaintiff had invested, seeking indemnity and/or contribution. The defendant argued that the partnerships failed to live up to their sales pitches. Before trial, the court severed the third party complaint from the primary action. The jury then found for the plaintiff based on a breach of fiduciary duty.

More than two years after the initial action was filed, NTS sought leave to amend its answer to include four recoupment defenses for breach of contract based on the dealer management agreements and soliciting dealer agreements entered into between Goldberg and NTS. The court noted that leave to amend may be granted even when there is substantial delay unless the movant acted in bad faith, the action will prejudice the non-movant, or the action is futile. Goldberg attempted to thwart the amended answer by claiming that the contract

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27 An interesting question is whether the defendant may recoup more than the plaintiff's claim. In other words, what happens if the defendant's counterclaim is larger than the plaintiff's primary claim? To use the earlier recoupment illustration, assume that company *A* now owes *B* $15 million but that *B* still owes the original $10 million. If *A* sues *B* for the $10 million, will the court allow *B* to recoup its entire $15 million or just the amount of the offset? While nothing close to a uniform answer is available, what authority there is seems to support the position that a recoupment cannot exceed the amount of the plaintiff's claim. In *Molnar v. Hedden*, 615 A.2d 647, (N.J. Super. Ct. App. Div. 1992), the court observed that a counterclaim "seeking greater damages than are sought by the complaint is, strictly speaking, not properly classifiable as a recoupment." *Id.* at 653. Similarly, the court in *Easy Living, Inc. v. Whitehead*, 417 N.E.2d 591, 596 (Ohio Ct. App. 1979), stated that because Whitehead's "defense arose out of the same transaction as the claim against her and since she claimed damages no larger than the claim against her, her defense was in the nature of a recoupment rather than a set-off." On the other hand, the court in *Multivision Northwest, Inc., v. Jerrold Electronics Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972) stated,

> According to at least one source, if the amount due defendant exceeds the amount due plaintiff and affirmative action is barred by limitations, defendant cannot recover the excess by way of recoupment. . . . Nevertheless, in what seems to be the only Georgia appellate decision on point, affirmative relief was allowed. Allowing affirmative relief seems correct under the Georgia approach.

Id. at 218.

28 845 F. Supp. 155 (S.D.N.Y. 1994).

claims were barred by the statute of limitations and, therefore, an amended complaint would be an exercise in futility.

Because the laws of three states governed the contract claims, the court examined the statute of limitations for each jurisdiction. As for Kentucky, the court noted that the fifteen-year statute of limitations had not expired, and therefore, there could be no bar. As for Missouri and New York, the court noted that each of those states specifically allows recoupment claims notwithstanding any time problems. Accordingly, because the contract defenses survived the time limitations, amendment of NTS's answer was not futile.

3. Recoupment and the Transactional Relation Requirement

Of equal significance, because it demonstrates the need of transactional relatedness, is the court's analysis in *Cauffiel Machinery Co. v. Eastern Steel & Metal Co.*[29] In *Cauffiel*, the plaintiff brought an action to collect on a promissory note. The defendant originally counterclaimed for breach of warranty based on the underlying sales contract. The court held that the plaintiff did breach the sales contract but reasoned that "[a]ffirmative relief . . . based on breach of contract . . . would be barred by the statute of limitations." The court stated, "The statute of limitations [did] not, however[,] operate to bar strict defenses . . . which [grew] out of the same transaction connected with plaintiff's claim. Appellee's defense by way of recoupment was not barred and was properly considered"[30] because the claim arose out of the same transaction as the plaintiff's cause of action.

For a more formalized explanation of the transactional relation requirement, consider the facts and holding in *Berger v. City of North Miami.*[31] This case arose out of a failed attempt to construct a municipal golf course. North Miami granted Munisport (predecessors of Berger) a contract to construct and operate a golf course. Part way into the contract, the Environmental Protection Agency took steps to mitigate hazardous waste problems created by Munisport's landfilling operation. North Miami—after agreeing with the EPA to take responsibility—sued to compel Munisport to bear part of the costs of cleanup. In response, Berger (as estate representative) tried to revive a time-barred contract claim by way of recoupment.

However, the *Berger* court rejected the plaintiff's recoupment defense. In doing so, the court made the following observation: "Distilled to its essence, the attempted assertion of contract-based

29 391 N.E.2d 743 (Ohio Ct. App. 1978).

30 *Id.* at 745–46 (citations omitted).

31 820 F. Supp. 989 (E.D. Va. 1993).

'recoupment' claims in response to North Miami's CERCLA counterclaim represents nothing more than an imaginative, yet ultimately futile, effort to resurrect stale, time-barred claims that should have been raised long ago."[32]

Despite the apparently restrictive holding in *Berger*, the court did not state that time-barred contract claims could not be raised as a recoupment defense. Indeed, the court did just the opposite when it observed that recoupment "enjoys continuing vitality today as a means of asserting an otherwise time-barred counterclaim."[33] The court, however, defined the boundaries of recoupment. In so doing, the court articulated the following three requirements for a proper recoupment defense. The "claim must: (i) arise from the same transaction or occurrence as the main claim; (ii) seek relief of the same kind and nature as that sought by the main claim; and (iii) be defensive in nature and seek no affirmative relief."[34]

The *Berger* court then focused on the first of the requirements and stated that the plaintiff's recoupment defense based on breach of contract did not arise out of the same transaction as the defendant's CERCLA claim. In the instant case, the defendant granted Frank Kaufman a thirty-year lease to develop and operate a local golf course. As noted earlier, during the construction phase, the EPA intervened to stop contamination problems caused by landfilling operations. Kaufman eventually abandoned the construction project.

