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Definite and Substantial Reliance: Remedying Injustice Under Section 90

Gerald Griffin Reidy
Fordham University School of Law

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Cover Page Footnote
For Mary, Elizabeth, Mom, and Dad.

DEFINITE AND SUBSTANTIAL RELIANCE: REMEDYING INJUSTICE UNDER SECTION 90

*Gerald Griffin Reidy**

INTRODUCTION

Uncle, aware that Nephew desires to buy a new car but does not quite have the means, promises[1] Nephew $1000.[2] Uncle promises the gift of money freely, expecting to receive nothing in return. Nephew, delighted at the gift, does indeed buy himself a new car. Commentators would generally agree that if Uncle subsequently refused to honor his promise, Nephew would have a viable claim against him in promissory estoppel.[3] It is questionable, though, whether the same would hold true if, under these circumstances, Nephew had reasonably relied upon Uncle's promise by performing a concrete act, but not the specific act that Uncle had expected; if, for example, Nephew had instead purchased a plane ticket for that long-dreamed-of trip to Las Vegas in reliance on the promised $1000.

The requirement for the promisee to perform the particular expected act, known as reliance of a "definite and substantial character," is one that has experienced varying degrees of academic recognition over the history of promissory estoppel.[4] In 1932, the original Restatement of Contracts first recognized the doctrine.[5] Section 90 of

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* For Mary, Elizabeth, Mom, and Dad.

1. The Restatement (Second) of Contracts defines promise in section 2:

> (1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. (2) The person manifesting the intention is the promisor. (3) The person to whom the manifestation is addressed is the promisee.

Restatement (Second) of Contracts § 2 (1981). Furthermore, "the word 'promise' is not limited to acts having a legal effect." *Id.* § 2 cmt. a.

2. This scenario is based on a hypothetical situation discussed at the 1926 American Law Institute hearings on the Restatement of Contracts. *See Discussion of the Tentative Draft, Contracts Restatement No. 2*, 4 A.L.I. Proc. app. at 88-114 (1926) [hereinafter *Discussion, Contracts Restatement No. 2*] (remarks of Prof. Williston, reporter); *infra* notes 34-37 and accompanying text.

3. *See, e.g.*, Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 Yale L.J. 111, 116-18 (1991) (discussing the argument over this hypothetical at the 1926 proceedings of the American Law Institute); *see also infra* notes 34-37 and accompanying text (same). Commentators argue mainly over the proper measure of damages to be awarded to Nephew, as did the Institute's participants. *See Discussion, Contracts Restatement No. 2*, *supra* note 2, app. at 88-114; *infra* Part II.B.3.

4. A definite and substantial act refers to the particular substantial act expected to occur in response to the promise. *See* Arthur Linton Corbin, Corbin on Contracts § 200 (1952) ("All action is definite after it occurs; so, the Institute must have meant that the promisor must have had reason to foresee the definite action or forbearance that in fact followed."); Black's Law Dictionary 423 (6th ed. 1990) (defining "definite" as "[f]ixed, determined, defined, bounded").

5. *See* Restatement of Contracts § 90 (1932).

the Restatement defined promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[6] Because of the weighty reputations of the original framers and their avowed endeavor to state the prevalent legal principles of the day, many courts accepted section 90 as the authoritative definition of promissory estoppel.[7]

Almost a half-century later, the second Restatement of Contracts offered a revised version of the doctrine.[8] It specifically removed the requirement for reliance of a definite and substantial character from section 90.[9] The section now reads:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[10]

The former requirement to induce action of a definite and substantial character was relegated to a comment under section 90 as a factor that courts might consider in determining the appropriate remedy for the promisee.[11]

This Note examines whether courts currently require reliance of a definite and substantial character for the enforcement of promises, and thus, whether the Restatement in its present form accurately reflects the state of the doctrine of promissory estoppel. Part I of this Note discusses the origins of promissory estoppel and its encapsulation in section 90 of each of the two Restatements of Contracts. Part II outlines the debate over the purpose and application of promissory estoppel and discusses the importance of definite and substantial reliance to that dialogue. Part III looks at the promissory estoppel cases

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6. *Id.*
7. *See infra* notes 38-41, 55-56 and accompanying text.
8. *See* Restatement (Second) of Contracts § 90(1) (1981).
9. *See id.*
10. *Id.*
11. Comment b reads:

> *Character of reliance protected.* The principle of this Section is flexible. The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant. Compare Comment to § 72 [exchange of promise for performance].

Id. § 90 cmt. b.

decided in 1997, with particular emphasis on cases involving donative promises,[12] and evaluates the presence of definite and substantial reliance in those cases. Part IV focuses on the role of definite and substantial reliance in donative situations and discusses its relation to the notion of injustice. This Note concludes that courts and litigants use promissory estoppel to remedy the injustice of promises that are not fulfilled despite having induced definite and substantial acts in reliance upon them. This Note argues that the current application and use of promissory estoppel fully resembles neither the view of the second Restatement nor the views of most current theorists, but instead continues to resemble the view encapsulated by Professor Williston in section 90 of the first Restatement.

I. THE ORIGINS OF THE RESTATEMENTS AND THEIR EFFECTS ON CONTRACTS JURISPRUDENCE

Not all promises are enforceable.[13] Thus, the main object of contract law is to determine which promises should be enforced.[14] For the most part, promises supported by consideration are enforceable.[15] Originally, the principle of consideration meant simply that the promisor had achieved some benefit, or that the promisee had suffered some detriment, on account of the promise.[16] For the past century,

12. A donative promise is a promise to make a gift. *See* Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 Calif. L. Rev. 821, 823-24 (1997) [hereinafter Eisenberg, *World of Gift*]. Professor Eisenberg defines gift as "a voluntary transfer that is made, or at least purports to be made, for affective reasons like love, affection, friendship, comradeship, or gratitude, or to satisfy moral duties or aspirations like benevolence or generosity, and which is not expressly conditioned on a reciprocal exchange." *Id.* at 823 (citation omitted); *see also id.* at 840-46 (discussing the difference between the transfer of a gift and the transfer of a commodity).

13. *See* Yorio & Thel, *supra* note 3, at 123.

14. *See* Melvin Aron Eisenberg, *Donative Promises*, 47 U. Chi. L. Rev. 1, 1 (1979) [hereinafter Eisenberg, *Donative Promises*] (citation omitted); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 Cornell L. Rev. 640, 640 (1982) [hereinafter Eisenberg, *Principles of Consideration*]; Yorio & Thel, *supra* note 3, at 166. As observed by Professor Morris Cohen:

> The actual world, which assuredly is among the possible ones, is not one in which all promises are kept, and there are many people—not necessarily diplomats—who prefer a world in which they and others occasionally depart from the truth and go back on some promise. It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.

Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 573 (1933).

15. *See* Eisenberg, *Principles of Consideration*, *supra* note 14, at 640.

16. *See* E. Allan Farnsworth, Contracts § 2.2 (2d ed. 1990) [hereinafter Farnsworth, Contracts]; Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 Cornell L. Rev. 1263, 1267 (1994).

however, the bargain principle[17] has become the governing principle of consideration and enforcement.[18] The bargain principle requires that a promisor seek a return promise or benefit in exchange for her promise, which the promisee must provide in exchange for that promise.[19]

Donative promises presented a unique problem for courts applying the bargain principle, because these types of promises are normally driven by altruistic motives, and consequently are often difficult to conceive of as bargains.[20] As a result, courts had traditionally refused to enforce even those donative promises upon which promisees had relied.[21] But courts did make specific exceptions for various categories of donative promises, including promises made in contemplation of marriage, promises made between relatives, gratuitous promises to give land, and charitable subscriptions.[22] Further, courts often enforced donative promises if "the underlying transaction could be artificially construed as a bargain."[23] Despite these numerous exceptions,

17. The Second Restatement defines bargain as "an agreement to exchange promises or to exchange a promise for a performance or to exchange performances." Restatement (Second) of Contracts § 3 (1981).

18. The Second Restatement defines consideration in section 71: "(1) To constitute consideration, a performance or a return promise must be bargained for. (2) 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." *Id.* § 71; *see* Eisenberg, *Principles of Consideration*, *supra* note 14, at 641-43; Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 Harv. L. Rev. 678, 679 (1984); Pham, *supra* note 16, at 1267; *see also* Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L. Rev. 472, 476-78 (1983) (stating that the bargain principle also requires the parties' mutual consent to be bound).

The bargain principle may not now reign quite so supreme. Professor Eisenberg's article, *Principles of Consideration*, discusses bases of enforcement other than the bargain, including promissory estoppel. *See* Eisenberg, *Principles of Consideration*, *supra* note 14, at 640. In it, he also noted that enforcement of bargains themselves have been limited where courts find them to be unconscionable. *See id.* at 640-41 & n.2.

19. *See* Restatement (Second) of Contracts § 71(2) (1981).

20. *See* Eisenberg, *World of Gift*, *supra* note 12, at 823-24; Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849, 1907-08 (1987).

21. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 19; Eisenberg, *Principles of Consideration*, *supra* note 14, at 656-57; Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 Fordham L. Rev. 303, 304 (1992) [hereinafter Feinman, *Last Article*].

22. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts § 6.2 (4th ed. 1998); Farnsworth, Contracts, *supra* note 16, § 2.19; Benjamin F. Boyer, *Promissory Estoppel: Principle From Precedents: I*, 50 Mich. L. Rev. 639, 644 (1952); Eisenberg, *Donative Promises*, *supra* note 14, at 19; Eisenberg, *Principles of Consideration*, *supra* note 14, at 656-57; Eisenberg, *World of Gift*, *supra* note 12, at 855; Feinman, *Last Article*, *supra* note 21, at 304 (describing the exceptions as having evolved to avoid injustice in particular kinds of cases); Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 Colum. L. Rev. 580, 585 (1998); Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 Mich. L. Rev. 908, 914 (1937).

23. Eisenberg, *Donative Promises*, *supra* note 14, at 19; *see also* Eisenberg, *Principles of Consideration*, *supra* note 14, at 656-57 (citing Siegel v. Spear & Co., 138 N.E. 414 (N.Y. 1923)). Such an exercise, however, injures the nature of gift-giving:

unrelied-upon promises were still held to be generally unenforceable.[24]

While the First Restatement was based largely upon the bargain theory of consideration,[25] its section 90 transformed the enforcement regime and enabled a wide acceptance of binding, yet unbargained-for, promises.[26] At the time section 90 was conceived, Samuel Williston—its primary author[27]—and his contemporaries intended it for enforcing relied-upon promises in purely donative settings, rather than in commercial contexts.[28] For Williston, reliance was a component that helped identify the type of promise that was deemed worthy of enforcement;[29] nevertheless, the key to enforcement was the promise itself rather than the existence of reliance on that promise.[30]

According to Williston and the First Restatement, courts enforced those donative promises that induced reliance of a "definite and substantial character," i.e., those which contemplated and induced a par-

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> Conceiving of gifts as bargains not only conceives of what is personal as fungible, it also endorses the picture of persons as profit-maximizers. A better view of personhood should conceive of gifts not as disguised sales, but rather as expressions of the interrelationships between the self and others. To relinquish something to someone else by gift is to give of yourself. Such a gift takes place within a personal relationship with the recipient, or else it creates one. Commodification stresses separateness both between ourselves and our things and between ourselves and other people.

Radin, *supra* note 20, at 1907.

24. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 19; Eisenberg, *Principles of Consideration*, *supra* note 14, at 656-57. Nor does Eisenberg believe that such promises should be enforced. *See* Eisenberg, *World of Gift*, *supra* note 12, at 821-25 (discussing the "donative promise principle"); *infra* notes 63-68 and accompanying text.

25. *See* Eisenberg, *Principles of Consideration*, *supra* note 14, at 657.

26. *See* Farnsworth, Contracts, *supra* note 16, § 1.8 (noting that the Restatement is highly persuasive authority and also noting that section 90 departed from precedents); Charles E. Clark, *The Restatement of the Law of Contracts*, 42 Yale L.J. 643, 656 (1933) (noting that "Section 90 has already become somewhat famous as representing some modification of the ancient rules of consideration"); Eisenberg, *Principles of Consideration*, *supra* note 14, at 657; *infra* notes 38-41 and accompanying text; *see also* Eisenberg, *World of Gift*, *supra* note 12, at 854-55 (describing the original section 90 as an innovation which radically transformed contract law); Charles L. Knapp, *Reliance in the Revised* Restatement: *The Proliferation of Promissory Estoppel*, 81 Colum. L. Rev. 52, 53 (1981) (describing section 90 and promissory estoppel as "the most radical and expansive development[s] of this century in the law of promissory liability").

27. *See* Eisenberg, *Principles of Consideration*, *supra* note 14, at 657 n.51 (noting that Corbin may have talked a reluctant Williston into proposing section 90, but also observing that Williston defended the section "ferociously" at the American Law Institute floor debates (citing *Discussion, Contracts Restatement No. 2*, *supra* note 2, app. at 85-114)).

28. *See* Grant Gilmore, The Death of Contract 73 (1974) (noting the then-general academic and judicial feeling that in commercial, as opposed to donative, settings, "[p]rofessionals should play the game according to the professional rules . . . of offer, acceptance, and consideration"); Yorio & Thel, *supra* note 3, at 133.

29. *See* Yorio & Thel, *supra* note 3, at 118-19.

