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Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What Our Students Should Know About Enforcement of Promises in a Historical and International Context

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Article

Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What our Students Should Know about Enforcement of Promises in A Historical and International Context

Charles Calleros*

Abstract

The common law theory of promissory estoppel offers a possible avenue for closing the gap between the civil law concept of cause and the common law doctrine of consideration. The civil law concept of cause supports the enforcement of gratuitous promises, or promises for which there is no consideration. The common law doctrine of consideration, by definition, does not support the enforcement of such promises. Students of United States contract law, however, may be surprised to learn that – in contrast to promissory estoppel as an affirmative cause of action in the United States – English common law recognizes promissory estoppel only as a defensive shield, except in the limited context of promises relating to ownership of land.

Further inquiry into the enforcement of promises under common law reveals a second surprise to students in the United States, where the legal effect of sealed instruments has largely been abandoned. English common law has never abandoned its modern equivalent of the early action

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> *of covenant, which provides for enforcement of a promise, even if gratuitous, if stated in an authenticated writing. Thus, a gratuitous promise under deed (a promise in a signed, witnessed, and delivered writing) is fully enforceable in England, arguably bringing English common law closer to the enforcement rules of the French Civil Code than to the common law of the United States.*
>
> *By including such comparisons in our contracts courses, students can appreciate the non-inevitability of the paths taken in the common law. At the same time, students can appreciate the degree to which the common law and civil law both recognize the need to enforce promises outside the context of an exchange, although they have taken slightly different roads to reach that destination.*

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Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What our Students Should Know about Enforcement of Promises in A Historical and International Context

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Introduction

Every legal system restricts the class of promises that merit legal enforcement. Most legal systems will readily enforce a promise that the promisor had consensually exchanged for another promise. Legal traditions differ, however, in the extent to which they will enforce a gratuitous promise – a promise to make a gift. Compared to the civil law concept of *cause*, the common law requirement of consideration is fairly restrictive. A charitable motivation can provide the *cause*, or reason, for a promise to make a gift; however, the consideration requirement excludes such gratuitous promises.

The common law courts have found the consideration doctrine to be overly restrictive in cases in which a party foreseeably and detrimentally relies on a gratuitous promise. However, rather than replacing the consideration doctrine with the more expansive concept of *cause*, common law courts in England and the United States adapted well-established estoppel principles to create a new species, "promissory estoppel," to address injustices resulting from reliance on a gratuitous promise.

Despite this similar origin, the doctrine of promissory estoppel evolved differently on each side of the Atlantic. In England, promissory estoppel has largely remained true to its roots, limited in most cases to shielding the relying party from a claim wielded by the promisor. In contrast, most jurisdictions in the United States have readily permitted promissory estoppel to act as a "sword," providing the relying party with an affirmative claim for damages against the promisor.

Employed as a sword, promissory estoppel can act as a substitute for consideration, providing an alternative ground for enforcing a promise, and thus protecting the promisee's expectation interest. Moreover, as the doctrine has fully evolved in the United States, promissory estoppel has gained a flexibility that increases the range of its operation. For example, the doctrine permits recovery of reliance costs even if the promise is too

indefinite to enforce or if the reliance or injustice is insufficiently substantial to justify full enforcement of the promise.

This state of affairs raises a number of questions. With its more robust promissory estoppel remedy, is the United States closer than England to the civil law's liberal enforcement of promises, including gratuitous promises? Or does English common law employ other means to liberally enforce promises, thus decreasing the need for a supplementary remedy in promissory estoppel?

The answers may be surprising to law students in the United States, where the effect of sealed instruments has largely been abolished. In contrast, English law has retained the modern equivalent to the early action of covenant, which provides for the enforcement of a promise, even if gratuitous, if stated in an authenticated writing. Thus, by supplementing the doctrine of bargained-for-exchange with the formality of a written, witnessed deed, English courts presumably have faced less pressure to broadly recognize promissory estoppel as an affirmative cause of action.

This article explores these issues in historical context, pausing along the way to analyze a few "chestnut" American cases that are popular in Contracts courses in the United States. The article's primary goal is to expand the scope of the inquiry to which first-year students are typically exposed. By briefly exploring the history of the consideration doctrine and comparing consideration to the civil law concept of *cause*, law students in the United States can appreciate the non-inevitability of the common law approach.

Even more eye-opening, however, is the divergence in the common law on enforcement of promises in the United States and England. By reading at least summaries of the English "chestnut" cases on estoppel, students can better appreciate the distinctive American stamp placed on the common law. Students may even reach the surprising conclusion that the English approach to enforcement of promises may be closer to the civil law concept of *cause* than to the combined common law approach of consideration and promissory estoppel in the United States.

I. Common Law and Civil Law Legal Methodology

This article views promissory estoppel as a remedy that brings common law enforcement of promises in the United States closer to the more expansive civil law concept of *cause*. Although it ultimately compares U.S. and English approaches to enforcement, this article uses the civil law concept of *cause* as an external benchmark for that comparison.

Therefore, a brief review of common law and civil law legal method will serve as a reminder of the legal contexts from which the doctrines spring.

Comparative legal methodology in the U.S. and France is such an intriguing topic because the civil law and common law systems have begun to converge to a modest extent, while still reflecting differences that are engaging to explore. The convergence comes from both sides of the Atlantic. The federal and state governments in the United States have vastly expanded the role of statutory and administrative law over the last century, thus taking substantial strides toward the dominant role of legislation that typifies civil law code systems.[1] For their part, French judges and academics will concede – at least unofficially – that French courts necessarily create law or legal norms when they apply the very general provisions of the French Civil Code to particular cases,[2] partly mirroring the lawmaking function of common law courts.[3] Moreover, although France does not embrace a formal doctrine of *stare decisis*,[4] courts and litigants, while recognizing that they are not bound to follow precedent, often choose to follow or refer to previous decisions of the *Cour de cassation*.[5] This practice is particularly apparent when the *Cour de cassation* has reconfirmed a principle through a series of consistent decisions.[6]

Nonetheless, differences between the systems remain substantial. Judicially-created common law, for example, remains a substantial part of the applicable law in the United States, particularly in states' laws of civil obligations. Even state code systems that largely occupy whole fields of law leave room for common law to fill gaps. The Uniform Commercial Code contains an explicit provision to this effect in commercial transactions, preserving the application of common law principles to the

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[1] *See, e.g.*, Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11 HARV. J.L. & PUB. POL'Y 35 (1988).

[2] JOHN P. DAWSON, THE ORACLES OF THE LAW 399, 416-31 (Greenwood Press 1978) (1968) (tracing the debate about the legal force of French jurisprudence); MITCHEL LASSER, JUDICIAL DELIBERATION: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 30-61 (2004); UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 84 (1997); EVA STEINER, FRENCH LEGAL METHOD 75 (2002); Mitchel Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J., 1325, 1344-55 (1995) (discussing modern theory that French judicial decisions create "legal norms" even if they do not amount to an official source of law).

[3] *See, e.g.*, CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 24-28, 33-40, 57-58 (6th ed. 2011).

[4] STEINER, *supra* note 2, at 76, 79-82. *But see id.* at 84 (arguing that psychological and sociological factors may result in greater pressures to follow French judicial decisions than does the more formal English system of *stare decisis*).

[5] STEINER, *supra* note 2, at 80-82, 97; Lasser, *Portraits*, *supra* note 2, at 1350-51.

[6] DAWSON, *supra* note 2, at 409; STEINER, *supra* note 2, at 87–88 (discussing the concept of "*jurisprudence constante*, whereby a particular interpretation or principle is repeated in a series of decisions").

extent that the statutory law of the Code does not displace them.[7] In other cases, U.S. courts have imported substantial bodies of common law into a statutory scheme with little or no explicit legislative direction.[8] Thus, common law rules in the United States constitute the bulk of the law in some fields, and these rules stand ready to fill gaps in statutory schemes, even in code systems designed to address a field of law in a fairly thorough manner.

This system stands in contrast to the French legal system, in which the *Code Civil* was conceived to provide systematic and comprehensive coverage.[9] Rather than filling gaps with a backdrop of common law, the civil law employs a process of "amplifying induction," through which individual articles of the code are taken to reflect "a wider legislative intent which can be applied outside the area covered by the individual enactments."[10]

Moreover, the common law doctrine of *stare decisis* requires courts in the United States to accord both a formal and a substantive respect to precedent that goes well beyond any informal consideration of precedent in France. For example, a court in the United States must follow the standing precedent of a court that sits above it and that reviews its decisions.[11] As stated by the U.S. Supreme Court, when determining whether to adhere to its ruling in a previous case, "[t]he Court of Appeals was correct in applying that principle despite its disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."[12]

Although any appellate court can overrule its own precedent, that court will do so only for very good cause and only after offering a detailed explanation for its change in course. The U.S. Supreme Court, for

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[7] U.C.C. § 1-103(b) (2001).

[8] *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981); State Oil Co. v. Khan, 522 U.S. 3, 20-21 (1997) (federal anti-trust statute invokes a common law term and reflects congressional expectation that courts would interpret the statute through the lens of common law traditions).

[9] *See* DAWSON, *supra* note 2, at 390-93 (explaining the 19th century exegetical school of thought, which advanced the view that the *Code Civil* is comprehensive and the legislature is the sole-lawmaking authority); STEINER, *supra* note 2, at 29, 32-33.

[10] FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 38-39 (Abraham Hayward transl., The Legal Classics Library 1986) ("In every triangle . . . there are certain data, from the relations of which all the rest are necessarily deducible: thus, given two sides and the included angle, the whole triangle is given. In like manner, every part of our law has points by which the rest may be given: these may be termed the leading axioms."). *But see* BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 5 (2d ed. 1992) (stating that the German scholar Savigny doubted that a code could comprehensively anticipate "every case that may arise," because "there are positively no limits to the varieties of actual combinations of circumstances.").

[11] *See, e.g.*, CALLEROS, LEGAL METHOD, *supra* note 3, at 55-57.