Soon thereafter, the city of North Miami and the EPA entered into a consent decree in which the city agreed to pay the cleanup costs of the project. After Kaufman's death, the city asserted a claim against the estate for partial reimbursement of the cleanup costs. The estate (through Morris Berger, the personal representative of Kaufman's estate) filed an action seeking to absolve it of any liability. North Miami counterclaimed, seeking to compel the estate to pay a share of the costs. The estate raised a recoupment defense for breach of the original contract (for the construction of the golf course) between Kaufman and North Miami.

On these facts, the *Berger* court ruled that the CERCLA claim was not sufficiently related to the construction contract to allow a recoupment defense to the time-barred claim. In doing so, the court applied the Federal Rule of Civil Procedure 13(a) "same transaction" test to determine whether the recoupment defense was sufficiently related to

32 *Id.* at 995.

33 *Id.* at 992.

34 *Id.*

the primary claim to enable it to survive the statute of limitations.[35] Accordingly, the court noted that Rule 13(a) requires an examination of three factors: "(i) whether issues of fact and law raised by the claim and counterclaim are largely the same; (ii) whether substantially the same evidence bears on both claims; and (iii) whether any logical relationship exists between the two claims."[36]

In light of a Rule 13(a) analysis, the court made several observations. First, CERCLA requires the application of federal law and involves inquiries into the identity of the differing parties responsible for the contamination. On the other hand, the breach of contract claim involves the application of state law when the parties are all defined by the contract. Further, because CERCLA issues differ from contract issues, the evidence must, by definition, be different. Finally,

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35 The pertinent part of the Rule states,

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

FED. R. CIV. P. 13(a). In determining what "same transaction" means, courts have generally applied a logical relation test. The Seventh Circuit has observed,

> The Fourth and Fifth Circuits both applied the "logical relationship" test to the debt counterclaims before them. This court considers the logical relationship test crucial in determining whether a claim and counterclaim arise from the same transaction or occurrence for purposes of Rule 13(a). We have observed that whether a particular counterclaim should be considered compulsory depends not so much on the immediacy of its connection with the plaintiff's claim as upon its logical relationship to that claim. This test is to be applied flexibly in order to further the policies of the federal rules in general and Rule 13(a) in particular.

Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1291 (7th Cir. 1980) (internal citations omitted). *But see* Newberry Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392 (9th Cir. 1996). In *Newberry* the Ninth Circuit stated,

> For the purposes of recoupment, a mere logical relationship is not enough: The fact that the same two parties are involved, and that a similar subject matter gave rise to both claims . . . does not mean that the two arose from the "same transaction." Rather, both debts must arise out of a single integrated transaction so that it would not be inequitable for the debtor to enjoy the benefits of that transaction without meeting its obligations. Use of this stricter standard for delineating the bounds of a transaction in the context of recoupment is in accord with the principle that this doctrine, as a non-statutory, equitable exception to the automatic stay, should be narrowly construed.

Id. at 1403 (citing Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984)).

36 *Berger*, 820 F. Supp at 992–93.

there is no necessary relationship between the construction project and the parties' liability for hazardous waste contamination.

Therefore, the holding in *Berger* does not necessarily prohibit resurrecting time-barred claims. However, the court's analysis is sound, and its understanding of recoupment is based on a systematic application of case law. Accordingly, the case stands for the narrower proposition that recoupment is subject to a very specific legal analysis, and therefore, attorneys are advised to carefully construct a proper recoupment defense.

B. Acknowledgment or Promise

It is generally recognized that a time-barred claim does not extinguish an action—only a remedy.[37] Thus an unqualified acknowledgment or a promise to pay will typically result in revival of the time-barred action. "[I]n order to continue or to revive the cause of action . . . there must be either an express promise of the debtor to pay that debt, or else . . . there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor."[38]

1. The Need to Be Clear

Fundamentally, then, for an acknowledgment to have its desired effect, it must be stated clearly. Accordingly, a debt based on a time-barred claim can be revived by "either an express unconditional promise to pay a subsisting debt, a conditional promise to pay such a debt if there is evidence to show that the condition has been performed, or an acknowledgment of such a debt from which a promise to pay may be implied."[39] While an acknowledgment must be clear and unequivocal,[40] "[i]t is not essential that the acknowledgment be

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37 *See* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

> At the time the Constitution was adopted the rule was already well established that suit would lie upon a promise to repay a debt barred by the statute of limitations—on the theory, as expressed by many courts, that the debt constitutes consideration for the promise, since the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld.