30. *See* Feinman, *Last Article*, *supra* note 21, at 305.

ticular act in reliance.[31] In Williston's words, section 90 "covers a case where there is a promise to give and the promisor knows that the promisee will rely upon the proposed gift *in certain definite ways*."[32] When such promises occurred, Williston suggested, they were to be enforced to their full extent.[33]

Williston's approach to the doctrine was illustrated by a hypothetical problem that arose at the 1926 proceedings of the American Law Institute.[34] In the scenario presented by a member of the audience, Uncle, aware that Nephew is considering buying a car, promises Nephew $1000.[35] Nephew, in reliance on the promise, then buys a car, but for only $600.[36] Williston maintained, despite some disagreement among audience members, that because Nephew had performed the act expected by Uncle, Uncle would be held to his promise; he would be liable for the full $1000.[37]

The influence that the Restatement in general, and section 90 in particular, has had upon American contract law is extraordinary.[38] The framers of the First Restatement endeavored to state the law as it then existed by clearly setting out mainstream legal principles that courts used to determine cases.[39] Judges apparently took the framers at their word: over the next forty-six years, courts cited to the Re-

31. *See* Restatement of Contracts § 90 (1932); *Discussion, Contracts Restatement No. 2*, *supra* note 2, app. at 93 (recording Williston's statement that section 90 covers promises for which "a reasonable person would say that the promisor expected the man to do just what he did or that he ought to have expected it"); Eisenberg, *Donative Promises*, *supra* note 14, at 22; Eisenberg, *Principles of Consideration*, *supra* note 14, at 657.

32. *Discussion, Contracts Restatement No. 2*, *supra* note 2, at 89 (remarks of Prof. Williston, reporter) (emphasis added); *see* Yorio & Thel, *supra* note 3, at 118.

33. *See* Yorio & Thel, *supra* note 3, at 118-19.

34. *See Discussion, Contracts Restatement No. 2*, *supra* note 2, app. at 88-114; *see also* Eisenberg, *Donative Promises*, *supra* note 14, at 23-27; Yorio & Thel, *supra* note 3, at 116-17.

35. *See Discussion, Contracts Restatement No. 2*, *supra* note 2, app. at 88.

36. *See id.* app. at 95.

37. *See id.* A famous debate ensued between Williston and members of the audience over the propriety of holding Uncle to the full extent of his promise when Nephew's act in reliance amounted to only $600. *See id.* at 95-96. Williston held his ground: "Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made." *Id.* at 103. Previously, regarding justice, Williston had stated that he "should be of the opinion that it was unjust under the circumstances . . . for [a] promisor not to do what he said he would." *Id.* at 87; *see also* Yorio & Thel, *supra* note 3, at 118-19 (discussing Williston's position in this debate).

38. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 19 ("Partly as a result of section 90 . . . the principle of promissory estoppel . . . is now an accepted part of American contract law."); E. Allan Farnsworth, *Ingredients in the Redaction of the* Restatement (Second) of Contracts, 81 Colum. L. Rev. 1, 1 (1981); Yorio & Thel, *supra* note 3, at 111-12.

39. *See* Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 Geo. Wash. L. Rev. 508, 514-15 (1998).

statement in over 12,000 cases.[40] Indeed, commentators have noted that over the decades, the Restatement has acquired precedential value nearly equal to that of a statute.[41]

Despite the Restatement's vast success with courts, the supremacy of Williston's conception of the promissory estoppel doctrine within academic circles was short-lived. In 1936, Fuller and Perdue published their famous article, *The Reliance Interest in Contract Damages: 1*,[42] which prompted a shift in focus away from the promise and towards reliance.[43] In their article, Fuller and Perdue identified three interests in contract remedies: expectation, restitution, and reliance.[44] They observed that courts normally award expectation damages in order to compensate for lost opportunities, to encourage reliance on business transactions, and to facilitate commerce.[45] None of these, they noted, apply to donative promises because such promises are not given as part of a productive exchange.[46] Following Fuller and Perdue, later scholars opined that Williston's and the First Restatement's requirement for reliance of a definite and substantial character had existed solely to justify full enforcement of donative promises, i.e., expectation damages.[47]

The long-developing view of reliance as the key to promissory estoppel enforcement was encapsulated in the Second Restatement's revised version of section 90.[48] The framers of the Second Restatement

40. *See Annual Report*, 56 A.L.I. Proc. 22 (1979) (noting citations to the Restatement of Contracts in 12,580 cases as of March 1, 1979); Maggs, *supra* note 39, at 515 n.72.

41. *See* Randy E. Barnett, *The Death of Reliance*, 46 J. Legal Educ. 518, 527 (1996) ("Courts are increasingly treating the Restatement as a statute .... [They] typically look to the Restatement, rather than to even very practical and accessible legal scholarship, to ascertain the prevailing contract doctrine.").

42. *See* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 Yale L.J. 52 (1936).

43. *See* Feinman, *Last Article*, *supra* note 21, at 305.

44. *See id.*; Fuller & Perdue, *supra* note 42, at 53-57.

45. *See* Fuller & Perdue, *supra* note 42, at 60-66; Yorio & Thel, *supra* note 3, at 119.

46. *See* Eisenberg, *World of Gift*, *supra* note 12, at 842-43; *infra* note 132.

47. *See* Calamari & Perillo, *supra* note 22, § 6.1; Eisenberg, *Donative Promises*, *supra* note 14, at 23, 25; Eisenberg, *Principles of Consideration*, *supra* note 14, at 658 (noting that an "unstated axiom" for Williston was that if promises are enforceable, they must be enforced to their full extent).

48. *See* Eisenberg, *Principles of Consideration*, *supra* note 14, at 658; Feinman, *Last Article*, *supra* note 21, at 306-07; Knapp, *supra* note 26, at 58-61. Even though Eisenberg welcomed the revision, he criticized the Second Restatement for not going far enough:

> [W]hile section 90(1) of . . . Restatement (Second) marks an improvement over its [predecessor], it is still subject to a number of serious defects. In particular, section 90(1) is unnecessarily cluttered; reflects a spurious distinction between promises as a class and promises upon which reliance can reasonably be expected; wrongly focuses attention on the expectation of the promisor rather than the reliance of the promisee; and wrongly implies that expectation, not reliance, is the normal measure of damages in cases in

reasoned that because the promisee's reliance interest was the basis for enforcement, reliance interest should also govern her damages.[49] The framers expressly revised section 90 in order to recognize reliance as a measure of damages.[50] They did so by eliminating the requirement for reliance of a definite and substantial character, and adding a sentence that noted: "The remedy granted for breach may be limited as justice requires."[51]

The Second Restatement also marked a shift in the framers' philosophy towards the nature and purpose of the Restatement itself.[52] While the intent behind the First Restatement was to state the law as it then existed, the intent of the Second Restatement's framers was to state the law as they believed it should be.[53] As proposed in Herbert Wechsler's report to the American Law Institute, the framers chose "to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."[54] The shift to a Restatement that is perhaps more reflective of the Institute's preferences than of the actual state of the law, however, has not diminished the Restatement's influence upon courts.[55] As of 1997, judges have cited the Restatements in over 24,000 contracts cases.[56]

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which enforcement is based on the reliance principle. Under a preferable approach, the Restatement (Second) would provide simply: "A promise that is reasonably relied upon is enforceable to the extent of the reliance." Eisenberg, *Donative Promises*, *supra* note 14, at 32 (emphasis omitted).

49. *See* Eisenberg, *Principles of Consideration*, *supra* note 14, at 658; Feinman, *Last Article*, *supra* note 21, at 306; Knapp, *supra* note 26, at 58.

50. *See* Restatement (Second) of Contracts § 90 reporter's note (1981) ("The principal change from the former [section] 90 is the recognition of the possibility of partial enforcement."); *Continuation of Discussion of the Restatement of the Law, Second, Contracts*, 42 A.L.I. Proc. 296 (1965) ("So the principal change in section 90 is to add the second sentence, which recognozed the possibility of partial enforcement . . . Now, once you have made that change, then the reqirement of reliance of a definite and substantial character becomes doubtful." (remarks of Prof. Braucter, reporter)); Eisenberg, *Principles of Consideration*, *supra* note 14, at 658; *see also* Eisenberg, *Donative Promises*, *supra* note 14, at 26 (stating that the Second Restatement has rejected Williston's axiom).

51. Restatement (Second) of Contracts § 90(1) (1981); *see* Eisenberg, *Principles of Consideration*, *supra* note 14, at 658; Feinman, *Last Article*, *supra* note 21, at 306; Knapp, *supra* note 26, at 58. The revised section 90 also expressly recognized the doctrine's applicability to promises given in commercial settings. *See* Restatement (Second) of Contracts § 90 cmts. b, e & reporter's note (1981); Eisenberg, *World of Gift*, *supra* note 12, at 822-23, 863; Knapp, *supra* note 26, at 53; Yorio & Thel, *supra* note 3, at 133. In addition, the Second Restatement recognizes foreseeable reliance by third parties. *See* Restatement (Second) of Contracts § 90 cmt. c (1981); Pham, *supra* note 16, at 1266.

52. *See* Farnsworth, *supra* note 38, at 5-12; Maggs, *supra* note 39, at 516-17.

53. *See* Farnsworth, *supra* note 38, at 5-9; Maggs, *supra* note 39, at 516-17.

54. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 150 (1969); *see* Farnsworth, *supra* note 38, at 5.

55. *See* Barnett, *supra* note 41, at 527; Maggs, *supra* note 39, at 517.

56. *See Annual Report*, 74 A.L.I. Proc. 25 (1997) (noting citations to the Restatements of Contracts in 24,671 cases as of April 1, 1997). Thirty of the 350 cases decided in 1997 that were examined for this Note cited to section 90 of the Second

Despite the consensus among the second Restatement's framers, new challenges have emerged to their conception of section 90. The next part outlines a current debate among theorists over section 90's purpose and use.

II. THE DEBATE

A debate currently exists within the academy over the purpose and application of the promissory estoppel doctrine.[57] On one side are the "Reliance" commentators, who argue that courts use promissory estoppel like a tort in order to compensate a promisee for her reasonable injurious reliance upon a promise.[58] For these theorists, *any*

Restatement in discussing promissory estoppel. *See, e.g.*, Steinke v. Sungard Fin. Sys., Inc., 121 F.3d 763, 776 (1st Cir. 1997) (noting parenthetically that Massachusetts has adopted the Restatement (Second) of Contracts section 90); Servais v. T.J. Management of Minneapolis, Inc., 973 F. Supp. 885, 898 (D. Minn. 1997) (citing the Restatement (Second) of Contracts section 90(1) cmt. b factors for evaluating whether enforcement of a promise is necessary to prevent an injustice); *In re* Blunt, 210 B.R. 626, 632-33 (Bankr. M.D. Fla. 1997) (noting that Florida has adopted the Restatement (Second) of Contracts section 90); LeStrange v. Korowotny, No. CV 94046929S, 1997 WL 707101, at *10-*12 (Conn. Super. Ct. Nov. 4, 1997) (quoting the Restatement (Second) of Contracts section 90(1) in refusing to hold a municipality immune from promissory estoppel liability); Biasotto v. Spreen, No. 96C-04-030-WTQ, 1997 WL 527956, at *6 (Del. Super. Ct. July 30, 1997) (noting that Delaware has adopted the Restatement (Second) of Contracts section 90); Orr v. Westminster Village North, Inc., 689 N.E.2d 712, 718 (Ind. 1997) (noting that Indiana has adopted the Restatement (Second) of Contracts section 90(1)); First Sec. Sav. Bank v. Aitken, 573 N.W.2d 307, 316 (Mich. Ct. App. 1997) (quoting the Restatement (Second) of Contracts section 90(1) in stating what is required for a promissory estoppel claim); Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006-08 (Pa. Super. Ct. 1997) (citing the Restatement (Second) of Contracts section 90(1), its comments, and its illustrations in reversing summary judgment on a promissory estoppel claim for house insurance); Engenius Entertainment, Inc., v. Herenton, 971 S.W.2d 12, 19-20 (Tenn. Ct. App. 1997) (citing the Restatement (Second) of Contracts section 90(1)); Stangl v. Ernst Home Ctr., Inc., 948 P.2d 356, 360 (Utah Ct. App. 1997) (noting that the Utah Supreme Court has defined promissory estoppel by quoting the Restatement (Second) of Contracts section 90(1)); *see also infra* note 140 (stating the parameters for the cases examined in this Note).

57. *See* Hillman, *supra* note 22, at 586. In outlining this debate, this Note focuses primarily on the works of Professors Melvin Eisenberg, Edward Yorio, and Steve Thel, arguably the most significant representatives of their respective schools of thought. Indeed, part V of Eisenberg's *World of Gift* is a direct response to Yorio's and Thel's *Promissory Basis of Section 90*. *See* Eisenberg, *World of Gift*, *supra* note 12, at 853 (discussing Yorio & Thel, *supra* note 3). As Eisenberg states, "Because Yorio & Thel's article is so important and so well-argued, and because it is echoed by other commentary [by Promise theorists], it deserves close and extensive attention." *Id.*

58. *See, e.g.*, Eisenberg, *Donative Promises*, *supra* note 14, at 2 (arguing against the enforcement of donative promises except for those which induced reasonable reliance by promisees); Eisenberg, *World of Gift*, *supra* note 12, at 825 (same). In *Questioning the "New Consensus"*, Professor Hillman compiled statistics from all promissory estoppel claims brought before courts over a two year period from 1994 to 1996. *See* Hillman, *supra* note 22, at 582-83. He concluded that reliance is crucial to a claim's success, a point he emphatically repeats throughout his article. *See id.* at 618-19.

reasonably foreseeable act in reliance upon a promise suffices to apply the doctrine, and thus, a definite and substantial character standard is inappropriately high.[59] On the other side are the "Promise" theorists[60] who argue that promissory estoppel is actually a contracts doctrine that courts use to enforce promises that result from deliberation.[61] These commentators argue that anticipation and internalization of the promise's consequences, i.e., the prospect of definite and substantial reliance, is what distinguishes those serious promises that courts should enforce.[62] Their conception, therefore, requires reliance of a definite and substantial character. As a result of these different approaches to promissory estoppel, the two camps disagree not only over the need for definite and substantial reliance, but also over the need for actual inducement of the promisee, and the appropriate remedy when applied. This part carefully examines each of these differences.

