Vanderbilt Law Review

Volume 36
Issue 6 *Issue 6 - November 1983*

Article 2

11-1983

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I. INTRODUCTION

A specter is haunting the law of contracts. The doctrine of promissory estoppel has evolved from relatively modest beginnings as a "consideration substitute" in donative promise cases[1] to a force that threatens to engulf a major portion of contract law.[2] In-

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1. *See infra* notes 251-60 and accompanying text.
2. *See infra* notes 306-11 and accompanying text.

deed, some commentators have suggested that promissory estoppel is evolving into a separate theory of recovery, independent of contract law.[3] To the extent that this evolution continues, the future of many traditional contract rules, such as the parol evidence rule, is doubtful.[4]

Regardless of whether promissory estoppel ultimately achieves the status of an independent theory or merely continues its evolution within the parameters of contract law, the historical course of the reliance principle's expansion exhibits such significant momentum that the thoughtful observer must speculate about likely future candidates for the doctrine's debilitating ministrations.[5] The parol evidence rule, at first glance, seems to be such a candidate for many reasons. The parol evidence rule has confused[6] and dissatisfied[7] legal scholars for a long time; for example, Professor Wigmore condemned the rule as "the most discouraging subject in the whole field of evidence."[8] Bringing the rule within estoppel's domain could simplify the application of the rule,[9] and legal scholars should appreciate anything that could clarify and rationalize its application. Furthermore, that promissory estoppel already has made substantial incursions into the province of the Statute of Frauds[10] may portend a similar role for promissory estoppel in the parol evidence context. Many similarities exist between the Statute and the rule[11] and many of the same arguments that justify the use of estoppel to circumvent the Statute[12] are equally applicable to justify the use of estoppel to bypass the parol evidence rule.[13]

Few cases to date have explored the possible interaction between promissory estoppel and the parol evidence rule.[14] This Arti-

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3. For an exhaustive discussion of this possibility, see Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983). *See also infra* notes 295-308 and accompanying text.

4. *See infra* note 434 and accompanying text.

5. One commentator describes promissory estoppel as "perhaps the most radical and expansive development of this century in the law of promissory liability." Knapp, *Reliance in the Revised* Restatement: *The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981).

6. *See infra* notes 15-25 and accompanying toxt.

7. *See infra* notes 162-202 and accompanying text.

8. 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2400, at 3 (3d ed. 1940).

9. *See infra* notes 583-87 and accompanying text.

10. *See infra* notes 354-435 and accompanying text.

11. *See infra* notes 521-30 and accompanying text.

12. *See infra* notes 347-48 & 377-419 and accompanying text.

13. *See infra* notes 532-37 & 545-64 and accompanying text.

14. *See infra* notes 438-518 and accompanying text.

cle attempts to explain why so few cases have explored this interaction, and discusses both the likelihood and the desirability of a significant intrusion by promissory estoppel into the parol evidence rule's domain. First, however, this Article necessarily focuses upon the parol evidence rule itself, the evolution of the promissory estoppel doctrine in general, and the doctrine's development as a device for circumventing the strictures of the Statute of Frauds.

II. THE PAROL EVIDENCE RULE

The parol evidence rule long has been "the source of endless confusion in contract law."[15] As Thayer noted eight decades ago, "[f]ew things are darker than this, or fuller of subtle difficulties."[16] Little has occurred in the ensuing years to gainsay the veracity of Thayer's observation. Even the rule's name is somewhat misleading.[17] "Parol" misleads because most formulations of the rule include within its scope written as well as oral terms.[18] While the use of the word "evidence" in the rule's title and in some judicial statements about the rule[19] may suggest that the rule is an evidentiary rule, legal scholars generally agree that the parol evidence rule is actually a rule of law.[20] Finally, some commentators have questioned whether "a maze of conflicting tests, subrules, and exceptions"[21] is a "rule" at all, especially in light of the number of exceptions to its operation[22] and the uncertainties surrounding

15. Note, *The Parol Evidence Rule: Is It Necessary?*, 44 N.Y.U. L. REV. 972, 972 (1969).

16. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 390 (1898).

17. "The term 'parol evidence rule' is something of a misnomer for it does not deal exclusively with parol, is not a rule of evidence, and at least in the minds of some, is not even a rule." Wallach, *The Declining "Sanctity" of Written Contracts—The Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 651 (1979). *See also* Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQ. L. REV. 337, 343 (1965-1966).

18. Murray, *supra* note 17, at 343. For a discussion of various formulations of the rule, see *infra* notes 61-69 and accompanying text.

19. "Because judges, in reserving a question of fact to themselves couched the process in rules which sounded like rules of evidence, the term 'evidence' is part of the title of the rule which only serves to add to the mystery surrounding it." Murray, *supra* note 17, at 343.

20. *See, e.g.*, J. CALAMARI & J. PERILLO, CONTRACTS § 3-5 (2d ed. 1977); 9 J. WIGMORE, *supra* note 8, § 2400, at 4 (3d ed. 1940); Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 189 (1965).

21. Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1036 (1968).

22. The number of recognized exceptions to the rule "raises doubts about its status as a 'rule' at all." *See* Note, *supra* note 15, at 972. For a discussion of the exceptions to the rule, see *infra* notes 124-51 and accompanying text.

both its definition and application.[23]

The rule's appellation, the variance among the numerous formulations of the rule, and the observed tendency of the courts to manipulate the rule to avoid the harsh results that otherwise may flow from its strict application[24] all undoubtedly have contributed to the fog of uncertainty surrounding the rule. The primary source of confusion, however, lies with misapprehensions concerning both the nature of the policies that the rule intends to serve and those policies' relative merit.[25] An inquiry into the rule's underlying policy bases necessarily must preface any explication of the rule in its various forms. This inquiry is particularly important in assessing the degree to which using promissory estoppel to circumvent the rule may hinder attainment of the rule's underlying policy objectives.

A. The Policy Bases of the Rule

Scholars have traced the historical origins of the parol evidence rule to "a primitive formalism which attached mystical and ceremonial effectiveness to the *carta* and the seal."[26] The rule may have survived the disappearance from our law of other vestiges of formalism because a written contract furnishes more reliable evidence of the terms of an agreement than does the parties' oral testimony, which may be the product of faulty memory, wishful thinking, or outright prevarication.[27] A major function of the rule,

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23. "Those who question whether the parol evidence rule is really a rule at all seem to feel that certainty of definition and application are required before something can be labeled a 'rule,' and the parol evidence rule tends to lack both." Wallach, *supra* note 17, at 651. For a discussion of the rule's various formulations, see *infra* notes 61-69 and accompanying text. For a discussion of the inconsistencies in the application of the rule, see *infra* text accompanying notes 120-23, 130, 149 & 153-61.

24. *See infra* notes 153-61 and accompanying text.

25. Professors Calamari and Perillo attribute the mystery surrounding the rule to a "basic disagreement as to the application of the . . . rule and as to the best method of ascertaining the intention of the parties—the process of contractual interpretation." J. CALAMARI & J. PERILLO, *supra* note 20, § 3-1. They further observe that: "The cases and treatises of the contract giants tend to conceal this conflict. While frequently masking disagreement by using the same terminology, Professors Williston and Corbin are often poles apart in the meaning they attach to the same terms." *Id.* Calamari and Perillo attribute this polarity of opinion to "conflicting value judgments as to policy issues that are as old as our legal system and that are likely to continue as long as courts of law exist." *Id.*

26. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 211, at 430 n.4 (1954); *see also* 9 J. WIGMORE, *supra* note 8, § 2426.

27. *See, e.g.*, Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 846 (1964) ("[T]he written instrument is a more reliable expression of the meaning of their contract than one party's not disinterested memory of his or the other

therefore, is the prevention of fraud or perjury.[28] This rationale, however, does not explain the application of the rule to written evidence of alleged terms that are not contained in the parties' final written contract.[29] This rationale also fails to explain the special role that the judge plays in parol evidence cases. The judge initially decides whether the rule excludes certain evidence. Why should jurors, whom courts rely upon to determine truth in a wide variety of legal contexts, lack the ability to determine truth reliably in matters of parol evidence?

Thus, while special devotion to the written word may have provided the origin of the parol evidence rule, the pervasive attitude that judges provide the best protection against perjured testimony[30] probably has been the reason for its continued viability.[31] A distrust of the jury as a reliable mechanism for divining truth[32] underlies the parol evidence rule. Left to their own devices, jurors may favor underdogs by relying upon alleged oral terms,[33] thereby deciding the case in a manner calculated to avoid a perceived injustice.[34] Jurors also may lack the sophistication needed to deal ef-

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party's prior oral utterances."); *see also* Kupka v. Morey, 541 P.2d 740, 747-48 n.9 (Alaska 1975); C. MCCORMICK, *supra* note 26, § 210, at 428; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2-9 (2d ed. 1980); Sweet, *supra* note 21, at 1036; Note, *supra* note 15, at 982.

28. *See, e.g.*, Kupka v. Morey, 541 P.2d 740, 747-48 n.9 (Alaska 1975); Masterson v. Sine, 68 Cal. 2d 222, 227, 65 Cal. Rptr. 545, 548, 436 P.2d 561, 564 (1968); Patterson, *supra* note 27, at 846; Note, *supra* note 15, at 982.

29. The rule "would seem to lose much of its force if the prior expression is written. The prior writing is not unchanged [sic] at the time of trial any more than the subsequent writing." Murray, *supra* note 17, at 342; *see also* Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 958 (1967). One scholar, however, notes that the vast majority of decided cases involve alleged oral terms. Wallach, *supra* note 17, at 651.

30. "If the parol evidence doctrine is to be administered chiefly by juries and not by judges, its special protection for written transactions fades." C. MCCORMICK, *supra* note 26, § 216, at 441-42; *see also* Note, *supra* note 15, at 982-83.

31. Professor McCormick argued that the formalist attributes of the rule had "a special survival value—the escape from the jury—which led the judges to retain for writings the conception that they had a sort of magical effect of erasing all prior agreements." C. MCCORMICK, *supra* note 26, § 211, at 430 n.4.

32. "[L]awyers have a strong distrust of the judicial process, especially the jury, as a means of ascertaining the truth." Sweet, *supra* note 21, at 1049; *see also* Wallach, *supra* note 17, at 653 n.9.

33. Professor Sweet notes that juries may "favor the underdog who rarely has the writing on his side." Sweet, *supra* note 21, at 1050. *See also* C. MCCORMICK, *supra* note 26, at § 210 ("[W]hen an issue arises involving choice between a writing and an alleged oral agreement, usually the one who sets up the spoken against the written word is economically the underdog.").

34. "If the jury is directed to bring in a general verdict (*i.e.* for the plaintiff or for the defendant), it may in doing so exercise its views of jury equity and thus impair the reliability of written instruments." Patterson, *supra* note 27, at 837. Professor McCormick similarly

fectively with complex commercial transactions involving numerous alleged oral and written contract terms.[35] Although under modern rules of procedure a judge may either overrule a jury's decision or decide the case himself when the proffered evidence reasonably supports only one conclusion, a judge may be unwilling to do so.[36] According to this view, the major service that the rule performs[37] is to allow judges to "strike down at the outset claims of oral variants on the writing, variants which the judge believes never were entered into but are fabrications, designed or unconscious."[38]

Fears concerning the unreliability of oral testimony and the inadequacies of the jury as a device for divining the truth, however, do not fully explain the sanctity that the parol evidence rule affords written agreements. Legal scholars note that the parol evidence rule is a rule of form,[39] and, therefore, performs the "channeling" function common to rules of form[40] by encouraging contracting parties to embody the terms of their agreement in a proper writing.[41] Under this view, courts deny enforcement of parol terms merely "because the parties have not used the proper form."[42] Rules of form embody certain assumptions about the rela-

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observed: "The average jury will, other things being equal, lean strongly in favor of the side which is threatened with possible injustice and certain hardship by the enforcement of the writing." C. McCORMICK, *supra* note 26, § 210, at 428.

35. "At an early date it was felt (and the feeling strongly remains) that writings require the special protection that is afforded by removing this issue from the province of unsophisticated jurors." J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 100. *See also* 9 J. WIGMORE, *supra* note 8, § 2426, at 86.

36. C. McCORMICK, *supra* note 26, § 216, at 440.

37. Other services of the rule include allowing trial judges to avoid issues concerning the agents' authority, the vagueness of oral agreements, and the relevance of oral conditions. Sweet, *supra* note 21, at 1050.

38. C. McCORMICK, *supra* note 26, § 216, at 440. As Professor Sweet noted, "[I]f a trial judge doubts that an asserted agreement ever took place, ruling on the basis of the parol evidence rule avoids commenting on the evidence, instructing on the weight and burden of proof, or granting a new trial. It also avoids branding the witness a liar." Sweet, *supra* note 21, at 1051. *See also* Wallach, *supra* note 17, at 653 (Trial judges who exclude evidence under the aegis of the rule do so either to protect the writing or to prevent less than credible evidence from reaching the jury.).

39. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 108 ("Since (and even before) the common law had its genesis, there has been a deeply-felt belief that transactions will be more secure, litigation will be reduced, and the temptation to perjury will be removed, if everyone will only use proper forms for his transactions.").

40. See *infra* notes 402-03 & 407-11 and accompanying text for a discussion of the channeling function in the Statute of Frauds context.

41. *See* Sweet, *supra* note 21, at 1036; Wallach, *supra* note 17, at 653; Note, *supra* note 15, at 982.

42. Sweet, *supra* note 21, at 1050.

tive reliability of formal versus informal transactions;[43] perhaps more importantly, however, the law perceives rules of form as adding stability to commercial transactions.[44] Thus, by protecting the integrity of written contracts the parol evidence rule may provide the predictability and certainty necessary for the efficient conduct of business.[45] The special role that the judge plays in parol evidence cases arguably is consistent with this view because jurors may not appreciate sufficiently the need for stability and certainty in commercial dealings.[46] A related subsidiary argument that commentators often advance in conjunction with this business efficiency rationale for the rule notes that the rule allows principals to control unauthorized commitments by their agents through the use of integration clauses in their contracts.[47]

Finally, another body of thought exists that attaches significantly less importance to writings *qua* writings. Under this view, the parol evidence rule is nothing more than a particularized version of the basic contractual interpretation rule which stipulates that later final expressions of intent prevail over earlier tentative expressions of intent.[48] Two major differences exist between the parol evidence rule and the more general rule of interpretation.

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43. On this point Sweet makes the following observation:

> A rule of form assumes that parties generally follow formal rules. The absence of proper form indicates it is unlikely that the agreement was made. Also, a rule of form assumes that witnesses will lie or forget facts if it is to their advantage to do so. Such a rule assumes people have poor memories and that litigation is an inefficient method of ascertaining facts.

Id. at 1053.

44. *See supra* note 39.

45. The Minnesota Supreme Court in 1924 observed that

> [w]ithout that rule there would be no assurance of the enforceability of a written contract. If such assurance were removed today from our law, generally disaster would result, because of the consequent destruction of confidence, for the tremendous but closely adjusted machinery of modern business cannot function at all without confidence in the enforceability of contracts. They must not be reduced to the innocuous character of a mere "scrap of paper."

Cargill Comm'n Co. v. Swartwood, 159 Minn. 1, 7, 198 N.W. 536, 538 (1924). *See also* Holton v. Bivens, 9 U.C.C. REP. SERV. (Callaghan) 836, 838 (Okla. Ct. App. 1971) ("Every person should have the right to rely upon written contracts. Allowing testimony of oral agreements in contradiction thereto can only result in confusion concerning reliability of the writing.").

46. Sweet, *supra* note 21, at 1036.

47. *Id.* at 1050, 1057. For a discussion of merger clauses and their effects, see *infra* note 189 and accompanying text.

48. *See, e.g.*, J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2; 3 A. CORBIN, CORBIN ON CONTRACTS § 574 (rev. ed. 1960); Farnsworth, *supra* note 29, at 958; Murray, *supra* note 17, at 338; Comment, *The Parol Evidence Rule: A Conservative View*, 19 U. CHI. L. REV. 348, 348 (1952).

The parol evidence rule only applies when the parties' final expression of intent is in written form, while the general rule of interpretation applies regardless of the final expression's form.[49] Furthermore, under the general rule of interpretation the jury determines whether the parties intended their last expression to supersede prior expressions, while under the parol evidence rule the trial judge makes this determination.[50]

Under this view the primary purpose of the rule is to prevent courts from interpreting earlier, tentative agreements or negotiations as part of an integrated writing that the parties actually intended as the final expression of their agreement.[51] Thus, according to this view the rule's justification is based upon the finality of the parties' written agreement.[52] Courts exclude oral or written[53] terms extraneous to such a writing not because doubt exists concerning the terms' reliability, but rather because the terms are irrelevant, since the parties superseded them in the final integrated writing.[54]

This last view of the rule—the rule as insurer that the final expression of intent governs—seems to be currently in vogue.[55]

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49. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 99-100 (emphasis in original).

50. *Id.* at 100.

51. C. MCCORMICK, *supra* note 26, § 210, at 428.

52. "[A]fter the parties have discussed and negotiated the terms of the transaction and have agreed on the terms hy signing an instrument emhodying them, all prior utterances have become discarded by the final act . . . which is the sole expression of their final promises and expectations." Patterson, *supra* note 27, at 846.

53. The policy of "*finality* applies to prior written as well as oral utterances." Patterson, *supra* note 27, at 846 (emphasis in original). Professor Murray, however, expresses some reservations on this issue:

> The rule exists to afford special protection to subsequent written expressions of agreement when the parties intend such expressions to be complete and final. Whether the parties intended this result in a particular case is a question of fact which is decided by the trial judge . . . because juries cannot be trusted to accord proper weight to the writing over prior oral expressions. Stating the purpose and operation of the rule in this fashion, it is difficult to clearly apply it when the prior expression is written. If juries would not accord proper weight to a final writing over a prior writing, perhaps the reason for the rule remains even where both expressions are written. Otherwise, the question of fact involved should be decided as are other questions of fact.

Murray, *supra* note 17, at 342-43.

54. Professor Wigmore observed that when a judge decides to apply the parol evidence rule to the parties' agreement "he does not decide that the excluded negotiations did not take place, but merely that *if* they did take place they are nevertheless legally immaterial." 9 J. WIGMORE, *supra* note 8, § 2430, at 98 (emphasis in original). When the judge decides that the rule does not apply "he does not decide that the negotiations did take place, but merely that *if* they did, they are legally effective, and he leaves to the jury the determination of fact whether they did take place." *Id.* (emphasis in original).

55. *See, e.g., id.* § 2425, at 75-76; Sweet, *supra* note 21, at 1036.

This view has influenced both the Uniform Commercial Code's version of the rule[56] and the position of the *Restatement (Second) of Contracts*.[57] Nonetheless, the other rationales, especially the greater relative reliability of written versus oral expressions of intent, remain important justifications for several reasons. First, the major dispute in most parol evidence cases does not concern whether the contracting parties intended the writing to supersede alleged prior expressions of their intent, but whether the parties ever actually agreed to the prior expressions.[58] Second, although many courts discuss the ascertainment of intent, they often use language which suggests that they are barring parol evidence because of its unreliability.[59] Last, the influence of ideas relating to the special significance of writings is probably the best explanation for those formulations of the rule that take a more restrictive view of the critical process by which courts may ascertain best the parties' intent to integrate their agreement into a final writing.[60]

B. The Parol Evidence Rule: Formulations, Exceptions, and Applications

While the essence of the parol evidence rule is clear, significant disagreement exists about the rule's various intricacies. Professor Murray explains the gist of the rule as follows: "When the parties to a contract embody the terms of their agreement in a writing, intending that writing to be the final expression of their agreement, the terms of the writing may not be contradicted by

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56. *See infra* notes 99-106 and accompanying text.

57. *See infra* notes 107-15 & 131 and accompanying text.

58. As Professor McCormick noted:

> Seldom from the case does one gain the impression that the dispute is really over whether an admitted oral agreement was intended to be superseded by the writing. Where the adversary's position is to be gleaned from the report, which is surprisingly seldom, it appears most often that he denies that any such oral counter-agreement was ever entered into.

C. McCORMICK, *supra* note 26, § 216, at 440. If Professor McCormick is correct, and intuitively he seems to be, then much of the recent concern with the rule as a device for effectuating the intent of the parties, however laudable that objective may be in terms of avoiding some of the obvious unfairness that results when courts treat the rule as a rule of form, may be largely misplaced. If the true function of the rule remains one of helping determine whether the parties ever entered into the alleged parol agreements, then conclusions about the rule's utility as a device in aiding the truth-seeking process should influence opinions about the desirability of the rule's continued viability.

59. Sweet, *supra* note 21, at 1048.

60. For a discussion of the polarity between Williston's and Corbin's views on this subject, see *infra* notes 78-98 and accompanying text.

evidence of any prior agreement."[61] Whether the rule applies to all prior agreements, regardless of whether they are in written or oral form is a topic of debate. Professors Corbin[62] and Williston,[63] taking the majority position, answer in the affirmative. Statements of the rule, however, exist that limit its application to prior oral agreements.[64] Furthermore, while scholars unanimously agree that the rule applies to alleged agreements made prior to the writing, but not to alleged agreements made subsequent thereto,[65] disagreement exists about the proper treatment of agreements allegedly made contemporaneously with the writing.[66] Professor Williston[67] and the Uniform Commercial Code[68] treat contemporaneous oral terms like prior terms, but treat contemporaneous written terms as part of the integrated writing. Professor Corbin, on the other hand, argues that terms are either prior or subsequent, and deems the use of the word "contemporaneous" to be an obfuscation of the integration issue.[69]

Further and more serious disagreement arises during actual application of the rule to particular fact situations, and concerns

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61. Murray, *supra* note 17, at 337.

62. See 3 A. CORBIN, *supra* note 48, § 573, at 357, for the following statement of the rule:

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, *whether parol or otherwise,* of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

Id. (emphasis added).

63. "Briefly stated, this rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, *oral or written,* where the parties have reduced their agreement to an integrated writing." 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 631, at 948-49 (3d ed. W. Jaeger 1961) (emphasis added).

64. *See, e.g.,* Sweet, *supra* note 21, at 1036 ("The parol evidence rule determines the provability of a prior or contemporaneous oral agreement when the parties have assented to a written agreement."). Professor McCormick premises the entire discussion of the rule on its applicability only to prior oral agreements. *See* C. MCCORMICK, *supra* note 26, §§ 210-22.

65. *See, e.g.,* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-6, at 113-14; J. WHITE & R. SUMMERS, *supra* note 27, § 2-9, at 78; Sweet, *supra* note 21, at 1042.

66. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 100.

67. 4 S. WILLISTON, *supra* note 63, § 628, at 913-15, § 631, at 952-53; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 100-01.

68. U.C.C. § 2-202 (1977) provides in part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of *any prior agreement or of a contemporaneous oral agreement* . . . .

Id. (emphasis added). *See also* J. WHITE & R. SUMMERS, *supra* note 27, § 2-10, at 78-79; Wallach, *supra* note 17, at 665.

69. 3 A. CORBIN, *supra* note 48, § 577, at 400-01; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 101; Murray, *supra* note 17, at 337 n.3.

the issues of the "finality" and "completeness" of a contract. Frequently, the "overriding issue in parol evidence disputes"[70] is whether the parties intended the written document to be a final and complete statement of their agreement, or a final statement of a part of their agreement, or perhaps nothing more than a memorandum not intended to be a final expression of their agreement at all."[71] The issue of "finality" is crucial because the rule does not apply to tentative or preliminary writings.[72] Scholars generally agree that parties may introduce any relevant evidence on the question of whether the parties intended the writing to be final.[73] While the question of finality often is cast as a question of law since the trial judge makes the determination, the question actually concerns an interpretation of intention, and thus is a question of fact.[74]

The question of completeness is of paramount importance because courts generally draw a distinction between writings that are a partial integration of the parties' agreement and writings that are a total integration of the agreement. Courts characterize as total integrations those writings that they determine to be both final and complete. Thereafter, evidence of any prior agreements may not contradict or supplement the totally integrated writing.[75] Courts characterize as partial integrations those writings that are final but incomplete. Evidence of prior agreements may not contradict such writings, although evidence of consistent additional terms may supplement such incomplete writings.[76] The issue of completeness, like the issue of finality, is a question of law in the sense that the trial judge decides the issue.[77]

The method that courts employ in determining whether a writing is complete is the subject of an intense conflict, with Professors Williston and Corbin heading the two sides of debate. Both scholars agree that the "intent" of the parties should be the

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70. Wallach, *supra* note 17, at 655.

71. *Id.*

72. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 101.

73. *See, e.g., id.*; 3 A. CORBIN, *supra* note 48, § 588, at 528-29.

74. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 101-02.

75. *Id.* § 3-2, at 101.