Id. at 725

38 Shepherd v. Thompson, 122 U.S. 231, 235 (1887).

39 Potterton v. Ryland Group, Inc., 424 A.2d 761, 763 (Md. 1981).

40 *See* GE Med. Sys. v. Silverman, No. CIV.A.96-4596, 1998 WL 54361, at *3 (E.D. Pa. Feb. 2, 1998).

> A clear, distinct and unequivocal acknowledgment of a debt . . . is sufficient to toll the statute. There must, however, be no uncertainty either in the

expressly stated in such words as 'I acknowledge this as an existing debt,' or 'I am liable on these bonds.' It is enough if language is used from which the acknowledgment may be fairly inferred."[41]

In *Buxton v. Diversified Resources Corp.*,[42] the court was faced with a claim for a potentially time-barred loan made by John Buxton to Diversified Resources. While Buxton claimed that a note was executed to secure the loan, the note itself could not be produced. However, a series of audit letters were introduced into evidence. These letters (which were signed by the president of Diversified) indicated that Diversified was indebted to Buxton in the amount of $20,000. In holding that these letters constituted a proper acknowledgment, the court noted that an acknowledgment does not have to contain the term "acknowledge." As the court stated, the key was whether "Diversified knowingly represtent[ed] to Buxton that [it] owed a debt to Buxton. Obviously it did."[43]

2. The Acknowledgment Must Be Unqualified

An acknowledgment "must be a clear, distinct, and unqualified admission."[44] While *Buxton* establishes that an acknowledgment can be reasonably inferred, there must still be some basis for the court to hold that the defendant has actually admitted a debt. Thus it was held in *Stefek v. Helvey*[45] that a notation on a check that stated "July 1975 payment on 1970–1971 [hurricane] repair under July 9, 1971 invoice of $11,062.04" did not pass as an unqualified acknowledgment.[46] The issue in *Stefek* was whether such a notation could toll the statute of limitations. The parties had contracted for construction repair work on a local motel and the contract specified that payment would be made by means of invoices. The contractor would send invoices to the architect for approval and payment. The court noted that the first

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acknowledgment or in the identification of the debt; and the acknowledgment must be plainly referable to the very debt upon which the action is based; and also must be consistent with a promise to pay on demand and not accompanied by other expressions indicating a mere willingness to pay at a future time.

Id.

41 Buxton v. Diversified Resources Corp., 634 F.2d 1313, 1317 (10th Cir. 1980) (citing Victory Inv. Corp. v. Muskogee Elec. Traction Co., 150 F.2d 889, 891 (10th Cir. 1945)).

42 634 F.2d 1313 (10th Cir. 1980).

43 *Id.* at 1318.

44 Doughty v. Bayne, 160 A.2d 609, 611 (Md. 1960).

45 601 S.W.2d 168 (Tex. Civ. App. 1980).

46 *Id.* at 170.

four invoices were approved and paid. The fifth invoice was eventually paid by the check with the notation referred to earlier. The court observed, however, that because the "notation [did] not unequivocally acknowledge . . . the debt set out by the sixth invoice, nor [did] it express a willingness to pay,"[47] there was insufficient proof of an acknowledgment of the remaining debt. The point seems to be that while the notation could have revived the fifth invoice (had it been time-barred), it could not serve to revive any related debts it did not clearly reference.

3. Timing of an Acknowledgment.

Finally, an acknowledgment can occur either after the statute of limitations has expired[48] or before the limitations period has run—in which case an acknowledgment tolls the statute of limitations.[49] Take, for example, the situation in *James v. Thurn*.[50] Peter James owed several thousand dollars to Vincent Thurn—secured by five notes. James did not repay the money owed, and Thurn failed to collect before the statute of limitations expired on some of the notes. However, Thurn offered to settle all of the debts for a lesser amount of cash and 580 shares of stock. James accepted, in writing, Thurn's proposal, but he failed to follow through as agreed. When Thurn sued to collect, the court observed that James's written acceptance of the settlement "clearly acknowledged the existence of the debt and revived the remedy insofar as those notes which had come due more than three years prior to the date of the written acknowledgment were concerned and tolled the statute of limitations as to those upon which limitations had not yet run."[51]

C. Equitable Estoppel

An equitable estoppel argument based on justifiable reliance of settlement negotiations can, in a proper case, prevent a defendant from relying on a time-barred defense.[52] However, the mere fact of

47 *Id.* at 171.

48 *See* Potterton v. Ryland Group, Inc., 424 A.2d 761, 765 (Md. 1981).

49 *See* James v. Thurn, 290 A.2d 490, 493 (Md. 1972).

50 *Id.*

51 *Id.* at 492.