A. *Promise vs. Reliance Generally*

On one side of the promissory estoppel debate is the Reliance position, which focuses on donative promises and argues that the basis for enforcement is injurious reliance.[63] These scholars suggest that, for both substantive and process-related reasons, donative promises generally are not, and should not be, enforceable.[64] Substantively, routine enforcement of donative promises would undermine the benevolent motives behind the promises, thereby impoverishing the donative relationship between the parties.[65] Further, this enforcement would fail to account for conditions that would morally obligate the promisee to release the promisor from honoring the promise, such as improvidence on the part of the promisor or ingratitude on the part of the promisee.[66] In addition to these substantive justifications, the Reliance position argues, courts should also generally refuse to enforce donative promises for process reasons, namely, because such

59. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 21-22.

60. This Note uses the terms "Reliance" and "Promise" to refer to these two schools of thought.

61. *See, e.g.*, Yorio & Thel, *supra* note 3, at 167 (arguing that the enforceability of promises turns on "the proof and quality of the promisor's commitment").

62. *See id.* at 113.

63. *See* Eisenberg, *World of Gift*, *supra* note 12, at 821-22; Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. Legal Stud. 411, 416 (1977).

64. *See* Eisenberg, *World of Gift*, *supra* note 12, at 821-23.

65. *See id.* at 846-49.

66. *See id.* at 821-23, 849-50; *infra* note 229; *see also* Eisenberg, *Donative Promises*, *supra* note 14, at 6 ("The potential availability of these excuses further explains the insecurity of a donative promisee's expectation."); Edwin W. Patterson, *An Apology for Consideration*, 58 Colum. L. Rev. 929, 942-43 (1958) (noting that promises are "limited by rather vague and unspecified excuses, such as 'change of circumstances' or 'unforeseen disadvantages' or even, possibly, 'conflicting but overlooked prior engagement'" which, in turn, limit the intensity of the promisor's expectation).

promises usually lack deliberation and are often poorly evidenced.[67] But the Reliance position further suggests that these concerns should be superseded when a promisee injuriously relies on a donative promise, because "[a] relying promisee has suffered not merely disappointment of the expectation created by the promise, but an actual diminution of . . . wealth."[68]

Promise scholars, on the other hand, believe that the key to promissory estoppel lies in the promise itself.[69] They believe that ultimately, "courts respond to an impulse to enforce serious promises."[70] As a result, courts look for promises given after deliberation, rather than impulse, and enforce only those promises.[71] According to these scholars, a promisor who makes a promise after considering its consequences has manifested an intention to be bound to that promise.[72] Reliance, then, is merely a factor in identifying a seriously-considered promise worthy of enforcement, rather than the basis of enforcement itself.[73]

These divergent conceptions of the promissory estoppel doctrine are revealed through the way these two groups would approach the hypothetical situation between Uncle and Nephew.[74] Uncle, aware that Nephew desires to purchase a new car, promises to give Nephew $1000. Nephew, relying on Uncle's promise, buys himself a new car. Both Reliance and Promise commentators would likely apply promissory estoppel to a subsequent refusal by Uncle to pay Nephew, but for different reasons. The Reliance position would provide Nephew with a remedy due to his reasonable reliance on Uncle's promise, i.e., his purchase of the car. Uncle injured Nephew by his promise that he knew could, and did, induce an act in reliance by Nephew. Uncle's refusal to compensate Nephew for that reasonable reliance is an injustice that merits enforcement. Promise theorists, on the other hand, would enforce Uncle's promise because Uncle made it with an intention to be bound. Uncle made the promise expecting Nephew to respond by buying a car. His promise was therefore deliberative, not impulsive. Uncle made it after considering its consequences, thereby manifesting his acceptance of those consequences and an intent to be bound to them. In these circumstances, promise theorists would say that injustice would lie in Uncle's failure to do what he said he would do. In both situations, the divergent conceptions of the doctrine's purpose affects how it is ultimately applied.

67. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 3-4, 18-19.
68. Eisenberg, *World of Gift*, *supra* note 12, at 834.
69. *See* Yorio & Thel, *supra* note 3, at 166.
70. *Id.* at 114.
71. *See id.* at 124.
72. *See id.* at 124-25.
73. *See id.* at 111-13.
74. *See supra* notes 34-37 and accompanying text.

B. *Breakdown of the Reliance-Promise Controversy*

The larger debate over the purpose of the promissory estoppel doctrine has resulted in disagreements over three primary issues of its application: whether definite and substantial reliance is required; whether actual inducement of the promisee is required; and whether the appropriate measure of damages is expectation or reliance. This section examines each of these issues in turn.

1. Definite and Substantial Reliance

The First Restatement required reliance of a definite and substantial character for application of the doctrine of promissory estoppel.[75] As Williston proclaimed: "We have confined the Section to the case where a reasonable person would say that the promisor expected the man to do *just* what he did or that he ought to have expected it."[76] In the shift towards the recognition of partial enforcement of promises,[77] however, the requirement for definite and substantial reliance came under increasing attack.[78] Commentators criticized it, opining that it existed only to justify the discarded axiom that all enforceable promises must be honored in full.[79] Accordingly, the Second Restatement deleted the requirement that reliance must be of a definite and substantial character in order to enforce the promise.[80]

The requirement for definite and substantial reliance, as opposed to reliance that is merely reasonable, is the key to the Promise theorists' conception of the doctrine of promissory estoppel.[81] In fact, they insist that its deletion from the Second Restatement was in error.[82] Courts, they argue, have always—and still do—routinely require reliance of a definite and substantial character, but do so because of the requirement's effect upon promisors in making their promises.[83] According to Promise scholars, it is the promisor's expectation of definite and substantial reliance on her promise that indicates the serious nature of the promise.[84] This requirement for definiteness ensures that a promisor has weighed and accepted the act that is expected to flow

75. *See* Restatement of Contracts § 90 (1932).

76. *Discussion, Contracts Restatement No. 2*, *supra* note 2, at 93 (remarks of Prof. Williston, reporter) (emphasis added).

77. *See* Restatement (Second) of Contracts § 90 reporter's note (1981); Yorio & Thel, *supra* note 3, at 127; *supra* notes 42-51 and accompanying text.

78. *See* Calamari & Perillo, *supra* note 22, § 6.1; Eisenberg, *Donative Promises*, *supra* note 14, at 23-26.

79. *See* Calamari & Perillo, *supra* note 22, § 6.1; Eisenberg, *Donative Promises*, *supra* note 14, at 23-26; *infra* text accompanying notes 136-37.

80. *See* Restatement (Second) of Contracts § 91 & reporter's note (1981). The significance of the deletion was not fully elaborated upon or understood. *See infra* note 91 and accompanying text.

81. *See* Yorio & Thel, *supra* note 3, at 123-29, 151-61.

82. *See infra* note 91 and accompanying text.

83. *See* Yorio & Thel, *supra* note 3, at 113, 124-27.

84. *See id.*

from her promise.[85] Similarly, the requirement for substantiality ensures that the promisor is conscious of the gravity of the expected act.[86] Promise scholars suggest that by screening out carefully-considered promises, the existence of the prospect of definite and substantial reliance performs a function similar to that of reciprocity in the bargain principle.[87]

Promise commentators argue that despite the Second Restatement's rejection of the requirement of definite and substantial reliance, courts still continue to apply it.[88] For example, Professors Yorio and Thel assert that, notwithstanding the language of section 90 and commentary on its application, "[j]udges actually enforce promises rather than protect reliance in section 90 cases."[89] While acknowledging that the function of the prospect of definite and substantial reliance is not widely recognized[90] or understood,[91] Professors Yorio and Thel nevertheless point out that all of the cases that the Second Restatement provides to illustrate the application of promissory estoppel under section 90(1) involve promises with a prospect of definite and substantial reliance.[92]

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85. *See id.* at 127.

86. *See id.* at 126-27.

87. *See id.* at 127; *supra* note 18 and accompanying text. In addition, the promisee's definite and substantial act can increase the likelihood that a promise was made. *See* Yorio & Thel, *supra* note 3, at 157. *But see* Eisenberg, *Donative Promises*, *supra* note 14, at 18-19 (stating that the existence of even merely reasonable reliance does not increase the likelihood that a promise was in fact made).

88. *See* Yorio & Thel, *supra* note 3, at 127-29.

89. *Id.* at 111.

90. *See id.* at 113.

91. Yorio and Thel note that Professor Braucher, the reporter for the Second Restatement, did not address this aspect of the definite and substantial requirement at the American Law Institute proceedings on the Second Restatement, "and the fundamental change effected by deleting the 'definite and substantial' clause was not fully appreciated." *Id.* at 127; *see also* Knapp, *supra* note 26, at 59 (stating that the deletion of the definite and substantial requirement causes some "confusing 'legislative history'" and may in fact be inaccurate).

92. *See* Yorio & Thel, *supra* note 3, at 162 & n.344 (citing D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942); Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976); Crail v. Blakely, 505 P.2d 1027 (Cal. 1973); Burgess v. California Mut. Bldg. & Loan Ass'n, 290 P. 1029 (Cal. 1930); Graddon v. Knight, 292 P.2d 632 (Cal. Ct. App. 1956); Chrysler Corp. v. Quimby, 144 A.2d 123 (Del. 1958); Kauffman v. Miller, 214 Ill. App. 213 (1919); Miller v. Lawlor, 66 N.W.2d 267 (Iowa 1954); Greiner v. Greiner, 293 P. 759 (Kan. 1930); Devecmon v. Shaw, 14 A. 464 (Md. 1888); McLearn v. Hill, 177 N.E. 617 (Mass. 1931); Huhtala v. Travelers Ins. Co., 257 N.W.2d 640 (Mich. 1977); Lusk-Harbison-Jones, Inc. v. Universal Credit Co., 145 So. 623 (Miss. 1933); Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959); Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898); Aiello v. Knoll Golf Club, 165 A.2d 531 (N.J. Super. Ct. App. Div. 1960); Horsfield v. Gedicks, 118 A. 275 (N.J. Ch. 1922), *aff'd mem.*, 124 A. 925 (N.J. 1924); Spiegel v. Metropolitan Life Ins. 160 N.E.2d 40 (N.Y. 1959); Siegel v. Spear & Co., 138 N.E. 414 (N.Y. 1923); Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891); Spector v. National Cellulose Corp., 48 N.Y.S.2d 234 (Sup. Ct. 1943), *aff'd*, 47 N.Y.S.2d 311 (App. Div. 1944); East Providence Credit

On the other hand, Reliance theorists, who were influential in jettisoning this requirement in the second Restatement,[93] require only uncompensated reasonable reliance rather than definite and substantial reliance.[94] They note that reasonable reliance of any character, in and of itself, does not cure the problems presented by the donative promise principle.[95] For one, it does not address the potential moral reasons that might obligate a promisee to release the promisor from honoring the promise.[96] In addition, there remain the significant process problems, both evidentiary and cautionary, that accompany donative promises.[97] The existence of reliance, according to the Reliance argument, can just as likely occur in the absence of a promise as in the presence of one.[98] And, while the prospect of definite and substantial reliance may have a sobering effect upon promisors by making them think twice, the Reliance position points out that donative promisors' motives are still "altruistic rather than calculating."[99] Therefore, such promises might not be as deliberative as the Promise commentators allege.[100]

Nevertheless, according to the Reliance position, a cognizable injury suffered by a donative promisee in reasonable reliance on the promise provides a powerful substantive reason for enforcement that outweighs those negative reasons against it.[101] The first Restatement's section 90 stated that actionable reliance must be both reasonable and foreseeable.[102] Moreover, the *de minimis* doctrine and the barrier of litigation costs would together operate to screen out frivolous claims.[103] Therefore, say Reliance commentators, there exists no

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Union v. Geremia, 239 A.2d 725 (R.I. 1968); Hoffman v. Red Owl Stores, 133 N.W.2d 267 (Wis. 1965)).

93. *See* Yorio & Thel, *supra* note 3, at 127-29.

94. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 20-22.

95. *See id.* at 18-20.

96. *See id.* at 5-6.

97. *See id.* at 18-19; Eisenberg, *World of Gift*, *supra* note 12, at 833-34.

98. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 18; Eisenberg, *World of Gift*, *supra* note 12, at 833.

99. Eisenberg, *World of Gift*, *supra* note 12, at 834; *see* Eisenberg, *Donative Promises*, *supra* note 14, at 18-19.

100. *See* Eisenberg, *World of Gift*, *supra* note 12, at 834; *see also* Eisenberg, *Donative Promises*, *supra* note 14, at 19 (noting that the persistence of these problems may help explain why courts traditionally refuse to enforce even relied-upon donative promises); *supra* notes 21-24 and accompanying text (describing the traditional reluctance to enforce donative promises).

101. *See* Eisenberg, *World of Gift*, *supra* note 12, at 834. Eisenberg states: "A donative promisor's refusal to reimburse the promisee for a diminution in the promisee's wealth resulting from reliance on the promise takes the relationship out of the affective realm" and moves it into the "world of contract." *Id.* at 851.

102. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 21-22 (discussing the Restatement of Contracts section 90).

103. *See id.*

reason to deny a remedy to a promisee who has relied reasonably on a promise and suffered a meaningful detriment.[104]

Reliance commentators also dispute the Promise theorists' interpretation of the actual state of the law.[105] First, they note that Professors Yorio and Thel base their premise on cases involving gratuitous promises given in purely commercial settings.[106] Such promises, they argue, normally resemble and are related to bargains, and thus are properly enforced as bargains.[107] In contrast, courts do not enforce donative promises that have not been relied upon, no matter how serious or well-documented they were when made.[108] In addition, the Reliance position argues that an attempt like Williston's, Yorio's, or Thel's to state the law "as it is," without regard to what the law should be, is a fundamentally flawed approach.[109]

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104. Eisenberg argues: "But if the promisee relied, and the promisor should reasonably have expected to induce reliance—as must be the case under the introductory clause of section 90—how could the law justifiably refuse to enforce the promise on the ground that the promisor need not have expected the promisee to do 'just' what he did?" Eisenberg, *Donative Promises*, *supra* note 14, at 22. He further observes that "if a donative promisee's reliance is nontrivial and consists of action that the promisor should reasonably have expected to induce . . . how could the law justifiably refuse to enforce the promise, at least to the extent of the reliance?" *Id.* at 21-22.