76. *Id.*; *see also* 4 S. WILLISTON, *supra* note 63, § 636; Sweet, *supra* note 21, at 1038. Corbin agrees in substance but would abandon the term "partial integration" on the ground that parties rarely intend incomplete writings to be final. 3 A. CORBIN, *supra* note 48, § 581, at 441. See *infra* notes 119-23 and accompanying text for a discussion of the confusion surrounding the terms "contradict" and "consistent" in partial integration cases.

77. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 103.

determinative element,[78] but the two use "intent" in very dissimilar ways.[79] Williston stresses the appearance of the writing as determinative in discerning the parties' intent;[80] he argues that the consideration of extrinsic evidence in determining the parties' intent emasculates the parol evidence rule.[81] According to Williston, if the writing includes a merger clause (also called an "integration" or "entire contract" clause),[82] then the writing is per se a total integration unless (1) the writing is obviously incomplete, (2) the merger clause is the product of fraud or mistake, or (3) other reasons exist that justify setting the contract aside.[83] If no merger clause exists and the writing is obviously incomplete on its face or only addresses the obligations of one party, the parties may introduce consistent additional terms.[84] If, however, the writing is apparently complete on its face, despite the absence of a merger clause, a court will treat it as a total integration unless the proffered additional terms are such as might "naturally and normally"[85] be made but not included in a written contract by similarly situated parties.[86] Parties always may prove the existence of "collateral" contracts, which are separate agreements supported by separate consideration, despite the apparent completeness of a particular writing.[87] Scholars have criticized Williston's approach

78. *See* 3 A. CORBIN, *supra* note 48, §§ 573-96; 4 S. WILLISTON, *supra* note 63, § 633.

79. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3.

80. Wallach, *supra* note 17, at 659. In this respect the Williston approach resembles the now-defunct "four corners" doctrine. *Id.* For a general discussion of the "four corners" doctrine, see *id.* at 656-57.

81. *See* 4 S. WILLISTON, *supra* note 63, § 633, at 1014. Determining the parties' intent through consideration of extrinsic evidence emasculates the rule because the existence of a collateral oral agreement conclusively indicates a partial integration, leaving as the only issue whether the parties made the alleged agreement. This issue presents a question of fact for the jury and, thus, eliminates the special protection that the trial judge should give the writing. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 104.

82. For a discussion of merger clauses and their general operation in parol evidence cases, see generally J. WHITE & R. SUMMERS, *supra* note 27, § 2-12; Sweet, *supra* note 21, at 1037, 1045; Wallach, *supra* note 17, at 677-78; Comment, *The "Merger Clause" and the Parol Evidence Rule*, 27 TEX. L. REV. 361 (1949).

83. 4 S. WILLISTON, *supra* note 63, § 633, at 1014, § 634, at 1017-20; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 104.

84. 4 S. WILLISTON, *supra* note 63, § 633, at 1014-15, §§ 636, 645; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 105.

85. *See* Wallach, *supra* note 17, at 658. This test also is known as the "reasonable man" test. *Id.; see also* C. MCCORMICK, *supra* note 26, § 216, at 441.

86. *See* 4 S. WILLISTON, *supra* note 63, §§ 638-39; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 105.

87. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 105; C. MCCORMICK, *supra* note 26, § 211, at 431; Sweet, *supra* note 21, at 1038.

and its emphasis on the writing because that approach treats the parol evidence rule as a rule of form;[88] such treatment subordinates the true intent of the parties to their legally presumed intent.

Corbin argues that a court can never determine the true intent of the parties by confining its attention to the parties' writing.[89] He clearly expressed his scorn for the Willistonian approach:

> Since the very existence of an "integration" . . . is dependent on what the parties thereto say and do, (necessarily extrinsic to the paper instrument) at the time they draw that instrument "in usual form," are we to continue like a flock of sheep to beg the question at issue, even when its result is to "make a contract for the parties," one that is vitally different from the one they made for themselves?[90]

Corbin thus plainly is concerned with ascertaining the true intent of the parties to the writing:[91] did the parties subjectively agree that the writing was a complete statement or merely a partial statement of their contract?[92] A trial court adopting the Corbin approach would look at all available extrinsic evidence to divine the parties' true intent on the integration issue;[93] it would test the admissibility of a proffered parol term "solely by the credibility of the party seeking to introduce the term."[94] Corbin's emphasis on the true intent of the parties, however, "emasculates the traditional parol evidence rule"[95] by depriving the trial judge of the "judicial trump card"[96] afforded by the more traditional approaches that allow a judge to exclude suspect evidence from the jury without appearing to rule on its credibility.[97] Consequently, the Corbin approach largely eliminates the "rule of form" aspects of the rule by denying writings the special treatment that the Willistonian approach affords them.[98]

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88. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 108. Courts following the Willistonian approach see the essential purpose of the parol evidence rule as protecting the integrity of written contract. *Id.* § 3-3, at 107.

89. "[I]t can never be determined by mere interpretation of the words of a writing whether it is an 'integration' of anything, whether it is 'the final and complete expression of the agreement' or is a mere partial expression of 'the agreement.' " 3 A. CORBIN, *supra* note 48, § 581, at 442.

90. *Id.* § 582, at 463.

91. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 106.

92. *See* Wallach, *supra* note 17, at 663.

93. *See id.* at 644.

94. *Id.*

95. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 106 n.45.

96. *See* Wallach, *supra* note 17, at 665.

97. *See id.; see also supra* notes 36-38 and accompanying text.

98. Wallach, *supra* note 17, at 664.

Despite the criticism that the Corbin approach emasculates the parol evidence rule, Corbin's arguments clearly have influenced recent formulations of the rule and have resulted in a general shift favoring attempts to ascertain the parties' true intent on the integration issue. For example, the Uniform Commercial Code's version of the rule significantly increases the chances that the trier of fact will consider evidence of extrinsic terms.[99] The Code suggests that partial integration is the norm[100] by initially focusing on whether the writing was "*intended* by the parties as a final expression of their agreement *with respect to such terms as are included therein* . . . ."[101] A court will bar evidence of consistent additional terms only when it "finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."[102] Furthermore, a court will deem the writing "complete and exclusive" and bar evidence of additional terms only if the court finds that the purported additional terms "if agreed upon, . . . would *certainly* have been included in the document."[103] This standard for a complete integration is much narrower than Williston's "naturally and normally" test.[104] The Code also allows evidence of course of dealing, course of performance, and usage of trade to explain or supplement the terms included in the writing,[105] even when this evidence appears to contradict apparently unambiguous terms in the writing.[106]

The *Restatement (Second) of Contracts* likewise reflects the influence of Corbin's ideas.[107] It provides that "a writing which in view of its completeness and specificity reasonably appears to be a complete agreement . . . is taken to be an integrated agreement unless it is established by other evidence that the writing did not

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99. *See id.* at 666-67.

100. *Id.* at 666; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-7.

101. U.C.C. § 2-202 (1977) (emphasis added); *see also* Wallach, *supra* note 17, at 666. Note also the Code's emphasis on the parties' intent. U.C.C. § 2-202 comment 2 further exemplifies this emphasis by stating that the object of the parol evidence process is to find "the *true understanding of the parties* as to the agreement . . . ." *Id.* (emphasis added).

102. U.C.C. § 2-202(b) (1977).

103. U.C.C. § 2-202 comment 3 (1977) (emphasis added); *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-7, at 115; J. WHITE & R. SUMMERS, *supra* note 27, § 2-10, at 79-80; Wallach, *supra* note 17, at 667-68.

104. Wallach, *supra* note 17, at 668.

105. U.C.C. § 2-202(a) (1977).

106. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-7, at 115; J. WHITE & R. SUMMERS, *supra* note 27, § 2-10, at 85-87; Wallach, *supra* note 17, at 665-66.

107. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 109.

constitute a final expression."[108] The *Restatement* rejects the notion that the writing itself can "prove its own completeness"[109] and notes that "wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties."[110] A court must determine the parties' intent to integrate by looking at "all relevant evidence,"[111] including usages of trade, course of dealing, and course of performance;[112] even the presence of a merger clause is not conclusive on the integration issue.[113] If the alleged omitted term is one that "in the circumstances might naturally be omitted from the writing," a court will deem the writing a partial integration.[114] That an omission "does not seem natural," however, will not prevent its admission "unless the court finds that the writing was intended as a complete and exclusive statement of the terms of the agreement."[115]

The clear thrust, then, of both the *Restatement (Second)*[116] and the Code[117] is to add momentum to what Williston himself perceived as the modern trend "toward increasing liberality in the admission of parol agreements."[118] By increasing the likelihood that courts will hold writings to be partial integrations rather than complete integrations, these more liberal formulations of the rule not only provide a formal rationale for the admission of terms inadmissible under form-oriented versions of the rule but also provide an increased opportunity for *sub rosa* judicial behavior aimed at producing "just" results at the expense of consistent application of the rule. Judges confronted with alleged terms that they believe are genuine may admit such terms by finding that the parties intended their writing to be only a partial integration of their agreement, regardless of the writing's facial completeness.[119] Of course,

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108. RESTATEMENT (SECOND) OF CONTRACTS § 209(3) (1981).

109. *Id.* § 210 comment b.

110. *Id.*

111. *Id.* § 209 comment c; *see id.* § 210 comment b.

112. *Id.* § 209 comment a.

113. *Id.* § 209 comment b; *see id.* § 216 comment e.

114. *Id.* § 216(2)(b). A comment to this section observes that if "the omission seems natural in the circumstances, it is not necessary to consider further the questions whether the agreement is completely integrated and whether the omitted term is within its scope, although factual questions may remain." *Id.* at comment d.

115. *Id.* at comment d ("[T]here is no rule or policy penalizing a party merely because his mode of agreement does not seem natural to others.").

116. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 111.

117. *See* Wallach, *supra* note 17, at 666-67.

118. 4 S. WILLISTON, *supra* note 63, § 638, at 1045.

119. C. MCCORMICK, *supra* note 26, § 212, at 432-33.

only such terms as are "consistent" with the writing are admissible, and terms which "contradict" terms in a partial integration are never admissible.[120] Whether a proffered extraneous term contradicts a term contained within the writing, however, is a difficult[121] and perhaps misleading[122] question, which itself provides fertile ground for judicial legerdemain. Courts in numerous recent cases have admitted evidence of extraneous terms on the grounds of "consistency" when any meaningful application of the consistency standard would dictate a different result.[123]

A brief examination of the numerous judicially-created exceptions to the rule's operation gives further evidence of the modern trend toward liberality in applying the parol evidence rule and of the confusion and inconsistency surrounding its application.[124] For example, courts generally agree[125] that the parol evidence rule does not apply to proof that the contract which a writing represents is subject to a condition precedent.[126] The courts, however, should distinguish between conditions precedent to the formation of a contract and conditions precedent to the performance of a contract.[127] Courts should admit on its own merit, rather than as an exception, evidence that the failure of a condition precedent prevented the formation of a contract since the rule only applies when a court determines that a complete or partial contract exists.[128] On

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120. *See supra* note 76 and accompanying text.

121. *See* J. WHITE & R. SUMMERS, *supra* note 27, § 2-10, at 81-84; Sweet, *supra* note 21, at 1038.

122. Professor Wigmore suggested that the only sensible inquiry concerning this aspect of the integration question is whether the proferred term is "additional" to the writing in the sense that it addresses issues not touched upon in the writing. Any additional term arguably contradicts previous terms. Parties hardly would seek to introduce extraneous terms tbat would have no effect on their obligations under the writing. 9 J. WIGMORE, *supra* note 8, § 2430.

123. *See, e.g.*, Bunge Corp. v. Recker, 519 F.2d 449 (8th Cir. 1975); Hunt Foods & Indus. v. Doliner, 26 A.D. 2d 41, 270 N.Y.S.2d 937 (1966); Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976). See Wallach, *supra* note 17, at 669-70, 674-76, for a discussion of these cases.

124. See J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 110, for the allegation that the genesis of at least some of these exceptions is "[d]issatifaction with rigid application" of the rule.

125. Some courts, however, refuse to recoguize the condition precedent exception on the ground that such conditions "are a type of contract term and arguably should be subject to some type of restriction on admissibility if not found in the written agreement." Wallach, *supra* note 17, at 654.

126. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 111-12; C. MCCORMICK, *supra* note 26, § 221, at 449-50.

127. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 112 n.4.

128. *See* 3 A. CORBIN, *supra* note 48, § 589, at 530-32; Broude, *The Consumer and the*

the other hand, the parol evidence rule should apply to conditions precedent to the performance of a contract; a party should be allowed to prove such conditions only if the writing is a partial integration and the alleged conditions merely supplement, rather than contradict, the writing.[129] Of course, any condition precedent is arguably inherently inconsistent with a facially unconditional writing. Nevertheless, cases exist in which courts have admitted as consistent conditions that plainly were "contradictory" under any reasonable construction of the term.[130] In addition, the *Restatement (Second)* plainly rejects the "consistency" standard as it applies to conditions.[131]

Parties also may avoid the strictures of the parol evidence rule by raising a variety of defenses attacking the validity of the underlying agreement that the writing represents. These defenses include most traditional contract defenses and constitute "a complex set of subrules and exceptions that equals the parol evidence rule itself in unevenness of application and confusion."[132] Courts may admit evidence which shows that the contract lacks consideration,[133] is illegal,[134] or is voidable due to fraud, duress, undue influence, or mistake.[135] Of these exceptions, the most important—not only because significant disagreement exists concerning the scope of the exception, but also because the exception serves as a convenient entree for judicial manipulation of the rule[136]—is the exception for fraud.[137] Indeed, the fraud exception could become "an

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Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code, 1970 DUKE L.J. 881, 891.

129. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 112; Sweet, *supra* note 21, at 1040.

130. *See, e.g.*, Williams v. Johnson, 229 A.2d 163, 166 (D.C. 1967) (allowing admission of a condition precedent in the face of a merger clause). For a discussion of *Williams* and other similar cases, see Broude, *supra* note 128, at 891-99.

131. *See* RESTATEMENT (SECOND) OF CONTRACTS § 217 comment h (1981).

132. Sweet, *supra* note 21, at 1039.

133. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 112; Sweet, *supra* note 21, at 1040.

134. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 112; C. MCCORMICK, *supra* note 26, § 221, at 451.

135. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 112; C. MCCORMICK, *supra* note 26, § 221, at 450-51; Sweet, *supra* note 21, at 1039.

136. Some scholars argue that "to circumvent the rule fraud has been found and reformation has been granted in situations where these concepts are not ordinarily deemed applicable." J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 110. *See also* Childres & Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 26 n.118 (1972) (collecting cases in which courts have expanded the fraud and mistake defenses to admit terms under the exception to the rule).

137. J. WHITE & R. SUMMERS, *supra* note 27, § 2-11. *But cf.* Sweet, *Promissory Fraud*

exception that swallows up the entire parol evidence rule."[138] Although some authorities only allow proof of fraud in the execution[139] of a contract to contradict the writing,[140] a party generally may show proof of fraud in the inducement[141] even though such proof contradicts an integration.[142] Authorities disagree about whether to allow proof of promissory fraud[143] to contradict an integration.[144]

Finally, another means of access for parol evidence and source of disagreement about the scope of the rule is the generally accepted principle that the rule does not apply to evidence aimed at interpretation of a writing, as long as such evidence does not vary, add to, or contradict the writing.[145] This principle in effect stipulates that such parol evidence is inadmissible only if the written terms are plain, clear, and unambiguous.[146] Authorities have criticized this corollary to the rule on the grounds that language is inherently ambiguous[147] and that courts which profess to find the language of a writing clear and unambiguous, of necessity, are en-

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and the Parol Evidence Rule, 49 CALIF. L. REV. 877 (1961) (To term the admission of evidence of fraud as an "exception" to the rule is erroneous because the rule only applies to valid contracts.).

138. J. WHITE & R. SUMMERS, *supra* note 27, § 2-11.

139. Fraud in the execution of a contract relates to deception concerning the contents of a writing. Sweet, *supra* note 137, at 888.

140. *Id.* at 887-88.

141. Fraud in the inducement exists when one party, by false representations, induces the other party to enter the contract. *Id.* at 888.

142. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 112 n.77; 3 A. CORBIN, *supra* note 48, § 580.

143. Promissory fraud consists of making a promise without intending to perform. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-4, at 112 n.77.

144. Some jurisdictions have held that a party may not prove the existence of a promise which contradicts an integration on a theory of promissory fraud. *Id.* A majority of jurisdictions, however, now treat the making of promises without intent to perform as the equivalent of a misrepresentation of fact and, thus, treat such misrepresentations like fraud in the inducement. *Id.* § 9-19, at 286-87; Sweet, *supra* note 137, at 888-89.

145. *See* C. MCCORMICK, *supra* note 26, §§ 217-20; J. WHITE & R. SUMMERS, *supra* note 27, § 2-11, at 89; Sweet, *supra* note 21, at 1041.

146. *See* Farnsworth, *supra* note 29, at 959.

147. "The very concept of plain meaning finds scant support in semantics, where one of the cardinal teachings is the fallibility of language as a means of communication." *Id.* at 952. See Young, *Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619, 632 n.57 (1964), for this discussion:

> Ambiguity in the sense of vagueness is the usual *carte d' entrée* for parol evidence, but ambiguity in this sense is a matter of degree: "as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include."

Id. (quoting Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 985 (S.D.N.Y. 1917)).

gaging in an exercise in interpretation.[148] Numerous examples of judicial confusion about, and manipulation of, this corollary exist.[149] Nonetheless, Corbin has argued that the parol evidence rule should not apply to evidence aimed at issues of interpretation since a court cannot know whether proffered evidence supplements or contradicts a writing and, hence, is admissible under the rule until it ascertains the meaning of the terms contained in the writing.[150] Both the *Restatement (Second)*[151] and the Uniform Commercial Code[152] embrace Corbin's position and thereby significantly broaden the admissibility of parol evidence offered under the pretext of aiding the interpretive process.

Given the foregoing catalog of confusion, disagreement, and judicial manipulation, some observers of the parol evidence rule believe that a significant dichotomy often exists between the realities of the rule's operation and its various official formulations.

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148. When a court makes the often repeated statement that the written words are so plain and clear and unambiguous that they need no interpretation . . . it is making an interpretation on the sole basis of the extrinsic evidence of its own linguistic experience and education, of which it merely takes judicial notice.

Corbin, *supra* note 20, at 189.

149. According to Corbin,

[t]here are many court decisions, made by highly respected courts, that are inconsistent with the repeated rule. If extrinsic evidence is admitted without objection, the trial court is never reversed for considering it in the process of interpretation. There are many cases, practically never subjected to criticism, in which the court has considered extrinsic evidence as a basis for finding that the written words are ambiguous; instead of ambiguity admitting the evidence, the evidence establishes the ambiguity. Learned judges have often differed as to whether the written words are ambiguous, each one sometimes asserting that *his* meaning is plain and clear. All that any court has to do in order to admit relevant extrinsic evidence is to assert that the written words are ambiguous; this has been done in many cases in which the ordinary reader can perceive no ambiguity until be sees the extrinsic evidence.

Id. at 161-62.

150. *Id.* at 188-90.

151. RESTATEMENT (SECOND) OF CONTRACTS § 212 comment b (1981) provides:

It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) [on interpretation of integrated agreements] is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and the statements made therein, usages of trade, and the course of dealing between the parties.

152. The actual Code provisions expressly consider only evidence relating to course of performance, usage of trade, or course of dealing. *See supra* notes 105-06 and accompanying text. U.C.C. § 2-202 comment 1(c) (1972), however, says that "[t]his section definitely rejects" any requirement that "a condition precedent to the admissibility" of such evidence "is an original determination by the court that the language used is ambiguous."

Professors Calamari and Perillo observe that: "It would . . . be a mistake to suppose that the courts follow any of these rules blindly, literally or consistently. As often as not they choose the standard or rule that they think will give rise to a just result in the particular case."[153] A study of the application of the parol evidence rule, then, must attempt to pinpoint the factors that influence judicial perception about the "justice" of a particular result. One commentator avers that "the proponent of the oral agreement will be permitted to prove it if the trial judge thinks it likely that the agreement was made and if there are no cogent reasons why it should not be enforced."[154] Unfortunately, since judicial manipulation of the rule varies from judge to judge, the outcome of any particular parol evidence case remains difficult to predict:

> Although the outcome of a case is often correct because courts, as a rule, have a good sense of fairness, there are cases that simply come out wrong. There are non-result-oriented judges who mechanically follow cases phrasing the Rule in its traditional form. Other judges, believing the Rule expresses a sound judicial policy, may refuse to admit the testimony of the oral agreement even if they believe the agreement took place and was intended to stand.[155]

Perhaps the most interesting suggestion about the realities of the rule's operation—a suggestion that emerges from a study of 149 parol evidence cases[156]—is that an examination of the status of the parties to the contract and the nature of their contract better explains decisions in parol evidence cases than does the rule itself.[157] The authors who conducted the study found that the courts' application of the rule in cases concerning "informal" contracts or contracts involving an abuse of the bargaining process varied greatly from the application of the rule in cases involving "formal" contracts.[158] The authors classified as "formal" any contract in which sophisticated parties "negotiated fairly and in detail"[159] and deemed "informal" any contract between unsophisticated par-

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153. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-14.

154. Sweet, *supra* note 21, at 1045.

155. *Id.* at 1046. For a discussion of a case in which a court excluded evidence of extrinsic terms despite convincing proof of the terms' existence, see *infra* notes 437-39 and accompanying text.

156. Professors Childres and Spitz conducted the study. *See* Childres & Spitz, *supra* note 136.

157. *See generally id.*

158. "Precisely those factors regarded as decisive in excluding alleged oral understandings in the formal contracts category were ignored by the courts when deciding cases involving informal contracts." *Id.* at 17.

159. *Id.* at 4.

ties.[160] The authors concluded that

> the rule functions effectively, indeed one can almost say it only functions, in cases assigned to the "formal contracts" category. In cases involving informal contracts, the parol evidence rule was almost always avoided, and where the court chose not to circumvent the rule, its decision was based on the credibility of proffered evidence, not its admissibility. As for cases in our third category—those involving an abuse of the bargaining process—the cases indicated tbat the parol evidence rule had no application at all with regard to the aggrieved party.[161]

C. *The Parol Evidence Rule: Criticisms and Suggestions for Improvement.*

Commentators frequently have assailed the inconsistency typifying the parol evidence rule's application and the confusion and disagreement about its underlying policy foundations. The parol evidence rule, scholars note, is difficult to apply consistently because it is riddled with exceptions[162] and is not sufficiently self-executing.[163] The result is a rule that encourages litigation,[164] "adversely affect[s] both the counseling of clients and the litigation process,"[165] and hurts the administration of justice.[166]

Questions concerning the validity of the basic assumptions upon which the rule obstensibly is premised have fueled the critical attack against the rule. Many feel that supporters of the rule have exaggerated the extent to which courts would fall prey to per-

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160. *Id.*

161. *Id.* at 7.

162. *See* Note, *supra* note 15, at 974.

163. The rule is not sufficiently self-executing because it does not contain any internal test for determining the finality and completeness of a writing. Consequently, courts and commentators are free to devise conflicting tests. *Id.* at 973.

164. "When any rule of law is riddled through with exceptions and applications difficult to reconcile, it is believed that litigation is stimulated rather than reduced." J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 110-11.

165. Sweet, *supra* note 21, at 1036. Professor Sweet argues that "[t]he different policies behind the rule have varying degrees of persuasiveness in different fact situations. The ceaseless flow of parol evidence opinions and the refusal of courts to give tlie real reasons for their decisions contribute to litigation prediction difficulties." *Id.* at 1044.

166. As Sweet notes:

> The administration of justice also suffers because of the parol evidence rule. Almost every parol evidence case involves lengthy and often fruitless bickering on the part of the attorneys. Much time is spent trying to unravel the intricacies of the rule. In addition, because the rule is phrased in admissibility terms, there is a substantial chance of a reversal of trial court decisions because the rule is often as misunderstood by appellate courts as by trial courts.

Id. at 1047; *see also* Hale, *The Parol Evidence Rule*, 4 OR. L. REV. 91, 91 (1925) (describing the rule as a "positive menace to the due administration of justice").

jured testimony absent the rule.[167] At any rate, fear of perjury does not justify refusing to enforce the parties' entire agreement.[168] Detractors of the rule further point out that modern juries are better educated than their predecessors,[169] are subject to more significant controls,[170] play a lesser role in dispute settlement,[171] and decide issues of credibility in many important contexts.[172] Thus, a primary justification of the rule—the rule as a jury control device[173]—may be unsupportable.

Indeed, the merits of each of the myriad justifications offered in support of the rule are debatable. Critics answer the argument that the rule allows judges the convenience of excluding untrustworthy evidence without branding witnesses as liars,[174] by arguing that the price paid for this convenience is too high.[175] They counter the assertion that the rule affords a degree of certainty to written contracts which is necessary to the efficient conduct of business,[176] by observing that the assumption that businessmen need such certainty is untested.[177] Besides, the critics note, the numerous ways of avoiding the rule and the various ways in which courts apply the rule operate to decrease the reliability of written contracts.[178] In any event, detractors feel that courts should

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167. *See supra* notes 27-38 and accompanying text.