52 *See* Hollins v. Yellow Freight Sys., Inc., 590 F. Supp. 1023, 1028 (N.D. Ill. 1984) ("Equitable estoppel will only be invoked, however, where a defendant made statements during the course of settlement negotiations which were calculated to lull the plaintiff into inaction and to induce a reasonable belief that the claim would be settled without suit.").

settlement negotiations is insufficient to support a claim of estoppel.[53] A demonstration of reliance is essential to establish a credible estoppel argument.[54]

Accordingly, if the negotiations are combined with promises or actions that induce the relying party not to file suit, then the opposing party may be estopped from claiming a statute of limitations defense. As the court in *Howard University v. Cassell*[55] held, the "[d]efendant must have done something that amounted to an affirmative inducement to plaintiffs to delay bringing action."[56]

1. Estoppel Factors

Several factors come into play in determining whether estoppel is warranted. Preliminarily, it makes little difference whether a party has knowledge of the statute of limitations. As the court in *United States v. Fidelity & Casualty Co.*[57] stated, "In those cases which have commented upon . . . the attorney's lack of awareness of the statute, this factor has not been considered of great significance. Furthermore, there appears no reason in principle why knowledge of the statutory period should be a critical factor in the invocation of equitable estoppel."[58]

In *Trustees of the American Federation of Musicians and Employers' Pension Fund* v. *Steven Scott Enterprises*,[59] the court outlined the four ele-

53 *See* Gieringer v. Silverman, 539 F. Supp. 498, 503 (E.D. Wis. 1982) ("Negotiations alone will not bring into play the doctrine of equitable estoppel, although a promise to pay may do so, particularly if the plaintiff failed to file suit due to reliance on the promised payment.").

54 *See* Office & Prof'l Employees Int'l Union v. Brownsville Gen. Hosp., 186 F.3d 326, 336 (3d Cir. 1999) ("[T]he party claiming estoppel must show (1) a material misrepresentation by the defendant, (2) reasonable reliance by the party claiming estoppel, and (3) damages flowing from that reliance.").

55 126 F.2d 6 (D.C. Cir. 1941).

56 *Id.* at 12 (quoting Hornblower v. George Washington Univ., 31 App. D.C. 64, 75, (D.C. 1908)); *see also* Henry Prods. Co. v. United States, 180 Ct. Cl. 928, 930 (1967) (stating that estoppel does not prohibit a statute of limitations defense based on optimistic negotiations that settlement was likely); Murphy v. Merzbacher, 697 A.2d 861, 866 (Md. 1997).

> [E]quitable estoppel will not toll the running of limitations absent a showing that the defendant "held out any inducements not to file suit or indicated that limitations would not be pleaded," and that the plaintiff brought his or her action within a reasonable time after the conclusion of the events giving rise to the estoppel.

Id. (quoting Booth Glass Co. v. Huntingfield Corp., 500 A.2d 641, 645 (Md. 1985) (quoting Nyitrai v. Bonis, 292 A.2d 642, 645 (Md. 1972))).

57 402 F.2d 893 (4th Cir. 1968).

58 *Id.* at 900.

59 40 F. Supp. 2d 503 (S.D.N.Y. 1999).

ments of a proper estoppel claim. According to the court, the "defendant must prove all four elements of equitable estoppel, which are (1) a promise, (2) reliance on that promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced."[60]

2. Reliance

The most important factors, however, are whether the defendant made a promise to pay or settle at some point in the future or has, either by words or actions, induced the plaintiff not to sue. The Seventh Circuit once made the observation that "the cases are legion that a promise to pay a claim will estop a defendant from asserting the applicable statute of limitations if the plaintiff relied in good faith on defendant's promise in forbearing suit."[61] Accordingly, if one party induces another not to sue, then the inducer cannot be heard to complain when the court refuses to listen to his assertion that the action is time-barred.

The court in *McWaters & Bartlett v. United States* stated the oft-cited rule of estoppel:

> Estoppel arises where one, by his conduct, lulls another into a false security, and into a position he would not take only because of such conduct. Estoppel, in the event of a disputed claim, arises where one party by his words, acts, and conduct led the other to believe that it would acknowledge and pay the claim, if, after investigation, the claim were found to be just, but when, after the time for suit had passed, breaks off negotiations and denies liability and refuses to pay. To constitute estoppel there must be deception relied upon by the other to his detriment.[62]

Take, for example, the case of *Scarborough v. Atlantic Coast Line Railroad Co.*[63] Alton Joseph Scarborough, Jr. (the plaintiff-appellant),

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60 *Id.* at 508.

61 Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067, 1071 (7th Cir. 1978); *see also* Bergeron v. Mansour, 152 F.2d 27, 30 (1st Cir. 1945).

> A person is estopped from denying the consequences of his conduct where that conduct has been such as to induce another to change his position in good faith or such that a reasonable man would rely upon the representations made. . . . Nor is an express promise to waive the statute of limitations necessary to estop a party from pleading the statute as a defense.

Id. (citations omitted); *see also* Matteucci v. Chain Drug Mktg. Ass'n, No. 96-1596, 1997 WL 3435, at *2 (7th Cir. Jan. 2, 1997) (agreeing that "the doctrine of equitable estoppel may suspend the running of the limitations period during settlement discussions where one party to negotiations promises not to plead the statute of limitations pending settlement talks").

62 272 F.2d 291, 296 (10th Cir. 1959).