[12] *Khan*, 522 U.S. at 20.

example, has stated that it may overrule one of its previous decisions if that decision appears now to be so clearly erroneous as to defy enforcement; if the decision has proved to be unworkable as a practical matter; or if the decision has been undermined by subsequent changes in related principles of law or in relevant facts (or our understanding of facts). These factors, however, must be weighed against the values of consistency and predictability, including the extent to which the populace has come to rely on the precedent.[13]

Stare decisis operates with special force when applied to precedent interpreting statutes because the legislature can easily correct any error in the court's interpretation.[14] Conversely, *stare decisis* applies more flexibly in the Supreme Court's interpretation of the U.S. Constitution,[15] because the U.S. Constitution is not easily amended to correct an outdated or otherwise problematic precedent.[16] Nonetheless, even in constitutional interpretation, *stare decisis* "demands special justification" for overturning precedent.[17] Against this background of legal method, we can compare the substance of the French doctrine of *cause* with its counterpart in Anglo-American common law, consideration.

II. Cause, Consideration, and Reciprocal Inducement

The requirement of consideration represents the common law system in two senses. First, common law systems require consideration in the formation of contracts, as contrasted with civil law systems. Second, consideration is almost entirely a product of judicial creation and development, unlike the enacted law that springs from statutes, regulations, and constitutional provisions.

To be sure, absence of consideration is seldom raised in litigation because the doctrine is so routinely satisfied in the kinds of commercial transactions that make up the bulk of litigated cases. Still, consideration is a fundamental element of contract formation in the common law system,[18] and it contrasts in an interesting way with the doctrine of *cause* in the French Civil Code.

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[13] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-55 (1992); *see also* Payne v. Tennessee, 501 U.S. 808, 828 (1991).
[14] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 233 (2009).
[15] *See*, *e.g.*, *Payne,* 501 U.S. at 828; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996).
[16] *See* U.S. CONST. art. V.
[17] Arizona v. Rumsey, 467 U.S. 203, 212 (1984); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (passionately debating whether the Court had sufficient justification for overruling precedent).
[18] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

Both *cause* and consideration reflect a reluctance to enforce all promises and an attempt to rationally define which promises deserve the attention of the enforcement machinery of the courts.[19] In drawing that line, however, the doctrines differ in their treatment of gratuitous promises.

A. The French Code Civil*'s Requirement of Cause*[20]

Article 1108 of the French *Code Civil* provides that contract formation requires the four elements of consent, capacity, an object forming the subject matter, and a lawful cause.[21] The fourth requirement of *cause* originated in Roman texts but was principally derived from the concept of *causa* developed in Canon law.[22]

In some ways, the French concept of *cause* appears to be more demanding than the common law concept of consideration. However, this is only because *cause* acts as a vessel for several restrictions on enforceability that are addressed as separate doctrines in the common law. For example, Article 1108's express requirement that the *cause* be "*licite*," coupled with a companion provision's definition of "*illicite*," or illicit,[23] demonstrates a civil law limitation on contract formation that corresponds roughly to common law defenses to enforcement based on a violation of law or public policy.[24] The element of *cause* has also been interpreted to

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[19] E. ALLAN FARNSWORTH, CONTRACTS § 1.5, at 11 (4th ed. 2004); *see* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 339 (4th ed. 2002); E. ALLAN FARNSWORTH, CONTRACTS § 1.5, at 11 (4th ed. 2004) ("No legal system has ever been reckless enough to make all promises enforceable"); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 253 (Dover ed., Dover Publ. 1991); NICHOLAS, *supra* note 10, at 118 (referring to the recognition in France that "there must be some limit" to the principle that "agreements should be observed").

[20] This section is adapted from a passage from an earlier article, Charles R. Calleros, *Introducing Civil Law Students to Common Law Legal Method Through Selected Issues in Contract Law*, 60 J. LEGAL EDUC. 641, 651-53 (2011).

[21] CODE CIVIL [C. CIV.] art. 1108 (Fr.); C. CIV. art. 1108 (John H. Crabb trans., rev. ed., Rothman 1995) [hereinafter Crabb trans.] (referring to "consent . . . capacity . . . [a]n object certain which forms the subject-matter of the engagement . . . [a] licit *causa*").

[22] NICHOLAS, *supra* note 10, at 118; *see also* Crabb trans., *Glossary*, at 422-23 (equating 'cause' with '*causa*' and defining 'cause' as "an element essential to the enforceability of a contract consisting of an adequately serious 'cause' or reason for a person to have obligated himself contractually.").

[23] C. CIV. art. 1133 (Fr.); Crabb trans., *supra* note 21, art. 1133; *see* Nicholas, *supra* note 10, at 128-136.

[24] *See, e.g.*, Hadnot v. Bay, Ltd., 344 F.3d 474, 478 & n. 14 (5th Cir. 2003) (arbitration agreement's bar on punitive damages in a discrimination case was unenforceable because it violated important remedial terms and policies of a U.S. employment discrimination statute); Bovard v. Am. Horse Enterprises, Inc., 201 Cal. App. 3d 832, 247 Cal. Rptr. 340 (1988) (denying enforcement of agreement to purchase business that manufactured items that were not themselves illegal, but which facilitated illegal drug use, and which therefore violated policies underlying California drug laws).

encompass limitations on validity that correspond roughly to common law defenses based on mistake of fact or the opposing party's material breach.[25]

In fact, the French requirement of *cause* is less restrictive on contract formation than the common law requirement of consideration. For example, unlike the consideration doctrine, which requires an exchange,[26] the French Civil Code specifically recognizes gratuitous contracts.[27] Additionally, the French Civil Code also recognizes contracts that contemplate an exchange,[28] if executed with formalities such as notarization[29] or handwritten terms, as required for some gratuitous contracts.[30] Moreover, if the French concept of *cause* refers to a "reason" for entering into a contractual obligation,[31] the required reason can be the "promisor's *intention libérale*, i.e. his intention to confer a gratuitous benefit on the promisee."[32]

This relatively expansive concept of *cause* reflects the Napoleonic *Code Civil*'s respect for the autonomy of the parties,[33] and its embrace of *pacta sunt servanda*, "the moral principle that contracts should be observed."[34] In contrast, the common law concept of consideration grew gradually out of a medieval system of common law writs that began with a decidedly restrictive view of enforceable obligations.

B. The Common Law Requirement of Consideration

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[25] *See* NICHOLAS, *supra* note 10, at 120–22, 125–26 (referring to cases of the *Cour de Cassation* finding absence of cause when, unknown to one or both parties, the subject matter of a contract or a central reason for contracting had ceased to exist at the time of contracting, or when one party seeks to excuse his performance because the other party has failed to perform); *cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 151–54 (1981) (contract voidable for mutual and unilateral mistake); RESTATEMENT (SECOND) OF CONTRACTS §§ 237–42 (discharge of remaining obligations for the other party's material breach).

[26] *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

[27] C. CIV. art. 1103 (Fr.); Crabb, trans., *supra* note 21, at art. 1103 ([A contract] "is unilateral when one or more persons are obligated toward one or more others without there being an engagement on the part of the latter."); C. CIV. art. 1105 (Fr.); Crabb, trans., *supra* note 21, at art. 1105 ("A *charitable* contract is one in which one of the parties procures for the other a purely gratuitous advantage.").

[28] *See* C. CIV art. 1106 (Fr.); Crabb trans., *supra* note 21, at art. 1106; *see also* C. CIV. art. 1102 (Fr.); Crabb trans., *supra* note 19, at art. 1102.

[29] *See, e.g.,* C. CIV. art. 931 (Fr.); Crabb, trans., *supra* note 21 at art. 931; C. CIV. art. 1317 (Fr.); Crabb, trans., *supra* note 21, at art. 1317.

[30] C. CIV. art. 1326 (Fr.); Crabb, trans., *supra* note 21 at art. 1326.

[31] Crabb trans., *supra* note 21, *Glossary*, at 422; NICHOLAS, *supra* note 17, at 118 ("cause" interpreted as "motivating reason or purpose").

[32] NICHOLAS, *supra* note 10, at 124; INTRODUCTION TO FRENCH LAW 217 (George A. Bermann & Etienne Picard, eds., 2008).

[33] C. CIV. art. 1134 (Fr.); Crabb trans., *supra* note 21, at art. 1134; *see also* DENIS MAZEAUD, LA NOTION DE CLAUSE PÉNALE § 53, at 43 (1992) (referring to the principle of *l'autonomie de la volonté* (autonomy of the will), a fundamental concept of French contract law).

[34] Nicholas, *supra* note 10, at 118.

1. A Brief History

a. Early Forms of Action: Debt and Covenant

Beginning with the reign of King Henry II (1154–89), early civil actions in the central royal courts in England were limited to claims that fit within recognized forms of action for which the Crown would issue a writ.[35] One of the earliest of these writs was debt-detinue which, in the early thirteenth century, split into two separate actions: an action for detinue to recover personal property or its value, and an action for debt to recover a sum owed for the delivery of something of value.[36]

Although a forerunner of contract law, the action for debt was not one for breach of promise; rather, it alleged that the defendant wrongfully withheld payment owed for something valuable that had already been delivered to the defendant.[37] This very feature, however, sowed the seeds of the consideration doctrine because debt required a *quid pro quo* in the form of the prior delivery of property or services to support the demand for payment.[38]

A plaintiff could more directly enforce a promise by bringing an action for breach of covenant, without the necessity of showing a *quid pro quo*.[39] By the fourteenth century, however, this writ applied only to promises set forth in a written instrument and formalized with a seal.[40]

Therefore, the action on covenant could not be used for informal transactions. Moreover, the action for debt proved unpopular with

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[35] *See, e.g.*, F. W. MAITLAND, EQUITY ALSO, THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 315-34 (A. H. Chaytor and W. J. Whittaker, eds. Cambridge Univ. Press, 1929) (1909); HOLMES, *supra* note 19, at 274-75.

[36] MAITLAND, *supra* note 35, at 342.

[37] BAKER, *supra* note 19, at 321-22; HOLMES, *supra* note 19, at 258; D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 141 (1999); *but cf.* BAKER, *supra* note 19, at 341 (yet debt referred to a continuing duty rather that the kind of past, spent, wrongful act normally associated with tort).

[38] *See* IBBETSON, *supra* note 37; HOLMES, *supra* note 19, at 252-53, 258, 267; A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 152, 193 (Clarendon Press 1975).