168. J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 109-10.

169. *See* C. MCCORMICK, *supra* note 26, § 216, at 441-42; J. WHITE & R. SUMMERS, *supra* note 27, § 2-9, at 77-78.

170. *See* J. WHITE & R. SUMMERS, *supra* note 27, § 2-9, at 77-78; Sweet, *supra* note 21, at 1056; Note, *supra* note 15, at 987.

171. *See* Sweet, *supra* note 21, at 1054 & n.79.

172. Professor Sweet questioned whether parol evidence cases would prove any more difficult for the jury to decide than cases concerning construction accidents, consumer injuries, or gift tax cases—all areas in which the jury exercises great control. *See* Sweet, *supra* note 21, at 1055; *see also* J. WHITE & R. SUMMERS, *supra* note 27, § 2-9, at 75-76; Note, *supra* note 15, at 985.

173. *See supra* notes 30-35 and accompanying text.

174. *See supra* notes 36-38 and accompanying text.

175. As Professor Sweet pointed out, "[p]roper issues may be missed or ignored, and the real reasons for the decision may not be given" when judges exclude evidence from the outset. Sweet, *supra* note 21, at 1057.

176. *See supra* notes 44-47 and accompanying text.

177. "Like most of the law's basic assumptions this one has never been tested by any survey of the actual effects in business of the presence or absence of such assurance." *See* C. MCCORMICK, *supra* note 26, § 210. Indeed, as Professor McCormick notes, "[p]erhaps the special protection [afforded by the rule] is no longer needed. The telephone, and the urgent call for high speed in certain types of important transactions, such as security trading, have accustomed businessmen to rely upon word of mouth, and dispense with the safeguard of writing." *Id.* § 216, at 441-42.

178. "Because it is impossible to forecast whether or not the facts of a given transaction will come within one of the exceptions or various tests of the rule, the assumption that

subordinate the goal of certainty to the goal of effectuating the parties' actual intentions in entering into their agreement.[179] Additionally, critics argue that the rule's emphasis on the reliability of written evidence is misplaced because writings may be forgeries or otherwise inaccurate.[180] They further argue that viewing the rule as a rule of form[181] is an unsatisfactory justification for its existence, since the rule really has not performed the "channeling" function that rules of form supposedly accomplish.[182] Finally, critics note that treating the parol evidence rule as a rule of form, in some cases, can extend unjustifiably the scope of the Statute of Frauds.[183]

For the purposes of determining whether the parol evidence rule is a likely candidate for the ministrations of promissory estoppel, the most significant criticisms of the rule attack the rule's potential for working injustice. People do enter parol agreements that they do not include in their written agreements. To the extent that the rule operates to bar proof of such agreements, it frustrates the true intentions of the parties[184] and results in courts enforcing a contract to which neither party agreed.[185] In many instances, a

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the rule is indispensable to business stability is specious." Note, *supra* note 15, at 983.

179. For example, Professor Sweet questions the priority of the rule's objectives:

> How clear is the need to protect writings from gullible or soft hearted juries or judges? In an era dominated by adhesion contracts, inequality of bargaining power and the pervasive use of liability limitations and exculpations, such commercial certainty should be subordinate to the protection of reasonable expectations. The law should be more concerned with protecting the *actual* agreement of the parties than with protecting [a] written agreement that *appears* to constitute the entire agreement.

Sweet, supra note 21, at 1056.

180. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 27, § 2-9, at 77-78.

181. *See supra* notes 39-43 and accompanying text.

182. Indeed, "[d]espite the long existence of the parol evidence rule, contracts which are partially written and partially oral are not uncommon." Note, *supra* note 15, at 983. The same author also observes that "informal business transactions between friends or long-time business associates are likely to involve 'understandings' between the parties that are not reduced to writing." *Id.; see also* Sweet, *supra* note 21, at 1036, 1047.

183. Since the Statute of Frauds never has required the entire agreement to be expressed in the memorandum, the treatment of the parol evidence rule as a rule of form effectively extends the scope of the Statute. *See* Sweet, *supra* note 21, at 1054. On the "channeling" function of rules of form, see *infra* notes 402-03 and accompanying text.

184. *See supra* notes 88-90 and accompanying text; *see also* Sweet, *supra* note 21, at 1058; Wallach, *supra* note 17, at 653; Note, *supra* note 15, at 974.

185. One observer notes that

> [s]ince parties *do* make oral agreements outside their written contract and *do* use words in other than the usual sense, the exclusion of this evidence by the parol evidence rule may force upon the parties a contract that they never intended to make. Thus, because the parol evidence rule may exclude as much truthful testimony as it does perjurious testimony, the rule constitutes a major source of injustice in contract

party may rely on oral assurances that the writing's failure to reflect accurately all the terms of the agreement is "no problem."[186] The tendency of the rule to favor unduly the party relying on the writing[187] may operate particularly to the detriment of consumers, who may be unable to understand the terms of the contract even if they actually read them.[188] In any event, consumers are unlikely to understand the significance of technical devices such as merger clauses that they are likely to encounter in standardized form contracts.[189]

A plethora of proposed alternatives or modifications to the parol evidence rule has arisen from the stinging criticism surrounding the rule. Some commentators conclude that the most expeditious way of overcoming the numerous difficulties that the rule poses is simply to discard the rule as a relic of the past that has outlived its original purposes and causes more problems than it solves.[190] Given the rule's long existence, such a resolution is unlikely,[191] although as Justice Hohnes once observed:

> It is revolting to have no hetter reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind limitation of the past.[192]

Others propose less drastic means than complete abrogation for reducing the dilemmas associated with the rule's operation. They suggest that the party standing on the writing bear the burden of proving its completeness and finality,[193] or that the rule operate as

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law.

Note, *supra* note 15, at 974-75 (emphasis added). *See also supra* note 90 and accompanying text.

186. *See* C. MCCORMICK, *supra* note 26, § 210, at 428 n.6.

187. *See* J. WHITE & R. SUMMERS, *supra* note 27, § 2-9, at 770-78.

188. "In most [consumer] situations, it is unlikely that the buyer will understand the terms of the writing even if he could and did read them." Broude, *supra* note 128, at 906.

189. Professor McCormick notes that

> [i]n certain types of relatively standardized transactions, particularly in the sale to consumers of appliances such an [sic] automobiles, air-conditioners, tractors, and television sets, it is customary for the standard preprinted form of contract or order blank to include a clause, frequently in fine print, providing that there are no promises, warranties, conditions or representations not appearing in the writing. Seldom are these provisions actually read by the purchaser and even less often would he understand their effect upon the statements and promises made by the salesman.

C. MCCORMICK, *supra* note 26, § 222.

190. *See* Note, *supra* note 15, at 976, 987-88.

191. "The rule . . . has existed so long that its total abandonment is not likely even if it could be shown that it is not needed." Sweet, *supra* note 21, at 1059.

192. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

193. *See* J. WHITE & R. SUMMERS, *supra* note 27, § 2-9, at 78.

a rebuttable presumption that the writing is inclusive and final—a presumption that a party may challenge by clear and convincing evidence to the contrary.[194] Another alternative proposal is that the rule only apply to truly integrated agreements[195] and that the courts recognize that the number of such agreements is relatively small.[196] Some commentators have added further qualifications to this proposal: that courts use the rule only to strike down prior terms that directly contradict the writing,[197] that they never use the rule to strike down contemporaneous terms,[198] and that when the Statute of Frauds requires written evidence of the parties' agreement courts discard the rule entirely in favor of an inquiry into whether a memorandum sufficient to satisfy the Statute exists. The last qualification would leave to the jury the issue of whether the parties indeed made the proferred prior oral agreement.[199] Finally, some authorities suggest that the manner of the rule's application should vary depending upon whether the contract in question is "formal,"[200] "informal,"[201] or involves an abuse of the bargaining process.[202]

The likelihood of the parol evidence rule's continued existence in some form or other forces consideration of whether the doctrine of promissory estoppel properly can play a part in ameliorating

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194. *See* Hale, *supra* note 166, at 122; Sweet, *supra* note 21, at 1061; Note, *supra* note 15, at 986.

195. *See* Sweet, *supra* note 21, at 1059-60, 1063. Professor Sweet says that the hallmark of such a contract is that the parties wrote it carefully and methodically. Sweet offers numerous criteria for determining the existence of such a contract. *Id.* at 1063-67.

196. *See id.* at 1064.

197. *See id.* at 1061.

198. *See id.*

199. *Id.* at 1054.

200. *See supra* notes 158-59 and accompanying text. Professors Childres and Spitz suggest that the rule should find its fullest application to "formal" contracts, but even in such cases they feel that its application should vary depending upon the nature of the proffered agreement. Childres & Spitz, *supra* note 136, at 7-12.

201. *See supra* note 160 and accompanying text. Regarding "informal" contracts, the Childres and Spitz study concludes that

> [t]he reasonable expectations of the parties at the time of entering these transactions can be reached only by shaping the parol evidence rule to an informal model, not by forcing the informal contract to abide by a rule designed for keenly negotiated, formal transactions. And shaping the rule for informal transactions seems to us to require ignoring it.

Childres & Spitz, *supra* note 136, at 17.

202. *See supra* note 158 and accompanying text. In situations in which one party has abused the bargaining process, Childres and Spitz conclude that "[a]ny person who alleges inferior bargaining position or an abuse of bargaining power should and usually does get his evidence to the trier of fact." Childres & Spitz, *supra* note 136, at 24.

both the confusion and the potential for injustice associated with the rule. The resolution of this issue, however, first requires an exploration of the promissory estoppel doctrine's evolution in general, and, in particular, its evolution as a device for circumventing the Statute of Frauds.

III. PROMISSORY ESTOPPEL—THE EVOLUTION OF THE DOCTRINE

The "bargain" theory of consideration,[203] which developed during the nineteenth century[204] served to limit a promisor's liability by denying promisees recovery for detrimental, but unbargained-for, reliance on a promise.[205] Courts applying this doctrine often reached seemingly unfair results.[206] Early twentieth century jurists, for a multiplicity of reasons,[207] afforded more protection to a promisee's reliance interests than their predecessors were willing to grant.[208] These jurists countered the classic response that reli-

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203. According to bargain theory, the consideration given on one side of a contractual obligation must be the "price" of the consideration given on the other side of the agreement. G. GILMORE, THE DEATH OF CONTRACT 19-21 (1974). Justice Holmes formulated the classic statement of the bargain idea:

> [I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal inducement, each for the other, between consideration and promise.

O. HOLMES, THE COMMON LAW 230 (1963).

204. The "bargain theory" arguably did not even exist prior to the nineteenth century. *See* G. GILMORE, *supra* note 203, at 19-21; *see also* Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 577 (1969). On the development of "pure" or "classical" contract theory in the nineteenth century, see generally L. FRIEDMAN, A HISTORY OF AMERICAN LAW 244 (1973) and M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 160 (1977).

205. G. GILMORE, *supra* note 203, at 19-21.

206. *See, e.g.*, Thorne v. Deas, 4 Johns. 84 (N.Y. Sup. Ct. 1809) (denying the part-owner of a sailing ship any recovery on the "gratuitous" promise of another part-owner te secure insurance to cover the vessel on its ill-fated voyage).

207. For a detailed exposition of the socio-historical considerations relating to this shift in judicial stance and their relevance to the evolution of "modern" contract law in general and promissory estoppel in particular, see Metzger & Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139, 141-58 (1980).

208. *See* Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440, 448 (1931). Professor Summers argued that "the analytical and historical schools of the past century have given way to the philosophical and sociological schools of the present and morality has re-asserted itself in the law." *Id.*; *see also* Note, C & K Engineering Contractors v. Amber Steel Co.: *Promissory Estoppel and the Right to Trial by Jury in California*, 31 HASTINGS L.J. 697, 711-12 (1980) (Promissory estoppel's extension of liability for promises that induce reliance is consistent with other changes in modern contract law that also recognize fairness as a substantive basis of contractual liability.); *infra* note 213.

ance upon gratuitous promises is unreasonable by simply noting the common occurrence of such reliance.[209] They argued, furthermore, that the bargain theory ignored the promisor's role in inducing the reliance.[210] Allowing individuals who had made promises to avoid all responsibility even though the promisors knew the promises likely would induce reliance by others would countenance a manifest injustice. Their search for a flexible doctrinal device to "do justice" in reliance cases led these early twentieth century jurists to principles of equity in general,[211] and equitable estoppel[212] in particular.[213]

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209. *See* Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 924-25 (1951).

210. *See* Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 373 (1969); Seavey, *supra* note 209, at 925 ("[O]ne who makes a promise intending not to keep it misrepresents his intent and, as in other cases of deceitful misrepresentation, it should not be a defense that the defendant succeeded in taking advantage of the plaintiff's credulity.").

211. Chancellors of courts of equity traditionally had acted as the "keeper of the king's conscience," and equity had long served to mitigate the sometimes harsh results that otherwise would flow from the strict application of statutes or common law rules. L. FRIEDMAN, *supra* note 204, at 22.

212. G. GILMORE, *supra* note 203, at 63-64. Equitable estoppel, or estoppel *in pais*, was a well-established outgrowth of the familiar equitable maxim that "he who has committed inequity shall not have equity." Annot., 56 A.L.R.3d 1037, 1040-41 (1974). Professor Pomeroy outlined the classic elements of equitable estoppel:

> 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.* 4. The conduct must be done with the intention, or at least with the *expectation*, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon . . . . 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse . . . .

3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 805, at 191-92 (5th ed. 1941) (emphasis in original). Scholars also have expressed the equitable estoppel test in terms of whether the promisor's conduct inducing reliance was "unconscionable." *See* L. VOLD, HANDBOOK OF THE LAW OF SALES § 15, at 93 & n.62 (2d ed. 1959).

213. As Professor Gilmore noted,

> [m]any judges . . . were not prepared to look with stony-eyed indifference on the plight of a plaintiff who had, to his detriment, relied on a defendant's assurances without the protection of a formal contract. However, the new doctrine [the bargain theory of consideration] precluded the judges of the 1900 crop from saying, as their predecessors would have said a half-century earlier, that the "detriment" itself was "consideration." They had to find a new solution, or at least, a new terminology. In such a situation the word that comes instinctively to the mind of any judge is, of course, "estoppel" . . . .

G. GILMORE, *supra* note 203, at 63-64.

By preventing a person "from denying or asserting anything to the contrary of that which by the person's own deeds, acts, or representations, has been set forward as the truth," equitable estoppel protected individuals relying on that party's representations.[214] Equitable estoppel in its original form, however, insufficiently protected reliance interests because of certain evidentiary requirements. Early statements of the doctrine required the plaintiff to prove that the defendant had actual fraudulent intent.[215] Although courts had reduced this requirement by the end of the nineteenth century and forced plaintiffs to prove only a misrepresentation that would "work a fraud" on them,[216] a more significant limitation remained. Traditionally, equitable estoppel applied only to misrepresentations of present or past *facts*.[217] Equitable estoppel, therefore, was theoretically inapplicable to cases in which the promisor's representations consisted solely of a promise of some future performance.[218] This "fact/promise" distinction was patently artificial[219] and undoubtedly produced unjust results.[220] Therefore, that "a rule of promissory estoppel would develop in recognition of the applicability of the estoppel principle to promises" was "inevitable."[221]

While Williston apparently was the first to use the designation "promissory estoppel,"[222] the historical origins of the doctrine lie

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214. Annot., 56 A.L.R.3d 1037, 1041 (1974).

215. *See* Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170, 174 n.21 (1967).

216. *See* Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281, 290 (1951).

217. *See, e.g.*, Henderson, *supra* note 210, at 376; Seavey, *supra* note 209, at 914.

218. *See, e.g.*, Bank of America v. Pacific Ready-Cut Homes, Inc., 122 Cal. App. 554, 562-63, 10 P.2d 478, 482 (Cal. Dist. Ct. App. 1932); Fiers v. Jacobson, 123 Mont. 242, 251, 211 P.2d 968, 972-73 (1949); *In re* Estate of Watson, 177 Misc. 308, 317, 30 N.Y.S.2d 577, 586-87 (Sup. Ct. 1941).

219. Promises concerning the future are difficult to distinguish from statements of present or past fact, since "every statement of the future includes some statement of present facts." *See* Seavey, *supra* note 209, at 922-23. The difficulty arises because "statements concerning the future and . . . promises [both] involve representations as to the present state of mind of the speaker." *Id.* at 914. As Lord Bowen noted: "[T]he state of a man's mind is as much of a fact as the state of his digestion." Edgington v. Fitzmaurise, 29 Ch. D. 459, 483 (1885).

220. Affording protection to promisees who rely on misrepresentations of fact while denying protection to promisees who rely on promises seems inherently unjust. *See* Seavey, *supra* note 209, at 914.

221. Henderson, *supra* note 210, at 376.

222. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 459 n.1 (1950) (citing 1 S. WILLISTON, THE LAW OF CONTRACTS § 139, at 308 (1st ed. 1920)).

in a much earlier series of cases. Dean Boyer's masterful article on the doctrine's origins[223] pointed to several classes of cases in which turn-of-the-century courts, by a variety of judicial devices—for instance, by finding non-existent "bargains"—protected the promisees' unbargained-for reliance, which they could not have protected by strict application of classical contract principles. Dean Boyer convincingly demonstrated that promissory estoppel principles afforded the clearest explanation for such judicial machinations.[224] Dean Boyer also found historical support for promissory estoppel principles in cases concerning gratuitous bailments,[225] gratuitous agency,[226] waivers,[227] rent reductions,[228] and promises of bonuses and pensions.[229] Finally, he found numerous cases purporting to apply the doctrine of equitable estoppel in instances in which the doctrine's traditional elements simply were not present.[230] The

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223. Boyer, *Promissory Estoppel: Principle From Precedents: Parts I & II,* 50 MICH. L. REV. 639, 873 (1952).

224. For example, Boyer noted that in charitable subscriptions cases many courts enforced promisors' pledges when charitable organizations acted in reliance upon the pledges. *Id.* at 644-46. While courts did this under a variety of guises, most often by trying to transform the parties' relationship into a "bargain" of some sort, no bargain actually existed in these cases under traditional contract principles. *Id.* at 646-49. In cases concerning oral promises to make gifts of land, numerous courts enforced such promises—despite the absence of bargained-for consideration and the promisor's failure to satisfy the Statute of Fraud's writing requirement—when the promisee (who was often the promisor's child) had taken possession and had made substantial improvements to the property. *See, e.g.,* Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); Evenson v. Aamodt, 153 Minn. 14, 189 N.W. 584 (1922); Seavey v. Drake, 62 N.H. 393, 394 (1882); Reid v. Reid, 115 Okla. 58, 241 P. 797 (1925). In such cases courts surmounted the absence of bargained-for consideration problem either by treating the promise as an executed gift or by finding that the promisee's expenditures in reliance amounted to "consideration" for the promisor's promise. *See* Boyer, *supra* note 223, at 657-62. In reliance situations courts circumvented the Statute of Frauds in the same way they did situations involving the equitable doctrine of part performance, which technically was applicable only to oral contracts to sell land and not to gratuitous oral promises to deliver title. *See id.* at 656.

225. *See, e.g.,* Coggs v. Bernard, 92 Eng. Rep. 107 (1703); Wheatley v. Low, 79 Eng. Rep. 578 (1623); *see generally* Boyer, *supra* note 223, at 665-74.

226. *See, e.g.,* Maddock v. Riggs, 106 Kan. 808, 190 P. 12 (1920); Barile v. Wright, 256 N.Y. 1, 175 N.E. 351, 245 N.Y.S. 899 (1931); Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921); *see generally* Boyer, *supra* note 223, at 873-83.

227. *See, e.g.,* Zarthar v. Saliba, 282 Mass. 558, 185 N.E. 367 (1933); Parish Mfg. Corp. v. Martin-Parry Corp., 293 Pa. 422, 143 A. 103 (1928); *see generally* Boyer, *supra* note 223, at 888-92.

228. *See, e.g.,* William Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650 (1934); *see generally* Boyer, *supra* note 223, at 892-98.

229. *See, e.g.,* Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 A. 571 (1932), *rev'd on other grounds,* 318 Pa. 490, 178 A. 490 (1935); *see generally* Boyer, *supra* note 223, at 883-88.

230. *See, e.g.,* Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898).

California Supreme Court significantly advanced this tendency to broaden the application of equitable estoppel when in *Seymour v. Oelrichs*[231] the court barred an employer-promisor's Statute of Frauds defense to a ten-year oral employment contract because of the employer's oral promise to reduce the contract to written form.

Additional support for the promissory estoppel principle came in a series of cases that the New York Court of Appeals decided during Justice Cardozo's tenure. In these cases the court took an "expansive" view of contract;[232] the court found "consideration" when none really existed under "bargain" principles,[233] supplied missing contractual terms,[234] implied promises in the absence of express promises,[235] and enforced charitable pledges in part on promissory estoppel grounds.[236] In each of these cases the court protected the reliance interests of promisees in situations in which strict application of classical contract principles would operate to deny recovery.

The widespread *de facto* and *de jure* recognition of promissory estoppel motivated the authors of the *Restatement of Contracts* to grant the doctrine formal recognition in section 90:[237] "A promise which the promisor should reasonably expect to induce action or forhearance 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."[238] The language of section 90 represents a clear departure from the traditional elements of equitable estoppel.[239] A promisee's reliance on a "promise" triggers the operation of section 90 without the promisee showing any misrepresentation of fact.[240] Nonetheless, the section covers only promises likely to induce reli-

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231. 155 Cal. 782, 106 P. 88 (1909). For a discussion of the case, see *infra* notes 356-61 and accompanying text.

232. See G. GILMORE, *supra* note 203, at 62, for a discussion of these cases.

233. *See, e.g.*, De Cicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807 (1917).

234. *See, e.g.*, Cohen & Sons, Inc. v. Lurie Woolen Co., 232 N.Y. 112, 133 N.E. 370 (1921).

235. *See, e.g.*, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

236. *See, e.g.*, Allegheny College v. National Chautauqua Bank, 246 N.Y. 369, 159 N.E. 173 (1927).

237. See G. GILMORE, *supra* note 203, at 63-64, for an account of the incorporation of § 90 into the *Restatement*. Gilmore contends that Professor Corbin essentially forced the other authors to include § 90 by citing the numerous cases in which the courts imposed promissory liability in the absence of bargained-for consideration. *Id.*

238. RESTATEMENT OF CONTRACTS § 90 (1932).

239. *See supra* note 212.

240. *See supra* notes 217-20 and accompanying text.

ance of a "definite and suhstantial character." Courts determine the definiteness and substantiality of reliance from the viewpoint of the promisor's reasonable expectations at the time the promise was made.[241] Whether, given the circumstances then known to him, the promisor reasonably should have expected the promise to induce significant reliance is the issue for the court's determination. While this objective test focuses on the promisor, section 90 analysis also inherently involves an inquiry into the reasonableness of the promisee's reliance.[242] Even given the existence of such a promise, section 90 only applies when the promisor's statements result in significant reliance. Furthermore, the reasonableness inquiry necessarily includes a judgment about the fairness of the result the promisee seeks.[243] The section specifically articulates this latter consideration in its insistence that enforcement of a promise is proper only when "injustice" would result from nonenforcement. While this element expressly focuses only on the effect that nonenforcement will have on the promisee,[244] the court impliedly considers the promisor's position in determining whether his promise was likely to induce substantial reliance by the promisee.[245]

Express recognition of the promissory estoppel principle in section 90, however, was not sufficient to effect an immediate incorporation of the newly articulated doctrine into the general body of law. For example, a few relatively recent cases exist in which the court required proof of elements properly associated with equitable estoppel before applying promissory estoppel principles.[246] Some of these cases may result from judicial confusion[247] or conserva-

241. *See* Boyer, *supra* note 222, at 461.

242. Plainly, the courts rarely, if ever, would hold a promisor to "reasonably expect" unreasonable reliance by his promisee. A comment to the *Restatement (Second)* version of § 90 notes that "the reasonableness of the promisee's reliance" is a facter for courts to consider in determining whether enforcement of the promisor's promise is necessary "to avoid injustice." RESTATEMENT (SECOND) OF CONTRACTS § 90 comment b (1981).

243. *See* Boyer, *supra* note 222, at 475. A court is unlikely to believe that enforcement of a promise is necessary to avoid injustice if the reliance upon it has been insubstantial. *Id.*

244. *See id.* at 485.

245. *See supra* note 241 and accompanying text. Arguably, a court could justify any hardship that it imposed on the promisor by enforcing his promise since the promisor should have foreseen the promisee's reliance. *See* Boyer, *supra* note 222, at 461-62, 485.

246. *See, e.g.*, Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 232 N.W.2d 921 (1975); Skillman v. Lynch, 74 S.D. 212, 50 N.W.2d 641 (1951); *see also* Henderson, *supra* note 210, at 377 n.192 (collecting cases).

