The Four Phases of Promissory Estoppel

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I. INTRODUCTION

Promissory estoppel is supremely misunderstood. It is said that promissory estoppel is waning,[1] dying, traveling a road to irrelevancy.[2] Some pronounce its death, as promissory estoppel is reabsorbed into the womb of tort from which it emerged in the not too distant past.[3] Proclaiming the primacy of promise and bargain, others

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1. Phuong N. Pham, Comment, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263, 1264 (1994).

2. *See, e.g.*, Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 304 (1992).

3. GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974) ("'contract' is being reabsorbed into the mainstream of 'tort'"). Protecting a promisee's reliance interest in tort has received much thoughtful commentary. *See, e.g.*, P.S. ATIYAH, PROMISES, MORALS, AND LAW (1981); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 771-78 (1979) (noting the resurgence of reliance-based liability at the expense of consensual liability); Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 487 (1950); Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 32 (1979); Charles

warmly reaffirm the doctrine's vitality as authentic classical contract law in action.[4] Eschewing border wars, a few courteously allow the doctrine to rest in the shadowlands of tort and contract.[5] Emulating

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L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 52-54 (postulating promissory estoppel as an independent theory of obligation predicated on the tort principle of reliance rather than on the contract principle of consent); Warren A. Seavey, *Reliance on Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951). Some scholars suggest that the remedy for detrimental reliance should be a tort action to recover reliance damages. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 70 (2d ed. 1977); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1274-75 (1980) (constructing an analogy between broken promises and defective products).

4. *See* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 111 (1991) ("This Article shows that the prominence of reliance in the text of Section 90 and in the commentary on the section does not correspond to what courts do in fact. Judges actually enforce promises rather than protect reliance in Section 90 cases."). *See also* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 5 (1981) (for the "Death of Contract" theorist, "a cognizable injury must be a palpable loss identifiable apart from the expectation that the promise will be kept . . . ."); RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1981) ("Certainly reliance is one of the main bases for enforcement of the half-completed exchange, and the probability of reliance lends support to the enforcement of the executory exchange."); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 317 (1986) ("In sum, bargained-for consideration and nonbargained-for reliance are equivalent to the extent that the existence of either in a transaction may manifest the intentions of one or both of the parties to be legally bound."); Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 133 (1987) ("promissory estoppel . . . liability can be understood as contractual in the broad sense that the promisor intended to be legally bound under an objective standard . . . . "); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 905 (1985) ("In our view, the expansion of promissory estoppel is not, as some have argued, proof that contract is in the process of being swallowed up by tort. Rather, promissory estoppel is being transformed into a new theory of distinctly *contractual* obligation."); Juliet P. Kostrisky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 905 (1987) (focusing on the discrete, bargained-for promise as the basis of contractual liability). One of the most influential law review articles ever written recognizes that the reliance interest is central to contract law and explains that a chief rationale for protecting the reliance interest is to fulfill the reasonable expectations of a promisee. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 59-62 (1936). "The difficulties in proving reliance and subjecting it to pecuniary measurement are such that [people] knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to [them]." *Id.* at 62.

5. As a noted scholar over a century ago perspicuously observed regarding a passenger who detrimentally relied on a train company's timetable and was given a remedy because the timetable was probably a proposal to contract (and certainly a false representation): "The case is perhaps open to the remark that a doubtful tort and the breach of a doubtful contract were allowed to save one another from adequate criticism." FREDERICK POLLOCK, THE LAW OF TORTS 343 n.(t) (1887). *See also* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 445-46 (1987) ("In this article, we suggest that promissory estoppel serves two of the functions served by traditional contract and tort remedies available to parties in consensual relationships: the enforcement of some promises intended as legally binding and the imposition of liability to compensate for harm caused by some misrepresentations. . . . Under promissory estoppel, some promises intended as

truth torn into a thousand pieces, the dissimilar and conflicting scholarship surrounding promissory estoppel merits assured resolution and guidance for our future in social and commercial transactions. In the common law tradition, our courts, in their mountainous mass of promissory estoppel opinions and decisions, may provide that resolution and guidance.

The hard-core research and scholarship of identifying, analyzing, and resolving more than a thousand promissory estoppel cases has been accomplished and published.[6] Given the gracious plenty of text and footnotes in print, this Article's purpose is to summarize the extensive case law and literature regarding promissory estoppel and report the findings in a condensed, accessible form for serious consideration and future use. With that aspiration, two broad conclusions can be reported from the outset.

First, all American jurisdictions (including American Samoa, Guam, Puerto Rico, and the Virgin Islands) adopt and apply some form of "promissory estoppel," grounded in Section 90 of the Restatement (Second) of Contracts.[7] Moreover, two American jurisdictions (Georgia and Louisiana) adopt promissory estoppel by

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legally binding are enforced though some traditional formal requirement, such as the requirement of bargained-for consideration, is lacking. In addition, some promissory misrepresentations are remedied, though no remedy would be available under traditional contract and tort doctrines."); Mark P. Gergen, *Liability for Mistake in Contract Formation*, 64 S. CAL. L. REV. 1, 4 (1990) ("Yet, while we should resist altering bargained-for terms of a contract through torts (unless we are quite sure that a term is ill-advised), we might use torts or imposed terms in contracts to create rights and duties when, as in the [promissory estoppel] cases examined here, a right is not a subject of bargaining and the failure to provide for such a right seems not to be an indication of people's preferences."); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L. J. 343, 387 (1969) ("But the major impact of promissory estoppel in recent years may be that it has made the whole matter of classification or definition less important in the decision of contract cases. Change is in fact being effected by quiet manipulation of the familiar labels."); Orvill C. Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28, 45 (1949) ("No complete identification of the doctrine of promissory estoppel can be made: in the generalization of the doctrine, some 'reuniting of tort and contract principles' appears and this makes it hard 'to categorize the principle of promissory estoppel as one of "tort" or "contract."'). The border may also include property as the classification and jurisdictional "lines among not only tort and contract, but property as well have become increasingly blurred." Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANNUAL SURVEY OF AMERICAN LAW 139, 139 (1989).

6. The publications include four new sections in 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS §§ 8.10-8.13, at 35-237 (Joseph M. Perillo ed., rev. ed. 1996) [hereinafter HOLMES on CORBIN], and a 276-page article in Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 101 (1996) [hereinafter Holmes' *Restatement*].

7. The "promissory estoppel" decisions of each jurisdiction are collected and thoroughly analyzed in HOLMES on CORBIN, *supra* note 6, § 8.12.

statute.[8] Furthermore, an incipient and evolving body of federal common law of promissory estoppel, predicated primarily on Section 90 of the Restatement (Second) of Contracts, has arisen with the advent of the 1990s.[9]

Second, the root basis of the doctrine is equity. The research evidences that promissory estoppel is a syncretistic doctrine of civil liability, or, more simply, a theory of American civil liability. In four evolutionary stages (explained in Part II), the doctrine reconciles, blends, and unifies the presumed disparate classifications of contract, tort, and equity. Even more plainly, promissory estoppel is promissory estoppel—neither exclusively contract nor tort nor equity. The doctrine's synergistic nature is aptly summarized by the federal Second Circuit Court:

> Thus, the protean doctrine of 'promissory estoppel' eludes classification as either entirely legal or entirely equitable, and the historical evidence is equivocal. It is clear, however, that both law and equity exert gravitational pulls on the doctrine, and its application in any particular case depends on the context in which it appears. For example, where a plaintiff sues for contract damages and uses detrimental reliance as a substitute for consideration, the analogy to actions in assumpsit (law) is compelling. By contrast, when the plaintiff uses promissory estoppel to avoid a draconian application of the Statute of Frauds, the pull of equity becomes irresistible.[10]

However, given so many subissues and concerns regarding the purpose, scope and function of promissory estoppel in modern contract law, merely reporting these two encyclopedic conclusions may neither

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8. In 1981, the Georgia General Assembly enacted GA. CODE ANN. § 13-3-44, a verbatim enactment of Section 90 of the RESTATEMENT (SECOND) OF CONTRACTS (1981). In 1984 Louisiana changed its law to incorporate detrimental reliance, otherwise unknown to civil law systems, as an additional basis for the enforceability of obligations by a statute patterned after the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) and titled "Cause Defined; Detrimental Reliance," LA. CIV. CODE ANN. art. 1967 (West 1996). The statute permits a court to grant either specific performance or damages. *See* Christian Larroumet, *Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law*, 60 TULANE L. REV. 1209 (1986). Regarding Louisiana promissory estoppel law prior to 1985, see Frederick H. Sutherland, Comment, *Promissory Estoppel and Louisiana*, 31 LA. L. REV. 84 (1970).

9. The federal decisions are collected and analyzed in HOLMES on CORBIN, *supra* note 6, § 8.13, at 231-37. Federal courts are being asked to apply this evolving federal common law of promissory estoppel under sundry federal acts. Recognizing that promissory estoppel is an equitable theory used to avoid injustice and enforce good faith, federal courts are circumventing the preemption provisions of acts like ERISA, LMRA, and others in divining a remedy *sua sponte* and fashioning a federal promissory estoppel claim patterned primarily on the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

10. Merex A.G. v. Fairchild Weston Systems, Inc., 29 F.3d 821, 825 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 737 (1995).

quiet nor assuage the ongoing debate. The contemporary dialectic spawns serious issues to be resolved. These sundry issues can be organized around four categories of questions to be authoritatively answered. The following four groupings of questions historically mirror the four developmental phases in which the doctrine evolved in the common law tradition, as explained in Part II of this Article. The four developmental phases (estoppel, contract, tort, and equity) embody these four categories of questions posed in the scholarly debate:

1. Is estoppel from equity the basis of promissory estoppel, as its name suggests?[11] If so, is the doctrine a defensive shield used by American courts to estop another from raising a defense involving the statute of frauds, statute of limitations, lack of consideration, or the parol evidence rule?
2. With its basis in promise and assent, is promissory estoppel a contract doctrine? If so, is the doctrine a consideration substitute used by courts to enforce definite and unambiguous promises in commercial transactions by awarding expectation damages, including lost profits in an appropriate case?
3. Is the root foundation of promissory estoppel grounded in the tort of detrimental reliance? If so, is the doctrine an independent claim for relief recognizing a *duty* to prevent (or not cause) foreseeable reliance, a *right* reasonably to rely on promises (including promissory representations and assurances), and a *remedy* for injurious reliance?

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11. As explained in Part II, a more descriptive, accurate term would be "reliance consideration." Unfortunately, Professor Samuel Williston first popularized the term "promissory estoppel" in a one sentence explanation, stating that "since [the promisee] relies on a promise and not on a misstatement of fact, the term 'promissory' estoppel or something equivalent should be used to mark the distinction." 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139, at 308 (1st ed. 1920). Professor Arthur Linton Corbin found the use of estoppel to be misleading and the entire phrase in need of clarification: "In saying that the term 'promissory estoppel' is objectionable, the author [Corbin] must not be understood as disapproving decisions that make use of it." HOLMES on CORBIN, *supra* note 6, at 20. Nonetheless, mere terminology means little. Rather, it is the discrete facts that are significant in light of the duty that exists to rectify another's loss suffered in foreseeable, reasonable reliance on a promise. The New York Court of Appeals instructs regarding promissory estoppel: "We should not be distracted by the manner in which a theory of recovery is titled. On careful consideration, it becomes clear that the commentators do not disagree in result, but only in nomenclature." Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1248 (N.Y. 1983). Although it is customarily claimed that New York does not adopt promissory estoppel in commercial transactions, the extensive dissent in this case reasoned that the majority recognized promissory estoppel as a commercial cause of action. *Id.* at 1248-51 (Jasen, J., dissenting). For an analysis of the New York opinions as evidencing adoption of the doctrine in both charitable and commercial contexts, see HOLMES on CORBIN, *supra* note 6, at 149-58.