63 178 F.2d 253 (4th Cir. 1949).

while employed by the railroad, was injured in a collision. The railroad—through several of its agents—asked Scarborough not to file suit until he was twenty-one. (At the time, Scarborough was seventeen.) The railroad insisted that Scarborough wait that long in order to determine the full extent of his injuries. In return, the railroad promised to pay the full extent of Scarborough's claim. Upon turning twenty-one Scarborough requested settlement of the claim, but the railroad denied all liability and raised the defense of the statute of limitations. In holding for Scarborough, the court observed,

> One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.[64]

D. Agreement to Waive or Extend the Statute of Limitations

Parties to a dispute may agree either to waive or extend the statute of limitations.[65] For example, under Minnesota law parties to a contract may waive the statute of limitations for a reasonable time.[66] In California, waiver is controlled by section 360.5 of the *Code of Civil Procedure.* For tolling agreements signed before the expiration of the limitations period, the *California Code* allows a four-year waiver running from the date of expiration. For agreements signed after the limitations period, the statute may be tolled for four years from the date of signing. California's four-year limit appears to be aimed at avoiding "perpetual contracts."[67]

Tolling agreements receive a particularly broad reading in Maryland. For example, in *Milton Co. v. Council of Unit Owners,*[68] the parties negotiated an agreement to extend the statute of limitations for claims based on implied warranties. However, the court affirmed the lower court's interpretation that expanded the agreement to extend the "Tolling Agreement to apply to all of the claims asserted in this action . . . [because] the operative provision of the Tolling Agreement

64 *Id.* at 258 (quoting Howard v. West Jersey & S.S.R. Co., 141 A. 755, 757–58 (N.J. Ch. 1928)).

65 *See* Hunter-Boykin v. George Washington Univ., 132 F.3d 77, 80 (D.C. Cir. 1998) ("Numerous other courts also have applied the usual rule that, in the absence of a legislative indication to the contrary, agreements to extend the statute of limitations are permitted without specific statutory authorization.").

66 Collins v. Environmental Sys. Co., 3 F.3d 238, 241–42 (8th Cir. 1993).

67 *See* California First Bank v. Braden, 264 Cal. Rptr. 820, 822 (Cal. Ct. App. 1989).

68 729 A.2d 981 (Md. 1999).

is paragraph one under which the Petitioners covenant not to raise limitations 'with respect to any suit.'"[69] In addition, Maryland has no statutory or case-law requirements directing the length of the waiver period.

The preceding analysis suggests that while agreements to waive or extend are routinely allowed, there are sufficient differences between the various states to prevent any general conclusions. A prudent attorney must, accordingly, research diligently the relevant jurisdictions in order to incorporate any peculiar requirements into the client's waiver or extension agreement.

II. WHY REVIVE TIME-BARRED CLAIMS

As already noted, time-barred claims may not be as final as one might suppose. However, the fact that a claim—otherwise barred by the running of the statute of limitations—can be revived does not necessarily mean that it should be revived. In other words, what justice is there in allowing the resurrection of a claim that has lain dormant for so long that it raised the presumption of finality? What purpose is served in subverting time-honored principles of claims limitations? The California Court of Appeals recently stated,

> Two major purposes underlie statutes of limitations—protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defense on the merits, and requiring plaintiffs to diligently pursue their claims. . . . "The general rule governing statutes of limitation is that the time for commencing an action continues to tick away so long as the proposed defendant can be sued and a personal judgment obtained against him. . . ." However, in an attempt to avoid unjust application of statutes of limitations where circumstances effectively render timely commencement of an action impossible or virtually impossible, a statute of limitations may be "tolled," i.e., its operation temporarily suspended during the pendency of a particular condition specified by statute or judicial decision. . . . Once the condition is lifted, the statute of limitations will continue to run.[70]

As the above opinion acknowledged, statutes of limitations are designed to protect defendants from plaintiffs who fail to diligently pursue their claims. Or, as the United States Supreme Court recently stated, "The statute of limitations establishes a deadline after which

69 *Id.* at 987.

70 Grell v. Laci Le Beau Corp., 87 Cal. Rptr. 2d 358, 361–62 (Cal. Ct. App. 1999) (quoting Bigelow v. Smik, 85 Cal. Rptr. 613, 615 (Cal. Ct. App. 1970)).

the defendant may legitimately have peace of mind . . . ."[71] Even though Americans are a litigious people,[72] we still believe it is important to come to a time of finality. Statutes of limitations provide that finality. The obvious question then is, "Why should we allow legal arguments to skirt the finality of a time-barred claim?"

The answer to that question is straight forward enough: as strongly as we may desire finality, we desire justice even more.[73] That answer may seem a bit naive, especially in a popular culture that exalts relativism over certainty.[74] Nevertheless, there still exists, within each person, an urge to seek the good.[75] And just as plainly, we are willing to forsake finality in order to protect some higher principle. The question is, "What is that higher principle?" As Justice Story observed,

> It is plain, therefore, that when the remedy is said to be extinguished by a prescription, and not the right, we are not to understand the term "right," in its technical legal sense, but merely as a moral obligation and claim in natural justice. In the common law, a right always supposes some mode, by which it can be enforced. It may be by action, or by entry, or retainer. But it is always contemplated by law, that there is some mode, by which it may legally be enforced.[76]

This Section of the note argues that each of the four strategies for reviving a time-barred claim relates to a higher principle of natural justice. It is that principle of justice that, as a body politic, we treasure

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71 Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980).