[39] *See, e.g.*, HOLMES, *supra* note 19, at 254 ("consideration was never required for contracts under seal"); *cf.* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 252, at 348-51 (West Publ. 1980) (1952) (sealed instrument is enforceable without consideration, but if it is part of an exchange, failure of other party to perform can excuse performance of the promise under seal, because it may be conditioned on the other performance).

[40] BAKER, *supra* note 19, at 318-20; *see also* MAITLAND, *supra* note 35, at 358; *id.* at 318, 320 ([p]romises arising out of less formal agreements and transactions could still be enforced in local courts); CORBIN, *supra* note 39, at 339-43.

plaintiffs, partly because the defendant could adopt the ancient wager of law. Under this procedure, the defendant could defeat the action by producing a sufficient number of compurgators, or "oath-helpers," that were willing to support the defendant's sworn denial by swearing their own oaths in support of the defendant's credibility.[41] According to Holmes, this procedure may have derived from ancient Anglo-Saxon practices in which transaction witnesses helped to establish that a defendant held property as the result of a sale rather than theft.[42]

b. Assumpsit as a Form of Trespass on the Case

Beginning in the fourteenth century, the English courts employed a writ of more general application, *trespass on the case*, which avoided some of the restrictions of debt and covenant.[43] One form of action on the case, *assumpsit*, provided a remedy when the defendant caused damage to the plaintiff's property while lawfully possessing the property, therefore not committing a simple trespass, after undertaking to provide a service.[44] In deciding in *Slade's Case* in 1602 that an action in assumpsit could be brought even if debt might otherwise apply, the King's Bench cleared the way for assumpsit to supplant debt and its outmoded wager of law.[45]

c. Assumpsit – Active Harm or Failure to Perform

In the early cases, assumpsit required the defendant to have engaged in active misfeasance in the undertaking, causing the plaintiff to have suffered a tangible loss or detriment. These requirements provided a forerunner to modern actions in both contracts and tort. In the seminal *Case of the Humber Ferryman* in 1348, the defendant actively caused the loss of the plaintiff's horse by overloading a ferry after undertaking to carry the horse across a river.[46] In another typical case, liability in assumpsit

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[41] MAITLAND, *supra* note 35, at 309-310; SIMPSON, *supra* note 38, at 137-40.
[42] HOLMES, *supra* note 19, at 255-56.
[43] SIMPSON, *supra* note 38, at 199, 203-05; IBBETSON, *supra* note 37, at 95-97; MAITLAND, *supra* note 35, at 359-62; HOLMES, *supra* note 19, at 274-75, 86-87; *see also* CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 204-06 (1980) (reviewing debate among historians whether the growth of trespass on the case over several centuries was facilitated by a statute of 1285).
[44] MAITLAND, *supra* note 35, at 362-63; HOLMES, *supra* note 19, at 274-75; *see* SIMPSON, *supra* note 38, at 199 (although the history of assumpsit begins in the 14th century, "[i]t was not until the 16th century that lawyers began to treat assumpsit as an action with its own identity").
[45] BAKER, Legal History, *supra* note 19, at 344-45; MAITLAND, *supra* note 35, at 364; HOLMES, *supra* note 19, at 288; SIMPSON, *supra* note 38, at 295-98.
[46] The Case of the Humber Ferryman (*Bukton v. Townsend*), 22 Lib. Ass. F. 94, pl. 41; *see also* SIMPSON, *supra* note 38, at 210-12 (analyzing *Bukton v. Townsend).*

arose when the defendant actively injured the plaintiff's horse by negligently shoeing the horse after undertaking to shod it.[47]

Eventually, however, courts applied assumpsit to nonfeasance, as in the simple failure to perform an undertaking,[48] as long as the plaintiff had still suffered some loss, such as making prepayments in reliance on the promise.[49] Liability for nonfeasance provided a foundation for the concept of breach of promise.[50]

In 1561, *Lucy v. Walwyn* further paved the road to a theory of contract. In that case, the courts began imposing liability for breach of promise in a fully executory contract arising from unperformed mutual promises without previously delivered *quid pro quo* or other detrimental reliance.[51] This significant development, coupled with the boost to assumpsit in *Slade's Case* forty-one years later, helped usher in the modern law of contracts and its consideration requirement.[52]

2. Consideration in Modern U.S. Contract Law

In most jurisdictions in the United States, nineteenth and twentieth century state legislation eventually abolished or eroded the legal effect of recording a promise in a sealed written instrument.[53] On the other hand, the element of *quid pro quo* associated with the common law action in debt, and the element of injury or detriment associated with assumpsit, contributed to more lasting and substantive elements in the developing requirement of consideration.[54]

a. Cause and Consideration

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[47] HOLMES, *supra* note 19, at 274-88; SIMPSON, *supra* note 38, at 203-04, 210-220.
[48] IBBETSON, *supra* note 37, at 133-35; MAITLAND, *supra* note 35, at 363; HOLMES, *supra* note 19, at 285.
[49] BAKER, *supra* note 19, at 338-39.
[50] *See* HOLMES, *supra* note 19, at 280 ("the allegation of an undertaking conveyed the idea of a promise").
[51] BAKER, *supra* note 19, at 341 (summarizing the case of Lucy v. Walwyn (1561) B. & M. 485).
[52] *Id.*; HOLMES, *supra* note 19, at 274, 287-88; IBBETSON, *supra* note 37, at 142.
[53] *See, e.g.*, U.C.C. § 2-203 (2011); CORBIN, *supra* note 39, § 241 at 339-43; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 7.9, at 243-45 (6th ed. 2009). *But see* Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617 (1993) (emphasizing that many states nonetheless still give some effect to the formality of setting forth a promise in a writing or in writing and under seal, such as by shifting the burden of proof on the issue of consideration or extending the statute of limitations).
[54] *See* Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 102-103 (2000).

In the sixteenth century, for example, the term *quid pro quo* from the action of debt, and the Roman term *causa* as developed in Canon law, often competed with the term "consideration" as a way of expressing a required element to enforce a promise in an action in assumpsit to enforce a promise.[55] As the term "consideration" prevailed and its requirements evolved, consideration departed from the relatively expansive view of *cause* in the French *Code Civil*.[56] Unlike the *Code Civil*, the modern conception of consideration requires an exchange, as in the exchange of mutual promises or the exchange of a performance for a promise.[57]

Accordingly, whereas a contract under the French *Code Civil* can encompass a single *objet*, with a charitable motivation as the *cause*,[58] the modern common law consideration doctrine essentially represents an exercise in distinguishing enforceable exchanges from generally unenforceable gratuitous promises.[59] A policy justification frequently offered for this distinction is the belief in common law countries that exchanges are more likely than gifts to benefit society by creating new wealth, thereby making exchanges more deserving of the attention of courts with limited resources.[60]

As explored later in this article, American common law will enforce a gratuitous promise if the promise satisfies the equitable doctrine of promissory estoppel.[61] That remedy, however, remains distinct from the concept of consideration and is limited to cases in which an injury, detriment, or other injustice results from foreseeable reliance on a promise.[62] The consideration doctrine, on the other hand, is satisfied without regard to reliance[63] or equality of the exchange,[64] so long as the promise to be enforced was part of a reciprocally induced exchange.[65]

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[55] IBBETSON, *supra* note 37, at 142; HOLMES, *supra* note 19, at 286; J.H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW 372-74, 385 (The Hambledon Press 1986).
[56] *See* BAKER, *supra* note 55, at 385.
[57] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 17, 71 (1981).
[58] *Supra* notes 21, 27, 32 and accompanying text.
[59] *See, e.g.,* Kirksey v. Kirksey, 8 Ala. 131 (1845); BAKER, *supra* note 19, at 340 (a gratuitous promise to build a house is only a "*nudum pactum*"); Robert A. Hillman & Maureen A. O'Rourke, *Rethinking Consideration in the Electronic Age*, 61 HASTINGS L.J. 311, 316 (2009); *see also* HOLMES, *supra* note 19.
[60] Hillman & O'Rourke, *supra* note 59 at 315, 317-20, 330 (describing this as the most convincing of several justifications offered by contracts scholar Lon Fuller).
[61] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (not using the term "promissory estoppel").
[62] *See, e.g.*, Binkowski v. Hartford Accident and Indem. Co., 876 N.Y.S.2d 295, 297, 60 A.D.3d 1473, 1474-75 (2009); Dick's Last Resort of West End, Inc. v. Market/Loss Ltd., 273 S.W.3d 905, 916 & n.4 (Tex. App. 2008); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).
[63] *See* BAKER, *supra* note 19, at 341 (describing historic recognition that contractual liability can be based on reciprocal executory promises alone).
[64] *Id.* at 341; RESTATEMENT (SECOND) OF CONTRACTS § 79 (1979); *but cf.* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 147-49 (Clarendon Press 1979) (beginning around 1770 the Chancery

One might say that the common law consideration doctrine requires an approximation of the *Code Civil*'s *objet*, or subject matter, on *each* side of the transaction. The current requirement that each party to a bargain must add a promise or immediate performance to the exchange stems from the detriment-or-injury requirement of the now-obsolete *assumpsit* action.[66] Under modern doctrine, the performance – or promised performance – need not visit a tangible loss, injury, or detriment on the person providing it,[67] so long as the performance consists of an act or forbearance that the obligor is not already legally obligated to perform,[68] and so long as a promise to engage in such a performance states a non-illusory commitment.[69]

b. Consideration as Bargained-for Exchange

These elements of exchange, however, do not amount to consideration under modern doctrine unless they are linked together in a bargain.[70] According to the Second Restatement, "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."[71] A plaintiff need not show that each party received a tangible benefit or profit from the other's promise or performance,[72] so long as each promise or performance was a genuine inducement for the return consideration:

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court could withhold equitable relief if the exchange was unfair, and juries may have discounted damages for breach if the bargain was lopsided in favor of the victim of breach).

[65] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71, 79 (1981).

[66] *See id.* at § 71 (1981); *see id.* at § 77 (distinguishing between good and illusory promises); E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 32 (7th ed. 2008)..

[67] *See, e.g.*, Hamer v. Sidway, 27 N.E. 256 (N.Y. Ct. App. 1891) (nephew's refraining from engaging in certain legal vices – or his promise to do so – in exchange for a promise to pay money, could satisfy the consideration requirement, even if such a forbearance would benefit him, and without regard to the effort it required); RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

[68] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 73 (1981).

[69] *See id.* § 77.