105. *See* Eisenberg, *World of Gift*, *supra* note 12, at 854.

106. *See id.* at 856-57.

107. *See id.* Donative promises are driven by affective motives such as generosity or gratitude and are not expressly conditioned upon a reciprocal exchange. *See id.* at 823; *supra* note 12 and accompanying text. Eisenberg and the Reliance position acknowledge a trend towards full enforcement of commercial promises. *See* Eisenberg, *World of Gift*, *supra* note 12, at 832-33, 863; *infra* note 133.

108. *See* Eisenberg, *World of Gift*, *supra* note 12, at 821-22. Eisenberg discusses, among others, the famous case of *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919). *See* Eisenberg, *World of Gift*, *supra* note 12, at 821-22. In *Dougherty*, the New York Court of Appeals, per Judge Cardozo, refused to enforce Aunt Tillie's promise to give $3000 to her nephew Charlie, despite her having recorded the promise in a signed promissory note "for value received." *Dougherty*, 125 N.E. at 95.

109. *See* Eisenberg, *World of Gift*, *supra* note 12, at 854. "An unspoken but underlying premise of Yorio and Thel's enterprise is that it is possible to interpret doctrinal authority wholly without regard to what the law should be as a matter of morals, policy, and experience. This premise is incorrect, and Yorio and Thel's entire enterprise is correspondingly flawed." *Id.* Eisenberg explains:

> [A] deciding court always has *power* to distinguish away what a precedent court said in favor of what it did, on the ground that what the court did was narrower, broader, or just different than what it said. The extent to which courts exercise this power, and more generally the way in which courts interpret a precedent, always depends in part on the extent to which the rule announced in the precedent is congruent or incongruent with the rule that the deciding court would adopt on a clean slate based on those propositions of morality, policy, and experience that the courts can properly take into account. Just such a principle has guided the Restatements in modern times: Restatement rules are to "give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh" in their deliberations.

Id. (quoting Wechsler, *supra* note 54, at 150); *see supra* notes 53-54 and accompanying text.

2. Inducement

Reliance and Promise commentators disagree over whether actual inducement of the promisee is necessary for application of promissory estoppel. Looking at the Uncle and Nephew hypothetical again, Nephew performed an expected act in reliance on Uncle's promise by purchasing the car. Commentators dispute whether Nephew, in order to have the promise enforced, must show that he would not otherwise have purchased the car but for Uncle's promise. Reliance theorists would require Nephew to show actual inducement, while Promise theorists would argue that occurrence of the purchase alone is sufficient.

According to the Reliance approach, if a promisee has not undertaken her act or forbearance solely because of the promise, then she has not been injured by the promise.[110] This position suggests that the promisee's injury provides the substantive reason that justifies enforcing an otherwise unenforceable donative promise.[111] Accordingly, if there is no injury, then there is no justification for enforcement.[112] This coincides with the Reliance view of contracts as protective of injurious reliance.[113]

Promise theorists, on the other hand, require only the occurrence of the expected act, rather than a showing of actual inducement.[114] A promise made with the prospect of a definite and substantial act by

110. *See* Eisenberg, *World of Gift*, *supra* note 12, at 834-36. In *Branca v. Board of Education, Sachem Central School District*, 657 N.Y.S.2d 445 (App. Div. 1997), the court reversed summary judgment for plaintiffs for failure to demonstrate actual inducement. *Id.* at 446-47. There, the school board had re-designated several public employees in "confidential/managerial" positions, thereby requiring them to withdraw from a collective staff association. *Id.* at 446. The school board, however, resolved to grant those employees the same benefits negotiated with the school district by the members of the staff association. *See id.* After 15 years, the school board discontinued the policy when it negotiated a new labor agreement with the staff association. *See id.* The confidential/managerial employees sued, seeking the new increased benefits. *See id.* The trial court granted summary judgment to the plaintiffs. *See id.* The appellate division reversed, noting that "even assuming that manifest injustice resulted, estoppel may be invoked against a governmental agency only where the misconduct of the agency has induced justifiable reliance by a party who then changes position to his or her detriment." *Id.* at 446-47 (citation omitted). The court held that:

> [Q]uestions of fact exist concerning the possible applicability of the doctrine of promissory estoppel since it is unclear whether any of the petitioners changed their positions to their detriment in reliance upon the Resolution. The petitioners' conclusory assertions that they had the option of accepting non-confidential positions, which would have allowed them to remain members of the [staff association], are inadequate to conclude that by accepting or continuing in confidential job titles they thereby changed their positions to their detriment. Accordingly, the lower court erred in making a summary determination upon the pleadings.

Id. at 447 (citations omitted).

111. *See supra* notes 63-68 and accompanying text.

112. *See supra* notes 63-68 and accompanying text.

113. *See supra* notes 191, 253 and accompanying text.

114. *See* Yorio & Thel, *supra* note 3, at 151-61.

the promisee is sufficiently serious to justify enforcement.[115] Subsequent occurrence of that expected act serves as evidence that the promise was indeed made, and made with that expectation in mind.[116] Accordingly, these commentators suggest, courts treat the mere occurrence of the act as conclusive proof of inducement, without inquiring whether a promisee was actually induced to act solely because of the promise.[117] Therefore, when courts speak of reliance, they mean only that a promisee acted in contemplation of the promise, not necessarily in sole reliance on the promise.[118] This accords with the view that the promisor's promise, rather than the promisee's reliance, is the basis for enforcement of the promise.[119]

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115. *See id.* at 152. This raises questions regarding whether and when a promisor who makes a promise with the prospect of causing a definite and substantial act in reliance may rescind that promise.

116. *See id.*

117. *See id.* To illustrate their contention that courts do not in fact require actual inducement, Professors Yorio and Thel discuss the classic case, *Devecmon v. Shaw*, 14 A. 464 (Md. 1888). *See* Yorio & Thel, *supra* note 3, at 155 (discussing *Devecmon*). In *Devecmon*, Uncle had promised Nephew that he would pay for Nephew's expenses for a trip to Europe. *See Devecmon*, 14 A. at 464-65. After making the trip to Europe, Nephew sought reimbursement from Uncle's estate for his expenses. *See id.* The Maryland Supreme Court held Uncle's estate liable for the expenses in the event that a promise was made. *See id.* It ruled that Nephew's expenses constituted consideration for Uncle's promise to pay. *See id.*

The court did not require Nephew to prove that he would not have taken the trip if not for Uncle's promise, and indicated that the issue was not relevant to its ruling: "It might very well be, and probably was the case, that [Nephew] would not have taken a trip to Europe at his own expense. But, whether this be so or not, the testimony would have tended to show that [Nephew] incurred expense at the instance and request of [Uncle] . . . ." *Id.* In addition, the court found that an inquiry into whether Nephew benefited from the trip was also not relevant. *See id.* at 465. Yorio and Thel note that this holding undermines the Reliance contention that application of promissory estoppel requires that a promisee suffer detriment on account of the promise. *See* Yorio & Thel, *supra* note 3, at 155.

Professor Hillman argues that *Devecmon* and the other cases cited by the Promise scholars, in support of their proposition that inducement and detriment are not required, can also be interpreted in accordance with the proposition that these elements are in fact required. *See* Hillman, *supra* note 22, at 612-14. He argues, for example, that the *Devecmon* court's observation that "[i]t might very well be, and probably was the case, that [Nephew] would not have taken [the] trip to Europe at his own expense" indicates the court's belief that Nephew probably was induced by Uncle's promise. *Id.* at 613 (quoting *Devecmon*, 14 A. at 464). Hillman concludes that "[t]he cases [cited by Promise scholars] . . . suggest the indispensability of detrimental reliance to a favorable outcome." *Id.* at 603.

118. *See* Yorio & Thel, *supra* note 3, at 159-60.

119. *See infra* Part II.A. Yorio and Thel acknowledge that both Restatements require that the promise actually induce the promisee's reliance. *See* Yorio & Thel, *supra* note 3, at 152. Williston, more so than the others, might then be able to claim to be "analyz[ing] what courts are doing instead of trying to force cases into accepted theories." *Id.* at 114. Nevertheless, Yorio and Thel claim that courts in fact do not require inducement. *See id.* at 152. This can lend credence to Williston's suggestion, echoed by Promise commentators, that the framers craft the Restatement to state simply, to the extent practicable, what courts actually do rather than force cases into preconceived theories. *See Discussion of the Tentative Draft, Contracts, Restatement*

3. Damages

Reliance and Promise commentators disagree over the appropriate measure of damages in applications of promissory estoppel. Using the Uncle-Nephew hypothetical, Uncle promised Nephew $1000.[120] Nephew only purchased his car for $600.[121] Promise commentators would hold Uncle liable to the full extent of his promise, because the act that he expected to occur, the car purchase, did indeed occur.[122] Accordingly, they would award Nephew $1000. Reliance theorists, on the other hand, would argue that Nephew should be compensated to the extent of his injury in reliance on Uncle's promise.[123] They would therefore limit Nephew's recovery to $600.

Promise commentators view the promisee's expectation as the proper measure of damages in promissory estoppel cases.[124] For them, the promise itself is the basis for enforcement; any promise which is identified as seriously considered, whether because it is supported by consideration or made with the prospect of definite and substantial reliance, is fully enforceable.[125] This view does not permit for partial enforcement—either a promise is binding or it is not.[126] It accords with the moral principle underlying promise-enforcement: having achieved her expected result, a promisor should do what she said she would do.[127]

The Reliance approach, on the other hand, holds that reliance is the proper measure of damages for the application of promissory estoppel.[128] This approach reasons that the basis for enforcement of a donative promise is the injury suffered by the promisee.[129] Thus, courts

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No. 1, 3 A.L.I. Proc. 159 (1925) ("The endeavor in this Restatement is to restate the law as it is."); Yorio & Thel, *supra* note 3, at 114.

120. The hypothetical was originally crafted for the purpose of disputing damages. *See supra* notes 34-37 and accompanying text.

121. *See supra* notes 34-37 and accompanying text.

122. *See infra* notes 124-27 and accompanying text.

123. *See infra* notes 128-33 and accompanying text.

124. *See* Yorio & Thel, *supra* note 3, at 130-51.

125. *See id.* at 113.

126. *See id.* at 113, 118-19.

127. *See id.* at 118-19. Williston, and the First Restatement, shared this view of enforcement: "Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made." *Discussion, Contracts Restatement No. 2*, *supra* note 2, app. at 103 (remarks of Prof. Williston, reporter); *see* Yorio & Thel, *supra* note 3, at 116-19. Williston vigorously defended his view that Uncle would be liable for the full $1000 which he had promised despite equally vigorous disagreement at the 1926 A.L.I. Proceedings. *See Discussion, Contracts Restatement No. 2*, *supra* note 2, app. at 95-114; Yorio & Thel, *supra* note 3, at 116-19; *see also* Eisenberg, *Principles of Consideration*, *supra* note 14, at 657 n.51 (noting Williston's spirited defense of section 90). Eisenberg, a Reliance commentator, has described Williston's argument in that debate as an example of the "extreme conceptualism of which he was occasionally capable." Eisenberg, *Donative Promises*, *supra* note 14, at 24.

128. *See* Eisenberg, *World of Gift*, *supra* note 12, at 836.

129. *See id.*

should remedy that injury by compensating the promisee's reliance.[130] In bargain situations, where parties have exchanged commitments, expectation damages are appropriate to facilitate commerce by encouraging trust in exchanges, enabling future planning, and compensating foregone alternative bargains.[131] But, the Reliance position suggests, because donative promises do not occur as part of a productive exchange and are instead voluntary promises to bestow gifts,[132] expectation damages are unnecessary and would "compensate" a promisee for something she never had.[133]

Reliance commentators recognize that the First Restatement reflected Williston's own view that promises are either enforceable or not enforceable.[134] They point out, though, that reliance has since been recognized as a legitimate substantive basis for promise enforcement.[135] Accordingly, the Second Restatement adopted this newer view of promise enforcement[136] and rejected the old axiom that enforceable promises must be enforced in full.[137]

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130. *See id.*

131. *See id.* at 832-35.

132. *See id.* at 842-43. Fuller and Perdue state that awards of expectation damages facilitate commerce by compensating for lost opportunities and encouraging reliance on business transactions. *See* Fuller & Perdue, *supra* note 42, at 60-66. They conclude that neither of these bases apply to donative promises because donative promises do not normally occur as part of a productive exchange. *See id.*.

133. *See* Eisenberg, *World of Gift*, *supra* note 12, at 833-35. Eisenberg criticizes Thel and Yorio for citing primarily commercial promises in support of their proposition that courts usually award expectation damages in promissory estoppel cases. *See id.* at 856-57. He states that such promises normally occur in an implied bargain context, and thus are properly enforced as bargains. *See id.*; *supra* note 107.

134. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 23-26.

135. *See* Eisenberg, *World of Gift*, *supra* note 12, at 826-27 (discussing Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941)). Professor Fuller identified three substantive bases for enforcing promises: (1) the protection of reliance; (2) the prevention of unjust enrichment; and (3) respect for private autonomy. *See* Fuller, *supra*, at 806-13. He concluded that none of these substantive bases applied to cases involving simple (unrelied-upon) donative promises. *See id.* at 815. In addition, he identified three formal bases: (1) an evidentiary safeguard ensuring that a promise was actually made; (2) a cautionary safeguard screening out impulsive promises; and (3) a channeling function signifying the promisor's intent to be bound. *See id.* at 800-02; *supra* notes 84-87 and accompanying text.

136. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 25-26. The Second Restatement expressly provided for partial enforcement by eliminating the requirement for definite and substantial reliance and adding the clause stating that the remedy can be limited as justice requires. *See* Restatement (Second) of Contracts § 90 reporter's note (1981); *Continuation of Discussion of the Restatement of the Law, Second, Contracts*, 42 A.L.I. Proc. 296-97 (1965) (remarks of Prof. Braucher, reporter); *supra* text accompanying notes 48-51. The Reliance commentators have stated that the reason for the requirement of definite and substantial reliance was to justify expectation damages. *See* Calamari & Perillo, *supra* note 22, § 6.1; Eisenberg, *Donative Promises*, *supra* note 14, at 25; Knapp, *supra* note 26, at 58.

137. This axiom of Williston's, Eisenberg suggests, had produced "counter-intuitive" results, such as the award of $1000 for Nephew. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 25-26; *supra* text accompanying notes 34-37. Professor Hillman reports that his survey revealed a flexibility in both courts' and litigants'

To bolster their respective positions, Reliance and Promise scholars both assert that the cases support their positions,[138] or at the very least, that the cases disprove the other side's approach.[139] Therefore, part III looks at the 1997 cases, particularly those involving donative promises, in an effort to determine which side held the prevalent view during that year.

III. THE 1997 CASES

The most effective way to evaluate courts' attitudes toward the application of promissory estoppel is to examine how they actually apply the doctrine. This part looks at the promissory estoppel cases decided by the courts in 1997.[140] It examines the character of the reliance upon the promises to which courts applied promissory estoppel principles in both commercial and donative contexts. It concludes that courts generally apply promissory estoppel to promises upon which promisees have relied in definite and substantial fashion.

When looking at these cases, it is important to remember that courts' views of the doctrine and their motives behind its application are often not readily decipherable from the language of their opinions. Most courts state adherence to the doctrine as expressed by section 90 of the Second Restatement.[141] Nevertheless, after doing so, many of these courts list definite and substantial reliance as a requirement, as did the First Restatement.[142] Some courts also set forth variations of

views of promissory estoppel remedies, thus underscoring the importance of section 90's permission to limit the remedy as justice requires. *See* Hillman, *supra* note 22, at 601, 610. He also notes, however, that the courts' approach is inconclusive because of: a lack of clarity in discussing the remedy; the fact that reliance and expectation damages are often identical; the intervention of other theories of recovery; and adherence to the damages requested by claimants. *See id.* at 601-02.

138. *See supra* notes 88-92 and accompanying text.

139. *See supra* notes 105-08 and accompanying text.

140. A search of the "ALLCASES" database in Westlaw using the parameters [da(1997) and ("promissory estoppel" or 156k85 or (restatement /5 "90")) and (rely or reliance or relies or relied)] generated 350 unrestricted cases. The term "156k85" is Westlaw's "key" indicator for promissory estoppel. A list of these cases is on file with the *Fordham Law Review*.

141. *See, e.g.*, Steinke v. Sungard Fin. Sys., Inc., 121 F.3d 763, 776-77 (1st Cir. 1997); *see also* Hillman, *supra* note 22, at 597 (noting a general acceptance that "courts still speak the language of reliance").

142. This possible continuity can indicate an internalization of the requirement by judges, or may simply reflect the effect of stare decisis. *See* Cole v. Knoll, Inc., 984 F. Supp. 1117, 1133 (W.D. Mich. 1997) (finding that plaintiff's purchase of a house and resignation from the military were insufficient reliance upon at-will employment, and that plaintiff had also failed to show a clear promise); Creative Demos, Inc. v. Wal-Mart Stores, Inc., 955 F. Supp. 1032, 1038 (S.D. Ind. 1997) (holding that because plaintiff still profited despite defendant's broken promise, plaintiff had not relied to her detriment), *vacated*, 142 F.3d 367 (7th Cir. 1998); Trammel Crow Co. No. 60 v. Harkinson, 944 S.W.2d 631, 636 (Tex. 1997) (refusing to apply promissory estoppel to a Texas statute requiring that all real estate brokers' commission agreements be in writing, and that a broker's reliance on an oral agreement was unreasonable for that very reason); *see also* Black's Law Dictionary 1214 (6th ed. 1990) (describing promis-

the requirement for definite and substantial reliance, many of which are tied closely to the detriment suffered by the promisee.[143] Therefore, in addition to what courts said in 1997, this part looks at what they did.

A. *Commercial Promises*

Commercial promises that result in concrete reliance normally have induced reliance of a definite and substantial character. Although promises occurring in commercial settings are the most often litigated under section 90,[144] most of these claims fail on account of either a defect in the promise itself[145] or a failure by the plaintiff to allege

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sory estoppel with First Restatement "definite and substantial character" language but then citing to the Second Restatement).

143. *See* Fischer v. Allied Signal Corp., 974 F. Supp. 797, 809 (D.N.J. 1997) (requiring that plaintiff "suffer[ ] a definite and substantial detriment as a result of the reliance such that the promise should be enforced to avoid injustice" and ruling that an employer's advice that volunteering for a supervisory post would accelerate career growth did not immunize an employee from the effects of a departmental reorganization); Duncan v. Office Depot, 973 F. Supp. 1171, 1176 (D. Or. 1997) (requiring "a substantial change in position by the party seeking [enforcement]" and finding that promissory estoppel does not apply to employer modifications of at-will employment contracts); Perez v. Alcoa Fujikura, Ltd., 969 F. Supp. 991, 1011 n.11 (W.D. Tex. 1997) (requiring "substantial reliance by the promisee to his detriment" to estop use of the parol evidence rule and alter a valid written contract); DeJoy v. Comcast Cable Communications Inc., 968 F. Supp. 963, 990-92 (D.N.J. 1997) (requiring that a promisee must experience a detriment of definite and substantial nature in reliance on the promise and allowing a claim based upon the refusal of another job offer in reliance upon a promise of continued employment, but doubting whether the claim would succeed at trial because a severance agreement alleviated the injury); *Creative Demos*, 955 F. Supp. at 1037-38 (holding that because plaintiff still profited despite defendant's broken promise, plaintiff had not relied to her detriment); Mitchell v. Bingham Mem'l Hosp., 942 P.2d 544, 549 (Idaho 1997) (requiring that the detriment suffered be "substantial in an economic sense" in ruling that the willingness of a hospital to negotiate medical and legal bills for plaintiff's injuries did not alleviate plaintiff's failure to file timely tort-claim notice pursuant to state statute).

144. Only three out of the 350 unrestricted 1997 cases involved arguably donative promises. *See supra* note 140.

145. Many courts look first for the existence of a clear promise when applying promissory estoppel. *See, e.g.*, Doyle v. Holy Cross Hosp., 682 N.E.2d 68, 70 (Ill. App. Ct. 1997) (requiring a promise clear enough for a reasonable person to believe that an offer was made); *see also* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. Chi. L. Rev. 903, 914 (1985) (stating three factors that increase the likelihood of recovery: (1) the existence of a credible promise; (2) the promisor's authority to make the promise, and (3) a return benefit from economic activity); Yorio & Thel, *supra* note 3, at 161-66 (discussing courts' examinations of promises in section 90 cases).

Some cases also fail due to a lack of authority on the part of the promisor. *See* Farber & Matheson, *supra*, at 917-18; *see also, e.g.*, Volvovitz v. Protein Sciences Corp., No. CV 970057952S, 1997 WL 397464, at *5 (Conn. Super. Ct. June 26, 1997) (ruling that promises by individual directors cannot bind the corporation and rejecting a promissory estoppel claim brought by a corporate president and director "who can be assumed to know the corporate law of this state"). Farber and Matheson discuss the importance of agency principles in promissory estoppel cases, noting that many courts do not detect the agency issue and instead, for example, label the reliance

concrete reliance.[146] A commercial promise is typically made deliberately in order to cause a reaction by a promisee.[147] The expected act in reliance is usually made clear by the commercial circumstances under which the promise is made.[148] This effect has prompted many commentators to identify a judicial trend towards general enforcement of commercial promises,[149] noting that because such promises

unreasonable. *See* Farber & Matheson, *supra*, at 917-18. They note *Ryan v. J.C. Penney Co.*, 627 F.2d 836 (7th Cir. 1980), as an example of a case that would have been better decided on agency principles. *See* Farber & Matheson, *supra*, at 919. In *Ryan*, the Seventh Circuit refused to enforce promises by a department manager and a branch personnel manager of a national department store that the plaintiff would not be fired except for just cause. *See Ryan*, 627 F.2d at 838. The court ruled that "without a promise of employment for a definite term or consideration beyond services rendered, no enforceable employment contract is created." *Id.* While Farber and Matheson concur in the result, they argue that the local managers' lack of authority would have been a better basis for the court's decision. *See* Farber & Matheson, *supra*, at 919. They note that "[i]t is doubtful that local personnel had actual authority to grant life tenure or that an employee could reasonably believe that such authority existed." *Id.*

146. *See, e.g.*, Croslan v. Housing Auth., 974 F. Supp. 161, 169 (D. Conn. 1997) ("[Plaintiff's] failure to seek other employment is not forbearance of a definite and substantial character as a matter of law because there is not sufficient evidence from which a reasonable person could find that [the plaintiff] failed to look for other work in detrimental reliance on the alleged promises." (quoting Engstrom v. John Nuveen & Co., 668 F. Supp. 953, 962-63 (E.D. Pa. 1987))). *But see infra* Part III.A.2 (discussing a ruling that an employee "accepts" an employer's "offer" of employment benefits by continuing to work in reliance upon the promise, thereby creating a binding agreement).

Sometimes, this requirement for a concrete act in reliance is confused with the requirement for reliance of a definite and substantial character. *See supra* note 4 (defining definite and substantial reliance); *see also* Hillman, *supra* note 22, at 596 (discussing the possibility that parties mistakenly believe that the rate of success for promissory estoppel claims is much greater than in actuality, and as a result, parties are "throwing in . . . claims only as subsidiary theories tacked on to a contract or other claim, sometimes even as an afterthought"). The likelihood of "thrown in" claims would appear to be greater in commercial contexts, due to the multifaceted nature of the disputes. *See Cole*, 984 F. Supp. at 1132 ("It is common for . . . plaintiff[s] asserting [implied just-cause contract] claims to add a 'throw-in' count asserting promissory estoppel.").

147. *See* Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 Wis. L. Rev. 943, 951.

148. *See infra* Part III.A.1 (discussing Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997)).

149. For example, Farber and Matheson identify an important role played by economic activity in the application of promissory estoppel. *See* Farber & Matheson, *supra* note 145, at 904-05. They argue that a return of economic benefits, tangible or intangible, to a promisor as a result of the promise is such a significant factor in enforcement that they advocate a new version of the doctrine. *See id.* at 929. Their proposed version states simply: "[C]ommitments made in furtherance of economic activity should be enforced." *Id.*; *see also* Eisenberg, *World of Gift*, *supra* note 12, at 832-33 (concurring that promises made in commercial contexts are regularly enforced).

Professor Jay Feinman has criticized both sides of the debate for the failure to acknowledge the importance of context and relations between parties in the enforcement of unbargained-for promises. *See* Feinman, *Last Article*, *supra* note 21, at 307-09. He praises commentators such as Farber and Matheson for taking the first steps away

often resemble bargains, they are rightly enforced as bargain contracts.[150] To illustrate, this section discusses three 1997 commercial promise cases: *Guckenberger v. Boston University*, *Doyle v. Holy Cross Hospital*, and *DeJoy v. Comcast Cable Communications Inc.*

1. Guckenberger v. Boston University[151]

Guckenberger involved a class action brought against Boston University on behalf of the University's learning disabled students.[152] Specifically, three of the named plaintiffs alleged that the University had induced them to enroll by promising particular accommodations for their disabilities.[153] The District of Massachusetts held that the University had made "definite and certain" promises to these three students that it should have reasonably foreseen would be relied upon by the students, and that the students did indeed rely on these

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from discrete promissory analysis, and advocates jettisoning the doctrine altogether in favor of a relational approach to the enforcement of such promises. *See id.* at 307, 310-11; *see also* Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel*, 33 Wayne L. Rev. 895, 905 & n.28 (1987) (identifying factors which courts recognize and account for as barriers to formal contracting despite the promisor's attainment of benefits: (1) the parties' relative status and knowledge; (2) the existence of a broader relationship between the parties; and (3) the existence of trust and confidence between the parties). Feinman's relational approach is a three-step process. *See* Feinman, *Last Article*, *supra* note 21, at 313. The first step is to identify where a particular transaction lies along a continuum from discrete transactions to complex relational transactions. *See id.* The second step is to determine the applicable norms; different norms will apply to transactions at different points along the continuum. *See id.* Step three would require deciding how, if at all, those norms could be translated into legal rules of contract. *See id.*

150. *See* Eisenberg, *World of Gift*, *supra* note 12, at 857. As Eisenberg observed, "Most commercial promises are either part of an express or implied bargain or in aid of a bargain, and therefore should be enforceable by expectation damages for much the same reasons that support expectation damages for explicit bargains." *Id.*

151. 974 F. Supp. 106 (D. Mass. 1997).

152. *See id.* at 114.