72 *See generally* Louis Fischer, *When Courts Play School Board: Judicial Activism in Education*, 51 W. EDUC. L. REP. 693, 702 (1989) ("Americans are today, and have always been, a litigious people."); Dan Fenno Henderson, *Security Markets in the United States and Japan: Distinctive Aspects Molded by Cultural, Social, Economic, and Political Differences*, 14 HASTINGS INT'L & COMP. L. REV. 263, 264 (1991).

> Americans are both the most litigious and the most individualistic of people—to a fault some would say, because it is not clear that certain aspects of the American "me generation" are the model of the global future. For Americans, individualism means legalistic rights implemented by justiciable law, lawsuits, and lawyers.

Id.

73 *See* United States v. City of Chicago, 978 F.2d 325, 333 (7th Cir. 1992) (stating affirmatively that "we cannot put our desire for finality in the way of rendering substantial justice").

74 *See* Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995 (1986) (arguing that relativistic ideas are widespread).

75 *See* Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 227 n.44 (1995) (noting that the basic inclinations of man includes seeking the good).

76 Le Roy v. Crowninshield, 15 F. Cas. 362, 369 (D. Mass. 1820) (No. 8269).

more than a general conclusion that rights are extinguished after some passage of time. Justice, a broad concept, raises many questions—nuances if you will—that a Note like this one simply cannot address. However, a certain amount of common ground can be established. From this common ground, a moral understanding of the strategies for reviving a time-barred action can be discussed. As a broad concept, justice works itself out in a variety of ways.[77] That fact, however, does not mean that justice can mean anything and so mean nothing. This Note argues that justice is rooted in the soil of moral truth.[78]

A. Recoupment

Moral laws are not always easily applied.[79] Just because a law is a just law does not mean it will always be justly applied. Any law rigidly applied will sweep together both the good and the bad. One commentator states,

> It is simply true that rules are relatively crude weapons to combat certain evils, and they sweep from the path much that we would not like swept if we could find a way to separate "wheat from chaff."
>
> Statute of limitations and statute of fraud defenses are examples of such rules. We want, in the former case, for people not to sit on their legitimate claims too long because of various policy reasons including the fact that evidence grows stale or gets lost. In the latter case, we want the solemnization of a writing out of fear that fraudulent claims will be advanced. There are good reasons for these rules, but it is clear they will sometimes be used to defeat claims which are both substantively just and otherwise relatively provable.[80]

As explained earlier, recoupment is a legal argument based on a defensive claim arising out of the same basic facts as the positive claim. As a very simple example, consider two friends—John and Tom. On day one, John borrows ten dollars from Tom and promises to repay

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77 *See* Brian Wilkinson, *Hugh Collins, Justice in Dismissal: The Law of Termination of Employment*, 15 COMP. LAB. L.J. 288, 288 (1994) (book review) ("One problem which may be expected to arise in any discussion of such a broad concept as justice is the variety of conceptions of justice which exist amongst individuals.").

78 *See* Walker v. City of Birmingham, 388 U.S. 307, 324 (1967) ("We believe in a system of law based on justice and morality.").

79 *See generally* Graham v. Collins, 506 U.S. 461, 505 (1993) (Souter, Blackman, Stevens, & O'Connor, JJ., dissenting) ("[A] 'new rule' of law, has proven hard to apply."); American Home Prod. Corp. v. Adriatic Ins. Co., No. 91-C-04-119, 1991 WL 236915, at *8 (Del. Super. Ct. Nov. 5, 1991) ("It's hard to apply the law of another forum and it's less valuable.").

80 Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 359 (1990) (citations omitted).

him on day six. On day five, Tom borrows five dollars from John and promises to repay him on day ten. On day fifteen, John sues Tom for failing to repay the five dollars. If this make believe jurisdiction has a twelve-day statute of limitations, John will recover his five dollars plus he will be allowed to keep the ten dollars he borrowed from Tom. This result is wrong. John gets the right to keep that which he does not own. Why should the legal system punish Tom just because he gave his friend an extra measure of grace? In the end, it does not; instead, we allow Tom to recoup the money owed to him.

"The purpose of recoupment . . . is to deter a plaintiff from waiting to file his or her action until a defendant's defenses to the action are time-barred."[81] In allowing a recoupment claim, then, courts are attempting to balance the legitimate right of a defendant to know—with some measure of certainty—that his obligation has come to an end, against a plaintiff's right to be treated justly. Or, as Professor Watson recently stated,

> The purpose of recoupment is not to provide a means to correct all mistakes or inconsistencies that arise after the expiration of the statutory period. That would denigrate the statute of limitations. Instead, its purpose is to provide protection against an offensive use of the statute of limitations that would produce an inequity tantamount to a fraud.[82]

While this explanation provides a moral understanding of recoupment, it does not provide a basis for—morally—distinguishing between set-off and recoupment. Accordingly, this Note offers the following as a tentative dividing line. It seems, almost intuitively, that people ascribe greater weight to some actions than to others. Call it a mental moral ledger. For some reason we distinguish between one action that calls for a response (like a thank you card for a gift) from another that does not (as when we find loose change hidden in the crevices of an old sofa).