4. Is modern equity the "mother mold" of promissory estoppel with the doctrine's basis grounded in the equitable principles of good faith and conscience? If so, does the doctrine grant the court discretion to enforce one's right to rely reasonably on promises, promissory representations, and assurances by using the equitable doctrine to fashion a personalized remedy to achieve corrective justice between the parties?

Although the current legal literature is overflowing with diverse beliefs, insights, and responses[12] to these four groups of questions, our courts have provided assured guidance. The surprising "answer" is "yes" to

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12. In addition to the articles already noted, a sampling of promissory estoppel articles worthy of study include: Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: I*, 50 MICH. L. REV. 639, 873 (1952); Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: II*, 50 MICH. L. REV. 873 (1952); Carolyn Edwards, *Promissory Estoppel and the Avoidance of Injustice*, 12 OKLA. CITY U. L. REV. 223 (1987); Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373; Thomas C. Folsom, *Reconsidering the Reliance Rules: The Restatement of Contracts and Promissory Estoppel in North Dakota*, 66 N.D. L. REV. 317 (1990); Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659 (1988); Robert E. Hudec, *Restating the "Reliance Interest,"* 67 CORNELL L. REV. 704 (1982); Margaret N. Kniffin, *Innovation or Aberration: Recovery for Reliance on a Contract Offer, as Permitted by the New Restatement (Second) of Contracts*, 62 U. DETROIT L. REV. 23 (1984); Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247; Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383 (1983); Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 SW. L.J. 841 (1990); Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931 (1988); Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983); Michael B. Metzer & Michael J. Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139 (1980); Todd D. Rakoff, *Fuller and Perdue's The Reliance Interest as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203; Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908 (1937); W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197 (1990); Orvill C. Snyder, *Promissory Estoppel in New York*, 15 BROOK. L. REV. 27 (1949); Michael I. Swygert & Donald W. Smucker, *Promissory Estoppel in Florida: Growing Recognition of Promissory Obligation*, 16 STETSON L. REV. 1 (1986); James O. Bass, Jr., Comment, *Promissory Estoppel—Measure of Damages*, 13 VAND. L. REV. 705 (1960); William R. Collins, Comment, *The Enigma of Promissory Estoppel in New York*, 48 ALBANY L. REV. 822 (1984); Fred G. Gerald, Comment, *The Doctrine of Estoppel Gains a Foothold Against the Statute of Frauds*, 1 CAP. U. L. REV. 205 (1972); Stephen K. Griffin, Comment, *Promissory Estoppel—The Basis of a Cause of Action Which Is Neither Contract, Tort or Quasi-Contract*, 40 MO. L. REV. 163 (1975); George A. Ragland, Comment, *Promissory Estoppel and Oral Employment Contracts*, 24 WASH. & LEE L. REV. 347 (1967); Gary Shapiro, Comment, *C & K Engineering Contractors v. Amber Steel Co.: Promissory Estoppel and the Right to Trial by Jury in California*, 31 HASTINGS L.J. 697 (1980); Steve Alan Ungerman, Comment, *Extension of the Doctrine of Promissory Estoppel into Bargained-for Transactions*, 20 SW. L.J. 656 (1966); Joseph D. Weinstein, Comment, *Promissory Estoppel in Washington*, 55 WASH. L. REV. 795 (1980); Cheryl Volta Brady, Note, *Ravelo v. County of Hawaii: Promissory Estoppel and the Employment At-Will Doctrine*, 8 U. HAW. L. REV. 163 (1986); Frederic C. Nelson, Note, *The Requirements of Promissory Estoppel as Applied to Third Party Beneficiaries*, 30 U. PITT. L. REV. 174 (1968).

all of the foregoing four sets of questions. Case law accurately delineates the four evolutionary stages of promissory estoppel. As an overview, promissory estoppel has evolved in American case law in four developmental stages: (1) *Estoppel Phase*, consisting initially of "defensive equitable estoppel" to estop contract defenses based on statutes of limitations and the statute of frauds. In the second part of this first phase, courts have extended "estoppel" based on representations of facts to "promissory" representations and enforced the promissory basis of the representation, thereby creating an affirmative theory of relief. Thus, this first phase of promissory estoppel consists of defensive equitable estoppel and offensive equitable estoppel. (2) *Contract Phase*, in which promissory estoppel has developed as a consideration substitute which courts have used to validate promises and award traditional contract expectation damages. (3) *Tort Phase*, in which courts have recognized a promisee's right to rely and a promisor's duty to prevent (or not cause) reasonably foreseeable, detrimental reliance. During this third phase, courts have applied promissory estoppel offensively (independent of contract) to award reliance damages. (4) *Equity Phase*, in which 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. The remedy is discretionary with no mechanical bright line rule; it is equitably molded for each case and may include the full range of remedies (expectation, reliance, restitution, specific performance and exemplary). Part II of this Article considers these four evolutionary phases.

II. FOUR PHASES IN THE DOCTRINAL EVOLUTION OF PROMISSORY ESTOPPEL

This Part examines the four discrete phases (estoppel, contract, tort, and equity) in the development of promissory estoppel. A brief history and background of promissory estoppel's ancient roots will be outlined to provide a context for the modern doctrine. The theoretical basis for each phase is then explained in sections A through D. These sections illustrate how courts apply these phases and translate them into remedies for each phase. It will be seen that the modern doctrine combines all four phases of promissory estoppel to form a synergistic whole.

As a threshold perspective, the doctrine now labeled promissory estoppel is not a modern twentieth-century development arising from opinions based on Section 90 of the Restatements of Contracts. Rather, it is a venerable, ancient form of relief with historical origins

in both the common law action of assumpsit[13] and ancient equity decisions.[14] Promissory estoppel's ancient genealogy in equity and

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13. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1981) ("[E]nforcement of informal contracts in the action of assumpsit rested historically on justifiable reliance on a promise."). The historical reliance basis of assumpsit is generally examined in P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975); KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT (1990).

At early common law, when one incurred an injury to person or property by justifiably relying on the undertaking of another, assumpsit became the prime action for enforcing the informal contract. *See* S.J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 37-38 (1975). Assumpsit prevailed over "equity" as the primary vehicle at early common law to fashion a remedy to redress detrimental reliance on informal promises which were not enforceable in themselves. For historical accounts of assumpsit in the common law courts as the eventual champion over chancery jurisdiction in redressing detrimental reliance on informal promises, see J.H. Baker, *From Sanctity of Contract to Reasonable Expectation?*, 32 CURRENT LEGAL PROBS. 17, 25-26 (1979); K.C.T. Sutton, *Promises and Consideration*, *in* ESSAYS ON CONTRACT 35, 40 (P.D. Finn ed., 1987). By the end of the fifteenth century, a relying promisee could sue in assumpsit for nonfeasance if the promisee had paid for something which later was not done. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 386 (3d ed. 1990) (The idea of using assumpsit "was not so much that the promise should be enforced, for the promise in itself was not actionable, but that the damage incurred in reliance on the word of another should be restored. . . . It was also a principle of moral philosophy, closely akin to the modern doctrine of promissory estoppel.").

14. Concerning the ancient turf battles between developing contract law in the common law action of assumpsit and equity decisions protecting the reliance interest by granting "promissory estoppel" relief, see generally J.L. Barton, *Equity in the Medieval Common Law*, *in* EQUITY IN THE WORLD'S LEGAL SYSTEMS 139 (Ralph A. Newman ed., 1973); J.A. Guy, *The Development of Equitable Jurisdictions 1450-1550*, *in* LAW, LITIGANTS AND THE LEGAL PROFESSION 80 (E.W. Ives & A.H. Manchester eds., 1983); Franz Metzger, *The Last Phase of the Medieval Chancery*, *in* LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 79 (Alan Harding ed., 1980); J.B. Post, *Equitable Resorts before 1450*, *in* LAW, LITIGANTS AND THE LEGAL PROFESSION 68 (E.W. Ives & A.H. Manchester eds., 1983); 10 SELDEN SOCIETY, SELECT CASES IN CHANCERY: A.D. 1364 TO 1471 (William Paley Baildon ed., 1896); Morris S. Arnold, *Fourteenth Century Promises*, 35 CAMBRIDGE L.J. 321 (1976).

In his influential article, Dean Ames explained how ancient equity provided "promissory estoppel" remedies.

> That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases. In one of them, in 1378 [2 Cal. Ch. II], the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in travelling [sic] to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a subpoena to compel the defendant to answer of his "disceit." The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. Appilgarth *v.* Sergeantson (1438) [1 Cal. Ch. XLI] was also a bill for *restitutio in integrum* . . . . It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "*grete* deceit." The remaining case, thirty years later [Y.B. 8 Ed. IV 4, pl. II], does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and

common law evidences that the doctrine is an ancient form of consideration predating the modern bargain theory of consideration by about five centuries. Noting that history, promissory estoppel could be renamed "reliance consideration."[15] Indeed, a fundamental objective of traditional contract law is to safeguard a promisee's reliance interest by redressing and rectifying harm caused by a promisee's conduct in reliance on an unfilled promise.[16] Naturally evolving from its origins in ancient equity[17] and assumpsit, modern judicial relief for detrimental reliance on promises, commitments, and assurances should have been classified as "reliance consideration."[18] This classification would have eliminated the need for new terminology such as promissory estoppel. But that classification did not happen with the advent of bargained-for consideration as the presumed

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the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpoena. James Barr Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 14-15 (1888). But by the sixteenth century, assumpsit at common law prevailed over equity as the primary judicial method for rectifying and redressing detrimental reliance on informal contracts.

Jealousy of the chancellors' growing jurisdiction was a potent influence in inducing the common law judges to the point of allowing the action of assumpsit. In 1481, to diminish the resort to the Court of Chancery, Justice Fairfax advised pleaders to pay more attention to actions on the case. Chief Justice Fineux remarked (after that advice was followed and sanctioned by the common law courts) that "it was no longer necessary to sue a *subpoena* in such cases." *Id.* at 14. With the triumph of assumpsit over equity in the 1500s, what we now refer to as "promissory estoppel" relief was generally granted at common law. By the mid-sixteenth century, "St Germain [*Doctor and Student*, ii. c. 24] regarded it as settled that 'if he to whom the promise is made have a charge by reason of the promise . . . he shall have an action . . . though he that made the promise had no worldly profit by it.'" THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 643 (5th ed. 1956).