247. *See* Note, *Estoppel and the Statute of Frauds*, 26 KAN. L. REV. 327, 329-30 (1978) ("The two doctrines [equitable and promissory esteppel] are . . . so similar that many courts fail to distinguish adequately between them, and some use the terms interchangeably.").

tism,[248] but many undoubtedly reflect legitimate judicial concerns about the potential effects of the doctrine's application. After all, in classical contract doctrine, gratuitous promises were among those least deserving of judicial protection.[249] Some of the judicial resistance that promissory estoppel has encountered may stem from judicial doubts concerning the reasonableness of unbargained-for reliance in bargain situations.[250]

This latter concern for the unbridled use of the reliance doctrine in bargain contexts played at least a *sub rosa* role in the first major restraint that the courts imposed on the application of section 90—the inapplicability of the section to cases involving "commercial" (bargained for) promises. Judge Learned Hand's 1933 opinion in *James Baird Co. v. Gimbel Brothers, Inc.*[251] firmly established this restraint for the next quarter-century. Judge Hand concluded that promissory estoppel did not apply to promises or offers contemplating a bargained-for exchange; such promises would become enforceable only when the promisee gave the bargained-for consideration. Promissory estoppel, he reasoned, would not apply in such situations because it applied only to purely "donative" promises for which the promisor never had anticipated receiving any exchange of consideration.[252]

While this restricted view of promissory estoppel found historical support in the gratuitous promise cases in which courts first applied the doctrine's principles[253] and in the knowledge that such cases were apparently the sole concern of the authors of the *Restatement* when they drafted section 90,[254] several considerations conspired to extend promissory estoppel beyond its role as a "con-

248. "The failure of the courts to adequately distinguish promissory estoppel from either equitable estoppel or part performance is due to the fact that equitable estoppel and part performance are much more established in the law, and courts are loath to establish new exceptions." Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114, 120 n.53 (1975).

249. *See* Henderson, *supra* note 210, at 346.

250. *See id.* at 360.

251. 64 F.2d 344 (2d Cir. 1933). The *James Baird* case concerned a subcontractor-defendant seeking to revoke its bid to supply materials for a construction project on the grounds of an alleged mistake after the plaintiff general contractor relied upon the subcontractor's bid by incorporating it into the general contractor's own bid on the prime contract. For a more complete discussion of *James Baird*, see *Boyer*, *supra* note 222, at 491-93.

252. 64 F.2d at 346.

253. *See supra* notes 224-29 and accompanying text.

254. *See* Henderson, *supra* note 210, at 345 ("The proceedings leading to the drafting of Section 90 . . . evidence concern solely with justifiable detrimental reliance on promises for which no agreed equivalent has been asked or tendered.").

sideration substitute" in donative promise cases.[255] Section 90's language[256] did not—either expressly[257] or implicitly[258]—bar the principle's application in the bargain context. Furthermore, and perhaps most importantly, injustice was as predictable a consequence of reliance in the bargain context as it was in situations concerning donative promises.[259] These factors, and the inherently expansionist nature of the reliance principle,[260] combined to make the eventual extension of promissory estoppel into the bargain context a foregone conclusion. Promissory estoppel finally entered into the bargain context in another subcontractor bid case, *Drennan v. Star Paving Co.*[261] In *Drennan,* Chief Justice Traynor bridged the gap between the donative promise and bargain realms by first implying a promise on a subcontractor's part not to revoke its bid due to the general contractor's foreseeable and unavoidable reliance on it, and then by invoking section 90 to prevent the revocation of this implied subsidiary promise.[262] The result in *Drennan* since has gained general acceptance in the courts[263] and received the official sanction of the *Restatement (Second).*[264]

Another major source of judicial resistance to promissory es-

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255. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 6-7; *see also* Note, *Promissory Estoppel and the Statute of Frauds in California,* 66 CALIF. L. REV. 1219, 1222-23 (1978).

256. *See supra* note 238 and accompanying text.

257. *See* Boyer, *supra* note 222, at 492.

258. *See id.; see also* Note, *Promissory Estoppel, Equitable Estoppel and the Farmer as a Merchant: The 1973 Grain Cases and the U.C.C. Statute of Frauds,* 1977 UTAH L. REV. 59, 82 ("To say that reliance *can* serve as a basis for enforcing gratuiteus promises does not exclude the use of reliance to enforce promises in other contexts.").

259. "Injustice can result where a gratuitous promise is given in connection with a commercial transaction as easily as it can in the instance of a charitable subscription." Boyer, *supra* note 222, at 492-93.

260. Observers have argued that the reliance principle and the bargain theory of consideration are not only inherently contradictory, but also ultimately may be mutually exclusive. *See* G. GILMORE, *supra* note 203, at 61 ("The one thing that is clear is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up.").

261. 51 Cal. 2d 409, 333 P.2d 757 (1958). A few cases prior to *Drennan* departed from the *James Baird* rule, but without the influential effect of Justice Traynor's decision in *Drennan. See, e.g.,* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Northwestern Eng'g Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943).

262. 51 Cal. 2d at 414, 333 P.2d at 760. For a fuller analysis of *Drennan,* see Henderson, *supra* note 210, at 355-56.

263. *See, e.g.,* Lyon Metal Prods., Inc. v. Hagerman Constr. Corp., 391 N.E.2d 1152, 1154-55 (Ind. Ct. App. 1979); E.A. Coronis Assocs. v. M. Gordon Coustr. Co., 90 N.J. Super. 69, 216 A.2d 246 (N.J. Super. Ct. App. Div. 1966); *see also* Note, *supra* note 208, at 713 (Promissory esteppel "bas grown from a rule which originally was thought to cover only purely gratuitous promises to a rule potentially applicable in commercial dealings.").

264. *See* RESTATEMENT (SECOND) OF CONTRACTS § 87(2) & illustration 6 (1981).

toppel stemmed from the fear that, in some cases, the doctrine might work an unfair hardship on promisors.[265] This fear largely is due to the uncertainty in determining the proper measure of damages in promissory estoppel cases. Courts generally agree that promissory estoppel will not support recovery when *quantum meruit* recovery of a promisee's restitution interest alone[266] would prevent injustice. The justification for this stance is attributable to the traditional rule that equitable relief is available only when no adequate remedy at law exists[267] and to the notion that no further enforcement of a promisor's promise is necessary to avoid injustice if the court fairly can place the promisee in *status quo*.[268] Often, however, a restitutionary recovery will be inadequate because the value to the promisor of the promisee's reliance will be significantly less than the promisee's losses resulting from his reliance.[269] In such situations courts generally fully enforce the promisor's promise and award expectation damages,[270] even though the *raison d'etre* of promissory estoppel is to protect promisees' reliance interests.[271] Section 90, which makes promises that meet its criteria "binding" and tries to avoid injustice through the "enforcement of the promise,"[272]predictably supports the award of expectation damages. Fully enforcing the promisor's promise also is consonant with the traditional view that promissory estoppel is essentially contractual in nature, serving to provide the missing elements needed to create a binding contract.[273] Traditionally, courts view

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265. *See* Boyer, *supra* note 222, at 489; Note, *supra* note 255, at 1245; *infra* notes 278-81 and accompanying text.

266. A promisee's restitution interest is equal to the value his reliance has conferred upon the promisor. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 53-54 (1936).

267. *See* Note, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590, 601 (1965).

268. *See* Boyer, *supra* note 222, at 485.

269. *See id.* at 486.

270. Expectation damages attempt to put plaintiffs in the position that they would be in if the defaulting party had performed the contract. *See* Fuller & Perdue, *supra* note 266, at 54.

271. A promisee's reliance interest equals the value of his actual change in position in anticipation of the promisor's performance. The objective that granting a reliance-based recovery serves is to return the promisee to the position he was in before the promisor made his promise. *Id.*

272. *See supra* note 238 and accompanying text.

273. *See, e.g.*, Note, *supra* note 248, at 126 (Promissory estoppel's role as a "consideration substitute" theoretically justifies an expectation award.). Williston apparently believed that an expectation award was the only proper measure of recovery in promissory estoppel cases. *See* Fuller & Perdue, *supra* note 266, at 64 & n.14.

reliance damages as a creature of tort law[274] while they view restitutionary or expectation awards as contractual remedies.[275] Finally, in some cases a reliance-based award would not compensate adequately the promisee for his injuries,[276] while full enforcement of the promisor's promise "satisfies the expectations which have been aroused justifiably."[277]

The "all or nothing" approach to damages in promissory estoppel cases—granting full expectation recovery to promisees at one end of the spectrum while restricting promisees at the other end to a restitutionary recovery—undoubtedly can produce unjust results.[278] For example, if the value of the promisor's full performance greatly exceeds the promisee's reliance losses, then injustice will result since the promisor experiences more harm from full enforcement than the promisee encounters from non-enforcement.[279] This potential for injustice suggests that a reliance-based recovery may be more appropriate in some promissory estoppel cases;[280] several courts that have disregarded the traditional damage theory employ such a situation-sensitive approach.[281]

The conceptual difficulties associated with awarding full expectation damages in promissory estoppel cases are especially apparent in the recent and highly controversial extension of promissory estoppel into the context of contract negotiations. Traditionally, courts would enforce only genuine promises by using promissory estoppel principles.[282] Indefinite[283] or illusory[284] promises, scholars felt, were improper subjects for the doctrine's

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274. *See* Fuller & Perdue, *supra* note 266, at 90 n.61. Fuller and Perdue conclude, however, that reliance always has been an element of contract damages. *Id.* at 89-96.

275. *See id.*; *see also* Note, *supra* note 255, at 1245.

276. *See* Note, *supra* note 248, at 128-29.

277. Boyer, *supra* note 223, at 664.

278. *See* Boyer, *supra* note 222, at 487.

279. *See id.* at 489.

280. *See id.* at 497.

281. For example, the Wisconsin Supreme Court has concluded that "[w]here damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should only be such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule-of-thumb approaches to the damage problem should be avoided." Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 701, 133 N.W.2d 267, 276 (1965); *see also* Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965).

282. *See* Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735 (1955); *see also* Henderson, *supra* note 210, at 361.

283. *See, e.g.*, Perlin v. Board of Educ., 86 Ill. App. 3d 108, 114, 407 N.E.2d 792, 798 (1980); Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 479, 395 A.2d 222, 230 (N.J. Super. Ct. App. Div. 1978); Boddy v. Gray, 497 S.W.2d 600 (Tex. Civ. App. 1973).

284. *See, e.g.*, 1A A. CORBIN, CORBIN ON CONTRACTS § 201 (1963) (Section 90 does not

application because a promise capable of enforcement did not exist in either situation. Clearly, application of promissory estoppel principles to such cases would depart from promissory estoppel's more traditional "consideration substitute" role. Furthermore, such an extension of the doctrine would be inconsistent with the traditional principles of offer and acceptance. The primary thrust of these principles is "to guarantee parties seeking an exchange extensive freedom to express, or to refuse to express, a willingness to be bound,"[285] and "to insure that, in most instances, obligation attaches only when it has been deliberately undertaken."[286] Nonetheless, given the tendency of twentieth century jurists to seek "just" results,[287] the general trend "toward a fuller and wider securing of interests and hence toward a wider and fuller enforcement of promises,"[288] and the ease of application of the broadly formulated reliance principle of section 90,[289] that courts ultimately applied promissory estoppel principles in the negotiation context is not surprising.

The most famous example[290] of promissory estoppel's extension into the area of contract negotiations is the Wisconsin Su-

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apply to illusory promises since reliance can not transform such a promise into a true promise.).

285. Henderson, *supra* note 210, at 357.

286. *Id.* at 358.

287. *See supra* notes 207-13 and accompanying text.

288. *See* Pound, *Consideration in Equity*, 13 ILL. L. REV. 667, 679 (1918).

289. *See* Henderson, *supra* note 210, at 353-54. Professor Henderson notes that

> [b]ecause of the flexibility which results from the generalized phrasing of the doctrine, many courts have apparently concluded that cases can be decided more easily by the use of promissory estoppel than by consideration rules. . . . The broad language of Section 90 also enables courts to avoid struggling with the more unintelligible aspects of consideration doctrine, such as the so-called requirement of 'mutuality of obligation.'

Id.

290. For another example of the doctrine's extension into the negotiation context, see Wheeler v. White, 385 S.W.2d 619 (Tex. Civ. App. 1964), *rev'd*, 398 S.W.2d 93 (Tex. 1965). In *Wheeler* the court allowed a plaintiff, who tore down an existing rental property in reliance upon the defendant's promise either to secure financing for improvements upon the plaintiff's real property or to provide the financing himself if none was availablo from third parties, to recover damages based on his reliance losses. The court based its decision on promissory estoppel despite the defendant's argument that the plaintiff's promise was too indefinite to be enforceable—an argument that both the trial court and the intermediate appellate court had accepted. *See also* Associated Tabulating Servs., Inc. v. Olympic Life Ins. Co., 414 F.2d 1306, 1310-11 (5th Cir. 1969); Hunter v. Hayes, 533 P.2d 952, 953 (Colo. Ct. App. 1975); Mooney v. Craddock, 35 Colo. App. 20, 25-26, 530 P.2d 1302, 1305 (Colo. Ct. App. 1974).

preme Court's *Hoffman v. Red Owl Stores, Inc.*[291] decision. The plaintiff in *Hoffman* sought a Red Owl franchise store and, in reliance on the defendant's promise that it ultimately would grant a franchise, sold his bakery at a loss, bought a small grocery to gain experience in the grocery business, moved his family, and bought an option on a site for the franchised store. The parties never consummated the proposed deal. When Hoffman filed suit Red Owl argued that no contract existed between the parties because the parties never reached agreement on the essential terms governing the proposed franchise relationship. The Wisconsin Supreme Court concurred with Red Owl's argument that the parties had not created a contract in the traditional sense of the term, but allowed Hoffman to recover a reliance-based award[292] under the theory of promissory estoppel. In the process, the court observed that "it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach-of-contract action,"[293] and noted that nothing in the language of section 90 required a promise serving as the basis of promissory estoppel to be "so comprehensive in scope as to meet the requirements of an offer."[294]

The above-quoted language from *Hoffman* certainly suggests that promissory estoppel may be evolving into a theory of recovery independent of contract[295]—a proposition with profound implications for rules of form such as the parol evidence rule.[296] Numerous observers have argued that the reliance principle properly resides outside the framework of contract; these observers have characterized it as a creature of tort law,[297] as a separate theory of recovery distinct from tort or contract,[298] as a hybrid between tort and con-

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291. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). For more extensive discussions of *Hoffman*, see Henderson, *supra* note 210, at 358-60, and Note, *Contracts: Reliance Losses: Promissory Estoppel as a Basis of Recovery of Breach for Agreement to Agree*, Hoffman v. Red Owl Stores, Inc., 51 CORNELL L.Q. 351 (1966).

292. *See supra* note 281.

293. 26 Wis. 2d at 698, 133 N.W.2d at 275.

294. *Id.*

295. *See* Henderson, *supra* note 210, at 359. Henderson, however, later concludes that promissory estoppel is contractual in nature. *Id.* at 378.

296. *See infra* noto 434 and accompanying text.

297. Professor Seavey notes that

> [e]stoppel is basically a tort doctrine and the rationale of . . . [§ 90] is that justice requires the defendant to pay for the harm caused by foreseeable reliance upon the performance of his promise. The wrong is not primarily in depriving the plaintiff of his promised reward but in causing the plaintiff to change position to his detriment.

Seavey, *supra* note 209, at 926.

298. *See* Beale, *Gratuitous Undertakings*, 5 HARV. L. REV. 222, 225 (1891); Note, *Promissory Estoppel—The Basis of a Cause of Action Which is Neither Contract, Tort or*

tract,[299] and as an "anti-contract"[300] doctrine that "may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation."[301] Other *Hoffman* explanations, however, continue to place the promissory estoppel doctrine within the traditional contract framework. Arguably, *Hoffman* merely allows the reliance that promissory estoppel protects to "substitute for" the offer and acceptance which traditional contract theory requires, in the same way that reliance substituted for consideration in the early donative promise cases.[302] Some commentators have asserted that *Hoffman* represents an extension of the concept of "good faith"[303] beyond the performance and enforcement areas and into the context of contract negotiations.[304] Allowing promissory estoppel to impose liability in the absence of the definite expressions of mutual intent to contract, which have been the *sine qua non* of classical contract liability, however, weakens the argument that the situation involves contract law in the traditional sense of that term.[305] Furthermore, support for the proposition that promissory estoppel is evolving into a non-contractual theory of recovery appears in several post-*Hoffman* cases that seem to treat estoppel as a basis of liability independent of

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Quasi-Contract, 40 MO. L. REV. 163 (1975).

299. *See* Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 942 (1937).

300. *See* G. GILMORE, *supra* note 203, at 61.

301. *Id.* at 90.

302. *See* Metzger & Phillips, *supra* note 207, at 173. Of course, since the application of promissory esteppel to donative promise cases dispenses with the element of bargain, even this limited application of promissory estoppel is a departure from traditional contract doctrine. *See* Annot., 115 A.L.R. 152, 154 (1938).

303. Authorities have recognized expressly the "good faith" requirement in § 1-203 of the Uniform Commercial Code and in § 205 of the *Restatement (Second) of Contracts*. Both of these provisions, however, concern good faith in the performance or enforcement of contracts; the provisions do not consider expressly good faith in contract formation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 comment c (1981).

304. *See* Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 223 (1968); *see also* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 811 (1941).

305. *See* Metzger & Phillips, *supra* note 207, at 186. For a case in which promissory estoppel serves as a substitute for a proper acceptance, see N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 738-40 (D.C. Cir. 1963).

contract law[306] and in the nontraditional approach to damages that some promissory estoppel cases[307] and the *Restatement (Second) of Contracts*[308]take.

Regardless of the outcome on the independent theory debate, two observations about the promissory estoppel doctrine seem undeniable. First, promissory estoppel has developed well beyond its origins and, in doing so, has gone well beyond classical contract theory. Second, the expansionist nature of the reliance principle and the general tendency of modern courts to seek "just" results suggest that further expansions of the promissory estoppel principle are likely. The *Restatement (Second) of Contracts* certainly has encouraged wider acceptance of the various applications of promissory estoppel. The new version of section 90,[309] for example, deletes the requirement that the reliance be of a "definite and substantial character."[310] Instead, a comment to the new section 90 expressly directs courts to consider, among other things, the reasonableness of the promisee's reliance,[311] its substantiality in relation to the remedy he seeks, the formality surrounding the promise's formation, and the extant evidence of the promise's existence

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306. *See, e.g.*, Debron Corp. v. National Homes Constr. Corp., 493 F.2d 352 (8th Cir. 1974). In *Debron* a contractor's acceptance varied the terms of a subcontractor's bid. The contractor voluntarily dismissed the contract portion of its claim before trial and the court allowed it to proceed solely on its estoppel claim. The court held that promissory estoppel could serve as the basis for a separate cause of action in which proof of all of the elements required in a breach of contract action would be unnecessary. *See id.* at 357; *see also* Allen v. A.G. Edwards & Sons, Inc., 606 F.2d 84, 87 (5th Cir. 1979); Northwestern Bank of Commerce v. Employers' Life Ins. Co. of Am., 281 N.W.2d 164 (Minn. 1979).

307. *See supra* note 281 and accompanying text.

308. *See infra* notes 315-17 and accompanying text. Nonetheless, the drafters of the *Restatement (Second)* apparently still view promissory estoppel as a contract law doctrine. The drafters include § 90 under the heading "Contracts Without Consideration," and a comment to the section notes that "[a] promise binding under this section is a contract . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d (1981).

309. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) provides:

> (1) A promise which the promisor should reasonably expect to induce action to 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.

Id. For a complete discussion of this new version of § 90, see generally Knapp, *supra* note 5.

310. *See supra* note 238 and accompanying text. One authority suggests that the drafters deleted this language to accommodate partial enforcement of promises in promissory estoppel cases. *See* Knapp, *supra* note 5, at 58.

311. This concern about the reasonableness of the promisee's reliance was already an inherent part of the original section's requirement that the promisor foresee the likelihood of definite and substantial reliance upon his promise. *See supra* note 242 and accompanying text.

in deciding whether to grant enforcement.[312] In addition, the new section 90 adds no requirement that the promise inducing reliance be so definite as to be enforceable as a contract, despite the stir that *Hoffman v. Red Owl Stores* created.[313] Indeed, an illustration accompanying the new section expressly sanctions the *Hoffman* result.[314] More importantly, by expressly stating that the remedy under the section "may be limited as justice requires,"[315] the drafters specifically have sanctioned an award of reliance-based damages in promissory estoppel cases when such an award is necessary to avoid injustice to promisors.[316] The drafters thus have removed a significant stumbling block to broader judicial acceptance of the reliance principle.[317]

IV. Promissory Estoppel and the Statute of Frauds

A. *The Statute of Frauds*

The British Parliament passed the original Statute of Frauds[318] when the law of contract was in its infancy[319] and when a primitive law of evidence excluded the testimony of persons with an interest in the outcome of the case.[320] Since the evidentiary rule prevented even parties to the case from testifying, a significant danger existed that the courts would impose contract liability on defendants for contractual obligations to which they never had assented.[321] That courts of the era had minimal control over jury verdicts and jurors were free to disregard the evidence and rule in accordance with their own knowledge of the facts exacerbated this danger.[322] Thus, Parliament sought to achieve two goals when it passed the original Statute in 1677:[323] the protection of defendants

312. *See* Restatement (Second) of Contracts § 90 comment b (1981).

313. *See supra* notes 291-304 and accompanying text.

314. *See* Restatement (Second) of Contracts § 90 comment d, illustration 10 (1981).

315. *See supra* note 309.

316. *See supra* notes 278-79 and accompanying text. A comment to the section, however, indicates that while "relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance," "full-scale enforcement by normal remedies is often appropriate." Restatement (Second) of Contracts § 90 comment d (1981).

317. *See supra* note 265 and accompanying text.

318. An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, ch.3.

319. Summers, *supra* note 208, at 441.

320. 6 W. Holdsworth, A History of English Law 387-89 (1924).

321. Summers, *supra* note 208, at 441; *see also* Willis, *The Statute of Frauds—A Legal Anachronism*, 3 Ind. L.J. 427, 430 (1928).

322. 6 W. Holdsworth, *supra* note 320, at 388.

323. *See generally* Costigan, *The Date and Authorship of the Statute of Frauds*, 26

from perjured testimony[324] and the placement of a "curb [on] the power of the juries."[325] The means that Parliament chose to attain these ends was a writing requirement for certain classes of contractual obligations.[326]

Almost from its inception, scholars have subjected the Statute to virulent criticism. These detractors have argued that the Statute generates as many "frauds and perjuries" as it prevents.[327] They also have castigated the Statute as the source of endless litigation.[328] Commentators also frequently suggest that modern developments in the law of contracts[329] and evidence,[330] when combined with the substantial control that modern courts can exercise over jury verdicts,[331] have eclipsed the major reasons for the Statute's enactment and have rendered it a proper subject for repeal.[332]

The most telling complaints about the Statute's operation, however, have focused on its potential for working injustice. The parties to an oral agreement within the ambit of the Statute may be ignorant of the Statute's existence or of its relevance to their transaction.[333] Their consequent failure to reduce their agreement

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HARV. L. REV. 329 (1913) (noting the uncertainty surrounding the authorship and the date of enactment of the Statute). For an amusing account of one of the early cases that reputedly moved Parliament to take action, see J. WHITE & R. SUMMERS, *supra* note 27, § 2-1.

324. *See* Summers, *supra* note 208, at 441.

325. *See id.* at 458; *see also* Costigan, *supra* note 323, at 343.

326. The most important types of obligations requiring written evidence were contracts concerning an interest in land (except leases not exceeding three years in length), promises by an executor or administrator to answer for a decedent's debts out of his personal estate, promises by persons to pay for the debts of another, contracts made on consideration of marriage, bilateral contracts not capable of execution within one year of their making, and contracts for the sale of goods of a value exceeding ten pounds. *See generally* 6 W. HOLDSWORTH, *supra* note 320, at 384-87.

327. *See, e.g.*, Child v. Godolphin, 21 Eng. Rep. 181 (1723); Stephen & Pollock, *Section Seventeen of the Statute of Frauds*, 1 L.Q. REV. 1 (1885); Sunderland, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916).

328. "There is no other statute that has been the source of so much litigation." J. SMITH, THE LAW OF FRAUDS 327 (1907).

329. *See* Willis, *supra* note 321, at 431.

330. Some authorities have characterized § 17 of the original Statute [the sale of goods provision] as "a relic of times when the best evidence on such subjects was excluded on a principle now exploded." Stephen & Pollock, *supra* note 327, at 6.

331. Professor Willis notes that "with the control exercised by the courts over juries in modern times the danger that juries will hold people liable on promises they never made is better protected by such court control than by a Statute of Frauds." Willis, *supra* note 321, at 430. *Cf. supra* notes 169-73 and accompanying text (parol evidence context).