We feel morally obligated in the first instance to make an appropriate response; however, the second instance—while creating a certain amount of pleasure—does not compel us to act. Similarly, set-off—because it is based on a separate action—is more like the loose change scenario. We would not say that because I found the change, you have a right to part of it just because you lost your watch. In like manner, recoupment is more like the thank you card for the gift. Be-

81 Ackerman v. Nat'l Property Analysts, Inc., 887 F. Supp. 494, 509 (S.D.N.Y. 1992).

82 Camilla E. Watson, *Equitable Recoupment: Revisiting an Old and Inconsistent Remedy*, 65 FORDHAM L. REV. 691, 753 (1996).

cause the actions flow from the same basic "good," we are more comfortable with importing a moral obligation to that situation.

B. Promise or Acknowledgment

It has been said that "[a] debt barred by the statute of limitations is still a debt, though the remedy upon it be suspended or gone. Its force as an existing obligation, even though only moral, is such that a promise to pay is binding without other consideration."[83] Take, for example, the facts and holding in *Ford v. Sweet*.[84]

Over the course of time, Gladys Mae Ford made several loans to her son-in-law, Herbert F. Sweet, who never repaid the loans. Sweet had as many excuses as he had requests for money. After several years and repeated appeals for repayment, Sweet sent a letter to Ford promising to repay her and setting a definite repayment schedule. When a lawsuit became necessary, Sweet claimed that the debts were no longer enforceable because the claims were time-barred. The trial court agreed and awarded summary judgment to Sweet.

On appeal, the Virginia Supreme Court—while acknowledging that the statute of limitations had indeed expired—recognized that a higher principle was at work. Sweet made an unconditional promise to repay his debt to his elderly mother-in-law. The court observed, "We construe Sweet's statement on the April 5 letter . . . as an acknowledgment of the indebtedness from which arose an implied promise to pay that removed the bar of the statute of limitations."[85]

In holding that a promise to repay a debt removed the obstacle of an expired statute of limitations, it appears that the Virginia Supreme Court elevated duty and a commitment to truth over finality. Sweet had a duty to fulfill a promise made to his mother-in-law. Of course that does not mean that every duty must or should be honored. In the main, however, it is good to fulfill one's vows. Yet because of moral weakness, people often need some encouragement to do the right thing. And so it is that human law is there to assist (even force) us to do good. As Saint Thomas put it,

> [S]ince some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evildoing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now

83 Woods v. Irwin, 21 A. 603, 603 (Pa. 1891).

84 297 S.E.2d 657 (Va. 1982).

85 *Id.* at 660.

> this kind of training, which compels through fear of punishment, is the discipline of laws.[86]

Saint Thomas's point, as it relates to time-barred actions, is that law should foster moral behavior. When the law (either by statute or common law) refuses to allow a person to resort to a limitations defense because she promised something else, then the moral good is enhanced. Saint Thomas would argue that one of the basic needs of people is the need to live in community.[87] However, community is damaged when lying is encouraged or allowed. A promise to pay what you owe (even if the limitations period has run) should be honored; and when a person refuses to honor the promise of his own free will, then it should be forced by positive law.

But if a promise should be fulfilled, why not simply enforce the original promise? In other words, the original debt, which may have been based on a promise, is just as morally binding, yet we do not ascribe a moral obligation to repay it when the limitations period has run. Why is this so? Partly, the answer stems from the fact that we, as a society, are willing to imply that a debt has been satisfied by the mere passing of time.[88] Of course, "the passing of a statute of limitations affects neither the unlawfulness of an underlying wrong nor the moral obligation of the wrongdoer, but only the remedy of one party to recover."[89] Or, as Justice Marshall once proclaimed, "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."[90] The point is that while the moral obligation to repay the debt survives, the state will not take action beyond a set time unless some event nullifies the concerns raised by the time constraints.[91]

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86 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, q. 95, art. 1 (Regnery Publ'g 1996).

87 Kmiec, *supra* note 75, at 222 n.44.

88 *See* Drake v. Tyner, 914 P.2d 519, 523 (Colo. Ct. App. 1996) (noting that there is a "presumption that, when the statute of limitations has run, the debt has been fully paid").

89 Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 427 n.139 (1996).

90 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200 (1819).

91 The whole argument seems to be based on a utilitarian justification. In other words, the good of the few must give way to the good of the many. This author is the first to acknowledge that this justification is less than satisfying. Part of the difficulty is because issues of "consideration" and "moral obligation"—phrases that have taken on a unique legal meaning based on various common law evolutions—complicate the argument. Unfortunately, a thorough review of those issues is beyond the scope of this Note. However, as the court in *Booth v. Hoskins*, 17 P. 225, 226 (Cal. 1888), stated,

> [t]he fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims

C. *Equitable Estoppel*

At the heart of an equitable estoppel defense is the naked proposition that you should not be allowed to take advantage of me just because I trusted you. In other words, deceit should not be rewarded. Saint Thomas would approve of laws forbidding deceit for two reasons: because people can choose not to lie and because a state that authorized lying could not long be maintained. As Saint Thomas said, "human laws [should] not forbid all vices . . . but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained."[92]

Parents teach their children not to take advantage of their siblings and their friends. Why? Because parents believe their children can measure up to this standard. Jesus more eloquently summarized the same idea when He instructed all of us to do unto others as we would have them do unto us.[93] Do we want to be misled? Then we should not mislead others. When our judicial system enforces an equitable estoppel defense, it is giving effect to the golden rule.