15. Justice Robert Braucher, Reporter of the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), accordingly interprets the history of "promissory estoppel" to be an ancient form of consideration:

> When a promise is enforceable in whole or in part by virtue of reliance, it is a "contract," and it is enforceable pursuant to a "traditional contract theory" antedating the modern doctrine of consideration. . . . We do not use the expression "promissory estoppel," since it tends to confusion rather than clarity.

Loranger Constr. Corp. v. E.F. Hauserman Co., 384 N.E.2d 176, 179 (Mass. 1978). The court in Greenstein v. Flatley, 474 N.E.2d 1130, 1134 (Mass. Ct. App. 1985), explains that Justice Braucher in *Loranger* disapproved of the label "promissory estoppel" but did not disapprove of the principle.

16. For an excellent commentary on how protecting the reliance interest underwrites the quintessential contract principle of protecting the reasonable expectations of contracting parties, see Baker, *supra* note 13.

17. Concerning promissory estoppel's ancient equitable foundation, see 4 W.T. BARBOUR, OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY (Paul Vinogradoff ed., 1914); C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 217-67, 289-329 (1949); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 82-96 (2d ed. 1981).

18. *See, e.g.*, Ames, *supra* note 14, at 14 ("[A] detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request.").

primary legal basis for validating and enforcing informal promises in nineteenth-century America.

The historical origins of consideration are well known. After the famous *Slade's Case*[19] in 1602, the declaration for the writ indebitatus assumpsit commenced with "in consideration that," which was later shortened to "the consideration." Consequently, the reason for enforcing a contract was typically described as consideration.[20] Based on the elements of the writ of debt (benefit to promisor) and of the writ of assumpsit (detriment to the promisee), consideration came to be generally defined as either a benefit to the promisor or a detriment to the promisee. If that were the end of the story, then consideration would be described as consisting of two varieties: "moral consideration" (benefit to promisor)[21] and "reliance consideration" (detriment to the promisee).[22] Reliance consideration would then have evolved and matured under the general heading of consideration.[23] For instance, an 1864 holding by the Connecticut High Court is representative of opinions at that time applying reliance consideration:

> Every sufficient consideration, though not technically an estoppel, contains the substantial elements of an estoppel in pais. One man

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19. 76 Eng. Rep. 1074 (K.B. 1602). The writ of assumpsit applying the reliance principle received renewed impetus in the famous case of Coggs v. Bernard, 92 Eng. Rep. 107 (K.B. 1703), in which Chief Justice Holt stated that the promisee's trust (reliance) in the promisor's undertaking can be a sufficient consideration to validate a promise. *Id.* at 107. Subsequent cases both in England and in the United States relied upon this opinion as a basis for enforcing contracts. *See, e.g.*, Shattuck, *supra* note 12, at 916 n.25. *See generally* Fuller & Perdue, *supra* note 4, at 68 ("Thus in the early stages of its growth the action of assumpsit was clearly dominated by the reliance interest . . . . "); Henderson, *supra* note 5, at 345 ("[R]eliance, whether actual or probable, was an essential ingredient in the evolutionary process through which consideration doctrine developed . . . .").

20. *See, e.g.*, E. Alan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 598 (1969) (regarding the term consideration as little more than "a word of art" employed to describe the requisite conditions for an action to lie in assumpsit).

21. *See* HOLMES on CORBIN, *supra* note 6, at 310-11 ("When a subsequent promise is made, without either an antecedent legal liability or a contract discharged by operation of law, the courts will uphold the promise as a moral consideration on the theory of the 'material benefit rule.'").

22. *See generally* 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.10 (rev. ed. 1995).

23. *See, e.g.*, Ames, *supra* note 14, at 14; School Dist. of City of Kansas City v. Stocking, 40 S.W. 656, 658 (Mo. 1897) (en banc) ("The question, then, is, can these notes be enforced, as valid contracts, notwithstanding Sheidley received no benefit therefrom, and intended them as purely gratuitous donations? If so, there must have been a legal consideration moving from the district to him. To constitute such consideration, it is not essential that Sheidley should have derived some benefit from the promise. The consideration will be sufficient to support the promise if the district expended money and incurred enforceable liabilities in reliance thereon.").

> by a promise induces another to change his situation; if he is allowed to deny the validity of the promise he is enabled to perpetrate a fraud. . . . [I]f a man by a promise induces the promisee or some other person on account of or for the promisee, to do some act or part with some chattel, title, interest, privilege, or right which the law regards as of some value [i.e., legal detriment], there is a sufficient consideration . . . .[24]

A few modern decisions continue to apply what they refer to as reliance consideration while professing they do not adopt promissory estoppel.[25]

Reliance consideration, however, was ultimately usurped by bargained-for consideration. By the end of the nineteenth century, the notion of a bargained-for exchange (the promise and the detriment must be mutual inducements) became the sole great flywheel of consideration.[26] If it had not, there would currently be three forms of consideration: bargained for consideration, reliance consideration, and moral consideration. Terminology such as "promissory estoppel" would be superfluous. But that did not happen because reliance consideration was transumed within the bargain principle of exchange that underwrote bargained-for consideration.[27] Consequently, reliance

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24. Rice v. Almy, 32 Conn. 297, 304 (1864).

25. Representative examples and analyses can be found under the North Carolina and Virginia headings in HOLMES on CORBIN, *supra* note 6, at 159-63, 201-05. Although West Virginia adopted promissory estoppel, its case law illustrates that jurisdictions will at times revert to "reliance consideration." *See, e.g.*, North American Royal Coal Co. v. Mountaineer Developers, 239 S.E.2d 673, 675 (W. Va. 1977) (When promisor makes an unequivocal statement in writing that she will pay promisee a sum certain in money, and promisee detrimentally relies on that statement as expected from the surrounding circumstances, the High Court held that there is a contractual relationship supported by consideration. In reality, the decision rests on reliance consideration, which should be expressed as "promissory estoppel.").

26. The notion that took over was that there is no legally binding promise without a bargained-for consideration plus either a benefit to the promisor or a detriment to the promisee. The bargain idea was pervasively accepted, in part owing to several famous pronouncements in OLIVER W. HOLMES, JR., THE COMMON LAW 293-94 (1881) ("The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise."), and in two judicial decisions: Wisconsin & Mich. Ry. v. Powers, 191 U.S. 379, 386 (1903) ("It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting."); Martin v. Meles, 60 N.E. 397, 398 (Mass. 1901) ("There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise."). The industrial revolution and market forces and principles in late nineteenth-century America also gave impetus to the legal contract ideal of an equivalent bargained-for exchange. *See* Farnsworth, *supra* note 20, at 577.

27. One may forget that while reliance in some instances is essential to bargain theory, bargain is not essential to reliance. Recall that even Oliver Wendell Holmes acknowledged that courts apply "reliance consideration" (promises which induce conduct in reliance) by finding a pretend bargained-for exchange. *Martin*, 60 N.E. at 386 (Mass. 1901).

consideration was gradually severed by twentieth-century courts in the common law tradition and labeled promissory estoppel. Promissory estoppel presently has its own autonomous sphere of influence[28] as an evolving equitable principle for enforcing the right to rely on promises (and other assuring present commitments) and for designing relief to afford corrective justice between the parties.

A thoroughgoing analysis of the twentieth-century American promissory estoppel decisions[29] reveals that promissory estoppel, in its case law development, has evolved, and continues to evolve in four distinct, progressive phases, which may generally be described as: (1) estoppel, (2) contract, (3) tort, and (4) equity. The following sections describe these evolutionary phases as well as the degree to which American jurisdictions have kept pace with the doctrine's evolution.

A. Phase One (Estoppel): Defensive and Offensive Equitable Estoppel

Commencing with cases in the nineteenth century, this initial stage can be summarized as promissory estoppel in its American genesis, an assimilation of two developmental attributes from the equitable principle of estoppel. First, estoppel provided the doctrine a defensive shield to prevent certain contract defenses from being raised. Second, estoppel gave the doctrine an offensive sword to empower courts to award affirmative relief. Estoppel's basis for

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28. With origins in both early common law and equity, and with resulting both legal and equitable remedies, the evolution of promissory estoppel roughly parallels the convoluted evolution of restitution. "Restitution developed in association with various technical doctrines of the earlier law. Some doctrines were developed in equity, some at law. Both lines left their mark, so that the terminology of restitution even today is the terminology of the forms and fictions of a very different world." 1 DAN B. DOBBS, LAW OF REMEDIES 570 (2d ed. 1993). Regarding restitution's diverse terminology and legal-equitable evolution, see *id.* at 570-655. For example, what developed at law from quasi (or implied-in-law) contracts was a remedial system awarding restitution in cases where no tort and no contract existed. Similar to detrimental reliance as the substantive basis of promissory estoppel, unjust enrichment became the substantive basis of restitution, as was explained by Lord Mansfield in 1760. *See* Moses v. MacFerlan, 97 Eng. Rep. 674, 679 (K.B. 1760) (Mansfield instructs that quasi-contract actions at law in assumpsit had an equitable character, and the legal action would lie when "the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."). Lord Mansfield's broad equitable policy statements established the principle of unjust enrichment as the root basis of restitution claims. Similarly, the equitable principle of redressing detrimental reliance is the root basis of promissory estoppel as evidenced in its fourth developmental phase. A serious scholarly comparison of the history and development of restitution and promissory estoppel is beyond the scope of this Article. Nonetheless, that scholarly effort ought to be accomplished prior to the drafting of the third Restatement of Contracts or a separate restatement of restitution and promissory estoppel.

29. *See* HOLMES on CORBIN, *supra* note 6, at 58-230; Holmes' *Restatement*, *supra* note 6.

affirmative relief arose when courts characterized promises as representations of fact for the application of equitable estoppel. All American jurisdictions have, in their earliest common law, decisions (adequately reported and described in the legal literature)[30] which assimilate these developmental attributes. The doctrine thereafter continued to evolve in three phases (with the arguable exceptions of North Carolina and Virginia which appear mired in this first phase).[31] The two attributes of the estoppel phase are discussed below.

1. Defensive Equitable "Promissory" Estoppel

The defensive reliance shield of estoppel arose historically when parties, who suffered losses in reliance on contracts that were unenforceable due to the statute of frauds or a statute of limitations, defensively declared that the other party is estopped from claiming the statute as a defense.[32] Customarily, the courts estopped the other party from claiming the statute only if the doctrine of equitable

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30. For other authoritative reports, see JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS §§ 6-1 to 6-7, at 272-92, § 19-47, at 841-44 (3d ed. 1987); E. ALAN FARNSWORTH, CONTRACTS §§ 2.5-7.6, at 49-52, § 6.12, at 453-60 (2d ed. 1990); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 66, at 272-88, § 78, at 357-64 (3d ed. 1990). As Justice Stern explains, it was the equitable basis of estoppel that gave rise to promissory estoppel.

> But just as the law has consistently upheld the doctrine [of equitable estoppel], so from the earliest times there was recognized, the principle that an estoppel might similarly arise from the making of a promise [promissory estoppel], even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice.

Fried v. Fisher, 196 A. 39, 41 (Pa. 1938).

31. *See supra* note 25.