332. Justice Stephen, speaking of the sale of goods provision of the original Statute, observed that "it should be thrown out of the window . . . the 17th section should be repealed, and the cases upon it be consigned to oblivion." Stephen & Pollock, *supra* note 327, at 5.

333. Justice Stephen noted that, despite the Statute's long tenure, "[i]n the great

to written form, therefore, may operate to preclude proof of the bona fide agreement that they actually made.[334] Indeed, defendants in modern times use the Statute to defend against agreements that they voluntarily assumed much more frequently than they use it to disprove fictitious agreements that perjurious plaintiffs fabricate.[335] These negative effects of the Statute have generated suggestions that the Statute's writing requirement is ill-suited to its avowed purpose of preventing fraud[336] and that courts should utilize other, more satisfactory, devices in grappling with the evidentiary problems inherent in oral agreements.[337]

The Statute, while it retains considerable vitality, has not emerged unscathed in the face of such continuing criticism. Recent versions of the Statute, in particular section 2-201 of the Uniform Commercial Code, have made significant attempts at reducing its potential for fraud,[338] and courts have reacted to the Statute's potential for injustice by carving out numerous "exceptions" to its operation[339] under the guise of statutory "interpretation." Such ju-

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mass of cases the contracting party is as unconscious of the existence of the Statute of Frauds as of the pressure of the atmosphere." *Id.* at 3.

334. *See* Willis, *supra* note 321, at 539; *see also* Stephen & Pollock, *supra* note 327, at 3.

335. Professors White and Summers note that

> [t]he possibility that plaintiffs [might] conjure up forged writings and perjured oral contracts out of whole cloth is unreal. These plaintiffs would be most unlikely to survive cross-examination, motions for directed verdict, and a jury's own scrutiny. But the possibility that defendants might get out of actual contracts simply for lack of a signed writing is not unreal at all.

J. WHITE & R. SUMMERS, *supra* note 27, § 2-8, at 74; *see also* Note, *supra* note 267, at 591. For a classic judicial response to such a use of the Statute, see Chief Judge Campbell's statement in Sivewright v. Archibald, 20 L.J.Q.B. (n.s.) 529, 536 (1851):

> I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgement, although the merits are entirely against him; although, believing that he had broke his contract, he could only have defended the action in the hope of mitigating the damages, and although he was not aware of the objection on which he now relies till within a few days before the trial.

336. "A true 'means to an end' surely should not serve commonly as a means to disserve that end . . . . Yet, centuries of experience and tons of case law testify that a statute of frauds can be an instrument of perjury and fraud." J. WHITE & R. SUMMERS, *supra* note 27, § 2-8, at 74.

337. *See, e.g.*, Summers, *supra* note 208, at 464 (hold plaintiffs seeking to prove the existence of oral contracts to the "beyond a reasonable doubt" standard of proof); Note, *supra* note 267, at 609 (require defendants to deny the existence of an oral contract under oath as a precondition of raising the Statute as a defense).

338. Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 829 (1950). For a detailed exposition of this aspect of § 2-201, see Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL. L. REV. 63, 69-74 (1980-1981).

339. These exceptions include the part performance doctrine, quasi-contract, fraud,

dicial incursions on the Statute's province have been so substantial that one legal historian claimed that "[i]n one sense, the statute of frauds [is] hardly a statute at all. It [is] so heavily warped by 'interpretation' that it [has] become little more than a set of common-law rules, worked out in great detail by the common-law courts."[340] The courts also have engaged in some rather questionable feats of judicial legerdemain when strict construction of the Statute would produce injustice.[341] Given this history of judicial circumvention of the strictures of the Statute and the inexorable advance of the doctrine of promissory estoppel,[342] courts' incorporation of promissory estoppel into the judicial arsenal of devices designed to circumvent the Statute was inevitable.

B. Promissory Estoppel and the Statute of Frauds

The equitable doctrine of part performance was the first judicially-created exception that courts employed to circumvent the Statute of Frauds' operation.[343] This initial equitable intrusion into the Statute's domain was consistent with equity's traditional role of preventing the harsh operation of statutes.[344] Courts of equity also commonly enforced oral contracts that were within the scope of the Statute in cases involving outright fraud on the theory that the supreme duty of equity was to prevent fraud.[345] When cases arose that did not involve fraud, but in which denial of an oral

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the imposition of constructive trusts, the "joint obligor" rule, the "main purpose" rule, equitable estoppel, and promissory estoppel. *See* Note, *supra* note 248, at 115-16.

340. L. FRIEDMAN, *supra* note 204, at 246-47.

341. *See, e.g.*, Summers, *supra* note 208, at 442. Summers notes that

> [h]ow many unjust suits have been prevented as a result of the statute cannot be estimated, but the reports are filled with cases where just claims have been defeated by its operation. This has resulted in a distorting of the statute, in order to prevent injustice, into the most inconceivable meanings, so that cases might be ruled to fall without its provisions.

Id.

342. *See supra* notes 203-317 and accompanying text.

343. *See* Costigan, *supra* note 323, at 344. According to Professor Costigan,

> [t]he statute's framers were thoroughly familiar with the part-performance problem, and the decisions which shortly after the passage of the Statute of Frauds settled the law that part-performance would make the oral contract for the sale of land enforceable in chancery, notwithstanding the statute, are conclusive evidence that its framers never intended the statute to prevent the giving of equitable relief in the part-performance cases.

344. *Id. See* Summers, *supra* note 208, at 447.

345. *See, e.g.*, Wakeman v. Dodd, 27 N.J. Eq. 564 (1876). In such cases courts justified the circumvention of the Statute by arguing: "relief is afforded in equity because of the fraud, and not by virtue of the contract." *Id.* at 565 (dictum).

promise's enforceability because of its failure to comply with the Statute's writing requirement would impose severe hardships on the promisee, equity courts began to employ the doctrine of equitable estoppel[346] to defeat the Statute. Courts justified equitable estoppel's use in Statute of Frauds cases by noting that "the invocation of the statute would allow the perpetration of a moral fraud,"[347] and that the prevention of such an inequitable use of the Statute would "be an aid in the ultimate function of the statute in preventing fraud."[348]

Equitable estoppel's utility as a device for protecting a promisee's reliance interests stemming from promises within the scope of the Statute suffered because of the doctrine's application only to misrepresentations of fact.[349] This limitation confined early applications of estoppel in the Statute of Frauds context to situations in which the promisor either had made misrepresentations concerning facts that would obviate the need for a writing,[350] or had represented that the promisor had executed a writing sufficient to satisfy the Statute.[351] The artificiality of the fact/promise distinction[352] and the manifest injustice that often flowed from its operation[353] eventually would cause courts to apply the emerging doctrine of promissory estoppel to Statute of Frauds cases.

At the turn of the century Statute of Frauds cases began to appear in which courts that purported to apply equitable estoppel[354] deviated significantly from that doctrine's traditional elements.[355] Perhaps the most important of these cases was the California Supreme Court's decision in *Seymour v. Oelrichs*.[356]

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346. See *supra* notes 212-14 and accompanying text for a discussion of equitable estoppel.

347. *See* Summers, *supra* note 208, at 446.

348. *Id.* at 447. Summers and others have argued that the part-performance doctrine, in reality, was nothing more than a limited variant of equitable estoppel. *Id.* The two doctrines clearly overlap and numerous examples exist of judicial confusion concerning their proper application. *See* Note, *supra* note 216, at 282-83 & nn.11-15.

349. *See supra* notes 217-18 and accompanying text.

350. *See* Note, *supra* note 267, at 595.

351. *See* Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ. L. REV. 205, 215 (1978).

352. *See supra* note 219 and accompanying text.

353. *See supra* note 220 and accompanying text.

354. *See, e.g.*, Kingston v. Walters, 16 N.M. 59, 113 P. 594 (1911) (seller orally promised to extend future payment date of debt); Perkiomen Brick Co. v. Dyer, 187 Pa. 470, 41 A. 326 (1898) (purchaser orally agreed to subscribe to stock).

355. See *supra* note 212 for the traditional elements of equitable estoppel.

356. 156 Cal. 782, 106 P. 88 (1909). The plaintiff in *Seymour*, a police captain, gave up secure employment, including pension rights and the right to a "good cause" discharge, in

Although purporting to base its decision on equitable estoppel,[357] the *Seymour* court actually estopped the surviving defendants from asserting their Statute of Frauds defense because of their ancillary promise to reduce the parties' agreement to writing.[358] Promissory, rather than equitable estoppel, more appropriately explains the *Seymour* result, based as it is upon plaintiff's reliance on the defendant's promise and not upon any misrepresentation of fact.[359] Nonetheless, the court in *Seymour* understandably attributed its holding to equitable estoppel since the legal community neither formally nor informally had recognized the doctrine of promissory estoppel.[360]

Courts subsequently broadened the *Seymour* "ancillary promise" exception to equitable estoppel's misrepresentation of fact requirement to include, among other things, promises by the defendant not to use the Statute as a defense.[361] Courts justified the circumvention of the Statute of Frauds in "ancillary" promise situations on two theoretical grounds. First, the courts wanted to prevent "frauds" upon promisees who relied upon oral promises.[362] Second, the courts defeated the Statute only indirectly since they used estoppel to enforce the ancillary promise, which was not within the Statute's scope, rather than the underlying promise, which was within the Statute's ambit.[363] However circuitous their logic, the courts ultimately were able to enforce promises that the Statute otherwise rendered unenforceable. Appropriate attribution of the *Seymour* result to promissory estoppel principles would not occur until the holding of the case gained official sanction of the *Restatement of Contracts* in 1932.[364]

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reliance upon a ten-year oral contract to serve as a property manager for the defendants. He alleged that one of the defendants, who later died while traveling in Europe, orally had promised to reduce the agreement to writing upon his return. *Id.* at 792, 106 P. at 93. Since the parties could not perform the contract within one year of its making, it fell within the ambit of the California Statute of Frauds. *Id.* at 786, 106 P. at 90.

357. *See id.* at 800, 106 P. at 96.

358. *Id.* at 799-800, 106 P. at 96.

359. *See* Summers, *supra* note 208, at 454.

360. *See supra* note 222 and accompanying text.

361. *See, e.g.*, Zellner v. Wassman, 184 Cal. 80, 86-87, 193 P. 84, 87 (1920).

362. *See, e.g.*, Seymour v. Oelrichs, 156 Cal. at 797-800, 106 P. at 94-96.

363. *See* Note, *supra* note 248, at 117; Note, *supra* note 258, at 74.

364. *See* RESTATEMENT OF CONTRACTS § 178 comment f (1932). Comment f provides:

> Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or a defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that

Nothing in the language of section 90 of the original *Restatement*[365]—the general section sanctioning promissory estoppel—suggested that promissory estoppel should enjoy any broader application in Statute of Frauds cases. Some modern courts accordingly continue to limit the use of promissory estoppel in Statute of Frauds cases to factual situations concerning ancillary promises.[366] Commentators have suggested that the reluctance of such courts to extend the application of promissory estoppel beyond cases involving ancillary promises may be attributable to fears that such an extension could result in the complete abrogation of the Statute.[367] Exactly how much protection the Statute affords promisors even in jurisdictions recognizing only the ancillary promise exception remains in doubt. A perjurer attempting to prove the existence of an oral agreement otherwise within the ambit of the Statute seemingly could assert the existence of a fictitious promise to reduce the alleged agreement to written form and thus vitiate any residual protection the Statute affords.

Nevertheless, limiting promissory estoppel to the ancillary promise context potentially works great injustice upon the beleaguered promisee. For one thing, such a limitation forgets that a promisee who relies on an underlying promise to perform experiences as great an injury if a court refuses to enforce the promise as a promisee who relies on an ancillary promise to put the agreement in writing.[368] More importantly, in most ancillary promise cases the promisee more likely is relying on performance of the underlying agreement than upon the ancillary promise. Not until the Califor-

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it was false; and *a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.*

Id. (emphasis added).

365. *See supra* note 238 and the accompanying text.

366. *See, e.g.*, 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement Sys., 432 F.2d 64, 65-66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971) (applying Texas law); Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 420-21, 493 P.2d 1220, 1225-26 (1972).

367. *See* Note, *supra* note 255, at 1229.

368. Commentators have argued that the ancillary promise rubric often has served to mask the true policy basis for circumventing the Statute's operation in such cases:

> It is appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds. There is certainly no need to resort to legal rubrics or meticulous legal formulas when better explanations are available. The policy behind enforcing an oral agreement which violated the Statute of Frauds [is] a policy of avoiding unconscionable injury . . . .

McIntosh v. Murphy, 52 Hawaii 29, 35, 469 P.2d 177, 180 (1970).

nia Supreme Court's decision in *Monarco v. Lo Greco*,[369] however, did a court explicitly recognize this.[370] Although the *Monarco* court adhered to the precedent set in *Seymour* by purporting to base its decision on equitable estoppel,[371] the doctrine they actually applied is promissory estoppel.[372] Several post-*Monarco* decisions recognizing the general proposition that reliance on oral promises can operate to circumvent the Statute regardless of the existence of an ancillary promise correctly have characterized the animating principle underlying their decisions as promissory estoppel.[373] Courts also have used promissory estoppel to circumvent the Uniform Commercial Code's Statute of Frauds requirement,[374] although the extant cases on point manifest considerable judicial confusion on the subject.[375]

Although the judicial tendency to circumvent the Statute of Frauds via promissory estoppel is apparently well-established and, indeed, seems to be gaining momentum, this Article would deceive if it failed to acknowledge the considerable resistance that the doctrine has encountered in the Statute of Frauds context. One obsta-

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369. 35 Cal. 2d 621, 220 P.2d 737 (1950). In *Monarco* the court enforced an oral promise two parents made to their son that they would leave him the hulk of their property at their death. In reliance on this promise the son remained at home and worked on the family farm for twenty years. Although defendants made no ancillary promise to reduce the agreement to written form or to refrain from raising the Statute as a defense, the court concluded that estoppel appropriately could exist when a promisor induces the promisee's reliance by promising to perform his part of their oral agreement. The court observed that "[i]n reality it is not the representation that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it." *Id.* at 626, 220 P.2d at 741. The court analyzed prior decisions and concluded that whenever unconscionable injury or unjust enrichment would result from enforcement of the Statute, "the doctrine of esteppel . . . applied whether or not plaintiff relied upon representations going to the requirements of the statute itself." *Id.* at 625, 220 P.2d at 741. The *Monarco* court characterized earlier cases refusing to apply estoppel as doing so either because a restitutionary remedy would compensate adequately the promisee or because no unconscionable injury would result from nonenforcement of the agreement. *Id.* at 623-24, 220 P.2d at 740.

370. A few cases decided in the interim between *Seymour* and *Monarco*, however, evidenced some considerable judicial stretching of the ancillary promise requirement in the quest for fair results. *See* Note, *supra* note 216, at 293-94.

371. 35 Cal. 2d at 625, 220 P.2d at 740.

372. *See supra* notes 359-60 and accompanying text. *But see* Note, *supra* note 255, at 1221-22 (describing *Monarco* as allowing proof of detrimental reliance sufficient to establish promissory estoppel to serve as the basis for an equitable estoppel). The Note's contrary position results from the author's view that promissory estoppel traditionally has functioned only as a consideration substitute. *See id.* at 1222-23.

373. *See, e.g.*, McIntosh v. Murphy, 52 Hawaii 29, 36-37, 469 P.2d 177, 181 (1970); Alpark Distrib., Inc. v. Poole, 95 Nev. 605, 607-08, 600 P.2d 229, 230-31 (1979).

374. U.C.C. § 2-201 (1977).

375. *See* Metzger & Phillips, *supra* note 338, at 91-96.

cle to the recognition of promissory estoppel as a legitimate device to circumvent the Statute has been judicial fears that observers would charge courts with usurping legislative power.[376] This concern, however, ignores several important facts. First, equity always has had the power to mitigate the harsh operation of statutes.[377] Second, the Statute has from its inception been the object of equitable intervention;[378] indeed, one prominent historian of the Statute has argued that its authors never intended the Statute to apply to the courts of equity.[379] Last, the usurpation argument fails to consider the judiciary's primary role in shaping the Statute.[380]

The usurpation argument against recognition of promissory estoppel as a legitimate means around the Statute recently has resurfaced with particular vigor in the discussion of section 2-201 of the Uniform Commercial Code. In the discussion, opponents of the widespread recognition of promissory estoppel in Statute of Frauds cases have coupled the usurpation argument with arguments premised on the familiar, though often discounted,[381] maxim of statutory construction: *Expressio unius est exclusio alterius*.[382] The major thrust of this combined attack is that, since the drafters of the Code specifically enumerated several methods[383] of avoiding

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376. *See, e.g.*, Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777, 779 (Fla. 1966).

377. *See supra* note 344 and accompanying text.

378. *See supra* notes 343 & 345-48 and accompanying text.

379. The judges who framed the Statute of Frauds were so anxious to tie the hands of juries and so possessed by the idea that the statute would not apply *ex proprio vigore* to chancery cases that they neglected to be as explicit in the wording of the statute as they should have been.

Costigan, *supra* note 323, at 344-45.

380. *See supra* notes 339-40 and accompanying text.

381. See Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-74 (1930), for the following observation:

> The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word *men*. It is neither customary nor convenient to indicate such emphasis in statutes, and without this indication, the first comment on the rule is that it is not true.

Id. (emphasis in original). *See also* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973).

382. Enumeration of specific items impliedly excludes all others. *See* United States v. Robinson, 359 F. Supp. 52, 58-59 (S.D. Fla. 1973) (interpreting wiretap authorization statute).

383. *See* U.C.C. § 2-201(2)-(3) (1977). These methods include the use of merchants' written confirmations, the manufacture of goods not suitable for sale to others in the regular course of business, an admission by the party against whom enforcement is sought that a contract for sale was made, and the prior acceptance of, coupled with either payment for or

the section's writing requirement,[384] the drafters impliedly precluded avoidance by any other manner, including estoppel.[385] This view is incorrect for various reasons.[386] The most important of these is that section 1-103 of the Code expressly provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to . . . estoppel . . . shall supplement its provisions."[387] This section applies prospectively as well as retrospectively,[388] and, therefore, can serve as a vehicle for incorporating into Code decisions legal developments that occur after the Code's enactment.[389]

Another, more important obstacle to the recognition of promissory estoppel as a legitimate means of circumventing the Statute is the fear of numerous courts that such recognition would result in the Statute's complete abrogation.[390] This fear, however, is unfounded. While promissory estoppel would permit proof of some oral agreements that the Statute otherwise would preclude the Statute would remain applicable both to wholly executory promises within its scope and to oral promises that have induced reliance insufficient to trigger application of estoppel.[391] Furthermore, although allowing estoppel to intrude into the Statute of Frauds context certainly will diminish some protection that the Statute otherwise affords contracting parties, substantial controversy exists over whether the Statute truly offers *any* significant protection. Given the Statute's numerous judicially created exceptions,[392] a dishonest plaintiff conceivably could "frame" a contract

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receipt of, the goods in issue.

384. *See* U.C.C. § 2-201(1) (1977).

385. *See* C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 858 (9th Cir. 1977) (Duniway, J., concurring); Cox v. Cox, 292 Ala. 106, 111, 289 So. 2d 609, 613 (1974); C.G. Campbell & Son, Inc. v. Comdeq Corp., 586 S.W.2d 40, 41 (Ky. Ct. App. 1979); *see also* Edwards, *supra* note 351, at 218.

386. *See* Metzger & Phillips, *supra* note 338, at 97-99 (fully discussing why the Code's enumeration does not preclude other methods of avoidance).

387. U.C.C. § 1-103 (1977).

388. "What the section [1-103] invites is not limited to law which exists as of the date of particular enactments of the Code." Summers, *supra* note 304, at 197 n.9.

389. Specifically, courts, under § 1-103, appropriately may incorporate the express recognition of promissory estoppel as a means of circumventing the Statute in *Restatement (Second) of Contracts* § 139.

390. This fear has been a strong consideration in those cases in which courts refused to countenance the circumvention of the Statute under any circumstances. *See, e.g.*, Kahn v. Cecelia Co., 40 F. Supp. 878, 880 (S.D.N.Y. 1941); Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 173 So. 2d 492, 495 (Fla. Dist. Ct. App. 1965), *aff'd*, 190 So. 2d 777 (Fla. 1966).

391. *See* Metzger & Phillips, *supra* note 338, at 82.

392. *See supra* notes 339-40 and accompanying text.

that was beyond the Statute's scope.[393] Moreover, that a writing satisfying the Statute exists does not indicate necessarily the true existence of a contract between the parties. The writing might be a forgery,[394] or might be a draft that parties optimistically signed in advance, looking forward to an agreement that failed to materialize.[395] Finally, memoranda satisfying the Statute are often incomplete;[396] thus, a perjurious promisee conceivably could convince a judge or jury of the existence of contract terms to which the promisor never actually assented.[397] All of these possibilities have led one commentator to observe that "there is a very serious doubt as to what protection the statute really does afford. Despite the lofty words about its glory that are so often pronounced, its protection, in most cases, is more illusory than real."[398]

Proponents of the expansion of promissory estoppel into the Statute of Frauds context, in sum, have convincing responses to all judicial fears concerning the abrogation of the Statute. Perhaps, the chief fear concerns the loss of the evidentiary function that the writing requirement serves.[399] The reliance that the promissory estoppel doctrine requires, however, likewise can serve this evidentiary function.[400] As one author notes "it is almost inconceivable that anyone should materially change his position, so as to satisfy all the elements of an estoppel, on the expectation of recouping himself on a 'framed' contract."[401] Another fear concerns the loss of the channeling and cautionary functions that the Statute's writing requirement serves.[402] The channeling function of the Statute encourages knowledgeable parties to reduce their agreements to

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393. *See* Summers, *supra* note 208, at 460.

394. J. WHITE & R. SUMMERS, *supra* note 27, § 2-8, at 73.

395. *Id.*

396. *Id.* § 2-3, at 57 (sales contract context). The various incarnations of the Statute never have required that a memorandum sufficient to satisfy the Statute's writing requirement be a complete integration of the parties' agreement. J. CALAMARI & J. PERILLO, *supra* note 20, § 19-27 & n.70.

397. J. WHITE & R. SUMMERS, *supra* note 27, § 2-8, at 72-73 (sales contract context).

398. Summers, *supra* note 208, at 460. *See also* J. WHITE & R. SUMMERS, *supra* note 27, § 2-8, at 73 (The Uniform Commercial Code's writing requirement is "so far from any kind of guarantee against successful perjury that it is inappropriate even to call it a means to fraud prevention at all.").

399. *See supra* notes 319-24 and accompanying text.

400. See *infra* notes 423-24 and accompanying text for a discussion of the *Restatement (Second) of Contracts'* recognition of promissory estoppel's evidentiary function. *See also* Note, *supra* note 208, at 710-11.

401. Summers, *supra* note 208, at 459-60.

402. *See* Note, *supra* note 215, at 182; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 19-1, at 673.

written form, and thus provides courts with a handy basis for distinguishing between enforceable and unenforceable agreements.[403] The cautionary function of the writing requirement discourages parties from entering into ill-considered agreements by forcing them to reduce their agreement to writing and impressing upon them the seriousness of their actions.[404] While the promissory estoppel reliance requirement cannot serve either of these functions,[405] significant grounds exist for concluding that the writing requirement also is inadequate as a channeling and cautionary device.[406]

Before the Statute can serve the channeling and cautionary functions, the parties must be aware of its existence and of its applicability to their agreement—a prerequisite often absent in everyday transactions.[407] An empirical study of actual business practice relating to the reduction of oral agreements to written form that the *Yale Law Journal* presented in 1957 indicated that the Statute plays a relatively insignificant role in inducing businessmen to put their agreements in written form.[408] Firms generally put their agreements in writing because they consider such devotion to the written word sound business policy.[409] Parties often put their agreements in writing simply to avoid problems of interpretation or to prevent each other from denying the existence of the agreement.[410] Even if the parties are aware of the Statute's writing requirement, they may refrain from creating a writing because one

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403. *See* Note, *supra* note 215, at 170-71; *see also* Fuller, *supra* note 304, at 800-01 (A formality like the writing requirement can provide a simple, external test for enforceability.).

404. *See* Fuller, *supra* note 304, at 800; Note, *supra* note 215, at 170.

405. *But see* Note, *supra* note 208, at 710. Since promissory estoppel only imposes liability for promises on which the promisor should foresee injurious reliance it, therefore, arguably fulfills a cautionary function because "[l]iability thus is not imposed for breach of impulsive promises made under circumstances in which legal consequences are, or should be, unexpected." *Id.*

406. The drafters of the Uniform Commercial Code apparently were not concerned with the channeling and cautionary functions of the writing requirement, since the various alternative methods they provided for satisfying the Statute in Code cases all concern the evidentiary function of the Statute. *See* Edwards, *supra* note 351, at 218.