153. *See id.* at 151-52. The Learning Disabled Support Services ("LDSS") Director at the University had told one plaintiff that she could substitute another course for her foreign language requirement. *See id.* at 151. The University, however, failed to honor its promise and instead required her to take Swahili. *See id.* at 152. The University told another plaintiff, who had flown in from California to investigate the learning-disabled facilities before deciding to attend, that considering his history and documentation, he would have "no problem" in getting needed exam accommodations. *See id.* at 151. Instead, he "labored from August until December of his freshman year without LDSS support" and was informed just before fall finals that he had been denied exam accommodations due to inadequate documentation. *See id.* at 152. He suffered stress-related illnesses, fared poorly on his final exams, and lost his scholarship. *See id.* at 128. The University sent a letter to a third plaintiff prior to her matriculation at the law school stating that any evaluation by a professional qualified to diagnose learning disabilities conducted within the previous three years or while an undergraduate would suffice to qualify her. *See id.* at 151-52. When she submitted her specialist's evaluation in her second year in order to receive exam accommodations, the University told her that she would have to be completely retested for dyslexia in the three weeks prior to her exams. *See id.* at 152.

promises to their detriment.[154] The court concluded that the University had breached agreements formed with the students through promissory estoppel.[155]

The University clearly made its promises with the expectation that the students would respond by registering at the University. The promises to two of the three students were given in response to direct inquiries from those students.[156] The promise to the third student, however, was contained in a letter mailed to her home prior to matriculation.[157] This could have created questions regarding inducement and the detrimental nature of her reliance, even though her act of registering was as concrete and expected as the acts of the other students. Nevertheless, although this fact may not demonstrate that she was actually induced to enroll by the University's promise, neither did it disprove actual inducement.[158]

2. Doyle v. Holy Cross Hospital[159]

In *Doyle*, a hospital had issued a handbook to its employees in which it promised to observe certain procedures and safeguards in the event that it ever needed to lay off any of its employees.[160] Several

154. *See id.* at 150-52.
155. *See id.* at 152.
156. *See id.* at 151-52.
157. *See id.*
158. It may be that a promise in contemplation of marriage is a clear case, but not the only case, in which a rescinding promisor "must not insist upon too nice a measure of proof" of inducement. *See* De Cicco v. Schweizer, 117 N.E. 807, 810 (N.Y. 1917) ("The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others."); *see also* Restatement (Second) of Contracts § 90(2) (1981) (noting that "[a] charitable subscription or a marriage settlement is binding under [promissory estoppel] without proof that the promise induced action or forbearance").
159. 682 N.E.2d 68 (Ill. App. Ct. 1997).
160. *See id.* at 69. The handbook containing the Economic Separation Policy was first issued in 1971. *See id.* The Economic Separation Policy, policy number 7-G, read in part:

> Holy Cross Hospital is committed to providing a working environment where employees feel secure in their job. We understand that job security is important to an employee and to that employee's family. There are instances, though, that for economic or other reasons it becomes apparent that the permanent elimination of departments, job classifications and/or jobs must be made, and there is no reasonable expectation that employees affected could be placed in other positions in the hospital or be recalled for work in one year or less. To ensure that the economic separation is handled in an objective, structured and consistent way, the following policies will be followed in determining which employees will be affected.
>
> 1. Job Classification
> 2. Length of Continuous Hospital Service
> 3. Ability and Fitness to Perform the Required Work
>
> . . . .
>
> Because of the special needs of our patients, the following factors will be used in an economic separation affecting R.N.'s:

years later, the hospital revised its handbook to add a disclaimer that none of its personnel policies were binding and that employees could be terminated at any time regardless of notice.[161] Several years after that, the hospital terminated the four plaintiffs.[162] Each plaintiff had been a nurse at the hospital since the time of the original handbook[163] and was terminated in violation of the promise contained within that handbook.[164]

The trial court concluded that the hospital could be released from its original promise to its employees regarding termination safeguards and procedures.[165] It observed that in Illinois, both promises and disclaimers in an employee handbook are rendered binding by an employee's continued willingness to work for that employer.[166] Thus, the court ruled that both of the "offers" had been "accepted" by the nurses' continued employment at the hospital.[167] The court held that

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1. Nursing Areas of Expertise
2. Length of Service Within Each Area of Expertise
3. Ability and Fitness to Perform the Required Work.

. . . .

Employees affected by an economic separation will be placed on a priority rehire list and will be contacted by the Human Resources Department if a position becomes available for which the separated employees may be eligible through experience, training, education and/or other qualifications. Priority rehire consideration shall be for a period of one year.

Id.

161. *See id.* The Employment Relationship Policy was added in 1983. *See id.* That policy, policy number 5-I, read:

> The Personnel Policies and other various Hospital employee and applicant communications are subject to change from time to time and are not intended to constitute nor do they constitute an implied or express contract or guarantee of employment for any period of time. The employment relationship between the Hospital and any employee may be terminated at any time by the Hospital or the employee with or without notice.

Id.

162. *See id.* at 69. The plaintiffs were all laid off in 1991. *See id.*

163. *See id.* One nurse was hired in 1960, another in 1968; the remaining two were both hired in 1972. *See id.*

164. *See id.* at 69-70. The nurses claimed breach of contract and promissory estoppel against the hospital. *See id.*

165. *See id.* at 70.

166. *See id.* The rule was stated by the Illinois Supreme Court in *Duldulao v. St. Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (Ill. 1987). The *Duldulao* court held that "an employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present." *Doyle*, 682 N.E.2d at 70 (quoting *Duldulao*, 505 N.E.2d at 318). The *Duldulao* court outlined three elements required for employee handbook provisions to become enforceable: (1) a clear promise so that an employee would reasonably believe that an offer has been made; (2) made "in such a manner that the employee is aware of its contents and reasonably believes it to be an offer"; (3) which the employee must accept "by commencing or continuing to work after learning of the [promise]." *Id.* (quoting *Duldulao*, 505 N.E.2d at 318).

167. *See Doyle*, 682 N.E. 2d at 70. The court followed an earlier appeals court decision, *Condon v. AT & T Co.*, 569 N.E.2d 518 (Ill. App. Ct. 1991), which had

the first promise was superseded by the second, and it dismissed the nurses' claims.[168]

The Illinois appellate court reversed the lower court's decision and held the hospital liable for its first promise.[169] It concluded that extending the Illinois rule to subsequent disclaimers was illogical, because this would have forced the nurses to quit their jobs in order to protect their promised employment rights, thereby rendering the first promise illusory.[170] The court held that the first promise was enforceable, while the second was not, and it reinstated the nurses' claims.[171]

The decision in *Doyle* offers two interesting insights into the court's application of promissory estoppel. The first involves the recognized reliance itself. It may be easier to see the plaintiffs' reliance in *Doyle* as definite and substantial than it is to see as concrete.[172] Indeed, many courts have found that continued employment alone is not sufficiently concrete to constitute reliance at all.[173] Nevertheless, the continued retention of employees and the benefits that it provides an employer are normally what employers expect and hope to engender when making such promises.[174] In that sense, if continued employment can be termed reliance at all under these circumstances, it is reliance of a definite and substantial character.

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extended the *Duldulao* rule to a subsequent disclaimer added by an employer. *See Doyle*, 682 N.E.2d at 70.

168. *See Doyle*, 682 N.E.2d at 70. Of course, the nurses could have protested the new "promise" and could have arguably signaled nonacceptance in other ways than by quitting. The facts on the record indicated no disapproval by these nurses of the second promise until the time of the case. This demonstrates that the Illinois rule is grounded not in bargain theory, but in promissory estoppel. *See infra* note 176.

169. *See Doyle*, 682 N.E.2d at 72. The court stated that it "respectfully disagree[d]" with *Condon*. *Id.* at 70.

170. *See id.* at 72. The court noted that *Duldulao* had not involved a subsequent disclaimer. *See id.* at 71.

171. *See id.* at 71-72. The court stated that the modification was not bargained for and was made solely for the benefit of the hospital. *See id.*

172. *See supra* note 146.

173. *See supra* note 146; *cf.* DeJoy v. Comcast Cable Communications, Inc., 968 F. Supp. 963 (D.N.J. 1997) (allowing a claim based upon the refusal of another job offer in reliance upon a promise of continued employment and job growth, but then doubting whether the claim would succeed at trial because a severance agreement alleviated the injury). Professor Hillman's survey revealed that employment cases were the most frequent type of case seeking promissory estoppel—47% of cases over his two year period—but also one of the least successful, with a 4.23% success rate compared to an average success rate for all other cases of 14.65%. *See* Hillman, *supra* note 22, at 591-94 & tbls. 2.1–2.2.

174. In their article, Farber and Matheson discuss the mutually beneficial workplace atmosphere engendered by the integrity of promises from employers to employees. *See* Farber & Matheson, *supra* note 145, at 920-24. In return for their promises to their employees, employers receive benefits in the form of increased loyalty and productivity which are not readily quantifiable. *See id.* at 921, 926. Farber and Matheson state that courts have increasingly recognized this and, as a result, have begun to uphold such promises under the promissory estoppel doctrine. *See id.* at 920-21, 925-26 (citing Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)).

Second, the decision in *Doyle* underscores the importance of injustice in applying the promissory estoppel doctrine. *Doyle* involved two promises, each promulgated in the same fashion, under the same circumstances, and relied upon in the same way. Nevertheless, the Illinois appellate court enforced one promise while refusing to enforce the other.[175] An explanation for this decision lies in the fact that any reliance by the nurses on the second promise was not detrimental to them, while their reliance on the first promise clearly was. The nurses could not have possibly relied to their detriment upon a promise which, by its very existence, was injurious to them.[176] Therefore, the application of section 90 to the second promise was not required in order to avoid an injustice.[177]

3. DeJoy v. Comcast Cable Communications Inc.[178]

In *DeJoy*, an employee relied even more concretely upon an employer's promise than the plaintiffs in *Doyle* did: he declined another offer of employment. The case involved a cable television service executive, Frank DeJoy,[179] whose company was entering negotiations for its acquisition by Comcast.[180] In anticipation of this takeover, DeJoy procured a generous severance agreement in the event he was unjustifiably demoted or terminated.[181] Additionally, DeJoy later received promises of continued employment and job growth with Comcast after the acquisition.[182] As a result, he declined another attractive employment offer from a rival cable company.[183] After DeJoy suffered a disability,[184] Comcast informed him that he was be-

175. *See Doyle*, 682 N.E.2d at 72.

176. This also illustrates that despite the Illinois precedents' use of the bargain language of "offer" and "acceptance," the rule is grounded in promissory estoppel and injustice. *See supra* note 168 and accompanying text. Even though the hospital's second policy statement may be labeled a promise in a sterile sense of the term, there still lacked an injustice which would demand enforcement of that "promise." *Compare* Restatement (Second) of Contracts § 2 (1981) (defining promise), *with id.* § 90 (defining promissory estoppel).

177. *See* Restatement (Second) of Contracts § 90(1) (1981).

178. 968 F. Supp. 963 (D.N.J. 1997).

179. DeJoy worked for Suburban Cablevision from 1981 to his departure in 1995. *See id.* at 969-70.

180. *See id.* at 970.

181. *See id.* at 969-70. The severance agreement with Suburban Cablevision would provide him with a one-time bonus in the event that he was terminated or demoted other than for just cause within six months after Suburban's sale to Comcast Cable. *See id.*

182. *See id.* at 970-71. The Regional Vice President of Comcast assured DeJoy of continued employment after the acquisition. *See id.* He told DeJoy that DeJoy would be an Area Vice President after the acquisition, and outlined for him a two-year pattern of career growth. *See id.* at 970.

183. *See id.* The offer came from the Cablevision corporation. *See id.*

184. DeJoy suffered an aneurysm, was hospitalized, and went on disability leave. *See id.* at 971.

ing demoted,[185] but he refused to accept the demotion and instead invoked the severance agreement.[186]

The District of New Jersey refused to grant summary judgment to Comcast on DeJoy's promissory estoppel claim for continued employment.[187] The court ruled that DeJoy had stated a viable claim, which required, in part, a definite and substantial detriment in reliance upon a clear promise.[188] Even though the court doubted whether DeJoy's claim would ultimately succeed at trial, it nonetheless held that the claim created a genuine issue of fact for jury consideration.[189]

Like the plaintiffs in *Doyle*, DeJoy was induced to rely upon an employer's promise in a definite and substantial way: he chose to remain in his job. DeJoy's act in reliance, however, was more visible than that of the *Doyle* plaintiffs, because DeJoy actually refused another offer of employment. As such, his is also a stronger case for actual inducement. Nevertheless, even though DeJoy stated all of the components necessary for a valid claim, the court questioned the likelihood of the ultimate success of his claim. As the court observed, DeJoy received a generous severance settlement and also later found another lucrative position, so his reliance was not likely to have been detrimental to him at all.[190] Through this observation, the court revealed its sensitivity to the overarching issues of injury and injustice, a sensitivity that it predicted a jury would share.

B. *Donative Promises*

The few donative promise cases that appeared before courts in 1997 all involved reliance of a definite and substantial nature. The courts enforced all of these promises. Donative promises represent the category of promises that are disputed most by academics[191] but least by

185. Two months after his aneurysm, Comcast informed him of the demotion to a position with lesser pay and responsibility than his previous position with Suburban Cablevision. *See id.* at 971-72.

186. *See id.* at 972-73.

187. *See id.* at 992. The court stated that under New Jersey law, an at-will employee can use promissory estoppel to recover "losses incident to reliance upon the job offer itself, even though the employer can terminate the relationship at any time." *Id.* at 991 (quoting Peck v. Imedia, Inc., 679 A.2d 745, 753 (N.J. Super. Ct. App. Div. 1996), *cert. denied*, 686 A.2d 763 (N.J. 1996)).

188. The court stated that in New Jersey, a claim for promissory estoppel requires: (1) a clear and definite promise by the promisor; (2) made with the expectation that it will induce reliance by the promisee; (3) upon which the promisee must have reasonably relied; (4) resulting in the promisee experiencing a detriment of definite and substantial nature. *See id.* at 990.

189. *See id.* at 992.