32. Since cases concerning promissory estoppel barring the Statute of Frauds are well known and voluminous, the lesser known statute of limitations cases will be mentioned here. There is much older authority holding that an obligor is "estopped" from using the statute of limitations as a defense where the obligor promised not to use the statute or otherwise lead the obligee to rely by not taking action. For instance, in 1885, the Pennsylvania High Court barred the running of the statute of limitations because the obligee relied in not suing on a prothonotary's promise to correct a court record. Armstrong v. Levan, 1 A. 204 (Pa. 1885). "The promise operated, not to revive a dead tort, but by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it; she has been misled to her injury; but for the defendant's promises she would have commenced her action before the six years had expired." *Id.* at 205. For other representative early examples, see Randon v. Toby, 52 U.S. 493 (1850); Phillips v. Phillips, 127 P. 346 (Cal. 1912); Lucas v. Nichols, 66 Ill. 41 (1872); McMakin v. Schenck, 98 Ind. 264 (1884); Holman v. Omaha & C.B. Ry. & Bridge Co., 90 N.W. 833 (Iowa 1902); Craig v. McBride's Heirs, 48 Ky. 9 (1848); Webber v. President etc. of Williams College, 40 Mass. 302 (1839); Thomas v. Hall, 100 A. 502 (Me. 1917); Renackowsky v. Bd. of Water Comm'rs, 81 N.W. 581 (Mich. 1900); Combs v. Little, 4 N.J. Eq. 310 (1843); Utica Ins. Co. v. Bloodgood, 4 Wend. 652 (N.Y. 1830); Turner v. King, 37 N.C. 132 (1842). *Cf.* W.P. Hamblin, Inc. v. Newark Fire Ins. Co., 139 A. 212 (R.I. 1927); Watterson v. Watterson, 38 Tenn. 1 (1858); Burton v. Stevens, 24 Vt. 131 (1852).

estoppel applied, which required reliance on a misrepresentation of past or present fact. However, representations of past and present fact did not include future fact, or an intention regarding the future, or executory promises relating to the future. It is well known how the "equitable" basis of estoppel was extended by courts gradually to include reliance on oral promises and on contracts.[33] The Alabama Supreme Court, for instance, explained that the purpose of both equitable and promissory estoppel "is to promote equity and justice in an individual case by preventing a party from asserting rights under a general technical rule of law when his own conduct renders the assertion of such rights contrary to equity and good conscience."[34]

Thus, the source of "estoppel" is good faith and conscience to promote equity and corrective justice in an individual case. In response to these early cases, the Restatement (Second) of Contracts added a new Section 139 which applies promissory estoppel as a shield to block a defense under a statute of frauds.[35] Most jurisdictions recognize promissory estoppel as a defensive reliance aegis to statutes of limitations and statutes of frauds.[36] Surprisingly, even North Carolina, which declares it does not adopt promissory estoppel as an affirmative cause of action, warmly embraces promissory estoppel as a bastion against the statute of frauds.[37]

Throughout the next three evolutionary phases of the doctrine, courts have continued to apply defensive promissory estoppel in several contexts: to estop another from raising a statute of frauds, a statute of limitations, or a lack of consideration (i.e., as a consideration substitute explained in the next phase). Additional defensive applications concern indefinite promises and the parol evidence rule.

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33. *See, e.g.*, Jackson v. Kemp, 365 S.W.2d 437 (Tenn. 1963) (the seminal Tennessee case adopting promissory estoppel based on the first RESTATEMENT OF CONTRACTS (1932) and applying the doctrine to an insurance agent's promise not to invoke the statute of limitations).

34. Mazer v. Jackson Ins. Agency, 340 So. 2d 770, 772 (Ala. 1976).

35. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

36. The cases are collected for each jurisdiction in HOLMES on CORBIN, *supra* note 6, § 8.12.

37. *See, e.g.*, Allen M. Campbell Co. v. Virginia Metal Indus., Inc., 708 F.2d 930, 932-34 (4th Cir. 1983) (North Carolina's doctrine of promissory estoppel creates an exception to and is not displaced by the UCC Statute of Frauds). North Carolina also recognizes promissory estoppel as a defense to the statute of limitations. *See* Joyner v. Massey, 1 S.E. 702, 704 (N.C. 1887) ("when the delay is induced by the request of the defendant, and his promise to pay, without relying upon the statute of limitations, the court will not allow the statute to bar, because it would be against equity and good conscience . . . ."). For a recent example, see One North McDowell Ass'n of Unit Owners, Inc. v. McDowell Dev. Co., 389 S.E.2d 834 (N.C. Ct. App. 1990).

Regarding indefinite promises and the doctrine's defensive use is the famous case of *Wheeler v. White*.[38] Wheeler detrimentally relied on White's promise, in a written agreement supported by consideration, to obtain or furnish a loan to finance construction of a shopping center on Wheeler's land.[39] White filed special exceptions asserting the written contract was unenforceable as it was too indefinite, containing no provisions for amount of monthly installments, amount of interest due, computing interest, and when interest would be paid. The trial court sustained the special exceptions and dismissed the suit; the Court of Civil Appeals affirmed.[40] The Texas Supreme Court held that the trial court did not err in sustaining the special exceptions, but reversed, holding that Wheeler stated a claim under the theory of promissory estoppel:

> The function of the doctrine of promissory estoppel is, under our view, defensive in that it estops a promisor from denying the enforceability of the promise . . . . Where the promisee has failed to bind the promisor to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained.[41]

Since the written "indefinite" contract had consideration, the court applied promissory estoppel not as a consideration substitute as in contract phase two, but as a defensive plea to estop White from asserting that the contract was too uncertain to enforce. The Texas Supreme Court's defensive application of promissory estoppel as a substitute for an offer/promise is analogous to the doctrine's defensive use as a consideration substitute which, at phase two, estops one from raising the lack of consideration. However, this distinctive Texas procedure seems unnecessary because the promise to invoke promissory estoppel is not equivalent to a definite "offer" to contract, as explained more fully in the text at phase three. In fact, when promissory estoppel evolves to stage four (equity), the doctrine has assimilated its application as a consideration substitute for awarding expectation damages and as an offer/promise substitute for awarding reliance damages.

The final subject concerning the doctrine's application as a defensive reliance shield is its interaction with the parol evidence rule.

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38. 398 S.W.2d 93 (Tex. 1965).
39. *Id.* at 94.
40. Wheeler v. White, 385 S.W.2d 619 (Tex. Civ. App. 1965).
41. *Wheeler*, 398 S.W.2d at 96-97.

Few American decisions have considered the issue of whether the defensive shield of promissory estoppel can prevent the application of the parol evidence rule (when a written agreement exists) by offensively validating a party's oral promise.[42] Given the Restatement's policy of applying promissory estoppel to subordinate form over substance,[43] the parol evidence rule is logically the next citadel of form over substance to be equitably estopped by the application of the doctrine.[44] But American courts have not as yet adequately addressed this issue, so the handful of cases naturally are inconclusive.

Those few cases holding that promissory estoppel cannot estop the application of the parol evidence rule have established two general trends. First, a paucity of cases directly hold that promissory estoppel cannot operate in the face of the parol evidence rule because the prior or contemporaneous promise is integrated in the written agreement.[45]

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42. *See* Metzger, *supra* note 12, at 1384 ("Few cases to date have explored the possible interaction between promissory estoppel and the parol evidence rule.").

43. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

44. This recognizes that Section 139, adopting Section 90 to estop a statute-of-frauds defense, demonstrates an "increased willingness" to use promissory estoppel to overcome form. Professor Charles Knapp foresees as

> inevitable that another bastion of form-over-substance, the parol evidence rule, eventually will fall under similar attack. If it is reasonable to rely on an entirely oral agreement, it must also be reasonable in some cases to rely on assurances that a writing is not necessary to preserve a particular term of agreement.

Knapp, *supra* note 3, at 78.

45. For instance, Alabama recently refused to expand the reliance shield of promissory estoppel. In Davis v. Univ. of Montevallo, 638 So. 2d 754 (Ala. 1994), the Alabama Supreme Court hesitantly declined to apply Section 90 of the RESTATEMENT (SECOND) OF CONTRACTS (1981) as an exception to the parol evidence rule where a terminated nonfaculty staff member with a one-year written contract asserted promissory estoppel based on an employee handbook. Without rigorous analysis, the High Court pithily dismissed the claim:

> The handbook does state that non-faculty staff would be 'appointed upon a year-to-year basis by the President, but with the assumption [of] continuing service . . . so long as the individual's performance' was 'satisfactory. . . .['] [P]laintiff claims that the handbook indicated a permanent continuous contract notwithstanding the written appointment form. Courts have been reluctant to permit the enforcement, by the application of the doctrine of promissory estoppel, of promises made contemporaneously with a completed contract, evidence of which promises comes within the prohibition of the parol evidence rule.

Id. at 757-78. This decision cited no cases which supported its holding and failed to discuss promissory estoppel as fulfilling the separate consideration exception to the parol evidence rule under the RESTATEMENT (SECOND) OF CONTRACTS § 216(2)(b) and cmt. c (1981). *See also* Johnson v. Curran, 633 P.2d 994, 996 (Alaska 1981) (High Court, without any analysis, unceremoniously discarded promissory estoppel and affirmed the trial court's refusal to admit parol evidence of a termination clause not contained in a standard form contract which constituted the agreement); Big G Corp. v. Henry, 536 A.2d 559, 562 (Vt. 1987) (where parties have a binding written contract, promissory estoppel cannot be invoked to circumvent the parol evidence rule by introducing parol evidence of an alleged side deal between buyer and vendor); North Am.

Second, other decisions do not mention the parol evidence rule and presumably do not even recognize the issue, but hold for example: "Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove a breach of contract."[46] In other words, promissory estoppel cannot apply defensively when there is a written contract validated by bargained-for consideration.

On the other hand, a strong line of decisions first applied equitable estoppel,[47] then later used promissory estoppel to block or end-run the parol evidence rule. These decisions estop collateral oral statements from being legally merged (under the parol evidence rule) into a written contract. An example is the landmark opinion in *Prudential Insurance Company of America v. Clark*,[48] where a Prudential insurance agent convinced Steve Clark, a soldier about to serve in Vietnam, to drop his current life insurance policy and purchase a Prudential policy which would not contain the customary limiting war risk and aviation exclusions.[49] Steve relied on the agent's promise and let his policy lapse. However, the Prudential life policy later issued to Steve had both a war risk and aviation exclusion.[50] When he died in Vietnam, Prudential paid his parents but then sued, claiming mistake, to get the monies back.[51] Although the jury found for Steve's

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Royal Coal Co. v. Mountaineer Developers, Inc., 239 S.E.2d 673, 675 (W. Va. 1977) (applying parol evidence rule to bar contemporaneous oral promise).