407. *See supra* note 333. For more recent evidence of the truth of this assertion, see *The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038, 1057-58 (1957) [hereinafter cited as *Yale Study*], which indicates that the Sales Act's requirement of written evidence of sales contracts for $500 or more had very little to do with whether businessmen reduced their agreements to written form.

408. *See id.*; *see also* Note, *supra* note 267, at 592.

409. *Yale Study*, *supra* note 407, at 1064.

410. *See* Note, *supra* note 267, at 593 n.16.

of the parties relies on the other's promise either to put their agreement in writing or to refrain from raising the Statute as a defense, or because both mistakenly believe that they have satisfied the writing requirement.[411]

The Yale Study also raised significant questions concerning the identity of the individuals or groups most likely to benefit from the Statute's writing requirement. According to the study, large manufacturers are more likely to demand written evidence of oral agreements than their smaller competitors[412] because of the difference in the nature of large- and small-scale business operations[413] and the comparatively lesser bargaining power that smaller companies enjoy.[414] Another reason that those operating smaller concerns are less writing-conscious may be that the small firms are less knowledgeable than their larger competitors about the Statute's existence and its applicability. The Statute, therefore, may be most likely to affect adversely those parties least likely to know of its requirements, least able to secure compliance with the requirements of which they are aware, and least capable of absorbing any losses associated with their reliance if others successfully use the Statute to bar their claims.[415]

The foregoing discussion suggests that the channeling and cautionary functions attributed to the Statute's writing requirement may be largely illusory since they are at odds with the realities of prevailing business practice; therefore, additional impetus exists for protecting a party's reliance on an oral promise within the ambit of the Statute. As Justice Stephen observed long ago, "[l]aws ought to be adjusted to the habits of society, and not to aim at remoulding them."[416] This observation seems particularly true if actual experience with a rule indicates that it has had little real effect in shaping human behavior despite over three centuries of existence. The Statute's failure to fulfill its channeling and cautionary functions, the possible elimination of the original justifications for the Statute by subsequent legal developments,[417] and courts' wide recognition of the Statute's potential for working in-

411. *Id.* at 597.
412. *See Yale Study, supra* note 407, at 1047.
413. *Id.* at 1051.
414. *Id.* at 1051-55.
415. Metzger & Phillips, *supra* note 338, at 103.
416. Stephen & Pollock, *supra* note 327, at 6.
417. *See supra* notes 329-32 and accompanying text.

justice[418] combine to present a compelling case for circumvention of the Statute via promissory estoppel in appropriate cases, if not its outright repeal.[419]

Two recent developments should serve to accelerate the growing judicial trend[420] toward defeating the Statute's writing requirement via promissory estoppel. The first, and least controversial, is the *Restatement (Second) of Contracts'* express recognition in section 139[421] that courts appropriately may utilize promissory estoppel to circumvent the Statute. The second development is the emergence of the notion of promissory estoppel as a theory of recovery independent of contract.

In addition to the obvious "respectability" conferred by the quasi-official sanction of the *Restatement (Second)*, section 139 includes evidentiary and remedial provisions[422] that should allay judicial fears concerning this use of promissory estoppel and should enhance the possibility that the future development of the doctrine will proceed in a more systematized, rational fashion. Subsection 139(2)(c)[423] of the *Restatement (Second)* expressly considers the evidentiary value of reliance by directing courts to consider the extent to which the promisee's reliance or other evidence introduced at trial corroborates the existence of the alleged oral promise. This

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418. *See supra* notes 333-36 and accompanying text.

419. Parliament repealed the bulk of the original Statute in 1954, retaining the writing requirement only for contracts for the sale of land and promises to answer for the debt, default, or miscarriage of another. Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, ch. 34. *See also supra* note 192 and accompanying text.

420. *See supra* notes 354-64 & 369-75 and accompanying text.

421. *Restatement (Second) of Contracts* § 139, reads as follows:

Enforcement by Virtue of Action in Reliance

(1) A promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.

422. *See infra* notes 425-30 and accompanying text.

423. *See supra* note 421.

provision should ensure wider acceptance of promissory estoppel in the Statute of Frauds context by satisfying the evidentiary purposes that the writing requirement ordinarily served and by obviating the possibility that courts will refuse to recognize an estoppel because of fears that the alleged oral agreement may be fictitious.[424] Section 139 also expressly treats the issue of the proper measure of damages in promissory estoppel cases—a subject which has generated considerable confusion and inconsistency since the initial formal recognition of the doctrine.[425] By stating that the "remedy granted for breach is to be limited as justice requires,"[426] section 139(1) expressly authorizes the use of reliance-based damages in promissory estoppel cases.[427] This not only provides for the judicial discretion necessary to deal effectively with promissory estoppel's remedial dilemmas,[428] but also should enable courts to retain whatever measure of the channeling function the writing requirement provides[429] by limiting recovery under oral promises to reliance damages. The judicial position espoused in section 139(1) should encourage knowledgeable parties to continue reducing their agreements to written form and should represent a proper balance between the abrogation of the Statute that complete enforcement of oral promises would cause, and the injustice that would result from rote denial of recovery for failure to comply with the strictures of the Statute.[430]

The second and more controversial support for using promissory estoppel to circumvent the Statute comes from the emergence of authorities suggesting the doctrine's possible status as an independent theory of recovery.[431] Some recent cases suggest that the Statute does not bar claims premised upon promissory estoppel since such claims are not contractually based and, therefore, are beyond the Statute's scope.[432] Such a suggestion represents a sig-

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424. *See supra* notes 400-01 and accompanying text.

425. *See supra* notes 265-81 and accompanying text.

426. RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1981).

427. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 139 comment d (1981). This comment provides that "when specific enforcement is available under the rule stated in § 129 [providing specific enforcement of land sales contracts when courts can avoid injustice only by specific performance], an ordinary action for damages is commonly less satisfactory . . . ." *Id.*

428. *See supra* notes 265-81 and accompanying text.

429. *See supra* notes 402-15 and accompanying text.

430. *See* Note, *supra* note 255, at 1242.

431. *See supra* notes 295-308 and accompanying text.

432. *See, e.g.*, R.S. Bennett & Co. v. Economy Mechanical Indus., 606 F.2d 182, 188 (7th Cir. 1979) (permitting plaintiff to assert promissory estoppel claim notwithstanding

nificant theoretical departure from the courts' traditional rationale in using estoppel to circumvent the Statute's operation—the prevention of injustice that otherwise would result from the Statute's operation.[433] While little practical difference arguably exists between allowing promissory estoppel to "substitute for" the Statute and treating the doctrine as an independent theory of recovery, the rationale of the latter theory is pregnant with significant implications concerning the fate of other traditional "contract" defenses such as the parol evidence rule. As Grant Gilmore observed,

> [S]ome of the recent cases are beginning to suggest that liability under § 90 or the doctrine of promissory estoppel or however it is described is somehow different from liability in contract. Thus, it may be, defenses based on the *statute of frauds* or the contract statute of limitation or the *parol evidence rule*—all these being looked on as contract-based defenses—are no longer available if the underlying theory of liability—§ 90 or an analogue—is not contract theory at all.[434]

Treating promissory estoppel as an independent theory of recovery, furthermore, could provide judges with an obvious, albeit technical, device for circumventing the Statute in situations in which mechanical application of the Statute otherwise would produce harsh results. Finally, by giving promissory estoppel independent theory status, judges would avoid charges of judicial usurpation of legislative power and abrogation of the Statute's writing requirement.[435]

V. Promissory Estoppel and the Parol Evidence Rule

A. *The Cases*

While, as the foregoing discussion plainly indicates, promissory estoppel has gained widespread legitimacy as a device for circumventing the Statute of Frauds, the same is not true in the parol evidence context. Upon survey of extant judicial authority on the subject, several things become abundantly clear. First, very few cases exist in which the issue of promissory estoppel's applicability to the parol evidence rule ever has arisen. Second, the fundamental attribute that all of the cases in which the issue has arisen share is a paucity of significant judicial analysis on the estoppel issue. Last,

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Statute's bar to contract recovery); N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 738-40 & n.9 (D.C. Cir. 1963); Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687, 696-97 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976).

433. *See supra* notes 347-48 and accompanying text.

434. G. Gilmore, *supra* note 203, at 66 (emphasis added).

435. *See supra* notes 376-89 and accompanying text.

and perhaps most significantly,[436] very few cases exist in which a court has refused to consider convincing evidence of an extrinsic promise in situations in which such refusal, in the court's judgment, would work a serious injustice on the party relying on the extrinsic promise. In one of the earliest cases to consider the applicability of promissory estoppel in the parol evidence context, however, the court did refuse to consider such convincing evidence.

In *Berverdor, Inc. v. Salyer Farms*[437] the California Court of Appeals held the trial court in error for admitting parol evidence of an omitted lease condition since the written lease was "on its face, full and complete and no fraud, mistake, imperfection, illegality or ambiguity was proved."[438] The appellate court rejected any application of equitable estoppel because the defendants had failed to prove the misrepresentation of fact that the doctrine required. The court then rejected application of promissory estoppel, although it acknowledged that promissory estoppel properly could be founded on a promise of future performance. The court observed that "we have been cited no case and we have been unable to find any case which in any way aids in the application of that doctrine to the case at bar."[439] Given the court's form-oriented approach to the parol evidence rule, its views on the unenforceability of the extrinsic agreement, and the realization that the court decided *Berverdor* nearly three months before the California Supreme Court's landmark *Monarco* decision on promissory estoppel's applicability to the Statute of Frauds,[440] that the court gave

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436. *See infra* notes 580-83 and accompanying text.

437. 97 Cal. App. 2d 459, 218 P.2d 138 (1950).

Plaintiff-lessor sued defendant-lessees for the last year of rent due under a three-year farm lease. Defendants acknowledged their failure to pay, but argued that the written lease was subject to a parol condition that the lessor would excuse rent payments if it became unprofitable for the lessee to pay. *Id.* at 460, 218 P.2d at 139-40. The trial court allowed defendants to introduce certain letters evidencing the alleged condition in support of this contention. Plaintiff's managing agent had signed the letters and had sent them to defendants prior to the execution of the lease. *Id.* at 461, 218 P.2d at 140. The trial court also allowed defendants to introduce evidence of certain conversations with plaintiff's agent who died shortly after execution of the lease; the most important of these conversations focused on defendants' concerns that the lease did not contain the agreed upon rent adjustment provision and on the agent's assurances that this omission was unimportant. *Id.* The trial court further allowed defendants to introduce evidence that in the year when they did not pay the rent insufficient water was available to support a profitable crop. *Id.* The trial court rendered judgment for plaintiff in a reduced amount, and both parties appealed.

438. *Id.* at 464, 218 P.2d at 142.

439. *Id.*

440. *See supra* notes 369-72 and accompanying text. The California Supreme Court decided *Monarco* on August 1, 1950. The California appeals court decided *Berverdor* on

defendants' estoppel arguments relatively short shrift is not surprising.

Nonetheless, the treatment that the defendants received in *Berverdor* stands in rather stark contrast to the treatment afforded parties relying on alleged oral agreements in much earlier California Statute of Frauds cases. In *Seymour v. Oelrichs,*[441] for example, the court allowed a party who had relied upon an alleged oral promise to reduce a wholly oral ten-year employment contract to writing to prove the existence of that contract. In *Berverdor*, on the other hand, the court denied defendants the opportunity to prove the existence of a single term of an otherwise written contract, even though defendants had credible written evidence supporting the existence of that term, were arguably no less reasonable in relying on the agent's promises and assurances than their counterpart in *Seymour,* and had suffered a significant injustice as a result of their reliance.

While the scant attention the *Berverdor* court paid to defendants' promissory estoppel arguments, perhaps, is excusable since the promissory estoppel doctrine had not departed yet from its traditional roles in any dramatic way when the court decided the case, later cases in which litigants sought to apply promissory estoppel in parol evidence cases unfortunately fail to provide any greater judicial analysis of the issue. For example, in *Mack v. Earle M. Jorgensen Co.*[442] the court found that the parties' written contract represented a complete integration of their agreement and that the parol evidence rule barred any proof of alleged oral promises. The court refused to allow proof of the promises under the umbrella of promissory estoppel, but did not reject outright the possibility that the reliance doctrine could, in some circumstances, operate to circumvent the parol evidence rule. Instead, the court concluded that "the evidence presented precludes the application of the doctrine of promissory estoppel,"[443] observing that "We are not aware of any decision applying the doctrine of promissory estoppel where, as in the instant case, the alleged oral agree-

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May 10, 1950.

441. *See* discussion *supra* notes 356-60 and accompanying text.

442. 467 F.2d 1177 (7th Cir. 1972). In *Mack* a terminated manufacturer's representative sought to introduce proof of oral assurances that his employer would not discharge him as long as he performed adequately. He alleged that various officers of the defendant company made these assurances after the company acquired his original employer and before he signed a written contract of employment containing a thirty-day termination clause. *Id.* at 1178-79.

443. *Id.* at 1179.

ment or promise was followed by a written contract, the terms of which are in direct conflict with the alleged oral agreement or promise."[444] Thus, the perceived conflict between the alleged oral assurances and the written contract served, in the eyes of the court, to prevent any further consideration of the estoppel issue because "[i]n such a situation, we seriously doubt whether the promisee could successfully argue that his reliance on the promise was justifiable."[445] Of course the alleged oral promises conceivably were not inconsistent with the written terms, but rather represented a condition upon the terms. Viewed in this light, the plaintiff's reliance seems more reasonable. The court's finding of inconsistency and its ultimate resolution of the case may reflect the court's doubts about whether the parties ever made the alleged promises.[446] Furthermore, the facts as presented by the court evidence no particular reliance by the plaintiff—no foregone alternative employment opportunities or other such substantial indicia of reliance that would produce injustice if the court refused to enforce the defendant's promise. Perhaps, given facts more conducive to a promissory estoppel claim the court might have considered its application to a parol evidence case.[447]

While the Seventh Circuit in *Mack* hinted at a willingness to apply promissory estoppel in certain parol evidence cases, the Supreme Court of Alaska unceremoniously discarded the applicability of the doctrine in *Johnson v. Curran*.[448] The court in *Johnson*

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444. *Id.*

445. *Id.*

446. The court, when discussing plaintiff's allegation that defendant's vice president made the alleged promise on the day plaintiff signed the written contract, stated that plaintiff "*claims* that Dellinger [the vice president] told him that he wouldn't he terminated as long as he did a good job." *Id.* (emphasis added). The court followed this statement with a discussion noting that plaintiff signed the written contract without objection, even though he had insisted on scratching out another provision which related to credits for orders booked before termination and which defendant originally included in the same paragraph as the termination clause. *Id.*

447. The validity of this suspicion is borne out by the court's subsequent decision in Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). *See infra* notes 484-96 and accompanying text.

448. 633 P.2d 994 (Alaska 1981). In *Johnson* plaintiffs brought suit against a nightclub owner who fired them despite the fact that their eight-week written employment contract (an American Federation of Musicians standard form contract) provided for two weeks more employment. Defendant, in an uncontroverted affidavit in opposition to the plaintiff's motion for summary judgment, asserted that a band member misrepresenting himself as the band's leader orally had assured her, before she signed the contract, that the agreement was subject to termination on two week's notice if the band did not draw well. *Id.* at 995. Defendant argued that the writing at best was a partial integration, that it was ambiguous, and that, in any event, evidence of the parol agreement should be admissible because of fraud in

affirmed the trial court's refusal to admit parol evidence of a termination clause not contained in the parties' standard form contract. While the court recognized that evidence of fraud is admissible even when a writing is a complete integration, the court held that the fraud exception to the rule did not apply because defendant failed to show that plaintiff's misrepresentation induced the defendant to enter the contract.[449] More important for our purposes, the court summarily dismissed defendant's promissory estoppel argument, noting that "the rule has no applicability in the factual context presented in the instant case; promissory estoppel is a principle applicable to situations where a promise unsupported by consideration is sought to be enforced and thus has no direct relevance to the case at bar."[450] The court apparently did not have any doubts about the credibility of the defendant's assertions since it "assumed" that the defendant's assertions were true.[451] The defendant's reliance losses, however, were not of the sort likely to present a particularly compelling case for relief. This consideration, the court's narrow conception of promissory estoppel, and its rather mechanical approach to the parol evidence rule make the scant attention afforded the promissory estoppel argument more understandable, if not more defensible.

In at least one more case in which the promissory estoppel issue surfaced, the court not only sidestepped the estoppel question, but also refused to grant relief on any other basis. In *Clark Oil & Refining Corp. v. Leistikow*[452] the court found that defendant's promissory estoppel argument presented no Statute of Frauds problem, but observed that "there is . . . difficulty with this defense as it relates to the parol evidence rule" since the leases in question were clear as to the duration of the agreement and contained an integration clause requiring modifications to be in writing and signed by the lessor's vice president.[453] Rather than address the issue of whether a party can use promissory estoppel to circumvent the parol evidence rule, the court concluded that the

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the inducement and promissory estoppel. *Id.* at 995-96.

449. *Id.* at 997.

450. *Id.* at 996.

451. *Id.* at 997-98.

452. 69 Wis. 2d 226, 230 N.W.2d 736 (1975). In *Clark Oil* two service station lessees raised promissory estoppel as a defense to an eviction action that followed the expiration of the parties' written lease agreement. The lessees argued that the lessor's agents orally promised that they could remain dealers as long as their performance was satisfactory, and that they relied upon plaintiff's promise by leaving long-standing former employment.

453. *Id.* at 237-38, 230 N.W.2d at 743.

defendant's allegations were insufficient to raise a promissory estoppel claim. The defendants, according to the court, had not shown that the court could avoid injustice only by enforcing the plaintiff's promises. The court also expressed doubts about whether foregoing prior employment constituted reliance of a "definite and substantial character."[454] The quoted language plainly addresses the requirements of section 90 as manifested in the *Restatement*.[455] While the *Restatement (Second)* since has dropped the definite and substantial reliance requirement,[456] and other courts have found foregoing prior employment to be sufficient reliance for a promissory estoppel claim,[457] the heart of the *Clark Oil* court's refusal to confront the promissory estoppel issue or to employ any other legal device to protect the defendants' reliance probably lies with its conclusion that defendants failed to demonstrate sufficient injustice to justify enforcing plaintiff's oral promise. Defendants, after all, could have entered into a new lease at a higher rate if they were willing to pay for it. Furthermore, defendants did not stand to lose a substantial investment in the franchise. Given the absence of a compelling claim for relief, the court, not surprisingly, eschewed defendants' invitation to apply promissory estoppel to the parol evidence rule.

While the courts in the foregoing cases denied application of promissory estoppel in the parol evidence context and refused to admit proffered extrinsic evidence on any other grounds, a number of cases exist in which courts declined formal use of promissory estoppel to circumvent the parol evidence rule, but found independent bases for enforcing parol promises that engendered significant reliance. For example, in *Wojciechowski v. Amoco Oil Co.*[458] plaintiff, a gas station franchisee, sought to enjoin the termination of a written "trial franchise" agreement drafted in conformity with the Petroleum Marketing Practices Act [PMPA].[459] Plaintiff argned that defendant's agents induced him to enter the trial agreement by making oral misrepresentations that the PMPA required that defendant treat him as a trial franchisee[460] and by orally promising that defendant would renew plaintiff's franchise if plaintiff "per-

454. *Id.* at 239, 230 N.W.2d at 744.
455. *See supra* note 238 and accompanying text.
456. *See supra* notes 309-12.
457. *See, e.g.*, Hunter v. Hayes, 533 P.2d 952 (Colo. Ct. App. 1975).
458. 483 F. Supp. 109 (E.D. Wis. 1980).
459. 15 U.S.C. §§ 2801-2806 (Supp. IV 1980).
460. 483 F. Supp. at 111, 114.

formed adequately."[461] Defendant's witnesses disputed plaintiff's version of these events, but the court concluded that plaintiff "was a more credible witness."[462] The court, nonetheless, rejected plaintiff's argument that defendant's promise to continue his franchise if he performed adequately gave rise to a claim based upon promissory estoppel. Promissory estoppel, according to the court, "provides no help to plaintiff's claim [because the oral promises] were made prior to the written contract."[463] Therefore, the court concluded, "the parol evidence rule nullifies the salutory [sic] effects of the doctrine of promissory estoppel."[464]

Despite its holding on promissory estoppel, the *Wojciechowski* court did not want to deprive plaintiff of his significant investment in the franchise. Consequently, it held that defendant's misrepresentations constituted a fraud that prevented the creation of a trial franchise under the PMPA.[465] Thus, defendant could not terminate plaintiff's franchise until defendant conformed with the more stringent PMPA requirements for terminating regular franchises.[466] Regarding the misrepresentations that PMPA required defendant to treat plaintiff as a trial franchisee, the court acknowledged the general rule that fraud cannot arise from misrepresentations of law, but held that defendant's misstatements concerning the PMPA's requirements fell within a recognized exception to the general rule predicated upon defendant's intentional misrepresentation, the relationship of trust between the parties, and defendant's superior knowledge and skill.[467] To defendant's objection that its promise relating to renewal of the franchise could not constitute fraud because it represented acts Amoco was to do in the future, the court responded that "if [defendant] had a pre-

461. *Id.* at 114.

462. *Id.*

463. *Id.* at 115.

464. *Id.* Wojciechowski relied heavily on McConnell v. L.C.L. Transit Co., 42 Wis. 2d 429, 167 N.W.2d 226 (1969), which concerned an alleged oral promise to a man employed as a general manager that the company would not discharge him as long as the business earned an annual profit. His written employment contract, however, clearly gave the employer the right to terminate him upon payment of an agreed sum as liquidated damages. The *McConnell* court did not reach the promissory estoppel issue because plaintiff asserted that defendant made many of the alleged promises *after* the parties signed the agreement. Thus, the parol evidence rule did not bar evidence of their existence and of their role in inducing the plaintiff to forego other employment opportunities. *Id.* at 437, 167 N.W.2d at 229-30. The *Wojciechowski* court, therefore, correctly concluded that *McConnell* was "of little help to plaintiff." 483 F. Supp. at 115.

465. 483 F. Supp. at 114-15 (citing 15 U.S.C. § 2803(b)(1) (Supp. V 1981)).

466. *Id.* at 115 (citing 15 U.S.C. § 2802 (Supp. V 1981)).

467. *Id.* at 114-15.

sent intention not to continue the franchise even if the performance was adequate, then this would constitute actionable fraud."[468] The court then concluded that "there is sufficient proof at this juncture in the litigation to show that defendant misrepresented its intention."[469]

Walker v. KFC Corp.[470] is similar in thrust, if not in methodology, to *Wojciechowski*. The plaintiff in *Walker* had purchased a restaurant franchise from defendant franchisor. Plaintiff claimed that defendant made numerous fraudulent parol representations concerning the viability of the franchise and its intentions concerning the franchise and the plaintiff. Plaintiff brought suit on numerous theories, including breach of contract, promissory estoppel, and fraud. When the jury found for plaintiff on the promissory estoppel and fraud claims, defendant moved for a judgment n.o.v., arguing (1) that the existence of a contract between the parties precluded any recovery under promissory estoppel and (2) that, in any event, promissory estoppel was inapplicable to promises preceding a written contract because of the parol evidence rule.[471]

On the first point, the court acknowledged the general rule that existence of a valid contract prevents any recovery based on estoppel,[472] but noted that "defendants provide no authority for the proposition that the mere existence of a contract between two parties precludes a recovery based on promises that were not part of the contract."[473] The court then proceeded to hold the oral promises as separate from the contract and to award recovery to plaintiff. The court concluded that since the jury found for defendant on the breach of contract claim, it necessarily based its verdict on promises that "were not bargained for and that were not included in the contract."[474]

On defendant's second argument, the court noted with approval the instructions to the jury providing that evidence of extrinsic terms was inadmissible for purposes of plaintiff's contract and estoppel claims unless the jury found that the written contract

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468. *Id.* at 115 (citing 37 AM. JUR. 2d *Fraud* § 59 (1968)).

469. *Id.*

470. 515 F. Supp. 612 (S.D. Cal. 1981).

471. *Id.* at 616.

472. *Id.; see, e.g.,* Guaranty Bank v. Lone Star Life Ins. Co., 568 S.W.2d 431, 434 (Tex. Civ. App. 1978); Pasadena Assocs. v. Connor, 460 S.W.2d 473, 481 (Tex. Civ. App. 1970). The emergence of promissory estoppel as an independent theory of recovery, however, would render such a rule obsolete. *See* Metzger & Phillips, *supra* note 3, at 549.

473. 515 F. Supp. at 616 (citations omitted).