[70] *See id.* § 71(1).

[71] *Id.* § 71(2).

[72] *See, e.g.*, Hamer v. Sidway, 27 N.E. 256 (N.Y. Ct. App. 1891) (nephew's refraining from engaging in certain legal vices – or his promise to do so – in exchange for his uncle's promise to pay money, could satisfy the consideration requirement without the need to inquire into whether the uncle would benefit from such forbearance in the ordinary sense); RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981); IBBETSON, *supra* note 37, at 142 (as early as the 1560's, the evolving consideration requirement became divorced from notions of benefit, requiring "a slightly looser conception of reciprocity"); *see also* HOLMES, *supra* note 19, at 289-90 ("it is said . . . [that consideration can be] . . . a benefit conferred by the promisee on the promisor, or any detriment incurred by the promisee").

> [I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration.[73]

Accordingly, one who performs the act requested in an offer to pay a reward has not satisfied the consideration requirement if he had no knowledge of the offered reward when he performed; in such a case, he obviously was induced exclusively by other factors to engage in the act.[74] Similarly, a past act cannot be consideration for a subsequent promise because the past act could not have been induced by a promise that had not yet been formed.[75]

This requirement of reciprocal inducement, cemented into U.S. common law doctrine by Justice Holmes in the nineteenth century,[76] could be viewed as consideration's counterpart to *cause* because reciprocal inducement relates to a party's *reason* for contracting.[77] Unlike the *Code Civil*'s embrace of an *intention libérale* as one type of *cause* or motivating reason,[78] a charitable motivation does not satisfy this requirement of inducement.[79]

The consideration doctrine's requirement of reciprocal inducement, and particularly its exclusion of a promise subsequently made in recognition of a past act, raises questions of justice and morality, addressed briefly in a nineteenth century American case familiar to many law students, *Mills v. Wyman*.[80] In *Mills*, Levi Wyman, an emancipated adult, fell ill while travelling, and Mills cared for Levi until Levi's death about two weeks later. On hearing of this, Levi's father, Seth Wyman, promised in writing to pay Mills' expenses. When Seth breached this promise, Chief Justice Parker, writing for the Massachusetts Supreme Court, resisted the invitation to expand the doctrine of consideration to encompass Seth's promise.

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[73] HOLMES, *supra* note 19, at 293; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 81 (1981).
[74] HOLMES, *supra* note 19, at 294.
[75] *Id.* at 296; CORBIN, *supra* note 39, at 283.
[76] HOLMES, *supra* note 19, at 293-94.
[77] *See* C. CIV. art. 1326 (Fr.) (referring to the requirement to "écrite par lui-même"); Crabb, trans., supra note 21, at art. 1326 (promises to provide money or goods gratuitously "must be established" in a signed document in which the monetary sum or quantity of goods are "written by . . . hand").
[78] *See* Crabb trans., supra note 21, *Glossary*, at 422; NICHOLAS, *supra* note 17, at 118 ("cause" interpreted as "motivating reason or purpose").
[79] *See* Stewart v. Trustees of Hamilton Coll., 2 Denio 403, 420–21 (N.Y. Sup. Ct. 1845).
[80] Mills v. Wyman, 3 Pick. 207 (Mass. 1825).

Justice Parker deplored Seth Wyman's breach of promise,[81] and implicitly recognized it as a breach of a moral obligation,[82] but he found no legal obligation to keep the promise. Seth Wyman's promise was not supported by consideration precisely because he had not requested Mills' services; Mills had acted solely on the basis of a sense of charity and not to exchange his services for a promise of payment.[83] Thus, Seth Wyman's promise, which could not have been an inducement to Mills, was gratuitous and unenforceable.

Ultimately, Justice Parker opted for certainty and predictability in the consideration doctrine at the expense of unfairness in special cases:

> General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.[84]

It is true that the law of some states will enforce a promise based on the moral obligation arising out of a past service;[85] however, even those courts will likely limit that expansion of the consideration doctrine to cases in which the past service transfers a substantial benefit directly to the promisor, particularly when the service results in significant injury or other

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[81] *See id.* at 209 ("[the defendant] is willing to have his case appear on the record as a particular example of injustice").
[82] *Id.* at 211 ("A deliberate promise . . . cannot be broken without a violation of moral duty").
[83] *Id.* at 209.
[84] *Id.* at 208-09. The court was compelled by precedent to recognize a limited exception in the form of enforcement of a new promise to revive an obligation that once was part of a bargained-for exchange and that was extinguished by operation of law (such as bankruptcy or running of the statute of limitations) before its revival by the new promise. *Id.* at 211 & n.1.
[85] *See, e.g.*, Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935) (enforcing a promise to pay support to an employee after the employee sustained permanent injuries while saving the promisor from death or serious injury); FARNSWORTH, *supra* note 19, § 2.8, at 60-63; RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981); *but see* Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945) (denying relief in circumstances similarly compelling as those in *Webb v. McGowin*).

cost to the promise.[86] Moreover, courts in the United States universally recognize claims in quasi-contract for restitution of the value of a service conferred on the defendant; however, that doctrine is limited to cases in which the enrichment of the defendant is unjust, as when the plaintiff had reasonably expected compensation for the service, perhaps because of a special relationship between the parties at the time of the enrichment.[87] Restitution would not apply to a case in which the plaintiff had acted out of a sense of charity and had expected no compensation,[88] which likely was the case in *Mills v. Wyman*. Without moral obligation or quasi-contract as possible grounds for relief, Mills squarely confronted consideration's requirement of reciprocal inducement, which was clearly lacking.

In closer cases, Holmes conceded that subtle changes of fact or factual inference could spell the difference between gratuitous promises on the one hand and exchanges with reciprocal inducement on the other.[89] Another nineteenth century American case, *Kirksey v. Kirksey*,[90] provides a good example. In *Kirksey*, Antillico's brother-in-law, on hearing of the death of his brother, Antillico's husband, wrote a letter promising to provide a comfortable house for Antillico and her children if she would "come down and see me."[91] Why was the brother-in-law bargaining for the presence of Antillico and her family on his estate, perhaps because he was lonely or because he needed their assistance in tending the land?[92] Or was he acting purely gratuitously, while stating the obvious fact that she and her family would need to move to enjoy the promised gift?

Although the Alabama Supreme Court's brief opinion provides little reasoning, the facts presented by the Court could have supported either conclusion. Indeed, the jury and one Alabama Supreme Court justice drew inferences supporting a finding of consideration, but the Alabama Supreme

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[86] *See, e.g.*, Webb v. McGowin, 168 So. 199 (Ala. 1936) (underscoring those points in denying review of the decision of the Court of Appeals). Other states may require the formality of a written promise as a limitation on this doctrine. *See, e.g.*, Realty Associates of Sedona v. Valley Nat'l Bank of Ariz., 738 P.2d 1121 (Ariz. App. 1986) (recognizing this doctrine generally, but relying on precedent in which the promise had been written).

[87] *See, e.g.*, FARNSWORTH, *supra* note 19, § 2.20, at 101-03.

[88] *See, e.g.*, *id.*; Pyeatte v. Pyeatte, 661 P.2d 196, 203 (Ct. App. 1983); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 1-2 (2011).

[89] HOLMES, *supra* note 19, at 292, 293.

[90] Kirksey v. Kirksey, 8 Ala. 131 (Ala. 1845); *see also* William R. Castro & Val D. Ricks, "*Dear Sister Antillico . . .": The Story of Kirksey v. Kirksey*, 94 GEO. L.J. 321 (2006).

[91] *Kirksey,* 8 Ala. at 132.

[92] The research conducted by Castro and Ricks convincingly paints a different and more complex picture. Castro & Ricks, *supra* note 90, at 327-53, 376-79. However, this article's analysis limits itself to the sparse facts presented by the court, as does this author in the classroom, because the stated facts define the precedential reach of the opinion.

Court reversed because a majority of justices found the brother-in-law's promise gratuitous and thus unenforceable.[93]

The *Kirksey* decision illustrates the restrictive nature of the consideration requirement, especially with its Holmesian emphasis on reciprocal inducement. In addition, the facts of the case underscore the injustice that may result from a promisee's reliance on a gratuitous promise that is later breached. On receiving the promise of a comfortable home, Antillico abandoned her current residence and moved her household approximately sixty miles to her brother-in-law's estate.[94] When the brother-in-law later removed her from the promised house, she presumably did not have the option of returning to her former residence.[95]

If such a case arose in modern times, Antillico's suit would include a claim for damages based on promissory estoppel. However, it is not clear that promissory estoppel was available to Antillico in Alabama in 1845, although its evolution was underway.[96]

III. Promissory Estoppel as Shield and Sword

A. Protecting Reliance on Promises as well as Representations of Facts

At the time of *Kirksey v. Kirskey* in the mid-nineteenth century, one who had relied on a representation of existing fact rather than representation of future intentions would be protected by promissory

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[93] *Kirksey,* 8 Ala. at 132.
[94] *Id.*
[95] *Id.* Antillico apparently abandoned her residence without following her brother-in-law's advice to liquidate her interest in the residence, which made her reliance particularly detrimental, but which might also undermine any claim for promissory estoppel if a court found her reliance to be unforeseeable or unreasonable or found that the injustice was of her own making. *See also, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (requiring foreseeable reliance and an injustice); CORBIN, *supra* note 39, § 200, at 288–91 (discussing "Limits of the Action in Reliance Doctrine"); *cf.* Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898) (finding it "grossly inequitable" that the promisor breached a promise that induced reliance that the promisor contemplated as a "reasonable and probable consequence of his gift").
[96] *See* CORBIN, *supra* note 39, § 194, at 280–81 (discussing how the resistance of Holmes and other judges to the promissory estoppel theory was eventually overcome by the American Law Institute's embrace of the doctrine); Castro & Ricks, *supra* note 90, at 369-70 (discussing Alabama case law's interpretation of reliance to equate with the detriment required for consideration, which Antillico's attorney did not cite); *Ricketts*, 77 N.W. at 365 (discussing how the Nebraska Supreme Court recognized a claim for promissory estoppel in the late nineteenth century).

estoppel in England or the United States.[97] If the representing party later advanced a claim resting on a contrary assertion of fact, the relying party could invoke estoppel as a shield against the claim.[98] By the mid-twentieth century, both England and the United States had extended estoppel theory to protect reliance on a *promise*, which amounted to a representation of future intentions rather than one of existing fact.