46. Walker v. KFC Corp., 728 F.2d 1215, 1220 (9th Cir. 1984) (applying California law). Arguably, such decisions hold that promissory estoppel is inapplicable when bargained-for consideration is present. For other no-second-bite decisions, see First Nat'l Bank v. Burton, Parsons & Co., 470 A.2d 822 (Md. Ct. Spec. App. 1984); Commerce, Crowdus & Canton, Ltd. v. DKS Constr., Inc., 776 S.W.2d 615 (Tex. Ct. App. 1989). Still other decisions simply hold (with no mention of the parol evidence rule) that promissory estoppel is inapplicable if there is an extant contract:

> Defendants agree that in Pennsylvania, a promissory estoppel claim can only exist in the absence of a contract. Courts have held that breach of contract and promissory estoppel may be pleaded in the alternative, but that if the court finds that a contract exists, the promissory estoppel claim must fail. . . . Promissory estoppel is an equitable remedy to be implemented only when there is no contract; it is not designed to protect parties who do not adequately memorialize their contracts in writing.

Iversen Baking Co. v. Weston Foods, Ltd., 874 F. Supp. 96, 102 (E.D. Pa. 1995). *See also* Del Hayes & Sons, Inc. v. Mitchell, 230 N.W.2d 588, 593 (Minn. 1975) ("The doctrine of promissory estoppel is wholly inapplicable here for the simple reason that an actual contract existed.").

47. *See, e.g.*, Harr v. Allstate Ins. Co., 255 A.2d 208, 218 (N.J. 1969) (applying equitable estoppel to reject the argument that an insurance agent's oral statements regarding coverage were merged into the insurance policy by the parol evidence rule).

48. 456 F.2d 932 (5th Cir. 1972) (applying Florida law).

49. *Id.* at 934.

50. *Id.*

51. *Id.* at 935.

parents, the trial court refused to follow the jury verdict. On appeal, the court stated:

> Prudential argues that under no theory may this Court take cognizance of the agent's promise and its inequitable conduct because of the Florida rule that any matters transpiring prior to or contemporaneous with the signing of an application for insurance are waived or merged into the application. The rule is nothing more than an embodiment of the parol evidence rule. . . . [The jury's verdict for the insured] recognized a duty of Prudential, dehors the writing, to act in an honorable and upright way in accordance with its agent's promise. Thus, application of promissory estoppel in no way trammels upon the parol evidence rule. Involved here is a separate enforceable promise and not a variance or modification of the terms of the policy.[52]

The pivotal decision in *Prudential Insurance* naturally steers to the final estoppel trait of phase one of promissory estoppel—decisions progressing from defensively using equitable estoppel to adopting it as an affirmative theory of recovery. This offensive application of the doctrine is discussed in the next subsection.

2. Offensive Equitable "Promissory" Estoppel

Selected insurance cases illustrate the offensive use of equitable estoppel. Consider this straightforward example. A party asks an insurance agent if a particular matter is covered by a certain kind of

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52. *Id.* at 937. *Accord* Florida Pottery Stores of Panama City, Inc. v. Am. Nat'l Bank, 578 So. 2d 801 (Fla. Dist. Ct. App. 1991). In Texas, compare Joseph v. Mahoney, 367 S.W.2d 213, 215 (Tex. Civ. App. 1963) (Promissory estoppel cannot operate in the face of the parol evidence rule: "We do not believe that there is an exception to the Parol Evidence Rule as a promissory estoppel as is introduced by appellant . . . .") with Roberts v. Geosource Drilling Serv., Inc., 757 S.W.2d 48, 50 (Tex. Ct. App. 1988) ("Sturm's undisputed oral promise clearly imposed a duty on Geosource to employ Roberts . . . . It is no answer that the parties' written contract was for an employment at will, where the employer foreseeably and intentionally induces the prospective employee to materially change his position to his expense and detriment, and then repudiates its obligations before the written contract begins to operate."); Rubin v. Adams, 368 S.W.2d 42, 44 (Tex. Civ. App. 1963) (Although pension was purported to be made in consideration of past service, parol evidence showed that pension was made in confirmation of a dozen oral promises of a pension for life, in reliance on which plaintiff had continued in service for several years.). For other examples of courts applying promissory estoppel as a bar to the parole evidence rule, see Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280, 283-84 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), *overruled by* Sunstream Jet Exp., Inc. v. International Air Serv. Co., 734 F.2d 1258 (7th Cir. 1984); J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 493 (N.D. Cal., S.D. 1954) (plaintiff's reliance on defendant's oral promise to retain plaintiff as distributor "so long as they did a satisfactory job" held to create an obligation not to terminate until a reasonable time had passed, despite defendant's express refusal to make a written agreement protecting plaintiff against termination).

insurance policy. Although the written policy does not cover that matter, the agent responds: "We've got you covered" or "We cover you for $7,500, and you are fully covered" or similar assurances. Did the insurance agent make a representation of fact or a promise regarding coverage? In reality, it makes little difference so long as estoppel is affirmatively applied to enforce the agent's statement. Thus, whereas earlier decisions applied equitable estoppel defensively,[53] modern decisions apply promissory estoppel as an affirmative cause of action to validate and enforce the agent's promissory representations. As the Fifth Circuit, applying promissory estoppel, succinctly explained:

> The case ends as, for all purposes, it began. The Travelers agent wrote: "My question is, is Mr. Holman properly covered under the Comprehensive Personal Liability policy or should he have an OL&T policy on this duplex and include with it the vacant property surrounding it?" The underwriter likewise speaking for Travelers answered: "Coverage exists." We agree.[54]

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53. The leading decision is Harr v. Allstate Ins. Co., 255 A.2d 208 (N.J. 1969). There, the agent orally told the insured that "we cover you for $7,500 and you are fully covered" and the court, rejecting the parol evidence rule argument, enforced the agent's statement of "fact/promise" by applying equitable estoppel. *Id.* at 218. For other insurance decisions creating and enforcing contractual promises through equitable estoppel, see United Pac. Ins. Co. v. Meyer, 305 F.2d 107 (9th Cir. 1962); Ivey v. United Nat'l Indem. Co., 259 F.2d 205 (9th Cir. 1958); Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) (en banc); Lecker v. Gen. Am. Life Ins. Co., 525 P.2d 1114 (Haw. 1974); Foster v. Johnstone, 685 P.2d 802 (Idaho 1984); Lewis v. Continental Life and Acc. Co., 461 P.2d 243 (Idaho 1969); Martinez v. John Hancock Mut. Life Ins. Co., 367 A.2d 904 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 377 A.2d 660 (N.J. 1977); Sec. Ins. Co. v. Greer, 437 P.2d 243 (Okla. 1968); Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co., 679 P.2d 879 (Or. Ct. App. 1984); Crescent Co. of Spartanburg, Inc. v. Ins. Co. of North Am., 225 S.E.2d 656 (S.C. 1976). Note that these cases do not directly address and analyze the application of the parol evidence rule.

54. Travelers Indem. Co. v. Holman, 330 F.2d 142, 152 (5th Cir. 1964) (recognizing and applying Texas promissory estoppel based on Section 90 of the RESTATEMENT OF CONTRACTS (1932)). In Bill Brown Constr. Co. v. Glen Falls Ins. Co., 818 S.W.2d 1 (Tenn. 1991), the insured trucker, specializing in hauling large cargoes, told an agent that he wanted "full insurance coverage." The agent responded: "That's no problem, you've got full coverage." When the insurer later denied coverage for an accident involving large cargo, the Court held:

> We are not unmindful of the force of the argument that the insurer should not be liable for coverage for which it has received no consideration. However, the same argument can be made against the vicarious liability of all principals for the tortious acts of their agents. When the misrepresentation of the agent is viewed as an action in tort, the absence of additional consideration to the insurer is irrelevant. When viewed as an action on an insurance contract, we agree with the courts which have considered the consideration argument and concluded that: It is here that promissory estoppel fills the gap.

Id. at 12. *See also* Midamar Corp. v. Nat'l-Ben Franklin Ins. Co. of Ill., 898 F.2d 1333, 1337 (8th Cir. 1990) (quoting Section 90 of the RESTATEMENT (SECOND) OF CONTRACTS (1981) and applying Iowa promissory estoppel law to an agent's assurances of insurance coverage for a

With the advent of such insurance decisions, promissory estoppel emerges as a distinct legal theory, an "offensive sword." The transition from equitable to promissory estoppel underwrites the transition to contract phase two in the evolution of the doctrine. In evolving to the second phase, promissory estoppel puts estoppel's equitable basis of remedial relief on more accurate affirmative grounds as an offensive theory providing affirmative remedies. That analysis was vigorously advocated by South Dakota Justice Henderson:

> [T]he trial court might well have bottomed the decision on "detrimental reliance" or "promissory estoppel." A student of the law can study the cases in South Dakota on these various "doctrines," until his eyes are bloodshot and bulging. But more and more, we are seeing these equitable doctrines come forward to achieve justice and fair dealing between [individuals]. . . . The literal constructionists live by the letter of the contract—they recognize nothing which is not expressed. Estoppel did not just arise, like the mists of creation; it was born out of conscience and embodied in the law to right wrongs. Here, the dealings between the parties, after the insurance contract was entered into, has been stonewalled, disregarded, and ignored. . . . [T]he adjuster's statements, conduct, and concealment misled Roseth. The adjuster only had to tell Roseth, "Roseth, the damaged cattle are not covered." But he did not do that; he knew that Roseth believed he was covered . . . . In my opinion, the trial court could have easily used the phrase "detrimentally relied" or "promissory estoppel," particularly the latter, and been home free, on the conceptual front.[55]

The apropos recognition of the affirmative heart of estoppel has arisen, as evidenced in the following three phases. In these phases, modern courts recognize and apply the principles of good faith, equity, and conscience as the doctrine of promissory estoppel matures and assumes a more significant stature in American law.

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specified loss); Crown Life Ins. Co. v. McBride, 517 So. 2d 660, 662 (Fla. 1987) (In response to a certified question, the Florida Supreme Court held "that the form of equitable estoppel known as promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice."). *Cf.* Northwestern Bank of Commerce v. Employers' Life Ins. Co. of Am., 281 N.W.2d 164, 165 (Minn. 1979) (life insurer's promise to notify bank as assignee in event of premium default to protect its collateral enforceable under promissory estoppel when insurer failed to notify bank of premium default and policy lapsed).

55. Roseth v. St. Paul Property and Liab. Ins. Co., 374 N.W.2d 105, 110-11 (S.D. 1985). For a comprehensive discussion regarding the use of and confusion with the South Dakota doctrine of equitable estoppel in the insurance context, see Sander v. Wright, 394 N.W.2d 896 (S.D. 1986).

B. Phase Two (Contract): Promissory Estoppel as Consideration Substitute

This second historical phase depicts courts applying promissory estoppel as a consideration substitute to validate and enforce promises (not purchased or bargained for) and awarding contractual expectation damages. The early twentieth-century cases led to the adoption of Section 90 in the first Restatement of Contracts,[56] which led to the general acceptance of promissory estoppel as a substitute for consideration. In legally binding promises, these decisions use a technique of "estoppel to deny consideration" to justify a traditional contract expectation judgment. While older decisions had spoken of "estoppel" or "equitable estoppel," modern decisions say "promissory estoppel." Decisions throughout American jurisdictions are replete with equitable estoppel masquerading as promissory estoppel;[57] so much so that some jurisdictions (e.g., North Carolina and Virginia) will not allow the doctrine to evolve to the third phase. This classic defensive use of estoppel (phase one) to deny consideration is commonly understood as making promissory estoppel synonymous with and the equivalent of consideration. Conceptually at this phase, promissory estoppel is a defensive shield (protecting a contract right) but is not an offensive sword (creating a new right).