474. *Id.*

either failed to reflect the parties' real intention due to fraud, mistake, or accident, or that the parties did not intend their writing to he an exclusive statement of their agreement.[475] The preceding language seems to paint the court's refusal to set aside the jury's verdict as standing for the relatively unexceptionable proposition that parties may prove and courts may enforce on promissory estoppel grounds those parol promises unsupported by consideration and extrinsic to an incomplete, or fraudulently induced, written contract.[476] The court, however, achieved this result in an interesting fashion. The jury, rather than the trial judge, ruled on the parol evidence question, an approach that emasculates the parol evidence rule and that virtually guarantees enforcement of parol promises that the jury believes the parties actually made.[477]

In two other cases courts nimbly maneuvered around the question of whether a court may use promissory estoppel to protect siguificant reliance on extrinsic promises that the parol evidence rule otherwise bars, but, nonetheless, found other legal justification for protecting such reliance. In *Prudential Insurance Co. of America v. Clark*,[478] for example, the court allowed beneficiaries of a life insurance policy issued to a soldier killed in a helicopter crash in Vietnam to recover for his death despite war risk and aviation exclusion clauses in the policy. Prudential's agent induced the insured to drop a prior policy that contained neither exclusion by promising to obtain a similar policy. The insured died after filing an application and prepaying the premium, but before finding out that the policy contained the exclusionary clauses. Pruden-

475. *Id.* at 616-17.

476. For another recent case taking a similar approach, see Kramer v. Alpine Valley Resort, Inc., 108 Wis. 2d 417, 321 N.W.2d 293 (1982). In *Kramer*, a school teacher/artisan leased space in a commercial complex, reduced his teaching load to half-time, and made a significant investment in labor and materials to construct a workshop in reliance upon parol promises that the complex would be open all year and would attract sizeable walk-through traffic. *Id.* at 420, 321 N.W.2d at 294-95. Although his written lease agreement contained neither of these promises, the Wisconsin Supreme Court rejected defendant's argument that the existence of an unambiguous contract between the parties precluded plaintiff's resort to promissory estoppel, holding that "where the contract fails to embody essential elements of the total business relationship of the parties . . . the existence of a contract does not bar recovery under promissory estoppel." *Id.* at 421-22, 321 N.W.2d at 295. The parol evidence rule, the court held, did not prevent proof of the alleged extrinsic promises because the written lease agreement "did not embody the entire business relationship" of the parties and the extrinsic promises "in no way" varied or contradicted "anything in the lease agreement." *Id.* at 426, 321 N.W.2d at 297-98.

477. On the traditional role of the judge in parol evidence cases, see *supra* notes 30-38, 46 & 50 and accompanying text.

478. 456 F.2d 932 (5th Cir. 1972).

tial initially paid the claim, then sued for return of the payment, alleging oversight and mistake.[479] The court treated the agent's promise as a separate promise independent of the written policy and enforced it on the basis of promissory estoppel, observing that:

> [T]his verdict recognized a duty of Prudential, dehors the writing, to act in an honorable and upright way in accordance with its agent's promise. Thus, *application of promissory estoppel in no way trammels upon the parol evidence rule.* Involved here is a separate enforceable promise and not a variance or modification of the terms of the policy.[480]

Similarly, in *Hohenstein v. S.M.H. Trading Corp.*[481] a stevedore firm's officer made an undisputed oral promise that the cargo vessel which the firm selected to carry the plaintiff shipper's cargo had sufficient capacity to store the shipper's entire cargo. The parties, however, did not incorporate this promise into their written contract. Subsequently, the shipper had to make other arrangements when the stevedore firm could not load all the shipper's cargo in the provided vessel. The court observed that "were this not complicated by an integrated writing constituting 'the' contract, there would be no doubt that this inquiry [about the capacity of the selected vessel] and response and reliance thereon would constitute a classic case analogous to 'promissory estoppel.' "[482] Rather than confront the estoppel issue, however, the court held that a fair reading of the written contract revealed a commitment by the stevedore that it could and would load all of the plaintiff's cargo on the specified vessel.[483]

While the equities of the cases and the courts' sense of justice may explain the decisions in the foregoing cases and the courts' failure to devote any significant attention to promissory estoppel's possible application to circumvent the parol evidence rule, three cases furnish more formal, albeit quite limited, support for the reliance doctrine's operation in the parol evidence context. The United States Court of Appeals for the Seventh Circuit's opinion

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479. *Id.* at 934-35.

480. *Id.* at 937 (emphasis added). For a case in which the parties never raised promissory estoppel arguments, but in which the court employed similar reasoning to circumvent the parol evidence rule, see Service Iron Foundry, Inc. v. M.A. Bell Co., 2 Kan. App. 2d 662, 669-70, 588 P.2d 463, 470-71 (1978) (sales agent who controlled insolvent principal held to have made independent express warranty to disappointed buyer of pollution control device; parol evidence rule inapplicable to sales agent who was not a party to written sales contract).

481. 382 F.2d 530 (5th Cir. 1967).

482. *Id.* at 535.

483. *Id.* at 536.

in *Ehret Co. v. Eaton, Yale & Towne, Inc.*[484] contains a curious admixture of both equitable and promissory estoppel principles. In *Ehret,* the plaintiff sales representative for the defendant manufacturer signed a "Commission Sales Agreement" that contained a "duration of agency" clause which gave either party the right to terminate the contract upon thirty days' notice. The contract further provided that in the event of termination the principal would pay commissions only on orders that it accepted prior to termination and that were deliverable within three months from the termination date.[485] Plaintiff, prior to signing, expressed concern about the termination provision because the nature of the defendant's products required the plaintiff to engage in substantial development work prior to the consummation of a sale. In response to such concern, defendant's General Sales Manager in a letter acknowledged the possible effect of the clause, but assured plaintiff that "in those few cases where the contract has been cancelled by us we have always been much more liberal than provided for in the contract."[486] He further assured plaintiff that "this discussion is probably academic only." [I]n the very unlikely event of cancellation, you will have to rely on receiving extremely fair treatment."[487] After receiving these assurances, plaintiff signed the agreement. Eleven months later defendant requested that plaintiff sign a new contract reflecting that defendant had changed its name. The new contract contained the same termination clause and an integration clause cancelling all prior agreements. Twenty-six months after plaintiff signed the new contract, defendant notified plaintiff that it was terminating the agreement and intended to construe the termination clause literally.[488]

Plaintiff filed suit for breach of contract, claiming that the General Sales Manager's letter entitled it to better treatment than defendant had given. Plaintiff succeeded in winning a jury verdict at trial. On appeal, defendant argued that the new contract contained the entire agreement between the parties, but the court upheld the trial judge's holding that defendant's representations "estopped" it from asserting its rights under the termination clause.[489] The court's language initially pertains to equitable estoppel, as the

484. 523 F.2d 280 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1976).
485. *Id.* at 282.
486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.* at 283-84.

court refers to the "representations" in the General Sales Manager's letter and plaintiff's reliance thereon, and notes that allowing defendant "to disclaim its representations after receiving the benefits therefrom . . . would have the fraudulent effect that an estoppel was designed to prevent."[490]

While defendant's statements that it always had been "more liberal" in past termination cases and that the new contract was necessary to reflect its name change were plainly representations of fact that could be the proper subject for an equitable estoppel, defendant's assurance of "extremely fair treatment" plainly is a promise of future performance and, thus, the proper subject of a promissory estoppel action.[491] Promissory estoppel further enters into the court's reasoning in the following confused statement:

> The question of damages was submitted to the jury on the theory of a possible breach of contract to give the plaintiff extremely fair treatment. Support for the treatment as an enforcible [sic] promise of the promise which, as a result of the plaintiff's reliance, creates an estoppel is supported by Restatement, Contracts, § 90 and Restatement 2d, Contracts, § 90 (Tent. Draft No. 2, 1965). Following this view, admission of the "extremely fair treatment" letter is not in conflict with the parol evidence rule as the defendant contends. An estoppel is an equitable remedy with its own independent force.[492]

Of course, section 90 deals exclusively with promissory estoppel and has nothing whatever to do with equitable estoppel, a point that may have eluded the court. Later discussion by the court on the damage issue, however, clearly indicates that the court is enforcing the "extremely fair treatment" promise as a *promise*.[493]

Following this tentative endorsement of promissory estoppel, the *Ehret* court blunted the impact of its decision by advancing a more conventional, if not more convincing, rationale for admitting

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490. *Id.* at 283. The dissent concurred with the majority's "finding of equitable estoppel," hut disagreed with its interpretation of the parties' agreement. *See id.* at 285-86 (Swygert, J., dissenting).

491. On the importance of the "fact/promise" distinction and its role in the evolution of promissory estoppel, see *supra* notes 217-21 and accompanying text.

492. 523 F.2d at 283-84.

493. *See id.* at 284 (quoting Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 701, 133 N.W.2d 267, 276 (1964), a famous § 90 case discussed *supra* notes 291-304 and accompanying text) for the following statement:

> We recognize that there is authority in jurisdictions other than Illinois for the proposition that the promise which becomes the basis for the estoppel is not to be enforced as a promise, and that damages, if awarded, "should be only such as in the opinion of the court are necessary to prevent injustice."

The court, however, subsequently concluded that "in the circumstances of this case, this latter theory produces the same result as determining damages under the contract." 523 F.2d at 284.

the General Sales Manager's letter: the court claimed that the language in the duration of agency clause was ambiguous, and noted that admitting parol evidence is proper in determining the meaning of contract terms.[494] Thus, the court in a classic instance of judicial legerdemain[495] has "put the cart before the horse" by admitting an extrinsic term to show an ambiguity that then justifies the term's admission.[496] While few conclusions unequivocally emerge from the welter of confusion that *Ehret* represents, one thing seems plain enough: despite its unclear reasoning, the *Ehret* court protected plaintiff's reliance on an extrinsic promise the existence of which defendant did not dispute and the terms of which contradicted an unambiguous clause in the parties' contract.

The *Philo Smith & Co. v. USLIFE Corp.*[497] decision exhibits similar judicial confusion concerning the elements of equitable and promissory estoppel. In *Philo Smith* the court dismissed plaintiffs' contract and quantum meruit claims, holding that the Statute of Frauds and the parol evidence rule barred the claims. Plaintiffs' promissory estoppel claim, however, went to the jury, with the trial

494. 523 F.2d at 284.

495. *See supra* note 149 and accompanying text.

496. On the subject of the "interpretation" exception to the parol evidence rule, see *supra* notes 145-52 and accompanying text.

497. 420 F. Supp. 1266 (S.D.N.Y. 1976), *aff'd per curiam*, 554 F.2d 34 (2d Cir. 1977) (construing New York law). In *Philo Smith* two partners sued to recover a finder's fee resulting from a corporate acquisition. The partners, one James Rutherford and Rodney Hawes, over a period of several years, signed two successive fee agreements to assist defendant in the acquisition of All American Life & Financial Corporation [All American]. Prior to signing the first agreement, Hawes objected to its proposed termination date. Defendant's chief executive officer assured Hawes that the agreement would be extended if necessary. With this assurance, Hawes signed. *Id.* at 1269. The acquisition fell through and Hawes took no further action relating to the USLIFE acquisition of All American. Near the expiration date of the agreement, defendant's CEO told Hawes he was still interested in acquiring All American and sent him a copy of a new fee agreement, which extended the termination date. Hawes again expressed concern about the termination date, but after receiving assurances that defendant would extend the date if they still wanted to acquire All American, the plaintiffs signed. Hawes again met with the CEO near the termination date of the second agreement and suggested that defendant extend the December 31, 1972, termination date. Crosby replied that they would "take care of the paper work if we get anything going after the first of the year," *id.* at 1270, but shortly thereafter told Hawes' former employer that he had no intention of entering another agreement because he was unhappy with Hawes' performance. *Id.*

Some five months after the expiration date of the second agreement the prospects for the acquisition suddenly brightened and defendant's CEO called Rutherford, who had been working continuously on the acquisition, and asked him to arrange a meeting with All American. Rutherford agreed to do so, but suggested that the fee agreement be updated, to which Crosby replied there would be no problem. USLIFE ultimately consummated the acquisition, but refused to pay defendants a finder's fee.

court ultimately granting a directed verdict in defendant's favor.[498] The court noted that plaintiffs' promissory estoppel claim faced "serious obstacles" in the forms of the Statute and the parol evidence rule,[499] but acknowledged that the claim possibly could surmount these obstacles when it stated that plaintiffs "had to establish the presence of the elements of promissory or equitable estoppel if they were to avoid the combined effect of the statute of frauds and the parol evidence rule."[500]

The *Philo Smith* court listed five elements that plaintiffs must show before courts will apply promissory estoppel. First, plaintiffs must show "an oral promise . . . made *contemporaneously with or subsequent to* the making of a written agreement."[501] Second, plaintiffs must show that "the promise was fraudulently made."[502] Third, "defendant must have anticipated that the plaintiffs would rely on the oral promise and such reliance must have been reasonable on the plaintiffs' part."[503] Fourth, "plaintiffs must have relied on [the] oral promise by engaging in acts which are 'unequivocally referable' to the oral promise."[504] Last, "plaintiffs must have suffered substantial injury as a result"[505] of their reliance. This list is highly objectionable. The first element leaves no real guidance as to the court's view about the effect that the parol evidence rule would have on promissory estoppel claims predicated upon promises made *prior* to the execution of the writing.[506] While the third and fifth elements properly reside under the umbrella of promissory estoppel, the second element's requirement that the promise be "fraudulently made" sounds more like equitable estoppel,[507] and the "unequivocally referable" test of the fourth element

498. *Id.* at 1274.

499. *Id.* at 1271.

500. The Court observed that the "impact of the statute of frauds on this case is stengthened by the effect of the parol evidence rule," since the parties had executed two integrated written agreements. *Id.*

501. *Id.* (emphasis added) (citations omitted).

502. *Id.* (citations omitted).

503. *Id.* at 1272 (citations omitted).

504. *Id.* (citations omitted).

505. *Id.* (citations omitted).

506. For Corbin's views on the worth of the "contemporaneous" concept in the integration context, see *supra* note 69 and accompanying text. Of course, the parol evidence rule should play no role whatsoever in the enforcement of extrinsic promises made subsequent to an integration. *See supra* note 65 and accompanying text.

507. *See supra* notes 215-16 and accompanying text. Of course, equitable estoppel would be inappropriate here because the plaintiffs alleged reliance on *promises*, not misrepresentations of *fact* by the defendant.

smacks of the equitable doctrine of part performance.[508]

Plainly, requiring relying promisees to meet such stringent requirements in order to raise successfully a promissory estoppel claim not only is questionable from the standpoint of traditional principles of promissory estoppel, but also presents an insurmountable obstacle in many parol evidence situations. Given the stacked list of elements, the court's finding that plaintiffs had failed to show that any of defendant's promises met the requisite elements[509] is hardly surprising. The heart of the decision probably rests on the court's determination that "the plaintiffs have completely failed to demonstrate any injury resulting from acts of reliance or that any acts of reliance were 'unequivocally referable' to any oral promises."[510] Only the initial aspect of the court's determination should be relevant. The reliance of many promisees likely is equally referable to the parties' written agreement.[511] The requirement of substantial injury stemming from the reliance, unlike the "unequivocally referable" requirement, is a universal element of any formulation of the promissory estoppel doctrine. Perhaps the best explanation of the result in *Philo Smith,* if not of its reasoning, lies with the court's conclusion that plaintiffs had not suffered substantial injury as a result of reliance. If the court had employed the standard enunciated by section 139 of the *Restatement (Second),*[512] it would have found that no "injustice" would result from denying euforcement to defendant's promises and the same result would have occurred.[513]

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508. See *supra* note 348 for the allegation that part performance is nothing more than an earlier, limited variant of the doctrine of equitable estoppel. One commentator doubts that any conduct could meet the "unequivocally referable" test and observes that acts which traditionally serve as evidence of part performance are nothing more than evidence of substantial reliance by the plaintiff. Note, *supra* note 216, at 286. Of course, under promissory esteppel the promise must cause the promisee's reliance. Boyer, *supra* note 222, at 470-71. The exact degree of causal relationship required, however, remains unclear. One author suggests that the promise at issue must play a "major role" in inducing reliance, but need not be the only causal facter. Comment, *Promissory Estoppel in Washington,* 55 WASH. L. REV. 795, 805 (1980). *See also* Miller v. Lawlor, 245 Iowa 1144, 1155, 66 N.W.2d 267, 274 (1954) (unnecessary for plaintiff seeking to circumvent Statute of Frauds via promissory esteppel to show reliance solely based on defendant's promise; sufficient that plaintiff would not have acted without promise).

509. 420 F. Supp. at 1272.

510. *Id.*

511. For a discussion of this point as it relates to the evidentiary value of reliance in parol evidence cases, see *infra* note 554 and accompanying text.

512. For the text of § 139, see *supra* note 421.

513. On appeal, the Second Circuit did little to clarify the trial court's decision. It affirmed the lower court's decision, but only addressed the Statute of Frauds issue, limiting

Five years after the *Philo Smith* decision, *Triology Variety Stores, Ltd. v. City Products Corp.*[514] presented the United States District Court for the Southern District of New York with the opportunity to rectify *Philo Smith's* legacy of conceptual disarray. Unfortunately, the court was only partially successful. In *Triology*, plaintiff filed suit seeking injunctive relief and damages. Plaintiff alleged five causes of action, three sounding in contract and two premised on promissory estoppel. The court dismissed the contract claims for, among other things, failure to comply with the Statute of Frauds, but allowed plaintiff's promissory estoppel claims to stand.[515] The court noted that the defendant "relies heavily" on *Philo Smith* in support of its motion to dismiss, but rejected *Philo Smith*'s applicability and criticized its reasoning. The court rejected *Philo Smith*'s requirement that reliance furnishing the basis for promissory estoppel be "unequivocally referable" to the alleged agreement[516] by observing that it had not found approval either by the Second Circuit or by the New York State courts, and by correctly noting that such a requirement more appropriately was asso-

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its holding to the plaintiff's failure to prove substantial injury and expressing doubts about the lower court's other holdings. *See* Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34 (2d Cir. 1977) (per curiam).

514. 523 F.Supp. 691 (S.D.N.Y. 1981) (construing New York law). In *Triology* defendant City Products Corporation, a franchisor of "Ben Franklin" stores, secured a ten-year lease, including options to renew for either an additional ten-year period or two successive five-year periods, on certain premises located in New York City. City Products subsequently entered two contracts with plaintiff Triology Variety Stores. The first contract was a franchise agreement conferring upon plaintiff's owners the right to use the "Ben Franklin" name and to sell franchised goods to the public. The second contract was a sublease of the premises that defendant previously leased for the store. The sublease was to expire sixteen days prior to the expiration of City Products' lease. The parties renewed both the lease and sublease at the end of the first ten-year period for an additional five years. In November of 1978, with twenty-six months remaining on the lease and sublease, an investor, after City Products screened and approved him, purchased Triology and entered into a new franchise agreement with a termination date of December 31, 1983. Prior to the purchases, the investor expressed concern about a clause in the franchise contract that allowed the franchisor to terminate the franchise in the event that the franchised store moved to a new location. The investor feared that this clause could cause his business to terminate at the end of the sublease if City Products failed to renew the lease and sublease. He, therefore, sought and allegedly received promises from various agents and employees of City Products that as long as the franchise remained in good standing City Products would renew the sublease. City Products, however, later refused to renew either the lease or the sublease. 523 F. Supp. at 693-94.

515. *Id.* at 694-96. Notably, the court's action in dismissing the plaintiff's contract claims but allowing his promissory estoppel claims to survive is consistent with treating promissory estoppel as a theory of recovery independent of contract. *See* Metzger & Phillips, *supra* note 3, at 510, 512.

516. *See supra* notes 504, 508 & 510-11 and accompanying text.

ciated with the doctrine of part performance. The court similarly rejected *Philo Smith*'s fraud requirement[517] with the observation that "New York State and federal courts have frequently applied the doctrine of promissory estoppel in the absence of a finding of fraud."[518] In the end, the court found that plaintiff and its owner "have set forth a valid claim of substantial injury for which it would be unconscionable to deny them the benefits of the promises upon which they allegedly relied."[519]

Plainly, *Triology* serves to clarify the elements of promissory estoppel under New York law. Since the court's discussion solely concerns promissory estoppel as a means of defeating the Statute of Frauds, however, it sheds no light on the court's views about whether promissory estoppel likewise may serve to defeat the parol evidence rule. Arguably, no significant parol evidence question may be present in *Triology*.[520] Promissory estoppel's future as a device for circumventing the parol evidence rule in the Southern District of New York, then, clearly awaits further judicial clarification.

Although the foregoing cases do not lend much significant support for the proposition that promissory estoppel is a worthy candidate for recognition in the parol evidence context, a number of considerations indicate a greater role for the doctrine in future parol evidence cases. The following section sets forth the arguments militating in favor of so expanding the reliance principle and attempts to anticipate and respond to counter-arguments that opponents likely will raise to any such expansion. The section, furthermore, briefly outlines the manner in which promissory estoppel's extension into the parol evidence context should proceed. This latter effort is, by nature, particularly exploratory and is only an at-

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517. *See supra* notes 502 & 507 and accompanying text.

518. 523 F. Supp. at 698 (footnote omitted).

519. *Id.*

520. Certainly, conventional arguments support the proposition that the admission of evidence concerning defendant's promises would not violate the parol evidence rule. City Product's oral promises concerning the written sublease, which the new owner acquired when he purchased Triology, were made subsequent to the initial execution of the sublease; potentially therefore, introduction of evidence of these promises might not contravene the parol evidence rule. *See supra* note 72 and accompanying text; *see also supra* note 513. The oral promises concerning the written franchise, although clearly made prior to the execution of the writing, could have represented a "collateral" agreement that was separate and distinct from the franchise contract. *See supra* note 96 and accompanying text. Alternatively, the franchise contract arguably was not a complete integration of the parties' agreement on the franchisor's obligations concerning renewal of the sublease. Whether the court failed to discuss the parol evidence issue for one of these reasons or because defendant simply failed to raise it, is unclear.

tempt to raise some of the issues that future courts and commentators must clarify.

B. *Should Promissory Estoppel Apply to Parol Evidence Cases?*

The parol evidence rule and the Statute of Frauds, as mentioned earlier, are strikingly similar. The same underlying policies support both doctrines:[521] prevention of perjury by excluding presumptively untrustworthy oral testimony[522] and the desire to give judges increased control over the jury.[523] Both are rules of form[524] whose efficacy as such some commentators have questioned.[525] The criticisms directed at the Statute and the rule are remarkably similar. Scholars criticize both for causing injustice because they may prevent proof of agreements that the parties actually made.[526] Both, critics note, have been the source of an enormous volume of litigation.[527] Similarly, observers argue that the reasons for adopting the Statute and the parol evidence rule no longer are compelling.[528] Finally, the courts have meted out similar treatment to both the Statute and the rule: erosion by numerous judicially-created exceptions[529] and frequent manipulation by judges seeking just results.[530] In sum, critics of both legal doctrines are abundant and these critics frequently suggest consigning the Statute and the rule to oblivion.[531]

The similarities between the Statute and the rule, the judicial trend of circumventing the Statute by promissory estoppel, and the historically expansionist nature of the reliance doctrine suggest that the parol evidence rule is a likely candidate for the application of promissory estoppel principles. Certainly, the reasoning

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521. Wallach, *supra* note 17, at 653.

522. *See supra* notes 27-28 & 320-21 and accompanying text; *see also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 109-10.

523. *See supra* notes 32-38 & 322-25 and accompanying text; *see also* Sweet, *supra* note 21, at 1053.

524. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-3, at 108; *see also* Sweet, *supra* note 21, at 1053-54.

525. *See infra* notes 559-63 and accompanying text.

526. *See supra* notes 184-89, 327 & 333-36 and accompanying text. Seavey, *supra* note 209, at 924 ("refusal to admit such evidence causes the Statute of Frauds and the parol evidence rule to be a trap").

527. *See supra* notes 164 & 328 and accompanying text.

528. *See supra* notes 167-73, 190 & 329-31 and accompanying text.

529. *See supra* notes 124-52 & 339-40 and accompanying text.

530. *See supra* notes 153-61 & 341 and accompanying text.