1. Promissory Estoppel in the United States

In 1898, in *Ricketts v. Scothorn*, the Nebraska Supreme Court protected a young woman's reliance on her grandfather's written promise to pay her $2,000, plus accruing interest, on her demand.[99] The promise was gratuitous under the bargain theory of consideration because the grandfather had promised to enable his granddaughter, Katie, to quit work if she so desired, but without requiring her to quit in exchange for his promise.[100] In reliance on the promise, however, she did quit work, causing her to suffer loss when her grandfather's executor refused to honor the grandfather's promise.[101]

In *Ricketts*, the court found grounds for estoppel in the circumstances of the case. The Grandfather, "desiring to put [Katie] in a position of independence, gave her the note," thus making a promise.[102] Katie changed her position in reliance on that promise by abandoning her employment for more than a year.[103] The court held that the grandfather "contemplated such action on her part as a reasonable and probable consequence of his [promised] gift" because he told her that he wished to make her financially independent so that she could choose to quit her job if she wished.[104] Therefore "it would be grossly inequitable" for him "to resist payment on the ground that the promise was given without consideration."[105]

By 1932, the American Law Institute had incorporated this new form of estoppel into Section 90 of its First Restatement of Contracts.[106] The factual predicates for relief were similar to those stated in *Ricketts v.*

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[97] Jorden v. Money, 10 Eng. Rep. 868 (H.L. 1854); MELVILLE BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE 555 (4th ed. 1886).
[98] *See* Pickard v. Sears, 112 Eng. Rep. 179, 180 (K.B. 1837).
[99] *Ricketts*, 77 N.W. at 365.
[100] *Id.* at 366.
[101] *Id.*
[102] *Id.* at 367.
[103] *Id.* at 366.
[104] *Id.* at 366.
[105] *Id.* at 367.
[106] RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

Scothorn.[107] They included a promise; an "action or forbearance of a definite and substantial character" in reliance on the promise, a reasonable expectation on the part of the promisor that the promise would induce such reliance; and a resulting "injustice" if the breached promise is not enforced.[108]

Section 90 did not use the term estoppel, but was entitled "Promise Reasonably Inducing Definite and Substantial Action."[109] In his 1920 treatise on contracts, however, Samuel Williston, the reporter for the First Restatement, had used the term "promissory estoppel" to refer to the theory that he later presented in Section 90.[110] It is widely known in the United States by that name.[111] The absence of the expansive term "estoppel" in Section 90 may have reflected a hope by Williston that Section 90 would be restricted to exceptional classes of noncommercial cases, such as charitable donations and family promises.[112] But the pre-Restatement case law on the equivalent of promissory estoppel was not limited to noncommercial settings,[113] the text of Section 90 does not exclude commercial settings,[114] and courts have not excluded commercial promises from its ambit.[115]

Williston set forth this ground for relief in a section separate from the provision for consideration as a bargained-for exchange, apparently reflecting a middle position between the view of Holmes and Corbin.[116] Holmes would have limited enforcement of promises to bargained-for exchanges, while Corbin supported expanding the definition of consideration to include promises that induce reliance.[117] The Second Restatement, published in 1981, retains this separation as well as the

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[107] *Ricketts*, 77 N.W. at 366.
[108] RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).
[109] *Id.*
[110] Hoffman v. Red Owl Stores, Inc., 133 N.W. 2d 267, 274 (Wis. 1965) (citing to § 139 of the first edition of Williston's treatise); David G. Epstein et al., *Reliance on Oral Promises: Statute of Frauds and "Promissory Estoppel,"* 42 TEX. TECH. L. REV. 913, 916 & n. 16 (2010) (citing to § 139 of what it refers to as Williston's 1920 treatise); Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement*, 34 U. MEM. L. REV. 499, 523 & n. 109, 525 & n. 124 (2004) (citing to § 139 of what it refers to as Williston's 1921 treatise).
[111] *E.g.*, Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 906 N.E.2d 520, 523 (Ill. 2009).
[112] *See, e.g.*, Teeven, *supra* note 110, at 529-33; Joel Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425, 444 (2007).
[113] Teeven, *supra* note 110, at 500-01, 506-10, 538-40.
[114] RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); *see* Ngugi, *supra* note 112, at 445-46.
[115] *See, e.g., Newton Tractor Sales, Inc.*, 906 N.E.2d at 520 (Ill. 2009); *Hoffman*, 133 N.W. 2d at 273-74 & n. 1.
[116] *See generally* Teeven, *supra* note 110 at, 511-28.
[117] *Id.*

continued absence of the term "promissory estoppel."[118] However, the Second Restatement liberalized Section 90, eliminating text requiring the reliance to be "definite and substantial," recognizing reliance by a third party, and permitting courts to issue the relief necessary to avoid injustice.[119] By allowing flexible remedies, such as approving an award of reliance costs rather than expectation interest, the Second Restatement encourages broader application of promissory estoppel.[120]

2. English Estoppel for Reliance on a Promise

In 1946, in *Central London Property Trust Ltd. v. High Trees House Ltd.*, the King's Bench confirmed that English law, too, had progressed beyond "estoppel in the strict sense," which is limited to reliance on a representation of fact.[121] As a "natural result of the fusion of law and equity," English decisions had for half a century provided support for protection of reliance on a promise.[122]

In *High Trees*, a landlord had rented a block of flats in London to a commercial tenant for 2,500£ per year for 99 years. In 1940, the landlord confirmed an agreement in writing to reduce the rent by half for the duration of wartime conditions.[123] No consideration had been given for this promise to waive half the rent in future years, and the court acknowledged that the commitment to reduce the rent was a "representation . . . as to the future" rather than one of existing fact.[124] A separate decision of 1854 stated that no relief would be available in such circumstances.[125] Nonetheless, Judge Denning cited four decisions between 1900 and 1946 to support extending estoppel to reliance on a promise, noting that the landlord had intended its promise to be binding until circumstances changed.[126]

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[118] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).
[119] *Id.* The second Restatement also advances the view that reliance on a promise of donation to a charitable organization should be enforceable without proof of reliance.
[120] *See, e.g.*, *Newton Tractor Sales, Inc.*, 906 N.E. at 527-28 (invoking flexibility in remedy to reject an argument that an affirmative cause of action for reliance on a promise during bargaining would cause a court to define expectation interest before the parties had completed their negotiations); Wheeler v. White, 398 S.W.2d 93, 96-97 (Tex. 1966) (awarding reliance costs in a commercial setting, and suggesting that reliance damages helped to meet a requirement that estoppel be "defensive" in application); *Hoffman*, 133 N.W. at 274-75 (awarding limited damages in commercial setting even though indefiniteness in the promised franchise would preclude expectation damages).
[121] [1947] 1 K. B. 130.
[122] *Id.* at 134–35.
[123] *Id.* at 131.
[124] *Id.* at 134.
[125] *Id.* (citing Jorden v. Money, 10 Eng. Rep. 868 (H.L. 1854)).
[126] *Id.* at 134-136.

B. Promissory Estoppel as a Sword, as Well as a Shield

However, the extension of estoppel in England and the United States diverged. In England, estoppel was limited in application to a shield against the other party's claim. In the United States, this new estoppel was transformed into a sword to advance an independent claim for relief. Traditional estoppel, protecting reliance on representations of existing fact, is properly limited to defensive use as a shield.[127] For the most part, England has retained this limitation for promissory estoppel, while most U.S. jurisdictions have applied the promissory estoppel as the basis for an affirmative claim for relief.

1. Estoppel as a Shield in England

Even though the *High Trees* decision referred broadly to a promise being "binding" when the promise induces reliance, the estoppel in that case was applied only as a shield against the landlord's claim for full rent for the duration of the war.[128] In citing to cases in the previous half century, which had extended estoppel to reliance on a promise of future action, the court was careful to note that:

> [t]he courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel.[129]

A few years after *High Trees*, the Court of Appeal for the King's Bench confirmed this limitation in *Combe v. Combe*.[130] In this case, prior to a final divorce decree, a husband promised to pay his wife 100£ each year as maintenance.[131] Although he did not request any action from her as a *quid pro quo*, his wife relied on this promise by refraining from applying

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[127] Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 906 N.E. 2d 520, 526 (Ill. 2009) (distinguishing traditional "equitable estoppel," as is it is commonly called in the U.S., with promissory estoppel); Low v. Bouverie [1891] 3 Ch. 82 105 (C.A.); Ngugi, *supra* note 112, at 453–55.
[128] [1947] 1 K.B. at 134-136.
[129] *Id.* at 134
[130] [1951] 2 A.C. 215 (K.B.).
[131] *Id.* at 215.

to the Divorce Court for maintenance.[132] In the wife's action to enforce the husband's promise, the trial court awarded her 600£.[133] The Court of Appeal reversed on the grounds that the husband's promise was unsupported by consideration, and estoppel could not be used by the wife as an affirmative cause of action.[134]

In the lead opinion in *Combe*, Lord Justice Denning – who earlier as trial judge had authored the decision in the *High Trees* case – expressly addressed the scope of the holding in the *High Trees* decision:[135]

> Much as I am inclined to favour the principle stated in the *High Trees* case . . . it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties . . . .[136]
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> . . . . Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind.[137]

Lord Justice Birkett agreed, specifically referring to the applicable principle as "one to be used as a shield and not as a sword."[138] Lord Justice Asquith, also in agreement, summed up the *High Trees* principle in the following terms:

> [w]hat that case decides is that when a promise is given which (1.) is intended to create legal relations, (2.) is intended to be acted upon by the promisee, and (3.) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise

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[132] *Id.*
[133] *Id.* at 216-17.
[134] *Id.* at 219–27.
[135] *Id.* at 219.
[136] [1951] 2 A.C. 215 (K.B.) (citation omitted).
[137] *Id.* at 220.
[138] *Id.* at 224.