That the consideration substitute was the second stage may elicit wonder given a general assumption that detrimental reliance damage cases came second in time. However, all American jurisdictions have consideration substitute cases which typically follow (or occur contemporaneous with) estoppel phase one. If a study were made only of these abundant decisions, the appropriate deduction would be that promissory estoppel is a contract theory with its basis grounded in promises and classical benefit-of-the-bargain remedies.[58] The majority of jurisdictions have advanced beyond this second (consideration substitute) stage. Only sixteen jurisdictions linger, some resolutely, at this contract phase two.[59]

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56. RESTATEMENT OF CONTRACTS § 90 (1932).

57. These inchoate "promissory estoppel" decisions for each jurisdiction can be found in HOLMES on CORBIN, *supra* note 6, § 8.12.

58. *See, e.g.*, Yorio & Thel, *supra* note 4, at 111.

59. The following jurisdictions have not evolved beyond the consideration-substitute phase: Arizona, Georgia, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, and West Virginia. Note, however, that Kansas and Missouri could reasonably be at tort phase three. *See* HOLMES on CORBIN, *supra* note 6, at 38-230.

Indeed, the sixteen jurisdictions mired in this second "consideration-substitute" phase focus their promissory estoppel decisions on the requirement of a "promise." Hence, to trigger Section 90, the promise must be express, clear, definite and unambiguous (i.e., an "offer"). Based on this heightened requirement, these jurisdictions make statements of law such as: "An expression of an intention to do something is not a promise."[60] Such holdings ignore the Second Restatement's definition of promise not as an offer but as evidencing commitment: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[61] In spite of this definition, state courts in these sixteen jurisdictions typically elevate the requisite promise to the stature of an "offer" to presentiate a contract. As a consequence, promissory estoppel has been held inapplicable in most cases in those jurisdictions. The rub is that those cases properly belong in the third developmental phase of "detrimental reliance" with possible reliance damage judgments being rendered.

A few states further restrict the doctrine in strict classical contract terms. Idaho, Iowa, Wyoming, and perhaps Georgia[62] hold that the first element of promissory estoppel is a "clear and definite agreement."[63] As the Idaho Supreme Court explained: "Under contract law, promissory estoppel, when proven, acts as a consideration substitute in the formation of a contract. . . . While promissory

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60. *See, e.g.*, Sch. Dist. No. 69 of Maricopa County v. Altherr, 458 P.2d 537, 544 (Ariz. Ct. App. 1969). Arizona is a prototype jurisdiction in which to study how courts apply the consideration substitute and grapple with the notion of extending the doctrine further. "Part of our reluctance to expand the applicability of Restatement § 90 to cases other than those in which promissory estoppel forms a substitute for consideration, thus permitting enforcement of noncontractual promises, is that the theory provides little in the way of legal rules for allowing or limiting recovery." Schade v. Diethrich, 760 P.2d 1050, 1060 (Ariz. 1988).

61. RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

62. For example, in Foley Co. v. Warren Eng'g, Inc., 804 F. Supp. 1540 (N.D. Ga. 1992) (applying Georgia's statutory enactment of Section 90), the court adopted the definition of promise contained in Section 2 of the RESTATEMENT (SECOND) OF CONTRACTS as requiring "commitment," but arguably then judicially rewrote the definition to require an offer and mutual assent. The court stated that "reliance alone does not a promise make; there must be something approaching a meeting of the minds, or a mutual understanding that a promise is being made upon which the promisee may reasonably be expected to rely." *Id.* at 1546.

63. The seminal opinion is Miller v. Lawlor, 66 N.W.2d 267, 272-74 (Iowa 1954) (holding that the first element of promissory estoppel required proof of a clear and definite oral agreement). *See also* Nat'l Bank of Waterloo v. Moeller, 434 N.W.2d 887, 889-90 (Iowa 1989) (holding a credit association's letter to the bank indicating the association would subordinate its mortgages on land "provided no unexpected problems arise" was not a "clear and definite agreement" for purposes of applying promissory estoppel); Lavoie v. Safecare Health Serv., Inc., 840 P.2d 239, 249 (Wyo. 1992) (adopting the Iowa elements including the "clear and definite agreement requirement" and the rationale of *Moeller*).

estoppel may provide consideration for a contract, there must be a sufficiently definite agreement to have an enforceable contract."[64] However, this quality of the agreement approach is best seen as aberrational, limited to a handful of states.

The majority of American jurisdictions do not restrict the equitable doctrine of promissory estoppel to the status of a contractual consideration substitute. In the renowned 1938 opinion of *Fried v. Fisher*,[65] the Pennsylvania High Court explained that the promissory estoppel "doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel . . . ."[66] As a fitting transition to tort phase three, the South Carolina Supreme Court ruled that promissory estoppel is not the legal equivalent of a contract even when used as a consideration substitute, but rather is the application of an equitable principle:

> The circumstances which may trigger the application of promissory estoppel in this case cannot be tortured into the requisite elements of a traditional contract. A contract and promissory estoppel are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.[67]

In accord, most courts progressed by providing corrective relief for the litigating parties based on the harm suffered, that is, rectifying detrimental reliance which is both reasonably foreseeable and caused by a promisor. Again, the affirmative heart of estoppel (good faith, conscience, and equity) was the prime source for this third phase of evolution in the doctrine of promissory estoppel.

C. Phase Three (Tort): Independent Claim for Detrimental Reliance

This stage is most familiar. When cases arose with defects in contract formation, classical contract relief was held inapplicable, as explained in the phase two (contract) cases. Yet, some courts perceived the necessity for corrective justice between the parties. Conceptually, these courts adopted and applied the doctrine as an offensive theory creating a new right independent of contract. Rather than focusing on the promise as an element of mutual assent, courts at this develop-

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64. *See, e.g.*, Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, 804 P.2d 900, 907 (Idaho 1991).

65. 196 A. 39 (Pa. 1938).

66. *Id.* at 41-42. The *Fried* court further stated, "It is important to bear in mind that, as already pointed out, the doctrine is much older in its origin and applications than the terminology now employed to describe it." *Id.* at 42.

67. Duke Power Co. v. S.C. Pub. Serv. Comm'n, 326 S.E.2d 395, 406 (S.C. 1985).

mental stage turned to the notion of a promissory commitment centering on the promisee's right to rely, and the promisor's duty to prevent (or not cause) harmful reliance which was reasonably foreseeable by the promisor.

These courts recognize the distinction between a "promise" which connotes commitment and an "offer" which connotes bargain. Thus, the required "promise" is not viewed in terms of a "clear and definite" offer/promise. An Oregon decision explains, "if a promise is not sufficiently definite to be enforceable, estoppel might permit the party who reasonably relies on that promise to obtain reliance damages. Thus, we implicitly recognized that a person can reasonably and foreseeably rely on a promise that is not sufficiently definite to be enforced."[68] Based on the objectively reasonable expectations of the promisor and promisee, a promise is essentially an invitation for the promisee to rely. The right to rely arises from promissory statements, assurances, and representations that show sufficient commitment to induce reasonable reliance in another. Any reliance is therefore evaluated objectively for reasonableness and foreseeability. Customarily, that evaluation is a factual one, done by the jury, based on all the surrounding circumstances. Rather than awarding the value of the promise, the judgment seeks to rectify the harm caused by molding an equitably rectifying remedy. Typically called reliance damages, the remedy generally restores the harmed party to a pre-promise posture.

Thirty-four American jurisdictions apply this third evolutionary stage by creating a contextually corrective remedy to fit the crime. In other words, the equitable doctrine at this stage empowers a court to tailor a remedy that achieves corrective justice between the parties. Reasonable foreseeability of injurious reliance is an important factor in fashioning equitable promissory estoppel relief, but actual foreseeability is not required. Foreseeability is measured objectively in accord with tort standards of foreseeability. For example, in *Sanders v. Arkansas-*

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68. Franklin v. Stern, 858 P.2d 142, 145 n.1 (Or. Ct. App. 1993) (citing Bixler v. First Nat'l Bank of Or., 619 P.2d 895, 898 n.4 (Or. Ct. App. 1980)), *opinion adhered to as modified on reconsideration*, 862 P.2d 508 (Or. Ct. App. 1993), *review denied*, 867 P.2d 1386 (Or. 1994). Regarding definitions of promise and offer, compare RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981) ("A promise is a manifestation of intention . . . so made as to justify a promisee in understanding that a commitment has been made.") with § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."). As an exemplar of decisions in about 30 states (including those in stage four), see Bercoon, Weiner, Glick and Brook v. Mfrs. Hanover Trust Co., 818 F. Supp. 1152 (N.D. Ill., E.D. 1993) (Prospective sublessee stated a promissory estoppel claim against lessee by alleging that lessee's agent informed sublessee that they had a "done deal.").

Missouri Power Company,[69] Sanders, a lineman who was seriously injured on the job by a "hot" electric line, claimed promissory estoppel by alleging the employer's agents promised Sanders would receive full pay and benefits until he could return to work.[70] In reliance on the promised salary and benefits for some 18 months, Sanders built a new home with special wheelchair accommodations.[71] The circuit court sustained a demurrer and dismissed Sanders' complaint. On appeal, the Arkansas court, discussing the foreseeability requirement, found reasonable detrimental reliance to be a jury question, and indicated that promissory estoppel applies. The court stated:

> [A]s long as the action in reliance on a promise is reasonable it matters not that the action taken was not directly induced by the promise sought to be enforced. We recognize this, however, as a problem of semantics. We prefer to state the problem as one of applying an objective standard in determining the reasonableness of an act in reliance. We do not propose here to enter, other than lightly, the further semantic struggle between the doctrines of detrimental reliance and promissory estoppel. . . . We hold the complaint before us stated facts sufficient to state a cause of action in that the appellant alleged he had built a new home especially equipped for a wheelchair user in reliance on the promise of the appellee. Of course, the appellant will have to prove to the trier of fact that his action was indeed based upon that reliance and that it was reasonable, but we find it sufficiently stated.[72]

Note that on remand the trial court presumably would have to determine if injustice can be avoided only by enforcing the promise to the extent of full contractual recovery ($675,000 alleged as promised pay and benefits for life), to the extent of reliance damages (for example, cost of new home) or to some combination of the two as equity dictates. Thus, Arkansas, like other jurisdictions, has granted reliance damages as well as expectation damages in promissory estoppel cases.

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69. 593 S.W.2d 56 (Ark. Ct. App. 1980).
70. *Id.* at 57.
71. *Id.*
72. *Id.* at 58-59.