As an affirmation of this position, consider the facts and holding in *McNeely v. Walters*.[94] McNeely executed and delivered a promissory note to the defendant Alice Rogers. The note was secured by a properly executed deed of trust. When McNeely failed to repay the loan, Rogers attempted to sell the attached real estate. McNeely sought to restrain the sale of the property claiming two things: (1) that he never executed the note and deed of trust but that they were signed in his name by his brother; and (2) that the statute of limitations barred the claim.

The *McNeely* court conceded that there was sufficient proof that the brother without authority had executed the note and deed of trust. Nevertheless, the court held that the plaintiff's suit must fail upon the principle of equitable estoppel. The court observed that McNeely was fully aware of all the facts surrounding the transaction yet made no effort to disclaim the transaction. Accordingly, "[b]y remaining silent when it was his duty to speak, plaintiff has disadvan-

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which courts of equity should always act upon is, as suggested by the court below, that he who seeks equity must do equity.

Id.

The only question is whether we, as a society, are willing to allow the courts to enforce equity without limit.

92 *Supra* note 86, at q. 96, art. 2.

93 *See Matthew* 7:12.

94 189 S.E. 114 (N.C. 1937).

taged the defendants. He ought not to be heard now in repudiation of his former conduct."[95]

The *McNeely* court concluded by observing that equitable estoppel "is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play."[96] In other words, "[t]he essence of both fraudulent concealment and equitable estoppel is that defendant should not be allowed to lead the plaintiff into believing the statute of limitations would not be applied or to fraudulently conceal facts from the plaintiff and then profit thereby."[97]

D. Agreement to Waive or Extend the Statute of Limitations

It has been held that "[n]o contract can be sustained if it is inconsistent with the public interest or detrimental to the common good."[98] However, regarding contracts to waive or extend statutes of limitation, the Supreme Court of California has held "that the privilege conferred by the statute of limitations is not a right protected under the rule of public policy, but it is a mere personal right for the benefit of the individual which may be waived."[99]

In other words, waiving or extending the statute of limitations does not work a public harm. Accordingly, that agreement should be enforced. However, the waiver must be reasonable in duration. As the court in *First National Bank v. Arkansas Development Finance Authority* noted, "The precise issue is whether an agreement to waive the statute of limitations for all time, made at the inception of the contract, is void because it violates public policy. We hold that such an agreement is void and unenforceable."[100] Two points can be drawn from this case. First, the length of the waiver must be reasonable (waiving for all time obviously was not), and second, the waiver cannot be anticipatory—that is, the agreement cannot be made before there is an actual need for it.

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95 *Id.* at 115.

96 *Id.* (citation omitted).

97 Alaska Airlines, Inc. v. Lockheed Aircraft Corp., 430 F. Supp 134, 138 (D. Alaska 1977).

98 Vasquez v. Glassboro Serv. Ass'n, 415 A.2d 1156, 1162 (N.J. 1980).

99 Brownrigg v. De Frees, 238 P. 714, 716 (Cal. 1925). *But see* Yeshiva Univ. v. Fidelity & Deposit Co., 500 N.Y.S.2d 241, 243 (1986) ("An agreement to waive or even extend the Statute of Limitations, adopted at the inception of the contract and not after the cause of action has accrued, is against public policy and void.").

100 870 S.W.2d 400, 402 (Ark. Ct. App. 1994).

The purpose of an agreement to waive or extend the statute of limitations is, like any other contract, to give effect to private laws. But private laws, like any other law, must be just and fair.[101] In other words, contracts must respect the dignity of the person. So if a contract to waive or extend the statute of limitations is due to fraud, duress, or lack of consideration (to name but a few contract concerns), then the contract is void as against public policy.[102] But if the contract is fairly made, then courts will uphold it for the same reason courts uphold any other contract—because "[t]he purpose of contract . . . is to protect the ability of one free personality to engage in exchange transactions with another free personality."[103]

III. CONCLUSION

Time-barred contract claims can be revived. This Note has examined both legal and moral justifications for reviving them. In summary, society bars an action on a claim when the claimant sits on his rights. But, because of various justice concerns, there are times when a dead claim can be resurrected. While this Note has begun the process of plumbing the depths of the moral sea, much still remains to be done. But then again, the endless possibilities of moral legal philosophy provide the continued fodder for future papers.

101 *See* Cimino v. Firstier Bank, 530 N.W.2d 606, 616 (Neb. 1995) ("The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.").

102 *See* Bates v. Southgate, 31 N.E.2d 551, 558 (Mass. 1941) ("[C]ontracts or clauses attempting to protect a party against the consequences of his own fraud are against public policy and void where fraud inducing the contract is shown, whether that fraud was 'antecedent' to the contract or 'entered into the making' of it.").

103 Chad McCracken, Note, *Hegel and the Autonomy of Contract Law*, 77 TEX. L. REV. 719, 730 (1999).