> or is inconsistent with it. It does not, as I read it, decide that a promisee can sue on the promise.[139]

Despite these clear rulings, the cases leading to *Combe v. Combe* did not form an unbroken line. In 1845, in *Hammersley v. De Biel*, the House of Lords recognized estoppel as a sword by enforcing a father-in-law's promise to make a marriage settlement, unsupported by consideration, on the basis that the plaintiff married in reliance on the promise.[140] This expansive use of estoppel has persisted in England under the label of proprietary estoppel, but only in the context of improvements made to land in reliance on a promise relating to the land.[141]

Outside the narrow context of proprietary estoppel, the English courts soon retreated from *Hammersley's* recognition of estoppel as a sword.[142] The retreat culminated in the definitive statements in *Combe v. Combe* that estoppel based on reliance on a promise must be "used as a shield and not as a sword,"[143] because the "principle does not create new causes of action where none existed before."[144]

Aside from recognizing proprietary estoppel as a cause of action, English courts may ultimately carve out other exceptions to the rule of *Combe v. Combe*. For instance, they may fully protect reliance on assurances that a purported obligation was valid and legally enforceable.[145] As a general rule, however, the limitation in *Combe* continues to be applied in contemporary English law.[146] In a decision of the House of Lords a few years after *Combe*, Viscount Simonds cast a wary eye on statements made in *Combe*, apparently because he considered the test for defensive estoppel enunciated in *Combe* overly expansive:[147]

> [T]he gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this because I would not have it supposed, particularly in

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[139] *Id.* at 225.
[140] 8 E.R. 1312 (H.L. 1845).
[141] Ngugi, *supra* note 112, at 469–73, 476.
[142] *Id. at* 467–69.
[143] [1951] 2 A.C. at 224 (K.B.) (Birkett, L.J.).
[144] *Id.* at 219 (Denning, L.J.).
[145] Amalgamated Inv. & Prop. Co. Ltd. (In Liquidation) v. Tex. Commerce Int'l Bank Ltd. [1982] Q.B. 84 (Ct. App.).
[146] Ngugi, *supra* note 112, at 482–83; Syros Shipping Co. S.A v. Elaghill Trading Co. [1981] 3 All E.R. 189 (Q.B. Comm. Crt.) (quoting *Combe v. Combe* to find that an arbitrator committed error in employing estoppel as a "new cause of action").
[147] Tungsten Elec. Co Ltd. V. Tool Metal Mfg. Co. Ltd. (No.3), [1955] 1 W.L.R. 761, 764.

> commercial transactions, that mere acts of indulgence are apt to create rights, and I do not wish to lend the authority of this House to the statement of the principle which is to be found in *Combe v. Combe* and may well be far too widely stated.[148]

2. Estoppel as a Sword in the United States

In contrast, it was never in doubt in the United States that the new doctrine of promissory estoppel could be wielded as a sword to support a cause of action for damages. In *Ricketts v. Scothorn*, the remedy for the injustice resulting from Katie's reliance on the grandfather's promise to pay her $2,000 plus interest was enforcement of the promise to pay.[149] This case and similar cases, some of them addressing promises made in a commercial context,[150] led the American Law Institute to state in Section 90 of the First Restatement that the promise "is binding if injustice can be avoided only by enforcement of the promise."[151] Nothing in this summary of law suggests that enforcement of promises had been or should be limited to defensive applications.[152]

There has been no retreat in the United States from this willingness to use promissory estoppel as a sword. In 1981, the American Law Institute published its Restatement (Second) of Contracts, retaining its description of promissory estoppel as an affirmative cause of action.[153] This restatement recognized flexibility in remedies by stating that the "remedy granted for breach may be limited as justice requires."[154]

For the most part, the Restatements accurately summarize principles that are generally accepted in the United States. The common law of contracts, however, is developed independently in each of the fifty states. Consequently, although "the principles of contract law do not differ greatly from one jurisdiction [in the U.S.] to another,"[155] the common law is not entirely uniform among states. Thus, as recently as 2009, a case arising in the State of Illinois raised the question of whether promissory estoppel

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[148] *Id.* (footnote omitted).
[149] Ricketts v. Scothorn, 77 N.W. 365, 367 (Neb. 1898).
[150] Ngugi, *supra* note 112, at 444 (referring to cases allowing recovery for reliance on commercial promises, cited in Williston's treatise).
[151] RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).
[152] Ngugi, *supra* note 112, at 439 (referring to the Restatement having been influenced by "American courts [that] were permitting litigants to use estoppel as a cause of action").
[153] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).
[154] *Id.*
[155] In re Cochise Coll. Park, Inc., 703 F.2d 1339, 1348 n.4 (9th Cir. 1983).

could be used offensively as a sword or was limited to defensive use as a shield.[156]

In the Illinois case raising that issue, Newton Tractor Sales, Inc. ("NTS") sought to purchase a competing retailer of farm equipment, Vandalia Tractor & Equipment, Inc. ("VTE").[157] NTS valued VTE partly because VTE was an authorized dealer of Kubota tractors; however, Kubota Tractor Corp. insisted that VTE join in a cancellation of its contract with Kubota and that NTS apply for a new dealership agreement with Kubota.[158] In reliance on a gratuitous promise by a Kubota representative that NTS would be approved as a Kubota dealer, NTS entered into the agreement to purchase VTE, while authorizing VTE to cancel its contract with Kubota.[159] Kubota corporate headquarters, however, ultimately denied NTS's application for a Kubota dealership.[160]

Both the Illinois trial court and the intermediate court of appeals found that promissory estoppel could be used only as a shield in Illinois, based on their application of precedent of the court of appeals.[161] On further appeal by NTS, the Illinois Supreme Court addressed the question "whether promissory estoppel is a recognized cause of action in Illinois."[162] The Supreme Court held in the affirmative in an opinion that suggests some surprise at the necessity for the court to clarify its position on what it viewed to be a settled matter of law.[163]

Although the Illinois Supreme Court conceded that, "promissory estoppel is most extensively recognized with respect to the abandonment of existing rights," the court found that its own precedent and some precedent of the court of appeals had previously recognized promissory estoppel as an affirmative cause of action.[164] The Illinois Supreme Court also cited to secondary sources and cases from other jurisdictions supporting the use of promissory estoppel as a sword.[165]

The court did not rest entirely on its precedent, however, but also responded to Kubota's policy arguments against recognition of an

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[156] Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 906 N.E. 2d 520, 521 (Ill. 2009) (describing lower court's holding that promissory estoppel could be used only as a shield).
[157] *Id.*
[158] *Id.* at 522.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 522-23.
[162] *Id.* at 521.
[163] *Id.* at 523-29.
[164] *Id.* at 526.
[165] *Id.*

affirmative cause of action.[166] Most substantially, Kubota argued that enforcing a promise made in the early stages of dealings aimed at negotiating a detailed bargain would be impractical.[167] Kubota argued that enforcement of such a promise would inhibit negotiations because a promise made at that stage would lack the detail and precision for which the parties were striving in their ultimate contract.[168] The Illinois Supreme Court rejected this argument because of the flexible remedies in modern promissory estoppel analysis,[169] as reflected in the Second Restatement's formulation of the doctrine,[170] and as explained in the celebrated case of *Hoffman v. Red Owl Stores, Inc*.[171]

Citing to *Hoffman* and a similar case from Texas,[172] the Illinois Supreme Court noted that the remedy for Kubota's breach of promise could be limited to NTS's reliance costs.[173] In *Hoffman*, the Wisconsin Supreme Court applied promissory estoppel to enforce a promise to provide a grocery store franchise to the plaintiff, even though the store had not yet been defined, so the promise was too indefinite to enforce through an award protecting expectation interest.[174] The court explained that American promissory estoppel flexibility permits a remedy that avoids the injustice caused by the reliance and breach of promise, and it accordingly approved an award of damages based on more definite reliance costs incurred by the plaintiff.[175] The Illinois Supreme Court thus rejected Kubota's argument that employing promissory estoppel as a sword would be impractical or would undermine preliminary negotiations.[176]

As the opinions in the lower courts of the *Newton* case illustrate, even eighty years after publication of the First Restatement, the law in some states still may require clarification on use of promissory estoppel as a sword, and some states may ultimately reject that approach.[177]

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[166] *Id*. at 526-527.
[167] *Id*. at 527.
[168] *Id*.
[169] *Id*. at 527–28.
[170] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1932).
[171] Hoffman v. Red Owl Stores, Inc., 133 N.W. 2d 267 (Wis. 1965).
[172] Wheeler v. White, 398 S.W. 2d at 93 (Tex. 1966).
[173] *Newton Tractor Sales, Inc.*, 906 N.E.2d at 528.
[174] *Hoffman*, 133 N.W.2d at 275-77.
[175] *Id*.
[176] *Newton Tractor Sales, Inc.*, 906 N.E. 2d at 527-28.
[177] Contracts scholar Joseph Perillo identifies only Virginia as a state that has specifically rejected promissory estoppel as an affirmative cause of action. Perillo, *supra* note 53, § 6.4, at 236 & n. 17 (citing to W.J. Schafer Assoc. v. Cordant, 493 S.E.2d 512 (Va. 1997)). One can find similar rejections in Texas case law, *see, e.g*., Stanley v. CitiFinancial Mortgage Co., Inc., 121 S.W.3d 811, 820 (Tex. Ct. App. 2003). However, other Texas cases hold to the contrary. *See* Epstein et al., *supra* note 110, at 923 & n. 66. These latter cases represent a careful reading of a decision of the Texas Supreme Court that

Nonetheless, as reflected in the First and Second Restatements, and in a century of case law from *Ricketts* to *Newton*, the prevailing approach in the United States without doubt is to recognize promissory estoppel as a sword as well as a shield.

C. Explaining the Divergence Between Promissory Estoppel in England and the U.S.

1. Sword and Shield More Fully Defined

Arguably, the English rule is not far removed from the American approach because even estoppel that is restricted in application to a defensive shield can be employed to advance an affirmative claim. In *Combe v. Combe*, Lord Justice Denning explained that reliance on a representation or promise sometimes gives rise to an estoppel that neutralizes a defense of the party resisting a claim, rather than raising a shield against the party advancing a claim:

> Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights . . . . On other occasions it is a defendant who is not allowed to insist on his strict legal rights. His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim. Thus a government department, which had accepted a disease as due to war service, were not allowed afterwards to say it was not, seeing that the soldier, in reliance on the assurance, had abstained from getting further evidence about it . . . .[178]

Taken to an extreme, this characterization could be expanded to argue that a form of defensive promissory estoppel is the equivalent of offensive promissory estoppel. If a plaintiff seeks to enforce a gratuitous promise on which the plaintiff relied, and if the defendant responds that the promise is unsupported by consideration, the plaintiff's assertion of

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approved of promissory estoppel as an affirmative cause of action, though misleadingly labeling it as "defensive" in the sense that estoppel prevented the defendant from denying liability for damages. *Wheeler*, 398 S.W. 2d at 96.