190. *See id.*

191. Professor Eisenberg notes that "donative promises, although at first glance an inconsequential area of contract law, in fact stand close to its center." Eisenberg, *World of Gift*, *supra* note 12, at 840. This is because the question of their enforcement "bears directly on one of the deepest social questions of contract law: whether contract law should be based on the deontological objective of ensuring that promisors

actual litigants.[192] When the Reliance and Promise theorists clash swords over the proper application of promissory estoppel, the debate generally centers on donative promises.[193] Nevertheless, in 1997, commercial promise cases far outnumbered donative promise cases.[194] This section looks at those three cases involving donative promises: *Nappi v. Nappi Distributors*, *Sutherland v. Barclays American/Mortgage Corp.*, and *Thomas v. E.B. Jermyn Lodge No. 2*. All three promissory estoppel claims were successful, and this part concludes that all three promises had been relied upon in definite and substantial ways.

1. Nappi v. Nappi Distributors[195]

In *Nappi*, the founder and president of a beer and wine distributor company, Nicholas Nappi, had promised the relatives of a friend that he would pay for an addition to their house.[196] The addition was going to be added in order to accommodate the friend, who had developed multiple sclerosis.[197] Nappi's company continued to pay for the addition after his death.[198] When the work was completed, the company sought to subtract those payments from money it had owed to Nappi's estate.[199] Nappi's widow objected to the set-off, claiming that Nappi's promise to pay for the addition did not create a legally binding obligation on his estate.[200] The Maine Supreme Court disagreed, holding that the company had discharged what was indeed an obligation to pay for the addition on behalf of its founder.[201]

Nappi clearly induced the relatives to act in definite and substantial reliance on his promise to pay for the addition. He made the promise with the clear expectation that they would undertake construction of an addition as a result of the promise. The relatives expressly testified

keep their promises because it is morally right that promises are kept, or on utilitarian considerations of facilitating commerce and compensating injured promisees." *Id.* at 838. Although donative promises have traditionally dominated the academic debate, a greater number of articles have been written recently that focus on some aspect of the promissory estoppel enforcement of commercial promises. *See, e.g.*, DeLong, *supra* note 147, at 943 (arguing that courts now require a commercial promisee to show "'enforcement reliance'—reliance on a reasonable belief in the legal enforceability of the promise—in addition to mere 'performance reliance'—reliance on a reasonable belief that the promise will be performed").

192. *See supra* note 144.

193. *See supra* Part II.

194. *See supra* note 144.

195. 691 A.2d 1198 (Me. 1997).

196. *See id.* at 1199.

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.* at 1200. After quoting section 90 of the Second Restatement, the court ruled that "[i]n the context of the transfer of land, when the donee has made substantial improvements to the land in 'reliance upon the promise to convey the land, courts will enforce the promise to convey.'" *Id.* (quoting Tozier v. Tozier, 437 A.2d 645, 648 (Me. 1981)).

that they would not have built the addition but for the promise.[202] As the court noted, Nappi had been the moving force behind the addition;[203] to say he was not obligated to pay as promised would clearly be unjust to the relatives who had acted in reliance upon that promise.[204]

2. Sutherland v. Barclays American/Mortgage Corp.[205]

In *Sutherland*, a mortgage company promised one of its mortgagors that it would allow her to postpone three months of payments on her mortgage.[206] The mortgagor's home had been destroyed in an earthquake, and she sought the postponement in order to allocate the money to her extraordinary expenses caused by the earthquake.[207] After the company refused to honor its promise and demanded that she pay for all three months at the end of the third month,[208] the mortgagor sought declaratory and injunctive relief against foreclosure on her home.[209] The California appellate court reversed the trial court's summary judgment ruling[210] for the mortgage company.[211]

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202. *See id.* at 1199.

203. *See supra* notes 196-99.

204. The friend and her relatives testified that they had not provided any consideration for the promise, but also testified that the addition would not have been built otherwise. *See Nappi*, 691 A.2d at 1199.

205. 61 Cal. Rptr. 2d 614 (Ct. App. 1997).

206. *See id.* at 617. During the three-month "stop" period, the mortgage company would expect no mortgage payments, send no notices of delinquency to her, and send no derogatory information regarding her account to credit agencies. *See id.*

Despite the commercial relationship between the parties in *Sutherland*, the promise between them was arguably donative because it was apparently motivated by benevolence, rather than a desire to obtain economic benefits in return. *See supra* note 12; *see also* Eisenberg, *World of Gift*, *supra* note 12, at 823-24 n.14 (including in the world of gift a charitable pledge that is purportedly made out of generosity and not expressly conditioned on a reciprocal exchange, despite the potentially self-interested motives of the pledgor).

207. *See Sutherland*, 61 Cal. Rptr. 2d at 617. These included rent on temporary alternate lodgings. *See id.*

208. The mortgage company threatened her with foreclosure and unsuccessfully attempted to assign her mortgage to the Federal Housing and Urban Development Agency. *See id.* at 617-19.

209. *See id.* at 617. One issue in the case was whether the mortgage company had actually fulfilled the promise. *See id.* at 620-21. The mortgagor believed that the company, by its promise, agreed to attach the three pay periods onto the end of the life of the mortgage. *See id.* at 617. The company argued that it had agreed only to postpone payments for the three-month period, at the end of which all three payments would be due in full. *See id.* at 620. It had acknowledged in a conversation with the mortgagor, however, that other earthquake victims in the area had been similarly misguided due to a lack of clarity on the company's part. *See id.* at 617-18. The court accepted the mortgagor's interpretation of the promise, and ruled that the mortgage company had failed to honor that promise. *See id.* at 620-21.

210. Professor Hillman considers a promissory estoppel claim to have succeeded on the merits if the claimant won a judgment on the merits after a trial or after an appeal, or won a summary judgment motion at any level. *See* Hillman, *supra* note 22, at 589.

211. *See Sutherland*, 61 Cal. Rptr. 2d at 622-23, 625.

The court held that, in these circumstances, promissory estoppel substituted for consideration and enabled the enforcement of an otherwise unenforceable gratuitous oral promise to postpone payments under a written note and deed of trust.[212]

Sutherland clearly relied in definite and substantial fashion by allocating her mortgage payments towards her earthquake expenses. She informed the mortgage company of her circumstances, and the company's promise was made with the expectation that she would act in the way that she did. Her reliance directly caused her injury, because the reallocation of money towards her earthquake expenses left her unable to meet her mortgage company's demand for payment in full.[213] Therefore, a failure to uphold the promise would have resulted in injustice to her.[214]

3. Thomas v. E.B. Jermyn Lodge No. 2[215]

Thomas involved a fraternal lodge that had promised to pay the legal fees of William Thomas, a member of the lodge facing criminal charges.[216] Thomas acted on the promise by hiring a lawyer, a step he would have otherwise been financially unable to take.[217] The lodge subsequently refused to honor its promise, determining that Thomas had not followed proper lodge procedure for making such requests.[218]

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212. *See id.* at 622. The court noted that promissory estoppel binds a promisor to his promise "when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." *Id.* (quoting Raedeke v. Gibraltar Sav. & Loan Ass'n, 517 P.2d 1157, 1161 n.1 (1974)).

213. The court expressly found that she had relied to her detriment. *See id.* at 622.

214. Although the company did not argue that Sutherland would have been unable to pay anyway, the court ruled that she had relied to her detriment after first noting that promissory estoppel requires a "substantial change in position." *Id.* (quoting *Raedeke*, 517 P.2d at 1161 n.1). Yorio and Thel have argued that the enforcement of promises to pay insurance premiums for people who apparently could not themselves pay the premiums indicates that actual reliance is not needed. *See* Yorio & Thel, *supra* note 3, at 155-56. To this, Hillman responds:

> [Yorio and Thel] assert that the promisee could not have relied on the promise because the promisee could not pay. However, most of the cases do not focus on why the promisee could not pay or whether the promisee could have borrowed or raised money if necessary. A fair hypothesis may be that the insured would have pursued those possibilities but for the promise.

Hillman, *supra* note 22, at 613-14.

215. 693 A.2d 974 (Pa. Super. Ct. 1997).

216. *See id.* at 976. He was charged with improperly distributing civil service test answers to Scranton police officers. *See id.*

217. *See id.* at 978. Thomas testified that he borrowed money from his mother to pay the legal fees on the express promise that the lodge would repay him. *See id.* & n.5.

218. *See id.* at 977. Thomas met with the Lodge's board of directors to request the assistance, various boardmembers questioned him about his legal representation, and the minutes of that board meeting were presented to the general members in their regularly scheduled meeting before granting Thomas's request. *See id.* The lodge's by-laws, however, required that a special members' meeting approve any requests for

The lodge appealed from a jury verdict for Thomas, arguing that the evidence did not support application of promissory estoppel because Thomas had not detrimentally relied upon the promise to pay the legal fees.[219] The Superior Court of Pennsylvania disagreed, affirming the trial court's denial of the lodge's motion for judgment notwithstanding the verdict.[220]

Thomas's retention of private legal counsel undoubtedly constituted reliance of a definite and substantial character. The lodge made its promise with the expectation that Thomas would hire his own attorney, the act that Thomas did indeed perform. Thomas was unable to pay for a private lawyer on his own, but hired one in reliance upon the lodge's promise to reimburse him. Therefore, the court properly held that he had detrimentally relied on the promise, and it dismissed the lodge's claim that specifically disputed that fact.[221]

All three donative promises that courts enforced in 1997 featured reliance of a definite and substantial character. In addition, all three promises prompted acts in reliance that were found to be detrimental to the promisees. Significantly, no other donative promises appeared before courts in 1997. This indicates the importance of injury and injustice in causing promisees to litigate, and courts to enforce, donative promises. Part IV discusses this importance and, more specifically, evaluates the role of an act in reliance that is not only definite and substantial but also detrimental to promisees in creating injustice that prompts promisees and courts to take action.

IV. Donative Promises and Injustice

The pecuniary and emotional costs of litigation, along with the understanding that donative promises are of uncertain reliability, likely deter promisees from seeking judicial enforcement of these promises. An injury caused by definite and substantial reliance upon a donative promise, however, gives rise to injustice for which promisees are willing to seek legal remedies and to which courts are willing to apply promissory estoppel. As a result, while few donative promises appeared before courts in 1997, all of them caused definite and substantial reliance on those promises.[222] Courts are similarly willing to overcome their own reluctance to enforce nonbargain promises when such reliance exists.[223] This part argues that the recurring presence of definite and substantial reliance merits its recognition as an essential

legal assistance. *See id.* The board had not informed Thomas of this requirement. *See id.* Thomas believed that he pursued his request normally; he had previously secured assistance with legal expenses in the same fashion in 1983. *See id.*

219. *See id.* at 978.

220. *See id.* at 976-80.

221. *See supra* notes 219-20 and accompanying text.

222. *See supra* Part III.B.

223. *See infra* Part IV.B.

component of promissory estoppel and ultimately reflects Professor Williston's promise-based conception of the doctrine.

A. *Promisees*

For the most part, donative promisees are not likely to contemplate legal action when the promises go unfulfilled. Because of the familiar relationships within which most donative promises are made, weighty emotional and financial costs generally deter litigation. The Reliance position, therefore, argues against the general enforceability of simple donative promises.[224] They reason that such a rule would not only fail to recognize that promisees often have a moral obligation to release promisors from these promises, but would also undermine the benevolent motives behind such promises and impoverish their emotional context.[225] The donative promisees involved in these relationships about which the Reliance theorists opine are likely to sense these considerations as acutely as those commentators.[226]

In addition, the uncertainty surrounding mere promises to give gifts reduces the likelihood that a promisee will actually rely upon such a promise, or seek legal enforcement if she has so relied. By promising to give a gift rather than actually giving it,[227] a donative promisor retains the ability to rescind upon a change of heart.[228] As a result, don-

224. *See* Eisenberg, *World of Gift*, *supra* note 12, at 846-49; *supra* notes 64-66 and accompanying text.

225. *See* Eisenberg, *World of Gift*, *supra* note 12, at 846-49; *supra* notes 64-66 and accompanying text.

226. *See* Eisenberg, *World of Gift*, *supra* note 12, at 847. Eisenberg has observed that:

> [T]he world of contract is a market world, largely driven by relatively impersonal considerations and focussed on commodities and prices. The impersonal organs of the state are an appropriate means to enforce promises made in such a world. In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship. That world would be impoverished if it were to be collapsed into the world of contract.

Id. The prospect of such impoverishment would no doubt give pause to the donative promisee. Andrew Kull opined that it would be "unthinkable" for Nephew to sue Uncle after Uncle broke his promise. *See* Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. Legal Stud. 39, 61-64 (1992).

227. Completed gifts are irrevocable. *See* Ray Andrews Brown, The Law of Personal Property § 7.1 (Walter B. Raushenbush ed., 3d ed. 1975); Eisenberg, *World of Gift*, *supra* note 12, at 824 ("[T]he common law draws exceptionally sharp distinctions between gifts and promises to make gifts: Gifts are irrevocable; promises to make gifts are unenforceable.").

228. The donative promisor can only retain this right, of course, in the absence of a certain reliance. *See* Restatement (Second) of Contracts § 90(1) (1981). Lying beneath Eisenberg's donative promise principle is the process-related rationale that "the potential for untrustworthy behavior is sufficiently large that making simple donative promises enforceable would lead to trouble." Eisenberg, *World of Gift*, *supra* note 12, at 851-52 n.74; *see also* E. Allan Farnsworth, *Promises to Make Gifts*, 43 Am. J. Comp. L. 359, 361 n.8 (1995) (noting three reasons why a donor might promise to give rather than actually give: (1) a lack of available funds; (2) a desire to earn a higher rate of

ative promises tend to arouse only hope within the promisees, rather than anticipation or reliance.[229] A promisee who relies upon such a promise, therefore, is vulnerable to the perception that she has acted carelessly,[230] or may even feel that she has gambled and lost.[231] As a result, promisees may tend not to act in reliance at all,[232] or upon doing so, to direct their disappointment inwardly rather than at the rescinding promisors.