Twenty jurisdictions[73] have evolved to and remain in this third detrimental reliance phase of promissory estoppel. Those twenty (plus the fourteen jurisdictions at the fourth phase) evidence that the majority of American jurisdictions have approved and adopted promissory estoppel as a theory, independent of contract, for awarding reliance damages. Acknowledging the defects in contract formation and validation on the discrete facts, courts in these jurisdictions, as a consequence, perceive the correlative rights and duties as distinct from contract. Courts focus on the promisor's promissory commitment that assuringly creates a reasonable expectation in the promisee of a right to rely. Courts cite and apply the definition of the Second Restatement of Contracts: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[74] The harm suffered by the promisee in exercising the right to rely is promissorily caused. Because the harm suffered (detrimental reliance) was reasonably expected and caused by the promissory commitment, it could have been prevented by the promisor. The promisor, having breached the duty to prevent the reasonable expectation of a right to rely, must therefore rectify the harm suffered. Since no promise or contract can be validated, courts fashion remedies (at this stage) based almost exclusively on the extent of the promisee's reliance. Because these decisions do not validate and enforce promises but compensate for harm caused, these damages have been perceived to be tort damages imposed to right wrongs.

Indeed, promissory estoppel does rectify wrongs. In the 1963 seminal case of *Jackson v. Kemp*,[75] the Tennessee Supreme Court applied Section 90 of the Restatement to enforce an insurance adjuster's promise to pay the plaintiff's medical bills if the plaintiff would retain no attorney and deal only with the adjuster.[76] In response to a demurrer of an indefinite promise by the adjuster regarding the amount to be paid, the high court acknowledged, "in establishing what these damages were there seems to be no good reason

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73. These jurisdictions include Alabama, Alaska, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Massachusetts, Mississippi, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma (but generally awards "full contractual remedies"), Oregon, South Carolina, Tennessee, Utah, Vermont, and Wyoming. To avoid a turf dispute, conceivably Mississippi may still be at contract phase two. Alaska, Nebraska, and Vermont may have matured to equity phase four.

74. RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

75. 365 S.W.2d 437 (Tenn. 1963).

76. *Id.* at 440.

to us for applying any different rule in establishing them than would be in an action if based on [a] tort."[77] However, just because detrimental reliance damages appear *ex delicto* in nature does not necessarily require promissory estoppel to be classified as a tort.[78] As explained next in phase four, the more accurate classification for promissory estoppel is "equity." The equity phase uses good faith, conscience, and justice to assimilate and apply the prior three phases as the contextual facts in each case demands.

At phase two, reliance and expectation damages tend to equate when promissory estoppel is used as a consideration substitute. In contrast, phase three demonstrates that courts use promissory estoppel to award reliance damages which equate more with tort damages in

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77. *Id.* When faced with an "indefinite" loan commitment agreement, the Texas Supreme Court similarly held: "Where the promisee has failed to bind the promisor to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained." Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965).

78. Border wars between contract law, tort law, and their professors are inevitable because the contours of our legal classifications are illusory, without bright lines. The doctrine of promissory estoppel is but one doctrine subject to tort/contract border wars. The obligation of good faith and fair dealing is another example of a concept subject to border wars, especially in employment and insurance contexts. *See, e.g.*, William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1224-25 (1994) (describing the contract paradigm as "the ideology of autonomy and consent" and the negligence paradigm as one that "fills in when, due to contract law's own rules about its applicability, we do not have the option of using contract law"). Regarding good faith, the author notes that equity has been overlooked in the border wars and suggests that a term like "conequitort" is the most accurate classification. *See* Eric Mills Holmes, *Is There Life After Gilmore's Death of Contract?—Inductions from a Study of Commercial Good Faith in First-Party Insurance Contracts*, 65 CORNELL L. REV. 330, 335 (1980).

> [C]ourts blend equity, tort and contract theories in dealing with the pathology of contract bargaining in general and the duty to disclose in particular. The proper legal classification for this overlapping of traditional categories might be called "conequitort." By focusing on the idea of "conequitort," one acquires a sharper perception of the good-faith concept.

Eric Mills Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 384 (1978). The seminal work explaining that the boundaries between contract and tort were eroding is GRANT GILMORE, THE DEATH OF CONTRACT 87-96 (1974) (suggesting a first-year course called "Contorts").

> Tort may be abandoning its great flywheel of fault for strict liability, compensation systems, and no-fault; fault, in turn however, is being absorbed into contract. Contract, using fault notions, seems to be embracing equitable principles such as the exerciser concept of unconscionability and the additur of good faith. The result of this mix is three varieties of contract breach: (1) the amoral classical contract breach with Hadley-limited damages; (2) the bad-faith breach for which not only compensatory but all nonpunitive damages proximately caused by the breach are recoverable; and (3) the fraudulent or oppressive [unconscionable] breach for which punitive damages are allowed. The proper label for this remedial expansion would be "conequitort."

Eric Mills Holmes & Dagmar Thürmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L & COMP. L. 323, 327 n.13 (1987).

restoring the promisee to a pre-promise status. That tort-like restoration is not necessarily paradoxical when courts recognize that one branch of promissory estoppel's family tree lies in tort.[79]

Promissory estoppel could be asserted as an independent tort cause of action and hence classified as a tort. For instance, Colorado courts recently confronted a claim for tortious promissory estoppel, but apparently foreclosed tort as a basis for recovery by holding that a claim for promissory estoppel cannot lie in tort.[80] Moreover, a few courts hold that promissory estoppel is not a basis for a punitive damage award.[81] Punitive damages are not recoverable under South Carolina law, for example, because "promissory estoppel is an equitable doctrine"[82] which, in good faith and conscience, properly points to phase four in the doctrine's evolution. In assimilating the three prior developmental stages of estoppel, contract and tort, the modern doctrine of promissory estoppel shows that courts have returned to one historical taproot in ancient equity.

D. Phase Four (Equity): Equitable Promissory Estoppel's Rights, Duties and Remedies

The remedy by phase four is acknowledged as discretionary, arising from equitable rights and duties which encompass the promisee's right reasonably to rely on promissory assurances and the promisor's duty to prevent (or not cause) foreseeable reliance by the promisee. In the 1980s and '90s, courts, reverting to the spirit of 1349 in Edward III's mandate to the Lord Chancellor, are forthrightly reclaiming "prerogative of grace" based on the principles of "Honesty, Equity, and Conscience."[83] For some reason unknown to this writer,

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79. *See* Farnsworth, *supra* note 20, at 594-96.

80. *See, e.g.*, Brace v. City of Lakewood, 899 P.2d 301, 304 (Colo. Ct. App. 1995), *rev'd and remanded on other grounds by* City of Lakewood v. Brace, 1996 WL 342293 (Colo. 1996); H. Decker v. Browning-Ferris Industries of Colorado, 903 P.2d 1150, 1156 (Colo. Ct. App. 1995).

81. *See, e.g.*, Covert v. Allen Group, Inc., 597 F. Supp. 1268, 1270 (D. Colo. 1984). But at least one jurisdiction has granted punitive damages based on promissory estoppel. *See* Greenstein v. Flatley, 474 N.E.2d 1130 (Mass. App. Ct. 1985) (granting both expectation damages and punitive damages in an equal amount). For an analysis of this decision and issues concerning measure of damages, see Becker, *supra* note 4.

82. Blanton Enters., Inc. v. Burger King Corp., 680 F. Supp. 753, 776 n.24 (D.S.C. 1988). *See also* Duke Power Co. v. S.C. Pub. Serv. Comm'n., 326 S.E.2d 395, 406 (S.C. 1985).

83. What we presently call "equity" originated in 1349, when Edward III by a general writ referred all matters within the king's divine "prerogative of Grace" to the Chancellor for adjudication. *See* 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 337 (1846). In the reign of Edward III (1327-1377), the English Court of Chancery appeared as a distinct court with prerogative jurisdiction to grant relief which common law courts would or could not give. Previously, the Chancery Court had exercised extraordinary jurisdiction

over the centuries we forgot or merged these three principles and now speak only in terms of "equity." And rather than chancery principles, we speak of equitable principles.

As early as 1873, the Michigan Supreme Court emphasized estoppel's good-faith basis: "There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on."[84] Modern courts cognitively cull out and apply that "chancery" root basis in administering promissory estoppel. In 1951, for instance, the Arkansas Supreme Court said:

> The name "promissory estoppel," has been adopted as indicating that the basis of the doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations. [The evolution of the doctrine] is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings.[85]

Thus, grounded on good faith, conscience, honesty, and equity (the four chancery principles and standards for evaluating conduct in social

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permissively by delegation from either the King or the Select Council. 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 33, at 37 (4th ed. 1918). However, it seems Edward III was too busy with affairs of state to decide which matters were "of Grace." The Chancellor was therefore a logical choice for delegation of prerogative of Grace, which required the Chancellor to base all decisions on the principles of "Honesty, Equity, and Conscience." *Id.* § 35, at 39. If one committed any unconscientious act or breach of faith and the "rigour of the law" favored that party, the other party who was thereby harmed would be granted corrective relief "under the head of conscience." In the fourteenth and fifteenth centuries, the Chancellor, becoming independent of the King and the Select Council, performed the functions of a court. By the end of the 1400s, the Chancellor had become the head of what the English call the Court of Chancery and Americans mistakenly call Equity.

With its source in Edward's writ, "good faith" (one basis of "promissory estoppel") was subsequently recognized and applied by American courts. For example, the Michigan Supreme Court explained:

> There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

Faxton v. Faxon, 28 Mich. 159, 161 (1873) (mortgagee promised never to enforce payment if promisee would remain on land and support others; relief is granted by the court under the heading of "estoppel" instead of "promissory estoppel," which is typical of decisions from all American jurisdictions in the doctrine's incipient developmental estoppel stage one).

84. *Id.*

85. Peoples Nat'l Bank of Little Rock v. Linebarger Constr. Co., 240 S.W.2d 12, 16 (Ark. 1951).

and commercial transactions), courts which have evolved to this fourth phase reaffirm their chancery powers and apply promissory estoppel to rectify wrongs with discretely designed corrective relief.[86] For instance, under California, New York, Texas, and Utah law,[87] promissory estoppel is definitely held to be an equitable doctrine recognizing equitable rights and remedies.

> Treatise writers and commentators have confirmed the generally Equitable nature of promissory estoppel in enforcing a promise which otherwise would be unenforceable. . . . The available authorities generally concur, however, that as of 1850 assumpsit would not lie to enforce a gratuitous promise, where the promisee's detrimental reliance was not requested by the promisor. . . . The equitable character of promissory estoppel is confirmed by a close scrutiny of the purpose of the doctrine, namely, that "Injustice can be avoided only by enforcement of the promise. . . . " Both historically and functionally, the task of weighing such equitable considerations is to be performed by the trial court, not the jury.

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86. The four principles and standards (conscience, good faith, honesty and equity) defining the Chancellor's judicial powers in modern times are customarily and collectively referred to as "equity," which can be somewhat misleading. The equitable principles of good faith and conscience were transformed into modern contract law. The RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Section 208 provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Consequently, good faith and unconscionability are generally considered and classified as contract doctrines. However, historically these modern doctrines are "equitable" in origin, conceived in Edward's 1349 writ to the Lord Chancellor, and thereafter implemented by the Court of Chancery. For a more comprehensive account of the equitable fount of "good faith," see Eric Mills Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 419-25 (1978). Likewise, promissory estoppel arises out of the four principles (now labeled equity), but is generally considered and classified as a contract doctrine.