[178] *Combe*, [1951] 2 A.C. at 219-220 (K.B.) (Denning, L.J.).

promissory estoppel can be used as a "shield" against the defendant's assertion of lack of consideration. This action is the equivalent of using promissory estoppel as a sword to assert a claim for damages; therefore, perhaps the English limitation of estoppel to a shield is indistinguishable from the use of promissory estoppel in the United States as a sword.

This argument, however, eventually encounters a barrier. Aside from the limited context of proprietary estoppel, English promise-based estoppel does not extend to blocking a defendant's assertion that a promise is unsupported by consideration, or provide an independent cause of action for damages. If it did, promise-based estoppel would have provided a basis for relief in *Combe v. Combe*, a case that denied relief precisely because the husband's promise was unsupported by consideration and estoppel did not provide a substitute. As Justice Denning wrote, "[s]eeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action."[179]

Thirty years later, the Commercial Court of the Queen's Bench quoted *Combe* in ruling that estoppel could not be employed as an affirmative cause of action to substitute for a purported agreement that lacked consideration.[180] Consequently, even though estoppel can be used as a shield in incremental ways to advance an affirmative cause of action, a fundamental distinction remains between the positions in the United States and England about the effect of estoppel when based on reliance on a promise without consideration. Claimants frequently wield estoppel as a sword in the United States, where the doctrine provides an independent claim for damages, whereas English jurisprudence generally limits estoppel to employment as a shield and not as an independent cause of action.

2. Is the Divergence Narrowed Through Recognition of an Implied Exchange?

In *Combe v. Combe*, Lord Justice Denning said the following about the doctrine of consideration: "Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge."[181] By referring to its "mitigation," his Lordship may have suggested that the consideration doctrine had been expanded sufficiently to reduce or eliminate the need for

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[179] *Id.* at 220 (Denning, L.J.).
[180] Syros Shipping Co. S.A v. Elaghill Trading Co., [1981] 3 All E.R. 189.
[181] *Id.*

a supplementary cause of action through promissory estoppel. Indeed, if the English version of consideration were sufficiently expansive so that it provided substantially the equivalent of promissory estoppel as applied in the U.S, then the divergence between English and U.S. law would be in name only.

As described in Section II.B.2 of this article, Holmes inspired a restrictive view of consideration in the United States. The requirement of reciprocal inducement successfully espoused by Holmes ensured that an action or forbearance taken in response to a promise would not satisfy the American consideration requirement unless the promisor sought the action in exchange for the promise. Consequently, in cases where un-bargained-for but foreseeable reliance on a promise justified a remedy in damages, an affirmative cause of action based on promissory estoppel became a necessary adjunct to the narrow conception of consideration.

Lord Justice Denning's reference to modification of a contract without consideration reflected one way that English consideration doctrine remains less demanding than American law, which has generally required consideration for the modification of a contract,[182] except for sales of goods governed by the Uniform Commercial Code.[183] That less demanding facet of English consideration doctrine, however, does not bring English law in line with the American use of promissory estoppel as a sword. To accomplish that, English law would need to find consideration in cases where a promise induced reliance that had not been requested by the promisor in exchange for the promise.

In *Combe v. Combe*, Denning LJ hinted at a possible avenue for such an expansion of English consideration doctrine by referring to the *implication* of a request by the promisor for an act or forbearance in exchange for his promise:

> Unilateral promises of this kind have long been enforced, so long as the act or forbearance is done on the faith of the promise and at the request of the promisor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises *ex post facto* . . . .[184]

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[182] *See, e.g.*, Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902).
[183] U.C.C. § 2-209 (2011).
[184] *Combe*, [1951] 2 A.C. at 221 (K.B.).

Lord Justice Asquith referred more directly to a required link between the promise and a return action or forbearance, similar to the American requirement of reciprocal inducement, but he too spoke of the possibility of an *implied* request by the promisor for action or forbearance:

> Finally, I do not think an actual forbearance, as opposed to an agreement to forbear . . . is a good consideration unless it proceeds from a request, express or implied, on the part of the promisor. If not moved by such a request, the forbearance is not in respect of the promise.[185]

Based on his interpretation of Lord Denning's scholarly writings, Professor Ngugi suggests the possibility that a request for action or forbearance could be so liberally implied under English law that it might lead to "invented consideration," which could encompass "a majority of the cases covered by the American doctrine of promissory estoppel."[186]

The opinions in *Combe v. Combe*, however, do not support such a fiction. If the concept of an implied request could be invoked in every case of foreseeable reliance, the concept could have been invoked in that case. Instead, Denning LJ stated:

> I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance, or in other words, any request by the husband, express or implied, that the wife should so forbear. He left her to apply if she wished to do so.[187]

Similarly, Lord Justice Birkett gave no indication that he would employ the concept of an implied request to "invent" consideration where none could be gleaned from the evidence: "There does not appear, as I read it, anywhere in the evidence a request by the husband that the wife should refrain from going to the court."[188]

In contrast, had this case arisen in the United States in the middle of the twentieth century, a court almost certainly would have entertained an affirmative cause of action in promissory estoppel in light of the wife's reliance on the husband's promise. Just as the husband in *Combe v. Combe*

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[185] *Id.* at 226–27.
[186] Ngugi, *supra* note 112, at 481–82.
[187] *Combe*, [1951] 2 A.C. at 221 (K.B.) (Denning, L.J.).
[188] *Id.* at 223 (Birkett, L.J.).

"left her to apply if she wished to do so,"[189] the grandfather's promise to pay $2,000 in *Ricketts v. Scothorn*, discussed in Section III.A.1, enabled his granddaughter to either continue or quit working as she wished.[190] The Supreme Court of Nebraska enforced the grandfather's promise even though the grandfather did not require his granddaughter to quit in exchange for his promise.[191] Therefore, as in *Ricketts*, the court would have entertained an affirmative claim of promissory estoppel on behalf of the wife in *Combe v. Combe* to determine whether foreseeable reliance by the wife created an injustice that warranted a remedy for damages.

The reference to an implied request in *Combe v. Combe* seems more consistent with the American concept of implied-in-fact obligations, such as an obligation to use reasonable efforts, inferred from all the circumstances even though not directly expressed by the parties.[192] Such an implication is not invented to create a fiction but instead is grounded in facts supported by objective evidence.[193] Indeed, even Holmes's restrictive concept of reciprocal inducement appears to be consistent with this sort of implication because Holmes referred to inducement as the "conventional" motivation for a promise.[194] Viewed in this light, the possibility of finding an implied request for an action or forbearance in exchange for a promise does not close the gap between English and American law on wielding promissory estoppel as a sword rather than merely interposing it as a shield.

3. Filling the Gap: English Recognition of Promises Under Deed

Perhaps the best explanation for the divergent approaches to promissory estoppel in England and the United States is the continued recognition in England of the equivalent of the ancient action of covenant.[195] Because English law continues to enforce a gratuitous promise if it satisfies the formalities of a deed, the English courts likely felt less pressure to recognize an affirmative cause of action for promissory estoppel than in the United States, where the early common law action for

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[189] *Id.* at 221 (Denning, L.J.).
[190] Ricketts v. Scothorn, 77 N.W. 365, 366 (Neb. 1898).
[191] *Id.* at 367.
[192] Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).
[193] *E.g.*, *Wood v. Lucy*, 118 N.E. at 214 (inferring an obligation to use reasonable efforts from the nature of the plaintiff's business, as stated in the recitals, and from the import of other rights and obligations expressed in the contract).
[194] HOLMES, *supra* note 19, at 293.
[195] *See* SIMPSON, *supra* note 38; CORBIN, *supra* note 39 (briefly discussing the attributes of this early form of action).

enforcement of a promise in a sealed writing had been abandoned or eroded in most states.[196]

The action of covenant in English common law has evolved over the centuries, requiring at one time a written promise identifying the parties, authenticated by a seal, and delivered to the promisee.[197] The modern equivalent of this action in England is a promise set forth in a deed: "[a] 'deed' is a formal document which can be used to make a unilateral (gratuitous) promise or a bilateral contract binding . . ."[198]

A statute enacted in 1989 clarifies that an individual no longer needs a seal to execute a deed.[199] Instead, a written instrument constitutes a deed if "it makes it clear on its face that it is intended to be a deed,"[200] and if the promisor signs it in the presence of an attesting witness and then delivers it to the promisee.[201] Though a seal is no longer necessary, enforcement of a promise under deed rests squarely on the formality of execution, rather than on any substantive requirement: "A contract made by deed derives its validity neither from the fact of the agreement nor because it is an exchange but solely from the form in which it is expressed."[202]

A nineteenth century English case, *Morley v. Boothby*, explains that the formality of a deed performs the gatekeeping function of consideration equally well:

> The common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it. In all other cases the contract was invalid, unless the party making the promise was to obtain some advantage, or the party to whom it was made, was to suffer

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[196] *See* Kennedy, *supra* note 54.
[197] Holmes, *supra* note 53, at 629-30.
[198] John Cartwright, *Protecting Legitimate Expectations and Estoppel in English Law*, Report to the XVIIth Int'l Cong. of Comp. L. (July 2006), 10.3 ELEC. J. COMP. L. at 3 (Dec. 2006), *available at* http://www.ejcl.org/103/art103-6.pdf (last visited July 26, 2012).
[199] Law of Property (Misc. Prov.) Act 1989 ch. 34 § 1 (Eng.) ("Any rule of law which . . . requires a seal for the valid execution of an instrument as a deed by an individual . . . is abolished); *see* J. BEATSON, ANSON'S LAW OF CONTRACT 75 n.2 (Oxford Univ. Press 2002) (abolition of the seal applies to all deeds and not just to those relating to land).
[200] *Id.* § 2.
[201] *Id.* § 3 (also allowing signing by an agent in the promisor's presence, if attested by two witnesses, and delivery by an authorized agent).
[202] BEATSON, *supra* note 199, at 73.