A promisee who has relied in a definite and substantial manner, however, is more likely to feel justified in her act, and thus more willing to pursue legal alternatives, when the promise upon which she so specifically relied is broken. A promisor who makes a promise expecting to induce a particular act manifests a higher level of commitment to the promisee and an understanding that the expected act will not go unrecognized.[233] A promisee is therefore likely to feel more secure in performing the expected act.[234] The promisee who suffers a substantial injury when such a promise is broken is more likely to feel

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return or gain a tax advantage; or (3) a desire to allow for contingencies that may cause a change of mind); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 Yale L.J. 1261, 1271-74 (1980) (arguing for non-enforcement of simple donative promises in part because reflection upon lost opportunities often causes a promisor to regret her promise, and because donative promises would be too cumbersome if they had to be conditioned upon the nonoccurrence of potential regrets).

229. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 3 ("[T]he psychological state aroused by a donative promise is often closer to hope than to anticipation."). As a result, Eisenberg notes that "'[s]eeing is believing' might well be the motto of donative promisees." *Id.* (footnote omitted). Eisenberg further notes that "the low intensity of [promisees'] expectations principally derives from their understanding that such promises are often not kept and that legal enforcement—whether or not available—is financially and emotionally impracticable." *Id.* at 3 n.7; *see also supra* note 66 (discussing reasons for a donative promisee's lack of expectation).

230. In addition, a disappointed promisee may not have the heart to seek enforcement. Eisenberg has noted that because a promised gift is an expression of affection, when that affection is withdrawn, the promised gift becomes empty. *See* Eisenberg, *World of Gift*, *supra* note 12, at 848. The promisee may not desire fulfillment of a promise that is now essentially valueless to him, even despite his own loss in reliance.

231. *See* DeLong, *supra* note 147, at 953. Professor DeLong, discussing commercial promises, notes:

> In the paradigmatic case, the promisee will be better off if she relies and the promise is performed, and worse off if she relies and the promise is breached, than she would be if she did not rely at all. Given the uncertainty about whether the promise will be performed, therefore, a promisee who relies on a promise takes a risk in order to obtain a benefit.

Id. (footnotes omitted).

232. As Eisenberg observes, "One reason that donative promises often fail to arouse a secure expectation is that the promisee realizes the promisor may back off when a sober self returns." Eisenberg, *Donative Promises*, *supra* note 14, at 5.

233. *See* Yorio & Thel, *supra* note 3, at 163 ("The promisor's contemplation of particular and substantial reliance is important . . . because it signals the quality of her commitment.").

234. *See id.*

like a victim of an injustice[235] and thus more willing to seek legal means of enforcement.[236] As a result, the donative promise cases that do appear before courts are likely to feature detrimental reliance of a definite and substantial character.

B. *Courts*

Promises that induce promisees to rely detrimentally in definite and substantial ways give rise to an injustice to which courts respond despite the absence of consideration.[237] Courts are generally reluctant to enforce promises that are not supported by consideration.[238] Indeed, section 90 has largely failed to transform promise enforcement towards reliance in the way some commentators once thought possible.[239] Courts are responsive, however, to injury and injustice.[240]

235. Reliance commentators also acknowledge a nexus between foreseeability and justice. *See* Hillman, *supra* note 22, at 611. Hillman states that "the justice of compensating a party for induced detrimental reliance is an important factor in the decisions," and later, that "[t]he requirement of foreseeability seems a reasonable manner of determining when detrimental reliance should be compensated." *Id.* at 615.

236. Eisenberg writes that uncompensated reasonable reliance begins to move a promise out of the donative realm and into "the hard-headed world of contract" where legal enforcement is routine. *See* Eisenberg, *World of Gift*, *supra* note 12, at 824-25, 850. Such an effect, then, could only be increased as the act in reliance becomes more substantial and more definite. *See id.*

Thus, in the introductory hypothetical, Nephew is more likely to rely upon Uncle's promise by buying a car than by buying the ticket to Las Vegas. He is also more likely in the first scenario to bring his Uncle to court over the broken promise.

237. *See* Eisenberg, *Donative Promises*, *supra* note 14, at 3 ("[T]he state (speaking through the courts) may fairly take the position that its compulsory processes will not be made available to redress every hurt, but only to remedy injuries that reach a certain intensity . . . .").

238. Professor Hillman's statistics indicate that reported promissory estoppel claims are seldom victorious. *See* Hillman, *supra* note 22, at 580; *see also* Response Oncology, Inc. v. Blue Cross & Blue Shield, 941 S.W.2d 771, 778 (Mo. Ct. App. 1997) (upholding a promissory estoppel claim by a cancer treatment center against a health insurance company but noting that "[e]stoppel is not a favorite of the law"); Virginia Sch. of the Arts, Inc. v. Eichelbaum, 493 S.E.2d 510, 512 (Va. 1997) (holding that the doctrine of promissory estoppel should not be adopted in Virginia).

239. Some writers have recently argued that the application and use of promissory estoppel has experienced significant decline. *See, e.g.*, Hillman, *supra* note 22, at 618-19 (stating that despite predictions that it would "'swallow up' bargain theory . . . promissory estoppel may no longer be, if it ever was, a significant theory of recovery"); Pham, *supra* note 16, at 1263-64 (noting that "courts, rather than enthusiastically embracing promissory estoppel theory, in fact severely limit its application"). For a prediction that promise enforcement would be "swallowed up" by the reliance principle, see generally Gilmore, *supra* note 28.

240. *See supra* Part III.B; *see also* Cole v. Knoll, Inc., 984 F. Supp. 1117, 1133 (W.D. Mich. 1997) ("[T]he doctrine of estoppel should be applied 'only where the facts are unquestionable and the wrong to be prevented undoubted.'" (quoting Barber v. SMH (US), Inc., 509 N.W.2d 791, 797 (Mich. Ct. App. 1993))); Cossack v. Burns, 970 F. Supp. 108, 117 (N.D.N.Y. 1997) ("[T]o sustain a claim for promissory estoppel under New York law, a plaintiff must also show that he 'suffered unconscionable injury.'"); Hillman, *supra* note 22, at 609-10 (stating that courts' perceptions of injustice govern awards of damages); *supra* note 143 and accompanying text (citing cases that explic-

Therefore, courts use section 90 to enforce donative promises when non-enforcement would result in injustice due to detrimental reliance of a definite and substantial nature.[241]

The existence of detrimental reliance in the 1997 cases, as well as reliance of definite and substantial character, persuasively suggests that both are required elements under section 90. Every donative promise that appeared in 1997 was relied upon in a definite and substantial way, clearly rendering unjust the promisor's failure to honor the promise.[242] The courts also specifically found that the promisees' reliance had been detrimental in every case[243]—in one case, the court found so in response to a direct challenge to that fact on appeal by the promisor.[244] One can argue that a court might still enforce a donative promise in the absence of either of the two elements. Nevertheless, the existence of both as clear components in every case more likely accords with Williston's observation and belief that both reliance of a definite and substantial character and actual inducement are indeed necessary for enforcement.[245]

Section 90 should reflect this central role of both definite and substantial reliance and inducement in actual cases involving donative

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itly seek detrimental reliance); *cf.* Yorio & Thel, *supra* note 3, at 114 ("[C]ourts respond to an impulse to enforce serious promises.").

This may also explain why Williston included the expectation of definite and substantial reliance, occurrence of the act itself, and inducement as requirements for the application of promissory estoppel. *See Yorio & Thel, supra* note 3, at 123. The Promise theorists now question the requirement for actual inducement. *See supra* Part II.B.2.

241. *See, e.g.*, West Cent. Mo. Reg'l Lodge No. 50 v. Board of Police Comm'rs, 939 S.W.2d 565, 569 (Mo. Ct. App. 1997) ("The essential elements of a promissory estoppel claim are (1) a promise; (2) detrimental reliance on the promise; (3) the promisor should have or did in fact clearly foresee the precise action which the promisee took in reliance; and (4) injustice can only be avoided by enforcement of the promise." (citing Townes v. Jerome L. Howe, Inc., 852 S.W.2d 359, 361 (Mo. Ct. App. 1993))); *see also supra* Part III (discussing the 1997 promissory estoppel cases). This highlights the importance of the final clause in section 90(1): "A promise . . . is binding if injustice can be avoided only by enforcement of the promise." Restatement (Second) of Contracts § 90(1) (1981). As Professor Corbin noted:

> [I]f all the other requirements of the stated rule are satisfied, does not justice always require enforcement of the promise? So far as the Restatement itself informs us, the answer is Yes. [But this clause] remind[s] the court that this particular rule cannot be applied by a mechanical process. Indeed, by its very existence, the clause is a suggestion that sometimes the answer should be No.

Corbin, *supra* note 4, § 200.

242. *See supra* Part III.

243. *See supra* Part III.

244. *See* Thomas v. E.B. Jermyn Lodge No. 2, 693 A.2d 974 (Pa. Super. Ct. 1997).

245. *See* Yorio & Thel, *supra* note 3, at 123.

promises.[246] For fifty years, the Restatement purported to be an accurate distillation of prevailing contract principles.[247] Consequently, many courts have adopted it as the law in their jurisdictions.[248] Because of this deference with which courts view the Restatement, it should aspire to be just that: an accurate statement of the law.

C. *Injustice*

The existence of both reliance of a definite and substantial character and injury as necessary components to the injustice inquiry indicates a promise-based conception of promissory estoppel. Indeed, the final analysis is whether the avoidance of injustice requires the application of promissory estoppel.[249] As indicated by the cases, injury is essential to injustice, for without an injury, injustice cannot exist.[250] As Promise theorists have observed, there can exist no injury without inducement.[251] A moral failure to honor one's promise may result in an injury to oneself or perhaps to society as a whole,[252] but it is not the type of injury for which civil contract law seeks to provide a remedy.[253] Reliance theorists are therefore correct to insist upon the importance of actual reliance in the application of the doctrine.[254]

Nevertheless, the 1997 cases also indicate that definite and substantial reliance is an equally necessary component to the injustice which promissory estoppel seeks to avoid.[255] In each donative case, the promisee's injury resulted from an act in reliance that was not only substantial, but also definite according to the expectation of the promisor.[256] This indicates a conception of the doctrine that is grounded in the promise, for it is the promise which not only prompts but also

246. As was the case in the First Restatement. *See* Restatement of Contracts § 90 (1932).

247. *See supra* notes 39, 56 and accompanying text; *see also* Restatement of Contracts at xi (1932) ("The function of the Institute is to state clearly and precisely in the light of the decisions the principles and rules of the common law.").

248. *See supra* notes 38-41, 55-56 and accompanying text.

249. Restatement (Second) of Contracts § 90(1) (1981).

250. *See supra* Part III.

251. *See* Yorio & Thel, *supra* note 3, at 159-60; *supra* Part II.B.2.

252. *See* Yorio & Thel, *supra* note 3, at 121.

253. Eisenberg states that "it is fair to say that American contract law . . . tends to focus on compensating injured promisees and facilitating commerce rather than on promise-keeping as an end in itself." Eisenberg, *World of Gift*, *supra* note 12, at 839; *see also supra* notes 13-14 and accompanying text (noting that not all promises are enforceable); *cf.* Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 579 (1933) ("Contractual obligation is not coextensive with injurious reliance because (1) there are instances of both injury and reliance for which there is no contractual obligation, and (2) there are cases of such obligation where there is no reliance or injury.").

254. *See, e.g.*, Hillman, *supra* note 22, at 580-81 (stressing the importance of actual reliance to promissory estoppel enforcement).

255. *See supra* Part III.B.

256. *See supra* Parts III.B, IV.B.

defines the injustice to be avoided.[257] The injustice ultimately arises from an injury that exists not simply because a promisee has reasonably relied, but because a promisor has refused to keep her promise despite causing the very act that she had anticipated causing.

This conception of the promissory estoppel doctrine fully accords with neither the Reliance view nor the Promise view of the doctrine. It does not completely coincide with the Reliance view[258] because the injustice to which courts and litigants respond does not simply result from uncompensated reasonable reliance. Nor does it fully accord with the Promise view[259] because the injury does not result merely from the breaking of a serious and deliberate promise. Instead, the injustice results from the promisor's failure to honor the promise with which she induced the very act in reliance that she had anticipated causing.

This injustice to which courts and litigants respond accords with Williston's view of promissory estoppel, the view that he derived from the cases and set forth in the First Restatement.[260] Williston's view, which resulted from his aim to state the law as it then existed,[261] required both definite and substantial reliance and the inducement of the promisee.[262] The 1997 donative cases indicate that these are still essential components to promissory estoppel's application and use.[263] While the Second Restatement explicitly recognizes the inducement component as essential, it does not similarly recognize the definite and substantial component.[264] Although one might argue that the Second Restatement implicitly requires that character of reliance, one could not do so without conceding that the First Restatement surpasses the Second in clarity.

CONCLUSION

Reliance of a definite and substantial character is routinely present in recent cases to which promissory estoppel was applied. This recurring presence indicates that this type of reliance is a necessary component in determining whether a promise must be enforced to avoid an injustice. Its coexistence with actual injury therefore reflects Professor Williston's original promise-based conception of the doctrine of promissory estoppel, the view that he derived from the cases and encapsulated in section 90 of the First Restatement. Although the Sec-

257. *See supra* Part II.A–B.
258. *See supra* Part II.A–B.
259. *See supra* Part II.A–B.
260. *See* Restatement of Contracts § 90 (1932); *see also* Yorio & Thel, *supra* note 3, at 123 (noting that Williston required induced reliance of a definite and substantial character); *supra* notes 31, 119 and accompanying text (same).
261. *See supra* note 119 and accompanying text.
262. *See supra* note 260.
263. *See supra* Parts III.B, IV.B.
264. *See* Restatement (Second) of Contracts § 90(1) (1981).

ond Restatement might state the promissory estoppel doctrine as some believe it should be, the First Restatement continues to state that doctrine as it currently exists. Judges do believe that the Restatement states the law as it is; therefore, the Institute's higher goal in framing the Restatement should be accuracy rather than aspiration.