87. *See, e.g.*, Merex A.G. v. Fairchild Weston Systems, Inc., 29 F.3d 821, 825-26 (2d Cir. 1994) (holding that promissory estoppel is equitable in nature and concerns equitable rights and remedies for which a jury trial is not guaranteed), *cert. denied*, 115 S. Ct. 737 (1995); Nimrod Mktg. (Overseas) Ltd. v. Texas Energy Inv. Corp., 769 F.2d 1076 (5th Cir. 1985) (applying Texas promissory estoppel law and holding no constitutional right to a jury trial under the Seventh Amendment), *cert. denied*, 475 U.S. 1047 (1986), *and cert. denied*, 476 U.S. 1104 (1986); C & K Eng'g Contractors v. Amber Steel Co., 587 P.2d 1136 (Cal. 1978) (holding that promissory estoppel both historically and functionally is equitable in nature, to be tried by the court as a matter of law and not by the jury); Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171, 174 (Utah Ct. App. 1993) ("promissory estoppel is an equitable claim for relief which is normally tried to the bench."). *See also* Aldrich v. Forbes, 385 P.2d 618 (Or. 1963) (noting that the reliance principle of Section 90 is increasingly recognized as an independent equitable standard of elementary fairness).

> We conclude that the trial court properly treated the action as equitable in nature, to be tried by the court with or without an advisory jury as the court elected.[88]

The private common law of promissory estoppel of fourteen American jurisdictions has progressed to this fourth unabridged, equitable stage.[89] In that regard, one final impression about the equitable right and remedy of promissory estoppel is proffered.

"Promissory estoppel is an equitable form of action in which equitable rights alone are recognized."[90] The primary equitable right is the promisee's right to rely. That right arises from the objectively reasonable expectations created and foreseeable by the promisor; that is, the promissory "statements" must objectively evidence a sufficient commitment or assurance upon which a reasonable person would rely. "The promisor is affected only by reliance which [the promisor] does or should foresee, and enforcement must be necessary to avoid injustice."[91]

The remedy for promissory estoppel is discretionary. No rigid or mechanical remedy rule applies. The remedy is not necessarily coextensive with damages for contract breach but is equitably molded ad hoc for each case according to the dictates of good faith, conscience, and justice.[92] With their reliance sabers, courts award the full range

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88. *C & K Eng'g Contractors*, 587 P.2d at 1138-39, 1141. This decision is approved and followed in Walton v. Walton, 36 Cal. Rptr. 2d 901 (Cal. Ct. App. 1995).

89. Promissory estoppel does not languish in the contract/tort shadowland but rests, stably rooted in equity, in the following jurisdictions: Arkansas, California, Colorado, Indiana, Louisiana, Minnesota, New York (in federal Second Circuit opinions because the High Court of New York has authoritatively neither accepted nor rejected Section 90 as an affirmative claim), Pennsylvania, Puerto Rico, South Dakota, Texas, Vermont, Washington, and Wisconsin. Conceivably, Vermont may not have sufficient decisions to place it at this fourth phase.

90. *Nimrod Mktg.*, 769 F.2d at 1080.

91. RESTATEMENT (SECOND) OF CONTRACTS § 90, cmt. b (1981).

92. Interesting evolutionary parallels (and differences) between promissory estoppel and restitution exist. For instance, a prominent remedies scholar explains how restitution has both a legal and equitable basis:

> The substantive basis of restitution is related to substantive equity. That is, courts applying substantive equity and courts applying the law of unjust enrichment are both applying a law of "good conscience" [as do courts applying promissory estoppel]. Remedially and historically speaking, however, restitution might be either a purely legal claim or a purely equitable claim [as with promissory estoppel in the fifteenth and sixteenth centuries].

1 DAN B. DOBBS, LAW OF REMEDIES § 4.1(2), at 556 (2d ed. 1993). However, promissory estoppel does not have to mirror restitution's tortured legal-equitable history and dichotomy. With a fused system of law and equity in modern times, courts can apply promissory estoppel (based on the four chancery principles) and fashion promissory estoppel relief from the full range of remedies without regard to the antecedent legal-equitable distinction. A thoughtful study of the interrelationship of promissory estoppel and restitution would be useful, but is beyond the

of remedies based on specific performance, restitution, expectation, reliance or exemplary damages,[93] or some other appropriate relief to achieve corrective justice between the parties.

> Where damages are awarded in promissory estoppel . . . , they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule of thumb approaches to the damage problem should be avoided. . . . "Moreover the amount allowed as Damages may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to [the plaintiff] of the promised performance. . . . In determining what justice requires, the court must remember all of its powers, derived from equity, law merchant, and other sources, as well as the common law. Its decree should be molded accordingly."[94]

Various imponderables should be taken into consideration as courts of justice "make the remedy fit the crime" and make any monetary judgment depend on the special circumstances and merits of all the claimants.

For instance, in *Hunter v. Hayes*,[95] Kathleen Hunter was promised a job as a flagger on a construction project.[96] In reliance, Ms. Hunter quit her position at the telephone company and remained unemployed for two months after the new employer reneged.[97] On her promissory estoppel claim, the Colorado Intermediate Court upheld the jury award of $320 per month for each month of unemployment, explaining that the award was necessary to avoid injustice:

> When a plaintiff's recovery is predicated on findings of a promise and detrimental reliance thereon, there is no fixed measure of damages to be applied to every case. Rather, the amount of

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scope of this Article. The end result may be a restatement of promissory estoppel.

93. Promissory estoppel was the basis for a punitive damage award in Greenstein v. Flatley, 474 N.E.2d 1130 (Mass. App. Ct. 1985), which concerned an office lease negotiation. The Massachusetts court employed promissory estoppel to award both expectation damages and punitive damages of equal amount because the owner's conduct "was an intentional course of action, taken to maintain his options despite [plaintiff's] predictable reliance on the existence of a deal." *Id.* at 1134.

94. Hoffman v. Red Owl Stores, 133 N.W.2d 267, 276-77 (Wis. 1965). *See also* State Mechanical Contractors, Inc. v. Village of Pleasant Hill, 477 N.E.2d 509, 512 (Ill. App. Ct. 1985) ("The tenor of the promissory estoppel theory is that the remedy for a broken promise upon which the promisee has relied to its detriment is that the remedy be just and equitable."), *appeal denied*, 483 N.E.2d 887 (Ill. 1985).

95. 533 P.2d 952 (Colo. Ct. App. 1975).

96. *Id.* at 953.

97. *Id.*

> damages should be tailored to fit the facts of each case and should be only that amount which justice requires.[98]

Courts of the fourteen jurisdictions which apply phase four of promissory estoppel evaluate the merits and defects of all available remedies in granting relief as conscience, good faith, and justice dictate. The most mature statements and holdings concerning the doctrine at this stage are articulated in case law from Arkansas, California, Colorado, Indiana, Minnesota, South Dakota, Texas, Washington, and Wisconsin.[99] It seems fitting to close with Judge (formerly Professor) Posner's succinct description of the protean doctrine: "If an unambiguous promise is made in circumstances calculated to induce reliance, and it does so, the promisee if hurt as a result can recover damages."[100] In sum, one can generally conclude that the majority of American jurisdictions recognize promissory estoppel both as an equitable reliance sword providing a cause of action with a panoply of remedies available as justice dictates, and a defensive shield to avoid injustice.

III. CONCLUSION

Promissory estoppel is neither waning nor dying as some report. Alive and vital, promissory estoppel has been steadfastly evolving over five centuries in the common-law tradition. All American jurisdictions adopt and apply some theory of promissory estoppel grounded in Section 90 of the Restatements of Contracts. Furthermore, commencing in the 1990s, an inchoate body of federal common law of promissory estoppel is rapidly evolving.[101] However, the legal literature is replete with polemically correct attempts to squeeze and pigeonhole this flexible equitable doctrine into a more familiar legal classification of contract or of tort. The *ex contractues* claim that "promissory estoppel" is exclusively a promissory contract theory (a consideration substitute) for enforcing clear, unambiguous, definite promises by granting only expectation damages. In contrast, the iconoclastic *ex delectoes* counter that "promissory estoppel" is an independent theory of detrimental reliance and award damages for harm caused by conduct in reliance on promissory manifestations that need not be the equivalent of offers to contract. In the middle are the ad hocs who hospitably

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98. *Id.* at 954.

99. *See* cases listed under these state headings in HOLMES on CORBIN, *supra* note 6, § 8.12.

100. Goldstick v. ICM Realty, 788 F.2d 456, 462 (7th Cir. 1986).

101. The federal cases are collected and analyzed in HOLMES on CORBIN, *supra* note 6, at 231-37.

permit the doctrine to abide in the shadowland of contract and tort. And so it goes with turf wars.

All three jurisprudential approaches and others can be comfortably accommodated under the equitable umbrella of promissory estoppel. This accommodation occurs when courts acknowledge that abstract classifications, theories, labels, and terminology mean little apart from the duty and right which exists. That right and its correlative duty were born in ancient equity and assumpsit, and thereafter developed in four stages: estoppel, contract, tort and equity. To be charitably brief, promissory estoppel at its most developed stage is an equitable theory. Subordinate legal classifications like contract and tort are covered under the umbrella of equity which can grant, traditional contract expectation damages, tort-like detrimental reliance damages, or some other relief as equity dictates.

With its equitable underpinnings (good faith, conscience, honesty, and equity), promissory estoppel recognizes the promisee's right reasonably to rely on the expectations created by the promisor. The promisor's statements and manifestations must objectively evidence a sufficient commitment or assurance upon which a reasonable person would foreseeably rely. In such a case, the promisor has a duty to prevent (or not cause) a promisee's detrimental reliance. The remedy for breach is discretionary and personalized, predicated on the principles and standards of good faith, conscience, honesty, and equity. A promisee or third party recovering under promissory estoppel should neither be penalized nor experience a windfall. Equitable promissory estoppel empowers courts to fashion a personalized remedy from the full range of remedies. Courts award expectation, reliance, restitution, specific performance, exemplary, injunctive, or other appropriate relief to achieve corrective justice between the parties.

The foregoing is a terse restatement of promissory estoppel law in action. Restatements come and restatements go. A restatement is not for all times a compilation of immutable legal principles. There will always be two large fields of legal uncertainty—the field of the obsolete and dying, and the field of the newborn and growing. That is evidenced by the need for the Restatement (Second) of Contracts, which will no doubt, by the evolutionary nature of the law, be followed by a third and so on. No longer are we Langdellian legal scientists looking for Platonic forms. Instead, we are legal commentators on the evolution of the law. It is necessary now, just as it was with the learned reporters and all their predecessors, to restate the rules of law in the light of subsequent collected experience. The restatements of promissory estoppel and its working rules, especially Section 90 of the

Restatement, must be tested and restated or abandoned in light of how courts apply or reject the doctrine of promissory estoppel. This Article provides a first step in restating Section 90 and related sections for a third Restatement of Contracts or for a new Restatement of Promissory Estoppel.