> some inconvenience in consequence of the one making, or the other accepting such promise.[203]

In the United States, however, the ceremony and formality of the seal or the deed diminished in cultural meaning and relevance,[204] leading to the gradual dilution of these formalities[205] and eventually their widespread rejection as a basis for enforcement.[206] The late contracts scholar E. Allan Farnsworth once lamented that "[i]n retrospect, the abolition of the seal without the substitution of some other formality seems rash."[207] After all, a method for ensuring the enforceability of a gratuitous promise may increase overall utility when the promisee desires assurance that the promise will be performed, and the promisor desires his promise to have the added value that comes with assurance that it is legally enforceable.[208]

More than a few scholars have joined the call for the return of the sealed instrument or similar formalities as a means of making gratuitous promises enforceable in the United States.[209] But a proposed uniform statute that would enforce written promises if accompanied by a statement of intention to be legally bound has gained little traction.[210] Any movement for return of the seal in the United States has met the realization that the ceremony of the seal no longer resonates in American society. Such movements have also apparently foundered on more substantive objections, such as Melvin Eisenberg's arguments that enforcement of gratuitous promises in the absence of reliance would demean the world of gifts and

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[203] Morley v. Boothby, [1825] 130 E.R. 455, 456, 3 Bing. 107, 112 (Crt. Comm. Pleas).
[204] *See* Eric Mills Holmes, *supra* note 53, at 632 ("the fact that formalities now meet with disrespect and ridicule shows the extent to which custom changes over time").
[205] *Id*. at 632-42.
[206] *Supra* Kennedy, *supra* note 54.
[207] E. Allan Farnsworth, *Promises to Make Gifts*, 43 AM. J. COMP. L. 359, 373 (1995); *see also* Calamari & Perillo, *supra* note 53, § 4.6, at 159 (regretting that purely nominal consideration is not effective under modern bargained-for exchange theory because "there ought to be a way to make a gratuitous promise binding absent the mechanism of a seal").
[208] *See* Farnsworth, *Promises*, *supra* note 207, at 362-65; Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977).
[209] *See, e.g*., Farnsworth, *Promises*, *supra* note 207, at 372; Holmes, *supra* note 53, at 618-29, 665-68; Randy E. Barnett, *A Consent Theory of Contract*, 86 COL. L. REV. 269, 308-14, 319-21 (1986); Celia Taylor, *My Modest Proposal*, 18 ST. THOMAS L. REV. 117 (2005) (humorously advocating for a return to the law of sealed instruments so that judges, attorneys, and academics can reallocate their time from drawing puzzling distinctions in consideration doctrine and debating the merits of enforcing gratuitous promises).
[210] Farnsworth, *Promises*, *supra* note 207, at 372; Eric Mills Holmes, *supra* note 53, at 651-52.

would ignore a moral obligation of the promisee to release a promisor whose mind has changed.[211]

As a result, although both common law countries recognized the need for enforcement of some promises unsupported by consideration, both countries have filled the gap by different means: an affirmative cause of action for promissory estoppel in the United States,[212] and the formality of the deed in England.[213]

Conclusion

The civil law concept of *cause* is easily contrasted with the common law doctrine of consideration because only the former is satisfied with a gratuitous promise motivated solely by a charitable intent. Conversely, consideration requires the promise to be linked in an exchange with a reciprocal promise or performance.

The restrictive nature of consideration, however, has proved unsatisfactory as the sole test for separating promises deserving of judicial enforcement from those left to the dictates of individual conscience. Consequently, common law courts have supplemented consideration with promissory estoppel (as it is called in the United States), a doctrine that

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[211] Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997); Congregation Kadimah Toras-Moshe v. DeLeo, 405 Mass. 365, 540 N.E.2d 691 (1989) (rejecting Restatement § 90(2)'s abandonment of required proof of reliance); Farnsworth, *Promises*, *supra* note 207, at 369-70 § 90(2) (represents "an expansion that is difficult to rationalize" and "has played to mixed reviews").

[212] Some states in the U.S. also enforce a promise made in recognition of a moral obligation arising out of a past act, in certain narrow fact patterns. *See*, *e.g.*, Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935). This theory, however, is still rejected in many states, maybe still the majority of them. *See* KEVIN M. TEEVEN, PROMISES ON PRIOR OBLIGATIONS AT COMMON LAW 115-123 (1998) (moral obligation theory was still a minority approach in 1998). Thus, the affirmative cause of action in promissory estoppel is substantially more significant than moral obligation in describing divergences between English and U.S. law in enforcement of promises.

[213] Beatson suggests another way in which English courts may outstrip the U.S. courts in permitting formality to overcome substantive requirements. The disinclination of English courts to inquire into the adequacy of consideration means that, "the requirement can be satisfied by nominal consideration." BEATSON, *supra* note 199, at 97. But Beatson admits that the consideration must be "of some value in the eye of the law," and the cases Beatson analyzes suggest that this "value" is measured by whether the other party was induced by the supposedly nominal consideration, *e.g.*, *id*. (quoting an English court's finding that the "plaintiffs were induced by the defendant's promise"). For the most part, this is the same test applied in the United States. RICHARD A. LORD, 3 WILLISTON ON CONTRACTS § 7:21, at 482-87 (4th ed. 2008) (whether a small sum is consideration or a sham turns on whether "the promisor is in fact bargaining for the small sum"). Thus, unless English courts are substantially more expansive in finding reciprocal inducement in marginal cases, nominal consideration is not a significant, additional way in which formality plays a larger role in England than in the U.S. This conclusion is underscored by the willingness of some courts in the U.S. to recognize a binding option contract based on the formality of stating the offer in a signed writing that "recites a purported consideration for making the offer" and proposes a fair exchange. RESTATEMENT (SECOND) OF CONTRACTS § 87(1)(a) (1981).

evolved in the late nineteenth and early twentieth centuries from traditional estoppel based on representation of fact. The doctrine of promissory estoppel permits courts to grant relief for a promisee's reliance on a gratuitous promise in some circumstances.

Accordingly, the addition of promissory estoppel to the common law arsenal can narrow the gap between the civil law and common law grounds for enforcing promises. Ironically, the addition of the doctrine also reveals a divergence between common law on either side of the Atlantic, one that rivals the gap between *cause* and consideration. On both continents, estoppel has progressed beyond its traditional form by protecting reliance on a promise of future action, rather than just a representation of existing fact. In England, however, promissory estoppel retains a traditional limitation. In most contexts, promissory estoppel functions only as a shield against the promisor's assertion of a claim. In contrast, promissory estoppel in most U.S. jurisdictions can also function as a sword to advance an affirmative cause of action.

This divergence would not be the first time that the former colonies borrowed a concept from their common law parent and then failed to heed parental counsels of restraint. For example, jury trials are now the exception in civil cases in England.[214] Civil cases in the United States, however, aside from equitable claims and defenses, generally are still tried before juries.[215]

Perhaps a certain exuberance, uninhibited nature, or simple lack of caution in the American spirit spurs it to take a good idea from its more restrained common law parent and to test the limits of that idea. However, if English conservatism has restricted its application of promissory estoppel, a corollary conservatism has filled the gap in English enforcement of promises, through retention of the modern equivalent of the early common law action of covenant, the promise under deed.

Ironically, the English common law on enforcement of promises arguably has more in common with the French *Code Civil* than with the common law of England's former colonies. Although French law does not impose a consideration requirement, French law enforces both promises in exchanges and gratuitous promises that are notarized or otherwise executed

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[214] Supreme Court Act 198, § 69, 2 Curr. Law Stat. Ann. (1981 c.54); JAMES GOBERT, JUSTICE, DEMOCRACY AND THE JURY 2 (1994) ("[I]n modern day Britain, jury trials in civil cases are a rarity.").
[215] Jacob v. New York, 315 U.S. 752, 752-53 (1942) (describing the right to a jury trial in civil cases in federal court as so "fundamental and sacred to the citizen" that it "should be jealously guarded by the courts); NEIL VIDMAR, WORLD JURY SYSTEMS 386 (2000) (the civil jury . . . is inextricably woven into the fabric of the American justice system).

with required formality.[216] English law does the same, without requiring the reliance needed for promissory estoppel.[217] Both legal systems recognize that a written promise executed with solemnity and formality serves the gate-keeping function – otherwise performed by consideration in the common law system – of cautioning the promisor against making improvident commitments.[218]

As first-year law students in the United States struggle with the concept of consideration[219] and then learn to accept its co-existence with promissory estoppel,[220] they might benefit from a modest dose of comparative law, if only to appreciate the non-inevitability of the path of the common law in the United States.[221] Students likely will be enlightened by the differences in the approaches of the common law countries, as well as surprised by the similarity of results in the parent common law country and the home of the quintessential civil code.

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[216] *Supra* notes 27-32 and accompanying text.
[217] *Supra* notes 195-203 and accompanying text (discussing English doctrine on promises under deed as an alternative to consideration); BEATSON, *supra* note 199, at 73.
[218] *See supra* notes 202-03 and accompanying text (the English deed is a matter of form that performs a cautionary function, making consideration unnecessary); NICHOLAS, *supra* note 10, at 59-60 (suggesting a similarity between the English deed and French notarization of donative promises, except that the latter does not substitute for consideration, and noting that notarization promotes both certainty and caution).
[219] Professor Taylor humorously calls for return of the sealed instrument, after "having been wearied for many years with debating complex, confusing, and contradictory positions and theories regarding the consideration doctrine and its impact on agreements that do not fit neatly within the bargained-for-exchange paradigm, and at length utterly despairing of success in making sense of the topic." Taylor, *supra* note 209, at 118.
[220] *Compare* GRANT GILMORE, THE DEATH OF CONTRACT 60-61 (1974) (arguing that consideration and promissory estoppel represent "matter" and anti-matter" and reflect "schizophrenia" in the first Restatement) *with* GARY WATT, EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW 76 (2009) (arguing that legal and equitable doctrines can work together harmoniously in "constructive opposition," just as one hand pushes against the bow while the other hand pulls on the bowstring).
[221] This author, for example, includes the substance of the comparative analysis in this article in his first-year Contracts electronic casebook. CHARLES R. CALLEROS, CONTRACTS: CASES, TEXT, AND PROBLEMS 57, 82-85, 107-11 (2012).