531. *See supra* notes 190 & 332 and accompanying text.

that justified estoppel's use in the Statute of Frauds context is applicable equally in parol evidence cases. The argument that estoppel's use to circumvent the Statute was necessary to prevent the Statute from serving as an agent of injustice, an argument at the heart of early estoppel cases involving the Statute,[532] similarly could serve to justify estoppel's use in preventing the parol evidence rule from operating as an agent of injustice.[533] As one recent commentator observed, "[i]f it is reasonable to rely on an entirely oral agreement, it must also be reasonable in some cases to rely on assurances that a writing is not necessary to preserve a particular term of [an] agreement."[534] Furthermore, the authors' inclusion of section 139[535] in the *Restatement (Second)* "indicates an increasing willingness to subordinate form to substance, where justice requires,"[536] a tendency which led one observer to conclude that "it seems inevitable that another bastion of form-over-substance, the parol evidence rule, eventually will fall under similar attack."[537]

Several other considerations also militate in favor of promissory estoppel's expansion into the parol evidence context. As previously observed, a general trend exists toward liberality in the enforcement of the parol evidence rule itself,[538] a trend which indicates a generally increased judicial willingness to admit evidence of terms extrinsic to written contracts and a diminished level of judicial concern for the doctrine's rule-of-form aspects.[539] The courts' observed tendency to manipulate the rule to obtain just results further supports promissory estoppel's expansion.[540] This tendency should make at least some courts consider applying a doctrine such as promissory estoppel, which openly and avowedly seeks just ends. An expansion of promissory estoppel's scope would be consistent with many observed tendencies in twentieth century contract law in general,[541] and with the modern fate of rules of form in particular.[542] Finally, if promissory estoppel ultimately

532. *See supra* notes 347-48 and accompanying text.
533. *See supra* notes 184-89 and accompanying text.
534. Knapp, *supra* note 5, at 78.
535. *See supra* notes 421-30 and accompanying text.
536. Knapp, *supra* note 5, at 78.
537. *Id.*
538. *See supra* note 118 and accompanying text.
539. *See infra* notes 558-65 and accompanying text.
540. *See supra* notes 119-23 and accompanying text.
541. *See supra* notes 207-08, 210, 213 & 287-88 and accompanying text.
542. *See, e.g.*, Sweet, *supra* note 21, at 1054 ("Rules of form have a poor performance record in American law.").

gains recognition as a theory of recovery independent of contract,[543] courts could argue that the parol evidence rule, a creature of contract, is simply inapplicable to claims premised on promissory estoppel.[544]

Given the similarities between the parol evidence rule and the Statute of Frauds, many of the concerns raised in criticism of promissory estoppel's circumvention of the Statute also should apply to extensions of the doctrine into the parol evidence context. Of course, the rebuttal arguments that support the use of promissory estoppel in the Statute of Frauds context apparently outweigh the concerns, and these arguments should prove equally persuasive when applied to the parol evidence rule. Indeed, because of the difference in the roles that the Statute and the rule play, proponents of promissory estoppel's application to parol evidence cases face an easier task than the proponents of the doctrine's application in the Statute of Frauds context. The judicial fears concerning abrogation of the Statute that observers often cite as a source of the resistance which promissory estoppel's incursion into the territory of the Statute has encountered[545] should not be as great an obstacle to estoppel's circumvention of the judicially created parol evidence rule. The only major statutory manifestation of the rule is section 2-202 of the Uniform Commercial Code.[546] The Code's section 1-103 facilitates estoppel's application to the Statute of Frauds;[547] this section could justify promissory estoppel's application to the Code's parol evidence rule just as easily.

Nonetheless, application of promissory estoppel to the parol evidence rule is certain to provoke judicial fears, similar to the concerns raised in the Statute of Frauds context,[548] concerning the loss of the protection that the rule affords written contracts. These fears include the increased threat of perjury, the loss of significant evidentiary value, the elimination of the rule's channeling and cautionary functions, the undermining of the rule's role as a source of predictability and certainty in commercial transactions, and the loss of the rule's capability of protecting the parties' intent to

543. *See supra* notes 297-308 & 431-35 and accompanying text.

544. *See supra* note 434 and accompanying text.

545. *See supra* notes 376-80 and accompanying text.

546. *See supra* notes 99-106 and accompanying text.

547. *See supra* notes 387-89 and accompanying text. *See also* J. WHITE & R. SUMMERS, *supra* note 27, § 2-11 (Judicially created exceptions to the parol evidence rule are still valid under § 1-103 except as specifically precluded by the language of § 2-202.).

548. *See supra* notes 390-91 and accompanying text.

finalize their agreement in an integrated writing. If the primary motivation for such fears is the prospect of perjury, the doubts jurists voiced about the efficacy of the Statute's writing requirement as a device for preventing perjury are equally applicable to the parol evidence rule. The writing as easily could be a forgery in a parol evidence case[549] as in a Statute of Frauds case.[550] Given the number of exceptions to both the Statute and the rule, a dishonest plaintiff as easily could "frame" a contract within an exception to the rule as he could within an exception to the Statute.[551] Arguably, less danger of perjury exists in parol evidence cases than in Statute of Frauds cases; in Statute of Frauds cases the basic issue concerns the existence of a contract, generally a given in parol evidence cases in which the central issue is whether the parties may vary or supplement an existing written contract with alleged extrinsic terms.[552]

While the existing writing, then, provides a convenient point of reference against which a court may measure the believability of the proffered extrinsic term in parol evidence cases,[553] a promisee's reliance often may provide substantially less evidentiary value in parol evidence cases than in Statute of Frauds cases.[554] Certainly, in some parol evidence cases the nature of the promisee's reliance plainly will be referable to the existence of the proffered extrinsic term; in many cases, however, reference to the parties' written contract may explain the parties' reliance equally well. Any sensible application of promissory estoppel in the parol evidence context plainly should consider the evidentiary value of the promisee's reliance in determining whether granting relief premised on reliance is appropriate.[555] Notably, Corbin's view of integration, which has been influential in current interpretations of the parol evidence rule, already has eroded substantially whatever special evidentiary protection the rule once afforded written contracts.[556] Thus, little real residual protection likely remains that application of promis-

549. *See supra* note 180 and accompanying text.

550. *See supra* note 394 and accompanying text.

551. *See supra* notes 392-98 and accompanying text.

552. *See* Note, *supra* note 15, at 984.

553. *Id.* Since some formulations of the parol evidence rule concern prior written terms, some parol evidence cases may exist in which the parties unquestionably agreed to the proffered extrinsic term at least at some point in the negotiation process. *See supra* notes 62-63 and accompanying text.

554. *See supra* notes 400-01 and accompanying text.

555. *See infra* notes 595-97 and accompanying text.

556. *See supra* notes 96-115 and accompanying text.

sory estoppel to circumvent the rule would erode.

Commentators who believe that the parol evidence rule properly functions as a rule of form[557] likely will view any incursion by promissory estoppel into the rule's province as a development that deleteriously will affect the rule's ability to fulfill the normal rule-of-form functions.[558] Although this undeniably would occur, critics raised similar objections to estoppel's circumvention of the Statute of Frauds. Proponents of this extension of the doctrine largely overcame the objections by noting that the Statute did not work well as a rule of form[559]—questioning its efficacy either as a cautionary[560] or channeling device.[561] These arguments are more persuasive when applied to the parol evidence rule, which has no significant role as a cautionary device and whose channeling abilities[562] critics question.[563] Modern interpretations of the rule, in any event, have reduced dramatically its potential to operate as a rule of form.[564] Finally, under contemporary versions of promissory estoppel, partial enforcement of extrinsic agreements through reliance-based damage awards is available. This option can preserve a modest channeling function for the parol evidence rule in much the same manner as it has done for the Statute of Frauds.[565]

Critics of the doctrine's extension also may argue that application of promissory estoppel in parol evidence cases would undermine the rule's vaunted, but often criticized,[566] role as a source of predictability and certainty in commercial transactions.[567] This argument's veracity depends upon whether the rule as currently applied provides some real measure of stability. In view of the numerous ways by which courts now circumvent the rule, questions exist about whether the rule truly provides commercial transactions with a significant measure of predictability.[568]

The last and most significant challenge to using promissory es-

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557. *See supra* note 39 and accompanying text.

558. Observers who view parol evidence's rule-of-form functions as significant also must view as deleterious the numerous existing means for circumventing the rule and its frequent distortion by the courts.

559. *See* Sweet, *supra* note 21, at 1053.

560. *See supra* note 345 and accompanying text.

561. *See supra* notes 406-07 and accompanying text.

562. *See supra* notes 40-42 and accompanying text.

563. *See supra* note 182 and accompanying text.

564. *See supra* note 98 and accompanying text.

565. *See supra* notes 429-30 and accompanying text.

566. *See supra* note 177 and accompanying text.

567. *See supra* notes 45-46 and accompanying text.

568. *See supra* note 178 and accompanying text.

toppel to circumvent the parol evidence rule arises because the rule's modern defenders justify it for its role in protecting the parties' intent to finalize their agreement in an integrated writing.[569] The effect that circumventing the rule via promissory estoppel would have on its ability to perform this admittedly salutary function depends on how a particular court determines the parties' intent to integrate their agreement. In a jurisdiction that adopts a Willistonian approach to integration, courts focus on the writing itself as the major consideration in determining the parties' intent to integrate. Formal recognition of promissory estoppel as a device for circumventing the rule in appropriate cases could provide the courts in such a jurisdiction with doctrinal justification for admitting proof of extrinsic terms to which they believe the parties actually agreed, even though those terms are such that similarly situated parties might "naturally and normally" have included in the writing.[570]

Admission of such terms under the ambit of estoppel could serve to minimize the rule-of-form aspects of the Willistonian approach, which otherwise can operate to frustrate the parties' true intent in the name of their presumed intent.[571] Plainly, if properly applied, promissory estoppel would in some cases facilitate admission of extrinsic terms to which the parties in fact did agree. The rule otherwise would bar such evidence. Thus, promissory estoppel's application could effectuate the parties' actual intent. Courts, however, that consciously follow the Willistonian approach, as opposed to courts that simply follow Williston out of blind adherence to precedent, arguably do so because they still perceive either that the rule so interpreted serves a valuable function as a rule of form,[572] or that the rule provides written contracts with a degree of deserved protection. Such a court would be loath to circumvent the parol evidence rule via estoppel because doing so would erode the rule's perceived ability to perform this valuable function.

Courts embracing Corbin's views on integration already attempt to determine the parties' subjective intent; these courts—willing to consider all available evidence on the issue of intent and to base admission solely on the basis of the evidence's

569. *See supra* notes 48-57 and accompanying text.

570. *See supra* notes 80-87 and accompanying text.

571. *See supra* notes 88-90 and accompanying text.

572. Even the Willistonian approach represents a diminution of the rule-of-form aspects of the parol evidence rule when compared with the now defunct "four corners" doctrine. *See* Wallach, *supra* note 17, at 656-60.

credibility[573]—already largely have abandoned the parol evidence's rule-of-form aspects.[574] In these jurisdictions, the issue becomes whether promissory estoppel really could offer any utility to such a court. The proponent of an alleged extrinsic term seeking to justify its admission on the grounds of estoppel presumably would have to offer the court convincing evidence of the existence of the term. Conceivably, the proponent also would have to offer evidence of either a promise to incorporate the term into the writing or an assurance that incorporation into the writing is unnecessary to preserve the term as an element of the parties' agreement.[575] A court adopting the Corbin approach as easily could conclude that the writing was a partial integration of the parties' agreement. Such a court would then admit evidence of the proffered term on this more traditional ground without using promissory estoppel.

The Corbin-following court, however, could not handle similarly a proffered term that plainly "contradicts" the writing but to which the court, nonetheless, believes the parties assented. Some courts might be willing to follow Corbin's lead to its logical conclusion and reject such a writing on the grounds that it lacks finality.[576] Others, however, might feel constrained by the longstanding general rule that only "consistent" extrinsic terms may supplement partially integrated writings.[577] If the proffered term contradicted the writing, then the court either would have to reject the term on the basis of inconsistency or resort to some difficult, though far from uncommon,[578] judicial gymnastics aimed at depicting the proffered term as consistent with the writing. The availability of promissory estoppel as a means of circumventing the parol evidence rule, in such a case, could provide doctrinal rationale for admitting contradictory extrinsic terms that the court, nonetheless, believes the parties intended to stand. The court thus would avoid frustrating the parties' true intent by excluding such a term and would obviate the need for judicial subterfuge justifying admission by pretending consistency.[579]

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573. *See supra* notes 91-94 and accompanying text.

574. *See supra* note 98 and accompanying text.

575. *See infra* notes 595-97 & 599 and accompanying text.

576. Corhin advocated ahandonment of the "partial integration" idea on the ground that parties rarely intend to consider an incomplete writing final. *See* 3 A. CORBIN, *supra* note 48, § 581, at 441. *See also* J. CALAMARI & J. PERILLO, *supra* note 20, § 3-2, at 101 n.16.

577. *See supra* note 120 and accompanying text. For a discussion of the pitfalls associated with this issue, see *supra* notes 121-22 and accompanying text.

578. *See supra* note 123 and accompanying text.

579. *But see* Mack v. Earle M. Jorgenson Co., 467 F.2d 1177, 1179 (7th Cir. 1972).

In addition to these concerns for the potentially deleterious effects on the salutary functions of the rule, two other, more pragmatic, problems exist that proponents of the change must confront before promissory estoppel ultimately gains formal judicial recognition in parol evidence cases. First, few cases exist in which the courts have discussed promissory estoppel's availability in the parol evidence context; furthermore, these cases offer scant support for the idea that courts may utilize estoppel in proper circumstances, to circumvent the parol evidence rule. The scarcity of such cases, however, is due in part to the proposition's novelty and the consequent unfamiliarity of courts and counsel with the arguments that support it. Furthermore, although the few cases in which courts have raised the promissory estoppel issue provide little authority for the proposition's viability, none of these cases evidences any thorough judicial analysis of the various arguments either in favor of, or against, circumventing the parol evidence rule by estoppel. Thus, while the proponents of estoppel's eventual intrusion into the sphere of the parol evidence rule cannot show convincing precedent in favor of their proposition, they need not confront any well-considered authority in opposition to it.

The second problem, however, is a more troubling argument that opponents could advance both to explain the current failure of promissory estoppel principles to make significant inroads into the parol evidence context and to argue that any future formal recognition of estoppel as a device for circumventing the parol evidence rule is unlikely: certain de facto aspects of the parol evidence rule's operation exist that conceivably could render superfluous any application of promissory estoppel. If, as some of the rule's critics assert, the only genuine issue in most parol evidence cases is whether the parties actually agreed to the alleged extrinsic term[580] and most courts in such cases seek "just" results by selecting as authority whichever formulation of the rule and its numerous exceptions reach the just result,[581] then a serious question arises concerning whether a controversial doctrine such as promissory estoppel offers any advantages. Certainly, an excellent explanation of why promissory estoppel, which has evidenced an historical tendency toward ever-increasing intrusion into the prov-

580. *See supra* note 58 and accompanying text.

581. *See supra* notes 153-54 and accompanying text. For a well-known assertion that this process of reasoning backwards to justify tentatively formed conclusions is actually descriptive of most judicial decision-making, see J. FRANK, LAW AND THE MODERN MIND 100-17 (1930).

inces of traditional contract law, has yet to gain significant formal recognition in the parol evidence context is that many courts long have afforded protection to parties relying on oral promises. Although rigorous application of the parol evidence rule would bar proof of these promises, courts reach just results by manipulating the rule itself.[582]

Several rejoinders to the argument of superfluousness are available to proponents of estoppel's intrusion into parol evidence rule cases. First, from an historical standpoint, judicial protection of reliance in a variety of contexts via various manipulations of traditional contract principles preceded the first *Restatement's* formal recognition of promissory estoppel.[583] Promissory estoppel provided a clearer doctrinal explanation for the results in these contexts and probably could provide a similar service in many parol evidence cases. Thus, the availability of other, less straightforward means of protecting reliance did not prevent ultimate recognition of promissory estoppel's applicability in other legal contexts, and no compelling reason exists to suspect that it will do so for the parol evidence rule.

Second, by openly admitting that they will use promissory estoppel to circumvent the strictures of the parol evidence rule when necessary to avoid injustice, courts could provide the parol evidence rule with a much needed measure of conceptual clarity. Apart from the general benefits associated with conceptual clarity,[584] formal recognition of the reliance principle in parol evidence cases could reduce the inconsistency that characterizes the parol evidence rule's current operation and thereby enhance the predictability that the rule affords. These benefits would help cure aspects of the rule that have been frequent targets of criticism.[585] Clearly, the availability of estoppel would have a beneficial effect on judicial treatment of the various exceptions to the rule, which are themselves the product of judicial dissatisfaction with the rule's potential for injustice[586] and serve as a frequent source of inconsistent judicial application.[587] Courts whose judicial arsenal included

582. *See, e.g.*, the cases discussed *supra* notes 470-83 and accompanying text.

583. *See supra* notes 223-37 and accompanying text.

584. "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Holmes, *supra* note 192, at 469.

585. *See supra* notes 164-66 and accompanying text.

586. *See supra* note 124 and accompanying text.

587. *See supra* notes 130, 132, 137 & 149 and accompanying text.

promissory estoppel as a device for furthering justice in parol evidence cases simply would have little need to indulge in the circuitous, and intellectually dishonest, process of torturing the facts of a case to bring the case within the ambit of an established exception to the rule. If ultimate results in parol evidence cases clearly arise from the court's perceptions of the situation's equities rather than from the arcana of the parol evidence rule, then predictability and certainty would result from the consequent focusing on the real issues involved.

Last, not all courts have indulged in manipulation of the parol evidence rule to further the interests of fairness. Some courts mechanically apply the rule to prevent proof of extrinsic terms that the court may believe the parties actually agreed to and intended to supplement the writing.[588] To the extent that such judicial behavior reflects timidity, rule-orientation rather than result-orientation, or an unwillingness to participate in the subterfuges in which more result-oriented courts indulge, the formal extension of promissory estoppel's reach into the parol evidence context could provide such courts with an acceptable doctrinal justification for avoiding injustice.

The rudiments of a version of promissory estoppel suitable for application in parol evidence cases already exist in section 139 of the *Restatement (Second),* which allows courts to enforce oral promises despite their failure to conform to the Statute of Frauds.[589] Section 139 and its attendant comments bear witness to its drafters' careful consideration of the multiplicity of factors that a court should consider carefully before employing promissory estoppel to circumvent a rule of form such as the Statute or the parol evidence rule. A comment to the section admonishes courts that parties seeking to take advantage of the section should bear a greater burden than their counterparts seeking relief under section 90.[590] The second subsection of section 139 lists numerous factors that are "significant" in "determining whether injustice can be avoided only by enforcement of the promise."[591] Most of these considerations have some relevance in parol evidence cases as well; the relevant factors include "the definite and substantial character of

588. *See supra* note 155 and accompanying text.

589. *See supra* note 421.

590. "Like § 90 this Section states a flexible principle, but the requirement of consideration is more easily displaced than the requirement of a writing." RESTATEMENT (SECOND) OF CONTRACTS § 139 comment b (1981).

591. *See supra* note 421.

the action or forbearance in relation to the remedy sought,"[592] "the reasonableness of the action or forbearance,"[593] and the "extent to which the action or forbearance was foreseeable by the promisor."[594]

Of particular relevance in parol evidence cases, however, is "the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence."[595] While the corroboration element may not have as much practical utility in parol evidence cases as it does in most Statute of Frauds cases,[596] the drafters could modify the subsection for parol evidence cases to allow the existing writing to serve as a yardstick against which courts may test the credibility of the proffered extrinsic term.[597] In addition, any formal promulgation of a parol evidence-rule version of promissory estoppel could admonish courts to consider the degree of formality surrounding the execution of the writing, the relative sophistication of the parties, and any evidence indicating that the writing is the product of an abuse of unequal bargaining power. Such factors are of obvious potential relevance in reestablishing the environment in which the parties made their agreement, and have some bearing not only on the degree of credibility the court should afford evidence of alleged extrinsic terms, but also upon the justice of the result sought by the proponent of the extrinsic term. In any event, these factors arguably play a *sub rosa* role in many courts' decisions regardless of whether courts afford them formal recognition.[598]

Several other observations can be made about the form promissory estoppel is likely to assume in parol evidence cases and the impact its application is likely to have on the operation of the parol evidence rule. First, presumably courts that presently restrict

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592. RESTATEMENT (SECOND) OF CONTRACTS § 139(2)(b) (1981).

593. *Id.* § 139(2)(d).

594. *Id.* § 139(2)(e).

595. *Id.* § 139(2)(c). Such an approach is obviously consistent with those proposals for reformation which suggest that courts compel proponents of extrinsic terms to prove their existence by "clear and convincing" evidence. *See supra* note 144 and accompanying text.

596. *See supra* note 554 and accompanying text.

597. *See supra* note 553 and accompanying text. Since these factors merely play an admonitory role rather than serving as conclusive determinants of the availability of relief, inconsistencies between the writing and the proffered extrinsic term should engender a measure of judicial wariness. Such inconsistencies, however, should not serve as a bar to enforcement if the court, nonetheless, believes in the legitimacy of the extrinsic term. *See supra* notes 576-79 and accompanying text.

598. *See supra* notes 158-61 and accompanying text.

promissory estoppel's application in Statute of Frauds cases to those cases concerning ancillary promises would impose similar restrictions on its application in parol evidence cases. Thus, these courts probably would insist on proof of a promise to incorporate the alleged extrinsic term into the writing or a promise not to raise the parol evidence rule as a defense to subsequent proof of such a term. Such a limitation of the reliance doctrine's application in the parol evidence context, however, would be subject to the same criticisms that critics have lodged against the limitation in the Statute of Frauds context.[599] Courts, therefore, should avoid such limitations. Second, as previously observed,[600] the potential for partial enforcement of an extrinsic term, which modern versions of promissory estoppel afford, could allow the parol evidence rule to continue to perform a channeling function, albeit at a reduced level. Last, the extension of promissory estoppel into the parol evidence rule's domain would not operate necessarily to deprive judges of the rule's jury control aspects, which allow the courts—without appearing to rule on the credibility of the party proffering evidence[601]—to exclude from jury consideration evidence of extrinsic terms whose credibility the court doubts. A court could maintain some jury control because while the issues of whether the promisor made a promise that he reasonably should expect to induce reliance and whether the promise actually induced reliance are questions of fact for the jury, the issue of whether enforcement of the promise is the only way to avoid injustice is a discretionary question of policy for the court to decide.[602] Thus, a court that remains unconvinced in the face of evidence that the jury has found convincing still retains a point of entry to judicial corrective action, albeit at a later stage in the proceedings.[603]

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599. *See supra* notes 358-70 and accompanying text.

600. *See supra* note 565 and accompanying text.

601. *See supra* notes 36-38 and accompanying text.

602. Gruen Indus., Inc. v. Biller, 608 F.2d 274, 280 (7th Cir. 1979); Kramer v. Alpine Valley Resort, Inc., 108 Wis. 2d 417, 422, 321 N.W.2d 293, 296 (1982); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 698, 133 N.W.2d 267, 275 (1965). At least one court has held that there is no right to a jury trial in promissory estoppel cases because promissory estoppel is an equitable doctrine. *See* C & K Eng'g Contractors v. Amber Steel Co., 23 Cal. 3d 1, 11, 587 P.2d 1136, 1141, 151 Cal. Rptr. 323, 328 (1978). For a discussion of *C & K* and a criticism of its holding, see Note, *supra* note 208, *passim*.

603. While this obviously concerns judicial subterfuge of the sort this Article criticizes, observers who see the rule's primary utility as a device for permitting such subterfuge hardly can complain.

VI. CONCLUSION

The parol evidence rule long has been the deserving recipient of criticism—criticism aimed at the confusion surrounding its bases in policy, the inconsistencies in its formulation, and the vagaries in its application. Several extant considerations suggest that the rule is both a likely and a proper candidate for the meliorating ministrations of the doctrine of promissory estoppel. Prominent among these considerations are the inherently expansionist nature of the reliance principle, the already well-established tendency of courts to circumvent the Statute of Frauds using promissory estoppel, the numerous similarities between the Statute and the rule, the modern trend toward liberality in the interpretation and application of the rule, and the possibility that promissory estoppel eventually will gain recognition as a separate theory of recovery independent of contract.[604]

An examination of the issues related to any eventual intrusion by promissory estoppel into the domain of the parol evidence rule indicates that the consequences attendant to such a development generally would be salutary in nature. Estoppel could enhance the effectuation of the parties' true intent in a written contract, an objective shared by modern formulations of the parol evidence rule, and could minimize the injustice associated with mechanical applications of the rule. Estoppel also could provide a better doctrinal explanation for the results courts reach in many parol evidence cases than the traditional parol evidence rubric that courts currently employ affords. Such doctrinal clarity would result in the focusing of judicial attention in parol evidence cases on the real issues that ultimately will determine whether a court will give legal effect to an extrinsic promise, a consequence likely to provide a much needed measure of clarity and predictability in the administration of the parol evidence rule. Finally, promissory estoppel's application in parol evidence cases would be consonant with the tendency of twentieth century contract law to elevate substance over form in the pursuit of just results, a tendency of which the reliance principle is merely one manifestation. Thus, although the extant evidence is admittedly far from conclusive and exercises in prediction are fraught with obvious perils, one addressing the parol

604. For a discussion of the numerous factors upon which such an eventuality depends, see Metzger & Phillips, *supra* note 3, at 553-56.

evidence rule might horrow from Lord Tennyson and say:

There's a new foot on the floor, my
friend,
And a new face at the door, my
friend,
A new face at the door.[605]

605. A. TENNYSON, *The Death of the Old Year*, in THE WORKS OF ALFRED LORD TENNYSON 62 (1896).